CYCLOPEDIA

OF

LAW AND PROCEDURE

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EDITOR-IN-CHIEF

VOLUME XI

NEW YORK

THE AMERICAN LAW BOOK COMPANY

LONDON: BUTTERWORTH & CO., 12 BELL YARD

1904

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

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By William Alexander Martin

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I. DEFINITION.

Costs are certain allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court. The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant, that the plaintiff sued him without cause. Thus the party to blame pays costs to the party without fault.[1]

II. SOURCE OF RIGHT TO COSTS.

At common law costs were not recoverable *eo nomine*.[2] Costs can therefore be imposed and recovered only in cases where there is statutory authority therefor.[3] While the power to impose costs must ultimately be found in some

1. Stevens *v.* Boston Cent. Nat. Bank, 168 N. Y. 560, 61 N. E. 904.

Other definitions are: "The expenses incurred by the parties in the prosecution or defence of a suit at law." Bouvier L. Dict.

"The expenses of an action recoverable from the losing party. An allowance to a party for expenses incurred in conducting his suit. The sums prosecuted by law as charges for services enumerated in the fee-bill." Anderson L. Dict.

"The word 'costs' seems to have a technical meaning, and is usually applied to the legal charges of a proceeding." Brower *v.* Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294.

The term "costs" may include disbursements. Van Meter *v.* Knight, 32 Minn. 205, 20 N. W. 142; Peat *v.* Worth, 7 Bosw. (N. Y.) 653.

2. State *v.* Meigs County, 14 Ohio Cir. Ct. 26, 7 Ohio Cir. Dec. 351. See also Musser *v.* Good, 11 Serg. & R. (Pa.) 247; Harnish *v.* Mowrer, 1 Lanc. L. Rev. 17.

If plaintiff failed he was punished by amercement for false clamor, and defendant, where the judgment was against him, *in misericordia cum expensis litis*. Musser *v.* Good, 11 Serg. & R. (Pa.) 247; Harnish *v.* Mowrer, 1 Lanc. L. Rev. 17.

3. *Alabama.*— Henry *v.* Murphy, 54 Ala. 246; Westcott *v.* Booth, 49 Ala. 182.

Arkansas.— Thorn *v.* Clendenin, 12 Ark. 60.

Colorado.— Phillips *v.* Corbin, 25 Colo. 567, 56 Pac. 180.

Connecticut.— Studwell *v.* Cooke, 38 Conn. 549.

District of Columbia.— District of Columbia *v.* Lyon, 18 D. C. 222.

Illinois.—Smith *v.* McLoughlin, 77 Ill. 596; People *v.* Pierce, 6 Ill. 553; Union County *v.* Axley, 53 Ill. App. 670; Richardson *v.* Allman, 40 Ill. App. 90.

Kansas.— Hall *v.* Greenwood County, 22 Kan. 37.

Kentucky.— Heard *v.* Faris, 1 Litt. 245.

Louisiana.— New Orleans Warehouse Co. *v.* Marrero, 106 La. 130, 30 So. 305.

Maryland.—Kiersted *v.* Rogers, 6 Harr. & J. 282.

Massachusetts.—Alger *v.* Boston, 168 Mass. 516, 47 N. E. 194.

Michigan.—Auditor-Gen. *v.* Baker, 84 Mich. 113, 47 N. W. 515.

Minnesota.— Atwater *v.* Russell, 49 Minn. 57, 52 N. W. 26.

Missouri.— Shed *v.* Kansas City, etc., R. Co., 67 Mo. 687; Hecht *v.* Heimann, 81 Mo App. 370; State *v.* Union Trust Co., 70 Mo. App. 311; Ford *v.* Kansas City, etc., R. Co., 29 Mo. App. 616.

Montana.— Orr *v.* Haskell, 2 Mont. 350.

Nebraska.— Wallace *v.* Sheldon, 56 Nebr. 55, 76 N. W. 418; Hastings *v.* Mills, 50 Nebr. 842, 70 N. W. 381.

New Hampshire.— Smith *v.* Boynton, 44 N. H. 529; State *v.* Kinne, 41 N. H. 238.

New Jersey.— Brittin *v.* Blake, 36 N. J. L. 442; *In re* Public Highway, 22 N. J. L. 293.

New York.— Stevens *v.* Boston Cent. Nat. Bank, 168 N. Y. 560, 61 N. E. 904; U. S. Equitable L. Assur. Soc. *v.* Hughes, 125 N. Y. 106, 26 N. E. 1, 34 N. Y. St. 591, 11 L. R. A. 280; Miller *v.* Bush, 29 N. Y. App. Div. 117, 51 N. Y. Suppl. 486; *In re* Grade Crossing Com'rs, 20 N. Y. App. Div. 271, 46 N. Y. Suppl. 1070; Patterson *v.* Burnett, 1 Silv. Supreme 166, 17 N. Y. Civ. Proc. 115, 4 N. Y. Suppl. 921, 23 N. Y. St. 363; Barry *v.* Winkle, 36 Misc. 171, 73 N. Y. Suppl. 188; Zinsser *v.* Herman, 24 Misc. 689, 53 N. Y. Suppl. 778; Worden *v.* Brown, 14 How. Pr. 532; Matter of Water Com'rs, 3 Edw. 56.

Ohio.— Bell *v.* Bates, 3 Ohio 380; State *v.* Meigs County, 14 Ohio Cir. Ct. 26, 7 Ohio Cir. Dec. 351.

Oregon.— State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25; Wood *v.* Fitzgerald, 3 Oreg. 568.

Pennsylvania.— King *v.* Boyles, 31 Pa. St. 424; Herbein *v.* Philadelphia R. Co., 9 Watts 272; Stewart *v.* Baldwin, 1 Penr. & W. 461; Lewis *v.* England, 4 Binn. 5; Salem Tp. *v.* Cook, 6 Pa. Co. Ct. 624; Com. *v.* Yeakel, 1 Woodw. 143.

South Carolina.— Scott *v.* Alexander, 27 S. C. 15, 2 S. E. 706; Carolina Nat. Bank *v.* Senn, 25 S. C. 572; Clifton *v.* Phillips, 1 McCord 469.

statute, the legislature may nevertheless grant the power in general terms to the courts, which in turn may make rules or orders under which costs may be taxed and imposed;[4] but the courts cannot make such rules or orders and impose costs thereunder, unless the power to do so is expressly given them by statute.[5]

III. BY WHAT LAW GOVERNED.

A. In General. The laws of the state where the suit is tried and not the laws of the state where the contract in suit was made govern as to costs.[6] Where a statute provides rules in regard to costs applicable generally, and also rules for special cases, the rules applicable to costs generally have no application to special cases, as the opposite construction would render the provisions relating to special cases nugatory.[7]

B. In Federal Court — 1. In General. Prior to the act of Feb. 26, 1853,[8] the taxation of costs in the various districts conformed to the practice of the state in which the district was situated;[9] and since the enactment of this statute, the same rule applies as respects all items of costs not specially covered by the enactment.[10] As regards matters relating to costs comprehended by the statute mentioned the statutes in practice in the state are not binding.[11]

2. On Removal to Federal Court. In one circuit the rule is that after the removal of a cause into the federal court the party cannot on recovering judgment be allowed the costs prescribed by the state statutes up to the time of removal, unless such items are taxable under the federal statutes relating to costs.[12] In another circuit items of costs taxable under state laws, and accruing prior to the removal of a cause to a federal court, are taxable on final judgment

Tennessee.— Mooneys *v.* State, 2 Yerg. 578.

Virginia.— West *v.* Ferguson, 16 Gratt. 270.

Wisconsin.— Everett *v.* Gores, 89 Wis. 421, 62 N. W. 82; Noyes *v.* State, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710.

United States.— Tesla Electric Co. *v.* Scott, 101 Fed. 524; O'Neil *v.* Kansas City, etc., R. Co., 31 Fed. 663; Kneass *v.* Schuylkill Bank, 14 Fed. Cas. No. 7,876, 4 Wash. 106, 1 Fish. Pat. Rep. 1; Coggill *v.* Lawrence, 6 Fed. Cas. No. 2,957, 2 Blatchf. 304.

See 13 Cent. Dig. tit. "Costs," § 1.

4. Tesla Electric Co. *v.* Scott, 101 Fed. 524; Jordan *v.* Agawam Woolen Co., 13 Fed. Cas. No. 7,516, 3 Cliff. 239.

5. *In re* Braintrim Independent School Dist., 23 Pa. Co. Ct. 510.

6. Union Mut. F. Ins. Co. *v.* Hopkins, 3 R. I. 110; Heath *v.* Griswell, 5 Fed. 573.

Thus a stipulation in a contract for attorney's fees to be taxed with the costs in case an action is brought thereon, although valid under the *lex loci contractus,* is a stipulation for costs and refers to the remedy. It is not a substantive part of the contract and cannot be enforced in another jurisdiction where such a stipulation is not lawfully enforceable. Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Hartford Security Co. *v.* Eyer, 36 Nebr. 570, 54 N. W. 838, 38 Am. St. Rep. 735.

7. Hotaling *v.* McKenzie, 7 N. Y. Civ. Proc. 320.

8. U. S. Rev. Stat. (1878) § 823 [U. S. Comp. Stat. (1901) p. 632].

9. Primrose *v.* Fenno, 113 Fed. 375; *In re* Costs in Civil Cases, 30 Fed. Cas. No. 18,284, 1 Blatchf. 652.

10. Primrose *v.* Fenno, 113 Fed. 375; Dedekam *v.* Vose, 7 Fed. Cas. No. 3,731, 3 Blatchf. 153.

11. O'Neill *v.* Kansas City, etc., R. Co., 31 Fed. 663.

Suits in territorial courts.— It has been held that where the United States is the prevailing party in a suit in a territorial court costs are to be governed by this act of congress, and not by a territorial statute relating to costs. U. S. *v.* Small, 3 Wash. Terr. 478, 17 Pac. 739. It has also been held that the statute refers solely to a discharge of duties imposed by the laws of the United States, and is hence not applicable to cases in the territorial courts in which the United States is not a party, or of which the federal courts would not have exclusive jurisdiction if the territory were a state. Marte *v.* Ogden City St. R. Co., 9 Utah 459, 35 Pac. 501.

12. Chadbourne *v.* German-American Ins. Co., 31 Fed. 625, 2 Blatchf. 539; Clare *v.* National City Bank, 5 Fed. Cas. No. 2,793, 14 Blatchf. 445.

Amendment of complaint.— Where a cause is removed from a state to a United States circuit court, and the plaintiff amends his complaint, he puts himself within a rule of practice of the circuit court, allowing a defendant in all cases to demand security for costs before answering, although the demand could not have been made in the state court where the action was commenced. Henning *v.* Western Union Tel. Co., 40 Fed. 658.

there, notwithstanding no provision is made for such items in the federal statutes.[13]

C. Statutes in Force at Termination of Action — 1. In General. The right to costs and the amount and items taxable are as a general rule governed by the statutes in force at the time of the termination of the action,[14] as the question of costs is one which is solely of statutory regulation and wholly dependent upon it.[15] A party has no vested right to costs at the commencement of an action.[16] It is competent for the legislature, at any time during the progress of a suit, to create an allowance for services not before provided for, and to increase or diminish or wholly abolish such allowance as existed at the time the suit was commenced.[17]

2. Effect of Saving Clauses. Where a statute relating to costs expressly excepts from its operation suits pending at the date it goes into effect, costs in such suits will be governed by the previous statutes relating to costs.[18] So where

13. Cleavers *v.* Traders' Ins. Co., 40 Fed. 863; Wolf *v.* Connecticut Mut. L. Ins. Co., 30 Fed. Cas. No. 17,924, 1 Flipp. 377.

14. *California.*—Begbie *v.* Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141.

Connecticut.—Taylor *v.* Keeler, 30 Conn. 324.

Indiana.— Free *v.* Haworth, 19 Ind. 404; Brock *v.* Parker, 5 Ind. 538.

Iowa.— Carter *v.* Bartel, 110 Iowa 211, 81 N. W. 462; Meigs *v.* Parke, Morr. 378.

Maine.— Ellis *v.* Whittier, 37 Me. 548. But *compare* Withee *v.* Preston, 33 Me. 211.

Massachusetts.— Com. *v.* Cambridge, 4 Metc. 35; Billings *v.* Segar, 11 Mass. 340.

Missouri.— Dougherty *v.* Downey, 1 Mo. 674.

New York.— Munson *v.* Curtiss, 43 Hun 214; Fargo *v.* Helmer, 43 Hun 17; Rich *v.* Husson, 1 Duer 617, 11 N. Y. Leg. Obs. 119; Brooklyn Bank *v.* Willoughby, 1 Sandf. 669; Crary *v.* Norwood, 5 Abb. Pr. 219; Stewart *v.* Lamoreaux, 5 Abb. Pr. 14; McMasters *v.* Vernon, 1 Abb. Pr. 179; Jones *v.* Underwood, 18 How. Pr. 532; Jackett *v.* Judd, 18 How. Pr. 385; Burnett *v.* Westfall, 15 How. Pr. 430; Fischer *v.* Hunter, 15 How. Pr. 156; Huber *v.* Lockwood, 15 How. Pr. 74; Moore *v.* Westervelt, 14 How. Pr. 279; Van Valkenburgh *v.* Van Alen, 1 How. Pr. 86; Onondaga *v.* Briggs, 3 Den. 173.

Pennsylvania.—Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Grace *v.* Altemus, 15 Serg. & R. 133.

South Carolina.— Irwin *v.* Brooks, 19 S. C. 96; Kapp *v.* Loyns, 13 S. C. 288; Clark *v.* Linsser, 1 Bailey 187.

Utah.— Hepworth *v.* Gardner, 4 Utah 439, 11 Pac. 566.

Vermont.— Pearl *v.* Harrington, Brayt. 47.

United States.— Lyell *v.* Miller, 15 Fed. Cas. No. 8,620, 3 McLean 422.

See 13 Cent. Dig. tit. "Costs," § 4.

But see Whitney *v.* Teichfuss, 11 Colo. 555, 19 Pac. 507, in which it was held that where a county by act of a certain date was changed from the third to the second class, the part of the costs of a suit in that county accruing after the date of the change should be taxed according to the rates for counties of the second class. This clearly implies that the prior law should govern as to costs accrued before the latter statute was enacted.

Settlement of cause before statute goes into effect.— A statute amending the charter of a city, by providing for the allowance of a certain amount as fixed costs on recovery in a designated class of actions, does not apply to an action settled by the parties out of court before the statute took effect, and such action cannot be continued to judgment for the benefit of plaintiff's attorney. Drago *v.* Smith, 92 Hun (N. Y.) 536, 36 N. Y. Suppl. 975, 72 N. Y. St. 418.

Where an action is dismissed with costs by default prior to a certain date, the right to costs and the amount thereof are regulated by the provisions of the code previous to the act of that date. Huber *v.* Lockwood, 15 How. Pr. (N. Y.) 74. And where a complaint is dismissed and further proceedings stayed by order of court until the hearing of a motion for a new trial, the costs are to be taxed in accordance with the law in force at the time of the dismissal. Scudder *v.* Gori, 3 Rob. (N. Y.) 629.

15. Onondaga *v.* Briggs, 3 Den. (N. Y.) 173.

16. Grace *v.* Altemus, 15 Serg. & R. (Pa.) 133.

17. Onondaga *v.* Briggs, 3 Den. (N. Y.) 173.

No saving clause.— If a statute repealing or amending the statute in force at the time the action is commenced contains no saving clause, the provisions of the former statute have no application in taxing costs. Meigs *v.* Parke, Morr. (Iowa) 378; Ellis *v.* Whittier, 37 Me. 548; Truscott *v.* King, 4 How. Pr. (N. Y.) 173; Holmes *v.* St. John, 4 How. Pr. (N. Y.) 66, 2 Code Rep. (N. Y.) 46; Grace *v.* Altemus, 15 Serg. & R. (Pa.) 133.

18. Gayden *v.* Bates, Walk. (Miss.) 209; Truscott *v.* King, 4 How. Pr. (N. Y.) 173; *Ex p.* Becker, 4 Hill (N. Y.) 613.

Excepting causes now pending.— Where a statute abolishing attorney's costs provides that the act shall not apply to "causes now pending," the proviso includes a motion to tax costs made after the passage of the act, in an action begun prior thereto. The motion

a statute relating to costs provides in express terms that it shall apply to designated items of costs in suits previously commenced, the statute applies only to the items of costs designated, and all other costs in the case will be governed by the former statute.[19]

IV. HOW STATUTES REGULATING COSTS ARE CONSTRUED.[20]

In England it seems that statutes relating to costs were considered penal in their nature and to be strictly construed;[21] and this is the rule in a number of the states.[22]

V. RIGHT AS AFFECTED BY SUCCESS OR FAILURE OF PARTY.

A. In Actions at Law — 1. Right of Prevailing Party to Costs. It is a rule of almost universal application under the statutes relating to costs, that in actions at law the prevailing party in the action is entitled to costs unless there is some special statute which on the facts of the particular case takes it out of the operation of the general rule.[23] The rule is not affected by the fact that the unsuc-

is merely incidental to the main cause, and not a new and independent proceeding. Bartless *v.* Beaufort, 47 S. C. 225, 25 S. E. 38.

Excepting existing liquidated contracts.— Where such statute provides that it shall not apply to "existing liquidated contracts," costs are taxable, under the former statute, in an action on a liquidated contract existing at the time of the passage of the latter act. McElwee *v.* Dickson, 55 S. C. 307, 33 S. E. 365.

19. Traver *v.* Kipp, 4 Abb. Pr. (N. Y.) 358.

20. For construction of statutes generally see Statutes.

21. Dibben *v.* Cooke, 2 Str. 1005.

22. Morrow *v.* Rosentihl, 106 Ala. 198, 17 So. 608; Dawson *v.* Matthews, 105 Ala. 485, 17 So. 19; Skinner *v.* Dawson, 87 Ala. 348, 6 So. 428; Shields *v.* Sheffield, 79 Ala. 91; State *v.* Brewer, 59 Ala. 130; *Ex p.* Tompkins, 58 Ala. 71; Dent *v.* State, 42 Ala. 514; Shed *v.* Kansas City, etc., R. Co., 67 Mo. 687; Gordons *v.* Maupin, 10 Mo. 352, 47 Am. Dec. 118; State *v.* Union Trust Co., 70 Mo. App. 311; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374; Ford *v.* Kansas City, etc., R. Co., 29 Mo. App. 616; *In re* Murphy, 22 Mo. App. 476. See also Jackson *v.* Siglin, 10 Oreg. 93; State *v.* Orangeburg County Treasurer, 10 S. C. 40.

But in Pennsylvania it is said that the courts have adopted the more wise and just policy that they ought to be largely and liberally interpreted so as to do complete justice by compensating parties who have been obliged to incur necessary expenses in prosecuting just and lawful claims or in defending themselves against unjust and unlawful ones. Steele *v.* Lineberger, 72 Pa. St. 239.

23. *Alabama.*— Townson *v.* Moore, 9 Port. 136.

California.— Lawrence *v.* Getchiel, (1884) 2 Pac. 746.

Colorado.— Cone *v.* Montgomery, 25 Colo. 277, 53 Pac. 1052; Ratcliffe *v.* Daken, 16 Colo. 100, 26 Pac. 341; Beckwith *v.* Beckwith, 11 Colo. 568, 19 Pac. 510.

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New Jersey.— Hall *v.* Leaming, 31 N. J. L. 321, 86 Am. Dec. 213.

New York.— Ashley *v.* Marshall, 29 N. Y. 494 [*affirming* 19 How. Pr. 110]; Mercantile Safe Deposit Co. *v.* Dimon, 55 N. Y. App. Div. 538, 67 N. Y. Suppl. 430; Dolan *v.* Mitchell, 39 N. Y. App. Div. 361, 57 N. Y. Suppl. 157; Noyes *v.* Children's Aid Soc., 10 Hun 289; People *v.* Lockwood, 9 Daly 68.

North Carolina.— Vann *v.* Newson, 110 N. C. 122, 14 S. E. 519; Cook *v.* Patterson, 103 N. C. 127, 9 S. E. 402; Wall *v.* Coving-

cessful party defended in good faith and upon reasonable grounds,[24] by the fact that he was not permitted to cross-examine the witnesses,[25] or by the fact that the jury attempted to divide the costs equally between the parties.[26] Nor has the court discretionary power to refuse costs in an action at law, although the successful party obtains judgment by the interposition of an equitable defense.[27]

2. Where Each Party Successful in Part — a. In General. Unless there be statutory authorization therefor costs cannot be apportioned, although both parties be successful in part.[28] Therefore, in the absence of such statute, if the plaintiff recover judgment, although for only part of the relief demanded, he is entitled to costs, as in such cases he is regarded as the prevailing party.[29] There are, however, statutes which modify the rule to some extent in some jurisdictions.[30]

b. Where There Are Separate Issues or Causes of Action — (i) *In Absence of Special Statutory Provision.* In the absence of some special statutory provision for the apportionment of costs, where each party succeeds on one or more of the causes of actions, claims, or issues, it would seem that the plaintiff having obtained a judgment for a part of the relief prayed would as the "prevailing party" be entitled to such costs. It has been so held in a number of decisions.[31]

ton, 76 N. C. 150; Lewis *v.* Johnston, 67 N. C. 38; King *v.* Howard, 15 N. C. 581.

Pennsylvania.— Haskins *v.* Low, 17 Pa. St. 64; Havard *v.* Davis, 1 Browne 334; Sayen *v.* Johnson, 3 Del. Co. 323.

Rhode Island.— Aldrich *v.* Providence, 15 R. I. 613, 10 Atl. 592.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 21 S. C. 162.

Tennessee.— Phœnix F. & M. Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270; Martin *v.* Reese, (Ch. App. 1899) 57 S. W. 419; Stark *v.* Murphy, (Ch. App. 1899) 52 S. W. 736.

Texas.—Bridges *v.* Samuelson, 73 Tex. 522, 11 S. W. 539; Jennings *v.* Moss, 4 Tex. 452.

Vermont.— Thrall *v.* Chittenden, 31 Vt. 183.

Virginia.— Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Allen *v.* Shriver, 81 Va. 174.

West Virginia.— Woods *v.* Stevenson, 43 W. Va. 149, 27 S. E. 309.

United States.— U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Kendall *v.* U. S., 12 Pet. 524, 9 L. ed. 1181; Trinidad Asphalt Paving Co. *v.* Robinson, 52 Fed. 347; Dunn *v.* Games, 8 Fed. Cas. No. 4,177, 2 McLean 344; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 3 Woodb. & M. 17.

See 13 Cent. Dig. tit. "Costs," § 108.

Where costs are given by statute a party's right thereto is absolute and the court has no discretion in the matter. St. Charles *v.* O'Mailey, 18 Ill. 407; Lultgor *v.* Walters, 64 Barb. (N. Y.) 417.

24. *In re* Proctor, 103 Iowa 232, 72 N. W. 516.

25. Cone *v.* Montgomery, 25 Colo. 277, 53 Pac. 1052.

26. Nation *v.* Little, 59 Kan. 773, 52 Pac. 96.

27. Lanz *v.* Trout, 46 How. Pr. (N. Y.) 94.

28. McDonald *v.* Evans, 3 Oreg. 474.

29. *California.*— Havens *v.* Dale, 30 Cal. 547.

Iowa.— Rand *v.* Wiley, 70 Iowa 110, 29 N. W. 814.

Kansas.— Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14.

Kentucky.— Smith *v.* Broyles, 15 B. Mon. 461; Combs *v.* Boswell, 1 Dana 473.

Louisiana.— Lamotte *v.* Martin, 52 La. Ann. 864, 27 So. 291; McCarthy *v.* Baze, 26 La. Ann. 382; Manning *v.* Ayraud, 15 La. Ann. 126.

Maryland.— Thomas *v.* Frederick County School, 9 Gill & J. 115.

North Carolina.— Wooley *v.* Robinson, 52 N. C. 30.

Oregon.— Phipps *v.* Taylor, 15 Oreg. 484, 16 Pac. 171; McDonald *v.* Evans, 3 Oreg. 474.

Pennsylvania.— Bachman *v.* Gross, 150 Pa. St. 516, 24 Atl. 712.

Texas.— Mullaly *v.* Noyes, (Civ. App. 1894) 26 S. W. 145.

See 13 Cent. Dig. tit. "Costs," § 112.

30. Thus in Iowa where a party is successful as to "part of his demand" and fails as to part, the court may apportion the costs (Andrews *v.* Zimmerman, 42 Iowa 708; Boone County *v.* Wilson, 41 Iowa 69); but the statute has been held not to apply to cases in which the cause of action is a single, indivisible claim, but only where the demand is composed of separate claims (Upson *v.* Fuller, 43 Iowa 409). A statute of Missouri providing for apportionment of costs between parties prevailing in part when considered in connection with many other provisions was held to apply to actions of contract only and not to actions *ex delicto*. Vineyard *v.* Lynch, 86 Mo. 684; Haseltine *v.* St. Louis, etc., R. Co., 39 Mo. App. 434.

31. O'Brien *v.* Dunlap, 5 Me. 281; Fowler *v.* Sheaver, 7 Mass. 14; Northampton *v.* Winder, 3 Pa. L. J. Rep. 223; Building Assoc. *v.* Cordwell, 1 Del. Co. (Pa.) 333. See also Thomas *v.* Frederick County School, 9 Gill & J. (Md.) 115; Costin *v.* Baxter, 29 N. C. 111.

But in one case the court not basing its decision on any special statute held that de-

(II) *Under Special Statutory Provisions* — (A) *In General.* In many jurisdictions statutes have been enacted which provide expressly or by implication for an apportionment of costs when each party is successful on one or more of several causes of actions or issues. Under a statute providing that where there are several causes of action in the same complaint, or several issues, each party has costs on issues decided in his favor, the costs of such issues as are decided against plaintiff should be taxed against him, and the costs of issues decided against defendant taxed against him,[32] and plaintiff is entitled to a separate judgment for costs against one of several defendants on separate issues made by him and found against him.[33] The costs accruing by reason of one cause of action decided against plaintiff may also be properly adjudged against him, under a statute entitling the prevailing party to all costs except as otherwise provided and authorizing the court on good cause to adjudge the costs otherwise.[34] So it has been held that each party may be permitted to tax costs on issues found in his favor, under a statute authorizing the courts in all actions triable before them to limit and allow such bills of costs as law and justice may require,[35] and where costs are made on an issue which was abandoned by the successful party, the court may apportion the costs under a statute authorizing an apportionment when plaintiff fails as to part of his demand.[36] Under a statute providing that each party shall recover costs upon the issues or claims on which he prevails, costs will be apportioned in an action on account where plaintiff prevails on one small item only of his entire account.[37] Under a statute providing that where there are two or more counts on distinct causes of action and a verdict is rendered for each of them on one or more thereof, each party shall recover his witnesses' costs on the trial of the counts on which the verdict is in his favor, plaintiff in an action of slander, who obtains judgment on one of two causes of action, is entitled as the prevailing party to the costs of the action and of all evidence introduced by him which is not specially applicable to the count on which defendant obtains a verdict, but not for that which is specially applicable to those counts, and defendant has costs for the evidence introduced by him which is specially applicable to the counts on which he prevails.[38]

(B) *Statutory Requirement of Recovery by, or Verdict in Favor of, Defendant.* Under a statute providing that where issues of fact are joined on several causes of action, if plaintiff recovers on one or more of the issues and defendant on the other or others each party is entitled to costs, the mere fact that defend-

fendant was entitled to costs relating to those causes of action on which plaintiff fails to recover. Louisville, etc., R. Co. *v.* Cofer, 110 Ala. 491, 18 So. 110.

32. Reynolds *v.* Shults, 106 Ind. 291, 6 N. E. 619; Knox *v.* Trafalet, 94 Ind. 346; Watkins *v.* Pickering, 92 Ind. 332; Acker *v.* McCullough, 50 Ind. 447; Sidner *v.* Spaugh, 26 Ind. 317; Sparks *v.* McFarland, 17 Ind. 205; Locke *v.* Munson, Wils. (Ind.) 54.

33. Reynolds *v.* Bond, 83 Ind. 36.

Judgment on issue conceded by defendant. — Where plaintiff has judgment on an issue conceded by defendant, and the latter has judgment on the remaining issue, defendant may have costs except for the filing of the complaint and for issuing, serving, and returning the summons. Hawkins *v.* Stanford, 138 Ind. 267, 37 N. E. 794.

So under a similar statute providing that if plaintiff recovers on one or more issues, where two or more issues of fact are joined, and defendant on the others, each is entitled to costs against the other. Defendant is entitled to costs against plaintiff, on recovery of judgment against plaintiff on one or more of several causes of action, and plaintiff likewise has costs in respect to issues on which he has judgment. Browning *v.* New York, etc., R. Co., 64 Hun (N. Y.) 513, 19 N. Y. Suppl. 453, 46 N. Y. St. 505, 22 N. Y. Civ. Proc. 193; Crane *v.* Miller, 50 N. Y. Suppl. 675; Hudson *v.* Guttenberg, 9 Abb. N. Cas. (N. Y.) 415; Crittenden *v.* Crittenden, 1 Hill (N. Y.) 359; Germain *v.* Dakin, 1 Cow. (N. Y.) 207.

34. St. Louis, etc., R. Co. *v.* Oliver, (Tex. Civ. App. 1896) 37 S. W. 642; Sweeny *v.* El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 290; Spiers *v.* Purcell, 2 Tex. Unrep. Cas. 624.

35. Smith *v.* Wiggin, 52 N. H. 112; Jordan *v.* Cummings, 43 N. H. 134; Meacham *v.* Jones, 10 N. H. 126.

36. Whitney *v.* Hackney, 20 Iowa 460.

37. Briggs *v.* Brewster, 23 Vt. 100.

38. Tatem *v.* Adams, 2 Cush. (Mass.) 180. And see Ramsay *v.* Warner, 97 Mass. 8, hold-

ant has defeated one or more of the causes of action does not entitle him to costs; there must be recovery in his favor, that is, an affirmative finding or verdict in his favor.[39] Therefore where there is a general verdict in plaintiff's favor and no verdict for defendant, the latter cannot be awarded costs, although he succeeded in defeating plaintiff upon one or more causes of action.[40] Defendant is not entitled to costs where plaintiff is nonsuited as to one or more causes of action[41] or the complaint dismissed as to one or more causes of action.[42] So under a statute providing that where there are two or more counts on distinct causes of action and a verdict is rendered for plaintiff on one or more and for the defendant on any of them, each party shall recover certain costs, defendant is not entitled to costs where plaintiff strikes out one count of his declaration in respect to which the jury have disagreed,[43] or where the court instruct the jury that defendant cannot recover on some counts, and the jury bring in a general verdict for plaintiff;[44] and the statute only applies where there is a verdict for plaintiff.[45]

(c) *Statutory Requirement That Recovery or Verdict Be on Separate Causes of Action or Issues.* Where the statutes make it a prerequisite to the apportionment of costs that the verdict for or recovery by the respective parties be on separate and distinct causes of action, separately stated, it must of course appear that the different counts were for distinct causes of action to render the statutes applicable.[46] The statutes are not operative where substantially the same cause of action is stated in different counts.[47] Perhaps as good a test as any for determining whether two causes of action are distinct and separate is whether a judgment on one would be a bar to a recovery on the other. If it would not the causes of action are within the purview of the statutes.[48] So these statutes have

ing that in an action on several notes, against one of which the defense of usury is successfully maintained but against the others no defense is established, each party is entitled to costs.

39. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106 [*affirming* 63 Hun (N. Y.) 19, 17 N. Y. Suppl. 415, 42 N. Y. St. 171, 22 N. Y. Civ. Proc. 43]; Reilly *v.* Lee, 33 N. Y. App. Div. 201, 53 N. Y. Suppl. 336; Moosbrugger *v.* Kaufman, 7 N. Y. App. Div. 380, 40 N. Y. Suppl. 213.

What constitutes recovery by defendant.— It has been held that a defendant who defeats a cause of action on the ground that it is based on an invalid contract "recovers" within the meaning of the statute, the view being taken that this amounts to an affirmative finding that judgment should be entered for defendant upon such cause of action. Welling *v.* Ivoroyd Mfg. Co., 15 N. Y. App. Div. 116, 44 N. Y. Suppl. 374 [*disapproving* Moosbrugger *v.* Kaufman, 7 N. Y. App. Div. 380, 40 N. Y. Suppl. 213]. So it was held that defendant had "recovered" on a cause of action as to which a plea of the statute of limitations was sustained. Blashfield *v.* Blashfield, 41 Hun (N. Y.) 249.

40. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106 [*affirming* 63 Hun (N. Y.) 19, 17 N. Y. Suppl. 415, 42 N. Y. St. 171, 22 N. Y. Civ. Proc. 43]; Cooper *v.* Jolly, 30 Hun (N. Y.) 224; Reed *v.* Batten, 6 N. Y. Suppl. 708, 22 Abb. N. Cas. (N. Y.) 69, 17 N. Y. Civ. Proc. 272; Johnson *v.* Fellows, 6 Hill (N. Y.) 353; Briggs *v.* Allen, 4 Hill (N. Y.) 538; Crittenden *v.* Crittenden, 1 Hill (N. Y.) 359; People *v.* Feeter, 12 Wend. (N. Y.) 480.

41. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106 [*affirming* 63 Hun (N. Y.) 19, 17 N. Y. Suppl. 415, 42 N. Y. St. 171, 22 N. Y. Civ. Proc. 43]; Crosley *v.* Cobb, 42 Hun (N. Y.) 166, 9 N. Y. Civ. Proc. 322; Briggs *v.* Allen, 4 Hill (N. Y.) 538.

42. McCarthy *v.* Innis, 61 Hun (N. Y.) 354, 15 N. Y. Suppl. 855, 40 N. Y. St. 682, 21 N. Y. Civ. Proc. 333; Heath *v.* Forbes, 11 N. Y. Suppl. 87, 18 N. Y. Civ. Proc. 207; Willard *v.* Strachan, 3 N. Y. Civ. Proc. 452.

43. Soule *v.* Russell, 13 Metc. (Mass.) 436.

44. New Marlborough *v.* Brewer, 170 Mass. 162, 48 N. E. 1089.

45. New Marlborough *v.* Brewer, 170 Mass. 162, 48 N. E. 1089; Ashton *v.* Touhey, 131 Mass. 26.

46. New Marlborough *v.* Brewer, 170 Mass. 162, 48 N. E. 1089. Such also was the holding in Dean *v.* Mann, 28 Conn. 352; Stoddard *v.* Mix, 14 Conn. 12, decided under a statute since repealed. And see McGuire *v.* Montross, 102 Iowa 20, 70 N. W. 743.

47. Totman *v.* Carpenter, 4 Cush. (Mass.) 148; Elder *v.* Bemis, 2 Metc. (Mass.) 599; Barlow *v.* Barlow, 35 Hun (N. Y.) 50; Quimby *v.* Claflin, 15 N. Y. Suppl. 508, 39 N. Y. St. 793.

48. Teator *v.* New York Mut. Sav., etc., Assoc., 32 Misc. (N. Y.) 542, 67 N. Y. Suppl. 15.

What are separate and distinct causes of action illustrated.— The causes of action are not distinct and separate where the different counts were for separate sums payable by the

no application where a single count in replevin covers several articles.[49] A similar statute providing that each party shall recover costs upon the issues or claims on which he shall prevail has been held to apply only where the issues and claims are distinct and to have no reference to the constituent parts of a single general issue or claim. It applies to those issues and claims made by the pleadings and not to those arising on the trial.[50]

(D) *Effect of Improper Joinder of Defenses.* Under a statute providing that if verdict shall be found on any issue joined in plaintiff's favor costs shall be allowed him, although on some other issue defendant is entitled to judgment, unless the court considers that defendant has probable cause to plead such matter which has so been found against him, where the general issue is improperly joined with another defense and found against defendant, he is not entitled to costs, although he prevail on the issue raised by the latter defense.[51]

c. Where Set-Off or Counter-Claim Filed. Where a set-off or counter-claim has been filed and allowed, wholly or in part, the party in whose favor final judgment is rendered will be entitled to costs in the absence of some special statutory provision changing the general rule which gives costs to the prevailing party. In other words plaintiff is entitled to costs if he has judgment for an amount in excess of the set-off or counter-claim allowed.[52] By parity of reasoning if the amount allowed as set-off or counter-claim exceeds the amount allowed on plaintiff's demand, defendant is entitled to costs.[53] If plaintiff fails he is not

same covenant, which might have been included in one count (Bull *v.* Ketchum, 2 Den. (N. Y.) 188); or where in an action of slander the declaration contains two counts alleging the utterance of similar words at different times (Sayles *v.* Briggs, 1 Metc. (Mass.) 291); or in an action of trespass *quare clausum fregit* where all the evidence admissible in support of either count might be received on that on which plaintiff obtained a verdict (Elder *v.* Bemis, 2 Metc. (Mass.) 599); or in ejectment where in each count distinct portions of separate lots were claimed and in one count the entire premises were claimed (Martin *v.* Martin, 3 How. Pr. (N. Y.) 202); but counts for assault and battery, malicious prosecution, and false imprisonment are "not all for the same cause of action," under a statute giving both parties costs where each recovers on one or more issue counts, which are not all for the same cause of action (Frank *v.* Wayne Cir. Judge, 54 Mich. 241, 20 N. W. 35).

49. Kilburn *v.* Lowe, 37 Hun (N. Y.) 237. *Compare* Coon *v.* Diefendorf, 8 N. Y. Civ. Proc. 293.

50. Brainerd *v.* Casey, 37 Vt. 479. To the same effect see Ross *v.* White, 60 Vt. 558, 15 Atl. 184, in which it was held that in trover for conversion of several articles where plaintiff failed to recover all that he sued for defendant was not entitled to apportionment as only a single issue was made by the pleadings. *Compare* Sanborn *v.* Chittenden, 27 Vt. 171.

51. Hatch *v.* Thompson, 67 Conn. 74, 34 Atl. 770.

52. *Kansas.*— Perley *v.* Taylor, 21 Kan. 712.

Louisiana.— Hunter *v.* Williams, 16 La. Ann. 129.

Missouri.— Du Pont *v.* McLaran, 61 Mo. 502.

New Hampshire.— Eastman *v.* Holderness, 44 N. H. 18.

Texas.— Downey *v.* Hatter, (Civ. App. 1898) 48 S. W. 32.

See 13 Cent. Dig. tit. "Costs," § 114.

53. *California.*— Davis *v.* Hurgren, 125 Cal. 48, 57 Pac. 684.

Louisiana.— Block *v.* Creditors, 46 La. Ann. 1334, 16 So. 267.

Massachusetts.— Wolcott *v.* Dooley, 4 Allen 400.

New Hampshire.— Eastman *v.* Holderness, 44 N. H. 18.

New York.— Ury *v.* Wilde, 3 N. Y. Suppl. 791, 19 N. Y. St. 674.

North Carolina.— Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 249, 26 S. E. 41.

North Dakota.— Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

Texas.— McCormack Harvesting Mach. Co. *v.* Gilkey, (Civ. App. 1893) 23 S. W. 325.

See 13 Cent. Dig. tit. "Costs," § 114.

See also —— *v.* ——, 27 Vt. 786. But *compare* Booth *v.* Cowan, 5 Sneed (Tenn.) 354, holding that where the demands of both plaintiff and defendant are allowed and judgment rendered for defendant for the excess in his favor, each party is entitled to costs incurred in establishing his demand, under a statute giving costs to the party in whose favor judgment is given.

Claims purchased since institution of suit. — Where the defendant sets up valid claims purchased since the institution of suit, the same may be adjudged as credits on the debt due plaintiff and the judgment rendered in favor of the party shown to be in debt to the other, but in no event should the defendant have judgment against the plaintiff for costs. Overby *v.* Wells, 54 S. W. 955, 21 Ky. L. Rep. 1316.

Rendition of general judgment for defendant.— In Massachusetts it has been held that

entitled to costs merely because defendant fails to establish his counter-claim.[54] Where a counter-claim is pleaded presenting several issues, some of which are decided in plaintiff's favor and some against him, a case is presented for apportionment where a statute gives the court power to apportion costs between the parties.[55] So also where each party is successful on his claim.[56] And under such statute where a counter-claim is filed and the court finds the damages sustained by the parties to be equal the costs may be divided;[57] but where defendant admits plaintiff's claim, and by the verdict it is reduced by a counter-claim, the costs of the trial are properly taxed against defendant where they arose principally from a counter-claim which was denied him and there are no facts to enable the court to make an intelligent apportionment of the costs.[58] Where a statute gives the court power to apportion costs as it may see fit, costs incurred by defendant in procuring evidence to establish his set-off because of plaintiff's denial thereof are properly chargeable to plaintiff, although he recovers judgment on his demand.[59]

d. Time of Moving For Apportionment. After dismissal of the action and judgment for costs, there is no case in court and no motion for apportionment can be entertained.[60]

B. In Suits in Equity — 1. Discretion of Court. In courts of equitable jurisdiction it is a rule of universal application that the allowance of costs is within the court's discretion,[61] and that the action of the trial court cannot be reviewed

if a general judgment for defendant is rendered in an action in which he has plead a declaration in set-off, neither party is entitled to costs as neither party has succeeded in proving his claim. Hartford *v.* Co-operative Mut. Homestead Co., 130 Mass. 447.

54. Whitelegge *v.* De Witt, 12 Daly (N. Y.) 319.

55. Gravel *v.* Clough, 81 Iowa 272, 46 N. W. 1092. See also Schawacker *v.* McLaughlin, 139 Mo. 333, 40 S. W. 935.

56. Melick *v.* Lyon, (Iowa 1902) 89 N. W. 33.

57. Wachendorf *v.* Lancaster, 66 Iowa 458, 23 N. W. 922; Ferguson *v.* Thorpe, 54 Iowa 422, 6 N. W. 690.

58. Smith *v.* Hess, 83 Iowa 238, 48 N. W. 1030.

59. Eichenlaub *v.* Gardner, 2 Cinc. Super. Ct. 249.

Where a breach of contract is established on a counter-claim the court may under such statute order plaintiff to pay a part of the costs, although defendant fails to show any actual damage. Burckhardt *v.* Burckhardt, 8 Ohio Dec. (Reprint) 496, 8 Cinc. L. Bul. 253.

60. Williamson *v.* Williamson, 1 Metc. (Ky.) 303.

61. *Alabama.*— Connor *v.* Armstrong, 91 Ala. 265, 9 So. 816; Falkner *v.* Campbell Printing Press, etc., Co., 74 Ala. 359; *Ex p.* Robinson, 72 Ala. 389; Kitchell *v.* Jackson, 71 Ala. 556; Hunt *v.* Lewin, 4 Stew. & P. 138.

California.— Gray *v.* Dougherty, 25 Cal. 266.

Colorado.— Putnam *v.* Lyon, 3 Colo. App. 144, 32 Pac. 492.

Connecticut.—Cowles *v.* Whitman, 10 Conn. 121, 25 Am. Dec. 60; Tomlinson *v.* Ward, 2 Conn. 396.

Florida.— Moyers *v.* Coiner, 22 Fla. 422; White *v.* Walker, 5 Fla. 478.

Georgia.— Ross *v.* Stokes, 64 Ga. 758; Pearce *v.* Chastain, 3 Ga. 226, 46 Am. Dec. 423.

Illinois.— Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393; Converse *v.* Rankin, 115 Ill. 398, 4 N. E. 504; Askew *v.* Springer, 111 Ill. 662; Howe *v.* Hutchinson, 105 Ill. 501; Otis *v.* Gardner, 105 Ill. 436; McArtee *v.* Engart, 13 Ill. 242; Groff *v.* Mutual L. Ins. Co., 92 Ill. App. 207; Earl *v.* Earl, 87 Ill. App. 491; North *v.* Roodhouse, 52 Ill. App. 17; Citizens' Ins. Co. *v.* Hamilton, 48 Ill. App. 593; Magnusson *v.* Charlson, 32 Ill. App. 580.

Kansas.— Emporia *v.* Whittlesey, 20 Kan. 17.

Kentucky.— Williamson *v.* Williamson, 1 Metc. 303; Kaye *v.* Louisville Bank, 9 Dana 261.

Maine.— Stilson *v.* Leeman, 75 Me. 412; Stone *v.* Locke, 48 Me. 425.

Maryland.— Owings *v.* Rhodes, 65 Md. 408, 9 Atl. 903; Hamilton *v.* Schwehr. 34 Md. 107; Lee *v.* Pindle, 12 Gill & J. 288.

Massachusetts.— Clark *v.* Reed, 11 Pick. 446; Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394.

Michigan.—Citizens' Sav. Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143; People *v.* Grand Rapids, etc., Plank Road Co., 67 Mich. 5, 34 S. W. 250; Van Wert *v.* Chidester, 31 Mich. 207; Comstock *v.* Comstock, 24 Mich. 39; Daniels *v.* Eisenlord, 10 Mich. 454.

Missouri.— Supreme Council L. of H. *v.* Nidelet, 85 Mo. App. 283.

Montana.— Black *v.* Black, 5 Mont. 15, 2 Pac. 317.

Nevada.— Welland *v.* Huber, 8 Nev. 203.

New York.— Stevens *v.* Central Nat. Bank, 168 N. Y. 560, 61 N. E. 904; Herrington *v.* Robertson, 71 N. Y. 280; Provost *v.* Provost, 70 N. Y. 141; Roussel *v.* Mathews, 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886; Cottle *v.* New York, etc., R. Co., 27 N. Y. App. Div. 604, 50 N. Y. Suppl. 1008; Black *v.* O'Brien,

or interfered with, unless such discretion has been manifestly abused.[62] Costs are awarded or refused according to the justice of each particular case,[63] but this discretion is not arbitrary.[64] It is a judicial discretion calling for sound judgment upon all the facts and circumstances of the case and must not be so exercised as to result in injustice or oppression.[65] In case the court's discretion is improperly exercised, its action may be reviewed and its decree in respect to costs reversed or modified.[66] The term "costs" as used in a statute providing that in equitable

23 Hun 82; Law *v.* McDonald, 9 Hun 23; Knapp *v.* New York El. R. Co., 4 Misc. 408, 24 N. Y. Suppl. 324, 53 N. Y. St. 571; Hammond *v.* Slocum, 50 How. Pr. 415; Bedell *v.* Hoffman, 2 Paige 199.

Ohio.— Walpole *v.* Griffin, Wright 95.

Oregon.— Security Sav., etc., Co. *v.* MacKenzie, 33 Oreg. 209, 52 Pac. 1046.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Philadelphia Nat. Bank, 195 Pa. St. 34, 45 Atl. 648; O'Hara *v.* Stack, 90 Pa. St. 477; Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382; Silverstein *v.* Cohen, 9 Kulp 282; Coleman *v.* Brooke, 15 Phila. 302, 39 Leg. Int. 158; *In re* Young, 2 Chester Co. 117.

South Carolina.—Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412; Younger *v.* Massey, 41 S. C. 50, 19 S. E. 125; Geddes *v.* Hutchinson, 40 S. C. 402, 19 S. E. 9; Alexander *v.* Meroney, 30 S. C. 335, 9 S. E. 266; McAfee *v.* McAfee, 28 S. C. 218, 5 S. E. 593; Lake *v.* Shumate, 20 S. C. 23; Bratton *v.* Massey, 18 S. C. 555; Childs *v.* Frazee, 15 S. C. 612; Cooke *v.* Pennington, 15 S. C. 185; Lewis *v.* Wilson, 1 McCord Eq. 210.

South Dakota.— Macomb *v.* Lake County, 13 S. D. 103, 82 N. W. 417.

Tennessee.— Snapp *v.* Purcell, 13 Lea 693; Hagar *v.* Wilson, (Ch. App. 1897) 46 S. W. 1033; Clark *v.* Clark, 4 Hayw. 36; Perkins *v.* McGavock, 3 Hayw. 255.

Texas.— Walling *v.* Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Spiers *v.* Purcell, 2 Tex. Unrep. Cas. 624.

Vermont.— Lamoille Valley R. Co. *v.* Bixby, 57 Vt. 548; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Rep. 58; Lyman *v.* Little, 15 Vt. 576; Mott *v.* Harrington, 15 Vt. 185.

Virginia.— Magarity *v.* Shipman, 82 Va. 784, 1 S. E. 109; Dillard *v.* Dillard, 77 Va. 820.

Washington.— Churchill *v.* Stephenson, 14 Wash. 620, 45 Pac. 28.

Wisconsin.— Jones *v.* Jones, 71 Wis. 513, 38 N. W. 88; Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249; Arnold *v.* Juneau County, 43 Wis. 627; Massing *v.* Ames, 38 Wis. 285.

United States.— Pennsylvania Ins. Co. *v.* Jacksonville, etc., R. Co., 66 Fed. 421, 13 C. C. A. 550; Avery *v.* Wilson, 20 Fed. 856; Wiegand *v.* Copeland, 14 Fed. 118, 7 Sawy. 442; Coburn *v.* Schroeder, 8 Fed. 521, 19 Blatchf. 493; Brooke *v.* Byam, 4 Fed. Cas. No. 1,949, 2 Story 553; Hill *v.* Triumph, 12 Fed. Cas. No. 6,500.

See 13 Cent. Dig. tit. "Costs," § 21.

62. *Colorado.*— Putnam *v.* Lyon, 3 Colo. App. 144, 32 Pac. 492.

Georgia.— Torress *v.* Raeburn, 108 Ga. 345, 33 S. E. 989; Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

Mississippi.— Sledge *v.* Obenchain, 59 Miss. 616.

Missouri.— Walton *v.* Walton, 19 Mo. 667.

New York.— Herrington *v.* Robertson, 71 N. Y. 280; Brundage *v.* Brundage, 60 N. Y. 544; Staiger *v.* Schultz, 4 Abb. Dec. 293, 3 Keyes 614, 3 Transcr. App. 4, 3 Abb. Pr. N. S. 377; Woodford *v.* Bucklin, 14 Hun 444.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Philadelphia Nat. Bank, 195 Pa. St. 34, 45 Atl. 648.

South Carolina.— Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412.

Tennessee.— State *v.* Lewis, 10 Lea 168.

United States.—Tyler Min. Co. *v.* Sweeney, 79 Fed. 277.

See 13 Cent. Dig. tit. "Costs," § 21.

63. Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382.

64. **"The discretion is not an arbitrary, capricious, blind discretion,** but a legal discretion, resulting from a view of the case, taken in combination with all the circumstances, and calling to its aid the issue of like questions, heretofore, upon cases as nearly analogous as can be found." Clark *v.* Clark, 4 Hayw. (Tenn.) 36.

65. *Alabama.*— Gray *v.* Gray, 15 Ala. 779.

California.— Kelly *v.* Central Pac. R. Co., 74 Cal. 565, 16 Pac. 390.

Georgia.— Hamilton *v.* Du Pre, 103 Ga. 795, 30 S. E. 248.

Illinois.— Hollingsworth *v.* Koon, 117 Ill. 511, 6 N. E. 148, 8 N. E. 193; Groff *v.* Mutual L. Ins. Co., 92 Ill. App. 207; North *v.* Roodhouse, 52 Ill. App. 17.

New York.— Husted *v.* Van Ness, 1 N. Y. App. Div. 120, 36 N. Y. Suppl. 1043, 72 N. Y. St. 28.

Pennsylvania.— Biddle's Appeal, (1887) 8 Atl. 640; Danner's Estate, 2 Lehigh Val. L. Rep. 422.

Tennessee.— Clark *v.* Clark, 4 Hayw. 36; Perkins *v.* McGavock, 3 Hayw. 255.

Wisconsin.— Menz *v.* Beebe, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601; Spengler *v.* Hahn, 95 Wis. 472, 70 N. W. 466.

See 13 Cent. Dig. tit. "Costs," § 21.

66. *California.*— Kelly *v.* Central Pac. R. Co., 74 Cal. 565, 16 Pac. 390.

Georgia.— Hamilton *v.* Du Pre, 103 Ga. 795, 30 S. E. 248.

Illinois.— Groff *v.* Mutual L. Ins. Co., 92 Ill. App. 207.

Tennessee.— Snapp *v.* Purcell, 13 Lea 693.

Wisconsin.— Menz *v.* Beebe, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601.

actions "costs" shall be in the discretion of the court has been held not to include disbursements.[67]

2. Right of Prevailing Party to Costs — a. General Rule. The general rule in suits in equity as well as in actions at law is that the prevailing party is entitled to costs,[68] and it will be applied unless the losing party can show that equity requires a different judgment.[69]

b. Application of Rule — (I) *Where Suit Necessary to Protect or Enforce Right* — (A) *In General.* The general rule that the successful party is entitled to costs applies ordinarily when the complainant is successful in a suit which is necessary to protect or enforce his rights.[70]

(B) *Where Denial of Complainant's Rights Makes Suit Necessary.* It applies where the defendant's denial of the complainant's rights makes it necessary for the latter to resort to a court of justice for the establishment of such rights and to be placed in a position to enjoy them.[71]

See 13 Cent. Dig. tit. "Costs," § 21.

Instance of abuse of discretion.— Where in an action for specific performance of a contract obtained by fraud, where a decree is entered for defendant on the merits, it is an abuse of discretion to tax costs against defendant. Kelly *v.* Central Pac. R. Co., 74 Cal. 565, 16 Pac. 390. So the imposition of costs on complainant on a bill to restrain a sale under a mortgage for a usurious debt and in a supplemental bill to redeem from a sale made without the court's authority, after the original bill was filed, is not a proper exercise of discretion. Hollingsworth *v.* Koon, 117 Ill. 511, 6 N. E. 148, 8 N. E. 193.

67. Van Meter *v.* Knight, 32 Minn. 205, 20 N. W. 142.

68. *Florida.*— Moyer *v.* Coiner, 22 Fla. 422; Lewis *v.* Yale, 4 Fla. 441.

Massachusetts.— Bryant *v.* Russell, 23 Pick. 508; Clark *v.* Reed, 11 Pick. 446.

New Hampshire.— Clement *v.* Wheeler, 25 N. H. 361.

New Jersey.— Bowker *v.* Gleason, (Ch. 1887) 11 Atl. 324.

New York.— Couch *v.* Millard, 41 Hun 212; Hunn *v.* Norton, Hopk. Ch. 344.

Pennsylvania.— Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; Danner's Estate, 2 Lehigh Val. L. Rep. 422.

Texas.— Walling *v.* Kinnard, 10 Tex. 508, 60 Am. Dec. 216.

Wisconsin.— Spengler *v.* Hahn, 95 Wis. 472, 70 N. W. 466.

United States.— Warren *v.* Burnham, 32 Fed. 579.

England.— Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Vancouver *v.* Bliss, 11 Ves. Jr. 458, 8 Rev. Rep. 207.

See 13 Cent. Dig. tit. "Costs," §§ 21, 108.

69. Clark *v.* Reed, 11 Pick. (Mass.) 446. And see Moyer *v.* Coiner, 22 Fla. 422; Clement *v.* Wheeler, 25 N. H. 361; Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 3 Woodb. & M. 17; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168.

70. *Colorado.*— Madeley *v.* White, 2 Colo. App. 408, 31 Pac. 181.

Illinois.— Taft *v.* Schwamb, 80 Ill. 289.

Kentucky.— Moon *v.* Story, 8 Dana 226; Ogle *v.* Ship, 1 A. K. Marsh. 287.

Massachusetts.— Iasigi *v.* Chicago, etc., R. Co., 129 Mass. 46.

Michigan.— Ward *v.* Jewett, Walk. 45.

New York.— Langburn *v.* Miles, 10 Abb. N. Cas. 42; Pratt *v.* Stiles, 9 Abb. Pr. 150; Haviland *v.* Bloom, 6 Johns. Ch. 178.

Improper or fraudulent conduct of defendant.— Where complainant was compelled by the improper conduct of the defendant and without fault on his own part to come into court for a settlement of partnership accounts he is entitled to costs. Ward *v.* Jewett, Walk. (Mich.) 45. So where defendant fraudulently altered a deed, and had it put on record after a decision of law against its validity, he should be compelled to pay the costs of a proceeding to set it aside. Bushnell *v.* Harford, 4 Johns. Ch. (N. Y.) 301.

71. *Indiana.*— Kimble *v.* Seal, 92 Ind. 276.

Kentucky.— Ogle *v.* Ship, 1 A. K. Marsh. 287; Lyon *v.* Ross, 1 Bibb 466.

Massachusetts.— Iasigi *v.* Chicago, etc., R. Co., 129 Mass. 46.

Michigan.— Salisbury *v.* Miller, 14 Mich. 160.

New York.— Wells *v.* Tolman, 88 Hun 438, 34 N. Y. Suppl. 840, 68 N. Y. St. 777; Dilts *v.* Sweet, 21 N. Y. Suppl. 57, 49 N. Y. St. 275.

Pennsylvania.—Shedwick *v.* Prospect M. E. Church, 160 Pa. St. 57, 28 Atl. 499.

Virginia.— Peers *v.* Barnett, 12 Gratt. 410.

Wisconsin.— Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539, 29 N. W. 559; Clinton *v.* Webster, 66 Wis. 322, 28 N. W. 349; Benson *v.* Cutler, 66 Wis. 305, 28 N. W. 134; Weston *v.* Olsen, 55 Wis. 613, 13 N. W. 700.

Illustrations.— Thus where defendant, in a specific performance suit in which plaintiff prevails, denies that plaintiff has any rights in the property, costs are properly awarded to plaintiff. Benson *v.* Cutler, 66 Wis. 305, 28 N. W. 134. So where defendant's refusal to execute a release renders a suit necessary, the court may, in rendering judgment for plaintiff, impose on defendant all the costs. Salisbury *v.* Miller, 14 Mich. 160. So where on the foreclosure of a mortgage, the mortgagor is forced to an action to establish a

(II) *Where Defendant Makes Unreasonable or Unconscientious Defense.* So it applies where defendant makes an unreasonable or unconscientious defense. Under these circumstances if the plaintiff is successful he is entitled to costs.[72]

(III) *Groundless or Useless Suits or Proceedings.* A complainant who brings a groundless suit[73] or makes a groundless application will be required to pay costs.[74] So also he will be chargeable with the costs of a useless litigation.[75]

(IV) *Where Losing Party Causes Unnecessary Costs.* The general rule that costs follow the result of the suit will not be departed from where the conduct of the losing party has been the chief cause of a large accumulation of costs.[76]

c. Limitations of and Exceptions to Rule — (I) *In General.* A court of equity has power to impose costs on a party, notwithstanding the fact that he is successful in the suit.[77]

(II) *Unnecessary Suits.* Thus where a suit is unnecessary for the establishment or protection of the complainant's rights he is, although successful, not entitled to costs,[78] but may be required to pay defendant's costs.[79]

right to redeem which the mortgagee denies, he is entitled to costs in case his right is established. Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539, 29 N. W. 559.

72. *Illinois.*— Downing *v.* Plate, 90 Ill. 268.

New Hampshire.— Lawrence *v.* Lawrence, 42 N. H. 109.

New Jersey.— Meserole *v.* Leary, (Ch. 1892) 23 Atl. 1074; Loss *v.* Obry, 22 N. J. Eq. 52.

New York.— Fort *v.* Gooding, 9 Barb. 388; Vroom *v.* Ditmas, 4 Paige 526.

West Virginia.— Tracy *v.* Tracy, 14 W. Va. 243.

Even though the suit is of such a character that the defendant would ordinarily be allowed costs, although complainant obtains the relief asked (as for instance a suit to redeem on mortgage), yet if the defendant set up an unconscientious defense, he will be denied costs. Slee *v.* Manhattan Co., 1 Paige (N. Y.) 48.

73. Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; Childe *v.* Harold, 5 Fed. Cas. No. 2,676, Olcott 275.

Where a libellant sues for wages and in addition thereto claims a large sum to which he was not entitled he will be refused costs. Johnson *v.* Blanchard, 7 Fed. 597.

74. Price *v.* White, Bailey Eq. (S. C.) 244.

75. Kauffman's Appeal, 112 Pa. St. 645, 4 Atl. 20.

76. Lewis *v.* Yale, 4 Fla. 441.

77. Paulding *v.* Watson, 21 Ala. 279; Howard *v.* Bennett, 72 Ill. 297; Taber *v.* Shattuck, 55 Mich. 370, 21 N. W. 371; Dill *v.* Wisner, 88 N Y. 153.

78. *Kentucky.*—Harland *v.* Eastland, Hard. 590.

New York.— Badeau *v.* Rogers, 2 Paige 209; De la Vergne *v.* Evertson, 1 Paige 181, 19 Am. Dec. 411.

North Carolina.— Beaslay *v.* Knox, 58 N. C. 1.

Vermont.— Stearns *v.* Wrisley, 30 Vt. 661.

Virginia.— Tapp *v.* Beverley, 1 Leigh 80. See 13 Cent. Dig. tit. "Costs," § 120.

Rule applied.— Thus it has been held that relief granted on a bill to enjoin a judgment by a party who neglected to make his defense at law will be at complainant's costs. Teil *v.* Roberts, 3 Hayw. (Tenn.) 139; Blevins *v.* Armstrong, 3 Hayw. (Tenn.) 135. And on a bill to enjoin a judgment for the price of land and to rescind the sale, complainant is not entitled to costs if he could have obtained the relief sought in another action pending at the time of commencing the injunction suit. Young *v.* McClung, 9 Gratt. (Va.) 336. So where complainant asks a court of equity to set off one judgment obtained in a court of law against another in the same court, and at the same time has a remedy by summary application to the court in which the judgments were rendered, the relief granted will be at complainant's cost. Gridley *v.* Garrison, 4 Paige (N. Y.) 647. It has also been held that where on setting aside a decree it appeared that the matter in controversy had previously been submitted to arbitrators, who had made an award differing little from the decree in the cause, and no reason appeared why the award might not have been set up as a bar complainant, although prevailing, should be denied costs. Freeland *v.* Manhattan, Hopk. (N. Y.) 276.

79. *District of Columbia.*— Gibbons *v.* Duley, 7 Mackey 320.

Illinois.— Frisby *v.* Ballance, 5 Ill. 287, 39 Am. Dec. 409.

New York.— Hunt *v.* Wallis, 6 Paige 371; Robinson *v.* Cropsey, 2 Edw. 138.

Pennsylvania.— See Nebsit *v.* Kerr, 3 Yeates 194.

Texas.— Gulf, etc., R. Co. *v.* Schneider, (Civ. App. 1894) 28 S. W. 260.

West Virginia.—Laidley *v.* Kline, 23 W. Va. 565.

See 13 Cent. Dig. tit. "Costs," § 120.

(III) *Negligence or Misconduct of Successful Party.* So if the suit is necessary only because of complainant's negligence or misconduct, he may be required to pay costs, although successful;[80] and the same is the case when he has been guilty of great laches in bringing suit and shows no excuse for his delay.[81] So where the complainant brings a suit to obtain relief, a part of which he knows he is not entitled to, the discretion of the court will be properly exercised in decreeing costs against him.[82] And if plaintiff unreasonably enforces an equitable right depriving defendant of the opportunity to satisfy the claim made against him without suit, the relief may be granted without costs or plaintiff be compelled to pay defendant's costs.[83] On the other hand defendant may be required to pay costs, although successful, when the complainant was misled into bringing suit by his misconduct.[84]

(IV) *Scandalous Matter in Pleading.* Scandalous matter in an answer is a ground for withholding costs from defendant, although he prevails in the suit.[85]

(V) *Where Complainant Has Good Reason to Think Defendant Liable.* Where it appears that complainant had good reason to think defendant liable, the court will not award costs against him, although unsuccessful, if defendant was in such a situation as to render it probable that he was liable on equitable principles.[86]

(VI) *Pursuing More Expensive Remedy.* Although the complainant succeeds in a suit, it may be a good cause for refusing him costs that he adopted a more expensive remedy than was necessary;[87] and under such circumstances he may even be charged with costs.[88]

(VII) *Where Relief Is Conditioned on Payment of Money.* Where the relief granted to complainant is conditioned on the repayment of money and the amount is paid without default, complainant is entitled to costs, but if default is made defendant is entitled to costs.[89]

(VIII) *Right of Court to Apportion Costs* — (A) *In General.* Courts of equity by virtue of the discretion universally vested in them by statute have power in a proper case to apportion the costs between the parties;[90] and their

Illustrations.— Complainant in a bill to quiet title which had never been impeached or threatened was charged with defendant's costs, although successful. Gibbons *v.* Duley, 7 Mackey (D. C.) 320; Robinson *v.* Cropsey, 2 Edw. (N. Y.) 138. So where a legacy is payable out of a fund consisting of bonds and notes drawing interest, and the legatees refused to take the securities themselves, he is not entitled to costs in a suit for the interest. Beasley *v.* Knox, 58 N. C. 1.

80. Andrews *v.* Hunt, 7 Mackey (D. C.) 311; Sanders *v.* Wilson, 34 Vt. 318; Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

Where a party by his unbusinesslike methods makes a suit necessary to cancel certain of his notes left for safe-keeping with a person whose administrator claims them as evidence of debt against the maker, he must pay the costs of the proceeding, although substantially prevailing therein. Andrews *v.* Hunt, 7 Mackey (D. C.) 311.

81. Paulding *v.* Watson, 21 Ala. 279; Coleman *v.* Brooks, 15 Phila. (Pa.) 302, 39 Leg. Int. (Pa.) 158.

82. Howard *v.* Bennett, 72 Ill. 297.

83. Welland *v.* Huber, 8 Nev. 203.

84. Pettit's Case, 19 Fed. Cas. No. 11,047. See also Twist *v.* Babcock, 48 Mich. 513, 12 N. W. 680, where it was held that costs may be given plaintiff, even while denying relief in proceedings to set aside transactions concerning which defendant's conduct had been such as to make it appear probable that they were fraudulent.

85. Mayhew *v.* Phœnix Ins. Co., 23 Mich. 105.

86. Clark *v.* Reed, 11 Pick. (Mass.) 446. And see Tatham *v.* Lewis, 65 Pa. St. 65.

87. Outtrin *v.* Graves, 1 Barb. Ch. (N. Y.) 49.

88. White *v.* Meday, 2 Edw. Ch. (N. Y.) 486.

89. Match *v.* Hunt, 38 Mich. 1.

90. *Alabama.*—Randolph *v.* Rosser, 7 Port. 249; Hunt *v.* Lewin, 4 Stew. & P. 138. See also Decatur Land Co. *v.* Cook, (1900) 27 So. 559.

California.— Cerf *v.* Ashley, 68 Cal. 419, 9 Pac. 658.

Illinois.— Waterman *v.* Alden, 144 Ill. 90, 32 N. E. 972; Joliet First Nat. Bank *v.* Adam, 34 Ill. App. 159.

Iowa.— Bush *v.* Yeoman, 30 Iowa 479; Brinck *v.* Neiweg, 29 Iowa 444.

Kentucky.— Kaye *v.* Louisville Bank, 9 Dana 261; Moody *v.* Dowdal, 2 A. K. Marsh. 212.

Massachusetts.—Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394.

Missouri.— Bender *v.* Zimmerman, 135 Mo.

action in apportioning costs,[91] or in denying a motion for apportionment,[92] will not be disturbed unless it appears from the facts disclosed by the record that there was an abuse of discretion.

(B) *Where Both Parties Successful in Part*—(1) In General. In equity where both parties are successful in part the court may, it has been held, refuse to allow costs to either,[93] or apportion the costs between them as may in its discretion seem fit.[94]

(2) Where There Are Separate Issues or Causes of Action. In courts of equity where each party succeeds as to one or more of the causes of action or issues the allowance of costs is within the sound discretion of the court. In some jurisdictions, where each party succeeds as to part of the causes of action or issues, the practice is to deny costs to either as against the other.[95] So in others it has been held that costs may properly be apportioned between the parties,[96] and in another that the fact that a plaintiff succeeds on one ground and fails on another is not of itself sufficient reason for refusal to allow him costs in equity.[97]

(3) Where Cross Bill or Cross Complaint Is Filed. Where a cross bill, cross complaint, or reconventional demand is filed, and each party is cast, neither recovers costs, but must pay his own costs.[98] If each party obtains all the relief

53, 36 S. W. 210; Bobb *v.* Wolff, 54 Mo. App. 515.

New York.— Matter of Heminp, 3 Paige 305; Nicoll *v.* Huntington, 1 Johns. Ch. 166.

Ohio.— Campton *v.* Griffith, Wright 321; Walpole *v.* Griffin, Wright 95.

Pennsylvania.— Greenmount Cemetery Co.'s Appeal, (1886) 4 Atl. 528; Graver's Appeal, 1 Lanc. L. Rev. 227; John's Estate, 2 Chest. Co. Rep. 281.

South Carolina.— Webb *v.* Chisolm, 24 S. C. 487.

Tennessee.— Clark *v.* Clark, 4 Hayw. 36; Bryant *v.* Puckett, 3 Hayw. 252.

See 13 Cent. Dig. tit. "Costs," § 261 *et seq.*

91. Bush *v.* Yeoman, 30 Iowa 479; Davis *v.* Cannady, 37 Kan. 296, 15 Pac. 225.

92. Koestenbader *v.* Pierce, 41 Iowa 204.

Where some of the causes of action jointly declared on are equitable, it is within the discretion of the court to apportion the costs. Churchill *v.* Stephenson, 14 Wash. 620, 45 Pac. 28.

93. *Illinois.*— Phy *v.* Clark, 35 Ill. 377.

Iowa.— Burton *v.* Mason, 26 Iowa 392.

New Jersey.— Coddington *v.* Idell, 30 N. J. Eq. 540; Fairchild *v.* Hunt, 14 N. J. Eq. 367.

New York.— Morris *v.* Wheeler, 45 N. Y. 708; Cross *v.* Smith, 85 Hun 49, 32 N. Y. Suppl. 671, 66 N. Y. St. 55; Davis *v.* Lambertson, 56 Barb. 480; Crippen *v.* Heermance, 9 Paige 211; Righter *v.* Stall, 3 Sandf. Ch. 608; Sagory *v.* Dubois, 3 Sandf. Ch. 466; Ten Eyck *v.* Holmes, 3 Sandf. Ch. 428. *Compare* Abendroth *v.* Durant, 9 N. Y. Civ. Proc. 446.

Pennsylvania.— Baum *v.* Wicklein, 2 Woodw. 242.

Vermont.— Eldridge *v.* Smith, 34 Vt. 484; Griswold *v.* Smith, 10 Vt. 452.

United States.— Marks Adjustable Folding Chair Co. *v.* Wilson, 43 Fed. 302.

See 13 Cent. Dig. tit. "Costs," § 272.

94. *Colorado.*—Stewart *v.* McLaughlin, 11 Colo. 458, 18 Pac. 619.

Iowa.— Hatch *v.* Judd, 29 Iowa 95.

Missouri.— Roll *v.* St. Louis, etc., Smelting, etc., Co., 52 Mo. App. 60.

Texas.— Galveston, etc., R. Co. *v.* Dowe, 70 Tex. 1, 6 S. W. 790.

United States.—Tesla Electric Co. *v.* Scott, 101 Fed. 524.

See 13 Cent. Dig. tit. "Costs," § 272.

95. Tucker *v.* Utica, 35 N. Y. App. Div. 173, 54 N. Y. Suppl. 855; West *v.* Utica, 71 Hun (N. Y.) 540, 24 N. Y. Suppl. 1075, 54 N. Y. St. 911; Couch *v.* Millard, 41 Hun (N. Y.) 212; Law *v.* McDonald, 9 Hun (N. Y.) 23; Walter *v.* F. E. McAllister Co., 21 Misc. (N. Y.) 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33; McCulloch *v.* Vibbard, 14 N. Y. Civ. Proc. 388; Crippen *v.* Heermance, 9 Paige (N. Y.) 211; Schmidt *v.* Scovill Mfg. Co., 37 Fed. 345; Adams *v.* Howard, 19 Fed. 317; Elfelt *v.* Steinhart, 11 Fed. 896, 6 Sawy. 480.

96. *Iowa.*— Strayer *v.* Stone, 47 Iowa 333; Burton *v.* Mason, 26 Iowa 392.

Kentucky.— Moody *v.* Dowdal, 2 A. K. Marsh. 212.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62 [*overruling* Hawkins *v.* Nowland, 53 Mo. 328]; Roll *v.* St. Louis, etc., Smelting Co., 52 Mo. App. 60; Plant Seed Co. *v.* Michel Plant, etc., Co., 37 Mo. App. 313.

Tennessee.— Grosvenor *v.* Bethell, 93 Tenn. 577, 26 S. W. 1069; Bryant *v.* Puckett, 3 Hayw. 252.

Vermont.— McConnell *v.* McConnell, 11 Vt. 290.

United States.— Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429.

See 13 Cent. Dig. tit. "Costs," § 273.

97. Gaylord *v.* Goodell, (Mass. 1899) 53 N. E. 275.

98. Patterson *v.* Nurnberg, (Colo. App. 1902) 68 Pac. 134; Finneran *v.* Coursey, 31 Kan. 408, 2 Pac. 554; Peniston *v.* Somers, 15 La. Ann. 679; New Orleans, etc., R. Co. *v.* Harper, 11 La. Ann. 212.

he demanded costs may be equally divided under a statute authorizing the court to apportion costs as it may think just and advisable.[99] If the issues raised by the cross complaint fail in part only the costs attending the successful issues are taxable against defendants to the cross complaint, under a statute making each party liable for costs of the issues as to which he has failed.[1] If complainant obtains the relief asked and the court finds the charges of the cross bill not sustained it is error to tax the costs of the cross bill against him.[2] Where on a bill and cross bill complainant in the original bill mainly succeeded, although each party claimed more than he was entitled to, complainant in the original bill was allowed the costs therein, and neither party was allowed costs as to the other.[3] Where a cross bill is dismissed, but the court erroneously gives judgment in favor of the defendant for a small amount, it is proper to refuse him costs.[4]

(c) *Where Both Parties at Fault.* In a suit in equity where both parties are in fault, the court will ordinarily require each party to pay his own costs,[5] or make each pay an equal share of the whole amount of costs taxed.[6] It has also been held that costs will not be allowed to either party as against the other where

99. Hale *v.* Young, 24 Nebr. 464, 39 N. W. 406.

1. Adams *v.* Laugel, 144 Ind. 608, 42 N. E. 1017.

2. Raht *v.* Union Consol. Min. Co., 5 Lea (Tenn.) 1.

3. Craig *v.* Tappin, 2 Sandf. Ch. (N. Y.) 78.

4. Teutonia Ins. Co. *v.* Bissell, (Tenn. Ch. App. 1897) 48 S. W. 703.

5. *Illinois.*— Wilson *v.* Lyon, 51 Ill. 530.

Kentucky.— Hamilton *v.* Hamilton, 13 B. Mon. 502.

Maryland.— Dorsey *v.* Smith, 7 Harr. & J. 345; Nowland *v.* Glenn, 2 Md. Ch. 368.

Massachusetts.— Bartlett *v.* Johnson, 9 Allen 530; Bogle *v.* Bogle, 3 Allen 158; Saunders *v.* Frost, 5 Pick. 259, 16 Am. Dec. 394.

Michigan.— Summers *v.* Bromley, 28 Mich. 125.

New Jersey.—Harrison *v.* Righter, 11 N. J. Eq. 389. See also Vanderhoven *v.* Romaine, 56 N. J. Eq. 1, 39 Atl. 129; Van Tine *v.* Van Tine, (Ch. 1888) 15 Atl. 249, 1 L. R. A. 155.

New York.— Johnson *v.* Taber, 10 N. Y. 319; House *v.* Eisenlord, 30 Hun 90; Spencer *v.* Spencer, 11 Paige 299; Caldwell *v.* Lieber, 7 Paige 483; Newburg *v.* Miller, 5 Johns. Ch. 101, 9 Am. Dec. 274; Brown *v.* Rickets, 4 Johns. Ch. 303, 8 Am. Dec. 567; De Riemer *v.* Cantillon, 4 Johns. Ch. 85; Beachman *v.* Eckford, 2 Sandf. Ch. 116.

Pennsylvania.— Coleman *v.* Brooke, 15 Phila. 302, 39 Leg. Int. 158; Jones *v.* Wadsworth, 11 Phila. 239, 33 Leg. Int. 416.

Tennessee.— See Glasgow *v.* Hood, (Ch. App. 1900) 57 S. W. 162.

Vermont.— Pinnock *v.* Clough, 16 Vt. 500, 42 Am. Dec. 521; Keeler *v.* Eastman, 11 Vt. 293; Mower *v.* Hutchinson, 9 Vt. 242; Wright *v.* Lynde, 1 Aik. 383.

Virginia.— Beverly *v.* Brooke, 4 Gratt. 187.

Wisconsin.— Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539, 29 N. W. 559; Green *v.* Wescott, 13 Wis. 606.

United States.—Loveridge *v.* Larned, 7 Fed. 294.

See 13 Cent. Dig. tit. "Costs," § 264.

6. *Alabama.*— Waller *v.* Jones, 107 Ala. 331, 18 So. 277; Perdue *v.* Brooks, 85 Ala. 459, 5 So. 126; Hudson *v.* Kelly, 70 Ala. 393; Smith *v.* Kennard, 38 Ala. 695.

Florida.— Chandler *v.* Sherman, 16 Fla. 99; White *v.* Walker, 5 Fla. 478.

Kentucky.— Jones *v.* Morehead, 3 B. Mon. 377.

New York.— Scott *v.* Thorp, 4 Edw. 1.

Pennsylvania.— Pile *v.* Pedrick, 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677; Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647, 24 Wkly. Notes Cas. 68; Pittsburgh Brass Co. *v.* Adler, 2 Mona. 235; *In re* Old, 8 Lanc. L. Rev. 329; Perkins *v.* Nichols, 2 Chest. Co. Rep. 229.

See 13 Cent. Dig. tit. "Costs," § 264.

Instances.— Thus where a purchaser had been suffered to hold possession three years, under a deed faulty by mistake, the court, on bill by the purchaser to stay an ejectment, and for a conveyance by the claimant, refused costs to either party (De Riemer *v.* Cantillon, 4 Johns. Ch. (N. Y.) 85); and this rule was also applied where unfounded claims were set up by both parties in a suit for a final settlement between partners of the partnership concerns (Caldwell *v.* Leiber, 7 Paige (N. Y.) 483); in a suit where it appeared that the parties were fraudulently concealing the actual facts of the case (Hamilton *v.* Hamilton, 13 B. Mon. (Ky.) 502); where plaintiff failed on the main merits of his bill and defendant acted against good faith and in violation of his moral obligations to plaintiff (Pinnock *v.* Clough, 16 Vt. 500, 42 Am. Dec. 521); where plaintiff sought relief against a mistake of himself as well as of defendant (Mower *v.* Hutchinson, 9 Vt. 242); or where in an action to enforce an implied trust no tender of the amount due the trustee has been made before filing the bill (Waller *v.* Jones, 107 Ala. 331, 18 So. 277); or where each party claims too much (Massing *v.* Ames, 38 Wis. 285).

there has been a mistrial resulting from a submission of the case in accordance with their own stipulations.[7]

VI. RIGHT AS AFFECTED BY AMOUNT OF RECOVERY.

A. Introductory Statement. As is shown in another connection, it is an almost universal rule that the prevailing party in an action at law is entitled to costs in the absence of some special statutory provision to the contrary.[8]

B. Where Amount Recovered Is Within Jurisdiction of Lower Court — 1. In General. By virtue of statutory provisions in many jurisdictions, however, varying somewhat as to the character of actions enumerated, but usually confining their operation to actions for money, or actions for damages, or either, if the amount recovered is such that the suit would have been cognizable by a court of lower grade, plaintiff will not be entitled to costs;[9] and in some of these jurisdictions each party pays his own costs.[10] While in others plaintiff must pay defendant's costs.[11]

In Delaware a statute providing that if suit is brought on a cause of action cognizable before a justice in a higher court and plaintiff shall not recover fifty dollars besides costs he shall not recover costs, unless affidavit[12] has previously been filed that plaintiff has a just cause of action against defendant exceeding fifty dollars, is held not to apply to amicable actions but only to adversary actions.[13]

In Maine quarter costs only can be taxed for the plaintiff when it appears on the motion of judgment that the action should have been originally brought before a justice.[14]

In Missouri, where the plaintiff in an action on contract recovers an amount which, exclusive of interest and aside from reduction by set-off, is below the juris-

7. Watts *v.* Tittabawassee Boom Co., 47 Mich. 540, 11 N. W. 377.

8. See *supra*, V, A, 1.

9. *Massachusetts.*— Joannes *v.* Pangburn, 6 Allen 243.

Michigan.— Kirby Carpenter Co. *v.* Trombley, 101 Mich. 447, 59 N. W. 809; Tolford *v.* Church, 66 Mich. 431, 33 N. W. 913; Ladd *v.* Duncan, 23 Mich. 285.

Nebraska.—Morsch *v.* Besack, 52 Nebr. 502, 72 N. W. 953; Hastings *v.* Mills, 50 Nebr. 842, 70 N. W. 381; Shields *v.* Gamble, 42 Nebr. 850, 61 N. W. 101; Pickens *v.* Polk, 42 Nebr. 267, 60 N. W. 556; Goodman, etc., Co. *v.* Pence, 21 Nebr. 459, 32 N. W. 219; Miller *v.* Roby, 9 Nebr. 471, 4 N. W. 65; Beach *v.* Cramer, 5 Nebr. 98; Geere *v.* Sweet, 2 Nebr. 76.

Nevada.— Klein *v.* Allenbach, 6 Nev. 159.

New York.— Tompkins *v.* Greene, 21 Hun 257; New *v.* Anthony, 4 Hun 52; Mechl *v.* Schwieckart, 67 Barb. 599; Lultgor *v.* Walters, 64 Barb. 417; Sherman *v.* Shisler, 6 Misc. 203, 27 N. Y. St. 215; Roome *v.* Jennings, 3 Misc. 413, 23 N. Y. Suppl. 666, 52 N. Y. St. 507; Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 161, 21 N. Y. St. 736; Walp *v.* Boyd, 2 N. Y. Suppl. 735; Hoodless *v.* Brundage, 8 How. Pr. 263; Smith *v.* Keeler, 8 How. Pr. 55; Sherry *v.* Cary, 13 N. Y. Civ. Proc. 256.

Ohio.— Linduff *v.* Steubenville, etc., Plank-Road Co., 14 Ohio St. 336; Brunaugh *v.* Worley, 6 Ohio St. 597; Louis *v.* Steamboat Buckeye, 1 Handy 150, 12 Ohio Dec. (Reprint) 74; Lawson *v.* Perry, Wright 242; Rogers *v.* Morse, 2 Ohio Dec. (Reprint) 31, 1 West. L. Month. 178.

South Dakota.— Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572; De Smet Tp. *v.* Dow, 4 S. D. 163, 56 N. W. 84; Pyle *v.* Hand County, 1 S. D. 385, 47 N. W. 401.

Washington.—Busby *v.* Carpenter, 2 Wash. 19, 3 Pac. 193 [*overruling* Ebey *v.* Engbe, 1 Wash. Terr. 72].

See 13 Cent. Dig. tit. "Costs." § 47 *et seq.*

The term "costs" includes disbursements, and if plaintiff recover less than fifty dollars he is not entitled to disbursements. Peet *v.* Warth, 1 Bosw. (N. Y.) 653.

Burden of proof.— If a judgment for plaintiff in a court of record is for less than fifty dollars, the burden is on plaintiff to show that the action was not within the jurisdiction of a justice to entitle him to costs. Youker *v* Johnson, 62 N. Y. App. Div. 584, 71 N. Y. Suppl. 178.

10. Shields *v.* Gamble, 42 Nebr. 850, 61 N. W. 101; Linduff *v.* Steubenville, etc., Plankroad Co., 14 Ohio St. 336.

11. Kirby Carpenter Co. *v.* Trombley, 101 Mich. 447, 59 N. W. 809; Kittridge *v.* Miller, 45 Mich. 478, 8 N. W. 94; Ladd *v.* Duncan, 23 Mich. 285; Inkster *v.* Carver, 16 Mich. 484; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572. And see New York cases cited *supra*, note 9.

12. **If the affidavit** made under this statute does not contain defendant's name in the body of it, it is insufficient, although signed by plaintiff. Chillas *v.* Brooks, 5 Harr. (Del.) 60.

13. Jones *v.* Murphy, 3 Harr. (Del.) 334.

14. Spaulding *v.* Yeaton, 82 Me 92, 19 Atl. 156; Houlton *v.* Martin, 50 Me. 336; Lawrence *v.* Ford, 44 Me. 427.

diction of the court, costs are adjudged against him. But if the court is of the opinion from the evidence that plaintiff when he brought the suit had reasonable grounds to believe himself entitled to a recovery within the jurisdiction of the court he will be allowed costs.[15]

In New Hampshire it has been held that if plaintiff, bringing his action in a court of record, had a reasonable expectation[16] of recovering an amount in excess of the jurisdiction of a justice, but recovers an amount within the justice's jurisdiction, he will nevertheless be entitled to full costs.[17]

In Pennsylvania where the plaintiff in an action for debt or damages in a court of record recovers an amount within the jurisdiction of a justice, he shall not recover costs, unless he made affidavit before obtaining process that he believes such debt or damages exceeded the jurisdiction of a justice.[18]

In Wisconsin if plaintiff does not recover one hundred dollars or more in actions on contract[19] or fifty dollars in actions of tort[20] he is not entitled to costs, but must pay defendant's costs.

2. Where Subject-Matter Not Cognizable by Lower Court. Nevertheless in the jurisdictions mentioned in the preceding section and in a few others, the rule seems to be well settled that if an action is brought in a higher court of which a lower court has not jurisdiction of the subject-matter, the plaintiff if he recovers judgment is entitled to costs, irrespective of the amount recovered.[21]

15. Hannan *v.* Shotwell, 55 Mo. 429.

The matter is one of discretion with the court; and not subject to any inflexible rule. Johnson *v.* Devlin, 31 Mo. 427.

16. If, however, he had no reasonable expectation of recovering a larger amount, the court will usually limit his costs to the amount recoverable before a justice (Church *v.* Clarke, 26 N. H. 366; Pickering *v.* Coleman, 12 N. H. 148; Barron *v.* Ashley, 4 N. H. 279); but to justify this limitation it must clearly appear that plaintiff had no such reasonable expectation (Bryant *v.* Bowen, 40 N. H. 157; Church *v.* Clarke, 26 N. H. 366; Gale *v.* Emery, 16 N. H. 83; Ames *v.* Cady, 6 N. H. 59).

17. Rochester *v.* Roberts, 29 N. H. 360; Herrick *v.* Fuller, 5 N. H. 247; Rumney *v.* Ellsworth, 4 N. H. 225.

18. Maloney *v.* Murphy, 173 Pa. St. 395, 34 Atl. 20, 37 Wkly. Notes Cas. (Pa.) 457; Glamorgan Iron Co. *v.* Rhule, 53 Pa. St. 93; Hale *v.* Ard, 48 Pa. St. 22; Bell *v.* Bell, 32 Pa. St. 309; Rogers *v.* Ratcliffe, 23 Pa. St. 184; Louer *v.* Hummel, 21 Pa. St. 450; Stewart *v.* Mitchell, 13 Serg. & R. (Pa.) 287; Sneively *v.* Weidman, 1 Serg. & R. (Pa.) 417; Rupert *v.* Rittenhouse, 8 Pa. Dist. 483; Alwine *v.* Turney, 24 Pa. Co. Ct. 464, 7 Northam. Co. Rep. (Pa.) 376; Doherty *v.* Watson, 29 Wkly. Notes Cas. (Pa.) 32; McCafferty *v.* Crew, 26 Wkly. Notes Cas. (Pa.) 352; Levan *v.* Potteiger, 2 Woodw. (Pa.) 37; Bliss *v.* Becker, 1 Woodw. (Pa.) 481; Zacharias *v.* Stoudt, 1 Woodw. (Pa.) 402; Hagar *v.* Delb, 1 Woodw. (Pa.) 383; Davenport *v.* William, 21 Pittsb. Leg. J. (Pa.) 208; South Chester School Dist. *v.* Hill, 1 Walk. (Pa.) 400.

The requirement of the statute must be strictly complied with both in respect to substance (Kelley *v.* Dodge Mfg. Co., 86 Pa. St. 466, holding that a statute requiring an affidavit that plaintiff believes the "debt or damages sustained" exceeds one hundred dollars is not complied with by an affidavit that plaintiff believes that his "claim and demand" exceed one hundred dollars) and time of filing (Maloney *v.* Murphy, 173 Pa. St. 395, 34 Atl. 20, holding that an affidavit filed more than a year after suit brought is not the legal equivalent of the affidavit required to be filed before the issue of the work).

The statute has been held not to apply where the cause is cognizable in a court of equity. Pratt *v.* Darlington, 7 Del. Co. (Pa.) 510.

19. Field *v.* Elroy, 99 Wis. 412, 75 N. W. 68.

What amounts to action on contract.— An action by the fire department of a city against an insurance agent to recover the percentage of insurance premium received by him to which plaintiff was entitled is an action "on contract" within the statute. Oshkosh Fire Dept. *v.* Tuttle, 50 Wis. 552, 7 N. W. 549.

20. Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; Bugbee *v.* Lombard, 94 Wis. 326, 68 N. W. 958; Collins *v.* Lowry, 78 Wis. 329, 47 N. W. 612.

21. *Maine.*— Lewis *v.* Warren, 49 Me. 322.

Massachusetts.— Bickford *v.* Page, 2 Mass. 455.

Michigan.— Mason *v.* Muskegon, 109 Mich. 456, 67 N. W. 692; Wardle *v.* Townsend, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511; Bacon *v.* Clyne, 70 Mich. 183, 38 N. W. 207; Gurney *v.* St. Clair, 11 Mich. 202.

Minnesota.— L. Kimball Printing Co. *v.* Southern Land Imp. Co., 57 Minn. 37, 58 N. W. 868; Potter *v.* Mellen, 36 Minn. 122, 30 N. W. 438; Greenman *v.* Smith, 20 Minn. 418.

Missouri.— Albers *v.* Eilers, 18 Mo. 279.

Nebraska.— Carlson *v.* Beckman, 35 Nebr. 392, 53 N. W. 203.

New Hampshire.— Pritchard *v.* Atkinson, 4 N. H. 291.

3. WHERE JURISDICTION OF SUBJECT-MATTER IS CONCURRENT. So in some of these jurisdictions it is held that where a statute provides that if it shall appear that a justice had jurisdiction of an action and it was brought in another court plaintiff shall not recover costs, plaintiff commencing his action in another court cannot recover costs, although such court has concurrent jurisdiction with the justice's court.[22]

C. Where Amount Recovered Does Not Equal or Exceed Designated Sum. In some jurisdictions the right to recover costs seems to be based solely on the amount of recovery, irrespective of whether or not the cause was cognizable in a lower court. Thus in the United States circuit court in either legal or equitable actions, if plaintiff recover less than five hundred dollars, exclusive of costs, he is not entitled to costs;[23] but in a case where the court has discretion in the matter he may be taxed with defendant's costs.[24] If the plaintiff had a reasonable expectation of recovering more than that sum the court will not adjudge costs against him.[25]

In California, where in an action for money or damages plaintiff recovers less than three hundred dollars, he is not entitled to costs;[26] but on the other hand will not have to pay defendant's costs.[27]

In Indiana in actions "on money demands on contracts"[28] brought in the circuit or superior court, if plaintiff recovers less than fifty dollars, exclusive of

New York.— Sherry *v.* Cary, 111 N. Y. 514, 19 N. E. 87, 19 N. Y. St. 608; Griffen *v.* Brown, 53 Barb. 428; Glackin *v.* Zeller, 52 Barb. 147; Stilwell *v.* Staples, 5 Duer 691, 3 Abb. Pr. 365; Silberstein *v.* Wm. Wicke Co., 22 N. Y. Suppl. 170, 171, 29 Abb. N. Cas. 291; Hayes *v.* O'Reilly, 8 N. Y. Civ. Proc. 347; Lablache *v.* Kirkpatrick, 8 N. Y. Civ. Proc. 340, 3 How. Pr. N. S. 61; Whitney *v.* Daggett, 6 Abb. N. Cas. 434; Lund *v.* Broadhead, 41 How. Pr. 146; Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. 299; Gilliland *v.* Campbell, 18 How. Pr. 177; Goodrich *v.* Stewart, 3 Wend. 439; Bigelow *v.* Stearns, 19 Johns. 168; Walsh *v.* Sackrider, 7 Johns. 537.

Pennsylvania.— Steffen *v.* Hartzell, 5 Whart. 448; Zell *v.* Arnold, 2 Penr. & W. 292; Devers *v.* Gething, 21 Pittsb. Leg. J. 115; Cauffman *v.* Baird, 1 L. T. N. S. 245.

South Dakota.— Pyle *v.* Hand County, 1 S. D. 385, 47 N. W. 401.

Wisconsin.— Maxim *v.* Wedge, 69 Wis. 247, 35 N. W. 11; French *v.* Keator, 51 Wis. 290, 8 N. W. 190; Van Patten *v.* Wilcox, 32 Wis. 340; Eaton *v.* Lyman, 30 Wis. 41; Noss *v.* Cord, 1 Wis. 389.

See 13 Cent. Dig. tit. "Costs," § 47 *et seq.*

22. Cressey *v.* Gierman, 7 Minn. 398; Geere *v.* Sweet, 2 Nebr. 76. Same holding under similar statute see Janney *v.* Funston, 1 Phila. (Pa.) 373, 9 Leg. Int. (Pa.) 114. *Contra,* Hepworth *v.* Gardner, 4 Utah 439, 11 Pac. 566. And *compare* Martin *v.* Grover, 9 Nebr. 263, 2 N. W. 354, in which it was held that county judges have and exercise the ordinary powers and jurisdiction of a justice of the peace under the act of March 3, 1873, and therefore where plaintiff, in an action before a county judge, in his bill of particulars claims fifty dollars but recovers only fifteen dollars, he is entitled to costs notwithstanding Code Civ. Proc. § 621, providing that if a justice of the peace has jurisdiction of the action and the same is brought in any other court, plaintiff shall not recover costs, but under a statute providing that in all actions founded upon debt or other contract if the plaintiff recover an amount which exclusive of interest is below the jurisdiction of the court, he shall pay costs, plaintiff who recovers less than one hundred dollars in the district court is nevertheless entitled to recover costs where the district and justices' courts have concurrent jurisdiction of actions of debt in sums less than one hundred dollars.

23. Van Siclen *v.* Bartol, 96 Fed. 796; Gibson *v.* Memphis, etc., R. Co., 31 Fed. 553; Leeds *v.* Cameron, 15 Fed. Cas. No. 8,206, 3 Sumn. 488.

24. Van Siclen *v.* Bartol, 96 Fed. 796.

25. Gibson *v.* Memphis, etc., R. Co., 31 Fed. 553; Cottle *v.* Payne, 6 Fed. Cas. No. 3,268, 3 Day (Conn.) 289, Brunn. Col. Cas. 59. See also Greene *v.* Bateman, 10 Fed. Cas. No. 5,762, 2 Woodb. & M. 359.

26. Kishlar *v.* Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

27. Anthony *v.* Grant, 101 Cal. 235, 35 Pac. 859.

Where the action and relief granted are both equitable the statute does not apply. Bemmerly *v.* Smith, 136 Cal. 5, 68 Pac. 97.

28. The statute has application to contracts only, and not to the enforcement of mortgage and other liens, of which justices' courts have no jurisdiction. Shotts *v.* Boyd, 77 Ind. 223. See also Scott *v.* Goldinghorst, 123 Ind. 268, 24 N. E. 333. But where, in an action to foreclose a mechanic's lien, plaintiff recovers less than fifty dollars "on the account," no mention being made of the lien, the action is considered "on the account" and defendant is entitled to costs. Cotton *v.* Routh, 19 Ind. App. 680, 49 N. E. 1086.

costs, he recovers no costs and must pay defendant's costs.[29] So it has been held that where one paragraph of a complaint counts on a contract, and nothing appears in the record to show that the recovery was not based on that paragraph, a judgment against plaintiff for costs will be sustained where he recovered less than fifty dollars.[30]

In New Jersey if the plaintiff does not recover more than two hundred dollars in actions commenced in the supreme court he is not entitled to costs.[31]

In Oregon, in actions for the recovery of money or damages, defendant is entitled to costs where plaintiff fails to recover fifty dollars or more.[32]

D. Rules of Common Application Under Both Classes of Statutes — **1. Effect of Seeking Other Relief Than Money Judgment.** Statutes providing that plaintiff shall not recover costs if the amount of his recovery does not equal or exceed a designated sum of money have no application, where the party asks and obtains other relief in addition to a money judgment. Under these circumstances he is entitled to costs irrespective of the amount of money recovered.[33] These statutes are fully operative, however, where a party asks but does not obtain judgment or other relief in addition to a money judgment.[34]

2. Effect of Allowance or Refusal of Set-Off or Counter-Claim — a. Where Allowance Reduces Recovery Below Amount Sufficient to Carry Costs. Where the statutes expressly except from their operation cases in which the amount recovered is reduced by set-off or counter-claim below the jurisdiction of the court in which suit is brought, or below the amount designated by statute as essential to authorize an award of costs to plaintiff or to exempt him from liability for defendant's costs, the plaintiff is of course entitled to costs where the amount recovered except for the allowance of a set-off or counter-claim would have been sufficient to carry costs.[35] In the absence of such express statutory exception the weight of authority is that the plaintiff will not be entitled to costs, although the amount recovered is reduced by set-off or counter-claim below the jurisdiction of the court, or below the amount made necessary by statute to entitle plaintiff to

29. Moore *v.* Newland, 90 Ind. 409 [*disapproving* Bates *v.* Kohn, 12 Ind. 355]; Stevenson *v.* Ennis, 39 Ind. 216; Ward *v.* Heishberger, 38 Ind. 76; State *v.* Parker, 33 Ind. 285; Columbus, etc., R. Co. *v.* Watson, 26 Ind. 50; Roberts *v.* Nodwift, 8 Ind. 339; Foglesong *v.* Moon, 5 Ind. 545; Brock *v.* Parker, 5 Ind. 538; Clark *v.* Weldridge, 5 Ind. 176; State *v.* Mann, 3 Ind. 350; Proctor *v.* Bailey, 5 Blackf. (Ind.) 495; Cotton *v.* Routh, 19 Ind. App. 680, 49 N. E. 1086.

30. Graves *v.* Duckwall, 103 Ind. 500, 3 N. E. 263.

31. Meyer *v.* Arnold, 43 N. J. L. 144, applying rule to action on bond to recover penalty.

The exception to the rule stated in the text contained in the language of the statute, "where the parties to a suit in which the amount recovered, exclusive of costs, exceeds $100, do not reside in the same county," is not limited to cases where both parties reside in the state, and will apply to a recovery by a foreign corporation, Goat, etc., Import Co. *v.* Paschall, 60 N. J. L. 137, 37 Atl. 454.

32. Lockwood *v.* Hausen, 16 Oreg. 102, 17 Pac. 715. See also U. S. Mortgage, etc., Co. *v.* Willis, (Oreg. 1902) 69 Pac. 266; Mason *v.* Riner, 18 Oreg. 153, 22 Pac. 532.

33. Marius *v.* Bicknell, 10 Cal. 217; Douglass *v.* Blankenship, 50 Ind. 160; Skinner *v.* Lee, 21 Mo. 517; Stewart *v.* See, 21 Mo. 513; Brown *v.* Ashley, 13 Nev. 251.

34. Brown *v.* Delavan, 63 Cal. 303; Himes *v.* Johnson, 61 Cal. 259.

35. *Indiana.*— Mills *v.* Rosenbaum, 103 Ind. 152, 2 N. E. 313; Fuller *v.* Curtis, 100 Ind. 237, 50 Am. Rep. 786; Bates *v.* Kahn, 12 Ind. 355; Nelson *v.* Robertson, 7 Ind. 531; Higman *v.* Brown, 3 Ind. 430; Dayton *v.* Hall, 8 Blackf. 556.

Maine.— Hathorne *v.* Cate, 5 Me. 74.

Massachusetts.— Williams *v.* Williams, 133 Mass. 587.

Michigan.— Wheeler *v.* Harrison, 28 Mich. 264.

Missouri.— Burton *v.* Martin, 4 Mo. 200.

Ohio.— Snoddy *v.* Mason, 6 Ohio Dec. (Reprint) 838, 8 Am. L. Rec. 415.

Pennsylvania.— Minich *v.* Minich, 33 Pa. St. 378; Barry *v.* Mervine, 4 Pa. St. 330; Odell *v.* Culbert, 9 Watts & S. 66, 52 Am. Dec. 317; Bartram *v.* McKee, 1 Watts 39; Grant *v.* Wallace, 16 Serg. & R. 253; Spear *v.* Jamieson, 2 Serg. & R. 530; Brailey *v.* Miller, 2 Dall. 74, 1 L. ed. 295; Levan *v.* Potteiger, 2 Woodw. 37; Wilcox *v.* Hutchinson, 4 Luz. Leg. Reg. 267.

Wisconsin.— Pyncheon *v.* Baxter, 2 Pinn. 31.

See 13 Cent. Dig. tit. "Costs," § 77 *et seq.*

costs or to exempt him from liability for defendant's costs;[36] but in one state the contrary conclusion has been reached,[37] and in another the decisions on the questions are conflicting, some that where the amount is reduced by set-off below the amount necessary to authorize an award of costs to plaintiff he is nevertheless entitled to costs,[38] one that defendant is entitled to costs,[39] and another that neither party is entitled to costs.[40] So in one state it has been held (no statute being mentioned in the decision) that where defendant's reconventional demand was set off in the main action and a judgment recovered by plaintiff for a balance it included costs.[41] In another jurisdiction, under a statute providing that when a counter-claim or set-off is pleaded, the party recovering judgment shall also recover his costs, the costs abide the general result. The fact that defendant recovers something on his counter-claim does not authorize an award of costs against plaintiff or deprive him of the right to costs, unless the amount so recovered is in excess of plaintiff's recovery.[42] In another jurisdiction, under a statute providing that when a plaintiff on a suit originally brought in the circuit court recover less than five hundred dollars, he shall not recover costs but may be adjudged to pay costs, where plaintiff suing for over that amount recovers less because of the allowance of a counter-claim for breach of warranty each party must pay his own costs.[43]

b. Where Allowance Does Not Reduce Recovery Below Amount Sufficient to Carry Costs. If notwithstanding the allowance or partial allowance plaintiff recovers more than the amount necessary to authorize an allowance of costs to him, he is of course entitled to costs.[44]

c. Where Notwithstanding Disallowance Recovery Is Insufficient to Carry Costs. Where plaintiff fails to recover an amount necessary to carry costs, notwithstanding the failure of defendant to establish his counter-claim, costs will be denied him.[45]

d. Where Set-Off or Counter-Claim Allowed Equals or Exceeds Plaintiff's Demand. Where defendant recovers an amount equal to,[46] or in excess of, plaintiff's demand on his counter-claim, and judgment is rendered in his favor, he is entitled to costs.[47]

36. Foster *v.* Ordway, 26 Me. 322; Barnard *v.* Curtis, 8 Mass. 535; Moore *v.* Dorron, 11 Nebr. 462, 9 N. W. 637; Rayburn *v.* Hurd, 19 Oreg. 59, 23 Pac. 669 [*disapproving* Roberts *v.* Carland, 1 Oreg. 332].

Under a Maine statute, where plaintiff's recovery is reduced below twenty dollars by reason of the amount allowed defendant in set-off, he is entitled to only quarter costs unless the jury in its verdict certifies that his recovery was reduced because of the allowance of such set-off. Hilton *v.* Walker, 56 Me. 70; Thompson *v.* Thompson, 31 Me. 130.

37. Burbank *v.* Willoughby, 5 N. H. 111.

38. Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. (N. Y.) 299, 6 Abb. Pr. N. S. (N. Y.) 319; Griffen *v.* Brown, 35 How. Pr. (N. Y.) 372; Parker *v.* Radliff, 14 Wend. (N. Y.) 68. See also Nauman *v.* Braun, 14 N. Y. Suppl. 139, 30 N. Y. Civ. Proc. 77.

39. Willett *v.* Starr, 8 Johns. (N. Y.) 123.

40. Kalt *v.* Lignot, 3 Abb. Pr. (N. Y.) 33, 12 How. Pr. (N. Y.) 535.

41. Bloch *v.* Creditors, 46 La. Ann. 1334, 16 So. 267.

42. Downey *v.* Hatter, (Tex. Civ. App. 1898) 48 S. W. 32; Brown *v.* Montgomery, (Tex. Civ. App. 1898) 47 S. W. 803; Bryan *v.* Allen, (Tex. Civ. App. 1896) 39 S. W. 963. *Compare* Denson *v.* McCasland, 2 Tex. Civ. App. 184, 21 S. W. 169, in which the statute mentioned was entirely overlooked.

Under the statute last mentioned, and another statute requiring one suing a county on a claim to pay costs when he recovers a less amount than the county allows him on it, where a county sets up a counter-claim and plaintiff recovers, but a less amount than has already been allowed by the county, plaintiff must pay costs. Ferrier *v.* Knox County, (Tex. Civ. App. 1896) 33 S. W. 896.

Set-off assigned after suit brought.— Under a statute of Texas where defendant recovers judgment on a set-off assignment to him after suit brought and larger in amount than plaintiff's claim, plaintiff is nevertheless entitled to costs if he prove his claim. Parrott *v.* Underwood, 10 Tex. 48.

43. Hamilton *v.* Baldwin, 41 Fed. 429.

44. Holgate *v.* Downer, (Ida. 1899) 57 Pac. 918; Benton *v.* Radford, 40 Ohio St. 106.

45. Butler *v.* Kneeland, 23 Ohio St. 196.

46. Maulsby *v.* Church, Wils. (Ind.) 362.

47. *California.*— Davis *v.* Hurgren, 125 Cal. 48, 57 Pac. 684.

Louisiana.— Bloch *v.* Creditors, 46 La. Ann. 1334, 16 So. 267.

e. What Amounts to Set-Off or Counter-Claim.[48] Within the rules heretofore stated, the following have been held set-offs or counter-claims: In an action for the price of a machine a claim for injury resulting from plaintiff's failure to regulate it as agreed;[49] in an action on a note, given in payment for a chattel, an answer alleging breach of warranty consisting in defects known to plaintiff rendering the chattel less valuable by a designated amount than it otherwise would have been;[50] and a credit claimed by an agent for compensation for services in an action against him by his principal for a balance in his hands.[51] So where plaintiff and defendant dealt with each other agreeing that the article furnished on either side should be applied on the other in part payment, and that when the accounts were closed the balance should be paid in cash, and the accounts remained open and unsettled, and defendant who was in arrears never rendered any account of items or prices until after suit was brought, it was held that plaintiff could not be held in fault for not applying payments before their amount was furnished, and that the court properly treated the case as one of set-off instead of payment in determining the question of costs.[52] On the other hand it has been held that in an action for rent, the tenant's defense of untenantableness of the premises, failure to repair, and an agreement that the tenant might remove before the expiration of his term did not constitute a defense of set-off;[53] and in an action for labor and a designated amount of money advanced a denial of any request to pay the money was held not to constitute a counter-claim.[54]

f. Presumption As to Method of Reduction of Claim. Where defendant pleads both set-off and payment and the trial court gives judgment for plaintiff for costs on his recovery, of an amount insufficient of itself to carry costs, it will be presumed in support of the judgment that the claim was reduced by evidence of set-off instead of payment, unless the record shows the contrary.[55] Where a counter-claim was filed and plaintiff was awarded costs on a judgment for a sum not sufficient to carry costs, it will be presumed that the demand was reduced by the counter-claim.[56] Where by statute defendant is entitled to costs made in establishing a controverted set-off, and in an action on a note in which he pleads the general issue and set-off the jury find a general verdict for plaintiff on the note less a designated amount, he will not be allowed costs, as when the plea of set-off is successfully interposed, if the deduction might have been made either under evidence under the general issue or under the plea of set-off.[57] So where the only defense set up in assumpsit is a settlement and work subsequently done for plaintiff to a designated amount, and the court instructed the jury that if they found the settlement sustained they should throw out all matters on either side that entered into the balance one way or the other as to the items of the deal after the settlement, and the jury found a verdict for plaintiff for a sum insufficient to

New York.— Ury *v.* Wild, 3 N. Y. Suppl. 791, 19 N. Y. St. 674.

North Carolina.— Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 249, 26 S. E. 41.

North Dakota.— Dows *v.* Glaskel, 4 N. D. 251, 60 N. W. 60.

Texas.— McCormick Harvesting Mach. Co. *v.* Gilkey, (Civ. App. 1893) 23 S. W. 325.

See 13 Cent. Dig. tit. "Costs," § 77 *et seq.*

48. See, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

49. Fuller *v.* Curtis, 100 Ind. 237, 50 Am. Rep. 786.

50. Mills *v.* Rosenbaum, 103 Ind. 152, 2 N. E. 313.

51. Shirley *v.* Entrickey, 3 Wkly. Notes Cas. (Pa.) 51.

52. Wheeler *v.* Harrison, 28 Mich. 264.

53. Grabar *v.* Hirshfield, 9 Pa. Co. Ct. 159.

54. Berry *v.* Merom, 120 Ind. 161, 22 N. E. 127.

55. Minich *v.* Minich, 33 Pa. St. 378; Watts *v.* Harding, 5 Tex. 386. To the same effect see Hatwood *v.* Campbell, 51 Ind. 83. *Compare* Pyncheon *v.* Baxter, 2 Pinn. (Wis.) 31, where it was held under a statute providing that if plaintiff's demand "as found on the trial" shall exceed fifty dollars and be reduced by set-off to a less sum, plaintiff shall recover costs — that where a judgment for plaintiff is fifty dollars or less it must be found on the trial that the plaintiff's real substantial demand exceeded fifty dollars and that it was reduced by the set-off, in order to entitle plaintiff to costs.

56. Fuller *v.* Curtis, 100 Ind. 237, 50 Am. Rep. 787. See also Snoddy *v.* Mason, 6 Ohio Dec. (Reprint) 838, 8 Am. L. Rec. 415.

57. Smith *v.* Garrett, 31 Ala. 492.

carry full costs, it was held that it could not be said that plaintiff was entitled to full costs on the ground that he established a claim for a sum sufficient to carry such costs which was reduced by set-off.[58]

3. Effect of Deduction Made Because of Usury. In a number of jurisdictions, by express statutory provision, if usury be proved in an action on contract and a deduction made from the amount claimed because thereof defendant recovers costs.[59] But in one of these jurisdictions the rule is limited at least to the extent that the amount recoverable must be reduced by proof of usury made by the defendant, and a voluntary indorsement of the amount of usurious interest taken or retained by the plaintiff before trial will not bring the case within the rule so as to entitle defendant to costs or deprive plaintiff of costs.[60] In another jurisdiction defendant recovers full costs if it be made to appear that usurious interest has been taken or reserved.[61] These statutes intend costs of the action and not merely costs incurred on the issue of usury.[62] A statute giving costs to defendant on proof of usurious interest under the general issue has been held not to apply to real actions such as writ of entry as on a mortgage.[63]

4. Effect of Deduction Made on Account of Payment. By special statutory provision in some jurisdictions, if plaintiff's demand is reduced by payment to an amount below the jurisdiction of the court in which the action is brought defendant is entitled to costs;[64] and the same is the rule under a statute giving costs to defendant where plaintiff's recovery is less than a certain sum.[65] So where statutes provide that plaintiff shall not recover costs, if his recovery not having been reduced by set-off or counter-claim is less than a designated amount, plaintiff is not entitled to costs, where the amount recovered is reduced by payment below the amount designated in the statute.[66] And under an act providing that if

58. Carter *v.* Snyder, 27 Mich. 484.

59. *Iowa.*— Garth *v.* Cooper, 12 Iowa 364.

Maine.— Loud *v.* Merrill, 45 Me. 516; Larrabee *v.* Lumbert, 32 Me. 97; Warren *v.* Coombs, 20 Me. 739.

Massachusetts.— Gerrish *v.* Black, 113 Mass. 486; Minot *v.* Sawyer, 8 Allen 78; Mansur *v.* Wilkins, 1 Metc. 488.

Missouri.— Mitchell *v.* Griffith, 22 Mo. 515.

Nebraska.— Rodgers *v.* Graham, 36 Nebr. 730, 55 N. W. 243.

See 13 Cent. Dig. tit. "Costs," § 81.

Usury pleaded to action on two notes.— Where defendant pleaded the general issue and usury to an action on two notes and recovered judgment on both with a deduction of three-fold interest from one of them, although plaintiff had costs, defendant also had costs because of his establishing usury. Brigham *v.* Marean, 7 Pick. (Mass.) 40.

If suit be brought on the last of several notes, secured by mortgage, and it appears that the note in suit was not usurious, but that usurious interest had been paid on the prior notes the court, although deducting such usurious interest, should give plaintiff his costs. Beauchamp *v.* Leagan, 14 Ind. 401.

Proof of usury.— The usury must be established at the trial. Proof supplied after the trial is insufficient. Hankerson *v.* Emery, 37 Me. 16. Under a statute providing that proof by the defendant's own oath is necessary to entitle him to costs, taking of usury established otherwise than by defendant's oath does not entitle defendant to costs. Wine *v.* Dunn, 24 Me. 128, as for instance by the voluntary act of the plaintiff in indorsing the amount received as usurious interest on his note after the commencement of the suit. Cummings *v.* Blake, 29 Me. 105.

60. Whitten *v.* Palmer, 50 Me. 125; Knight *v.* Frank, 48 Me. 320; Lumberman's Bank *v.* Bearce, 41 Me. 505.

61. Neel *v.* Clay, 48 Ala. 252; Black *v.* Hightower, 30 Ala. 317.

62. Cattle *v.* Haddox, 17 Nebr. 307, 22 N. W. 565.

63. Carson *v.* Walton, 51 Me. 382.

64. Browning *v.* Hart, 29 Tex. 271; Tinsley *v.* Ryon, 9 Tex. 405; Cochran *v.* Kellum, 4 Tex. 120.

65. Lewis *v.* New York Dry Dock Co., 1 N. Y. Leg. Obs. 200.

66. Mandigo *v.* Mandigo, 26 Mich. 349; Bates *v.* Norris, 55 N. Y. Super. Ct. 269, 13 N. Y. St. 302, 13 N. Y. Civ. Proc. 395; Mills *v.* New York Ct. C. Pl., 10 Wend. (N. Y.) 557 note; Matteson *v.* Bloomfield, 10 Wend. (N. Y.) 555; Cooper *v.* Coats, 1 Dall. (Pa.) 308, 1 L. ed. 150; Wilcox *v.* Hutchinson, 4 Luz. Leg. Reg. (Pa.) 267.

Exception — Contract to pay debt of third person.— If plaintiff's demand exceeding one hundred dollars be reduced by evidence of a special contract to pay the debt of a third person he may recover costs. Manning *v.* Eaton, 7 Watts (Pa.) 346.

Where whole amount paid.— Plaintiff's right to costs on recovery of a money judgment for fifty dollars or more under the New York statute exists only where judgment is actually recovered for that amount, and he is not entitled to costs where the

actions within the jurisdiction of a justice be commenced in any other court and plaintiff recovers less than a designated amount he shall not have his costs, if the recovery in such other court is reduced below the jurisdiction thereof by payments plaintiff is not entitled to costs.[67]

5. Determination of Amount For Purpose of Fixing Right to Costs. While the amount claimed determines what court has jurisdiction[68] the amount recovered is the basis for determining the question of costs.[69] Where there are several counts the recoveries on the different counts may be added to make up the sum necessary to entitle plaintiff to costs,[70] and where separate verdicts are rendered against defendants sued jointly, the separate sums awarded may be added to make up such amount,[71] unless the action is one in which the defendant could not properly be joined.[72] A sum awarded as costs by the jury cannot be added;[73] nor can interest accruing after verdict;[74] but where the jury find a verdict for a debt or damages and interest, plaintiff has been held entitled to costs if the two sums aggregate the amount necessary to carry costs.[75] If a consent judgment is entered for an amount sufficient to give costs to plaintiff, and the parties go to trial for the balance of plaintiff's claim, he will be entitled to costs, although the verdict is for less than the amount requisite to give plaintiff costs.[76]

E. Under Statutes Providing That Costs Shall Not Exceed Recovery. In most jurisdictions statutes exist which provide that in designated actions of tort the costs[77] awarded plaintiff shall not exceed the damages recovered.[78] The

claim was paid pending the action and that fact was set up by supplemental answer. Burke *v.* Phillips, 20 Misc. (N. Y.) 413, 45 N. Y. Suppl. 1024.

67. Pepper *v.* Oram, Tapp. (Ohio) 72.

68. Hastings *v.* Mills, 50 Nebr. 842, 70 N. W. 381.

69. *Indiana.*— Nelson *v.* State, 2 Ind. 249.

Massachusetts.— Fisk *v.* Gray, 100 Mass. 191; Denham *v.* Lyon, 1 Mass. 15.

Nebraska.— Hastings *v.* Mills, 50 Nebr. 842, 70 N. W. 381; Rosenbaum *v.* Dunston, 16 Nebr. 111, 19 N. W. 610; Beach *v.* Cramer, 5 Nebr. 98.

New Jersey.— Meyer *v.* Arnold, 43 N. J. L. 144.

New York.— Powers *v.* Gross, 66 N. Y. 646; Pinder *v.* Stoothoof, 7 Abb. Pr. N. S. 433; Blank *v.* Westcott, 7 Abb. Pr. N. S. 225; Brady *v.* Smith, 1 N. Y. City Ct. 175.

Ohio.— Van Buskirk *v.* Dunlap, 2 Ohio Dec. (Reprint) 233, 2 West. L. Month. 126.

South Dakota.— De Smet Tp. *v.* Dow, 4 S. D. 163, 56 N. W. 84.

Washington.—Busby *v.* Carpenter, 2 Wash. 19, 3 Pac. 193 [*overruling* Ebey *v.* Engle, 1 Wash. Terr. 72].

Wisconsin.— Dunning *v.* Faulkner, 10 Wis. 394; Kreuger *v.* Zirbel, 2 Wis. 233.

See 13 Cent. Dig. tit. "Costs," § 55.

70. Hillman *v.* Whitney, 2 Allen (Mass.) 268.

71. Huff *v.* Jewett, 20 Misc. (N. Y.) 35, 44 N. Y. Suppl. 311; Boon *v.* Horn, 3 Strobh. (S. C.) 159; Johnson *v.* Mississippi, etc., R. Co., 31 Fed. 551. *Compare* Derby *v.* Stevens, 64 Cal. 287, 30 Pac. 820, holding that where the aggregate of the judgments recovered by plaintiff in an action against several stock-holders of a corporation to enforce their liability for a corporate debt exceeds three hundred dollars, but he does not recover any single judgment, joint or several, for three hundred dollars or more he is not entitled to costs.

72. Richards *v.* Scott, (Ida. 1901) 65 Pac. 433.

73. Seaman *v.* Bailey, Col. & C. Cas. (N. Y.) 391; Van Horne *v.* Petrie, Col. & C. Cas. (N. Y.) 390.

74. Harvey *v.* Bangs, 53 Me. 514; Joannes *v.* Pangborn, 6 Allen (Mass.) 243.

75. Douglas *v.* Nichols, 133 Mass. 470; Loring *v.* Morrison, 25 N. Y. App. Div. 139, 48 N. Y. Suppl. 975, 5 N. Y. Annot. Cas. 151. *Contra*, Troy City Bank *v.* Grant, 1 How. Pr. (N. Y.) 135.

76. Hoe *v.* Sanborn, 24 How. Pr. (N. Y.) 26. See also Holmes *v.* Leland, 1 Gray (Mass.) 625. Here in an action brought originally in the court of common pleas for use and occupation of two tenements, as to one of which plaintiff pleaded that he owed nothing and as to the other a tender of thirty dollars, the court instructed the jury that they were not to include in a verdict for plaintiff for the use and occupation of the second tenement the amount tendered, and they returned a general verdict for plaintiff for fifteen dollars on which judgment was rendered. It was held that plaintiff finally recovered more than twenty dollars, within the meaning of the statute, and was entitled to costs.

77. The term "costs" as used in these statutes has been uniformly held to include disbursements. Stone *v.* Duffy, 3 Sandf. (N. Y.) 761, Code Rep. N. S. (N. Y.) 129; Warren *v.* Chase, 8 Misc. (N. Y.) 520, 28 N. Y. Suppl. 765, 59 N. Y. St. 416; Wheeler *v.* Westgate, 4 How. Pr. (N. Y.) 269; Keating *v.* Anthony, Code Rep. N. S. (N. Y.) 233; Emerick *v.* Krause, 52 Wis. 358, 9 N. W. 16.

78. See statutes of the several states.

specific designation by the statutes of the actions in which costs are limited by the amount of damages recovered excludes all other actions from their operation.[79] According to some decisions statutes providing generally that in designated actions costs awarded plaintiff shall not exceed the damages recovered, if such damages be assessed at a sum less than or not exceeding a designated sum, do not authorize a judgment against plaintiff in defendant's favor for costs made by the latter,[80] or a judgment against plaintiff for the balance of the costs accruing in the case, although the recovery be less than, or not in excess of, the sum specified in the statute;[81] and where under such provisions plaintiff recovers a less amount of damages than the amount designated by the statute, the court will render judgment for him for a like sum in costs, notwithstanding the jury assessed the costs to defendant[82] or found a verdict for costs for plaintiff.[83] According to other decisions if plaintiff does not recover a sum in excess of that designated he is liable for all costs of suit except an amount equal to the damages recovered.[84] Where the trial court renders judgment for costs not exceeding the damages recovered, and the record does not show that the case was by the facts excepted from the operation of the statute, it will be presumed on appeal that such facts did not exist.[85]

VII. RIGHT AS AFFECTED BY CHARACTER OF ACTIONS, PROCEEDINGS, OR QUESTIONS INVOLVED.

A. Introductory Statement. As already shown the prevailing party in actions at law, whatever may be their character, is entitled to costs in the absence of some express statutory provision authorizing a different disposition of the question of costs.[86] So it has also been shown that in suits in equity the costs are in the discretion of the court, but will usually be awarded the prevailing party, unless the court considers that the circumstances are such as will authorize a departure from the general rule.[87] It has also been shown that in actions at law the general rule that the prevailing party is entitled to costs is subject to certain modifications and limitations imposed by statute which are dependent upon the amount recovered.[88] It is the purpose of this chapter to consider in what manner and to what extent, if any, the general rule that the prevailing party is entitled to costs is affected by the character of the action, proceedings, or questions involved.[89]

B. Actions Involving Questions of Title to Real Property — 1. In General. In most jurisdictions the statutes contain special provisions governing the right to costs where the determination of the action involves a consideration

Most of the decisions arising under these statutes admit of a more specific classification than under a general treatise on "Costs" and will be found under their appropriate titles such as ASSAULT AND BATTERY; CRIMINAL CONVERSION; FALSE IMPRISONMENT; LIBEL AND SLANDER; MALICIOUS PROSECUTION; SEDUCTION; TRESPASS, etc.

79. Gorton *v.* U. S., etc., Steamship Co., 13 N. Y. Suppl. 653, 37 N. Y. St. 556, 20 N. Y. Civ. Proc. 196. Thus a provision that no more costs than damages can be recovered in an action of "slander or trespass, assault and battery" does not apply to actions of trover (Johnson *v.* Sims, 4 Stew. & P. (Ala.) 330) nor to actions of trespass *quare clausum fregit* (Williams *v.* Perkins, 1 Port. (Ala.) 471).

80. Thurmond *v.* Horton, 10 Ga. 500; Willman *v.* Clouser, 16 Ind. 318; Sinclair *v.* Roush, 14 Ind. 450; Meade *v.* French, 4 Wash. 11, 29 Pac. 833; Sherible *v.* Janish, 13 Wis. 615.

81. Ivey *v.* McQueen, 17 Ala. 408.

82. Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761.

83. Hardin *v.* Lumpkin, 5 Ga. 452.

84. Britton *v.* Wright, 1 Greene (Iowa) 426; Steffner *v.* Burton, 87 Tenn. 135, 10 S. W. 358 [*overruling* Gardenhire *v.* McCombs, 1 Sneed (Tenn.) 83].

85. Mackison *v.* Clegg, 95 Ind. 373. But see Gray *v.* Tate, 11 Humphr. (Tenn.) 64, where it was held that the facts authorizing a judgment for costs not in excess of damages recovered must appear on the record and will not be presumed from the judgment of the court.

86. See *supra*, V.

87. See *supra*, V, B, 1 *et seq.*

88. See *supra*, VI.

89. See *infra*, VII, B *et seq.*

of the question of title to real property. These statutes vary somewhat in phraseology. In some jurisdictions the plaintiffs will be entitled to costs as of course, if the question of title arise on the pleadings or the trial judge certifies that title came in question on the trial.[90] Under other statutes the question must arise on the pleadings; it will not be sufficient that the judge certified that title came in question.[91] In another jurisdiction, to enable a party who recovers only a designated amount of damages in an action in the nature of trespass, *quare clausum fregit* to have costs, a judge must certify that the title to real estate was in fact concerned.[92] And in another jurisdiction there is a general provision that in actions for damages solely not arising out of contract if plaintiff do not recover a designated amount he shall recover no more costs than damages, except certain actions among which are actions wherein title to real property is involved.[93] Where a case is brought within the provision of these statutes the plaintiff is entitled to costs when successful, irrespective of the amount recovered.[94] It is immaterial that such amount was within the jurisdiction of a justice of the peace.[95] And other statutes providing that in actions no more costs than damages should be recovered if the damages recovered do not equal a designated amount,[96] or providing that defendant shall recover costs if in actions of costs a designated amount is not recovered,[97] have no application to cases of the character under consideration.

90. Under the New York statutes, if the question of title arises on the pleadings, no certificate of the judge is necessary to entitle plaintiff to costs. Kelly *v.* New York, etc., R. Co., 81 N. Y. 233. Under former statutes a certificate that the question of title arose on the pleadings was necessary. Lafarge *v.* Eames, 1 Wend. 99; Jackson *v.* Randall, 11 Johns. 405; Farrington *v.* Rennie, 2 Cai. 220.

In Pennsylvania it has been held that the statute 22 & 23 Car. II, c. 9, prohibiting plaintiff from recovering costs in an action of trespass *quare clausum fregit* unless the court certifies that the title of land comes in question is in force. Under this statute it has been held that no costs can be recovered where the record does not show that the title to land was the chief question or a judge does not so certify. Bowers *v.* Taylor, 3 Del. Co. 334. The statute has been held not to apply where the title is shown by the pleadings to be involved (Taylor *v.* Coppock, 1 Del. Co. 190), nor where costs are awarded in the verdict of the jury (Hinds *v.* Knox, 4 Serg. & R. 417). And it has been held that in trespass *quare clausum fregit* where the question of the entry of judgment is settled by the same judge who tries the cause a formal certificate of the judge that the title to land was chiefly in issue is not necessary. Knabb *v.* Kaufman, 1 Woodw. 325.

In Wisconsin it has been held that if the plaintiff recovers less than a designated amount and it does not appear from the pleadings or a certificate from the judge that title to land came in question the defendant gets costs. Wausau Boom Co. *v.* Plumer, 49 Wis. 112, 4 N. W. 1072.

91. Fowler *v.* Fowler, 52 Conn. 254; White *v.* Fuller, 36 Conn. 149; Arnold *v.* Kellogg, 25 Conn. 248; Mansfield *v.* Church, 21 Conn. 73; Bishop *v.* Seeley, 18 Conn. 389; Scoville *v.* Seeley, 14 Conn. 238. And see Maxwell *v.* Potter, 47 Me. 487; Burnham *v.* Ross, 47 Me. 456.

92. Heims *v.* Ring, 11 Allen (Mass.) 352.

93. Under the Indiana statute it has been held that where in trespass *quare clausum fregit* in which the general issue was pleaded, plaintiff had judgment for costs, it will be presumed in support of the judgment if the record does not show the contrary that the title to land came in question on the trial. Stewart *v.* Henry, 5 Blackf. (Ind.) 445.

94. *Indiana.*—Burnett *v.* Coffin, 4 Ind. 218.

Maine.— Maxwell *v.* Potter, 47 Me. 460 note; Burnham *v.* Ross, 47 Me. 456; Morrison *v.* Kittridge, 32 Me. 100; Sutherland *v.* Jackson, 32 Me. 80; Williams *v.* Veazie, 8 Me. 106.

Massachusetts.— Butterfield *v.* Caverly, 6 Cush. 275; Butterfield *v.* Pearson, 10 Mass. 410.

New Hampshire.—Brown *v.* Mathes, 5 N. H. 229.

New Jersey.— Hunt *v.* Morris, 12 N. J. L. 175, 22 Am. Dec. 483.

New York.— Kelley *v.* New York, etc., R. Co., 81 N. Y. 233; Brotherton *v.* Wright, 15 Wend. 237; Hubbell *v.* Rochester, 8 Cow. 115; Rogers *v.* McGregor, 4 Cow. 531.

Oregon.— Bentley *v.* Jones, 7 Oreg. 108; Crossman *v.* Lander, 3 Oreg. 495.

Wisconsin.— Ames *v.* Meehan, 63 Wis. 408, 23 N. W. 586.

See 13 Cent. Dig. tit. "Costs," § 37 *et seq.*

95. Burnham *v.* Ross, 47 Me. 456; Koenigshof *v.* Spaulding, 59 Mich. 245, 26 N. W. 484; Druse *v.* Wheeler, 22 Mich. 439; Hankinson *v.* Baird, 6 N. J. L. 130.

96. Burnett *v.* Coffin, 4 Ind. 218; Dinehart *v.* Wells, 2 Barb. (N. Y.) 432.

97. Maxim *v.* Wedge, 69 Wis. 547, 35 N. W. 11.

2. Instances in Which Questions of Title Held to Be Involved. The question of title has been held to be involved in the following actions: Trespass for building a fence on plaintiff's land, where the question in dispute was the location of the true line;[98] trespass *quare clausum fregit* where there is a conflict of evidence as to the true location of the boundary line between the respective closes of the parties;[99] where the defense is that plaintiff was not the owner or possessor of the land,[1] or where the defendant sets up as a defense the right to maintain a surface-drain;[2] actions for trespass on land where the question is whether the *locus in quo* was highway or not,[3] where defendant justifies under an alleged right of way across the premises[4] or under a claim that at the time of the acts complained of the *locus in quo* was his soil and freehold and that he had a right of way over it,[5] where defendant disputes plaintiff's right of possession at the time of the acts complained of[6] or sets up title in himself,[7] or where the production of plaintiff's title is necessary to enable him to maintain the action;[8] trespass for disturbing plaintiff in his fishing on his own land to which defendant pleaded not guilty and set up title to the fishery;[9] ejectment for building a structure overlapping on plaintiff's land;[10] an action for overflowing land to the permanent injury of the soil and freehold;[11] a suit to enjoin a judgment for payment of purchase-money on the ground of failure of title;[12] an action of waste;[13] an action for obstructing a watercourse in which plaintiff's title is disclosed and the question of priority of rights discussed;[14] an action for obstructing a private way;[15] an action by a landowner for the value of fish taken from his private grounds and for exemplary damages allowed by statute for such act;[16] an action against an elevated railroad company for damages to land abutting on a street in which the road is constructed;[17] a proceeding to make real estate assets where defendants set up title to the land in controversy, which issue is found against them;[18] an action to recover the rental value and mesne profits of land on which defendant is charged to have entered wrongfully, where defendant alleged ownership in himself;[19] an action for breach of covenant of quiet enjoyment in which the complaint alleges that plaintiff had been evicted by the rightful owner who was entitled to possession and the answer denying such allegations;[20] a suit against a pewholder in a church for rent of the pew, the pew having been granted to such holder and his heirs by a church corporation;[21] an action in which defendant justifies entering on the premises and removing a building on the allegation that

98. Long *v.* Ober, 51 Vt. 73.

99. Bachelder *v.* Green, 38 N. H. 265. *Contra*, Bishop *v.* Seeley, 18 Conn. 389.

1. Cheney *v.* Dallett, 1 Del. Co. (Pa.) 225.

2. Coleman *v.* Thomson, 6 Pa. Co. Ct. 126.

3. Anderson *v.* Buchanan, 8 Ind. 132.

4. Hall *v.* Hodskins, 30 How. Pr. (N. Y.) 15; Heaton *v.* Ferris, 1 Johns. (N. Y.) 146; Merring *v.* Sparrer, 1 Del. Co. (Pa.) 457.

5. Mansfield *v.* Church, 21 Conn. 73.

6. Powers *v.* Conroy, 47 How. Pr. (N. Y.) 84.

7. Labeau *v.* Labeau, 61 Mich. 81, 27 N. W. 861; Washburn *v.* Tinkham, 8 N. H. 507; Forsoith *v.* Clogston, 3 N. H. 401; Lazarus *v.* Rosenberg, 70 N. Y. App. Div. 105, 75 N. Y. Suppl. 11; Locklin *v.* Casler, 50 How. Pr. (N. Y.) 43.

8. Dickerson *v.* Wadsworth, 33 N. J. L. 357; Hubbell *v.* Rochester, 8 Cow. (N. Y.) 115.

Where plaintiff is compelled in an action of trespass to come prepared to prove title the admission of his title by defendant at the trial will not deprive him of his right to costs. Niles *v.* Lindsley, 8 How. Pr. (N. Y.) 131.

9. Adgate *v.* Stores, 2 Root (Conn.) 160.

10. Leprell *v.* Kleinschmidt, 112 N. Y. 364, 19 N. E. 812, 21 N. Y. St. 80 [*reversing* 1 N. Y. Suppl. 821, 17 N. Y. St. 231].

11. Dixon *v.* Scott, 18 N. J. L. 430. See also to the same effect Tuncliff *v.* Lawyer, 3 Cow. (N. Y.) 382.

12. Reeves *v.* Dickey, 10 Gratt. (Va.) 138.

13. Padelford *v.* Padelford, 7 Pick. (Mass.) 152.

14. Simpson *v.* Seavey, 8 Me. 138, 22 Am. Dec. 228.

15. Crocker *v.* Black, 16 Mass. 448.

16. Gerry *v.* Liddle, 82 Hun (N. Y.) 35, 31 N. Y. Suppl. 58, 63 N. Y. St. 358.

17. Powers *v.* Manhattan R. Co., 14 N. Y. Suppl. 130, 37 N. Y. St. 893, 20 N. Y. Civ. Proc. 78.

18. Noble *v.* Koonce, 76 N. C. 405.

19. Boardway *v.* Scott, 31 Hun (N. Y.) 378.

20. De Graff *v.* Hoyt, 4 Thomps. & C. (N. Y.) 348.

21. Third Presb. Congregation *v.* Andruss, 21 N. J. L. 325.

he built the house at a time when he and plaintiff were contesting claimants for the lands under the land laws of the United States;[22] and an action of tort for tearing down and carrying away a wooden building, parcel of an estate consisting of land and buildings thereon standing then in the occupation of defendant as tenant for a term of years, the reversion of which belonged to plaintiff, in which defendant admits that he pulled down and removed the building, "but whether the same belonged to plaintiff he has no knowledge, and can neither admit nor deny, but leaves plaintiff to prove," and justifies the removal.[23]

3. Instances in Which Questions of Title Held Not to Be Involved. The question of title is not involved in the following actions: An action which actual possession is sufficient to maintain;[24] an action of trespass on land in which the justification is a license to do the acts complained of,[25] in which the issue is whether defendant having permission to enter for one purpose availed himself thereof for a different purpose,[26] in which plaintiff describes the land by metes and bounds and defendant admits plaintiff's ownership of the premises so described but denies that the alleged trespass is on such premises,[27] or in which plaintiff offers to show title, and the same is rendered unnecessary by defendant's admission of title;[28] an action for damages caused by defendant's obstructing a road to plaintiff's land, where there is no claim for any invasion of plaintiff's possession or for any injury to their freehold;[29] an action for breach of covenant of a lease, although title is alleged in the complaint and denied by defendant;[30] an action for assault and battery in which the answer states that immediately before the alleged assault plaintiff entered on defendant's close and that defendant removed him using no unnecessary force;[31] an action against an overseer of highways for diverting at a highway at which plaintiff owned the fee a stream of water from defendant's barn-yard and tearing away his watering-trough;[32] an action against the owner of adjoining premises for damages caused by smoke and dust emitted through pipes inserted by defendant in the wall separating the premises, where defendant admits title to the premises to be as plaintiff alleged, but alleges that the wall was a party-wall and that the holes in it had been in use more than twenty years;[33] or an action involving the question of defendant's right to enter on plaintiff's land in order to remove personal property.[34]

4. When Question of Title Considered to Be Raised by Pleadings. Title to real estate appears by the pleadings to be in question where the complaint in an action of waste alleges a forfeiture and asks recovery of possession;[35] in an action by a judgment creditor to set aside as fraudulent a conveyance made by the

22. Crossman *v.* Lander, 3 Oreg. 495.

23. Willard *v.* Baker, 2 Gray (Mass.) 336.

24. Quinn *v.* Winter, 15 Daly (N. Y.) 383, 7 N. Y. Suppl. 775, 25 N. Y. St. 851; Muller *v.* Bayard, 15 Abb. Pr. (N. Y.) 449, holding that the term "title to real property" as used in the statute means right of possession and not possession in fact, nor mere right of property.

25. William *v.* Price, 53 Barb. (N. Y.) 442, 37 How. Pr. (N. Y.) 15; Rathbone *v.* McConnell, 20 Barb. (N. Y.) 311; O'Reilly *v.* Davies, 4 Sandf. (N. Y.) 722; Launitz *v.* Barnum, 4 Sandf. (N. Y.) 637; Muller *v.* Bayard, 15 Abb. Pr. (N. Y.) 449; People *v.* New York C. Pl., 18 Wend. (N. Y.) 579; Chandler *v.* Duane, 10 Wend. (N. Y.) 563, 25 Am. Dec. 578; *Ex p.* Coburn, 1 Cow. (N. Y.) 568; Otis *v.* Hall, 3 Johns. (N. Y.) 450; Bowers *v.* Taylor, 3 Del. Co. (Pa.) 334. *Compare* Stewart *v.* Hughes, 1 Del. Co. (Pa.) 143.

26. Bloomingdale *v.* Steubing, 14 Misc. (N. Y.) 549, 35 N. Y. Suppl. 1074, 70 N. Y. St. 718.

27. Heintz *v.* Dellinger, 28 How. Pr. (N. Y.) 39.

28. Brown *v.* Majors, 7 Wend. (N. Y.) 495. To the same effect see Burnet *v.* Kelly, 10 How. Pr. (N. Y.) 406.

29. Rumsay *v.* New York, etc., R. Co., 21 N. Y. Suppl. 193, 50 N. Y. St. 253.

30. Aaron *v.* Foster, 11 N. Y. Civ. Proc. 325.

31. Welsh *v.* Fallihee, 75 Hun (N. Y.) 308, 27 N. Y. Suppl. 81, 56 N. Y. St. 777.

32. Learn *v.* Currier, 15 Hun (N. Y.) 184.

33. Dunster *v.* Kelly, 55 N. Y. Super. Ct. 370, 18 N. Y. St. 370.

34. Corcoran *v.* Webster, 50 Wis. 125, 6 N. W. 513.

35. Snyder *v.* Beyer, 3 E. D. Smith (N. Y.) 235.

debtor;[36] in an action of trespass to land where *liberum tenementum* is pleaded;[37] where defendant's general denial of each and every allegation of the complaint fairly construed denies defendant's title;[38] where the answer sets up title in a third person;[39] where the defendant files with the general issue notice that he will show ownership in himself;[40] where there is an allegation that plaintiff is entitled to possession of the land and a denial of the same;[41] in an action for trespass on unoccupied lands where the general issue is pleaded;[42] in an action for injury to the freehold, since in such action it is necessary to allege and prove title;[43] in an action of trespass or case where from the complaint it appears that plaintiff relies on his title to establish a constructive possession without proving actual possession;[44] in an action of case for overflowing land where defendant pleads the general issue and a justification of a right of prescription;[45] in an action for assault and battery, where the replication alleges the trespass to have been committed in the public highway and the rejoinder claims that it was the public highway,[46] or where the defense was (1) general denial, (2) *son assault demesne*, or (3) justification in defense of defendant's real property;[47] in an action against a village for injury to plaintiff's property by constructing a sewer so as to throw its contents on plaintiff's property, in which the answer denies the complaint, alleges that the sewer is a natural watercourse long used by him and claims title adverse to plaintiff;[48] where a complaint alleges plaintiff's title in an easement in the bed of a street on which his premises abutted and that defendant had involved the easement without proceedings to condemn the same, and the answer denies any knowledge or information in the premises;[49] where the complaint alleges ownership and possession of land and an entry thereon by defendant and the taking of trees and shrubbery, and the answer alleges that defendant did the acts complained of under an agreement with plaintiff;[50] where a complaint alleges that plaintiff is the owner and in possession of certain land and that defendant carried a building therefrom and converted it to his own use, and the answer admits that defendant's sheriff levied upon and took the building into custody under an execution against plaintiff and denies all other allegations;[51] where a complaint contains three counts: (1) for labor and material furnished for a dwelling-house alleged to be owned by defendants; (2) for damages caused by entrance of defendants into the house before completion without plaintiff's consent; and (3) for lumber belonging to plaintiff taken by defendants but not used in the erection of the house, and the answer of one of the defendants contains a general denial;[52] or in an action for injury to real property where the complaint alleges plaintiff to be the owner of an undivided half of the premises, without alleging possession, and the answer denies this and alleges defendant to be the owner of an undivided half, and the reply admits defendant's title as pleaded.[53]

5. When Question of Title Considered Not to Be Raised by Pleadings. No claim of title to real property arises on the pleadings in an action of trespass on

36. Van Wyck *v.* Baker, 11 Hun (N. Y.) 309.

37. Budd *v.* Stille, 16 N. J. L. 263.

38. Crowell *v.* Smith, 35 Hun (N. Y.) 182.

39. Farrell *v.* Hill, 69 Hun (N. Y.) 455, 23 N. Y. Suppl. 402, 52 N. Y. St. 620, where it was held that such answer will be deemed controverted without a reply, as it does not set up a counter-claim.

40. Walters *v.* Tefft, 57 Mich. 390, 24 N. W. 117.

41. Grosso *v.* Lead, 9 S. D. 165, 68 N. W. 310.

42. Dunckel *v.* Farley, 1 How. Pr. (N. Y.) 180. See also Hubbell *v.* Rochester, 8 Cow. (N. Y.) 115.

43. Kelly *v.* New York, etc., R. Co., 81 N. Y. 233.

44. Booth *v.* Sherwood, 12 Minn. 426.

45. Eustace *v.* Tuthill, 2 Johns. (N. Y.) 185; Heaton *v.* Ferris, 1 Johns. (N. Y.) 146.

46. Dinehart *v.* Wells, 2 Barb. (N. Y.) 432.

47. Lillis *v.* O'Conner, 8 Hun (N. Y.) 280.

48. Green *v.* Canandaigua, 30 Hun (N. Y.) 306.

49. Jones *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 437, 14 N. Y. Suppl. 632, 39 N. Y. St. 177.

50. Powell *v.* Rust, 8 Barb. (N. Y.) 567, Code Rep. N. S. (N. Y.) 172.

51. Lipsky *v.* Borgmann, 52 Wis. 256, 9 N. W. 158, 38 Am. Rep. 735.

52. Davies *v.* Williams, 13 N. Y. Civ. Proc. 138.

53. Booth *v.* Sherwood, 12 Minn. 426.

land where the allegation of title is admitted or not denied;[54] where the complaint alleges title in plaintiff, and the defendant merely pleads a general denial;[55] where the answer did not deny plaintiff's title but alleged that defendant committed the acts complained of by direction of the highway commissioner, who had proceeded to open a highway on the *locus in quo* and that defendant believed it to be a lawful highway;[56] where defendant claims title to part of the premises and as to the rest admits trespass and offers judgment, where plaintiff accepts the offer and admits defendant's title to that part of the premises claimed by him;[57] in an action of trespass *quare clausum fregit* where the complaint is in the usual form;[58] in an action for trespass for entering plaintiff's land and carrying off personal property affixed to a mill where damages are claimed for the value of the property and for injuries to the mill and premises, and the answer set up that defendant was the owner and in actual possession "of all the property described in the complaint or therein mentioned" and that he took away from the premises in a peaceable manner "all the property mentioned in the complaint";[59] in an action of covenant by a lessee against a lessor for breach of a covenant of title in the lessor, when the only plea is *non est factum*;[60] in an action for personal injuries in which it was alleged as a defense that plaintiff when injured was a trespasser;[61] in an action by a landlord against his tenant for injuries to the leased premises where the complaint alleges ownership;[62] in an action for diverting a stream of water from land of which plaintiff alleges he was the owner and possessor, and in which the answer denies each and every allegation;[63] where a complaint alleging that defendants as town assessors carelessly and unlawfully assessed to plaintiff a parcel of land in the town; that plaintiff was neither an inhabitant of the town nor owner of the land, and that in consequence of such assessment personal property of plaintiff was levied on and sold and the defendants put in a general demand of all matters in the complaint charging unlawful action on their part, but did not affirmatively allege any title in plaintiff in the land assessed;[64] or in an action against a railroad company for negligently starting a fire on plaintiff's land, where the defense is the exercise of due care and no claim of interest in the land is made.[65]

6. When Question of Title Considered to Arise on the Proceedings. A claim of title to real property arises on the proceedings when in an action of trespass *quare clausum fregit* defendant claims that the plaintiff had possession of the land or any right or title thereto and plaintiff introduced the conveyance constituting his claim of title in evidence.[66]

7. When Title Properly Certified to Have Come in Question. A certificate that title to real estate came in question at the trial is properly given where the complaint alleges ownership of certain premises and trespasses thereon by defendant and the answer is a general denial and the question of title is gone into at the

54. Lynk *v.* Weaver, 128 N. Y. 171, 28 N. E. 508, 40 N. Y. St. 349 [*reversing* 13 N. Y. Suppl. 951, 34 N. Y. St. 1016].

55. Ostrom *v.* Potter, 104 Mich. 115, 62 N. W. 170.

56. Dexter *v.* Alfred, 74 Hun (N. Y.) 259, 26 N. Y. Suppl. 592, 56 N. Y. St. 264.

57. Pevare *v.* Towne, 57 N. H. 220.

58. Squires *v.* Seward, 16 How. Pr. (N. Y.) 478.

59. Corcoran *v.* Webster, 50 Wis. 125, 6 N. W. 513, holding that the words quoted in the text must be construed to mean the property removed.

60. Barney *v.* Keith, 6 Wend. (N. Y.) 555.

61. Pierret *v.* Moller, 3 E. D. Smith (N. Y.) 574.

62. Cleveland *v.* Wilder, 78 Hun (N. Y.) 591, 29 N. Y. Suppl. 209, 60 N. Y. St. 764. This is obviously correct because the tenant cannot deny his landlord's title, and because the allegation of ownership is unnecessary. To the same effect see McCullough *v.* McCullough, 2 Nott & M. (S. C.) 361. But see Dempsey *v.* Hall, 35 N. Y. Super. Ct. 201, which seems to be in direct conflict with the rule stated.

63. Rathbone *v.* McConnell, 21 N. Y. 466, holding that possession alone would entitle plaintiff to recover. To the same effect see Ehle *v.* Quackenboss, 6 Hill (N. Y.) 537.

64. Bailey *v.* Daigler, 50 Hun (N. Y.) 538, 3 N. Y. Suppl. 718, 20 N. Y. St. 549.

65. Fisk *v.* Wabash R. Co., 114 Mich. 248, 72 N. W. 205.

66. Soper *v.* Barker, 36 Wis. 648.

trial;[67] the rule is otherwise, however, where the title to the real estate was in issue but not tried.[68]

8. Effect of Joining Causes of Action, One of Which Does Not Involve Title. Where several causes of action are joined, one of which does not involve a claim of title to real property, defendant is entitled to costs where he succeeds on the issue of title.[69] If plaintiff succeeds on such issue, he is entitled to costs, although he fail on a cause of action for the recovery of personal property;[70] and also where there is a general verdict in his favor.[71] The question of title is not in issue so as to entitle plaintiff to full costs, where the court decides that the cause of action involving question of title cannot be maintained and submits to the jury only the issue involved in the other cause of action.[72]

9. Effect of Defendant Establishing Title to Part of Land. Where defendant claims that the acts complained of were committed on land not belonging to plaintiff, and plaintiff succeeds in establishing that part of the *locus in quo* on which the acts were committed belonged to him he is entitled to costs.[73] Where, however, defendant sets up title to only a portion of the *locus in quo*, and establishes title thereto, and plaintiff recovers for the trespass only as to that part of the premises not affected by the plea of title, plaintiff does not recover costs but is chargeable with those of defendant.[74]

10. Where Title Involved in First but Not in Second Trial. Where in trespass *quare clausum fregit* title to real estate is drawn in question so as to entitle plaintiff to full costs, the fact that on a second trial the case is tried on other grounds not involving title will not defeat the right to such costs.[75]

11. Where Party Has Reason to Believe That Question of Title Will Be Raised. Where from the acts of a party[76] or the framing of his pleadings[77] his opponent has good reason to believe that title to real property will be involved and acts on that assumption he will if successful be entitled to recover costs as if title had been brought in question, although in fact it was not.

C. Amicable Actions. In amicable actions costs will ordinarily be refused both parties,[78] or divided equally between them.[79]

D. Special Proceedings. To authorize an allowance of costs in special proceedings,[80] some special statutory authorization is necessary. These proceedings

67. Horton *v.* Jordan, 11 N. Y. Suppl. 2, 32 N. Y. St. 920.

68. Taylor *v.* Wright, 24 Misc. (N. Y.) 205, 53 N. Y. Suppl. 423, 28 N. Y. Civ. Proc. 108.

69. Alexander *v.* Hard, 42 How. Pr. (N. Y.) 131.

70. Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736.

71. Guffey *v.* Free, 19 Pa. St. 384; Weiand *v.* Dillinger, 1 Leg. Gaz. (Pa.) 115. See also Williams *v.* Glenn, 2 Penr. & W. (Pa.) 137; Cheney *v.* Dallett, 1 Del. Co. (Pa.) 225.

72. Robbins *v.* Sawyer, 3 Gray (Mass.) 375.

73. Heath *v.* Barmour, 53 Barb. (N. Y.) 444.

74. Morss *v.* Salisbury, 48 N. Y. 636; Shull *v.* Green, 49 Barb. (N. Y.) 311; Morss *v.* Jacobs, 35 How. Pr. (N. Y.) 90. To the same effect see Crosby *v.* Moore, 6 N. H. 57. But *compare* Ryder *v.* Hathaway, 2 Metc. (Mass.) 96, which seems to conflict with this view.

75. Bachelder *v.* Green, 38 N. H. 265.

76. Carpenter *v.* Britton, 61 N. H. 430.

77. Gay *v.* Hults, 55 Mich. 327, 21 N. W. 357; Falkel *v.* Moore, 32 Hun (N. Y.) 293.

78. Rotch *v.* Livingston, 91 Me. 461, 40 Atl. 426; Smith *v.* Tecumseh First Nat. Bank, 17 Mich. 479; Dodge *v.* Wilbur, 5 Sandf. (N. Y.) 397; McConnell *v.* McConnell, 11 Vt. 290.

79. Frazer *v.* Miller, 12 Kan. 459.

80. **What are special proceedings.**— The following have been held "special proceedings:" Proceedings to review or vacate an assessment. *In re* Protestant Episcopal Public School, 86 N. Y. 396; People *v.* Board of Taxes, etc., Com'rs, 76 N. Y. 64. *Contra*, Matter of Jetter, 55 How. Pr. (N. Y.) 67. Habeas corpus proceedings. *Ex p.* Barnett, 11 Hun (N. Y.) 468, 52 How. Pr. (N. Y.) 73. Proceedings to acquire title to land under the general railroad law. *In re* New York, etc., R. Co., 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123. An application to compel a receiver to pay a claim from funds in his hands. People *v.* Rochester City Bank, 96 N. Y. 32. Eminent domain proceedings by a city. *In re* Wells Ave. Sewer, 46 Hun (N. Y.) 534. A proceeding to determine the right and manner of the intersection of a railroad track. Hornellsville Electric R. Co. *v.* New York, etc., R. Co., 83 Hun (N. Y.) 407, 31 N. Y. Suppl. 745, 64 N. Y. St. 416. A proceeding under the general railroad act by one railroad company

are not within the purview of statutes authorizing the allowance of costs in "actions."[81] In many jurisdictions statutes have been enacted authorizing the allowance of costs, in special proceedings generally or in designated classes of special proceedings;[82] and under some of these provisions the costs are in the discretion of the court.[83]

E. Novel or Doubtful Questions. In equitable actions or in any other actions in which the court is by statute vested with discretion in the allowance of costs, costs should not be given either party where doubtful or novel questions are involved.[84]

F. Interlocutory Proceedings — 1. Motions Generally — a. Discretion of Court in Awarding Costs. In New York the allowance of costs of motions is now and indeed always has been within the discretion of the court;[85] and a party

to secure a crossing over another's track. *In re* Cortland, etc., R. Co., 98 N. Y. 336. Proceeding to disbar an attorney. *In re* Kelly, 59 N. Y. 595. Controversy between assignee for the benefit of creditors and a creditor of the assignor as to the validity of the latter's claim. Potter *v.* Durfee, 44 Hun (N. Y.) 197. Inquisition of lunacy. *Ex p.* Clapp, 20 How. Pr. (N. Y.) 385. An application by a railroad company for authority to construct its road along a street under a statute giving such power, but making it a condition precedent to its exercise in respect to a street in an incorporated village that it shall procure the order of the supreme court on notice to the village trustees. Matter of Lima, etc., R. Co., 68 Hun (N. Y.) 252, 22 N. Y. Suppl. 967, 52 N. Y. St. 186. So where the holder of mortgages on the shares of certain of the defendants in an action of partition to which he was not a party applied after interlocutory judgment for sale of the premises to have his mortgages paid out of the proceeds of such sale, in which proceeding an order of reference was made to ascertain and report the costs therein, the costs were in the discretion of the court, as this was a special proceeding. Byrnes *v.* Lebagh, 12 N. Y. Civ. Proc. 417. And see, generally, Actions.

What are not special proceedings.— The following have been held not special proceedings: Proceedings to remove a policeman from office. People *v.* Metropolitan Bd. of Police, 39 N. Y. 506. An application for costs in the surrogate's court. *Ex p.* Mace, 4 Redf. Surr. (N. Y.) 325. A warrant of committal served by the sheriff on defendant in a divorce proceeding for refusing to pay costs to plaintiff as ordered by the court. Doyle *v.* Doyle, 4 N. Y. Civ. Proc. 265. Dismissal of appeal from the county court to the supreme court. Andrews *v.* Long, 22 Hun (N. Y.) 24. An attachment issued to enforce the order of the court in supplementary proceedings. Seeley *v.* Black, 35 How. Pr. (N. Y.) 369. Issues of fact joined where a return is made to an alternative writ of mandamus. People *v.* Lewis, 28 How. Pr. (N. Y.) 470. Supplemental proceedings. Dauntless Mfg. Co. *v.* Davis, 24 S. C. 536; Kennesaw Mills Co. *v.* Walker, 19 S. C. 104. Condemnation proceedings for the erection of a mill-dam. Folmar *v.* Folmar, 71 Ala. 136.

81. *Ex p.* Pierce, 12 How. Pr. (N. Y.) 532; Columbia Water Power Co. *v.* Columbia, 4 S. C. 388. See also Monmouth *v.* Leeds, 79 Me. 171, 8 Atl. 828, holding that costs are not allowable to either side in a statutory proceeding to discover and establish boundary lines between towns; the proceedings not being in the nature of an action no pleadings being filed nor issue joined.

82. See statutes of the several states.

83. People *v.* Board of Taxes, etc., Com'rs, 76 N. Y. 64; Potter *v.* Durfee, 44 Hun (N. Y.) 197; Byrnes *v.* Lebagh, 12 N. Y. Civ. Proc. 417. See also Barnes *v.* Smith, 104 Mass. 363.

84. *Michigan.*— Myer *v.* Hart, 40 Mich. 517, 29 Am. Rep. 553; Ellis *v.* Fletcher, 40 Mich. 321; People *v.* Auditor-Gen., 38 Mich. 746.

New York.— People *v.* Barton, 44 Barb. 148; Alward *v.* Alward, 15 N. Y. Civ. Proc. 151, 2 N. Y. Suppl. 42, 17 N. Y. St. 864; Pattison *v.* Hull, 9 Cow. 747.

Pennsylvania.— Denehey *v.* Harrisburg, 2 Pearson 330; Coleman *v.* Brooke, 15 Phila. 302, 39 Leg. Int. 158.

Vermont.— Washburn *v.* Bellows Falls Bank, 19 Vt. 278.

Virginia.— Jones *v.* Mason, 5 Rand. 577, 16 Am. Dec. 761.

United States.— Grattan *v.* Appleton, 10 Fed. Cas. No. 5,707, 3 Story 755.

See 13 Cent. Dig. tit. "Costs," § 32.

85. Price *v.* Price, 61 Hun (N. Y.) 604, 16 N. Y. Suppl. 359, 41 N. Y. St. 399; Lennox *v.* Eldred, 65 Barb. (N. Y.) 526; Dambman *v.* Butterfield, 4 Thomps. & C. (N. Y.) 542; Stevenson *v.* Pusch, 40 How. Pr. (N. Y.) 91; Bowne *v.* Anthony, 13 How. Pr. (N. Y.) 301; Morrison *v.* Ide, 4 How. Pr. (N. Y.) 304; Chadwick *v.* Brother, 4 How. Pr. (N. Y.) 283, 3 Code Rep. (N. Y.) 21; Stiles *v.* Fisher, 3 How. Pr. (N. Y.) 52. See also Crosby *v.* Day, 81 N. Y. 242.

Review of discretion.— Ordinarily the discretion of the court in awarding or refusing costs of motion will seldom be reviewed or appealed. Lennox *v.* Eldred, 65 Barb. (N. Y.) 526. And see, generally, Appeal and Error.

is not entitled to motion costs unless they are allowed by the order of the court making it.[86]

b. Right of Prevailing Party to Costs — (I) *General Rule.* In Michigan it has been held that costs on motion are allowed of course, unless some special reason is shown why they should not be imposed.[87] In New Jersey it has been held that on setting aside an irregular proceeding, the party against whom it has been taken is not liable for costs; that in such case he demands a right and not a favor.[88] So in jurisdictions where costs are in the discretion of the court the party prevailing on a motion is ordinarily entitled to costs.[89]

(II) *Exceptions and Limitations of Rule* — (A) *In General.* But where costs are within the discretion of the court the successful party is not entitled to costs of motion where it is granted him as a favor.[90] If the motion is to be relieved from a default, movant may be charged with costs as a condition of obtaining the relief sought.[91] Although a motion be granted, costs will not be allowed where questions thereby arising are questions of first impression.[92] Nor will the successful party be entitled to costs where the decisions are conflicting in respect to the question involved.[93] Again where one party makes an application to the court in consequence of the declarations of the other party, although the application be dismissed, such other party shall pay the costs.[94]

(B) *Effect of Unnecessary Matter in Moving Papers.* The prevailing party in a motion will not be allowed costs where the papers on which the motion is based are unnecessarily voluminous and contain irrelevant matter.[95]

(C) *Effect of Partial Success.* If the moving party only obtains part of the relief asked for in his notice he should not be allowed costs.[96]

(D) *Effect of Correction of Error Before Notice of Motion.* Where the error in relation to which a motion is made is corrected before the papers for the motion were served, but after they had been prepared, the moving party will not be entitled to costs of motion.[97] Otherwise where the error is corrected after the notice of the motion.[98]

c. Withdrawal of or Failure to Prosecute Motion. In one jurisdiction it has

86. Price *v.* Price, 61 Hun (N. Y.) 604, 16 N. Y. Suppl. 359, 41 N. Y. St. 399; Nellis *v.* De Forrest, 6 How. Pr. (N. Y.) 413; Morrison *v.* Ide, 4 How. Pr. (N. Y.) 304; Chadwick *v.* Brother, 4 How. Pr. (N. Y.) 283, 3 Code Rep. (N. Y.) 21.

87. O'Flynn *v.* Eagle, 7 Mich. 306.

88. Boggs *v.* Chichester, 13 N. J. L. 209.

89. Anonymous, 18 Wend. (N. Y.) 578; 2 Rumsey Pr. 473, 474.

Costs of opposing motion. — It has been held that costs may be allowed a party for appearing at a general term and resisting a motion which should have been made at a special term (Donaldson *v.* Jackson, 9 Wend. (N. Y.) 450); where the notice asks in the affirmative for two different modes of relief, one of which the moving party is entitled to (Smith *v.* Jones, 2 Code Rep. (N. Y.) 33); or where the affidavits resisting the motion clearly show that it will be ineffectual (Bradt *v.* Way, 2 Cai. (N. Y.) 96, Col. Cas. (N. Y.) 361); and if a default is opened on application, the applicant should pay the costs of opposing the motion (Vanderheyden *v.* Mallary, 3 How. Pr. (N. Y.) 295). The costs should be confined to such motions as are litigated or which require preparation and service of papers and notice upon the adverse party. Bowne *v.* Anthony, 13 How. Pr. (N. Y.) 301.

Unreasonable resistance of motion. — The successful party will be entitled to costs where his adversary makes an unreasonable resistance to the motion. Gilmartin *v.* Smith, 4 Sandf. (N. Y.) 684. See also Kane *v.* Van Vranken, 5 Paige (N. Y.) 62.

90. Leighton *v.* Wood, 17 Abb. Pr. (N. Y.) 177; Jones *v.* U. S. Slate Co., 16 How. Pr. (N. Y.) 129.

91. Leighton *v.* Wood, 17 Abb. Pr. (N. Y.) 177.

92. Ely *v.* Holton, 15 N. Y. 595; Rathbun *v.* Markham, 43 How. Pr. (N. Y.) 271.

93. Tindal *v.* Jones, 11 Abb. Pr. (N. Y.) 258.

94. Leonard *v.* Manard, 1 Hall (N. Y.) 200.

95. Buffalo *v.* Scranton, 20 Wend. (N. Y.) 676; Pitcher *v.* Clark, 2 Wend. (N. Y.) 631; Seebor *v.* Hess, 5 Paige (N. Y.) 85.

96. McKenzie *v.* Hackstaff, 2 E. D. Smith (N. Y.) 75; Corbin *v.* George, 2 Abb. Pr. (N. Y.) 465; Penfield *v.* White, 8 How. Pr. (N. Y.) 88; Steam Nav. Co. *v.* Weed, 8 How. Pr. (N. Y.) 49; Whipple *v.* Williams, 4 How. Pr. (N. Y.) 28; Bates *v.* Loomis, 5 Wend. (N. Y.) 78.

97. Stow *v.* Smith, 2 How. Pr. (N. Y.) 268.

98. Williamson *v.* Ong, 1 W. Va. 84.

been held that a party who appears to resist a motion is entitled to costs thereof where the moving party defaults.[99] In another jurisdiction it has been held that ordinarily notice of a motion which has been served cannot be withdrawn without paying the costs of the motion.[1]

d. Necessity For Demand For Costs. If a notice of a motion which is granted by default does not state that costs will be asked none can be granted;[2] and costs cannot be granted upon a default after a notice of motion which merely asks for general relief.[3]

e. What Costs Allowable — (I) *In General.* Where a party appears for the purposes of a motion only, it is only costs of the motion[4] which can properly be awarded.[5]

(II) *Number of Bills of Costs Taxable.* Where a motion in several causes is based on one set of papers and is successful only one bill of costs can be taxed;[6] and where a motion in several causes is resisted on one set of papers only one bill of costs can be taxed.[7] So costs of one motion only will be allowed where two or more separate motions contain substantially the same facts, and the same plaintiffs and attorneys.[8] If separate attorneys appear on a motion for different parties in the same action costs of one motion only will be allowed.[9] If there are several causes between the same plaintiff and different defendants and motions in each are made by defendants for judgment, as in case of nonsuit, and granted unless plaintiff pay costs, the costs of only one motion will be allowed where the attorneys were the same in each case.[10]

2. Motion to Compel Filing of Pleading. In one case it has been held that costs may be allowed on an *ex parte* motion to compel the filing of a pleading where the party omits to file it after notice requiring him to do so;[11] in another it was held that costs should not be allowed on an *ex parte* order directing defendant to file his answer.[12]

3. Motion to Strike Out Pleading. Where a statute empowers a court to allow costs of motion, such costs may be given on denying a motion to strike out a

99. People *v.* Highway Com'rs, 15 Mich. 518.

1. Walkinshaw *v.* Perzel, 7 Rob. (N. Y.) 606, 32 How. Pr. (N. Y.) 310.

Extent and limits of rule.— Where, however, notice of motion involving two distinct subject-matters is given, it may be countermanded as to one of the matters without payment of costs of the motion. Walkinshaw *v.* Perzel, 7 Rob. (N. Y.) 606, 32 How. Pr. (N. Y.) 310. In another case where plaintiff's counsel took a rule by default, which was opened by the court on the same day, and he was immediately notified of such fact and that defendant's counsel desired to oppose the motion, and plaintiff's counsel refused to bring it on, defendant's counsel was allowed to take a rule for costs at the close of the term. Wade *v.* Carter, 1 How. Pr. (N. Y.) 17.

2. Smith *v.* Fleischman, 17 N. Y. App. Div. 532, 45 N. Y. Suppl. 553; Chase *v.* Chase, 29 Hun (N. Y.) 527; Banta *v.* Marcellus, 2 Barb. (N. Y.) 373; Crippen *v.* Ingersoll, 10 Wend. (N. Y.) 603. But see Jones *v.* Cook, 11 Hun (N. Y.) 230, where it was held that where both parties are present costs may be given, although not asked for in the notice.

3. Northrop *v.* Van Dusen, 5 How. Pr. (N. Y.) 134; Crippen *v.* Ingersoll, 10 Wend. (N. Y.) 603.

4. **The amount of costs allowable on a motion is usually a matter of statutory regulation,** and an allowance greater than prescribed by statute is erroneous. Abbott *v.* Johnson, 47 Wis. 239, 2 N. W. 332.

5. Burnhardt *v.* Rice, 15 N. Y. Suppl. 936, 21 N. Y. Civ. Proc. 331; *Ex p.* Benson, 6 Cow. (N. Y.) 592.

Copies of papers.— On a special motion a party is not entitled to charge for the copy of pleadings or of a case or bill of exceptions incorporated into the motion, unless good cause exists for using copies instead of the originals. Benedict *v.* Jones, 18 Wend. (N. Y.) 557.

6. Jackson *v.* Keller, 18 Johns. (N. Y.) 310.

7. Boeran *v.* Jerome, 1 Wend. (N. Y.) 293; Jackson *v.* Garnsey, 3 Cow. (N. Y.) 385.

8. Cortland County Mut. Ins. Co. *v.* Lathrop, 2 How. Pr. (N. Y.) 146. And see McCoun *v.* New York Cent., etc., R. Co., 50 N. Y. 176.

9. Mitchell *v.* Westervelt, 6 How. Pr. (N. Y.) 265.

10. Post *v.* Jenkins, 2 How. Pr. (N. Y.) 33; Schermerhorn *v.* Noble, 1 Den. (N. Y.) 682. See also Jackson *v.* Clark, 4 Cow. (N. Y.) 532.

11. Langbein *v.* Gross, 14 Abb. Pr. N. S. (N. Y.) 412.

12. Edlefson *v.* Duryee, 21 Hun (N. Y.) 607, 59 How. Pr. (N. Y.) 326.

demurrer as frivolous;[13] but on sustaining a motion to strike out an amended petition from the file, it is erroneous to render judgment for costs against plaintiff as on a trial.[14] Costs will not be imposed on denial of a motion to strike out the answer where the plaintiff was right in serving the notice of motion.[15]

4. Motion For Change of Venue. Where it is expressly so provided by statute the person obtaining a change of venue must pay the costs of the motion;[16] but only such items are taxable as are provided for in the statute authorizing the taxation.[17] In the absence of any special statute relating to costs on change of venue, the costs abide the event of the suit and are taxable in the bill of the prevailing party.[18]

5. Motion For Continuance[19] — a. Who Liable For Costs. The taxation of costs on the granting of a continuance is regulated largely by statutes and rules of court. In some jurisdictions it has been held that costs of a continuance are properly taxed against the party whose act made the continuance necessary;[20] in one jurisdiction that where a party moving had good grounds for continuance his adversary cannot tax costs during the continuance;[21] and in another that costs resulting from a continuance granted on the application of a party must be taxed against the party applying for the continuance in any event.[22] Under a statute providing that continuances for providential cause shall not be charged to either party, where a continuance is granted because of the illness of counsel it was held that no costs should be imposed.[23] And it has been held that if a trial goes off because of the mistake of the judge or sheriff in making out the panel of a struck jury the plaintiff is not liable to costs.[24] A statute providing that certain costs may be required as a condition of granting a continuance applies to a continuance from one term to another as well as to a continuance to a later day in the same term.[25] Where a person has paid costs as a condition of obtaining a continuance such costs cannot be again taxed against him on a final judgment if his adversary is successful.[26]

13. Lander *v.* Hall, 69 Wis. 326, 34 N. W. 80.

14. Robinson *v.* Erickson, 25 Iowa 85.

15. Rider *v.* Bates, 66 How. Pr. (N. Y.) 129.

16. Robbins *v.* Neal, 10 Iowa 560; Allen *v.* Skiff, 2 Iowa 433.

17. Head *v.* Levy, 52 Nebr. 456, 72 N. W. 583.

18. O'Connell *v.* Gavett, 7 Colo. 40, 1 Pac. 902; Norton *v.* Rich, 20 Johns. (N. Y.) 475; Worthy *v.* Gilbert, 4 Johns. (N. Y.) 492.

Extent of rule.— So where the motion is denied the party moving, although eventually successful in the action, is not entitled to the costs of the motion (Gidney *v.* Spelman, 6 Wend. (N. Y.) 525); and in one case it has been held that costs of opposing the motion will not be allowed unless the motion is denied, because the moving party's papers are defective (Sill *v.* Trumbull, 1 Cow. (N. Y.) 589). But see Phelps *v.* Wasson, 2 How. Pr. (N. Y.) 126; Dunn *v.* Mason, 1 How. Pr. (N. Y.) 41, where it was held in memorandum decisions that where costs are asked on a motion for change of venue the moving party must pay costs of opposing the motion. In another case it has been held that where a motion to change the venue of a cause is denied the costs of opposing the motion abide the event and are taxable in the general costs of the cause Goodenow *v.* Livingston, 1 How. Pr. (N. Y.) 232.

19. For payment of costs see, generally, Continuances in Civil Cases, 9 Cyc. 151.

20. Hockett *v.* Turner, 19 Kan. 527; Ewing *v.* Byers, 2 Yeates (Pa.) 128; McAfee *v.* McClure, 11 Wkly. Notes Cas. (Pa.) 173; Balliet *v.* Allentown School Dist., 1 Leg. Chron. (Pa.) 148, 5 Leg. Gaz. (Pa.) 130; Knabb *v.* Kaufman, 1 Woodw. (Pa.) 319; Loveman *v.* Taylor, 85 Tenn. 1, 2 S. W. 29. *Compare* Quirk *v.* Costello, 1 Pa. Co. Ct. 264, 265, where it is said: "In many counties of the state, the payment of costs by the party obtaining a continuance follows as a matter of course."

On continuance granted plaintiff at his request and for his benefit, it is an abuse of discretion to tax the costs of the continuance against his adversary. Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051.

21. Winthrop *v.* Carlton, 8 Mass. 456. See also Pulliam *v.* Bartee, 3 Brev. (S. C.) 146, where it was held that where a party applying for a postponement of trial shows good cause therefor, the court has discretion either to order the costs to be paid or to abide the event of the action.

22. Holzman *v.* Hibben, 100 Ind. 338; Mitchell *v.* Stephens, 23 Ind. 466.

23. Printup *v.* Mitchell, 19 Ga. 586.

24. Ogden *v.* Gibbons, 7 N. J. L. 122.

25. Lawson *v.* Hill, 66 Hun (N. Y.) 288, 20 N. Y. Suppl. 904, 49 N. Y. St. 251.

26. Penn Yan *v.* Tuell, 9 How. Pr. (N. Y.) 400.

b. What Costs Allowed. Where costs are imposed on granting a continuance, only such costs as are by law taxable can be included.[27] Where an application is granted on condition that plaintiff indemnify defendant for costs in preparation for trial, the order, under the New York statutes, includes witness' fees paid, which are rendered ineffectual by the postponement, and also fees paid witnesses who did not attend court, where the latter cannot be recovered back.[28] The word "costs" in an order imposing costs, as a condition of a continuance, means only costs of the term and not costs of the action.[29]

6. Motions Subsequent to Judgment — a. Motion to Arrest Judgment. In perhaps the majority of jurisdictions the rule is that on arrest of judgment neither party is entitled to costs.[30] In some jurisdictions, however, it has been held that where the defendant prevails on a motion in an arrest of judgment because of a defective declaration, he is entitled to costs;[31] and it has been held that when judgment is arrested in a supreme court, the defendant is entitled to costs in that court and in the court below.[32] It has been held also that where judgment is arrested after verdict, and leave to amend a new trial is granted, costs are allowed to defendant from the time the case went to the jury.[33]

b. Motion to Set Aside Judgment — (i) *In General.* Costs on a motion to set aside a judgment are in some jurisdictions in the discretion of the court.[34]

27. Murray *v.* Emmons, 26 N. H. 523; Kennedy *v.* Nixon, 6 N. J. L. 159; Lawson *v.* Hill, 66 Hun (N. Y.) 228, 20 N. Y. Suppl. 904, 49 N. Y. St. 251.

The imposition of a gross sum as costs is improper, under a statute requiring, as a condition of an adjournment, that the adverse party be paid "a sum not exceeding $10 . . . , besides the fees of his witnesses, and other taxable disbursements already made and incurred, which are rendered ineffectual by the adjournment." Kennedy *v.* Wood, 54 Hun (N. Y.) 14, 7 N. Y. Suppl. 90, 26 N. Y. St. 34. Where a statute provides that plaintiff shall recover no more costs than the debt or damages, "except costs which may accrue from continuance at the request of the defendant," the court adds to the amount of costs equal to the debt, etc., the costs that accrue at any term in which the defendant appellee obtains a continuance, but not the costs of any subsequent term, as a consequence of such continuance. Davis *v.* Tarble, 2 Aik. (Vt.) 259.

28. Inderlied *v.* Whaley, 4 Silv. Supreme (N. Y.) 29, 7 N. Y. Suppl. 74, 26 N. Y. St. 7.

Construction of order imposing costs in Michigan.— Under an order for continuance on condition of payment to plaintiff of all legal costs that he has incurred for the term, the costs to which he is entitled are of the date of defendant's accepting notice of taxation, and he is not entitled to tax the fees of witnesses thereafter detained. Barney *v.* Love, 101 Mich. 543, 60 N. W. 58.

29. Kirkman *v.* Dixon, 65 N. C. 179.

In Indiana it has been held that a preliminary judgment against defendant, on a motion to postpone the trial to a day in term, should not be for all the costs of the term, but only the costs caused by the delay. Holzman *v.* Hibben, 100 Ind. 338.

30. *Connecticut.*— Hawley *v.* Castle, Kirby 218; Anonymous, Kirby 89.

Illinois.— Smith *v.* Curry, 16 Ill. 147.

Maryland.— State *v.* Greenwell, 4 Gill & J. 407.

New York.— Otis *v.* Hitchcock, 6 Wend. 433; Pangburn *v.* Ramsay, 11 Johns. 141.

North Carolina.— Governor *v.* Twitty, 13 N. C. 386.

Pennsylvania.— *Ex p.* Schick, 1 Leg. Gaz. 62.

Tennessee.— Caldwell *v.* State, 2 Sneed 490.

England.—Cameron *v.* Reynolds, Cowp. 403. See 13 Cent. Dig. tit. "Costs," § 252.

Reason of rule.— In a number of the cases the rule assigned for disallowing costs to the successful party on the motion in an arrest was that the error for which the judgment was arrested being apparent from the pleadings, he might have taken advantage thereof by demurrer, and that by failure to do so he had contributed to the costs of the proceedings. Smith *v.* Curry, 16 Ill. 147; State *v.* Greenwell, 4 Gill & J. (Md.) 407.

31. Gibson *v.* Waterhouse, 5 Me. 19; Little *v.* Thompson, 2 Me. 228; Hogins *v.* Arnold, 19 Pick. (Mass.) 191; Favour *v.* Sargent, 6 Pick. (Mass.) 5; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75. See also Belknap *v.* Boston, etc., R. Co., 48 N. H. 388, holding that a defendant is entitled to costs upon an arrest of judgment, and that where judgment is arrested for a defect in the declaration, apparent upon the record, and one for which a plea in abatement or a demurrer would have been sustained, that fact may afford a reason why the court in its discretion should disallow or limit such costs on arrest of judgment.

32. Baker *v.* Sherman, 73 Vt. 26, 50 Atl. 633. See also Dunham *v.* Powers, 42 Vt. 1. And *compare* Bowdish *v.* Peckham, 1 D. Chipm. (Vt.) 144.

33. Carlisle *v.* Weston, 1 Metc. (Mass.) 26.

34. Olmstead *v.* Firth, 64 Minn. 243, 66 N. W. 988; Cox *v.* Bennet, 13 N. J. L. 165.

It has been held that where both parties are in the wrong each should pay his own costs on such a motion.[35]

(II) *DEFAULT JUDGMENT.* By an express statutory provision in California a default judgment can only be set aside on payment by the moving party of all costs accruing to his opponent to the time of service and filing of motion therefor.[36] In other jurisdictions, however, costs are within the discretion of the court.[37] Again it has been held that where a judgment is obtained by default, through a misapprehension of defendant's attorney, and it appears clearly that the plaintiff has no cause of action, and should have known, if he did not, that he had none when he commenced proceedings, the judgment should be set aside and plaintiff required to pay defendant costs of motion;[38] and where plaintiff whose proceedings subsequent to defendant's default and the entry of judgment were irregular refused to open the default on a suitable explanation and offer on the part of defendant, costs were awarded against plaintiff on defendant's motion to set aside default.[39] In an equitable action, in one jurisdiction, it was held that where a sole defendant resides out of the state and no foreign publication is ordered or notice given to him, costs on opening the decree at his instance should be ordered to abide the event of the suit;[40] and, in another, that, where a decree *pro confesso* was improperly entered, and an application was properly made by defendant to set it aside, he should not be taxed with the costs of the suit up to the time of the application when no blame attaches to him.[41]

c. Motion to Stay or Quash Execution. A party who is successful on a motion to stay an execution is entitled to costs of the proceedings,[42] so a party succeeding on a motion to quash an execution is entitled to costs.[43] Where a motion to set aside an execution is denied but both parties are in fault, each party should pay his own costs.[44]

d. Motion to Set Aside Sale. A successful party in a motion to set aside an execution sale is ordinarily entitled to costs.[45]

7. OTHER PROCEEDINGS SUBSEQUENT TO JUDGMENT. Where an issue is made up by leave of court to try whether a confession of judgment is fraudulent the party prevailing is entitled to his costs.[46] Where immediately on the rendition of a special verdict judgment was rendered by the trial court, it was held that there was no such "application for judgment upon a special verdict" as would entitle the successful party to costs under a statute providing for costs on such application.[47]

8. AMENDMENT OF PLEADINGS — a. Declaration or Complaint — (I) *STATING NEW CAUSE OF ACTION OR ALTERING SCOPE OF ACTION.* In many jurisdictions it is held that where a complaint is so amended that it states a new cause of action or materially alters the scope of the action the defendant will ordinarily be

35. Cox *v.* Bennet, 13 N. J. L. 165.

36. Leet *v.* Grants, 36 Cal. 288; Bailey *v.* Taaffe, 29 Cal. 422; Howe *v.* Independent Consol. Gold, etc., Min. Co., 29 Cal. 72; People *v.* O'Connell, 23 Cal. 281.

37. See Woodford *v.* Alexander, 35 Fla. 333, 17 So. 658; Oram *v.* Dennison, 13 N. J. Eq. 438.

38. Kane *v.* Demarest, 13 How. Pr. (N. Y.) 465.

39. Gilmartin *v.* Smith, 4 Sandf. (N. Y.) 684.

40. Oram *v.* Dennison, 13 N. J. Eq. 438.

41. Woodford *v.* Alexander, 35 Fla. 333, 17 So. 658.

42. Shearer *v.* Boyd, 10 Ala. 279; Chicago Corn Exch. Bank *v.* Blye, 9 N. Y. St. 67.

Limitation of rule.— Where an application to stay execution is the result of mutual mistake or misapprehension of the parties, neither should be charged with costs of the application. Rogers *v.* Rogers, 2 Paige (N. Y.) 458.

43. Barnes *v.* Robinson, 4 Yerg. (Tenn.) 485.

44. Cox *v.* Bennet, 13 N. J. L. 165.

45. Beach *v.* Dennis, 47 Ala. 262. See also Hoppock *v.* Cray, (N. J. Ch. 1891) 21 Atl. 624.

For example where a sale is made, in a decree, void for want of indispensable parties, the losing party pays the costs of the motion. Riley *v.* Wiley, 3 Dana (Ky.) 75. And the costs of a motion to set aside a partition sale contested by the purchaser are to be taxed against him when a motion prevails. Neal *v.* Smith, 22 Mo. 349.

46. Todd *v.* Stroud, 1 Rich. (S. C.) 25.

47. Kenney *v.* Pittsburgh First Nat. Bank, 8 N. Y. Civ. Proc. 398.

allowed all costs up to the time of such amendment;[48] and the rule is held to apply to cases where the plaintiff is permitted to amend after a judgment in his favor has been reversed.[49]

(II) *To Cure Variance.* No costs will be allowed, because of an amendment to cure an immaterial variance;[50] but it has been held that an amendment to cure a material variance will be allowed on payment of defendant's costs from and after the time the objection for variance was made.[51]

(III) *Amendments as of Course.* Under a statute providing that any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering expires, or at any time within twenty days after the service of the answer or demurrer thereto, a party may amend as of course within the time specified, notwithstanding a motion by his adversary in relation to such pleading within the period allowed for amendment.[52]

48. *Massachusetts.*— Lester *v.* Lester, 8 Gray 437.

New Hampshire.— Clark *v.* First Cong. Soc., 46 N. H. 272.

New York.—Frisbie *v.* Averell, 87 Hun 217, 33 N. Y. Suppl. 1021, 68 N. Y. St. 758; Ruellan *v.* Stillwell, 56 N. Y. Suppl. 344, 28 N. Y. Civ. Proc. 243; Brady *v.* Cassidy, 13 N. Y. Suppl. 824, 37 N. Y. St. 501; Troy, etc., R. Co. *v.* Tibbits, 11 How. Pr. 168; Hare *v.* White, 3 How. Pr. 296; Grim *v.* Wheeler, 3 Edw. 448. *Compare* Marsh *v.* McNair, 40 Hun 216.

Pennsylvania.— Carter *v.* Salter, 1 Del. Co. 403.

Texas.— Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Crescent Ins. Co. *v.* Camp, 64 Tex. 521; Woods *v.* Huffman, 64 Tex. 98; Kirkland *v.* Little, 41 Tex. 456.

See 13 Cent. Dig. tit. "Costs," § 218.

Amendment adding new count after nonsuit.— Where a plaintiff is nonsuited for the want of a count or a substantially sufficient count he will be permitted to amend on payment to the defendant of the costs of a plea in the subsequent proceedings and the costs of opposing the motion. Bennett *v.* New York, 1 Sandf. (N. Y.) 658.

Amendment adding parties.—If plaintiff by leave amend his bill by introducing an additional defendant costs will be allowed defendants to the time of amendment. McLellan *v.* Osborne, 51 Me. 118. See also Marlett *v.* Doctor, 89 Wis. 347, 61 N. W. 1125.

Amendment rendering change of defense necessary is permitted only on payment of all costs up to time of amendment. Chapman *v.* Webb, 6 How. Pr. (N. Y.) 390.

Trial before referee.— Where on a trial before a referee he expresses the opinion that an amendment should be allowed to render certain evidence admissible, and that application should be made to the special term for permission to amend, and amendment is granted, the plaintiff should, as a condition of being permitted to amend, be required to pay all the costs of the action before trial. Hayes *v.* Kerr, 39 N. Y. App. Div. 529, 57 N. Y. Suppl. 323.

For amendment held not to change cause of action so as to justify taxation of all costs accrued prior to the amendment see Smaltz *v.* Hancock, 118 Pa. St. 550, 12 Atl. 464; Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407; Lancaster *v.* Richardson, (Tex. Civ. App. 1898) 45 S. W. 409.

49. Bates *v.* Salt Springs Nat. Bank, 43 N. Y. App. Div. 321, 60 N. Y. Suppl. 313; Fox *v.* Davidson, 40 N. Y. App. Div. 620, 58 N. Y. Suppl. 147; McEntyre *v.* Tucker, 40 N. Y. App. Div. 444, 58 N. Y. Suppl. 146, 29 N. Y. Civ. Proc. 185; Bowen *v.* Sweeny, 66 Hun (N. Y.) 42, 20 N. Y. Suppl. 733, 734, 49 N. Y. St. 603, 605; Cramer *v.* Lovejoy, 41 Hun (N. Y.) 581; Howard *v.* Moller, 11 Misc. (N. Y.) 719, 31 N. Y. Suppl. 1129, 64 N. Y. St. 875; Walton *v.* Mather, 10 Misc. (N. Y.) 216, 31 N. Y. Suppl. 111, 63 N. Y. St. 380; Ireland *v.* Metropolitan El. R. Co., 8 N. Y. St. 127; McGrane *v.* New York, 19 How. Pr. (N. Y.) 144; Prindle *v.* Aldrich, 13 How. Pr. (N. Y.) 466; Downer *v.* Thompson, 6 Hill (N. Y.) 377. See also as sustaining this doctrine Harwood *v.* Baldwin, 6 Ky. L. Rep. 656, where it was held that where the court of appeals reverses a judgment with directions to permit plaintiffs to amend their petition they should be compelled to pay all costs, after the answer of defendant up to the answer of the amended petition, although the court of appeals did not impose terms. But *compare* Dixon *v.* Risley, 114 Cal. 304, 46 Pac. 5, where it was held that where an appellate court directs the trial court to permit an amendment of the complaint the latter cannot impose as a condition of the amendment the payment of costs of the appeal with its accruing costs.

Extra allowance.— Imposition of costs of the trial court and general term as a condition of amending a complaint, where the judgment for plaintiff has been reversed, does not include an extra allowance. Wardlaw *v.* New York, 23 N. Y. Suppl. 669.

50. Sipe *v.* Sipe, 14 Ind. 477; Ernst *v.* Fox, 26 Wash. 526, 67 Pac. 258.

51. Smith *v.* Proctor, 1 Sandf. (N. Y.) 72; Proctor *v.* Andrew, 1 Sandf. (N. Y.) 70; Flower *v.* Garr, 20 Wend. (N. Y.) 668.

52. Rider *v.* Bates, 66 How. Pr. (N. Y.) 129; Welch *v.* Preston, 58 How. Pr. (N. Y.) 52; Sutton *v.* Wegner, 72 Wis. 294, 39 N. W.

(IV) *MATTER STRICKEN OUT BY COURT OF ITS OWN MOTION.* Where the court of its own motion strikes matter out of an affidavit filed in a proceeding before a clerk no costs will be allowed the opposite party.[53]

(V) *OTHER AMENDMENTS.* Under a statute providing that an amendment may be permitted either with or without payment of costs, an order on a plaintiff to withdraw one of the items constituting a cause of action may be granted without imposing costs on plaintiff.[54] Where the defendant filed a general demurrer to the plaintiffs' writ and declaration, and the demurrer was sustained, and plaintiffs moved to amend their writ, which was allowed, and the defendant excepted to the allowance of an amendment, after which the defendant filed a general demurrer to the declaration, which was overruled, and the defendant excepted thereto, a statute providing that the plaintiff may amend upon the payment of costs from the time of filing a demurrer does not apply until after the decision on the defendant's exceptions by the law court.[55] Where the parties in replevin went to trial on the affidavit, no bill of particulars having been filed, and an appeal was perfected and depositions taken, and witnesses summoned for trial in the appellate court, and on the case being called, defendant for the first time raised the point that a bill of particulars should be filed, and the court thereupon ordered such bill, imposing on plaintiff as a condition of filing the same all costs to date, the condition was inequitable and should not have been imposed.[56] Where a plaintiff is permitted to amend by adding another defendant it is an abuse of discretion to tax defendant with costs of the motion.[57] Where the amendment of a bill causes no additional costs except the taking of one witness' evidence, with which plaintiff was charged, the costs accruing to the time of the amendment should not be taxed to plaintiff because of the amendment.[58] Where the plaintiff applies to amend a summons and complaint, after answer and before notice of trial, he must pay costs for proceedings before notice of trial, costs of resisting the motion to amend, and such disbursements as are chargeable by statute against the unsuccessful party.[59]

b. Plea or Answer — (I) *IN GENERAL.* Where an answer is amended so as to set up a defense calculated to defeat the entire action, it should be permitted only on payment of all the plaintiff's costs to the time of amendment.[60] So where a judgment for defendant has been reversed, defendant will be permitted to

775. *Contra*, Williams *v.* Wilkinson, 5 How. Pr. (N. Y.) 257.

53. People *v.* Murray, 22 N. Y. Suppl. 1051, 23 N. Y. Civ. Proc. 53.

54. Latimer *v.* Sullivan, 37 S. C. 120, 15 S. E. 798.

55. Hare *v.* Dean, 90 Me. 308, 38 Atl. 227, where it was said that in contemplation of law plaintiffs had not amended their writ and could not do so until the exceptions were overruled, and it had been finally decided that the proposed amendment was allowed.

In New Jersey it has been held that a party applying to amend a declaration after a special demurrer to it has been filed must pay costs. Condit *v.* Neighbor, 12 N. J. L. 320.

56. Casterline *v.* Day, 26 Kan. 306.

57. Marlett *v.* Doctor, 89 Wis. 347, 61 N. W. 1125.

58. Jones *v.* Galbraith, (Tenn. Ch. App. 1900) 59 S. W. 350.

59. Hare *v.* White, 3 How. Pr. (N. Y.) 296.

60. Julio *v.* Equitable L. Assur. Soc., 2 N. Y. City Ct. 301. See also Anonymous, 1 Fed. Cas. No. 476, 2 Wash. 270.

Extra allowance.— It has been held that the court may require defendants to pay an extra allowance as a condition for granting leave to file a supplemental answer, where the motion for leave was not made until after the trial was concluded (Mabie *v.* Adams, 1 Month. L. Bul. (N. Y.) 65), but not where the motion was made before the trial was concluded (Jenkins *v.* Adams, 1 Month. L. Bul. (N. Y.) 65).

In Texas where defendant in trespass to try title, after pleading "Not guilty" and after trial and reversal on appeal, files an amended answer, claiming only a part of the amount in suit, and recovers such part, he will be adjudged to pay those costs only which accrued before the filing of the amended answer. Keyser *v.* Mensback, 77 Tex. 64, 13 S. W. 967.

In Wisconsin it has been held that payment of all taxable costs and disbursements of plaintiff at the time of filing original answer and ten dollars costs of motion is not inadequate on allowance of a motion to amend. Smith *v.* Dragert, 65 Wis. 507, 27 N. W. 317.

amend only on condition of paying plaintiff's costs to date and costs of motion.[61] An appeal from a refusal of a motion to amend the answer after time therefor had expired will be granted on payment of costs of motion and costs of appeal.[62] Where a demurrer to an amended answer was sustained and leave given to serve another amended answer, which was not acted on, and defendant afterward moved to be allowed to serve the second amended answer just as the cause was to be brought to trial, it was held that the motion should not have been granted except on payment of the taxable term fees and the filing and service of an affidavit of merits.[63]

(II) *Amounting to Plea Puis Darrein Continuance.* Where an amendment amounts to a plea *puis darrein*, it should be allowed only on payment of costs.[64]

c. Formal Defects. Where the statute provides that the court shall and may amend all and every defect of form, errors of form are held to be amendable without imposing costs.[65]

d. Amendment by Agreement of Counsel. If there is an agreement by counsel to amend it has been held that the court will grant leave to amend without costs.[66]

e. Effect of Offer to Pay Costs as Condition of Amendment. Where plaintiff offers to pay all costs to which defendant is entitled, before moving to amend his declaration by adding a special count, defendant will not be allowed costs if he resists the motion.[67]

f. Non-Compliance With Order to Amend. Non-compliance with an order to amend a complaint does not justify the court in imposing payment of all the costs on plaintiff, without dismissing the case or doing anything else.[68]

g. Right of Successful Party to Tax Costs Paid as Condition of Amendment. The party eventually successful in an action, who has paid costs as a condition to the allowance of an amendment by him, is not entitled to tax against his opponent the amount so paid;[69] and where the unsuccessful party pays costs as a condition of making an amendment, such costs cannot again be taxed against him on final judgment.[70]

61. Alexander Lumber Co. *v.* Abrahams, 20 Misc. (N. Y.) 674, 46 N. Y. Suppl. 538.

62. Knauth *v.* Heller, 68 Hun (N. Y.) 570, 23 N. Y. Suppl. 106, 52 N. Y. St. 764.

63. Haggerty *v.* Phelan, 61 N. Y. Super. Ct. 453, 18 N. Y. Suppl. 789.

64. State *v.* Moses, 20 S. C. 465.

65. Tripp *v.* Duffy, 10 R. I. 264; Ellis *v.* Appleby, 4 R. I. 462.

In New York it has been held that the amendment will be allowed on paying costs of the motion. Weston *v.* Worden, 19 Wend. 648; Tooker *v.* Arnoux, 1 Month. L. Bul. 54. See also Weill *v.* Metropolitan R. Co., 10 Misc. 72, 30 N. Y. Suppl. 833, 63 N. Y. St. 170.

66. Johnson *v.* Chaffant, 1 Binn. (Pa.) 75.

67. Bell *v.* Judson, 2 How. Pr. (N. Y.) 42.

Where an objection to an answer filed is a purely technical one, and before motion costs have been offered by the party desiring to correct the mistake and declined no costs of motion will be allowed. Schiller *v.* Maltby, 11 N. Y. Civ. Proc. 304.

68. Harvey County *v.* Munger, 24 Kan. 760.

If plaintiff declines to strike out on motion one of two counts for the same cause of action, he will be liable for all the costs if he fails to establish a distinct cause of action for each count. Watson *v.* Bell, 37 Iowa 640.

On failure of defendant to comply with an order to plead to a complaint within a designated time on reversal of the judgment, the court may require him to pay costs. Roush *v.* Fort, 3 Mont. 175.

69. Meloney *v.* Somers, 50 Conn. 520; Richardson *v.* Hine, 43 Conn. 201; Woolsey *v.* Ellenville, 84 Hun (N. Y.) 234, 32 N. Y. Suppl. 546, 65 N. Y. St. 746; Skinner *v.* White, 69 Hun (N. Y.) 127, 23 N. Y. Suppl. 384, 52 N. Y. St. 737; Seneca Nation, etc. *v.* Hawley, 32 Hun (N. Y.) 288; New York Belting, etc., Co. *v.* New Jersey Car-Spring, etc., Co., 32 Fed. 755. *Contra*, Havemeyer *v.* Havemeyer, 48 N. Y. Super. Ct. 104; Starr Cash Car Co. *v.* Reinhardt, 6 Misc. (N. Y.) 365, 6 N. Y. Suppl. 746; Dovale *v.* Ackerman, 11 N. Y. Suppl. 5, 24 Abb. N. Cas. (N. Y.) 214.

70. Byrne *v.* Brooklyn City, etc., R. Co., 6 Misc. (N. Y.) 6, 26 N. Y. Suppl. 65, 58 N. Y. St. 121; Marx *v.* Gross, 2 Misc. (N. Y.) 500, 22 N. Y. Suppl. 387, 51 N. Y. St. 92, 23 N. Y. Civ. Proc. 97.

Right to costs against party whose name is stricken out.— Where a writ is amended by striking out one of the plaintiffs' names on terms which have been complied with, de-

h. Payment of Costs as Condition Precedent to Amendment. Where an order requires a party to amend and directs him to pay costs, it has been held that the payment of the costs is not a condition precedent to the amendment;[71] but where judgment is rendered against a party on demurrer, with leave to withdraw the demurrer and plead, on payment of costs, he must it seems tender the costs before pleading.[72]

9. On Withdrawal of Pleadings. Withdrawal of answer by the defendant upon plaintiff's consent does not exempt him from paying costs up to that time.[73]

10. Rulings on Demurrer — a. Rules Peculiar to Certain Jurisdictions — (I) *New York* — (A) *Demurrer to Complaint* — (1) Right to Costs. Under the New York statutes[74] the right of the successful party to costs is absolute, where in a common-law action a demurrer to the complaint is sustained or overruled, unless an issue of fact remains undisposed of, in which case costs are in the discretion of the court and may be denied either party or awarded either absolutely or to abide the event;[75] and an order granting costs on overruling the demurrer should expressly provide for taxation before the clerk of the county in which the action is brought or before the judge designated in the order.[76]

(2) Amount Taxable. Where a demurrer to the complaint is overruled, with leave to answer on payment of costs, plaintiff's proceedings before notice of trial are not at all affected, and consequently costs for such proceedings should not be taxed; but the costs should be limited to proceedings after notice and before trial, and a fee for the trial of the issue of law.[77]

(B) *Demurrer to Answer.* Under the New York code an interlocutory judgment sustaining a demurrer to part of an answer may properly award costs to the successful party and provide for execution to collect the costs;[78] but he is not entitled to recover costs as on a litigation and disposition of all the issues, but only the amount prescribed by statute on the determination of the single issue involved.[79] Where a demurrer is interposed to the whole answer, and the defendant does not avail himself of the permission to plead anew, final judgment will be entered for full costs.[80] According to some decisions, where a demurrer to an answer is sustained with leave to answer over, the taxable costs are those incurred after notice of trial and before trial and the trial fee,[81] and no others. Others hold that the plaintiff is also entitled to the fee for proceedings before notice of trial.[82]

fendant is not entitled when judgment is rendered to costs against the plaintiff whose name is so stricken out. Richardson *v.* Wolcott, 10 Allen (Mass.) 439.

71. Sturtevant *v.* Fairman, 4 Sandf. (N. Y.) 674, holding that in order to have such an effect it must be expressed to be "on payment," etc., or in other equivalent express terms. And *compare* Butts *v.* Chapman, 4 Fed. Cas. No. 2,257, 1 Cranch C. C. 570, where it was held that when an amendment is allowed on payment of costs, such payment is not a condition precedent to amendment, but may be enforced or await the event of the suit.

72. Sands *v.* McClelan, 6 Cow. (N. Y.) 582.

73. Wendell *v.* Lipsky, 8 N. Y. Civ. Proc. 388.

74. N. Y. Code Civ. Proc. § 3232.

75. Tallman *v.* Bernhard, 75 Hun (N. Y.) 30, 27 N. Y. Suppl. 6, 58 N. Y. St. 597, 23 N. Y. Civ. Proc. 284; Marsh *v.* Graham, 19 Misc. (N. Y.) 263, 44 N. Y. Suppl. 253; Kellar *v.* Shrady, 61 N. Y. Suppl. 1123; Olifiers *v.* Belmont, 33 N. Y. Suppl. 623, 67 N. Y. St. 329, 24 N. Y. Civ. Proc. 408. See also *infra*, VII, F, 10, b, (III).

76. Marsh *v.* Graham, 19 Misc. (N. Y.) 263, 44 N. Y. Suppl. 253.

77. Louis *v.* Empire State Ins. Co., 75 Hun (N. Y.) 364, 27 N. Y. Suppl. 83, 56 N. Y. St. 766; Anonymous, 3 Sandf. (N. Y.) 756; Marsh *v.* Graham, 19 Misc. (N. Y.) 262, 44 N. Y. Suppl. 253; Thompson *v.* Stanley, 22 N. Y. Suppl. 887; Crary *v.* Norwood, 5 Abb. Pr. (N. Y.) 219; Phipps *v.* Van Cott, 15 How. Pr. (N. Y.) 110.

78. Brassington *v.* Rohrs, 3 Misc. (N. Y.) 258, 22 N. Y. Suppl. 761, 52 N. Y. St. 171, 23 N. Y. Civ. Proc. 146.

79. Kneering *v.* Lennon, 3 Misc. (N. Y.) 247, 22 N. Y. Suppl. 775, 51 N. Y. St. 907; Basso *v.* Basso, 19 Abb. N. Cas. (N. Y.) 173.

80. Garrett *v.* Wood, 61 N. Y. App. Div. 294, 70 N. Y. Suppl. 359.

81. Garrett *v.* Wood, 61 N. Y. App. Div. 294, 70 N. Y. Suppl. 359; Jones *v.* Butler, 83 Hun (N. Y.) 91, 31 N. Y. Suppl. 401, 63 N. Y. St. 814; Garrett *v.* Wood, 23 Misc. (N. Y.) 7, 51 N. Y. Suppl. 651; Kneering *v.* Lennon, 3 Misc. (N. Y.) 247, 22 N. Y. Suppl. 775, 51 N. Y. St. 907.

82. Adams *v.* Ward, 60 How. Pr. (N. Y.) 288; Van Valkenburgh *v.* Van Schaick, 8

(II) *Wisconsin.* Under the Wisconsin statutes[83] it is competent for the court on ruling on a demurrer to require the unsuccessful party to pay costs, as a condition of pleading over;[84] but costs are not recoverable on an order overruling or sustaining a demurrer, except as a condition of answering or serving an amended pleading.[85]

(III) *Other Jurisdictions.*[86] Under the North Carolina statute[87] the complaint may be amended of course on the interposition of a demurrer, if this is done before the expiration of the time allowed for answering, but after the expiration of that time the defendant has a right to have his demurrer heard, and if the demurrer is sustained it is in the discretion of the judge to permit an amendment.[88] Under the South Carolina statutes, on overruling a demurrer to a complaint, the trial court may require the payment of all costs up to that time as a condition of leave to answer.[89] In Colorado the court may impose the payment of not less than five dollars or more than ten dollars into court for the use of the successful party as a condition for pleading over on the overruling of a demurrer.[90] In Connecticut where a statute provides that the plaintiff may amend his declaration during the first three days of the first term of the court without costs, and after that time in the discretion of the court as to payment of costs, and by rule of court amendments are to be allowed during the first term without costs, and after that time only on payment of costs, the matter of requiring costs on amendment made at the first term of the court still rests in the discretion of the court.[91]

b. Rules of General Application—(I) *On Failure to Demur.* In the absence of statutory provision to the contrary[92] failure of the defendant to demur when he should have done so does not bar his right to costs in the event of his success;[93] but he should not be allowed more costs than he would have gotten if the cause had been settled on demurrer.[94]

How. Pr. (N. Y.) 271; Collomb *v.* Caldwell, 5 How. Pr. (N. Y.) 336.

83. Wis. Rev. Stat. (1898), § 2686, provides that after the decision of a demurrer the court may allow the unsuccessful party to amend or plead over on terms.

84. Bishop *v.* Aldrich, 48 Wis. 619, 4 N. W. 775.

85. Case *v.* Fuldner, 110 Wis. 568, 86 N. W. 163; Schroeder *v.* Richardson, 101 Wis. 529, 78 N. W. 178; Schoenleber *v.* Burkhardt, 94 Wis. 575, 78 N. W. 343; Bishop *v.* Aldrich, 48 Wis. 619, 4 N. W. 775; Curtis *v.* Moore, 15 Wis. 134.

The remedy afforded by the statute is exclusive, on the familiar principle that statutory rights are to be exclusively enforced by statutory remedies, where such remedies are provided. Schroeder *v.* Richardson, 101 Wis. 529, 78 N. W. 178.

86. A Georgia statute providing that where a party has been negligent in respect to an amendment the court may as a condition of allowing an amendment compel him to pay his adversary the costs of the proceedings for which he moves is not affected by the act of Dec. 16, 1895. Ga. Acts (1895), pp. 45, 46; Haskins *v.* Throne, 101 Ga. 126, 28 S. E. 611.

87. Clarke Code Civ. Proc. N. C. § 272, which provides that any pleading may be once amended of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering expires.

88. Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386. See also Netherton *v.* Candler, 78 N. C. 88, where it was held that where a demurrer is interposed to a demurrable complaint it is error for the court to permit an amendment and overrule the demurrer; that the demurrer should be sustained and costs imposed on the plaintiff, and then the court may in its discretion permit an amendment.

89. Cheraw, etc., R. Co. *v.* White, 14 S. C. 51.

90. Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410; Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

91. Richardson *v.* Hine, 43 Conn. 201.

92. Mast *v.* Lehman, 100 Ky. 464, 38 S. W. 1056, 18 Ky. L. Rep. 949, holding, under a statute requiring a party to demur before filing further pleadings or to be liable for costs resulting from such failure, that defendant, who withdrew his demurrer to an insufficient complaint and answer, was not entitled to judgment for costs, consequent on the withdrawal of his demurrer, where judgment was rendered in defendant's favor on the pleadings, notwithstanding the verdict, on defendant's motion.

93. American Wire-Nail Co. *v.* Bayless, 91 Ky. 94, 15 S. W. 10, 12 Ky. L. Rep. 694. See also cases cited *infra*, note 95. *Contra*, Dawes *v.* Taylor, 35 N. J. Eq. 40; Brooks *v.* Byam, 4 Fed. Cas. No. 1,949, 2 Story 553.

94. Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 8 N. Y. Suppl. 834, 29 N. Y. St. 68; Shaw *v.* Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; Murray *v.* Graham, 6 Paige (N. Y.)

(II) *On Demurrer Sustained in Part and Overruled in Part.* It has been held that where a demurrer is sustained in part and overruled in part, neither party is entitled to costs as against the other.[95]

(III) *Where Issue of Fact Remains Undisposed of.* Where a statute authorizes an allowance of costs to the successful party on determining a demurrer, such allowance may be made, although an issue of fact remains undisposed of;[96] and under the New York statutes, the costs awarded include all the costs of the action, involving the trial of an issue of law, and an interlocutory judgment may be entered therefor.[97]

(IV) *On Demurrer to Answer Carried Back to Complaint.* Where a demurrer to an answer is carried back to the complaint, and plaintiff asks leave to amend, taxable costs of the demurrer on leave to amend fall on plaintiff.[98]

11. Issues Directed Out of Chancery. Where an issue is directed by a court of chancery to be tried by a jury the costs thereof are within the discretion of the court.[99]

12. Exceptions to Reports. On exceptions to a master's report the party who succeeds in a substantial particular is as a general rule entitled to costs.[1] If a single exception is taken to a commissioner's report and the chancery decision overruling it is affirmed on appeal, the party excepting is entitled to costs of special exception and appeal, under a decree in his favor "with costs."[2] If a party files exceptions to an account and fails to insist on it before the auditor appointed to hear them he is liable for the costs.[3]

VIII. RIGHT AS AFFECTED BY CHARACTER OF TERMINATION OF ACTION.

A. Voluntary Dismissal or Discontinuance by Plaintiff — 1. As to All Defendants — a. Right of Plaintiff to Costs. If plaintiff voluntarily dismisses or discontinues his action, he is not as a rule entitled to costs.[4]

622; Clark *v.* Banner, 21 N. C. 608; Reed *v.* Noe, 9 Yerg. (Tenn.) 283; Harland *v.* Bankers', etc., Tel. Co., 32 Fed. 305. See also Com. *v.* Morrison, 7 Ky. L. Rep. 665.

Failure of one of several defendants to demur.— Where one of several defendants fails to demur for non-joinder of a party, the bringing in of whom does not change the issues, he is not entitled to costs up to that time. Hand *v.* Burrows, 15 Hun (N. Y.) 481.

95. Benner *v.* Benner, 58 Hun (N. Y.) 609, 12 N. Y. Suppl. 472, 35 N. Y. St. 602; Hollingshead *v.* Woodward, 35 Hun (N. Y.) 410; Petrakion *v.* Arbelly, 76 N. Y. Suppl. 731, 23 N. Y. Civ. Proc. 183; Sargent *v.* Sargent Granite Co., 23 N. Y. Suppl. 886, 52 N. Y. St. 517; McGuire *v.* Briscoe, 16 Fed. Cas. No. 8,813*a*, 2 Hayw. & H. 54. *Compare* Adams *v.* Porter, 1 Cush. (Mass.) 170, where it was held that where the defendant in a bill of discovery demurs, and the demurrer was sustained as to certain formal parts of the bill and was overruled as to the residue, and was then withdrawn, and the bill amended, the defendant, notwithstanding the delay caused by filing the demurrer, should be entitled to his costs, on filing full and proper answers. And see Canon *v.* Ballard, 62 N. J. Eq. 383, 52 Atl. 352, holding, under a statute providing that if the demurrer to a bill be allowed the complainant shall pay costs, that if the demurrer to a bill for want of equity for multifariousness and non-joinder is sustained as to non-joinder only the demurring party is nevertheless entitled to costs. The statute is considered mandatory.

96. Meylin *v.* Woodford, 1 Blackf. (Ind.) 286; Doelger *v.* O'Rourke, 12 N. Y. Civ. Proc. 254; Adams *v.* Ward, 60 How. Pr. (N. Y.) 288.

97. Doelger *v.* O'Rourke, 12 N. Y. Civ. Proc. 254.

98. McCabe *v.* Cruikshank, 106 Fed. 649.

99. Decker *v.* Caskey, 3 N. J. Eq. 446; Com. *v.* Quinter, 2 Woodw. (Pa.) 377. See also Levy *v.* Levy, 28 Md. 25.

Feigned issues.— This rule has frequently been applied in respect to feigned issues. Carpenter *v.* Easton, etc., R. Co., 28 N. J. Eq. 390; Reigels' Appeal, 1 Walk. (Pa.) 72; Adler *v.* Goldsmith, 2 Lanc. L. Rev. 282; Peters *v.* Shanner, 1 Del. Co. (Pa.) 252. *Compare* Jarrard *v.* Zook, 1 Woodw. (Pa.) 406. But it is said that costs of such issue are usually awarded to the successful party. Carpenter *v.* Easton, etc., R. Co., 28 N. J. Eq. 390.

1. Sandford *v.* Clarke, 38 N. J. Eq. 265.

2. Pinchback *v.* McCraden, 1 Hill Eq. (S. C.) 413.

3. Funk's Estate, 1 Pa. Co. Ct. 430.

4. Todhunter *v.* Marshall, 32 Ind. 96; Miller *v.* Pentecost, 5 J. J. Marsh. (Ky.) 362.

Where, however, plaintiff's bill entitles him to relief, but is dismissed because of defendant's action, making unnecessary a decree for

b. Right of Defendant to Costs — (i) *Statement of Rule.* As a general rule where the plaintiff voluntarily dismisses or discontinues his action the defendant is entitled to costs.[5] Thus it has been held that an action cannot be discontinued after defendant's appearance without payment of costs;[6] after the defendant has retained an attorney;[7] after answer;[8] after plea in abatement has been sustained;[9] after a plea of the statute of limitations;[10] after reversal on appeal;[11] or after judgment for defendant has been reduced to a nominal amount on appeal and a new trial granted.[12] And it has been held that plaintiff must pay costs on dismissal or discontinuance, where an opinion is given in a suit in equity, involving the merits of the cause, but not decisive of plaintiff's right to proceed further.[13] So where plaintiff discontinues his action because the writ is lost or not returned defendant is entitled to costs.[14] The rule has also been held to apply where the plaintiff moves to dismiss for want of jurisdiction.[15] Where plaintiff is permitted to discontinue only the defendants who oppose the discontinuance should be awarded costs.[16]

(ii) *Limitations of Rule.* It is within the discretion of the court to permit an action to be discontinued without payment of costs[17] or without payment of all accrued costs.[18] Thus it has been held that the cause may be discontinued

the relief sought, it has been held that plaintiff is entitled to costs. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

Costs of motion to discontinue.— Notice of plaintiff's motion "for an order discontinuing this action without costs" does not warrant the granting of the costs of the motion to plaintiff, as in the notice they do not ask for costs of motion. Elliott *v.* Vermilyea, 59 N. Y. Suppl. 181.

5. *Connecticut.*— Wildman *v.* Munger, 70 Conn. 380, 39 Atl. 599.

Illinois.— Langlois *v.* Matthiessen, 155 Ill. 230, 40 N. E. 496; Schofield *v.* Settley, 31 Ill. 515; Kinman *v.* Bennett, 2 Ill. 326.

Indiana.— Sebrell *v.* Fall Creek Tp., 27 Ind. 86.

Iowa.— Acres *v.* Hancock, 4 Iowa 568.

Maine.— Watson *v.* Delano, 86 Me. 508, 30 Atl. 114.

Massachusetts.— Stevens *v.* Stevens, 1 Metc. 279.

Missouri.— North Missouri R. Co. *v.* Reynal, 25 Mo. 534; North Missouri R. Co. *v.* Lackland, 25 Mo. 515.

New York.— Banta *v.* Marcellus, 2 Barb. 373; Sweetzer *v.* Smith, 5 Silv. Supreme 178, 8 N. Y. Suppl. 156, 27 N. Y. St. 628; Ackroyd *v.* Newton, 24 Misc. 424, 53 N. Y. Suppl. 682; Weigan *v.* Held, 3 Abb. Pr. 462; Foster *v.* Bowen, Code Rep. N. S. 236; Tanner *v.* Tibbits, 19 Wend. 133; Saxton *v.* Stowell, 11 Paige 526; Perine *v.* Swaim, 2 Johns. Ch. 475; Raymond *v.* Redfield, 2 Edw. 196.

South Carolina.— Mason *v.* Winsmith, 17 S. C. 585; Floyd *v.* White, Dudley Eq. 40; Ramsay *v.* Marsh, Harp. 472.

Washington.— Thorndike *v.* Thorndike, 1 Wash. Terr. 175.

See 13 Cent. Dig. tit. "Costs," § 195.

Effect of mistake in notice of discontinuance.— A mistake in a notice of discontinuance that it is "with costs to plaintiff" instead of with costs to defendant is immaterial, since the statute gives costs to defendant in all cases of discontinuance. Slocomb *v.* Thatcher, 20 Mich. 52.

6. Whitney *v.* Brown, 30 Me. 557; Averill *v.* Patterson, 10 N. Y. 500; Bedell *v.* Powell, 13 Barb. (N. Y.) 183; Smith *v.* White, 7 Hill (N. Y.) 520.

7. Robinson *v.* Taylor, 12 Wend. (N. Y.) 191. See also Foster *v.* Bowen, Code Rep. N. S. (N. Y.) 236.

8. Wilkinson *v.* Wilkinson, 2 R. I. 414.

9. Hyde *v.* Cole, 1 Iowa 106.

10. Hausman *v.* Rosenfield, 18 Abb. Pr. (N. Y.) 379, where it was held that the fact that the defendant had no other defense was not a sufficient ground for permitting plaintiff to discontinue without costs.

11. Jaffray *v.* Goldstone, 62 Hun (N. Y.) 52, 16 N. Y. Suppl. 430, 41 N. Y. St. 901; Van Wyck *v.* Baker, 11 Hun (N. Y.) 309. See also Sherman *v.* Washtenau Cir. Judge, 52 Mich. 474, 18 N. W. 224.

12. Shaffer *v.* Currier, 13 Ill. 667.

13. Whitten *v.* Whitten, 5 Cush. (Mass.) 42.

14. Gilbreth *v.* Brown, 15 Mass. 178.

15. Reynolds *v.* Plummer, 19 Me. 22. See also Patterson *v.* Ball, 18 Fed. Cas. No. 10,823, 1 Cranch C. C. 571.

16. Bloomingdale *v.* Luchow, 70 N. Y. App. Div. 613, 617, 75 N. Y. Suppl. 28.

17. De Barante *v.* Deyermand, 41 N. Y. 355; Ackroyd *v.* Newton, 24 Misc. (N. Y.) 424, 53 N. Y. Suppl. 682; Sunney *v.* Roach, 4 Abb. Pr. (N. Y.) 16.

18. National Wall Paper Co. *v.* Szerlip, 9 N. Y. App. Div. 206, 41 N. Y. Suppl. 376, 75 N. Y. St. 787. Thus where a referee allows the time for making his report to expire on the ground that he does not know how to decide the case, and plaintiff moves for leave to discontinue without payment of costs on affidavits showing a partial success on his part, he should be allowed to discontinue without costs of the prosecution and trial on payment of motion costs. Lochlin *v.* Casler, 52 How. Pr. (N. Y.) 228.

without payment of costs, if a rule therefor is entered before appearance of defendant;[19] where a suit is discontinued before the return-day and no costs have been incurred by defendant before receiving verbal notice of the discontinuance;[20] where the defendant interposes a plea of infancy;[21] where he has obtained a discharge under the insolvent laws,[22] or a discharge under an act giving relief in cases of imprisonment;[23] where written notice of discontinuance is given (under a statute expressly authorizing it);[24] where the defendant has been sentenced to the state prison;[25] or where a person has been made a party unnecessarily, and without his authority.[26] So it has been held that where complainant had reason to suppose that the conduct of defendant was fraudulent, until the circumstances were explained by his answer, the bill may be dismissed without costs;[27] and in special proceedings the court may permit a discontinuance without costs, being expressly empowered by statute to do so.[28]

(III) *Effect of Counter-Claim or Set-Off.* On a dismissal the defendant's right to costs is not affected by his having filed a counter-claim which was afterward withdrawn.[29] If a cause in which the defendant has filed a set-off is referred, and the cause is thereafter dismissed for failure of either party to take out a commission, defendant is not entitled to costs, both parties being equally in default.[30]

2. As to One of Several Defendants. Ordinarily the plaintiff will not be permitted to discontinue as to one of several defendants without paying him his costs;[31] but he will only have to pay the costs of the defendant as to whom the discontinuance is entered.[32] If, however, a defendant who has no interest in the subject-matter in controversy sets up a claim, and insists on a declaration of his rights, a dismissal as to him will be made without costs.[33] And the court may in a proper case permit plaintiff to discontinue as to one defendant without payment

19. Averill *v.* Patterson, 10 N. Y. 500; Smith *v.* White, 7 Hill (N. Y.) 520.

20. Fullam *v.* Ives, 37 Vt. 659, holding that under such circumstances it is within the discretion of the court whether to give costs or not.

21. Cuyler *v.* Coats, 10 How. Pr. (N. Y.) 141; Van Buren *v.* Fort, 4 Wend. (N. Y.) 209. *Compare* Houseman *v.* Rosenfield, 18 Pr. (N. Y.) 379, where it was held that the fact that defendant pleads the statute of limitations and has no other defense is not sufficient ground to permit plaintiff to discontinue without costs.

22. Severy *v.* Bartlett, 57 Me. 416; Staiger *v.* Shultz, 4 Abb. Dec. (N. Y.) 293, 3 Keyes (N. Y.) 614, 3 Transcr. App. (N. Y.) 4, 3 Abb. Pr. N. S. (N. Y.) 377; Merritt *v.* Arden, 1 Wend. (N. Y.) 91; Case *v.* Belknap, 5 Cow. (N. Y.) 422; Hart *v.* Storey, 1 Johns. (N. Y.) 143; Clark *v.* Scofield, 16 Vt. 699.

Necessity for discharge in insolvency.— It has been held in one case that where after commencing suit the plaintiff discovers that the defendant is insolvent and unable to pay a judgment he may discontinue without costs. Reeder *v.* Seely, 4 Cow. (N. Y.) 548. But see Wheaton *v.* McGlade, 1 Wend. (N. Y.) 34, where it was held that an actual discharge is necessary.

A stipulation not to take advantage of discharge in insolvency as a defense to a suit does not affect the right to discontinue without payment of costs. Honeywell *v.* Burns, 8 Cow. (N. Y.) 121.

23. Ashworth *v.* Wrigley, 1 Hill (N. Y.) 160; Ludlow *v.* Hackett, 18 Johns. (N. Y.) 252.

24. Ballou *v.* Ballou, 26 Vt. 673.

25. Fort *v.* Palmerton, 19 Wend. (N. Y.) 94; Lackey *v.* McDonald, 1 Cai. (N. Y.) 116.

26. Taul *v.* Winn, 5 J. J. Marsh. (Ky.) 437.

27. Lupin *v.* Marie, 2 Paige (N. Y.) 169.

28. *In re* Wells Ave. Sewer, 12 N. Y. St. 567.

29. Thayer *v.* Holland, 11 Daly (N. Y.) 187.

30. Lapham *v.* Norris, 10 Cush. (Mass.) 312.

31. Ferguson *v.* State Bank, 11 Ark. 512; Fuller *v.* Miller, 58 Me. 40; Chase *v.* Dunham, 1 Paige (N. Y.) 572.

Where one of several defendants only brought into court.— In a suit against several joint debtors, where one only is brought into court, and plaintiff proceeds under the statute as if all were brought in, and the one brought in succeeds in establishing a personal defense, although plaintiff's cause of action was fully proved, plaintiff is not entitled to discontinue, without costs, as to defendant brought into court, having proceeded to trial with a full knowledge of the defense, and put defendant to the expense of proving his infancy; but it would be otherwise if plaintiff had been surprised on the trial with such defense. Leggett *v.* Boyd, 6 Wend. (N. Y.) 500.

32. Ganet *v.* Mears, 4 Wis. 306.

33. McKinnon *v.* McDonald, 57 N. C. 1, 72 Am. Dec. 574.

of costs, where it is by statute vested with discretion in the matter.[34] When a suit has been discontinued as to some of the defendants costs caused by them cannot be taxed against the other defendants.[35]

3. What Amounts to Discontinuance.[36] An amendment of the summons and declaration, amounting to abandonment of the original action, and an election to prosecute a new one, amounts to a discontinuance;[37] and so does a "misentry" in a cause that had been pending several terms because of the loss of the writ.[38]

B. Dismissal on Motion of Defendant. Where a suit is dismissed on motion of defendant he will ordinarily be entitled to costs. It is so held where the cause is dismissed for failure to prosecute;[39] on the ground that the plaintiff, a *feme sole*, has married pending suit;[40] or for failure of plaintiff to serve a copy of the complaint on defendant when this is required by statute.[41] So where a person is unnecessarily made a party the suit will be dismissed as to him with costs.[42] And where a writ is quashed on motion of defendant for errors apparent on its face the defendant is entitled to costs as the prevailing party.[43] Where a suit is dismissed on defendant's motion because no plaintiff is named in the writ costs will not be awarded because there is no one against whom an execution for costs could issue.[44] So a defendant is not entitled to costs on quashing plaintiff's writ before appearance entered, under a statute giving costs only after appearances.[45]

C. Dismissal For Want of Jurisdiction. There is some conflict of authority as to the power of the trial court to award costs on the dismissal of an action for want of jurisdiction. In a considerable number of decisions it is held that no costs can be awarded.[46] A considerable number of decisions, however, some of

34. Waterbury Mfg. Co. *v.* Krause, 1 Hilt. (N. Y.) 560. See also Butler *v.* Morris, 1 Bosw. (N. Y.) 329.

35. Clark *v.* Adams, 80 Tex. 674, 16 S. W. 552.

36. See, generally, Dismissal and Nonsuit.

37. Hagerty *v.* Hughes, 4 Baxt. (Tenn.) 222. *Compare* Tears *v.* Van Buren, 2 How. Pr. (N. Y.) 152.

38. Gilbreth *v.* Brown, 15 Mass. 178.

39. Tillspaugh *v.* Dick, 8 How. Pr. (N. Y.) 33; Cusson *v.* Whalon, 5 How. Pr. (N. Y.) 302, Code Rep. N. S. (N. Y.) 27; Moses *v.* Boney, 1 Nott & M. (S. C.) 38.

On denial of motion.— Where plaintiff has suffered the cause to go off the calendar, defendant's motion to dismiss for want of prosecution should be denied only on condition that plaintiff pay defendant's costs from the time he suffered the cause to be stricken, although plaintiff showed sufficient ground to deny the motion. Corbett *v.* Claflin, 17 Abb. Pr. (N. Y.) 418.

40. Haines *v.* Corliss, 4 Mass. 659.

41. Aultman *v.* Becker, 10 S. D. 58, 71 N. W. 753.

42. Paton *v.* Lancaster, 38 Iowa 494; Covenhoven *v.* Shuler, 2 Paige (N. Y.) 122, 21 Am. Dec. 73.

43. Lyford *v.* Bryant, 38 N. H. 88.

44. Jones *v.* Sutherland, 73 Me. 157; Gray *v.* Parker, 16 Vt. 652.

45. Coxe *v.* James, 9 N. J. L. 378.

46. *Massachusetts.*— Clark *v.* Rockwell, 15 Mass. 221; Williams *v.* Blunt, 2 Mass. 207; Osgood *v.* Thurston, 23 Pick. 110. The rule is now otherwise in this state, due perhaps to the change of statute. See also Massachusetts cases cited *infra*, note 47.

Michigan.— Crane *v.* Reeder, 23 Mich. 92.

New Hampshire.— Eames *v.* Carlisle, 3 N. H. 130.

New York.—Sullivan *v.* Frazee, 1 Rob. 616. The weight of authority is against this rule in New York. See also New York cases cited *infra*, note 47.

Rhode Island.— Hopkins *v.* Brown, 5 R. I. 357.

Tennessee.— Turner *v.* Farley, 3 Yerg. 300; Taul *v.* Collingsworth, 2 Yerg. 579. See also Cannon *v.* McAdams, 7 Heisk. 376; Evans *v.* Shields, 3 Head 70; Walker *v.* Snowden, 1 Swan 193. The first two cases cited here were decided before the enactment of a statute expressly authorizing the allowance of costs on dismissal for want of jurisdiction. The last three, which were decided since the enactment of said statute, but apparently without notice thereof, have been expressly overrruled in Nashville *v.* Wilson, 88 Tenn. 407, 12 S. W. 1082. See also Tennesseee cases cited *infra*, note 47.

Vermont.— Barlow *v.* Burr, 1 Vt. 488. Rule changed by statute. See *infra*, note 47.

Washington.— Thurston County *v.* Scammell, 7 Wash. 94, 34 Pac. 470.

Wisconsin.— Elderkin *v.* Spurbeck, 2 Pinn. 129, 1 Chandl. 69, 52 Am. Dec. 148.

United States.— Citizens' Bank *v.* Cannon, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451; Hornthal *v.* Keary, 9 Wall. 560, 19 L. ed. 560; Nashville *v.* Cooper, 6 Wall. 247, 18 L. ed. 851; Auer *v.* Lombard, 72 Fed. 209, 19 C. C. A. 72; Pentlarge *v.* Kirby, 20 Fed. 898; Cooper *v.* New Haven Steam Boat Co., 18 Fed. 588; Wenberg *v.* Cargo of Mineral Phosphate, 15 Fed. 285; Cumberland Bank *v.* Willis, 2 Fed. Cas. No. 885, 3 Sumn. 472; Burnham *v.* Rangeley, 4 Fed. Cas. No. 2,177,

them based on statutes, either expressly or by implication authorizing it, hold that costs may be awarded by the trial court on dismissal for want of jurisdiction;[47] and others hold that if the want of jurisdiction does not appear upon the face of the proceedings, and it is necessary that the defendant should appear and raise the objection in some appropriate form, costs should be awarded.[48] Where a suit is dismissed because the process was void for failure of the clerk issuing it to affix the seal of court, defendant will not be allowed costs because plaintiff was not at fault.[49]

D. Dismissal of Suit Prosecuted Without Authority. Where a suit is dismissed on the ground that it was not brought or prosecuted with the authority of the plaintiff, the court has no power to render judgment for costs against him.[50]

E. Dismissal or Discontinuance Where Further Prosecution Made Impossible by Law. Where an action is dismissed or the party permitted to

2 Woodb. & M. 417. See also Lowe *v.* Benjamin, 15 Fed. Cas. No. 8,565, 1 Wall. Jr. 187, holding that where a libel is dismissed for want of jurisdiction, apparent on its face, costs of suit cannot be awarded, but costs of motion to dismiss may.

See 13 Cent. Dig. tit. "Costs," § 197.

These decisions generally proceed on the ground that the court has no jurisdiction to award costs any more than to award damages or any other relief on the merits when the case is not legally before them. Pentlarge *v.* Kirby, 20 Fed. 898. See also cases cited *supra*, this note.

Where an appellee has not objected to the jurisdiction of the court on appeal costs will not be awarded to him on dismissal of appeal for want of jurisdiction. Maxfield *v.* Freeman, 39 Mich. 64.

47. *Alabama.*—Hilliard *v.* Brown, 103 Ala. 318, 15 So. 605; Westmoreland *v.* Hale, 11 Ala. 122. The last case cited is apparently based on a statute declaring that the unsuccessful party shall be liable for the costs.

Colorado.— Denver, etc., R. Co. *v.* Church, 7 Colo. 143, 2 Pac. 218.

Illinois.— *Dictum* in Kinman *v.* Bennett, 2 Ill. 324.

Indiana.— Dixon *v.* Hill, 8 Ind. 147.

Kentucky.—Moran *v.* Masterson, 11 B. Mon. 17. *Compare* Banks *v.* Fowler, 3 Litt. 332.

Maine.— Wentworth *v.* Wyman, 80 Me. 463, 15 Atl. 33; Call *v.* Mitchell, 39 Me. 465; Turner *v.* Putnam, 31 Me. 557, under statute allowing costs to prevailing party.

Massachusetts.— Elder *v.* Dwight Mfg. Co., 4 Gray 201; Hunt *v.* Hanover, 8 Metc. 343; Jordan *v.* Dennis, 7 Metc. 590; Cary *v.* Daniels, 5 Metc. 236, under statute allowing costs to prevailing party. So held also in Pratt *v.* Bacon, 11 Pick. 495, apparently without special statutory authority.

Mississippi.— Balfour *v.* Mitchell, 12 Sm. & M. 629.

Missouri.— Ensworth *v.* Curd, 68 Mo. 282, under statute allowing costs to prevailing or successful party.

New York.— Day *v.* Sun Ins. Office, 40 N. Y. App. Div. 305, 57 N. Y. Suppl. 1033; Simmons *v.* Cummins, 32 Hun 551; Thiem *v.* Madden, 27 Hun 371; Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 39 Barb. 16; King *v.* Poole, 36 Barb. 242; McMahon *v.* Mutual Ben. L. Ins. Co., 3 Bosw. 644. See also Burnhardt *v.* Rice, 21 N. Y. Civ. Proc. 331; *Ex p.* Benson, 6 Cow. (N. Y.) 592.

Tennessee.— Nashville *v.* Wilson, 88 Tenn. 407, 12 S. W. 1082, under statute authorizing allowance of costs on dismissal for want of jurisdiction.

Texas.— Baines *v.* Mensing, 75 Tex. 200, 12 S. W. 984, under statute authorizing allowance of costs to successful party.

Vermont.— Solomon Colony *v.* Maeck, 8 Vt. 114, under statute directing court to tax costs on dismissal for want of jurisdiction.

See 13 Cent. Dig. tit. "Costs," § 197.

Reason for rule.— According to some of the decisions, as the court must determine whether it has authority to entertain a particular controversy, it has to that extent jurisdiction over the parties and the subject-matter, and as an incident of the power to decide it has the power to award costs. Hilliard *v.* Brown, 103 Ala. 318, 15 So. 605.

Where, upon the failure of a party to perfect a change of venue applied for by him, the court sustains a motion to tax the costs against him, as provided by statute, and the sustaining of the motion is entered of record, but no judgment for such costs is rendered, the court has jurisdiction, upon a proper application made by the adverse party after the dismissal of the cause, to then enter the judgment. Lotz *v.* Scott, 119 Ind. 434, 21 N. E. 1087.

48. Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94; Thomas *v.* White, 12 Mass. 364; Lane *v.* Jones, 94 Mich. 540, 54 N. W. 283; Harriott *v.* New Jersey R., etc., Co., 1 Daly (N. Y.) 377; Chambers *v.* Feron, etc., Co., 56 N. Y. Suppl. 338.

Where an issue of fact must be passed upon by the court in order to reach the conclusion that it has no jurisdiction costs will be allowed on dismissal. State *v.* Meyes, 40 N. J. L. 252.

49. Tibbetts *v.* Shaw, 19 Me. 204.

50. Miller *v.* East School Dist., 26 Conn. 521; Town *v.* Greene, 32 Kan. 148, 4 Pac. 156. See also Imhoff *v.* Wurtz, 9 N. Y. Civ. Proc. 48.

discontinue, because a further prosecution is made impossible by act of law, as for instance by a repeal of the statute under which the action was brought,[51] or by the proclamation of emancipation, freeing the subject-matter of the suit,[52] no costs will be allowed the defendant, but each party must pay his own costs.

F. Discontinuance by Expiration of Justice's Term of Office. Where a cause is discontinued by the expiration of the justice's term of office, the writ having been returned almost three months before, plaintiff is not liable for costs, not being responsible for the course of litigation.[53]

G. Nonsuit. Ordinarily in the case of a nonsuit the defendant is entitled to costs;[54] but a judgment for costs is the only judgment which it is proper to enter.[55]

H. Abatement — 1. By Death of Party — a. Right of Parties to Costs. Where a suit or proceeding abates on the death of the plaintiff or defendant each party must pay his own costs up to that time,[56] unless the costs are payable out of

51. Dudley *v.* Greene, 35 Me. 14; Saco *v.* Gurney, 34 Me. 14; Thayer *v.* Seavey, 11 Me. 284; Cole *v.* Rose, 65 How. Pr. (N. Y.) 520. *Contra,* Turley *v.* Logan County, 17 Ill. 151. *Compare* Sumner *v.* Cummings, 23 Vt. 427, where it was held that where pending a penal action the statute authorizing such an action was repealed, and defendant moved to dismiss, and thereupon plaintiff procured a discontinuance, costs will be allowed defendant only from the time of filing the motion to dismiss.

52. Kidd *v.* Morrison, 62 N. C. 31.

53. Johnson *v.* Kingsbury, 28 Vt. 486.

54. *California.*— Fairchild *v.* King, 102 Cal. 320, 36 Pac. 649.

Iowa.— Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

Kentucky.— Dana *v.* Gill, 5 J. J. Marsh. 242, 20 Am. Dec. 255.

Maine.—Smith *v.* Allen, 79 Me. 536, 12 Atl. 542; Palmer *v.* Merrill, 57 Me. 26; Wesley *v.* Sargent, 38 Me. 315; Fuller *v.* Whipple, 15 Me. 53.

Mississippi.— Mississippi Cent. R. Co. *v.* Beatty, 35 Miss. 668.

Nebraska.— Sheedy *v.* McMurtry, 44 Nebr. 499, 3 N. W. 21.

New Hampshire.— Cate *v.* Nutter, 27 N. H. 515.

New York.— Allaire *v.* Lee, 4 Duer 609; Hogeboom *v.* Clark, 17 Johns. 268; Brown *v.* Lambert, 16 Johns. 148. See also Jackson *v.* Schauber, 4 Cow. 78.

Pennsylvania.— Hall *v.* Knapp, 1 Pa. St. 213.

South Carolina.— Benbow *v.* Richardson, 21 S. C. 601.

Wisconsin.—Combs *v.* Dunlap, 19 Wis. 591.

See 13 Cent. Dig. tit. "Costs," § 209.

Where a nonsuit was set aside and plaintiff ordered to pay costs of the term, and no exception was taken to the action of the court, and after verdict for plaintiff the defendant moved the court to tax plaintiff with all costs that accrued before the nonsuit, it was held that the refusal of the court so to do was not error. Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head (Tenn.) 116.

Where several defendants in an action of tort pleaded jointly in the common pleas, but severally in the supreme court, and there filed a joint specification of defense, and plaintiffs were nonsuited, defendants were entitled only to joint costs in the common pleas, but to several costs for travel and attendance in the supreme court. Fales *v.* Stone, 9 Metc. (Mass.) 316.

On motion for judgment as in case of a nonsuit, plaintiff on being allowed to stipulate to try the cause at the next term will be required to pay the costs of the motion. Anderson *v.* Johnson, 5 Sandf. (N. Y.) 1.

On motions for judgment, as in case of nonsuit, in two cases between the same parties, and alike in all respects, defendant is entitled to costs of motion in each case where plaintiff tendered a stipulation to try with an offer to pay the actual costs made up to the time of such tender. Gregory *v.* Travis, 1 How. Pr. (N. Y.) 92.

55. Thomason *v.* Southern R. Co., 113 Fed. 80, 51 C. C. A. 67.

56. *California.*— Begbie *v.* Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141.

Illinois.— Harvey *v.* Harvey, 87 Ill. 54.

Maine.— Ryder *v.* Robinson, 2 Me. 127.

Massachusetts.— Fales *v.* Stone, 9 Metc. 316; Cutts *v.* Haskins, 11 Mass. 56.

New Jersey.— Riggs *v.* Tyson, 1 N. J. L. 39; Benson *v.* Wolverton, 16 N. J. Eq. 110.

New York.— Travis *v.* Waters, 12 Johns. 500 [*affirming* 1 Johns. Ch. 85]; Johnson *v.* Thomas, 2 Paige 377.

North Carolina.— Brown *v.* Rainor, 108 N. C. 204, 12 S. E. 1028; Officers *v.* Taylor, 12 N. C. 99.

Ohio.— Farrier *v.* Cairns, 5 Ohio 45.

Pennsylvania.— Ebling's Estate, 9 Pa. Co. Ct. 138.

South Carolina.— Latta *v.* Surginer, 2 McCord 430.

See 13 Cent. Dig. tit. "Costs," § 180.

Where the estate of a defendant, dying pending suit, is decreed to be administered on as insolvent, the suit is thereby discontinued, and no costs can be awarded to or against persons summoned therein as trustees. Farnsworth *v.* Page, 17 N. H. 334.

Limitation of rule — Several parties on either side.— The decisions do not seem to be entirely harmonious as to the rule to be fol-

a particular fund or are connected with a duty toward the party claiming them.[57] If the suit abates after judgment and pending an appeal the same rule applies — each party must bear his own costs incurred prior thereto.[58]

b. Right of Officers to Costs. In the absence of express statutory authorization, no judgment for costs can be rendered in favor of the officers of the court against the survivor, where suit abates by the death of one of the parties.[59]

2. By Marriage. Where an action by a *feme sole* abates because of her marriage during its pendency the defendant will be entitled to costs.[60]

I. Judgment by Confession. Where a judgment is rendered by confession or a decree rendered on appeal taken as confessed the party in whose favor the decree or judgment is rendered is entitled to costs as being the prevailing party.[61]

IX. Right as Affected by Tender of Money or Offer of Judgment.

A. Source of Right to Save Costs by Offering Judgment. The right to offer judgment for the purpose of saving costs is purely statutory, and such right can be exercised only in the courts designating it.[62]

B. Effect of Acceptance — 1. Of Tender — a. Made Before Suit. Where defendant pleads tender before suit brought and pays the money into court, and plaintiff accepts the tender, the money will be paid over to plaintiff and judgment rendered against him for costs;[63] but if the money is not brought into court, the judgment should be against defendant for the amount of the tender and the costs.[64]

b. Made After Suit. If the plaintiff accepts a tender made after suit brought, the defendant pays the costs up to that time,[65] but he is not liable for any further costs;[66] and the plaintiff is liable for costs only after acceptance.[67]

lowed where one of several parties on either side dies. Thus in one decision it has been held that where one of several complainants dies, and the others have an option by statute to abandon the suit as abated or proceed with it, they cannot be subjected to costs if they elect not to do so. Pells *v.* Coon, Hopk. Ch. (N. Y.) 450. In another that if defendant obtains a verdict, in an action by husband and wife, and the wife dies before judgment, defendant may suggest her death on the record and take judgment for costs against the husband. Fowler *v.* Shearer, 7 Mass. 31. And in another that where two joint defendants had recovered, and plaintiff petitioned for review, pending which one of defendants died, the surviving defendant was entitled to costs as of course. Anonymous, 31 Me. 590.

57. Sears *v.* Jackson, 11 N. J. Eq. 45; Travis *v.* Waters, 12 Johns. (N. Y.) 500.

58. Begbie *v.* Begbie, 128 Cal. 154, 60 Pac. 667, 45 L. R. A. 141; Harvey *v.* Harvey, 87 Ill. 54.

Costs of appeal.— It has been held, under a statute providing that in all actions the attorney shall be allowed specific amounts for making and serving a case for appeal and for argument in the supreme court, where plaintiff in an action for tort on two appeals reverses the judgment of the lower court in defendant's favor, after which defendant dies, and the action abates, he is entitled to the costs of the appeals, although there be no final determination of the action. Huff *v.* Watkins, 25 S. C. 243. See also Cordray *v.* Barnes, 3 Rich. (S. C.) 281.

59. Prestridge *v.* Court Officers, 42 Ala. 405; Garrison *v.* Burden, 40 Ala. 513; Hollingsworth *v.* Bagley, 35 Tex. 345.

60. Haines *v.* Corliss, 4 Mass. 659.

61. Harvey *v.* Crawford, 2 Blackf. (Ind.) 43; Mattoon *v.* Pearce, 12 Mass. 406. See also Emery *v.* Downing, 13 N. J. Eq. 59.

Answering on payment of costs.— The defendant, coming in after a decree *pro confesso*, regularly taken upon any reasonable ground of indulgence, without unnecessary delay, will be permitted to answer, upon payment of costs, although the court may require to see the answer or to be informed of the nature of the defense. 1 Daniell Ch. Pr. 576.

Unnecessary costs.— Where a bill is taken as confessed, the taking of testimony to support it is irregular in ordinary cases and the costs of such testimony cannot be charged against defendant. Covell *v.* Cole, 16 Mich. 223.

62. Thompson, etc., Mfg. Co. *v.* Ferch, 78 Minn. 520, 81 N. W. 520.

63. Hanson *v.* Todd, 95 Ala. 328, 10 So. 354; Monroe *v.* Chaldeck, 78 Ill. 429; Haeussler *v.* Duross, 14 Mo. App. 103; Mela *v.* Geis, 3 N. Y. Civ. Proc. 152.

On acceptance of tender made before suit brought, the money having been paid into court, the plaintiff recovers no costs. Foote *v.* Palmer, Wright (Ohio) 336.

64. Monroe *v.* Chaldeck, 78 Ill. 429.

65. Murray *v.* Windley, 29 N. C. 201, 47 Am. Dec. 324.

66. Shant *v.* Southern, 10 Iowa 415.

67. Noland *v.* Pope, 7 J. J. Marsh. (Ky.) 137.

After appeal.— These rules apply where the

2. Of Offer of Judgment. Under the Maine statute[68] defendant is entitled to costs from the time of the offer, and plaintiff is entitled to no costs thereafter, although the offer was not accepted until a subsequent term.[69] Under the Missouri statute[70] it has been held that if defendant confess the cause of action in a sum below the jurisdiction of the court, and the judgment be rendered on the confession, he shall not recover costs.[71] Under one New York statute[72] where, after the making of an offer of judgment, both parties notice the cause for trial, and thereafter, and within the time allowed, the plaintiff serves a written notice accepting the offer, the defendant is not entitled to costs after the service of the offer, and plaintiff is only entitled to costs accruing before notice of trial;[73] and under another statute giving defendant costs as of course, where the recovery is insufficient to entitle the plaintiff to costs, if plaintiff accepts an offer of judgment for a less amount than will entitle him to costs defendant is entitled to costs.[74]

C. Effect of Refusal — 1. Where Judgment Recovered More Favorable Than Tender or Offer. Where the plaintiff recovers a judgment more favorable than the judgment offered, or for a larger sum or more complete relief than is tendered, the tender or offer will not in any way affect the defendant's liability for costs;[75]

tender after suit brought made in the trial court is accepted after appeal to the supreme court. Kennebec Purchase *v.* Davis, 2 Me. 352.

68. The Maine statute provides that if defendant offers judgment defendant recovers costs from that time, if plaintiff shall fail to recover a sum due at the time of the offer greater than the sum offered. Me. Rev. Stat. (1883), c. 82, § 25.

69. Hartshorn *v.* Phinney, 48 Me. 300.

For rule under former statute see Pingree *v.* Snell, 46 Me. 544; Mercer *v.* Bingham, 42 Me. 289; Pingree *v.* Snell, 42 Me. 53.

70. The Missouri statute provides that in any action defendant may, before the trial or judgment, serve on plaintiff an offer in writing to allow judgment to be taken against him for the sum or to the effect therein specified, and if plaintiff accept the offer and give notice thereof within ten days he may file the offer and an affidavit of notice or acceptance and judgment shall be entered accordingly. Mo. Rev. Stat. (1899), § 751.

71. Lee *v.* Stern, 22 Mo. 575, 576, where the court said: "We conceive it would be evidently against the spirit of the act to make the plaintiff lose his costs by an acceptance of the offer of the defendants. Such a construction would little harmonize with its policy, as in many cases it might prevent a compromise."

72. The statute provides that defendant may before trial serve on plaintiff's attorney a written offer to allow judgment for a specified sum, and that if plaintiff within ten days afterward serves a written notice of acceptance, he may file the summons and the offer with proof of acceptance with the clerk, who may enter judgment accordingly. N. Y. Code Civ. Proc. § 738.

73. Van Allen *v.* Glass, 60 Hun (N. Y.) 546, 15 N. Y. Suppl. 261, 39 N. Y. St. 676, 21 N. Y. Civ. Proc. 127.

On appeal from justice.— Under a statute providing that on appeal from a judgment for money only either party may, within fifteen days after service of notice of appeal, serve a written offer to allow judgment to be entered in the appellate court in favor of either party for a specified sum, and that the party refusing to accept the offer shall be liable for costs of appeal, unless the recovery be more favorable than the sum offered, where plaintiff on appeal to the county court accepts an offer of judgment, it was improper to order an entry of judgment for the sum offered and stay the taxing of plaintiff's costs, as they should have been taxed and included in the judgment as an incident to his recovery. Hollenback *v.* Knapp, 42 Hun (N. Y.) 207.

74. Johnson *v.* Sagar, 10 How. Pr. (N. Y.) 552. But *compare* Moffett *v.* Deom, 8 N. Y. Civ. Proc. 85, where it was held that if the plaintiff accepts offer of judgment for less than an amount which would carry costs he is not entitled to costs, and that the defendant by making the offer waived right to costs.

Under a statute denying costs when suit is settled before judgment, and the sum actually due and admitted is insufficient to carry costs, costs will not be denied where plaintiff's right to recovery had been litigated for a year and a half, and after a referee's report against defendant, and on the eve of judgment, defendant offers to pay the damages assessed by the referee and leave plaintiff to pay costs. Grosvenor *v.* Rogers, 3 Den. (N. Y.) 267.

75. *Connecticut.*— Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Canfield *v.* New Milford Eleventh School Dist., 19 Conn. 529.

Iowa.— Swails *v.* Cissna, 61 Iowa 693, 17 N. W. 39.

Kansas.— Atchison, etc., R. Co. *v.* Ireland, 19 Kan. 405.

Louisiana.— First Municipality *v.* Bell, 4 La. Ann. 121; Allen *v.* Wills, 4 La. Ann. 97.

Massachusetts.—Upton *v.* Foster, 148 Mass. 592, 20 N. E. 198; O'Connor *v.* Wyeth, 14 Allen 159. *Compare* Williams *v.* Ingersoll, 12 Pick. 345, which seems to maintain the contrary, under a rule of court.

Michigan.— Emerson *v.* Kinne, 110 Mich.

and it has been determined that this rule will apply notwithstanding the fact that the excess is trifling.[76]

2. Where Judgment Recovered Less Favorable Than Tender or Offer — a. In Case of Tender — (i) *Made Before Suit.* Where before suit brought[77] the defendant tenders to plaintiff the money or other relief to which he thinks he is entitled, and the plaintiff refuses to accept it, on failure to recover a more favorable judgment the plaintiff is not entitled to recover costs;[78] but on the other

678, 68 N. W. 982; Benedict *v.* Beurmann, 90 Mich. 396, 51 N. W. 461; Thompson *v.* Townsend, 41 Mich. 346, 1 N. W. 1042.

Missouri. — Williams *v.* Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689.

New Hampshire. — Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New York. — Dayton *v.* Parke, 67 Hun 137, 23 N. Y. Suppl. 613, 51 N. Y. St. 542; Fieldings *v.* Mills, 2 Bosw. 489; Thornall *v.* Crawford, 34 Misc. 714, 70 N. Y. Suppl. 63; Fargo *v.* Hamlin, 5 N. Y. St. 297.

North Carolina. — Stephens *v.* Koonce, 102 N. C. 266, 9 S. E. 315.

Pennsylvania. — Coleman *v.* Ross, 46 Pa. St. 180. See also Dresser *v.* Witherle, 9 Me. 111; Haley *v.* Newport Gas Light Co., 6 R. I. 582.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

On appeal from inferior court. — Where judgment is rendered for seventy dollars before a justice of the peace, and on appeal the circuit court adjudges that the plaintiff is entitled to recover fifty dollars tendered by defendant and the sum of twenty-two dollars, there is no reduction of the judgment of the justice, and the defendant is not entitled to costs. Taggart *v.* Ratts, 117 Ind. 138, 19 N. E. 763. It has been held that a statute providing that in suits before justices the defendant may tender to the plaintiff a judgment for the amount that he shall admit to be due, and if the plaintiff shall not accept the offer, and defendant shall appeal, plaintiff shall pay all costs of appeal on failure to recover a more favorable judgment, applies only to a case where the judgment is actually not greater on appeal, and not to a case where it ought not to have been greater. McGuire *v.* Morris, 6 Kulp (Pa.) 485.

76. Swails *v.* Cissna, 61 Iowa 693, 71 N. W. 39; Boyden *v.* Moore, 5 Mass. 365 (excess forty-one cents); Wright *v.* Behrens, 39 N. J. L. 413 (excess one dollar). But *compare* McKibbin *v.* Peters, 6 Pa. Dist. 67, 19 Pa. Co. Ct. 36, which seems to maintain the contrary doctrine.

77. What is commencement of suit. — The service of process is the commencement of suit, for the purpose of taxing costs; and where tender is made after the writ is in the hands of the officer but before service thereof, defendant will be entitled to costs if the cause proceeds to trial, and the plaintiff fails to recover a more favorable judgment. Randall *v.* Bacon, 49 Vt. 20, 24 Am. Rep. 100. See also Brown *v.* Ferguson, 2 Den. (N. Y.) 196, where the court held that a tender by defendant after plaintiff's attorney has brought and sent off the declaration to be tried, but before filing of service, is a tender before suit brought. And see, generally, Actions, 1 Cyc. 739.

78. *Colorado.* — Leis *v.* Hodgson, 1 Colo. 393.

Illinois. — Wagner *v.* Heckenkamp, 84 Ill. App. 323.

Kentucky. — Higgins *v.* Connor, 3 Dana 1; Sibert *v.* Kelly, 6 T. B. Mon. 669; Rucker *v.* Howard, 2 Bibb 166.

Mississippi. — Cook *v.* Martin, 5 Sm. & M. 379.

New York. — Archer *v.* Cole, 22 How. Pr. 411.

Pennsylvania. — Winebiddle *v.* Pennsylvania R. Co., 2 Grant 32; Beaver *v.* Whiteley, 3 Pa. Co. Ct. 613; Miller *v.* Plymire, 1 Walk. 233.

United States. — Wilcox *v.* Richmond, etc., R. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804.

Compare Redman *v.* Thomas, 39 Mo. App. 143.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

Instances. — In replevin, where a defendant before the retaking of his property, under an equitable defense, tenders the amount which he claims to be the only sum due plaintiff, and keeps the tender good, and a verdict is found in favor of plaintiff for a less sum than the tender, he is not entitled to costs. Archer *v.* Cole, 22 How. Pr. (N. Y.) 411. So a plaintiff obtaining a decree for specific performance, such as defendant had tendered prior to the commencement of a suit, is not entitled to recover costs. Sibert *v.* Kelly, 6 T. B. Mon. (Ky.) 669.

On change of venue. — If a cause instituted before a justice is removed by change of venue to another district, the defendant may deposit with the constable of the latter court the amount of the tender made by him before suit, and entitle himself to costs if the judgment against him does not exceed the tender. Griffith *v.* Jackson, 45 Mo. App. 165.

Return to defendant of amount deposited. — Since in Missouri a party making a deposit divests himself of all title and his adversary is entitled to the money, regardless of the result of the action, a return to the defendant of the amount deposited by the officer, in whose custody it was placed, is unauthorized, and does not affect the tender nor divest the defendant of the right to judgment for costs on plaintiff's failure to recover judgment for a larger amount. Griffith *v.* Jackson, 45 Mo. App. 165.

Taking money from officer not authorized to hold it. — The fact that the defendant takes money deposited with the constable from the clerk of court, to whom without authority

hand must pay defendant's costs.[79] This rule is not affected by the fact that costs may have been incurred preparatory to commencing suit, as costs are not incident to the action until it is actually pending.[80]

(II) *Made After Suit.* Where the defendant after suit brought makes tender of the amount of money or such other relief as he conceives the plaintiff is entitled to, the plaintiff is nevertheless entitled to recover costs up to the time of the tender, although he fail to recover a judgment more favorable than the tender,[81] but plaintiff recovers no other costs,[82] and must pay defendant's costs subsequent to tender.[83]

b. In Case of Offer of Judgment — (I) *In General.* Where an offer of judgment is refused by the plaintiff, and he fails to recover a more favorable judgment, he is nevertheless entitled to costs up to the time of the offer;[84] but

the latter has transferred it, does not deprive him of the benefit of the tender, where he afterward returns the money so the plaintiff has the benefit of it. Voss *v.* McGuire, 26 Mo. App. 452.

79. *Alabama.*— Schuessler *v.* Simon, 100 Ala. 422, 14 So. 203; Gallagher *v.* Witherington, 29 Ala. 420.

Indiana.— Prather *v.* Pritchard, 26 Ind. 65.

Iowa.— Johnson *v.* Triggs, 4 Greene 97.

Louisiana.— St. James Parish *v.* Hunsaker, 28 La. Ann. 291.

Maryland.— Gamble *v.* Sentman, 68 Md. 71, 11 Atl. 584.

Michigan.— Bowser *v.* Birdsell, 49 Mich. 5, 12 N. W. 888.

Missouri.— Seibert *v.* Oberle, 4 Mo. App. 565.

New York.— Pollacek *v.* Scholl, 51 N. Y. App. Div. 319, 64 N. Y. Suppl. 979; Logue *v.* Gillich, 1 E. D. Smith 398; Knight *v.* Beach, 7 Abb. Pr. N. S. 241.

North Carolina.— Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699.

Pennsylvania.—Walker *v.* West, 4 Pa. Dist. 85; German Lutheran Congregation *v.* Van Reed, 1 Woodw. 78.

South Carolina.— Shiel *v.* Randolph, 4 McCord 146.

Texas.— Burkitt *v.* McDonald, 26 Tex. Civ. App. 426, 64 S. W. 694.

Wyoming.— Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

80. Studwell *v.* Cooke, 38 Conn. 549.

81. New Brunswick State Bank *v.* Holcomb, 7 N. J. L. 193, 11 Am. Dec. 549; Sharpless *v.* Dobbins, 1 Del. Co. (Pa.) 25; Hinchie *v.* Foster, 4 McCord (S. C.) 253.

82. *Illinois.*— Frantz *v.* Rose, 89 Ill. 590.

Kansas.— Logan *v.* Hartwell, 5 Kan. 649.

Kentucky.— Bull *v.* Harragan, 17 B. Mon. 349.

New Jersey.— Wright *v.* Behrens, 39 N. J. L. 413; New Brunswick State Bank *v.* Holcombe, 7 N. J. L. 193, 11 Am. Dec. 549.

Ohio.— Hay *v.* Ousterout, 3 Ohio 384.

Pennsylvania.— Sharpless *v.* Dobbins, 1 Del. Co. (Pa.) 25.

83. *Georgia.*— Wing *v.* Blocker, 115 Ga. 778, 42 S. E. 67.

Illinois.— Frantz *v.* Rose, 89 Ill. 590; Sweetland *v.* Tuthill, 54 Ill. 215; Hollenberg *v.* Tompkins, 49 Ill. App. 323.

Kansas.— Elder *v.* Elder, 43 Kan. 514, 23 Pac. 600.

Maryland.— Columbian Bldg. Assoc. *v.* Crump, 42 Md. 192.

Michigan.— Snyder *v.* Quarton, 47 Mich. 211, 10 N. W. 204; Smith *v.* Curtiss, 38 Mich. 393.

New Hampshire.— Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New York.— Hill *v.* Place, 7 Roh. 389; Atkins *v.* Colton, 3 Wend. 326.

North Carolina.— Murray *v.* Windley, 29 N. C. 201, 47 Am. Dec. 324; Houghton *v.* Leary, 20 N. C. 14.

Pennsylvania.—Sharpless *v.* Dobbins, 1 Del. Co. 25.

Vermont.— Carpenter *v.* Welch, 40 Vt. 251.

Wisconsin.— Newton *v.* Allis, 16 Wis. 197.

United States.— The Rossend Castle, 30 Fed. 462.

On setting aside default judgment.—Where on motion of defendant the court set aside a judgment against him taken by default, and leave is given him to plead, on condition of paying costs to date and depositing in court the amount of the judgment, and on the trial plaintiff recovers a less amount than the former judgment, the deposit in court of the amount of the judgment, and the failure of plaintiff to prove that he was entitled to its full amount, does not render him liable for costs, as in case of a refusal to accept a proper tender. Hovey *v.* Middleton, 56 Ill. 468.

84. *California.*—Douthitt *v.* Finch, 84 Cal. 214, 24 Pac. 929.

Indiana.— Rose *v.* Grinstead, 53 Ind. 202.

Iowa.— Manning *v.* Irish, 47 Iowa 650.

Kansas.— Kaw Valley Fair Assoc. *v.* Miller, 42 Kan. 20, 21 Pac. 794.

Maine.— Higgins *v.* Rines, 72 Me. 440; Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

Massachusetts.— Madden *v.* Brown, 97 Mass. 148.

New York.— Magnin *v.* Dinsmore, 46 How. Pr. 297; Burnett *v.* Westfall, 15 How. Pr. 430; Keese *v.* Wyman, 8 How. Pr. 88; McLees *v.* Avery, 4 How. Pr. 441.

Ohio.— New York, etc., R. Co. *v.* Clark, 54 Ohio St. 509, 43 N. E. 1038.

Vermont.— Clark *v.* Rice, 6 Vt. 33.

he recovers no costs accruing after the offer,[85] and must pay defendant's costs accruing subsequent to the offer,[86] which the latter is entitled to have set-off against plaintiff's judgment.[87]

(II) *On Recovery of Less Favorable Judgment on Appeal.* The general rule applies where an offer to confess judgment in an inferior court is not accepted, and on appeal the plaintiff recovers a less amount than that offered. In such case he will be liable for costs of defendant accruing after the offer.[88] A statute permitting a judge to give or withhold costs in his discretion on a partial reversal of a judgment does not apply, where the amount due has been tendered before suit.[89] And the fact that between the original judgment in a justice's

Wisconsin.—Montgomery *v.* American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

85. *Kentucky.*— Evans *v.* Chapel, 13 Bush 121.

Maine.— Gilman *v.* Pearson, 47 Me. 352.

New York.— Guttroff *v.* Wallach, 3 Misc. 136, 22 N. Y. Suppl. 745, 51 N. Y. St. 495; Hirschspring *v.* Boe, 13 N. Y. Civ. Proc. 125, 20 Abb. N. Cas. 402; Wallace *v.* Markham, 1 Den. 671. See also Hecox *v.* Ellis, 19 Wend. 157.

North Carolina.— Russ *v.* Brown, 113 N. C. 227, 18 S. E. 107.

Wisconsin.— Sanderson *v.* Cream City Brick Co., 110 Wis. 618, 86 N. W. 169.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

Rule applicable where some of the plaintiffs are withdrawn.— A statute providing that if plaintiff does not accept an offer for judgment made before trial and fails to recover a sum equal to the offer, he cannot recover costs, applies to an action by several plaintiffs, in which leave is granted one of them, on his motion to strike out the names of the others after the offer is made, and the case proceeds in the name of the remaining plaintiff. Shearer *v.* Hutchinson County, 10 S. D. 9, 70 N. W. 1051.

Consolidated actions.—Where C recovered a judgment before a justice against M, and thereafter M brought suit against C before a justice and recovered a judgment, and both actions on appeal to the district court were consolidated and tried as one action, and a verdict rendered in favor of M for less than five dollars, it was held that the judgment would carry the entire costs of the consolidated action and of the case of M against C, notwithstanding the fact that C had in his action brought by him and before a trial in the justice's court offered in writing to consent to a judgment in favor of M in the action for five dollars. Cockerell *v.* Moll, 18 Kan. 154.

86. *California.*—Douthitt *v.* Finch, 84 Cal. 214, 24 Pac. 929.

Iowa.— De Long *v.* Wilson, 80 Iowa 216, 45 N. W. 764; Manning *v.* Irish, 47 Iowa 650.

Kansas.— Chicago, etc., R. Co *v.* Townsdin, 45 Kan. 771, 26 Pac. 427; Kaw Valley Fair Assoc. *v.* Miller, 42 Kan. 20, 21 Pac. 794; Wichita, etc., R. Co. *v.* Beebe, 38 Kan. 427, 17 Pac. 154.

Maine.— Higgins *v.* Rines, 72 Me. 440; Gilman *v.* Pearson, 47 Me. 352; Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

Massachusetts.— Madden *v.* Brown, 97 Mass. 148.

Missouri.— Rosenberger *v.* Harper, 83 Mo. App. 169.

Nebraska.— Wachsmuth *v.* Orient Ins. Co., 49 Nebr. 590, 68 N. W. 935.

New Hampshire.— Richey *v.* Cooper, 45 N. H. 414.

New York.— Kiernan *v.* Agricultural Ins. Co., 3 N. Y. App. Div. 26, 37 N. Y. Suppl. 1070, 73 N. Y. St. 870; Smith *v.* Kerr, 49 Hun 29, 1 N. Y. Suppl. 454, 17 N. Y. St. 351, 15 N. Y. Civ. Proc. 126; Niagara Falls Suspension Bridge Co. *v.* Bachman, 4 Lans. 523; Bulkley *v.* Back, 54 N. Y. Super. Ct. 300; Schneider *v.* Jacobi, 1 Duer 694; Hirschspring *v.* Boe, 13 N. Y. Civ. Proc. 125, 20 Abb. N. Cas. 402; Burnett *v.* Westfall, 15 How. Pr. 430; Keese *v.* Wyman, 8 How. Pr. 88.

Pennsylvania.— McLane *v.* Hoffman, 164 Pa. St. 491, 30 Atl. 399.

Vermont.— Clark *v.* Rice, 6 Vt. 33.

Wisconsin.—Sanderson *v.* Cream City Brick Co., 110 Wis. 618, 86 N. W. 169; Williams *v.* Ready, 72 Wis. 408, 39 N. W. 779; Kellogg *v.* Pierce, 60 Wis. 342, 18 N. W. 848.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

87. Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621; Bulkley *v.* Back, 54 N. Y. Super. Ct. 300; Gardner *v.* Davis, 15 Pa. St. 41.

88. *Indiana.*— Wallace *v.* Hays, 20 Ind. 252.

Iowa.— Watts *v.* Lambertson, 39 Iowa 272.

Michigan.— Wilcox *v.* Laflin, etc., Powder Co., 44 Mich. 35, 5 N. W. 1091.

Ohio.— Cohoon *v.* Kineon, 46 Ohio St. 590, 22 N. E. 722.

Pennsylvania.— Randall *v.* Wait, 48 Pa. St. 127; Gardner *v.* Davis, 15 Pa. St. 41.

South Carolina.— Williford *v.* Gadsden, 27 S. C. 87, 2 S. E. 858.

Wisconsin.— Erd *v.* Chicago, etc., R. Co., 41 Wis. 65.

See 13 Cent. Dig. tit. "Costs," § 159.

Recovery of less favorable in court of appeals.— Where a judgment for plaintiff more favorable than the offer is affirmed at the general term, but modified by the court of appeals, so that it becomes less favorable, the court of appeals will award no costs to either party in that court, but the defendant is entitled to costs subsequent to the offer, including costs of the general term. Sturgis *v.* Spofford, 58 N. Y. 103.

89. Wilcox *v.* Laflin, etc., Powder Co., 44 Mich. 35, 5 N. W. 1091.

court, which was for more than the offer, and the final judgment in the circuit, which was for less, there was an intermediate appeal, cannot, whatever be the result of that appeal, operate to render plaintiff any the less liable for all costs incurred by defendant subsequent to the offer.[90]

(III) *What Costs Included.* Where by the terms of a statute authorizing an extra allowance, such allowance cannot be made unless the party in whose favor it is claimed has recovered judgment, the costs to which defendant is entitled when plaintiff obtains a less favorable judgment will not include an extra allowance.[91] The word "costs," in statutes of the character under consideration, have been held to include disbursements.[92] A statute providing that plaintiff, recovering a judgment for less than what had been tendered, shall pay all "costs" which shall accrue on appeal, has been held to include defendant's attorney fee.[93]

D. What Is Essential to Make Tender Available — 1. In General. The offer must amount to a legal tender,[94] and be made according to the requirements of the statute authorizing it.[95] It must be absolute and unconditional.[96]

2. Necessity of Offering Costs and Interest. It should include costs up to the time of tender if made after suit brought.[97] It has been held that the party to whom a tender is made is not bound to inform the party making it of the costs that have accrued, if no inquiry is made regarding the same.[98] If the plaintiff is entitled to interest the tender must include interest.[99]

3. Necessity of Keeping Tender Good. The tender must be kept good;[1] and for this purpose it is the almost universal rule to require a deposit of the amount

90. Williford *v.* Gadsden, 27 S. C. 87, 2 S. E. 858.

91. Keese *v.* Wyman, 8 How. Pr. (N. Y.) 88; McLees *v.* Avery, 4 How. Pr. (N. Y.) 441, 3 Code Rep. (N. Y.) 104.

92. Woolsey *v.* O'Brien, 23 Minn. 71.

93. German Lutheran Congregation *v.* Van Reed, 1 Woodw. (Pa.) 78.

94. Woodruff *v.* Depue, 14 N. J. Eq. 168. See also Beard *v.* Heck, 13 York Leg. Rec. (Pa.) 17.

95. Mechanics', etc., Bank *v.* Barnett, 27 La. Ann. 177; Thompson *v.* Edwards, 23 La. Ann. 183; Rand *v.* Harris, 83 N. C. 486; Stakke *v.* Chapman, 13 S. D. 269, 83 N. W. 261.

96. Butler *v.* Metcalf, 17 Colo. 531, 30 Pac. 253; Butler *v.* Hinckley, 17 Colo. 523, 30 Pac. 250; Moore *v.* Vail, 13 N. J. Eq. 295; Leavitt *v.* Woods, 10 Wend. (N. Y.) 558. *Compare* The Pennsylvania, 22 Fed. 208.

Tender conditional on giving receipt in full for all demands is insufficient. Butler *v.* Metcalf, 17 Colo. 531, 30 Pac. 253.

97. *Illinois.*— Sweetland *v.* Tuthill, 54 Ill. 215.

Iowa.— Freeman *v.* Fleming, 5 Iowa 460; Powell *v.* Western Stage Co., 2 Iowa 50.

Massachusetts.—Emerson *v.* White, 10 Gray 351; Whipple *v.* Newton, 17 Pick. 168; Hampshire Manufacturers' Bank *v.* Billings, 17 Pick. 87.

New Hampshire.— Thurston *v.* Blaisdell, 8 N. H. 367.

New York.— Bernstein *v.* Levy, 68 N. Y. Suppl. 833; People *v.* Banker, 8 How. Pr. 258; Retan *v.* Drew, 19 Wend. 304.

Ohio.— Burt *v.* Dodge, 13 Ohio 131.

South Carolina.—Broughton *v.* Richardson, 2 Rich. 64; Hinchy *v.* Foster, 3 McCord 428.

Vermont.— Smith *v.* Wilbur, 35 Vt. 133. See also George *v.* Sunday, 1 Woodw. 364.

See 13 Cent. Dig. tit. "Costs," § 142.

Tender after impanelment of jury must include witness' fees of witnesses in court. Beard *v.* Heck, 13 York Leg. Rec. (Pa.) 17.

Tender on appeal from justice's court must include all costs up to time of tender. Storer *v.* Bohmann, 18 Ohio Cir. Ct. 884.

Travel and attendance fees of witnesses, subpœnaed in good faith by plaintiff to attend an approaching trial of a cause, must be included in the tender, where it is too late to countermand their attendance. Smith *v.* Wilbur, 35 Vt. 133.

98. Smith *v.* Wilbur, 35 Vt. 133.

Where the costs are either fixed by statute or easily determinable the failure of a party to state on request the amount of costs already accrued, so that the other party may tender the amount of damages and costs and relieve himself from further liability does not excuse a less tender. Willey *v.* Laraway, 64 Vt. 566, 25 Atl. 435.

99. Bernstein *v.* Levy, 68 N. Y. Suppl. 833.

1. *Illinois.*— Wagner *v.* Heckenkamp, 84 Ill. App. 323.

Kansas.— Saun *v.* Lashell, 45 Kan. 205, 25 Pac. 561.

New York.—Roosevelt *v.* Bull's Head Bank, 45 Barb. 579.

Vermont.— Davis *v.* Nelson, 73 Vt. 328, 50 Atl. 1094.

United States.— Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678; Ramirez *v.* Mexican Steamship Co., 107 Fed. 530; Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*.

See 13 Cent. Dig. tit. "Costs," § 137 *et seq.*

The duty rests upon a party making a tender to have the money at all times where the

tendered in court.[2] Unless this is done the money is not necessarily within the control of the plaintiff, who is entitled to it.[3]

4. Time of Making. Where a statute prescribes the time within which tender must be made it will be ineffectual if not made within the time prescribed.[4] In the absence, however, of any special statutory provision as to the time of making tender, a tender may be made at any time before suit brought.[5]

5. Necessity of Pleading. In order that a tender may be available to prevent costs it should be pleaded.[6] The plea should allege tender and payment into court of a specific sum, and should state with certainty when and under what circumstances such payment was made.[7]

E. What Is Essential to Make Offer of Judgment Available — 1. By Whom Made. The offer may be made by the defendant, his attorney of record, or his duly authorized agent.[8] Where there are several defendants, the decisions are not in harmony as to who must make the offer or the effect of an offer made by part of the defendants.[9]

opposite party can take it if he chooses to do so. Wagner *v.* Heckenkamp, 84 Ill. App. 323.

2. *Illinois.*— Monroe *v.* Chaldeck, 78 Ill. 429.

Iowa.— Johnson *v.* Triggs, 4 Greene 97.

New York.— Wilson *v.* Doran, 39 Hun 88; Hill *v.* Place, 7 Rob. 389; Falkenberg *v.* Bash, 33 Misc. 607, 67 N. Y. Suppl. 1111; Mull *v.* Jones, 18 N. Y. Suppl. 359, 45 N. Y. St. 643; Knight *v.* Beach, 7 Abb. Pr. N. S. 241; Brown *v.* Ferguson, 2 Den. 196.

Pennsylvania.— Seibert *v.* Kline, 1 Pa. St. 38; Harvey *v.* Hackley, 6 Watts 264; George *v.* Sunday, 1 Woodw. 364. But see Winebiddle *v.* Pennsylvania R. Co., 2 Grant 32.

Vermont.— Strusguth *v.* Pollard, 62 Vt. 157, 19 Atl. 228.

United States.— The Rossend Castle, 30 Fed. 462.

See 13 Cent. Dig. tit. "Costs," § 139.

See also Raiford *v.* Governor, 29 Ala. 382; Garner *v.* Crosswait, 6 T. B. Mon. (Ky.) 426. *Contra*, Klein *v.* Keyes, 17 Mo. 326.

3. Wilson *v.* Doran 39 Hun (N. Y.) 88. See also Johnson *v.* Triggs, 4 Greene (Iowa) 97.

4. Willey *v.* Laraway, 64 Vt. 566, 35 Atl. 435.

A statute allowing tender to be made in certain cases at any time "until three days before the commencement of the term," to which the action is returnable, includes from the period mentioned both the day on which the tender is made and the first day of the term. Willey *v.* Laraway, 64 Vt. 566, 35 Atl. 435.

If the statute provides for tender any time before trial the tender made after the jury is struck is too late and is of no effect. Beard *v.* Heck, 13 York Leg. Rec. (Pa.) 17.

5. Sweetland *v.* Tuthill, 54 Ill. 215.

6. Falkenberg *v.* Bash, 33 Misc. (N. Y.) 607, 67 N. Y. Suppl. 1111.

7. People *v.* Banker, 8 How. Pr. (N. Y.) 258.

A plea alleging tender after filing of the complaint will be demurrable, unless it expressly shows that the action had been commenced. Ireland *v.* Montgomery, 34 Ind. 174.

A defendant is not estopped, in a plea of tender to the plaintiff's attorney before the entry of the action, to allege that the sum tendered was the amount of the debt claimed and costs, because the declaration contains two counts, one of which is for money had and received to a larger amount than the sum tendered. Sawyer *v.* Baker, 20 N. H. 525.

8. See the statutes of the several states.

9. In New York it is held that an offer of judgment by one of several defendants is not available, unless the cause is in such a situation in regard to other defendants than those making the offer that the plaintiff on filing the offer can immediately take judgment against all for the amount or to the effect specified (Bannerman *v.* Quackenbush, 17 Abb. N. Cas. 103, 9 N. Y. Civ. Proc. 108; Griffiths *v.* De Forest, 16 Abb. Pr. 292; Brusle *v.* Gilmer, 16 Abb. Pr. 292 note; Bridenbecker *v.* Mason, 16 How. Pr. 203); but that when an offer is made by one or more defendants, and the suit is so situated that the plaintiff on accepting it may enter judgment to the effect offered against all the parties jointly liable with those making the offer, the plaintiff must accept it, or proceed at his peril as to the future costs (La Forge *v.* Chilson, 3 Sandf. 752, Code Rep. N. S. 159).

In North Carolina it is held that if there are several defendants the offer must be made by all the defendants or their common attorney. Williamson *v.* Lock's Creek Canal Co., 84 N. C. 629.

In Ohio it is held that where an offer is made by one defendant, he is entitled to judgment for his costs from the time of such offer, if a more favorable judgment is not recovered. New York, etc., R. Co. *v.* Clark, 54 Ohio St. 509, 43 N. E. 1038. See also Harris *v.* Dailey, 16 Ind. 183, where it was held that where a suit was brought by the holder of a note, to whom the payee had assigned it without writing and according to statute, the assignor was joined as defendant to answer as to the assignment, his name

2. NECESSITY FOR WRITTEN OFFER. If the statute so require the offer must be in writing.[10]

3. CONTENTS. While the disregard of unessential technicalities will not vitiate the offer,[11] it must nevertheless be so distinctly made that there is no room for conflicting affidavits as to the fact of its having been made.[12] It should be for a definite sum,[13] and must not include items other than those sued on.[14] It should be an offer to allow judgment, and not to pay a specified amount if plaintiff "will dismiss the action."[15] It must, if required by statute, also tender costs;[16] and should include interest if interest be due.[17]

4. SIGNATURE, ACKNOWLEDGMENTS, AND AFFIDAVITS OF AUTHORITY. The offer must be signed by the defendant,[18] by his agent,[19] or by his attorney.[20] And if the statute requires an affidavit showing the attorney's authority to be annexed to the offer it will be a nullity without such affidavit.[21] No amendment of an offer defective in this respect can be made;[22] nor does the plaintiff waive the defect by refusing the offer and proceeding in the action.[23] If made by the defendant himself no acknowledgment is necessary.[24]

5. TIME OF MAKING. Under a statute providing that defendant may before trial serve a written offer of judgment on plaintiff, which plaintiff may "within ten days thereafter" accept, etc., an offer to be of any effect must be served at

need not be noticed in an offer by the maker of the note to confess a judgment for a given sum, since the offer itself admitted the same and waived further proceedings.

10. Enos *v.* St. Louis, etc., R. Co., 41 Mo. App. 269; Dowd *v.* Smith, 8 Misc. (N. Y.) 619, 29 N. Y. Suppl. 821, 61 N. Y. St. 333; Bridenbecker *v.* Mason, 16 How. Pr. (N. Y.) 203.

Oral offer entered on docket.— It has been held that an oral answer of defendant, entered by a justice in his docket, that "defendant tenders judgment for six cents and costs up to date," is a sufficient compliance with a statute requiring a written offer of judgment. Williams *v.* Ready, 72 Wis. 408, 39 N. W. 779.

What amounts to offer in writing.— A writing duly signed by defendant's agent and read in presence of the parties to the plaintiffs by the agent, offering to allow plaintiffs to take judgment for a specified sum, and which is delivered to the justice, is an "offer in writing." Carpenter *v.* Kent, 11 Ohio St. 554.

11. Masterson *v.* Homberg, 29 Kan. 106.

12. Post *v.* New York Cent. R. Co., 12 How. Pr. (N. Y.) 552.

13. Smith *v.* Bowers, 3 N. Y. Civ. Proc. 72.

Reference to pleadings.— It has been held that an offer is sufficient, although it does not in terms specify the sum for which judgment is to be entered, if by reference to the pleadings it makes the amount easily ascertainable. Burnett *v.* Westfall, 15 How. Pr. (N. Y.) 420.

14. Phillips *v.* Shearer, 56 Iowa 261, 9 N. W. 218.

15. Quinton *v.* Van Tuyl, 30 Iowa 554.

16. Harter *v.* Comstock, 11 Ind. 525; Pape *v.* Chauvin-Fant Furniture Co., 25 Mont. 417, 65 Pac. 424; Loring *v.* Morrison, 25 N. Y. App. Div. 139, 48 N. Y. Suppl. 975; Ranney *v.* Russell, 3 Duer (N. Y.) 689; Warden *v.* Sweeney, 86 Wis. 161, 56 N. W. 647.

Offers held sufficient as to costs.— Offers of judgment with "accrued costs" (Rose *v.* Grinstead, 53 Ind. 202; Holland *v.* Pugh, 16 Ind. 21; Petrosky *v.* Flanagan, 38 Minn. 26, 35 N. W. 665) or "costs to date" (Keller *v.* Allee, 87 Ind. 252; Lynk *v.* Weaver, 128 N. Y. 171, 28 N. E. 508, 40 N Y. St. 349 [*overruling* Leslie *v.* Walrath, 45 Hun (N. Y.) 18]; Henderson *v.* Bannister, 1 N. Y. City Ct. 125) are not insufficient as excluding costs of carrying the offer into effect. They will be construed to include such costs.

17. Pape *v.* Chauvin-Fant Furniture Co., 25 Mont. 417, 65 Pac. 424.

18. Ossenkop *v.* Akeson, 15 Nebr. 622, 19 N. W. 709; Bridenbecker *v.* Mason, 16 How. Pr. (N. Y.) 203.

19. Bridenbecker *v.* Mason, 16 How. Pr. (N. Y.) 203, where it was held that the agent must be especially authorized to sign the offer. See also Randall *v.* Wait, 48 Pa. St. 127, where it was held that an offer of judgment in a justice's court may be made by an agent in defendant's absence.

20. Bridenbecker *v.* Mason, 16 How. Pr. (N. Y.) 203.

21. Riggs *v.* Waydell, 78 N. Y. 586 [*affirming* 17 Hun (N. Y.) 515]; Smith *v.* Kerr, 49 Hun (N. Y.) 29, 1 N. Y. Suppl. 454, 17 N. Y. St. 351, 15 N. Y. Civ. Proc. 126; McFarren *v.* St. John, 14 Hun (N. Y.) 387; Perine *v.* Wiggins, 10 N. Y. Suppl. 939, 18 N. Y. Civ. Proc. 172; Brown *v.* Nichols, 2 N. Y. City Ct. 153.

22. Riggs *v.* Waydell, 17 Hun (N. Y.) 515; Werbolowsky *v.* Greenwich Ins. Co., 5 N. Y. Civ. Proc. 303, 14 Abb. N. Cas. (N. Y.) 96 [*overruling* Eagan *v.* Moore, 2 N. Y. Civ. Proc. 300]; Brown *v.* Nichols, 2 N. Y. City Ct. 153.

23. Riggs *v.* Waydell, 78 N. Y. 586; Brown *v.* Nichols, 2 N. Y. City Ct. 153.

24. Pfister *v.* Stumm, 7 Misc. (N. Y.) 526, 27 N. Y. Suppl. 1000.

least ten days before the action is reached for trial.[25] Where a statute relating to "confessions of judgment at any time before a trial" provides that if plaintiff shall not recover a more favorable judgment, defendant shall recover from plaintiff the costs occasioned subsequent to the offer, and another statute relative to confessions of judgment "before an action for the recovery of money" provides that if plaintiff shall afterward commence an action and not recover more than the amount so offered to be confessed, he shall pay all costs of the action, an offer made before suit brought is not good, as the pendency of an action is clearly contemplated.[26]

6. Notice, Service, Etc. An offer of judgment by defendant to be effective must in some way be brought to the notice of the opposite party.[27] What steps will be effective for this purpose must of course depend on the provisions of the statute authorizing the offer. If the statute requires service of the offer of judgment on the opposite party such service is necessary to give the offer effect,[28] unless waived.[29] If the statute requires the offer to be made in open court, on notice to the opposite party, this is a condition precedent to the effectiveness of the offer.[30] So where statutes provide that after suit brought the defendant may offer in court to confess judgment for part of the amount claimed, etc., or that the defendant may at any time before trial serve on the plaintiff or his attorney an offer to allow judgment against him, an offer not made in open court nor served on the plaintiff out of court is insufficient.[31]

F. What Amounts to a Judgment More Favorable Than Offer or Tender — 1. In General. A judgment for a sum less than or equal to the amount offered

25. Herman *v.* Lyons, 10 Hun (N. Y.) 111, 2 Abb. N. Cas. (N. Y.) 90; Sares *v.* Matthews, 15 N. Y. Suppl. 510, 39 N. Y. St. 920; Walker *v.* Johnson, 8 How. Pr. (N. Y.) 240; Conroy *v.* Hulin, 7 How. Pr. (N. Y.) 161; Brown *v.* Nichols, 2 N. Y. City Ct. 153.

If served so late that the cause is reached and tried before the expiration of the ten days, the rights of the parties are in all respects as if no offer had been made. Walker *v.* Chilson, 65 Hun (N. Y.) 529, 20 N. Y. Suppl. 527, 48 N. Y. St. 203; Lippencott *v.* Goodwin, 8 How. Pr. (N. Y.) 242; Pomeroy *v.* Hulin, 7 How. Pr. (N. Y.) 161.

Offer made after amendment.— Under a statute authorizing the referee "on the trial" of an issue of fact to allow amendments to pleadings, an amendment can be allowed only after commencement of the trial; and therefore an offer of judgment not made until after the allowance of an amendment is not made "before trial," so as to escape liability for further costs in case a more favorable judgment is not recovered. Warner *v.* Babcock, 9 N. Y. App. Div. 398, 41 N. Y. Suppl. 493, 75 N. Y. St. 885.

26. Horner *v.* Pilkington, 11 Ind. 440.

27. Driesbach *v.* Morris, 94 Pa. St. 23.

28. Horner *v.* Pilkington, 11 Ind. 440; Thompson, etc., Mfg. Co. *v.* Ferch, 78 Minn. 520, 81 N. W. 520; Towner *v.* Remick, 19 Mo. App. 305; Friedman *v.* Eisenberg, 4 N. Y. Suppl. 551, 24 N. Y. St. 298.

Filing the offer and orally calling attention of counsel thereto was held a sufficient compliance with a statute requiring service of notice. Keller *v.* Allee, 87 Ind. 252.

Merely placing a written offer on file with the papers, although the plaintiff may have noticed that such offer has been made, is insufficient. Fike *v.* France, 12 Ohio St. 624.

Refusal to accept service.— Where an offer is made to deliver to the plaintiff a copy of the offer of judgment and the plaintiff refuses it the service is sufficient. Lieurance *v.* McComas, 59 Mo. App. 118.

Service on the attorney of the plaintiff is sufficient. Holland *v.* Pugh, 16 Ind. 21; Smith *v.* Kerr, 49 Hun (N. Y.) 29, 1 N. Y. Suppl. 454, 17 N. Y. St. 351, 15 N. Y. Civ. Proc. 126.

Where there are several plaintiffs each must be served with offer of judgment. Enos *v.* St. Louis, etc., R. Co., 41 Mo. App. 269.

29. Noonan *v.* Smith, 12 Abb. N. Cas. (N. Y.) 337.

30. Horner *v.* Pilkington, 11 Ind. 440; Madden *v.* Brown, 97 Mass. 148; Armstrong *v.* Spears, 18 Ohio St. 373; Fike *v.* France, 12 Ohio St. 624; New Providence Tp. *v.* Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. ed. 904.

31. Rose *v.* Peck, 18 Nebr. 529, 26 N. W. 363. See also Van Benthan *v.* Osage County Com'rs, 49 Kan. 30, 30 Pac. 111, where it was held, under statutes providing that where defendant serves a written offer to compromise on plaintiff, and he refuses to accept, etc., and another statute providing that after suit brought defendant may offer in court to confess judgment for a part of the amount claimed, that if the plaintiff is present in court when the offer is made and has had notice that the offer will be made, and of the time when it will be made, and the amount thereof, etc., defendant may give plaintiff notice of his intended offer, the time when he proposes to make it, and the

is not a more favorable judgment.[32] The amount of a judgment is not the only test of its favorableness.[33] The judgment and not the verdict determines the right to costs, where there has been an offer of judgment, because the court may disregard the verdict or reject it, or any portion of it.[34]

2. QUESTION HOW AFFECTED BY COMPUTATION OF INTEREST. Where a claim in suit is unliquidated no interest can be added to the sum offered, for the purpose of determining whether the judgment obtained is more favorable than that offered;[35] and in case of a claim which is not unliquidated the court, in determining whether the recovery is more favorable than the offer, will reject the interest which accrued between the time of the offer and the recovery of the judgment,[36] and will include interest computed only to the date of the offer.[37]

3. QUESTION HOW AFFECTED BY EXTINGUISHMENT OF SET-OFF OR COUNTER-CLAIM. Where upon a trial the plaintiff extinguishes a set-off or counter-claim of the defendant, which with the verdict obtained exceeds defendant's offer, plaintiff recovers a more favorable judgment and is entitled to costs.[38]

G. In What Actions Offer of Judgment May Be Made. Where a statute authorizes an offer of judgment it must be confined to the actions or proceedings which are clearly within its terms.[39]

amount thereof, or must call attention of the court to the offer when plaintiff is present in court.

32. Hammond *v.* Northern Pac. R. Co., 23 Oreg. 157, 31 Pac. 299.

33. Howard *v.* Farley, 29 How. Pr. (N. Y.) 4, 18 Abb. Pr. (N. Y.) 367, where it was held that where in an action to recover an instalment of interest due upon a bond secured by a mortgage, the principal of which was not due, the defendant offered to allow judgment for principal and interest, and the plaintiff pending judgment in form refused the offer, but subsequently recovered judgment for interest only, the latter judgment might be deemed more favorable than the offer, because on a judgment, according to the offer, the defendant might have paid off the principal immediately and compelled the plaintiff to seek another investment.

Where, in an action against partners, one of them, who alone was served with summons, offered to allow judgment to be taken against himself, and on a trial a joint judgment was recovered for the same amount, there was not an offer of as favorable a judgment as was finally obtained. Bannerman *v.* Quackenbush, 9 N. Y. Civ. Proc. 108.

34. Wallace *v.* American Linen Thread Co., 16 Hun (N. Y.) 404.

35. Johnston *v.* Catlin, 57 N. Y. 652; Thornall *v.* Crawford, 34 Misc. (N. Y.) 714, 70 N. Y. Suppl. 61; Brown *v.* Nichols, 2 N. Y. City Ct. 153.

36. Pike *v.* Johnson, 47 N. Y. 1; Schulte *v.* Lestershire Boot, etc., Co., 88 Hun (N. Y.) 226, 34 N. Y. Suppl. 663, 68 N. Y. St. 258; Smith *v.* Bowers, 3 N. Y. Civ. Proc. 72; Tilman *v.* Keane, 1 Abb. Pr. N. S. (N. Y.) 23; Budd *v.* Jackson, 26 How. Pr. (N. Y.) 398; Brown *v.* Nichols, 2 N. Y. City Ct. 153. To the same effect see Wordin *v.* Bemis, 33 Conn. 216; Kellogg *v.* Pierce, 60 Wis. 342, 18 N. W. 848.

37. Smith *v.* Bowers, 3 N. Y. Civ. Proc. 72.

38. Tompkins *v.* Ives, 36 N. Y. 75 [*affirming* 30 How. Pr. (N. Y.) 12]; Kautz *v.* Vandenburgh, 77 Hun (N. Y.) 591, 28 N. Y. Suppl. 1046, 60 N. Y. St. 496; Fielding *v.* Mills, 2 Bosw. (N. Y.) 489; Dowd *v.* Smith, 8 Misc. (N. Y.) 619, 29 N. Y. Suppl. 821, 61 N. Y. St. 333; Turner *v.* Honsinger, 31 How. Pr. (N. Y.) 66; Ruggles *v.* Fogg, 7 How. Pr. (N. Y.) 324; Brown *v.* Nichols, 2 N. Y. City Ct. 153; Tipton *v.* Tipton, 49 Ohio St. 364, 30 N. E. 826. *Contra*, Richey *v.* Cooper, 45 N. H. 414, and *compare* McClatchey *v.* Finley, 62 Iowa 200, 17 N. W. 469 (where it was held that in an action on a note where defendants pleaded failure of consideration and counter-claim, and judgment was rendered in their favor on said pleas, but for plaintiff on the note, defendant's offer to confess judgment for a less sum than adjudged plaintiff was not a waiver of his right to costs on said pleas, and did not affect his right to recover the same); Scoville *v.* Kent, 8 Abb. Pr. N. S. (N. Y.) 17.

Setting up offset after suit brought.— As a general rule the defendant will not be permitted to throw costs on plaintiff by proof of an offset purchased after the time of the offer to compromise or by making payments after such offer. But where the demand in suit is the primary debt of another, and the plaintiff sues as assignee of the account without having become the owner of the entire account, and the person primarily liable pays off part of the account to the person originally entitled to it, and before the plaintiff had made payment to such person, such plaintiff is in no position to claim any exemption from the rule prescribed for taxing costs. Colcord *v.* Conger, 10 Okla. 458, 62 Pac. 276.

39. People Sav. Bank, etc., Assoc. *v.* Collins, 27 Conn. 142; Hart *v.* Skinner, 16 Vt. 138, 42 Am. Dec. 500; McHugh *v.* Timlin, 20 Wis. 487.

Equitable actions.— A statute providing

H. Effect on Offer of Judgment of Amendment of Complaint. There seems to be some uncertainty as to the effect of an amendment of a complaint on an offer of judgment previously made. It has been held that where an amendment is permitted, which may have the effect of rendering the offer of no avail, for the purpose of preventing further costs, the court should at least permit an amendment of the offer to meet the new conditions presented by the amendment.[40] And again there are cases holding that an amendment, made after the time in which to accept the offer of judgment has passed, and which amendment does not materially change the issues, does not deprive the defendant of the benefit of his offer.[41]

I. Renewal of Offer of Judgment. Where an offer of judgment has not been accepted, the defendant may serve a second offer for a different amount before trial.[42] An offer duly made in an inferior court need not be repeated in an intermediate court, to which the cause has been taken on appeal.[43]

J. Fixing Time of Acceptance of Offer. By statutory provision defendant may be given the right to have the time fixed by the court within which plaintiff may accept his offer to be defaulted for a specified sum.[44]

K. Proof of Tender or Offer of Judgment. It seems that a tender or offer of judgment should be shown by the record and not proved by parol evidence.[45]

that defendant may before trial serve on plaintiff's attorney a written offer to allow judgment for a sum specified with costs, and that if plaintiff does not accept the same, and fails to obtain a more favorable judgment, he cannot recover costs from the time of said offer, applies to equitable actions. Singleton *v.* Home Ins. Co., 121 N. Y. 644, 24 N. E. 1021, 31 N. Y. St. 906; Kiernan *v.* Agricultural Ins. Co., 3 N. Y. App. Div. 26, 37 N. Y. Suppl. 1070, 74 N. Y. St. 417. *Contra,* Conolly *v.* Hyams, 42 N. Y. App. Div. 63, 58 N. Y. Suppl. 932; Stevens *v.* Veriane, 2 Lans. (N. Y.) 90.

Trespass.— An action of trespass *quare clausum fregit* is a personal action, within the meaning of a statute authorizing an offer of default in such actions for the purpose of giving defendant costs after the offer, in case plaintiff fails to recover a judgment more favorable than the offer. Boyd *v.* Cronan, 71 Me. 286. A trespass committed under a claim of right is not a "casual or involuntary trespass," within a statute which provides that on tendering sufficient amends therefor the trespasser, if afterward sued, may recover costs. Viall *v.* Carpenter, 16 Gray (Mass.) 285. So a tender after action brought for damages, occasioned by trespass on plaintiff's land, is not within a statute providing that any person "who may sue on any debt or demand payable in money" may tender to the "creditor" before an entry of an action at court, the amount of such debt or demand with interest and costs. Lawrence *v.* Gifford, 17 Pick. (Mass.) 366.

Assault and battery.— A statute precluding a plaintiff from recovering costs in an "action for the recovery of money only," accruing after an offer by defendant to allow judgment to be taken against him for a certain sum, if plaintiff fails to recover a larger sum, applies to a civil action for assault and battery. Clippenger *v.* Ingram, 17 Kan. 586.

Mortgages.— In a writ of entry on a mortgage, where defendant offered to be defaulted for the amount he admitted to be due, he was not entitled to costs, although the amount found due was less than plaintiff's original claim, under a statute giving such costs in actions founded on "judgments or contracts." Carson *v.* Walton, 51 Me. 382.

Unliquidated damages.— A statute providing that defendant may at any time before a jury is sworn, or a trial commenced, serve upon a plaintiff, or file with the justice, an offer in writing to allow judgment to be taken against him for the sum or to the effect therein specified, has been held to apply to actions for the recovery of unliquidated damages. Lieurance *v.* McComas, 59 Mo. App. 118. *Compare* Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

40. Brooks *v.* Mortimer, 10 N. Y. App. Div. 518, 42 N. Y. Suppl. 299.

41. Woelfle *v.* Schmenger, 12 N. Y. Civ. Proc. 24, 2 N. Y. City Ct. 154; Kilts *v.* Seeber, 10 How. Pr. (N. Y.) 270.

No amendment of the complaint can take from defendant the right ultimately secured by his offer of judgment. So held in Kilts *v.* Seeber, 10 How. Pr. (N. Y.) 270.

42. Hibbard *v.* Randolph, 72 Hun (N. Y.) 626, 25 N. Y. Suppl. 854, 56 N. Y. St. 431.

43. Kleffel *v.* Bullock, 8 Nebr. 336, 1 N. W. 250.

44. Me. Rev. Stat. (1857), c. 82, § 21. *Compare* Gilman *v.* Pearson, 47 Me. 352, holding that, although no time has been fixed by the court for acceptance of the offer, defendant will be entitled to costs in case the offer shall be accepted by plaintiff before trial. The offer is not void because no time is fixed for acceptance. To the same effect see Woodcock *v.* McCormick, 55 Me. 532.

45. Seibert *v.* Kline, 1 Pa. St. 38, holding that a tender of the amount due plaintiff in an action in a justice's court, which tender was made in order to charge plaintiff with costs, cannot be shown by parol, but must

X. RIGHT AS AFFECTED BY TENDER BY COMPLAINANT IN EQUITABLE ACTION.

Where one seeking equitable relief and who is not entitled thereto, without first paying defendant money or giving him other relief, makes a sufficient [46] tender, and the defendant refuses it, making it necessary to bring suit, defendant may be required to pay the whole costs.[47]

XI. RIGHT AS AFFECTED BY ABSENCE OF DEMAND BEFORE SUIT.[48]

Where it is a person's duty within a reasonable time after receipt of money belonging to another to pay it over, no demand is necessary before suit brought against him to recover it in order to entitle plaintiff to costs, and this is so, although no trust relation exists between the parties.[49] Where, however, a statute expressly provides that a demand for money or other relief sought to be recovered be made before suit brought, as a condition of the recovery of costs, the plaintiff is not entitled to costs, although successful in the action, in the absence of such demand.[50] So in equitable actions in which costs are largely in the discretion of the court, it may take into consideration the want of such demand in determining costs,[51] and not only deny costs to plaintiff,[52] but require him to pay costs.[53] If, however, defendant admits in his answer that he would not have complied with the demand if it had been made, the want of demand cannot affect plaintiff's right to costs if successful.[54]

XII. RIGHT AS AFFECTED BY DISCLAIMER.[55]

A defendant having no interest in the subject-matter of the action, in order

appear by the record of the justice. But see Bourda *v.* Jones, 110 Wis. 52, 85 N. W. 671, holding that where a statute authorizing an offer of judgment provides that it shall not be offered in evidence if not accepted or mentioned on the trial, the court may find that the judgment recovered was less than that offered, although the offer of judgment was not in evidence. And *compare* Jacobs *v.* Owen, 30 Oreg. 593, 48 Pac. 431, holding that where defendant alleged the tender and deposit in court of that part of the amount admitted to be due, a verdict in favor of plaintiff for that sum does not of itself show that the allegations of tender and deposit were found to be true, so as to entitle defendant to recover his costs without a special finding to that effect.

46. If money is tendered complainant should not recover costs on a judgment in his favor if he has failed to make the tender good by bringing the money into court. Galloway *v.* Barr, 12 Ohio 354; Dustin *v.* Newcomer, 8 Ohio 49. See also Sneed *v.* Town, 9 Ark. 535, where it was held that the plaintiff in equity must pay or bring into court all that he is in equity bound to pay before he can obtain the relief sought, and that the costs of the proceedings in equity up to the time of such payment will be decreed against him.

If the tender is insufficient the defendant, according to one decision, will be entitled to costs. Cree *v.* Lord, 25 Vt. 498. Another holds that if the failure to make the proper tender is not pleaded as a defense the costs must abide the result; but that if the defendant relies on the want of tender, and there is no unjustifiable resistance to taking a decree by the plaintiff, the court will require the plaintiff to pay the costs of the proceeding. Security Sav., etc., Co. *v.* Mackenzie, 33 Oreg. 209, 52 Pac. 1046. So another decision holds that if complainant after failure to make the requisite tender files an amendment containing such tender he should be required to pay the costs of the proceeding. Bare *v.* Wright, 23 Iowa 101.

47. Gage *v.* Goudy, (Ill. 1892) 29 N. E. 896.

48. For effect of failure to make demand in particular actions see, generally, ACTIONS, 1 Cyc. 694; CHATTEL MORTGAGES; CONTRIBUTION; DISCOVERY; EXECUTORS AND ADMINISTRATORS; MORTGAGES; MUNICIPAL CORPORATIONS; PRINCIPAL AND AGENT; REPLEVIN; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TAXATION; TRADE-MARKS; and the like special titles.

49. Chowen *v.* Felps, 26 Mont. 524, 69 Pac. 54.

50. Topsham *v.* Blondell, 82 Me. 152, 19 Atl. 93; Brewster *v.* Hornellsville, 54 N. Y. Suppl. 915.

51. Welland *v.* Huber, 8 Nev. 203.

52. Gilham *v.* Cairns, 1 Ill. 164; Brown *v.* Glines, 42 N. H. 160.

53. Condict *v.* Wood, 25 N. J. L. 319; Conover *v.* Walling, 28 N. J. Eq. 333.

54. Glen *v.* Fisher, 6 Johns. Ch. (N. Y.) 33, 10 Am. Dec. 310.

55. For matters relating to disclaimer see, generally, CREDITORS' BILLS; EJECTMENT; EMINENT DOMAIN; MORTGAGES; PARTITION;

to avoid payment of costs should promptly enter a disclaimer.[56] He should not make a defense if he wishes to be discharged without payment of costs.[57] He may be required to pay costs if the disclaimer is filed after answer.[58] And if his motion for dismissal is refused he cannot, after a trial on the merits, escape liability for costs, on the ground that he is not a proper party.[59] So where he has been guilty of fraud he cannot by disclaiming avoid responsibility for costs.[60] In equity, if the defendant disclaims and has given no cause for the suit, he will be entitled to costs.[61]

XIII. RIGHT AS AFFECTED BY SETTLEMENT OF CAUSE OUT OF COURT.

A. Right of Plaintiff to Recover Costs — 1. Where No Agreement Made as to Costs — a. Jurisdictions in Which Plaintiff Is Held Entitled to Costs. In some jurisdictions the rule is that where a cause of action is extinguished by agreement of the parties, whether by payment, compromise, release, or otherwise, the plaintiff will be entitled to costs, in the absence of some agreement in relation to the disposition of costs.[62]

b. Jurisdictions in Which Plaintiff May or May Not Be Entitled to Costs — (i) *When Costs Not Recoverable.* In other jurisdictions it is held that where a cause of action is extinguished by agreement between the parties, whether by payment, settlement, release, or otherwise, no agreement being made as to costs,

QUIETING TITLE; TRESPASS TO TRY TITLE; TROVER; WRIT OF ENTRY.

56. League *v.* State, 93 Tex. 553, 57 S. W. 34 [*affirming* (Tex. Civ. App. 1900) 56 S. W. 262].

57. Holman *v.* Norfolk Bank, 12 Ala. 369. See also Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23.

58. Etter *v.* Dignowitty, 77 Tex. 212, 13 S. W. 973; Dikes *v.* Miller, 24 Tex. 417.

59. Wilcox *v.* Goldsmith, 44 Iowa 573.

60. Costigan *v.* Howard, 100 Mich. 335, 58 N. W. 1116.

61. Usher *v.* Jouitt, 5 Litt. (Ky.) 32; Kennedy *v.* Davis, 2 Bibb (Ky.) 343; McKinnon *v.* McDonald, 57 N. C. 1, 72 Am. Dec. 574.

62. *Arkansas.*— Reid *v.* Hart, 45 Ark. 41; Greenhaw *v.* Arnold, 38 Ark. 461; Goings *v.* Mills, 1 Ark. 11.

Delaware.—Atherholt *v.* Robinson, 6 Houst. 428; Catts *v.* Clements, 6 Houst. 348.

Indiana.— Jeffersonville R. Co. *v.* Kalen, 39 Ind. 233; Jeffersonville R. Co. *v.* Weinman, 39 Ind. 231.

Kentucky.— Jarboe *v.* McAtee, 7 B. Mon. 279; McKoy *v.* Chiles, 5 T. B. Mon. 259.

Missouri.— Nettles *v.* Sweazea, 2 Mo. 100; Marshall *v.* Vincent, 58 Mo. App. 647. But see Thompson *v.* Union Elevator Co., 77 Mo. 520.

Ohio.—See Friedlander *v.* Avondale, 8 Ohio Cir. Ct. 608, in which it was held that where defendant voluntarily satisfies plaintiff's claim pending an appeal from judgment for plaintiff, the reviewing court will dismiss at defendant's costs. But *compare* Standard Oil Co. *v.* Valley R. Co., 7 Ohio Cir. Ct. 442, in which it was held that when a claim is settled before judgment, nothing being said about costs, the court may award the same against either or both parties in its discretion. And see Campton *v.* Griffith, Wright 321, for the rule prevailing in the chancery court before it was abolished — it being held in such case that neither party is entitled to costs.

Pennsylvania.— Wagner *v.* Wagner, 9 Pa. St. 214; Posten *v.* Mead, 2 C. Pl. 215. *Contra*, McCoy *v.* Loughery, 11 Phila. 302, 33 Leg. Int. 158.

Tennessee.— State *v.* Dail, 3 Heisk. 272.

Texas.— Altgelt *v.* San Antonio, (Civ. App. 1900) 55 S. W. 761.

Vermont.— Belknap *v.* Godfrey, 22 Vt. 288. In chancery cases in this state it has been held that the court may grant leave to discontinue without costs where the cause is compromised. Beardsley *v.* Hatch, 11 Vt. 151.

Virginia.— Hudson *v.* Johnson, 1 Wash. 10. See 13 Cent. Dig. tit. "Costs," § 171 *et seq.*

Pleading settlement puis darrein continuance.— In a number of decisions it is held that where settlement is pleaded *puis darrein continuance* the plaintiff is entitled to costs up to the time of filing the plea. Hitt *v.* Lacey, 3 Ala. 104, 36 Am. Dec. 440; Greenleaf *v.* Allen, 83 Me. 333, 22 Atl. 221; Nettles *v.* Sweazea, 2 Mo. 100. See also Moore *v.* Emerick, 38 Ark. 203, where it was held that a plea in an action of debt that before suit commenced plaintiff had in another state sued and attached defendant's property, which since the later suit had been sold, and the debt fully satisfied, will not bar a judgment for costs.

Release executed by one plaintiff.— A release executed after an action has been commenced to recover the penalty for a failure to enter satisfaction of a mortgage on the record, the release being executed by one of plaintiffs alone, without the other's assent, does not "bar the expense of the suit theretofore incurred." Harris *v.* Swanson, 67 Ala. 486.

the plaintiff cannot recover costs.[63] This rule has been held to apply as well in equity as at law, although the question of costs be reserved for the decision of the chancellor;[64] and it has also been held to apply, whether the parties make the settlement themselves or submit it to others to make for them.[65]

(II) *When Costs Recoverable.* Where, however, payment is made to one not having authority to bind the plaintiff by receiving the same, without the knowledge or sanction of the plaintiff, the situation is as though a tender merely had been made, or the money had been paid into court, and there is no such acceptance as bars the right to costs.[66] It has also been held that the payment of a chattel mortgage by the mortgagor, during the progress of an action by the mortgagee against a trespasser for the conversion of the mortgaged property, does not deprive the mortgagee of his right to costs.[67] And in an action of debt on a bond, where it appeared that the condition was performed after the commencement of the action, so that on a hearing judgment is awarded for nominal damages only, plaintiff was held entitled to full costs.[68]

2. Where Agreement Is Made as to Costs. Where an agreement to pay costs is entered into, such agreement includes only the costs which may be legally allowed.[69] On the settlement of a suit an agreement to pay costs,[70] or waiving the right to

63. *Connecticut.*— Buell *v.* Flower, 39 Conn. 462, 12 Am. Rep. 414; Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Canfield *v.* Eleventh School Dist., 19 Conn. 529.

Illinois.— Morgan *v.* Griffin, 6 Ill. 565; Skinner *v.* Jones, 5 Ill. 193; Poppers *v.* Meager, 33 Ill. App. 20.

Massachusetts.— Davis *v.* Harrington, 160 Mass. 278, 35 N. E. 771. See also Moore *v.* Cutter, 3 Allen (Mass.) 468, in which it was held that the court had power to refuse costs to defendant, although by oversight the cause remained on the docket after settlement. But *compare* Marshall *v.* Merritt, 97 Mass. 516, which is not in accord with the rule stated in the text.

New Hampshire.— Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

New Jersey.— Den *v.* Pidcock, 12 N. J. L. 363; Anderson *v.* Exton, 4 N. J. L. 173; Bruce *v.* Gale, 13 N. J. Eq. 211.

New York.— Pulver *v.* Harris, 62 Barb. 500; Bendit *v.* Annesley, 42 Barb. 192; Warfield *v.* Watkins, 30 Barb. 395; Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. 681, 42 N. Y. Suppl. 14; Keeler *v.* Van Wie, 49 How. Pr. 97; Munn *v.* Greenwood, 1 How. Pr. 32; Johnson *v.* Brannan, 5 Johns. 267, 268; Watson *v.* De Peyster, 1 Cai. 66.

South Carolina.—Montgomery *v.* Harson, 1 Brev. 480.

Wisconsin.—Two Rivers Mfg. Co. *v.* Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131; Geiser Threshing-Mach. Co. *v.* Smith, 36 Wis. 295, 17 Am. Rep. 494.

See 13 Cent. Dig. tit. "Costs," § 171 *et seq.*

Reason for rule.— See Bendit *v.* Annesley, 42 Barb. (N. Y.) 192; Two Rivers Mfg. Co. *v.* Beyer, 74 Wis. 210, 218, 42 N. W. 232, 17 Am. St. Rep. 131, where the court says: "Costs are merely incidental to an action based on a sufficient cause of action, and are not part of it, but the creature of the statute, which can only follow a judgment or final determination of the action, in which the cause of action is merged. An action cannot he brought merely for the costs thereof, nor can an action be maintained, after the cause of action has been removed, merely for the costs thereof, for they would be no longer incidental, but the principal of the suit."

Payment before service of process.— Where the claim is paid on the filing of the original notice, and no suit has been commenced by service, no right to costs arises. Reynolds *v.* Hamil, Code Rep. N. S. (N. Y.) 230.

64. Bruce *v.* Gale, 13 N. J. Eq. 211; Stewart *v.* Ellice, 2 Paige (N. Y.) 604; Eastburn *v.* Kirk, 2 Johns. Ch. (N. Y.) 317; Campton *v.* Griffith, Wright (Ohio) 321. See also Green *v.* Chandler, 25 Tex. 148, where it was held that where a vendor sued a purchaser for the balance of the purchase-money, and defendant showed that the bond for title having been found fraudulently defective he had given notice of renunciation of the contract, and plaintiff some months after the suit cured the defect, it was inequitable to decree that defendant pay the costs.

65. Anderson *v.* Exton, 4 N. J. L. 173; Walpole *v.* Griffin, Wright (Ohio) 95.

66. Moffatt *v.* Henderson, 48 N. Y. Super. Ct. 449. See also Bogardus *v.* Richtmeyer, 3 Abb. Pr. (N. Y.) 179, where it was held that where after suit brought, the amount sued for is paid to plaintiff's agent, who has no knowledge of the suit, plaintiff will nevertheless be entitled to costs.

67. Millar *v.* Olney, 80 Mich. 293, 45 N. W. 140.

68. Hudson *v.* Tenney, 6 N. H. 456.

69. Wallace *v.* Coates, 1 Ashm. (Pa.) 110.

Attorneys' fees.— An agreement to pay costs includes only costs which follow the judgment and not attorneys' fees. Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489.

70. Martin *v.* White, 1 Bibb (Ky.) 583.

Parol undertaking to pay costs.— An agreement under seal containing no provision as to costs, which compromises a suit, does not prevent either party from setting up and proving a parol undertaking, that one of the

costs,[71] is binding and enforceable. Where persons severally liable are united as defendants, but appear by different attorneys and answer separately, and, after issue joined and after the action has been noticed for trial, settle, and, as part of the terms of settlement, agree to pay plaintiff the legal costs of the action, plaintiff is entitled to only one bill of costs.[72]

B. Right of Defendant to Recover Costs. In a number of chancery decisions, it has been held that if the parties settle the cause, reserving the question of costs, the court will not hear the cause on the question of costs merely, and the defendant as well as the plaintiff must pay his own costs;[73] so in many other decisions it seems to be held without qualification that in the absence of any agreement as to costs the defendant is not entitled to recover any costs on a settlement of the cause of action.[74] On the other hand some decisions hold broadly that the defendant is entitled to costs on a settlement;[75] and other decisions hold that where defendant pleads payment, or some other method of extinguishment of a cause of action, and is successful, he will be entitled to costs.[76] Again it has been held that where the plaintiff makes costs by an ineffectual resistance to the execution of his agreement to discontinue defendant is entitled to costs.[77] So too it has been held that if the plaintiff fails to discontinue the action as soon as it is settled he is liable for subsequent costs.[78] It has also been held that where plaintiff settles a suit on a joint and several obligation against several defendants, who defend separately, some of them without the concurrence of the others, he is liable for costs to defendants with whom he did not settle.[79]

XIV. WHO ENTITLED TO COSTS.

A. Plaintiffs. Where suit is brought in the name of one person for the use of several, and the suit is successful, only one bill of costs can be allowed.[80] If there are several plaintiffs, some of whom are successful, they are entitled to a full bill of costs, less such charges as relate exclusively to the plaintiffs who have

parties should pay the costs that had accrued. This does not contradict or vary the written agreement, but is distinct and independent of it. Morancy *v.* Quarles, 17 Fed. Cas. No. 9,788, 1 McLean 194.

71. Coburn *v.* Whitely, 8 Metc. (Mass.) 272.

72. Latham *v.* Bliss, 6 Duer 661.

73. Bruce *v.* Gale, 13 N. J. Eq. 211; Stewart *v.* Ellice, 2 Paige (N. Y.) 604; Eastburn *v.* Kirk, 2 Johns. Ch. (N. Y.) 317; Campton *v.* Griffith, Wright (Ohio) 321; Walpole *v.* Griffin, Wright (Ohio) 96. *Compare* Allen *v.* Lewis, 74 Ala. 379, where it was held that when the defendant in an equitable action purchases the plaintiff's asserted cause of action, and the plaintiff refuses to dismiss according to agreement, thus forcing the defendant to set up the release in bar, the exercise of the chancellor's discretion is called into requisition, and the decree imposing costs on the defendant, if erroneous, cannot be reviewed.

74. *Illinois.*— Morgan *v.* Griffin, 6 Ill. 565.

New Hampshire.— Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

New Jersey.— Den *v.* Pidcock, 12 N. J. L. 363; Anderson *v.* Exton, 4 N. J. L. 173.

New York.— Johnson *v.* Brannon, 5 Johns. 268; Watson *v.* De Peyster, 1 Cai. 66.

Pennsylvania.— Posten *v.* Mead, 2 C. Pl. 215.

See 13 Cent. Dig. tit. "Costs," § 171 *et seq.*

Under a statute making plaintiff liable for costs for failure to enter an action after service of summons, the plaintiff is not liable for costs where a suit is settled after action commenced, and the officer in disobedience of plaintiff's orders nevertheless served summons. Frazier *v.* Merrill, 31 N. H. 496. And under this statute where an action commenced against two persons jointly is settled by one of them with the assent of the other, the latter cannot recover costs from plaintiff on failure to enter the action. Carlton *v.* Choate, 6 N. H. 138.

75. Coburn *v.* Whitely, 8 Metc. (Mass.) 271; Wilson *v.* Pharr, 47 N. C. 451, under a statute expressly providing for an allowance of full costs to defendant on nonsuit of plaintiff.

76. Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. (N. Y.) 681, 42 N. Y. Suppl. 14; Keeler *v.* Van Wie, 49 How. Pr. (N. Y.) 97; New York Dry Dock Co. *v.* McIntosh, 5 Hill (N. Y.) 505. See also Leavitt *v.* Harpswell School Dist., 78 Me. 574, 7 Atl. 600.

77. Staples *v.* Wellington, 62 Me. 9.

78. Sanborn *v.* Sanborn, 41 N. H. 306. See also Lewis *v.* Jewett, 51 Vt. 378, in which it was held that defendant is entitled to recover all costs accruing after plaintiff had received payment *pendente lite*.

79. Clark *v.* Wood, 9 Wend. (N. Y.) 435.

80. Thomas *v.* Sever, 12 Mass. 329; Dowes *v.* Bell, 4 Mass. 106; Paine *v.* McIntier, 1

failed.[81] If several defendants appear by separate attorneys and interpose separate defenses, and separate judgments may be rendered against each defendant, plaintiff, if successful, is entitled to as many bills of costs as there are defendants.[82] If a bill is brought to revive and execute a decree, representatives of complainant in the original bill who paid the costs allowed in the bill to revive and execute the decree are entitled to recover all costs to the exclusion of the other complainants.[83]

B. Persons Improperly or Unnecessarily Made Defendants. It has been held that if one who has no interest in the cause and against whom no relief can be given answers, the bill will be dismissed as to him with costs;[84] but it has been held that one who is unnecessarily made a party is not entitled to costs of making a defense where a defense is not necessary to protect his rights,[85] and where in a court of chancery parties are erroneously made by the court's own direction costs should not be given against complainant.[86]

C. Defendants Not Served With Process or Not Answering. A defendant who has not been served with process, and who has not appeared,[87] or a defendant who has not answered, is not entitled to costs.[88]

D. Where There Are Several Defendants — 1. Where All Defendants Are Successful — a. In Suits in Equity. In an equitable action the fact that several prevailing defendants plead separately, especially when they have the same solicitor, does not necessarily entitle them to separate costs; each case depends on its own facts.[89] It has been held in some cases that if there is no necessity for pleading separately only one bill of costs should be allowed,[90] while others hold that the allowance of separate bills of costs to defendants who might have joined in their defense depends on the apparent fairness of such action, and that if the filing of separate answers was in good faith separate bills of costs may be allowed.[91] If two defendants not joined in interest appear by different attorneys, put in separate answers, and both succeed, it is within the discretion of the court to allow costs to each defendant.[92]

b. In Actions At Law — (I) *Rule in New York*[93] — (A) *Where Defendants Appear by Same Attorney.* The general rule seems to be that only one bill

Mass. 69. And see Probate Judge *v.* Rice, 58 N. H. 400.

81. Hinman *v.* Booth, 20 Wend. (N. Y.) 666.

82. McIntyre *v.* Wynne, 21 N. Y. Civ. Proc. 208 [*disapproving* Buell *v.* Gay, 13 How. Pr. (N. Y.) 31, which holds that where there are several defendants, and the court renders judgment against one, and allows the action to proceed against others, the plaintiff may be entitled to several bills of costs; but where the plaintiff recovers but one judgment, however numerous the defendants, or the defenses or issues, he can have but one bill of costs].

Demurrers to answers sustained and permission to amend.— So where defendants appear by separate attorneys and make separate answers, to which demurrers are sustained, and they are permitted to amend on payment of costs, plaintiff is entitled to a separate bill of costs against each defendant. Comstock *v.* Halleck, 4 Sandf. (N. Y.) 671.

83. Kennedy *v.* Davis, 7 T. B. Mon. (Ky.) 372.

84. Reeves *v.* Adams, 17 N. C. 192; Beale *v.* Ryan, 40 Tex. 399. See also Moore *v.* Fauntleroy, 3 A. K. Marsh. (Ky.) 360, where it was held that if a party against whom no decree can be made is brought before the court he should recover costs.

85. Barker *v.* Burton, 67 Barb. (N. Y.) 458; Merchants Ins. Co. *v.* Marvin, 1 Paige (N. Y.) 557.

86. Lewis *v.* Thornton, 6 Munf. (Va.) 87.

87. Elliott *v.* State Bank, 4 Ark. 437; Harty *v.* Smith, 74 Ill. App. 194.

88. Briscoe *v.* McGee, 2 J. J. Marsh. (Ky.) 370; Salls *v.* Salls, 19 N. Y. Suppl. 246.

89. Stilson *v.* Leeman, 75 Me. 412.

Where separate defense is partial only.— On a bill to redeem land from a mortgage, if the mortgagee and an assignee of the mortgage are made parties and answer separately, it has been held that they are each entitled to tax for an answer, but for only one bill of costs, subsequently accruing, if the filing of separate answers is the only respect in which separate defenses are made. Miller *v.* Lincoln, 6 Gray (Mass.) 556.

90. Davis *v.* McNeil, 36 N. C. 344. See also Pratt *v.* Bacon, 11 Pick. (Mass.) 495.

91. Garwood *v.* Hartley, 39 N. J. Eq. 78; Putnam *v.* Clark, 34 N. J. Eq. 51.

92. Hauselt *v.* Vilmar, 76 N. Y. 630.

The discretion of the court in allowing only one bill of costs where the defendants answer separately is not reviewable. Van Gelder *v.* Van Gelder, 84 N. Y. 658.

93. Contract or tort.—Under the New York statutes the rules governing the allowance

of costs will be allowed where several defendants appear by the same attorney, whether they put in separate answers or not.[94] And such is the rule where defendants appear by separate attorneys who are partners,[95] or by separate attorneys, one of whom is the clerk of the other.[96]

(B) *Where Defendants Appear by Different Attorneys.* In actions at law where all of the defendants are successful, those who are not united in interest and who have appeared by separate attorneys, are entitled to costs as of course and as of right,[97] unless it be shown that the several appearances were in bad faith and for the purpose of increasing costs,[98] and the burden of showing this fact rests on the plaintiff.[99] It has also been held that if all the defendants in an action are successful, and have made separate defenses by separate attorneys, they will be entitled to separate bills of costs although united in interest, if there be nothing to show collusion or bad faith on the part of the defendants.[1]

(II) *Rule in New Hampshire.* In New Hampshire the rules governing the allowance of costs, where a number of defendants who are sued in one action are successful, seems to be the same, regardless of the character of the action.[2] If the defendants join in their plea they are entitled to only one bill of costs,[3] and they will ordinarily be entitled to but one bill of costs, although they sever in their

of costs in cases where all the defendants are successful is the same whether the action is one of contract or one of tort. Delaware, etc., R. Co. *v.* Burkard, 40 Hun (N. Y.) 625; Williams *v.* Cassady, 22 Hun (N. Y.) 180; Bridgeport F. & M. Ins. Co. *v.* Wilson, 20 How. Pr. (N. Y.) 511.

94. Braden *v.* Kakhaiser, 3 Sandf. (N. Y.) 760; Bailey *v.* Johnson, 1 Daly (N. Y.) 61; Atkins *v.* Lefever, 5 Abb. Pr. N. S. (N. Y.) 221; Lindslay *v.* Deafendorf, 43 How. Pr. (N. Y.) 90. See also Albany, etc., R. Co. *v.* Cady, 6 Hill (N. Y.) 265. But *compare* Hall *v.* Lindo, 8 Abb. Pr. (N. Y.) 341 (where it was held that the fact that defendants severing in their defense employ the same attorney is a circumstance which will induce the court to look into the case closely to discover whether the separate defenses are necessary and are interposed in good faith but has no other effect); New York, etc., R. Co. *v.* Schuyler, 29 How. Pr. (N. Y.) 89 (holding that where defendants are compelled by the nature of the case to answer separately and to establish by proof distinct and independent rights of action, by way of counter-claim against the plaintiff for which they recover distinct awards of damages, they are entitled to separate bills of costs).

Limitation of rule.— Where through plaintiff's neglect some months elapse between service of summons and complaint on one defendant and service thereof on the other, rendering two answers necessary, although they contain substantially the same defense, each defendant should be allowed costs before notice of trial and disbursements prior to issue being joined by service of the answer of the defendant last served. Lindslay *v.* Deafendorf, 43 How. Pr. (N. Y.) 90.

Costs of one appeal.— Where one appeal is taken by a number of defendants, and the cause argued by one attorney, only one bill of costs is allowable. Fischer *v.* Langbein, 31 Hun (N. Y.) 272.

95. Brockway *v.* Jewett, 16 Barb. (N. Y.) 590; Crofts *v.* Rockefeller, 6 How. Pr. (N. Y.) 9; Howell *v.* Veith, 2 N. Y. City Ct. 405.

Presumptions as to partnership.— The fact that attorneys appearing for defendants answering separately occupy the same office affords strong grounds for presuming that the separation was for the purpose of increasing costs. Slater Bank *v.* Sturdy, 15 Abb. Pr. (N. Y.) 75.

96. Howell *v.* Veith, 2 N. Y. City Ct. 405.

97. Such defendants have the right to present bills of costs to the clerk and have them taxed by him without first obtaining an order of court directing that this be done. Delaware, etc., R. Co. *v.* Burkard, 40 Hun (N. Y.) 625.

98. Delaware, etc., R. Co. *v.* Burkard, 40 Hun (N. Y.) 625; Royce *v.* Jones, 23 Hun (N. Y.) 452; Williams *v.* Cassady, 22 Hun (N. Y.) 180, 59 How. Pr. (N. Y.) 490; Castellanos *v.* Beauville, 2 Sandf. (N. Y.) 670; Forrest *v.* Thompson, 8 N. Y. St. 345; Olifiers *v.* Belmont, 33 N. Y. Suppl. 623, 67 N. Y. St. 329, 24 N. Y. Civ. Proc. 408; Lane *v.* Van Orden, 11 Abb. N. Cas. (N. Y.) 228; Milligan *v.* Robinson, 58 How. Pr. (N. Y.) 380; Collomb *v.* Caldwell, 5 How. Pr. (N. Y.) 336; Tenbroeck *v.* Paige, 6 Hill (N. Y.) 267. *Compare* Harper *v.* Chamberlain, 14 Abb. Pr. (N. Y.) 408.

99. Royce *v.* Jones, 23 Hun (N. Y.) 452; Lane *v.* Van Orden, 11 Abb. N. Cas. (N. Y.) 228.

1. Bridgeport F. & M. Ins. Co. *v.* Wilson, 20 How. Pr. (N. Y.) 511; Wilber *v.* Wiltsey, 13 How. Pr. (N. Y.) 506.

Within the purview of this rule making a separate defense by a separate demurrer must be regarded the same as making a separate defense by a separate answer. Wilbur *v.* Wiltsey, 13 How. Pr. (N. Y.) 506.

2. Prescott *v.* Bartlett, 43 N. H. 298.

3. Crosby *v.* Lovejoy, 6 N. H. 458.

defense, if the same facts furnish the same defense to each.[4] If the defenses are different, separate costs may be allowed each defendant.[5]

(III) *Rule in Other Jurisdictions* — (A) *In Actions on Contract.* In a number of jurisdictions the following rules have been formulated with respect to allowance of costs where all the defendants are successful: If in an action of contract they make a joint defense, they are entitled to but one bill of costs;[6] if they make separate defenses, they are entitled to separate bills of costs where separate defenses were necessary;[7] if, however, they might and should have joined, they will be entitled to only one bill of costs, although pleading separately.[8]

(B) *In Actions of Tort.* Where the defendants in an action of tort join in their plea and are successful only one bill of costs will be allowed;[9] where, however, defendants plead severally and prevail the rule as to the allowance of costs is not uniform.[10]

2. Where Part of Defendants Are Successful — a. The English Doctrine. According to the English decisions prior to 8 & 9 Wm. III, c. 2, if one of several defendants was acquitted he was not entitled to costs, the word "defendants" in the statute being construed to mean only the case of a total acquittal of all the defendants.[11]

b. Rules in Alabama, California, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, and North Carolina. Under the statutes of Alabama, Illinois, Indiana, Iowa, Michigan, Mississippi, and North Carolina, if one or more of several defendants are successful, he or they are entitled to costs.[12] And under a

4. Prescott *v.* Bartlett, 43 N. H. 298; Hanson *v.* Ossipee, 20 N. H. 523. *Compare* Crosby *v.* Lovejoy, 6 N. H. 458, which holds that in actions of tort, if the defendants plead severally and succeed, each is entitled to a separate bill of costs. In explaining this decision the court in Prescott *v.* Bartlett, *supra*, said that in Crosby *v.* Lovejoy, *supra*, it did not appear that the defenses depended on the same question of fact.

5. Currier *v.* Grafton, 28 N. H. 73.

6. Mathers *v.* Cobb, 3 Allen (Mass.) 467.

7. Bill *v.* Boynton, 158 Mass. 274, 33 N. E. 399; Taylor *v.* Jaques, 109 Mass. 270; Terry *v.* Chandler, 23 Wis. 456.

8. Upton *v.* Pratt, 106 Mass. 344; Ward *v.* Johnson, 13 Mass. 148; Meagher *v.* Bachelder, 6 Mass. 444; Peabody *v.* Minot, 24 Pick. (Mass.) 329; North Bank *v.* Wood, 11 Vt. 194; Shrewsbury *v.* Stong, 10 Vt. 591.

Parties summoned as copartners.— Where in a trustee process the trustees are summoned as partners only, they are entitled to only one bill of costs, although they make separate answers, because the answer of only one copartner is necessary. Gerry *v.* Gerry, 10 Allen (Mass.) 160.

9. Fales *v.* Stone, 9 Metc. (Mass.) 316; West *v.* Brock, 3 Pick. (Mass.) 303; Ewer *v.* Beard, 3 Pick. (Mass.) 64. See also Barry *v.* McGrade, 14 Minn. 286, which holds that only one bill of costs is allowable where the defendants answer jointly, appear by one attorney, and there is one trial as to all. *Contra*, Crosby *v.* Folger, 6 Fed. Cas. No. 3,423, which seems to be based on a misconception of Mason *v.* Waite, 1 Pick. (Mass.) 452.

10. **In Maine and Massachusetts,** if defendants in an action of tort plead severally and prevail, each is entitled to costs severally (Stilson *v.* Leeman, 75 Me. 412; O'Connell *v.* Bryant, 126 Mass. 232; George *v.* Reed, 104 Mass. 366; Davis *v.* Hastings, 8 Cush. (Mass.) 313; Fales *v.* Stone, 9 Metc. (Mass.) 316; West *v.* Brock, 3 Pick. (Mass.) 303; Mason *v.* Waite, 1 Pick. (Mass.) 452), except for money paid out for expenses by all jointly (O'Connell *v.* Bryant, 126 Mass. 232). And in the last-named state this doctrine applies, although the defendants appear by the same attorney (O'Connell *v.* Bryant, 126 Mass. 232), or unite in filing a bill of particulars. It is the plea that governs the judgment. Fales *v.* Stone, 9 Metc. (Mass.) 316.

In Minnesota if the defendants in good faith appear by separate attorneys and interpose separate defenses by separate answers each is entitled on a recovery in his favor to separate costs. Slama *v.* Chicago, etc., R. Co., 57 Minn. 167, 58 N. W. 989.

In North Carolina, although defendants in tort sever, yet where there is but one judgment in their favor, as "that they go without day," they shall recover but one set of costs. McNamara *v.* Kerns, 24 N. C. 66. *Compare* Stockstill *v.* Shuford, 5 N. C. 39, which appears to hold otherwise.

In Vermont separate travel and allowance fees before a justice and travel and term fees in the county court may be taxed by two or more defendants in an action of tort, unless by joining in a plea in bar they so identify their interests as to make the success of each dependent upon that of the other. Downer *v.* Flint, 28 Vt. 527. See also North Bank *v.* Wood, 11 Vt. 194; Shrewsbury *v.* Stong, 10 Vt. 591.

11. Steele *v.* Lineberger, 72 Pa. St. 239 [*citing* Reg. *v.* Danvers, 1 Salk. 194; Dibben *v.* Cooke, 2 Str. 1005].

12. *Alabama.*— Neff *v.* Edwards, 81 Ala. 246, 2 So. 88.

statute of California it has been held not an abuse of discretion to allow costs to such of the defendants as prevailed.[13] Under a Minnesota statute one of several defendants in an action of tort if successful is entitled to costs.[14]

e. Rules in Kansas, Massachusetts, New Hampshire, New Jersey, and Texas. So without mentioning any statute, the courts of Kansas and Texas have held that where one defendant is successful the plaintiff must pay his costs.[15] In Massachusetts, where one or more of a number of defendants sued in tort are successful, it is the practice to allow him or them costs.[16] In New Hampshire if part of the defendants have been successful in an action of contract,[17] although they are entitled to costs, they will not be allowed several bills of costs where there was no separate pleading and the ground of defense was common to all those discharged.[18] In New Jersey it was held that one of two defendants in trespass, who was acquitted, was entitled to his costs, where it did not appear that there was reasonable ground for making him a defendant.[19]

d. Rules in New York and Pennsylvania. Under the statutes of New York[20] where in an action against two or more defendants the plaintiff is entitled to judgment against one or more but not against all of them, the successful defendant is not entitled to costs as of course.[21] Costs cannot be awarded him in any event, except where he is not united in interest with those against whom plaintiff recovers, and where they have made separate defenses by separate answers.[22] In Pennsylvania a statute providing that in enumerated actions, any one or more of several defendants who shall be acquitted shall recover costs, has been held to apply only to the actions so enumerated.[23]

Illinois.— Smith *v.* Forbes, 14 Ill. App. 477.

Indiana.— Hiday *v.* Gilmore, 3 Blackf. 148.

Iowa.— Lull *v.* Anunosa Nat. Bank, 101 Iowa 537, 81 N. W. 784; Boswell *v.* Gates, 56 Iowa 143, 8 N. W. 809.

Michigan.— Black *v.* Carpenter, 104 Mich. 286, 62 N. W. 369.

Mississippi.— Binns *v.* Brittain, 30 Miss. 693.

North Carolina.— Brisco *v.* Norris, 112 N. C. 671, 16 S. E. 850.

See 13 Cent. Dig. tit. "Costs," § 351 *et seq.*

How costs taxed.— In Alabama it was held that where the verdict is in favor of one joint defendant and against the other, a judgment that the successful defendant "go hence and recover of plaintiff his costs," requires one half of the whole cost to be taxed against plaintiff. Morris *v.* Robinson, 80 Ala. 291. In North Carolina, in trespass against six defendants, three of whom were acquitted, the proportion of defendant's witness' costs — one half — should be taxed against plaintiff, although the pleas were joint in form. Harriss *v.* Lee, 46 N. C. 225.

13. Abram *v.* Stuart, 96 Cal. 235, 31 Pac. 44.

14. Barry *v.* McGrade, 14 Minn. 286.

15. Union Pac. R. Co. *v.* Horney, 5 Kan. 340; Beale *v.* Ryan, 40 Tex. 399.

16. Brown *v.* Stearns, 13 Mass. 536; Durgin *v.* Leighton, 10 Mass. 56; Galloway *v.* Pitman, 3 Mass. 408.

If all the defendants in such action join in pleading and two or more are acquitted, they will be entitled to one bill of costs only; if they plead severally, each successful defendant is entitled to separate costs. West *v.* Brock, 3 Pick. (Mass.) 303. See also Fales *v.* Stone, 9 Metc. (Mass.) 316. *Compare* Mason *v.* Waite, 1 Pick. (Mass.) 452.

17. This would also be the rule regardless of the character of the action, as no distinction seems to be made between actions of tort and contract so far as the question of costs is concerned. See Prescott *v.* Bartlett, 43 N. H. 298.

18. Ticknor *v.* Harris, 15 N. H. 106.

19. Abrams *v.* Flatt, 5 N. J. L. 641.

20. N. Y. Code Civ. Proc. § 3229.

21. Eastman *v.* Gray, 30 N. Y. Suppl. 895, 63 N. Y. St. 149; Krafft *v.* Wilson, 3 How. Pr. N. S. (N. Y.) 18.

22. Allis *v.* Wheeler, 56 N. Y. 50 [*overruling* Corbett *v.* Ward, 3 Bosw. (N. Y.) 632; Zink *v.* Attenburg, 18 How. Pr. (N. Y.) 108]; Park *v.* Spaulding, 10 Hun (N. Y.) 128; Churchill *v.* Wagner, 23 Misc. (N. Y.) 595, 52 N. Y. Suppl. 252.

If either of these circumstances be not present no costs can be awarded a successful defendant. Park *v.* Spaulding, 10 Hun (N. Y.) 128; Krafft *v.* Wilson, 3 How. Pr. N. S. (N. Y.) 18. And even in cases where both are present the court is not bound to award him costs. The matter rests solely in the discretion of the court and it may allow costs. Allis *v.* Wheeler, 56 N. Y. 50; Sinskie *v.* Brust, 66 N. Y. App. Div. 34, 72 N. Y. Suppl. 922; Sawyer *v.* Gates, 14 N. Y. St. 236. And where that discretion is wisely exercised a judgment entered thereupon will not be disturbed. Hodgkins *v.* Mead, 5 N. Y. Suppl. 435, 25 N. Y. St. 937, 17 N. Y. Civ. Proc. 16.

23. Steele *v.* Lineberger, 72 Pa. St. 239; Maus *v.* Maus, 10 Watts (Pa.) 87; Ramsdell *v.* Owens, 12 Pa. Co. Ct. 416.

e. Rules in Connecticut, South Carolina, Tennessee, Vermont, and Federal Courts. Under a statute of Connecticut,[24] where several of the defendants are successful, only one bill of costs will be allowed.[25] Under a statute of South Carolina it has been held that where a verdict has been found in favor of one joint defendant he is entitled to have his costs, but where the costs have been joint, as a joint appearance, plea, etc., he is only entitled to half costs.[26] Under a statute of Tennessee it has been held that where one of several joint defendants are acquitted, he may recover of plaintiff such costs only as accrued separately and properly on account of his being a defendant in the suit.[27] Under the statutes of Vermont it has been held that plaintiff may recover against one or more defendants, and the other defendants recover their costs whether the suit be on a contract in writing or not.[28] In the federal courts it has been held that where a bill is sustained with costs as against some defendants and dismissed with costs as to others, the latter are entitled not only to have taxed the items special to their defense, but also to have apportioned in their favor the items which were of a joint character.[29]

XV. WHO LIABLE FOR COSTS.

A. Liability of Each Party For Costs Made by Himself. In contemplation of law each party to a suit pays the costs made by him as they accrue in the progress of the suit;[30] and while in most jurisdictions this theory is ordinarily not carried into practice, each party is nevertheless primarily liable for costs made by himself to the officers or other persons rendering the services for which the costs were incurred,[31] unless, as seems to be the case in some jurisdictions, primary liability for costs made by the successful party is by statute imposed on the party cast.[32] In any event if costs cannot be made out of the party cast, the successful party may be compelled to pay costs made by himself.[33] This, however, is the limit of his liability. He cannot be compelled to pay the costs made by his unsuccessful adversary.[34]

B. Persons Not Parties to Suit. In many jurisdictions the rule is well settled that no judgment for costs can be rendered against a person who is not actually a party to the suit.[35]

24. Conn. Sess. Laws (1875), p. 31.

25. Sanford *v.* French, 45 Conn. 101.

26. McClure *v.* Sutherland, 4 McCord (S. C.) 158, construing a statute providing that if a verdict shall be found for one of several defendants he shall have costs against the plaintiff. See also Trapp *v.* McKenzie, 2 Nott & M. (S. C.) 571.

27. Sloan *v.* Parks, 2 Swan (Tenn.) 62.

28. Broughten *v.* Fuller, 9 Vt. 373.

29. American Box Mach. Co. *v.* Crosman, 57 Fed. 1029.

30. People *v.* Harlow, 29 Ill. 43; Morgan *v.* Griffin, 6 Ill. 565; Boyd *v.* Humphries, 53 Ill. App. 422.

31. *Arkansas.*— *Ex p.* Ashley, 3 Ark. 63.

Nebraska.— Lechler *v.* Stark, 12 Nebr. 242, 11 N. W. 320.

North Carolina.— Superior Ct. Office *v.* Lockman, 12 N. C. 146; Brehon *v.* Tutom, 2 N. C. 20.

Pennsylvania.—Wingett's Estate, 6 Pa. Co. Ct. 383; Lowenstein *v.* Biernbaum, 14 Phila. 199, 37 Leg. Int. 156.

Texas.— De la Garza *v.* Carolan, 31 Tex. 387; Anderson *v.* McKinney, 22 Tex. 653; Moore *v.* Moore, (Sup. 1888) 8 S. W. 28.

See 13 Cent. Dig. tit. "Costs," § 369 *et seq.*

32. McConkey *v.* Chapman, 58 Iowa 281, 12 N. W. 295. See also Harlee *v.* Ward, 15 Rich. (S. C.) 231; Corrie *v.* Fitts, 3 McCord (S. C.) 25.

33. Superior Ct. Office *v.* Lockman, 12 N. C. 146; Cleaveland *v.* Henderson, 4 Tex. 182. And see cases cited in preceding note. In the progress of the suit there are many things done necessary to end the litigation which neither party directs, the fees for which constitute what are called general costs. It has been held that such fees are properly taxable against the successful party who is entitled to recover them against his unsuccessful antagonist, but the fact that the unsuccessful party may be insolvent furnishes no reason why the successful party should not pay such costs. Brown *v.* Young, 8 Ky. L. Rep. 523.

34. Cleaveland *v.* Henderson, 4 Tex. 182.

35. *Alabama.*— *Ex p.* Louisville, etc., R. Co., (1900) 27 So. 239; Griffin *v.* Smith, 14 Ala. 571.

Illinois.— Wallace *v.* Espy, 68 Ill. 143; Foreman Shoe Co. *v.* Lewis, 92 Ill. App. 554. And see Rowe *v.* People, 96 Ill. App. 438.

Kentucky.— Doe *v.* Jones, 6 B. Mon. 388; Myers *v.* Smith, 5 B. Mon. 279; Brentlinger *v.* Funk, 3 J. J. Marsh. 656.

C. Persons Suing For Their Own Benefit in Another's Name — 1. Rule Under New York Statute. Under the New York statute[36] a person who brings suit in the name of another for his own benefit is liable for costs if the defendant be successful.[37] Nevertheless the statute applies only when such person is chargeable with bringing the action.[38] It is not enough that had the suit succeeded the recovery would have been for his exclusive benefit,[39] or that he may have interferred in the action, if in truth he is not chargeable with having brought it.[40]

2. Rule Under Pennsylvania Statute. Under the Pennsylvania statute[41] one who merely takes an active part in carrying on a suit in the name of another is not liable to the plaintiff's witnesses for their daily pay and mileage without an express promise to pay. But he is liable without such promise, where he projects and institutes the suit in another's name and is the active agent in having it brought.[42]

Maine.— Anonymous, 31 Me. 590; Moore *v.* Mann, 29 Me. 559; Freeman *v.* Cram, 13 Me. 255.

Missouri.— German Lutheran Church *v.* Walther, 42 Mo. App. 68.

New Hampshire.— Winship *v.* Conner, 43 N. H. 167; Pike *v.* Pike, 24 N. H. 384; Holland *v.* Seaver, 21 N. H. 386.

North Carolina.— Loven *v.* Parson, 127 N. C. 301, 37 S. E. 271; Davis *v.* Higgins, 91 N. C. 382.

See 13 Cent. Dig. tit. "Costs," § 338 *et seq.*

In New Hampshire, in certain classes of cases, persons are allowed to come in and defend in the name of another person on giving bond to pay all costs made by such defense; but they do not become parties to the record, although their names be entered on the docket, but have leave to appear to defend not as parties, but in the name and behalf of the parties to the record. In such cases no judgment for costs can be rendered against them, but the remedy, if the plaintiff prevail, is on the bond that such persons are usually required to give. Winship *v.* Conner, 43 N. H. 167.

36. N. Y. Civ. Proc. § 3247, provides that where an action is brought in the name of another by a transferee of the cause of action, or by any other person who is beneficially interested therein, the transferee or other person so interested is liable for costs as if he was plaintiff.

37. Slauson *v.* Watkins, 95 N. Y. 369; Giles *v.* Halbert, 12 N. Y. 32; Henricus *v.* Englert, 17 N. Y. Suppl. 237, 43 N. Y. St. 598; Colvard *v.* Oliver, 7 Wend. (N. Y.) 497.

38. Giles *v.* Halbert, 12 N. Y. 32; McHarg *v.* Donelly, 27 Barb. (N. Y.) 100; Cutter *v.* Reilly, 5 Rob. (N. Y.) 637; Wheeler *v.* Wright, 23 How. Pr. (N. Y.) 228.

39. Greenwood *v.* Marvin, 11 N. Y. St. 235; Wheeler *v.* Wright, 23 How. Pr. (N. Y.) 228.

40. Whitney *v.* Cooper, 1 Hill (N. Y.) 629.

Application and extent of the rule.— Thus the following persons are liable for costs if defeated: A judgment creditor procuring an action to be brought in the name of a receiver appointed in supplemental proceedings instituted by him, and for whose sole benefit the case is brought. Ward *v.* Roy, 69 N. Y. 96; Gallation *v.* Smith, 48 How. Pr. (N. Y.) 477. *Compare* Cutter *v.* Reilly, 5 Rob. (N. Y.) 637. A person who brings and prosecutes a suit in the name of another under an agreement with the nominal party to carry on the suit at his own expense and have a portion of the expected recovery. Giles *v.* Halbert, 12 N. Y. 32, 5 How. Pr. (N. Y.) 319. One who, either by himself or in conjunction with another, has retained an attorney to prosecute a suit. Whitney *v.* Cooper, 1 Hill (N. Y.) 629. A person suing in a corporate name in which he did business, it appearing after the suit was terminated that there was no such corporation and that such person was promoter of the suit. Metropolitan Addressing, etc., Co. *v.* Goodenough, 21 N. Y. Civ. Proc. 268. So it has been held that where a mortgagee holding a judgment of foreclosure defends the mortgagor's title in an action of ejectment without becoming a party, he is liable for subsequently accruing costs in the event of a judgment against defendant as being the real party in interest. Sand *v.* Church, 32 N. Y. App. Div. 139, 52 N. Y. Suppl. 854. And also that one bringing suit in the name of another is liable for costs recovered against the nominal plaintiff, although his interest in the demand prosecuted is only by way of mortgage or lien. Whitney *v.* Cooper, 1 Hill (N. Y.) 629. On the other hand where, after suit brought by A against B, the latter delivers claims to A's attorney with directions to apply the amount collected thereon to the satisfaction of A's claim, and the attorney, without A's knowledge or consent, brings suit on one of the claims and is defeated, A is not beneficially interested in such suit, and is not liable for the costs, within the meaning of the statute. Elliot *v.* Lewicky, 51 N. Y. Super. Ct. 51.

41. Section 2 of the act of April 23, 1829, provides that "the equitable plaintiff or person for whose use or benefit and at whose instance any action has been or may be prosecuted, whether named on the record or not, shall be liable to execution on judgment (for costs) against the legal plaintiff or plaintiffs: Provided, that where such equitable plaintiff or plaintiffs were not named on the record previous to judgment, his name shall be suggested on the record, supported by affidavit of his interest in the cause, before execution shall issue."

42. Utt *v.* Long, 6 Watts & S. (Pa.) 174, 177.

3. RULE IN ILLINOIS. Where a person prosecutes a suit in the name of another, he is bound to indemnify and protect him against the payment of costs.[43]

D. Persons Defending in Another's Name. As a general rule, it is apprehended, a person who for the protection of his own interest defends an action in the name of another will not be liable for costs;[44] but where a person not a defendant on the record, to whom a statute gives the opportunity of defending, avails himself of the opportunity by defending in the name of the party sued, he is liable for costs in case of failure, no matter what the form or nature of the action may be, provided the costs cannot be collected of the defendant of record.[45]

E. Persons Suing in Another's Name Without His Consent. Persons bringing suit for another without his authority are liable for costs and disbursements by defendant when the latter succeeds in the action;[46] and one who is made a party plaintiff without his knowledge or consent is not liable for costs.[47]

F. Assignees of Cause of Action — 1. INDEPENDENTLY OF STATUTE. In a number of decisions in which no statutory authority is mentioned,[48] and in others in which it is expressly declared that no statutory authority is necessary,[49] it is held that an assignee of a cause of action who sues in the name of the assignor shall if the action fail be liable for costs, and if the assignment is taken after suit brought, the assignee will be liable for costs already accrued as well as those which are made by himself. Other decisions hold that in such case the assignor will be liable for costs.[50]

Where the real owner and party in interest in suit is the use plaintiff, the objection to a quasi-corporation as legal plaintiff that there is no one responsible for the costs cannot be maintained. Washington Camp *v.* Funeral Ben. Assoc., 8 Pa. Dist. 198.

43. In order to obtain such protection the nominal party must apply to the court where the case is pending for an order on the beneficial plaintiff to indemnify him. Young *v.* Campbell, 9 Ill. 156; Buckmaster *v.* Beames, 8 Ill. 97; Keystone Mfg. Co. *v.* Watts, 100 Ill. App. 11.

44. Ryers *v.* Hedges, 1 Hill (N. Y.) 646; Miller *v.* Adsit, 18 Wend. (N. Y.) 672. See also cases cited *supra*, note 35, p. 90.

45. Farmers' L. & T. Co. *v.* Kursch, 5 N. Y. 558; Perrigo *v.* Dowdall, 25 Hun (N. Y.) 234. See also Sand *v.* Church, 32 N. Y. App. Div. 137, 52 N. Y. Suppl. 854, where it was held that where one entitled to be made a party by defending in the name of another became liable for costs, the refusal of the nominal defendant to permit him to continue such defense or to take an appeal did not relieve him of such liability.

Rule applied in case of landlord coming in and defending in ejectment. Jackson *v.* Van Antwerp, 1 Wend. (N. Y.) 295. But see *dictum* in Livingston *v.* Clements, 1 Hill (N. Y.) 648, criticizing rule.

46. Willet Baptist Soc. *v.* Loomis, 49 Hun (N. Y.) 414, 3 N. Y. St. 572; Staten Island North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; Butterworth *v.* Stagg, 2 Johns. Cas. (N. Y.) 291. See also Giles *v.* Halbert, 12 N. Y. 32. And see German Lutheran Church *v.* Walther, 42 Mo. App. 68, where it was held that if parties wrongfully and without authority institute suit in another's name they have committed a wrong for which they can be held liable if any injury or damage result.

Limitation of rule.— Where suit is brought by an attorney in the name of a party without authority and fails, the plaintiff is liable for the costs. The defendant has a right to presume a retainer. Hamilton *v.* Wright, 37 N. Y. 502.

47. McGeorge *v.* Big Stone Gap Imp. Co., 88 Fed. 599.

48. Miller *v.* Adsit, 18 Wend. (N. Y.) 672; Schoolcraft *v.* Lathrop, 5 Cow. (N. Y.) 17; Waring *v.* Barret, 2 Cow. (N. Y.) 460; Norton *v.* Rich, 20 Johns. (N. Y.) 475; Canby *v.* Ridgway, 1 Binn. (Pa.) 496; Beatty *v.* Railroad Co., 4 Lanc. L. Rev. 1.

49. Davenport *v.* Elizabeth, 43 N. J. L. 149; Jordan *v.* Sherwood, 10 Wend. (N. Y.) 622.

An assignee of non-negotiable paper suing in the name of the payee will on rule be compelled to pay costs if he fail. Ashe *v.* Smith, 3 N. C. 305.

An independent action may be maintained against the assignee to recover costs. So held in Baker *v.* Raley, 18 Mo. App. 562.

Where the assignee is required to give security for costs he is of course liable on the bond so given. Hodgdon *v.* Merrill, 26 N. H. 16.

50. Freeman *v.* Cram, 13 Me. 255.

In South Carolina, where the assignee of a non-negotiable instrument sues in the name of the assignor and fails, the assignor is liable for costs (Lomax *v.* Baker, 1 Speers 161); and the same is the case where the instrument assigned is negotiable, unless it appear that the action failed by reason of matter arising subsequent to the transfer (Myers *v.* James, 2 Bailey 547). But if the assignee of a non-negotiable instrument brings

2. Under Statutory Provisions. By express statutory provision the assignee of a cause of action on which suit is brought may be made liable for costs if the action fails.[51] In jurisdictions where the assignee may be held liable for costs, the rule has no application if the assignment is made simply as collateral for the indebtedness;[52] and it has been held not to apply when the assignment is only of a part and not of the whole cause of action,[53] where the assignor remains the real party in interest,[54] or where a surety upon an undertaking given on obtaining an order of arrest applies to the court to set aside a default made by the plaintiff in that action, and to be permitted to prosecute, and who does prosecute, the action.[55]

G. Assignees of Judgment. The assignee of a judgment which is reversed on appeal is liable not only for costs accruing after the assignment, but also for all costs of the action.[56]

H. Beneficial or Use Plaintiffs. Where a person beneficially interested is made a party to the record *eo nomine* he is subject to the court's orders and judgment and may be required to pay costs.[57]

I. Person Suing in Representative Capacity.[58] A statute exempting per-

suit thereon after payment in the name of the payee, without his knowledge or consent, the payee is not liable for costs. Horton *v.* Blair, 2 Bailey 545.

51. In New York the assignee of a cause of action, who brings suit in the name of his assignor, or continues a suit brought by his assignor in the latter's name, whether the assignment be made before or after suit brought, is liable for costs if the action fail (Code Civ. Proc. § 3247; Bliss *v.* Otis, 1 Den. 656; Whitney *v.* Cooper, 1 Hill 629; Giles *v.* Halbert, 12 N. Y. 32); and under this statute, if the assignment is made after suit brought, and the defendant is successful, the assignee will be liable for costs accruing both before and after the assignment (Genet *v.* Davenport, 58 N. Y. 607). It has been held that the New York statute applies only as against one prosecuting the action, and not against one defending it. Peetsch *v.* Quinn, 12 Misc. 61, 33 N. Y. Suppl. 87, 66 N. Y. St. 639; Bendernagle *v.* Cocks, 19 Wend. 151; Miller *v.* Adsit, 18 Wend. 672.

Under a Kentucky statute providing that where the right of the plaintiff is transferred or assigned during the pendency of an action, the court may allow the person to whom the transfer or assignment is made to be substituted in the action, proper orders being made as to security for costs, it has been held that where a right of action is transferred, and the name of the assignee substituted for that of the plaintiff, and the order of substitution made without objection provides that the party substituted shall be responsible for all costs, past and future, this operates as a release of the original plaintiff for all costs. Warner *v.* Turner, 18 B. Mon. (Ky.) 758.

52. Peck *v.* Yorks, 75 N. Y. 421; Dowling *v.* Bucking, 52 N. Y. 658; Wolcott *v.* Holcomb, 31 N. Y. 125; Thorn *v.* Beard, 23 N. Y. Civ. Proc. 188; Miller *v.* Franklin, 20 Wend. (N. Y.) 630; Davis *v.* Higgins, 92 N. C. 203; De Witt *v.* Perkins, 25 Wis. 438. *Contra*, Carnahan *v.* Pond, 15 Abb. Pr. (N. Y.) 194.

53. Davis *v.* Higgins, 92 N. C. 203, under a statute providing that, in actions in which the cause of action shall become by assignment after commencement of the action the property of a person not a party, such person shall be liable for costs in the same manner as if he were a party. The contrary view has been maintained in New York, possibly because of a difference in the wording of the respective statutes. Bliss *v.* Otis, 1 Den. (N. Y.) 656.

54. *In re* Harwood, 21 N. Y. Suppl. 572, 50 N. Y. St. 114; Winants *v.* Blanchard, 12 N. Y. St. 384; Pendleton *v.* Johnson, 21 N. Y. Civ. Proc. 272. See also McCarthy *v.* Wright, 56 Hun (N. Y.) 387, 10 N. Y. Suppl. 824, 31 N. Y. St. 371.

55. Metropolitan Concert Co. *v.* Sperry, 58 Hun (N. Y.) 470, 12 N. Y. Suppl. 494, 35 N. Y. St. 611.

56. Tucker *v.* Gilman, 58 Hun (N. Y.) 167, 11 N. Y. Suppl. 555, 33 N. Y. St. 962.

Where a judgment is assigned to the attorney of record, who receives payment thereon, he becomes liable to an action by persons whose unpaid fees are taxed therein. Abbey *v.* Fish, 23 Ohio St. 403.

Where the judgment is reversed in part, and the costs of the appeal are adjudged against the appellee, the appellant in paying to the assignee the part as to which there is an affirmance is entitled to deduct the amount of these costs, and that too although the assignee was never substituted in the place of the assignor as a party to the cause (Mitchell *v.* White, 47 Mo. App. 316), or although the assignment was made merely by way of collateral security (Mitchell *v.* White, 47 Mo. App. 316). But see De Witt *v.* Perkins, 25 Wis. 438, where it is held that the assignee of a judgment cannot be held liable for costs of an appeal where the assignment is merely by way of security.

Reassignment of judgment.— Where one to whom a judgment has been assigned after the docketing thereof afterward reassigns it to the assignor, he is not liable for costs if the judgment be subsequently set aside. Chamberlin *v.* West, 6 N. Y. Leg. Obs. 226.

57. Lewis *v.* Lewis, 25 Ala. 315; Morgan *v.* Hale, 12 W. Va. 713.

58. As to liability for costs of persons acting in a representative capacity see, generally, Executors and Administrators;

sons suing in a representative capacity from personal liability for costs has no application to actions unnecessarily brought by plaintiff in a representative capacity and which he should have brought in his individual capacity.[59]

J. Interveners. An intervener may be charged with costs of the intervention where he withdraws his plea at the trial,[60] where he fails to show that he has an actual interest in the subject-matter of the suit,[61] or where it appears that the intervention was not made in good faith[62] or was not necessary for the protection of the intervener's interests.[63] It has also been held that parties voluntarily coming into a suit as defendants before any costs had accrued but such as were necessary to the preparation and decision of the suit are liable to costs.[64] If the intervener is successful it has been held that he should be awarded costs caused by the contesting of his claim against the party making the contest.[65]

K. Substituted Parties. Upon the substitution of a new party in place of the original party to a suit, the substituted party may become responsible for all costs and the original party discharged.[66]

L. Where There Are Several Plaintiffs. Where several plaintiffs unite in bringing an action and are unsuccessful, the defendant is entitled to costs against all.[67] If the proceeding is to enforce separate and distinct claims and all are unsuccessful each is liable for a moiety of the costs and not *pro rata* according to the amount of their respective claims.[68] If two plaintiffs unite in an action [of ejectment] one count alleging title in one plaintiff and one in another, and a verdict is found in favor of one plaintiff and against another, the defendant is entitled to costs against the unsuccessful plaintiff.[69]

GUARDIAN AND WARD; RECEIVERS; TRUSTS; and the like special titles.

59. Bedell *v.* Barnes, 29 Hun (N. Y.) 589.

60. Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

61. Gifford *v.* Workman, 15 Iowa 34.

If intervener files a joint answer with defendant and makes a joint defense with him, and they are unsuccessful, judgment should be against both for costs. Spruill *v.* Arrington, 109 N. C. 192, 13 S. E. 779. See also Manning *v.* Shoop, 170 Pa. St. 236, 32 Atl. 412.

Where the judgment in favor of the intervener is reversed on appeal the intervener is liable for the costs of the trial of the issues raised by his intervention and also the costs of the appeal. Reay *v.* Butler, 99 Cal. 477, 33 Pac. 1134.

62. Gifford *v.* Workman, 15 Iowa 34.

63. Barnard *v.* Bruce, 21 How. Pr. (N. Y.) 360.

64. Davis *v.* Sharron, 15 B. Mon. (Ky.) 64.

65. McGarry *v.* McDonnell, 82 Iowa 732, 47 N. W. 866. *Compare* Jackson *v.* Fawlkes, (Tex. Sup. 1892) 20 S. W. 136, where it was held that in an action on a note transferred to plaintiff as collateral security for a debt of less amount than the note, the transferrer who intervenes to protect his interest is not entitled to costs, but costs should be awarded against him.

66. *Ex p.* James, 59 Mo. 280, construing Wagner Stat. Mo. (1872), p. 1050, § 9. See also Romich *v.* Perry, 61 Iowa 238, 16 N. W. 93, in which it was held that where attached property is replevied from a sheriff, and an attaching creditor substituted as a defendant in a replevin suit instead of the sheriff, the plaintiff if successful is entitled to judgment for costs against the substituted defendant.

67. Knowlton *v.* Pierce, 41 How. Pr. (N. Y.) 361. And see Neal *v.* Elliott, 18 B. Mon. (Ky.) 604, holding that a co-plaintiff is liable for costs, although he may have sold his interest in the subject-matter in litigation after commencement of the suit.

68. Carpenter *v.* Nixon, 5 Hill (N. Y.) 260, where it was said that the costs may have accrued wholly irrespective of the amount of their judgment, depending upon the grounds and nature of the defense.

Entry of judgment against part of plaintiffs.— Where judgment is entered for costs against two plaintiffs only, where all are liable, such plaintiffs if they desire to compel entry of judgment against all must apply to the court for that relief or the judgment will not be set aside on motion on that ground. Knowlton *v.* Pierce, 41 How. Pr. (N. Y.) 361.

69. Maybury *v.* Evans, 19 Wend. (N. Y.) 625.

Apportionment of costs by part of plaintiffs defeated.—Where there are five plaintiffs in ejectment, three of whom are successful as to part of the items in suit, the two who fail are liable to pay the full bill of costs less such portions of the costs of the defense as relate exclusively to the prevailing plaintiffs, and the two plaintiffs so failing to recover are jointly liable for the whole costs, which the defendant is entitled to recover, although one abandons the prosecution sooner than the other. Hinman *v.* Booth, 20 Wend. (N. Y.) 666. So when several plaintiffs sue jointly and severally for land and some of them recover and some do not, the court may order costs taxed against the plaintiffs who fail, to the

M. Where There Are Several Defendants — 1. Where Some of Defendants Are Successful. Where one of several joint defendants is successful the plaintiff is entitled to recover of the others the costs incurred in the joint defense or otherwise, except such as may be separated therefrom as having exclusive reference to the defendant who is discharged.[70] Where a statute provides that if plaintiff succeeds against part of defendants and not against others he shall recover costs only from the former, it is error to render judgment against the defendants cast for costs made by a co-defendant against whom no judgment could be rendered because he was a non-resident.[71] Under a statute requiring that all the obligors in a joint contract shall be sued together, including those who may have performed their part, in order that the latter may recover back what they have paid, in case it should be determined that they were not bound, the judgment for costs must be *in solido*, against those who have not performed their part.[72]

2. Where All Defendants Are Cast — a. In General. It has been held that on judgment for plaintiff against several defendants who make the same defense,[73] the costs will be decreed against them jointly and not apportioned among them.[74] Where separate judgments in one action are rendered against several persons liable for the same cause of action they are all liable up to the point of satisfaction and to reasonable costs in the prosecution of appropriate remedies.[75] If separate suits be brought against several defendants for a joint tort, the plaintiff may recover separately against each, but he can have but one satisfaction; and he may elect *de melioribus damnis*, and issue his execution therefor against one of them; and

extent of their due proportion, according to the actual facts of the case, of the whole cost incurred. But the defendant has no right to have judgment against them, irrespective of what proportion of the cost they caused to be incurred, for a mere numerical proportion based on the number of shares in the land not recovered, as compared with the number recovered. Cureton *v.* Taylor, 89 Ga. 490, 15 S. E. 643.

70. Sloan *v.* Parks, 2 Swan (Tenn.) 62. See also Boothe *v.* Cowan, 5 Sneed (Tenn.) 354. But see Johnson *v.* Miller, 93 Iowa 165, 61 N. W. 422, in which it was held that where seven persons are sued for a joint tort, and make a joint defense, and plaintiff recovers judgment against six only, these six must pay all the costs; that the costs cannot be apportioned so that they shall pay but six sevenths of the total costs, notwithstanding a statutory provision that where there are several defendants the costs shall be apportioned according to the several judgments rendered. It is not a case of separate judgments in favor of the plaintiff and against all of the defendants.

Discontinuance as to some and judgment by default as to others.—In an action against several defendants, where two are defaulted and the third pleads, and thereafter the plaintiff discontinues against the third and takes judgment against the other two, he is entitled to costs against the defaulted defendants only up to the time of the default. Matthews *v.* Vining, 21 Pick. (Mass.) 335. To the same effect is Howk *v.* Bishop, 10 Hun (N. Y.) 509.

Non prosequitur as to some, and others cast.— Where suit is brought to enforce a liability on a joint contract and *non prosequitur* is entered as to some, the remaining defendants who are cast are not liable for the costs of service on those as to whom *non prosequitur* was entered. Guie *v.* Ash, 1 Chest. Co. Rep. (Pa.) 400.

71. Moore *v.* Estes, 79 Ky. 282.

72. Drew *v.* Atchison, 3 Rob. (La.) 140.

73. **In an action of tort against several jointly, if the jury render a joint verdict** against them, it has been held that judgment should be rendered against them jointly for costs, although they may have pleaded separately. Eames *v.* Stevens, 26 N. H. 117. *Compare* Hillman *v.* Newington, 57 Cal. 56, in which it was held that in an action to recover damages for the commission of a joint trespass it is proper as against the defendants to apportion costs recovered equally among the defendants.

74. Barret *v.* Foley, (N. J. Ch. 1889) 17 Atl. 687, holding this to be true, although part of the defendants are insolvent, thus throwing the burden of all the costs on the others. *Compare* Traughber *v.* Smelzer, 108 Tenn. 347, 67 S. W. 475, holding that where three defendants each claim an undivided third interest in property in suit, one third of the costs may properly be taxed against each of the parties on rendition of an adverse decision instead of the entire costs being jointly taxed against all.

As regards the amount of costs recoverable it has been held that separate judgments for full bills of costs against different defendants in the same trial or proceedings is erroneous. Mechanics', etc., Nat. Bank *v.* Winant, 1 N. Y. Suppl. 659. See also Phipps *v.* Van Cott, 15 How. Pr. (N. Y.) 110; Buell *v.* Gay, 13 How. Pr. (N. Y.) 31. See also, generally, *infra*, XX, for amount of costs recoverable.

75. Sherman *v.* Brett, 7 Wis. 139, holding also that there can be but one satisfaction.

the other defendants will be obliged to pay the costs of the suits against them respectively.[76]

b. Where One Defendant Suffers Default. Where two or more defendants are sued upon a joint liability and one of them defaults, all the defendants are equally liable for the whole costs, where those who make a defense are unsuccessful.[77]

c. Where Separate Defenses Are Unnecessarily Made. Where several defendants have a common defense and file separate answers, the court will in its discretion charge them with the costs occasioned thereby.[78]

3. Where One Defendant Tenders Separate Issues. Where one of several defendants tenders separate issues, all of which are found against him, there is no error in adjudging costs thereof against him personally.[79]

4. Where Defendants Sever in Their Pleadings. Where two defendants sever in their pleading it is improper on sustaining a demurrer to the plea of one of them to adjudge against him all costs in the suit expended up to that time.[80]

5. Defendants Subsequently Brought In. Where a person is brought in as defendant, he should not be charged with costs adjudged by a previous decree against a co-defendant[81] or for costs incurred before being brought into the case.[82]

XVI. LIABILITY OF FUND FOR PAYMENT OF COSTS.

A. In General. Where complainant is compelled to resort to a court of equity to obtain his rights in respect of a fund in controversy, and on an account being taken it appears that the defendants have not acted honestly or in obedience to the court's order, the costs will be charged against defendants' share of the fund.[83] So where a person is made a party to a creditor's bill to enable the complainant to obtain a debt due from him to the complainant's judgment debtor, which debt such person is ready and willing to pay, he is entitled to his costs out of the fund.[84]

B. Fund Created or Preserved For the Benefit of Several Persons. Courts of equity have power to charge funds realized from or preserved by liti-

76. Livingston *v.* Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330. See also Knickerbacker *v.* Colver, 8 Cow. (N. Y.) 111. In this case two joint trespassers were sued by a single non-bailable *capias ad respondendum*, but appeared by separate attorneys; and the proceedings were several for the trespass against each, with five dollars damages by confession, and full costs against each. One having paid, on being discharged from the damages, it was held that this discharged the other; but that plaintiff might collect his costs of each. *Compare* Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154, holding (by a divided court) that if, while separate suits are pending against several joint trespassers, one suit is settled and the defendant therein discharged, although it was the intention of both parties that the discharge should affect only the cause of action against the defendant, and that it should not affect the plaintiff's right of recovery in the other suits, it will yet operate as a discharge of the entire cause of action against all, and there can be no recovery in the other suits either of nominal damages or of costs.

77. Warner *v.* Ford, 17 How. Pr. (N. Y.) 54; Catlin *v.* Billings, 13 How. Pr. (N. Y.) 511; Hinman *v.* Booth, 20 Wend. (N. Y.) 666. See also Smith *v.* Harris, 12 Ill. 462. *Compare* Hempy *v.* Ransom, 33 Ohio St. 312, where it is held that if an action is brought against two defendants jointly on account, and one of them defaults, and the other answers and denies joint liability, but admits a separate liability, and if separate judgments are rendered, in the rendition of each judgment the plaintiff is entitled to costs, but neither defendant is liable to pay costs made by the plaintiff against the other.

78. Ravenel *v.* Lyles, Speers Eq. (S. C.) 281.

Where several defendants unnecessarily put in several demurrers and proceeded separately to decrees, upon overruling the demurrers, the court charged each defendant with the same costs to which he would have been liable on a joint demurrer. Le Roy *v.* Servis, 2 Cai. Cas. (N. Y.) 175.

79. Boyd *v.* Jackson, 82 Ind. 525.

80. Hay *v.* State Bank, 5 Ark. 250.

81. Williams *v.* Washington, 43 S. C. 355, 21 S. E. 259.

82. Kennedy *v.* Kennedy, 66 Ill. 190; Williams *v.* Washington, 43 S. C. 355, 21 S. E. 259.

Especially is this true when he had not acted unjustly or improperly in connection with the matter in litigation and had no interest in the same and set up no claim of any such interest. Kennedy *v.* Kennedy, 66 Ill. 190.

83. Salter *v.* Allen, 6 D. C. 182.

84. Stafford *v.* Mott, 3 Paige (N. Y.) 100.

gation with the costs and expenses of such litigation,[85] but to authorize the exercise of this power the litigation in which the costs and expenses were incurred must have been in promotion of the interests of those eventually found to be entitled to the fund.[86]

C. Costs of Audit on Distribution of Fund. Ordinarily the costs of audit on distribution of a fund are payable from the fund.[87] Where a fund has been ordered into court by claimants acting in good faith and after proper inquiry and without intending to obstruct the progress of the cause the court will not be strict in imposing costs upon them when unsuccessful,[88] but may charge the fund with the costs of the audit.[89] Where, however, costs are unnecessarily caused, they should usually be paid by the party causing them.[90]

D. Charging Fund With Payment of Fees of Counsel or Officers of Court. In the United States supreme court it is said to be the settled rule never to allow counsel on either rule to be paid out of the fund in dispute.[91] In another jurisdiction it has been held that where funds realized from litigation are brought into court, courts of equity in the exercise of their authority may order the payment of the costs of their officers out of the fund realized through their labors and exertions before making distribution of the proceeds to the successful litigants.[92]

XVII. TIME OF VESTING OF RIGHT TO COSTS.

A. In Actions at Law. As a general rule in actions at law[93] no liability

85. Whitsett *v.* City Bldg., etc., Assoc., 3 Tenn. Ch. 526; Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940.

86. Schwartz *v.* Keystone Oil Co., 164 Pa. St. 415, 30 Atl. 297; *In re* Tarr, 10 Pa. Super. Ct. 554.

Exhaustion of fund by senior judgment.— Where a younger fieri facias by process of garnishment brings money into court and the older judgment takes all the money, the expense of bringing in the fund, including reasonable counsel fees, should be paid out of the fund, and all expenses as well as the net sum realized should be credited on the older fieri facias. The younger judgment realizing no part of the fruit of its diligence should pay no part of the expense. Bullard *v.* Leaptrot, 57 Ga. 522.

If one of a number of persons having a common interest in a fund brings a suit at his own expense, in behalf of all, for its preservation or administration, the court in which the suit is brought will order a reasonable amount to be paid him out of the fund to reimburse him for his outlay (Davis *v.* Bay State League, 158 Mass. 434, 33 N. E. 591; Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 780, 29 L. ed. 940), or require a proportional contribution from those who accept the benefits of his efforts (Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 780, 29 L. ed. 940).

87. Perkins *v.* Nichols, 2 Chest. Co. Rep. (Pa.) 229.

88. Dinsmore *v.* Davis, 7 Wkly. Notes Cas. (Pa.) 295, 13 Phila. (Pa.) 57, 36 Leg. Int. (Pa.) 174.

89. Griffis *v.* Griffis, 12 Pa. Co. Ct. 390; Tatem *v.* Crawford, 11 Phila. (Pa.) 195, 33 Leg. Int. (Pa.) 83.

90. Patterson's Appeal, 1 Pittsb. (Pa.) 135; Perkins *v.* Nichols, 2 Chest. Co. Rep. (Pa.) 229. Where a first mortgagee after bill filed, decree of foreclosure, and payment of the mortgage debt, continues his suit, obtains the appointment of a receiver, and resists the claim of a second mortgagee for the payment of a just debt out of the mortgaged property, thus protracting the litigation and continuing the receivership, he is properly chargeable with the costs of the receivership. Herndon *v.* Hurter, 19 Fla. 397.

91. Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628. And see Temple *v.* Lawson, 19 Ark. 148, where it was said: "It seems to be a rule, permanently established by courts of chancery, that they will, in no case free from fraud in the defendants, allow interpleaders their solicitor's fee, to be paid generally, or out of the special fund brought into court."

In Florida and New York it has been held that extra counsel fees will not be paid complainant's counsel out of a fund in court belonging to a defendant, except in those cases where the counsel has been employed to recover or create such fund for the joint benefit of both parties. State *v.* Florida Cent. R. Co., 16 Fla. 703; Ryckman *v.* Parkins, 5 Paige (N. Y.) 543.

In Georgia it was held that where all the assets of an insolvent corporation have been placed in the hands of a receiver and through him are in process of judicial administration, the successful effort of intervening creditors, by independent petition to speed the cause in order to enable them to realize at an earlier date than probably they would be able to do, does not entitle them to be allowed their counsel fees out of the general fund, or out of the fund realized from the sale of such property. Ober, etc., Co. *v.* Macon Constr. Co., 100 Ga. 635, 28 S. E. 388.

92. Timmonds *v.* Wheeler, 12 Ohio Cir. Ct. 19.

93. **The only limitation of the rule is in the** case of interlocutory costs, where a court in

for right to costs accrues until a final judgment has been rendered in the cause.[94]

B. In Suits in Equity. In courts of equity a different rule prevails. These courts have a large discretion in the matter of costs and frequently give costs in intermediate stages of a cause without waiting for a final decree.[95]

XVIII. WAIVER, RELEASE, OR LOSS OF RIGHT TO COSTS.

A. By Failure to Apply For Costs in Time. The right to costs may be waived by failure to file application for costs within the time required by statute.[96]

B. Failure to Perfect Judgment. A statute providing that judgment shall be entered without costs if the successful party in an action fails to enter and perfect it within sixty days after the finding of the court shall be filed does not apply to proceedings to condemn land, which are special proceedings,[97] nor to decisions rendered by the supreme court upon appeal from lower courts.[98] It applies, however, where the successful party fails to perfect judgment within the prescribed time after the confirmation of the referee's report,[99] and to cases terminating by the court ordering a nonsuit.[1]

C. By Perfecting Judgment Without Inserting Costs. A party waives costs of appeal to the general term by perfecting a judgment upon the order of

accordance with a statute authorizing it directs the costs to be paid at once. Trail *v.* Somerville, 22 Mo. App. 308.

94. *Georgia.*— Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133; Ballin *v.* Ferst, 55 Ga. 546.

Kentucky.— Louis *v.* Seaton, 7 Ky. L. Rep. 592.

Maine.— McGlinchy *v.* Hall, 58 Me. 152.

Massachusetts.— Ross *v.* Harpin, 99 Mass. 175. See also McLeoud *v.* Freeman, 122 Mass. 441.

Missouri.— Conroy *v.* Frost, 38 Mo. App. 351.

New York.— Robinson *v.* Hall, 35 Hun 214; Overton *v.* Auburn Nat. Bank, 3 N. Y. St. 169; Oesterriches *v.* Jones, 13 N. Y. Civ. Proc. 98; Torry *v.* Hadley, 14 How. Pr. 357.

Pennsylvania.—Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237.

Utah.— Hepworth *v.* Gardner, 4 Utah 439, 11 Pac. 566.

See 13 Cent. Dig. tit. "Costs," § 290 *et seq.*

The property of the party cast cannot be appropriated for payment of costs until final judgment has been rendered against him. Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133.

Costs awarded on determining a demurrer to part of an answer where other issues remain to be disposed of cannot be assessed or enforced until final judgment is rendered upon the whole issue. Robinson *v.* Hall, 35 Hun (N. Y.) 214; Armstrong *v.* Cummings, 22 Hun (N. Y.) 570; Oesterriches *v.* Jones, 13 N. Y. Civ. Proc. 98; Mora *v.* Sun Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 304; Palmer *v.* Smedley, 13 Abb. Pr. (N. Y.) 185.

Costs are not payable out of a fund until the fund has been adjudged subject to costs on the termination of the case. Ballin *v.* Ferst, 55 Ga. 546.

Fees taxed as costs in favor of a referee are not payable until the final determination of the cause. Conroy *v.* Frost, 38 Mo. App. 351.

Discharge in bankruptcy pending suit.— A claim for costs against a party is not barred by his discharge in bankruptcy granted during the pendency of the action in which the costs accrued. Hall *v.* Brown, 59 N. H. 198. See also McLeod *v.* Freeman, 122 Mass. 441.

95. Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133; Avery *v.* Wilson, 20 Fed. 856; Adams Eq. 389; 2 Daniell Ch. Pr. 1457. See also Clement *v.* Wheeler, 25 N. H. 361; Scarborough *v.* Burton, 2 Atk. 111, 26 Eng. Reprint 470.

This discretion can be properly exercised in giving to the prevailing party the incidental costs which have arisen during the progress of the cause about a matter completely disposed of by the court and not necessary to be considered on further directions. Avery *v.* Wilson, 20 Fed. 856.

96. See *infra*, XXII, D, 3.

97. Barker *v.* Milwaukee, etc., R. Co., 60 Wis. 480, 19 N. W. 445; Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443.

98. Williams *v.* Giblin, 86 Wis. 648, 57 N. W. 1111.

Motion for new trial.— It has been held that a motion for a new trial operates as a stay within the meaning of a proviso, excepting from the operation of the statute, in cases in which there is a stay of proceedings after verdict. Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852.

So a stipulation "that either party may move for judgment at any general or special term of said court, on the verdict rendered herein, and that no advantage shall be taken by the other for the reason that the moving for judgment was postponed" operates as a waiver of the statutory limitation. Blomberg *v.* Stewart, 67 Wis. 455, 30 N. W. 617.

99. Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825.

1. McDonough *v.* Milwaukee, etc., R. Co., 69 Wis. 358, 34 N. W. 120.

affirmance without inserting costs, and the entry of the judgment is regular, notwithstanding costs were not included.[2]

D. By Taking Out Execution For Damages Only. Where a statute provides that on appeal from taxation of costs judgment shall be considered as rendered on the day when costs are finally taxed and allowed, except where a bond is given and judgment is given for plaintiff, and defendant appeals from the taxation of costs without giving bond, the taking out of execution by plaintiff for damages only, pending such appeal, defendant not having waived his appeal, operates as a waiver by plaintiff of his right to costs.[3]

E. By Failure to Claim Costs. A failure to claim costs on the part of one entitled thereto may under certain circumstances operate as a waiver of his right to costs.[4]

F. By Discharge in Bankruptcy. Inasmuch as costs are incident to a judgment a discharge in bankruptcy discharges the costs.[5]

G. By Release of One Defendant. A release of one of two defendants for costs does not affect the liability of the other defendant for costs.[6]

H. By Subsequent Change of Law Governing Costs. Where costs have been duly taxed, and no appeal has been taken, any subsequent change in the laws governing costs does not affect the right to the costs as taxed.[7]

XIX. STIPULATIONS IN REGARD TO COSTS.

A. Validity. A stipulation that costs in a proceeding should abide the event of the action is valid,[8] and so is an agreement waiving costs,[9] and that too although the case is one in which costs are in the discretion of the court.[10] Such stipulations are binding although verbal,[11] unless required by rule of court to be in writing.[12] Counsel of plaintiff of record may bind the use plaintiff by an agreement that he shall pay costs.[13]

2. Whitney *v.* Townsend, 67 N. Y. 40.

3. Davis *v.* Ferguson, 148 Mass. 603, 20 N. E. 311.

4. If at the time of making a tender the debtor has no knowledge of the commencement of a suit, and the creditor does not inform him thereof or make claim of costs, but refuses to accept the amount tendered solely on account of its insufficiency to pay the debt, it may be regarded as a waiver of all claim for costs. Haskell *v.* Brewer, 11 Me. 258. So where a creditor who resided in another state commenced an action on book-account against his debtor in this state, and afterward saw the debtor in such other state, and demanded of him payment of the debt there, and threatened to commence a suit against him there unless he complied, and denied that the suit in this state was commenced by his direction or authority, and thereupon defendant paid the amount which plaintiff claimed, and plaintiff executed and delivered to him a receipt in full of accounts, it was held that these declarations of plaintiff were equivalent to an express waiver of his claim for costs in the suit in this state. Belknap *v.* Godfrey, 22 Vt. 288.

5. Clark *v.* Rowling, 3 N. Y. 216, 53 Am. Dec. 290.

The rule applies notwithstanding the costs are on a judgment confessed after the bankrupt's discharge in an action pending at the time of his discharge. Emmerson *v.* Beale, 8 Fed. Cas. No. 4,469, 2 Cranch C. C. 349.

6. Edmunds *v.* Smith, 52 N. J. Eq. 212, 27 Atl. 827.

7. Thompson *v.* Thompson, 6 S. C. 279.

8. Dorr *v.* Steichen, 18 Minn. 26.

Limitation of rule.— Where a statute expressly declares that costs shall not be allowed out of the estate of a decedent to an unsuccessful contestant of a will a stipulation that costs shall be so awarded is not enforceable (Matter of Keeler, 7 N. Y. Suppl. 199, 26 N. Y. St. 90, 18 N. Y. Civ. Proc. 30, 23 Abb. N. Cas. (N. Y.) 376), and notwithstanding a stipulation in foreclosure proceedings between plaintiff's solicitor and the solicitor of a party improperly joined to pay his costs, such costs are not chargeable on the surplus arising from the sale of the mortgaged premises (Nelson *v.* Mortgomery, 1 Edw. (N. Y.) 657).

9. Coburn *v.* Whitely, 8 Metc. (Mass.) 272; Otman *v.* Fish, 1 How. Pr. (N. Y.) 185.

10. Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975. *Contra*, Landon *v.* Walmuth, 76 Hun (N. Y.) 271, 27 N. Y. Suppl. 717, 59 N. Y. St. 87.

11. Otman *v.* Fish, 1 How. Pr. (N. Y.) 185.

12. Bates *v.* Norris, 55 N. Y. Super. Ct. 269, 13 N. Y. St. 302, 13 N. Y. Civ. Proc. 395; Rust *v.* Hauselt, 8 Abb. N. Cas. (N. Y.) 148.

13. Pates *v.* St. Clair, 11 Gratt. (Va.) 22 [*citing* Devers *v.* Ross, 10 Gratt. (Va.) 252, 60 Am. Dec. 331].

B. Construction. The term "costs" as used in a stipulation for payment of costs includes only such costs as are ordinarily and legally taxable.[14]

C. Methods of Enforcement. Ordinarily, it is apprehended, where a stipulation has been made as to payment of costs, the court in which the action is pending will enter judgment for costs in accordance with the stipulation.[15]

XX. AMOUNT AND ITEMS ALLOWABLE.

A. Under Statutes Containing Fee Bill. Where a statute contains a fee bill enumerating items which may be recovered no other costs are taxable than those so enumerated.[16] The items allowed by the fee bill cannot be increased by agreement of the bar.[17]

B. Service of Process or Other Papers — 1. Source of Right to Tax. There can be no taxation as costs of charges for service of process or other papers in a cause in the absence of statutory authorization.[18]

2. Unnecessary Service. Where the service of process or papers is one which is not required by law compensation therefor cannot be taxed as costs.[19]

3. Invalid Service. Costs of publication of a notice, which is invalid because of defects therein, are not taxable.[20] So where writs issued on a judgment against defendant have been stayed by reason of defective service the officer's fees therefor are not taxable against defendant.[21]

4. Service by Other Than Authorized Officer. The decisions are conflicting as to the right of a party to tax as costs fees for mileage and service of process by a person other than an officer authorized by law to make service. In some jurisdictions it is well settled that a party himself serving his own subpœnas is entitled to fees and mileage for such service;[22] while in others a party is not enti-

14. See *infra*, XX.

An extra allowance cannot be awarded under such a stipulation. Fish *v.* Coster, 28 Hun (N. Y.) 64; People *v.* Fitchburg R. Co., 18 N. Y. Suppl. 269, 44 N. Y. St. 229.

Attorneys' fees in jurisdictions where such fees are not taxable as costs cannot be allowed under such a stipulation (McDonald *v.* Page, Wright (Ohio) 121); but in jurisdictions where attorneys' fees are taxable the term "all legal costs" has been held to include charges for travel and attendance and other items that inure to the benefit of the attorney as well as clerks', officers', and witness' fees (James *v.* Bligh, 11 Allen (Mass.) 4). A stipulation in an action to foreclose a mechanic's lien that designated persons shall fix the amount due each plaintiff and that on ascertainment judgment shall be entered for foreclosure of the liens sued on does not exclude the allowance for reasonable attorneys' fees provided by statute for this class of actions. Rapp *v.* Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325.

15. See Dorr *v.* Steichen, 18 Minn. 26; Fish *v.* Coster, 28 Hun (N. Y.) 64; People *v.* Fitchburg R. Co., 18 N. Y. Suppl. 269, 44 N. Y. St. 229. But in one case the court without assigning any reason denied a motion for judgment for costs and held that the remedy was by action on the agreement. Union Mut. F. Ins. Co. *v.* Hopkins, 3 R. I. 110. And in another case it was held that on an agreement to pay costs to defendant's attorney, an action to enforce the agreement in the name of the party would lie. Safford *v.* Stevens, 2 Wend. (N. Y.) 158.

16. Sinclair *v.* Missouri, etc., R. Co., 74 Mo. App. 500; Anonymous, 20 N. J. L. 112; Downing *v.* Marshall, 37 N. Y. 380; Walsh *v.* Bowery Sav. Bank, 9 N. Y. Civ. Proc. 177; Matter of Root, 8 Paige (N. Y.) 625. See also Henry *v.* Murphy, 54 Ala. 246; *Ex p.* Badgett, 6 Ark. 280; Doe *v.* Green, 2 Paige (N. Y.) 347.

17. Woodward *v.* Roberts, 51 N. H. 552.

Effect of stipulation.— Costs beyond the statutory allowance cannot be awarded because of a stipulation (O'Keefe *v.* Shipherd, 23 Hun (N. Y.) 171), except where the right to make a stipulation of this character is expressly conferred by statute (Mark *v.* Buffalo, 87 N. Y. 184). And notwithstanding an agreement of counsel in relation thereto costs cannot be taxed for specific items which are not designated in the fee bill or authorized by rule of court. Lee *v.* Simpson, 42 Fed. 434.

18. State *v.* Allen, 26 N. J. L. 145.

19. Ferguson *v.* Wooley, 9 N. Y. Civ. Proc. 236; Otis *v.* Forman, 1 Barb. Ch. (N. Y.) 30; Putnam *v.* Ritchie, 7 Paige (N. Y.) 42; McLaren *v.* Charrier, 5 Paige (N. Y.) 530.

20. Abbot *v.* Banfield, 43 N. H. 152.

21. Boyd *v.* Johnson, 144 Pa. St. 174, 22 Atl. 753.

22. Axtell's Appeal, (Pa. 1886) 6 Atl. 560; Peterson *v.* Williams, 1 Pa. Co. Ct. 93; Lyon *v.* Marshall, 1 Pa. Co. Ct. 90; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Carroll *v.* Petry, 15 Wkly.

tled to tax as costs for his own services in serving subpœnas.[23] There is also a conflict of authority as to the right to tax for services in serving subpœnas by private persons other than parties to the suit. In some jurisdictions it is held that no costs are taxable therefor.[24] In others the contrary view is taken;[25] while in one state it is held discretionary with the court whether or not it shall tax a reasonable compensation.[26] It has been held that charges for service by an officer other than the one authorized to make service are not taxable as costs.[27]

5. SERVICE IN ONE OF SEVERAL SUITS. Where witnesses are subpœnaed in but one of several suits depending upon the same title and defense, and but one suit is tried, service cannot be taxed in each case.[28]

6. NECESSITY FOR INDORSEMENT OF FEES ON WRIT OR PRECEPT. Where a statute provides that "all travelling fees and fees for the service of writs or precepts of which an officer is required to make a return, shall be indorsed on the writ or precept, or they shall not be allowed," charges for serving requisitions on towns, notices to parties, and for travel in serving them, and for service of summons on jurors drawn from such towns, are rightfully disallowed, where they are not indorsed on any precept.[29]

7. COMPUTATION OF MILEAGE. Mileage will be allowed only for the actual distance traveled,[30] although several subpœnas are served on the same travel,[31] and is to be calculated by the nearest traveled route.[32]

C. Fees of Officers of Court — 1. IN GENERAL. Costs taxable in a case ordinarily include fees of officers of the court.[33] Where the fee bill specifically designates the items for which charges can be made no others can be taxed as costs.[34] Costs of the officers of the court to which a cause is removed have been held taxable, although the cause is taken back to the court from which the removal was made and thereafter tried in a court to which the cause is again removed.[35]

2. REFEREES. Fees of referees are usually made taxable as costs by statute.[36]

Notes Cas. (Pa.) 416; Quay *v.* Quay, 1 Chest. Co. Rep. (Pa.) 489; Ketner *v.* Miller, 1 Chest. Co. Rep. (Pa.) 369; Todd *v.* Painter, 1 Chest. Co. Rep. (Pa.) 176; Harnish *v.* Mowrer, 1 Lanc. L. Rev. 17. See also Ferguson *v.* Reeves, 31 N. J. L. 289.

Amount allowed.— Where a party serves a subpœna he cannot be allowed greater fees than an officer would be allowed for the same service. Kepner *v.* Miller, 1 Chest. Co. Rep. (Pa.) 369.

23. Chicago, etc., R. Co. *v.* Dunning, 18 Ill. 494; Hannibal, etc., Plank-Road, etc., Co. *v.* Bowling, 53 Mo. 311.

24. Chicago, etc., R. Co. *v.* Dunning, 18 Ill. 494; Conway *v.* McGregor, etc., R. Co., 43 Iowa 32; McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56; Creighton *v.* Cole, 10 Wash. 472, 38 Pac. 1007.

25. Youngs *v.* Harold, 14 Pa. Co. Ct. 525; Lyon *v.* Marshall, 1 Pa. Co. Ct. 90; Triebel *v.* Deysher, 2 Woodw. (Pa.) 55; Smith *v.* Wilbur, 35 Vt. 133; West *v.* Walworth, 33 Vt. 167.

26. Young *v.* Makepeace, 108 Mass. 233.

27. Alexander *v.* Horn, (Ind. 1891) 28 N. E. 122; Alexander *v.* Harrison, 2 Ind. App. 47, 28 N. E. 119; St. Matthew's Sav. Bank *v.* New York Fidelity, etc., Co., 105 Fed. 161.

28. Jackson *v.* Hoagland, 1 Wend. (N. Y.) 69.

When there is no evidence to sustain the allegation that there was but one service, fees for serving the subpœna and notifying the arbitrator in each case will be allowed, where two causes between different plaintiffs and the same defendant, and involving different investigations, were heard, on the same day, and at the same time and place. Evans *v.* Hart, 10 Lanc. Bar (Pa.) 77.

29. Briggs *v.* Taunton, 110 Mass. 423. See also Gregg *v.* Crabtree, 33 Ill. 273.

30. Cody *v.* Clelam, 1 Pa. Co. Ct. 8.

31. Feusier *v.* Virginia City, 3 Nev. 58. See also Law *v.* Cobb, 1 Luz. Leg. Obs. (Pa.) 3.

32. Cody *v.* Clelam, 1 Pa. Co. Ct. 8.

Service in another county.— Under a rule of court providing that fees of constables shall be the same as allowed by law at the place where taken, the costs of serving a subpœna in another county will be allowed at the rates obtaining in the county where the service is made. Lyon *v.* Marshall, 1 Pa. Co. Ct. 90.

Where a subpœna is given to an officer at his residence, mileage is estimated from such residence to the place where the subpœna is returned. Burgess *v.* Sharples, 5 Pa. Co. Ct. 241.

33. Pennsylvania R. Co. *v.* Keiffer, 22 Pa. St. 356; Ranck *v.* Hill, 3 Pa. St. 423. See also State *v.* Wolfrom, 25 Wis. 468.

34. Thorne *v.* Victoria, 23 Fed. Cas. No. 13,988; U. S. *v.* One Package Ready-Made Clothing, 27 Fed. Cas. No. 15,950.

35. Boyden *v.* Williams, 84 N. C. 608.

36. See Schawacker *v.* McLaughlin, 139 Mo. 333, 40 S. W. 935; Arrington *v.* Good-

The amount taxed must be that prescribed by statute, in the absence of a written agreement for a different compensation.[37] But a stipulation by the attorneys fixing referee's fees is "the consent of the parties," within a statute fixing such fees at a certain amount, unless a different rate is fixed "by the agreement of the parties . . . in writing." And, where such stipulation has been acted upon by the referee, and the amount of his fees as fixed has been paid by the successful party, the court has no power, when neither fraud nor collusion has been shown, to reduce the allowance.[38] So it has been held that where a party at the commencement of a reference stipulates with the opposite party to pay half the referee's fees the stipulation will be enforced,[39] and that an agreement by a party in a proceeding in open court to pay the expense of a reference in a certain event is enforceable on the occurrence of the event on which his liability depends.[40] If the agreement for other fees than those fixed by the statute is not in writing it is not enforceable.[41] A stipulation for fees of a referee in an action brought in a court having no power to appoint referees confers no right to include such a disbursement in the judgment.[42]

3. CLERKS. Although a statute provides for the taxation of clerk's fees for designated services, no fees can be taxed unless the services are actually performed,[43] and fees cannot be allowed for certifying papers which are not required by law to be certified.[44] Where an action removed from a state court is dismissed at defendant's costs in the federal court, a clerk's fee of a designated amount per

rich, 95 N. C. 462; Worthy *v.* Brower, 93 N. C. 492; Wall *v.* Covington, 76 N. C. 150; Swaine *v.* McCullock, 75 N. C. 495.

In special proceedings.— Under statutes making referee's fees taxable as costs in actions, and providing that costs may be allowed in the discretion of the court in special proceedings at the rate allowed for similar services in civil actions, claimants, on a reference to ascertain their rights to surplus money in a mortgage foreclosure, are entitled to referee's fees, such proceeding being a special proceeding. Elwell *v.* Robbins, 43 How. Pr. (N. Y.) 108. So a proceeding to compel a special guardian, appointed to sell the real estate of an infant, to account for and pay over moneys received by him as such guardian, not being a motion, but a special proceeding, the fees of a referee to whom a question of fact in the proceedings is referred may be allowed as costs. Spelman *v.* Terry, 74 N. Y. 448.

On setting aside default.— After a complaint in an action had been answered by defendant, plaintiff served an amended complaint, and defendant defaulted. Thereupon reference was had, and defendant's default was thereafter set aside on defendant's motion, and he was allowed to answer without any provisions being made for the referee's fees. It was held that in the final costs recovered by plaintiff such fees were properly taxed as disbursements in the case. Bowe *v.* Brown, 4 N. Y. St. 456.

37. Shultz *v.* Whitney, 9 Abb. Pr. (N. Y.) 71, 17 How. Pr. (N. Y.) 471; Thompson *v.* Thompson, 6 S. C. 279. Se also Bowe *v.* Brown, 4 N. Y. St. 456.

Examination of unnecessary matter.— Where the successful party procures an examination by the referee of matters not in issue he is liable for the costs of such examination. Keokuk County *v.* Howard, 42 Iowa 29.

38. Mark *v.* Buffalo, 87 N. Y. 185, in which the recovery allowed by the reference was twelve thousand dollars, and the amount of costs allowed the successful party also twelve thousand dollars. *Compare In re* Haldorn, 10 Mont. 281, 25 Pac. 438, where under a similar statute the court held that a referee would not be permitted to exact exorbitant fees under color of such agreement, and in which the amount agreed upon, namely, eighteen dollars a day, and twenty cents for each folio of transcript and ten cents for each folio of copy, was reduced to eight dollars a day, the amount fixed by statute in the absence of an agreement.

39. Brick *v.* Fowler, 61 How. Pr. (N. Y.) 153; Bloodgood *v.* Bloodgood, 59 How. Pr. (N. Y.) 42.

40. Fischer *v.* Raab, 56 How. Pr. (N. Y.) 218.

41. Gilman's Estate, 12 N. Y. Civ. Proc. 179.

42. Szerlip *v.* Baier, 21 Misc. (N. Y.) 331, 47 N. Y. Suppl. 133.

43. Stewart *v.* Crosby, 15 Tex. 513.

Special proceedings.— Under a statute providing that in special proceedings costs may be allowed in the discretion of the court at the rate allowed for similar services in civil actions, on a reference to ascertain the right of claimants to surplus money in a foreclosure the claimants are entitled to clerk's fees in the proceedings. Elwell *v.* Robbins, 43 How. Pr. (N. Y.) 108.

44. Edmondson *v.* Mason, 16 Cal. 386. See also Texas Midland R. Co. *v.* Parker, (Tex. Civ. App. 1902) 66 S. W. 583, in which it was held that fees for recording the return on a citation could not be taxed, there being no law requiring this to be done.

folio for copying into the final record the process and pleadings in the state court, together with the proceedings for removal sent up in the transcript, is properly taxed against defendant, under a statute providing that the clerk's fee for making any record shall be a designated amount per folio.[45] Although a case is dismissed by consent of parties, it is too late after the term is passed to object to an order dismissing at plaintiff's cost, although the order be incorrect, and the clerk's fees are a proper charge under such order.[46] Where a statute provides that a clerk shall not have fees for filing any paper issued by him he cannot tax costs for filing subpœnas and citations issued by him;[47] but he may tax costs for filing affidavits of witnesses showing their attendance, as such affidavits are not issued within the meaning of the statute.[48] Under a statute requiring a clerk to give a certificate of attendance on the affidavit of a witness, he can make only one charge therefor in taxing costs, taking the affidavit and giving the certificate being one act, and coming under the item in the schedule of fees allowing a fee for "administering an oath, with a certificate and seal."[49]

4. SHERIFFS. Sheriffs' fees are only taxable in accordance with the provisions of some statute;[50] nor can a greater amount be allowed for any particular services than prescribed by statute.[51] Where a sale on execution is illegal a sheriff's commissions are not taxable against defendant, but should be paid by plaintiff.[52] So where a demurrer to a complaint is overruled with leave to answer on payment of costs, plaintiff is not entitled to taxation of sheriff's fees on execution.[53] A clerk cannot insert in a bill of costs a charge for sheriff's commissions, if he himself has made no such charge in his return.[54]

5. REGISTERS. By analogy to justices' costs and those of arbitrators in case of appeal, and those of the supreme court on an affirmance of a judgment, the fees of a register, in an issue *devisavit vel non*, are taxable with the other costs accruing upon the trial in the common pleas and can be collected with them.[55]

6. MASTERS. Where a decree ordering an account is set aside with costs, master's fees paid by defendant for the accounting should be taxed against plaintiff.[56]

7. RECEIVERS. In one state it is held that where a person is enjoined from prosecuting his business and his property placed in the hands of a receiver, at plaintiff's instance, the compensation for the receiver's services is taxable as costs against the plaintiff if unsuccessful.[57] In another state it has been held that a court cannot, upon dismissing an action in which a receiver has been appointed, tax, as costs against plaintiff, expenses of running the business placed in the receiver's hands; that such items must be recovered, if at all, in an action for that purpose.[58] So in another it has been held that the amount of compensation and

45. Blain *v.* Home Ins. Co., 30 Fed. 667.

46. Cahn *v.* Zung Wah Lung, 28 Fed. 396.

47. Texas Midland R. Co. *v.* Parker, (Tex. Civ. App. 1902) 66 S. W. 583.

48. Texas Midland R. Co. *v.* Parker, (Tex. Civ. App. 1902) 66 S. W. 583.

49. Texas Midland R. Co. *v.* Parker, (Tex. Civ. App. 1902) 66 S. W. 583.

50. Smith *v.* Williamson, 11 N. J. L. 313; Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 5 Daly (N. Y.) 124]; O'Connor *v.* O'Connor, 47 N. Y. Super. Ct. 498; Biggerstaff *v.* Cox, 46 N. C. 536. See also Spencer *v.* Peterson, 41 Oreg. 257, 68 Pac. 519.

Execution attachment.— A statute providing for the taxation of sheriff's fees on a fieri facias authorizes the taxation of fees in an execution attachment, as it is in the nature of a fieri facias. Hoover *v.* Landis, 10 Lanc. Bar (Pa.) 15.

51. Hudson *v.* Erie R. Co., 57 N. Y. App. Div. 98, 68 N. Y. Suppl. 28.

52. Wright *v.* Leclaire, 3 Iowa 221.

53. Thompson *v.* Stanley, 22 N. Y. Suppl. 897, 22 N. Y. Civ. Proc. 348.

54. Bryan *v.* Buckmaster, 1 Ill. 408.

55. Dellinger *v.* Dellinger, 1 Pa. Co. Ct. 13.

56. American Diamond Drill Co. *v.* Sullivan Mach. Co., 131 U. S. 428, 9 S. Ct. 794, 33 L. ed. 217 [*affirming* 32 Fed. 552, 23 Blatchf. 144].

A decree that complainant's bill be dismissed with costs includes a master's fee, although not yet fixed by the court. Janes' Appeal, 87 Pa. St. 428 [*quoting* Worcester Dict. as to the definition of "costs"].

57. St. Louis *v.* St. Louis Gas Light Co., 87 Mo. 224 [*affirming* 11 Mo. App. 237].

58. Walton *v.* Williams, 5 Okla. 642, 49 Pac. 1022.

expenses allowed to the receiver, if a proper charge against an insolvent bank, is properly costs of suit, which should be paid in preference to the general creditors of the bank.[59] So in one state it has been held that where interveners asked for an appointment of a receiver, the fact that the consent is afterward filed and the receiver is appointed on such consent does not relieve them from paying the costs of the receivership.[60] In the federal courts it has been held that where a receiver is appointed at the instance of plaintiff, and the ultimate decision of the case upon appeal, reversing the decree below, is adverse to him, the receiver's commissions, paid out of the funds in his hands, will not be taxed as costs against plaintiff, his appointment being regular and properly made in the case.[61]

8. AUDITORS. Fees of auditors are ordinarily taxable as costs and payable by the losing party.[62]

9. ACCOUNTANTS. Where, pending a receivership, an investigation of the accounts of a corporation is conducted by an expert accountant retained and paid by certain creditors, which investigation results in the realization of a large sum for the receivership, the expense of the investigation will be charged against the fund, and the disbursements of the creditors in that behalf repaid to them out of it.[63]

D. Fees of Jurors. Fees of jurors, it is apprehended, are ordinarily taxable. Statutes allowing a certain amount per day to the jury are not unconstitutional.[64] Where a statute provides that a jury fee shall be taxed with the costs of each suit, as a special fund for the payment of jurors, a fee can only be taxed in such cases as are tried by jury.[65] But where a statute provides that if in a trial the jury for any cause is discharged without finding a verdict, plaintiff shall pay the jury fees, he must pay jury fees where a nonsuit is granted and the jury discharged.[66] Under a statute providing that where a special jury is summoned the losing party shall pay the additional costs, the costs of a special jury will be taxed to the losing party, although the regular panel be in attendance and on pay.[67] Under a statute allowing a jury fee of a designated amount to be taxed as a part of the costs, the entire amount may properly be taxed where but one case is tried on the same day, although the trial does not consume the whole of the day.[68]

E. Attorney's Fees — 1. NECESSITY FOR STATUTE OR STIPULATION AUTHORIZING ALLOWANCE. Attorney's fees are not allowable in the absence of a statute[69] or

59. Ephraim *v.* Pacific Bank, 136 Cal. 646, 69 Pac. 436.

60. Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525.

61. Ferguson *v.* Dent, 46 Fed. 88.

62. Dorsey *v.* Hammond, 1 Bland (Md.) 463; St. Joseph's Orphan Asylum's Appeal, 38 Pa. St. 535; Primrose *v.* Fenno, 113 Fed. 375. See also Clay *v.* Miller, 2 Litt. (Ky.) 279.

Voluntary payment by party not liable.— Where a statute provides that auditor's fees are to be paid by plaintiff, and to be taxed in his bill of costs if he prevails, yet if defendant voluntarily pays these fees and prevails in the suit he is not entitled to have them taxed in his favor. Lincoln *v.* Taunton Copper Mfg. Co., 13 Allen (Mass.) 276.

63. Sands *v.* Greeley, 83 Fed. 772.

64. Steele *v.* Central R. Co., 43 Iowa 109.

Struck jury.— Plaintiff must pay the costs of a special jury, struck on defendant's motion, and tax them in his bill of costs if he recovers judgment. Den *v.* Stiger, 4 N. J. L. 417.

Recognitors.— In an assize of nuisance, the *per diem* of the recognitors for attendance cannot be taxed against the losing party, because they are not jurors within the meaning of the fee bill, but are to be paid by the public and not by the parties. Barnet *v.* Ihrie, 1 Rawle (Pa.) 44.

65. Hoard *v.* Bulkley, 8 Ill. 154. See also Freshour *v.* Hihn, 99 Cal. 443, 34 Pac. 87.

66. Fairchild *v.* King, 102 Cal. 320, 26 Pac. 649; Luke *v.* Logan, 66 Cal. 33, 4 Pac. 883. See also Rives *v.* Columbia, 80 Mo. App. 170, in which it was held, under a statute providing that the costs of a special jury shall be paid by the party applying, irrespective of the result, unless the judge at the close of the case certifies that it was one for which a special jury should have been ordered, that where a party ordering a special jury takes a nonsuit after impanelment of the jury, but before trial, he must pay the costs of the jury.

67. Dunn *v.* Nashville, etc., R. Co., 3 Baxt. (Tenn.) 415.

68. State *v.* Verwayne, 44 Iowa 681.

69. *Georgia.*— See Robinson *v.* Holst, 96 Ga. 19, 23 S. E. 76, holding that where de-

in the absence of some agreement or stipulation specially authorizing the allowance thereof.[70]

2. EFFECT AND OPERATION OF STIPULATION. In jurisdictions where stipulations for the payment of attorney's fees are considered valid these fees are taxable as costs.[71] If the statute provides that before a fee shall be allowed an affidavit shall be filed with the original papers stating that the attorney has made no agreement with any one to divide the fees, the filing of such affidavit is a condition precedent to the allowance of the attorney's fee,[72] and should be filed with the original petition.[73] In no event will a larger amount than is actually expended be allowed, notwithstanding the provisions of the instrument in which the stipulation is made, where the statute so provides.[74] The amount and items recoverable as attorneys' fees must of course depend on the statutes or stipulations of parties authorizing their allowance.[75] A statute which prohibits the allowance of more than a designated amount in an action at law has no application to a suit in equity.[76]

3. RIGHT OF PERSON ACTING AS HIS OWN ATTORNEY TO FEES. A person who is not an attorney and conducts his own suit in person is not entitled to attorney's fees.[77]

fendant was not stubbornly litigious and did not act in bad faith, the recovery of attorney's fees as part of plaintiff's costs on directing a verdict for plaintiff was not authorized.

Illinois.— Byers *v.* Vincennes First Nat. Bank, 85 Ill. 423; Eimer *v.* Eimer, 47 Ill. 373; Constant *v.* Matteson, 22 Ill. 546; Cooper *v.* McNeil, 9 Ill. App. 97.

Iowa.— Grapes *v.* Grapes, 106 Iowa 316, 76 N. W. 796; Denby *v.* Fie, 106 Iowa 299, 76 N. W. 702; Newell *v.* Sanford, 13 Iowa 463; Blake *v.* Blake, 13 Iowa 40.

Kansas.— Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787.

Louisiana.— Melancon *v.* Robichaud, 19 La. 357.

Pennsylvania.— Grubb's Appeal, 82 Pa. St. 23; Tar's Estate, 10 Pa. Super. Ct. 554; Harrah's Estate, 7 Pa. Dist. 698.

Washington.— Larson *v.* Winder, 14 Wash. 647, 45 Pac. 315.

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 684.

See 13 Cent. Dig. tit. "Costs," § 665.

In equity cases.— It has been said, that while counsel fees are not generally allowable, the court may in its discretion in an equitable action allow attorneys' fees. Salmina *v.* Juri, 96 Cal. 418, 31 Pac. 365. But see Williamson *v.* Williamson, 1 Metc. (Ky.) 303, holding that a statute giving a chancery court discretion as to whether it shall or shall not allow costs does not authorize the taxation of attorneys' fees.

Under a statute authorizing an attorney's fee in cases tried before a jury, the fact that after a trial is begun the cause is disposed of by the court upon motion for a nonsuit or by directing a verdict does not take away the right. Kimble *v.* Kimble, 14 Wash. 369, 44 Pac. 866. And the striking of a plea on demurrer is a failure to sustain the plea, for which attorney's fees may be allowed plaintiff, under a statute prohibiting fees unless the plea filed is not sustained. Mashburn *v.* Inman, 97 Ga. 396, 24 S. E. 39; Butler *v.* Mutual Aid, etc., Co., 94 Ga. 562, 20 S. E. 101.

70. Shellabarger *v.* Thayer, 15 Kan. 619; Stover *v.* Johnnycake, 9 Kan. 367; Rosa *v.* Doggett, 8 Nebr. 48; De Coursey *v.* Johnston, 134 Pa. St. 328, 10 Atl. 1074.

Where a cross bill is unnecessary, solicitor's fees cannot be allowed the cross complainant. Shaeppi *v.* Glade, 95 Ill. App. 500.

71. Spiesberger *v.* Thomas, 59 Iowa 606, 13 N. W. 745; McAllister's Appeal, 59 Pa. St. 404; Roberts *v.* Palmore, 41 Tex. 617.

Stipulations of this character do not compel the debtor to pay the fees where he does not dispute the claim and pays at maturity, but where an attorney has been employed in good faith, by reason of the neglect or refusal of the debtor to pay, the fact that the money has been paid to the attorney without execution does not relieve the debtor from his agreement to pay such fees. Imler *v.* Imler, 94 Pa. St. 372. See also Davidson *v.* Vorse, 52 Iowa 384, 3 N. W. 477.

72. Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347.

73. Wilkins *v.* Troutner, 66 Iowa 557, 24 N. W. 37.

Withdrawal from case.—Where an attorney who has filed the requisite affidavit withdraws from the case, the attorney subsequently prosecuting the cause must file an affidavit, which will be treated as an amendment of the original affidavit. Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347.

74. White *v.* Lucas, 46 Iowa 319.

75. Hill *v.* Durand, 58 Wis. 160, 15 N. W. 390.

If more than the amount prescribed by statute is taxed the error is cured if the excess is remitted before appeal. Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54.

76. Grace *v.* Newbre, 31 Wis. 19.

77. Stewart *v.* New York Ct. C. Pl., 10 Wend. (N. Y.) 597; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46; Gorse *v.* Parker, 36 Fed. 840.

Where a party defending a suit in person procures an attorney to prepare and obtain an order to show cause, which is served with-

There is a conflict of authority as to whether an attorney conducting a case in his own behalf is entitled to tax fees therefor as costs. Some decisions hold that he is not;[78] others, that he is entitled to the same taxable costs as if he had conducted the action as attorney for another;[79] and others, that he may tax attorney's fees as in other cases, except a retaining fee.[80]

4. Right to Fees in Several or Consolidated Actions. Where several actions to enforce separate claims are consolidated, an attorney's fee taxable against defendant should be taxed as if the actions were one;[81] but where several suits by the same plaintiff against different defendants are submitted to referees, who are to render a final award, an attorney's fee of a designated amount is allowable in each of the original cases, under a statute allowing such fees to be taxed in each case submitted to a referee.[82]

5. Number of Fees as Affected by Number of Defendants. Ordinarily, where one attorney acts in behalf of several defendants in the same suit, only one attorney's fee is taxable,[83] except where the interests of the several defendants are separate, and it is necessary to interpose separate answers.[84]

6. Amount Taxable. If a specific amount is prescribed by statute the court cannot allow a greater sum.[85] If the amount is not prescribed by statute, the court should exercise its discretion as to the amount to be allowed, and not be governed wholly by the opinions of attorneys as to the value of the service.[86]

7. Docket-Fees Under Federal Statute — a. Right to Fees. U. S. Rev. Stat. § 824, allows a docket-fee of twenty dollars on a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty. There is considerable difference of opinion as to what constitutes a final hearing within this provision. Some decisions hold that any order or determina-

out any formal appearance by the attorney, plaintiff will on prevailing be entitled to tax attorney's fees where there has been an appearance by the attorney. Stewart *v.* New York Ct. C. Pl., 10 Wend. (N. Y.) 597.

78. Patterson *v.* Donner, 48 Cal. 369; Willard *v.* Bassett, 27 Ill. 37, 79 Am. Dec. 393; Garrett *v.* Pierce, 74 Ill. App. 225; Moore *v.* Jones, 17 Fed. Cas. No. 9,768, 23 Vt. 739.

A person acting as attorney for himself and others in a partition suit is not entitled to have his fee for services taxed as costs and apportioned ratably among all the parties. Cheney *v.* Ricks, 168 Ill. 533, 48 N. E. 75.

An attorney suing in his own name as principal cannot recover counsel fees as the agent of another. Ealer *v.* McAllister, 19 La. Ann. 21.

On prosecution of suit in the names of two attorneys by one of them for both, a retaining fee is not taxable. Jordans *v.* Van Hoesen, 18 Wend. (N. Y.) 648.

79. Drake *v.* Berry, 42 N. J. L. 60; Crommelin *v.* Dinsmore, 1 N. Y. City Ct. 69.

80. Flaacke *v.* Jersey City, 33 N. J. Eq. 57; Willard *v.* Harbeck, 3 Den. (N. Y.) 260.

81. Allis *v.* Meadow Spring Distilling Co., 67 Wis. 16, 29 N. W. 543, 30 N. W. 300. *Compare* Minturn *v.* Main, 2 Sandf. (N. Y.) 737, which is apparently in conflict with this doctrine.

A statutory prohibition against the taxation of attorneys' fees in several suits, where a joint suit could have been brought against all, is applicable to plaintiff's attorneys alone, and not to defendants or their attorneys, having no control in bringing the suits. Columbia Bank, etc., Co. *v.* Haldeman, 3 Pa. L. J. Rep. 167, 5 Pa. L. J. 28.

82. Switzer *v.* Home Ins. Co., 46 Fed. 50.

In Vermont it was held in an early decision that in actions *ex delicto* it is not usual to allow separate attorney's fees unless the trial, or at least the judgments, are separate. North Bank *v.* Wood, 11 Vt. 194.

Where several cases by the same complainant against the same defendant, and all involving the same questions, are submitted on one brief under an agreement that all should abide the event of the one in which the brief was furnished, complainant, on a reversal of the cases, is entitled to attorney's fees in each case as on argument. Holbrook *v.* Winsor, 25 Mich. 211; Chapaton *v.* Butler, 18 Mich. 337.

83. Tracey *v.* Stone, 5 How. Pr. (N. Y.) 104; Morton *v.* Croghan, 1 Cow. (N. Y.) 233; Wendell *v.* Lewis, 8 Paige (N. Y.) 613; Haughton *v.* Barney, 37 N. C. 393; Perry Mfg. Co. *v.* Brown, 19 Fed. Cas. No. 11,014. See also Adams *v.* Beloit, 105 Wis. 363, 81 N. W. 869.

Under a statute allowing to attorneys prosecuting or defending a suit a designated sum, to be recovered by the prevailing party, only one fee can be allowed in a single suit, however numerous the parties or distinct their interests. Lee *v.* Smyley, 6 Ala. 773.

84. Walker *v.* Russell, 7 Abb. Pr. (N. Y.) 452 note, 16 How. Pr. (N. Y.) 91; Adams *v.* Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441. See also Wendell *v.* Lewis, 8 Paige (N. Y.) 613.

85. *In re* Root, 8 Paige (N. Y.) 625.

86. Beall *v.* Robinson, 91 Ill. App. 247.

tion resulting in a final disposition of the cause is a final hearing.[87] Others hold that there is a final hearing only when some question of law or fact has been submitted to the court requiring not formal action merely but consideration, that is, the submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether plaintiff or libellant has made out the case stated by him in his bill or libel, on the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court.[88] The statute does not authorize taxation where on a trial by a jury the jury disagree,[89] where in an action at law a jury has been waived,[90] nor on a reference to a master in a suit in equity under an interlocutory order before a final hearing.[91] A proceeding in the supreme court under its original jurisdiction against a judge of an inferior court to obtain mandamus to compel him to proceed in the cause is a "civil cause" within the statute.[92] In a law case, where there is a final trial before a jury, the attorney's fee is always to be taxed, and it is for the court to determine who is the prevailing party.[93]

b. Number of Fees Taxable. According to some decisions where there are several trials of the same cause a docket-fee may be allowed for each trial.[94] This has been denied, however, in others.[95] In another it is held that it cannot be taxed more than once when a case has been twice heard, as for instance before and after appeal;[96] and in another that it cannot be taxed twice — first on final decree against the principal and afterward on another decree against the surety.[97]

F. Fees For Proceedings Before Notice of Trial. Defendant is entitled to costs of proceedings before notice of trial on discontinuance of the action before trial;[98] but not where after serving notice of trial, but without filing a note of

87. Carter *v.* Sweet, 84 Fed. 16; Greener *v.* Steinway, 48 Fed. 708; Partee *v.* Thomas, 27 Fed. 429; Price *v.* Coleman, 22 Fed. 694; Andrews *v.* Cole, 20 Fed. 410; Goodyear *v.* Sawyer, 17 Fed. 2; The Alert, 15 Fed. 620; Hayford *v.* Griffiths, 11 Fed. Cas. No. 6,264, 3 Blatchf. 79.

Within this rule a hearing after replication filed (Goodyear Dental Vulcanite Co. *v.* Osgood, 10 Fed. Cas. No. 5,594, 2 Ban. & A. 529), or a final decree obtained *pro confesso* without demurrer or answer (Andrews *v.* Cole, 20 Fed. 410) is final.

88. Peck, etc., Co. *v.* Fray, 92 Fed. 947; Kaempfer *v.* Taylor, 78 Fed. 795; Louisville, etc., R. Co. *v.* Merchants' Compress, etc., Co., 50 Fed. 449; New York Belting, etc., Co. *v.* New Jersey Car Spring, etc., Co., 32 Fed. 755; Ryan *v.* Gould, 32 Fed. 754; Wigton *v.* Brainerd, 28 Fed. 29; Mercartney *v.* Crittenden, 24 Fed. 401; Consolidated Bunging Apparatus Co. *v.* American Process Fermentation Co., 24 Fed. 658; McLean *v.* Clark, 23 Fed. 861; The Anchoria, 23 Fed. 669; Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Yale Lock Mfg. Co. *v.* Colvin, 14 Fed. 269, 21 Blatchf. 168; Coy *v.* Perkins, 13 Fed. 111; Beckwith *v.* Easton, 3 Fed. Cas. No. 1,212, 4 Ben. 357; Dedekam *v.* Voss, 7 Fed. Cas. No. 3,730, 3 Blatchf. 77.

Intervention. — An intervener who prevails in an intervention in an equity proceeding is not entitled to a docket-fee, as this is not a final hearing. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 684.

89. Cleaver *v.* Traders' Ins. Co., 40 Fed. 863; Strafer *v.* Carr, 6 Fed. 466.

90. Jones *v.* Schell, 13 Fed. Cas. No. 7,493, 8 Blatchf. 79.

91. Doughty *v.* West, etc., Co., 7 Fed. Cas. No. 4,030, 8 Blatchf. 107, 4 Fish. Pat. Cas. 318. See also Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 684.

92. *Ex p.* Hughes, 114 U. S. 548, 5 S. Ct. 1008, 29 L. ed. 281.

93. Williams *v.* Morrison, 32 Fed. 682.

Where a cause is remanded to the state court for want of jurisdiction in the circuit court, the court may allow such attorney's fees as would ordinarily be allowed on the final disposition of the cause. Josslyn *v.* Phillips, 27 Fed. 481.

94. American Diamond Rock-Boring Co. *v.* Sheldon, 28 Fed. 217; Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Schneider *v.* Barnett, 7 Fed. 451.

95. Huntress *v.* Epsom, 15 Fed. 732. To the same effect see Bostick *v.* Cox, 28 Ark. 566, in which it was held that under a statute providing that in all cases in the supreme, circuit, and chancery courts in which costs are recovered the clerk shall tax as costs a docket-fee, only one fee is recoverable of the same party in any one case, whether litigated before one or more courts.

96. Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,197, 7 Blatchf. 16.

97. Dedekam *v.* Vose, 7 Fed. Cas. No. 3,730, 3 Blatchf. 77.

Stipulation to hear several causes together. — It is proper to tax a docket-fee where a case is one of a number stipulated to be heard together, and the decree in one case to stand as the decree in all. Goodyear Dental Vulcanite Co. *v.* Osgood, 10 Fed. Cas. No. 5,594, 5 Ban. & A. 529.

98. Rockefeller *v.* Weiderwax, 3 How. Pr. (N. Y.) 382.

issue, as prescribed by statute, he has the action dismissed for want of prosecution.[99] There is considerable conflict of authority as to whether the fee is taxable on an interlocutory judgment on demurrer. Thus some decisions hold that where a demurrer to an answer is sustained plaintiff is entitled to costs for proceedings before notice of trial,[1] while more recent decisions hold the contrary.[2] So a number of decisions hold that where a demurrer to the complaint is overruled, with leave to defendant to answer on payment of costs, costs before notice of trial are not taxable;[3] and it has been held that costs before notice of trial are not taxable on overruling a demurrer to an answer.[4] Although an action has been tried more than once, the successful party is entitled to tax but one fee for proceedings before notice of trial.[5]

G. Fees For Proceedings After Notice of Trial and Before Trial. The fee for proceedings after notice of trial and before trial is taxable in favor of defendant, where plaintiff withdraws a juror and amends his complaint;[6] discontinues after defendant has noticed the cause for trial;[7] where the action is dismissed for want of prosecution after being noticed for trial;[8] on the overruling of a demurrer to the answer;[9] or where a demurrer to the whole complaint is sustained.[10] Plaintiff is entitled to the fee where a demurrer to the complaint is overruled with leave to defendant to answer on payment of costs;[11] where the terms for vacating a judgment and letting defendant in to defend require him to pay "all the costs of the hearing before the referee in this action, and of the proceedings subsequent thereto;"[12] or where a demurrer to the answer is sustained with permission to defendant to plead anew on payment of costs.[13] This fee, however, is not taxable in plaintiff's favor where defendant defaults, and the court simply takes proof to determine whether plaintiff is entitled to judgment, because notice of trial is neither necessary nor proper under these circumstances.[14] There is some conflict of opinion as to the number of fees to be allowed where there is more than one trial. Some decisions hold, without qualification, that only one fee can be taxed, although the case may for any reason have been tried more than once.[15] In other decisions it has been held that where the new trial results from a reversal of the judgment and an order granting the

99. Gilroy *v.* Stampfer, 30 Misc. (N. Y.) 830, 61 N. Y. Suppl. 924.

1. Adams *v.* Ward, 60 How. Pr. (N. Y.) 288; Van Valkenberg *v.* Van Schaick, 8 How. Pr. (N. Y.) 271.

2. Jones *v.* Butler, 83 Hun (N. Y.) 91, 31 N. Y. Suppl. 401, 63 N. Y. St. 814; Garrett *v.* Wood, 23 Misc. (N. Y.) 7, 51 N. Y. Suppl. 651.

3. Louis *v.* Empire State Ins. Co., 75 Hun (N. Y.) 364, 47 N. Y. Suppl. 83; Anonymous, 3 Sandf. (N. Y.) 756; Thompson *v.* Stanley, 22 N. Y. Civ. Proc. 348; Phipps *v.* Van Cott, 15 How. Pr. (N. Y.) 110.

4. Crary *v.* Norwood, 5 Abb. Pr. (N. Y.) 219.

5. Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212.

More than one fee cannot be taxed, although the cause may have been noticed several times for trial. Jackson *v.* McBurney, 6 How. Pr. (N. Y.) 408.

6. Dewey *v.* Stewart, 6 How. Pr. (N. Y.) 465.

7. Hall *v.* Lindo, 8 Abb. Pr. (N. Y.) 341.

8. Andrews *v.* Schnitzler, 48 N. Y. Super. Ct. 173; Roberts *v.* Aden, 2 N. Y. City Ct. 302.

9. Crary *v.* Norwood, 5 Abb. Pr. (N. Y.) 219.

10. Marsh *v.* Graham, 19 Misc. (N. Y.) 263, 43 N. Y. Suppl. 253.

11. Louis *v.* Empire State Ins. Co., 75 Hun (N. Y.) 364, 27 N. Y. Suppl. 83, 56 N. Y. St. 766; Anonymous, 3 Sandf. (N. Y.) 756; Marsh *v.* Graham, 19 Misc. (N. Y.) 263, 43 N. Y. Suppl. 252; Thompson *v.* Stanley, 22 N. Y. Civ. Proc. 248; Phipps *v.* Van Cott, 15 How. Pr. (N. Y.) 110.

12. Buckingham *v.* Minor, 18 How. Pr. (N. Y.) 257.

13. Jones *v.* Butler, 83 Hun (N. Y.) 91, 31 N. Y. Suppl. 401, 63 N. Y. St. 814; Garrett *v.* Wood, 23 Misc. (N. Y.) 7, 51 N. Y. Suppl. 651; Adams *v.* Ward, 60 How. Pr. (N. Y.) 288.

On sustaining a demurrer to one of several counter-claims, with leave to amend the answer on payment of costs "upon said demurrer," only a trial fee can be allowed. Kniering *v.* Lennon, 3 Misc. (N. Y.) 247, 22 N. Y. Suppl. 775, 51 N. Y. St. 907.

14. Cohen *v.* Cohen, 72 Hun (N. Y.) 393, 25 N. Y. Suppl. 387, 55 N. Y. St. 463.

15. Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212; Jackett *v.* Judd, 18 How. Pr. (N. Y.) 385.

trial only one fee is taxable,[16] while others hold that where the new trial results from a disagreement of the jury two fees are taxable.[17] So in another it was held that where a cause placed on the short-cause calendar is sent back to the general term because the trial was not finished in one hour, and is thereafter tried in its regular order, the successful defendant is entitled to tax two fees for costs after notice of trial.[18]

H. Trial Fees — 1. In General. The statutes of some jurisdictions authorize fees of designated amounts[19] for the trial of an issue of law and for the trial of an issue of fact. A trial fee is only allowed where there is an issue[20] and a trial thereof.[21] The trial fee is taxable on an interlocutory judgment on demurrer.[22] Where there are issues of fact in an equity case, which are referred, the prevailing party is entitled to the fee for the trial of issues of fact, although the reference reserves all other questions.[23] The clerk has no right to exact a trial fee in advance of the trial day in anticipation of a trial, and as a condition precedent to putting the cause on the calendar.[24]

2. Number of Trial Fees Allowable. No matter how many trials of a case there may be, a trial fee is allowed for each trial.[25] It has been so held where the jury disagree on the first trial;[26] where a default judgment against plaintiff

16. Kummer *v.* Christopher, etc., St. R. Co., 12 Misc. (N. Y.) 387, 33 N. Y. Suppl. 581, 67 N. Y. St. 404.

17. Friedheim *v.* Metropolitan St. R. Co., 35 Misc. (N. Y.) 199, 71 N. Y. Suppl. 485; Kummer *v.* Christopher, etc., St. R. Co., 12 Misc. (N. Y.) 387, 33 N. Y. Suppl. 581, 67 N. Y. St. 404; Zelmanovitz *v.* Manhattan R. Co., 33 N. Y. Suppl. 583, 67 N. Y. St. 405; Spring *v.* Day, 44 How. Pr. (N. Y.) 390. But see Seifter *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 443, 65 N. Y. Suppl. 1123.

18. Gilroy *v.* Badger, 28 Misc. (N. Y.) 143, 58 N. Y. Suppl. 1106.

19. Additional fee where trial lasts more than two days.—N. Y. Code Civ. Proc. § 3251, provides that if the trial of an issue of fact necessarily occupies more than two days, ten dollars in addition to the ordinary trial fee is allowable. A trial lasts more than two days where the case is on trial two days and plaintiff rests, and the complaint is dismissed on the third day. Mott *v.* Consumers Ice Co., 8 Daly (N. Y.) 244. So an additional allowance should be made where more than two days are necessarily occupied in completing the trial, including the preparation and submission of written points for argument, if that way of submission is agreed on. Mygatt *v.* Wilcox, 35 How. Pr. (N. Y.) 410. On the other hand, where a trial began in the afternoon of one day and the jury took the case at five P. M. on the next day and returned a verdict at ten A. M. on the following morning, the trial had not occupied more than two days within the meaning of the statute. Washburne *v.* Oliver, 62 How. Pr. (N. Y.) 482. But if a trial occupies more than two days, and two previous mistrials each occupy more than two days, an allowance for extra time should be made for the trial and for both mistrials. Hudson *v.* Erie R. Co., 57 N. Y. App. Div. 98, 68 N. Y. Suppl. 28. And the additional fee may be allowed on the hearing of an application before a referee occupying more than two days. Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417.

20. Cohen *v.* Cohen, 72 Hun (N. Y.) 393, 25 N. Y. Suppl. 387, 55 N. Y. St. 463; *In re* New York, etc., R. Co., 20 Hun (N. Y.) 201, 63 How. Pr. (N. Y.) 123; Pardee *v.* Schenck, 11 How. Pr. (N. Y.) 500.

Although the trial of an issue of fact may involve the consideration of questions of law, the only fee allowable is for the trial of issues of fact, as the statutory issue of law is an issue framed on the record. Beem *v.* Newaygo Cir. Judge, 97 Mich. 491, 56 N. W. 760.

21. Gowing *v.* Levy, 17 N. Y. Suppl. 771, 43 N. Y. St. 767, 22 N. Y. Civ. Proc. 10. See also *In re* Du Bois, 36 Misc. (N. Y.) 488, 73 N. Y. Suppl. 939.

Necessity of verdict.— In case of a trial of an issue of fact it need not result in a verdict. Hamilton *v.* Butler, 19 Abb. Pr. (N. Y.) 446.

Where the questions of law arising on a trial or verdict are subsequently heard at a special term the successful party is entitled to a trial fee. Waterbury *v.* Westervelt, 3 Sandf. (N. Y.) 749.

22. Anonymous, 3 Sandf. (N. Y.) 756; Marsh *v.* Graham, 19 Misc. (N. Y.) 263, 43 N. Y. Suppl. 252; Kniering *v.* Lennon, 3 Misc. (N. Y.) 247, 22 N. Y. Suppl. 775, 51 N. Y. St. 907; Crary *v.* Norwood, 5 Abb. Pr. (N. Y.) 219; Adams *v.* Ward, 60 How. Pr. (N. Y.) 288.

23. Wiggins *v.* Arkenburgh, 4 Sandf. (N. Y.) 688.

24. Matter of Du Bois, 36 Misc. (N. Y.) 488, 73 N. Y. Suppl. 939; Matter of Hale, 32 Misc. (N. Y.) 104, 65 N. Y. Suppl. 449.

25. Inkster *v.* Carver, 17 Mich. 64; Cregin *v.* Brooklyn Crosstown R. Co., 19 Hun (N. Y.) 349; La Fond *v.* Jetzkowitz, 17 Abb. N. Cas. (N. Y.) 87; Jones *v.* Case, 38 How. Pr. (N. Y.) 349; Van Shaick *v.* Winne, 8 How. Pr. (N. Y.) 5; Dodd *v.* Curry, 4 How. Pr. (N. Y.) 123.

26. Hamilton *v.* Butler, 4 Rob. (N. Y.) 654, 30 How. Pr. (N. Y.) 36; Spring *v.* Day, 44 How. Pr. (N. Y.) 390.

is opened and a second trial had;[27] or where an inquest previously taken by plaintiff is opened and a second trial had.[28] So where actions are consolidated under a stipulation that one is to abide the event of the other, a successful party is entitled to a trial fee for each.[29]

3. WHAT AMOUNTS TO A TRIAL. A trial, within the statute, is had where a cause is at issue on issues of fact, and is regularly noticed for trial and placed on the calendar, and when reached in its order the complaint is dismissed for failure of plaintiff to appear;[30] where the cause is settled or discontinued by plaintiff;[31] where an inquest is taken on default to ascertain the amount of plaintiff's claim;[32] where a verdict is directed for plaintiff at circuit, subject to the opinion of the court at general term;[33] where in special proceedings the matter has been referred to a referee to take proof of the facts, and there has been a hearing before him, and a final order made on his report;[34] where a question of law arising upon the trial of an issue of fact is reserved for further consideration and decided as on a motion founded on the clerk's minutes;[35] where an action which has been placed on the short-cause calendar is sent back to the general calendar because the trial was not finished in one hour;[36] where plaintiff is given absolute judgment on the pleadings;[37] where an agreed case is argued;[38] where plaintiff at the trial obtains leave to withdraw a juror;[39] or where the complaint is dismissed on a trial instead of on special motion.[40] On the other hand it is held that there is no trial where a motion to dismiss the complaint is denied and the cause directed to go to the circuit for trial,[41] or where there is a reference to take an account or ascertain damages.[42] So it has been held that a motion for judgment on the pleadings,[43] an application for judgment on a pleading as frivolous, which is granted, but leave reserved the unsuccessful party to plead over,[44] a reference for the admeas-

27. Cole *v.* Lowery, 23 N. Y. Suppl. 674, 23 N. Y. Civ. Proc. 113.

28. Baker *v.* McMullen, 28 Misc. (N. Y.) 128, 58 N. Y. Suppl. 1086; Wessels *v.* Carr, 6 N. Y. Suppl. 535, 23 Abb. N. Cas. (N. Y.) 464; Candee *v.* Jones, 13 N. Y. Civ. Proc. 160; Lennon *v.* McIntosh, 19 Abb. N. Cas. (N. Y.) 175; La Fond *v.* Jetzkowitz, 17 Abb. N. Cas. (N. Y.) 87.

29. Koch *v.* Koch, 1 N. Y. City Ct. 255.

30. Sutphen *v.* Lash, 10 Hun (N. Y.) 120; Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622; Cole *v.* Lowery, 23 N. Y. Suppl. 674, 23 N. Y. Civ. Proc. 113; Van Gelder *v.* Hallenbeck, 2 N. Y. Suppl. 252, 18 N. Y. St. 19; Rogers *v.* Degen, 10 Abb. Pr. (N. Y.) 313; Dodd *v.* Curry, 4 How. Pr. (N. Y.) 123.

31. Ehlers *v.* Willis, 63 How. Pr. (N. Y.) 341.

32. Weiss *v.* Morrell, 7 Misc. (N. Y.) 541, 28 N. Y. Suppl. 61; Jacob Hoffman Brewing Co. *v.* Volpe, 4 Misc. (N. Y.) 260, 23 N. Y. Suppl. 812, 53 N. Y. St. 179; Wessels *v.* Carr, 6 N. Y. Suppl. 535, 22 Abb. N. Cas. (N. Y.) 464.

Where defendant withdraws his answer and offers judgment, and plaintiff takes an inquest and enters judgment for the amount claimed, this amounts to a trial. Hawley *v.* Davis, 5 Hun (N. Y.) 642.

33. Wilcox *v.* Curtiss, 10 How. Pr. (N. Y.) 91.

34. *In re* Clarke, 15 N. Y. Suppl. 867, 27 Abb. N. Cas. (N. Y.) 144.

35. Waterbury *v.* Westervelt, 3 Sandf. (N. Y.) 749, Code Rep. N. S. (N. Y.) 215.

36. Gilroy *v.* Badger, 28 Misc. (N. Y.) 143, 58 N. Y. Suppl. 1106.

37. Pratt *v.* Allen, 19 How. Pr. (N. Y.) 450; *In re* Bernhard, 1 N. Y. Suppl. 225, 16 N. Y. St. 240, 14 N. Y. Civ. Proc. 195; Hill *v.* Simpson, 11 Abb. Pr. N. S. (N. Y.) 343, in which it was also said that such would not be the case if an application was granted with leave to plead over; that in such case the moving party would be entitled only to costs of motion.

38. Nielson *v.* Mutual Ins. Co., 3 Duer (N. Y.) 683.

39. Mott *v.* Consumers' Ice Co., 8 Daly (N. Y.) 244; Dewey *v.* Stewart, 6 How. Pr. (N. Y.) 465. But see Starr Cash Car Co. *v.* Reinhardt, 23 N. Y. Suppl. 733, 52 N. Y. St. 942, which seems to be in conflict with this view.

40. Shannon *v.* Brower, 2 Abb. Pr. (N. Y.) 377.

41. Evans *v.* Ferguson, 10 N. Y. Civ. Proc. 57.

42. McMulkin *v.* Bates, 46 How. Pr. (N. Y.) 405; Taaks *v.* Schmidt, 25 How. Pr. (N. Y.) 340. See also Young *v.* Syracuse, etc., R. Co., 35 Misc. (N. Y.) 114, 71 N. Y. Suppl. 221, in which it was held that a mere assessment of damages was not a trial.

43. Pach *v.* Gilbert, 9 N. Y. Suppl. 546, 29 N. Y. St. 833.

44. Candee *v.* Ogilvie, 5 Duer (N. Y.) 658; Bernhard *v.* Kapp, 11 Abb. Pr. N. S. (N. Y.) 342; Wesley *v.* Bennett, 6 Abb. Pr. (N. Y.) 12; Butchers', etc., Bank *v.* Jacobson, 22 How. Pr. (N. Y.) 470; Marquisee *v.* Brigham, 12

urement of dower,[45] an application for judgment to a judge at chambers,[46] the taking of evidence by commissioners, for the purpose of determining the value of real estate in litigation,[47] a motion for extra allowance after plaintiff offers to discontinue the action and pay costs,[48] or the argument of a motion for new trial[49] is not a trial within the rule. It has also been held that there is no trial at the circuit where after impaneling the jury and examining the witnesses the cause is referred,[50] or where the cause is settled or discontinued while upon the day calendar and before it is reached for trial.[51]

I. Calendar Fees. Calendar fees are not taxable where the cause is not placed on the calendar;[52] and where a cause is transferred from an equity to a jury calendar, under a statute subsequently declared unconstitutional, calendar fees are not taxable, as the expenditure is without warrant of law, and therefore not a "necessary disbursement."[53]

J. Term Fees — 1. When Allowable. The amount designated by statute for allowance for a term fee is granted for terms during which a cause is necessarily on the calendar awaiting trial.[54] The cause, however, must be "necessarily" on the calendar, as this is expressly required by statute. It will be considered "necessarily" on the calendar when regularly and properly placed there.[55] The prevailing party is entitled to a term fee for terms during which the cause is held under advisement by the court.[56] The right to term fees is not affected by the fact that the court's business was such that it was apparent that the cause could not be reached,[57] nor will plaintiff's right to term fees be affected by the fact that plaintiff himself did not notice the case for trial where defendant had so noticed it.[58] Term fees are not allowable where the cause is for any reason improperly or not necessarily on the calendar;[59] where the cause is postponed at

How. Pr. (N. Y.) 399; Rochester City Bank *v.* Rapelje, 12 How. Pr. (N. Y.) 26; Roberts *v.* Clark, 10 How. Pr. (N. Y.) 451; Gould *v.* Carpenter, 7 How. Pr. (N. Y.) 97. *Contra*, Pratt *v.* Allen, 19 How. Pr. (N. Y.) 450; Roberts *v.* Morrison, 7 How. Pr. (N. Y.) 396; Lawrence *v.* Davis, 7 How. Pr. (N. Y.) 354.

45. Price *v.* Price, 61 Hun (N. Y.) 604, 16 N. Y. Suppl. 359, 41 N. Y. St. 399.

46. Marquisee *v.* Brigham, 12 How. Pr. (N. Y.) 399.

47. *In re* New York, etc., R. Co., 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123.

48. McComb *v.* Kellogg, 13 N. Y. Civ. Proc. 150.

49. Jackett *v.* Judd, 18 How. Pr. (N. Y.) 385; Potsdam, etc., R. Co. *v.* Jacobs, 10 How. Pr. (N. Y.) 453; Moore *v.* Cockroft, 9 How. Pr. (N. Y.) 479. *Contra*, Mechanics' Banking Assoc. *v.* Kiersted, 10 How. Pr. (N. Y.) 400; Hager *v.* Danforth, 8 How. Pr. (N. Y.) 448; Ellsworth *v.* Gooding, 8 How. Pr. (N. Y.) 1.

50. Syracuse Third Nat. Bank *v.* McKinstry, 2 Hun (N. Y.) 443, 5 Thomps. & C. (N. Y.) 52.

51. Studwell *v.* Baxter, 33 Hun (N. Y.) 331; Sutphen *v.* Lash, 10 Hun (N. Y.) 120; Lockwood *v.* Salmon River Paper Co., 20 N. Y. Suppl. 967, 974, 49 N. Y. St. 302, 303; Kronsberg *v.* Mayer, 15 N. Y. Suppl. 328, 20 N. Y. Civ. Proc. 80; Oelberman *v.* Rosenbaum, 4 N. Y. Suppl. 210, 15 N. Y. Civ. Proc. 389; Ehlers *v.* Willis, 63 How. Pr. (N. Y.) 341. *Contra*, Dupurey *v.* Phœnix, 1 Abb. N. Cas. (N. Y.) 133 note.

52. Lyon *v.* Wilkes, 1 Cow. (N. Y.) 591.

53. Kohn *v.* Manhattan R. Co., 8 Misc. (N. Y.) 421, 28 N. Y. Suppl. 663, 59 N. Y. St. 34.

54. Kahn *v.* Coen, 30 N. Y. Suppl. 347, 62 N. Y. St. 107, 31 Abb. N. Cas. (N. Y.) 478; Simpson *v.* Rowan, 13 N. Y. Civ. Proc. 206.

"The rule is general that a successful party is entitled to his term fees when he attends the circuit prepared for trial, and the cause through no fault of his is not tried." Gay *v.* Seibold, 3 N. Y. Civ. Proc. 169 [*citing* Minturn *v.* Main, 2 Sandf. (N. Y.) 737; Fisher *v.* Hunter, 15 How. Pr. (N. Y.) 156; Williams *v.* Horgan, 13 How. Pr. (N. Y.) 139].

55. Kahn *v.* Coen, 30 N. Y. Suppl. 347, 62 N. Y. St. 107, 31 Abb. N. Cas. (N. Y.) 478; Sipperly *v.* Warner, 9 How. Pr. (N. Y.) 332.

Estoppel to deny that cause was necessarily on calendar arises against a party noticing it for trial. Stanswood *v.* Benson, 2 Month. L. Bul. (N. Y.) 39.

56. Bliss *v.* Tripp, 16 Gray (Mass.) 287, under a statute allowing the prevailing party a term fee for each term during which the action is pending in court.

57. Martin *v.* Lillibridge, 111 Mich. 71, 69 N. W. 75.

58. Vandeveer *v.* Warren, 11 N. Y. Civ. Proc. 319.

59. Bowen *v.* Sweeny, 66 Hun (N. Y.) 42, 20 N. Y. Suppl. 733, 734, 49 N. Y. St. 603, 605; Candee *v.* Ogilvie, 5 Duer (N. Y.) 658; Nobis *v.* Pollock, 13 N. Y. Suppl. 837, 18 N. Y. Civ. Proc. 1; Drew *v.* Comstock, 17 How. Pr. (N. Y.) 469. See also Inkster *v.* Carver, 17 Mich. 64.

Illustrations.— Term fees are not allowable

the request of the party asking term fees;[60] where no note of issue is filed for any term for which the cause is noticed for trial;[61] where parties refuse or neglect to try the cause at a term for which it is regularly noticed, although having the opportunity to do so;[62] or where plaintiff serves an amended complaint, destroying the old issues.[63] Where a cause before it is reached on the calendar after the circuit is referred by stipulation, the successful party is entitled to tax a term fee for that circuit, but not where the cause is referred without the consent of the opposite party.[64] Fees are not allowable for the term at which the cause is tried.[65]

2. NUMBER OF FEES TAXABLE. Where a statute or rule of court limits the number of term fees, a greater number than specified cannot be allowed.[66] Where a statute provides that the successful party in an action in the superior court shall be allowed but three term fees in any action, unless allowed by order of the court, and that if the case goes up two additional term fees may be allowed, as many term fees as there are terms may be allowed in the discretion of the court, where the case does not go up.[67]

K. Fees For Entering Judgment. Where a cause is discontinued, and no reason exists for entering a judgment, defendant is not entitled to costs for entering the judgment.[68] Otherwise where the judgment is actually entered.[69]

L. Evidence — 1. COPIES OF DEEDS AND OTHER PAPERS. Costs cannot be taxed for papers not needed in a cause;[70] for papers not actually used;[71] nor for papers which must be presumed to be in the possession of the party producing the copies;[72] and so in some jurisdictions it is held that the expense of copies of deeds and other documents produced at the trial is never taxable.[73] In other jurisdictions,

where the cause is settled before the term for which the fee is asked (Latham *v.* Bliss, 13 How. Pr. (N. Y.) 416), where defendant, after notice that no further proceedings will be taken, continues to notice the cause thereafter and put it on the calendar (Jennings *v.* Fay, Code Rep. N. S. (N. Y.) 231), or where some of the parties have not been served and some have not answered (Bowen *v.* Sweeny, 66 Hun (N. Y.) 42, 20 N. Y. Suppl. 733, 734, 49 N. Y. St. 603, 605).

60. Gay *v.* Seibold, 3 N. Y. Civ. Proc. 169; Hanna *v.* Dexter, 15 Abb. Pr. (N. Y.) 135; Hinman *v.* Bergen, 5 How. Pr. (N. Y.) 245. See also Sipperly *v.* Warner, 9 How. Pr. (N. Y.) 332; Perry *v.* Livingston, 6 How. Pr. (N. Y.) 404, in which it was held that the successful party was not entitled to a term fee where he procured a postponement against the consent of the other party.

61. Gowing *v.* Levy, 17 N. Y. Suppl. 771, 43 N. Y. St. 767, 22 N. Y. Civ. Proc. 10.

62. Hendricks *v.* Bouck, 4 E. D. Smith (N. Y.) 461; Carroll *v.* Watters, 10 N. Y. Civ. Proc. 6; Ormsby *v.* Babcock, 2 Abb. Pr. (N. Y.) 253; Whipple *v.* Williams, 4 How. Pr. (N. Y.) 27.

63. Herzfeld *v.* Reinach, 28 Misc. (N. Y.) 459, 57 N. Y. Suppl. 669.

64. Sipperly *v.* Warner, 9 How. Pr. (N. Y.) 332; Perry *v.* Livingston, 6 How. Pr. (N. Y.) 404. See also Benton *v.* Sheldon, 1 Code Rep. (N. Y.) 134.

65. Gilman *v.* Redington, 67 Barb. (N. Y.) 321; Mechanics' Banking Assoc. *v.* Kiersted, 4 Duer (N. Y.) 639; Place *v.* Butternuts Woolen, etc., Mfg. Co., 28 How. Pr. (N. Y.) 184.

66. Pearman *v.* Gould, (N. J. Ch. 1887) 8 Atl. 285; Duncan *v.* Erickson, 82 Wis. 128, 51 N. W. 1140. See also Hamilton *v.* Butler, 4 Rob. (N. Y.) 654, holding that an extra term fee after the cause has been on the calendar for five terms, and after it has been once tried, although set down by the judge for another trial at the next term, cannot be allowed for such term.

Number of term fees on reference.— Term fees are not allowable for every term of court between the date of an order of reference and that of the filing of a referee's report. Benton *v.* Bugnall, Code Rep. N. S. (N. Y.) 229. Nor is a term fee to be allowed for each term the cause is indorsed for hearing before the referee. Anonymous, 1 Duer (N. Y.) 596, 8 How. Pr. (N. Y.) 82.

67. Leonard *v.* O'Reilley, 137 Mass. 138.

68. Harden *v.* Hardick, 2 Hill (N. Y.) 384.

Where a statute requires the clerk to account for a judgment fee "in each action tried," it has been held that he should tax a judgment fee where the court fails to agree on a judgment and continues a case for further hearing, the view being taken that the action is "tried." Walker *v.* Sargeant, 13 Vt. 352.

69. Clegg *v.* Aiken, 11 N. Y. St. 354.

70. Senior *v.* Anderson, 130 Cal. 290, 62 Pac. 563; Mann *v.* Rice, 3 Barb. Ch. (N. Y.) 42.

71. Kaempfer *v.* Taylor, 78 Fed. 795.

72. Ford *v.* Louisville, etc., R. Co., 45 Fed. 210.

73. Den *v.* Johnson, 13 N. J. L. 156; Murphy *v.* Loyd, 3 Whart. (Pa.) 356; Ingersoll *v.* Sherry, 1 Phila. (Pa.) 68, 7 Leg. Int. (Pa.) 66. See also Hoyt *v.* Jones, 31 Wis. 389, in which it was held that an abstract of title was not a taxable disbursement. (The

however, costs of copies of certain papers have in a proper case been held taxable.[74]

2. Exemplifications. Exemplifications which are rejected are not taxable as costs;[75] nor can they be taxed in any event,[76] except where there is statutory authority therefor.[77]

3. Maps, Surveys, and Plats. The cost of a survey having no influence on the question before the court,[78] or not used on the trial,[79] is not taxable in favor of the prevailing party; and ordinarily the expense of procuring surveys, maps, plats, or plans is not taxable as costs,[80] except where there is clear statutory authority therefor.[81]

4. View. Plaintiff must pay the costs of a view, where defendant has not joined in it, although the trial be postponed on affidavit of defendant.[82] The cost of viewing the ground by the jury will be allowed in the federal court, where the procedure of the state courts of record within the district is to allow such costs.[83]

5. Models. Some decisions hold that the cost of copies of models for use in an infringement suit is not taxable by the prevailing party, because not "exemplifications or copies of papers necessarily obtained for use on the trial," within the

rule in this state has since been changed by express statutory provision.)

74. *Massachusetts.*— Suffolk *v.* Mill Pond Wharf Corp., 5 Pick. 540.

Minnesota.—Wentworth *v.* Griggs, 24 Minn. 450.

Mississippi.— Bell *v.* Medford, 57 Miss. 31.

New Hampshire.— Ela *v.* Knox, 46 N. H. 16, 88 Am. Dec. 179.

New York.— Jackson *v.* Mather, 2 Cow. 584.

Tennessee.— Smith *v.* Hutchison, 104 Tenn. 394, 58 S. W. 226.

Washington.—New Whatcom *v.* Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236.

United States.— Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112.

See 13 Cent. Dig. tit. "Costs," § 708 *et seq.*

For use on interlocutory hearing.— Copies of papers obtained for use on interlocutory or incidental motions or hearings are not obtained for use on trials, within the meaning of U. S. Rev. Stat. § 983, providing for taxing as costs the expenses in obtaining such copies. Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112.

75. Leeds *v.* Loud, 2 Miles (Pa.) 189.

76. Den *v.* Johnson, 13 N. J. L. 156; Hanel *v.* Baare, 9 Bosw. (N. Y.) 682; Christmas *v.* Biddle, 1 Phila. (Pa.) 68, 7 Leg. Int. (Pa.) 66.

A charge for traveling expenses, to procure the exemplification of a judgment in another court, is not allowable as a necessary disbursement. Doe *v.* Green, 2 Paige (N. Y.) 347.

77. Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860 (in which it is held that the cost of the exemplification of a foreign judgment is properly taxable. The statute although not mentioned in the decision expressly authorizes it); Ford *v.* Louisville, etc., R. Co., 45 Fed. 210 (in which it is held that under a statute providing that lawful fees for exemplifications necessarily obtained for use on trials may be taxed as costs, a successful party may tax transcripts of suits on which he relies merely to defeat his adversary's title). See also Niles *v.* Griswold, 3 How. Pr. (N. Y.) 23; Jackson *v.* Root, 18 Johns. (N. Y.) 336.

78. Hampton *v.* Eubank, 4 J. J. Marsh. (Ky.) 634.

79. Ela *v.* Knox, 46 N. H. 16, 88 Am. Dec. 179.

80. *California.*— Bathgate *v.* Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158.

New Jersey.— Booraem *v.* North Hudson County R. Co., 44 N. J. Eq. 70, 14 Atl. 106.

New York.— Rothery *v.* New York Rubber Co., 90 N. Y. 30; Mark *v.* Buffalo, 87 N. Y. 184; Provost *v.* Farrell, 13 Hun 303; Sinne *v.* New York, 8 N. Y. Civ. Proc. 252 note; Low *v.* Vrooman, 15 Johns. 238.

Oregon.— Weiss *v.* Meyer, 24 Oreg. 108, 32 Pac. 1025.

Pennsylvania.— Caldwell *v.* Miller, 46 Pa. St. 233; Heath *v.* Walton, 9 Pa. Dist. 218.

Rhode Island.— Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

South Carolina.— Lesly *v.* Burford, 1 Brev. 460.

United States.— Tuck *v.* Olds, 29 Fed. 883; New Hampshire Land Co. *v.* Tilton, 29 Fed. 764. *Compare* Lillienthal *v.* Southern California R. Co., 61 Fed. 622.

See 13 Cent. Dig. tit. "Costs," § 709.

A charge for a map in a bill of costs is not a necessary disbursement, appearing as such on its face, which, unless controverted, will control the court on taxation. Miller *v.* Highland Ditch Co., 91 Cal. 103, 27 Pac. 536.

81. Williams *v.* Close, 14 La. Ann. 737; Leighton *v.* Haynes, 58 Me. 408; Wesley *v.* Sargent, 38 Me. 315.

Amount allowed.— A judgment allowing the expense of making a plan to be taxed as costs will not be reversed on the ground that the allowance is unreasonable, where no witness estimated the value of the plan at less than the amount allowed. Surgi *v.* Roselius, 14 La. Ann. 263.

82. Miller *v.* Reed, 4 N. J. L. 350.

83. Huntress *v.* Epsom, 15 Fed. 732.

meaning of the statute allowing fees therefor to be taxed as costs by the prevailing party.[84] Other decisions, without mentioning any statute, hold that the cost of copies of models, properly procured for use as a part of the evidence in the suit, may be allowed, but that the cost of other models or machines cannot.[85]

M. Witness' Fees — 1. Parties to Suit. The general rule is that a party testifying in his own behalf is not entitled to witness' fees, whether suing for himself[86] or in a representative capacity,[87] or testifying for another joined with him.[88] Some decisions modify the rule, to the extent that a party attending solely as a witness and examined as such is entitled to witness' fees.[89] So it has been held that a party who is examined by his opponent is entitled to witness' fees, although he would not have been if he had not been thus examined.[90]

2. Persons Interested in Suit. Costs may be taxed for fees of persons attending as witnesses in a suit in which they are interested, but in which they are not parties.[91]

84. Cornely *v.* Markwald, 24 Fed. 187, 23 Blatchf. 248; Parker *v.* Bigler, 18 Fed. Cas. No. 10,726, 1 Fish. Pat. Cas. 285, 14 Leg. Int. (Pa.) 180; Woodruff *v.* Barney, 30 Fed. Cas. No. 17,986, 1 Bond 528, 2 Fish. Pat. Cas. 244.

85. Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Hathway *v.* Roach, 11 Fed. Cas. No. 6,213, 2 Woodb. & M. 63; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210.

86. *Indiana.*— Goodwin *v.* Smith, 68 Ind. 301.

Minnesota.— See Barry *v.* McGrade, 14 Minn. 286.

New Hampshire.— Stratton *v.* Upton, 36 N. H. 581.

New Jersey.— Corle *v.* Monkhouse, 61 N. J. L. 535, 43 Atl. 100.

New York.— Case *v.* Price, 17 How. Pr. 248; Perry *v.* Livingston, 6 How. Pr. 404; Christy *v.* Christy, 6 Paige 170. *Contra,* Logan *v.* Brooks, 8 Abb. Pr. 127; Rogers *v.* Chamberlain, 7 Abb. Pr. 452; Querissle *v.* Hilliard, 3 Abb. Pr. 31. See also Walker *v.* Russell, 7 Abb. Pr. 452 note, 16 How. Pr. 91.

Pennsylvania.— Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Parker *v.* Martin, 3 Pittsb. 166; Stehman *v.* Iron Co., 2 Lanc. L. Rev. 33; Triebel *v.* Deysher, 2 Woodw. 55; Lutz *v.* Daniel, 2 Woodw. 12.

Tennessee.— Grub *v.* Simpson, 6 Heisk. 92.

Texas.— Texas Midland R. Co. *v.* Parker, 28 Tex. Civ. App. 116, 66 S. W. 583.

Vermont.— Hale *v.* Merrill, 27 Vt. 738.

Wisconsin.— Grinnell *v.* Denison, 12 Wis. 402.

United States.— Sebring *v.* Ward, 21 Fed. Cas. No. 12,598, 4 Wash. 546; Warren *v.* Weaver, 29 Fed. Cas. No. 17,203, 1 Wkly. Notes Cas. (Pa.) 107.

See 13 Cent. Dig. tit. "Costs," § 724.

The rule is based on the assumption that the party is an interested party, and therefore is not subjected to any loss of time or inconvenience. Beatty *v.* Railroad Co., 4 Lanc. L. Rev. 1.

Wife of party stands on same footing as party.— Texas Midland R. Co. *v.* Parker, 28 Tex. Civ. App. 116, 66 S. W. 583; Cole *v.* Angel, (Tex. Civ. App. 1894) 28 S. W. 93.

Where a suit is brought against a partnership, which pleads non-joinder of a partner and in bar, and the case is tried on an issue made by the latter, and the partner who is not named testifies for defendants, for whom there is a verdict, the verdict as effectually protects defendant and the partner not joined from another suit as if they had been named; and, inasmuch as he could not maintain an action against a firm of which he was a partner for his attendance as a witness, his costs are not taxable against plaintiff. Pentecost *v.* Parks, 8 Pa. Dist. 636.

87. Bambrey *v.* Baltimore, etc., R. Co., 6 Pa. Co. Ct. 145 (next friend); Eakin *v.* Fulmer, 4 Pa. Co. Ct. 319 (administrator); Rhoads *v.* Bank, 2 Chest. Co. Rep. (Pa.) 206 (assignee); Grub *v.* Simpson, 6 Heisk. (Tenn.) 92. *Compare* Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860, holding that witness' fees of a nominal party having little or no interest in the suit are taxable.

88. Hale *v.* Merrill, 27 Vt. 738. *Compare* Barry *v.* McGrade, 14 Minn. 286, in which it was said that a defendant is entitled to fees as a witness only when it appears that he attended solely as a witness for his co-defendant.

89. Bronner *v.* Frauenthal, 12 Abb. Pr. (N. Y.) 183; Van Dusen *v.* Bissell, 29 How. Pr. (N. Y.) 481; Walker *v.* Russell, 16 How. Pr. (N. Y.) 91; Tuck *v.* Olds, 29 Fed. 883. See also Logan *v.* Thomas, 11 How. Pr. (N. Y.) 160. *Contra,* Steere *v.* Miller, 28 How. Pr. (N. Y.) 266.

90. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127; George *v.* Starrett, 40 N. H. 135. See also Goodwin *v.* Smith, 68 Ind. 301.

91. Medbury *v.* Butternuts, etc., Turnpike Co., 1 How. Pr. (N. Y.) 231; Emerald Beneficial Assoc. *v.* O'Donnell, 9 Kulp (Pa.) 446; Sharpless *v.* Pikeland Creamery, 1 Pa. Co. Ct. 42; Evans *v.* Lancaster School Bd., 2 Chest. Co. Rep. (Pa.) 205. *Contra,* Rice *v.* Palmer, 2 Bailey (S. C.) 117.

Witness' fees and mileage of officers of a corporation which is a party will be taxed as costs in the federal courts, such being the practice of the state courts, and there being no settled practice relative thereto in the

3. Attorneys. Witness' fees are not taxable for the testimony of an attorney who testified merely to free himself from an imputation of neglect of duty.[92] It has even been held that an attorney is never entitled to fees as a witness.[93]

4. Witnesses Subpœnaed but Not Examined. There is considerable difference of opinion as to the right of a successful party to tax as costs against his adversary fees of witnesses subpœnaed but not examined. In one state the rule is that where a witness is summoned but not sworn or tendered to the opposite party, his fees are not taxable against the parties summoning him, although successful;[94] but if examined by the opposite party, the party summoning him will be entitled to tax his fees as costs if successful.[95] So some decisions apparently hold without qualification that fees of witnesses summoned but not called in behalf of the successful party are not taxable as costs against his adversary, but they are against the weight of authority.[96] In a number of decisions it is held that if the attendance is procured in good faith, and the cause is settled, continued, or disposed of in any summary manner, dispensing with the necessity for their use, the prevailing party may recover the costs of such witnesses.[97] So according to one line of decisions the fees of witnesses summoned but not examined are taxable, unless the opposite party show that they were not summoned in good faith, but for purposes of oppression.[98] An equally large number recognize the right of a party to tax the fees of such witnesses, but differ from those just cited, in that such fees will be allowed only on condition that the party show in some satisfactory manner,

federal courts of the district. Neard *v.* Millersburg Home Water Co., 79 Fed. 129.

92. Pearman *v.* Gould, (N. J. Ch. 1887) 8 Atl. 285.

93. Crummer *v.* Huff, 1 Wend. (N. Y.) 24. *Compare* Reynolds *v.* Warner, 7 Hill (N. Y.) 444.

94. Curetson *v.* Garretson, 111 N. C. 271, 16 S. E. 338; Loftis *v.* Baxter, 66 N. C. 340; Wooley *v.* Robinson, 52 N. C. 30. See also Venable *v.* Martin, 4 N. C. 128. But *compare* Munday *v.* Henry, 46 N. C. 487, which does not seem to be in accord with these decisions.

If plaintiff abandons one of several counts representing distinct causes of action, and obtains a verdict on the others, the other party on objecting should not be made to pay for the attendance of witnesses summoned to sustain the abandoned count. Fox *v.* Keith, 46 N. C. 523.

95. Porter *v.* Durham, 79 N. C. 596.

96. Bacon *v.* Matthews, 5 Harr. (Del.) 385; Mason *v.* Deen, 10 Ga. 443; Simpkins *v.* Atchison, etc., R. Co., 61 Fed. 1000.

97. Teeple *v.* Dickey, 94 Ind. 124; Miller *v.* De Armond, 93 Ind. 74; Alexander *v.* Hoen, (Ind. App. 1891) 28 N. E. 122; Alexander *v.* Harrison, 2 Ind. App. 47, 28 N. E. 119; Cheever *v.* Pittsburg, etc., R. Co., 74 Hun (N. Y.) 539, 26 N. Y. Suppl. 829, 57 N. Y. St. 188; Anderson *v.* McKinney, 22 Tex. 653.

Discretion of court.— Some decisions hold that it is within the discretion of the court whether such fees are taxable. Chandler *v.* Beal, 132 Ind. 596, 32 N. E. 597; Ohio, etc., R. Co. *v.* Trapp, 4 Ind. App. 69, 39 N. E. 812; Deweese *v.* Smiley, 1 Ind. App. 81, 27 N. E. 444.

Presumption on appeal.—Where the fees of witnesses subpœnaed but not used by the successful party are taxed in the losing party's costs, it will be presumed on appeal that they were rightly taxed where the evidence is not in the record. Hutts *v.* Williams, 55 Ind. 237.

98. *Alabama.*— Coker *v.* Patty, 51 Ala. 511. See also Smith *v.* Donelson, 3 Stew. & P. 393.

California.— Randall *v.* Falkner, 41 Cal. 242.

Illinois.— See Highway Com'rs *v.* Hamilton, 21 Ill. App. 199.

Massachusetts.— Farmer *v.* Storer, 11 Pick. 241.

Pennsylvania.— De Benneville *v.* De Benneville, 1 Binn. 46; Com. *v.* Swisher, 3 Pa. Dist. 662; Swiler *v.* Casey, 1 Pearson 126; Scott's Estate, 15 Pa. Co. Ct. 316; Burgess *v.* Sharpless, 5 Pa. Co. Ct. 241; Dellinger *v.* Dellinger, 1 Pa. Co. Ct. 13; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Litz *v.* Kauffman, 2 Walk. 227; Cliemenson *v.* Green, 2 Chest. Co. Rep. 206.

Tennessee.— Knox *v.* Thomas, 5 Humphr. 573.

Texas.— Perry *v.* Harris, 1 Tex. App. Civ. Cas. 478.

Utah.— Cole *v.* Ducheneau, 13 Utah 42, 44 Pac. 92.

Virginia.— See Eppes *v.* Cralle, 1 Munf. 258.

Wisconsin.— Baumbach *v.* Gessler, 82 Wis. 231, 52 N. W. 259.

United States.— Clarke *v.* American Dock, etc., Co., 25 Fed. 641.

See 13 Cent. Dig. tit. "Costs," § 718.

When notified that witnesses are not needed.— Where a party summons witnesses to support an issue after notification by the opposite party that no question thereon will be raised, he will be taxed with the costs of their attendance, although acting under the advice of counsel, if he summons them. Porter *v.* Williams, 22 Ala. 525.

by affidavit or otherwise, that the witnesses were summoned in good faith and not with intent to oppress.[99]

5. Witnesses Not Subpœnaed or Living Beyond Reach of Subpœna. According to a number of decisions fees for mileage or attendance of witnesses who are not subpœnaed, or who cannot lawfully be subpœnaed because living beyond the reach of a subpœna, are not taxable in favor of the party at whose request they attend.[1] In a number of decisions, however, it has been held that the fees of witnesses who attend and testify, but who are not summoned, are taxable as costs by the party summoning them against the opposite party;[2] and in a very large number of cases the rule is broadly stated, without any qualification as to the necessity of being sworn or examined, that a party who attends court in good faith, without being summoned, or who lives beyond the reach of summons, is entitled to witness' fees therefor, and that the party requesting his attendance, if successful, is entitled to tax such fees as costs in the case.[3]

99. *Alabama.*— Forcheimer *v.* Kaver, 79 Ala. 285; Briley *v.* Hodges, 3 Port. 335.

Idaho.— Griffith *v.* Montandon, (1894) 35 Pac. 704.

Maryland.— Davis *v.* Batty, 1 Harr. & J. 264; Hutchins *v.* Eden, 3 Harr. & M. 101.

Michigan.—Gilbert *v.* Kennedy, 22 Mich. 5.

Nevada.— State *v.* Gayhart, 26 Nev. 278, 66 Pac. 1087, 68 Pac. 113.

New York.— Durant *v.* Abendroth, 48 Hun 614; Kohn *v.* Manhattan R. Co., 8 Misc. 421, 28 N. Y. Suppl. 665, 59 N. Y. St. 601; Robitzek *v.* Hect, 3 N. Y. Civ. Proc. 156.

Ohio.— Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225.

Oregon.— Pugh *v.* Good, 19 Oreg. 85, 23 Pac. 827.

South Carolina.— Taylor *v.* McMahan, 2 Bailey 131.

Vermont.— Dean *v.* Cass, 73 Vt. 314, 50 Atl. 1085; Bliss *v.* Connecticut, etc., R. Co., 47 Vt. 755.

See 13 Cent. Dig. tit. "Costs," § 718.

Presumption where many witnesses summoned.— Where a large number of witnesses are summoned but not examined, the presumption arises that they are unnecessary, and costs should not be allowed for their attendance unless the presumption is overcome, by showing why, if they are material, the party is able to dispense with their testimony. Haynes *v.* Mosher, 15 How. Pr. (N. Y.) 216; Dean *v.* Williams, 6 Hill (N. Y.) 376.

Where taxation objected to.— Some decisions hold that if the taxation of the costs of such witnesses is objected to, the party summoning them should show they were or might have been material, or make affidavits stating facts showing the necessity of having such witnesses in attendance. Marshall *v.* Layton, 2 Harr. (Del.) 344; Osborne *v.* Gray, 32 Minn. 53, 19 N. W. 81.

1. *Nevada.*— Meagher *v.* Van Zandt, 18 Nev. 230, 2 Pac. 57. *Compare* State *v.* Gayhart, (1902) 68 Pac. 113.

North Carolina.— Thompson *v.* Hodges, 10 N. C. 318.

South Carolina.—Clark *v.* Linsser, 1 Bailey 187; Micklin *v.* Morrow, 1 Treadw. 474.

Tennessee.— Hopkins *v.* Waterhouse, 2 Yerg. 230.

Texas.— Sapp *v.* King, 66 Tex. 570, 1 S. W. 466.

United States.— Lillienthal *v.* Southern California R. Co., 61 Fed. 622; Haines *v.* McLaughlin, 29 Fed. 70; Anonymous, 1 Fed. Cas. No. 431, 5 Blatchf. 134; Sawyer *v.* Aultman Mfg. Co., 21 Fed. Cas. No. 12,397, 5 Biss. 165; Spaulding *v.* Tucker, 22 Fed. Cas. No. 13,221, 2 Sawy. 50, 4 Fish. Pat. Cas. 633; Woodruff *v.* Barney, 30 Fed. Cas. No. 17,986, 1 Bond 538, 2 Fish. Pat. Cas. 244.

See 13 Cent. Dig. tit. "Costs," § 717.

A person who attends at the request of a party without being summoned, and who is not sworn or examined, is not entitled to costs against the losing party. Fisher *v.* Burlington, etc., R. Co., 104 Iowa 588, 73 N. W. 1070.

Where a subpœna is void because the party lives outside of the jurisdiction his fees are not taxable. Mylius *v.* St. Louis, etc., R. Co., 31 Kan. 332, 1 Pac. 619; Sapp *v.* King, 66 Tex. 570, 1 S. W. 466; Dreskill *v.* Parrish, 7 Fed. Cas. No. 4,075, 5 McLean 213, 7 Fed. Cas. No. 4,076, 5 McLean 241.

2. De Benneville *v.* De Benneville, 1 Binn. (Pa.) 46; Swiler *v.* Casey, 1 Pearson (Pa.) 126; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018; Simpkins *v.* Atchison, etc., R. Co., 61 Fed. 999.

3. *Indiana.*—Alexander *v.* Harrison, 2 Ind. App. 47, 28 N. E. 119.

Massachusetts.—Farmer *v.* Storer, 11 Pick. 241.

Oregon.— Perham *v.* Portland Gen. Electric Co., (1898) 53 Pac. 424; Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129; Crawford *v.* Abraham, 2 Oreg. 163.

Pennsylvania.— Com. *v.* Smith, 4 Pa. Co. Ct. 321; Lagrosse *v.* Curran, 10 Phila. 140, 31 Leg. Int. 148; Congregation *v.* Strauch, 2 Leg. Rec. 102.

South Carolina.— Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. 331, 44 Am. Dec. 771.

Texas.— International, etc., R. Co. *v.* Richmond, 28 Tex. Civ. App. 513, 67 S. W. 1029.

6. Witnesses Not Attending Trial. Ordinarily the fees of witnesses who do not attend the trial are not taxable as costs against the opposite party,[4] and that too although the witness was prevented from attending by no fault of his own.[5]

7. Witnesses Summoned by Both Parties. Witnesses summoned by both parties are only entitled to one compensation.[6]

8. Witnesses Attending in Several Suits. Fees may be taxed against the party cast for a witness, who is a party in another suit in the same court,[7] and for a witness attending as witness for another party in another suit at the same time.[8] So many decisions lay down the rule broadly that a witness who attends in several cases between the same parties,[9] or brought by the same plaintiff against several defendants,[10] or against the same defendant by several plaintiffs,[11] are entitled to fees in all.

United States.— St. Matthew's Sav. Bank *v.* Fidelity, etc., Co., 105 Fed. 161; Hanchett *v.* Humphrey, 93 Fed. 895; Sloss Iron, etc., Co. *v.* South Carolina, etc., R. Co., 75 Fed. 106; Pinson *v.* Atchison, etc., R. Co., 54 Fed. 464; Eastman *v.* Sherry, 37 Fed. 844; The Syracuse, 36 Fed. 830; The Vernon, 36 Fed. 113; Cahn *v.* Monroe, 29 Fed. 675; U. S. *v.* Sanborn, 28 Fed. 299; Anderson *v.* Moe, 1 Fed. Cas. No. 359, 1 Abb. 299; Cummings *v.* Akron Cement, etc., Co., 6 Fed. Cas. No. 3,473, 6 Blatchf. 509; Dennis *v.* Eddy, 7 Fed. Cas. No. 3,793, 12 Blatchf. 195.

See 13 Cent. Dig. tit. "Costs," § 717.

The reason assigned is that if the witness is willing to attend and does attend without a subpœna, the service thereof would be superfluous, and would only increase the costs without benefiting either party. U. S. *v.* Sanborn, 28 Fed. 299.

4. Booth *v.* Smith, 5 Wend. (N. Y.) 107; Mead *v.* Mallory, 27 How. Pr. (N. Y.) 32; Dowling *v.* Bush, 6 How. Pr. (N. Y.) 410; Purdy *v.* Morgan, 2 How. Pr. (N. Y.) 149; Ehle *v.* Bingham, 4 Hill (N. Y.) 595. But see Carpenter *v.* Taylor, 4 N. C. 689, in which it was held that if plaintiff summon material witnesses, not more than the law allows, and they are absent when the trial comes on, and he is successful, defendant is liable to pay fees of such witnesses. *Compare* Johnson *v.* Wideman, Cheves (S. C.) 26, in which it was held that a witness attending on a subpœna ticket without writ is entitled to his fees from the party defeated in the suit.

Witness subpœnaed for another day.— Where a case is assigned for trial on a certain day, and witness by mistake is subpœnaed for another day, the party making the mistake must pay the witness' fees for that day. Maher *v.* Mitchell, 1 Pa. Co. Ct. 570.

5. Bremerman *v.* Hayes, 22 Pa. Co. Ct. 399.

This rule has been held to apply even to fees for previous attendance, where the witness is not present when the case is tried. Davis *v.* Mills, 86 Tenn. 269, 9 S. W. 691; Williams *v.* Henderson, 1 Overt. (Tenn.) 424. *Contra,* Roth *v.* Meads, 20 How. Pr. (N. Y.) 287.

6. Renfro *v.* Kelly, 10 Ala. 338; Hopkins *v.* Waterhouse, 2 Yerg. (Tenn.) 230.

Where the parties in two causes have made an arrangement for the attendance of witnesses in both causes by payment of their fees in one case, no fees will be allowed in the other case. Bliss *v.* Brainard, 42 N. H. 255.

7. Hopkins *v.* Waterhouse, 2 Yerg. (Tenn.) 323. But see Simpkins *v.* Atchison, etc., R. Co., 61 Fed. 1000, which seems to hold to the contrary. See also Parker *v.* Cartzler, 18 Fed. Cas. No. 10,730, 5 McLean 5, holding that where a witness is summoned in several causes, fees for him are taxable only in one case, to be distributed and charged equally among the cases in which he is summoned.

8. Bliss *v.* Brainard, 42 N. H. 255; McHugh *v.* Chicago, etc., R. Co., 41 Wis. 79; Young *v.* Newark Merchants' Ins. Co., 29 Fed. 273.

9. *Georgia.*— Robinson *v.* Banks, 17 Ga. 211.

Minnesota.— Schuler *v.* Minneapolis St. R. Co., 76 Minn. 48, 78 N. W. 881.

New Hampshire.— *Compare* Bliss *v.* Brainard, 42 N. H. 255.

New York.— Hicks *v.* Brennan, 10 Abb. Pr. 304; Vance *v.* Speir, 18 How. Pr. 168; Wilder *v.* Wheeler, 1 How. Pr. 136; Willink *v.* Reckle, 19 Wend. 82; Jackson *v.* Hoagland, 1 Wend. 69.

Texas.— Flores *v.* Thorn, 8 Tex. 377; Cabell *v.* Orient Ins. Co., 22 Tex. Civ. App. 635, 55 S. W. 610.

Utah.— Smith *v.* Nelson, 23 Utah, 512, 65 Pac. 485.

See 13 Cent. Dig. tit. "Costs," § 721.

Reference of cross actions.— In Sanders *v.* Failing, 3 Thomps. & C. (N. Y.) 64, it was held that on a reference of cross actions, involving the same subject-matter or same reference, and one trial had of both, the prevailing party was entitled to an allowance for witness' fees in only one action. See also Evans *v.* Hart, 10 Lanc. Bar (Pa.) 77, in which it was held that when two causes were heard by the same arbitrators on the same day and at the same place, and witnesses were summoned in each to appear at the same time and place, witness' fees should be allowed in but one case.

10. Gray's Harbor Boom Co. *v.* McAmmant, 21 Wash. 465, 58 Pac. 573; Parker *v.* Bigler, 18 Fed. Cas. No. 10,726, 1 Fish. Pat. Cas. 285.

11. Vernon, etc., R. Co. *v.* Johnson, 108 Ind. 126, 8 N. E. 700, construing Ind. Acts (1883), p. 48.

9. Where Causes Are Consolidated. Where two causes are consolidated for the purposes of trial, and a subpœna is issued in one cause for a person who is a party in the other and he appears and is examined, his witness' fees should be taxed as a part of the costs.[12]

10. Incompetent Witnesses. Fees of witnesses rejected as incompetent are not taxable as costs against the opposite party.[13]

11. Witnesses Whose Testimony Is Immaterial, Incompetent, and Irrelevant. Many decisions hold that a party cannot tax the fees of a witness whose testimony is rejected or stricken out as being immaterial, irrelevant, or incompetent,[14] and that too although the witness may have been subpœnaed in good faith.[15] On the other hand it has been held that the fact that the testimony of a witness is immaterial or inadmissible is no reason for not taxing his costs against the losing party if summoned in good faith.[16]

12. Expert Witnesses. Sums paid for compensation of expert witnesses beyond ordinary fees authorized by statute for witnesses generally are not taxable as costs.[17]

13. Witnesses of Unsuccessful Party. Fees of witnesses of the unsuccessful party should not be included in a judgment against him for costs.[18]

14. Number of Witnesses For Whom Costs Taxable — a. In General. The court may exercise its discretion as to the number of witnesses for which a prevailing party shall be allowed to tax costs.[19] The party is bound to exercise a proper discretion as to the number of witnesses. He cannot call an unlimited number and charge the expense on his opponent.[20] If he has called an unneces-

12. State *v.* Gayhart, (Nev. 1902) 68 Pac. 113, holding further that where, upon the trial of consolidated causes, a witness who had been subpœnaed in one cause before consolidation is called, sworn and examined touching matters relating wholly to the other cause, and it does not appear that his attendance in the proceeding in which the subpœna issued was necessary for any purpose, his fees as a witness in that proceeding should not be allowed.

13. Crozier *v.* Berry, 27 Ga. 346; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Henn *v.* Holt, 15 Wkly. Notes Cas. (Pa.) 403; Bank *v.* Wirebach, 2 Lanc. L. Rev. 274.

This is true, although the ruling was erroneous, if it was not appealed from. Keith *v.* Goodwin, 51 N. C. 398.

14. West *v.* Shockley, 4 Harr. (Del.) 287; Grover *v.* Drummond, 25 Me. 185; Com. *v.* Lucas, 24 Pa. Co. Ct. 126; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Fisher *v.* Scott, 15 Wkly. Notes Cas. (Pa.) 126; Abel *v.* Fisher, 3 Northam. Co. Rep. (Pa.) 68; Troy Iron, etc., Factory *v.* Corning, 23 Fed. Cas. No. 14,197, 7 Blatchf. 16.

15. Eakin *v.* Fulmer, 4 Pa. Co. Ct. 319.

16. Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389; Mankato Lime, etc., Co. *v.* Craig, 81 Minn. 224, 83 N. W. 983.

Waiver of objection for irrelevancy.— A party who without objection allows his opponent to examine witnesses on impertinent matter is himself in default, and if defeated their fees will be taxed against him. Voltz *v.* Newbert, 17 Ind. 187.

17. *California.*— Bathgate *v.* Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Miller *v.* Highland Ditch Co., 91 Cal. 103, 27 Pac. 536; Faulkner *v.* Hendy, 79 Cal. 265, 21 Pac. 754.

Idaho.— McDonald *v.* Burke, 2 Ida. 995, 48 Pac. 440, 35 Am. St. Rep. 276.

Louisiana.— Rathbone *v.* Neal, 4 La. Ann. 563, 50 Am. Dec. 579.

New York.— Mark *v.* Buffalo, 87 N. Y. 184; Matter of Bender, 86 Hun 570, 33 N. Y. Suppl. 907, 67 N. Y. St. 682; Randall *v.* Morning Journal Assoc., 22 Misc. 715, 49 N. Y. Suppl. 1064.

United States.— The William Branfoot *v.* Hamilton, 52 Fed. 390, 3 C. C. A. 155.

See 13 Cent. Dig. tit. "Costs," § 738.

18. Trigg *v.* Larson, 10 Minn. 220; Price *v.* McGee, 1 Brev. (S. C.) 455; Cook *v.* Barrett, 15 Wis. 596; Stokes *v.* Knarr, 11 Wis. 389.

19. Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; Chicago, etc., R. Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Kley *v.* Healey, 2 N. Y. Suppl. 231, 18 N. Y. St. 174; Lowerre *v.* Vail, 5 Abb. Pr. (N. Y.) 227; Irwin *v.* Deyo, 2 Wend. (N. Y.) 285; Congregation *v.* Strauch, 2 Leg. Rec. (Pa.) 102; Greene County Justices *v.* Graham, 6 Baxt. (Tenn.) 77.

Necessity of witness will be presumed from his being sworn and examined, in the absence of evidence to the contrary. Wheeler *v.* Ruckman, 5 Rob. (N. Y.) 702.

Time of fixing number of witnesses.— Under a statute providing that the court may limit the number of witnesses whose fees are to be taxed such number should be determined before the fee bill is made up by the clerk. Tewes *v.* Harmon, 29 Ill. App. 254.

20. Lowerre *v.* Vail, 5 Abb. Pr. (N. Y.) 227.

sary number he may be required, although successful, to pay the fees of so many of them as were not needed.[21] The court ordinarily will not interfere, however, unless there is a clear disparity between the end to be accomplished by the proof and the instruments for its accomplishment,[22] or unless there be evidence of oppression.[23]

b. Number of Witnesses Testifying to Single Fact. In a number of jurisdictions it is provided by statute that not more than a designated number of witnesses summoned by the successful party to prove a single fact can be taxed against the unsuccessful party.[24] A general provision that fees will not be allowed for more than two witnesses to the same fact has no application where the judgment for costs is against the party summoning the witnesses.[25]

15. Allowance Where Cause Not Set For Trial or Improperly Listed. Where the cause has not been set for trial,[26] or is improperly listed,[27] a party cannot tax as costs fees of witnesses for attendance, etc.

16. Allowance in Case of Continuance or Delay. It has been held that the successful party should be allowed witness' fees for attendance during the time the trial was delayed,[28] and additional traveling expenses resulting from a continuance, when caused by the fault of his opponent;[29] but if he himself caused the delay he should not be allowed witness' fees for attendance before the trial was put off,[30] nor additional mileage nor attendance where the cause is continued by mutual consent;[31] and an allowance of a continuance, on condition of paying defendant's costs in preparation for trial, includes witness' fees so paid by defendant.[32]

17. Allowance in Excess of Legal Fees. A person can only recover as costs the actual amount of fees paid each witness and only to the extent of the amount

If fees are allowed for too many witnesses the judgment may be reversed. Field *v.* McVickar, 9 Johns. (N. Y.) 130. But see White *v.* Murtland, 71 Ill. 250, 22 Am. Dec. 100.

21. Wood *v.* Stewart, 9 Ind. App. 321, 36 N. E. 658; Lowerre *v.* Vail, 5 Abb. Pr. (N. Y.) 227; Irwin *v.* Deyo, 2 Wend. (N. Y.) 285; Com. *v.* Wood, 3 Binn. (Pa.) 414; Greene County Justices *v.* Graham, 6 Baxt. (Tenn.) 77. See also Lovitt *v.* Peterson, 6 Humphr. (Tenn.) 23.

22. Lowerre *v.* Vail, 5 Abb. Pr. (N. Y.) 227.

23. De Benneville *v.* De Benneville, 1 Binn. (Pa.) 46; Com. *v.* Smith, 4 Pa. Co. Ct. 321.

24. Curetin *v.* Garrison, 111 N. C. 271, 16 S. E. 338. See also Bussard *v.* Catalino, 4 Fed. Cas. No. 2,228, 2 Cranch C. C. 421.

This statute has been held to mean such facts as are material and which may necessarily arise in the progress of a cause, either incidentally, collaterally, or directly, upon the issue. Randolph *v.* Perry, 2 Port. (Ala.) 376, 27 Am. Dec. 659; Smith *v.* Donelson, 3 Stew. & P. (Ala.) 393; Grimes *v.* Clarke, 2 A. K. Marsh. (Ky.) 377. It does not apply where questions of character and general reputation are at issue. Holmes *v.* Johnson, 33 N. C. 55; Byrd *v.* Rouse, 4 N. C. 53; Esselman *v.* Brown, 2 Sneed (Tenn.) 303. *Contra*, Davis *v.* Melvin, 1 Ind. 136.

25. Cabell *v.* Orient Ins. Co., 22 Tex. Civ. App. 635, 55 S. W. 610.

26. Porter *v.* Williams, 22 Ala. 525; Bogan *v.* White, Dudley (S. C.) 316; Barton *v.* Bird, 1 Overt. (Tenn.) 66.

27. Cody *v.* Clelam, 1 Pa. Co. Ct. 8.

28. Hunter *v.* Russell, 59 Fed. 964. See also Dwight *v.* Peoples, 1 Pa. Co. Ct. 141, holding that where a party and his witnesses are kept several days waiting for the calling of a case, and then he obtains a continuance to attend a funeral, he should be allowed witness' fees for the time of such attendance when eventually successful.

29. Hake *v.* Brown, 44 Fed. 734. See also Com. *v.* Swisher, 3 Pa. Dist. 662; Herman *v.* Shank, 15 Pa. Co. Ct. 406, which cases hold that where a cause is continued, and the witnesses go home and return to the trial on the day fixed, double mileage is taxable. But see Eakin *v.* Fulmer, 4 Pa. Co. Ct. 319; Todd *v.* Painter, 1 Chest. Co. Rep. (Pa.) 176; Sweet *v.* Pennock, 1 Chest. Co. Rep. (Pa.) 16.

Where the witnesses who attend on a day set for trial return home on an adjournment of the cause by the court because unable to take it up at that time, double mileage is taxable for such witnesses. Miller *v.* Huntington, 1 How. Pr. (N. Y.) 218; Koch *v.* Peters, 97 Wis. 492, 73 N. W. 25.

30. Titus *v.* Bullen, 6 Wend. (N. Y.) 562. See also Perry *v.* Williams, 14 Pa. Co. Ct. 422.

Reference of cause.— Where a party knew that a cause would have to be referred, and on such reference he is successful, he will not be allowed witness' fees for attendance at the circuit at which the cause was referred. Pike *v.* Nash, 16 How. Pr. (N. Y.) 53.

31. Rowe *v.* Shaw, 56 Me. 306.

32. Inderlied *v.* Whaley, 7 N. Y. Suppl. 74, 26 N. Y. St. 7, 17 N. Y. Civ. Proc. 377.

legally due the witness;[33] and where he has paid some less than their legal fees and some more, the legal fees of all cannot be grouped together to make the sum equal to the amount paid to all.[34]

18. TIME FOR WHICH ATTENDANCE TAXED. Where a cause is tried on the first day of the term only one day's attendance will be allowed;[35] nor can fees be taxed for attendance of witnesses during the trial of the case after their discharge;[36] and the fact that the trial closed too late during the day for the witnesses to go home does not authorize the taxation of another day's attendance.[37] If the cause is set down for trial on a particular day, and the time is short and the witnesses live a considerable distance, the party may keep them in attendance; but if considerable time is to elapse before the trial and the witnesses are convenient, a charge for their attendance on days when they are not needed should not be allowed.[38] An order, seasonably made, that no action except a designated one will be tried after a particular day of the term, and the parties will not be allowed to tax fees for the attendance of witnesses in other actions after that day, precludes the taxation of costs for the subsequent attendance of witnesses, in all but the specified action.[39]

19. MILEAGE — a. For What Distance Allowed — (I) *IN STATE COURTS.* Mileage for travel outside the state is not taxable as costs in a civil cause in the state courts.[40] But the fact that a witness lives outside of the state does not deprive him of the right to mileage within the state,[41] which is to be taxed from the state line to the place of trial and return on the ordinary route from the witness' place of residence to the place of trial.[42]

(II) *IN FEDERAL COURTS.* In the federal courts the decisions are conflicting. A federal statute permits the deposition of a witness to be taken when he lives

33. Burrow *v.* Kansas City, etc., R. Co., 54 Fed. 278. See also Rogers *v.* Rogers, 2 Paige (N. Y.) 458.

34. Burrow *v.* Kansas City, etc., R. Co., 54 Fed. 278.

The fact that a party has paid his witness, who was subpœnaed and examined at the trial, in advance at a rate in excess of the legal compensation does not prevent him from recovering the fees legally payable to the witness as part of his costs. Triebel *v.* Dreysher, 2 Woodw. (Pa.) 55.

35. Crummer *v.* Huff, 1 Wend. (N. Y.) 24.

What amounts to attendance.— When a case is in order for trial with a prospect that it will be reached speedily, and a person who may be wanted as a witness actually attends at a place in close proximity to the court-house, with the purpose and expectation of going thence if necessary to the court-house to be present at the trial of the case as a witness, and is then suffered to depart for the rest of the day, he may fairly be said to have attended as a witness on that day and a witness' fee for his attendance may be taxed. Reid *v.* Wright, 181 Mass. 306.

36. Den *v.* Vancleve, 5 N. J. L. 589; Missouri, etc., R. Co. *v.* Willis, (Tex. Civ. App. 1899) 52 S. W. 625.

37. Evans *v.* Ferguson, 10 N. Y. Civ. Proc. 57.

38. Andrews *v.* Cressy, 2 Minn. 67. To the same effect see Curtis *v.* Dutton, 4 Sandf. (N. Y.) 719; Allen *v.* Mahon, 1 Abb. N. Cas. (N. Y.) 468; Ehle *v.* Bingham, 4 Hill (N. Y.) 595.

Where a party is compelled to keep his witnesses in court by a refusal of a continuance, he is entitled to witness' fees therefor as part of his costs. Ludy *v.* Philadelphia Traction Co., 2 Pa. Dist. 848.

39. Fabyan *v.* Russell, 39 N. H. 399.

40. *Illinois.*— Fish *v.* Farwell, 33 Ill. App. 242.

Maine.— Kingfield *v.* Pullen, 54 Me. 398.

Massachusetts.— White *v.* Judd, 1 Metc. 293; Melvin *v.* Whiting, 13 Pick. 184.

New Hampshire.— Gunnison *v.* Gunnison, 41 N. H. 121, 77 Am. Dec. 764.

New York.— Hines *v.* Schenectady County Mut. Ins. Co., 7 How. Pr. 142; Howland *v.* Lenox, 4 Johns. 311.

Oregon.— Crawford *v.* Abraham, 2 Oreg. 165.

Pennsylvania.— Com. *v.* Boyer, 20 Pa. Co. Ct. 638; Cody *v.* Clelam, 1 Pa. Co. Ct. 8.

See 13 Cent. Dig. tit. "Costs," § 743.

A statute providing that witnesses living more than a designated number of miles from the place of trial cannot be compelled to attend has been held not to prohibit the granting of full mileage to a witness attending from a greater distance. Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784. See also Raft River Land, etc., Co. *v.* Langford, 5 Ida. (Hasb.) 62, 51 Pac. 1027.

41. Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

42. Melvin *v.* Whiting, 13 Pick. (Mass.) 184; Dunham *v.* Sherman, 19 How. Pr. (N. Y.) 572; Wheeler *v.* Lozee, 12 How. Pr. (N. Y.) 448; Com. *v.* Boyer, 20 Pa. Co. Ct. 638.

farther than one hundred miles from the place of trial, and another allows subpœnas to be served in other districts in case the witness does not live farther than one hundred miles from the place of trial. In some circuits it is held that mileage for attendance of witnesses who have not been summoned, or who reside beyond the reach of summons, is not taxable.[43] These decisions, however, are against the weight of authority. Many decisions hold that the successful party is entitled to have costs taxed for the entire mileage of witnesses, regardless of the distance they come or the fact that they have come from outside of the district or state.[44] In other decisions mileage has under these circumstances been allowed, but is restricted to one hundred miles.[45]

b. How Distance Computed. Mileage should be computed by the usual and ordinary route of travel between the witness' place of residence and the place of holding court,[46] notwithstanding the witness pursued a longer route.[47] In computing mileage a fraction of a mile is to be considered as a whole mile.[48]

20. Necessity of Witness Demanding Fees. It has been held that fees for witnesses are not taxable as costs unless they require or apply for payment.[49]

21. Effect on Right of Taking Witness' Deposition. The fact that a witness' deposition has been taken and is on file is no objection to the allowance of the fees of such witness in the taxation of costs, if he attended and was examined in person.[50]

N. Depositions — 1. Right to Tax in General. In a proper case the expense of taking depositions is a proper item of costs to be allowed to the prevailing party.[51]

2. Depositions of Party or Person Interested in Suit. A party's deposition in his own behalf is not taxable as costs,[52] but if made by him to be used by his opponent it may be taxed.[53] The deposition of a person interested in a suit but not a party thereto is taxable as costs.[54]

43. See *supra*, XX, M, 5.

44. Hunter *v.* Russell, 59 Fed. 964; U. S. *v.* Sanborn, 28 Fed. 299; Anderson *v.* Moe, 1 Fed. Cas. No. 359, 1 Abb. 299; Hathaway *v.* Roach, 10 Fed. Cas. No. 6,213, 2 Woodb. & M. 63; Prouty *v.* Draper, 20 Fed. Cas. No. 11,447, 2 Story 199; Whipple *v.* Cumberland Cotton Mfg. Co., 29 Fed. Cas. No. 17,515, 3 Story 84.

45. Sloss Iron, etc., Co. *v.* South Carolina R. Co., 75 Fed. 106; Pinson *v.* Atchison, etc., R. Co., 54 Fed. 464; Burrow *v.* Kansas City, etc., R. Co., 54 Fed. 278; The Progresso, 48 Fed. 239; The Vernon, 36 Fed. 113; Buffalo Ins. Co. *v.* Providence, etc., Steam-Ship Co., 29 Fed. 237; Beckwith *v.* Easton, 3 Fed. Cas. No. 1,212, 4 Ben. 357; The Leo, 15 Fed. Cas. No. 8,252, 5 Ben. 486. See also Wooster *v.* Hill, 44 Fed. 819; Smith *v.* Chicago, etc., R. Co., 38 Fed. 321.

46. Swiler *v.* Casey, 1 Pearson (Pa.) 126; Johnson *v.* A. & N. P. R. Co., 1 Pa. Co. Ct. 10; Hunter *v.* Russell, 59 Fed. 964.

47. Hunter *v.* Russell, 59 Fed. 964.

A statutory provision that mileage shall be computed from the court-house means the house in which the court is held, and not necessarily the court-house of the county. Reeves *v.* Ferguson, 31 N. J. L. 289.

48. Bedel *v.* Goodall, 26 N. H. 92.

49. Goodwin *v.* Smith, 68 Ind. 301; Clark *v.* Linsser, 1 Bailey (S. C.) 187.

But a statute disallowing fees to witnesses who do not attend before the clerk within two days after trial does not prevent a successful party, who has paid his witnesses and duly filed an itemized bill of costs within the required time, from having the amount included in his judgment. Marte *v.* Ogden City St. R. Co., 9 Utah 459, 35 Pac. 501. But see Thompson *v.* Hodges, 10 N. C. 318.

50. Anderson *v.* Moe, 1 Fed. Cas. No. 359, 1 Abb. 299; Beckwith *v.* Easton, 4 Fed. Cas. No. 1,212, 4 Ben. 357.

51. Pyne *v.* National Steam-Ship Co., 18 N. Y. Suppl. 166, 44 N. Y. St. 791; Finch *v.* Calvert, 13 How. Pr. (N. Y.) 13; Braintrim *v.* Independent School Dist., 23 Pa. Co. Ct. 510; Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 231, 45 Am. Dec. 771; Prouty *v.* Draper, 20 Fed. Cas. No. 11,447, 2 Story 199.

Depositions taken under stipulation of parties are, it has been held, under the New York statutes, taxable to the same extent as depositions taken under commission. Smith *v.* Servis, 13 N. Y. Suppl. 941, 36 N. Y. St. 917. *Contra*, Newman *v.* Greiff, 3 N. Y. Civ. Proc. 362.

52. George *v.* Starrett, 40 N. H. 135; Edwards *v.* Adams, 2 Pa. Co. Ct. 563. See also Delcomyn *v.* Chamberlain, 39 N. Y. Super. Ct. 359, in which it was held that where the court making the order for a commission makes no order for the taxation of costs, and no person is examined but plaintiff, the commissioner's fee should not be allowed.

53. George *v.* Starrett, 40 N. H. 135.

54. Sattler *v.* Altman, etc., Mach. Co., 9 Pa. Dist. 73.

3. Items Taxable — a. In General. Fees for copies of cross interrogatories as settled, for defendant, and to be served on complainant's solicitor,[55] drafting and copying depositions under a commission,[56] and postage paid on a commission to take testimony[57] have been held taxable. But costs on a rule to take depositions are not taxable, unless so provided by statute.[58] Nor is money paid to an agent for taking and bringing back a commission to and from another state taxable.[59]

b. Fees of Officers Taking Depositions. Fees of the officers taking depositions are proper items of allowance, whether taken in or out of the state.[60]

c. Witness' Fees. Witness' fees for attendance on the taking of depositions are taxable as costs.[61]

d. Attorney's Fees. In the absence of statutory authorization attorney's fees for taking depositions are not taxable as costs.[62] Under the act of congress of Feb. 26, 1853, a designated amount is taxable as fees for the attorney, solicitor, or proctor, for every deposition taken and admitted as evidence in a cause.[63] Such

55. Mann *v.* Rice, 3 Barb. Ch. (N. Y.) 42, holding that fees for an affidavit of service of cross interrogatories which was rendered necessary by the denial of plaintiff's solicitor that he had been served with a copy of interrogatories on the part of defendant are allowable in taxation of costs, but an engrossment of such affidavit, which is not to be filed, is not taxable.

56. Corlies *v.* Cummings, 7 Cow. (N. Y.) 154. See also Jackson *v.* Mather, 2 Cow. (N. Y.) 584.

57. Prouty *v.* Draper, 20 Fed. Cas. No. 11,447, 2 Story 199.

58. Uhl *v.* Scholtz, 4 L. T. N. S. (Pa.) 14.

59. Lynch *v.* Wood, 1 Dall. (Pa.) 310, 1 L. ed. 151; Williams *v.* Jones, 2 Hill (S. C.) 555.

60. *Alabama.*— Hair *v.* Logan, 10 Ala. 431.

Minnesota.— Wentworth *v.* Griggs, 24 Minn. 450.

New York.— Dunham *v.* Sherman, 11 Abb. Pr. 152, 19 How. Pr. 572.

Pennsylvania.— Tappan *v.* Columbia Bank, etc., Co., 2 Pa. L. Rep. 456, 4 Pa. L. J. 224.

United States.—Tesla Electric Co. *v.* Scott, 101 Fed. 524; Fry *v.* Yeaton, 9 Fed. Cas. No. 5,142, 1 Cranch C. C. 550.

See 13 Cent. Dig. tit. "Costs," § 602.

Notary fees for taking two depositions of the same witness will not be allowed, unless the necessity for taking both appears. Wentworth *v.* Griggs, 24 Minn. 450.

When no commission was issued for a notary in another state to take depositions, his services in taking depositions are not taxable. Clark *v.* Hill, 33 Mo. App. 116.

Fees limited by statute.— Under a statute allowing the commissioner twenty cents a folio for taking and certifying depositions to file, and providing that no other compensation shall be taxed and allowed, a charge of three dollars a day for attendance is erroneous. Tesla Electric Co. *v.* Scott, 101 Fed. 524. In New York commissioners' fees for taking depositions out of the state are a disbursement which, to warrant taxation, must be shown to have been necessary. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106.

61. Dunham *v.* Sherman, 19 How. Pr. (N. Y.) 572; Lynch *v.* Wood, 1 Dall. (Pa.) 310, 1 L. ed. 151; Tappan *v.* Columbia Bank, etc., Co., 2 Pa. L. J. Rep. 456, 4 Pa. L. J. 224; Vanriper *v.* Vanriper, 3 Lanc. L. Rev. 155.

Amount allowed.—A statute providing that ten dollars may be awarded to either party for taking the deposition of a witness authorizes an allowance of only ten dollars, although the depositions of several witnesses are taken under one commission. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106; O'Brien *v.* Commercial F. Ins. Co., 38 N. Y. Super. Ct. 4; Johnson *v.* Chappell, 7 Daly (N. Y.) 43. *Contra,* Marston *v.* Hebert, 60 How. Pr. (N. Y.) 490. And a statute allowing a fee for each deposition taken in a cause does not apply to oral testimony taken by a special master on a reference. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 38 Fed. 775.

Mileage of witnesses allowed where parties agree to take testimony of witnesses residing in other states before a commissioner in New York city. Spaulding *v.* Tucker, 22 Fed. Cas. No. 13,221, 4 Fish. Pat. Cas. 633, 3 Sawy. 50.

Where a cause is removed from a state to a federal court, fees of witnesses attending at the taking of depositions issued out of the state court will be allowed if the depositions are issued before the removal of the cause, and that too although the depositions are not used because of the presence of the witnesses or because the facts testified to are admitted at the trial. Young *v.* Merchants' Ins. Co., 29 Fed. 273.

62. See *supra,* XX, E, 1.

63. Beckwith *v.* Easton, 3 Fed. Cas. No. 1,212, 4 Ben. 357; Stimpson *v.* Brooks, 23 Fed. Cas. No. 13,454, 3 Blatchf. 456; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,197, 7 Blatchf. 16. See also Hake *v.* Brown, 44 Fed. 734.

What is a deposition within the rule.— Where objections to a deposition have been waived by allowing it to be used, it is a "deposition," within the statute mentioning the test. And a deposition is taken and admitted in evidence, within the statute where it was taken for use on motion for a pre-

fees are allowed to the party as compensation for his attorney's services in and about the depositions, and are to be taxed in addition to the fees of commissioners who take the testimony.[64] The statute applies to cases at common law where the depositions are given in evidence at the trial, and to suits in equity where depositions are read at the hearing.[65] It also applies to depositions taken before notaries, under stipulation that they should be treated as if taken under the rule as to depositions taken before regularly appointed officers.[66] The fee designated is taxable for the deposition of each witness, although more than one deposition is returned in the same inclosure.[67] According to some decisions, where a deposition is taken in one cause, but by stipulation used in others, only one solicitor's fee is taxable, and that in the suit for which the deposition is originally taken.[68] Other decisions hold the contrary.[69]

e. Attendance of Party or Counsel. Attendance of the opposite party at the taking of deposition is not taxable unless authorized by statute.[70] Nor is such attendance taxable where there is a special remedy provided by statute for the recovery of expenses for travel and attendance.[71]

f. By What Law Governed. The expense of depositions taken in one state to be used in the state courts of another state is taxable at the rate fixed by the statutes of the state where used.[72]

liminary injunction, although not thus used because the motion was withdrawn, but was used on final hearing. Indianapolis Water Co. *v.* American Strawboard Co., 65 Fed. 534. See also Barnardin *v.* Northall, 83 Fed. 241.

Voluntary dismissal.— Such fees are not taxable where a cause is voluntarily dismissed. Cahn *v.* Qung Wah Lung, 28 Fed. 396.

64. Broyles *v.* Buck, 37 Fed. 137.

65. Stimpson *v.* Brooks, 23 Fed. Cas. No. 13,454, 3 Blatchf. 456; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,197, 7 Blatchf. 16.

66. Ingham *v.* Pierce, 37 Fed. 647 [*overruling* Tuck *v.* Olds, 29 Fed. 883; Strauss *v.* Myer, 22 Fed. 467]. See also Ferguson *v.* Dent, 46 Fed. 88.

67. Broyles *v.* Buck, 37 Fed. 137.

68. Cary *v.* Lovell Mfg. Co., 39 Fed. 163; Winegar *v.* Cahn, 29 Fed. 676; American Diamond Rock-Boring Co. *v.* Sheldon, 28 Fed. 217; Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112; Simon *v.* Neumann [*cited* in Wooster *v.* Handy, 23 Fed. 49, 58, 23 Blatchf. 112]; Dedekam *v.* Vose, 7 Fed. Cas. No. 3,730, 3 Blatchf. 77.

If a deposition is taken and entitled in several suits, but is written down only once, and there is no agreement that the attorney's fee shall be taxed but once for all the cases, the fee is taxable for the deposition in each case. Archer *v.* Hartford F. Ins. Co., 31 Fed. 660; Wooster *v.* Handy, 23 Fed. 49, 23 Blatchf. 112.

69. Greene *v.* French, 5 N. J. L. J. 228; Jerman *v.* Stewart, 12 Fed. 271.

70. Jackson *v.* Hooker, 1 Cow. (N. Y.) 586.

Attendance of counsel.— The expenses of a journey to a distant city to attend the taking of a deposition cannot be taxed as costs on the ground that the notice was too short to permit the employment and instruction of local counsel. The William Branfoot *v.* Hamilton, 52 Fed. 390, 3 C. C. A. 155.

Under the Indiana statutes a party who attends at the taking of depositions is entitled to fees for attendance and mileage, when the failure to take the depositions results from the negligence of the party giving the notice. Whitestown Milling Co. *v.* Zahm, 10 Ind. App. 471, 36 N. E. 764.

71. Powers *v.* Hale, 25 N. H. 145.

Refusal of witness to complete deposition. — Where a statute provides that if any party after giving notice to the adverse party neglects or refuses to take a deposition, the adverse party may be allowed as costs such amount as the court may deem equitable, etc., unless notified that the deposition will not be taken, the party giving the notice of the taking of the deposition is not liable to the adverse party for costs for neglecting to take it, where the witness attends and submits to an examination in part, but refuses to complete it, and neither party requests compulsion. Ott *v.* Hentall, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226.

72. McNider *v.* Sirrine, 84 Iowa 745, 51 N. W. 170.

If there is no statute fixing the fees, the officer taking the deposition should be allowed for what the services are reasonably worth, not exceeding what was actually paid or incurred. Wentworth *v.* Griggs, 24 Minn. 450.

If a commission is issued from a federal court to a person in another state, other than a circuit court commissioner, the statutory compensation of such commissioner for the same service is the measure of an allowance to such person. If the commission issues to a foreign country, where no officers are provided by the law of the United States for the execution thereof, with definite, fixed fees, the amount allowed by law here will be the measure of compensation for the service abroad, unless it be shown that the custom-

4. EFFECT OF PROLIXITY. Where a deposition is unnecessarily prolix, the prevailing party cannot recover for the expenses incurred in the taking of so much thereof as was unnecessary,[73] and that portion may be properly taxed to such party.[74]

5. NECESSITY FOR CERTIFICATION OF ITEMS. The officer taking a deposition should certify each item of costs and transmit the evidence of services rendered to show the court that the services have been performed, and that the charges are such as the law allows.[75]

6. NECESSITY FOR FILING WITHIN REQUIRED TIME. The costs of taking depositions are not taxable when not filed within the time required by rule of court.[76]

7. NECESSITY FOR USE OF DEPOSITIONS AS GROUND OF ALLOWANCE. There is considerable conflict of opinion as to the necessity for the use of depositions at the trial as a basis for the allowance of costs made in procuring them. It has been held that if the deposition is rejected because the magistrate's certificate of notice to the opposite party is defective,[77] or because the witness was within the reach of a subpœna, and the party knew it,[78] it is not taxable as costs. So it has been held that if the witness whose deposition was taken attends the trial it is not taxable as costs.[79] On the other hand it has been held that where the deposition is taken in good faith, but the witness is produced by order of court and testifies at the trial, the deposition will nevertheless be taxable.[80] Again it has been held that the fact that the deposition is not used is no ground for not taxing it as costs, where it is rendered unnecessary by the act of the opposite party.[81]

O. Affidavits. Costs for *ex parte* affidavits offered upon the hearing of

ary charge in such foreign country is greater. Sedgwick *v.* Grinnell, 21 Fed. Cas. No. 12,613, 10 Ben. 6. *Compare* The Frisia, 27 Fed. 480, in which it was held that in the absence of evidence showing the existence, at the place of executing a commission to take testimony, of a customary rate of charges for services rendered by the commissioner in executing the commission, or for like services, proof of the fact that the sum actually paid the commissioner is a reasonable sum to pay for like work at the place of payment will warrant the allowance of the item as a disbursement properly made to secure the execution of the commission.

73. Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 24 Atl. 729; Sanborn *v.* Braley, 47 Vt. 170.

74. Borland *v.* Walker, 7 Ala. 269; Stafford *v.* Bryan, 2 Paige (N. Y.) 45.

Where the evidence taken in a deposition is irrelevant under the complaint costs therefor are not taxable for plaintiff. Teague *v.* South Carolina R. Co., 8 Rich. (S. C.) 154. To the same effect see Eastman *v.* Getz, 84 Fed. 458, 28 C. C. A. 459.

75. Russell *v.* Ashley, 21 Fed. Cas. No. 12,150, Hempst. 546.

76. Ulrich *v.* Getz, 2 Lanc. L. Rev. 137.

77. George *v.* Starrett, 40 N. H. 135.

78. Russell *v.* Ashley, 21 Fed. Cas. No. 12,150, Hempst. 546.

79. Greenville, etc., R. Co. *v.* Choice, 7 Rich. (S. C.) 40; Pinson *v.* Atchison, etc., R. Co., 54 Fed. 464.

Costs are not taxable for depositions taken to be used on a reference to a master, although they are referred to upon a motion for rehearing which results in a dismissal of the bill as upon a final hearing. Spill *v.* Celluloid Mfg. Co., 28 Fed. 870.

80. Nead *v.* Millersburg Home Water Co., 79 Fed. 129. See also Barber *v.* Robinson, 82 Minn. 112, 84 N. W. 732; Bancroft *v.* Freeman, 7 Wkly. Notes Cas. (Pa.) 64.

If no exception is taken to a deposition it is taxable, although not used. Sloss Iron, etc., Co. *v.* South Carolina, etc., R. Co., 75 Fed. 106.

It is only where bad faith is satisfactorily shown that the court will impose on a party the costs of a deposition of a person who was summoned and who testified at the trial. Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3.

When used at subsequent trial.— Where a deposition was not used at the trial for which it was taken, because the witness was present, but was used at a subsequent trial, the expense of taking it was allowed to be taxed. Lamb *v.* Stone, 11 Pick. (Mass.) 527.

81. Furman *v.* Peay, 2 Bailey (S. C.) 612; Hunter *v.* International R. Imp. Co., 28 Fed. 842.

Effect of nonsuit.— If plaintiffs are entitled to general costs and disbursements in an action, costs for taking a deposition will be allowed, although they be nonsuited, such failure not showing the disbursement to have been unnecessary. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106. *Compare* Cahn *v.* Monroe, 29 Fed. 675, in which it was held that where plaintiff is nonsuited on the statement of his case by his attorney defendant cannot tax as costs expense of taking depositions as they are not "admitted in evidence" within the statute authorizing taxation of depositions when admitted in evidence.

merely incidental motions are not taxable.[82] Even where costs of an affidavit are taxable, if it is purposely made long to increase costs, a deduction to the extent of the unnecessary matter included will be made.[83]

P. Stenographer's Fees — 1. Source of Right to Tax as Costs. Stenographer's fees are not taxable as costs in the absence of a statute[84] or some special agreement between the parties authorizing it.[85]

2. Under Statute Providing For Reasonable and Necessary Expenses. Under a statute providing for the allowance of enumerated items by way of disbursements, "and such other reasonable and necessary expenses" as are taxable according to the course and practice of the court, or by express provision of law, it is only for fees of official stenographers that disbursements may be taxed.[86] Fees of stenographers employed upon a reference are not taxable as disbursements in the absence of a stipulation to that effect.[87] According to some decisions the expense of a copy of the stenographer's minutes of a former trial, procured for use on a second trial, is not taxable;[88] but other decisions have taken the contrary

82. *In re* Boscawen, 37 N. H. 466.

83. Legg *v.* Kinney, 2 Wend. (N. Y.) 255.

Affidavits of verification.— A statute providing that if upon any paper filed there be indorsed any affidavit of service or other matter, but one fee for filing such paper and such matter indorsed thereon shall be allowed, does not apply to affidavits of verification and schedules attached to bills or answers. Flaacke *v.* Jersey City, 33 N. J. Eq. 57.

84. *Idaho.*— McDonald *v.* Burke, 2 Ida. 995, 28 Pac. 440, 52 Am. St. Rep. 276.

Montana.— State *v.* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402.

New Mexico.— Givens *v.* Veeder, 9 N. M. 405, 54 Pac. 879.

New York.— Down *v.* McGourkey, 15 Hun 444; Colton *v.* Simmons, 14 Hun 75; Provost *v.* Ferrell, 13 Hun 303; Cohen *v.* Weill, 32 Misc. 198, 65 N. Y. Suppl. 695; Anderson *v.* De Braekeleer, 25 Misc. 343, 55 N. Y. Suppl. 721; Griggs *v.* Guinn, 21 N. Y. Suppl. 451, 23 N. Y. Civ. Proc. 46.

South Carolina.— Hughes *v.* Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2; Scott *v.* Alexander, 27 S. C. 15, 2 S. E. 706.

Washington.— Bringgold *v.* Spokane, 19 Wash. 333, 53 Pac. 368; Tingley *v.* Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; Brown *v.* Winehill, 4 Wash. 98, 29 Pac. 927.

United States.— Kelly *v.* Springfield R. Co., 83 Fed. 183; Bridges *v.* Sheldon, 7 Fed. 17, 18 Blatchf. 295, 507; *Ex p.* Jaffray, 13 Fed. Cas. No. 7,170, 1 Lowell 321. See also Atwood *v.* Jaques, 63 Fed. 561; The William Branfoot *v.* Hamilton, 52 Fed. 390, 3 C. C. A. 155.

See 13 Cent. Dig. tit. "Costs," § 744.

85. *Missouri.*— State *v.* Gans, 72 Mo. App. 638.

New Mexico.— Givens *v.* Veeder, 9 N. M. 405, 54 Pac. 879.

New York.— Seasongood *v.* New York El. R. Co., 18 N. Y. Suppl. 775, 22 N. Y. Civ. Proc. 100.

Pennsylvania.— O'Neill *v.* Duff, 11 Phila. 244, 33 Leg. Int. 408.

United States.— Kelly *v.* Springfield R. Co., 83 Fed. 183; Bridges *v.* Sheldon, 7 Fed. 17, 18 Blatchf. 295, 507; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210. See also Gunther *v.* Liverpool, etc., Ins. Co., 10 Fed. 830, 20 Blatchf. 390.

See 13 Cent. Dig. tit. "Costs," § 747.

Method of taxation under agreement.— A stipulation by the parties that the fees of a stenographer for taking the testimony may be taxed as costs operates as a submission to the court of the question of the amount allowable and waives the right to have the question determined by the jury. And where, on a stipulation that the court may tax the stenographer's fees as costs, the court of its own motion refers the question of the amount allowable to a referee, his findings are merely advisory, and the court may disregard them and enter an order on the evidence returned by the referee. Trail *v.* Sumerville, 22 Mo. App. 1.

86. Nugent *v.* Keenan, 53 N. Y. Super. Ct. 530.

87. Nugent *v.* Keenan, 53 N. Y. Super. Ct. 530; Cohen *v.* Weill, 67 N. Y. Suppl. 917; Seasongood *v.* New York El. R. Co., 18 N. Y. Suppl. 775, 22 N. Y. Civ. Proc. 100; Varnum *v.* Wheeler, 9 N. Y. Civ. Proc. 421; Adams *v.* New York, etc., R. Co., 20 Abb. N. Cas. (N. Y.) 180.

Agreement that each party shall pay half. — Where the parties on a trial before a referee employ a stenographer to take the minutes and agree that each party shall pay half the fee, the successful party cannot tax as a disbursement the amount paid by him. Mark *v.* Buffalo, 87 N. Y. 184; Colton *v.* Simmons, 14 Hun (N. Y.) 75.

Transcript not ordered from day to day.— A stenographer's fee for a copy of his minutes is not taxable as a necessary disbursement of the successful party, where they were not ordered from day to day during the trial, and the defeated litigant did not appeal. Kahn *v.* Norrie, 4 Hun (N. Y.) 72, in which the court did not consider whether in any event it would be a proper disbursement.

88. Hudson *v.* Erie R. Co., 57 N. Y. App. Div. 98, 68 N. Y. Suppl. 28; Hamilton *v.* Butler, 4 Rob. (N. Y.) 654, 19 Abb. Pr. (N. Y.) 446; Spring *v.* Day, 44 How. Pr.

view.[89] So some decisions hold that stenographer's minutes obtained for the purpose of properly preparing amendments to a case on appeal are taxable disbursements,[90] but this is denied in others.[91]

3. Under Other Provisions. A statute authorizing the taxation of stenographer's fees as costs "in every case" does not include garnishment proceedings.[92] Under a statute requiring the party ordering the reporter to transcribe testimony to pay therefor, the fees so paid are not recoverable as costs or disbursements.[93] Where one statute applicable to a particular court requires the stenographer to file a copy of his notes on order of court for the use of court and parties without charge, and another statute requires him to furnish such copy to the parties on payment of the statutory fees, a party who obtains a copy from the clerk without applying to the court for it, under the first provision, cannot tax the amount paid by him as costs.[94]

(N. Y.) 390. See also *In re* Metropolitan El. R. Co., 18 N. Y. Suppl. 899, 46 N. Y. St. 138.

89. Kummer *v.* Christopher, etc., R. Co., 12 Misc. (N. Y.) 387, 33 N. Y. Suppl. 581; Zelmanovitz *v.* Manhattan R. Co., 33 N. Y. Suppl. 583, 67 N. Y. St. 405, 24 N. Y. Civ. Proc. 402; Flood *v.* Moore, 2 Abb. N. Cas. (N. Y.) 91.

90. Ridabock *v.* Metropolitan El. R. Co., 8 N. Y. App. Div. 309, 40 N. Y. Suppl. 938, 75 N. Y. St. 336; Stevens *v.* New York El. R. Co., 58 N. Y. Super. Ct. 569, 9 N. Y. Suppl. 707, 31 N. Y. St. 404, 18 N. Y. Civ. Proc. 350; Park *v.* New York Cent., etc., R. Co., 33 Misc. (N. Y.) 320, 68 N. Y. Suppl. 400; Cutter *v.* Morris, 7 N. Y. St. 426; Sebley *v.* Nichols, 32 How. Pr. (N. Y.) 182.

91. Shaver *v.* Eldred, 86 Hun (N. Y.) 51, 33 N. Y. Suppl. 158, 66 N. Y. St. 783; Pfaudler Barm Extracting Bunging Apparatus Co. *v.* Sargent, 43 Hun (N. Y.) 154.

As basis for bill of exceptions.— If a copy of the stenographer's notes is necessary to enable a party to make a case or bill of exceptions, the expense in procuring it is taxable. Varnum *v.* Wheeler, 9 N. Y. Civ. Proc. 421.

Copy of the stenographer's notes, obtained for the purpose of moving for a new trial on the minutes, has been held not taxable. Whitney *v.* Roe, 75 Hun (N. Y.) 508, 27 N. Y. Suppl. 511, 57 N. Y. St. 683.

92. Mechanics', etc., Bank *v.* Glaser, 40 Mo. App. 371.

A copy of testimony taken on the trial of an action at law by a stenographer, under a stipulation obtained by a party for the purpose of preparing a bill of exceptions, is not "obtained for use on the trial," within the meaning of U. S. Rev. Stat. § 983. Monahan *v.* Godkin, 100 Fed. 196.

Mistrial.— Where a statute provides that the party employing a stenographer shall be responsible for his compensation in transcribing his notes for case on appeal, the party is not responsible in case of a mistrial, where the notes are ordered transcribed on motion of the other party. Louisville, etc., R. Co. *v.* Ray, (Tenn. Sup. 1898) 46 S. W. 554.

Under a statute providing that a stenographer's fee shall be taxed in each case in the district court in any county in which a stenographer may be appointed, such fee must be taxed as costs in every case in such county, although the stenographer is not called upon to render any services in that particular case. Beebe *v.* Wells, 37 Kan. 472, 15 Pac. 565.

93. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Barkly *v.* Copeland, 86 Cal. 493, 25 Pac. 3.

What amounts to an order.— The following language held an order: "Mr. Reporter, transcribe your notes of the proceedings, and file them with the clerk." Taylor *v.* McConigle, 120 Cal. 123, 52 Pac. 159.

Transcript ordered by court.— Under a statute providing that where a transcript is ordered by the court, the fees therefor must be paid by the respective parties in equal proportions, or by such of them and in such proportions as the court may order, where a transcript is made on order of court, the amount paid by the successful party is taxable as costs. Barkly *v.* Copeland, 86 Cal. 493, 25 Pac. 3. See also Sharp *v.* Hull, 81 Ill. App. 400. But where the court refuses to order the transcript unless plaintiff will consent, and he refuses such consent, the reporter's fees for transcribing the notes cannot be charged as costs. Senior *v.* Anderson, 130 Cal. 290, 62 Pac. 563. See also Detroit, etc., R. Co. *v.* Hayt, 55 Mich. 347, 21 N. W. 367, 911. But *compare* Maynard *v.* Vinton, 59 Mich. 155, 27 N. W. 2, in which the opposite result was reached under a similar statute. So under a statute requiring an official stenographer by direction of the judge, either upon his own motion or that of either party, to take notes of the testimony, "and upon the motion of either party" to cause a full transcript of the same to be made, a stenographer's fee for transcript is not taxable as costs against the unsuccessful party, unless the transcript was made by order of the court. Albin *v.* Louisville R. Co., 67 S. W. 17, 23 Ky. L. Rep. 2274.

94. Thurston *v.* Luce, 61 Mich. 486, 28 N. W. 679.

But under one statute awarding legal fees paid stenographers for *per diem* or for copies as costs to the party entitled thereto, and another statute prescribing the legal fees of stenographers for copies of the testimony transcribed from their notes, since the clerk

4. AMOUNT AND ITEMS ALLOWABLE. Where a statute prescribes the pay of a stenographer and authorizes the court to appoint a stenographer and allow him reasonable compensation, an amount not exceeding the limit prescribed by statute, and approved by the trial court, is properly taxed.[95]

Q. Reference. In the absence of any special statutory provision in regard to costs of a reference, it is apprehended that such costs will be taxable against the losing party and in favor of the successful party,[96] the hearing before the referee being a regular part of the proceedings in the suit.[97]

R. Failure to Try Cause in Accordance With Notice or on Failure to Countermand Notice. Where a party fails to try a cause, pursuant to notice of trial given by him, or to countermand it in due season, he must pay the costs of the term of the opposite party, who has omitted to notice the cause and attends in obedience to the call of the party noticing it prepared to try the cause;[98] and one appearing to oppose a motion, of which he has been duly notified, is entitled to costs on failure of the other party to appear.[99] If plaintiff, after giving notice of trial, countermands it, he must pay the costs incurred by defendant between the service of notice and the countermand.[1] This is true, although it appear that the cause could not have been tried, by reason of the state of business at the circuit.[2]

S. Special Proceedings. By express provision of the New York statute the costs allowed in a "special proceeding" must be at the rate allowed for similar services in an "action."[3]

cannot transcribe the stenographic notes into longhand, the fee paid the stenographer for such transcription is chargeable as part of the costs. State *v.* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402.

95. Cox *v.* Patten, (Tex. Civ. App. 1902) 66 S. W. 64.

Estimate of amount transcribed.— The custom among stenographers of computing two and one-half folios to the page, without actual count, will not prevail in estimating the number of folios of a transcript for the taxing of costs. Maltby *v.* Plummer, 73 Mich. 539, 41 N. W. 683.

Fees held excessive.— The charges of sixty-nine dollars for stenographer and eighty-five dollars for commissioner in taking five depositions in New York, covering ninety-six pages of record, are exorbitant, in the absence of proof that they are the legal fees in that state. Collins *v.* Rosenham, 43 S. W. 726, 19 Ky. L. Rep. 1445.

96. Tinkham *v.* Meigs, 16 Mass. 450; Huffman *v.* Stork, 25 S. C. 267.

Where the court is empowered by statute to tax such costs in such manner as in its discretion shall seem just it is proper to tax the costs against the losing party. Hyman *v.* Heuff, 2 Misc. (N. Y.) 388, 21 N. Y. Suppl. 984, 50 N. Y. St. 603; Arrington *v.* Jenkins, 95 N. C. 462; White *v.* Jones, 94 N. C. 411; Tinkham *v.* Meigs, 16 Mass. 450.

97. Tinkham *v.* Meigs, 16 Mass. 450.

98. Seifert *v.* Schnillner, 62 How. Pr. (N. Y.) 496. See also Eft *v.* Reeve, 31 N. J. L. 139.

99. Johnson *v.* Provincial Ins. Co., 11 Mich. 455.

1. Anonymous, 7 Hill (N. Y.) 168; Morse *v.* Lafarge, 2 Wend. (N. Y.) 241; Bostwick *v.* Munger, 1 Wend. (N. Y.) 97; Keyes *v.* Beardsley, 18 Johns. (N. Y.) 135; Jackson *v.* Mann, 1 Cai. (N. Y.) 123. See also McGregor *v.* Cleveland, 12 Wend. (N. Y.) 201.

Hearing before referee.— The rule is the same where a cause is noticed for hearing before a referee. Dauchy *v.* Allen, 3 How. Pr. (N. Y.) 210; Baily *v.* Norris, 1 Code Rep. (N. Y.) 29.

If plaintiff pays costs for not going to trial, pursuant to notice, although he is eventually successful, he is not entitled to recover from his adversary the costs so paid. Linacre *v.* Lush, 3 Wend. (N. Y.) 305.

2. Jennings *v.* Holbert, 1 How. Pr. (N. Y.) 66; Anonymous, 7 Hill (N. Y.) 168.

3. Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417.

What are special proceedings.— Proceedings to mortgage trust lands (*In re* Clark, 15 N. Y. Suppl. 867, 27 Abb. N. Cas. (N. Y.) 114), an application to the surrogate's court for leave to issue an execution on a judgment taken against a decedent in his lifetime (*In re* Taylor, 8 N. Y. Civ. Proc. 453), and a proceeding to vacate an assessment in the city of New York, at least when instituted at special term (*In re* Jetter, 78 N. Y. 601 [*reversing* 14 Hun (N. Y.) 93]) are special proceedings. But proceedings supplementary to execution (Seeley *v.* Black, 35 How. Pr. (N. Y.) 369), proceedings to set aside a judgment (Pitkin *v.* Cooley, 5 Hun (N. Y.) 48), or an application for an order taxing the fees of the applicant as a real-estate agent and appraiser in proceedings by the city of New York to acquire a site for a city hall (*In re* New York, 69 N. Y. Suppl. 178) are not special proceedings.

Under a statute providing that a decision in a special proceeding for review is for the

T. Consolidated Actions. In New York it has been held that a successful party cannot in a consolidated action tax the costs of an action which was discontinued before the consolidation;[4] and that after an order of consolidation of several actions the costs of only a single action are taxable,[5] at least unless the order reserves the right to tax the costs of the discontinued actions.[6] In Pennsylvania, where there are several actions between the same parties and they agree that a verdict and judgment in one of them shall determine all, and the same witnesses are summoned in each action, plaintiff will be allowed to tax costs for them only in the case that is tried.[7] In Texas, where after appeal by defendant from a justice's judgment for plaintiff, the latter commenced another suit in the county court on the same cause of action claiming that the justice had no jurisdiction of the former action, and the two suits are consolidated on defendant's motion, it was held that plaintiff was not entitled to costs in the justice's court judgment.[8]

U. Interlocutory Proceedings. The amount and items for the costs taxable on interlocutory proceedings is closely allied to the substantive right to or liability for costs on such proceedings.[9]

V. Disbursements — 1. In General. By the provisions of the statutes in some jurisdictions the successful party in an action is entitled to recover necessary disbursements made by him.[10] Under a statute providing that a party to whom costs are awarded in an action is entitled to include in his bill of costs all necessary disbursements made by him, the clerk has authority to tax disbursements, although the allowance be of costs only, since under the statute disbursements follow the allowance of costs;[11] but the right to recover such necessary disbursements is incident to the right to recover costs,[12] and a party, even

purposes of costs to be deemed an action at issue on a question of law, an order vacating and setting aside an execution, levy, and sale thereunder, and ordering an alias execution to issue, is not a special proceeding, but a motion, costs of appeal from which are to be governed by a statute providing "costs may be allowed on an original motion, or on an appeal from an order, in the discretion of the court, not exceeding ten dollars." Tillman *v.* Jackson, 1 Minn. 189.

4. Blake *v.* Michigan Southern, etc., R. Co., 17 How. Pr. (N. Y.) 228.

Where two actions are tried together the successful party is entitled to costs in both so far as they are separated. Hildebrant *v.* Crawford, 6 Lans. (N. Y.) 502. But where three actions by the same plaintiffs against the same defendants were tried together by a referee under a stipulation that "the evidence is to be taken as in one case and to be deemed to be taken in all of the cases so far as applicable," the fees of witnesses who were called and testified but once, but whose evidence was admissible in all the cases, should be taxed but once and apportioned among the actions. Brown *v.* Sears, 23 Misc. (N. Y.) 559, 52 N. Y. Suppl. 292.

5. Halsey *v.* McCallum, 2 N. Y. City Ct. 338. See also Law *v.* Jackson, 2 Wend. (N. Y.) 209, holding that where it is agreed by the parties in two actions that one shall be tried and the other abide the result, full costs cannot be allowed in the latter suit for services not actually performed or which were unnecessary.

6. Hiscox *v.* New Yorker Staats-Zeitung, 3 Misc. (N. Y.) 110, 23 N. Y. Suppl. 682, 52 N. Y. St. 212.

7. Curtis *v.* Buzzard, 15 Serg. & R. (Pa.) 21.

Where two cases by separate plaintiffs against the same defendant were consolidated, and in one a verdict was rendered for plaintiff and in the other for defendant, it was held that the latter might tax the entire bill against plaintiff in the case in which the verdict was in his favor. Showers *v.* Heidelberg Tp., 3 Pa. Dist. 201.

8. Wooldridge *v.* Womack, 1 Tex. App. Civ. Cas. § 338.

9. See *supra*, VII, F.

10. Swift *v.* De Witt, 6 N. Y. Leg. Obs. 314; Whitsett *v.* City Bldg., etc., Assoc., 3 Tenn. Ch. 526; Meyer *v.* Foster, 16 Wis. 294; Gunther *v.* Liverpool Ins. Co., 10 Fed. 830.

A disbursement incurred in good faith in the progress of a cause will be deemed necessary, although the expense results in no benefit to the party, but may in fact have benefited his adversary. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268, 31 N. E. 1080, 48 N. Y. St. 106.

11. Cassidy *v.* McFarland, 2 Misc. (N. Y.) 189, 21 N. Y. Suppl. 585, 50 N. Y. St. 199, 23 N. Y. Civ. Proc. 65.

Interpreters' fees are taxable as a necessary and proper disbursement. Meyer *v.* Foster, 16 Wis. 294.

Revenue stamps, not being mentioned in the fee bill, are not taxable as costs. Reeves *v.* Ferguson, 31 N. J. L. 289.

12. Nurse *v.* Justus, 6 Oreg. 75.

though he prevails in an action, if for any reason he is not entitled to costs, is not entitled to disbursements.[13]

2. Party's Attendance. In some states it has been held that a successful party is entitled to tax costs of his attendance.[14] It has also been held that a federal court, sitting in a state where attendance is taxable as costs, should allow the taxation of attendance as costs,[15] but that attendance of the successful party cannot be taxed in the federal court where not allowable in the state court.[16]

3. Party's Traveling Expenses. In one jurisdiction it has been held that traveling expenses of a party are not taxable as costs.[17] In others such expenses may be taxed as costs.[18] But the travel for which costs may be taxed must be within the limits of the state.[19]

13. Peet *v.* Warth, 1 Bosw. (N. Y.) 653; Marsullo *v.* Billotto, 55 How. Pr. (N. Y.) 375; Wheeler *v.* Westgate, 4 How. Pr. (N. Y.) 269; Belding *v.* Conklin, 4 How. Pr. (N. Y.) 196. *Contra*, Newton *v.* Sweet, 4 How. Pr. (N. Y.) 134; Taylor *v.* Gardner, 4 How. Pr. (N. Y.) 67.

14. Hall *v.* Durell, 9 Pick. (Mass.) 328; Hayward *v.* Richie, 7 Mass. 286; Carleton *v.* Gile, 29 N. H. 44.

Attendance in several suits.— Where a bill to enjoin the use of a machine and a law case in regard to the same invention are pending at the same term, and defendant is in attendance for the law case, he will not be allowed costs for attendance on a dismissal of the bill in equity. Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 2 Robb. Pat. Cas. 567, 3 Woodb. & M. 17.

Attendance at several terms.— Where an action is defaulted, plaintiff will be entitled to tax fees for attendance, as in defaulted actions, at each term while the action shall be necessarily continued. Carleton *v.* Gile, 29 N. H. 44. So when an action is continued from term to term under reference, the party recovering costs shall be allowed to tax his travel, at the term the rule is entered, and his attendance from the commencement of the term to the day on which the rule is so entered. At the term when the report is made he may tax his attendance until the report is accepted, recommitted, or discharged; and at each intermediate term he may tax one day's attendance. Hayward *v.* Richie, 7 Mass. 286.

On change of venue.— Under a statute awarding defendant sued in the wrong county, and who demands a change to the proper county, a reasonable compensation for his trouble and expense in attending in the wrong county, defendant is entitled to expense of attendance by attorney, although he did not attend in person. Allen *v.* Van, 1 Iowa 568.

On discontinuance.— Where an action was decided by the court to have been discontinued by plaintiff, defendant was allowed to tax costs for his attendance after the discontinuance until the final disposition of the action. Earle *v.* Hall, 22 Pick. (Mass.) 102.

On reference.— The taking of testimony before a referee is a "trial of the cause," within the statute relating to costs, and the usual fee for attendance thereon may be taxed. Hill *v.* Durand, 58 Wis. 160, 15 N. W. 390.

15. Nichols *v.* Brunswick, 18 Fed. Cas. No. 10,239, 3 Cliff. 88

16. Sebring *v.* Ward, 21 Fed. Cas. No. 12,598, 4 Wash. 546. See also Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210.

17. McDonald *v.* McDonald, 45 Mich. 44, 7 N. W. 230.

Traveling expenses not taxable in federal court when not allowable in state court of state where federal court is sitting. Sebring *v.* Ward, 21 Fed. Cas. No. 12,598, 4 Wash. 546. The rule is otherwise where state court allows such expenses. Nichols *v.* Brunswick, 18 Fed. Cas. No. 10,239, 3 Cliff. 88.

18. Kingfield *v.* Pullen, 54 Me. 398; Den *v.* Johnson, 13 N. J. L. 156.

Number of terms for which travel taxable. — When an action is continued from term to term under reference, the party recovering costs shall be allowed to tax his travel, at the term when the rule is entered. At the term when the report is made he may tax his travel until the report is accepted, recommitted, or discharged; and at each intermediate term he may tax his travel. Hayward *v.* Richie, 7 Mass. 286. See also Carleton *v.* Gile, 29 N. H. 44, in which it was held that where an action is defaulted at the first term, plaintiff is entitled to tax for his travel at each term while the action shall be necessarily continued. So a statute giving the prevailing party an allowance for travel for each term during which the action is pending authorizes an allowance to the successful party for travel for each term a cause is before an auditor or under advisement by the court. Bliss *v.* Tripp, 16 Gray (Mass.) 287.

Travel in several suits.— Where a bill brought to enjoin the use of certain machines and a lawsuit in regard to the same invention are pending at the same term, and defendant is in attendance for the law case, he will not be allowed costs for travel, on dismissal of the bill in equity. Hovey *v.* Stevens, 12 Fed. Cas. No. 6,746, 2 Robb. Pat. Cas. 567, 3 Woodb. & M. 17.

19. Kingfield *v.* Pullen, 54 Me. 398; White *v.* Judd, 1 Metc. (Mass.) 293; Den *v.* Johnson, 13 N. J. L. 156; Mattoon *v.* Mattoon, 22 Vt. 450. *Compare* Whipple *v.* Cumberland Cotton Mfg. Co., 29 Fed. Cas. No. 17,515, 3 Story 84, in which it was held that where the personal attendance and presence of plaintiff was important, although not indispensable, he might tax his travel from without the state to the place of trial.

4. MAINTENANCE OF IMPRISONED DEBTOR. Where it is the duty of a creditor to provide for the maintenance of an imprisoned debtor, the expense so incurred can be recovered as costs on the execution.[20]

5. CARE OF PROPERTY. The decisions are not harmonious as to the right to tax as costs expenses incurred by an officer in taking care of property in his custody. In some decisions the right is denied.[21] In others, without mentioning any special statutory provision, such charges have been taxed as costs.[22] In others, the right has been held to be given by statute.[23] If the statute provides for an allowance for keeping property, of such a sum as the court may allow, an allowance by order of court is necessary to authorize the taxation thereof.[24] Nor can such charges be taxed unless the particular items are returned upon the process, where a statute requires this to be done.[25] So items for unauthorized services rendered in respect to attached property, which have never been filed or claimed as costs, are not recoverable in an action by plaintiff, to whom the claim has been assigned by the officer.[26]

6. TELEGRAPHIC DESPATCHES. Sums spent for telegraphic despatches may be taxed as costs where shown by affidavit to have been reasonably necessary.[27]

7. PROSPECTIVE COSTS. In a recent decision in New York it is held that where a demurrer to the complaint is overruled, with leave to answer on payment of costs, plaintiff cannot tax prospective charges for satisfaction piece, transcript, and filing;[28] and in an early decision in the chancery court it was held that only

20. Smith *v.* Staples, 49 Conn. 87. See also Townsend *v.* U. S., 24 Fed. Cas. No. 14,119.

21. Genesee County Sav. Bank *v.* Ottawa Cir. Judge, 54 Mich. 305, 20 N. W. 53. See also ATTACHMENT, XIII, H [4 Cyc. 721].

Insurance on property seized.— An officer has no authority to insure property seized by him, and remaining in his custody until the cause is disposed of, at the expense of either party without the consent of such party, and the expense is not taxable as costs in the case. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,162, 1 Cliff. 509.

22. Kellogg *v.* Kimball, 139 Mass. 296, 30 N. E. 95; Hoyt *v.* Phillips, 1 Sweeny (N. Y.) 76; *In re* Fifteen Empty Barrels, 9 Fed. Cas. No. 4,778, 1 Ben. 125; U. S. *v.* Three Hundred Barrels of Alcohol, 28 Fed. Cas. No. 16,509, 1 Ben. 72. See also ATTACHMENT, XIII, H [4 Cyc. 721].

In an equity case it was held that the expenses incurred in preserving attached property might be allowed as costs. Burns *v.* Rosenstein, 135 U. S. 449, 10 S. Ct. 817, 34 L. ed. 193.

23. Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217 (being considered "costs," within a statute giving costs to the successful party); Jones *v.* Thomas, 14 Ind. 474; Snead *v.* Wegman, 27 Mo. 176; Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592 (being a "necessary disbursement"). See also ATTACHMENT, 4 Cyc. 721.

Stay after levy.— Under a statute providing that where an execution is stayed after a levy, the plaintiff shall be entitled to such additional compensation for his trouble and expenses in taking care of and preserving the property as the court or judge allow, auctioneer's or keeper's fees cannot be allowed the sheriff except where there has been a stay, and where the court has allowed them. McKeon *v.* Horsfall, 88 N. Y. 429.

Statute requiring officer to take charge of property.— Although the statute relating to sheriff's fees does not provide for compensation to him for the care of attached property, yet costs may be taxed against the attachment plaintiff for his reasonable expenditures in that respect, because the statutes require the officer to take care of the property attached. Morgan *v.* North Texas Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 138. But *compare* Cutter *v.* Howe, 122 Mass. 541, in which it was held, under a statute enumerating sheriff's fees, and making no provision for such allowance, that proof of a custom to include in the taxable costs of the action an officer's charges for custody of attached property is immaterial and cannot establish the right to have such charges so taxed.

Where a statute allows officers stated fees, and for "other" services such sums as are in proportion to the fees established by law, a sheriff may charge for taking and delivering property to plaintiff in replevin, but plaintiff cannot tax as costs charges for transporting it to him, nor for holding it until a bond is taken. Woodward *v.* Amsden, 57 Vt. 446.

24. Berry *v.* G. V. B. Mining Co., 5 Ida. (Hash.) 691, 51 Pac. 746; Barman *v.* Miller, 23 Minn. 458.

25. Reed *v.* Smith, 25 Nebr. 64, 40 N. W. 591.

26. Colby *v.* Mitchell, (Tex. Civ. App. 1896) 33 S. W. 1040.

27. Dougliss *v.* Atwell, 3 N. Y. Civ. Proc. 80; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210.

28. Thompson *v.* Stanley, 22 N. Y. Suppl. 897, 22 N. Y. Civ. Proc. 348.

such prospective disbursements are taxable as must necessarily be incurred for fees of officers fixed by law, and which can be ascertained.[29] In Iowa it has been held, under a statute allowing costs to the successful party, that he is entitled to accruing costs;[30] and in Washington it has been held that costs on an execution, being accruing costs, should not be taxed.[31] In Indiana a general judgment for costs carries costs afterward accruing, and even though a definite sum is specified in the entry it does not follow that there may be no further liability for costs.[32]

8. Commissions on Money Collected. The commissions of a sheriff or marshal upon money collected on an execution, and the commissions of the clerk of court when the sheriff is directed by law to pay the money in to him instead of to the party directly are part of the costs of the suit to be paid by the judgment debtor for which execution may issue.[33]

9. State Tax on Litigation. A taxation on litigation imposed by statute on the unsuccessful party in a civil action is a specific tax for revenue purposes, and not costs.[34]

10. Printing. In the absence of statute, rule of court, or agreement of parties authorizing it, the expense of printing any papers or documents used in a cause is not taxable as disbursements; as for instance briefs,[35] pleadings, or abstracts of pleadings;[36] evidence;[37] record or abstracts of record;[38] or referee's opinion and judgment.[39] These items, however, are taxable when so authorized.[40] So it has

29. Crippen *v.* Brown, 11 Paige (N. Y.) 628.

Amendment of decree.— In an equitable suit, costs of amending a decree, which became necessary through an error of the solicitor for the successful party, will not be allowed as costs. Otis *v.* Forman, 1 Barb. Ch. (N. Y.) 30.

30. Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247.

31. Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710.

32. Dufour *v.* Kious, 91 Ind. 409; Pittsburgh, etc., R. Co. *v.* Elwood, 79 Ind. 306; Palmer *v.* Glover, 73 Ind. 529.

33. Kitchen *v.* Woodfin, 14 Fed. Cas. No. 7,855, 1 Hughes 340.

34. Johnson *v.* State, 85 Tenn. 325, 2 S. W. 802; Elliston *v.* Winstead, 10 Lea (Tenn.) 472; State *v.* Nance, 1 Lea (Tenn.) 644; Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860. But see State *v.* Cole, 6 Lea (Tenn.) 492, which seems to hold the contrary.

Application of rule.— The statutory provision that "all costs accrued at the instance of the successful party which cannot be collected out of the other party, may be recovered, on motion, by the persons entitled to them, against the successful party" does not entitle the state to recover as costs against the successful party the litigation tax imposed on the unsuccessful party by statute. State *v.* Nance, 1 Lea (Tenn.) 644.

35. Scott *v.* Alexander, 27 S. C. 15, 2 S. E. 706; Luxfer Prism Patents Co. *v.* Elkins, 99 Fed. 29; Kelly *v.* Springfield R. Co., 83 Fed. 183; Gird *v.* California Oil Co., 60 Fed. 1011; Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210. See also *Ex p.* Hughes, 114 U. S. 548, 5 S. Ct. 1008, 29 L. ed. 281, in which it was said: "It has never been the practice of this court in cases before it under its appellate jurisdiction, to tax, as costs, disbursements by counsel or parties for printing briefs. We see no reason for adopting a different rule in cases within our original jurisdiction."

36. Hussey *v.* Bradley, 12 Fed. Cas. No. 6,946*a*, 5 Blatchf. 210.

37. Atwood *v.* Jaques, 63 Fed. 561; Harding *v.* Altemus, 11 Fed. Cas. No. 6,049; Spaulding *v.* Tucker, 22 Fed. Cas. No. 13,221, 2 Sawy. 50. See also Roundtree *v.* Rembert, 71 Fed. 255.

38. Atwood *v.* Jaques, 63 Fed. 561.

39. Veeder *v.* Mudgett, 27 Hun (N. Y.) 519. And the printing of evidence taken before a referee to whom a special proceeding was referred to hear and report, and used on the hearing at special term with the referee's report and other papers, is not the "making of a case" for which a fee of twenty dollars may be taxed. Matter of Clarke, 15 N. Y. Suppl. 867, 27 Abb. N. Cas. (N. Y.) 144.

Order of court.— Under a statute allowing the "expense of printing the papers for any hearing, when required, by a rule of the court," to be taxed as disbursements, an order of court that the report of a referee be printed is not a rule of the court and does not bring the expense within the provision. Scott *v.* Alexander, 27 S. C. 15, 2 S. E. 706.

40. In Pearman *v.* Gould, (N. J. Ch. 1887) 8 Atl. 285, it was held (no reason stated) that the complainant in a chancery suit is entitled to have the expense to him of printing testimony taken by defendant taxed in his bill of costs.

Briefs.— Sackett *v.* Smith, 46 Fed. 39; Hake *v.* Brown, 44 Fed. 734; Dennis *v.* Eddy, 7 Fed. Cas. No. 3,793, 12 Blatchf. 195.

Record and evidence.— Inkster *v.* Carver, 17 Mich. 64; Hake *v.* Brown, 44 Fed. 734; Jordan *v.* Agawam Woollen Co., 13 Fed. Cas. No. 7,516, 3 Cliff. 239. See also *Ex p.* Hughes, 114 U. S. 548, 5 S. Ct. 1008, 29

been held that, under a statute providing that whenever there shall appear a claim for official services rendered by any officer of a court and there do not appear to be any fees fixed by law as a compensation, the court, judge, or justice on application shall make an order specifically fixing the allowance for such claim; printers' fees for advertisements made by the sheriff may be collected as part of the costs in the case.[41]

11. COPIES OF PLEADINGS. Costs for copies of pleadings required by rule of court to be furnished are taxable.[42] But a statute making an allowance of twenty-five cents per folio for drawing all pleadings in an action, and twelve cents per folio "for engrossing or copying the same" does not authorize a charge for a copy to file, in addition to the engrossed copy and a copy to keep.[43]

W. Unnecessary Costs — 1. IN GENERAL. In actions at law the court has power in the exercise of its discretion to disallow to plaintiff any costs which he has caused unreasonably and unnecessarily to be accumulated. Statutes allowing costs to the prevailing party do not mean costs unnecessarily incurred.[44] Thus a party will not be allowed costs for unnecessary matter in pleadings, but the court will allow costs only for such part as is proper;[45] and where a party is unsuccessful he is taxable with the expense of a copy of the whole pleading served on the opposite party.[46] So where litigation is unnecessarily protracted for the purpose of vexation the court will award costs against the party so acting.[47] In equitable actions the court may apportion the costs and refuse to tax the whole amount against the unsuccessful party where the successful party has made unnecessary costs.[48]

2. SEPARATE ACTIONS AGAINST ONE DEFENDANT WHICH MIGHT HAVE BEEN JOINED. In a number of jurisdictions it is the rule, usually and perhaps always, because of some special statutory provision, that where separate actions are brought against the same defendant on claims which could have been united in one action, plaintiff will be entitled to recover costs of one action only.[49]

L. ed. 281, in which it was held that a party may tax disbursements for printing objections in the nature of pleadings, no statute or rule of court being mentioned.

41. Gardner *v.* Brown, 22 Ind. 447.

42. Yale Lock Mfg. Co. *v.* Colvin, 14 Fed. 269, 21 Blatchf. 168.

Costs cannot be taxed for copies of pleadings prepared by a private individual. McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

Where the district court, on appeal from a board of equalization, has in its discretion allowed pleadings to be filed, although not required by statute, copy fees may be included in taxing costs. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

43. Duncan *v.* Erickson, 82 Wis. 128, 51 N. W. 1140. To the same effect see Reid *v.* Martin, 77 Wis. 142, 45 N. W. 820.

44. Meadows *v.* Rogers, 17 Ark. 361.

45. Maupin *v.* Everett, 8 Ky. L. Rep. 356; Summerside Bank *v.* Ramsey, 55 N. J. L. 122, 25 Atl. 274; Porter *v.* English, 1 Phila. (Pa.) 85, 7 Leg. Int. (Pa.) 150.

46. McRae *v.* Guion, 58 N. C. 129.

47. Alexander *v.* Alexander, 8 Ala. 796.

48. *Arkansas.*— Blakeney *v.* Ferguson, 14 Ark. 640.

Connecticut.— Hoyt *v.* Smith, 27 Conn. 468.

Kentucky.— Jones *v.* Morehead, 3 B. Mon. 377. See also Grines *v.* March, 3 A. K. Marsh. 367.

New York.— North American F. Ins. Co. *v.* Graham, 5 Sandf. 197; Clark *v.* Bundy, 3 Paige 432; German *v.* Machin, 6 Paige 288; Hannan *v.* Osborn, 4 Paige 336; Union Ins. Co. *v.* Van Rensselaer, 4 Paige 85; Chapman *v.* Munson, 3 Paige 347; Green *v.* Storm, 3 Sandf. Ch. 305.

South Carolina.— Pruitt *v.* Pruitt, 59 S. C. 509, 38 S. E. 213.

Tennessee.— Lassater *v.* Garrett, 4 Baxt. 368.

United States.— Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,198, 10 Blatchf. 223.

Where a large mass of irrelevant testimony is introduced by the successful party the costs may be divided. Lassater *v.* Garrett, 4 Baxt. (Tenn.) 368; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,198, 10 Blatchf. 223.

49. *California.*— Longmaid *v.* Coulter, 123 Cal. 208, 56 Pac. 791.

Kentucky.— Combs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529.

Louisiana.— Bolton *v.* Harrod, 10 Mart. 115.

Massachusetts.— Stafford *v.* Gold, 9 Pick. 533.

Missouri.— Maberry *v.* Missouri Pac. R. Co., 83 Mo. 664.

New York.— Munro *v.* Tousey, 13 N. Y. Suppl. 81, 36 N. Y. St. 520.

Pennsylvania.— Towanda Bank *v.* Ballard,

3. Several Actions Against Defendants Who Might Have Been Joined in One Action. A statute limiting the recovery of costs where two or more actions are brought for the same cause against persons who might have been joined in one action has been held to apply to separate actions for the same cause against a sheriff and his indemnitor.[50] According to some decisions where separate suits are brought against the maker and indorser of a note plaintiff is entitled to costs in both suits, although there can be but one satisfaction of the debt.[51] According to other decisions if judgment is rendered against one for debt and costs and the same is paid pending the action against the other plaintiff is not entitled to costs in the other action.[52] It has also been held that where maker and guarantor are sued separately costs are allowed in both suits,[53] and also where several actions are brought against each promisor in a joint and several note,[54] or against makers severally liable thereon.[55] It has further been held that where a judgment for damages and costs in an action of tort against one tort-feasor has been paid pending action against another, plaintiff is not entitled to a judgment for costs in the suit against such other,[56] but that where plaintiff prosecutes both actions to judgment before recovering satisfaction he is entitled to costs in both.[57]

4. Suits Based on Matters Proper as Defense, Set-Off, or Counter-Claim. Under a statute providing that if any defendant personally served with notice omit to set up a counter-claim arising out of the contract or transaction on which plaintiff bases his action he cannot afterward maintain an action against plaintiff

7 Watts & S. 434. See also Fisher *v.* Rick, 2 Woodw. 435. But *compare* Kemp *v.* Kemp, 1 Woodw. 189.

The rule has no application in the case of causes of action accruing at different times, where action is brought on them as they successively accrue (Ft. Wayne, etc., R. Co. *v.* Clark, 59 Ind. 191; Wade *v.* Musselman, 15 Ind. 77; Eames *v.* Black, 72 Me. 263. See also Houston, etc., R. Co. *v.* Perkins, 2 Tex. App. Civ. Cas. § 520), where the party has grounds of action for distinct trespasses which could not have been joined in one action (Dorrell *v.* Johnson, 17 Pick. (Mass.) 263), where a party has lien debts the enforcement of which requires separate suits against each piece of property (Bicknell *v.* Trickey, 34 Me. 273), to actions by a sheriff on replevin bonds given by a party whose goods were attached on several writs by several creditors (Morse *v.* Hodsdon, 5 Mass. 314), nor to a case where plaintiff on different days brings two actions before the same police court against the same defendant returnable on different days on demands which might have been joined in one suit and defendant is defaulted in both (Butler *v.* Shapleigh, 10 Cush. (Mass.) 303). So the rule has been held to apply to plaintiffs of record only. Perry *v.* Kennebunkport, 55 Me. 453, holding that where the indorsee of two negotiable notes of the same maker payable to different payees causes the notes to be sued at the same term in the names of the payees, plaintiff of record will be entitled to costs in each suit, although the indorsee indorses the writs as assignee. And a statute restricting costs to one action in several actions on contract between the same parties, causes of which accrued prior to the commencement of either, has been held not applicable to actions of debt under a penal statute. Hall *v.* Adams, 2 Aik. (Vt.) 130.

50. Quin *v.* Bowe, 10 Daly (N. Y.) 505, 11 Abb. N. Cas. (N. Y.) 115.

51. Columbia Bank *v.* Ross, 4 Harr. & M. (Md.) 456; Austin *v.* Bemiss, 8 Johns. (N. Y.) 356. See also Whipple *v.* Newton, 17 Pick. (Mass.) 168, where it was held that where the holder of a note commenced separate actions thereon against the maker and indorser he was not obliged to accept a tender made by the maker during the pendency of the actions, unless it included costs of both actions.

The fact that before termination of the action against one a judgment for debt and costs was rendered against the other and paid by him will not absolve the former for costs of the action against him. Otts *v.* Jones, 18 Fed. Cas. No. 10,619, 2 Cranch C. C. 351.

52. Nugent *v.* Delhomme, 2 Mart. (La.) 307; Foster *v.* Buffum, 20 Me. 124; Maine Bank *v.* Osborn, 13 Me. 49; Gilmore *v.* Carr, 2 Mass. 171. See also Farwell *v.* Hilliard, 3 N. H. 318.

53. Meech *v.* Churchill, 2 Wend. (N. Y.) 630.

54. Simonds *v.* Centre, 6 Mass. 18.

55. Porter *v.* Ingraham, 10 Mass. 88.

56. Mitchell *v.* Lihbey, 33 Me. 74; Savage *v.* Stevens, 128 Mass. 254. And see Ayer *v.* Ashmend, 31 Conn. 447, 83 Am. Dec. 154.

57. Savage *v.* Stevens, 128 Mass. 254. And see Butler *v.* Ashworth, 110 Cal. 614, 43 Pac. 4, 386, holding that separate actions against joint tort-feasors are not within a statutory prohibition against recovery of costs in more than one action where defendants sued separately might have been joined in the same action.

therefor except at his own cost, the facts bringing the case within the statute must be set up by answer to deprive plaintiff of costs.[58]

X. Extra Allowance — 1. Source of Right to Extra Allowance. No extra allowance can be granted in the absence of some special statutory authorization,[59] and where so authorized must be governed strictly by the statute.[60]

2. Nature and Object of Allowance. An extra allowance of costs is made by way of indemnity to the successful litigant for actual expenses necessarily or reasonably incurred beyond the taxable costs,[61] but it is to be computed upon costs incurred in the trial court alone.[62] The granting thereof is in the discretion of the court[63] and cannot be demanded as a legal right.[64]

3. Actions or Proceedings in Which Allowance Made — a. Difficult and Extraordinary Cases. Statutes in some states provide for an extra allowance where the cause is "difficult and extraordinary."[65] In determining what cases are within the statute no general rule can be adopted, but each case must be determined according to its own peculiar circumstances.[66] The case, however, must appear

58. Terry *v.* Shively, 93 Ind. 413; Polley *v.* Wood, 30 Ind. 407; Norris *v.* Amos, 15 Ind. 365.

Where it appeared that before the commencement of the action defendant had obtained judgment against plaintiff in a similar action from which plaintiff appealed but afterward satisfied the same, and plaintiff's cause of action accrued before the rendition of such judgment, it was held that for the purposes of this case the judgment was not vacated by the appeal, but that there had been a trial and adjudication contemplated by the statute in which plaintiff might have presented his claim against defendant and had it adjudicated and therefore plaintiff was not entitled to costs. Scott *v.* Niles, 40 Vt. 573.

59. Matter of Grade Crossing Com'rs, 20 N. Y. App. Div. 271, 46 N. Y. Suppl. 1070.

60. Conaughty *v.* Saratoga County Bank, 92 N. Y. 401.

61. Burke *v.* Candee, 63 Barb. (N. Y.) 552; McQuade *v.* New York, etc., R. Co., 5 Duer (N. Y.) 613. See also Wilde *v.* Joel, 6 Duer (N. Y.) 671, 15 How. Pr. (N. Y.) 320.

Additional allowance is treated as part of the costs in an action to which a party becomes entitled. United Press *v.* New York Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288.

62. People *v.* Fitchburg R. Co., 133 N. Y. 239, 30 N. E. 1011, 44 N. Y. St. 907; People *v.* New York Cent. R. Co., 29 N. Y. 418; Wolfe *v.* Van Nostrand, 2 N. Y. 570; Martin *v.* McCormick, 3 Sandf. (N. Y.) 755, Code Rep. N. S. (N. Y.) 214; Winne *v.* Fanning, 19 Misc. (N. Y.) 410, 44 N. Y. Suppl. 262; People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 138.

63. Wilber *v.* Williams, 4 N. Y. App. Div. 444, 38 N. Y. Suppl. 893, 74 N. Y. St. 604; Couch *v.* Millard, 3 How. Pr. N. S. (N. Y.) 22; Sackett *v.* Ball, 4 How. Pr. (N. Y.) 71, 2 Code Rep. (N. Y.) 47; Hurd *v.* Farmers' L. & T. Co., 16 Wkly. Dig. (N. Y.) 480.

64. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334.

65. Fla. Code Civ. Proc. § 234; N. Y. Code Civ. Proc. § 3253. See also Dorsett *v.* Ormiston, 53 N. Y. App. Div. 629, 65 N. Y. Suppl. 931; Kilmer *v.* Hathorn, 17 Hun (N. Y.) 87; Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 156, 161, 21 N. Y. St. 736.

Discretion of court.— In determining whether a case is within the statute, the court exercises a discretion which will seldom be interfered with. Bryon *v.* Durrie, 6 Abb. N. Cas. (N. Y.) 135.

66. Fox *v.* Gould, 5 How. Pr. (N. Y.) 278.

Illustrations.— Causes are within the rule where great length of time is taken to prepare and try them. Dorsett *v.* Ormiston, 53 N. Y. App. Div. 629, 65 N. Y. Suppl. 931; Burke *v.* Candee, 63 Barb. (N. Y.) 552; Fort *v.* Gooding, 9 Barb. (N. Y.) 388; Hallinan *v.* Ft. Edward, 26 Misc. (N. Y.) 422, 57 N. Y. Suppl. 162. See also Kilmer *v.* Evening Herald Co., 70 N. Y. App. Div. 291, 75 N. Y. Suppl. 243; Seagrist *v.* Sigrist, 20 N. Y. App. Div. 336, 46 N. Y. Suppl. 949; Bridges *v.* Miller, 2 Duer (N. Y.) 683; Shields *v.* Wortmann, 15 N. Y. Suppl. 589, 39 N. Y. St. 798; Zabriskie *v.* Central Vermont R. Co., 13 N. Y. Suppl. 735, 36 N. Y. St. 661; Shiels *v.* Wortmann, 8 N. Y. Suppl. 799, 30 N. Y. St. 173. Thus an action to restrain the levy of an illegal tax, in which there is much work in procuring evidence (People *v.* Westchester County, 15 N. Y. Suppl. 580, 39 N. Y. St. 798), an action on a large number of causes acquired by assignment from different persons, requiring an examination into the particular facts of each cause of action (Durant *v.* Abendroth, 1 N. Y. Suppl. 537, 16 N. Y. St. 263, 15 N. Y. Civ. Proc. 36), an action involving "more than ordinary labor and preparation by counsel" (National Lead Co. *v.* Dauchy, 22 Misc. (N. Y.) 372, 49 N. Y. Suppl. 379), an action to recover a large sum as damages for injuries to leased premises, in which a counter-claim is set up and the issues are litigated with great bitterness, and a large number of witnesses called (McCulloch *v.* Dobson, 15 N. Y. Suppl. 602, 39 N. Y. St. 907, 908), an action claiming large damages for disturbance of enjoyment of valuable

to be difficult and extraordinary to authorize the allowance.[67] It must be beset with more than the ordinary difficulties of litigation, necessarily justifying or requiring more than ordinary expenditure of money or labor.[68] The better practice is to deny an extra allowance in all doubtful cases, and grant it only in those which are clearly within the statute.[69] An extra allowance should not be granted where plaintiff's own fault or misconduct has caused the case to be difficult and extraordinary,[70] or has misled defendant into interposing a defense,[71] or where an allowance would be inequitable.[72] Even though the case be difficult and extraordinary, the court is not bound at all events to make the allowance. It may exercise its discretion in this regard.[73]

b. Actions to Determine Claims to Real Property. Statutes authorizing an extra allowance in actions to determine claims to real property do not apply to actions to foreclose mechanics' liens,[74] to proceedings for apportionment of taxes and assessments on lands and for the sale thereof,[75] nor to actions by vendors to foreclose land contracts.[76]

c. "Litigated" Cases. A statute which provides that the prevailing party shall be allowed a percentage on the amount recovered in litigated cases, not to exceed a designated amount, does not apply to an alternative judgment in replevin for the return of the property or for its value.[77]

premises by causing tenants to abandon them (Morrison *v.* Agate, 20 Hun (N. Y.) 23), a proceeding by a stock-holder of a bank to enjoin it from exercising its corporate rights and from making any payments or transferring any of its property (Conaughty *v.* Saratoga County Bank, 28 Hun (N. Y.) 373), and an action to foreclose a mechanic's lien (Horgan *v.* McKenzie, 17 N. Y. Suppl. 174, 43 N. Y. St. 131; Lawson *v.* Reilly, 13 N. Y. Civ. Proc. 290) are within the rule. But an action in which the only defense interposed is the statute of limitations, and which takes but a short time to try (Adams *v.* Stern, 29 Hun (N. Y.) 280), an action in which the only question tried was as to the right of plaintiff to recover on a contract of sale of chattels (Barnes *v.* Denslow, 9 N. Y. Suppl. 53, 30 N. Y. St. 315), an action in which the answer was stricken out as frivolous (Beers *v.* Squire, 1 Code Rep. (N. Y.) 84), and an action in which the trial lasted only a few hours, and there was nothing peculiar in the character of the cause, although the questions were somewhat complicated (Dexter *v.* Gardner, Code Rep. N. S. (N. Y.) 80) are not within the rule. So the mere fact that a considerable number of witnesses had been examined, and that the cause for that reason extended over a considerable period, does not bring it within the statute. Fox *v.* Fox, 22 How. Pr. (N. Y.) 453. But see Howard *v.* Rome, etc., Plank Road Co., 4 How. Pr. (N. Y.) 416, 3 Code Rep. (N. Y.) 41.

Both difficult and extraordinary.— To authorize an extra allowance it has been held that the case must be both difficult and extraordinary. Duncan *v.* De Witt, 7 Hun (N. Y.) 184. See also Fox *v.* Fox, 22 How. Pr. (N. Y.) 453.

Allowance on second trial.— An extra allowance of costs will be granted to a party on a new trial, although not difficult and extraordinary, where, although the same party was successful on the first trial, which was difficult and extraordinary, the judgment was reversed and a new trial ordered. Howell *v.* Van Siclen, 4 Abb. N. Cas. (N. Y.) 1.

67. Lozier *v.* Saratoga Gas, etc., Co., 59 N. Y. App. Div. 390, 69 N. Y. Suppl. 247; Allen *v.* Albany R. Co., 22 N. Y. App. Div. 222, 47 N. Y. Suppl. 1017; Graham *v.* New York L. Ins., etc., Co., 46 Hun (N. Y.) 261; New York El. R. Co. *v.* McDaniel, 31 Hun (N. Y.) 310; Citizens' Nat. Bank *v.* Lilienthal, 57 N. Y. Suppl. 567; Hall *v.* Prentice, 3 How. Pr. (N. Y.) 328.

68. Hart *v.* Bostwick, 14 Fla. 162.

69. Gould *v.* Chapin, 4 How. Pr. (N. Y.) 185.

70. Hinman *v.* Ryder, 44 N. Y. Super. Ct. 330; Tillman *v.* Powell, 13 How. Pr. (N. Y.) 117; Sands *v.* Sands, 9 How. Pr. (N. Y.) 453.

71. Kelly *v.* Chenango Sav. Bank, 45 N. Y. Suppl. 658.

72. Kelly *v.* Chenango Sav. Bank, 45 N. Y. Suppl. 658; Hurd *v.* Farmers' L. & T. Co., 16 N. Y. Wkly. Dig. 480. But *compare* Kelly *v.* Chenango Sav. Bank, 45 N. Y. Suppl. 658; Brown *v.* Farmers' L. & T. Co., 9 N. Y. Suppl. 337.

73. Maher *v.* Garry, 3 N. Y. App. Div. 480, 38 N. Y. Suppl. 436, 448, 74 N. Y. St. 58, 72; Losee *v.* Bullard, 54 How. Pr. (N. Y.) 319; Rice *v.* Wright, 3 How. Pr. (N. Y.) 405. See also Kayser *v.* Arnold, 1 N. Y. Suppl. 412, 16 N. Y. St. 105.

74. Wright *v.* Reusens, 15 N. Y. Suppl. 504, 39 N. Y. St. 802.

75. Powers *v.* Barr, 24 Barb. (N. Y.) 142.

76. Burkhart *v.* Babcock, 2 How. Pr. N. S. (N. Y.) 512. See also McMulkin *v.* Hovey, 46 How. Pr. (N. Y.) 405.

77. Wheatland Mill Co. *v.* Pirrie, 89 Cal. 459, 26 Pac. 964.

A case litigated on demurrer is within the

d. Special Proceedings. The New York statutes do not authorize extra allowances in any special proceedings,[78] except certiorari to review an assessment.[79]

e. Actions to Procure an Adjudication Upon "An Instrument in Writing." A statute providing for an extra allowance in actions to procure an adjudication upon an instrument in writing applies to an action to enforce covenants of a lease,[80] and to an action to restrain defendant from violating a written agreement to sell only to plaintiffs articles made by a secret method, in which the construction and effect of the instrument arose incidentally.[81]

4. Persons Who May Be Awarded Allowance. Under N. Y. Code Civ. Proc. § 3253, "any party" may be awarded an extra allowance in a proper case.[82] The court may order allowances to both parties, where each has been in part successful.[83] To entitle one to an allowance, however, he must have an interest in the subject-matter[84] and be successful in the suit.[85]

5. On What Allowance Computed — a. Amount of Recovery or Claim. The words "amount of recovery or claim," as contained in a statute providing for an additional allowance upon "the amount of the recovery or claim or subject-matter involved," mean that the recovery or claim shall be for money, the words, "subject-matter involved" being used to cover all other cases.[86] Where plaintiff recovers a money judgment, the basis of computation for an extra allowance is the amount recovered and not the amount claimed.[87] Where a specific sum is claimed, it furnishes the basis of computation, on which an extra allowance

statute. Packard *v.* Wilson, 72 Cal. 124, 13 Pac. 220.

78. Matter of Brooklyn, 88 Hun (N. Y.) 176, 34 N. Y. Suppl. 991; *In re* Simpson, 26 Hun (N. Y.) 459; Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417; Burritt *v.* Silliman, 24 How. Pr. (N. Y.) 337.

79. N. Y. Code Civ. Proc. § 3253.

80. Smith *v.* St. Philips' Church, 107 N. Y. 610, 14 N. E. 825.

81. Gray *v.* Robjohn, 1 Bosw. (N. Y.) 618.

82. Under N. Y. Code Civ. Proc. § 3252, only plaintiff is entitled to costs. Williams *v.* Hernon, 13 Abb. Pr. (N. Y.) 297.

83. Weed *v.* Paine, 31 Hun (N. Y.) 10, 4 N. Y. Civ. Proc. 305; Chester *v.* Jumel, 2 Silv. Supreme (N. Y.) 179, 5 N. Y. Suppl. 823, 24 N. Y. St. 229.

A person suing in forma pauperis is not entitled to an extra allowance. Marx *v.* Manhattan R. Co., 14 Daly (N. Y.) 563, 3 N. Y. Suppl. 113.

If all difficult questions are decided for plaintiff, if defendant succeeds in the case, an additional allowance should nevertheless not be granted to him for having contested questions on which plaintiff succeeded. Pilot Com'rs *v.* Spofford, 4 Hun (N. Y.) 74.

84. Doremus *v.* Doremus, 66 Hun (N. Y.) 125, 20 N. Y. Suppl. 906, 49 N. Y. St. 808, in which it was held that an inchoate right of dower in the share of one party was not such an interest.

85. Murray *v.* Robinson, 9 Hun (N. Y.) 137; Pinder *v.* Stoothoff, 7 Abb. Pr. N. S. (N. Y.) 433.

86. Coates *v.* Goddard, 34 N. Y. Super. Ct. 118.

Limit of allowance.— The amount of the claim or recovery is the limit of the allowance to be awarded and not the measure. People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 148.

Effect of reversal of money judgment.— A judgment for a specific amount cannot form the basis of an extra allowance, where it is reversed on the ground that only nominal damages have been suffered. Gray *v.* Manhattan R. Co., 3 Misc. (N. Y.) 239, 22 N. Y. Suppl. 771, 51 N. Y. St. 905.

87. Wilkinson *v.* Tiffany, 4 Abb. Pr. (N. Y.) 98; Collins *v.* Reynolds Card Mfg. Co., 2 Month. L. Bul. 45.

Application of rule.— In an action to enjoin the operation of an elevated railway in front of plaintiff's premises and to recover for depreciation to his property, an allegation that the premises had depreciated seventy-five thousand dollars, not claimed as damages but made simply as the basis for injunctive relief, is not considered as a basis on which to calculate an extra allowance, as being the amount claimed. Gray *v.* Manhattan R. Co., 3 Misc. (N. Y.) 239, 22 N. Y. Suppl. 771, 51 N. Y. St. 905. So where plaintiff alleges an interest in mines, from which defendant had sold seven hundred thousand dollars' worth of minerals and received to plaintiff's use upward of two hundred and fifty thousand dollars, the latter amount is the amount claimed. Abbey *v.* Wheeler, 57 N. Y. App. Div. 417, 68 N. Y. Suppl. 252.

Presumption as to value.— In making an extra allowance, in which the subject-matter involved is stocks, the court cannot presume that they are worth more than their face value. Smith *v.* Baker, 42 Hun (N. Y.) 504.

Where no specific amount is claimed and a money judgment is recovered the allowance should be based on the recovery. Tolon *v.* Carr, 12 Daly (N. Y.) 520.

is awarded defendant.[88] It cannot, however, in any event be computed on a larger sum than claimed, and where the complaint is dismissed, and neither the summons nor complaint state any amount sought to be recovered, no extra allowance can be granted.[89]

b. Subject-Matter Involved — (i) *Term Defined and Explained.* The term "subject-matter involved," as contained in a statute providing for an additional allowance upon the "subject-matter involved," means the possession, ownership, or title to property or other valuable thing, which is to be determined by the result of the action.[90] It does not mean the property which may be either

88. Sentenis *v.* Ladew, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569; McConnell *v.* Manhattan Constr. Co., 4 N. Y. Suppl. 226, 21 N. Y. St. 870, 16 N. Y. Civ. Proc. 310; Wilkinson *v.* Tiffany, 4 Abb. Pr. (N. Y.) 98; Hicks *v.* Waltermire, 7 How. Pr. (N. Y.) 371. But see Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y.) 339, in which an allowance to defendant was based not on the amount paid but on the value of the property.

Effect of agreement of counsel as to amount of claim.— Where counsel agree that the amount for which plaintiff claims to recover shall be fixed at a certain sum, an extra allowance to defendant will be based thereon. Pilot Com'rs *v.* Spofford, 47 How. Pr. (N. Y.) 479.

89. Adams *v.* Sullivan, 42 Hun (N. Y.) 278.

90. Conaughty *v.* Saratoga County Bank, 92 N. Y. 401; Burke *v.* Candee, 63 Barb. (N. Y.) 552; Coleman *v.* Chauncey, 7 Rob. (N. Y.) 578; People *v.* Albany, etc., R. Co., 16 Abb. Pr. (N. Y.) 465; Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y.) 305. See also Adams *v.* Arkenburgh, 106 N. Y. 615, 13 N. E. 594; Rothery *v.* New York Rubber Co., 90 N. Y. 30; Atlantic Dock Co. *v.* Libby, 45 N. Y. 499; Proctor *v.* Soulier, 8 N. Y. App. Div. 69, 40 N. Y. Suppl. 459, 74 N. Y. St. 895; Lahey *v.* Kortright, 58 N. Y. Super. Ct. 576, 11 N. Y. Suppl. 47, 32 N. Y. St. 112, 19 N. Y. Civ. Proc. 80; Rank *v.* Grote, 50 N. Y. Super. Ct. 275; Loeser *v.* Liebmann, 14 N. Y. Suppl. 569, 39 N. Y. St. 12; Warren *v.* Buckley, 2 Abb. N. Cas. (N. Y.) 323; Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y.) 305.

Illustrations.— In an action by a judgment creditor to set aside a conveyance in fraud of creditors, whether plaintiff or defendant succeeds, the "subject-matter involved" is the amount due on plaintiff's judgment, not the value of the land. Potter *v.* Farrington, 24 Hun (N. Y.) 551; New Mfg. Co. *v.* Galway, 26 N. Y. Suppl. 950, 23 N. Y. Civ. Proc. 239. In an action by a legatee for an accounting by the executor and for distribution — the legatee's interest. Weaver *v.* Ely, 83 N. Y. 89. In an action to determine the validity of a lease of a railroad, which involves the right to possession and use — the value of the lease, not of the railroad or its rental value. Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 63 N. Y. 176. In proceedings to enjoin a city from paying the contract price for building waterworks — the contract price, not the mere profits on the contract. Mingay *v.* Holly Mfg. Co., 99 N. Y. 270, 1 N. E. 785. See also Barker *v.* Oswegatchie, 62 Hun (N. Y.) 208, 16 N. Y. Suppl. 734, 40 N. Y. St. 831. In an action for an accounting of trust funds said to have been received by defendant — the amount so received, and for which he should account. Woodbridge *v.* Saratoga Springs First Nat. Bank, 45 N. Y. App. Div. 166, 61 N. Y. Suppl. 258. In an action to enjoin a railroad, unless they pay "fee damages" for injuries to plaintiff's lot — the sum so claimed. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 374, 24 N. Y. Suppl. 422, 54 N. Y. St. 286, 23 N. Y. Civ. Proc. 180. In an action for partition — the property partitioned, and not the value of plaintiff's share. Doremus *v.* Crosby, 66 Hun (N. Y.) 125, 20 N. Y. Suppl. 906, 49 N. Y. St. 808. In an action to set aside chattel mortgages and for an accounting — the amount of the mortgages. Couch *v.* Millard, 8 N. Y. Civ. Proc. 431, 3 How. Pr. N. S. (N. Y.) 22. In an action to enjoin the infringement of an easement — the value of the easement. Lattimer *v.* Livermore, 72 N. Y. 174. In an action to enjoin the erection of a structure — the right to erect it, not the structure itself. People *v.* New York, etc., Ferry Co., 68 N. Y. 71 [*affirming* 7 Hun (N. Y.) 105]. In an action to have deeds declared a mortgage — the value of the land. Burke *v.* Candee, 63 Barb. (N. Y.) 552. In a suit to establish title to land — the land. Deuterman *v.* Gainsborg, 54 N. Y. App. Div. 575, 66 N. Y. Suppl. 1009. In an action to restrain a corporation from exercising franchises — the franchises, not its capital and money assets. Conaughty *v.* Saratoga County Bank, 92 N. Y. 401. In an action to recover back money paid for land because of defective title — the money paid, and not the value of the land. Moore *v.* Appleby, 36 Hun (N. Y.) 368 [*affirmed* in 108 N. Y. 237, 15 N. E. 377]. In an action to enjoin a company from constructing its road on one route and to compel it to adopt another route — the value of the franchises, not the cost of what had been constructed or additional cost of construction on the other route. People *v.* Genesee Valley Canal R. Co., 95 N. Y. 666. In an action to enjoin a city from compelling plaintiff at its own expense to carry a street across its tracks — amount of such expense. Rochester, etc., R. Co. *v.* Rochester, 17 N. Y. App. Div. 257, 45 N. Y. Suppl. 687. In an action to restrain the removal of bark before the close of

indirectly or remotely affected by the result, as such a rule would from its vagueness and uncertainty be impracticable in application.[91]

(II) *Necessity For Subject-Matter Having Money Value.* To authorize an extra allowance it is essential that a pecuniary value may be predicated of the subject-matter.[92] Importance of the litigation in any other than its pecuniary aspect affords no basis for an allowance;[93] nor does the fact that a possible money value may accrue incidentally.[94]

(III) *Necessity of Showing Money Value of Subject-Matter.* It is also essential that the money value of the subject-matter be shown;[95] and it is

the peeling season — the value of the right to remove it. Lyon *v.* Belchford, 8 N. Y. Civ. Proc. 229.

91. Conaughty *v.* Saratoga County Bank, 92 N. Y. 401.

92. People *v.* Adams, 128 N. Y. 129, 27 N. E. 1075, 38 N. Y. St. 880 [*reversing* 13 N. Y. Suppl. 714, 37 N. Y. St. 603, 20 N. Y. Civ. Proc. 195]; Adams *v.* Arkenburgh, 106 N. Y. 615, 13 N. E. 594; People *v.* Genesee Valley Canal R. Co., 95 N. Y. 666; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401; Heilman *v.* Lazarus, 90 N. Y. 672; Weaver *v.* Ely, 83 N. Y. 89; Atlantic Dock Co. *v.* Libby, 45 N. Y. 499; Opitz *v.* Hammen, 41 N. Y. App. Div. 468, 58 N. Y. Suppl. 987; Husted *v.* Thomson, 38 N. Y. App. Div. 315, 57 N. Y. Suppl. 9; Godley *v.* Kerr Salt Co., 3 N. Y. App. Div. 17, 37 N. Y. Suppl. 988, 73 N. Y. St. 530; Donovan *v.* Wheeler, 67 Hun (N. Y.) 68, 22 N. Y. Suppl. 54, 51 N. Y. St. 411; Barker *v.* Oswegatchie, 62 Hun (N. Y.) 208, 16 N. Y. Suppl. 734, 41 N. Y. St. 831; Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 61 Hun (N. Y.) 161, 15 N. Y. Suppl. 763, 39 N. Y. St. 966, 21 N. Y. Civ. Proc. 204; Johnson *v.* Shelter Island Grove, etc., Assoc., 47 Hun (N. Y.) 374; Hoffman *v.* De Graaf, 39 Hun (N. Y.) 648; Diamond Match Co. *v.* Roeber, 35 Hun (N. Y.) 421 [*affirmed* in 106 N. Y. 473, 13 N. E. 419, 60 Am. St. Rep. 464]; Musgrave *v.* Sherwood, 29 Hun (N. Y.) 475; People *v.* Rockaway Beach Imp. Co., 28 Hun (N. Y.) 356; People *v.* Albany, etc., R. Co., 5 Lans. (N. Y.) 25; Grissler *v.* Stuyvesant, 67 Barb. (N. Y.) 81; People *v.* Flagg, 25 Barb. (N. Y.) 652; Powers *v.* Barr, 24 Barb. (N. Y.) 142; Bradley *v.* Walker, 60 N. Y. Super. Ct. 324, 17 N. Y. Suppl. 383, 44 N. Y. St. 213, 22 N. Y. Civ. Proc. 1; Voorhis *v.* French, 47 N. Y. Super. Ct. 364; Coates *v.* Goddard, 34 N. Y. Super. Ct. 118; Smallwood *v.* Schwieteriug, 10 Misc. (N. Y.) 103, 31 N. Y. Suppl. 149, 63 N. Y. St. 514; Christopher, etc., R. Co. *v.* Twenty-Third St. R. Co., 20 N. Y. Suppl. 556, 48 N. Y. St. 805; Perkins *v.* Whitney, 12 N. Y. Suppl. 184, 34 N. Y. St. 951; Munro *v.* Smith, 6 N. Y. Suppl. 426, 25 N. Y. St. 624, 23 Abb. N. Cas. (N. Y.) 275; Patterson *v.* Burnett, 4 N. Y. Suppl. 921, 23 N. Y. St. 363, 17 N. Y. Civ. Proc. 115; Knapp *v.* Hammersley, 13 N. Y. Civ. Proc. 258; Palmer *v.* De Witt, 42 How. Pr. (N. Y.) 466; Meyer *v.* Rasquin, 20 N. Y. Wkly. Dig. 98.

The subject-matter in controversy is not capable of a money valuation in an action brought merely for equitable relief, and not for money or property (Weeks *v.* Southwick, 12 How. Pr. (N. Y.) 170), or where nothing is involved beyond a mere intangible legal right (Johnson *v.* Shelter Island Grove, etc., Assoc., 47 Hun (N. Y.) 374), or ordinarily where the only relief asked is an injunction (Atlantic Dock Co. *v.* Libby, 45 N. Y. 499; Palmer *v.* De Witt, 42 How. Pr. (N. Y.) 466), as for instance to restrain the diversion of a stream (Godley *v.* Kerr Salt Co., 3 N. Y. App. Div. 17, 37 N. Y. Suppl. 988, 73 N. Y. St. 530), to enjoin a sale of stock (Smallwood *v.* Schwietering, 10 Misc. (N. Y.) 103, 31 N. Y. Suppl. 149, 63 N. Y. St. 514), to restrain proceedings to dispossess (Grissler *v.* Stuyvesant, 67 Barb. (N. Y.) 81), to restrain police commissioners from adjudicating title to office (Voorhis *v.* French, 47 N. Y. Super. Ct. 364), or to enjoin the completion of a pier and compel the removal of the part already built (People *v.* New York, etc., Ferry Co., 68 N. Y. 71). So there can be no basis for an extra allowance in an action to vacate an award (Hoffman *v.* De Graaf, 39 Hun (N. Y.) 648), to remove from office a corporate officer (People *v.* Giroux, 29 Hun (N. Y.) 248), to reform a contract (Heert *v.* Cruger, 14 Misc. (N. Y.) 508, 35 N. Y. Suppl. 1063, 70 N. Y. St. 688; Christopher, etc., R. Co. *v.* Twenty-Third St. R. Co., 20 N. Y. Suppl. 556, 48 N. Y. St. 805), or "to obtain some sort of relief in respect to a paper in the form of a general release which had been executed by the plaintiff including an injunction against its use" (Husted *v.* Thomson, 38 N. Y. App. Div. 315, 57 N. Y. Suppl. 9).

93. Conaughty *v.* Saratoga County Bank, 92 N. Y. 401.

94. Winans *v.* Adams, 128 N. Y. 129; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401; Schneider *v.* Rochester, 50 N. Y. App. Div. 22, 63 N. Y. Suppl. 360; Donovan *v.* Wheeler, 67 Hun (N. Y.) 68, 22 N. Y. Suppl. 54, 51 N. Y. St. 411.

95. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334; Adams *v.* Arkenburgh, 106 N. Y. 615, 13 N. E. 594; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401; Heilman *v.* Lazarus, 90 N. Y. 672, 12 Abb. N. Cas. (N. Y.) 19, 65 How. Pr. (N. Y.) 95; Parish *v.* New York Produce Exch., 54 N. Y. App. Div. 323, 66 N. Y. Suppl. 613; People *v.*

necessary that the money value of the subject-matter be shown by reasonably clear and satisfactory evidence.[96]

(iv) *Determination of Value of Subject-Matter.* It is for the court to determine the value of the subject-matter involved for the purpose of making additional allowance.[97]

c. Necessity For Interposition of Defense. It is a condition precedent to the granting of an extra allowance in a difficult and extraordinary case that a defense should have been interposed.[98]

d. Necessity of Final Judgment. In no case is a party entitled to an extra

Page, 39 N. Y. App. Div. 110, 56 N. Y. Suppl. 834, 58 N. Y. Suppl. 239; Black *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 468, 53 N. Y. Suppl. 312; Koehler *v.* Brady, 22 N. Y. App. Div. 624, 47 N. Y. Suppl. 984; Wood *v.* Lary, 47 Hun (N. Y.) 550; Adams *v.* Sullivan, 42 Hun (N. Y.) 278; People *v.* Genesee Valley Canal R. Co., 30 Hun (N. Y.) 565; People *v.* Rockaway Beach Imp. Co., 28 Hun (N. Y.) 356; Strauss *v.* Union Cent. L. Ins. Co., 33 Misc. (N. Y.) 571, 67 N. Y. Suppl. 931; Abell *v.* Bradner, 15 N. Y. Suppl. 64, 39 N. Y. St. 5; Maloy *v.* Associated Lace Makers' Co., 7 N. Y. Suppl. 958, 28 N. Y. St. 735; Lyon *v.* Belchford, 8 N. Y. Civ. Proc. 229.

96. Arthur *v.* Dalton, 14 N. Y. App. Div. 115, 43 N. Y. Suppl. 581.

Evidence held sufficient to show value.— An uncontradicted affidavit that plaintiff had spent fifty thousand dollars in advertising the articles on which he used the trade-mark in controversy is sufficient evidence of value. Munro *v.* Smith, 6 N. Y. Suppl. 426, 25 N. Y. St. 624, 23 Abb. N. Cas. (N. Y.) 275. So in an action to enjoin defendant from operating its railroad by electricity there is a basis for extra allowance where there is evidence as to the value to defendant of its right to run its cars by the method sought to be enjoined. Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., R. Co., 135 N. Y. 393, 32 N. E. 148, 48 N. Y. St. 417, 31 Am. St. Rep. 838, 17 L. R. A. 764 [*reversing* 61 Hun (N. Y.) 161, 15 N. Y Suppl. 763, 39 N. Y. St. 966]. In an action for damages to realty, where it appears that the property is worth one hundred and twenty-five thousand dollars, and plaintiff claims the damage amounts to that sum, there is sufficient evidence of value. Israel *v.* Metropolitan R. Co., 10 Misc. (N. Y.) 722, 31 N. Y. Suppl. 816, 64 N. Y. St. 638. And in an action of ouster, where the complaint demands that the alleged usurpers pay the fine of two thousand dollars imposed, there is a basis for an extra allowance. People *v.* Adams, 13 N. Y. Suppl. 714, 37 N. Y. St. 603, 20 N. Y. Civ. Proc. 195. For other cases in which the evidence was held sufficient to form a basis for extra allowance see Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334; Adams *v.* Arkenburgh, 106 N. Y. 615, 13 N. E. 615, 11 N. Y. St. 121; Hart *v.* Ogdensburg, etc., R. Co., 89 Hun (N. Y.) 316, 35 N. Y. Suppl. 566, 70 N. Y. St. 226; Empire City Subway Co. *v.* Broadway, etc., R. Co., 87 Hun (N. Y.) 279, 33 N. Y. Suppl. 1055, 67 N. Y. St. 741; Barker *v.* Oswegatchie, 62 Hun (N. Y.) 208, 16 N. Y. Suppl. 734, 41 N. Y. St. 831; Sickles *v.* Richardson, 14 Hun (N. Y.) 110; Carpenter *v.* Shook, 17 N. Y. Suppl. 257, 43 N. Y. St. 226; Rutty *v.* Person, 6 N. Y. Civ. Proc. 25.

Evidence held insufficient to show value.— A tax imposed on a franchise, which is the subject-matter involved, does not furnish sufficient evidence of the value thereof to authorize an extra allowance. People *v.* Ulster, etc., R. Co., 128 N. Y. 240, 28 N. E. 635, 40 N. Y. St. 280. So where the only proof of the value is the allegation that the action is brought to procure a judgment allowing plaintiff to redeem from forfeiture certain stock upon payment of the sums due thereon for unpaid assessments, and that the amount so due is fifteen thousand, two hundred and sixty-seven dollars, it is not error to refuse defendants an extra allowance. Weeks *v.* Silver Islet Consol. Min., etc., Co., 58 N. Y. Super. Ct. 247, 11 N. Y. Suppl. 48, 32 N. Y. St. 417.

97. Grissler *v.* Stuyvesant, 67 Barb. (N. Y.) 81; Archer *v.* Boudinet, Code Rep. N. S. (N. Y.) 372.

On application therefor the unsuccessful party is entitled to have this value determined, but failure to insist waives the right. Dresser *v.* Jennings, 3 Abb. Pr. (N. Y.) 240.

98. Barnes *v.* Meyer, 41 N. Y. Suppl. 210, 75 N. Y. St. 649, 25 N. Y. Civ. Proc. 372.

A defense is interposed where a cause is submitted on an agreed statement of facts. Kingsland *v.* New York, 52 Hun (N. Y.) 98, 4 N. Y. Suppl. 685, 22 N. Y. St. 497, 16 N. Y. Civ. Proc. 323. So a demurrer to the complaint is a defense. New York El. R. Co. *v.* Harold, 30 Hun (N. Y.) 466; Winne *v.* Fanning, 19 Misc. (N. Y.) 410, 44 N. Y. Suppl. 262; Vietor *v.* Halstead, 14 N. Y. Suppl. 516, 38 N. Y. St. 407; Williams *v.* Kiernan, 4 Month. L. Bul. 41. *Contra*, Eldridge *v.* Strenz, 39 N. Y. Super. Ct. 295.

A trial is not necessary.— It is enough if the action has been terminated in such form that the successful party can lawfully claim payment of his costs, and enforce payment in any mode known to practice. Moulton *v.* Beecher, 11 Hun (N. Y.) 192; Coffin *v.* Coke, 4 Hun (N. Y.) 616; Mills *v.* Watson, 45 N. Y. Super. Ct. 591; Carter *v.* Clark, 2 Sweeny (N. Y.) 189.

allowance until a final judgment has been rendered and is ready for entry.[99] It is not designed to be given at any stage of the action, whenever the court might impose the payment of costs as a condition.[1] Nevertheless a judgment is final which disposes of the case then pending. It need not necessarily dispose finally of the cause of action between the parties so that no other action can be brought.[2]

e. Necessity of Right to Costs. An extra allowance cannot be granted to a party in whose favor no costs are taxable.[3]

f. Right as Affected by Tender or Offer of Judgment. Defendant in a proper case is entitled to an extra allowance where plaintiff recovers a less amount than is tendered by him.[4] The decisions are very conflicting as to the effect of an offer of judgment for a specified sum and costs when accepted. Some decisions hold that this bars all right to an extra allowance,[5] while others maintain the contrary view.[6] The decisions are also conflicting as to the effect of a settlement before judgment on the right to an extra allowance;[7] and it has been held that where defendant confesses judgment before plaintiff is entitled to a default judgment, plaintiff is not entitled to an allowance.[8]

99. Bush *v.* O'Brien, 52 N. Y. App. Div. 452, 65 N. Y. Suppl. 131; Toch *v.* Toch, 9 N. Y. App. Div. 501, 41 N. Y. Suppl. 353, 75 N. Y. St. 772; De Stuckle *v.* Tehuantepec R. Co., 30 Hun (N. Y.) 34, 3 N. Y. Civ. Proc. 410, 65 How. Pr. (N. Y.) 288; Merchants' Exch. Nat. Bank *v.* Commercial Warehouse Co., 35 N. Y. Super. Ct. 214; Hackett *v.* Equitable L. Assur. Soc., 30 Misc. (N. Y.) 530, 63 N. Y. Suppl. 853. But see Abbey *v.* Wheeler, 57 N. Y. App. Div. 417, 68 N. Y. Suppl. 252, in which an extra allowance was granted on an interlocutory judgment.

The test must be that the action has terminated in such form that the successful party can lawfully claim payment of the costs on such termination and enforce their payment. McDonald *v.* Mallory, 46 N. Y. Super. Ct. 58.

1. Merchants' Exch. Nat. Bank *v.* Commercial Warehouse Co., 35 N. Y. Super. Ct. 214.

Illustrations.— An extra allowance will not be awarded on an interlocutory judgment sustaining or overruling a demurrer with leave to amend or answer over. Rudd *v.* Robinson, 54 Hun (N. Y.) 339, 7 N. Y. Suppl. 535, 27 N. Y. St. 98; De Stuckle *v.* Tehuantepec R. Co., 30 Hun (N. Y.) 34, 3 N. Y. Civ. Proc. 410, 65 How. Pr. (N. Y.) 288; Hackett *v.* Equitable L. Assur. Soc., 30 Misc. (N. Y.) 530, 63 N. Y. Suppl. 853. *Contra*, Abbey *v.* Wheeler, 57 N. Y. App. Div. 417, 68 N. Y. Suppl. 252. Nor will it be awarded on a final determination on demurrers interposed by some of the defendants, while issues raised by the answer of another defendant remain undetermined. Bush *v.* O'Brien, 52 N. Y. App. Div. 452, 65 N. Y. Suppl. 131.

Reversal of judgment on demurrer to complaint.—Where a judgment reversing a judgment for defendant on demurrer includes a provision that he have leave to answer over on paying costs, this is not "final costs" in the action, and an extra allowance is not included. McDonald *v.* Mallory, 46 N. Y. Super. Ct. 58.

2. David *v.* Ætna Ins. Co., 9 Iowa 45.

3. Kahn *v.* Schmidt, 83 Hun (N. Y.) 541, 32 N. Y. Suppl. 33, 65 N. Y. St. 190; Couch *v.* Millard, 41 Hun (N. Y.) 212; Jordan *v.* Hess, 24 N. Y. Suppl. 489, 54 N. Y. St. 326; Brown *v.* Farmers' L. & T. Co., 9 N. Y. Suppl. 337; Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y.) 31.

4. Landon *v.* Van Etten, 57 Hun (N. Y.) 122, 10 N. Y. Suppl. 802, 32 N. Y. St. 439, 19 N. Y. Civ. Proc. 78 [*overruling* Magnin *v.* Dinsmore, 47 How. Pr. (N. Y.) 11]; Pilot Com'rs *v.* Spofford, 3 Hun (N. Y.) 57; Hirschspring *v.* Boe, 13 N. Y. Civ. Proc. 125, 20 Abb. N. Cas. (N. Y.) 402. *Contra*, McLees *v.* Avery, 4 How. Pr. (N. Y.) 441.

5. Pool *v.* Osborn, 8 N. Y. Civ. Proc. 232; Brace *v.* Beatty, 7 Abb. Pr. (N. Y.) 445 [*reversing* 5 Abb. Pr. (N. Y.) 221]. See also Pratt *v.* Conkey, 15 How. Pr. (N. Y.) 27.

6. Safety Steam-Generator Co. *v.* Dickson Mfg. Co., 61 Hun (N. Y.) 335, 16 N. Y. Suppl. 32, 40 N. Y. St. 681, 21 N. Y. Civ. Proc. 329; Coates *v.* Goddard, 34 N. Y. Super. Ct. 118.

7. **That extra allowance may be granted.**— See Gelpeck *v.* Leather Cloth Co., 12 Abb. Pr. (N. Y.) 361 note; Brown *v.* New York, etc., Safeguard Ins. Co., 7 Abb. Pr. (N. Y.) 345.

The contrary view.— See Bostwick *v.* Tioga R. Co., 17 How. Pr. (N. Y.) 456.

Foreclosure proceedings.— Where in foreclosure proceedings offer of judgment for a sum specified with interest is made in the form provided for by statute, plaintiff will not be entitled to an extra allowance, although he recover a sum slightly in excess of the offer. Penfield *v.* James, 56 N. Y. 659; Astor *v.* Palache, 49 How. Pr. (N. Y.) 231. But where no offer as provided by statute is made, the right to an extra allowance is not thereby defeated. Connecticut River Banking Co. *v.* Voorhies, 3 Abb. Pr. (N. Y.) 173; Astor *v.* Palache, 49 How. Pr. (N. Y.) 231; Bartow *v.* Cleveland, 16 How. Pr. (N. Y.) 364; New York F. & M. Ins. Co. *v.* Burrell, 9 How. Pr. (N. Y.) 398. But see Lockman *v.* Ellis, 58 How. Pr. (N. Y.) 100.

8. Davison *v.* Waring, 9 How. Pr. (N. Y.) 254.

g. Right as Affected by Entry of Judgment. The entry of judgment is not a waiver of the right to an extra allowance, although it cannot be granted after taxation and entry of costs.[9]

6. The Application — a. Where and to Whom Made. Application for extra allowance must be made before the court,[10] and ordinarily to the judge[11] trying the cause.[12] Thus a referee to whom the cause has been referred,[13] the court of appeals to which the cause has been appealed,[14] or the general term, before whom exceptions are heard in the first instance on a verdict found by the jury in the special term,[15] have no power to make an allowance.

b. Time of Application and Allowance. By express provision of a rule of court, allowance can be made only "before final costs are adjusted."[16] Accordingly application must be made before taxation of costs and entry of judgment in the trial court.[17] The practice in such cases is to make the motion for extra

If the cause is discontinued on plaintiff's motion "on payment of defendant's costs to be taxed, and of an extra allowance herein which may hereafter be made or granted to defendant," defendant is entitled to the extra allowance. Folsom *v.* Van Wagner, 7 Lans. (N. Y.) 309.

9. Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y.) 305.

10. People *v.* New York Cent. R. Co., 29 N. Y. 418; Wolfe *v.* Van Nostrand, 2 N. Y. 570; Toch *v.* Toch, 9 N. Y. App. Div. 501, 41 N. Y. Suppl. 353; Clarke *v.* Rochester, 29 How. Pr. (N. Y.) 97; Dyckman *v.* McDonald, 5 How. Pr. (N. Y.) 121.

District in which made.— The application must be made in the district where the cause was tried, although the justice trying it resides in another. Bear *v.* American Rapid Tel. Co., 36 Hun (N. Y.) 400; Hun *v.* Salter, 24 Hun (N. Y.) 640 [*affirmed* in 92 N. Y. 651].

11. Hun *v.* Salter, 24 Hun (N. Y.) 640; Lottimer *v.* Livermore, 6 Daly (N. Y.) 501; Saratoga, etc., R. Co. *v.* McCoy, 8 How. Pr. (N. Y.) 526; Osborne *v.* Betts, 8 How. Pr. (N. Y.) 31; Flint *v.* Richardson, 2 Code Rep. (N. Y.) 80. But see Mann *v.* Tyler, 6 How. Pr. (N. Y.) 235, Code Rep. N. S. (N. Y.) 382.

Judge at chambers cannot in New York make allowance (Mann *v.* Tyler, 6 How. Pr. (N. Y.) 235), except in first district where authorized by statute (Main *v.* Pope, 16 How. Pr. (N. Y.) 271).

12. Object of rule requiring a motion to be made before a judge trying the cause is that the judge granting the order may be in possession of the facts and circumstances of the case. Wilber *v.* Williams, 4 N. Y. App. Div. 444, 38 N. Y. Suppl. 893, 74 N. Y. St. 604.

Waiver of objection.— An objection that the application was made to a different judge may be waived. Wilber *v.* Williams, 4 N. Y. App. Div. 444, 38 N. Y. Suppl. 893, 74 N. Y. St. 604; Wiley *v.* Long Island R. Co., 88 Hun (N. Y.) 177, 34 N. Y. Suppl. 415, 68 N. Y. St. 425. See also Griggs *v.* Brooks, 79 Hun (N. Y.) 394, 29 N. Y. Suppl. 794, 61 N. Y. St. 499.

13. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 374, 24 N. Y. Suppl. 422, 54 N. Y. St. 286; Pinsker *v.* Pinsker, 44 N. Y. App. Div. 501, 60 N. Y. Suppl. 902; Main *v.* Pope, 16 How. Pr. (N. Y.) 271; Osborne *v.* Betts, 8 How. Pr. (N. Y.) 31; Howe *v.* Muir, 4 How. Pr. (N. Y.) 252.

Court cannot delegate power to referee.— People *v.* Albany, etc., R. Co., 5 Lans. (N. Y.) 25.

14. Wolfe *v.* Van Nostrand, 4 How. Pr. (N. Y.) 208.

15. Moskowitz *v.* Hornberger, 20 Misc. (N. Y.) 558, 46 N. Y. Suppl. 462; Douglas *v.* Haberstro, 10 Abb. N. Cas. (N. Y.) 6.

16. N. Y. Gen. Rules Prac. No. 45.

17. Board of Pilot Com'rs *v.* Spofford, 3 Hun (N. Y.) 52, 57, 5 Thomps. & C. (N. Y.) 353, 357 [*affirmed* in 4 Hun (N. Y.) 74]; Mills *v.* Watson, 45 N. Y. Super. Ct. 591; Martin *v.* McCormick, 3 Sandf. (N. Y.) 755; Winne *v.* Fanning, 19 Misc. (N. Y.) 410, 44 N. Y. Suppl. 262; Hotaling *v.* Marsh, 14 Abb. Pr. (N. Y.) 161; Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y.) 305; Moulton *v.* Beecher, 52 How. Pr. (N. Y.) 230; People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 148; Beals *v.* Benjamin, 29 How. Pr. (N. Y.) 101; Clarke *v.* Rochester, 29 How. Pr. (N. Y.) 97; Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y.) 242. *Compare* Trimm *v.* Marsh, 2 Hun (N. Y.) 383, 4 Thomps. & C. (N. Y.) 577; Powers *v.* Wolcott, 12 How. Pr. (N. Y.) 565.

Application by party after affirmance of judgment in his favor is too late. Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y.) 242.

Where the unsuccessful party obtains a reversal of the judgment, he, according to some decisions, is entitled on a remittitur to apply to the trial court for an extra allowance, on the ground that he has had no occasion or opportunity theretofore to make application. Parott *v.* Sawyer, 26 Hun (N. Y.) 466; Brown *v.* Farmers' L. & T. Co., 18 N. Y. Civ. Proc. 131, 9 N. Y. Suppl. 337. According to others in which the rule is strictly construed he is not. Eldridge *v.* Strenz, 39 N. Y. Super. Ct. 295. And see as supporting this doctrine McGregor *v.* Buell, 3 Abb. Dec. (N. Y.) 86, 1 Keyes (N. Y.) 153, 33 How. Pr. (N. Y.) 450; People *v.* New York, etc., R. Co., 14 N. Y. St. 168.

Opening taxation of costs.— While application for additional allowance should be made before final costs are adjusted, the court may

allowance immediately after the trial, without reference to further proceedings by either party.[18]

c. Notice of Application. The decisions as to the necessity for notice of application are not altogether harmonious. The weight of authority, however, is probably to the effect that notice is not necessary where the application is made immediately after trial.[19] And in some decisions it is held that if application is made at the same term notice is unnecessary.[20] In all other cases, however, notice is perhaps necessary.[21] Thus where the trial court directs a verdict for plaintiff, and orders that exceptions be heard in the first instance at general term, the proper practice is to apply on notice for an extra allowance where order for judgment for plaintiff is made.[22]

d. Hearing and Determination. The court may determine an application for an extra allowance on the facts disclosed at the trial or brought to its attention by affidavits;[23] and where the cause has been tried by a referee, it is the usual and better practice to require his certificate that the cause was difficult and extraordinary,[24] but this is not jurisdictional, and the absence of the certificate does not prevent the court from considering the motion.[25]

e. Judgment or Order. Where an extra allowance is granted, the sum allowed is inserted in the judgment-roll as part of the judgment,[26] is collectable by force of the judgment,[27] and no written order is necessary to authorize the insertion of the allowance in the judgment.[28]

7. Amount Allowed — a. In General. The statutes providing for an extra allowance designate the maximum percentage which may be allowed on the amount recovered or claimed or the value of the subject-matter involved. Of course the allowance can in no case exceed the percentage so designated,[29] and

nevertheless set aside a taxation of costs upon a proper application for the purpose of allowing a motion for extra allowance to be made. Thompson *v.* St. Nicholas Nat. Bank, 54 Hun (N. Y.) 397, 7 N. Y. Suppl. 491, 27 N. Y. St. 186.

18. People *v.* New York Cent. R. Co., 29 N. Y. 418.

19. Walsh *v.* Weidenfeld, 3 Daly (N. Y.) 334; Mann *v.* Tyler, 6 How. Pr. (N. Y.) 235. See also Saratoga, etc., R. Co. *v.* McCoy, 8 How. Pr. (N. Y.) 526. But see Bush *v.* O'Brien, 52 N. Y. App. Div. 452, 65 N. Y. Suppl. 131, which seems to be in conflict with the above view.

20. Mautner *v.* Pike, 32 Misc. (N. Y.) 745, 65 N. Y. Suppl. 563; Mitchell *v.* Hall, 7 How. Pr. (N. Y.) 490.

21. Walsh *v.* Weidenfeld, 3 Daly (N. Y.) 334; Mann *v.* Tyler, 6 How. Pr. (N. Y.) 235.

Sufficiency of notice.— An order directing the adverse party to show cause why the applicant should not be allowed his costs and further relief is sufficient notice. Carter *v.* Clark, 32 N. Y. Super. Ct. 189.

Waiver of objections to notice.— Where motion is made on two days' notice instead of eight days, and is opposed, without objection as to the time of notice, it cannot be again raised on a subsequent motion to set aside the order for irregularity. Main *v.* Pope, 16 How. Pr. (N. Y.) 271.

22. Moskowitz *v.* Hornberger, 20 Misc. (N. Y.) 558, 46 N. Y. Suppl. 462.

23. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334; Hayden *v.* Mathews, 4 N. Y. App. Div. 338, 38 N. Y. Suppl. 905. *Compare* Bush *v.* O'Brien, 52 N. Y. App. Div. 452, 455, 65 N. Y. Suppl. 131 (in which it was said: "Whether an order shall be granted or not must be determined from the papers presented to the court when application is made for it"); Gori *v.* Smith, 6 Rob. (N. Y.) 563; People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 148 (which seems to require a formal application supported by affidavits).

Where a court dismisses a complaint for want of jurisdiction, it cannot make an extra allowance, because it must first determine whether the case is difficult and extraordinary. Genet *v.* Delaware, etc., Canal Co., 57 Hun (N. Y.) 174, 10 N. Y. Suppl. 467, 32 N. Y. St. 209.

24. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 374, 24 N. Y. Suppl. 422, 54 N. Y. St. 286; Fox *v.* Gould, 5 How. Pr. (N. Y.) 278.

25. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 374, 24 N. Y. Suppl. 422, 54 N. Y. St. 286.

26. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334; People *v.* New York Cent. R. Co., 29 N. Y. 418; People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 148.

27. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334.

28. Smith *v.* Coe, 7 Rob. (N. Y.) 477. See also Jackson *v.* Figaniere, 15 How. Pr. (N. Y.) 224.

29. Hagenbuchle *v.* Schutz, 69 Hun (N. Y.) 183, 23 N. Y. Suppl. 611, 53 N. Y.

even though the amount allowed does not exceed the maximum percentage authorized by statute, it may nevertheless be excessive, and will be so considered if a much less amount would indemnify the party to whom the allowance is made,[30] or the trial occupies a short time.[31] Extra allowance granted to several defendants cannot exceed in the aggregate the maximum percentage specified in the statutes on the amount claimed or the subject-matter involved.[32]

b. Where Party Sues to Recover Share of Property or Fund. Where a party sues to recover a share in property, an allowance granted him must be computed on the value of the share which he recovers, not on the whole property.[33] Conversely, a person suing one of several insurers for his proportion of a loss can recover an extra allowance only on the basis of such proportion.[34]

c. Whether Interest Included. If in an action on contract a referee's report or verdict allows interest as part of the damages recoverable, an extra allowance should be based on interest as well as on principal.[35]

d. As Affected by Interposition of Counter-Claim or Set-Off. Where plaintiff establishes his claim and also defeats a counter-claim or set-off, he is entitled to have an allowance based on both;[36] unless the successful prosecution of the claim necessarily defeats the set-off or counter-claim[37] or it is stricken out before he is required to reply to it.[38] If the claim is not contested, except to the extent that it should be abated by the amount counter-claimed, plaintiff is not entitled to an allowance where the counter-claim is established.[39] If defendant obtains a judgment for a balance found due him, the allowance may be based on the amount

St. 598; McConnell *v.* Manhattan Constr. Co., 4 N. Y. Suppl. 226, 21 N. Y. St. 871, 16 N. Y. Civ. Proc. 310.

An allowance in excess of the amount in controversy is excessive. Sheehey *v.* Kelly, 33 Hun (N. Y.) 543; Baldwin *v.* Reardon, 48 N. Y. Super. Ct. 166. See also Bradley *v.* Walker, 60 N. Y. Super. Ct. 324, 17 N. Y. Suppl. 383, 22 N. Y. Civ. Proc. 1.

A statute which restricts additional allowances to a party, or to two or more parties on the same side, to two thousand dollars, does not, in case parties adversely related to the action are each successful, have any further application than that the allowance should not exceed two thousand dollars to the parties on each side of the action. Weed *v.* Paine, 4 N. Y. Civ. Proc. 305.

30. Seagrist *v.* Sigrist, 20 N. Y. App. Div. 336, 46 N. Y. Suppl. 949. See also Dann *v.* Wormser, 38 N. Y. App. Div. 460, 56 N. Y. Suppl. 474.

31. Gordon *v.* Strong, 15 N. Y. App. Div. 519, 44 N. Y. Suppl. 481; Cornwell *v.* Parke, 52 Hun (N. Y.) 596, 5 N. Y. Suppl. 905, 23 N. Y. St. 829.

32. Doremus *v.* Crosby, 66 Hun (N. Y.) 125, 20 N. Y. Suppl. 906, 49 N. Y. St. 808; New York Breweries Co. *v.* Nichols, 25 N. Y. Suppl. 425, 55 N. Y. St. 179; Lane *v.* Van Orden, 11 Abb. N. Cas. (N. Y.) 228.

The words "any party" do not mean "each party"; otherwise the court might, if there were twenty parties, allow one hundred per cent. Doremus *v.* Crosby, 66 Hun (N. Y.) 125, 20 N. Y. Suppl. 906, 49 N. Y. St. 808.

33. Struthers *v.* Pearce, 51 N. Y. 365.

This is true, whether the party joins as defendants all others claiming shares in the fund (Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y.) 31), or sues in behalf of all who may elect to join him, where none do so (Mills *v.* Ross, 168 N. Y. 673, 61 N. E. 1131 [*affirming* 39 N. Y. App. Div. 563, 57 N. Y. Suppl. 680]).

34. Laird *v.* Littlefield, 34 N. Y. App. Div. 43, 53 N. Y. Suppl. 1082 [*affirmed* in 164 N. Y. 597, 58 N. E. 1089].

35. Clegg *v.* Aiken, 8 N. Y. Civ. Proc. 249, 17 Abb. N. Cas. (N. Y.) 88. See also Carpenter *v.* Shook, 17 N. Y. Suppl. 257, 43 N. Y. St. 226.

In an action of tort an extra allowance should be computed on the amount given by the jury, and not on that amount with interest, which the statute directs the court to add thereto. Sinne *v.* New York, 8 N. Y. Civ. Proc. 252 note. But see Seifter *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 443, 65 N. Y. Suppl. 1123. *Compare* Boyd *v.* New York Cent., etc., R. Co., 6 N. Y. Civ. Proc. 222, where the allowance was computed upon the interest, special application having been made therefor.

36. Barclay *v.* Culver, 4 N. Y. Civ. Proc. 365, 66 How. Pr. (N. Y.) 342; Woonsocket Rubber Co. *v.* Rubber Clothing Co., 1 N. Y. Civ. Proc. 350, 62 How. Pr. (N. Y.) 180; Lissberger *v.* Schoenberg Metal Co., 2 N. Y. City Ct. 158.

37. Barnes *v.* Denslow, 9 N. Y. Suppl. 53, 30 N. Y. St. 315; Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y.) 31.

38. Knauth *v.* Wertheim, 14 N. Y. Suppl. 391, 26 Abb. N. Cas. (N. Y.) 369.

On partial success on a counter-claim, an allowance to plaintiff should not be computed upon the entire amount thereof. Bates *v.* Fish Bros. Wagon Co., 50 N. Y. App. Div. 38, 63 N. Y. Suppl. 649.

39. New York, etc., R. Co. *v.* Carhart, 39 Hun (N. Y.) 363.

claimed by plaintiff, and not on the amount of recovery.[40] If neither party is successful, plaintiff is not entitled to an allowance computed on the amount of the counter-claim,[41] and neither is defendant, when his conduct has been extremely vexatious.[42]

8. Number of Extra Allowances. The successful party is entitled to only one extra allowance, although the case may have been tried more than once. He is not entitled to an additional allowance taxed as costs on the first trial.[43]

9. Vacating Order For Allowance. Where the court making an extra allowance has jurisdiction, another judge cannot on motion set aside or reverse the decision.[44]

10. Review of Order For Allowance. In New York an order granting an allowance affects a substantial right, and is appealable both to the general term[45] and to the court of appeals.[46] But the extent of review in these two courts is different. The latter can never review the discretion of the trial court in making an allowance,[47] but may review its action when it has exceeded the limitations fixed by the statute authorizing extra allowances, either in exceeding the maximum amount provided for by statute or in making an allowance in a case not authorized by statute, for here a question of law is presented.[48] In the general term an award of an extra allowance is reviewable on the merits;[49] but the discretion of the trial court will not ordinarily be reviewed, unless abused.[50] If it is clear that this has been done the order will be reversed.[51] To obtain a review in the general term formal exceptions are unnecessary,[52] but the burden is on the appellant to show error, whether on appeal to the general term[53] or to the court

40. Vilmar *v.* Schall, 61 N. Y. 564. But see Woonsocket Rubber Co. *v.* Rubber Clothing Co., 1 N. Y. Civ. Proc. 350, 62 How. Pr. (N. Y.) 180.

41. Hammann *v.* Jordan, 59 N. Y. Super. Ct. 95, 13 N. Y. Suppl. 803, 36 N. Y. St. 434.

42. Hall *v.* U. S. Reflector Co., 5 Month. L. Bul. 1.

43. Flynn *v.* Equitable L. Assur. Soc., 18 Hun (N. Y.) 212; Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212.

This rule does not apply in ejectment suits. — Under the statutes relating to ejectment, if a party pays the costs of the first trial, including an extra allowance, this does not prevent the granting of another extra allowance against him in case he is defeated on the second trial. Bolton *v.* Schriever, 135 N. Y. 65, 31 N. E. 1001, 47 N. Y. St. 870, 18 L. R. A. 242; Wing *v.* De la Rionda, 131 N. Y. 422, 30 N. E. 243, 43 N. Y. St. 305.

Where two defendants appear by one attorney, they can have but one extra allowance on succeeding. New Mfg. Co. *v.* Galway, 26 N. Y. Suppl. 950, 23 N. Y. Civ. Proc. 239.

44. Fisher *v.* Hepburn, 48 N. Y. 41; Dresser *v.* Jennings, 3 Abb. Pr. (N. Y.) 240.

45. Hanover F. Ins. Co. *v.* Tomlinson, 58 N. Y. 215; Duncan *v.* De Witt, 7 Hun (N. Y.) 184; Wilkinson *v.* Tiffany, 4 Abb. Pr. (N. Y.) 98; People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 148.

46. People *v.* New York Cent. R. Co., 30 How. Pr. (N. Y.) 148.

47. Sentenis *v.* Ladew, 140 N. Y. 463, 35 N. E. 650, 55 N. Y. St. 831, 37 Am. St. Rep. 569; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401; Comins *v.* Jefferson County, 64 N. Y. 626; Southwick *v.* Southwick, 49 N. Y. 510.

48. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 35 N. E. 1065, 52 N. Y. St. 334; Conaughty *v.* Saratoga County Bank, 92 N. Y. 401.

Amount slightly in excess of statutory allowance. — Where the extra allowance is only slightly in excess of the maximum fixed by statute, the court of appeals will not interfere. The remedy is by motion to correct the judgment. Kraushaar *v.* Meyer, 72 N. Y. 602.

49. People *v.* New York Cent. R. Co., 29 N. Y. 418.

50. Proctor *v.* Soulier, 8 N. Y. App. Div. 69, 40 N. Y. Suppl. 459, 74 N. Y. St. 895; Wilber *v.* Williams, 4 N. Y. App. Div. 444, 38 N. Y. Suppl. 893, 74 N. Y. St. 604; Preston *v.* Howk, 3 N. Y. App. Div. 43, 37 N. Y. Suppl. 1079, 74 N. Y. St. 426; Gooding *v.* Brown, 35 Hun (N. Y.) 153; Morrison *v.* Agate, 20 Hun (N. Y.) 23; Bryon *v.* Durrie, 6 Abb. N. Cas. (N. Y.) 135; Union Bank *v.* Mott, 13 Abb. Pr. (N. Y.) 247; Smith *v.* Underhill, 19 N. Y. Suppl. 249, 47 N. Y. St. 23.

51. McKeen *v.* Fish, 33 Hun (N. Y.) 28.

52. Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 138 N. Y. 252, 33 N. E. 1065, 52 N. Y. St. 334 [*affirming* 63 Hun (N. Y.) 275, 18 N. Y. Suppl. 50, 48 N. Y. St. 454]. *Compare* Bancroft *v.* Home Benefit Assoc., 58 N. Y. Super. Ct. 492, 12 N. Y. Suppl. 718, 35 N. Y. St. 459, in which it was held that an allowance granted without notice cannot be reviewed in the absence of motion to vacate.

53. Sprague *v.* Bartholdi Hotel Co., 56 N. Y. Super. Ct. 608, 3 N. Y. Suppl. 828.

of appeals.[54] All the facts bearing on the allowance should be presented.[55] In Florida an allowance is reviewable to ascertain whether the cause is one in which an allowance may be made and whether the sum allowed is within the statutory limit; but discretion in making the order or as to the amount allowed will not be interfered with unless it exceeds the statutory amount.[56]

Y. Increased Costs — 1. Introductory Statement. In a number of jurisdictions the statutes provide for the allowance of increased costs in designated cases.[57]

2. On Filing Insufficient Petition. A statute providing that where two petitions have been adjudged insufficient and a third has been filed, if the third is adjudged insufficient or the whole or some part is stricken out, the party filing such pleading shall pay treble costs and no further petition shall be filed, and that judgment shall be rendered applies to all civil actions, including proceedings to contest a will.[58]

3. Necessity of Applying For Increased Costs. A party entitled to double or treble costs must make application therefor or they will not be allowed.[59]

4. Necessity For Certificate of Allowance. A statute providing that where on the trial of an "action" any fact appears whereby a party is entitled to increased costs the judge or referee shall make a certificate stating the fact and that such certificate shall be the only competent evidence before the taxing officer does not apply to a special proceeding where the costs are discretionary.[60]

5. Effect of Plaintiff's Failure to Recover Amount Sufficient to Carry Costs. As defendant must recover judgment to entitle him to increased costs, he is not entitled to such costs when plaintiff recovers a sum so small as to entitle defendant to costs.[61]

6. Effect of Joining Person to Whom Increased Costs Cannot Be Given. Where suit is brought against two or more persons, one only of whom may be awarded increased costs under the statute, and they plead severally and are successful, the party to whom increased costs may be awarded will be entitled thereto and the other defendants to single costs.[62]

7. Effect of Reversal of Judgment. Where a defendant to whom a statute gives increased costs on recovery of judgment obtains a judgment which is subsequently reversed he is not entitled to increased costs.[63]

8. Effect of Death of Party Entitled to Increased Costs. The death of a

54. People *v.* Clarke, 9 N. Y. 349.

55. Meyer Rubber Co. *v.* Lester Shoe Co., 86 Hun (N. Y.) 473, 33 N. Y. Suppl. 888, 67 N. Y. St. 636; Hamilton *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 491, 8 N. Y. Suppl. 546, 29 N. Y. St. 28, 18 N. Y. Civ. Proc. 164. See also Tolman *v.* Syracuse, etc., R. Co., 31 Hun (N. Y.) 397; Dana *v.* Fiedler, Code Rep. N. S. (N. Y.) 224. But *compare* De Long *v.* De Long Hook, etc., Co., 89 Hun (N. Y.) 399, 35 N. Y. Suppl. 509, 70 N. Y. St. 161.

Matters not shown by record.— In estimating the proper amount of an extra allowance, the general term cannot consider any matter not shown by the record. Cornwell *v.* Parke, 52 Hun (N. Y.) 596, 5 N. Y. Suppl. 905, 22 N. Y. St. 829.

Presumptions.— If the amount in controversy does not appear, it will be presumed that the amount allowed does not exceed the amount authorized by statute. Everingham *v.* Vanderbilt, 12 Hun (N. Y.) 75.

56. Hart *v.* Bostwick, 14 Fla. 162.

57. See the statutes of the several states.

58. Gordon *v.* Burris, 125 Mo. 39, 28 S. W. 191.

59. Norris *v.* Lynch, 121 Mass. 586; Anonymous, 4 Wend. (N. Y.) 216; Stewart *v.* Schultz, 33 How. Pr. (N. Y.) 3; Mack *v.* McCulloch, 2 How. Pr. (N. Y.) 127. But see Carpentier *v.* Willett, 28 How. Pr. (N. Y.) 376.

60. Wood *v.* Randolph, 9 Misc. (N. Y.) 507, 30 N. Y. Suppl. 344, 61 N. Y. St. 80.

No certificate is necessary in an action if not required by the statute providing for increased costs. People *v.* Wayne County Cir. Judge, 14 Mich. 33.

61. Nichols *v.* Ketcham, 19 Johns. (N. Y.) 167.

62. Row *v.* Sherwood, 6 Johns. (N. Y.) 109. And see Lawrence *v.* Titus, 1 Hall (N. Y.) 421.

But where they plead jointly none of the defendants will be awarded increased costs where the statute expressly so forbids. Bradley *v.* Fay, 18 How. Pr. (N. Y.) 481; Merrill *v.* Near, 5 Wend. (N. Y.) 237; Wales *v.* Hart, 2 Cow. (N. Y.) 426.

63. Foster *v.* Cleveland, 6 How. Pr. (N. Y.) 233, Code Rep. N. S. (N. Y.) 402; Dock-

party entitled to double costs and the substitution of his representatives in his place do not affect the right to double costs.[64]

9. Method of Computation. The English method of computation of double costs was to add to single costs one-half their amount,[65] and such has been held the rule in some states of the United States.[66] In others, however, the English practice has not been adopted by statute or otherwise, and the rule is to tax single costs and multiply them by two.[67] As respects treble costs the practice is to tax single costs and multiply them by three.[68] Double costs when allowable are computed on the whole taxed bill, including disbursements.[69]

10. Form of Judgment. Where judgment is rendered for treble costs it is sufficient to state the aggregate sum "being treble the costs and charges of the plaintiff" without first stating the amount of the single costs and then the treble amount.[70]

Z. Interest on Costs. In the absence of statute authorizing it, interest on the costs awarded cannot as a general rule be allowed.[71] But a judgment for costs is a "judgment for money," within the meaning of a statute relating to interest, and bears interest from the date of the return of the verdict or finding of the court, until the same shall be satisfied.[72]

XXI. AWARD OF COSTS AND CERTIFICATE.

A. Necessity For Award. Whenever costs do not follow the judgment or decree as of course, but are within the discretion of the court, they must be specially awarded or no costs can be taxed.[73] If, however, costs follow the judgment as of course, no special award is necessary.[74]

stader *v.* Sammons, 4 Hill (N. Y.) 546; Heimers *v.* Davidson, 2 N. Y. City Ct. 308.

64. Carpentier *v.* Willet, 3 Rob. (N. Y.) 700.

65. Shields *v.* Lozear, 34 N. J. L. 530 [*citing* 2 Tidd 987].

66. Gilbert *v.* Kennedy, 22 Mich. 5; Stephens *v.* Ligon, Harp. (S. C.) 439.

67. Shields *v.* Lozear, 34 N. J. L. 530; Welsh *v.* Anthony, 16 Pa. St. 254.

68. Davison *v.* Schooley, 10 N. J. L. 145; Mairs *v.* Sparks, 5 N. J. L. 513; Crane *v.* Dod, 2 N. J. L. 340; King *v.* Havens, 25 Wend. (N. Y.) 420; Walker *v.* Burnham, 7 How. Pr. (N. Y.) 55; Shoemaker *v.* Nesbit, 2 Rawle (Pa.) 201. But *compare* Patchin *v.* Parkhurst, 9 Wend. (N. Y.) 443.

69. Klinck *v.* Kelly, 15 Abb. Pr. N. S. (N. Y.) 135.

70. Davison *v.* Schooley, 10 N. J. L. 145.

71. Baum *v.* Reed, 74 Pa. St. 320; Gatewood *v.* Palmer, 10 Humphr. (Tenn.) 466. But see Enright *v.* Hubbard, 34 Conn. 197, in which it was held that the allowance of interest on costs was within the discretion of the trial court.

72. Palmer *v.* Glover, 73 Ind. 529.

A statute giving interest on a judgment for costs has no application unless the judgment be entered for a fixed sum for costs. State Trust Co. *v.* Cowdrey, 68 Hun (N. Y.) 97, 22 N. Y. Suppl. 601, 52 N. Y. St. 45.

73. *Maine.*— Stone *v.* Lock, 48 Me. 425.

Massachusetts.—Winslow *v.* Otis, 5 Gray 360.

Minnesota.— Myers *v.* Irvine, 4 Minn. 553.

New York.— Le Roy *v.* Browne, 54 Hun 584, 8 N. Y. Suppl. 82, 28 N. Y. St. 210, 18 N. Y. Civ. Proc. 125, 10 N. Y. Suppl. 328; Kreitz *v.* Frost, 55 Barb. 474; People *v.* Densmore, 1 Barb. 557; Coddington *v.* Bowen, 2 Silv. Supreme 417, 6 N. Y. Suppl. 355, 24 N. Y. St. 832; Williams *v.* Horgan, 6 Duer 658; Fargo *v.* Hamlin, 5 N. Y. St. 297; Williams *v.* Blumer, 49 How. Pr. 12; Travis *v.* Waters, 12 Johns. 500.

South Carolina.— Dauntless Mfg. Co. *v.* Davis, 24 S. C. 536.

Vermont.— Conable *v.* Bucklin, 2 Aik. 221.

United States.— Coburn *v.* Schroeder, 8 Fed. 521, 19 Blatchf. 493.

See 13 Cent. Dig. tit. "Costs," § 305.

Action to abate nuisance.— Where in an action to abate a nuisance the complaint is dismissed costs are not allowed as of course, but must be awarded. Le Roy *v.* Browne, 54 Hun (N. Y.) 584, 8 N. Y. Suppl. 82, 28 N. Y. St. 210, 18 N. Y. Civ. Proc. 125, 10 N. Y. Suppl. 328.

Motion to appoint receiver.— The costs of such a motion are not taxable without an order of court awarded them. Dauntless Mfg. Co. *v.* Davis, 24 S. C. 536.

Where one of several defendants is successful.— Under a statute providing that the court may award costs to such of several defendants not united in interest and making separate defenses as have judgment in their favor, defendant sued with others on their liability on a note, succeeding on his defense, is not entitled to costs as of course without an award thereof. Williams *v.* Horgan, 6 Duer (N. Y.) 658; Lindsley *v.* Deafendorf, 43 How. Pr. (N. Y.) 90; Attica Bank *v.* Wolf, 18 How. Pr. (N. Y.) 102.

74. Luthgor *v.* Walters, 64 Barb. (N. Y.) 417.

B. Necessity For Certificate — 1. That Title to Real Estate Was Involved. In some jurisdictions to entitle a plaintiff to costs in case he recovers less than a designated amount it is necessary that the court shall certify that the title to real estate came in question.[75]

2. That a Greater Amount of Damages Should Have Been Allowed. In Alabama no more costs than damages are allowed in actions of tort, where the recovery is less than the sum designated in the statute, unless the court certifies that a larger amount of damages should have been allowed.[76]

3. That There Were Reasonable Grounds For Expecting Larger Recovery. A statute providing that if plaintiff shall not recover more than a designated amount he shall not recover costs unless the judge certifies that he had reasonable grounds to expect to recover more than that sum has been held to apply only to an action *ex contractu*. Such certificate is not necessary to carry costs in an action of damages to land by improper construction of a railroad.[77]

4. That Trespass Was Wilful and Malicious. In Pennsylvania in an action of trespass, if plaintiff recovers less than a designated amount, the court, in order to entitle plaintiff to costs, must certify that the trespass was wilful and malicious, and it has been held that the court will so certify where in an action of trespass *quare clausum fregit*, it appeared that the defendant continued the acts of trespass after being notified to quit.[78]

C. By Whom Costs Awarded — 1. In General. The award of costs is a judicial act and must be made by the court, unless the cause is referred.[79] The clerk who is merely an officer of court cannot award costs,[80] nor can auditors appointed to take and state accounts.[81] So a jury have no power to award costs.[82]

2. By What Court Awarded — a. In General. To authorize a court to award costs, there must be a statutory authority therefor, either express or implied.[83]

75. See *supra*, VII, B.

76. Tippins *v.* Peters, 103 Ala. 196, 15 So. 564; Tecumseh *v.* Mangum, 67 Ala. 246. See also Galle *v.* Lynch, 21 Ala. 579; Reid *v.* Gordon, 2 Stew. (Ala.) 469.

The statute does not apply to an action of debt on an attachment bond (McAllister *v.* McDow, 26 Ala. 453), nor to an action commenced in a justice's court and brought by appeal to the circuit court (Baker *v.* Keith, 77 Ala. 544).

Where plaintiff recovers no more than the designated sum and the judge fails to certify that more damages should have been awarded, a judgment for plaintiff for more costs than damages is reversible error. Guttery *v.* Boshell, 132 Ala. 596, 32 So. 304.

77. Kansas City, etc., R. Co. *v.* Mabry, 67 Miss. 131, 7 So. 224.

78. Coleman *v.* Thomson, 6 Pa. Co. Ct. 126.

79. Baltimore *v.* Baltimore County Com'rs, 19 Md. 554; Van Deusen *v.* Newcomer, 40 Mich. 525; Jarvis *v.* Mohr, 18 Wis. 188; American Diamond Drill Co. *v.* Sullivan Mach. Co., 32 Fed. 552, 23 Blatchf. 144.

80. Bailey *v.* Stone, 41 How. Pr. (N. Y.) 346; Jarvis *v.* Mohr, 18 Wis. 188; American Diamond Drill Co. *v.* Sullivan Mach. Co., 32 Fed. 552, 23 Blatchf. 144.

81. Calvert *v.* Carter, 18 Md. 73; Lyman *v.* Warren, 12 Mass. 412.

82. *Arkansas.*— Wilson *v.* Newland, 5 Ark. 373.

California.— Shay *v.* Tuolumne Water Co., 6 Cal. 286.

Iowa.— Meigs *v.* Parke, Morr. 378.

Louisiana.— Walsh *v.* Collins, 11 Mart. 558.

Massachusetts.— Anonymous, 11 Mass. 358.

New Hampshire.— Tucker *v.* Cochran, 47 N. H. 54.

Pennsylvania.— Ruth *v.* Edelman, 2 Leg. Gaz. 125.

South Carolina.— Curlee *v.* Bond, 1 Brev. 297.

Texas.— Garrett *v.* McMahan, 34 Tex. 307; Baker *v.* Wofford, 9 Tex. 516.

United States.— Day *v.* Woodworth, 13 Wall. 363, 14 L. ed. 181.

If the jury attempt to do so that portion of their verdict awarding costs may be rejected as surplusage. Lincoln *v.* Hapgood, 11 Mass. 350; Tucker *v.* Cochran, 47 N. H. 54; Garrett *v.* McMahan, 34 Tex. 307.

83. Struthers *v.* Christal, 3 Daly (N. Y.) 327; Long *v.* Olmstead, 3 Dem. Surr. (N. Y.) 581.

The federal supreme court sitting as a court of original jurisdiction in equity has power to award costs. This power is incidental to its authority as a court of equity and, although never expressly granted, has been repeatedly exercised by acts of congress. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 460, 15 L. ed. 449.

When authority implied.— Although there is no statute expressly authorizing the supreme court to render judgment for costs made in that court such power will be implied where a statute authorizes the clerk

The court before which a cause is tried must award costs. If the court before which the final determination of a case is heard does not award costs there is no authority elsewhere to adjudge costs.[84]

b. After Appeal. In New York, where the court of appeals affirms a judgment of the general term, reversing a judgment of the special term and ordering a new trial, and directs judgment absolute for plaintiffs, with costs, the costs awarded by the court of appeals are the costs of that court only, and the special term, after the remittitur has been filed, has power to award costs and an extra allowance in ordering final judgment.[85] In Maryland it has been held that where a cause is neither affirmed nor reversed, but is remanded in order that the proceedings may be so amended as to conform to the opinion within expressed, all the costs of the cause including those of the appeal remain subject to the final decree.[86]

3. By Referee. Where a cause is referred, referees are ordinarily empowered to award costs.[87] The report to be coextensive with the cause should embrace the question of costs as well as damages or other relief asked.[88] Statutes providing that no costs shall be awarded a successful party on the recovery of less than a designated amount do not apply to a case heard before a referee, where the statute authorizing such hearing provides that full costs shall be taxed on the report of the referee, irrespective of the amount of the recovery.[89] Where an action is tried by a referee, the irregularity of his report in the matter of costs cannot be questioned by the clerk in taxing costs. The decision awarding costs

of that court to issue execution for the costs incurred therein. Sparks *v.* Wood, 18 N. C. 489.

84. Eldridge *v.* Strenz, 39 N. Y. Super. Ct. 295. See also Davis *v.* Briggs, 3 How. Pr. (N. Y.) 171, holding that a court has no authority to award costs in matters over which another court has exclusive jurisdiction.

Where a cause is removed from a state court to a federal court, the authority of the state court is at an end and it cannot render judgment for costs made prior to the removal. Under the statute governing removal of causes the state court after removal can proceed no further, and the cause then proceeds in the federal court as if originally brought there. Williams *v.* Atkins, 6 Coldw. (Tenn.) 615.

85. Barnard *v.* Hall, 143 N. Y. 399, 38 N. E. 301, 62 N. Y. St. 305.

Where the court of appeals reverses the decision of the general and special terms of the supreme court, sustaining a demurrer to an alternative writ of mandamus with costs to defendant, the special term is the proper court to award costs of proceedings before it and costs of proceedings in the general term should be awarded by it. People *v.* Queens County, 83 Hun (N. Y.) 237, 31 N. Y. Suppl. 569, 64 N. Y. St. 159.

86. Perkins *v.* Emory, 55 Md. 27; Smith *v.* Shaffer, 50 Md. 132; Doub *v.* Mason, 5 Md. 612.

87. Hatch *v.* Hatch, 57 Me. 283; Anonymous, 31 Me. 590; McLaughlin *v.* Old Colony R. Co., 166 Mass. 260, 44 N. E. 252; Lyman *v.* Warren, 12 Mass. 412; Bacon *v.* Crandon, 15 Pick. (Mass.) 79; Anonymous, 2 N. J. L. 213; Coddington *v.* Bowen, 2 Silv. Supreme 417, 6 N. Y. Suppl. 355, 24 N. Y. St. 832; Ludington *v.* Taft, 10 Barb. (N. Y.) 447; Phelps *v.* Wood, 46 How. Pr. (N. Y.) 1; Gilliland *v.* Camphell, 18 How. Pr. (N. Y.) 177; Graves *v.* Blanchard, 4 How. Pr. (N. Y.) 300.

Although an order of reference is silent as to the power to award costs, referees acting thereunder may award costs. McLaughlin *v.* Old Colony R. Co., 166 Mass. 260, 44 N. E. 252.

A referee is not invested with power to impose costs of a motion made at a special term and ought not to be embarrassed with the question of terms to be imposed for the granting of a favor by the court to either of the parties before him in any litigation. Market Nat. Bank *v.* Pacific Nat. Bank, 10 N. Y. Civ. Proc. 19.

Where an equity action has been decided by a referee to whom the whole issues were referred, an award of costs can only be made by the referee, and the special term has no power to do so. Nassau Bank *v.* Newburgh Nat. Bank, 32 N. Y. App. Div. 268, 52 N. Y. Suppl. 1118.

88. Ludington *v.* Taft, 10 Barb. (N. Y.) 447; Graves *v.* Blanchard, 4 How. Pr. (N. Y.) 300.

Finding that action was not maintainable in justice's court.— Where the amount recovered is insufficient to carry costs unless the subject is such that it could not have been prepaid in the justice's court, it is proper for the referee to find also whether plaintiff is entitled to costs on the ground that the action could not have been maintained in the justice's court. Gilliland *v.* Campbell, 18 How. Pr. (N. Y.) 177.

89. Brown *v.* Keith, 14 Me. 396.

stands before the clerk as the mandate of the court, and until vacated and set aside on proper application to the court must be obeyed.[90]

D. Time of Application For an Award of Costs. Ordinarily no order for costs or disbursements should be made until a final judgment is recovered.[91] Rendering judgment for costs one year after the parties are out of court, on motion of plaintiff, without notice to the other parties, is erroneous;[92] but it has been held that the fact that an order for taxation for costs is made in vacation is no ground for interfering with the judgment if they were taxed to the proper party.[93] A justice of the peace after judgment on a verdict has authority to proceed on the same date to determine the costs and if necessary to hold the case open a reasonable time for that purpose.[94] If a final decree is silent as to costs they cannot afterward be ordered to be paid, unless there is a rehearing and the decree is opened for that purpose.[95]

E. Time of Making Certificate. If a certificate of designated facts necessary to entitle either party to costs is authorized to be made by the judge either before or after verdict, such certificate cannot be made after judgment.[96]

F. Requisites of Award — 1. In General. Interlocutory costs should be awarded by order and not by judgment,[97] and it has been held that an order allowing an amendment on condition of paying costs to date should fix a date for payment.[98]

2. Fixing Amount of Costs. Ordinarily an award of costs need not fix the amount. This is a ministerial act to be performed by the taxing officer.[99]

90. Ballou *v.* Parsons, 67 Barb. (N. Y.) 19.

91. Weeks *v.* Cornwell, 38 Hun (N. Y.) 577.

An order compelling a person to pay costs as being the person beneficially interested in the recovery can only be made after judgment against plaintiff for the costs has been perfected. Fredericks *v.* Niver, 28 Hun (N. Y.) 417.

Determination of amount of damages.— No final judgment for costs should be rendered until the amount of damages is found, where the question as to which party costs should be given is made to depend upon the amount of damages recovered. Hemingway *v.* Peter, 25 Mich. 202.

92. Davis *v.* Harrison, 2 J. J. Marsh. (Ky.) 189.

Motion at rendition of judgment.— Where one sues as a poor person and judgment is rendered in his favor for the amount of the verdict without costs, and no motion is made for judgment of costs at the time of its rendition, he cannot recover costs on a rule for defendant to show cause why execution should not issue for costs. Carter *v.* Wood, 33 N. C. 22.

93. *In re* Carman's Will, (Iowa 1891) 48 N. W. 985.

94. Saunders *v.* Tioga Mfg. Co., 27 Mich. 520.

95. Stone *v.* Locke, 48 Me. 425; Travis *v.* Waters, 1 Johns. Ch. (N. Y.) 85.

Where in an equitable proceeding plaintiff was defeated in the lower court, and did not, prior to a favorable decision in the court of appeals, have an opportunity to invoke the discretionary power of the lower court in allowing costs, he may in the lower court apply for an allowance of costs after a favorable decision of the appellate court. Helsk *v.* Reinheimer, 14 N. Y. St. 465.

96. Ramsay *v.* Kittridge, 23 Mich. 488.

Where the statute does not designate the time at which the certificate shall be given it will be in time if made after verdict and before judgment. Knabb *v.* Kaufman, 1 Woodw. (Pa.) 325. But where a statute provides that if plaintiff recover less than a designated amount he shall not recover any costs of defendant, unless the judge shall be of the opinion and so enter on the record that plaintiff had reasonable grounds to expect to recover more than such amount, such entry on the record must be made at the term at which the judgment is rendered, and the filing of the certificate by the judge at such term without an entry on the record is insufficient. Shackleford *v.* Levy, 65 Miss. 125.

97. Robinson *v.* Scott, 3 Litt. (Ky.) 233.

Where an action of trespass commenced by capias was quashed but no order relating to costs was made, and an exception was issued against plaintiff, which the court below refused to vacate, this in fact amounts to an order that plaintiff should pay costs, and it cannot be objected that there was no formal order disposing of costs made. Becker *v.* Goldschild, 9 Pa. Super. Ct. 50.

98. McHugh *v.* Mechanics' Mut. Sav. Assoc. Co., 5 Ky. L. Rep. 317.

Where each party is entitled to costs the fact that the judgment has not been entered in favor of appellant is not an objection to a judgment which has been properly entered in favor of appellee. Machette *v.* Wanless, 2 Colo. 169.

99. *Alabama.*— De Witt *v.* Bigelow, 11 Ala. 480.

3. WHERE SECURITY HAS BEEN GIVEN. Where defendant is successful in a case where plaintiff is given security for costs, judgment for costs may be rendered at the same time against a surety, but if such judgment is omitted he will be liable on the undertaking.[1]

4. INSERTING COSTS IN JUDGMENT AFTER ENTRY. Under a statute requiring the clerk to include the costs in the judgment, the clerk cannot enter the judgment and then at a subsequent time insert the costs.[2]

G. Operation and Effect — 1. OF AWARD. A judgment for costs includes all legal items of costs which have accrued,[3] but only such items as the party is by law entitled to recover.[4] It includes only the costs made by the party to whom they are awarded. He is not entitled to recover costs expended by his adversary.[5] It does not entitle the owner of the judgment to the costs of an appeal previously adjudged against him in the appellate court.[6] A general judgment for costs against a defendant includes only such costs as are incurred by plaintiff against such defendant. It does not include costs incurred by plaintiff against a co-defendant.[7] If a demurrer is overruled and by the order or judgment overruling the

Illinois. — Jackson *v.* Cummings, 15 Ill. 449.

Indiana. — Koons *v.* Williamson, 90 Ind. 599; Pittsburgh, etc., R. Co. *v.* Elwood, 79 Ind. 306; Palmer *v.* Glover, 73 Ind. 529.

Kansas. — Clippenger *v.* Ingram, 17 Kan. 584.

Missouri. — Bobb *v.* Graham, 15 Mo. App. 289.

New York. — *In re* Kelly, 3 Hun 636, 6 Thomps. & C. 117; People *v.* Nevins, 1 Hill 154.

Washington. — Huntington *v.* Blakeney, 1 Wash. Terr. 111.

United States. — The Liverpool Packet, 15 Fed. Cas. No. 8,407, 2 Sprague 37.

See 13 Cent. Dig. tit. "Costs," § 316.

Costs of former trial.—A report of referees awarding to a party all the costs of a former trial without ascertaining the amount has been held erroneous. Johnson *v.* Johnson, 2 N. J. L. 317.

Costs on interlocutory motions. — The amount of costs given on motions made in the regular progress of the suit, such as motions for nonsuit, to change venue, and the like, need not be specified in the order, since the statute and not the court gives the costs, except where the motions are denied with costs for some irregularity, in which case the costs are inserted in the order. Thomas *v.* Clark, 5 How. Pr. (N. Y.) 375, Code Rep. N. S. (N. Y.) 71.

1. Davis *v.* Farmer, 28 Mo. 54.

A joint judgment for costs should not be rendered against plaintiff and a surety, but on reversal of the judgment for that cause the verdict will be allowed to stand and the cause remanded for judgment to be entered against plaintiff alone. Muldrow *v.* Davis, 12 Sm. & M. (Miss.) 655.

2. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418; Chapin *v.* Broder, 16 Cal. 403. *Contra*, Antoine Co. *v.* Ridge Co., 23 Cal. 219.

In Minnesota it has been held that the clerk may tax costs after entry of judgment, and that the regularity of the judgment is not affected by the insertion therein after its entry of the amount of costs. Leyde *v.* Martin, 16 Minn. 38.

Where judgment has been entered up without costs being inserted therein the court may give leave to amend by inserting it. McLendon *v.* Frost, 59 Ga. 350; O'Driscoll *v.* McBurney, 2 Nott & M. (S. C.) 58.

3. Gillet *v.* Roadman, 5 Humphr. (Tenn.) 44.

"Payment of costs of the action to the present time" in an order means such costs as would go to the prevailing party in case of a determination of the suit in his favor at the date of the order. Havemeyer *v.* Havemeyer, 44 N. Y. Super. Ct. 170; Dawson *v.* Burnham, 2 Month. L. Bul. 39.

Limiting costs. — A statute provided that where plaintiff does not recover more than twenty dollars, only one quarter costs shall be allowed, and further provided that on reports of referees full costs may be allowed, unless the report otherwise provides. The report of the referee awarded plaintiff less than twenty dollars, but provided that "legal costs of court" should be taxed. This was held to entitle plaintiff to full costs. Stevens *v.* Spear, 82 Me. 184, 19 Atl. 157.

4. Carlock *v.* Spencer, 7 Ark. 12. See also Smith *v.* Shaffer, 65 Ga. 459.

A judgment for costs generally includes costs made both before and after rendition of judgment. If new costs accrue the judgment opens to receive them. Peyton *v.* Brooke, 3 Cranch (U. S.) 92, 2 L. ed. 376.

5. Marsh *v.* Hendricks, 3 N. J. L. 196. See also Russell *v.* Giles, 31 Ohio St. 293.

6. Farquhar *v.* Hendley, 24 Tex. 300. And see Hines *v.* Holland, 3 Tex. App. Civ. Cas. § 99, holding that a judgment of the circuit court that plaintiff recover of defendant all costs incurred in a case tried in the justice's and circuit court and appealed to the court of appeals does not include the costs on appeal, which the appellate court ordered taxed against plaintiff.

7. Brown *v.* State, 12 Ark. 623.

Where a decree which was not appealed from directs that one defendant recover costs

demurrer defendant is required to pay "costs" the costs are confined to those accruing on the demurrer.[3]

2. Of Certificate. In any cause in which a certificate of the judge is necessary to entitle the person to costs a certificate given by the judge is conclusive upon the taxing officer.[9] If improperly granted the remedy is by motion to set it aside.[10]

H. Review and Correction of Award — 1. In Trial Court. If there are errors in the allowance of costs by the court, the remedy is by application for a modification of the order and not by an appeal from the taxation from the clerk in accordance with the order.[11] If it is sought to raise the question of the power of the court to award costs the proper method is by motion to strike them from the judgment, and if the power is found not to exist the judgment may be corrected by striking out the costs.[12] If a judgment for costs is void it may be set aside on motion if made in time.[13]

2. In Appellate Court — a. Right of Review — (I) *Where Other Questions Than Costs Involved.* Where the proper steps have been taken there is no doubt that an appellate court can review and correct errors in an award for costs if there are other questions also involved in the appeal.[14]

(II) *Where No Questions Other Than Costs Involved* — (A) *In Equitable Actions.* In courts of equity the general rule, except where changed by statute, is that an appeal does not lie for the correction of errors in respect to costs only.[15] Even though additional errors are assigned, the judgment will not

against another defendant alone, and leaves open for future adjustment the costs between the other parties, it is error to subsequently charge another defendant with all the costs in the case. Williams *v.* Washington, 43 S. C. 355, 21 S. E. 259.

8. Dennison *v.* Yost, 61 Md. 139.

Where a demurrer is overruled "with ten dollars costs, payable by the defendant to the plaintiff," and it is further ordered that defendant have leave to answer within twenty days, "first paying said ten dollars," the payment is required only in the event that defendant neglects to answer over. Curtis *v.* Moore, 15 Wis. 134.

9. Lillis *v.* O'Conner, 8 Hun (N. Y.) 280; Cooley *v.* Cummings, 56 N. Y. Super. Ct. 521, 4 N. Y. Suppl. 530, 24 N. Y. St. 172, 17 N. Y. Civ. Proc. 145; Barney *v.* Keith, 6 Wend. (N. Y.) 555.

If a certificate is given by a referee before whom a cause was tried, it is not conclusive on the court which may review the grounds on which the certificate was granted. Davies *v.* Williams, 13 N. Y. Civ. Proc. 138.

10. Barney *v.* Keith, 6 Wend. (N. Y.) 555.

11. Clark *v.* Sullivan, 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 397, 31 N. Y. St. 756, 19 N. Y. Civ. Proc. 147. See also Manhattan R. Co. *v.* Youmans, 81 Hun (N. Y.) 82, 30 N. Y. Suppl. 566, 62 N. Y. St. 562.

A merely formal error in an award of costs may be amended by the trial court. Kiersted *v.* Rogers, 6 Harr. & J. (Md.) 282. See also State *v.* Turner, 8 Gill & J. (Md.) 125.

If no order granting a motion for a certificate that title to real estate is involved has been formally entered, the remedy is by motion to set aside the certificate and not by appeal. Cooley *v.* Cummings, 56 N. Y. Super. Ct. 521, 4 N. Y. Suppl. 530, 24 N. Y. St. 172, 17 N. Y. Civ. Proc. 145.

12. People *v.* Alden, 13 N. Y. Civ. Proc. 317.

13. *Ex p.* James, 59 Mo. 280.

Motion at subsequent term.— A motion to vacate a judgment for costs cannot be made at a term subsequent to that at which judgment was rendered. Noland *v.* Lock, 16 Ala. 52.

14. See Appeal and Error.

15. *New York.*— Rogers *v.* Holly, 18 Wend. 350; Eastburn *v.* Kirk, 2 Johns. Ch. 317.

South Carolina.— Lewis *v.* Wilson, 1 McCord Eq. 210.

Vermont.— Joslyn *v.* Parlin, 54 Vt. 670; Hastings *v.* Perry, 20 Vt. 272.

Virginia.— Ashby *v.* Kiger, 3 Rand. 165.

United States.— Du Bois *v.* Kirk, 158 U. S. 58, 15 S. Ct. 729, 39 L. ed. 895; *In re* Paper Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Glendale Elastic Fabric Co. *v.* Smith, 100 U. S. 110, 25 L. ed. 547; Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. ed. 688; Clarke *v.* Richmond, etc., Terminal R., etc., Co., 62 Fed. 328, 10 C. C. A. 387.

See 13 Cent. Dig. tit. "Costs," § 327.

An exception to the rule has been recognized where the appeal presents a mere question of statutory regulation in respect to the allowance or denial of costs (Smith *v.* Donelson, 3 Stew. & P. (Ala.) 393; Crosby *v.* Stephan, 97 N. Y. 606. See also The City of Augusta, 80 Fed. 297, 25 C. C. A. 430), or where the costs constituted a part of the relief sought by the bill or were erroneously charged upon an estate or fund (Crosby *v.* Stephan, 97 N. Y. 606). So where one item included in the decree is for clerk's fees in making and certifying transcript on a former

be reversed if the appeal can be sustained only on the ground of error in respect to costs.[16]

(B) *In Actions at Law.* In some jurisdictions appeal or error does not lie to correct a judgment merely on the ground of error in the award or refusal of costs.[17] In other jurisdictions it is held that the question of costs in legal actions and proceedings affect a substantial right and is reviewable whenever it is legitimately before the appellate court, unless the allowance of costs was discretionary.[18]

b. Methods of Obtaining Review. In equity suits the discretion of the court as to costs cannot be reviewed on motion, but only by an exception to the findings and an appeal from the judgment.[19]

c. Prerequisites of Review. To authorize a review of the action of the trial court in awarding or refusing to award costs, objection must be taken in the court below. Objections taken for the first time on appeal or error will not be considered.[20] So the party objecting to the award of costs should designate the

appeal, the appellate court may review the same on the merits. Blanks *v.* Klein, 78 Fed. 395, 24 C. C. A. 144.

16. Du Bois *v.* Kirk, 158 U. S. 58, 15 S. Ct. 729, 30 L. ed. 895. See also Crosby *v.* Stephan, 97 N. Y. 606, holding that the courts will not permit the rule to be evaded by coupling the appeal for costs with another ground, which was unfounded for the mere purpose of giving color to the appeal for costs.

17. Tandy *v.* Hatcher, 9 Ky. L. Rep. 721; Wood *v.* Weimar, 104 U. S. 786, 26 L. ed. 779. And see Wood *v.* Leach, 69 Me. 555, holding that a judgment is not reversible for erroneous taxation of costs. See also APPEAL AND ERROR, III, D, 3, e [2 Cyc. 479].

Where the costs incurred are trivial an appeal will not be tried on its merits for the purpose of determining the right to such costs. Thomas *v.* Craig, 60 Minn. 501, 62 N. W. 1133. See also State *v.* Horne, 119 N. C. 853, 26 S. E. 36, holding that where the subject-matter of the action has been destroyed by accident, compromise, or otherwise, the court will not try such case on the merits merely to determine which side should pay costs.

18. Crosby *v.* Stephan, 97 N. Y. 606; Sturgis *v.* Spofford, 58 N. Y. 103; McGregor *v.* Comstock, 19 N. Y. 581.

An order otherwise appealable is not the less so because it affects only costs. McGregor *v.* Comstock, 19 N. Y. 581.

In Alabama it has been held, without mentioning any special statutory authority, that where the successful party is improperly charged with costs, although he objected to such a judgment, the error is not a mere clerical mistake amendable on motion in the court rendering the judgment or in the supreme court at the costs of plaintiff in error, but is a ground for the reversal of the judgment. Beason *v.* Riddle, 11 Ala. 743.

In North Carolina where the question is whether a particular item is properly chargeable as costs (Morristown Mills Co. *v.* Lytle, 118 N. C. 837, 24 S. E. 530; Elliott *v.* Tyson, 117 N. C. 114, 23 S. E. 102; State *v.* Byrd, 93 N. C. 624), or whether taking the case below as rightfully decided the costs are properly adjudged (State *v.* Horn, 119 N. C. 853, 26 S. E. 36; Blount *v.* Simmons, 118 N. C. 9, 26 S. E. 923) these questions are reviewable on appeal.

19. Rosa *v.* Jenkins, 31 Hun (N. Y.) 384; Woodford *v.* Bucklin, 14 Hun (N. Y.) 444.

20. *California.*— Crane *v.* Forth, 95 Cal. 88, 30 Pac. 193.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 141, 35 N. E. 881, 887; Levy *v.* Berkowsky, 50 Ill. App. 537.

Indiana.— Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129.

Iowa.— Holton *v.* Butler, 22 Iowa 557.

Kentucky.— Churchill *v.* Rogers, Hard. 182.

Louisiana.— Blanc *v.* Cousin, 15 La. Ann. 294; Fulton *v.* Brown, 10 La. Ann. 350.

New York.— Stanton *v.* Taylor, 19 N. Y. Suppl. 43, 45 N. Y. St. 906.

North Carolina.— Hall *v.* Younts, 87 N. C. 285; Bynum *v.* Daniel, 63 N. C. 24.

Pennsylvania.— Convers *v.* Vanatta, 24 Pa. St. 257.

South Carolina.— Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743.

Texas.— Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

See 13 Cent. Dig. tit. "Costs," § 328.

Thus the point cannot be raised for the first time on appeal that the court erred in rendering judgment against appellant for costs (Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129), that the judgment is against only some of the defendants for costs and not also against a co-defendant (Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079), that the court acted erroneously in respect to costs of motions made in the progress of the cause below (Churchill *v.* Rogers, Hard. (Ky.) 182), or that plaintiffs are debarred from recovering costs because they violated an injunction in bringing suit (Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743).

In New Hampshire questions relating to allowance of costs are not open to revision at the law term, unless the question is referred to the law term by the presiding justice at the trial term. Nutter *v.* Varney, 64 N. H. 334, 10 Atl. 615; Griffin *v.* Auburn, 58 N. H.

alleged error therein, by pointing out the items and amounts which are erroneous;[21] and a modification of a report of a referee as to the matter of costs in a case where the taxation of costs is a matter of discretion cannot be reviewed where none of the testimony before the referee is preserved in the record.[22] If a party seeks to have only such part of an order reviewed as awards costs, he must so state specifically in his notice of appeal.[23]

d. Determination. In the absence of an affirmative showing of error it will be presumed that the action of the court below with respect to costs is correct.[24] Where costs are in the discretion of the trial court the judgment in respect to costs will not ordinarily be reviewed.[25]

I. Ownership of Costs Awarded. A judgment for costs cannot be rendered in favor of any one but a party to the suit. Such a judgment cannot be rendered on motion in favor of the officers of the court.[26] In some jurisdictions a judgment for costs in favor of a party is his absolutely, whether or not he has actually advanced such costs.[27] In other jurisdictions as between the party obtaining judgment for costs and the officers of court, the latter are owners of the costs to the extent of the fees due for their services. The owner of the judgment is merely a trustee for the officers, who are the equitable and actual owners of the costs.[28] In some jurisdictions witnesses stand on the same footing as officers of

121; Harvey *v.* Reeds, 49 N. H. 531; Smith *v.* Boynton, 44 N. H. 529; Bartlett *v.* Hodgdon, 44 N. H. 472.

21. Eigenmann *v.* Kerstein, 72 Ind. 81.

22. Hottenstein *v.* Conrad, 9 Kan. 435.

23. Croshy *v.* Stephan, 97 N. Y. 606.

24. *Illinois.*— Welch *v.* Wallace, 8 Ill. 490.

Iowa.— Minnesota Stone-Ware Co. *v.* Knapp, 75 Iowa 561, 39 N. W. 893.

Kansas.— See St. Louis, etc., R. Co. *v.* Miller, 18 Kan. 212.

New York.— Robertson *v.* Sayre, 134 N. Y. 97, 31 N. E. 250, 30 Am. St. Rep. 627, 45 N. Y. St. 588 [*affirming* 53 Hun 490, 6 N. Y. Suppl. 649, 25 N. Y. St. 449].

Texas.— Latham *v.* Taylor, 15 Tex. 247; Walling *v.* Kinnard, 10 Tex. 508, 60 Am. Dec. 216.

Wisconsin.— Lanyon *v.* Woodward, 65 Wis. 543, 27 N. W. 337.

See 13 Cent. Dig. tit. "Costs," § 329.

25. *Arkansas.*— Meadows *v.* Rogers, 17 Ark. 361.

Connecticut.— Canfield *v.* Bostwick, 22 Conn. 270.

Iowa.— Scott *v.* Cole, 27 Iowa 109.

New Hampshire.— Janvrin *v.* Scammon, 29 N. H. 280.

New York.— Cottle *v.* New York, etc., R. Co., 27 N. Y. App. Div. 604, 50 N. Y. Suppl. 1008; Le Roy *v.* Browne, 10 N. Y. Suppl. 328; *Ex p.* Nelson, 1 Cow. 417; Heath *v.* McInroy, 6 Johns. 277.

Vermont.— Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

United States.— Clarke *v.* Richmond, etc., Terminal R., etc., Co., 62 Fed. 328.

See 13 Cent. Dig. tit. "Costs," § 327.

To authorize a review there must be a manifest abuse of discretion. Meadows *v.* Rogers, 17 Ark. 361; Scott *v.* Cole, 27 Iowa 109.

26. Patterson *v.* Mobile Cir. Ct. Officers, 11 Ala. 740.

The assignment of a verdict before entry of judgment thereon is a nullity and an attempt to assign it will not carry costs. Lawrence *v.* Martin, 22 Cal. 173.

27. Hayes *v.* Boyer, 59 Ind. 341; Armsworth *v.* Scotten, 29 Ind. 495; Kershaw *v.* Delahoussaye, 9 Rob. (La.) 77; Williams *v.* Gallien, 1 Rob. (La.) 94; De la Garza *v.* Carolan, 31 Tex. 387.

Thus the party recovering judgment for costs has the right to control and receive the money so recovered in the same way as he would control any other money judgment. Armsworth *v.* Scotten, 29 Ind. 495. As a consequence a payment of the judgment for costs to the clerk is not a payment to the party entitled to costs. Hayes *v.* Boyer, 59 Ind. 341. And where plaintiff in execution buys in the property, the sheriff has no right to resell it on his refusal to pay his costs. Kershaw *v.* Delahoussaye, 9 Rob. (La.) 77. If plaintiff recovers judgment and defendant pays him the officer's costs, this does not discharge defendant from liability to them. Ellsbre *v.* Ellsbre, 28 Pa. St. 172.

28. *Missouri.*— Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; State *v.* Ashbrook, 40 Mo. App. 64.

Pennsylvania.— Ellsbre *v.* Ellsbre, 28 Pa. St. 172; Moyer *v.* Opie, 23 Pittsb. Leg. J. 17.

South Carolina.— Scharlock *v.* Oland, 1 Rich. 207; Corrie *v.* Jacobs, Harp. 326; Corrie *v.* Givens, 3 McCord 25.

Tennessee.— Carey *v.* Campbell, 3 Sneed 62; Smith *v.* Van Bebber, 1 Swan 110.

United States.— Aiken *v.* Smith, 57 Fed. 423, 6 C. C. A. 414; Collins *v.* Hathaway, 6 Fed. Cas. No. 3,014, Olcott 176.

See 13 Cent. Dig. tit. "Costs," § 330 *et seq.*

As a consequence the court will uphold their right to the costs against acts of the owner of the judgment to their prejudice. Moyer *v.* Opie, 23 Pittsb. L. J. (Pa.) 17; Collins *v.* Hathaway, 6 Fed. Cas. No. 3,014,

court,[29] while in others the owner of the judgment is entitled to the fees and mileage of his witnesses.[30]

XXII. TAXATION AND CORRECTION OF ERRONEOUS TAXATION.

A. Necessity For Taxation. The party entitled to costs must make application to have his costs taxed.[31] Judgment is not perfected until costs have been taxed and inserted therein.[32] The court cannot pass upon a disputed item before there has been a taxation of costs.[33]

B. By Whom Taxed. The award of costs is the act of the court;[34] but in practically all jurisdictions the clerk of the court in which the action is pending taxes the costs,[35] subject to the revision and control of the court, on appropriate

Olcott 176. A release and execution of satisfaction of the judgment by him will not be permitted to deprive them of their costs. State *v.* Ashbrook, 40 Mo. App. 64; Scharlock *v.* Oland, 1 Rich. (S. C.) 207.

29. Garrett *v.* Cramer, 14 Mo. App. 401; Carey *v.* Campbell, 3 Sneed (Tenn.) 62.

30. Hartley *v.* Hoppee, 3 Pa. Dist. 770, 3 Lack. Jur. (Pa.) 337; Sims *v.* Anderson, 1 Hill (S. C.) 394. To the same effect see Howard Bldg., etc., Assoc. *v.* Philadelphia, etc., R. Co., 102 Pa. St. 220; Howell *v.* Withers, 1 Pa. Dist. 62; Thomas *v.* Burnett, 21 Pittsb. Leg. J. (Pa.) 13, 2 Luz. Leg. Reg. (Pa.) 155.

31. Angier *v.* Hager, 51 N. Y. App. Div. 171, 64 N. Y. Suppl. 692; Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87; Conners *v.* Osborn, 4 Wis. 280.

32. Lentilhon *v.* New York, 3 Sandf. (N. Y.) 721; McMahon *v.* Allen, 7 Abb. Pr. (N. Y.) 1; Hunt *v.* Middlebrook, 14 How. Pr. (N. Y.) 300; Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87; Cord *v.* Southwell, 15 Wis. 211.

Until this is done it is not appealable. Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87; Smith *v.* Hart, 44 Wis. 230.

Time of inserting costs in judgment.— In one jurisdiction where the statute requires insertion of costs in the judgment two days after taxation, it was held that the statute was merely directory and did not prevent their entry after the expiration of two days. Smith *v.* Nelson, 23 Utah 512, 65 Pac. 485. In another, where a similar requirement obtains, it was held that an insertion by the clerk of costs in the judgment three years after taxation is void. Orr *v.* Haskell, 2 Mont. 350.

33. Swift *v.* Kelly, 2 Wend. (N. Y.) 623. And see Bedel *v.* Goodall, 26 N. H. 92.

It is improper to include in an execution a gross sum as costs which have not been taxed. Bogar *v.* Walker, 89 Ill. App. 457.

34. Baltimore *v.* Baltimore County Com'rs, 19 Md. 554. See also *supra*, XXI, C.

As to taxation by bankruptcy court see BANKRUPTCY, II, B, 15 [5 Cyc. 248].

35. *Illinois.*— Bogar *v.* Walker, 89 Ill. App. 457.

Indiana.— Pittsburgh, etc., R. Co. *v.* Elwood, 79 Ind. 306; Palmer *v.* Glover, 73 Ind. 529.

Kentucky.— Ellison *v.* Stevenson, 6 T. B. Mon. 271.

Maryland.— Baltimore *v.* Baltimore County Com'rs, 19 Md. 554.

Massachusetts.— Dodd *v.* Lewis, 10 Mass. 26.

Michigan.— Beem *v.* Newaygo Cir. Judge, 97 Mich. 491, 56 N. W. 760; Abbott *v.* Mathews, 26 Mich. 176.

Mississippi.— Court Officers *v.* Fish, 7 How. 403.

New York.— O'Loughlin *v.* Hammond, 12 N. Y. Civ. Proc. 170; Matthews *v.* Matson, 3 N. Y. Civ. Proc. 157; Higgins *v.* Callahan, 2 N. Y. Civ. Proc. 302; McMahon *v.* Mutual Ben. L. Ins. Co., 8 Abb. Pr. 297; People *v.* Colborne, 20 How. Pr. 378; Van Schaick *v.* Winne, 8 How. Pr. 5; Mitchell *v.* Westervelt, 6 How. Pr. 265.

Pennsylvania.— The rule of the common pleas providing that all bills of costs shall be taxed in the first instance by the prothonotary if taxation be required, subject to an appeal to the court, is a proper exercise of the power of the court to make rules for the orderly and convenient despatch of business. Becker *v.* Goldschild, 9 Pa. Super. Ct. 50.

South Carolina.— Bradley *v.* Rodelsperger, 6 S. C. 290.

See 13 Cent. Dig. tit. "Costs," § 753.

After remand by appellate court.— Where judgment has been entered in the circuit court for the damages found by the jury and costs, leaving a blank for the amount of the costs, and the cause is affirmed by the supreme court, and mandate issued in the court below, the costs are properly taxed in the court below and the amount inserted in the blank. Sizer *v.* Many, 16 How. (U. S.) 98, 14 L. ed. 861.

Taxation of costs is nothing more than the exercise of a ministerial power, involving in some degree the use of judgment and discretion, like that of auditing officers, and is not imposed in the first instance on any court of record (Abbott *v.* Matthews, 26 Mich. 176. And see Pittsburg, etc., R. Co. *v.* Elwood, 79 Ind. 306), which as a general rule has not the power to tax costs (Bogar *v.* Walker, 89 Ill. App. 457; Beem *v.* Newaygo Cir. Judge, 97 Mich. 291, 56 N. W. 760; O'Loughlin *v.* Hammond, 12 N. Y. Civ. Proc. 170; Matthews *v.* Matson, 3 N. Y. Civ. Proc. 157).

proceedings taken to obtain a retaxation in case of error.[36] A bill of costs taxed by the clerk has the authority of a judgment.[37]

C. Notice of Taxation — 1. Necessity. Ordinarily the statutes require notice of taxation to be served on the opposite party.[38] A judgment for costs without such notice is irregular. It is, however, subject to correction or modification by readjustment or retaxation.[39]

2. Requisites and Sufficiency — a. In General. If the statute prescribes personal service service by mail is invalid.[40] So the service will be held insufficient where the affidavit merely states that it was left "with a person then in charge" of the attorney's office, without giving his name or stating whether it was his clerk or whether the attorney himself was absent.[41] Taxation made after the day noticed has been held irregular if made without a new notice to the opposing attorney.[42]

b. By Whom Given. If the statute does not prescribe who shall give notice, it has been held that it may be given by the clerk of court.[43]

3. Time of Giving. The time of giving notice is usually a matter of statutory regulation.[44] The giving of notice before entry of judgment is a mere irregularity which does not render the notice invalid.[45]

4. Waiver of Defects. Irregularity in the notice will not be deemed waived by the appearance of defendant's counsel before the clerk, when made under protest on his part;[46] but where it appears from the record that on plaintiff's motion to set aside the taxation of costs defendants gave plaintiff notice that they consented to a retaxation at any time plaintiff might name, and offered to remit

36. Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271; Baltimore *v.* Baltimore County Com'rs, 19 Md. 554; Court Officers *v.* Fish, 7 How. (Miss.) 403; Wooley *v.* Robinson, 52 N. C. 30.

37. Court Officers *v.* Fisk, 7 How. (Miss.) 403.

38. *California.*— Riddell *v.* Harrell, 71 Cal. 254, 12 Pac. 67.

New York.— Doke *v.* Peek, 1 Code Rep. 54.

Pennsylvania.— Carter *v.* Salter, 1 Del. Co. 403.

South Carolina.— Price *v.* McGee, 1 Brev. 455.

Wisconsin.— Perkins *v.* Davis, 16 Wis. 470; Cord *v.* Southwell, 15 Wis. 211.

See 13 Cent. Dig. tit. "Costs," § 765.

39. *California.*— Failure to give notice renders the taxation absolutely void. Riddell *v.* Harrell, 71 Cal. 254, 12 Pac. 67.

Illinois.— Goodwillie *v.* Millimann, 56 Ill. 523.

Minnesota.— Jakobsen *v.* Wigin, 52 Minn. 6, 53 N. W. 1016.

New York.— Stimson *v.* Huggins, 16 Barb. 658; Brady *v.* New York, 1 Sandf. 569; Potter *v.* Smith, 9 How. Pr. 262; Mitchell *v.* Hall, 7 How. Pr. 490; Dix *v.* Palmer, 5 How. Pr. 233. But see Northrop *v.* Van Dusen, 5 How. Pr. 134; Mabbett *v.* Kelly, 2 How. Pr. 62; Jackson *v.* Varick, 7 Cow. 412.

Oregon.— *Compare* Rader *v.* Barr, 37 Oreg. 453, 61 Pac. 1027, 1127.

See 13 Cent. Dig. tit. "Costs," § 765.

40. Thompson *v.* Brannan, 76 Cal. 618, 18 Pac. 783.

Taxation of costs on insufficient notice is not absolutely void. Lindholm *v.* Itasca Lumber Co., 64 Minn. 46, 65 N. W. 931.

41. Johnson *v.* Curtis, 51 Wis. 595, 8 N. W. 489.

42. Bissell *v.* Dayton, 2 How. Pr. (N. Y.) 80; Morris *v.* Sliter, 2 How. Pr. (N. Y.) 36.

If the party does not appear on the day for which notice is given and the costs are not then taxed, they may be taxed afterward without further notice. Cooper *v.* Astor, 1 Johns. Cas. (N. Y.) 32.

43. Cureton *v.* Westfield, 24 S. C. 457.

44. See the statutes of the several states.

How time computed.— Where costs were taxed on October 30, upon a notice dated and served on the twenty-eighth of the month, the notice was sufficient under a statute providing that the clerk shall insert in the entry of judgment on the application of the prevailing party upon two days' notice to the other, the sum of the charges for costs. Diederich *v.* Nachsheim, 33 Wis. 225.

45. Murphy *v.* Mulvena, 108 Mich. 347, 66 N. W. 224.

A notice given before the right to receive costs was established is not invalid, provided the right to such costs as were noticed existed at the date for which the notice was given. Anonymous, 4 Sandf. (N. Y.) 693.

Where notice served on an attorney residing at a distance is so short that the party serving the notice has cause to believe that the attorney will be unable to attend on the taxation, such attorney will not be concluded by his failure to appear, although the notice was technically regular. Goodyear *v.* Baird, 11 How. Pr. (N. Y.) 377.

46. Gildersleeve *v.* Halsey, 3 Sandf. (N. Y.) 756, Code Rep. N. S. (N. Y.) 126.

any items adjudged improper, and that plaintiff has failed to avail himself of such offer, the judgment will not be set aside on appeal for failure to give proper notice of such taxation.[47]

5. Who Entitled to Notice. A party who appears but makes no answer is entitled to notice of taxation,[48] and so is any person who is liable to pay costs,[49] although not a party to the action.[50]

D. Memorandum or Bill of Costs — 1. Necessity. Ordinarily a memorandum or bill of costs is required to be filed by the successful party;[51] and when it conforms to the requirements of the statute and is verified, it is *prima facie* evidence that the items specified are properly taxable, and the burden is upon the party disputing its correctness to show that it was improper.[52]

2. Form and Requisites — a. Setting Forth Items — (i) *In General.* No item of costs or disbursements not set forth in the memorandum or bill of costs will be allowed,[53] except where the statute provides that specified items need not be included in the memorandum.[54] Each item must be separately set forth.[55] So it must contain only items which the claimant has paid or is liable to pay.[56]

(ii) *Witness' Fees.* To authorize an allowance of witness' fees, the names of the witnesses should be given,[57] and the fees of each witness separately stated.[58] The time during which the witness was in attendance must also be given,[59] and

47. Joint School-Dist. No. 7 *v.* Kemen, 72 Wis. 179, 39 N. W. 131.

48. Elson *v.* New York Equitable Ins. Co., 2 Sandf. (N. Y.) 654.

49. Matter of Moss, 6 How. Pr. (N. Y.) 263.

Person not entitled to costs.— A party who has answered disclaiming any interest and demanding costs, and whose answer has been stricken out as frivolous and against whom no further proceedings are taken, has no right to notice of taxation, as he is not entitled to costs. Adams *v.* Myers, 61 Wis. 385, 21 N. W. 250.

50. State *v.* Marshall, 28 S. C. 559, 6 S. E. 564.

51. Chapin *v.* Broder, 16 Cal. 403; Matter of Brown, 65 How. Pr. (N. Y.) 461.

52. Meyer *v.* San Diego, 132 Cal. 35, 64 Pac. 124; San Francisco *v.* Collins, 98 Cal. 259, 33 Pac. 56; Barnhart *v.* Kron, 88 Cal. 447, 26 Pac. 210; Herr *v.* Keemer, 1 Lanc. L. Rev. 337; Colusa Parrot Min., etc., Co. *v.* Anaconda Copper-Min. Co., 104 Fed. 514. But see Miller *v.* Hottenstein, 1 Woodw. (Pa.) 236.

53. Hotchkiss *v.* Smith, 108 Cal. 285, 41 Pac. 304; McKinney *v.* Roberts, (Cal. 1885) 8 Pac. 3. And see German Ins. Co. *v.* Eddy, 37 Nebr. 461, 55 N. W. 1073.

54. Butte First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829.

55. *In re* Central Park Case, 12 Abb. Pr. (N. Y.) 107; Shannon *v.* Brower, 2 Abb. Pr. (N. Y.) 377; Rogers *v.* Rogers, 2 Paige (N. Y.) 458; Walker *v.* Goldsmith, 16 Oreg. 161, 17 Pac. 865; Cross *v.* Chichester, 4 Oreg. 114; Wilson *v.* Salem, 3 Oreg. 482; Crawford *v.* Abraham, 2 Oreg. 163; Hopkins *v.* Godbehire, 2 Yerg. (Tenn.) 241; Hopkins *v.* Waterhouse, 2 Yerg. (Tenn.) 230; Beckwith *v.* Easton, 3 Fed. Cas. No. 1,212, 4 Ben. 357. See also Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710.

56. Crawford *v.* Abraham, 2 Oreg. 163.

It is not essential that the costs should have been actually paid.— It is sufficient that the party applying to have them taxed is liable therefor. Howard *v.* Stent, 2 Bailey (S. C.) 272.

57. *Michigan.*— Jeffery *v.* Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

New York.— Jones *v.* Van Ranst, 2 Hall 530; Hicks *v.* Brennan, 10 Abb. Pr. 304; Taaks *v.* Schmidt, 25 How. Pr. 340; Toll *v.* Thomas, 15 How. Pr. 315; Haynes *v.* Mosher, 15 How. Pr. 216; Wheeler *v.* Lozee, 12 How. Pr. 446; La Farge *v.* Luce, 1 Wend. 73. See also Cheever *v.* Pittsburgh, etc., R. Co., 74 Hun 539, 26 N. Y. Suppl. 829, 57 N. Y. St. 188.

Pennsylvania.— Baumgardner *v.* Shoff, 2 Del. Co. 76.

Utah.— Cole *v.* Ducheneau, 13 Utah 42, 44 Pac. 92.

Wisconsin.— See Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697.

See 13 Cent. Dig. tit. "Costs," § 774.

58. Houston, etc., R. Co. *v.* Jones, 46 Tex. 133; Perry *v.* Harris, 1 Tex. App. Civ. Cas. § 478.

59. *Idaho.*— Stickney *v.* Berry, (1900) 62 Pac. 924.

Michigan.— Jeffery *v.* Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

Minnesota.— Andrews *v.* Cressy, 2 Minn. 67.

New York.— Shufelt *v.* Rowley, 4 Cow. 58; Jackson *v.* Scott, 6 Johns. 330.

Pennsylvania.— Baumgardner *v.* Shoff, 2 Del. Co. 76; Herr *v.* Keemer, 1 Lanc. L. Rev. 58.

Tennessee.— Hopkins *v.* Godbehire, 2 Yerg. 241.

Utah.— Cole *v.* Ducheneau, 13 Utah 42, 44 Pac. 92.

See 13 Cent. Dig. tit. "Costs," § 774.

Where a defendant corporation asks to tax as costs fees and mileage of its officers summoned as witnesses in the case the affidavit

the distance traveled if mileage is asked.[60] All statutory requirements,[61] such as a certificate that the witnesses were material and necessary,[62] a certificate of travel and attendance by the witness,[63] or a statement showing the residence of the witness,[64] must be observed. It need not be alleged in terms that the fees of the witnesses have been paid.[65] But if a party claims witness' fees for his attendance as a witness, his affidavit that he attended solely as a witness should be required in addition to any other proof, as no one but himself can swear positively that he was not attracted to the trial by his interest in the case.[66]

(III) *Fees For Service of Process.* To authorize recovery for service of subpœnas the names and number of the persons on whom the subpœnas were served should be given and the distance traveled by the officer who served them.[67]

(IV) *Cost of Documents.* Items for copies of documents cannot be allowed without an affidavit that they were necessarily used or obtained for use.[68]

(V) *Fees of Referee.* Where opposition is made on taxation of costs to the disbursements for referee's fees, the charge should be supported by an affidavit showing the number of days spent in the business of the reference and that they were so spent necessarily. The general affidavit of disbursements or a mere certificate by the referee to the number of sittings is not sufficient.[69]

b. Verification. The memorandum or bill of costs should contain a proper

must distinctly show not only that the witnesses have attended but that the fees have been or will be paid. Cheever *v.* Pittsburgh, etc., R. Co., 74 Hun (N. Y.) 539, 26 N. Y. Suppl. 829, 57 N. Y. St. 188.

60. *Idaho.*— Stickney *v.* Berry, (1900) 62 Pac. 924.

Michigan.— Jeffery *v.* Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

Minnesota.— Merriman *v.* Bowen, 35 Minn. 297, 28 N. W. 921.

New York.— Lawson *v.* Hill, 66 Hun 288, 20 N. Y. Suppl. 904, 49 N. Y. St. 251. See also Inderlied *v.* Whaley, 4 Silv. Supreme 29, 7 N. Y. Suppl. 74, 26 N. Y. St. 7; Logan *v.* Thomas, 11 How. Pr. 160; Schermerhorn *v.* Van Voast, 5 How. Pr. 458, Code Rep. N. S. 400; Shufelt *v.* Rowley, 4 Cow. 58; Lyon *v.* Wilkes, 1 Cow. 591; Jackson *v.* Scott, 6 Johns. 330; Rogers *v.* Rogers, 2 Paige 458.

Pennsylvania.— Baumgardner *v.* Shoff, 2 Del. Co. 76; Herr *v.* Keemer, 1 Lanc. L. Rev. 58.

Tennessee.— Hopkins *v.* Godbehire, 2 Yerg. 241.

Utah.— Cole *v.* Ducheneau, 13 Utah 42, 44 Pac. 92.

See 13 Cent. Dig. tit. "Costs," § 774.

An affidavit which shows that the witness who attended resided at a specified distance from the place of trial is not sufficient. Logan *v.* Thomas, 11 How. Pr. (N. Y.) 160; Schermerhorn *v.* Van Voast, 5 How. Pr. (N. Y.) 458, Code Rep. N. S. (N. Y.) 400.

61. Under a statute providing that a party obtaining an adjournment may be required to pay witness' fees already made or incurred which have been rendered ineffectual by the adjournment, an affidavit made upon an adjournment showing the names of persons who have been subpœnaed, the places where subpœnaed, and the number of miles such places are distant from the place of trial, but not the residences of such persons, the distance each must have necessarily traveled, when they had been subpœnaed, or that their fees had been paid or incurred, is not sufficient to justify taxation of their fees as costs. Lawson *v.* Hill, 66 Hun (N. Y.) 288, 20 N. Y. Suppl. 904, 49 N. Y. St. 251.

62. O'Loughlin *v.* Hammond, 12 N. Y. Civ. Proc. 171; Hicks *v.* Brennan, 10 Abb. Pr. (N. Y.) 304; Wheeler *v.* Lozee, 12 How. Pr. (N. Y.) 446; Dean *v.* Williams, 6 Hill (N. Y.) 376. See also Durant *v.* Abendroth, 15 N. Y. St. 342; Wills *v.* Lance, 28 Oreg. 371, 43 Pac. 384, 487.

In Minnesota if the witnesses are for any cause not sworn and an allowance of their fees is objected to, there must be an affidavit stating facts which show the necessity of having them in attendance. Osborne *v.* Gray, 32 Minn. 53, 19 N. W. 81.

63. Bacon *v.* Crandon, 15 Pick. (Mass.) 79; Clark *v.* Linsser, 1 Bailey (S. C.) 187.

Where the certificate of a witness is attended with suspicious circumstances the court will require an explanatory affidavit. Cook *v.* Holmes, 1 Mass. 295.

64. Merriman *v.* Bowen, 35 Minn. 297, 28 N. W. 921; Taaks *v.* Schmidt, 25 How. Pr. (N. Y.) 340; Haynes *v.* Mosher, 15 How. Pr. (N. Y.) 216; Wheeler *v.* Lozee, 12 How. Pr. (N. Y.) 446; Cole *v.* Ducheneau, 13 Utah 42, 44 Pac. 92.

65. Chiatovich *v.* Hanchett, 93 Fed. 727.

66. Bronner *v.* Frauenthal, 20 How. Pr. (N. Y.) 355, 12 Abb. Pr. (N. Y.) 183.

67. Baumgardner *v.* Shoff, 2 Del. Co. (Pa.) 76; Herr *v.* Keemer, 1 Lanc. L. Rev. 58; Brown *v.* Brown, 12 Lanc. Bar (Pa.) 114; Cole *v.* Ducheneau, 13 Utah 42, 44 Pac. 92.

68. Duncombe *v.* Richards, 47 Mich. 646, 11 N. W. 186; Maxwell *v.* Bay City Bridge Co., 42 Mich. 67, 51 N. W. 963; Adams *v.* Ward, 60 How. Pr. (N. Y.) 288.

69. Brown *v.* Windmuller, 14 Abb. Pr. N. S. (N. Y.) 359.

verification of the disbursements,[70] showing that they were necessarily paid or incurred.[71] In some jurisdictions the attorney may make the verification.[72]

3. TIME OF FILING. The time of filing a memorandum or bill of costs is usually a matter of statutory regulation.[73] A cost bill filed before judgment is premature and will be stricken out.[74] Under the statutes of a number of jurisdictions failure to file the memorandum in the time prescribed by statute operates as a waiver of the rights to costs,[75] unless a good excuse is shown. The determination of what constitutes such excuse is within the discretion of the trial court.[76] Where a statute provides that the successful party shall file his memorandum within five days after the verdict or notice of the decision of the court, the fact that no notice of the decision is served on the successful party does not excuse him from filing his memorandum within five days after he has knowledge of the decision. Actual knowledge does away with the necessity of notice.[77] If the memorandum is pre-

70. Walker *v.* Goldsmith, 16 Oreg. 161, 17 Pac. 865; Cross *v.* Chichester, 4 Oreg. 114; Crawford *v.* Abrahams, 2 Oreg. 163.

71. Andrews *v.* Cressy, 2 Minn. 67; Beckwith *v.* Easton, 20 Fed. Cas. No. 1,212, 14 Ben. 357. See also Jerman *v.* Stewart, 12 Fed. 271.

It is insufficient to state that the items have been paid and incurred without further stating that they were necessary. Andrews *v.* Cressy, 2 Minn. 67.

72. Burnham *v.* Hays, 3 Cal. 115, 58 Am. Dec. 389; Morris *v.* Rodgers, 26 Oreg. 577, 38 Pac. 931.

Person not attorney of record.— A statute requiring a cost bill to be "verified by the oath of the party or his attorney or agent or by the clerk of his attorney" is sufficiently complied with when the affidavit is made by one who is familiar with the facts and assisted at the trial, although not an attorney of record. Yorba *v.* Dobner, 90 Cal. 337, 27 Pac. 185.

A mere authentication by the certificate of counsel that he thinks the items are correct is not sufficient. Triebel *v.* Deysher, 2 Woodw. (Pa.) 55.

73. See the statutes of the several states.

Computation of time.— Where the memorandum is required to be filed within five days after judgment, the time shall be computed by excluding the first day and also the last day when it falls on Sunday. Nicklin *v.* Robertson, 28 Oreg. 278, 22 Pac. 993, 52 Am. St. Rep. 790.

A rule of court providing that when a cause is continued the bill of costs for attendance of witnesses must be filed within four days or it will not be allowed is not unreasonable. Flisher *v.* Allen, 141 Pa. St. 525, 21 Atl. 672, 28 Wkly. Notes Cas. (Pa.) 8.

74. Sellick *v.* De Carlow, 95 Cal. 644, 30 Pac. 795.

Before decision on appeal.— Where defendant before trial offered to let judgment go for a certain amount, and on the trial plaintiff recovered less than said amount but appealed, a motion by defendant to tax the costs against plaintiff was premature when made before the appeal had been determined. Book *v.* Chicago, etc., R. Co., 72 Mo. App. 76.

75. *California.*— Dow *v.* Ross, 90 Cal. 562, 27 Pac. 409; O'Neil *v.* Donahue, 57 Cal. 226; Abila *v.* Padilla, 19 Cal. 388.

Idaho.— Stickney *v.* Berry, (1900) 62 Pac. 924.

Maine.— Allen *v.* Haskell, 31 Me. 589.

Nevada.— State *v.* Ormsby County First Judicial Dist. No. 1,601, (1901) 66 Pac. 743.

Washington.—Matheson *v.* Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955.

Wisconsin.— Fox River Flour, etc., Co. *v.* Kelley, 70 Wis. 305, 35 N. W. 542; McDonough *v.* Milwaukee, etc., R. Co., 69 Wis. 358, 34 N. W. 120.

See 13 Cent. Dig. tit. "Costs," § 771.

76. Farley *v.* Bryant, 41 Me. 400.

Forgetfulness or press of business constitutes no excuse. Dow *v.* Ross, 90 Cal. 562, 27 Pac. 409.

77. Dow *v.* Ross, 90 Cal. 562, 27 Pac. 409; Mullally *v.* Irish-American Benev. Soc., 69 Cal. 559, 11 Pac. 215; O'Neil *v.* Donahue, 57 Cal. 226. See also Matheson *v.* Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955. *Compare* Spoor *v.* Riverside County, 113 Fed. 26, holding that under the rule of the circuit court for the ninth circuit which requires a party in whose favor a judgment or decree is rendered, and who claims costs, to file and serve a memorandum of his costs and disbursements within five days after rendition of the verdict, or "after notice of the decision of the court," and which further provides that "notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party," the five days do not begin to run in an equity case until notice has been received in one of the three ways specified. It is not sufficient that the solicitor had actual knowledge of the decision, or that his clerk or representative was present at the announcement. The word "decision" as used in the statute will be construed to mean the finding of facts and conclusions of law, signed by the court and filed with the clerk as a basis of the judgment. Porter *v.* Hopkins, 63 Cal. 53; Sholes *v.* Stead, 2 Nev. 107.

sented to the clerk in time it will not be stricken out because the clerk without notice to the party did not file it because a former item of costs was unpaid.[78]

4. Amendment. Where the memorandum has been filed within the time limited, the court may on a proper showing allow it to be amended,[79] but such amendment will not be permitted unless mistake, inadvertence, or excusable neglect be shown.[80] If a bill of costs is filed which does not comply with the statute, and within the time allowed by law a second one is filed in proper form, costs are properly taxed under the second bill, the action of the court being equivalent to the allowance of an amendment.[81]

E. Objections to Taxation. On application for taxation the proofs presented by the applicant, although conforming with the requirements, are not conclusive, but may be opposed by proof on the part of the adverse party or person interested in reducing the amount of costs.[82] The mode of stating objections to taxation if not prescribed by statute is a matter of practice to be regulated by the court in which the objections originate.[83] Where notice of the objections must be given the opposite party, no other objections than those specified will be considered.[84]

F. Hearing and Determination — 1. Powers and Duties of Taxing Officer. The sole duty of the taxing officer in relation to the costs is to ascertain and determine which items of costs and disbursements the party presenting costs for adjustment is entitled to.[85] He has no power to decide whether any costs at all can be given,[86] and he can allow no items not claimed.[87] Whether the taxation is opposed or not he should satisfy himself that the items proposed for taxation are correct,[88] and that statutory requirements with regard to taxation are complied with;[89] and if he discovers illegal items,[90] or such as were unreasonably or unnecessarily incurred,[91] he should disallow them. He must decide questions of fact

78. Beck *v.* Pasadena Lake Vineyard Land, etc., Co., 130 Cal. 50, 62 Pac. 219.

79. Burnham *v.* Hays, 3 Cal. 115, 58 Am. Dec. 389; State *v.* First Judicial Dist. Ct., 26 Nev. 253, 66 Pac. 743; Willis *v.* Lance, 28 Oreg. 371, 43 Pac. 384, 487.

An amendment relates back to the time of filing. Galindo *v.* Roach, 130 Cal. 389, 62 Pac. 597.

80. Burnham *v.* Hays, 3 Cal. 115, 58 Am. Dec. 389.

The court will not, after an order made retaxing costs and finding that defendant's affidavits were insufficient to entitle him to certain items of cost, permit defendant to amend his affidavits where the granting of such permission will entitle plaintiff to a larger allowance of costs than the amount of such items, it being inferred that defendant has a concealed purpose in asking for something to his disadvantage. Ball *v.* Sprague, 23 How. Pr. (N. Y.) 241.

81. Smith *v.* Nelson, 23 Utah 512, 65 Pac. 485.

82. Crosley *v.* Cobb, 37 Hun (N. Y.) 271.

83. Davidson *v.* Lamprey, 17 Minn. 32.

Objections not filed within the time required will not be considered in the absence of a reasonable excuse. Hislop *v.* Moldenhauer, 24 Oreg. 106, 32 Pac. 1026; Walker *v.* Goldsmith, 16 Oreg. 161, 17 Pac. 865; Com. *v.* Selznick, 20 Pa. Co. Ct. 128. And see Cord *v.* Southwell, 15 Wis. 211.

In New York affidavits opposing taxation should be presented to the taxing officer at the time of taxation. Comly *v.* New York, 1 N. Y. Civ. Proc. 306.

In Oregon it has been held that objections to items claimed as disbursements must be to each item separately and the reason of such objection clearly stated. Walker *v.* Goldsmith, 16 Oreg. 161, 17 Pac. 865; Wilson *v.* Salem, 3 Oreg. 482. So an objection to the taxation of mileage for a witness on the ground that he voluntarily attended from outside the county without an order of the court does not raise the question that the oral examination of such witness was unnecessary. Spencer *v.* Peterson, 41 Oreg. 237, 68 Pac. 1108.

84. State *v.* Allen, 26 N. J. L. 145.

85. Bailey *v.* Stone, 41 How. Pr. (N. Y.) 346; Yeagley *v.* Wenger, 5 Luz. Leg. Rec. (Pa.) 119. And see Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271.

86. Yeagley *v.* Wenger, 5 Luz. Leg. Reg. 119.

87. Bryan *v.* Buckmaster, 1 Ill. 408.

88. Crosley *v.* Cobb, 37 Hun (N. Y.) 271.

In Oregon it has been held that where no objections were filed to a statement of costs the clerk has no discretion in allowing the items therein contained. Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

89. Rogers *v.* Rogers, 2 Paige (N. Y.) 458.

90. Crosley *v.* Cobb, 37 Hun (N. Y.) 271; Stimson *v.* Huggins, 16 Barb. (N. Y.) 658.

91. Delcomyn *v.* Chamberlain, 48 How. Pr. (N. Y.) 409.

raised by conflicting affidavits.[92] If the statute require the costs of the parties to be taxed and entered on the record separately it is improper for him to enter up all the costs in one general fee bill.[93]

2. Evidence — a. In General. If items claimed are disputed the right thereto must be affirmatively shown by affidavit or otherwise to justify allowance.[94] If affidavits are presented showing that certain witnesses for whom fees were charged were not called or were not in attendance, such fees should be disallowed in the absence of proof that such witnesses were necessary or showing why they were not called.[95] In the absence of proof to the contrary the return of a constable on a subpœna is evidence of its service and of his right to fees for serving it.[96] Oral evidence has been held competent to contradict an affidavit of service of an offer of judgment, in a case where such offer is important in determining the right to costs.[97] If objection to taxation is based on the prolixity of the papers taxed, the objecting party should furnish the taxing officer with the means of deciding the question.[98]

b. Presumptions and Burden of Proof. Presumptions are in favor of the correctness of a cost bill, prepared in accordance with the statutory requirements, if not controverted,[99] except where it contains items which on their face appear to be incorrect.[1] If, however, the items are denied by affidavit, the burden of proof is on the party claiming the costs.[2] The fact that certain items appear from the taxation to be unpaid is no objection to their allowance, as it will be presumed that liability has been incurred therefor.[3]

G. Correction of Erroneous Taxation — 1. In Lower Court — a. Jurisdiction. Proceedings to retax must as a general rule be heard before the court of which the clerk who taxed the costs is an officer;[4] and it has been held that a motion for retaxation can only be entertained in open court and not by a judge

92. Crosley *v.* Cobb, 37 Hun (N. Y.) 271.

93. Wallace *v.* Flierschman, 22 Nebr. 203, 34 N. W. 372.

An objection that the cost bill is unintelligible because of abbreviations therein should not be sustained, if it can nevertheless be understood by the court or officer taxing the costs. Myers *v.* Shoneman, 90 Ill. 80. And see Hyer *v.* Caro, 18 Fla. 694.

94. Shultz *v.* Whitney, 9 Abb. Pr. (N. Y.) 71, 17 How. Pr. (N. Y.) 471.

95. Rohitzek *v.* Hect, 3 N. Y. Civ. Proc. 156; Dowling *v.* Bush, 6 How. Pr. (N. Y.) 410. And see Miller *v.* Lyon, 6 Allen (Mass.) 514; Hite *v.* Chittenden, 1 N. Y. Leg. Obs. 360.

Probative force of evidence.— In a proceeding to tax, evidence consisting of the usual affidavit attached to the bill of costs is not disproved by evidence that like mileage for some witnesses had been taxed by plaintiff in another action. Lyman *v.* Young Men's Cosmopolitan Club, 38 N. Y. App. Div. 220, 56 N. Y. Suppl. 712.

Where there were two cases between the same parties and the witnesses attended on subpœnas, not having the exact title of either case, in taxing the costs of such witnesses it must be left to them to say upon oath in which of the cases they were respectively subpœnaed. Bogan *v.* White, Dudley (S. C.) 316.

96. Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

97. Enos *v.* St. Louis, etc., R. Co., 41 Mo. App. 269.

98. Waller *v.* Harris, 7 Paige (N. Y.) 479.

99. Miller *v.* Highland Ditch Co., 91 Cal. 103, 27 Pac. 536; Elliot *v.* Collins, (Ida. 1898) 53 Pac. 453; Sherman *v.* Washtenaw Cir. Judge, 52 Mich. 474, 18 N. W. 224.

The certificate of a witness as to his travel and attendance, if no suspicious circumstance attend it, is usually considered conclusive, but if it appears suspicious an explanatory affidavit will be required of the witness. Cook *v.* Holmes, 1 Mass. 295.

1. Miller *v.* Highland Ditch Co., 91 Cal. 103, 27 Pac. 536.

2. Griffith *v.* Montandon, 4 Ida. (Hasb.) 75, 35 Pac. 704.

3. Lewis *v.* Brown, 16 S. C. 58. And see Primrose *v.* Fenno, 113 Fed. 375.

As to number of subpœnas.— Where a witness swears that he attended on several different months, in pursuance of a subpœna, it will be presumed that there was a separate subpœna for each month. Wheeler *v.* Ruckman, 5 Rob. (N. Y.) 702.

4. *Illinois.*— Bogar *v.* Walker, 89 Ill. App. 457.

Kentucky.— McCann *v.* Gouge, 9 B. Mon. 56. See also Henry *v.* Vinson, 13 Ky. L. Rep. 400.

Michigan.— Beem *v.* Newaygo Cir. Judge, 97 Mich. 491, 56 N. W. 760.

North Carolina.— Wooley *v.* Robinson, 52 N. C. 30.

Wisconsin.— Ross *v.* Heathcock, 57 Wis. 89, 15 N. W. 9. And see Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87.

at chambers or by a court commissioner.[5] If for any reason there remains an undecided question regarding costs after decision on appeal, the court by which the judgment is rendered is the court to determine it.[6]

b. Method of Obtaining Relief. The method of obtaining relief against erroneous taxation of costs is usually by motion to retax in the court where the judgment was rendered,[7] and not by appeal or error to a court of appellate jurisdiction in the first instance without having taken any step in the trial court to have the error corrected.[8] So relief against erroneous taxation cannot be had in any other action or proceeding than that in which the question of costs arose.[9] Erro-

See 13 Cent. Dig. tit. "Costs," § 800.

Limitation of rule.— Where an allowance is made to a party for the expenses of procuring attendance of witnesses in one district, and the case is afterward removed to another district where all the witnesses reside, it is proper for the judge of the latter district to review the allowance made and modify it according to his views of the necessary costs in his district. Sheckles *v.* Sheckles, 3 Nev. 404. So it has been held that after the motion to retax has been made a change of venue on the motion may be allowed. State *v.* Hollenbeck, 68 Mo. App. 366.

5. Schauble *v.* Tietgen, 31 Wis. 695. And see Cord *v.* Southwell, 15 Wis. 211.

6. State *v.* Orleans Parish, 107 La. 69, 31 So. 645.

7. *Alabama.*— Spann *v.* Cole, 13 Ala. 473. *Compare* Ivey *v.* Gilder, 119 Ala. 495, 24 So. 715.

California.—Rogers *v.* Druffel, 46 Cal. 654; Meeker *v.* Harris, 23 Cal. 285.

District of Columbia.— Williams *v.* Getz, 17 App. Cas. 388.

Idaho.— *Compare* McDonald *v.* Burke, 2 Ida. 995, 28 Pac. 440, 35 Am. St. Rep. 276.

Illinois.— Miller *v.* Adams, 5 Ill. 195.

Indiana.— Smawley *v.* Stark, 16 Ind. 371; Conaway *v.* Conaway, 10 Ind. App. 229, 37 N. E. 189.

Iowa.— Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, 82 N. W. 779; McGuffie *v.* Dervine, 1 Greene 251.

Kansas.— Linton *v.* Housh, 4 Kan. 535.

Kentucky.— Williams *v.* Jackman, 2 J. J. Marsh. 352; Walton *v.* Brashears, 4 Bibb 18.

Michigan.— Reeves *v.* Scully, 1 Walk. 340.

Mississippi.—Court Officers *v.* Fisk, 7 How. 403.

Missouri.—Error in allowing items of costs awarded by order of court cannot be corrected by motion for retaxation by the clerk. The remedy is by motion for new trial after judgment for such costs. This remedy is permitted only where the duty of taxing the costs in the first instance devolves on the clerk. Bosley *v.* Parle, 35 Mo. App. 232. See also Mann *v.* Warner, 22 Mo. App. 577.

Nebraska.— Citizens' Nat. Bank *v.* Gragg, 53 Nebr. 760, 74 N. W. 273; Hoagland *v.* Van Etten, 31 Nebr. 293, 47 N. W. 920; Wilkinson *v.* Carter, 22 Nebr. 186, 34 N. W. 351; Whitall *v.* Cresman, 18 Nebr. 508, 26 N. W. 245; Woods *v.* Colfax, 10 Nebr. 552, 7 N. W. 269.

New Jersey.—Shangnuole *v.* Ohl, 58 N. J. L. 557, 34 Atl. 755; Allen *v.* Hickson, 6 N. J. L. 409.

New York.— Le Roy *v.* Browne, 54 Hun 584, 8 N. Y. Suppl. 82, 28 N. Y. St. 210; Beattie *v.* Qua, 15 Barb. 132; Hecla Consol. Gold Min. Co. *v.* O'Neill, 22 N. Y. Suppl. 130, 51 N. Y. St. 436; Lotti *v.* Krakaner, 1 N. Y. Civ. Proc. 312; Comly *v.* New York, 1 N. Y. Civ. Proc. 306; Matter of Fourth Ave., 11 Abb. Pr. 189; Lloyd *v.* Brewster, 5 Paige 87. *Compare* Woodford *v.* Bucklin, 14 Hun 444.

North Carolina.— Cureton *v.* Garrison, 111 N. C. 271, 16 S. E. 338; Wells *v.* Goodbread, 36 N. C. 9.

Pennsylvania.— Corcoran *v.* Hetzel, 9 Pa. Co. Ct. 82.

South Carolina.— Crocker *v.* Collins, 44 S. C. 500, 22 S. E. 719; Dauntless Mfg. Co. *v.* Davis, 24 S. C. 536; Dilling *v.* Foster, 21 S. C. 334; Prince *v.* Sutherland, 12 S. C. 109.

South Dakota.— Where costs are improperly taxed against a party his remedy is by motion to have the judgment modified and not by appeal from the taxation of costs. Sorenson *v.* Donahue, 12 S. D. 204, 80 N. W. 179; *In re* Kirby, 10 S. D. 416, 73 N. W. 908.

Tennessee.— Ross *v.* McCarty, 3 Humphr. 169; Sherman *v.* Brown, 4 Yerg. 561.

Washington.—Newberg *v.* Farmer, 1 Wash. Terr. 182.

See 13 Cent. Dig. tit. "Costs," § 796 *et seq.*

In justice's court.— After a trial in a suit before a justice in which the jury failed to agree, plaintiff dismissed his suit and the justice thereupon taxed a part of the costs against defendant. It was held that defendant had a right of appeal from the justice's order as to costs, not for the purpose of having costs retaxed in the justice's transcript, but for the purpose of a new trial, and after the trial to have the costs taxed by the court. Halliday *v.* Shugart, 56 Ill. 44.

8. Beattie *v.* Qua, 15 Barb. (N. Y.) 132; Hecla Consol. Gold Min. Co. *v.* O'Neill, 22 N. Y. Suppl. 130, 51 N. Y. St. 436, 23 N. Y. Civ. Proc. 143; Comly *v.* New York, 1 N. Y. Civ. Proc. 306; Crocker *v.* Collins, 44 S. C. 500, 22 S. E. 719; Dauntless Mfg. Co. *v.* Davis, 24 S. C. 536. *Compare* Valentine *v.* Norton, 30 Me. 194, which seems to conflict with this rule.

9. *California.*— Rogers *v.* Druffel, 46 Cal. 654.

Iowa.— Jackson *v.* Gould, 96 Iowa 488, 65 N. W. 406.

Massachusetts.—McLaughlin *v.* Western R. Co., 12 Cush. 131.

neous taxation is not a ground to quash an execution,[10] to set aside a judgment in which the costs are inserted,[11] or to reverse the judgment.[12] Error in taxation of costs cannot be corrected in a proceeding by rule against the sheriff;[13] nor is an objection to confirmation of a sale decreed in the action in which the costs were awarded an appropriate remedy for correction of errors in the taxation thereof.[14] On a motion to retax the claim is not that the judgment should be reversed or modified but that the costs were improperly taxed by the clerk.[15]

c. Necessity For Motion to Retax. If a party is dissatisfied with the decision of the taxing officer upon particular items he must move for retaxation, although his adversary also moves for retaxation in respect to other items.[16] An agreement after judgment rendered to submit the question of the correctness of the taxation of costs to a judge and indorse the amount disallowed if any is for the benefit of defendant and it is for him to procure the revision.[17]

d. Notice of Motion to Retax. When a party desires a retaxation of costs he must give his adversary notice of the motion to retax.[18] A notice given immediately after the receipt of a copy of the bill of costs is in time.[19] The contents of the notice must be determined by the statutes and practice of the jurisdiction in which a retaxation is sought.[20]

e. Who Entitled to Object to Taxation. A witness who is not a party cannot appeal from a judgment or order retaxing costs,[21] and a party cannot object that

Missouri.— McGindley *v.* Newton, 75 Mo. 115.

New Jersey.— Cammann *v.* Traphagen, 1 N. J. Eq. 230.

New York.— Brady *v.* New York, 1 Sandf. 569. See also New York *v.* Cornell, 9 Hun 215.

North Carolina.— Wells *v.* Goodbread, 36 N. C. 9.

Tennessee.—Whitesides *v.* Rayle, 3 Humphr. 205; Ross *v.* McCarty, 3 Humphr. 169.

Wisconsin.— Stokes *v.* Knarr, 11 Wis. 389.

See 13 Cent. Dig. tit. "Costs," § 796 *et seq.*

Mandamus does not lie to correct error in the taxation of costs. Woodman *v.* Somerset County Com'rs, 24 Me. 151; State *v.* Kenosha Cir. Judge, 3 Wis. 809.

10. Spann *v.* Cole, 13 Ala. 473; Meeker *v.* Harris, 23 Cal. 285; Walton *v.* Brashears, 4 Bibb (Ky.) 18; Warrensburg *v.* Simpson, 22 Mo. App. 695.

11. Watson *v.* Gardiner, 50 N. Y. 671.

12. Hoagland *v.* Van Etten, 31 Nebr. 292, 47 N. W. 920; Shangnuole *v.* Ohl, 58 N. J. L. 557, 34 Atl. 755. And see Lindley *v.* Dakin, 13 Ind. 388, holding that it is not ground for reversal that the judgment included costs when no motion for taxation was made in the court below.

13. Prince *v.* Sutherland, 12 S. C. 109.

14. Smith *v.* Foxworthy, 39 Nebr. 214, 57 N. W. 994.

15. Fisher *v.* Burlington, etc., R. Co., 104 Iowa 588, 73 N. W. 1070.

16. Rogers *v.* Rogers, 2 Paige (N. Y.) 458. And see Hall *v.* Reese, 26 Tex. Civ. App. 395, 64 S. W. 687.

17. Pierce *v.* Goodrich, 47 Me. 173.

18. Williams *v.* Hays, 9 N. J. L. 383; Gage *v.* Page, 10 Tex. 365.

The taxing officer is not entitled to notice. State *v.* Hollenbeck, 68 Mo. App. 366.

19. Lloyd *v.* Brewster, 5 Paige (N. Y.) 87.

20. In California a notice of motion to retax costs not accompanied by affidavit specifying the grounds of objection, but stating that the items mentioned were not legally chargeable and were not necessary disbursements, is sufficient, since the statute providing for taxation of costs by the court does not specify what the notice shall contain. Senior *v.* Anderson, 130 Cal. 290, 62 Pac. 563.

In Massachusetts it has been held that where a party against whom costs were to be taxed notified the clerk that he desired to be present at the taxation, informing him that if any of certain items marked by him should be allowed an appeal to one of the judges would be insisted on, this was sufficient notice of his intention to appeal. Winslow *v.* Hathaway, 1 Pick. 211.

In New Jersey the party moving for a retaxation must in his notice state the particulars to which he objects. Williams *v.* Hays, 9 N. J. L. 383.

In New York it has been held unnecessary to serve copies of the papers used before the clerk on a taxation of costs with the notice for motion to retax. Ferguson *v.* Wooley, 9 N. Y. Civ. Proc. 236; Webb *v.* Crosby, 11 Paige 193. It is sufficient to produce to the court upon the hearing of the motion the papers used before such officer or copies thereof, together with satisfactory evidence of their authenticity. Webb *v.* Crosby, 11 Paige 193. If objections to the taxation have been made orally and the moving party has stated in an affidavit what took place on the taxation, a copy of the affidavit should be served on the adverse party with the motion to retax. Webb *v.* Crosby, 11 Paige 193.

21. Boyd *v.* Humphries, 53 Ill. App. 422; Perkins *v.* Delta Pine Land Co., 66 Miss. 378, 6 So. 210.

a decree in his favor does not definitely fix the amount of the referee's fees, as he is not concerned in the interest of any one under the decree but himself.[22]

f. Time of Moving For Retaxation. In a number of jurisdictions it has been held that an application to retax may be made at a term subsequent to that at which judgment was rendered,[23] but in others the contrary rule obtains.[24] Where a statute requires a motion to retax to be made within ten days after judgment, and a judgment provides that costs should be taxed against defendant but left the amount blank, the motion will be in time if made within ten days after the insertion of the amount of costs.[25] It has been held too late to move for a retaxation after execution,[26] after the costs have become a part of the judgment which is affirmed on appeal,[27] or where the bill of costs was taxed by the clerk by order of the court and both parties had leave to file objections but both waived exceptions and the court confirmed the report.[28]

g. Requisites of Motion to Retax. The motion to retax must specially show in what respect the taxation is claimed to have been erroneous. It must point out the items objected to,[29] unless the items objected to are such as are not pro-

22. Werner *v.* Rheinhardt, 20 Fed. 163.

23. *Illinois.*—Tanton *v.* Keller, 78 Ill. App. 31.

Indiana.— Conaway *v.* Conaway, 10 Ind. App. 229, 37 N. E. 189.

Iowa.— Fisher *v.* Burlington, etc., R. Co., 104 Iowa 588, 73 N. W. 1070. *Compare* Olson *v.* Lamb, (1901) 85 N. W. 397.

Missouri.— State *v.* Hannibal, etc., R. Co., 78 Mo. 575; Dulle *v.* Deimler, 28 Mo. 583; Clark *v.* Hill, 33 Mo. App. 116. But see Paul *v.* Minneapolis Threshing Mach. Co., 87 Mo. App. 647; Bosley *v.* Parle, 35 Mo. App. 232; Mann *v.* Warner, 22 Mo. App. 577, which cases hold that the statute authorizing retaxation on motion at a subsequent term to that at which the judgment was entered applies to cases only where the duty of taxing the costs devolves in the first instance upon the clerk of the court.

Nebraska.— A motion to retax made necessary by mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order may be made at any time within three years after judgment upon reasonable notice to the adverse party or his attorney. Cattle *v.* Haddox, 17 Nebr. 307, 22 N. W. 565.

New Jersey.— Den *v.* Chapman, 8 N. J. L. 176.

North Carolina.— If made at any time within one year it is in time. *In re* Smith, 105 N. C. 167, 10 S. E. 982.

Texas.—McLennan County *v.* Graves, (Sup. 1901) 64 S. W. 861 [*reversing* (Civ. App. 1901) 62 S. W. 122].

See 13 Cent. Dig. tit. "Costs," § 807.

24. Green Bay, etc., Canal Co. *v.* Clark County Sup'rs, 43 Wis. 252; Blagrove *v.* Ringgold, 3 Fed. Cas. No. 1,480, 2 Cranch C. C. 407; Crabtree *v.* Neff, 6 Fed. Cas. No. 3,315, 1 Bond 554.

In New York it was held in some of the earlier decisions that an application for retaxation made after two terms had elapsed was too late. McLean *v.* Farward, 1 Cow. 49; Morris *v.* Mullett, 1 Johns. Ch. 44. In another case it was held that where costs were settled by the clerk on November 1 and proceedings were had at the January special term to set aside the adjustment, which were noticed for February special term in another county where a default was taken which was set aside on terms, there was no laches in making the motion. Dresser *v.* Wickes, 2 Abb. Pr. 460.

25. Bringgold *v.* Spokane, 19 Wash. 333, 53 Pac. 368.

Where a statute provides that "a party dissatisfied with the costs claimed may within five days after notice of filing of the bill of costs file a motion to have the same taxed by the court," the service and filing of a written notice of the motion within the five days and making the motion *viva voce* on the day designated, although after the five days have expired, is sufficient. Kishlar *v.* Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

26. Barnes *v.* Smith, 104 Mass. 363. See also Bellingham Bay, etc., R. Co. *v.* Strand, 5 Wash. 807, 32 Pac. 782.

27. Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y.) 242, 3 Code Rep. (N. Y.) 224.

28. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 460, 15 L. ed. 449.

29. *Michigan.*— Genesee County Sav. Bank *v.* Ottawa Cir. Judge, 54 Mich. 305, 20 N. W. 53; Reeves *v.* Scully, Walk. 340.

Missouri.— Tittman *v.* Thornton, 53 Mo. App. 512; Haseltine *v.* St. Louis, etc., R. Co., 39 Mo. App. 434.

New York.— Toll *v.* Thomas, 15 How. Pr. 315; Constantine *v.* Van Winkle, 2 How. Pr. 273; Wilder *v.* Wheeler, 1 How. Pr. 136; Lotti *v.* Krakauer, 1 N. Y. City Ct. 60.

Oregon.— An affidavit for relief against the illegal taxation of costs should show that they had been taxed through mistake, inadvertence, surprise, or excusable neglect. Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

Pennsylvania.— Raisley *v.* Morgan, 17 Pa. Co. Ct. 268.

South Carolina.— Cureton *v.* Westfield, 24 S. C. 457.

Washington.— Bellingham Bay, etc., Co. *v.* Strand, 5 Wash. 807, 32 Pac. 782.

Wisconsin.— Wirth *v.* Bartell, 89 Wis. 594,

vided for by the fee bill,[30] and state the grounds of objection.[31] It has also been held that a motion made several years after judgment should state the time when the judgment was rendered and when the costs were first taxed.[32] Where there is a dispute as to what papers were used before the taxing officer, the moving party should obtain and present a certificate of the clerk showing fully what papers or records were used and should also produce to the court the original papers or certified copies thereof.[33] The notice may be oral in the absence of a statutory requirement that it be in writing.[34]

h. Grounds For Retaxation. A retaxation will not be granted except for good cause shown.[35]

i. Questions Considered. On proceedings to retax the original judgment awarding costs to the prevailing party can neither be attacked nor reviewed. The only questions that can be considered are the items or amounts to be taxed.[36] Objections to items of costs not made before the taxing officer will not be passed upon by the court,[37] except where no costs can be lawfully taxed.[38]

j. Evidence Considered. The hearing of such proceedings before the trial court is simply a revision of the case made before the taxing officer and not a trial *de novo* upon new objections or proofs.[39] Accordingly it has been held that no evidence other than that submitted to the taxing officer will be considered.[40] It is improper to use any other papers except so far as it may be necessary to

62 N. W. 408; Turner *v.* Scheiber, 89 Wis. 1, 61 N. W. 280.

United States.— Dedekam *v.* Vose, 7 Fed. Cas. No. 3,731, 3 Blatchf. 153.

See 13 Cent. Dig. tit. "Costs," § 810.

Injunction operative as motion.— An injunction to restrain collection of an execution for costs because of alleged illegality of some of the items should be treated strictly as a mere motion to retax. There should be no reference to an auditor, nor judgment for damages or for interest. Lockart *v.* Stuckler, 49 Tex. 765.

Motion good in part and bad in part.— Although a judgment for costs includes costs not properly recoverable, it is not error to overrule a motion to modify such judgment; the motion including both costs properly and those improperly awarded. Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513.

Where oral objections were taken before the taxing officer the party asking a retaxation should state in an affidavit what took place on the taxation. Webb *v.* Crosby, 11 Paige (N. Y.) 193.

30. Wilder *v.* Wheeler, 1 How. Pr. (N. Y.) 136.

31. Toll *v.* Thomas, 15 How. Pr. (N. Y.) 315; Wilder *v.* Wheeler, 1 How. Pr. (N. Y.) 136.

32. Gage *v.* Page, 10 Tex. 365.

33. Ferguson *v.* Wooley, 9 N. Y. Civ. Proc. 236.

34. Carpy *v.* Dowdell, 129 Cal. 244, 61 Pac. 1126.

35. Thornton *v.* McLendon, 99 Ga. 590, 27 S. E. 186.

It is sufficient ground that the cost bill is shown to be erroneous. Berry *v.* G. V. B. Mining Co., 5 Ida. (Hasb.) 691, 51 Pac. 746; Wilson *v.* Jenkins, 147 Ind. 533, 46 N. E. 889. See also Bathgate *v.* Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158. But the fact of a discrepancy between the bill of costs issued with the first execution and that issued with a second is not ground for a retaxation of the costs, as the clerk may correct error in such bills. McDonald *v.* Cox, 104 Ala. 379, 16 So. 113.

36. Tecumseh Iron Co. *v.* Mangum, 67 Ala. 246; Purvis *v.* Kroner, 18 Oreg. 414, 23 Pac. 260. To the same effect see Persch *v.* Quiggle, 57 Pa. St. 247.

37. *Minnesota.*— Davidson *v.* Lamprey, 17 Minn. 32; Barry *v.* McGrade, 14 Minn. 286; Myers *v.* Irvine, 4 Minn. 553.

New York.— Deegan *v.* Karp, 13 N. Y. Civ. Proc. 202; Cuyler *v.* Coats, 10 How. Pr. 141; Peck *v.* Wood, 2 How. Pr. 209; Lotti *v.* Krakauer, 1 N. Y. City Ct. 60. *Contra*, Pentz *v.* Hawley, 2 Barb. Ch. 552.

Oregon.— Walker *v.* Goldsmith, 16 Oreg. 161, 17 Pac. 865.

Pennsylvania.— McDonald *v.* Alliance Coal Min. Co., 8 Pa. Co. Ct. 460.

Wisconsin.— Latimer *v.* Marrain, 43 Wis. 107; Hawkins *v.* Northwestern Union R. Co., 34 Wis. 302; Akerly *v.* Vilas, 23 Wis. 628.

See 13 Cent. Dig. tit. "Costs," § 803.

38. Kirst *v.* Wells, 47 Wis. 56, 1 N. W. 357.

39. State *v.* Wertzel, 84 Wis. 344, 54 N. W. 579.

40. Pearman *v.* Gould, (N. J. Ch. 1887) 8 Atl. 285; Evans *v.* Silberman, 7 N. Y. App. Div. 139, 40 N. Y. Suppl. 298; Hoyt *v.* Phillips, 1 Sweeny (N. Y.) 76; Sherry *v.* Cary, 13 N. Y. Civ. Proc. 256; Varnum *v.* Wheeler, 9 N. Y. Civ. Proc. 421; Logan *v.* Thomas, 11 How. Pr. (N. Y.) 160; Brown *v.* Lambert, 16 Johns. (N. Y.) 148; Emmons *v.* Cairnes, 11 Paige (N. Y.) 380; Remington Paper Co. *v.* O'Brien, 18 N. Y. Wkly. Dig. 209; Baumgardner *v.* Shoff, 2 Del. Co. (Pa.) 76. *Compare* Rodas *v.* Reese, 4 B. Mon. (Ky.) 586.

show the action of the taxing officer,[41] or to ascertain whether there were any new facts by reason of which the court should order a readjustment before the clerk instead of correcting the error itself.[42]

k. Presumption and Burden of Proof. It will be presumed that the taxation was correct until the contrary is shown.[43] The burden is on the party objecting to show error in the taxation, unless error is apparent on the face of it.[44]

l. How Errors Corrected. In one jurisdiction it has been held that the retaxation should be made by the court. The case should not be remanded to the clerk for new action.[45] In another it has been held that where both parties have appeared at the hearing the court may direct that the taxation be set aside and that any judgment for such costs entered thereon be vacated.[46] In another it has been held that if after a cause has been referred back to the clerk for retaxation the clerk fills the blank in the judgment with the amount of costs originally taxed, the same is a nullity and may be erased and expunged from the judgment.[47] So in another it has been held that error of the clerk in entering a judgment for costs against defendant in the sum claimed in defendant's cost bill, before the determination of defendant's motion to tax costs, is cured by an order of court reducing the amount.[48]

m. Waiver of Right to Retaxation. The right to a retaxation of costs may be waived by laches.[49] The right has also been held to be waived by an appeal from the judgment,[50] by voluntary payment at the time of taking an appeal,[51] and by failure to move till after entry and satisfaction of judgment.[52] So where a refer-

41. Lyman *v.* Young Men's Cosmopolitan Club, 38 N. Y. App. Div. 220, 56 N. Y. Suppl. 712.

42. Shultz *v.* Whitney, 17 How. Pr. (N. Y.) 471, 9 Abb. Pr. (N. Y.) 71.

43. Lyon *v.* Wilkes, 1 Cow. (N. Y.) 591.

44. State *v.* McO'Blenis, 27 Mo. 508; Williams *v.* Hays, 9 N. J. L. 383; Texas, etc., R. Co. *v.* White, (Tex. Civ. App. 1898) 48 S. W. 530.

A motion to retax unsupported by evidence should be denied as to all items in the cost bill that do not appear from the cost bill itself to be illegal. Thiessen *v.* Riggs, 5 Ida. (Hasb.) 487, 51 Pac. 106.

45. Hawkins *v.* Fuller, 62 Mich. 531, 29 N. W. 92.

46. Jones *v.* Cook, 11 Hun (N. Y.) 230. And see Corle *v.* Monkhouse, 61 N. J. L. 535, 43 Atl. 160.

If a question of law is presented the court may allow or disallow the item presented instead of ordering a new taxation before the clerk. If the objection presents a question of fact the court may determine it and allow or disallow the item or it may direct a new taxation before the clerk, specifying the grounds of the proofs upon which the item was allowed or disallowed. Crosley *v.* Cobb, 37 Hun (N. Y.) 271.

47. Ross *v.* Heathcock, 57 Wis. 89, 15 N. W. 9.

48. Foley *v.* California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

49. Taylor *v.* Boardman, 16 Mich. 506; Guckenheimer *v.* Angevine, 16 Hun (N. Y.) 453; Oakes *v.* High, 11 Misc. (N. Y.) 313, 32 N. Y. Suppl. 289, 65 N. Y. St. 497; McLean *v.* Forward, 1 Cow. (N. Y.) 49; Morris *v.* Mullett, 1 Johns. Ch. (N. Y.) 44.

As for instance by delaying to move for retaxation until after the lapse of several terms after taxation (McLean *v.* Forward, 1 Cow. (N. Y.) 49), or by failure to appear at the taxation of costs after due notice without excuse (Taylor *v.* Boardman, 16 Mich. 506).

50. Pfaudler Barm Extracting Bunging Apparatus Co. *v.* Sargent, 43 Hun (N. Y.) 154; Guckenheimer *v.* Angevine, 16 Hun (N. Y.) 453; Sleeman *v.* Hotchkiss, 18 N. Y. Suppl. 533, 45 N. Y. St. 749. But see Allen *v.* Seaward, 86 Iowa 718, 52 N. W. 557.

Limitation of rule.— Defendant taxed costs and entered judgment without notice to plaintiff. The latter had notice of retaxation and opposed the taxation on the ground that they had not been awarded. The clerk took the matter under consideration and afterward taxed costs for defendant. Two days later plaintiff in order to be timely with his appeal, and not knowing that the clerk had awarded costs, gave notice of appeal from the judgment of nonsuit and costs. It was held that plaintiff did not thereby waive his objections to the taxation of costs. Le Roy *v.* Browne, 54 Hun (N. Y.) 884, 8 N. Y. Suppl. 82, 28 N. Y. St. 210.

51. Clague *v.* Hudgson, 16 Minn. 291.

52. Gaines *v.* Mensing, 64 Tex. 325. And see Burrows *v.* Butler, 38 Hun (N. Y.) 121, holding that where on taxation after notice an item of term fees is stricken out the moving party cannot have a retaxation in order to have the item included, that plaintiff by entering his judgment must be deemed to have accepted the decision of the clerk upon the taxation.

Where defendant moves for retaxation of costs claimed by plaintiff, agreeing to pay the damages and the costs due on retaxation, which agreement defendant accepts and the court retaxes the costs, striking out general

ence is granted on plaintiff's motion to allow the defendant the costs of the term, the latter cannot on appeal from the final taxation question the discretion of the court in disallowing such costs where he acquiesced therein until after trial.[53]

n. Waiver of Irregularities in Proceedings to Tax Costs. If sheriff's fees are not taxed in the county of the action as required by statute, and no objection is taken, it will be considered waived.[54] So where the question of the erroneous taxation of costs by the clerk is brought before the court on notice of appeal and the court on motion makes an order referring the same back to the clerk for taxation after a hearing and argument by the attorneys of the respective parties without any objection having been interposed by either party to such hearing, any irregularity in the proceeding is waived, and it cannot be objected that the matter came before the court irregularly upon mere notice of appeal to the presiding judge.[55] Where, after final judgment in the court below, there is no order for costs, no application can be made in the supreme court for such costs.[56]

o. Costs of Motion to Retax and of Opposing Application. If a party applying for retaxation does not succeed in obtaining a retaxation as to some of the items objected to, he will be charged with the costs of opposing his application;[57] but if he is successful he will ordinarily be entitled to the costs of the motion.[58] If, however, both parties are in fault, one in including improper items and the other in objecting to items properly taxed, each party will be charged with his own costs on the retaxation.[59] So where defendants having moved to retax the costs, plaintiff offered to deduct the sum claimed as excessive if defendants would withdraw their motion without costs of motion, which they refused to do, it is within the discretion of the court to deny costs of motion on deducting a smaller sum than that claimed.[60] Costs of motion for retaxation may be denied the moving party, although successful, where a part of the amount originally taxed against him was due to his own fault.[61] If a motion to retax is made after decree and costs as first taxed were paid in full and receipt given therefor, the cost of the motion cannot be included in the assessment of retaxed costs.[62]

2. In Appellate Court — a. Power of Appellate Court to Correct Errors in Taxation. An appellate court may in a proper case correct errors in the taxation of costs in the court below.[63]

b. Whether Appeal or Error Lies. In some jurisdictions it has been held that a writ of error and not an appeal is the proper proceeding to obtain a revision by

items, plaintiff is bound by the agreement, and after payment of the judgment and costs less the items so struck out is not entitled to execution for such items. Bowen *v.* Weatherman, 2 Ida. 1184, 31 Pac. 814.

53. Hite *v.* Chittenden, 1 N. Y. Leg. Obs. 360.

54. Nestor *v.* Bischoff, 1 Silv. Supreme (N. Y.) 329, 5 N. Y. Suppl. 312, 24 N. Y. St. 356.

55. Ross *v.* Heathcock, 57 Wis. 89, 15 N. W. 9.

56. Houghton *v.* Sawlas, 57 Vt. 635.

57. Pentz *v.* Hawley, 2 Barb. Ch. (N. Y.) 552.

Claiming costs in motion.— Where a party moving for retaxation asks costs in his notice of motion he must pay the costs of opposing the motion. Medbury *v.* Butternuts, etc., Turnpike Co., 1 How. Pr. (N. Y.) 231.

In South Carolina it is held that a statute which provides that "costs may be allowed on a motion in the discretion of the court or judge, not exceeding ten dollars" applies only to motions, and not to an appeal to the circuit judge from the decision of the clerk on the taxation of costs, in which latter case no such allowance should be made. State *v.* Marshall, 28 S. C. 559, 562, 6 S. E. 564.

58. O'Connell *v.* Bryant, 126 Mass. 232; Doe *v.* Green, 2 Paige (N. Y.) 347. And see Miller *v.* Muegge, 27 Mo. App. 670.

Success as to part of the items objected to entitles the moving party to costs of the motion. State *v.* Allen, 26 N. J. L. 145.

Although costs are not asked for in the notice of motion to retax the court may nevertheless allow them to the moving party if he is successful. Jones *v.* Cook, 11 Hun (N. Y.) 230.

59. Doe *v.* Green, 2 Paige (N. Y.) 347.

60. Stubbings *v.* McGregor, 86 Wis. 248, 56 N. W. 641.

61. Hopkins *v.* Rush River, 70 Wis. 10, 34 N. W. 909, 35 N. W. 939. See also Peek *v.* Wood, 2 How. Pr. (N. Y.) 172.

62. Pearman *v.* Gould, (N. J. Ch. 1887) 8 Atl. 285.

63. Walden *v.* Dudley, 49 Mo. 419; Johnson *v.* Curtis, 51 Wis. 595, 8 N. W. 489.

a court of appellate jurisdiction of an erroneous taxation of costs.[64] In others it has been held that an appeal is the proper remedy.[65]

c. From What Appeal Taken. An error in respect to costs cannot be corrected on appeal from an order denying a new trial, as such error furnishes no ground for a new trial.[66] In some jurisdictions an appeal may be taken from an order made in relation to the motion to retax costs;[67] while in others this is denied and the appropriate remedy held to be to appeal from or bring error to the judgment.[68] In some jurisdictions, if the order is made before rendition and entry of final judgment, it can be reviewed only on appeal from the judgment, raising the question of the correctness of the taxation by a statement annexed to the judgment-roll.[69] If the order is made after rendition and entry of judgment an appeal lies from it.[70]

d. Prerequisites to Review and Correction in Appellate Court — (i) *Presentation of Question in Lower Court.* Objections based on alleged errors in the taxation of costs cannot be raised in an appellate court for the first time. To authorize a consideration of such objections they must be presented in the trial court by some appropriate method — ordinarily by a motion to retax,[71] a ruling

64. Smith *v.* Coats, 19 Ill. 405; Miller *v.* Adams, 5 Ill. 195; Valentine *v.* Norton, 30 Me. 50; Andrews *v.* Cressy, 2 Minn. 67. And see Ford *v.* Wright, 7 N. H. 586.

65. Ivey *v.* Gilder, 119 Ala. 495, 24 So. 715; McLaughlin *v.* Western R. Co., 12 Cush. (Mass.) 131; Jacobs *v.* Potter, 8 Cush. (Mass.) 236; Abbott *v.* Mathews, 26 Mich. 176; Huff *v.* Watkins, 20 S. C. 477. *Compare* Garner *v.* Prewitt, 32 Ala. 13; Thomas *v.* Sever, 12 Mass. 379; Waite *v.* Garland, 7 Mass. 453.

66. Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107.

67. *Indiana.*— Hill *v.* Shannon, 68 Ind. 470.

New York.— See Sluyter *v.* Smith, 2 Bosw. 673.

North Carolina.— Morristown Mills Co. *v.* Lytle, 118 N. C. 837, 24 S. E. 530.

Oregon.— Cross *v.* Chichester, 4 Oreg. 114.

Pennsylvania.— Corcoran *v.* Hetzel, 9 Pa. Co. Ct. 82.

South Carolina.—Dilling *v.* Foster, 21 S. C. 334; Stegall *v.* Bolt, 11 S. C. 522. See also Columbia Water-Power Co. *v.* Columbia, 4 S. C. 388.

See 13 Cent. Dig. tit. "Costs," § 797.

68. Herrick *v.* Marotte, 30 Minn. 159, 14 N. W. 793; Minnesota Valley R. Co. *v.* Flynn, 14 Minn. 552; Andrews *v.* Cressy, 2 Minn. 67; Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520; Strickland *v.* Flagstaff Silver Min. Co., 1 Utah 199. See also Herrick *v.* Butler, 30 Minn. 156, 14 N. W. 794. And see Appeal and Error, III, D, 3, e, (II) [2 Cyc. 594].

In Wisconsin the proper practice is to appeal from the judgment (McHugh *v.* Chicago, etc., R. Co., 41 Wis. 79; American Button-Hole, etc., Co. *v.* Gurnee, 38 Wis. 583; Ernst *v.* Brooklyn, 24 Wis. 616; Cord *v.* Southwell, 15 Wis. 211), although the order was made after the judgment was otherwise complete (Cord *v.* Southwell, 15 Wis. 211), except where the costs were awarded in the absence of the party or his attorney on whom no sufficient notice was served (Johnson *v.* Curtis, 51 Wis. 595, 8 N. W. 489).

69. Flubacher *v.* Kelly, 49 Cal. 116; Dooly *v.* Norton, 41 Cal. 439; Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107; Levy *v.* Getleson, 27 Cal. 685; Herson *v.* Chicago, etc., R. Co., 18 Mo. App. 439; Orr *v.* Haskell, 2 Mont. 350; Hibbard *v.* Tomlinson, 2 Mont. 220; Rader *v.* Nottingham, 2 Mont. 157. See also Kelly *v.* McKibben, 54 Cal. 192.

70. Empire Gold Min. Co. *v.* Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810; Dooly *v.* Norton, 41 Cal. 439 [*overruling* Lasky *v.* Davis, 33 Cal. 677]; Shed *v.* Kansas City, etc., R. Co., 67 Mo. 687; Herson *v.* Chicago, etc., R. Co., 18 Mo. App. 439; Ryan *v.* Maxey, 15 Mont. 100, 38 Pac. 228; Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 346, 17 Pac. 108. See also Bosley *v.* Parle, 35 Mo. App. 232.

71. *Alabama.*— Faulkner *v.* Chandler, 11 Ala. 725.

Arizona.— Dawson *v.* Lail, 1 Ariz. 490, 3 Pac. 399.

California.— Muir *v.* Meredith, 82 Cal. 19, 22 Pac. 1080; Stoddard *v.* Treadwell, 29 Cal. 281; Gronfier *v.* Minturn, 5 Cal. 492; Guy *v.* Franklin, 5 Cal. 416.

Illinois.— Klajda *v.* Wilandt, 92 Ill. App. 373; Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206; Sisson *v.* Pearson, 44 Ill. App. 81.

Indiana.— McGlennan *v.* Margowski, 90 Ind. 150; Baldwin *v.* Logansport, 73 Ind. 346; Leffler *v.* Rice, 44 Ind. 103; Hooker *v.* Philippe, 26 Ind. App. 501, 60 N. E. 167; Stanley *v.* Stanley, 14 Ind. App. 398, 42 N. E. 1031; Studabaker *v.* Markley, 7 Ind. App. 368, 34 N. E. 606.

Iowa.— Snell *v.* Dubuque, etc., R. Co., 88 Iowa 442, 55 N. W. 310; Allen *v.* Seaward, 86 Iowa 718, 52 N. W. 557; Yeager *v.* Circle, 1 Greene 438; McGuffie *v.* Dewine, 1 Greene 251.

Kansas.— Teats *v.* Herrington Bank, 58 Kan. 721, 51 Pac. 219; State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547; Lowe's Appeal, 46 Kan. 255, 26 Pac. 749.

Louisiana.—McMullen *v.* Jewell, 3 La. Ann. 139; Amis *v.* Merchants' Ins. Co., 2 La. Ann. 594.

obtained thereon,[72] and the appropriate steps taken to preserve the ruling for review.[73]

(II) *Showing Error in Appellate Court* — (A) *In General.* The party complaining in a court of appellate jurisdiction of alleged errors in the taxation of costs in the court below must affirmatively show some error in the taxation of the costs by some appropriate method, or it will be presumed in support of the action of the lower court that there was no error in the taxation,[74]

Massachusetts.— Day *v.* Berkshire Woolen Co., 1 Gray 420; Jacobs *v.* Potter, 8 Cush. 236.

Michigan.— Abbott *v.* Mathews, 26 Mich. 176.

Minnesota.— Stevens *v.* McMillin, 37 Minn. 509, 35 N. W. 372; Coles *v.* Berryhill, 37 Minn. 56, 33 N. W. 213; Jensen *v.* Crevier, 33 Minn. 372, 23 N. W. 541; Berry *v.* McGrade, 14 Minn. 286; Fay *v.* Davidson, 13 Minn. 298; Hurd *v.* Simonton, 10 Minn. 423.

Nebraska.— Yankton, etc., R. Co. *v.* State, 49 Nebr. 272, 68 N. W. 487; Shields *v.* Gamble, 42 Nebr. 850, 61 N. W. 101; Roberts *v.* Drehmer, 41 Nebr. 306, 59 N. W. 911; Haskell *v.* Valley County, 41 Nebr. 234, 59 N. W. 680; Cahn *v.* Lipson, 39 Nebr. 776, 58 N. W. 280; Real *v.* Honey, 39 Nebr. 516, 58 N. W. 136; German Ins. Co. *v.* Eddy, 37 Nebr. 461, 55 N. W. 1073; Bates *v.* Diamond Crystal Salt Co., 36 Nebr. 900, 55 N. W. 258; Wilkinson *v.* Carter, 22 Nebr. 186, 34 N. W. 351; Whitall *v.* Cressman, 18 Nebr. 508, 26 N. W. 245; Cozine *v.* Hatch, 17 Nebr. 694, 24 N. W. 389.

Nevada.— Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520.

New York.— Beattie *v.* Qua, 15 Barb. 132; Baker *v.* Codding, 3 Misc. (N. Y.) 512, 23 N. Y. Suppl. 5, 52 N. Y. St. 416; People *v.* Oakes, 1 How. Pr. 195. And see New York *v.* Best, 19 N. Y. App. Div. 58, 45 N. Y. Suppl. 970.

Oregon.— Albert *v.* Salem, 39 Oreg. 466, 65 Pac. 1068, 66 Pac. 233.

Pennsylvania.— McCauley's Appeal, 86 Pa. St. 187; Shuman *v.* Pfoutz, 1 Penr. & W. 61; Corcoran *v.* Hetzel, 9 Pa. Co. Ct. 82.

South Carolina.— Armstrong *v.* Friesleben, 28 S. C. 605, 5 S. E. 479; Cooke *v.* Roole, 26 S. C. 321, 2 S. E. 609; Dilling *v.* Foster, 21 S. C. 334; Huff *v.* Watkins, 20 S. C. 477; Bradley *v.* Rodelsperger, 6 S. C. 290; Williams *v.* Jones, 2 Hill 555.

South Dakota.— American Banking Co. *v.* Lynch, 13 S. D. 34, 82 N. W. 77.

Tennessee.— Trouts *v.* Alabama, etc., R. Co., 97 Tenn. 364, 37 S. W. 90; Arnold *v.* State, 96 Tenn. 82, 33 S. W. 723; State *v.* Goodbar, 8 Lea 451; Sherman *v.* Brown, 4 Yerg. 561.

Texas.— Bridge *v.* Samuelson, 73 Tex. 522, 11 S. W. 539; Wierbusch *v.* Taylor, 64 Tex. 53; Allen *v.* Woodson, 60 Tex. 651; Jones *v.* Ford, 60 Tex. 127; Castro *v.* Illies, 11 Tex. 39; Pennsylvania F. Ins. Co. *v.* Wagley, (Civ. App. 1896) 36 S. W. 997; Missouri, etc., R. Co. *v.* Crane, (Civ. App. 1895) 32 S. W. 11.

Utah.— Smith *v.* Nelson, 23 Utah 512, 65 Pac. 485; People *v.* Peacock, 5 Utah 237, 14 Pac. 332.

Vermont.— Bliss *v.* Little, 64 Vt. 133, 23 Atl. 725.

Washington.— Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67; Newbergh *v.* Farmer, 1 Wash. Terr. 182.

Wisconsin.— Lauterbach *v.* Netzo, 111 Wis. 326, 87 N. W. 229; Duffy *v.* Ryan, 79 Wis. 242, 48 N. W. 374; Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678; Dinsmore *v.* Smith, 17 Wis. 20; Perkins *v.* Davis, 16 Wis. 470; Cord *v.* Southwell, 15 Wis. 211. *Compare* Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

See 13 Cent. Dig. tit. "Costs," § 804.

72. *Kansas.*— Linton *v.* Housh, 4 Kan. 535.

Louisiana.—McMullen *v.* Jewell, 3 La. Ann. 139.

Michigan.— Abbott *v.* Mathews, 26 Mich. 176.

Nebraska.— Yankton, etc., R. Co. *v.* State, 49 Nebr. 272, 68 N. W. 487; Shields *v.* Gamble, 42 Nebr. 850, 61 N. W. 101; Roberts *v.* Drehmer, 41 Nebr. 306, 59 N. W. 911; Richards *v.* Borowsky, 39 Nebr. 774, 58 N. W. 277; Real *v.* Honey, 39 Nebr. 516, 58 N. W. 136; Bates *v.* Diamond Crystal Salt Co., 36 Nebr. 900, 55 N. W. 258; Wilkinson *v.* Carter, 22 Nebr. 186, 34 N. W. 351; Wood *v.* Colfax, 10 Nebr. 552, 17 N. W. 269.

South Carolina.— Cooke *v.* Poole, 26 S. C. 321, 2 S. E. 609; Bradley *v.* Rodelsperger, 6 S. C. 290.

Tennessee.— Arnold *v.* State, 96 Tenn. 82, 33 S. W. 723; State *v.* Goodbar, 8 Lea 451.

See 13 Cent. Dig. tit. "Costs," § 804.

73. *California.*— Muir *v.* Meredith, 82 Cal. 19, 22 Pac. 1080.

Nebraska.— Cahn *v.* Lipson, 39 Nebr. 776, 58 N. W. 280; Richards *v.* Barowsky, 39 Nebr. 774, 58 N. W. 277; Real *v.* Honey, 39 Nebr. 516, 58 N. W. 136; Bates *v.* Diamond Crystal Salt Co., 36 Nebr. 900, 55 N. W. 258.

Tennessee.— State *v.* Goodbar, 8 Lea 451.

Vermont.— Collins *v.* St. Peters, 65 Vt. 618, 27 Atl. 425.

Wisconsin.— Cord *v.* Southwell, 15 Wis. 211.

See 13 Cent. Dig. tit. "Costs," § 805.

74. *Alabama.*— Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422; Beadle *v.* Davidson, 75 Ala. 494.

California.— Gates *v.* Buckingham, 4 Cal. 286.

Illinois.— Governer *v.* Ridgway, 12 Ill. 14; Dieterich *v.* Richey, 34 Ill. App. 343.

Indiana.— McCutchen *v.* McCutchen, 141 Ind. 697, 41 N. E. 324; Whisler *v.* Lawrence, 112 Ind. 229, 13 N. E. 576; Smith *v.* Strain, 72 Ind. 600; Miller *v.* Hays, 26 Ind. 380; Nichols *v.* Woodruff, 8 Blackf. 493.

and as a result of such presumption the taxation of costs by the court below will not be disturbed.[75]

(B) *Record.* To authorize a revision by a court of appellate jurisdiction of alleged errors in the taxation of costs, the record must contain sufficient data to enable the court to determine whether error has been committed.[76] Unless the evidence on which the trial court acted is presented its decision will not be disturbed.[77]

(C) *Bill of Exceptions.* To present to the appellate court any question relating to taxation of costs a bill of exceptions must be filed,[78] unless the error is apparent from the judgment-roll itself.[79] No objection is open which is not stated therein.[80] The bill of exceptions should show the grounds of the motion,

Iowa.— McNider *v.* Sirrine, 84 Iowa 58, 50 N. W. 200; Yeager *v.* Circle, 1 Greene 438.

Massachusetts.— Southworth *v.* Packard, 7 Mass. 95.

Minnesota.— Clague *v.* Hodgson, 16 Minn. 291.

Montana.— Waite *v.* Vinson, 18 Mont. 410, 45 Pac. 552; Marden *v.* Wheelock, 1 Mont. 49.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881; Mitchell *v.* Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

New York.— People *v.* Elmer, 3 Paige 85; Rogers *v.* Rogers, 2 Paige 458.

North Carolina.— Tilley *v.* Bivens, 110 N. C. 343, 14 S. E. 920.

Pennsylvania.— De Long *v.* Allentown, 1 Woodw. 195.

South Carolina.— Lewis *v.* Brown, 16 S. C. 58.

Washington.— Newberg *v.* Farmer, 1 Wash. Terr. 182.

Wisconsin.— Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

See 13 Cent. Dig. tit. "Costs," § 817.

75. Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422; Sharum *v.* Padgett, 23 Ind. 193; Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; Matthews *v.* Matthews, 1 N. Y. Suppl. 222, 17 N. Y. St. 994, 14 N. Y. Civ. Proc. 399.

Presumption in favor of correctness of clerk's taxation is overcome by a judgment of the circuit court retaxing them. State *v.* Hollenbeck, 68 Mo. App. 366.

76. *Alabama.*— Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422; Beadle *v.* Davidson, 75 Ala. 494.

Illinois.— Chicago, etc., R. Co. *v.* Aldrich, 134 Ill. 9, 24 N. E. 763.

Indiana.— Smith *v.* Strain, 72 Ind. 600; Leyner *v.* State, 8 Ind. 490; Garn *v.* Working, 5 Ind. App. 14, 31 N. E. 821.

Kentucky.— Moon *v.* Story, 8 Dana 226.

Louisiana.— Whitney Iron Works *v.* Reuss, 40 La. Ann. 112, 3 So. 500.

Massachusetts.— Kellogg *v.* Kimball, 139 Mass. 296, 30 N. E. 95.

Montana.— Hibbard *v.* Tomlinson, 2 Mont. 220.

Nevada.— Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520.

New York.— Whitney *v.* Roe, 75 Hun 508, 27 N. Y. Suppl. 511, 57 N. Y. St. 683; Beattie *v.* Qua, 15 Barb. 132; Palmer *v.* Ranken, 56 How. Pr. 354.

Ohio.— Goldsmith *v.* State, 30 Ohio St. 208.

Oregon.— Thomas *v.* Thomas, 24 Oreg. 251, 33 Pac. 565.

Tennessee.— State *v.* Goobar, 8 Lea 451.

Vermont.— Carver *v.* Adams, 40 Vt. 552.

See 13 Cent. Dig. tit. "Costs," § 813; and APPEAL AND ERROR, XIII, L, 18 [3 Cyc. 175].

77. *Alabama.*— Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422.

Indiana.— Leyner *v.* State, 8 Ind. 490.

Iowa.— McNider *v.* Sirrine, 84 Iowa 58, 50 N. W. 200.

Louisiana.—Whitney Iron Works *v.* Reuss, 40 La. Ann. 112, 3 So. 500.

United States.— U. S. *v.* Harmon, 147 U. S. 268, 13 S. Ct. 327, 37 L. ed. 164.

See 13 Cent. Dig. tit. "Costs," § 813.

Brief.— A motion on appeal to retax costs will not be heard where no brief to support it or statement of costs accompanies the motion. Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400.

78. *California.*— Gates *v.* Buckingham, 4 Cal. 286.

Indiana.— Leffel *v.* Obenchain, 90 Ind. 50; Bunnell *v.* Studebaker, 88 Ind. 338; Tilman *v.* Harter, 38 Ind. 1; Urton *v.* Luckey, 17 Ind. 213.

Massachusetts.— Hubner *v.* Hoffman, 106 Mass. 346; Richardson *v.* Curtis, 2 Gray 497. See also Nichols *v.* Bucknam, 117 Mass. 488.

Nevada.— Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520.

Ohio.— Goldsmith *v.* State, 30 Ohio St. 208.

Tennessee.— Arnold *v.* State, 96 Tenn. 82, 33 S. W. 723.

Wisconsin.— Perkins *v.* Davis, 16 Wis. 470.

See 13 Cent. Dig. tit. "Costs," § 815.

Signature of judge.— Illegality of taxing attorney's fees will not be determined on an appeal from the taxation where the record only contains a statement that only part of the costs allowed are witness' fees and part attorney's fees. Such record not being signed by the judge when made part of the judgment-roll by the bill of exceptions or statement on appeal. Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 440, 17 Pac. 113.

79. Klein *v.* Allenbach, 6 Nev. 159.

80. Richardson *v.* Curtis, 2 Gray (Mass.) 497.

the evidence, and the ruling on the motion.[81] It is not, however, rendered nugatory by the fact that it omits the technical statement that it contains all the evidence.[82]

e. Hearing and Determination. The appellate court will not in reviewing taxation of costs go into the merits of the case to ascertain whether judgment was given for the right party.[83] Regard will be had only to what ought not to be charged for or what is charged for at too high a rate.[84] If the nature of the questions involved in the suit is material upon the question of costs, the court may examine the evidence if the pleadings leave the nature of the questions involved in doubt.[85] The reviewing court may revise the whole taxation, deducting for the items that are too large or illegally embraced in the bill and adding whenever they are deficient. If upon the whole the amount of costs allowed is not greater than what defendant in error would have been entitled to upon a correct taxation, the judgment will not be reversed.[86]

H. Notice of Judgment Retaxing Costs. It has been held that plaintiffs in an action being constructively in court from the beginning of the action until complete satisfaction or discharge of the judgment rendered are not entitled to special notice of the judgment rendered on motion to retax.[87]

I. Effect of Proceedings to Retax on Judgment. A rule to correct taxation of costs does not operate *per se* as a supersedeas.[88]

XXIII. SECURITY FOR COSTS.

A. Grounds For Requiring Security — 1. In General. In the United States the matter of requiring security for costs is one almost entirely of statutory provision and regulation.[89]

2. Non-Residence — a. As to State or County — (i) *Statement of Rule.* Originally in England foreigners were not required to give security for costs;[90]

81. Gallimore *v.* Blankenship, 99 Ind. 390; Perkins *v.* Davis, 16 Wis. 470. And see Whisler *v.* Lawrence, 112 Ind. 229, 13 N. E. 576; Goldsmith *v.* State, 30 Ohio St. 208.

To authorize a correction of error in the taxation of costs, a mere general statement that costs were improperly taxed is insufficient. The party objecting must specify each item or amount which he considers erroneous and state the reasons why they are so considered. Moore *v.* Toennisson, 28 Kan. 608.

82. Merrill *v.* Shirk, 128 Ind. 503, 28 N. E. 95.

83. Tecumseh Iron Co. *v.* Mangum, 67 Ala. 246; Williams *v.* Williams, 81 Ind. 113.

84. Cock *v.* Smith, 4 Hayw. (Tenn.) 35. And see Mixell *v.* Bradford, 2 Serg. & R. (Pa.) 488.

85. Holmes *v.* Wright, 36 Ind. 383, holding that where it is material on the question of costs whether the title to real estate is involved the court may examine the evidence if the pleadings leave this question in doubt.

The certificate of the judge who presided in the trial court, filed in the case by his order and stating his instructions to the jury, is admissible to show the grounds of the verdict when material to the decision of the question of costs. Holmes *v.* Leland, 1 Gray (Mass.) 625.

Neither oral nor written evidence will be received to contradict and control the proof contained in the transcript of the record brought up from the court below. Fabyan *v.* Russell, 38 N. H. 84. See also Ford *v.* Wright, 7 N. H. 586.

86. Fabyan *v.* Russell, 38 N. H. 84; Chamberlain *v.* Sterling, 26 N. H. 115; Bedel *v.* Goodall, 26 N. H. 92. And see Ford *v.* Wright, 7 N. H. 586.

The decision of a motion to retax costs will not be disturbed where the items appear proper on their face and the objections thereto were heard and determined on competent evidence. Hoyt *v.* Selby Smelting, etc., Co., 90 Cal. 339, 27 Pac. 288.

If the fixing of an item is left to the discretion of the trial court its decision will not ordinarily be disturbed. Patent Brick Co. *v.* Moore, 75 Cal. 205, 16 Pac. 890. But a taxation of costs by a court in its discretion conferred by statute will be set aside where it was made under erroneous views of the law affecting the rights of the parties. Morris *v.* Wheeler, 45 N. Y. 708.

87. Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580.

88. Miller *v.* Netherland, 1 Swan (Tenn.) 66. See also Melvin *v.* Bird, 131 Mass. 561, holding that an appeal from the clerk to a judge of the same court in the matter of taxation does not vacate the judgment, but if the appeal is waived before hearing the judgment is left in force as of the day when it was entered. See also Appeal and Error, 2 Cyc. 796, note 59.

89. See cases cited *infra*, note 90 *et seq.*

90. Maxwell *v.* Mayer, 2 Burr. 1026; Lamii *v.* Sewell, 1 Wils. Ch. 266.

but subsequently it became the settled practice to allow defendant to require security for costs where plaintiff was a foreigner, in default of which the suit was dismissed.[91] An examination of these decisions will show that they are not based on any statute or rule of court. In America also, in practically all jurisdictions, it is competent and customary to require a non-resident of the state to give security for costs, this being the usual ground for requiring security.[92] It is probably true that in most jurisdictions there is express statutory authorization for so doing, but notwithstanding this fact it may be asserted with confidence that the right to require security for costs from a non-resident suitor, whether in law or in equity, exists here as in England, without any statute or rule of court specially providing therefor; and that the statutes are merely declaratory of the common law.[93]

(II) *Persons Within the Rule* — (A) *In General.* A person will be deemed a non-resident who has no usual place of abode in the state at which process may be served,[94] or where his family is domiciled in another state, although he may have a place of business within the state;[95] and even though he may be

91. Denn *v.* Fulford, 2 Burr. 1177; Ganesford *v.* Levy, 2 H. Bl. 118; Carr *v.* Shaw, 6 T. R. 496; Fitzgerald *v.* Whitmore, 1 T. R. 362; Pray *v.* Edie, 1 T. R. 267.

92. *Arkansas.*— Palmer *v.* Hicks, 17 Ark. 505.

Kentucky.— Tibb *v.* Clarkson, 2 B. Mon. 34.

Maryland.— Mayer *v.* Tyson, 1 Bland 559.

New Jersey.— Governor *v.* Sureties on Administration Bond, 3 N. J. L. 754; Shuttleworth *v.* Dunlop, 34 N. J. Eq. 488; Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249.

New York.— Swift *v.* Collins, 1 Den. 659; Fogg *v.* Edwards, 57 How. Pr. 290; Gilbert *v.* Gilbert, 2 Paige 603; Baldwin *v.* Williamson, Hopk. 117.

North Carolina.—Moore *v.* Banner, 39 N. C. 293.

Pennsylvania.— Fisher *v.* Evans, 1 Browne 257; Knoll *v.* Philadelphia Traction Co., 42 Wkly. Notes Cas. 232; Hansen *v.* Ackley, 2 Wkly. Notes Cas. 569.

Rhode Island.— Pratt *v.* Fenner, 8 R. I. 40.

South Carolina.— Nolly *v.* Kirkley, 1 Hill 41; Furnan *v.* Harman, 2 McCord 436.

Virginia.— Lambert *v.* Key, 4 Hen. & M. 484.

West Virginia.— Nease *v.* Capepart, 15 W. Va. 299.

United States.— Miller *v.* Norfolk, etc., R. Co., 47 Fed. 264; Lovering *v.* Heard, 15 Fed. Cas. No. 8,554, 1 Cranch C. C. 349.

See 13 Cent. Dig. tit. "Costs," § 427.

Effect of non-residence of defendant.— It has been held in one case that a rule requiring security from a non-resident plaintiff is not affected by the fact that the defendant is also a non-resident. Stewart *v.* Welsbach Light, etc., Co., 39 Wkly. Notes Cas. (Pa.) 68. But the contrary view has been taken in other decisions. Broat *v.* Knight, 10 Pa. Dist. 140, 24 Pa. Co. Ct. 670; Tyler *v.* Bannon, 30 Wkly. Notes Cas. (Pa.) 372.

As to non-resident defendants see *infra*, XXIII, B, 1.

93. Den *v.* Wilson, 5 N. J. L. 680; Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249; Swift *v.* Collins, 1 Den. (N. Y.) 659; People *v.* Oneida C. Pl., 18 Wend. (N. Y.) 562; Freeman *v.* Refowich, 20 Pa. Co. Ct. 15; Furnam *v.* Harmon, 2 McCord (S. C.) 443. *Contra*, Buckwalder's Estate, 6 Pa. Co. Ct. 20; Brace *v.* Evans, 6 Pa. Co. Ct. 19.

Courts of equity follow courts of law.— If a statute requires security for costs from non-residents of the state in actions at law, but is silent as regards suits in equity, the courts of equity will follow the courts of law in regard to requiring security. Moore *v.* Banner, 39 N. C. 293; Pratt *v.* Fenner, 8 R. I. 40.

94. Gillen *v.* Wilmington, 2 Marv. (Del.) 154, 42 Atl. 430; Thomas *v.* Gibbons, 25 Pa. Co. Ct. 28. To the same effect see Norton *v.* Bennett, 22 Hun (N. Y.) 604.

Particular facts held to show non-residence. — *Maryland.*—Haney *v.* Marshall, 9 Md. 194.

New Jersey.— Mulford *v.* Geschchiat, 16 N. J. L. 272.

New York.— Levy *v.* Meirowitz, 16 Misc. 284, 38 N. Y. Suppl. 123, 7 N. Y. St. 576.

West Virginia.— Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

England.— Stewart *v.* Stewart, 20 Beav. 332.

Particular facts held to show residence.— Evans *v.* Bradshaw, 10 Gratt. (Va.) 207.

95. Krom *v.* Kursheedt, 51 N. Y. Super. Ct. 119, 6 N. Y. Civ. Proc. 371, 1 How. Pr. N. S. (N. Y.) 38. As sustaining this doctrine see also Roberti *v.* Methodist Book Concern, 1 Daly (N. Y.) 3. But *compare* Flaherty *v.* Cary, 25 N. Y. App. Div. 195, 49 N. Y. Suppl. 303, where it is held that where a party removes to another state, with the intention to remain there permanently, if his business requires it, he becomes a resident of that state, although his domicile may be in the state where suit is brought.

Person having office in New York city.— Under a statute requiring security for costs, if plaintiff resides without the state, or if the action be in the city court of New York, and he resides without the county, and a further provision making a plaintiff, who has a regular office for the transaction of business in person in the city of New York, a resident thereof, within the previous section, a non-

actually within the jurisdiction,[96] or have property in the state,[97] he will be required to give security if he resides out of the state.

(B) *Persons Leaving Jurisdiction After Commencement of Suit.* While the rule seems to be otherwise in some jurisdictions,[98] the weight of authority is that a plaintiff who becomes a non-resident after commencement of the suit is within the rule requiring a non-resident plaintiff to give security for costs;[99] but to authorize the application of this doctrine there must be an actual removal from the jurisdiction,[1] and an intention to reside outside of it.[2]

(C) *Persons Becoming Residents Pending Suit.* It has been held that where a non-resident becomes a resident pending suit, the rule requiring security will be stricken out by leave of court.[3] Other decisions, however, have held that the practice requiring security from non-residents is in no way affected thereby,[4] especially where he has no property in the state and there is some doubt as to his having become a resident.[5]

(D) *Where One of Several Plaintiffs Is a Resident.* Where there are several plaintiffs in the action, one of whom is a resident, the rule does not apply,[6] and

resident of the state who has an office in the city of New York need not give such security. Beebe *v.* Parker, 4 N. Y. Suppl. 97, 24 N. Y. St. 120, 16 N. Y. Civ. Proc. 320, 22 Abb. N. Cas. (N. Y.) 445; Wyckoff *v.* Devlin, 8 N. Y. Civ. Proc. 138, 2 How. Pr. N. S. (N. Y.) 333.

96. Knoll *v.* Philadelphia Traction Co., 42 Wkly. Notes Cas. (Pa.) 232; Appleton *v.* Ruth, 15 Wkly. Notes Cas. (Pa.) 127; Hansen *v.* Ackley, 2 Wkly. Notes Cas. (Pa.) 569.

A resident alien is not within the rule requiring security for costs from non-residents, unless his residence is merely temporary. Norton *v.* Mackie, 8 Hun (N. Y.) 520.

97. Churchman *v.* Merritt, 50 Hun (N. Y.) 270, 2 N. Y. Suppl. 843, 19 N. Y. St. 191.

98. State *v.* Lawson, 5 Ark. 665; Johnson *v.* Huber, 134 Ill. 511, 25 N. E. 790 [*affirming* 34 Ill. App. 527]; Leadbeater *v.* Roth, 25 Ill. 587; Thompson *v.* Neal, 1 Dana (Ky.) 469.

99. *Delaware.*— Gillen *v.* Wilmington, 2 Marv. 154, 42 Atl. 430; Townsend *v.* Houston, 2 Harr. 157.

Indiana.— Malaby *v.* Hinkston, 4 Blackf. 127.

Massachusetts.— Smith *v.* Castles, 1 Gray 108.

New Hampshire.— Leazar *v.* Cota, 43 N. H. 81.

New Jersey.— Roumage *v.* Mechanics' Ins. Co., 12 N. J. L. 95; Newman *v.* Landrine, 14 N. J. Eq. 291, 18 Am. Dec. 249.

Pennsylvania.— Sharp *v.* Buffington, 2 Watts & S. 454; Roese *v.* Barry, 1 Wkly. Notes Cas. 20; McGarry *v.* Crispin, 3 Pa. L. J. Rep. 25, 4 Pa. L. J. 353. *Contra,* Searle *v.* Mann, 1 Miles 321.

Virginia.— Vance *v.* Bird, 4 Munf. 364.

United States.— McCutchen *v.* Hilleary, 16 Fed. Cas. No. 8,742, 1 Cranch C. C. 173.

England.— Anonymous, Dick. 775; Dyott *v.* Dyott, 1 Madd. 187; Weeks *v.* Cole, 14 Ves. Jr. 518.

See 13 Cent. Dig. tit. "Costs," § 432.

Removal pending appeal.—A plaintiff removing from the state pending appeal by defendant cannot be compelled to give security while the judgment stands unreversed. Flint *v.* Van Deusen, 24 Hun (N. Y.) 440. And see Kanouse *v.* Martin, 3 How. Pr. (N. Y.) 24, where it is held to be unnecessary for a non-resident plaintiff in error to file security for costs.

Where defendant is in default as to payment of costs.— Where an order overrules a demurrer with leave to defendant to answer on payment of costs, while defendant is in default of payment he is not entitled to security if plaintiff becomes a non-resident. Butler *v.* Wood, 10 How. Pr. (N. Y.) 313.

1. Morten *v.* Domestic Tel. Co., 1 Abb. N. Cas. (N. Y.) 290. And see Gilbert *v.* Gilbert, 2 Paige (N. Y.) 603.

2. Jones *v.* Kearns, 18 Mart. & Y. (Tenn.) 242 [*citing* Green *v.* Charnock, 3 Bro. Ch. 371, 2 Cox Ch. 284, 1 Ves. Jr. 396, 29 Eng. Reprint 589; Craig *v.* Bolton, 2 Bro. Ch. 609, 29 Eng. Reprint 334; Dyott *v.* Dyott, 1 Madd. 187]; Hoby *v.* Hitchcock, 5 Ves. Jr. 699.

3. Nicholls *v.* Johns, 18 Fed. Cas. No. 10,232, 2 Cranch C. C. 66. And see Judd *v.* Claremont, 66 N. H. 418, 23 Atl. 427, holding that where plaintiff was a non-resident when she commenced suit, and the writ was indorsed by a resident, but subsequently she became a resident, and moved to strike off the name of the indorser, the motion was to be determined by the trial court as a question of fact.

4. Ambler *v.* Ambler, 8 Abb. Pr. (N. Y.) 340; Standard Pub. Co. *v.* Bartlett, 6 Ohio Dec. (Reprint) 965, 9 Am. L. Rec. 58.

5. McCalley *v.* Moore, 14 Pa. Co. Ct. 37.

6. *Alabama.*— Eudora Min., etc., Co. *v.* Barclay, 122 Ala. 506, 26 So. 113; *Ex p.* Jemison, 31 Ala. 392; *Ex p.* Bush, 29 Ala. 50.

Illinois.— Wood *v.* Goss, 24 Ill. 626.

Indiana.— Thalman *v.* Barhour, 5 Ind. 178.

Maryland.— Mayer *v.* Tyson, 1 Bland 559.

New Jersey.— Anonymous, 3 N. J. L. 886; Jones *v.* Knauss, 33 N. J. Eq. 188.

New York.— Sims *v.* Bonner, 60 N. Y. Super. Ct. 63, 16 N. Y. Suppl. 800, 42 N. Y. St. 10, 21 N. Y. Civ. Proc. 355.

indeed this is true notwithstanding the fact that the resident plaintiff or plaintiffs be an insolvent person or persons.[7]

(E) *Where Nominal or Use Plaintiff, or Both, Are Non-Residents.* According to some decisions, security for costs may be required, although the non-resident plaintiff is merely a nominal plaintiff suing for the use of a resident, on the ground that he would be the person against whom the defendant would have to proceed for costs.[8] Other decisions hold that if the plaintiff is merely a nominal plaintiff he should not be required to give bond for costs if the use plaintiff is a resident.[9] By express statutory provision in some jurisdictions, if the beneficial plaintiff is a non-resident he must give security for costs;[10] and the same conclusion has been reached in other decisions, where no express statutory requirement to that effect was relied on or mentioned.[11] If both the nominal and use plaintiffs reside out of the state security for costs will be required.[12]

(F) *Domestic and Foreign Corporations.* A domestic corporation is not a non-resident within the rule, although it has no property within the state;[13] but a foreign corporation is and must give security for costs,[14] although having a place of business within the state,[15] and although it is entitled to receive a certificate to do business in the state, and is required to appoint an agent for service, on whom process may be served.[16]

(III) *Actions or Proceedings in Which Security Required.* The right to require a non-resident plaintiff to give security for costs applies to all actions at law, whether sounding in tort or contract, where the character of the action is not restricted by statute,[17] and, it is apprehended, to all suits in equity. It does

Pennsylvania.— Zimmerman *v.* Mendenhall, 2 Miles 402.

England.— Winthorp *v.* Royal Exch. Assur. Co., Dick. 282; Walker *v.* Easterby, 6 Ves. Jr. 612. The following English cases are also cited as supporting this doctrine in Jones *v.* Knauss, 33 N. J. Eq. 188: Thomel *v.* Roelants, 2 C. B. 290, 52 E. C. L. 290; Anonymous, 2 Cromp. & J. 88; Doe *v.* Roe, 1 Hodges 315; Anonymous, 7 Taunt. 307, 2 E. C. L. 375.

See 13 Cent. Dig. tit. "Costs," § 433.

Reason for rule.— As each plaintiff is bound for the whole costs, defendant has security if one is within the jurisdiction. Walker *v.* Easterby, 6 Ves. Jr. 612.

7. Den *v.* Boqua, 10 N. J. L. 192; Jones *v.* Knauss, 33 N. J. Eq. 188; Ten Broeck *v.* Reynolds, 13 How. Pr. (N. Y.) 462; Pfister *v.* Gillespie, 2 Johns. Cas. (N. Y.) 109. And see sustaining this doctrine: McConnell *v.* Johnston, 1 East 431, 6 Rev. Rep. 310; Reddick *v.* Sinnott, 1 Hud. & B. 204. But *compare* Wood *v.* Goss, 24 Ill. 627.

On the death of the resident plaintiff the non-resident plaintiff may be required to give security for costs. Lambert *v.* Smith, 14 Fed. Cas. No. 8,027, 1 Cranch C. C. 347.

8. Deen *v.* Boyd, 9 Dana (Ky.) 169; Youde *v.* Youde, 3 A. & E. 311, 30 E. C. L. 157. See also Seward *v.* Wilson, 2 Ill. 192, decided under a statute relating particularly to justices' courts.

9. *Ex p.* Bush, 29 Ala. 50; Lewis *v.* Lewis, 25 Ala. 315; O'Connell *v.* Rea, 51 Ill. 306; Caton *v.* Harmon, 2 Ill. 581; Goodrich *v.* Pendleton, 3 Johns. Ch. (N. Y.) 520.

10. Stillman *v.* Dunklin, 48 Ala. 175; Palmer *v.* Hicks, 17 Ark. 505; Smith *v.* Robinson, 11 Ill. 119. *Contra,* in Illinois before the adoption of this statute. Buckmaster *v.* Beames, 8 Ill. 1.

Removal from state.— By express statutory provision in Alabama, if a suit be commenced by or for the use of a resident, who afterward removes from the state, defendant may require security for costs. *Ex p.* Louisville, etc., R. Co., 124 Ala. 547, 27 So. 239.

11. State *v.* Layman, 46 Md. 190; Charles *v.* Waterman, 2 How. Pr. (N. Y.) 122. And see State *v.* Roche, 91 Ind. 406; Swift *v.* Collins, 1 Den. (N. Y.) 659; Phenix *v.* Townshend, 2 Code Rep. (N. Y.) 2. But *compare* Horton *v.* Shepherd, 1 N. Y. Civ. Proc. 26.

12. Roberts *v.* Reintzell, 20 Fed. Cas. No. 11,911, 2 Cranch C. C. 235.

13. Philadelphia, etc., Steamboat Co. *v.* Andrews, 8 N. J. L. 177. *Compare* Edward Thompson Co. *v.* Lobenthal, 33 N. Y. Suppl. 417, 67 N. Y. St. 419, 24 N. Y. Civ. Proc. 247.

Test of residence.— A private corporation resides where its principal office is located. Residence does not depend on the habitation of its stock-holders. Lyman Ventilating, etc., Co. *v.* Southard, 15 Fed. Cas. No. 8,633, 12 Blatchf. 405.

14. Grant *v.* Crittenton, 13 N. Y. Civ. Proc. 123; Michigan Bank *v.* Jessup, 19 Wend. (N. Y.) 10. But *compare* memorandum decision in Potomac Co. *v.* Gilman, 19 Fed. Cas. No. 11,317, 2 Cranch C. C. 243.

15. Henry Huber Co. *v.* Warren, 29 Misc. (N. Y.) 588, 61 N. Y. Suppl. 247; F. A. Kennedy Co. *v.* McCormack, 15 N. Y. Civ. Proc. 239.

16. Fidelity Mut. F. Ins. Co. *v.* Hart, 1 Pennew. (Del.) 447, 41 Atl. 974.

17. Keller *v.* Townsend, 2 Abb. N. Cas. (N. Y.) 432.

not apply, however, to proceedings to open, modify, or reverse judgments,[18] or to revive judgments;[19] nor does it apply to a motion on notice, until the notice is filed or the motion and production of notice entered on record.[20]

b. Persons Living Within State but Outside Jurisdiction of Court. In a number of jurisdictions, by virtue of statutory provisions[21] authorizing it, persons living within the state but outside of the jurisdiction of the court may be required to give security for costs.[22]

c. Reason For Requiring Security. The object of requiring security for costs in such cases is to have someone within reach of process of the court who is bound therefor.[23]

3. Poverty. Security for costs is never required merely on the ground of poverty, in the absence of statute expressly or by implication making it a ground.[24]

4. Absence of Grounds For Claim. Where a statute authorizes the court to require security upon good cause shown, security may be ordered where facts exist which raise a legal presumption that the claim is unfounded.[25]

18. Roberts *v.* Price, 2 Ohio Dec. (Reprint) 681, 4 West. L. Month. 581. See also Firestone *v.* Christ, 2 Pa. Co. Ct. 413.

19. Johnson *v.* Hoskins, 12 Ark. 635.

20. Francisco *v.* Bullock, 3 B. Mon. (Ky.) 54.

21. And even in the absence of any statute authorizing it, the right to require security of such persons has been affirmed. Mayer *v.* Tyson, 1 Bland (Md.) 559; Rogers *v.* Bishop, Harp. (S. C.) 536. *Contra*, Weeks *v.* Trask, 2 Mart. (La.) 247.

22. C. E. Sherin Special Agency *v.* Seaman, 49 N. Y. App. Div. 33, 63 N. Y. Suppl. 407; Bolton *v.* Taylor, 3 Rob. (N. Y.) 647, 18 Abb. Pr. (N. Y.) 385; Hicks *v.* Payson, 7 Abb. Pr. (N. Y.) 326; Blossom *v.* Adams, 2 Code Rep. (N. Y.) 59, 7 N. Y. Leg. Obs. 314; Sloat *v.* New York, etc., R. Co., 5 N. Y. Leg. Obs. 417; Stephens *v.* Blair, 1 N. Y. Leg. Obs. 234; Ullman *v.* Abbott, (Wyo. 1902) 67 Pac. 467.

A corporation is a "person" within a statute providing that the defendant may require security for costs, where in an action brought in the county court the plaintiff resides without the county. C. E. Sherin Special Agency *v.* Seaman, 49 N. Y. App. Div. 33, 63 N. Y. Suppl. 407.

On appeal from justice's court.— Where a statute requires a non-resident of the county to give security for costs in a justice's court, if the defendant does not ask that this be done, and the plaintiff recovers judgment, and the cause is appealed to a court in which security is only required when the plaintiff is a non-resident of the state, security for costs cannot be required in that court. Coffey *v.* Collier, 12 Ind. 565.

23. *Arkansas.*— Byrd *v.* Crutchfield, 7 Ark. 149.

South Carolina.—Nolly *v.* Kirkley, 1 Hill 41.

West Virginia.—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

Wisconsin.— Conrad *v.* Cole, 15 Wis. 545.

United States.— Heckman *v.* Mackey, 32 Fed. 574.

England.— Doe *v.* Alston, 1 T. R. 491; Fitzgerald *v.* Whitmore, 1 T. R. 362; Pray *v.* Edie, 1 T. R. 267.

See 13 Cent. Dig. tit. "Costs," § 427 *et seq.*

24. Gale *v.* French, 16 N. H. 95; Smith *v.* Williamson, 11 N. J. L. 315; Felt *v.* Amidon, 48 Wis. 66, 4 N. W. 327; Golding *v.* Barlow, Cowp. 24; Ross *v.* Jacques, 9 Dowl. P. C. 737, 10 L. J. Exch. 306, 8 M. & W. 135; Hamill *v.* Henry, 5 L. T. Rep. N. S. 243; Tidd Pr. 535.

See 13 Cent. Dig. tit. "Costs," § 409.

"In all cases where it shall appear reasonable." — Under a statute authorizing the court to require security "in all cases where it shall appear to them reasonable," it may require security on the ground of inability to pay costs, but will not in general do so in the absence of circumstances of vexation and oppression. Feneley *v.* Mahoney, 21 Pick. (Mass.) 212.

"In case the court shall be satisfied" of inability to pay.— Under a statute providing that "in case the court shall be satisfied" that the plaintiff is unable to pay costs or is so unsettled as to endanger the officers in their legal demands, it may require security, the matter of requiring or refusing the security is solely in the discretion of the court. Ward *v.* Wilms, 16 Colo. 86, 27 Pac. 247; Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78; Papineau *v.* Belgarde, 81 Ill. 61; Clement *v.* Brown, 30 Ill. 43; Selby *v.* Hutchinson, 9 Ill. 319; Gesford *v.* Critzer, 7 Ill. 698. Security may be required when the applicant shows that he has long known the plaintiff and her pecuniary circumstances, and that he knows of no property belonging to her from which costs can be made. Parr *v.* Van Horne, 40 Ill. 122.

"Upon good cause shown." — It has been held that the power to require is not conferred by a statute authorizing a court to require security "upon good cause shown." Gale *v.* French, 16 N. H. 95.

In Rhode Island it is held that a statute (the provisions of which are not given) authorizes the court to require security because of inability to pay costs. Conley *v.* Woonsocket Sav. Inst., 11 R. I. 147; Pratt *v.* Fenner, 8 R. I. 40.

25. Gale *v.* French, 16 N. H. 95.

5. CIRCUMSTANCES OF OPPRESSION AND VEXATION. Under a statute providing that the court may upon good cause shown order reasonable security for costs to be furnished, the court has authority to require security for costs where the plaintiff is pursuing his claim under circumstances of oppression or vexation.[26]

B. Who May Be Required to Give Security[27] — 1. DEFENDANTS. Under the American decisions,[28] it appears that in the absence of a statute[29] a defendant cannot be required to give security for costs in any event.[30]

2. INTERVENERS. If a third person applies and obtains leave to come in and defend or prosecute, he may be required to give security for costs;[31] and on the other hand the court, it has been held, has the inherent power to permit a person to intervene without giving security.[32] So, it has been held, under a statute which gives a person the absolute right to be brought in as defendant, security for costs cannot be required as a condition to the granting of such right.[33]

3. CORPORATIONS.[34] A statute requiring security from "persons" has been held not to require it from corporations.[35] A domestic corporation is required to give costs by a statute providing that if defendant shall at any time before answering file an affidavit stating that he has a good defense, in whole or in part, if he be a non-resident or a corporation, before any further proceedings in the case he shall give security for costs.[36] A proceeding by notice and motion by a company against a delinquent stock-holder is a suit within the statute requiring a corporation to give security for costs.[37] A statute requiring a foreign

26. Gale *v.* French, 16 N. H. 95.

27. **As to foreign ambassadors** see AMBASSADORS AND CONSULS, 2 Cyc. 267, note 36; 268, note 46.

As to libels in admiralty see ADMIRALTY, 1 Cyc. 871.

As to non-resident plaintiffs see *supra*, XXIII, A, 2; APPEAL AND ERROR, 2 Cyc. 511; ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 243.

As to poor persons see *supra*, XXIII, A, 3; *infra*, XXIV.

As to revival of suit see ABATEMENT AND REVIVAL, 1 Cyc. 82, note 8.

28. **There are no English cases**, it seems, in which the defendant was required to give security for costs; and in one case it was held that the court would not require a non-resident defendant to give security for costs as a prerequisite of compelling the non-resident plaintiff to give defendant security for costs. Baxter *v.* Morgan, 2 Marsh. 80, 6 Taunt. 379, 16 Rev. Rep. 628, 1 E. C. L. 662.

29. Under a statute providing that the chancery court may when necessary require of either party sufficient security "for the costs of prosecution," the term "costs of prosecution" should be construed to apply to a defense, when it consists of affirmative counterclaims. Badger *v.* Taft, 58 Vt. 585, 3 Atl. 535.

30. Den *v.* Inslee, 6 N. J. L. 475; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

Defendant seeking affirmative relief by cross bill.— A defendant seeking affirmative relief by cross bill need not file bond for costs, in the absence of statute requiring it. Hall *v.* Fowlkes, 9 Heisk. (Tenn.) 745. *Compare* Keele *v.* Cunningham, 2 Heisk. (Tenn.) 288.

So a non-resident defendant who seeks affirmative relief by cross bill or cross complaint is not within a statute requiring security from non-resident plaintiffs. Stein *v.* McGrath, 128 Ala. 175, 30 So. 792; Moss *v.* Robertson, 56 Nebr. 774, 77 N. W. 403; State *v.* Thurston County, 17 Wash. 564, 50 Pac. 482.

31. Leazar *v.* Cota, 43 N. H. 81; Holland *v.* Seaver, 21 N. H. 388; McHugh *v.* Astrophe, 1 Misc. (N. Y.) 218, 20 N. Y. Suppl. 877, 878, 49 N. Y. St. 79; McKesson *v.* Mendenhall, 64 N. C. 502; Chease *v.* Greenough, 88 Pa. St. 403. *Contra*, Petty *v.* Hayden, 115 Iowa 212, 88 N. W. 339.

32. Rosenberg *v.* Courtney, 8 Misc. (N. Y.) 616, 29 N. Y. Suppl. 327, 60 N. Y. St. 823.

33. Hertzog *v.* Tamsen, 22 Misc. (N. Y.) 766, 49 N. Y. Suppl. 1015.

34. **Domestic and foreign corporations** as affected by statutes requiring security for costs from non-residents see *supra*, XXIII, A, 2, a, (II), (F).

35. Dunmore Mfg. Co. *v.* Morton, Brayt. (Vt.) 18. This is a rather strange construction, and is clearly contrary to the weight of authority. See *supra*, XXIII, A, 2, a, (II), (F).

36. D. M. V. Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446.

A domestic corporation cannot be required to give security for costs under a statute providing that security for costs may be required in an action brought in the New York city court, where plaintiff is a person residing without the city or is a foreign corporation. Edward Thompson Co. *v.* Lobenthal, 33 N. Y. Suppl. 417, 67 N. Y. St. 419, 24 N. Y. Civ. Proc. 247.

37. Alabama, etc., R. Co. *v.* Harris, 25 Ala. 232.

Failure to require in a proper case.— The refusal of the circuit court to dismiss a suit commenced by a corporation without first giv-

corporation to give security applies to a national bank organized under the act of congress.[38]

4. Trustees in Bankruptcy. A statute authorizing the defendant to require a security for costs if the plaintiff is "the official assignee or official trustee of a debtor, or an assignee in bankruptcy, where the action is brought upon a cause of action arising before the assignment, the appointment of the trustee or the adjudication in bankruptcy" does not apply to an action brought by a trustee in bankruptcy to set aside transfers made by the bankrupt.[39]

C. Constitutionality of Statutes Requiring Security. Statutes requiring security for costs are not unconstitutional.[40]

D. Jurisdiction. Where the statutes designate the courts in which security can be required, no others than those so designated have authority to require security.[41] A judge of one court cannot make an order for security in a cause pending in another court.[42]

E. Application For Security — 1. Necessity For Application. Ordinarily it is apprehended, that an application for security for costs is necessary.[43]

2. Time of Making — a. Statement of Rule. The right of a defendant to demand security for costs may be waived by his own laches in making application therefor;[44] but the greatest lack of harmony exists among the decisions as to the

ing security, as required, is available on appeal, and the cause will be remanded with directions to dismiss the suit. The Empire *v.* Alabama Coal Min. Co., 29 Ala. 698.

38. National Park Bank *v.* Gunst, 1 Abb. N. Cas. (N. Y.) 292.

39. Schreier *v.* Hogan, 70 N. Y. App. Div. 2, 74 N. Y. Suppl. 1051; Reilly *v.* Rosenberg, 57 N. Y. App. Div. 408, 68 N. Y. Suppl. 265.

40. *Illinois.*— Gesford *v.* Critzer, 7 Ill. 698.

Louisiana.— Grover's Succession, 49 La. Ann. 1050, 22 So. 313.

Maryland.— Haney *v.* Marshall, 9 Md. 194.

Tennessee.— Akling *v.* St. Louis, etc., Packet Co., (Sup. 1898) 46 S. W. 24.

United States.— Miller *v.* Norfolk, etc., R. Co., 47 Fed. 264.

41. Smith *v.* Humphrey, 15 Iowa 428; Gordon *v.* Ellison, 9 Iowa 317, 74 Am. Dec. 353; Longrill *v.* Downey, 7 N. Y. Suppl. 503, 27 N. Y. St. 51; Mellen *v.* Hutchins, 8 Abb. N. Cas. (N. Y.) 228; Pierce *v.* Pierce, 21 Tex. 469.

After appeal from judgment on demurrer. — Where a statute provides that entry in the supreme court of any question arising on appeal shall only transfer the question to be decided and not the cause, the trial court may require security for costs after appeal from a judgment on a demurrer to the declaration. Joannes *v.* Underwood, 6 Allen (Mass.) 240.

42. *In re* Martin, 1 How. Pr. N. S. (N. Y.) 28, 7 N. Y. Civ. Proc. 399; Granbery *v.* Newby, 52 N. C. 422. See also Longstreet *v.* Sawyer, 15 N. Y. Suppl. 608, 21 N. Y. Civ. Proc. 16.

43. Cox *v.* Hunt, 1 Blackf. (Ind.) 146; Parks *v.* Goodwin, 1 Dougl. (Mich.) 56; Shackleford *v.* Wallace, 4 Tex. 239.

Waiver of application, etc.— Where plaintiff gives security in the action, where security is provided for by law, without any precedent steps therefor being taken by defendant, plaintiff will be held to have waived such steps. Baggett *v.* Watson, 70 Miss. 64, 11 So. 679.

44. Cator *v.* Collins, 2 Mo. App. 225; Turell *v.* Erie R. Co., 46 N. Y. App. Div. 296, 61 N. Y. Suppl. 308; Segal *v.* Cauldwell, 22 N. Y. App. Div. 95, 47 N. Y. Suppl. 839; Wood *v.* Blodgett, 49 Hun (N. Y.) 64, 2 N. Y. Suppl. 304, 17 N. Y. St. 295; Gifford *v.* Rising, 48 Hun (N. Y.) 128, 14 N. Y. St. 596, 14 N. Y. Civ. Proc. 172; Robertson *v.* Barnum, 29 Hun (N. Y.) 657; Sims *v.* Bonner, 60 N. Y. Super. Ct. 63, 16 N. Y. Suppl. 800, 42 N. Y. St. 10; Florence *v.* Bulkley, 1 Duer (N. Y.) 705; Wolff *v.* Houston, etc., R. Co., 2 N. Y. Suppl. 789, 19 N. Y. St. 762; Todd *v.* Marsily, 15 N. Y. Civ. Proc. 247; McDonald *v.* Peet, 7 N. Y. Civ. Proc. 200; Buckley *v.* Gutta Percha, etc., Mfg. Co., 3 N. Y. Civ. Proc. 428; Healy *v.* Twenty-Third St. R. Co., 1 N. Y. Civ. Proc. 15; Weber *v.* Moog, 12 Abb. N. Cas. (N. Y.) 108; Fearn *v.* Gelpcke, 13 Abb. Pr. (N. Y.) 473; Robinson *v.* Sinclair, 1 Den. (N. Y.) 628; Boucher *v.* Lindsley, 1 Ohio Dec. (Reprint) 457, 10 West. L. J. 96; Frantz *v.* Dehart, 1 Pa. Co. Ct. 4; Hass *v.* Railroad Co., 5 Lanc. L. Rev. 253; Swift *v.* Stine, 3 Wash. Terr. 518, 19 Pac. 63.

Applications have been held too late: After joinder of issue and placing of cause on trial list. Smart *v.* Chamberlin, 26 Wkly. Notes Cas. (Pa.) 272. After answer, unless excuse is shown for the delay. Kelley *v.* Kremer, 74 N. Y. App. Div. 456, 77 N. Y. Suppl. 515; Dunaway *v.* Terry, 37 Misc. (N. Y.) 510, 75 N. Y. Suppl. 974. After cause has been noticed for trial. Swan *v.* Matthews, 3 Duer (N. Y.) 613; McDonald *v.* Peet, 7 N. Y. Civ. Proc. 200; Robinson *v.* Sinclair, 1 Den. (N. Y.) 628. After calling of the cause for trial. St. Louis, etc., R. Co. *v.* South, 43 Ill. 176, 93 Am. Dec. 103; Beymer *v.* Endly, Tapp. (Ohio) 166. After issue joined and appearance before arbitrators. Cantelo *v.* Binns, 2 Miles (Pa.) 86. When made at the term next after the re-

proper time of applying or moving for security for costs, and even in the same state the decisions are frequently conflicting. Some decisions hold that the application may be made at any time before trial;[45] others that application may be made at any stage of the trial, provided the trial is not delayed or the opposite party prejudiced.[46] And while it has often been held that an application after issue joined is not too late,[47] the probable weight of authority is that application must be made at least before issue joined.[48] And in some decisions it is held that if the applica-

turn of the writ. Mechanics' Bank *v.* Goodwin, 14 N. J. L. 439. See also Foster *v.* Swasey, 9 Fed. Cas. No. 4,984, 2 Woodb. & M. 217. After cause has been referred. Florence *v.* Bulkley, 1 Duer (N. Y.) 705; Abell *v.* Bradner, 3 N. Y. Suppl. 20, 1 N. Y. St. 859. *Contra*, Uhle *v.* Burnham, 46 Fed. 500. After referee has made his report. Prince *v.* Towns, 33 Fed. 161. After summoning (Wallace *v.* Collins, 5 Ark. 41, 39 Am. Dec. 359), impaneling (Frasure *v.* Zimmerly, 25 Ill. 202), or swearing jury (Adae *v.* Zangs, 41 Iowa 536). During (Fitzsimmons *v.* Curley, 50 N. Y. Super. Ct. 429, 6 N. Y. Civ. Proc. 156; Weber *v.* Moog, 12 Abb. N. Cas. (N. Y.) 108; Swift *v.* Stine, 3 Wash. Terr. 518, 19 Pac. 63; Conrad *v.* Cole, 15 Wis. 545. *Compare* Caton *v.* Collins, 2 Mo. App. 225) or after trial (Turell *v.* Erie R. Co., 46 N. Y. App. Div. 296, 61 N. Y. Suppl. 308; Jackson *v.* Bushnell, 13 Johns. (N. Y.) 330). After several trials. Wolf *v.* Houston, etc., R. Co., 50 Hun (N. Y.) 604, 2 N. Y. Suppl. 789, 19 N. Y. St. 763, 16 N. Y. Civ. Proc. 107. After argument. Edwards *v.* Helm, 5 Ill. 142. After verdict. Knoll *v.* Philadelphia Traction Co., 42 Wkly. Notes Cas. (Pa.) 232. After judgment for plaintiff. Day *v.* Wilcox, 2 McCord (S. C.) 454; Furnan *v.* Harman, 2 McCord (S. C.) 436. See also Abell *v.* Bradner, 3 N. Y. Suppl. 20, 17 N. Y. St. 859, 15 N. Y. Civ. Proc. 241; Eureka Consol. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cas. No. 4,549, 5 Sawy. 121. After reversal of judgment for defendant. Bay City *v.* Bay Cir. Judge, 126 Mich. 50, 85 N. W. 263. After plaintiff has obtained a lien for his claim. Westein Pub. House *v.* Valentine, 3 Pa. Dist. 242. On appeal by defendant from a judgment against him in a justice's court. Hatton *v.* Weems, 12 Gill & J. (Md.) 83; Pierce *v.* Pierce, 21 Tex. 469; Foreman *v.* Gregory, 17 Tex. 193; Taylor *v.* American Brewing Assoc., (Tex. Civ. App. 1897) 41 S. W. 111. On appeal from default judgment of justice. Hebblewhite Mfg. Co. *v.* H. J. White Co., 24 Pa. Co. Ct. 82. See also Frantz *v.* Dehart, 1 Pa. Co. Ct. 4. *Contra*, Bement *v.* Jackson, 9 Pa. Dist. 706. After issuance of process. Strausbaugh *v.* Doran, 2 Ohio Dec. (Reprint) 421, 3 West. L. Month. 37; Wheeler *v.* Taylor, 2 Ohio Dec. (Reprint) 96, 1 West. L. Month. 354, under statute providing that a justice may, previous to issuing process, require security from a non-resident of the township. After vacating judgment dismissing complaint and filing of an amended complaint. Fagan *v.* Strong, 11 N. Y. Suppl. 766, 19 N. Y. Civ. Proc. 88. After suit opened as favor to defendant. Bliss *v.* Brooklyn, 3 Fed. Cas. No. 1,545, 10 Blatchf. 217. Application eight years after suit brought. Bogardus *v.* Williams, 1 Pa. Co. Ct. 673, 1 Lehigh Val. L. Rep. 218.

45. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733; *Ex p.* Jones, 83 Ala. 587, 3 So. 811; Gedney *v.* Purdy, 47 N. Y. 676.

46. Burgess *v.* Gregory, 1 Edw. (N. Y.) 449; Micklethwaite *v.* Rhodes, 4 Sandf. Ch. (N. Y.) 434; Shaw *v.* Wallace, 2 Dall. (Pa.) 179, 1 L. ed. 339, 1 Yeates (Pa.) 176; Germain Fruit Co. *v.* Roberts, 18 Pa. Co. Ct. 144; Miller *v.* Norfolk, etc., R. Co., 47 Fed. 264; Stewart *v.* The Sun, 36 Fed. 307; Hugunin *v.* Thatcher, 18 Fed. 105, 21 Blatchf. 497.

47. Kimbark *v.* Blundin, 6 Ill. App. 539 (under a statute specially providing that "the right to require security for costs shall not be waived by any proceeding in the cause"); Code *v.* Williams, 5 N. J. L. J. 218; Rommel *v.* Kirk, 4 N. J. L. J. 216; Wicker *v.* Elmira Heights, 42 N. Y. App. Div. 426, 59 N. Y. Suppl. 130; Micklethwaite *v.* Rhodes, 4 Sandf. Ch. (N. Y.) 434; Hickock *v.* Park Assoc., 14 Wkly. Notes Cas. (Pa.) 12; Kirk *v.* Korn, 13 Wkly. Notes Cas. (Pa.) 281; Rathbone *v.* Stetson, 4 Wkly. Notes Cas. (Pa.) 55; Hallahan *v.* Murray, 3 Wkly. Notes Cas. (Pa.) 44; Buck *v.* James, 2 Chest. Co. Rep. (Pa.) 401. But see New Jersey, New York, and Pennsylvania decisions to the contrary cited *infra*, note 48.

48. *Arizona.*— Muldon *v.* Place, (1885) 6 Pac. 479.

Illinois.— Papineau *v.* Belgarde, 81 Ill. 61; Randolph *v.* Emerick, 13 Ill. 344.

Iowa.— Gilbert *v.* Hoffman, 66 Iowa 205, 23 N. W. 632, 55 Am. Rep. 263; Sprague *v.* Haight, 54 Iowa 446, 6 N. W. 693, under statutes expressly requiring application before answer.

Kentucky.— Tibb *v.* Clarkson, 2 B. Mon. 34.

Michigan.— Van Slyck *v.* Wolcott, 2 Mich. N. P. 65.

New Jersey.— Roumage *v.* Mechanics' Ins. Co., 12 N. J. L. 95.

New York.— Corbett *v.* Brantingham, 65 N. Y. App. Div. 335, 72 N. Y. Suppl. 763; Turell *v.* Erie R. Co., 46 N. Y. App. Div. 296, 61 N. Y. Suppl. 308; Henderson *v.* McNally, 33 N. Y. App. Div. 132, 53 N. Y. Suppl. 351; Segal *v.* Cauldwell, 22 N. Y. App. Div. 95, 47 N. Y. Suppl. 839; Sims *v.* Bonner, 60 N. Y. Super. Ct. 63, 16 N. Y. Suppl. 800, 42 N. Y. St. 10, 21 N. Y. Civ. Proc. 355; Dwyer *v.* McLaughlin, 27 Misc.

tion is made so short a time before the trial that the granting of it would necessitate a continuance it should be refused.[49]

b. Limitations of Rule. Where sufficient excuse is shown for failure to make application for security within the proper time, the defendant will be entitled to an order requiring security,[50] but the burden is on him to show the facts constituting an excuse.[51]

3. Notice of Application. There is considerable diversity of holding as to the necessity of notice of application for security for costs, a part of which may perhaps be accounted for by the difference in the wording of the statutes. In some jurisdictions it is held that in cases where the right to security for costs is absolute no notice is necessary;[52] but that if it is within the court's discretion whether to require security notice is necessary;[53] and yet in another jurisdiction notice

187, 57 N. Y. Suppl. 220; Smith, etc., Brass Works *v.* Kahn, 18 Misc. 597, 42 N. Y. Suppl. 478; Schwartz *v.* Scott, 35 N. Y. Suppl. 607, 25 N. Y. Civ. Proc. 53; Ryan *v.* Potter, 4 N. Y. Civ. Proc. 80; Buckley *v.* Gutta Percha, etc., Mfg. Co., 3 N. Y. Civ. Proc. 428; Kleinpeter *v.* Enell, 2 N. Y. Civ. Proc. 21; Healy *v.* Twenty-Third St. R. Co., 1 N. Y. Civ. Proc. 15; Goodrich *v.* Pendleton, 3 Johns. Ch. 520; Long *v.* Majestre, 1 Johns. Ch. 202.

Pennsylvania.— Voss *v.* Sensenig, 14 Pa. Co. Ct. 631; Southmayed *v.* Henderson, 13 Wkly. Notes Cas. 78; Bickford *v.* Ice Co., 8 Wkly. Notes Cas. 106; Fuchs *v.* Wright, 6 Wkly. Notes Cas. 157.

See 13 Cent. Dig. tit. "Costs," § 466.

49. Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159 [*affirmed* in 185 Ill. 400, 57 N. E. 197]; Griffith *v.* Crawford County, 1 Ohio Dec. (Reprint) 457, 10 West. L. J. 97; Boucher *v.* Lindsley, 1 Ohio Dec. (Reprint) 457, 10 West. L. J. 96. *Compare* memorandum decision in Thomas *v.* Woodhouse, 23 Fed. Cas. No. 13,917, 1 Cranch C. C. 341.

50. Corbett *v.* Brantingham, 65 N. Y. App. Div. 335, 72 N. Y. Suppl. 763; Segal *v.* Cauldwell, 22 N. Y. App. Div. 95, 47 N. Y. Suppl. 839; Wood *v.* Blodgett, 15 N. Y. Civ. Proc. 114; Hayes *v.* Second Ave. R. Co., 5 Month. L. Bul. 92.

It is a sufficient excuse, for failure to file in time: That the delay was caused by plaintiff's acts. Cooke *v.* Metropolitan St. R. Co., 59 N. Y. App. Div. 154, 69 N. Y. Suppl. 4. That defendant was ignorant of the grounds for requiring security, if he moved therefor as soon as he learned of the grounds. Willson *v.* Eveline, 39 N. Y. App. Div. 129, 56 N. Y. Suppl. 632; Boucher *v.* Pia, 8 Bosw. (N. Y.) 691. That defendant obtained an extension of time to plead, if the application be made before expiration of the period granted. Rommel *v.* Kirk, 4 N. J. L. J. 216; Johnson *v.* Metropolitan St. R. Co., 56 N. Y. App. Div. 286, 67 N. Y. Suppl. 855. So it has been held that the fact that the defendant's delay in moving for security for costs until after service of answer occurred during the summer vacation is sufficient to allow the court to exercise its discretion in determining whether the delay is excusable. Segal *v.* Cauldwell, 22 N. Y. App. Div. 95, 47 N. Y. Suppl. 839.

What is not a sufficient excuse.— An affidavit setting up that defendant filed his answer before making application for security for costs because the court was not in session for *ex parte* business, so that he could not secure an extension of time to answer, does not show facts relieving him from his failure to apply for security before answering, as the time to answer could be extended by any judge. Kelley *v.* Kremer, 74 N. Y. App. Div. 456, 77 N. Y. Suppl. 515.

Defendant is not charged with notice that plaintiff was a non-resident because the complaint was verified by plaintiff's agent, and stated that the reason why it was not verified by plaintiff was because he was not then within the state. Willson *v.* Eveline, 39 N. Y. App. Div. 129, 56 N. Y. Suppl. 632.

If the grounds for requiring security arise during the progress of the suit, the application must be made before defendant takes any step in the case after notice of such grounds. Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249. See also McGarry *v.* Crispin, 3 Pa. L. J. Rep. 25, 4 Pa. L. J. 353.

51. Smith, etc., Brass Works *v.* Kahn, 18 Misc. (N. Y.) 597, 42 N. Y. Suppl. 478.

52. Churchman *v.* Merritt, 50 Hun (N. Y.) 270, 2 N. Y. Suppl. 843, 19 N. Y. St. 191; Mitchell *v.* Dick, 8 Misc. (N. Y.) 98, 28 N. Y. Suppl. 1003, 60 N. Y. St. 161; Schwartz *v.* Scott, 35 N. Y. Suppl. 607, 70 N. Y. St. 380, 25 N. Y. Civ. Proc. 53; Swift *v.* Wheeler, 13 N. Y. Civ. Proc. 343. Under a similar statute see Cadwell *v.* Manning, 15 Abb. Pr. (N. Y.) 271, 24 How. Pr. (N. Y.) 38; Champlin *v.* Pierce, 3 Wend. (N. Y.) 445; Felton *v.* Hopkins, 89 Wis. 143, 61 N. W. 77.

53. Kelley *v.* Kremer, 74 N. Y. App. Div. 456, 77 N. Y. Suppl. 515; Swift *v.* Wheeler, 46 Hun (N. Y.) 580, 13 N. Y. Civ. Proc. 343; Kamermann *v.* Eisner, 22 Misc. (N. Y.) 554, 49 N. Y. Suppl. 1111; Wood *v.* Blodgett, 15 N. Y. Civ. Proc. 124.

Limitation of rule.— Where the absolute right to security is lost by not applying therefor until after answer served, notice of the motion therefor should be given. Corbett *v.* Brantingham, 65 N. Y. App. Div. 335, 72 N. Y. Suppl. 763.

Manner of service waived by acceptance of notice. Georgia Lumber Co. *v.* Strong, 3 How. Pr. (N. Y.) 246.

has been held necessary, although there is no express requirement to that effect in the statute.[54] Where notice is expressly required, it is erroneous to make an order requiring security for costs without giving notice;[55] but if the order is complied with and no delay is occasioned it furnishes no ground for new trial[56] Notice to the plaintiff's attorney at law has been held sufficient.[57]

4. What the Application Must Show. An application for security should show the existence of the grounds for requiring it.[58] If there is any apparent delay in making the application, it should show when the existence of the grounds for security was brought to defendant's knowledge, that the court may determine whether he has used due diligence in making his application.[59] If a statute or rule of court requires an affidavit that there is a meritorious defense, or something equivalent thereto, this should be given,[60] but not otherwise.[61]

5. Hearing and Determination. It has been said that slight evidence is sufficient

54. Holshausen *v.* Hollingsworth, 32 Tex. 86; Houston *v.* Sublett, 1 Tex. 523.

55. Thompson *v.* Miller, 2 Stew. (Ala.) 470. See also Dismukes *v.* Dismukes, 1 McCord (S. C.) 552.

56. Dulany *v.* Elford, 22 S. C. 304.

57. Vance *v.* Bird, 4 Munf. (Va.) 364; Goodtitle *v.* See, 1 Va. Cas. 123.

Under West Virginia statute.— Under a statute providing that there may be a suggestion on the records of the court that plaintiff is a non-resident and that security for costs is required, and after sixty days from such suggestion the suit shall be dismissed, unless before dismissal plaintiff be proved to be a resident of the state or security be given, the court requires no other notice than the entry of the suggestion on the record. Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

Where the attorney was present in court. — When the motion to require security was made plaintiff cannot object that he had no notice of the motion. Frazer *v.* Moore, 28 Tex. Civ. App. 427, 67 S. W. 427.

58. See cases cited *infra*, this note.

That plaintiff is unable to pay costs.— The affidavit of defendant that he is acquainted with plaintiff's financial condition, and that to the best of his knowledge and belief plaintiff is unable to pay the costs likely to accrue in the action, is sufficient, under a statute providing that defendant may file a motion to ask the court to dismiss the action or rule the plaintiff to give security on an affidavit that "the plaintiff is insolvent, or is not able to pay the costs likely to accrue in said case." Marsh *v.* Kinna, 2 Mont. 547.

That defendant is a non-resident.— An affidavit stating that defendant's attorney is informed by H, a personal friend of plaintiff, that plaintiff is a non-resident, but that H refuses to make affidavit thereto, makes out a *prima facie* case of non-residence. Mitchell *v.* Dick, 8 Misc. (N. Y.) 98, 28 N. Y. Suppl. 1003, 60 N. Y. St. 161. If defendant states positively that plaintiff is a non-resident, and that defendant has only recently learned such fact, this is sufficient, without stating the source of knowledge. Wicker *v.* Elmira Heights, 42 N. Y. App. Div. 426, 59 N. Y. Suppl. 130.

That defendant is without the jurisdiction. — A motion to require plaintiff in an action in the New York city court to give security for costs, because he has not an office within the city, must show that fact affirmatively. Gage *v.* Peetsch, 12 Misc. (N. Y.) 548, 34 N. Y. Suppl. 20, 67 N. Y. St. 875. See also Stephenson *v.* Hanson, 4 N. Y. Civ. Proc. 104.

59. Roumage *v.* Mechanics' Ins. Co., 12 N. J. L. 95; Newman *v.* Landrine, 14 N. J. Eq. 291, 82 Am. Dec. 249; Bogardus *v.* Williams, 1 Pa. Co. Ct. 673, 1 Lehigh Val. L. Rep. 218; McGarry *v.* Crispin, 3 Pa. L. J. Rep. 25, 4 Pa. L. J. 353. See also Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

60. See D. M. V. Live Stock Ins. Co. *v.* Henderson, 38 Iowa 448; Wilson *v.* Fowler, 104 N. C. 471, 10 S. E. 566; Heller *v.* Dreifuss, 34 Wkly. Notes Cas. (Pa.) 83.

Covering whole claim.— Under the rules of the court of one state the affidavit must be to the whole claim. Heller *v.* Dreifuss, 34 Wkly. Notes Cas. (Pa.) 83. Under the statutes of another, an affidavit that the party has a good defense, in whole or in part, is sufficient. See D. M. V. Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446.

How defense stated.— According to some decisions it is sufficient to allege generally that the defendant has a good defense, without setting out the facts constituting it. D. M. V. Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446; Sheridan *v.* Cassidy, 1 Wkly. Notes Cas. (Pa.) 134. In another (construing a statute expressly requiring it) the facts constituting the defense must be stated. Fidelity Mut. F. Ins. Co. *v.* Simmons, 1 Pennew. (Del.) 474, 42 Atl. 367. And other decisions, without expressly so holding, seem to show that the facts constituting the defense should be stated. Terriberry *v.* Broude, 173 Pa. St. 48, 33 Atl. 699, 37 Wkly. Notes Cas. (Pa.) 435; Trenton Rubber Co. *v.* Small, 3 Pa. Super. Ct. 8, 39 Wkly. Notes Cas. (Pa.) 281. So in another case it has been held that a certificate that defendant had "a good defense to the action" was equivalent to the statement that "plaintiffs were not entitled to recover." Wilson *v.* Fowler, 104 N. C. 471, 10 S. E. 566.

61. Corn Exch. Nat. Bank *v.* Kimball, 20 Abb. N. Cas. (N. Y.) 290.

to overcome a *prima facie* case made by a party moving for a dismissal, if security be not given.[62] A motion for security based on non-residence should be denied where in the proceedings plaintiff is set up as a resident, and in all the papers it does not appear that he is not a resident.[63]

F. Order For Security. Before a party can be put in default and the cause dismissed for failure to file security for costs, there must be an order requiring security;[64] and it should be sufficiently clear and certain to apprise the party of what is required of him. If in substantial compliance with the statute or rule of court under which it is made it will be sufficient;[65] but a substantial compliance at least is necessary.[66] An order is not defeated or impaired by transfer of the cause of action and motion to substitute the transferee in plaintiff's stead, pending application for the order.[67] And it has been held that where a court has the power to require security independent of statute, a change in the situation of the parties, by repeal of a statute or modification thereof, cannot be urged as a reason for vacating the order in another court, to which the cause has been transferred.[68] Notice of an order should in general be given to the party affected thereby.[69] The successor of a judge who made an order for security cannot review or modify it after the time limited for compliance therewith has expired.[70] The order is

62. Twining *v.* Martin, 65 Ill. 157.

Affidavits having equal weight.— It has been held that on an application for security the affidavits of the respective parties may have equal weight. Hamilton *v.* Dunn, 22 Ill. 259.

63. Holt *v.* Winters, 30 Fed. 29.

Evidence held sufficient to show non-residence.— An application was granted where it appeared that plaintiff's wife lived with a witness after plaintiff went away, that she received two letters from him requesting her to come to Chicago, and that she had accordingly gone. Anonymous, 33 Me. 584.

Where objections to the jurisdiction for non-residence are taken by answer, the determination of this fact should be left to abide the result of the trial of the issue so presented. The question of non-residence cannot be determined on a motion for security for costs. Simkins *v.* Lake Shore, etc., R. Co., 19 Fed. 802, 21 Blatchf. 554.

64. Walker *v.* Smith, (Miss. 1895) 19 So. 102; Overstreet *v.* Davis, 24 Miss. 393. See also Morrow *v.* Shepherd, 9 Mo. 214.

Where an order for security has been made, the defendant is under no obligation to take any further steps in the cause until the order has been complied with. Anderson *v.* Smith, 2 Mackey (D. C.) 1. But *compare* Newsom *v.* Ran, 18 Ohio 240.

65. Marsh *v.* Kinna, 2 Mont. 547; Colt *v.* Wheeler, 12 Abb. Pr. (N. Y.) 388; Champlin *v.* Pierce, 3 Wend. (N. Y.) 445; Shackleford *v.* Wallace, 4 Tex. 239.

Aider of defective order.— A note made by the judge on his docket, stating that the plaintiff is shown to be a non-resident, and that he give security for costs before the next term, or the cause be dismissed, is merely directory to the clerk, and from it he may complete his minutes, and it is not in itself a notice to the defendant of a requirement of security; but if the entry is perfected by being transferred to the minutes of the court in proper form it is a sufficient compliance with the statute. Claiborne *v.* Harris, 11 Ala. 647.

Waiver of irregularity.— Where it is merely customary and not required by statute that an order for security be in the alternative to file security within a designated time or show cause why it should not be required, irregularity, if any, in an order merely directing the giving of security, is waived if motion to set aside is not made. Bronson *v.* Freeman, 8 How. Pr. (N. Y.) 492.

66. Vale *v.* Brooklyn Cross-Town R. Co., 12 N. Y. Civ. Proc. 102.

Entry of order nunc pro tunc.— An entry reciting that plaintiff is ruled to give security by the next term does not authorize the entry of an order to that effect *nunc pro tunc* at a subsequent term, unless it shows the reason why the order is made. Lewis *v.* Lewis, 25 Ala. 315; Reid *v.* Brasher, 7 Port. (Ala.) 448.

Order requiring bond or mortgage.— An order compelling plaintiff to give bond or to give a mortgage on land owned by him as security for costs, under penalty of having his case dismissed, is not erroneous, as being a requirement that he should mortgage his land. Dale *v.* Presnell, 119 N. C. 489, 26 S. E. 27.

67. McNamara *v.* Harris, 4 N. Y. Civ. Proc. 76.

68. Dyer *v.* Dunivan, 3 How. Pr. (N. Y.) 135.

An order to show cause why an order requiring security should not be vacated which recites that the order was made without notice and without sufficient grounds, sufficiently shows the irregularity for which it was sought to vacate the order requiring security, namely, the non-service of notice. Swift *v.* Wheeler, 13 N. Y. Civ. Proc. 343.

69. Anderson *v.* Osborn, 1 How. Pr. (N. Y.) 79; Houston *v.* Sublett, 1 Tex. 523.

70. Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512; McCollum *v.* Massey, 2 Bailey (S. C.) 606.

reviewable on appeal from a judgment dismissing the action for non-compliance therewith.[71]

G. Form and Requisites of Security — 1. In General. Numerous kinds of security for costs, such as bonds, undertakings, recognizances, indorsements, and deposits of money in court, are in use in the different jurisdictions, one or more of which will be accepted as security in each jurisdiction, according as the statute may provide. The form of security required is usually a matter of statutory regulation; but in the absence of such statute a bond will be sufficient,[72] and so will a deposit;[73] but there should be either a deposit or some enforceable obligation.[74] If the statute designates the security and provides that no other shall be regarded as sufficient the kind designated must be given.[75]

2. Bonds[76] — a. In General. If the form is prescribed by statute[77] it need not be in the precise words or form given. A bond in substantial compliance will be sufficient.[78]

b. Contents. The bond should contain the names of the parties to the suit,[79] unless indorsed on the back of the summons;[80] but it need not state the kind of action[81] or designate the obligee, unless the statute so requires.[82] It should expressly bind the executors and administrators.[83] It will be defective if the penalty named therein is for a less amount than required by statute;[84] but a larger penalty than designated by statute cannot be required.[85] In designating the costs intended to be secured, it should be as broad as the statute, and include all costs intended to be covered thereby.[86]

71. Marsh *v.* Kinna, 2 Mont. 547.

And this is true notwithstanding the court is vested with large discretion in making it. It will be reviewed if based on insufficient grounds. Ball *v.* Bruce, 27 Ill. 332.

72. Barton *v.* McKinney, 3 Stew. & P. (Ala.) 274; Parks *v.* Allen, 2 Head (Tenn.) 522.

73. Stribling *v.* Kentucky Bank, 48 Ala. 451; Wheelock *v.* Brinckerhoff, 13 Johns. (N. Y.) 481.

74. State *v.* McCarty, 60 Md. 373.

75. Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512.

76. See, generally, Bonds.

For forms of bonds held sufficient see McDonald *v.* Wood, 118 Ala. 589, 24 So. 36; Simpson *v.* Rice, 43 Kan. 22, 22 Pac. 1019; Dunton *v.* Harper, 64 S. C. 338, 42 S. E. 153; Broyles *v.* Blair, 7 Yerg. (Tenn.) 279; Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,088, 3 McLean 368; Hoyt *v.* Byrd, 12 Fed. Cas. No. 6,807, Hempst. 436.

77. If no form of bond is prescribed, it is sufficient if the object be distinctly and clearly stated. Nolly *v.* Kirtley, 1 Hill (S. C.) 41.

78. Kettelle *v.* Wardell, 2 Ill. 592; Linn *v.* Buckingham, 2 Ill. 451; Smith *v.* Norval, 2 Code Rep. (N. Y.) 14.

An omission of an essential condition does not invalidate the bond where the statute expressly provides that it shall not. Burson *v.* Mahoney, 6 Baxt. (Tenn.) 304.

Where the bond has the essential features and parts of a common-law agreement it will be enforceable as such, although it may not comply with the statutory form. Warner *v.* Ross, 9 Abb. N. Cas. (N. Y.) 385.

79. Modglin *v.* Slay, 11 Ark. 693; Broyles *v.* Blair, 7 Yerg. (Tenn.) 279; Eason *v.* Clark, 2 Yerg. (Tenn.) 522; Williamson *v.* Buzzard, 30 Fed. Cas. No. 17,751*a*, Hempst. 243.

Mistake in defendant's name invalidates bond. Hanly *v.* Campbell, 4 Ark. 562.

"The same against the same." — A security for costs so entitled is insufficient. Warnock *v.* Russell, 2 Ill. 383.

Abbreviation of christian names of plaintiffs does not invalidate bond. King v. Thompson, 4 Ill. 184.

Failure to give names of all parties. — A security reciting the title of the cause as "A *v.* B," instead of "A *v.* B and C," is bad. England *v.* McLaughlin, 35 Ala. 590.

80. Holly *v.* Perry, 94 N. C. 30.

81. Chanie *v.* Bull, 8 Yerg. (Tenn.) 219; Broyles *v.* Blair, 7 Yerg. (Tenn.) 279.

82. McPherson *v.* Commercial Nat. Bank, 61 Nebr. 695, 85 N. W. 895; Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,088, 3 McLean 368. *Compare* Barnett *v.* Warren Cir. Ct., Hard. (Ky.) 172.

83. Schenke *v.* Rowell, 1 Abb. N. Cas. (N. Y.) 295.

84. *Ex p.* Morgan, 30 Ala. 51.

85. Northrop *v.* Wright, 1 How. Pr. (N. Y.) 146. See also Baldwin *v.* Williamson, Hopk. (N. Y.) 117.

If the statute provides that the penalty shall be "at least" for a designated amount the court may in a proper case require a bond for a larger amount than designated. Leftwick *v.* Clinton, 26 How. Pr. (N. Y.) 26.

86. *Ex p.* Morgan, 30 Ala. 51; Owings *v.* Finley, 3 Ark. 136. See also Hunt *v.* Butcher, 5 Blackf. (Ind.) 341.

Instances of bond held sufficiently broad. — A bond for "the payment to defendant, the several officers of the court, and all others interested, of all costs which may be awarded to be paid" is a sufficient compliance with a statute requiring a bond "to pay, or cause to be paid, all the costs which may accrue in such action." Baggs *v.* Lanning, 1 Mo. 261.

c. Execution. In the absence of statute requiring it, the plaintiff himself need not join in the execution of the bond.[87] As regards the manner of execution it will be sufficient if the bond is subscribed by the obligors, although their names do not appear in the body of the obligation;[88] and a firm may sign a bond in the partnership name.[89] The bond must be sealed in the absence of statute dispensing with a seal;[90] but it need not be marked filed as of any term.[91]

d. Number Required. More than one bond can be required from a non-resident plaintiff as security for costs, although there are several defendants appearing separately.[92]

e. Amendment. Where a statute requires the giving of a bond before commencement of suit, it has been held that if the bond so given is defective it cannot be amended after suit brought.[93]

3. UNDERTAKINGS.[94] An undertaking, although not in compliance with the statute, will nevertheless be enforceable if good as a common-law obligation.[95] If the statute requires the signature of the surety to be witnessed by the clerk it will be bad unless so witnessed.[96] And the undertaking should likewise be approved by the clerk, if this is required by statute.[97]

4. RECOGNIZANCES.[98] A recognizance is good, although the party to whom bound is not named, if the parties to the suit are named and the person executing it agrees to be the security for costs.[99] A recognizance conditioned to pay any

So a bond for "all costs that may accrue in a suit, and be adjudged against the plaintiff" is sufficient, under a rule requiring an indorsement for "all costs for which the plaintiff may be liable in the suit." Hoyt *v.* Byrd, 12 Fed. Cas. No. 6,807, Hempst. 436.

87. *Kansas.*— Simpson *v.* Rice, 43 Kan. 22, 22 Pac. 1019.

Kentucky.— Barnett *v.* Warren Cir. Ct., Hard. 172.

New York.— Ellensohn *v.* Hasselbach, 17 Misc. 92, 39 N. Y. Suppl. 332; Hubbard *v.* Gicquel, 14 N. Y. Civ. Proc. 15; Wagner *v.* Adams, 1 How. Pr. 191; Micklethwaite *v.* Rhodes, 4 Sandf. Ch. 434.

North Carolina.— Wall *v.* Fairly, 66 N. C. 385.

Texas.— Langham *v.* Thomason, 5 Tex. 127.

See 13 Cent. Dig. tit. "Costs," § 480.

A non-resident plaintiff will not be allowed to file her own bond for costs on a showing that she is a freeholder in the city in which the cause is pending, and that she will move there before trial. Dalton *v.* Bateson, 12 Pa. Co. Ct. 544.

88. Simpson *v.* Rice, 43 Kan. 22, 22 Pac. 1019.

Signing under attestation of clerk.— The signature of one not a party, written under the attestation of a clerk of the court from which process issued and not opposite to the seal where the name for security for costs was intended to be placed, is a fatally defective bond. Keeland *v.* Harper, 10 Ala. 178.

89. Kettelle *v.* Wardell, 2 Ill. 592; Linn *v.* Buckingham, 2 Ill. 451.

90. Prather *v.* Palmer, 4 Ark. 456; Hickey *v.* Smith, 4 Ark. 161.

91. Himes *v.* Blakesley, 21 Ill. 509, where it was held that if inadvertently marked as of one term, when it should have been of another, the mistake may be corrected.

Indorsing bond as filed.— The fact that, on appeal from a justice's court to the county court, the clerk of the county court did not indorse a bond given in the justice's court for costs as filed by him does not prevent the bond as appearing as one for costs in the county court. Glameyer *v.* Hamilton, (Tex. Civ. App. 1900) 60 S. W. 471.

92. Rothchild *v.* Wilson, 10 N. Y. Suppl. 61, 24 Abb. N. Cas. (N. Y.) 123, 19 N. Y. Civ. Proc. 76; Leftwick *v.* Clinton, 26 How. Pr. (N. Y.) 26; Robinson *v.* Haller, 8 Wash. 309, 36 Pac. 134.

93. Williamson *v.* Buzzard, 30 Fed. Cas. No. 17,751*a*, Hempst. 243.

94. See, generally, UNDERTAKINGS.

95. Brion *v.* Kennedy, 47 Mich. 499, 11 N. W. 288.

Entry on back of declaration.— Where a non-resident plaintiff is ordered to give security for costs, it will be sufficient to enter the security on the back of the declaration. Furnan *v.* Harman, 2 McCord (S. C.) 442.

96. Cummings *v.* Wingo, 31 S. C. 427, 10 S. E. 107.

Attestation by attorney of surety's signature is insufficient (Wilson *v.* Potter, 9 Rich. (S. C.) 411), although indorsed by the clerk "approved and filed" (McCarley *v.* Turner, 33 S. C. 161, 11 S. E. 645).

It is a sufficient attestation by the clerk that his certificate is made at the time the undertaking is executed, on the same page of the paper, with his words and signature attested by the seal of court immediately following the signature of the surety, and to the effect that he has both witnessed the signature and in the first instance judged of the sufficiency of the surety and approved of the same. Garrett *v.* Niel, 49 S. C. 560, 27 S. E. 512.

97. Cummings *v.* Wingo, 32 S. C. 427, 10 S. E. 107.

98. See, generally, RECOGNIZANCES.

99. Parks *v.* Smith, 2 Head (Tenn.) 523.

judgment the court may render in a case is not objectionable for containing no penalty.[1] A recognizance showing by the caption that it was taken in the proper county sufficiently shows that fact.[2] A recognizance if in substantial compliance with the statute is sufficient.[3]

5. INDORSEMENTS. It has been held in one state that an attorney having authority to commence suit is authorized to place the name of the plaintiff upon the writ as indorser;[4] in another, that he may do so if authorized in writing;[5] and in another, that he must have special authority in writing before he can indorse the name of a third person as security on a complaint.[6] It is insufficient to indorse the writ with the initials of the party. The surname should at least be given;[7] but the surname[8] or the surname and initials have been held sufficient.[9] So there being no statutory provision as to the form of the indorsement, an indorsement as follows has been held sufficient: "From the office of," and under these words the signature of the attorney.[10] The indorsement of a writ by a partnership in the partnership name is good.[11] If one of the plaintiffs is a nonresident and the other is not, an indorsement is sufficient if made by any party and in any form which would render it sufficient if both plaintiffs were citizens of the state.[12] Where the court orders a new indorsement of a writ in an action originally commenced in the common pleas, an indorsement on an office copy of an original writ filed in the supreme court is sufficient to bind the indorser without any indorsement of the original writ in the court below.[13]

6. DEPOSITS. If the kind of security is not designated by statute[14] a deposit of money may be given by way of security.[15] If a deposit is given as security the money should be deposited with the clerk,[16] and it has been held that it cannot be withdrawn before expiration of the time within which an appeal may be taken from the judgment for plaintiff.[17] A deposit made as security cannot be

1. Kincaid *v.* Sharp, 3 Head (Tenn.) 151.
2. Wellman *v.* State, 5 Blackf. (Ind.) 343.
3. Kincaid *v.* Sharp, 3 Head (Tenn.) 151.
A minute of recognizance stating that it is "conditioned as provided by law" has been held sufficient. Collins *v.* Edson, 55 Vt. 48.
If the statute requires a minute of the recognizance to show the sum in which the surety is bound a recognizance not complying therewith is void. Sisco *v.* Hurlburt, 17 Vt. 118.
4. Miner *v.* Smith, 6 N. H. 219.
5. Rowe *v.* Truitt, 14 Me. 393.
6. Bullard *v.* Johns, 50 Ala. 382. *Compare* Stevens *v.* Getchell, 11 Me. 443, where it was held that where the name of the plaintiff was indorsed on the writ by an attorney, it was a sufficient indorsement where it was done in the presence of the plaintiff without his objection, the attorney's name not being added to the indorsement.
7. Robbins *v.* Hill, 12 Pick. (Mass.) 569.
8. Sawtell *v.* Wardell, 56 Me. 146; Perkins *v.* Walker, 16 Vt. 240.
9. Clark *v.* Paine, 11 Pick. (Mass.) 66. See also Strout *v.* Bradbury, 5 Me. 313.
10. Ferguson *v.* Gardner, 92 Me. 245, 42 Atl. 393. See also Bennett *v.* Holmes, 79 Me. 51, 7 Atl. 902; Stone *v.* McLanathan, 39 Me. 131.
The effect of such indorsement will not be defeated by other evidence that such indorsement was not intended to create the statute liability. Ferguson *v.* Gardner, 92 Me. 245, 42 Atl. 393.
11. Fisher *v.* Foss, 30 Me. 459.
12. Scruton *v.* Deming, 36 N. H. 432.
13. Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117.
14. Wheelock *v.* Brinckerhoff, 13 Johns. (N. Y.) 481.
15. If, however, the statute enumerates the kind of security required and does not authorize a deposit as security, such deposit will not be sufficient (Powell *v.* Phœnix Ins. Co., 10 Ky. L. Rep. 80; Edwards *v.* Middleton, 28 Tex. Civ. App. 316, 66 S. W. 570. But see Fenet *v.* Wilson, 3 Hill (S. C.) 340, which seems to hold the contrary); and will not prevent the filing of a motion to require the plaintiff to give security for costs (Edwards *v.* Middleton, 28 Tex. Civ. App. 316, 66 S. W. 570).
Two modes presented by statute.— An order to make a deposit as security does not deprive the plaintiff of the right to secure costs by procuring an indorser of the summons, where both of these modes are authorized by statute. Columbus Cent. R. Co. *v.* Wilkin, 10 Ohio S. & C. Pl. Dec. 467, 8 Ohio N. P. 35.
16. Ammidown *v.* Woodman, 31 Me. 580.
Amounts held insufficient: Five and one-half dollars (Ulman *v.* Langham, 49 Ala. 265) and ten dollars (Stribling *v.* Kentucky Bank, 48 Ala. 451).
17. Kansas City First Nat. Bank *v.* Hall, 19 Misc. (N. Y.) 278, 44 N. Y. Suppl. 255. *Contra*, Hoffman *v.* Lowell, 4 N. Y. Civ. Proc. 103.

appropriated to payment of costs awarded against plaintiff in a former action.[18] Where an order has been made for a deposit, the question whether the plaintiff has defaulted must be judicially determined before final judgment dismissing the action can be rendered.[19]

7. Qualification and Sufficiency of Sureties and Indorsers. The plaintiff's attorney may act as his surety,[20] unless prohibited by statute;[21] and a statute requiring "recognizance of some person other than the plaintiff" does not prevent the next friend from recognizing for the costs of an infant's suit.[22] A person *non compos mentis* cannot act as indorser of a writ for himself or another.[23] If required by statute the sureties should be residents of the county where suit is brought,[24] but not otherwise.[25] A statute requiring a "responsible person" as indorser means a person able to pay costs for which he may become liable.[26] Where objection to the qualification of sureties is made the burden is on the party giving the security to show its sufficiency.[27]

8. Number of Sureties Required. One surety is sufficient in a bond for costs, in the absence of statute providing to the contrary.[28]

9. Justification of Sureties. Justification of sureties for costs is unnecessary, unless they are excepted to.[29] Where justification is demanded and a bond in a designated penalty is required, each surety, it has been held, should justify in double the amount.[30]

H. Time of Giving Security — 1. Under Statutes Requiring Security Before Commencement of Suit — a. Where Indorsement of Writ or Petition Required. The statutes of some jurisdictions require an indorsement of the writ before service or of the petition before filing, by some responsible person as security for costs. Some courts hold that there is no discretionary power to permit this to be done at any subsequent period.[31] The majority of decisions, however, maintain

18. Fraser *v.* Ward, 13 Daly (N. Y.) 431, 9 N. Y. Civ. Proc. 11.

19. Columbus Cent. R. Co. *v.* Wilkin, 10 Ohio S. & C. Pl. Dec. 467, 8 Ohio N. P. 35.

20. Hubbard *v.* Gicquel, 14 N. Y. Civ. Proc. 15; Walker *v.* Holmes, 22 Wend. (N. Y.) 614; Micklethwaite *v.* Rhodes, 4 Sandf. Ch. (N. Y.) 434.

A mayor of a city is not, merely because of his official capacity, incompetent to act as surety as an individual for the costs of a suit by the city. Powers *v.* Decatur, 54 Ala. 214.

21. Cook *v.* Caraway, 29 Kan. 41.

A rule of court which forbids attorneys to become sureties should not be applied to a suit commenced before the passage of the law authorizing the establishment of the rule. Eslava *v.* Ames Plow Co., 47 Ala. 384.

22. Duffy *v.* Pinard, 41 Vt. 297.

23. Clark *v.* Perkins, 3 N. H. 339.

24. Smith *v.* McDermott, 93 Cal. 421, 29 Pac. 34.

25. Brooks *v.* James, 16 Wash. 335, 47 Pac. 751.

26. Farley *v.* Day, 26 N. H. 527.

27. Buckmaster *v.* Beames, 8 Ill. 97.

Waiver of objection to security.— Where counsel for plaintiff was an inferior officer of one of the branches of a surety company offered as surety, and on proceeding to justify such surety under a statute permitting justification by an officer of the surety company with knowledge of its financial condition, an objection to the sufficiency of the surety is not abandoned by defendant's failure to examine such counsel with regard to the financial condition of the company, counsel not having offered himself as a witness nor signified that he was there for that purpose. Haines *v.* Hein, 67 N. Y. App. Div. 389, 73 N. Y. Suppl. 293.

28. Micklethwaite *v.* Rhodes, 4 Sandf. Ch. (N. Y.) 434. See also Hubbard *v.* Gicquel, 14 N. Y. Civ. Proc. 15, under a statute requiring undertakings to be executed by "one or more sureties."

29. Washburne *v.* Langley, 16 Abb. Pr. (N. Y.) 259. See also Simpson *v.* Rice, 43 Kan. 22, 22 Pac. 1019.

Effect of justification before exception.— Where a defendant has a specified time in which to decide whether he will except to the sureties, although they justify before exception, they must justify after exception also. Washburne *v.* Langley, 16 Abb. Pr. (N. Y.) 259.

When justification in first instance unnecessary.— Under a statute requiring security for costs, and providing that the court may order a new bond on proof that the original is insufficient, surety need not justify on the cost bond in the first instance. Brooks *v.* James, 16 Wash. 335, 47 Pac. 751.

30. Mount *v.* Mount, 11 Paige (N. Y.) 383. *Compare* Riggins *v.* Williams, 2 Duer (N. Y.) 678, in which it was held that a justification of one surety was sufficient.

31. Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71; Brackett *v.* Bartlett, 19 N. H. 129; Pettingill *v.* McGregor, 12 N. H. 179.

the contrary view, and hold that it is not too late to give such security after service and return of the writ.[32]

b. Where Bond or Undertaking Required. In many jurisdictions statutes require bonds or undertakings to be filed before commencing suit, and some of these statutes provide that the cause may be dismissed on motion for non-compliance therewith, while others provide in effect that the cause may be dismissed on motion if the plaintiff fail to comply with an order thereafter made to give security within the time prescribed by order. Under some statutes it has been held that the defendant should never be permitted to file a bond after commencement of the action if motion to dismiss is made,[33] while the contrary conclusion has been reached under provisions nearly identical.[34] Under other provisions it has been held that plaintiff may be permitted to file bond after motion is made to dismiss for failure to give security at commencement of suit.[35] Again it has been held sufficient if bond be filed at any time before trial,[36] after verdict,[37] or at any time before trial, unless pleaded in abatement.[38] In one decision it has been held that security may be filed subsequent to the commencement of the suit without leave of court.[39]

2. Under Rule or Order Requiring Security. Where the plaintiff fails to comply with a rule or order requiring him to give security within a certain time, the court may permit him to file it after expiration thereof.[40] Some decisions hold

32. Haskins *v.* Citizens' Bank, 12 Nebr. 39, 10 N. W. 466; Newsom *v.* Ran, 18 Ohio 240.

It has accordingly been held in one case that security may be filed before motion to set aside the writ is granted (Parks *v.* Goodwin, 1 Dougl. (Mich.) 56); in another, that it will be sufficient if the party is ready to give security when the action is called for trial (Gray *v.* Wilcox, 56 Mich. 58, 22 N. W. 109); and in another, that a statute requiring security to be lodged with the clerk before commencement of the action is complied with by indorsement of the undertaking, to secure costs made on the complaint before the summons and complaint are handed to the sheriff to be executed (*Ex p.* Locke, 46 Ala. 77).

33. Edgar Gold, etc., Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113; Hickman *v.* Haines, 10 Ill. 20; Ripley *v.* Morris, 7 Ill. 381 (statute and practice now changed); Portsmouth Foundry, etc., Works *v.* Iron Hill Furnace, etc., Co., 11 Bush (Ky.) 47 (under statute providing for dismissal on motion when security not given before commencement of suit — statute and practice now changed); Sutro *v.* Simpson, 14 Fed. 370, 4 McCrary 276.

34. Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444; Butts *v.* Moorehead Mfg. Co., 43 Minn. 296, 45 N. W. 444, where it was held that security may be filed *nunc pro tunc* after commencement of suit. See also Mill Bank *v.* Broadway Bank, 3 Abb. Pr. N. S. (N. Y.) 223.

35. *Arkansas.*— Robinson *v.* Meyer, 25 Ark. 79, under a statute requiring bond before commencement of suit, and providing for dismissal on motion at any time before judgment, unless bond be filed within time allowed by court.

Illinois.— Richards *v.* People, 100 Ill. 390; Lee *v.* Waller, 13 Ill. App. 403, under a statute providing that if the plaintiff fails to file bond at the beginning of suit, as required, he may avoid dismissal by filing bond within such time as the court may direct.

Indiana.— Hughes *v.* Osborn, 42 Ind. 450; Dowell *v.* Richardson, 10 Ind. 573, under a statute providing that suit will not be dismissed for want of filing bond before commencing suit, if plaintiff file security on being ordered to do so.

Missouri.— Posey *v.* Buckner, 3 Mo. 604; New England L. & T. Co. *v.* Brown, 59 Mo. App. 461, under a statute requiring bond before suit brought, and authorizing dismissal on motion, unless filed before determination of motion.

North Carolina.— Russell *v.* Saunders, 48 N. C. 432; McDowell *v.* Bradley, 30 N. C. 92.

See 13 Cent. Dig. tit. "Costs," § 479.

36. Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042, provisions of statute not given.

37. Culley *v.* Laybrook, 8 Ind. 285.

38. Cabell *v.* Payne, 2 J. J. Marsh. (Ky.) 134. See also Wheelin *v.* Kertley, Hard. (Ky.) 540, statute not given.

After plea in abatement.— In Arkansas a court may permit the filing of bond after plea in abatement. Campbell *v.* Garratt, 24 Ark. 279; Perkins *v.* Reagan, 14 Ark. 47.

39. Baker *v.* Palmer, 83 Ill. 568.

40. *Alabama.*— Sandlin *v.* Southern Warehouse Co., (1888) 4 So. 732; *Ex p.* Jones, 83 Ala. 587, 3 So. 811; May *v.* Eastin, 2 Port. 414; Jones *v.* Wilkinson, 3 Stew. 44.

Arkansas.— Modglin *v.* Slay, 11 Ark. 693.

California.— Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179.

Indiana.— Lemon *v.* Temple, 7 Ind. 556; Freeman *v.* Hukill, 4 Blackf. 9.

Mississippi.— Kyle *v.* Stinson, 13 Sm. & M. 301.

New York.—Cornuel *v.* Heinze, 67 Hun 652, 22 N. Y. Suppl. 117, 51 N. Y. St. 461.

that the matter rests entirely in the discretion of the trial judge, and that his refusal to permit security to be given after the expiration of the time named in the order should not be reviewed;[41] but the undoubted weight of authority is that the penalty of dismissal should not be visited on the plaintiff merely for failure to file security within the designated time.[42] It has accordingly been held in some jurisdictions that security offered at any time before dismissal should be received;[43] in others, that security tendered before motion to dismiss, although after the expiration of the time allowed, should be received;[44] or that security may be given at any time before trial.[45] The removal of the cause from one court to another does not make any change in the time within which the plaintiff is required to obey a rule for security.[46]

3. **How Time Computed.** If a party is ordered to file a bond for costs on or before a certain day, he has the whole of the day named to comply with the order.[47] An order allowing certain days wherein to file security for costs means calendar days and not days of the term of court.[48]

I. Failure to Give Security and Proceedings Thereon — 1. Failure to File as Ground For Dismissal. Failure to file security for costs is a ground for dismissal or abatement of the suit.[49]

North Carolina.— Smith *v.* Mitchell, 63 N. C. 620; Rodgers *v.* Cherry, 52 N. C. 539.

Rhode Island.— Rosenfeld *v.* Swarts, 22 R. I. 315, 47 Atl. 690.

Tennessee.—Majors *v.* Blevins, 6 Humphr. 43.

Contra, McCollum *v.* Massey, 2 Bailey (S. C.) 606.

See 13 Cent. Dig. tit. "Costs," § 479.

Excuses for non-compliance.— Prevention from complying with a rule for security by act of law is sufficient reason for permitting plaintiff to give security after expiration of the rule. Smith *v.* Mitchell, 63 N. C. 620. And where plaintiff is under an order to file security, and shows that he has been delayed in procuring it because of plaintiff's absence from the state, but expects to procure it and bring the case to trial at the next circuit, he will be allowed to stipulate to bring the case to trial at such term on payment of costs of motion. Northrup *v.* Wright, 2 How. Pr. (N. Y.) 199.

Extension of time by succeeding judge.— Where the circuit court orders security for costs to be given by an absent plaintiff on the first day of the following term, but imposes no penalty for non-compliance, it is within the discretion of the succeeding judge to permit the security to be filed after the time fixed in the first order. Williams *v.* Connor, 14 S. C. 621, which is distinguishable from McCollum *v.* Massey, 2 Bailey (S. C.) 606, in that in the latter it appears that the order required plaintiff to be nonsuited on non-compliance therewith.

41. Modglin *v.* Slay, 11 Ark. 693; Town *v.* Evans, 11 Ark. 9. See also Felton *v.* Hopkins, 89 Wis. 143, 61 N. W. 77, where it was held that excuse for default must be shown before plaintiff can be permitted to file security after the designated time.

42. Whitaker *v.* Sanford, 13 Ala. 522; Lyons *v.* Long, 6 Ala. 103; McGill *v.* Beitner, 114 Mich. 646, 72 N. W. 613; Vance *v.* Bird, 4 Munf. (Va.) 364; Goodtitle *v.* See, 1 Va. Cas. 123; Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

43. Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Cook *v.* Ross, 46 Tex. 263; Hays *v.* Cage, 2 Tex. 501; Rhodes *v.* Phillips, 2 Tex. 162; Cook *v.* Beasely, 1 Tex. 591; Posey *v.* Aiken, 17 Tex. Civ. App. 44, 42 S. W. 368; Vance *v.* Bird, 4 Munf. (Va.) 364; Goodtitle *v.* See, 1 Va. Cas. 123; Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444; Reverez *v.* Camellos, 20 Fed. Cas. No. 11,717, 1 Cranch C. C. 50.

Bond filed after motion to dismiss may be in time. Heinekamp *v.* Beaty, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67.

44. Brown *v.* Ravencroft, 1 Mo. 397; King *v.* Jackson, 25 Nebr. 466, 41 N. W. 448.

45. Reese *v.* Billing, 9 Ala. 263.

46. Holt *v.* Tennallytown, etc., R. Co., 81 Md. 219, 31 Atl. 809.

47. Modglin *v.* Slay, 11 Ark. 693.

48. Swainson *v.* Bishop, 52 Mo. 227.

49. *Arkansas.*— Town *v.* Evans, 11 Ark. 9; Newton *v.* Cocke, 10 Ark. 169; Pearce *v.* Baldridge, 7 Ark. 413; Kittlewell *v.* Scull, 3 Ark. 474; Clark *v.* Gibson, 2 Ark. 109; Means *v.* Cromwell, 1 Ark. 247.

Kentucky.— Hopkins *v.* Chambers, 7 T. B. Mon. 254.

Louisiana.— Grover's Succession, 49 La. Ann. 1050, 22 So. 313.

Maine.— Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71.

Massachusetts.— Feneley *v.* Mahoney, 21 Pick. 212.

Minnesota.— Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

Mississippi.— Overstreet *v.* Davis, 24 Miss. 393.

Missouri.— Evans *v.* Hayes, 2 Mo. 184.

Montana.— Marsh *v.* Kinna, 2 Mont. 547.

New York.— Hinman *v.* Pierce, 50 Hun 209, 2 N. Y. Suppl. 861, 19 N. Y. St. 390, 16 N. Y. Civ. Proc. 138; Hinds *v.* Douglass, 19 Abb.

2. OBJECTION FOR FAILURE TO FILE — a. Necessity For. Nevertheless the right to require security for costs may be waived[50] by failure to make the proper objection to plaintiff's failure to file security or by not making such objection in time.[51]

b. Time of Making. The decisions are not harmonious on this question, where the failure complained of is a non-compliance with the statute requiring security to be given at the time of commencing suit. Thus in one state it has been held that the objection should be plea in abatement at the return-term.[52] In other jurisdictions it has been held that the objection should be interposed at the earliest possible moment[53] or before taking any other steps in the cause.[54]

Pr. 11; Hinds *v.* Woodbury, 29 How. Pr. 379; Glover *v.* Cuming, 12 Wend. 295; Bridges *v.* Canfield, 2 Edw. 217.

Tennessee.— Irvins *v.* Mathis, 11 Humphr. 603; Majors *v.* Blevins, 6 Humphr. 43.

Texas.— Frazer *v.* Moore, 28 Tex. Civ. App. 427, 67 S. W. 427.

Virginia.—Anderson *v.* Johnson, 32 Gratt. 558.

Wisconsin.— Felton *v.* Hopkins, 89 Wis. 143, 61 N. W. 77.

See 13 Cent. Dig. tit. "Costs," § 537.

50. Where the right to security has been waived or abandoned, it cannot be revived by a subsequent bill of revivor by an administrator of the complainant. Hatton *v.* Weems, 12 Gill & J. (Md.) 83.

51. *Arkansas.*— Webb *v.* Jones, 2 Ark. 330.

Maryland.— State *v.* McCarty, 60 Md. 373.

Massachusetts.—Gilbert *v.* Nantucket Bank, 5 Mass. 97.

North Carolina.— State *v.* Cox, 46 N. C. 373.

South Carolina.—Allgood *v.* Robertson, 55 S. C. 446, 33 S. E. 483; Fonville *v.* Richey, 2 Rich. 10.

Tennessee.— Cowan *v.* Donaldson, 95 Tenn. 322, 32 S. W. 457.

West Virginia.—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444; Enos *v.* Stansbury, 18 W. Va. 477.

Wisconsin.— Conrad *v.* Cole, 15 Wis. 545.

See 13 Cent. Dig. tit. "Costs," § 537.

52. Carpenter *v.* Aldrich, 3 Metc. (Mass.) 58; Whiting *v.* Hollister, 2 Mass. 102. See also Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 254; Irvins *v.* Mathis, 11 Humphr. (Tenn.) 603.

53. Muldon *v.* Place, (Ariz. 1885) 6 Pac. 479; Adams *v.* Miller, 14 Ill. 71; Adams *v.* Miller, 12 Ill. 27.

54. Edgar Gold, etc., Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113; State *v.* Leonard, 7 Blackf. (Ind.) 223; Presse, etc., Paper Works *v.* Willet, 14 Abb. Pr. (N. Y.) 119.

Instances of objection too late.—*After pleading to merits.*— *Alabama.*— Heflin *v.* Rock Mills Mfg., etc., Co., 58 Ala. 613; Lavange *v.* Burke, 50 Ala. 61; Weeks *v.* Napier, 33 Ala. 568.

Arkansas.— Lincoln *v.* Hancock, 5 Ark. 703; Kittlewell *v.* Scull, 3 Ark. 474; Webb *v.* Jones, 2 Ark. 330.

Illinois.— People *v.* Cloud, 50 Ill. 439; Dunning *v.* Dunning, 37 Ill. 306; School Trustees *v.* Walters, 12 Ill. 154.

Indiana.— Lindley *v.* Kindall, 4 Blackf. 189.

Massachusetts.— Carpenter *v.* Aldrich, 3 Metc. 58.

New York.— Hay *v.* Power, 2 Edw. 494.

South Carolina.— *Ex p.* Hill, 55 S. C. 446, 33 S. E. 483; Fonville *v.* Richey, 2 Rich. 10.

Tennessee.— Hall *v.* Fowlkes, 9 Heisk. 745. *Compare* Stillman *v.* Dunklin, 48 Ala. 175; *Ex p.* Robbins, 29 Ala. 71.

See 13 Cent. Dig. tit. "Costs," § 531 *et seq.* But see Michael *v.* Forsythe, 2 Chest. Co. Rep. (Pa.) 32 (holding that the filing of a plea before the expiration of a rule to give security for costs is not waiver of such rule, when the plea is filed in accordance with a rule to plead and is necessary to prevent judgment against defendant); Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444 (holding that where one defendant obtains a rule for security, his right to security is not lost by the filing of a demurrer to the bill by another defendant within the term allowed for giving security).

After jury sworn.— Wheelin *v.* Kertley, Hard. (Ky.) 540.

After continuance.— Harper *v.* Columbus Factory, 35 Ala. 127; McVickar *v.* Ludlow, 2 Ohio 259. And see State *v.* McCarthy, 60 Md. 373, where it was held that the right to insist on a compliance with the rule for costs is waived for the term when the defendants agree that the case shall be continued. And see Shuttleworth *v.* Dunlop, 34 N. J. Eq. 488, where objection was made after asking for and obtaining a continuance of an interlocutory motion and a hearing thereof.

After going to trial.— Weeks *v.* Napier, 33 Ala. 568; Spencer *v.* Trafford, 42 Md. 1; Enos *v.* Stansbury, 18 W. Va. 477.

After judgment.— *California.*—Comstock *v.* Clemens, 19 Cal. 77.

Kentucky.— Shelley *v.* Newport Sav. Assoc., 11 Bush 305; Davies *v.* Graham, 2 A. K. Marsh. 540.

Mississippi.— Grimball *v.* Mississippi, etc., R. Co., 3 Sm. & M. 38.

New York.— Merchants' Bank *v.* Mills, 3 E. D. Smith 210.

United States.— Lytle *v.* Fenn, 15 Fed. Cas. No. 8,651, 3 McLean 411.

See 13 Cent. Dig. tit. "Costs," § 531 *et seq.*

After appeal to an intermediate court (Duncan *v.* Richardson, 34 Ala. 117; Kolbe *v.* People, 85 Ill. 336; Robertson *v.* Marshall County Com'rs, 10 Ill. 559; Coffey *v.* Collier, 12 Ind. 565) or to the court of last resort (Eslava *v.* Ames Plow Co., 47 Ala. 384; Meyer *v.*

c. Methods of Raising. Where the statute prescribes the method by which the defendant may take advantage of the plaintiff's failure to give security for costs this method should be followed.[55] The most usual method is by motion to dismiss;[56] but in some jurisdictions the failure may be availed of by plea in abatement,[57] and in others by motion to stay proceedings.[58] Such failure, however, cannot be availed of by answer,[59] demurrer,[60] or by objection to admission of evidence.[61] If the ground for a motion is the failure of a non-resident plaintiff to give security, as required by statute, before commencing suit, the motion should be supported by affidavit, verifying the facts necessary to sustain the motion.[62]

Wiltshire, 92 Ill. 395; Gunn *v.* Gudehus, 15 B. Mon. (Ky.) 447; Bullard *v.* Dorsey, 7 Sm. & M. (Miss.) 9; Howard *v.* Union Bank, 7 Humphr. (Tenn.) 26). And this rule has been applied in the case of a non-resident defendant. Haymond *v.* Camden, 22 W. Va. 180.

After motions to dismiss the petition and demurrers thereto have been overruled, and application to the supreme court for mandamus to compel dismissal of the petition denied. Heflin *v.* Rock Mills Mfg., etc., Co., 58 Ala. 613.

Till time of trial.— In Maryland it has been held that the right of defendant to move for a judgment of nonsuit, for the failure of the plaintiff to comply with a rule for costs, is not lost by a delay of eight months, but continues up to the time of trial. Holt *v.* Tenallytown, etc., R. Co., 81 Md. 219, 31 Atl. 809.

Under a statute requiring indorsement of a writ as security for costs before service, the service of the writ without indorsement will operate as a waiver of the security as regards the sheriff, but not as to the defendant, the security being for the benefit of both of them. Johnson *v.* Ralph, Tapp. (Ohio) 165.

55. Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

56. *Alabama.*— Alabama, etc., R. Co. *v.* Harris, 25 Ala. 232.

Arkansas.— Clark *v.* Gibson, 2 Ark. 109; Means *v.* Cromwell, 1 Ark. 247.

Kentucky.— Hopkins *v.* Chambers, 7 T. B. Mon. 254.

Maine.— Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71.

Massachusetts.— Feneley *v.* Mahoney, 21 Pick. 212.

Minnesota.— Butts *v.* Moorehead Mfg. Co., 43 Minn. 296, 45 N. W. 444; Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

Montana.— Marsh *v.* Kinna, 2 Mont. 547.

New York.— Merchants' Bank *v.* Mills, 3 E. D. Smith 210; Hinds *v.* Woodbury, 29 How. Pr. 379.

Tennessee.— Cowan *v.* Donaldson, 95 Tenn. 322, 32 S. W. 457.

Vermont.— Whittaker *v.* Perry, 37 Vt. 631.

See 13 Cent. Dig. tit. "Costs," § 537 *et seq.*

Defective pleading as substitute for motion.— A pleading which is defective in form, as a plea in abatement, may be sufficient as a motion to dismiss. Whittaker *v.* Perry, 37 Vt. 631.

Pleading over after unsuccessful motion to dismiss for failure to file security waives a ruling on the motion. Hite *v.* Kendall, 2 Ark. 338.

57. Clark *v.* Gibson, 2 Ark. 109; Means *v.* Cromwell, 1 Ark. 247; Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 254; Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71.

Distinction between plea in abatement and motion to dismiss.— Under the statutes of some jurisdictions, where both remedies exist, the results of plea in abatement and a motion to dismiss differ in this respect, where the defendant moves to dismiss for failure to give security, the security may be given afterward, but not so when the matter is pleaded in abatement. Means *v.* Cromwell, 1 Ark. 247; Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 254.

58. Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

59. Butts *v.* Moorehead Mfg. Co., 43 Minn. 296, 45 N. W. 444; Henry *v.* Bruns, 43 Minn. 295, 45 N. W. 444.

60. Cowan *v.* Donaldson, 95 Tenn. 322, 32 S. W. 457.

61. *In re* Albert, 80 Mo. App. 554.

Right to discovery.— If a suit is brought for the use of a non-resident, and the beneficiary fails to file his bond for costs, and defendant pleads in abatement the non-residence of plaintiff, but cannot prove it, he will be entitled to discovery. Palmer *v.* Hicks, 17 Ark. 505.

62. Hardwick *v.* Campbell, 7 Ark. 118; Means *v.* Cromwell, 1 Ark. 247.

Effect of failure to file affidavit.— A motion to dismiss for failure to file security may be stricken out if not supported by affidavit, but this is not a ground for demurrer to the motion. Hardwick *v.* Campbell, 7 Ark. 118.

The affidavit should state both the non-residence of the plaintiff and that no bond has been filed. Johnson *v.* Hoskins, 12 Ark. 635; Cox *v.* Garvin, 6 Ark. 431. So it has been held that an affidavit for dismissal for want of security for costs in an action by one for the use of another is fatally defective if it fails to aver the irresponsibility and non-residence of the use plaintiff. O'Connell *v.* Rea, 51 Ill. 306. See also Caton *v.* Harmon, 2 Ill. 581.

Non-residence can only be established by plaintiff's own admission or other competent testimony. Smith *v.* Dudley, 2 Ark. 68.

d. Notice of. If notice of the motion is required by statute, it should be given.[63]

3. Review of Order Dismissing Suit. Ordinarily the discretion of the court in dismissing a suit for failure to give security for costs will not be interfered with by the appellate court,[64] but where there has been a clear abuse of this discretion the appellate court will reverse.[65] It has been held that where a cause has been dismissed for want of security, the reasons for granting the motion should appear on the record,[66] that it may be seen that the case is within the statute.[67]

4. Proceedings to Compel Court to Dismiss Suit. Mandamus is the proper remedy to compel dismissal of a suit for want of security for costs.[68]

5. Reinstatement of Cause. The courts have power on good cause shown to reinstate a cause dismissed for failure to give security for costs;[69] but such action on the part of the court seems to be largely a matter of discretion,[70] and should not be exercised if there is any unnecessary delay in making the application.[71]

6. Effect on Judgment or Order of Failure to Give Security. The fact that security for costs was not given when required by statute or order of court does not invalidate the judgment;[72] nor does it affect an order made in the cause appointing a receiver to take charge of the property in controversy.[73]

J. Defective Security and Proceedings Thereon. No one can object that security given is defective who is not directly interested in the costs intended to be secured thereby.[74] The objection that the security given is defective may be taken by motion for additional security[75] or by motion to dismiss.[76] It has been held that where the security required is an indorsement of the writ, an objection to its sufficiency should be made at the first term;[77] and where the security is a bond it was said that the objection should be made at the earliest possible moment.[78]

63. Means *v.* Cromwell, 1 Ark. 247. *Compare* Joint School Dist. No. 7 *v.* Kemen, 72 Wis. 179, 39 N. W. 131, where it was held, under a statute providing that on failure of plaintiff to comply with an order requiring security for costs, the court may on motion of defendant dismiss the action, a judgment of dismissal for such cause will not be reversed because defendant failed to serve notice of application for judgment.

64. Perkins *v.* Reagan, 14 Ark. 47. And see, generally, Appeal and Error.

65. Whitsett *v.* Blumenthal, 63 Mo. 479.

66. If the record does not show that any evidence was offered in support of the motion, the appellate court will presume in favor of the trial court's decision. Hickey *v.* Smith, 6 Ark. 456; Cox *v.* Garvin, 6 Ark. 431; Smith *v.* Dudley, 2 Ark. 68.

67. Reid *v.* Brasher, 7 Port. (Ala.) 448; Read *v.* Carson, Minor (Ala.) 17. *Contra, dictum* in Thompson *v.* Miller, 2 Stew. (Ala.) 470.

68. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733; *Ex p.* Morgan, 30 Ala. 51; *Ex p.* Robbins, 29 Ala. 71; *Ex p.* Cole, 28 Ala. 50. And see, generally, Mandamus.

Reason for rule.— An appeal is obviously an inadequate remedy, because the citizen is forced into litigation with a non-resident pending the further continuance of the suit and the appeal indemnity against the costs, which is the evil the statute intends to avoid. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733.

69. Sharp *v.* Miller, 3 Sneed (Tenn.) 42; Majors *v.* Blevins, 6 Humphr. (Tenn.) 43; Mississippi Union Bank *v.* Hudgeons, 3 Tex. 9; Cook *v.* Beasely, 1 Tex. 591; Edwards *v.* Middleton, 28 Tex. Civ. App. 316, 66 S. W. 570.

70. Gifford *v.* Roberts, 125 Mich. 408, 84 N. W. 465; Cook *v.* Ross, 46 Tex. 263.

71. See Lindsay *v.* Twining, 15 Fed. Cas. No. 8,367, 1 Cranch C. C. 206.

72. Alford *v.* Jacobson, 46 Wis. 574, 1 N. W. 233; Taylor *v.* Wilkinson, 22 Wis. 40.

73. Gallaway *v.* Campbell, 142 Ind. 324, 41 N. E. 597.

74. Harding *v.* Griffin, 7 Blackf. (Ind.) 462, where it was held that a defendant whose costs are secured by a bond given cannot object thereto because the bond does not, as required by statute, secure also the costs of the officers of court.

75. St. John State Bank *v.* Gruver, 7 Kan. App. 695, 51 Pac. 915.

76. Hardwick *v.* Campbell, 7 Ark. 118.

An affidavit in support of a motion must be given, and it should set out the bond and submit its validity to the determination of the court. Hardwick *v.* Campbell, 7 Ark. 118.

77. Gilbert *v.* Nantucket Bank, 5 Mass. 97; Leazar *v.* Cota, 43 N. H. 81.

78. Courson *v.* Browning, 78 Ill. 208.

It is too late to object to the form of sufficiency of security after pleading to the merits (James *v.* Tait, 8 Port. (Ala.) 476; Clark *v.* Gibson, 2 Ark. 109; Courson *v.* Browning, 78 Ill. 208; Garrett *v.* Niel, 49 S. C. 560, 27 S. E. 512); after time limited for pleading in abatement has expired (Seaver *v.* Allen, 48 N. H. 473); after going to

So it was held that a motion for nonsuit, on the ground that the prosecution bond was improperly executed, should be denied where plaintiff offered to perfect the bond.[79]

K. Additional Security — 1. Right of Plaintiff to Give. If there has been an attempt to comply with the law by giving security, but it is for any reason defective, the cause should not be dismissed, without giving the party an opportunity to give additional and sufficient security.[80]

2. Power to Require. In all cases where security may be required in the first instance, whether by virtue of some statutory provision or because considered to exist at common law, the court has power in a proper case, according to the weight of authority, to require additional security,[81] and in some jurisdictions special provision is made by statute for requiring additional security in certain cases.[82]

3. Under What Circumstances Required. To authorize an order requiring new security, it is essential that there shall have been a change in the circumstances of the case, of the parties, or of the sureties. The mere fact that the security was insufficient when taken will not authorize an order requiring new security.[83] It has been held a sufficient ground that the amount specified is insufficient[84] or that the surety dies pending suit,[85] becomes unable to pay costs,[86] or becomes insolvent.[87] So it has been held that where a writ which has been indorsed for

trial (Rutter *v.* Sullivan, 25 W. Va. 427); or after demurrer (Clark *v.* Gibson, 2 Ark. 109).

79. Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713.

80. Good *v.* Jones, 56 Ala. 538; Stribling *v.* Kentucky Bank, 48 Ala. 451; Peavey *v.* Burket, 35 Ala. 141; Meech *v.* Fowler, 14 Ark. 29; Shaw *v.* Havekluft, 21 Ill. 127; Rothchild *v.* Wilson, 10 N. Y. Suppl. 61, 19 N. Y. Civ. Proc. 76, 24 Abb. N. Cas. (N. Y.) 123; Herndon *v.* Rice, 21 Tex. 455; Collins *v.* Edson, 55 Vt. 48.

Amendment of bond.— Where there is an error in the cost bond filed by a non-resident in the name of the obligee, the court may permit the obligor to amend the bond by inserting defendant's true name. Mandel *v.* Peet, 18 Ark. 236.

Amendment of recognizance.— Where no sum is mentioned in the minutes of a recognizance upon a writ, or where the name of the person recognized is omitted, the court has no power to amend the defect. But in a case where the sum in which the surety was bound was omitted in the minutes of the recognizance and the defendant pleaded the defect in abatement, and the court allowed an amendment, without rendering judgment on the plea, the defendant by not filing exceptions will be held to acquiesce in the amendment. Peck *v.* Smith, 3 Vt. 265.

If there has been a discontinuance as to one defendant, the new bond given should be executed to all the original defendants, as it relates back to the time when the first bond was executed and takes the place of it in every respect. McLain *v.* Churchill, 5 Ark. 239.

In Louisiana it has been held that where a security taken by the court is insufficient the court may order additional security. Mussina *v.* Alling, 12 La. Ann. 799.

81. Reid *v.* Brasher, 7 Port. (Ala.) 448; Ingraham *v.* Cook, Quincy (Mass.) 4; Whitcher *v.* Whitcher, 10 N. H. 440; Vaughan *v.* Vincent, 88 N. C. 116; McDowell *v.* Bradley, 30 N. C. 92; Tyler *v.* Person, 5 N. C. 498. See also Deprez *v.* Thomson-Houston Electric Co., 66 Fed. 22, where the federal court, following the equity practice in the state courts, held that without special statutory authority they could require additional security. *Contra,* Hartford Quarry Co. *v.* Pendleton, 4 Abb. Pr. (N. Y.) 460; Owen *v.* Grundy, 8 Yerg. (Tenn.) 436 (in which it was held that there must be special statutory authority for requiring security for costs); Jones *v.* Kearns, Mart. & Y. (Tenn.) 242.

82. See N. Y. Code Civ. Proc. § 3276; Tenn. Code (1896), § 4927.

83. Ball *v.* Bruce, 27 Ill. 332; Greer *v.* Whitfield, 4 Lea (Tenn.) 85; Martin *v.* Hazard Powder Co., 93 U. S. 202, 23 L. ed. 885; Jerome *v.* McCarther, 21 Wall. (U. S.) 17, 22 L. ed. 515.

84. Brewster *v.* Wooster, 24 N. Y. Civ. Proc. 83; Reck *v.* Phœnix Ins. Co., 18 N. Y. Wkly. Dig. 505 [*affirmed* in 2 Silv. Supreme (N. Y.) 342, 5 N. Y. Suppl. 543, 24 N. Y. St. 646].

85. Tracey *v.* Dolan, 31 N. Y. App. Div. 24, 52 N. Y. Suppl. 351; Duvall *v.* Wright, 8 Fed. Cas. No. 4,212, 4 Cranch C. C. 169.

86. Ingraham *v.* Cook, Quincy (Mass.) 4.

87. Bridges *v.* Canfield, 2 Edw. (N. Y.) 208; Owen *v.* Grundy, 8 Yerg. (Tenn.) 436 (under express statutory authorization). See also Ball *v.* Bruce, 27 Ill. 332. *Contra,* Slater Bank *v.* Sturdy, 13 Abb. Pr. (N. Y.) 224; Hartford Quarry Co. *v.* Pendleton, 4 Abb. Pr. (N. Y.) 460; Jones *v.* Kearns, Mart. & Y. (Tenn.) 242. And see Leazar *v.* Cota, 43 N. H. 81, where it was held, under a statute requiring original writs to be indorsed "by the plaintiff, his agent, or attorney, being an inhabitant of the State; if the plaintiff is not an inhabitant of this State, by some responsible person who is an inhabitant," that the indorsement of a non-resident plaintiff,

costs is lost and a new one filed the court may in its discretion require the new writ to be indorsed;[88] and that a new bond may be substituted for the original one, in order to render the original surety competent to justify.[89] A new bond will not be ordered because made payable to the officers of the court instead of to defendant, where the bond as executed is in strict conformity with the statute.[90] And where the plaintiff makes a deposit for security instead of giving an undertaking, as he is permitted to do by statute, he cannot be required to give any further security whatever under any circumstances;[91] and this is especially true where a statute provides that "it shall be in lien of all security for costs."[92]

4. Application For. The time of applying for additional security must depend largely on the circumstances of the particular case in which it is asked.[93] The application must show that new facts have arisen since the security was given, making additional security necessary;[94] and notice should be given to plaintiff.[95]

5. Review of Order Requiring or Refusing. An order requiring additional security for costs is largely a matter of discretion with the trial court and is not reviewable;[96] but the appellate court will nevertheless reverse an order granted on an insufficient affidavit.[97] If the trial court abuses its discretion in refusing to require additional security for costs the judgment rendered in plaintiff's favor will not be reversed therefor, as it is no longer of any importance that security should have been given.[98]

L. Vacation of Order For Security. The court requiring security for costs has the power to set aside the order;[99] but it has been held that a succeed-

or that of his agent or attorney, is sufficient, without reference to their responsibility, and a new indorsement will not be ordered, although the indorser cannot answer for costs.

88. Whitcher *v.* Whitcher, 10 N. H. 440.

89. Hoys *v.* Tuttle, 8 Ark. 124, 56 Am. Dec. 309; McLain *v.* Churchill, 5 Ark. 239; Virginia *v.* Evans, 28 Fed. Cas. No. 16,969, 1 Cranch C. C. 581.

90. Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403.

91. Honduras *v.* Soto, 112 N. Y. 310, 19 N. E. 845, 20 N. Y. St. 749, 16 N. Y. Civ. Proc. 270, 8 Am. St. Rep. 744, 2 L. R. A. 642 [*reversing* 47 Hun (N. Y.) 174], where it was held that a statute providing that after the allowance of an undertaking given pursuant to an order the court may under designated circumstances require additional security has no application where deposit is made. And see Gates *v.* McDonald, 60 Hun (N. Y.) 583, 14 N. Y. Suppl. 907, 39 N. Y. St. 128; Newhall *v.* Appleton, 57 N. Y. Super. Ct. 154, 6 N. Y. Suppl. 4, 29 N. Y. St. 524.

92. Carr *v.* Osterhout, 32 Kan. 277, 4 Pac. 318.

93. In one case an application was refused when made during trial, at a time when the granting of it would practically amount to nonsuiting the plaintiff, who was a poor man and unable to give further security in the midst of the trial. Pritchard *v.* Henderson, 3 Pennew. (Del.) 128, 50 Atl. 247.

A statute providing that new security may be required "at any stage of the cause" does not apply to the retaking of a partnership account after modification of a final decree on appeal and remand. Paul *v.* Hill, 3 Tenn. Ch. 342.

Under a statute providing for additional security "at any time," it has been held that the application is in time if made at any time before judgment (Reck *v.* Phœnix Ins. Co., 18 N. Y. Wkly. Dig. 505), but not after judgment from which no appeal is taken (Brackett *v.* Griswold, 46 Hun (N. Y.) 442).

94. Greer *v.* Whitfield, 4 Lea (Tenn.) 85. See also Nugent *v.* Keenan, 53 N. Y. Super. Ct. 530; Holshausen *v.* Hollingsworth, 32 Tex. 86.

Application held insufficient.— Security for costs other than required by the rules will not be required of a plaintiff in the federal circuit court, where the moving papers neither show any item of taxable costs nor disbursements incurred, nor any steps taken which involved any disbursements, nor any itemized statement of extraordinary disbursements, which are to be made at once in proceedings already taken. Thannhauser *v.* Cortes Co., 9 Fed. 225, 19 Blatchf. 397.

95. Houston *v.* Roberts, 10 Tex. 348.

96. Ball *v.* Bruce, 27 Ill. 332; Adams *v.* Reeves, 76 N. C. 412; Jones *v.* Cox, 46 N. C. 373.

97. Ball *v.* Bruce, 27 Ill. 332.

98. Wilcox *v.* Byington, 36 Kan. 212, 12 Pac. 826; Manspeaker *v.* Pipher, (Kan. App. 1897) 48 Pac. 868.

So the reviewing court will not reverse a judgment in plaintiff's favor because the trial court refused to dismiss the action for plaintiff's non-compliance with an order to furnish security. Eastman *v.* Godfrey, 15 Kan. 341.

99. Moore *v.* Merritt, 9 Wend. (N. Y.) 482.

Grounds to set aside.— Where an order to furnish new security is absolute, instead of giving the plaintiff the option to give new security or justify the old security, a party

ing judge[1] will not hear evidence to rescind his predecessor's order for security in cases of extreme hardship or gross fraud.[2] If an order for costs is dismissed at the instance of the party at whose request it was granted before the time has expired for compliance therewith, the cause should not be stricken from the docket because of such non-compliance.[3]

M. Liability of Surety or Indorser — **1. Basis of Liability.** Ordinarily the surety or indorser is not liable for costs where the plaintiff is successful;[4] but the fact that the plaintiff is successful on the trial will not exonerate the surety from liability for costs, where the judgment in his favor is reversed.[5] Whether a person voluntarily becoming security in a case where security is not required by law can be held liable for costs is a question which has been ruled both ways.[6] A nonsuit renders the surety liable.[7]

2. Accrual of Liability. It has been held that liability does not accrue until rendition and entry of judgment for costs, and the statute of limitations does not begin to run until that date;[8] but where the form of security given is indorsement of the writ, it seems that liability is incurred at the time of indorsement.[9]

3. Extent of Liability[10] — **a. For Costs Made in Trial Court.** The amount and items of costs which may be recovered on the bond against the surety depend very largely on the wording of the bond and the statute under which it is given.[11]

cannot object to the rule on this ground, unless he appear and offer to justify his security. Creamer *v.* Ford, 1 Heisk. (Tenn.) 307.

1. After the expiration of the time limited for giving security, a succeeding judge has no power to reverse or modify the order. Cummings *v.* Wingo, 31 S. C. 427, 10 S. E. 107; Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512.

2. Bomar *v.* Trail, 1 Bailey (S. C.) 533.

3. Mississippi, etc., R. Co. *v.* Ballad, 5 Sm. & M. (Miss.) 606. See also Grimball *v.* Mississippi, etc., R. Co., 3 Sm. & M. (Miss.) 38.

4. Fairbanks *v.* Townsend, 8 Mass. 450; Colville *v.* McKinney, 1 Yerg. (Tenn.) 448; Bowne *v.* Arbuncle, 3 Fed. Cas. No. 1,742, Pet. C. C. 233.

But in a court of equity the chancellor may award costs against either party without regard to the result of the suit, and a surety is subject to the exercise of that power, whether his principal succeeds or not (Carren *v.* Breed, 2 Coldw. (Tenn.) 465); and although the bond provides that the complainant shall successfully prosecute the suit or pay all costs incident on failure thereof, the surety may be held liable for the costs, although his principal succeeds in the suit, if the costs are taxed to his principal (Allison *v.* Stephens, 2 Head (Tenn.) 251). See also Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40. *Compare* Kennedy *v.* Jack, 1 Yerg. (Tenn.) 82, which seems to maintain the contrary doctrine.

As to liability of attorney as indorser see Attorney and Client, 4 Cyc. 922.

5. Ball *v.* Gardner, 21 Wend. (N. Y.) 270. See also cases cited *infra,* note 18 *et seq.,* which sustain this doctrine. *Contra,* Kennedy *v.* Jack, 1 Yerg. (Tenn.) 82.

6. That indorser is liable see Noble *v.* Markley, Wright (Ohio) 177. *Compare* Schæfer *v.* Waldo, 7 Ohio St. 309, holding that where a person without order or leave of court enters himself as security for costs on the docket, and on motion to dismiss for want of security appears and consents to the order of the court recognizing him as surety, and the court approves of him as surety, he becomes bound as such.

That indorser is not liable see Crossman *v.* Moody, 26 Me. 40.

7. Talbot *v.* Whiting, 10 Mass. 359; Hamiltons *v.* Moody, 21 Mo. 79.

8. Fewlass *v.* Keeshan, 88 Fed. 573, 32 C. C. A. 8; McClaskey *v.* Barr, 79 Fed. 408.

9. Oliver *v.* Blake, 24 Me. 353; Thomas *v.* Washburn, 24 Me. 225; Standard Pub. Co. *v.* Bartlett, 6 Ohio Dec. (Reprint) 965, 9 Am. L. Rec. 58.

Where a writ is indorsed before the enactment of a statute, lengthening the time within which action shall be commenced, but providing that the provisions therein contained are not to extend to any liability incurred before its passage, such statute has no application to the liability of such indorser. Oliver *v.* Blake, 24 Me. 353; Thomas *v.* Washburn, 24 Me. 228.

10. Joint liability.— Where persons sign their names to the following, "We acknowledge ourselves as security for the costs in this case," the contract is joint only, and not joint and several. Boswell *v.* Morton, 20 Ala. 235.

11. Effect of stipulation to which surety is not party.— Items of cost for which the surety is not ordinarily liable are not recoverable against him on a stipulation between the parties, to which he was not a party, that such items should be taxable as costs. Schawacker *v.* McLaughlin, (Mo. 1897) 40 S. W. 935.

State tax on litigation is not an item of costs and not included in the bond. *In re* State Tax Cases, 12 Lea (Tenn.) 744.

Ordinarily the bond only includes costs made by the defendant himself,[12] and not those made by the plaintiff;[13] but the surety may bind himself to pay all costs made in the cause of whatever nature, and he has been held so liable on some bonds.[14] If a designated amount is named in the bond, the amount recoverable of the surety is limited thereby.[15] If a cause is removed from a state to a federal court the indorsement covers costs made in both courts.[16] On removal of plaintiff pending suit the bond given should include costs that had accrued before removal.[17]

b. For Costs Made on Appeal, Etc. There is some diversity of opinion, due to some extent to the wording of the statutes, as to whether costs of appeal are items recoverable against a surety and indorser. In a considerable number of cases it has been held that costs made on appeal to an intermediate court are taxable.[18] So in others it has been held that costs made on appeal to the court of last resort are also recoverable against the surety or indorser;[19] but the contrary has been

12. Hiett *v.* Davis, 88 Ind. 372; Smith *v.* Arthur, 116 N. C. 871, 21 S. E. 696 (on bond providing for payment of all costs that defendant shall recover of plaintiff); Hallman *v.* Dellinger, 84 N. C. 1 (on bond to pay the defendant "such sum as may be for any cause recovered against the plaintiff"); Swain *v.* McCullock, 75 N. C. 495; Deaton *v.* Mulvaney, 1 Lea (Tenn.) 73.

Bond not including costs made by defendant.— A bond conditioned to pay all fees accruing in the action to the officers of the court is not violated by a failure to pay the costs incurred by defendant, for whom judgment is rendered. Chiles *v.* Calk, 2 T. B. Mon. (Ky.) 29.

Nominal plaintiff.— A statute making the indorser of a writ liable for defendant's costs, in case of plaintiff's avoidance or inability to pay them, applies to an action brought by a nominal plaintiff for the benefit of a third person. Skillings *v.* Boyd, 10 Me. 43.

13. Hiett *v.* Davis, 88 Ind. 372; Smith *v.* Arthur, 116 N. C. 871, 21 S. E. 696; Hyer *v.* Smith, 12 Fed. Cas. No. 6,978, 3 Cranch C. C. 376.

Application of sum provided for in bond to payment of plaintiff's witnesses.— The plaintiff's security for costs cannot by his own act apply the sum for which he is liable for the benefit of the plaintiff by paying his witnesses. The defendant has a right to such sum for his own witnesses and other costs, after satisfaction of the costs of the officers of the court. Locke *v.* McFalls, 3 Sneed (Tenn.) 674.

Bond making liable for costs made by defendant and plaintiff's witness' fees.— Under a statute providing that the surety shall be bound for the payment of all costs adjudged against the plaintiff and for the costs of the plaintiff's witnesses, whether the plaintiff obtain judgment or not, the extent of the surety's liability is for the costs which the defendant may recover against the plaintiff and for the costs of the latter's own witnesses, without regard to the character of the judgment rendered. McKenzie *v.* Horr, 15 Ohio St. 478.

Statutes making successful party liable for costs made by him, which cannot be collected out of the other party, and to be recovered on motion by the persons entitled to them against the successful party, do not change the rule and make the surety liable for costs made by his principal. Deaton *v.* Mulvaney, 1 Lea (Tenn.) 73.

14. Whitehurst *v.* Coleen, 53 Ill. 247 (under a statute requiring a bond to pay all costs that may accrue in the cause); Glameyer *v.* Hamilton, (Tex. Civ. App. 1900) 60 S. W. 471 (under a statute similarly worded).

Illustrations.— A bond for "costs in this case" (McClaskey *v.* Barr, 79 Fed. 408), for "costs and fees in the case" (Sawyer *v.* Williams, 72 Fed. 296), or for "all the costs and charges accruing in the suit" (Wilson *v.* Hudspeth, 14 N. C. 57) includes costs accruing both upon and after the execution of the bond.

15. Bolinger *v.* Gordon, 11 Humphr. (Tenn.) 61.

16. Sawyer *v.* Williams, 72 Fed. 296; Pullman Palace-Car Co. *v.* Washburn, 66 Fed. 790 [*affirmed* in 76 Fed. 1005].

17. *Ex p.* Louisville, etc., R. Co., 124 Ala. 547, 27 So. 239.

18. Dunn *v.* Sutliff, 1 Mich. 24; Starlocki *v.* Williams, 34 Minn. 543, 26 N. W. 909 (under a statute authorizing a justice to require "security of the plaintiff for costs"); Traver *v.* Nichols, 7 Wend. (N. Y.) 434 (bond for "security for the payment of any sum which might be adjudged against" plaintiff); Glameyer *v.* Hamilton, (Tex. Civ. App. 1900) 60 S. W. 471 (bond to pay the costs "in said court," meaning the justice's court); Smith *v.* Lockwood, 34 Wis. 72; McClaskey *v.* Barr, 79 Fed. 408 (bond including "costs in this case"). See also Hutchinson *v.* Grout, 40 Hun (N. Y.) 207.

19. Hendricks *v.* Carson, 97 Ind. 245 (bond for "all costs which may accrue in the action"); Martin *v.* Kelly, 59 Miss. 652 (bond for "all costs accrued or to accrue in the suit"); Tibbles *v.* O'Connor, 28 Barb. (N. Y.) 538 (bond for "such sum as might for any cause be recovered against plaintiff"); Forty-Second St., etc., Ferry R. Co. *v.* Guntzer, 36 N. Y. Super. Ct. 567 (bond that "the obligors should pay on demand

held in numerous other cases.[20] So the costs accruing on a writ of certiorari[21] or on a writ of review[22] are not recoverable against a surety or indorser, being independent and original proceedings.

4. STEPS NECESSARY TO FIX LIABILITY. The plaintiff may recover costs from the surety without first paying them himself.[23] If the bond is conditioned that the plaintiff will pay on demand the costs awarded against him, such demand is necessary to render the surety liable.[24] There is some difference in the holdings as to the necessity of exhausting the remedy against a plaintiff in order to fix the liability of the surety. In a number of cases it is held that the surety is immediately liable on recovery of judgment for costs against his principal, and that proceedings to recover from him may be instituted without suing out execution on the judgment.[25] In others, however, an exhaustion of remedies against the principal is held necessary to fix the surety's liability,[26] and reasonable diligence must be used.[27] For this purpose it has been held that the execution should be sued out within a year from the time the judgment was rendered,[28] and that the return should show the inability or avoidance of the original plaintiff.[29] A return of *non est investus* made and dated before the return-day does not render the indorser liable;[30] and if the execution is delivered to an officer after the court has adjourned on the return-day, his return of *non est investus* will not charge the indorser.[31]

5. RELEASE. A court cannot release a surety for costs without the consent of the party for whose benefit he became surety.[32] So it has been held that the

all costs that might be awarded to defendant").

In Tennessee, in chancery cases, the bond has been held to include costs of appeal (Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40; Bowman *v.* Harman, (Tenn. Ch. App. 1895) 35 S. W. 1020); and that too although the surety's liability be expressly limited by the bond to the costs of the chancery court (Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40).

20. Clark *v.* Quackenboss, 28 Ill. 112; Whitwell *v.* Burnside, 1 Metc. (Mass.) 39 (bond to pay all costs decreed in the court of common pleas); Dawson *v.* Holt, 12 Lea (Tenn.) 27 (bond conditioned "to pay all costs which may be adjudged at any time against the principal"); Hawkins *v.* Thornton, 1 Yerg. (Tenn.) 146 (bond conditioned to prosecute the suit with effect, or pay all costs that may be awarded against plaintiff); Lambert *v.* Key, 4 Hen. & M. (Va.) 484 (undertaking to pay all costs which may be awarded defendant and all fees which may become due in a suit to the officers of the court); Bailey *v.* McCormick, 22 W. Va. 95. See also Wheeler *v.* Meyer, 96 Mich. 242, 55 N. W. 688; Ortmann *v.* Merchants' Bank, 42 Mich. 464, 4 N. W. 167, which, although very obscure, seem to maintain this doctrine.

21. Fenno *v.* Dickinson, 4 Den. (N. Y.) 84.

22. Ely *v.* Forward, 7 Mass. 25; Sanford *v.* Candia, 54 N. H. 419.

23. Hamilton *v.* Baltimore, etc., R. Co., 8 Ohio S. & C. Pl. Dec. 435.

24. Nelson *v.* Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310.

25. Woodward *v.* Peabody, 39 N. H. 189; Shepley *v.* Story, 3 N. H. 63; Butler *v.* Haynes, 3 N. H. 21; Eaton *v.* Sloan, 2 N. H. 552; Chadbourne *v.* Hodgdon, 1 N. H. 359; Parsons *v.* Pearson, 1 N. H. 336 (a statute providing that the indorser of the writ "shall be liable in case of the plaintiff being out of the state"); McClaskey *v.* Barr, 79 Fed. 408 (the bond declaring that the surety acknowledges himself security for costs); Gaines *v.* Travers, 9 Fed. Cas. No. 5,180 (the bond being given under a rule prescribing the condition that the respondent will pay the money awarded by the final decree, and that summary process of execution may be issued on such bond against the principal and sureties to enforce the decree).

26. Neal *v.* Washburn, 24 Me. 331; Wilson *v.* Chase, 20 Me. 385 (under a statute making the indorser liable on the avoidance or inability of the defendant); Ruggles *v.* Ives, 6 Mass. 494; Broyles *v.* Blair, 7 Yerg. (Tenn.) 279 (bond conditioned to pay all costs which may accrue for wrongfully bringing the suit); Hammond *v.* St. John, 4 Yerg. (Tenn.) 107.

27. Merrill *v.* Walker, 24 Me. 237; Wilson *v.* Chase, 20 Me. 385; Ruggles *v.* Ives, 6 Mass. 494.

28. Neal *v.* Washburn, 24 Me. 331; Wilson *v.* Chase, 20 Me. 385; Ruggles *v.* Ives, 6 Mass. 494. *Compare* Miller *v.* Washburn, 11 Mass. 411.

If the plaintiff takes out the execution within a year, and within the time it has to run causes to be done whatever is reasonably practicable to obtain payment from the execution debtor, this will be sufficient to bind the surety. Oliver *v.* Blake, 24 Me. 353.

29. Neal *v.* Washburn, 24 Me. 331; Wilson *v.* Chase, 20 Me. 385; Ruggles *v.* Ives, 6 Mass. 494.

30. Chadbourne *v.* Hodgdon, 1 N. H. 359.

31. Blaisdell *v.* Sheafe, 5 N. H. 201.

32. *Massachusetts.*— Ely *v.* Forward, 7 Mass. 25.

surety is not released by a transfer of the cause by consent of the parties from a county court to a circuit court;[33] by the permanent removal of the plaintiff from the state pending suit;[34] by the mere changing of the issues in the pleadings;[35] by the death of the plaintiff during suit and the insolvency of his estate;[36] by moving for new security;[37] or by the giving of an additional bond.[38] So a surety is not released from the payment of costs already accrued by the plaintiffs taking the pauper oath,[39] or for costs thereafter accruing, where no motion is made for release.[40] Partial payment on a judgment does not entitle the sureties to *pro rata* abatement of their liability.[41] So on the death of a surety his estate is bound for costs accruing both before and after his death.[42] On the other hand the following facts are held sufficient to discharge the surety: Dismissal of the action;[43] the substitution of a new party plaintiff in lieu of the original one;[44] a submission to arbitration of the subject-matter of the suit.[45] So where plaintiff obtains judgment for a certain sum and costs, although the case is retained for future disposition of a counter-claim therein, and the claim is compromised and an agreement made that plaintiff pay costs, the surety is not liable therefor.[46]

6. Enforcement — a. By Summary Proceedings.[47] Some courts take the view that a surety by binding himself to pay the costs becomes a party to the record, and is as effectually bound by the judgment of the court as if he was a party to the suit,[48] and under some statutes or rules of court, judgment may be rendered against the surety or execution issued against him immediately on rendition of the judgment against the plaintiff.[49] So some statutes or rules of court expressly authorize the summary enforcement of the surety's liability by rule or motion in

New Hampshire.— Kendall *v.* Fitts, 22 N. H. 1.

North Carolina.— Holder *v.* Jones, 29 N. C. 191.

Ohio.— Standard Pub. Co. *v.* Bartlett, 8 Ohio Dec. (Reprint) 75, 5 Cinc. L. Bul. 501.

Texas.— Hickey *v.* Rhine, 16 Tex. 576.

United States.— Fewlass *v.* Keeshan, 88 Fed. 573, 32 C. C. A. 8; McClaskey *v.* Barr, 79 Fed. 408.

See 13 Cent. Dig. tit. "Costs," § 553.

33. Broyles *v.* Blair, 7 Yerg. (Tenn.) 279.

34. Proprietors Merrimack River Locks, etc. *v.* Reed, 8 Metc. (Mass.) 146.

35. Schawacker *v.* McLaughlin, (Mo. 1897) 40 S. W. 935.

36. Philpot *v.* McArthur, 10 Me. 127, under a statute making the indorser liable upon the avoidance or inability of the plaintiff to pay defendant's costs. *Compare* Parsons *v.* Williams, 9 Conn. 236 (holding that the surety was discharged by the death of the plaintiff, the conditions of the bond being that the plaintiff should prosecute his suit to effect, and answer all damages, in case he made not his plea good); Eaton *v.* Sloan, 2 N. H. 552 (where it was held that where a plaintiff dies while the action is pending, the indorser of the writ is discharged, as the statute requires execution against the plaintiff to render the indorser liable, and as no execution can issue against the plaintiff when he dies pending suit).

37. Standard Pub. Co. *v.* Bartlett, 8 Ohio Dec. (Reprint) 75, 5 Cinc. L. Bul. 501. To the same effect see Lovelace *v.* Smith, 8 Baxt. (Tenn.) 263.

38. McClaskey *v.* Barr, 79 Fed. 408.

39. Kincaid *v.* Sharp, 3 Head (Tenn.) 151.

40. Crider *v.* Lifsey, 10 Heisk. (Tenn.) 456; Grills *v.* Hill, 2 Sneed (Tenn.) 711.

41. Blackwell *v.* Bainbridge, 1 Misc. (N. Y.) 499, 20 N. Y. Suppl. 950, 49 N. Y. St. 707.

42. Fewlass *v.* Keeshan, 88 Fed. 573, 32 C. C. A. 8; McClaskey *v.* Barr, 79 Fed. 408.

43. Hollingsworth *v.* Matthews, 19 Mo. 406 (dismissal for want of a sufficient bond); Lake *v.* Arnold, 44 How. Pr. (N. Y.) 332 (dismissal for refusal of the sureties to justify); Standard Pub. Co. *v.* Bartlett, 6 Ohio Dec. (Reprint) 965, 9 Am. L. Rec. 58.

Dismissal by one plaintiff.— The surety on a joint and several undertaking for two plaintiffs continues liable, notwithstanding one of the plaintiffs dismisses the suit. McCabe *v.* Sutton, 7 Lea (Tenn.) 248.

44. *Ex p.* James, 59 Mo. 280. To the same effect see Ryan *v.* Williams, 29 Kan. 487.

45. Dunn *v.* Sutliff, 1 Mich. 24. But see Shepley *v.* Story, 3 N. H. 63, which seems to maintain the contrary doctrine.

46. Smith *v.* Arthur, 116 N. C. 871, 21 S. E. 696.

47. For form of notice to enter judgment against surety on bond for costs see Sandford *v.* Frankhauser, 24 Kan. 98.

48. Schawacker *v.* McLaughlin, (Mo. 1897) 40 S. W. 935; Hamiltons *v.* Moody, 21 Mo. 79; Nolly *v.* Squire, 1 Hill (S. C.) 41; Gaines *v.* Travis, 9 Fed. Cas. No. 5,180.

49. *Illinois.*— Whitehurst *v.* Coleen, 53 Ill. 247.

Missouri.— Schawacker *v.* McLaughlin, 139 Mo. 333, 40 S. W. 935; Hamiltons *v.* Moody, 21 Mo. 79.

South Carolina.— Stuckey *v.* Crosswell, 12 Rich. 273.

Texas.— Glameyer *v.* Hamilton, (Civ. App. 1900) 60 S. W. 471.

the original cause.[50] A motion or rule is necessary where this method of enforcement is prescribed by statute.[51] Some decisions hold that no notice of the motion is necessary;[52] but it should of course be given when expressly required by statute.[53] The motion should be made before the costs are taxed.[54] It has been said that on the motion every fact should appear of record necessary to insure a recovery,[55] that nothing will be taken by intendment.[56]

b. By Action on Bond — (I) *Where Action Brought.* It does not seem to be necessary to sue the surety in the court where the suit was brought.[57]

(II) *Leave to Sue.* Leave of court to sue on a bond given as security for costs is not a prerequisite to the commencement of the suit.[58]

Wisconsin.— Smith *v.* Lockwood, 34 Wis. 72.

United States.— Gaines *v.* Travis, 9 Fed. Cas. No. 5,180, Abb. Adm. 422.

See 13 Cent. Dig. tit. "Costs," § 559.

Exclusiveness of remedy by execution.— Where the statute authorizing security for costs provides an adequate remedy against the surety by execution against him in the same action, a separate action against him for costs cannot in general be maintained. Smith *v.* Lockwood, 34 Wis. 72.

In what court remedy given.— Where a statute or rule of court authorizes this summary procedure in a justice's court, the remedy may be resorted to in any court where judgment for costs is rendered against a plaintiff for which the surety is liable. Smith *v.* Lockwood, 34 Wis. 72. See also Glameyer *v.* Hamilton, (Tex. Civ. App. 1900) 60 S. W. 471.

50. Barton *v.* McKinney, 3 Stew. & P. (Ala.) 274; Overstreet *v.* Davis, 24 Miss. 393 (a statute limits this remedy to cases where the plaintiff is a non-resident); McClaskey *v.* Barr, 79 Fed. 408.

Necessity for statutory authorization.— It has been held that a party cannot proceed by rule against the surety unless so authorized by statute, the view being taken that such proceedings are departures from the rules which govern actions generally, and should not be extended beyond the cases expressly authorized by law. Mussina *v.* Alling, 12 La. Ann. 799.

The certificate of a judgment rendered in the appellate court is sufficient to warrant the statutory proceeding by motion against a security for costs in the trial court. Williams *v.* McCurdy, 22 Ala. 696.

51. Dodson *v.* Harris, 10 Ala. 566, holding that an entry of judgment by the court without such motion is error.

If the surety is dead, his administrator, and the distributee and heir are properly made parties to the motion, where the estate, although it has passed into the hands of the distributee, has not been fully settled. McClaskey *v.* Barr, 79 Fed. 408.

52. Martin *v.* Avery, 8 Ala. 430; Barton *v.* McKinney, 3 Stew. & P. (Ala.) 274.

53. Sanford *v.* Frankhauser, 24 Kan. 98.

The following notice held sufficient: "You will take notice that a motion will be made on behalf of the officers and ex-officers of this court, having fees in the above entitled case, to take judgment against you as sureties on the plaintiff's bond for costs in the above entitled case," at a certain time and place. Sanford *v.* Frankhauser, 24 Kan. 98.

Where judgment is asked in the supreme court against a surety, after final judgment in the suit, the surety is entitled to notice of the application. *In re* Cost Cases, 7 Lea (Tenn.) 379. See also Earle *v.* Cureton, 13 S. C. 19.

Where successful party is sought to be charged.— The fact that the successful party is a non-resident, on whom notice cannot be served, does not dispense with notice to his surety for costs on a motion, under a statute providing that all costs accrued at the instance of the successful party which cannot be collected of the defeated party may be recovered on motion from the successful party by the person entitled thereto. Williamson *v.* Burge, 7 Heisk. (Tenn.) 117.

54. Boswell *v.* Morton, 20 Ala. 235.

55. Thus it has been held necessary to show: The grounds for requiring security. Martin *v.* Avery, 8 Ala. 430; Barton *v.* McKinney, 3 Stew. & P. (Ala.) 274. That the person sought to be charged became surety for costs. Martin *v.* Avery, 8 Ala. 430. The amount of the costs (Martin *v.* Avery, 8 Ala. 430), but this has been likewise denied (Boswell *v.* Morton, 20 Ala. 235).

56. Barton *v.* McKinney, 3 Stew. & P. (Ala.) 274.

57. Starlocki *v.* Williams, 34 Minn. 543, 26 N. W. 909, where a statute authorizing an action before the court where the suit was brought to recover the costs was held permissive.

In Tennessee, however, it has been held that a surety on a bond for costs can only be sued in the court in which the action was brought. Burson *v.* Mahoney, 6 Baxt. (Tenn.) 304, under a statute providing that the surety shall undertake to pay all costs that may at any time be adjudged against his principal, in the event that they are not paid by the principal.

Where cause removed.— The rule "security for costs" may be enforced against a non-resident plaintiff in the county to which the cause is removed from the county in which the rule was made. Holt *v.* Tennallytown, etc., R. Co., 81 Md. 219, 31 Atl. 809.

58. Higley *v.* Robinson, 7 Wend. (N. Y.) 482.

(III) *PARTIES.* The proper parties to sue in an action on a bond depends largely on the form of the bond. If the bond is merely to pay the costs of the suit, no obligee being named, the defendant is entitled to sue thereon in his own name;[59] if made payable to one of defendants, suit must be brought in the name of the one designated for the benefit of the others;[60] if given to defendant and "all the officers" of a designated court,[61] or to defendant and the "clerk and marshal,"[62] it has been held that they should join with the defendant, and in their proper names, not in their official characters, as described in the bond. Where the defendant is made obligee in the bond, it has been held that the bond should be put in suit in his name only, for the benefit of all others entitled to fees or costs.[63] Where the bond is made payable to the officers of the court, one of them may sue thereon (the other refusing to join him) without making witnesses entitled to fees parties plaintiff.[64]

(IV) *DECLARATION.*[65] The petition, declaration, or complaint in an action on a bond for costs must show to whom the promise was made,[66] and allege the breach.[67] It should show that the plaintiff is liable for or has paid costs,[68] state the amount thereof,[69] and state that he has had judgment for them.[70]

(V) *PLEAS AND DEFENSES.* In an action on a bond it cannot be set up in defense that errors were made in the amount of costs taxed.[71] It is likewise no defense that the bond had not been approved.[72] An answer alleging that defendant had no knowledge or information sufficient to form a belief as to whether any costs had been adjudged to plaintiff has been held to set up a good defense.[73] The fact that the law, under which a suit in which costs were awarded is brought, was repealed pending the appeal of the action is a legal defense to the surety's liability for costs, which must be set up in an action to enforce such liability, and is not a ground for enjoining a judgment on the bond.[74] A plea of *nul tiel record* puts in issue only the existence of the record, and not the truth of its statement.[75]

(VI) *EVIDENCE.* It may be shown that final judgment was rendered in order to

59. Buckingham *v.* Burgess, 4 Fed. Cas. No. 2,088, 3 McLean 368.

60. Ham *v.* Tinchener, 3 T. B. Mon. (Ky.) 196.

61. Ham *v.* Tinchener, 3 T. B. Mon. (Ky.) 196. *Compare* Glidewell *v.* McGaughey, 2 Blackf. (Ind.) 359.

62. Chiles *v.* Smith, 3 T. B. Mon. 199.

63. Pryor *v.* Beck, 21 Ala. 393. *Contra,* Byrd *v.* Crutchfield, 7 Ark. 149, where it is said that any party entitled to fees has as much right to sue on the bond as the obligee himself. See also Garrett *v.* Cramer, 14 Mo. App. 401, where it was held that a witness entitled to costs might sue.

64. Bodeman *v.* Reinhard, (Tex. Civ. App. 1900) 54 S. W. 1051.

65. See, generally, BONDS, VI, C, 1 [5 Cyc. 822].

66. Louis *v.* Seaton, 7 Ky. L. Rep. 592.

67. Louis *v.* Seaton, 7 Ky. L. Rep. 592.

Assigning the breach in the words of the agreement is sufficient. If the language be coextensive with the condition and negative its performance this will be sufficient. Pryor *v.* Beck, 21 Ala. 393.

Demand.— If the bond is conditioned to pay on demand costs which might be awarded against the principal, the demand must be alleged. Nelson *v.* Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310.

68. Hiett *v.* Davis, 88 Ind. 372.

69. Glidewell *v.* McGaughey, 2 Blackf. (Ind.) 359.

70. Louis *v.* Seaton, 7 Ky. L. Rep. 592.

Effect of breach.— In declaring on the bond conditioned to pay to the officers of the court the fees for which the obligee shall become liable, it is not a good assignment of the breach to allege that the obligor failed to pay the fees to the obligee. Chiles *v.* Calk, 3 T. B. Mon. (Ky.) 341.

71. Pryor *v.* Beck, 21 Ala. 393; Lesster *v.* Lawyers' Surety Co., 50 N. Y. App. Div. 181, 63 N. Y. Suppl. 804; Tomson *v.* Junkin, (Pa. 1886) 4 Atl. 540.

Objections of this character can only be raised by a direct motion to retax in the original suit. Pryor *v.* Beck, 21 Ala. 393.

72. Skinner *v.* Lucas, 68 Mich. 424, 36 N. W. 203.

73. Cary *v.* Ducker, 52 Ark. 103, 12 S. W. 204, where it was also held that a paragraph setting up that defendant had no knowledge or information sufficient to form a belief as to whether the costs claimed to be paid by plaintiffs were the fees authorized by law, and as to whether the same or any part thereof had been paid by them, sets up a good defense.

74. Foshee *v.* McCreary, 123 Ala. 493, 26 So. 309.

75. Hawley *v.* Middlebrook, 28 Conn. 527.

show that liability for costs has accrued.[76] To show delivery of the bond evidence is admissible that the justice stated that it had been filed.[77] Where the amount of costs has been proved by competent evidence, which is uncontradicted, admission of incompetent evidence to show the amount is harmless error.[78]

(VII) *JUDGMENT.* Where a statute provides for issuance of execution jointly against the principal and surety, which is first to be collected out of the principal if it can be so made, and if not then out of the surety, the judgment is defective, when it omits to provide that the execution shall be first made out of the principal, and if this cannot be done then out of the surety.[79]

c. By Scire Facias[80] — (I) *RIGHT TO MAINTAIN.* A bond for costs is so far a record that it may be enforced by scire facias,[81] and in the absence of a statute providing some other remedy it is the proper,[82] and perhaps the only, remedy for enforcing the liability of an indorser of a writ for costs.[83]

(II) *WHERE BROUGHT.* Scire facias against the indorser of a writ to recover the costs of the original suit is local, and must be brought in the county and in the court where the record of the judgment in the suit in which costs were awarded remained.[84]

(III) *ALLEGATIONS.*[85] If the scire facias be on a bond, it should be described with particularity;[86] if on an indorsement of a writ it should be alleged that the writ was indorsed in the manner required by statute,[87] that the judgment was unsatisfied,[88] or that the principal was unable to pay costs.[89] It is not necessary to allege that the judgment against plaintiff in the original writ has not been reversed;[90] nor that on the avoidance of the plaintiff the indorser became liable, as such fact will be presumed as a matter of law.[91]

(IV) *PLEAS AND DEFENSES.* It is no defense for an indorser that a set-off was pleaded in the original action;[92] nor can he set up as a defense that there

76. McWhirter *v.* Frazier, 129 Ala. 450, 29 So. 445.

The judgment should be proved by the record only where it is not shown that it has been destroyed. Cary *v.* Ducker, 52 Ark. 103, 12 S. W. 204. *Compare* Pryor *v.* Beck, 21 Ala. 393, where it was held that a transcript of judgment certified in due form by the proper officer is admissible for the plaintiff in a suit against the sureties, although the clerk may be entitled to a portion of the costs sought to be recovered.

77. Hiett *v.* Davis, 88 Ind. 372.

The "fee book and witness book" are admissible in an action on a bond for costs. Hiett *v.* Davis, 88 Ind. 372.

78. McWhirter *v.* Frazier, 129 Ala. 450, 29 So. 445.

79. Burson *v.* Mahoney, 6 Baxt. (Tenn.) 304.

80. See, generally, SCIRE FACIAS.

81. Searcy *v.* Whitesides, 5 Hayw. (Tenn.) 120.

82. How *v.* Codman, 4 Me. 79; Reid *v.* Blaney, 2 Me. 128; McGee *v.* Barber, 14 Pick. (Mass.) 212; Newsom *v.* Ran, 18 Ohio 240; Noble *v.* Markley, Wright (Ohio) 177.

83. Merrill *v.* Walker, 24 Me. 237.

84. Parsons *v.* Pearson, 1 N. H. 336.

85. For form of scire facias against indorser of writ for costs see Miller *v.* Washburne, 11 Mass. 411; Woodward *v.* Peabody, 39 N. H. 189.

86. Searcy *v.* Whitesides, 5 Hayw. (Tenn.) 120.

The court will not permit an amendment of a scire facias after joinder and demurrer. Farnham *v.* Bell, 3 N. H. 72.

87. Farnum *v.* Bell, 3 N. H. 72.

Sufficiency of allegations of indorsement.— It is not necessary to allege that the writ was indorsed before service, the allegation that it was indorsed importing an indorsement before service; or that the defendant in the scire facias indorsed as agent or attorney, because the statute having required that the original writ should be indorsed by the plaintiff, or by some agent or attorney, whoever indorsed, not being the plaintiff, is presumed to indorse as agent or attorney (McGee *v.* Barber, 14 Pick. (Mass.) 212); and neither should it be alleged that the writ was indorsed on the back thereof, as the word "Indorsed" imparts this fact (Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117).

88. Ruggles *v.* Ives, 6 Mass. 494; McGee *v.* Barber, 14 Pick. (Mass.) 212.

That the judgment is unsatisfied is sufficiently stated by alleging that the necessary measures, specifying them, have been taken to obtain satisfaction, and have proved unavailing. McGee *v.* Barber, 14 Pick. (Mass.) 212.

89. Ruggles *v.* Ives, 6 Mass. 494.

90. McGee *v.* Barber, 14 Pick. (Mass.) 212.

91. McGee *v.* Barber, 14 Pick. (Mass.) 212.

92. Kingsbury *v.* Cooke, Smith (N. H.) 217.

ought not to have been judgment against defendant in the original action,[93] or that there was irregularity in obtaining the judgment against his principal.[94] So under statutes which make the indorser liable without any issuance of execution against the principal debtor, it is no defense that insufficient efforts were made to collect the costs from the principal;[95] otherwise, under statutes where due diligence must be used to collect from the principal, in order to charge the indorser with liability.[96] If the scire facias is on a bond for costs, the execution can only be put in issue by *non est factum*, and not by *nul tiel record*.[97]

(v) *Evidence.* Whether the principal has or has not avoided is a matter of record, arising from the return upon the execution, and if *non est inventus* be returned, this is conclusive evidence of the avoidance.[98] So a return showing that no property of the judgment debtor is to be found within the precinct of the officer executing the process is conclusive of that fact, but not of the inability of the judgment debtor, because the debtor may have property in other precincts.[99] And it has been held in accordance with these views that parol evidence is admissible, on the one side, and on the other, to show the ability or inability of the execution debtor, provided the same be not inconsistent with the return.[1] Arrest and release, under the poor debtors' act, on giving bond, is not *prima facie* evidence of inability, as the giving of bond may be only the means of extending time of payment.[2]

d. By Actions of Assumpsit and Case.[3] In one state it has been held that in the absence of any statute specially authorizing it an action of assumpsit will lie to enforce the liability of an indorser of an original writ for costs;[4] and in another, where scire facias was formerly considered the only remedy, an action on the case is now expressly authorized by statute.[5] Where the declaration in describing the suit in which defendant had become surety omitted the name of one of the defendants therein other than the declarant, this was held an immaterial variance.[6] The docket entry, together with an extended record of the original action, although stating that the defendant indorsed the writ, is not sufficient evidence of that fact. This must be determined by inspection of the writ itself, if it be found.[7] The return of the proper officer of an execution for costs that he has demanded payment from the indorser who neglected to pay the same, or to show personal property sufficient to satisfy the same, is by statute made conclusive evidence of the liability of the indorser.[8]

93. Kingsbury *v.* Cooke, Smith (N. H.) 217.

94. Stedman *v.* Ingraham, 22 Vt. 346.

95. Smith *v.* Ingraham, 22 Vt. 414.

96. Thomas *v.* Washburn, 24 Me. 225.

97. Searcy *v.* Whitesides, 5 Hayw. (Tenn.) 120.

98. Ruggles *v.* Ives, 6 Mass. 494.

99. Thomas *v.* Washburn, 24 Me. 225; Craig *v.* Fessenden, 21 Me. 34; Harkness *v.* Farley, 11 Me. 491; Palister *v.* Little, 6 Me. 350. *Contra*, Chase *v.* Gilman, 15 Me. 64; Wixon *v.* Lapham, 5 Allen (Mass.) 206, where such return was held conclusive evidence of inability.

Scire facias on bond.— The return of an execution "Not found" is sufficient evidence of the fact in scire facias on a prosecution bond against a surety. Broyles *v.* Blair, 7 Yerg. (Tenn.) 279.

1. Oliver *v.* Blake, 24 Me. 353. And see Thomas *v.* Washburn, 24 Me. 225, and cases cited in preceding note.

2. Dillingham *v.* Codman, 18 Me. 74.

Amendment of judgment.— A mistake of time of rendition of judgment in an execution for costs may be amended when produced in evidence and scire facias against the indorsers. Chase *v.* Gilman, 15 Me. 64.

Evidence held sufficient to show inability.— The return of the officer that he had made diligent search for the party's property and could find none, and that he did not arrest him because he had taken the benefit of the bankrupt act, together with evidence that bankrupt proceedings were instituted against the party before the issuing of the execution, and that his property was afterward assigned under the bankrupt law, was sufficient to show inability to pay costs. Proprietors Merrimack River Locks, etc. *v.* Reed, 8 Metc. (Mass.) 146.

3. See, generally, Assumpsit, Action of; Case, Action on.

4. Carroll *v.* Williams, 18 R. I. 450, 28 Atl. 902.

5. See Me. Rev. Stat. (1883), c. 81, § 7.

6. Carroll *v.* Williams, 18 R. I. 450, 28 Atl. 902.

7. Wilson *v.* Hobbs, 32 Me. 85.

8. Chesley *v.* Perry, 78 Me. 164, 3 Atl. 180.

7. Right to Counter-Security. If in any case a surety is entitled to dismissal of a suit for failure of plaintiff to give him counter-security, the circumstances must be extraordinary, involving fraud or imposition, or the like.[9]

8. Right of Appeal. Although a surety on a prosecution bond is not a party in an action, yet, when he is made a party to the proceeding to tax the costs, he may appeal from an order allowing a motion to retax.[10]

XXIV. SUITS IN FORMA PAUPERIS.

A. Source and Grounds of Right to Sue. In the absence of special statutory authorization no one is entitled to sue as a poor person;[11] but when so authorized plaintiff may sue *in forma pauperis* if it appear that without such permission he will be unable to prosecute the action, and that he has a reasonably good chance to succeed.[12]

B. In What Actions Right Granted. The right to sue as a poor person extends both to actions at law and to suits in equity.[13]

C. To What Persons Right Granted. Unless the statutes restrict the right to residents, non-residents of the state may in a proper case sue *in forma pauperis*,[14] although a statute requires security from non-residents;[15] and it has been held that infants[16] and persons becoming insolvent after suit brought may

9. Crawford *v.* Logan, 7 B. Mon. (Ky.) 182.

10. Smith *v.* Arthur, 116 N. C. 871, 21 S. E. 696.

11. Hoey *v.* McCarthy, 124 Ind. 464, 24 N. E. 1038; Campbell *v.* Chicago, etc., R. Co., 23 Wis. 490. But see *dictum* in Hickey *v.* Rhine, 16 Tex. 576.

12. Miazza *v.* Calloway, 74 N. C. 31; McClenahan *v.* Thomas, 6 N. C. 247; Whelan *v.* Manhattan R. Co., 86 Fed. 219.

13. Philips *v.* Rudle, 1 Yerg. (Tenn.) 121.

Actions in justice's court.— A statute providing in substance that a plaintiff who has a just demand against a defendant, and who by reason of his poverty cannot give security for costs, may maintain his action without a bond for costs, applies to actions commenced before a justice. Barnett *v.* Lark, 45 Kan. 428, 25 Pac. 869.

Appeals and writs of error.— In some jurisdictions the right has also been held to extend to appeals and writs of error (Andrews *v.* Page, 2 Heisk. (Tenn.) 634; Philips *v.* Rudle, 1 Yerg. (Tenn.) 121; Columb *v.* Webster Mfg. Co., 76 Fed. 198; Bland *v.* Lamb, 2 Jac. & W. 399), but in others this is denied (Lyons *v.* Murat, 54 How. Pr. (N. Y.) 368; Ostrander *v.* Harper, 14 How. Pr. (N. Y.) 16; McDonald *v.* New York City Sav. Bank, 2 How. Pr. (N. Y.) 35; Moore *v.* Cooley, 2 Hill (N. Y.) 412). And see Appeal and Error, 2 Cyc. 825.

Suit commenced by arrest.— It has been held that the statutes do not extend to a case where the plaintiff commences suit by arresting defendant. Friedman *v.* Fischer, 5 N. Y. St. 913.

14. *Indiana.*— Fuller *v.* Mehl, 134 Ind. 60, 33 N. E. 733; Wright *v.* McLarinan, 92 Ind. 103 (statutory authorization extending to "any person"); Pittsburg, etc., R. Co. *v.* Jacobs, 8 Ind. App. 556, 36 N. E. 301.

Indian Territory.— St. Louis, etc., R. Co. *v.* Farr, 56 Fed. 994, 6 C. C. A. 211, statutory authorization extending to "every poor person."

Mississippi.— Henry *v.* Shepherd, 52 Miss. 125.

New Jersey.— Jones *v.* Knauss, 33 N. J. Eq. 188.

New York.— Harris *v.* Mutual L. Ins. Co., 18 N. Y. Civ. Proc. 195 [*affirmed* in 21 N. Y. Civ. Proc. 192]; Heckman *v.* Mackey, 32 Fed. 574. *Contra*, Christian *v.* Gouge, 10 Abb. N. Cas. (N. Y.) 82; Anonymous, 10 Abb. N. Cas. (N. Y.) 80.

North Carolina.— Porter *v.* Jones, 68 N. C. 320, statutory authorization extending to "any person."

Tennessee.— Lisenbee *v.* Holt, 1 Sneed 42, statutory authorization extending to "any poor person."

Contra, Kelty *v.* Valle, 66 Mo. 601. *Compare* Osowicki *v.* Ferrick, 106 Mich. 41, 63 N. W. 981.

See 13 Cent. Dig. tit. "Costs," § 500.

A statute expressly restricting the right to residents bars non-residents from suing *in forma pauperis*. Hilliard *v.* Stark, 14 Lea (Tenn.) 9.

Ability to acquire jurisdiction of defendant in plaintiff's state does not affect his right to sue *in forma pauperis* in defendant's state. Pittsburg, etc., R. Co. *v.* Jacobs, 8 Ind. App. 556, 36 N. E. 301.

15. Harris *v.* Mutual L. Ins. Co., 10 N. Y. Suppl. 473, 18 N. Y. Civ. Proc. 195 [*affirmed* in 13 N. Y. Suppl. 718, 37 N. Y. St. 599, 20 N. Y. Civ. Proc. 192]. See also Hardesty *v.* Ball, 46 Kan. 555, 26 Pac. 959.

Where a non-resident pauper is on the facts shown denied the right to sue as such, a statute of this character applies, and he must give security. Hoey *v.* McCarthy, 124 Ind. 464, 24 N. E. 1038.

16. Consolidated Coal Co. *v.* Gruber, 91 Ill. App. 15 [*affirmed* in 188 Ill. 584, 59 N. E. 254]; Hotaling *v.* McKenzie, 7 N. Y. Civ. Proc. 320; Erickson *v.* Poey, 5 N. Y.

have the benefit of the statute;[17] but one of several co-plaintiffs cannot sue as a poor person.[18]

D. Effect of Failure to Pay Costs of Former Suit. Liability for costs in a former action is not a ground for a refusal to permit plaintiff to prosecute a second action against the same defendant as a poor person, where it is so provided by statute,[19] or even in the absence of statute, unless the plaintiff's conduct appear to have been vexatious.[20]

E. Effect of Hiring Attorney on Contingent Fee. According to the weight of authority, if an attorney takes a cause on a contingent fee, the party will not be permitted to sue *in forma pauperis*.[21] Under such circumstances the attorney should be required to give security.[22]

F. Application For Leave to Sue — 1. Time of Making. Application for leave to sue *in forma pauperis* must be seasonably made, or it will be denied.[23] Under the English statutes the application to sue *in forma pauperis* in actions at law should be made at the commencement of the action and not afterward; but it has been said that the rule is otherwise in equity, where costs are discretionary.[24] In most of the states the statutes differ widely from the English statutes, and the rule under the latter furnishes no guidance for determining the time of application. In a number of jurisdictions the application may be made even after an order has been made or rule entered requiring security for costs;[25] and in another it has been held that the application may be made either before trial or at any stage of the trial.[26] It has been held too late to move after judg-

Civ. Proc. 379 [*affirmed* in 96 N. Y. 669]. And see, generally, Infants.

17. Eakert *v.* McCord, 21 Pa. Co. Ct. 333.

18. The poverty of all must be shown, and leave given to all. Ostrander *v.* Harper, 14 How. Pr. (N. Y.) 16.

19. Sellars *v.* Myers, 7 Ind. App. 148, 34 N. E. 496; Young *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 126, 54 N. Y. Suppl. 600; Rosa *v.* Second Ave. R. Co., 20 N. Y. App. Div. 334, 46 N. Y. Suppl. 807; Harris *v.* Mutual L. Ins. Co., 18 N. Y. Civ. Proc. 195; Roberti *v.* Carlton, 18 How. Pr. (N. Y.) 466.

20. Tidd Pr. 98 [*citing* Winter *v.* Slow, 2 Str. 878; Jones *v.* Curry, 3 Wils. Ch. 24; Hutton *v.* Colboys, E. 35 Geo. III. K. B.].

21. Cahill *v.* Manhattan R. Co., 38 N. Y. App. Div. 314, 57 N. Y. Suppl. 10; Harris *v.* Mutual L. Ins. Co., 20 N. Y. Civ. Proc. 192; Downs *v.* Farley, 12 N. Y. Civ. Proc. 119, 18 Abb. N. Cas. (N. Y.) 464; Boyle *v.* Great Northern R. Co., 63 Fed. 539.

Reason for rule.— If the suit is carried on partially for benefit of counsel, it will be unjust for the court to allow the litigation to proceed without expense on the pretense that the plaintiff is unable to pay. Boyle *v.* Great Northern R. Co., 63 Fed. 539.

In Texas, however, this doctrine is denied. It is there held that an agreement of the character under consideration does not bar the party's right to sue *in forma pauperis*, and that when he is permitted to do so the attorney need not give security. Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Gulf, etc., R. Co. *v.* Scott, (Tex. Civ. App. 1894) 28 S. W. 457.

22. Boyle *v.* Great Northern R. Co., 63 Fed. 539.

23. Florence *v.* Bulkley, 1 Duer (N. Y.) 705; Alexander *v.* Meyers, 8 Daly (N. Y.) 112.

24. See Dudley *v.* Balch, 4 Hayw. (Tenn.) 193; Tidd Pr. 98.

25. *Illinois.*— Clement *v.* Brown, 30 Ill. 43.

Kansas.— Huey *v.* Brimer, 9 Kan. App. 149, 58 Pac. 485.

New Mexico.— Bearup *v.* Coffer, 9 N. M. 500, 55 Pac. 289.

New York.— Shearman *v.* Pope, 106 N. Y. 664, 12 N. E. 713; Shapiro *v.* Burns, 7 Misc. 418, 27 N. Y. Suppl. 980, 58 N. Y. St. 479, 23 N. Y. Civ. Proc. 365. *Contra*, Friedman *v.* Fischer, 5 N. Y. St. 913. And see Glasberg *v.* Dry Dock, etc., R. Co., 12 N. Y. Civ. Proc. 50, in which it was held that a motion made a long time after order for security was too late.

Texas.— Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

United States.— Woods *v.* Bailey, 113 Fed. 390; McDuffee *v.* Boston, etc., R. Co., 82 Fed. 865.

See 13 Cent. Dig. tit. "Costs," § 505.

Filing second affidavit.— Plaintiff may file a proper affidavit of poverty, although a former affidavit was adjudged insufficient and an order for security had been made. Woods *v.* Bailey, 113 Fed. 390.

Simultaneous applications for security and for leave to sue in forma pauperis.— Where a motion for leave to sue as a poor person and a motion for security for costs are simultaneous, and the facts necessary to justify each of the orders are shown, plaintiff's motion should be granted, and defendant's denied. Hotaling *v.* McKenzie, 7 N. Y. Civ. Proc. 320.

26. Peck *v.* Farnham, 24 Colo. 141, 49 Pac. 264.

ment,[27] or three years after issue joined, no excuse being shown for the delay.[28]

2. NOTICE. In one state it has been held that if an application is made after the defendant has appeared notice thereof is necessary;[29] but in another, where application may be made at any stage of the trial, notice is not necessary, a statute providing that notice of a motion made during trial shall not be required.[30]

3. REQUISITES. The application if in the form prescribed by statute will be sufficient.[31] Usually it is required to state the inability of the plaintiff to prosecute the action, unless permitted to sue *in forma pauperis*, and that the plaintiff has a reasonably good cause of action;[32] and the facts constituting the cause of action should be stated so that the court may decide upon its merits.[33] If the statute requires the application to state that applicant's attorney will prosecute without compensation, the application will be fatally defective if it fails to so state.[34]

4. HEARING AND DETERMINATION. Ordinarily the granting of leave to sue *in forma pauperis* is largely a matter of discretion with the court,[35] and leave should

27. Ostrander *v.* Harper, 14 How. Pr. (N. Y.) 16.

28. Sweeney *v.* White, 10 Misc. (N. Y.) 29, 30 N. Y. Suppl. 1051, 63 N. Y. St. 242.

29. Conhoy *v.* Ayres, 25 Misc. (N. Y.) 52, 53 N. Y. Suppl. 1004; Ostrander *v.* Harper, 14 How. Pr. (N. Y.) 16; Thomas *v.* Wilson, 6 Hill (N. Y.) 257; Isnard *v.* Cazeaux, 1 Paige (N. Y.) 39.

30. Peck *v.* Farnham, 24 Colo. 141, 49 Pac. 364.

31. Hiawatha *v.* Warren, 8 Kan. App. 209, 55 Pac. 484; Maggett *v.* Roberts, 108 N. C. 174, 12 S. E. 890; Creamer *v.* Ford, 1 Heisk. (Tenn.) 307.

Amendment.— Where the affidavit is defective, the court should permit it to be amended. Atchison *v.* Riggle, 6 Kan. App. 5, 49 Pac. 616; Heckman *v.* Mackey, 32 Fed. 574.

32. Hoey *v.* McCarthy, 124 Ind. 464, 24 N. E. 1038; Weinstein *v.* Frank, 56 N. Y. App. Div. 275, 67 N. Y. Suppl. 746; Lewis *v.* Smith, 21 R. I. 324, 43 Atl. 542; Spalding *v.* Bainbridge, 12 R. I. 244; Whelan *v.* Manhattan R. Co., 86 Fed. 219; Boyle *v.* Great Northern R. Co., 63 Fed. 539. See also Tracy v. Bible, 181 Ill. 331, 54 N. E. 966.

Sufficiency of application to show inability to pay costs.—An affidavit is insufficient which only states that plaintiff has not the present means to prosecute the action, but does not state that he will be unable to get the requisite means. Kaufmann *v.* Manhattan R. Co., 68 N. Y. App. Div. 94, 74 N. Y. Suppl. 146. So a petition stating that petitioner is not worth one hundred dollars, and will be unable to prosecute his action unless allowed to sue as a poor person, and further stating that in case the petition is denied he desires additional time in which to furnish security, is insufficient. Berkman *v.* Wolf, 65 N. Y. App. Div. 79, 72 N. Y. Suppl. 661. And so is an affidavit that plaintiff has been asked to give one thousand dollars as security, and that "by reason of her poverty she is unable to give security for said costs," as it may be claimed that the inability has reference merely to the amount demanded. Woods *v.* Bailey, 111 Fed. 121. On the other hand an affidavit sufficiently shows inability which states that the plaintiff has made diligent effort to procure a surety, that several persons have refused to act as security when requested, and that she is poor and has no means wherewith to employ a surety company. Lewis *v.* Smith, 21 R. I. 324, 43 Atl. 542. And it has been held that an affidavit stating that plaintiff is unable to give security for all the costs, but that he cannot swear that he is unable to pay the costs as they accrue, that he has paid all the accrued costs except a small balance, to cover which he has made a deposit with the clerk, who has failed to give him the exact amount, is sufficient answer to a rule for costs. Long *v.* McCauley, (Tex. 1887) 3 S. W. 689.

Waiver of objections to affidavit.— Objections to the form of a poverty affidavit cannot be raised after judgment. Dennis *v.* Benfer, 54 Kan. 527, 38 Pac. 806.

33. Weinstein *v.* Frank, 56 N. Y. App. Div. 275, 67 N. Y. Suppl. 746; Whelan *v.* Manhattan R. Co., 86 Fed. 219.

Sufficiency of application.— An application is insufficient which shows counsel's advice that petitioner has a good cause of action, but does not set forth facts sufficient to satisfy the court independent of this advice. Weinstein *v.* Frank, 56 N. Y. App. Div. 275, 67 N. Y. Suppl. 746; Lewis *v.* Smith, 21 R. I. 324, 43 Atl. 542. But it has been held that an application sufficiently states the nature of the cause of action where it alleges that the plaintiff has a cause of action, "as will more fully appear with reference to the complaint." McGillicuddy *v.* Kings County El. R. Co., 10 Misc. (N. Y.) 21, 30 N. Y. Suppl. 833, 62 N. Y. St. 648.

The affidavit should be so certain in its statements that a charge of perjury could be based thereon if false. Woods *v.* Bailey, 111 Fed. 121.

34. Rutkowsky *v.* Cohen, 74 N. Y. App. Div. 415, 77 N. Y. Suppl. 546.

35. Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Clement *v.* Brown, 30 Ill. 43; Wetz *v.* Greffe, 71 Ill. App. 313; Hoey *v.* McCarthy, 124 Ind. 464, 24 N. E. 1038; Alexander *v.* Myers, 8 Daly (N. Y.) 112;

not be granted unless a clear case is made for its exercise.[36] In other words the grounds for granting the application must be clearly shown.[37] According to some decisions, where the affidavit is in compliance with the statute, a party is entitled to have the application granted unless it is contested;[38] but other decisions hold that in any event before leave will be granted there must be some kind of showing made to the court in support of the affidavit;[39] that before leave will be granted on presentation of the affidavit, the court may inquire into the facts and grant or refuse relief, according as it appears true or otherwise.[40] Where the former view prevails, the application should be contested by counter affidavits, and not by answer[41] or by motion to dismiss.[42]

Spalding *v.* Bainbridge, 12 R. I. 244. *Compare* Shapiro *v.* Burns, 7 Misc. (N. Y.) 418, 27 N. Y. Suppl. 980, 58 N. Y. St. 479, 23 N. Y. Civ. Proc. 365.

36. Hoey *v.* McCarthy, 124 Ind. 464, 24 N. E. 1038; Beyer *v.* Clark, 22 N. Y. Suppl. 540; Harris *v.* Mutual L. Ins. Co., 13 N. Y. Suppl. 718, 37 N. Y. St. 599; Downs *v.* Farley, 18 Abb. N. Cas. (N. Y.) 464; Moore *v.* Cooley, 2 Hill (N. Y.) 412; Isnard *v.* Cazeaux, 1 Paige (N. Y.) 39; Whittle *v.* St. Louis, etc., R. Co., 104 Fed. 286.

37. Hoey *v.* McCarthy, 124 Ind. 464, 24 N. E. 1038; Downs *v.* Farley, 12 N. Y. Civ. Proc. 119; Boyle *v.* Great Northern R. Co., 63 Fed. 539.

38. Kahn *v.* Singer Mfg. Co., 18 Misc. (N. Y.) 568, 42 N. Y. Suppl. 461; Young *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 126, 54 N. Y. Suppl. 600; Simon *v.* Blanchett, (Tex. Civ. App. 1896) 37 S. W. 346; Woods *v.* Bailey, 113 Fed. 390; McDuffee *v.* Boston, etc., R. Co., 82 Fed. 865. See also Bearup *v.* Coffey, 9 N. M. 500, 55 Pac. 289; Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Brooks *v.* Hicks, 20 Tex. 666; Wickelman *v.* A. B. Dick Co., 85 Fed. 851, 29 C. C. A. 436, which seem to sustain this doctrine.

39. Whittle *v.* St. Louis, etc., R. Co., 104 Fed. 286; Whelan *v.* Manhattan R. Co., 86 Fed. 219; Columb *v.* Webster Mfg. Co., 76 Fed. 198.

40. Boyle *v.* Great Northern R. Co., 63 Fed. 539.

Poverty within the meaning of the statutes is sufficiently shown by evidence that the plaintiff owns no property, that the property assessed to him is his wife's, and that several persons to whom he has applied have refused to act as security (Walker *v.* Smith, (Miss. 1895) 19 So. 102); by evidence that an infant plaintiff cannot obtain a responsible person to act as next friend, and that he owns property not worth over fifty dollars (Wright *v.* McLarinan, 92 Ind. 103); or by evidence that plaintiff's property is so encumbered that he cannot mortgage or sell it, and cannot procure a surety (Meyer *v.* Weber, (Tex. Civ. App. 1897) 40 S. W. 627). On the other hand it is not sufficient to show that an infant has inherited no property and has none that was given him. Gallerstein *v.* Manhattan R. Co., 55 N. Y. Suppl. 444. So an application to prosecute an action for brokerage is denied where there is no evidence that plaintiff is an object of charity or that he cannot by proper exertions earn sufficient to pay the expense entitling him to a hearing. Zeimmer *v.* Schmalz, 1 N. Y. City Ct. 435. Nor is one entitled to sue as a poor person who is making twenty dollars a week and paying two hundred dollars a year rent. Wickelman *v.* A. B. Dick Co., 85 Fed. 851, 29 C. C. A. 436.

Insufficiency of evidence to rebut claim of poverty.— Evidence that the plaintiff is of sufficient physical ability to labor for and acquire means to prosecute or defend is not sufficient to show that he should not be allowed to sue as a poor person. Kerr *v.* State, 35 Ind. 288. So an averment in an application for leave to sue as a pauper that plaintiff is not worth one hundred dollars besides wearing apparel and furniture necessary for himself and family, and the subject-matter of the action is not contradicted by defendant's testimony that defendant resides with his family in an apartment of four or five rooms well furnished, and is regularly employed, making fifteen dollars a week. McNamara *v.* Nolan, 13 Misc. (N. Y.) 76, 34 N. Y. Suppl. 178, 68 N. Y. St. 229.

The oath of the plaintiff may be received to establish the fact that he has a good cause of action. Sumner *v.* Candler, 74 N. C. 265.

41. Kahn *v.* Singer Mfg. Co., 18 Misc. (N. Y.) 568, 42 N. Y. Suppl. 461.

Who may make counter affidavits.— Where a statute provides that only the clerk in a court of record may contest an affidavit of inability to give security for costs, the contest is properly stricken out where he refuses to join. Weatherford, etc., R. Co. *v.* Duncan, 10 Tex. Civ. App. 479, 31 S. W. 562.

Counter affidavits are insufficient which merely set up an affirmative defense, and do not controvert the grounds of the application Kahn *v.* Singer Mfg. Co., 18 Misc. (N. Y.) 568, 42 N. Y. Suppl. 461.

Reply to counter affidavits.— Where the plaintiff states his cause of action in general terms and on information and belief, without stating the source of information and belief given, and the cause of action is denied by affidavits, to which he fails to reply, he should not be allowed to sue as a poor person. Saltzman *v.* Northrup, 18 Misc. (N. Y.) 353, 41 N. Y. Suppl. 547, 75 N. Y. St. 1047.

42. Woods *v.* Bailey, 113 Fed. 390.

G. To What Court Order Granting Leave Extends. An order permitting one to sue as a pauper extends only to the court in which it is made.[43]

H. Costs Not Within Purview of Order. A person permitted to sue *in forma pauperis* may be charged with interlocutory costs for any irregularity in the proceedings on his part, for the expense of expunging scandalous and impertinent matter from any of his pleadings or proceedings, or for the costs of his contempts.[44]

I. Vacation of Order Granting Leave. For good cause shown[45] an order permitting plaintiff to sue *in forma pauperis* will be set aside, and when this is done, he will be liable for costs in the same manner as if it had never been made.[46] A distinct order, however, is necessary. It will not be inferred from the mere fact of a judgment being given for costs.[47] The right to have the order set aside may be barred by unnecessary delay in moving therefor,[48] especially where notice of the application is not given to plaintiff.[49] Where the discretion of the court has been fairly exercised in vacating an order its action will not be reviewed.[50]

J. Effect of Obtaining Leave on Eventual Liability For Costs. Under the English statute it seems that no judgment could be rendered against a poor person for costs, although unsuccessful;[51] but under the statutes of most states the right to sue as a poor person does not relieve him from liability for costs, in case he is defeated in the action.[52]

K. Right of Person Suing to Recover Costs. In the absence of statute prohibiting it,[53] it has been held that, although he paid no costs, a person suing *in forma pauperis* may recover costs if successful.[54]

XXV. COSTS ON APPEAL OR ERROR.

A. From Courts of Record — 1. Right to Costs — a. Source of Right. The right to costs of appeal or writ of error are dependent solely on statute. In the absence of special statutory authorization such costs cannot be allowed.[55]

43. If the cause is removed to another court leave must be obtained anew. Oakes *v.* High, 11 Misc. (N. Y.) 313, 32 N. Y. Suppl. 289, 65 N. Y. St. 497; Collett *v.* Frazier, 48 N. C. 398; Clark *v.* Dupree, 13 N. C. 411.

44. Richardson *v.* Richardson, 5 Paige (N. Y.) 58; Smith *v.* Oldis, 2 Molloy 475.

On motion to amend a complaint the court may impose terms on the plaintiff, notwithstanding the order permitting him to sue *in forma pauperis*. Coyle *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 345, 43 N. Y. Suppl. 499; Neugrosche *v.* Manhattan R. Co., 1 N. Y. St. 302; Elwin *v.* Routh, 1 N. Y. Civ. Proc. 131; Moore *v.* Cooley, 2 Hill (N. Y.) 412. See also Richardson *v.* Richardson, 5 Paige (N. Y.) 58.

45. Grounds held sufficient.— It is a sufficient ground to set aside an order allowing a plaintiff to sue as a poor person that it appear that he made a false statement as to his property (Moyers *v.* Moyers, 11 Heisk. (Tenn.) 495), subsequently becomes able to give security (Dale *v.* Presnell, 119 N. C. 489, 26 S. E. 27; Clark *v.* Dupree, 13 N. C. 411), was guilty of improper conduct in the prosecution of the suit (Steele *v.* Mott, 20 Wend. (N. Y.) 679; Clark *v.* Dupree, 13 N. C. 411; Rice *v.* Brown, 1 B. & C. 39; Brittain *v.* Greenville, 2 Str. 1121), or transferred his interest in the subject-matter thereof (Davis *v.* Higgins, 91 N. C. 382).

46. Steele *v.* Mott, 20 Wend. (N. Y.) 679.

47. Clark *v.* Dupree, 13 N. C. 411.

Order requiring security operates to revoke order allowing plaintiff to sue *in forma pauperis*. Kelty *v.* Valk, 66 Mo. 601.

48. See St. Louis, etc., R. Co. *v.* Farr, 56 Fed. 994, 6 C. C. A. 211, for acts held sufficient.

49. Coon *v.* Stepp, 84 N. C. 599.

50. Young *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 126, 54 N. Y. Suppl. 600.

51. Tidd Pr. 98.

52. The object of the statute is merely to afford him the opportunity to assert his rights. Leggett *v.* Ryan, 55 Miss. 379; Wilson *v.* Geitz, 75 Mo. App. 11; McPherson *v.* Johnson, 69 Tex. 484, 6 S. W. 798; Davis *v.* Adams, 109 Fed. 271.

Liability for defendant's costs.— Under a statute providing that whenever any person shall sue as a pauper no officer shall require of him any fee, and he shall recover no costs, the plaintiff pays none of the defendant's costs if he fails. Booshee *v.* Surles, 85 N. C. 90.

53. *Aliter*, where a statute prohibits such recovery. Draper *v.* Buxton, 90 N. C. 182; Hall *v.* Younts, 87 N. C. 285; Booshee *v.* Surles, 85 N. C. 90.

54. Scatchmer *v.* Foulkard, 1 Eq. Cas. Abr. 125. See also *dictum* in Rice *v.* Brown, 1 B. & P. 39.

55. *Arkansas.*— Wilson *v.* Fussell, 60 Ark. 194, 29 S. W. 277.

b. By What Law Governed. The right to costs of appeal or error and the rate of compensation or items allowable are as a general rule governed by the statute in force at the time of the determination of the appeal or writ of error.[56] These statutes apply in case of actions commenced before their enactment[57] or pending at the time of their enactment;[58] in case the appeal is taken before the enactment but heard afterward;[59] or in case a writ of error is brought after the enactment on a judgment rendered prior thereto.[60] The rule does not apply, however, when the statute contains a saving clause in respect to actions commenced but not terminated before its enactment.[61]

c. Discretion of Court. The courts have no discretion in the matter of refusing or allowing costs, except such as may be expressly vested in them by statutory provisions.[62]

d. On Affirmance — (i) *In General.* As a general rule where a judgment or decree is affirmed, the appellee or defendant in error will be entitled to costs.[63]

New Jersey.— Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674.

New Mexico.— Price *v.* Garland, 5 N. M. 98, 20 Pac. 182.

Pennsylvania.— Lewis *v.* England, 4 Binn. 5; Munshower *v.* Evans, 2 Chest. Co. Rep. 489.

Vermont.— Munger *v.* Verder, 59 Vt. 386, 8 Atl. 154. And see Andrews *v.* Marion, 23 Minn. 372.

See 13 Cent. Dig. tit. "Costs," § 832 *et seq.*

56. Ellis *v.* Whittier, 37 Me. 548; Billings *v.* Segar, 11 Mass. 340; Dougherty *v.* Downey, 1 Mo. 674; Garling *v.* Ladd, 27 Hun (N. Y.) 112; Larmon *v.* Aiken, 4 Hun (N. Y.) 591; Ackerly *v.* Tarbox, 19 Abb. Pr. (N. Y.) 119. But see Arnold *v.* Bright, 41 Mich. 416, 50 N. W. 392.

57. Dougherty *v.* Downey, 1 Mo. 674.

58. Ellis *v.* Whittier, 37 Me. 548; Billings *v.* Segar, 11 Mass. 340.

59. Garling *v.* Ladd, 27 Hun (N. Y.) 112.

60. Larmon *v.* Aiken, 4 Hill (N. Y.) 591.

61. Thus on an appeal or writ of error brought before the enactment of such a statute, but decided subsequent thereto, costs will be governed by the prior statute. Brigham *v.* Dole, 2 Allen (Mass.) 49; Gay *v.* Richardson, 18 Pick. (Mass.) 417; Brockway *v.* Jewett, 16 Barb. (N. Y.) 590; Sherman *v.* Youngs, 6 How. Pr. (N. Y.) 318; Dean *v.* Gridley, 11 Wend. (N. Y.) 167; Farr *v.* Thomson, 1 Rich. (S. C.) 4. See also Skinner *v.* Watson, 35 Conn. 124.

62. Logue *v.* Gillick, 1 E. D. Smith (N. Y.) 398; Smith *v.* Wait, 39 Wis. 512; Elkhorn First Nat. Bank *v.* Prescott, 27 Wis. 616.

As to the right to exercise discretion in particular cases and under particular circumstances see *infra*, XXV, A, 1, d *et seq.*

New and doubtful questions.— Where the appellate court is vested with discretion in the matter of costs and the question involved is a new and doubtful one, the court may deny costs to either party. Perrine *v.* Applegate, 14 N. J. Eq. 531; Hesse *v.* Briggs, 45 N. Y. Super. Ct. 417.

Where the statutes prescribe the amount of items which shall be allowed, the court has no power to limit it to a less sum or otherwise change it. Roberson *v.* Rochester Folding Box Co., 68 N. Y. App. Div. 528, 73 N. Y. Suppl. 898; Gray *v.* Hannah, 3 Abb. Pr. N. S. (N. Y.) 183.

63. *Illinois.*—O'Reer *v.* Strong, 13 Ill. 688; Fayette County *v.* Morton, 53 Ill. App. 552.

Indiana.— Buser *v.* Blair, 47 Ind. 519.

Kentucky.— March *v.* Thompson, 1 Litt. 310.

Maine.— Cole *v.* Sprowl, 38 Me. 190.

Massachusetts.— Williams *v.* Taunton, 126 Mass. 287; Ely *v.* Forward, 7 Mass. 25; Jarvis *v.* Blanchard, 6 Mass. 4.

Michigan. — Taber *v.* Shattuck, 55 Mich. 370, 21 N. W. 371; Mickle *v.* Maxfield, 42 Mich. 304, 3 N. W. 961.

New York.— Wadley *v.* Davis, 38 Hun 186; Henderson *v.* Jackson, 2 Sweeny 603; Clarke *v.* Meigs, 10 Bosw. 337; Eisler *v.* Union Transfer, etc., Co., 16 Daly 456, 12 N. Y. Suppl. 732, 35 N. Y. St. 374 [*following* Clark *v.* Carroll, 1 N. Y. Civ. Proc. 298 note, 61 How. Pr. 47]; Richards *v.* Cook, 1 E. D. Smith 386; Canton Surgical, etc., Co. *v.* Webb, 16 N. Y. Suppl. 932, 42 N. Y. St. 187.

North Carolina.— Green *v.* Ealman, 6 N. C. 12.

Ohio.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 1 Ohio Cir. Dec. 60.

Oregon.— Fry *v.* Hubner, (1899) 57 Pac. 420.

Vermont.— Stewart *v.* Martin, 16 Vt. 397; Ellenwood *v.* Parker, 3 Vt. 65.

United States.— Montalet *v.* Murray, 4 Cranch 46, 2 L. ed. 545.

See 13 Cent. Dig. tit. "Costs," § 884.

Grounds of affirmance.— Costs may be awarded in favor of the successful party, whether the judgment is affirmed on the ground that the court had no jurisdiction or that the complaint does not state facts sufficient to constitute a cause of action. Fry *v.* Hubner, (Oreg. 1899) 57 Pac. 420.

On affirmance of a default judgment plaintiff is entitled to costs accruing subsequent to the default, since they would not have been incurred but for the defendant's appeal, which again set the cause in motion. Wells *v.* Banister, 4 Mass. 514.

Sustaining decree on other grounds.— The fact that the appellate court sustains a decree of the trial court on grounds other than those

Nevertheless there are numerous exceptions and limitations to this rule. Thus it has been held that no costs will be awarded, although the judgment is affirmed where the appellee or defendant in error makes default[64] or fails to file a brief on appeal;[65] where the decree below is made without appellant's knowledge or without an opportunity for him to be heard;[66] on affirmance in a doubtful case;[67] where the judgment is affirmed because the court is equally divided;[68] or where the judge *a quo* has given no reason for his decision as required by constitutional provision.[69] So it has been held that where appellee files an argument on the merits, but appellant files no argument, and the case is affirmed, appellant will not be entitled to costs.[70]

(II) *Where Both Parties Appeal.* In some jurisdictions it is held where both parties appeal and the judgment or decree is affirmed no costs will be allowed either party.[71] Again it has been held that the costs may be apportioned in the discretion of the court;[72] and that where both parties appeal and both are in fault the costs should be divided equally.[73]

(III) *Where Error Complained of Has Been Cured by Amendment.* There is some diversity in the practice as to allowance of costs where the judgment is affirmed after error has been cured by amendment.[74]

assigned by the latter court is not necessarily a reason for depriving appellee of costs on appeal, especially where the appellate court has not found it necessary to go to the extent of considering the reasons on which the court below decided the case. Post *v.* Beacon Vacuum Pump, etc., Co., 89 Fed. 1, 32 C. C. A. 151.

Where order affirmed on rehearing.—Where on appeal from an order granting a new trial, the order is at first reversed, and finally affirmed on the ground first suggested on the rehearing, costs of the appeal should be allowed to appellant. Yule *v.* Bishop, 133 Cal. 574, 65 Pac. 1094.

64. Jones *v.* Todd, 2 J. J. Marsh. (Ky.) 359; Lindsey *v.* Jordan, Litt. Sel. Cas. (Ky.) 32; Lewis *v.* Hosey, 56 N. Y. Suppl. 26.

65. Brick *v.* Brick, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761.

66. Owens *v.* Barroll, 88 Md. 204, 40 Atl. 880.

67. Price *v.* Price, 46 Mich. 68, 8 N. W. 724.

68. Wright *v.* Smith, 44 Mich. 560, 7 N. W. 240; Whiting *v.* Butler, 29 Mich. 122. And see Rose *v.* French, 39 Mich. 136.

69. Johnson *v.* Brown, 3 Mart. N. S. (La.) 601.

70. Devore *v.* Adams, 68 Iowa 385, 27 N. W. 267.

71. Smith *v.* Savin, 69 Hun (N. Y.) 311, 23 N. Y. Suppl. 568, 53 N. Y. St. 378, 30 Abb. N. Cas. (N. Y.) 192; Duffy *v.* Duncan, 32 Barb. (N. Y.) 587; Green *v.* Shurtliff, 19 Vt. 592; Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177; The Miletus, 17 Fed. Cas. No. 9,545, 5 Blatchf. 335 [*affirming* 29 Fed. Cas. No. 17,461]. But see Shattuck *v.* Woods, 1 Pick. (Mass.) 171, 3 Pick. (Mass.) 267, holding that each is entitled to costs. And *compare* Martin *v.* Tarbox, 23 Misc. (N. Y.) 761, 51 N. Y. Suppl. 319, which reaches substantially the same result by awarding costs to each party and setting them off one against the other.

Waiver of exceptions by one party.—Where both parties except and one prevails on his opponent's exceptions and waives his own, neither should recover costs of the appeal. Childs *v.* New Haven, etc., Co., 135 Mass. 570. *Compare* Dewey *v.* Humphrey, 5 Pick. (Mass.) 187.

72. Prosser *v.* Whitney, 46 Mich. 405, 9 N. W. 449. To the same effect see Walker *v.* Field, 53 Mich. 4, 18 N. W. 534.

73. Kingsbury *v.* Powers, (Ill. 1889) 20 N. E. 3.

74. In Arkansas and Illinois it has been held that where the error complained of has been cured by an amendment of the record in the lower court and transcript perfected by certiorari, judgment will be affirmed without imposing costs on the defendant in error. Burton *v.* Feild, 19 Ark. 228; Ellis *v.* Ewbanks, 4 Ill. 584.

In Kentucky under a statute which gives the court no discretion but requires it to award costs to the appellee or plaintiff in error, on an affirmance of the judgment, it must award costs to appellee, although the error complained of has been cured by an amendment made since the suing out of the writ of error. Irvine *v.* Scobee, 5 Litt. (Ky.) 70. *Compare* Gay *v.* Caldwell, Hard. (Ky.) 63.

In Michigan it has been held that where an important error has been amended or cured by the correction of the record in the trial court, after appeal has been taken, costs will not be awarded on affirmance of the judgment. Rogers *v.* Anderson, 40 Mich. 290.

In Texas where error in entering judgment is corrected before any costs have attached on appeal, the costs will be taxed against appellant in case of affirmance, the judgment not having been rendered by default. Lowdon *v.* Fisk, (Tex. Civ. App. 1894) 27 S. W. 180.

Where appellee procures an amendment of the errors complained of, it is held in some jurisdictions that he must pay the costs of

(iv) *In Special Proceedings.*[75] In New York, where an appeal is taken in special proceedings,[76] the costs on affirmance are in the discretion of the court.[77] In South Carolina where a decision of a court of inferior jurisdiction in a special proceeding is brought before the circuit court for review, such proceedings must for all purposes of costs be deemed an action at issue on a question of law, and costs thereon shall be awarded and collected as provided by law.[78]

e. On Reversal — (i) *In Cases Reversed For Want of Jurisdiction.* In the federal courts the general rule is to allow both costs of appeal and the costs made in the trial court on reversal for want of jurisdiction against the party who improperly invoked the jurisdiction of the court below and that too, whether or not he be the successful party on the appeal.[79] In the state courts there is a diversity of opinion. In some cases the costs of appeal or writ of error have been allowed.[80] On the other hand costs have been denied either party.[81]

(ii) *In Cases Reversed on Other Grounds* — (a) *Costs of Appeal* — (1) Rule That Costs of Appeal May Be Awarded — (a) In General. A reviewing court gives costs according to statute only. In the absence of statutory

the appeal. Seely *v.* Pelton, 63 Ill. 101; Shipley *v.* Spencer, 40 Ill. 105; Board of Education *v.* Helston, 32 Ill. App. 300; Whipple *v.* Hertzberger, 11 La. Ann. 475; Waite *v.* Palmer, 78 Pa. St. 192. And see Goodrich *v.* Cook, 81 Ill. 41, holding that where defendant in error neglects to file a certificate of evidence until a writ of error is sued out, and he then brings it to the appellate court by a supplemental record, on which the decree is affirmed, he is liable for all the costs.

75. See also *infra*, XXV, A, 1, e, (iv).

76. The following have been held special proceedings: A summary proceeding to compel a party to support a relative. Haviland *v.* White, 7 How. Pr. (N. Y.) 154. A proceeding for the admeasurement of dower. Smith *v.* Smith, 6 Lans. (N. Y.) 313. An application for an order compelling commissioners to assess damages claimed by landowners in proceedings to extend a street. Matter of South Market St., 80 Hun (N. Y.) 246, 29 N. Y. Suppl. 1030, 61 N. Y. St. 626. An application for a peremptory writ of mandamus. People *v.* New York, etc., R. Co., 47 Hun (N. Y.) 43. An *ex parte* proceeding on which no judgment can be given affecting others. Darden *v.* Maget, 18 N. C. 498, decided under old practice act.

77. People *v.* Carter, 46 Hun (N. Y.) 444; Everall *v.* Lossen, 7 N. Y. Civ. Proc. 112.

If costs are allowed they should be at the same rate as for similar services in an action. *In re* Protestant Episcopal Public School, 86 N. Y. 392. Only such costs as are given in an action can be awarded. Everall *v.* Lossen, 7 N. Y. Civ. Proc. 112.

78. See S. C. Code Proc. § 331; Campbell *v.* Sanders, 42 S. C. 522, 20 S. E. 415.

What is not a court of inferior jurisdiction. — Commissioners provided by the act of 1891 and before whom direct tax claims are to be brought is not a court of inferior jurisdiction within the meaning of S. C. Code Proc. § 331. Campbell *v.* Sanders, 42 S. C. 522, 20 S. E. 415.

79. North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 20 S. Ct. 869, 44 L. ed. 1061 [*reversing* 85 Fed. 802]; Neel *v.* Pennsylvania Co., 157 U. S. 153, 15 S. Ct. 589, 39 L. ed. 654; Chappell *v.* Waterwurth, 155 U. S. 102, 15 S. Ct. 34, 39 L. ed. 85; Blacklock *v.* Small, 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70; Everhart *v.* Huntsville Female College, 120 U. S. 223, 7 S. Ct. 555, 30 L. ed. 623; Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. ed. 462; Sneed *v.* Sellers, 68 Fed. 729, 15 C. C. A. 631; Craswell *v.* Belanger, 56 Fed. 529, 6 C. C. A. 1; Southwestern Tel., etc., Co. *v.* Robinson, 48 Fed. 769, 1 C. C. A. 91.

Limitations and exceptions to rule. — The decisions are not altogether harmonious on the question under consideration. Thus in two cases in the circuit court of appeals (Tug River Coal, etc., Co. *v.* Brigel, 70 Fed. 647, 17 C. C. A. 367; Tug River Coal, etc., Co. *v.* Brigel, 67 Fed. 625, 14 C. C. A. 577), where it appeared that the appellant made no objection for want of jurisdiction in the court below, it was held that costs of appeal on reversal should be equally divided. So in Wetherby *v.* Stinson, 62 Fed. 173, 10 C. C. A. 243, the circuit court of appeals reversed the decree for want of jurisdiction below, and refused costs without stating any reason. And in Peper *v.* Fordyce, 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435, it was held that "upon a reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require."

80. Burke *v.* Jackson, 22 Ohio St. 268; Norton *v.* McLeary, 8 Ohio St. 205. See also McClary *v.* Hartwell, 25 Mich. 139, where it was held that where the want of jurisdiction was because of some defect in the law, under which the suit was brought, the appellate court on reversing should award costs of appeal only.

Plaintiff in error was held entitled to "costs" in Brown *v.* Saltenstall, 3 J. J. Marsh. (Ky.) 672, there being nothing in the opinion to show whether the court meant to allow costs of appeal only or to include costs of trial also.

81. Muskegon *v.* S. K. Martin Lumber Co., 86 Mich. 625, 49 N. W. 489. And see Harrison *v.* Sager, 28 Mich. 1.

authorization such court has not power to award costs of appeal or error.[82] Ordinarily, however, costs of appeal or error are by statute allowed the appellant or plaintiff in error on reversal;[83] and the fact that the party whose judgment is reversed is successful on the new trial will not entitle him to costs made by him on proceedings in error.[84] The court can make no exception on the ground of the appellee's poverty, unless vested by statute with discretion to do so.[85]

(b) Exceptions to Rule. There are, however, some exceptions to the rule stated.[86] Thus it has been held that if the reversal results in a mere change of

82. Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674; Waters *v.* Van Winkle, 3 N. J. L. 567.

83. *Arkansas.*— Wilson *v.* Thompson, 56 Ark. 110, 19 S. W. 321; De Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363.

California.— Schaeffer *v.* Hofmann, (1894) 37 Pac. 932.

Connecticut.— Beach *v.* Travelers Ins. Co., 73 Conn. 475, 47 Atl. 754.

Georgia.— Turner *v.* Carroll, 56 Ga. 456; McGuire *v.* Johnson, 25 Ga. 604.

Illinois.— Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 395; Otten *v.* Lehr, 68 Ill. 64; Sans *v.* People, 8 Ill. 338.

Indiana.— McCole *v.* Loehr, 79 Ind. 430; Eigermann *v.* Kerstein, 72 Ind. 81; Andrews *v.* Hammond, 8 Blackf. 540.

Iowa.— Sherman *v.* Hale, 76 Iowa 383, 41 N. W. 48.

Kentucky.— Brooks *v.* Clay, 2 Bibb 499; Clark *v.* Davis, Hard. 410. And see Davidson *v.* Dishman, 59 S. W. 326, 22 Ky. L. Rep. 940.

Louisiana.— State *v.* Toups, 44 La. Ann. 890, 11 So. 524; Saillard *v.* Turner, 14 La. 259. See also Simpson *v.* Richardson, 18 La. Ann. 303.

Maryland.— Sellers *v.* Zimmerman, 21 Md. 355; Doub *v.* Mason, 5 Md. 612; Griffith *v.* Frederick County Bank, 6 Gill & J. 424.

Missouri.— Jennings *v.* St. Louis, etc., R. Co., 59 Mo. App. 530; Clifton *v.* Sparks, 29 Mo. App. 560.

Nebraska.— Republican Valley R. Co. *v.* Fink, 28 Nebr. 397, 44 N. W. 434.

New York.— McMoran *v.* Lange, 25 N. Y. App. Div. 11, 48 N. Y. Suppl. 1000; Harrison *v.* Swart, 34 Hun 259; Burnell *v.* Coles, 26 Misc. 378, 56 N. Y. Suppl. 208; Thornall *v.* Turner, 23 Misc. 363, 51 N. Y. Suppl. 214; Nicoll *v.* Lloyd, 67 N. Y. Suppl. 947; Arnold *v.* Sandford, 15 Johns. 534.

Ohio.— Cartwright *v.* Sole, 16 Ohio 316.

Pennsylvania.— Keller *v.* Swartz, 137 Pa. St. 65, 20 Atl. 627; Laughman's Appeal, 2 Mona. 653; Reigel's Appeal, 1 Walk. 72, costs on appeal only allowed; no costs of appeal are allowed where the cause is reversed on writ of error.

Rhode Island.— Wheeler *v.* Wheeler, 2 R. I. 1.

South Carolina.— Cunningham *v.* Cauthen, 47 S. C. 150, 25 S. E. 87; Hall *v.* Hall, 45 S. C. 4, 22 S. E. 881.

Texas.— Flores *v.* Coy, 1 Tex. App. Civ. Cas. § 804. See also Missouri, etc., R. Co. *v.* Enos, 92 Tex. 577, 52 S. W. 928.

Vermont.— Carleton *v.* Taylor, 50 Vt. 220; Pollard *v.* Wheelock, 20 Vt. 370; Stevens *v.* Hollister, 19 Vt. 605; Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687; Washburn *v.* Bellows Falls Bank, 19 Vt. 278; Wheelock *v.* Wheelock, 5 Vt. 433; Baker *v.* Blodgett, 1 Vt. 141.

Wisconsin.— Burr *v.* Dana, 72 Wis. 639, 39 N. W. 562, 40 N. W. 635; Eviston *v.* Cramer, 54 Wis. 220, 11 N. W. 556; Smith *v.* Wait, 39 Wis. 512; Calkins *v.* Hays, 4 Wis. 200.

United States.— Bradstreet *v.* Potter, 16 Pet. 317, 10 L. ed. 978; Clerke *v.* Harwood, 3 Dall. 342, 1 L. ed. 628; Cochran *v.* Childs, 111 Fed. 433, 49 C. C. A. 421.

See 13 Cent. Dig. tit. "Costs," § 900.

In New Jersey the statute only extends to reversals on appeal. No costs are allowable to appellant where a reversal is obtained on writ of error. Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674. See also Hann *v.* McCormick, 4 N. J. L. 109.

In Massachusetts, Maine, and Connecticut it has been held that no costs at all are allowed plaintiff in error when the judgment is reversed for error in law. Marble *v.* Snow, 14 Me. 195; Brown *v.* Chase, 4 Mass. 436; Smith *v.* Franklin, 1 Mass. 480; Berry *v.* Ripley, 1 Mass. 167; Howe *v.* Gregory, 1 Mass. 81. And see Sloan's Appeal, 1 Root (Conn.) 151.

In Pennsylvania the plaintiff in error is not entitled to costs on reversal in the supreme court, as the statute makes no provision for such case (Smith *v.* Sharp, 5 Watts 292; Wright *v.* Small, 5 Binn. 204; Munshower *v.* Evans, 2 Chest. Co. Rep. 489), otherwise, however, in case a judgment or decree is reversed on appeal. See also Keller *v.* Schwartz, 137 Pa. St. 65, 20 Atl. 627; Work *v.* Maclay, 14 Serg. & R. 265; Laughman's Appeal, 2 Mona. 653; Reigel's Appeal, 1 Walk. 72.

84. Waters *v.* Van Winkle, 3 N. J. L. 567.

85. Christianson *v.* Pioneer Furniture Co., 100 Wis. 343, 77 N. W. 174, 917.

86. Where appellee in a chancery suit prevails on all points litigated, especially if to a greater extent than in the court below, but the decree is reversed in order to settle all the rights of the parties involved, as by an accounting of rents and profits, appellant should pay the costs in both courts. Davis *v.* Smith, 43 Vt. 269.

Where judgment is reversed because of iniquity in the transaction out of which the action arises, costs will not be awarded to plaintiff in error as an award for being successful in a defense based on his own turpi-

form in the judgment the appellant will be required to pay the costs of appeal;[87] and the same is the case where the amount of the judgment is reduced by an infinitesimal sum.[88] So it has been held that costs will not be awarded on reversal of the judgment on the ground that the result in the trial court was in the nature of a mistrial;[89] where the defendant in error had lost the benefit of his exceptions from causes beyond his control;[90] where a judgment is reversed because based on no cause of action;[91] or where the error could have been corrected on motion in the trial court without appeal.[92]

(2) Rule That Costs Abide Event. In some states if the judgment is reversed on a writ of error the costs abide the event of a new trial if the suit is remanded,[93] and no costs are allowed where the judgment is reversed and no new trial awarded.[94]

(B) *Costs Made in Lower Court*—(1) Where Final Judgment Rendered on Appeal or Error. In many jurisdictions, if the whole merits of the case are fully and finally determined by the decision of the reviewing court, it will finally decide the controversy by giving such a judgment in favor of the plaintiff in error or appellant as should have been given in the court below and will award him his costs in that court;[95] but in these jurisdictions plaintiff in error or appellant is not entitled to costs in the court below, unless in addition to a reversal he obtains also by the decision of the court in error a final judgment in his favor.[96]

tude. Williams *v.* Guarde, 34 Mich. 82. See also Russell *v.* North American Ben. Assoc., 116 Mich. 699, 75 N. W. 137, holding that where the allowance for costs is discretionary and the conduct of the prevailing party is obnoxious to a sense of justice costs will not be allowed.

Where plaintiff in error has founded its objections on findings of fact made and filed after the resignation of the judge who tried the case, and has in some respects proceeded as though such findings were valid, no costs will be awarded to either party on the reversal, on the ground of the invalidity of such findings. Ells *v.* Rector, 32 Mich. 379.

87. Coit *v.* Waples, 1 Minn. 134; Illinois Cent. R. Co. *v.* Wells, 104 Tenn. 706, 59 S. W. 1041. See also Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 78 Am. St. Rep. 926, 50 L. R. A. 729, holding that where defendant brought the whole case to the supreme court and sustained only one unimportant assignment of error, the costs of appeal were properly taxed against it.

88. Heyneman *v.* Garneau, 33 Mo. 565; Missouri, etc., R. Co. *v.* Davidson, 25 Tex. Civ. App. 134, 60 S. W. 278. And see Belle City Mfg. Co. *v.* Kemp, 27 Wash. 288, 67 Pac. 583.

89. Demill *v.* Thompson, 45 Mich. 412, 8 N. W. 80; Demill *v.* Moffat, 45 Mich. 410, 8 N. W. 79.

90. Crittenden *v.* Schermerhorn, 35 Mich. 370. In this case the bill of exceptions was settled by the judge after his term had expired.

91. Barnard *v.* Colwell, 39 Mich. 215.

92. Fronbar *v.* Johnson, 20 Ala. 477; Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520; Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227.

93. Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674. See also Hann *v.* McCormick, 4 N. J. L. 109; Wright *v.* Small, 5 Binn. (Pa.) 204; Munshower *v.* Evans, 2 Chest. Co. Rep. (Pa.) 489. See also Work *v.* Maclay, 14 Serg. & R. (Pa.) 265.

In Wisconsin, where the judgment is reversed and a new trial granted, the supreme court has discretionary power to direct that the costs taxed therein in favor of the prevailing party shall abide the final result in the court below. Bank of Commerce *v.* Elliott, 109 Wis. 648, 85 N. W. 417.

94. Smith *v.* Sharp, 5 Watts (Pa.) 292.

95. *Arkansas.*— De Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363. See also Wilson *v.* Thompson, 56 Ark. 110, 19 S. W. 321.

Illinois.— Toledo, etc., R. Co. *v.* Durkin, 76 Ill. 395. *Compare* Camp *v.* Morgan, 21 Ill. 255.

Maryland.— Griffith *v.* Frederick County Bank, 6 Gill & J. 424.

New Jersey.— Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674.

New York.— Jacks *v.* Darrin, 1 Abb. Pr. 232; Estus *v.* Baldwin, 9 How. Pr. 80; Dunham *v.* Simmons, 5 Hill 507.

United States.— Clerke *v.* Harwood, 3 Dall. 342, 1 L. ed. 628.

See 13 Cent. Dig. tit. "Costs," § 901 *et seq.*

96. *Kentucky.*— Garrison *v.* Singleton, 5 Dana 160.

New Jersey.— Lehigh Valley R. Co. *v.* McFarland, 44 N. J. L. 674.

New York.— Ellert *v.* Kelly, 4 E. D. Smith 12; Gosling *v.* Acker, 2 Hill 291.

Ohio.— Cartwright *v.* Sole, 16 Ohio 360.

Pennsylvania.— See Reigel's Appeal, 1 Walk. 72.

See 13 Cent. Dig. tit. "Costs," § 901 *et seq.*

In Maine it has been held that although the judgment is final, appellant is not en-

(2) WHERE CAUSE IS REMANDED FOR NEW TRIAL. In many jurisdictions if a judgment is reversed and remanded for new trial, cost of the former trial will abide the event of the suit.[97] In other jurisdictions this rule does not obtain.[98]

(III) *ON APPEAL OF BOTH PARTIES.* Where both parties appeal and the judgment is reversed on each appeal, each will pay one half of the costs of appeal.[99] If a judgment is reversed for errors injurious to plaintiff only costs will be taxed in favor of plaintiff on his appeal and no judgment for costs will be given defendant.[1]

(IV) *IN SPECIAL PROCEEDINGS.*[2] In New York where an appeal is taken in special proceedings and a reversal had costs are in the discretion of the court.[3] In South Carolina the prevailing party on appeal in a special proceeding is entitled to the supreme court fee of fifteen dollars allowed as costs by the statutes "in all classes of cases whether legal or equitable."[4]

f. On Dismissal — (I) *IN GENERAL.* Where an appeal is dismissed appellee is ordinarily entitled to costs of appeal.[5] Where, however, an appeal is taken before

titled to judgment for costs made in the lower court. Byrnes *v.* Hoyt, 12 Me. 458.

In Vermont, in a chancery case, although a final decree was rendered on appeal, no costs in the lower court were allowed. Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687.

97. *California.*—Stoddard *v.* Treadwell, 29 Cal. 281; Visher *v.* Webster, 13 Cal. 58.

Iowa.— Palmer *v.* Palmer, 94 Iowa 454, 66 N. W. 734.

Michigan.— Lester *v.* Sutton, 7 Mich. 329.

Missouri.— Jennings *v.* St. Louis, etc., R. Co., 59 Mo. App. 530. *Compare* Clifton *v.* Sparks, 29 Mo. App. 560.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098.

New York.— House *v.* Lockwood, 48 Hun 550, 1 N. Y. Suppl. 540, 16 N. Y. St. 13, 14 N. Y. Civ. Proc. 411.

Ohio.— Cartwright *v.* Sole, 16 Ohio 316.

South Carolina.— Bratton *v.* Massey, 18 S. C. 555; Muse *v.* Peay, Dudley Eq. 236.

See 13 Cent. Dig. tit. "Costs," § 901 *et seq.*

In Louisiana the losing party on appeal pays costs of appeal and those of the lower court incurred subsequent to the decision appealed from. Costs incurred prior to the decision appealed from should abide the final decision of the courts. Simpson *v.* Richardson, 18 La. Ann. 303.

Where on exceptions filed a new trial was granted after an execution had issued against defendant and been satisfied, and on the second trial plaintiff obtained judgment for a less amount than had been paid on the execution he was nevertheless held entitled to costs. Framingham Mfg. Co. *v.* Barnard, 2 Pick. (Mass.) 532.

98. In Indiana a reversal will ordinarily authorize an award of costs made in the court below as well as costs of appeal to the appellant, whether the judgment on appeal be final or not. Eigeman *v.* Kerstein, 72 Ind. 31; Winton *v.* Conner, 24 Ind. 107; Doyle *v.* Kiser, 8 Ind. 396.

In Maryland the rule seems to be the same as in Indiana. Sellers *v.* Zimmerman, 21 Md. 355; Doub *v.* Mason, 5 Md. 612; Beatty *v.* Davis, 9 Gill 211; Calwell *v.* Boyer, 8 Gill & J. 136.

In Pennsylvania it has been held that where judgment is reversed and the same party prevails on the new trial, the court will not permit him to tax the costs of the first trial. Havard *v.* Davis, Browne 334.

99. Tice *v.* Durby, 59 Iowa 312, 13 N. W. 301; Clark *v.* Anderson, 13 Bush (Ky.) 111.

1. Palmer *v.* Yager, 20 Wis. 91.

If an appeal and writ of error are taken on the same decree and there is a reversal in favor of plaintiff in error and affirmance in all other respects, appellees will be entitled to their costs on appeal and the cost of the writ of error will be divided. White *v.* Hardin, 5 Dana (Ky.) 141.

2. See also *supra,* XXV, A, 1, d, (IV).

3. *In re* Protestant Episcopal Public School, 86 N. Y. 396; People *v.* New York, etc., R. Co., 47 Hun (N. Y.) 43.

So also in North Carolina; and where there was mutual mistake, the reviewing court refused to award costs to either party. Darden *v.* Maget, 18 N. C. 498.

4. Sease *v.* Dobson, 36 S. C. 554, 15 S. E. 703, 704. And see Huff *v.* Watkins, 25 S. C. 243.

5. Markham *v.* Ross, 73 Ga. 105; Kinman *v.* Bennett, 2 Ill. 326; White *v.* Anthony, 23 N. Y. 164; Easton *v.* Tarmadge, 2 Cow. (N. Y.) 402; Murray *v.* Munford, 2 Cow. (N. Y.) 400.

Under a Maine statute which requires that the party shall "finally prevail" to entitle him to costs, if the dismissal of the appeal ends the litigation and leaves a final judgment appealed from in force, costs will be allowed the prevailing party, as for instance, where no appeal lies. Turner *v.* Putnam, 31 Me. 557. But no costs are allowed unless the dismissal puts an end to the controversy. Turner *v.* Putnam, 31 Me. 557; Sweetser *v.* Kenney, 31 Me. 288.

In Massachusetts if a writ of error is quashed costs are not allowed defendant in error. Costs are only allowed on affirmance. Jarvis *v.* Blanchard, 6 Mass. 4.

On dismissal of one of two appeals from a judgment on two separate records presenting the same questions, costs will be allowed against appellant, although it was taken

the determination of a new trial, because of a statute requiring appeals to be taken within a designated time after rendition of judgment, and a new trial is afterward granted by the trial court, although the appeal will be dismissed, appellant will be entitled to costs of appeal.[6] And where a controversy on an appeal is terminated by respondent without appellant's consent each party will pay his own costs on dismissal.[7]

(II) *For Failure to Prosecute.* As a general rule if the appeal or writ of error is dismissed for want of prosecution the appellant or plaintiff in error must pay the costs.[8]

(III) *For Want of Jurisdiction.* There is a sharp conflict of authority as to the power to award costs on dismissal of an appeal because the court for any reason is without jurisdiction thereof. In many decisions it is held that no costs can be awarded;[9] in others that no costs will be allowed where it is apparent on the face of the record that the court has no jurisdiction of the appeal.[10] Other decisions, some being based on special statutory provisions, hold that costs are allowable.[11] So there are decisions holding that costs of the motion to dismiss for

from an abundance of caution and settled a doubtful question of practice, and the appellant is successful on either appeal. Abbey *v.* Wheeler, 170 N. Y. 122, 62 N. E. 1074 [*reversing* 58 N. Y. App. Div. 451, 69 N. Y. Suppl. 432].

Where an appeal to an intermediate court is dismissed and a motion for affirmance made, and the cause transferred to another intermediate court, to equalize business, and the court of last resort decides that the case is not transferable and directs the cause to be transferred to the first court, which thereafter denied motion for affirmance, the parties are not liable for costs in the court to which the cause was transferred, nor in the supreme court, because the transfer was taken without any motion on their part. Tabor *v.* Chapman, 21 Tex. Civ. App. 366, 50 S. W. 1035.

Where appellant in a motion for new trial calls attention to a defect in a judgment, which prevents it from being final, costs of the appeal will be taxed against appellee, where the appeal is dismissed on the ground that the judgment is not final. Burch *v.* Burch, (Tex. Civ. App. 1894) 28 S. W. 828; Llano Imp., etc., Co. *v.* White, 5 Tex. Civ. App. 110, 23 S. W. 594.

6. Blackburn *v.* Abila, (Cal. 1895) 39 Pac. 797.

7. Moores *v.* Moores, 36 Oreg. 261, 59 Pac. 227.

8. Blair *v.* Cummings, 39 Cal. 667; Shepard *v.* Rhodes, 10 Ill. App. 557; Montalet *v.* Murray, 3 Cranch (U. S.) 249, 2 L. ed. 429.

In Massachusetts it has been held that if appellant be the original plaintiff and enter his appeal, but fail to prosecute it, the court will enter judgment for the appellee, for costs of both courts; but if appellant be the original defendant, he will be defaulted, on failing to prosecute his appeal after entering it, and plaintiff will have judgment according to the justice of his case, without regard to the judgment below. Campbell *v.* Howard, 5 Mass. 376.

Where plaintiff abandons his appeal after both parties had appealed and defendant succeeds only in part neither party should have costs against the other. Leftwich *v.* Clinton, 4 Lans. (N. Y.) 176.

9. *Alabama.*— Mazange *v.* Slocum, 23 Ala. 668.

Arkansas.—Love *v.* McAlister, 42 Ark. 183; Touhy *v.* Rector, 26 Ark. 315; Derton *v.* Boyd, 21 Ark. 264; Neale *v.* Peay, 21 Ark. 93; Morrow *v.* Walker, 10 Ark. 569; Heflin *v.* Owens, 10 Ark. 265; McKee *v.* Murphy, 1 Ark. 55.

Illinois.— See Meeks *v.* Leach, 91 Ill. 323.

Kentucky.— Williams *v.* Wilson, 5 Dana 596; Haney *v.* Sharp, 1 Dana 442. But see *infra*, note 11.

Michigan.— Portage Lake, etc., Ship Canal Co. *v.* Haas, 20 Mich. 326.

Mississippi.—Green *v.* Whiting, 1 Sm. & M. 579. But see *infra*, note 11.

North Carolina.— Chunn *v.* Jones, 34 N. C. 251.

Ohio.— Moore *v.* Boyer, 42 Ohio St. 312; Rothwell *v.* Winterstein, 42 Ohio St. 249; Norton *v.* McLeary, 8 Ohio St. 205; Nichol *v.* Patterson, 4 Ohio 200; Wilson *v.* Holeman, 2 Ohio 253; Paine *v.* Portage County, Wright 417; Reidermann *v.* Tafel, 9 Ohio Dec. (Reprint) 393, 12 Cinc. L. Bul. 284.

Pennsylvania.— Thompson *v.* Fisher, 6 Watts & S. 520.

Tennessee.— Rogers *v.* Hill, 1 Yerg. 400. Rule is changed by statute. See *infra*, note 11.

Wisconsin.— Blackwood *v.* Jones, 27 Wis. 498; Felt *v.* Felt, 19 Wis. 193; Pratt *v.* Brown, 4 Wis. 188; Mitchell *v.* Kennedy, 1 Wis. 511.

United States.— Strader *v.* Graham, 18 How. 602, 15 L. ed. 464; McIver *v.* Wattles, 9 Wheat. 650, 6 L. ed. 182; Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. ed. 261; Maxfield *v.* Levy, 4 Dall. 330, 1 L. ed. 854; Mead *v.* Platt, 17 Fed. 836, 2 Blatchf. 435.

See 13 Cent. Dig. tit. "Costs," § 877 *et seq.*

10. Dever *v.* Mortragon, 4 Colo. 255; Bartels *v.* Hoey, 3 Colo. 279.

11. *California.*— Blair *v.* Cummings, 39 Cal. 667.

want of jurisdiction are allowable;[12] and it has been held that where a writ of error is dismissed for want of jurisdiction, and the defendant in error is defendant below, he is entitled to costs.[13]

(iv) *Dismissal on Motion of Respondent.* Where an appeal is dismissed on motion of respondent he is entitled to his costs.[14]

(v) *Dismissal by Appellant or Plaintiff in Error.* Ordinarily where the appellant or plaintiff in error dismisses an appeal or writ of error he must pay costs of appeal.[15] It has been held, however, that on dismissing an appeal, which complainant had ordered discontinued, but which defendant's attorney sought to keep alive long enough to secure his fees, costs should be denied.[16]

g. On Affirmance in Part and Reversal in Part — (i) *In General* — (a) *Costs of Appeal or Error.* The rules governing costs of appeal in case the judgment is affirmed in part and reversed in part are greatly lacking in uniformity. In a number of jurisdictions the rule seems to be that under these circumstances the appellant is entitled to costs of appeal;[17] but in one jurisdiction costs will be divided,[18] and in another each party must pay his own costs if the appellee pre-

Georgia.— Pope *v.* Jones, 79 Ga. 487, 4 S. E. 860.

Illinois.— Le Moyne *v.* Harding, 132 Ill. 78, 23 N. E. 416; Bangs *v.* Brown, 110 Ill. 96; Kinman *v.* Bennett, 2 Ill. 326.

Kansas.— Kent *v.* Labette County, 42 Kan. 534, 22 Pac. 610; Noyes *v.* Miller, 41 Kan. 153, 20 Pac. 854.

Kentucky.—Bassett *v.* Oldham, 7 Dana 168.

Maine.— Pomroy *v.* Cates, 81 Me. 377, 17 Atl. 311; Brown *v.* Allen, 54 Me. 436; Bennett *v.* Green, 46 Me. 499; Call *v.* Mitchell, 39 Me. 465; Harris *v.* Hutchins, 28 Me. 102.

Massachusetts.— Elder *v.* Dwight Mfg. Co., 4 Gray 201; Turner *v.* Blodgett, 5 Metc. 240 note; Cary *v.* Daniels, 5 Metc. 236.

Michigan.— Bryan *v.* Smith, 10 Mich. 229.

Minnesota.— Hawke *v.* Deuel, 2 Minn. 58; Moody *v.* Stephenson, 1 Minn. 401.

Mississippi.— Work *v.* Mallory, 25 Miss. 172.

Missouri.— Brown *v.* Missouri Pac. R. Co., 85 Mo. 123; State *v.* Thompson, 81 Mo. 163; Smith *v.* St. Louis, etc., R. Co., 53 Mo. 338.

New Jersey.— Montgomery *v.* Bruere, 11 N. J. L. 168.

New York.— Mechanics' Bank *v.* Snowden, 2 Paige 299.

Tennessee.— Douglass *v.* Nequelona, 88 Tenn. 769, 14 S. W. 283; Jackson *v.* Baxter, 5 Lea 344; Welsh *v.* Marshall, 6 Yerg. 455.

Texas.— Wadsworth *v.* Chick, 55 Tex. 241; Llano Imp., etc., Co. *v.* White, 5 Tex. Civ. App. 109, 23 S. W. 594.

Utah.— Cereghino *v.* Third Dist. Ct., 8 Utah 455, 32 Pac. 697.

Washington.— Grunewald *v.* West Coast Grocery Co., 11 Wash. 478, 39 Pac. 964.

See 13 Cent. Dig. tit. "Costs," § 877 *et seq.*

12. People *v.* Madison County Judges, 7 Cow. (N. Y.) 423; Bradstreet *v.* Higgins, 114 U. S. 262, 5 S. Ct. 880, 29 L. ed. 176. See also Gaylords *v.* Kelshaw, 1 Wall. (U. S.) 81, 17 L. ed. 612.

13. Winchester *v.* Jackson, 3 Cranch (U. S.) 514, 2 L. ed. 516.

14. Moore *v.* Lyman, 13 Gray (Mass.) 394; Dalbkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871.

15. *Connecticut.*— Ogden *v.* Lyman, 1 Day 34.

Illinois.— Kinman *v.* Bennett, 2 Ill. 326.

Louisiana.—Seawell *v.* Key, 5 La. Ann. 271.

Massachusetts.— Bowler *v.* Palmer, 2 Gray 553.

New Hampshire.— West *v.* Wentworth, 26 N. H. 203.

See 13 Cent. Dig. tit. "Costs," § 878.

The rule has been held to apply, although the appellant dismissed the appeal because he was unable to procure a settlement of the bill of exceptions, by reason of the death of the trial judge. Oelbermen *v.* Newman, 83 Wis. 212, 53 N. W. 451. It also applies where the appeal is dismissed on appellant's motion because the recognizance was defective. West *v.* Wentworth, 26 N. H. 203.

Certiorari.— Costs to defendant are not allowable in certiorari proceedings or dismissal by the petitioner. Frazer *v.* District of Columbia, 7 Mackey (D. C.) 150.

16. Lapham *v.* Lapham, 40 Mich. 527.

17. *California.*— Schaeffer *v.* Hofmann, (1894) 37 Pac. 932; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

Colorado.— See Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 465, 42 Pac. 650.

Michigan.— Avery *v.* Payne, 12 Mich. 540.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098.

United States.— Baldwin *v.* Ely, 9 How. 580, 13 L. ed. 266. See also Northern Trust Co. *v.* Sneider, 77 Fed. 818, 23 C. C. A. 480.

See 13 Cent. Dig. tit. "Costs," § 900 *et seq.*

In Kansas where plaintiff in error brings up for review a judgment which includes an amount about which there is no controversy, and the part complained of is found to be erroneous, so that the judgment is reversed in part, he is entitled to recover all of his costs which accrued in the appellate court. Heithecker *v.* Fitzhugh, 41 Kan. 54, 21 Pac. 782.

18. Sidner *v.* Alexander, 31 Ohio St. 433; Bouton *v.* Lord, 10 Ohio St. 453; Collins *v.* John, Wright (Ohio) 628; Ames *v.* Sloat, Wright (Ohio) 577; Carter *v.* Hawley, Wright (Ohio) 332.

vails in relation to the most important matters in controversy.[19] Again it has been held that if the appellee substantially prevails he will be entitled to costs of appeal.[20] On the other hand in many jurisdictions the costs are solely in the discretion of the court;[21] thus each party has been required to pay his own costs of appeal;[22] while in other cases in the same jurisdictions the appellee has been required to pay costs.[23] Again it has been held that appellant may be required to pay costs, when the error could have been corrected below,[24] or where all the main questions are decided against him.[25]

(B) *Costs Made in Lower Court.* Where a judgment or decree is reversed in part appellee is entitled to costs in the lower court.[26]

(II) *Where Judgment Affirmed as to One Appellant and Reversed as to Another.* The lack of uniformity in the decisions is such that no general rule can be formulated from them as to the right to costs where a judgment or decree is reversed as to one or more of the appellants or plaintiffs in error and affirmed as to one or more of them.[27] Where a judgment against two defendants is reversed as to one and affirmed as to another, and no special circumstances render a different disposition proper, the reversal, it has been held, should be with costs to appellant.[28]

19. Clarke *v.* Clay, 31 N. H. 393; Kingman *v.* Kingman, 31 N. H. 182; Mathes *v.* Bennett, 21 N. H. 188; Wendell *v.* French, 19 N. H. 205; Leavitt *v.* Wooster, 14 N. H. 550; Griswold *v.* Chandler, 6 N. H. 61.

20. George *v.* Richardson, Gilm. (Va.) 230; Defarges *v.* Lipscomb, 2 Munf. (Va.) 451; Ellzey *v.* Lane, 2 Hen. & M. (Va.) 589.

21. Romberg *v.* McCormick, 194 Ill. 205, 62 N. E. 537; Walton *v.* Fretwell, 3 A. K. Marsh. (Ky.) 519; Metropolitan El. R. Co. *v.* Duggin, 11 N. Y. Suppl. 819, 33 N. Y. St. 992, and cases cited *infra*, notes 22–25.

22. *Alabama.*— Rainey *v.* Rainey, 35 Ala. 282.

Illinois.— Graham *v.* People, 111 Ill. 253; Northrup *v.* Phillips, 99 Ill. 449; Joliet First Nat. Bank *v.* Adam, 34 Ill. App. 159.

Kentucky.— Aulich *v.* Colvin, 6 B. Mon. 289, 43 Am. Dec. 164; Marshall *v.* Anderson, 1 B. Mon. 198; Galloway *v.* Hamilton, 3 T. B. Mon. 270; Dillon *v.* Dudley, 1 A. K. Marsh. 66; Burrows *v.* Miller, 3 Bibb 77; Foster *v.* Hunt, 3 Bibb 32; Veech *v.* Pennebaker, 2 Bibb 326.

New York.— Pickett *v.* Barron, 29 Barb. 505; Williams *v.* Sherman, 15 Johns. 195; Smith *v.* Jansen, 8 Johns. 111.

North Carolina.— Hawkins *v.* Richmond Cedar Works, 122 N. C. 87, 30 S. E. 13.

23. Cowles *v.* Morgan, 34 Ala. 535; White *v.* Hardin, 5 Dana (Ky.) 141; Walton *v.* Fretwell, 3 A. K. Marsh. (Ky.) 519; Sherry *v.* Schraage, 48 Wis. 93, 4 N. W. 117.

24. Moore *v.* People, 108 Ill. 484.

25. Saltmarsh *v.* Smith, 32 Ala. 404.

26. Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288; Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 465, 42 Pac. 650; Baldwin *v.* Ely, 9 How. (U. S.) 580, 13 L. ed. 266.

27. In **Alabama** and **Louisiana** it has been held that the appellant as to whom judgment was affirmed and the appellee must pay the costs. Tyus *v.* De Jarnette, 26 Ala. 280; Parham *v.* Cobb, 9 La. Ann. 423.

In **Illinois** it was held that where one of four appellants was successful, judgment was properly entered against appellee for one fourth of the costs of appeal, there being no data to determine what items of costs were made by each. Streuter *v.* Willow Creek Drainage Dist., 72 Ill. App. 561.

In **Massachusetts** it was held that where on review by three defendants plaintiff obtained a verdict against two only, the third was entitled to costs both on the first trial and on the review. Durgin *v.* Leighton, 10 Mass. 56.

In **Texas** it has been held that the appellant against whom judgment has been affirmed must pay the costs of appeal. Hopson *v.* Murphy, 4 Tex. 248.

In **Virginia** it was held that where so much of a judgment as affects an appellant is affirmed, the appellee will be entitled to costs, although the court reverses so much of the judgment as affects a third party who has not appealed. Harman *v.* Odell, 6 Gratt. (Va.) 207.

28. Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459. And see Johnstone *v.* Connor, 10 N. Y. St. 702 (where, the complaint in a supreme court action having been dismissed with costs as to two defendants who appeared by the same attorney, the judgment was affirmed by the general term with costs, and on further appeal to the court of appeals the judgment was affirmed as to one of defendants and a new trial ordered as to the other. It was held that the defendant ultimately successful became entitled to all of such costs); Metropolitan El. R. Co. *v.* Duggin, 58 Hun (N. Y.) 156, 11 N. Y. Suppl. 353, 33 N. Y. St. 836, 19 N. Y. Civ. Proc. 255 (where judgment having been rendered on demurrers in favor of D and S and seven other defendants for costs and an additional allowance was affirmed at general term with costs, but the court of appeals reversed the judgment except as to D and S, it was held that D and S were entitled to full costs at general and special terms, and to two ninths

(III) *Where Judgment Affirmed as to One Appellee and Reversed as to Another.* Where a judgment or decree is affirmed as to one of several appellees and reversed as to the other or others, the successful appellee is entitled to costs of the appeal.[29] Where a judgment dismissing a complaint on the merits awards costs to the defendants, and on appeal it is affirmed as to one of them with costs of suit, reversed as to three others, and as to one, neither reversed nor affirmed, the two defendants are entitled to their costs as awarded by the court below.[30] Where on reversing a decree one of the appellees gets by the decision on appeal what was sought by his bill and denied by the court below, and another prevailed on appeal to the same extent that he prevailed in the court below, a third appellee as to whom the judgment is reversed pays to the appellant his costs.[31]

h. On Modification — (I) *In General.* In perhaps the majority of jurisdictions an appellant or plaintiff in error, who obtains a modification of a judgment in his favor, is entitled to costs of appeal.[32] The holdings, however, are not entirely uniform. Thus in some jurisdictions the appellee or respondent will be entitled to costs, although the judgment be modified, if he substantially succeed in the action;[33] and in another that no costs would be allowed either party under such circumstances.[34] In one jurisdiction by rule of court, if a judgment is modified and the judgment on appeal contains no directions as to costs, the appellant may be required to pay the costs of appeal;[35] and in another, although the judgment is modified in appellant's favor, he must still pay the costs of appeal, which by statute follow the judgment of course.[36]

(II) *By Reduction of Amount of Recovery* — (A) *In General.* Where the appellant succeeds in reducing the amount of the judgment he will in general be entitled to costs of appeal.[37]

of the extra allowance). *Compare* Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127, holding that where, on a joint appeal by two defendants, the decree was reversed as to one and affirmed as to the other, no costs were allowed to either party.

29. Davis *v.* Filer, 40 Mich. 310; Willey *v.* Morrow, 1 Wash. Terr. 474. And see Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689, 46 Am. Rep. 652, holding that where plaintiff appealed from a judgment in favor of two defendants and the judgment was affirmed as to one of them, plaintiff will only be allowed for his taxable costs.

30. Hauselt *v.* Bonner, 3 Silv. Supreme (N. Y.) 121, 6 N. Y. Suppl. 282, 473, 25 N. Y. St. 36, 17 N. Y. Civ. Proc. 320.

31. Breckenridge *v.* Auld, 1 Rob. (Va.) 148.

32. *Idaho.*— Kelly *v.* Leachman, (1895) 39 Pac. 1113.

Illinois.— Agney *v.* Strohecker, 21 Ill. App. 625.

Iowa.— Kenyon *v.* Tramel, 71 Iowa 693, 28 N. W. 37.

Louisiana.— Schwartz *v.* Salter, 40 La. Ann. 272, 4 So. 77; Heard *v.* Wynn, 22 La. Ann. 469.

Massachusetts.— Bruce *v.* Leonard, 4 Mass. 614; Billerica *v.* Carlisle, 2 Mass. 158.

Michigan.— Nester *v.* Swift, 50 Mich. 42, 14 N. W. 692; Howe *v.* Lemon, 37 Mich. 164. *Compare* Perkins *v.* Perkins, 16 Mich. 162.

Minnesota.— Henry *v.* Meighen, 46 Minn. 548, 49 N. W. 323, 646; Allen *v.* Jones, 8 Minn. 172; Sanborn *v.* Webster, 2 Minn. 323.

Missouri.— McCond *v.* Doniphan Branch R. Co., 21 Mo. App. 317.

South Carolina.— Sullivan *v.* Latimer, 43 S. C. 262, 21 S. E. 3; Murray *v.* Aiken Min., etc., Mfg. Co., 39 S. C. 457, 18 S. E. 5; Huff *v.* Watkins, 25 S. C. 243.

Wisconsin.— Nooan *v.* Orton, 31 Wis. 265. See 13 Cent. Dig. tit. "Costs," § 892.

In affirming a default judgment which by some oversight was rendered for less than was due and which plaintiff was obliged to correct by appeal, he was still allowed costs, although defendant never appeared. Mechanics', etc., Bank *v.* Andrus, 9 Rob. (La.) 17.

33. Harris *v.* Osnowitz, 35 N. Y. App. Div. 594, 55 N. Y. Suppl. 172; Haukland *v.* Minneapolis, etc., R. Co., 11 S. D. 493, 78 N. W. 958. See also Wendel *v.* French, 19 N. H. 205.

34. New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; Packard *v.* Lacing-Stud Co., 70 Fed. 66, 16 C. C. A. 639.

35. Meads *v.* Lazar, 93 Cal. 530, 29 Pac. 125.

36. Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736; Carolina Cent. R. Co. *v.* Phillips, 78 N. C. 49.

37. *Idaho.*— Kelly *v.* Leachman, (1895) 39 Pac. 1113.

Louisiana.— Heard *v.* Wynn, 22 La. Ann. 469.

Michigan.— Field *v.* Loveridge, 114 Mich. 220, 72 N. W. 160; Burrell *v.* New York, etc., Solar Salt Co., 14 Mich. 34.

Missouri.— West *v.* Creve Cœur Lake Ice Co., 19 Mo. App. 547.

(B) *Where Part of Judgment Is Remitted.* According to the weight of authority where on appeal or error appellee or defendant in error remits a portion of the amount recovered he will be required to pay the costs of the appeal or writ of error;[38] but the opposite conclusion seems to have been reached in some jurisdictions, where it is held that under such circumstances the appellee is entitled to costs of appeal.[39] Again it has been held that where a judgment was affirmed as to two thirds of the amount recovered on condition that appellee filed a remittitur for the other one third the costs of appeal should be apportioned,

Vermont.— Scott *v.* Lans, 21 Vt. 507.

See 13 Cent. Dig. tit. "Costs," § 873.

Rule in Maine.— The decisions here do not seem harmonious. In Polleys *v.* Smith, 10 Me. 69, it was held that the provision in the act of 1821 that the prevailing party shall recover costs does not permit the costs after an appeal by defendant to be recovered by him in case he reduces the debt or damages recovered in the common pleas, but the costs both before and after the appeal must be awarded to plaintiff. In Brown *v.* Attwood, 7 Me. 356, it was held that Me. Stat. (1826), c. 347, § 4, giving appellant costs on his obtaining a reduction of the damages awarded against him, entitled a defendant to costs in the appellate court where he secured a reduction of the verdict rendered against him below, although the entry of judgment thereon was delayed by his motion for a new trial till the interest on the verdict made the judgment finally entered thereon larger than it was in the court below.

Rule in Washington.— It has been held that where a judgment is reduced by a very small amount, the judgment should not be reversed so as to charge the respondent with the costs of appeal. Belle City Mfg. Co. *v.* Kemp, 27 Wash. 111, 67 Pac. 580.

Where on review the appellant succeeds in reducing the judgment he is entitled to costs of the review in Maine and Massachusetts. Dodge *v.* Reed, 40 Me. 331; Kavanagh *v.* Askins, 3 Me. 397; Williams *v.* Hodge, 11 Metc. (Mass.) 266; Billerica *v.* Carlisle, 2 Mass. 150. And in New Hampshire if the appellant merely succeeds in reducing the damages to a small amount the court in its discretion may limit its costs. Woodbury *v.* Parshley, 10 N. H. 392.

Where stipulations for correction of errors on which the judgment appealed from is modified were made after the appeal was taken appellant is entitled to costs of appeal. Kelly *v.* Leachman, (Ida. 1895) 39 Pac. 1113.

38. This in effect is considered an admission that the judgment was excessive.

Colorado.— Consolidated Gregory Co. *v.* Raber, 1 Colo. 511.

Illinois.— Elgin City R. Co. *v.* Salisbury, 162 Ill. 187, 44 N. E. 407; Hefling *v.* Van Zandt, 162 Ill. 162, 44 N. E. 424; Glos *v.* McKeown, 141 Ill. 288, 31 N. E. 314; School Trustees *v.* Hihler, 85 Ill. 409; Welsh *v.* Johnson, 76 Ill. 295; Lowman *v.* Aubery, 72 Ill. 619.

Indiana.— Cravens *v.* Duncan, 55 Ind. 347; Pate *v.* Roberts, 55 Ind. 277. See Waterhouse *v.* Fickle, 1 Ind. 529.

Iowa.— Payne *v.* Billingham, 10 Iowa 360; Thompson *v.* Purnell, 10 Iowa 205.

Louisiana.— New Orleans *v.* Jeter, 13 La. Ann. 509; Rhodes *v.* Skolfield, 10 Rob. 131. But see Brashear *v.* Wilkins, 9 Rob. 56; Dyer *v.* Seals, 7 La. 131, which seem to maintain the contrary doctrine.

Missouri.— Higgs *v.* Hunt, 75 Mo. 106; Peck *v.* Childers, 73 Mo. 484; Clark *v.* Bullock, 65 Mo. 535; Miller *v.* Hardin, 64 Mo. 545; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474. *Compare* Buckner *v.* Armour, 1 Mo. 534; West *v.* Creve Cœur Ice Co., 19 Mo. App. 547.

Ohio.— Doty *v.* Rigour, 9 Ohio St. 526.

Texas.— Butt *v.* Schrimpf, 31 Tex. 601; Arnold *v.* Williams, 21 Tex. 413; Weaver *v.* Lewis, 12 Tex. 103; Barnes *v.* Darby, 18 Tex. Civ. App. 468, 44 S. W. 1029; Travis County *v.* Trogdon, 9 Tex. Civ. App. 117, 29 S. W. 405. But *compare* Pearce *v.* Tootle, 75 Tex. 148, 12 S. W. 536; Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565, which seem to limit the doctrine at least to the extent that where a case is contested below and the error in the amount of the judgment is not very large and the appellant failed to ask this correction in the court below, the appellee should be allowed costs of appeal.

United States.— Kentucky Bank *v.* Ashley, 2 Pet. 327, 481, 7 L. ed. 440, 492.

See 13 Cent. Dig. tit. "Costs," § 913.

Effect of conditional remittitur.— On a review petitioner will not be allowed costs where the only mistake complained of was a miscalculation of interest, although before the petition for review was filed the creditor offered to omit the excess if defendant would pay the correct amount. Ilsley *v.* Knight, 1 Mass. 467.

Where cause is brought to hearing notwithstanding remittitur.— Where the judgment appealed from is excessive by reason of erroneous computation and in the supreme court the excess is remitted with appellant's consent, after which the case is nevertheless brought to hearing and the judgment affirmed, the appellee has costs of appeal. Hall *v.* Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524.

39. Smith *v.* Turnley, 46 Ga. 454; Young *v.* Cohen, 44 S. C. 376, 22 S. E. 409; Stepp *v.* National L., etc., Assoc., 41 S. C. 206, 19 S. E. 490; Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613, 52 N. W. 1136. Where a judgment is affirmed on remission of a portion of the amount, the plaintiff in error is not entitled to costs made in the lower court. Smith *v.* Turnley, 46 Ga. 454.

two thirds against appellant and one third against appellee;[40] and that costs of appeal should not be allowed either party when the judgment below was for too much, and plaintiff on discovering the error offered soon after the appeal to make the proper reduction.[41]

(c) *Method of Computation.* In estimating whether a judgment has been reduced on appeal or review interest accruing on the verdict must be excluded.[42]

(III) *Where Both Parties Appeal.* Where both parties appeal and each obtains a modification of the decree it is held in some jurisdictions that each pays his own costs of appeal;[43] in another that the appellee must pay costs in both courts;[44] in another that where the decree is modified as to the losing party costs will be denied both;[45] and in another that where both plaintiff and defendant except to the decision and defendant prevails on both exceptions, he is entitled to costs in the reviewing court, although a balance is found due plaintiff.[46]

(IV) *Modification as to One of Several Appellants.* Where a decree is affirmed as to one of two appellants, but modified as to the other, the latter is entitled to costs of appeal — half to be taxed to appellee and half to the other appellant.[47] And it has been held that where on appeal by several plaintiffs or defendants from a judgment it is modified as to some and affirmed as to the others, the respondent is entitled to costs against those as to whom it is affirmed and those as to whom it is modified are entitled to costs as against the respondent.[48]

(V) *Modification Ex Gratia.* Where on an appeal the decree is modified *ex gratia* defendant in error may be allowed to recover his costs.[49]

i. Acts or Omissions of Parties as Affecting Right to Costs[50] — (I) *Objections on Grounds Not Brought to Attention of Trial Court* — (A) *On Reversal of Judgment.* Where a judgment is reversed for errors not brought to the attention of the court below the appellant is generally denied costs.[51] It has been

40. Bock Springs Nat. Bank *v.* Luman, (Wyo. 1896) 47 Pac. 73.

41. Kemple *v.* Darrow, 39 N. Y. Super. Ct. 447.

Mutual mistake.— In Perrine *v.* Hotchkiss, 2 Thomps. & C. (N. Y.) 370, it was held that when the case came to be printed and respondent discovered mutual mistake of the parties and the referee, whereby an item in the appellant's favor was omitted, and he at once offered to allow appellant the amount of the item before the appeal was brought to argument, respondent should not be charged with the costs of the appeal by reason of the mistake.

42. Brown *v.* Attwood, 7 Me. 356; Kavanagh *v.* Askins, 3 Me. 397.

43. Bradford *v.* Kelly, 3 Bibb (Ky.) 317, 6 Am. Dec. 656. And see Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250.

44. Hilligsberg *v.* Holmes, 7 La. 565.

45. Rehead *v.* Hounson, 46 Mich. 243, 9 N. W. 267.

46. Downer *v.* Frizzle, 10 Vt. 541. *Compare* Gaines *v.* Fagala, (Tenn. Ch. App. 1897) 42 S. W. 462, where it was held that where both parties brought error to the supreme court, and defendant failed in all his contentions and complainant was sustained as to only one exception, it was proper to tax complainant with one third and defendant with two thirds of the costs on error.

47. Kenyon *v.* Tramel, 71 Iowa 693, 28 N. W. 37.

48. Nelson *v.* Munch, 30 Minn. 132, 14 N. W. 578.

49. Brown *v.* American Stone Press Brick Mfg. Co., 54 Ill. App. 647; Sexton *v.* Chicago Storage Co., 30 Ill. App. 95.

50. **Effect of imperfect preparation** see *infra*, XXV, A, 8, a, (VI).

Including unnecessary matter in papers see *infra*, XXV, A, 8, a, (II).

51. *Alabama.*— Hartwell *v.* Blocker, 6 Ala. 581. See also Prout *v.* Hoge, 57 Ala. 28.

Kentucky.— See Crook *v.* Turpin, 10 B. Mon. 243.

Massachusetts.— Brown *v.* Austin, 1 Mass. 208, 2 Am. Dec. 11.

Michigan.— Clark *v.* Raymond, 27 Mich. 456.

Nebraska.— Merriam *v.* Dunbar, 11 Nebr. 208, 7 N. W. 443.

New York.— Dohn *v.* Buffalo Amusement Co., 66 N. Y. App. Div. 446, 73 N. Y. Suppl. 95; Willis *v.* Parker, 30 Misc. 750, 62 N. Y. Suppl. 1078; Janos *v.* Samstag, 31 Misc. 790, 65 N. Y. Suppl. 223.

United States.— Peper *v.* Fordyce, 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435; Tug River Coal, etc., Co. *v.* Brigel, 67 Fed. 625, 14 C. C. A. 577. But sometimes he is allowed his own costs. Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 15 S. Ct. 228, 39 L. ed. 271; Peninsula Iron Co. *v.* Stone, 121 U. S. 631, 7 S. Ct. 1010, 30 L. ed. 915.

But in Illinois it is held that it is within the discretion of the court to divide costs. Moore *v.* People, 108 Ill. 484.

In Texas, however, it has been held that appellant may be taxed with costs. Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68,

held, however, that an appellant who first pleads prescription in the supreme court, the case being therefore remanded, must pay costs.[52]

(B) *On Modification and Affirmance.* Likewise where a judgment is modified so as to correct errors not brought to the attention of the court below which could, and probably would, have been corrected in that court, the appellant in some jurisdictions is denied costs;[53] and in others he must pay costs.[54] In other jurisdictions the practice does not seem to be uniform. The courts in some cases merely deny the costs to appellant,[55] and in other cases award costs against him.[56] If the appellant did not have an opportunity to correct the error in the trial court the costs will on modification of the judgment be imposed on the appellee.[57]

(II) *Failure to Move For New Trial in Time.* Where a motion for a new trial is overruled because not presented in the time and manner directed by the court, and an appeal is taken and the judgment reversed, the appellant will not be allowed his costs either on appeal or in the court below.[58]

(III) *Delay in Filing Transcript.* It has been held that where a transcript of the record was filed by defendant in error, after the term authorized by law for filing had expired, it will be stricken from the record at his costs.[59]

(IV) *Errors Caused by Fault of Appellant.* Where the appellant or his counsel is responsible for the errors complained of he will, although the cause be reversed, be responsible for costs of appeal.[60]

45 S. W. 974; Friedman *v.* Payne, (Civ. App. 1896) 35 S. W. 47; Gunn *v.* Miller, (Civ. App. 1894) 26 S. W. 278.

Where a decree is erroneous only from a clerical mistake, appellant may recover costs in the supreme court upon its being there modified and affirmed, although he might have procured a correction by motion in the lower court as he was not required to show proceeding. Kenyon *v.* Tramel, 71 Iowa 693, 28 N. W. 37.

52. Parmele *v.* Johnston, 15 La. 429.

53. *California.*— Noonan *v.* Hood, 49 Cal. 293.

Idaho.—Jolly *v.* Woodworth, (1895) 42 Pac. 512.

Illinois.— Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55.

Michigan.— Snell *v.* Race, 78 Mich. 334, 44 N. W. 286.

South Dakota.—Mead *v.* Pettigrew, 11 S. D. 529, 78 N. W. 945.

Wisconsin.— Menz *v.* Beebe, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601; Hersey *v.* Milwaukee County, 16 Wis. 185, 82 Am. Dec. 713.

See 13 Cent. Dig. tit. "Costs," § 912.

54. *Alabama.*— Wood *v.* Steele, 65 Ala. 436.

Indiana.—Roberts *v.* Hamilton, 15 Ind. 305.

New York.— Zimmerman *v.* Long Island R. Co., 14 N. Y. App. Div. 562, 43 N. Y. Suppl. 883; Clark *v.* Geery, 40 N. Y. Super. Ct. 227. *Compare* Steward *v.* Green, 11 Paige 535.

Texas.— Dodge *v.* Richardson, 70 Tex. 209, 8 S. W. 30; Smock *v.* Tandy, 28 Tex. 130; Garza *v.* Hammond, (Civ. App. 1897) 39 S. W. 610; Storrie *v.* Cortes, (Civ. App. 1897) 39 S. W. 607; Burkitt *v.* Twyman, (Civ. App. 1896) 35 S. W. 421; Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353; Yoe *v.* Milan County Co-Operative Cotton, etc., Alliance, (Civ. App. 1895) 32 S. W. 162; McDaniel *v.* Martin, (Civ. App. 1894) 25 S. W. 1041; Gulf, etc., R. Co. *v.* Vinson, (Civ. App. 1893) 24 S. W. 956; Chapman *v.* Bolton, (Civ. App. 1894) 25 S. W. 1001; Montrose *v.* Fannin County Bank, (Civ. App. 1893) 23 S. W. 709.

Washington.— Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973.

See 13 Cent. Dig. tit. "Costs," § 912.

In Georgia where the plaintiffs in error do not complain of the inclusion of attorney's fees in the verdict against them and defendants in error voluntarily ask that they should be written off and the judgment is otherwise sustained, costs will be taxed against the plaintiffs in error. Thompson *v.* Mallory, 115 Ga. 112, 41 S. E. 240.

55. Kaufman *v.* Dostal, 73 Iowa 691, 36 N. W. 643; Raguet *v.* Carmouche, 6 La. Ann. 94; Lang *v.* Cadwell, 13 Mont. 458, 34 Pac. 957; Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741; Knox *v.* Gerhauser, 3 Mont. 267.

Costs of lower court.— Where defendant fails to call the attention of the lower court to a point on which he prevails, on appeal, a motion to award the costs of the lower court against plaintiff will be denied. Griswold *v.* Metropolitan El. R. Co., 122 N. Y. 640, 25 N. E. 361, 33 N. Y. St. 642.

56. Matthes *v.* Imperial Acc. Assoc., 110 Iowa 222, 81 N. W. 484; Bayliss *v.* Hennessey, 54 Iowa 11, 6 N. W. 46; Baudoin *v.* Tete, 10 La. Ann. 69; Palmer *v.* Murray, 8 Mont. 312, 21 Pac. 126.

57. Flannery *v.* Anderson, 4 Nev. 437.

58. Kinney *v.* Williams, 1 Colo. 191.

59. Cunningham *v.* Perkins, 28 Tex. 488.

60. Haskins *v.* Tucker, 1 Colo. 263; Jones *v.* Fennimore, 1 Greene (Iowa) 134; Risers *v.* McLean, 10 La. Ann. 565; Lafleur *v.* Mouton, 8 La. Ann. 489. Where the necessity for remanding a cause is occasioned by the acts of the appellant in objecting to proper testi-

(v) *Errors Caused by Fault of Appellee.* On the other hand where a cause is reversed for error caused by the fault of the appellee he must pay the costs of appeal.[61]

(vi) *Where Both Parties at Fault.* Where a decree is modified and it appears that both parties had been in error from the beginning no costs should be given to either.[62] So where a case made on appeal is not fully presented and is sent back for a finding of facts costs will not be awarded.[63]

(vii) *Failure to Take Steps to Secure Costs.* Where a party entitled to costs of appeal neglects to comply with the prescribed means of securing the allowance of his costs he forfeits his rights thereto.[64] So if a party does not ask judgment in the court below for an item of interlocutory costs he loses the right thereto and cannot assign for error the omission of the court to render such judgment.[65]

2. Who Liable For Costs — a. Persons Not Parties or Improperly Joined as Parties. One not a party to an appeal cannot be charged with the costs thereof.[66] And such is the rule in respect to a person improperly made a party to an appeal.[67]

b. Primary Liability For Costs. In some jurisdictions the appellant is held to be primarily responsible for all the costs of the appeal.[68]

3. Who Entitled to Costs. A person not appealing is not entitled to any costs of appeal.[69] It has been held, however, that on reversal of a decree for complainants where one of the defendants who properly made several defenses took no part in the appeal by reason of a stipulation under which he had no occasion

mony he must pay the costs of appeal. Delphine *v.* Guillet, 11 La. Ann. 424.

Clerical error.—A mistake in giving the name of the party against whom a decree has been rendered when the true name appears in the record is clerical and will be corrected in the appellate court at the cost of plaintiff in error. McBroom *v.* McBroom, 19 Ala. 173.

If a defect in the bill prevents rendition of a final decree in complainant's favor and the cause is remanded for that reason he will be charged with costs of appeal. Cruikshank *v.* Luttrell, 67 Ala. 318.

61. Farmers' High Line Canal, etc., Co. *v.* Moon, 22 Colo. 560, 45 Pac. 437; Cleveland *v.* Cohrs, 13 S. C. 397.

Defective pleading.— Where a defendant prevails in his appeal, which was rendered necessary by complainant's defective pleadings he is entitled to the costs of the appeal. Cleveland *v.* Cohrs, 13 S. C. 397.

62. McCurdy *v.* Clark, 27 Mich. 445.

63. Tuxbury *v.* French, 39 Mich. 190.

64. Osborne *v.* Paulson, 37 Minn. 46, 33 N. W. 12.

65. Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460.

66. Price *v.* Barnes, 7 Ind. App. 1, 34 N. E. 408; Schluderberg *v.* Robertson, 60 Md. 602; Holler *v.* Apa, 18 N. Y. Suppl. 588, 47 N. Y. St. 485; Tompkins County *v.* Bristol, 58 How. Pr. (N. Y.) 3; Potter *v.* Chapin, 6 Paige (N. Y.) 639.

Limitation of rule.— It has been held in an action on a note that where both defendants are liable before judgment is erroneously entered against only one and on appeal by him judgment is rendered against both, the costs of an appeal will be charged against the other defendant. Brown *v.* Keye, (Tex. Civ. App. 1894) 25 S. W. 988.

Motion to quash writ of error.— Where one of two judgment defendants brings error, and the other refuses to join therein, and defendant in error moves to quash the writ, and an order on this motion is served on defendant who declined to join that he join in the writ or be precluded from bringing error, and at the time appointed defendant does not join, the order will be that his default be entered and the costs of the motion be taxed to plaintiff in error. Thompson *v.* Valarino, 2 How. Pr. (N. Y.) 259.

67. O'Boyle *v.* Shannon, 80 Ind. 159.

68. In **Louisiana** the appellant is primarily liable for all the costs occasioned by appeal, and plaintiff, if appellee, cannot be called on to pay these costs, unless and until he is condemned to pay them by judgment on appeal. State *v.* Judge Fourth Dist. Ct., 30 La. Ann. 599.

In Tennessee a successful appellant will be liable for all costs of appeal if they cannot be made out of the appellee. Lefeber *v.* Nashville, etc., R. Co., 92 Tenn. 164, 20 S. W. 978; Mathis *v.* Memphis, 6 Baxt. (Tenn.) 439. A return of an execution against him unsatisfied is sufficient proof of this fact. Lefeber *v.* Nashville, etc., R. Co., 92 Tenn. 164, 20 S. W. 978.

69. Pool *v.* Horton, 45 Mich. 404, 8 N. W. 59; Vroom *v.* Ditmas, 4 Paige (N. Y.) 526; Pollard *v.* Reardon, 65 Fed. 848, 13 C. C. A. 171.

The fact that a judgment is erroneous as to a defendant not appealing does not entitle an appellant, as to whom a judgment is affirmed, to costs. Burke *v.* Hindman, 70 Ill. App. 496.

to do so he is entitled to costs in the court below.[70] Where an issue tried between several defendants is wholly distinct, and bears no relation to the issue between the plaintiff and the defendants, a judgment on an appeal between the defendants upon their issue, to which plaintiff was a necessary respondent to maintain his judgment recovered on the main issue, which awards costs to "respondents," entitled the plaintiff and the responding defendant to their separate costs.[71]

4. SECURITY FOR COSTS OF APPEAL. Whether or not security for costs must be given by an appellant or plaintiff in error is a matter solely of statutory regulation.[72] In the absence of statute requiring such security it need not be given.[73] Statutes requiring non-residents to give security for costs before commencing an action are usually held to apply as well to appeals or writs of error taken or sued out by them.[74] It has been held that an application for rehearing after final judgment by a non-resident is within a statute requiring security for costs in actions commenced by or for the use of non-residents;[75] and the rule has been held to apply to use plaintiffs.[76] Where an appellant has moved from the state after an appeal he cannot be required to give security.[77]

5. PROSECUTION OF APPEAL OR WRIT OF ERROR IN FORMA PAUPERIS. To authorize the prosecution of appeal or writ of error *in forma pauperis*, express statutory authority is necessary.[78]

6. AWARD OF COSTS — a. Necessity For Award — (I) *WHERE COSTS FOLLOW JUDGMENT.* Where the law declares the right to costs to follow a favorable decision, it is not requisite to the prevailing party's right thereto that in the final determination costs should be in direct terms awarded. The prevailing party is under such circumstances entitled to costs, although the judgment is silent as to costs.[79]

(II) *WHERE COSTS DISCRETIONARY.* Where costs are discretionary with the

Where part of the appellants pending an appeal compromise and fail to prosecute the appeal they will not be entitled to costs, although the judgment is reversed as to all. Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

70. Pollard *v.* Reardon, 65 Fed. 848, 13 C. C. A. 171.

71. Reynolds *v.* Ætna L. Ins. Co., 30 Misc. (N. Y.) 152, 61 N. Y. Suppl. 901.

72. See cases cited *infra*, notes 74–77.

In cases appealed from a circuit court commissioner security cannot be required under a statute requiring security for costs only in actions begun in the circuit court. People *v.* Wayne Cir. Judge, 41 Mich. 551, 49 N. W. 923.

73. Dillard *v.* Noel, 2 Ark. 123; Livermore *v.* Bond, 19 Vt. 607. And see, generally, APPEAL AND ERROR, 2 Cyc. 818.

74. Edgar Gold, etc., Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113; Filley *v.* Cody, 3 Colo. 221; Talpey *v.* Doane, 2 Colo. 298; Roberts *v.* Fahs, 32 Ill. 474; Hickman *v.* Haines, 10 Ill. 20; Ripley *v.* Morris, 7 Ill. 381.

But under a statute providing that the title of an action shall not be changed in consequence of an appeal a defendant appealing cannot in any legal sense of the term be called a plaintiff so as to compel him to file security for costs as a non-resident. Johnson *v.* Yoemans, 8 How. Pr. (N. Y.) 140. See also Steam Nav. Co. *v.* Weed, 8 How. Pr. (N. Y.) 49.

Waiver.— The right to require security from a non-resident, plaintiff in error, may be waived (McVicker *v.* Ludlow, 2 Ohio 259); but the filing of a supersedeas bond does not constitute a waiver (Filley *v.* Cody, 3 Colo. 221).

75. Garrett *v.* Terry, 33 Ala. 514.

76. Smith *v.* Robinson, 11 Ill. 119.

77. Kerr *v.* Wilson, 38 Ill. App. 97; Berry *v.* Griffith, 1 Harr. & G. (Md.) 440; Button *v.* Hannibal, etc., R. Co., 51 Mo. 153. *Compare* Charlotte, etc., R. Co. *v.* Earle, 13 S. C. 44, where it has been held that a statute requiring security for costs from a plaintiff not residing in the state at the commencement of the action does not authorize the appellate court to require security for costs on appeal from an appellant who has left the state since commencing the action.

78. See APPEAL AND ERROR, 2 Cyc. 824 *et seq.*

79. *California.*— Hathaway *v.* Davis, 33 Cal. 161.

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 27 Mont. 40, 69 Pac. 244.

New York.— Ires *v.* West. R. Co., 49 N. Y. 660; Revere Copper Co. *v.* Dimmock, 29 Hun 299; Combs *v.* Combs, 25 Hun 279, 62 How. Pr. 304; Board of Pilot Com'rs *v.* Spofford, 3 Hun 52; Margulies *v.* Damrosch, 23 Misc. 77, 51 N. Y. Suppl. 833.

Pennsylvania.—O'Neal *v.* McClure, 1 Phila. 102, 7 Leg. Int. 179.

Vermont.— Bliss *v.* Little, 64 Vt. 133, 23 Atl. 725.

Wisconsin.— See Fairbank *v.* Newton, 48 Wis. 384, 4 N. W. 327.

United States.— McKnight *v.* Craig, 6 Cranch 183, 3 L. ed. 193; Bartels *v.* Redfield, 47 Fed. 708.

See 13 Cent. Dig. tit. "Costs," § 941.

court the rule is otherwise. An award by the court is in such case a prerequisite to allowance of costs.[80] If a statute requires the court to assign a reason for the allowance of costs under designated circumstances, an award made without complying with the statute is erroneous.[81]

b. Time of Making Award.[82] Where an appeal is dismissed in vacation the court may award costs at the next term of court.[83] So it has been held that where judgment is affirmed on exceptions costs may be awarded after the court adjourns;[84] also that costs which are of such a character as to acquire allowance must be at the term at which the judgment is rendered and not after.[85]

c. Construction of Orders in Relation to Costs — (I) *In General.* The construction and effect of an order in relation to costs in a case on appeal in error must depend largely upon the phraseology of the order itself. Orders awarding costs in general terms,[86] allowing costs of the supreme court and of the court below,[87] that appellant recover of appellee all costs in its behalf expended,[88] that appellee pay all costs in the lower court and in the appellate court,[89] for judgment absolute against appellant without costs to either party,[90] reversing cause without costs,[91] for a new trial with costs to appellant to abide the event,[92] and for a new

80. Stokes *v.* Schlachter, 66 N. J. L. 334, 49 Atl. 588; *In re* Protestant Episcopal Public School, 86 N. Y. 396; People *v.* Smith, 13 Hun (N. Y.) 227; Pennell *v.* Wilson, 5 Rob. (N. Y.) 661; Newcomb *v.* Hale, 64 How. Pr. (N. Y.) 400, 12 Abb. N. Cas. (N. Y.) 338, 4 N. Y. Civ. Proc. 25; Nellis *v.* De Forrest, 6 How. Pr. (N. Y.) 413; Savage *v.* Darrow, 4 How. Pr. (N. Y.) 74.

Instances.— Thus where a new trial is awarded on appeal, and the order is silent on the subject of costs, neither party is entitled to the costs of the appeal. Pennell *v.* Wilson, 5 Rob. (N. Y.) 674. So also costs are not matter of right on an appeal to the court of appeals from a decision of the supreme court on a common-law certiorari, directed to a tribunal or officer not being a court, and unless they are awarded by the court of appeals they should not be inserted in the judgment entered on the remittitur. People *v.* Smith, 13 Hun (N. Y.) 227.

Limitation of rule.— The rule stated in the text is subject to this limitation: Where there is a rule of the supreme court requiring the clerk to tax specified costs, unless for special reasons apparent upon the record it is otherwise ordered, the rule will be deemed an exercise of the court's discretion in awarding costs where they are discretionary, and unless the court otherwise directs the clerk is bound to allow the prevailing party the costs specified in the rule. It is not necessary that any reference be made to costs in the opinion. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 990, 67 Pac. 30.

81. Handel *v.* Kramer, 1 Tex. App. Civ. Cas. § 826.

82. Under a statute providing that if the supreme court shall certify that there was reasonable cause for an appeal by plaintiff, he may recover costs of appeal, although he recovers less than a designated amount, in the court appealed to, the certificate must be given before judgment is entered. Plimpton *v.* Baker, 9 Pick. (Mass.) 70.

83. Curtis *v.* Williams, 27 Ill. App. 497.

84. Strong *v.* Hobbs, 20 Vt. 192.

85. Wilson *v.* Stark, 47 Mo. App. 116.

86. In California if the cause is remanded and costs awarded in general terms, only the costs on appeal are included, leaving the costs of the former trial to abide the event of the suit. Gray *v.* Gray, 11 Cal. 341.

87. Under a statute of Michigan, providing that in case of reversal costs shall be in the discretion of the court if judgment is reversed, and costs of the supreme court and of the court below are allowed plaintiff in error, such allowance does not cover the costs of the former trials and reversals, but the latter must await the final judgment of the cause. Jeffery *v.* Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

88. In Texas it is held that the usual entry in the appellate court that "appellants recover of appellee, all costs in its behalf expended" is equivalent to judgment for costs in both courts. Bonner *v.* Wiggins, 54 Tex. 149.

89. Brown *v.* Thompson, (Tex. Civ. App. 1895) 31 S. W. 1087, where it was held in that state that judgment of the appellate court ordering that "appellees pay all costs both in the lower court and in this court" does not require appellees to pay the costs taxed against appellant on an interlocutory order in the court below when the order was not considered on appeal.

90. If the New York court of appeals affirms an order and orders judgment absolute against appellant "without costs to either party," this disposes of all the costs in the action either of the appeal or of the motion, and an insertion by respondent of costs in the judgment entered on the remittitur is irregular. Patten *v.* Stitt, 50 N. Y. 591.

91. Sander *v.* New York, etc., R. Co., 56 N. Y. App. Div. 273, 67 N. Y. Suppl. 809; Hurley *v.* Brown, 55 N. Y. App. Div. 8, 67 N. Y. Suppl. 279, holding that where the appellate division of the supreme court reverses a cause "without costs" only costs of the appeal are meant.

92. Where the general term of the city court affirms a judgment in favor of plain-

trial requiring as a condition the payment of all costs of the action after notice of trial[93] have been considered and received judicial interpretation by the courts. In the United States supreme court it has been held that the naming of the amount for which plaintiff is entitled to judgment in an order by the supreme court remanding a cause to the circuit court for further proceedings in accordance with the decree of the supreme court does not prevent the circuit court from including the costs of such suit in its decree, above the amount of the judgment stated in the order remanding the cause.[94]

(II) *TERM "COSTS."* In Louisiana, on a judgment on an appeal that judgment in the lower court be "affirmed with costs," the appellant pays costs of appeal as well as the other costs.[95] The words "with costs" in an order of reversal or affirmance in the New York court of appeals, in a case where the allowance of costs is discretionary, is construed to mean costs in the court of appeals only;[96] and the supreme court has no power to allow costs after such a disposition of the case.[97] The rule applies to orders as well as judgments.[98] Where, however, the prevailing party is entitled to costs as of course the words "with costs" in an order of reversal or affirmance in the court of appeals will be construed to mean all costs made in both the appellate court and the court below.[99] The words "with costs" in a judgment of the general term of the supreme court, reversing a judgment of the special term, has been construed to include costs of both courts.[1] In the United States supreme court a decree of reversal as to one

tiff with costs, and the common pleas reverse the judgment and order a new trial with costs "to appellant" to abide the event, plaintiff (respondent) in case he succeeds on a new trial cannot tax the costs either of the city court general term or the common pleas general term. Bannerman *v.* Quackenbush, 2 N. Y. City Ct. 172.

93. An order for new trial requiring as a condition payment of all costs of the action after notice of trial includes the costs of a new trial below as well as the costs of appeal. North *v.* Sargeant, 14 Abb. Pr. (N. Y.) 223.

94. New Orleans *v.* Gaines, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102.

95. State *v.* Judge Twelfth Judicial Dist., 18 La. Ann. 523.

96. *In re* Amsterdam Water Com'rs, 104 N. Y. 677, 10 N. E. 545; *In re* Protestant Episcopal Public School, 86 N. Y. 396; Sisters of Charity *v.* Kelly, 68 N. Y. 628; People *v.* New York, etc., R. Co., 47 Hun (N. Y.) 43; People *v.* Mercantile Credit-Guaranty Co., 35 Misc. (N. Y.) 755, 72 N. Y. Suppl. 373; Sweet *v.* Syracuse, 20 N. Y. Suppl. 924, 49 N. Y. St. 262; *In re* Hood, 1 N. Y. Suppl. 833, 17 N. Y. St. 705. But see Bogardus *v.* Rosendale Mfg. Co., 1 Duer (N. Y.) 592; Von Keller *v.* Schulting, 45 How. Pr. (N. Y.) 139.

Rule applicable to special proceedings.— On affirming, on appeal, a final order in summary proceedings to recover the possession of real property the costs taxable are such only as would be taxable if the special proceedings had been an action and the final order a judgment. Everall *v.* Lassen, 13 Daly (N. Y.) 10.

Where the New York supreme court affirms a surrogate's decision and the court of appeals reverses both decisions "with costs," appellant is not entitled to costs in the court of appeals or in the supreme court. Macgregor *v.* Buell, 17 Abb. Pr. (N. Y.) 31.

97. *In re* Hood, 1 N. Y. Suppl. 833, 17 N. Y. St. 705.

98. People *v.* Randall, 8 Daly (N. Y.) 81.

99. Murtha *v.* Curley, 92 N. Y. 359, 65 How. Pr. (N. Y.) 86 [*reversing* 64 How. Pr. (N. Y.) 465]; Jermain *v.* Lake Shore, etc., R. Co., 31 Hun (N. Y.) 558; Revere Copper Co. *v.* Dimmock, 29 Hun (N. Y.) 299; Burdett *v.* Lowe, 22 Hun (N. Y.) 588; Sanders *v.* Townshend, 11 Abb. N. Cas. (N. Y.) 217; Rust *v.* Hauselt, 59 How. Pr. (N. Y.) 389.

Extra allowance.— Where judgment has been ordered absolute in the court of appeals with costs, the special term has power upon the remittitur to entertain and grant a motion made by the defendants for an additional allowance. Jermain *v.* Lake Shore, etc., R. Co., 31 Hun (N. Y.) 558; Parrott *v.* Sawyer, 26 Hun (N. Y.) 466.

On dismissal of appeal.— It has been held that an order of the court of appeals contained in the remittitur dismissing an appeal with costs after argument on the merits means that the general costs ought to be taxed or adjusted, and does not refer to motion costs alone. Webb *v.* Norton, 10 How. Pr. (N. Y.) 117.

1. Schoonmaker *v.* Bonnie, 51 Hun (N. Y.) 34, 3 N. Y. Suppl. 492, 20 N. Y. St. 428, 16 N. Y. Civ. Proc. 64. See also *In re* Hood, 30 Hun (N. Y.) 472.

In special proceedings.— Where a determination in favor of plaintiff in special proceeding is affirmed on appeal to the general term "with costs," he is only entitled to costs of an appeal as from an order and not as from a judgment. People *v.* Troy, 12 N. Y. St. 412. The affirmance "with costs," by the general term of an order of the special term in a special proceeding is an award of the costs of appeal, and constitutes a direc-

of several plaintiffs in error, "with costs," is interpreted to allow only the costs of the successful plaintiff in error.[2]

(III) *TERM "COSTS TO ABIDE EVENT."* There is considerable difference in the holdings of the New York courts with respect to the proper construction of the term "with costs to abide the event."[3] To this extent at least all of the decisions agree: Where the appellant obtains a judgment of reversal "with costs to abide the event" and is also successful on the new trial, he is entitled to the costs of both trials and of the appeal.[4] And where the respondent is successful on the new trial the decisions are fairly harmonious to the effect that he is entitled to costs of both trials.[5] The line of cleavage between the cases arises in respect to costs of appeal under such circumstances. The court of appeals in construing its own order has held that the respondent is also entitled to costs of appeal where it makes an order that "costs shall abide the event."[6] So in a number of departments of the general term of the supreme court and in the general terms of some of the other lower courts, it is held that orders made by them directing costs to abide the event will entitle the respondent to costs of appeal when he is successful on the new trial;[7] however, in other departments of the general term the contrary conclusion has been reached.[8] Where on appeal from a judgment

tion by the court that respondents recover costs "at the rates allowed for similar services in an action." Wood *v.* Board of Excise Com'rs, 9 Misc. (N. Y.) 507, 30 N. Y. Suppl. 344, 61 N. Y. St. 80.

Where separate appeals are taken by two persons from the same order and the same are never consolidated, but are tried together for convenience, and are dismissed "with costs," the order will be construed to give costs to appellee from each of the appellants. Lesster *v.* Lawyers' Surety Co., 62 N. Y. Suppl. 479 [*affirming* 29 Misc. (N. Y.) 779, 62 N. Y. Suppl. 430].

2. Sulley *v.* American Nat. Bank, 179 U. S. 68, 21 S. Ct. 29, 45 L. ed. 89.

3. The court of appeals has held that the construction placed by the general term of the supreme court upon its own order should not be interfered with by the court of appeals. Union Trust Co. *v.* Whiton, 78 N. Y. 491.

4. Carpenter *v.* Manhattan L. Assur. Co., 25 Hun (N. Y.) 194; *In re* Moss, 34 N. Y. Suppl. 798, 68 N. Y. St. 720, 24 N. Y. Civ. Proc. 438; Isaacs *v.* New York Plaster Works, 4 Abb. N. Cas. (N. Y.) 4; Carvey *v.* Rider, 2 Cow. (N. Y.) 617.

5. Franey *v.* Smith, 126 N. Y. 658, 27 N. E. 559, 37 N. Y. St. 480; Smith *v.* Smith, 22 N. Y. App. Div. 319, 47 N. Y. Suppl. 987; House *v.* Lockwood, 48 Hun (N. Y.) 550, 1 N. Y. Suppl. 540, 16 N. Y. St. 13, 14 N. Y. Civ. Proc. 411; Durant *v.* Abendroth, 48 Hun (N. Y.) 16, 1 N. Y. Suppl. 538, 16 N. Y. St. 263; Donovan *v.* Vandemark, 22 Hun (N. Y.) 307; Union Trust Co. *v.* Whiton, 17 Hun (N. Y.) 593; Patten *v.* Stitt, 34 N. Y. Super. Ct. 346; Sheridan *v.* Genet, 1 N. Y. Civ. Proc. 306 note; Howell *v.* Van Siclen, 4 Abb. N. Cas. (N. Y.) 1 [*affirming* 8 Hun (N. Y.) 524]. And see Havemeyer *v.* Havemeyer, 48 N. Y. Super. Ct. 104. *Contra*, Cochran *v.* Gottwald, 42 N. Y. Super. Ct. 214, which holds that he is not entitled to recover costs of the first trial. And *compare* Thomas *v.* Evans, 50 Hun (N. Y.) 441, 3 N. Y. Suppl. 297, 20 N. Y. St. 884.

6. Franey *v.* Smith, 126 N. Y. 658, 27 N. E. 559, 37 N. Y. St. 480; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 84 N. Y. 469 [*reversing* 22 Hun (N. Y.) 563].

7. Smith *v.* Smith, 22 N. Y. App. Div. 319, 47 N. Y. Suppl. 987; Herbst *v.* Vacuum Oil Co., 22 N. Y. Suppl. 42, 50 N. Y. St. 555; Comly *v.* New York, 1 N. Y. Civ. Proc. 306; Sanders *v.* Townsends, 63 How. Pr. (N. Y.) 343. See also Powers *v.* Manhattan R. Co., 14 N. Y. Suppl. 130, 20 N. Y. Civ. Proc. 78, holding that where in an action in which a successful plaintiff is entitled to a judgment for costs as of course a judgment for plaintiff was reversed by the court of appeals "with costs to abide the event" and judgment for him was rendered on the second trial, he is entitled to the costs and disbursements of the first trial and of the appeals both of the general term and of the court of appeals.

An order of the court of common pleas reversing a judgment of the general term of the city court and directing a new trial "with costs to appellant to abide the event" includes the cost of the appeals to the common pleas and to the general term of the city court and also the costs in the trial court, and where respondent prevails on the new trial the costs mentioned in the order of reversal cannot be taxed by him. So held in Starr Cash Car Co. *v.* Reinhardt, 6 Misc. (N. Y.) 365, 26 N. Y. Suppl. 746, 56 N. Y. St. 404.

8. House *v.* Lockwood, 48 Hun (N. Y.) 550, 1 N. Y. Suppl. 540, 16 N. Y. St. 13, 14 N. Y. Civ. Proc. 411; Durant *v.* Abendroth, 48 Hun (N. Y.) 16, 1 N. Y. Suppl. 538, 16 N. Y. St. 263; Howell *v.* Van Siclen, 8 Hun (N. Y.) 524 [*affirmed* in 4 Abb. N. Cas. (N. Y.) 1]; Lydd *v.* Kenny, 1 N. Y. Civ. Proc. 310 note; Sheridan *v.* Genet, 1 N. Y. Civ. Proc. 309 note; Koon *v.* Thurman, 2 Hill (N. Y.) 357.

of the county court the general term awards a new trial, costs to abide the event, the appellant if again unsuccessful recovers no costs of appeal.[9] Where a judgment recovered by the plaintiff is affirmed at the general term but reversed by the court of appeals "with costs of this court (the court of appeals) to abide the event of the action" and thereafter the judgment is upon reargument at the general term again affirmed, the plaintiff cannot include in his bill of costs the costs of the first appeal to the general term.[10]

7. Taxation — a. Power to Tax. Whether the court or clerk shall tax costs depends largely on the character of the costs to be allowed.[11] When costs are taxed by the clerk without any direction from the court, he must tax them in accordance with the general rules governing the subject of taxation.[12]

b. Application For Taxation. If the time within which an application for taxation or memorandum of costs must be filed is designated by statute it must be filed within that time.[13] If the statute requires verification the application or memorandum must be verified.[14] And it has been held that whether there is any statute or rule of court specifically regulating it or not it is irregular to tax costs without notice to the opposite party.[15] If one party wishes to have unnecessary costs taxed to his adversary and the record does not show who was responsible therefor, this point may be presented to the court by affidavit or other proof.[16]

c. Objections to Taxation. Objections to items of taxation should be filed within the time required by statute[17] or they will be waived.[18]

d. Correction of Erroneous Taxation — (i) *In General.* An erroneous taxation of costs may be corrected; but whether the proper remedy for the correction of an erroneous taxation of costs is an appeal,[19] a motion to correct,[20] a motion to

9. Marx *v.* McLoud, 50 Hun (N. Y.) 605, 3 N. Y. Suppl. 74, 21 N. Y. St. 957.

10. Bigler *v.* Pinkney, 24 Hun (N. Y.) 224.

11. If the costs are discretionary they should ordinarily be taxed by the court or by the clerk, under specific directions given by the court. If the costs are of course they are ordinarily taxable by the clerk. See *supra*, XXII, B.

12. Fairbank *v.* Newton, 48 Wis. 384, 4 N. W. 327.

Taxation of costs generally see *supra*, XXII.

13. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30.

Filing application after term at which judgment was rendered.—After affirmance on appeal a motion for a rehearing was denied the following term, and respondent did not file a cost bill till after the denial of such petition. It was held, under the rules providing that no mandate can issue until the motion for a rehearing is disposed of, that the bill was filed within a reasonable time, although not within the term at which the judgment was rendered. Richardson *v.* Orth, 40 Oreg. 252, 66 Pac. 925, 69 Pac. 455.

A statute requiring bills of costs to be filed within two days after decision has been held not to apply to cases on appeal in the supreme court. Gray *v.* Gray, 11 Cal. 341, "as decisions are made from time to time in vacation, attorneys residing out of this city could not file their memorandums of costs within the time limited."

On amendment obviating error.— Where the record in the circuit court after a writ of error is sued out is so amended as to remove the error of which complaint has been made, a motion by the plaintiff in error for judgment for costs comes too late after the amended record is filed. Such a motion should be interposed or terms should be insisted upon by plaintiff in error when the application is made to file the amended record, when it is discretionary with the court to require the payment of costs as a condition to the filing of the same. Toledo, etc., R. Co. *v.* Butler, 53 Ill. 323.

14. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30.

15. State *v.* Second Judicial Dist. Ct., 27 Mont. 40, 69 Pac. 244; Akerly *v.* Vilas, 23 Wis. 628.

16. U. S. Sugar Refinery *v.* Providence Steam, etc., Co., 62 Fed. 375, 10 C. C. A. 422.

17. Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30, holding, however, that the filing of an affidavit in support of an application for taxation waives the objection that such objections were not filed in time.

18. State *v.* Second Judicial Dist. Ct., 27 Mont. 40, 69 Pac. 244.

19. Jones *v.* Frost, 28 Cal. 245, holding that where the court adds to the amount of the judgment a sum for costs after time for filing the memorandum has expired, and after the appeal has been perfected, the error can only be corrected by an appeal from the order for such costs.

20. Beardsley Scythe Co. *v.* Foster, 36 N. Y. 516 (holding that if costs awarded in the judgment below are improperly embraced in the judgment of affirmance the correction should be made on motion when the record is remitted); Collins *v.* Jaynesville, 111

retax,[21] an application for a rehearing, or for a modification of the judgment,[22] or otherwise, seems to depend largely upon the stage of the proceeding as well as upon the attendant circumstances of the case.[23] Taxation of costs cannot be questioned collaterally in a suit on an appeal-bond.[24]

(II) *Motion to Retax.* A motion to retax must point out the specific items objected to.[25] And as a prerequisite to the rehearing on the question of taxation objections should first be taken before the taxing officer.[26] The questions as to costs of appeal should be made while the cause is before the supreme court, otherwise the court has no power in the matter.[27] A petition for rehearing in the matter of taxation cannot be filed after the expiration of the term.[28] On a motion to retax the supreme court will not review disputed questions of fact unless under very peculiar circumstances.[29]

8. Amount and Items Allowable — a. Papers Customarily Essential to Appeal — (I) *In General.* Ordinarily it seems the cost of the record is taxable on appeal;[30] but in some jurisdictions, by virtue of statute or rule of court, such is not the case.[31] When authorized by statute allowance may be made for drawing

Wis. 348, 87 N. W. 241, 1087 (holding that if the court has impliedly decided in favor of full allowance to the successful party of costs for printing and reply brief, by failing to direct otherwise when deciding an appeal, the error, if there is any, can only be corrected by motion to correct the judgment, and not by motion to retax costs). And see Fairbank *v.* Newton, 48 Wis. 384, 4 N. W. 327.

After an appeal has been dismissed and the cause remanded, if a respondent charges too much costs for appeal, the remedy is by motion in the court below. Dresser *v.* Brooks, 2 N. Y. 559.

21. Huntington *v.* Blakeney, 1 Wash. Terr. 111, where it is held that if notwithstanding a judgment of affirmance the costs are excessive, the appellate court may remand the cause to the trial court for execution and give leave to either party to move for retaxation in that court.

22. Where a judgment is reversed on condition with direction that upon the performance thereof it is to stand affirmed, if the appellant is not satisfied with the judgment as rendered, his remedy is to ask for a rehearing or for a modification of the judgment within thirty days after the decision and before the remittitur goes down, and it is too late to ask for such modification after the regular issuance of the remittitur. Durkee *v.* Garvey, 84 Cal. 590, 24 Pac. 929.

23. See *supra*, XXII, G.

24. Parisher *v.* Waldo, 72 Ill. 71.

25. Brownlee *v.* Hewitt, 1 Mo. App. 604; Summerhill *v.* Darrow, (Tex. 1901) 62 S. W. 1054.

26. Akerly *v.* Vilas, 23 Wis. 628.

27. Bradlee *v.* Appleton, 2 Allen (Mass.) 93; Bliss *v.* Little, 64 Vt. 133, 23 Atl. 725.

28. Buckler *v.* Rogers, 6 Ky. L. Rep. 737.

29. Arnold *v.* Bright, 41 Mich. 416, 50 N. W. 392.

Nor will the court examine the bill of exceptions, except to settle a disagreement between abstracts, and an objection by the appellee on reversal to the taxation of costs for the printing of so much of appellant's abstract as contains the evidence, on the ground that the bill of exception contains no specification of errors relating thereto, occurring at the trial and excepted to, cannot be considered unless the fact relied on is shown by the abstract. Peart *v.* Chicago, etc., R. Co., 8 S. D. 634, 67 N. W. 837.

30. Summerville Macadamized, etc., Road Co. *v.* Baker, 70 Ga. 513; Anonymous, 5 Ill. 48; Baker *v.* Guinn, (Tex. Civ. App. 1894) 25 S. W. 140.

If an additional abstract is rendered necessary because of inaccuracies, errors, and omissions in the one furnished by appellant, the costs of the additional abstract will be taxed to him whether he is successful or not. Walden *v.* Lewis, 71 Ill. 453; Calumet *v.* Grain, etc., Co. *v.* Williams, 97 Ill. App. 36; Lane *v.* Sechler Carriage Co., 96 Ill. App. 610; Bowman *v.* Kraft, 81 Ill. App. 92; Munns *v.* Loveland, 15 Utah 25, 49 Pac. 743.

Use of original record.— The clerk of the court of last resort may tax a copy of the record as a part of the costs of the successful party where he has used the original record with the understanding that he would be charged for a copy. Minor *v.* Christie, 65 S. W. 826, 23 Ky. L. Rep. 1569.

Where, pending an appeal, the original transcript is destroyed by fire and the appellant has another made out, the costs of the second transcript is taxable as part of the costs to be paid by appellee on reversal. Moore *v.* Bayne, 75 Tex. 665, 12 S. W. 850.

31. See Lee Injector Mfg. Co. *v.* Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760, where it is held that under rule thirty-one of the rules of the circuit court of appeals, in the sixth circuit, the cost of the transcript of record on appeal cannot be taxed in that court in favor of the appellant, but it must be taxed in the circuit court. And see Beach *v.* Travelers' Ins. Co. 73 Conn. 475, 47 Atl. 754, holding that the record is not taxable in the supreme court where there is a reversal and remandment for new trial. Conn. Gen. Stat. § 833, making it taxable in the court where it is finally disposed of.

a bill of exceptions;[32] but unless authorized by statute costs are not taxable for making or serving a case[33] or for copying it for the printer;[34] nor for copying indorsement of papers.[35] It has been held that where, on appellant's attorney presenting to respondent's attorney a transcript on appeal for certification he refused to certify it, the appellant should recover the cost of procuring the certification.[36] The cost of preparing a petition for rehearing will not be recovered by the prevailing party, where the clerical work could have been done by appellant's counsel.[37]

(II) *UNNECESSARY PAPERS.* Where a transcript, bill of exceptions, or case is unnecessary, the party filing it will not be allowed costs therefor.[38]

(III) *PAPERS NOT USED.* It does not follow, however, that because a transcript is not used it will be considered unnecessary in the sense that costs therefor will not be allowed.[39]

(IV) *INCLUDING UNNECESSARY MATTER IN PAPERS.*[40] Where the record, transcript, abstract, case, bill of exceptions, or other papers necessary to a deter-

32. Schwalbach *v.* Chicago, etc., R. Co., 73 Wis. 137, 40 N. W. 579.

33. Shaver *v.* Eldred, 86 Hun (N. Y.) 51, 33 N. Y. Suppl. 158, 66 N. Y. St. 783; Finley *v.* Cudd, 45 S. C. 87, 22 S. E. 753.

Authorized by statute in Dakota.— Canton First Nat. Bank *v.* North, 6 Dak. 136, 41 N. W. 736, 50 N. W. 621.

Where a case is not prepared in accordance with rules of court, it is held in one jurisdiction, the appellant should pay costs, although successful, on appeal. Spratt *v.* Early, 169 Mo. 357, 69 S. W. 13.

34. Elder *v.* Charlotte, etc., R. Co., 15 S. C. 610.

35. Abbott *v.* Johnston, 47 Wis. 239, 2 N. W. 332.

36. Lydon *v.* Godard, 5 Ida. (Hasb.) 607, 51 Pac. 459.

A rule of court allowing the costs of obtaining the clerk's certification to the transcript to be taxed to respondent on his refusal or failure to certify to the correctness of the transcript within five days after its presentation to him for that purpose is merely intended to give the respondent the opportunity of protecting himself from paying such costs and does not permit costs to be cast on him for such refusal where the appeal does not succeed. Loftus *v.* Fischer, 113 Cal. 286, 45 Pac. 328.

37. Young *v.* Hughes, 39 Oreg. 586, 65 Pac. 987, 66 Pac. 272.

38. *California.*— Woodland Bank *v.* Hiatt, 59 Cal. 580.

District of Columbia.— Stevens *v.* Seher, 11 App. Cas. 245; McLane *v.* Cropper, 5 App. Cas. 276.

Illinois.— Van Duser *v.* Pomeroy, 24 Ill. 289.

Iowa.— Goll *v.* Miller, 87 Iowa 426, 54 N. W. 443.

Kentucky.— Dean *v.* Ball, 3 Bush 502.

New York.— Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417; Corlies *v.* Cummings, 7 Cow. 154.

Wisconsin.— Treat *v.* Hiles, 76 Wis. 367, 45 N. W. 221; Irvin *v.* Smith, 68 Wis. 227, 31 N. W. 912.

See 13 Cent. Dig. tit. "Costs," § 968.

Thus where two appeals are taken upon the same record, the cost of the unnecessary transcript last filed will not be included in the taxation of costs for the party filing it. Dean *v.* Ball, 3 Bush (Ky.) 502. So where after procuring and paying for a transcript of the evidence, but before the statement is settled, the appellant appeals on the judgment-roll and the cause is reversed, the appellant cannot recover for the transcript. Woodland Bank *v.* Hiatt, 59 Cal. 580.

Unnecessary appeal.— Where a correction of the decree could have been made by a motion in the lower court and the correction did not necessitate a resort to the appellate court, the costs of bringing the main bill of exceptions up will not be taxed against defendant in error. Davidson *v.* Story, 106 Ga. 799, 32 S. E. 867.

Unnecessary writ of error.—An appellee who brings error after an appeal has been perfected instead of having his assignments of error incorporated in the appeal record will be liable for costs in any proceedings by error. Carroll *v.* Winslow, 20 Tex. 731; Caperton *v.* Winslow, 18 Tex. 125; Hunt *v.* Howes, 74 Fed. 657, 21 C. C. A. 356.

39. Thus where the plaintiff enters the judgment satisfied releasing defendant from liability thereon, after the expense of procuring a transcript has been incurred, the appellant will be entitled to tax as costs the expense so incurred. Monnett *v.* Hemphill, 110 Ind. 299, 10 N. E. 230.

If the appellant files a transcript after the time has expired for the appellant to file it and obtains a dismissal of the appeal, the expense may be taxed as part of the costs of defending the appeal. Mahone *v.* Long, 3 Rand. (Va.) 557.

So it has been held that costs for matter required by statute to be embodied in a transcript will be allowed, although such matter was not necessary for determination of the appeal. Soules *v.* McLean, 7 Wash. 451, 35 Pac. 1082.

40. What constitutes unnecessary matter. — Inserting pleadings in a bill of exceptions (Joliet, etc., R. Co. *v.* Jones, 20 Ill. 221), incorporating in the record affidavits of wit-

mination of the appeal contains unnecessary matter the party responsible for the insertion should bear the expense thereof.[41] While the ordinary practice is to

nesses claiming attendant's fees (Bennett *v.* People, 30 Ill. 389), inserting in the transcript the copy of the record of another case (Tahler *v.* Cord, 3 Ky. L. Rep. 760), inserting verbatim in a case certified copies of deposition taken pending suit (Corlies *v.* Cummings, 7 Cow. (N. Y.) 154; Jackson *v.* Mather, 2 Cow. (N. Y.) 584), including the whole testimony verbatim in the record (Richards *v.* Waupun, 59 Wis. 45, 17 N. W. 979), attaching as an appendix to the case the pleading in another case between the same parties (Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 56, 53 N. W. 27), setting forth the testimony in the printed case in the form of questions and answers, thereby extending the evidence from two hundred and fifty-five pages when it could have been easily condensed into fifty pages (Southmayd *v.* Waterton F. Ins. Co., 47 Wis. 517, 2 N. W. 1137), including in the transcript on the second appeal in a chancery case the opinion on the former appeal (Lehman *v.* Dozier, 78 Ala. 235; Life Assoc. of America *v.* Neville, 72 Ala. 517; Lake *v.* Security Loan Assoc., 72 Ala. 207) are illustrations of unnecessary matter included. On the other hand it has been held that when questions of fact are sought to be reviewed by the appellate court it is not an unnecessary expense to have the whole evidence printed (Akerly *v.* Vilas, 23 Wis. 628); so where appellant has omitted to print some of the papers referred to in the order from which the appeal was taken respondent may tax in his bill of costs such disbursements as were rendered necessary in printing the omitted papers, but he will be restricted in printing to only those to which such reference was made (Stubbs *v.* Ripley, 7 N. Y. St. 478); and where appellant requested certain instructions, which were given, and excepted to portions of the court's charge, such instructions and the full charge were properly sent up on appeal, and a successful appellee who sent them up is not liable for the cost thereof, under rule twenty-two (Hancock *v.* Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679).

41. *Alabama.*— Halsey *v.* Murray, 112 Ala. 185, 20 So. 575; Lehman *v.* Dozier, 78 Ala. 235; Lake *v.* Security Loan Assoc., 72 Ala. 207; Smith *v.* Smith, 30 Ala. 642.

California.— Jones *v.* Iverson, 131 Cal. 101, 63 Pac. 135; Kimball *v.* Semple, 31 Cal. 657; People *v.* Holden, 28 Cal. 123; Harper *v.* Minor, 27 Cal. 107.

District of Columbia.— Baltimore, etc., R. Co. *v.* Walker, 2 App. Cas. 521; Baltimore, etc., R. Co. *v.* Fitzgerald, 2 App. Cas. 501.

Georgia.— Weaver *v.* Stoner, 114 Ga. 165, 39 S. E. 874; Cochran *v.* Hudson, 110 Ga. 762, 36 S. E. 71; Pullman's Palace Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498; Savannah, etc., R. Co. *v.* Howard, 91 Ga. 99, 16 S. E. 306; Stewart *v.* De Loach, 86 Ga. 729, 12 S. E. 1067; Bell *v.* Hutchings, 86 Ga. 562, 12 S. E. 974; Western Union Tel. Co. *v.* Hill, 86 Ga. 500, 12 S. E. 817; Higginbotham *v.* Campbell, 85 Ga. 638, 11 S. E. 1027.

Idaho.— Thiessen *v.* Riggs, (1897) 51 Pac. 107; Sommercamp *v.* Catlow, 1 Ida. 716.

Illinois.— Smith *v.* Brittenham, 94 Ill. 624; Thatcher *v.* People, 79 Ill. 597; Joliet, etc., R. Co. *v.* Jones, 20 Ill. 221.

Iowa.— Goll *v.* Miller, 87 Iowa 426, 54 N. W. 443; Bigelow *v.* Hoover, 85 Iowa 161, 52 N. W. 124, 39 Am. St. Rep. 296; Jons *v.* Campbell, 84 Iowa 557, 51 N. W. 37; Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764; Diamond *v.* Palmer, 79 Iowa 578, 44 N. W. 819; Baldwin *v.* Foss, 71 Iowa 389, 32 N. W. 389; Donahua *v.* McCosh, 70 Iowa 733, 30 N. W. 14. And see Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

Kentucky.— Forest Hill Bldg., etc., Assoc. *v.* McEvoy, 66 S. W. 1031, 24 Ky. L. Rep. 161; Tabler *v.* Cord, 3 Ky. L. Rep. 760.

Maryland.— Chappell *v.* Stewart, 95 Md. 76, 51 Atl. 411; Dumay *v.* Sanchez, 71 Md. 508, 18 Atl. 890.

Michigan.— Sanford *v.* Rowley, 93 Mich. 509, 53 N. W. 658; Malthy *v.* Plummer, 73 Mich. 539, 41 N. W. 683; Rice *v.* Rice, 50 Mich. 448, 15 N. W. 545.

Minnesota.— Henry *v.* Meighen, 46 Minn. 548, 49 N. W. 323, 646.

Missouri.— Stark *v.* Hill, 31 Mo. App. 101.

Nebraska.— Streitz *v.* Hartman, 35 Nebr. 406, 53 N. W. 215; Winkler *v.* Roeder, 23 Nebr. 706, 37 N. W. 607, 8 Am. St. Rep. 155.

New Jersey.— Personette *v.* Johnson, 40 N. J. Eq. 532, 4 Atl. 778.

New York.— Jackson *v.* Mather, 2 Cow. 584.

North Carolina.— Gray *v.* Little, 127 N. C. 304, 37 S. E. 270; Baker *v.* Hobgood, 126 N. C. 149, 35 S. E. 253; Hancock *v.* Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679; Roberts *v.* Lewald, 108 N. C. 405, 12 S. E. 1028; Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; Kivett *v.* McKeithan, 90 N. C. 106; Clayton *v.* Johnston, 82 N. C. 423; Grant *v.* Reese, 82 N. C. 72.

North Dakota.— State *v.* Heinrich, (1902) 88 N. W. 734.

Oregon.— Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30; Albert *v.* Salem, 39 Oreg. 466, 65 Pac. 1068, 66 Pac. 233; Young *v.* State, 36 Oreg. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548.

South Dakota.— Kirby *v.* Western Union Tel. Co., 8 S. D. 54, 65 N. W. 482; Aldrich *v.* Wilmarth, 4 S. D. 38, 54 N. W. 1051.

Texas.— McLennan County *v.* Graves, 94 Tex. 635, 64 S. W. 861 [*reversing* 26 Tex. Civ. App. 49, 62 S. W. 122]; Blum *v.* Davis, 56 Tex. 423; Galveston Ins. Co. *v.* Long, 51 Tex. 89; Chambers *v.* Fisk, 22 Tex. 504; Whitley *v.* General Electric Co., 18 Tex. Civ.

tax the party responsible for so much of the matter as is unnecessary, the courts have in some cases divided the costs of the transcript or abstract equally between the parties;[42] and in others have required the party needlessly encumbering it to pay the whole expense thereof.[43]

(v) *Papers Used Twice.* Where papers are twice used,[44] as in the case of an additional abstract used both in the appellate court and in the supreme court,[45] or as in the case of stenographer's minutes procured in a former trial and also used in the preparation of a bill of exceptions after a second trial,[46] the expense

App. 674, 45 S. W. 959; Hamm *v.* J. Stone, etc., Live-Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427; Stephenson *v.* Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; International, etc., R. Co. *v.* Saul, 2 Tex. App. Civ. Cas. § 716.

Washington.— King County *v.* Collins, 1 Wash. Terr. 469.

West Virginia.— Spang *v.* Robinson, 24 W. Va. 327.

Wisconsin.—Willey *v.* Lewis, 113 Wis. 618, 88 N. W. 1021; Dehsoy *v.* Milwaukee Electric R., etc., Co., 110 Wis. 412, 85 N. W. 973; Baumgart *v.* Modern Woodmen of America, 85 Wis. 546, 55 N. W. 713; Hiner *v.* Fond du Lac, 71 Wis. 74, 36 N. W. 632; Baker *v.* Madison, 62 Wis. 137, 22 N. W. 583; Richards *v.* Waupun, 59 Wis. 45, 17 N. W. 975; Archer *v.* Meadows, 33 Wis. 166.

United States.— Edison Electric Light Co. *v.* Bernard, 91 Fed. 694; Nederland L. Ins. Co. *v.* Hall, 86 Fed. 741, 30 C. C. A. 363; Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73.

See 13 Cent. Dig. tit. "Costs," § 968.

A limitation of the doctrine stated has, however, been recognized in one case, where it appeared that the counsel agreed on "the case on appeal," it was held that the losing party should be taxed with the printing of the whole thereof, although it contained much unnecessary matter. Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 415, 26 S. E. 27. But see State *v.* Malster, 57 Md. 287, in which it was held that where much matter was unnecessarily incorporated in the record each party should pay one half of the cost.

"Transcripts should not be encumbered with matter which cannot have any possible bearing upon the points involved in the case. It not only entails additional labor upon the courts, but it is a burden which should not be laid upon the shoulders of the losing party, and when it is done, the cost of inserting such irrelevant matter will be taxed against the party responsible for it." Stephenson *v.* Chappell, 12 Tex. Civ. App. 296, 303, 33 S. W. 880, 36 S. W. 482.

42. *California.*— McDougal *v.* Downey, 45 Cal. 165; Sichel *v.* Carrillo, 42 Cal. 493.

District of Columbia.— Barbour *v.* Moore, 4 App. Cas. 535.

Maryland.— Snook *v.* Munday, 90 Md. 704, 45 Atl. 1005.

Missouri.—Rider *v.* Kirk, 82 Mo. App. 120.

United States.— Ball, etc., Co. *v.* Kraetzer, 150 U. S. 111, 14 S. Ct. 48, 37 L. ed. 1019; Union Pac. R. Co. *v.* Stewart, 95 U. S. 279, 24 L. ed. 431; Sarah *v.* Bellais, 52 Fed. 233, 3 C. C. A. 56.

See 13 Cent. Dig. tit. "Costs," § 971.

43. *California.*— Bullard *v.* His Creditors, 56 Cal. 600; People *v.* Miles, 56 Cal. 401.

Illinois.— Sanner *v.* Union Drainage Dist. No. 1, 175 Ill. 575, 51 N. E. 857; Kelly *v.* Kellogg, 79 Ill. 477; Milk *v.* Moore, 39 Ill. 584; Richardson *v.* Cassidy, 63 Ill. App. 482.

Iowa.— Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

Kentucky.— Murrell *v.* McCallister, 78 Ky. 73.

Michigan.— Sager *v.* Tupper, 38 Mich. 258.

New Jersey.— Vliet *v.* Wykoff, 42 N. J. Eq. 642, 9 Atl. 679.

Wisconsin.—Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778.

See 13 Cent. Dig. tit. "Costs," § 971.

Thus where it is impracticable to separate the material from the immaterial matter, the party furnishing the transcript will be required to pay the entire cost. Palmer *v.* Fleming, 5 App. Cas. (D. C.) 365.

44. Where two defendants appeal on the same set of papers and the judgment is affirmed as to one and reversed as to the other, but there is no proof that the successful defendant paid or incurred any part of the expense, and his appeal could have been just as effectively presented in a less expensive manner, no disbursements for printing or for stenographer's minutes will be taxed in his favor. Kane *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 366, 7 N. Y. Suppl. 653, 28 N. Y. St. 399. See also Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; Fitzgerald *v.* Hennepin County Catholic Bldg., etc., Assoc., 56 Minn. 424, 57 N. W. 1066, 59 N. W. 191.

45. An appellee who has been successful in both the appellate and supreme courts is not entitled in the latter court to a taxation of the cost of an additional abstract, which he has been compelled to file in that court, where such abstract is the same one as he printed and filed in the appellate court, where he was appellant and for which he recovered costs in that court. Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153. See also Potter *v.* Carpenter, 56 How. Pr. (N. Y.) 89; Louisville Steam Forge Co. *v.* Mehler, 65 S. W. 129, 23 Ky. L. Rep. 1338.

46. Where stenographer's minutes used by defendant in preparing a bill of exceptions had been procured and paid for by him on a former trial the expense should not be taxed

of procuring or preparing such papers will not ordinarily be taxed for costs for their subsequent use. It has been held, however, that the fact that appellant in making up his printed case used part of the printed case prepared in a former appeal, but for the printing of which he never recovered any costs, will not prevent his recovering for the printing of the whole case when used on the subsequent appeal.[47] Where the record is printed in the circuit court and paid for by a receiver, under order of the court, from funds in his hands, and such printed record is used on appeal in the supreme court without further expense to the parties, the expense of printing the record, it has been held, should be taxed in favor of the party recovering the costs.[48]

(VI) *Effect of Imperfect Preparation.* Ordinarily if abstracts, transcripts, or other papers to be used on appeal are not prepared in accordance with the statutes or rules of court regulating them no costs will be allowed therefor.[49]

b. Costs of Printing — (I) *In General.* Statutory authority, express or implied, is necessary to authorize the allowance of costs for the printing of papers to be used on appeal.[50] In some jurisdictions it is permissible to tax, as costs, the expense of printing original abstracts;[51] in others, the expense of printing the case on appeal;[52] and in another, the expense of printing paper-books.[53] So in some jurisdictions the expense of printing the record seems to be permissible.[54]

as costs against plaintiff. Roby Lumber Co. *v.* Gray, 73 Mich. 363, 42 N. W. 839.

47. Akerly *v.* Vilas, 23 Wis. 628.

48. Ferguson *v.* Dent, 46 Fed. 88.

49. *Arkansas.*— Central Coal, etc., Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

Illinois.— Marseilles Land, etc., Co. *v.* Aldrich, 86 Ill. 504; Illinois Cent. R. Co. *v.* Creighton, 53 Ill. App. 45.

Minnesota.— Cooper *v.* Stinson, 5 Minn. 522.

Mississippi.— Montgomery *v.* McGuire, 59 Miss. 193.

New York.— Fuchs *v.* William H. Sweeney Mfg. Co., 12 N. Y. Suppl. 870, 34 N. Y. St. 525. See also Matter of Loper, 32 Misc. (N. Y.) 534, 67 N. Y. Suppl. 339.

Wisconsin.— Dufur *v.* Paulson, 110 Wis. 281, 85 N. W. 965; Baker *v.* Madison, 62 Wis. 137, 22 N. W. 583. See also Crouse *v.* Chicago, etc., Co., 102 Wis. 196, 78 N. W. 446, 778.

See 13 Cent. Dig. tit. "Costs," § 966.

Illustrations.— Thus where an abstract is so imperfectly drawn as to give the court little aid in examining the record no costs will be allowed therefor. Marseilles Land, etc., Co. *v.* Aldrich, 86 Ill. 504. So if a statute provides for the allowance of costs for the printing of abstracts costs will not be allowed for an abstract prepared in any other way. Cooper *v.* Stinson, 5 Minn. 522. And where abstracts do not contain marginal references to the pages of the record, as required by rule, no costs therefor will be allowed. Illinois Cent. R. Co. *v.* Creighton, 53 Ill. App. 45.

Limitation of rule.— Notwithstanding a statute only provides for the allowance of costs for printed papers, costs will be allowed for typewritten papers, when the party on account of poverty is permitted, in accordance with another statute, to present them in this shape. Finley *v.* Cudd, 45 S. C. 87, 22 S. E. 753.

50. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 446, 63 Pac. 128, 83 Am. St. Rep. 573; Decamp *v.* Crane, 21 N. J. Eq. 544; Jennings *v.* The Perseverance, 3 Dall. (U. S.) 336, 1 L. ed. 625.

Thus the costs of printing of abstracts cannot be allowed unless there is statutory authority for it. Gage *v.* Rogers, 52 Mo. App. 331; Black *v.* Indianapolis, etc., Elevator Co., 8 N. D. 96, 76 N. W. 984.

51. See Doyle *v.* Teas, 5 Ill. 202.

52. Salter *v.* Utica, etc., R. Co., 86 N. Y. 401; Phipps *v.* Van Cott, 15 How. Pr. (N. Y.) 110; Wilcox *v.* Curtiss, 10 How. Pr. (N. Y.) 91.

Failure of court to direct allowance.— When a case is decided without any direction being given as to whether the successful party shall be allowed full costs of printing the "case," the court is considered to decide in favor of such allowance and the costs shall be so taxed. Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087.

53. Chambers *v.* Smith, 2 Chest. Co. Rep. (Pa.) 516.

54. Lee Injector Mfg. Co. *v.* Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760.

In the District of Columbia, where both parties to a decree appeal, it is the duty of the one first docketing his appeal to pay for the printing of the transcript of the record or so much thereof as he may deem necessary to be printed. Zeust *v.* Staffan, 13 App. Cas. (D. C.) 388.

In New Mexico the costs for printing the transcript of the record on appeal are improperly taxed as costs when the amount in controversy does not exceed one thousand dollars. Givens *v.* Veeder, 9 N. M. 405, 54 Pac. 879.

Even in jurisdictions where the expense of printing is allowable the cost of unnecessary printing will be taxed against the party responsible therefor.[55]

(II) *Briefs*—(A) *Right to Allowance For Printing.* In the absence of some positive statutory authority there can be no allowance made for the expense of printing a brief.[56] Nevertheless an allowance for printing briefs is held to be authorized by statute in some jurisdictions. Thus this expense has been held allowable under statutes authorizing an allowance for disbursements made for the printing of papers where rules of court make printed briefs necessary;[57] but if such printing is not thus made necessary, no allowance will be made therefor.[58] Nor can costs be taxed where the brief does not contain the matter required by the rules.[59]

(B) *Unnecessary or Irrelevant Matter.* No allowance will be made for printing unnecessary matter in briefs.[60] Scurrilous and abusive matter will be stricken out and no costs allowed therefor.[61] And it has been held in one case that no cost will be allowed for a brief containing disrespectful language in reference to the trial court.[62]

(C) *Unnecessary Briefs.* So costs will not be allowed for the printing of an unnecessary brief.[63]

55. Finch *v.* Strickland, 130 N. C. 44, 40 S. E. 841; State *v.* Heinrich, (N. D. 1902) 88 N. W. 734.

56. And in a number of jurisdictions where the question has been raised it has been held that such allowance is not permissible.

Louisiana.— Cline *v.* Crescent City R. Co., 42 La. Ann. 35, 7 So. 66.

Massachusetts.— Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray 415.

Missouri.— Wilson *v.* Ruthrauff, 87 Mo. App. 226.

South Carolina.— Moore *v.* Denson, 1 Speers 29.

United States.— *Ex p.* Hughes, 114 U. S. 548, 5 S. Ct. 1008, 29 L. ed. 289; Lee Injector Mfg. Co. *v.* Penherthy Injector Co., 109 Fed. 964, 48 C. C. A. 760; Kurscheedt Mfg. Co. *v.* Naday, 108 Fed. 918, 48 C. C. A. 140. *Contra,* Neff *v.* Pennoyer, 17 Fed. Cas. No. 1,084, 3 Sawy. 335.

See 13 Cent. Dig. tit. "Costs," § 978.

Considered as oral argument.— Some of the courts are inclined to place briefs on the same footings as oral argument of counsel. Cline *v.* Crescent City R. Co., 42 La. Ann. 35, 7 So. 66; Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415.

57. Roby Lumber Co. *v.* Gray, 73 Mich. 363, 42 N. W. 839; Hart *v.* Marshall, 4 Minn. 552; State *v.* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402; Ryan *v.* Maxey, 17 Mont. 164, 42 Pac. 760; Phipps *v.* Van Cott, 15 How. Pr. (N. Y.) 110. See also Emry *v.* Raleigh, etc., R. Co., 105 N. C. 44, 11 S. E. 162; McElwee *v.* Kennedy, 59 S. C. 335, 37 S. E. 920.

58. Mayer *v.* Friedman, 30 Misc. (N. Y.) 364, 62 N. Y. Suppl. 452, 30 N. Y. Civ. Proc. 221. See also Lewis *v.* Fox, 11 Abb. Pr. (N. Y.) 134; Ingwaldsen *v.* Skrivseth, 8 N. D. 544, 80 N. W. 475.

59. Brinkley Car Works Mfg. Co. *v.* Cooper, 70 Ark. 331, 67 S. W. 752; Baker *v.* Allen, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93; Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165; Milwaukee Cold Storage Co. *v.* Dexter, 99 Wis. 214, 74 N. W. 976, 40 L. R. A. 837.

60. *Iowa.*— York *v.* Clemens, 41 Iowa 95.

Minnesota.— Hart *v.* Marshall, 4 Minn. 552.

South Dakota.— Kirby *v.* Western Union Tel. Co., 8 S. D. 54, 65 N. W. 482.

Washington.— Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 561; Bellingham Bay Land Co. *v.* Dibble, 6 Wash. 165, 32 Pac. 1081; State *v.* Friedrich, 3 Wash. 418, 28 Pac. 748.

Wisconsin.— Cook *v.* Minneapolis, etc., R. Co., 98 Wis. 624, 74 N. W. 561; Bosworth *v.* Merchants' F. Ins. Co., 80 Wis. 393, 49 N. W. 750; Shove *v.* Shove, 79 Wis. 497, 48 N. W. 647; Mast *v.* Lockwood, 59 Wis. 48, 17 N. W. 543; Southmayd *v.* Watertown F. Ins. Co., 47 Wis. 517, 2 N. W. 1137.

See 13 Cent. Dig. tit. "Costs," § 980.

"The same economy should be exercised in the preparation of briefs that the opposite party is compelled to pay for, as in incurring any other costs, to the end that the unsuccessful litigants shall not be required to pay for their successful opponents unnecessary and wasteful expenditure." State *v.* Friedrich, 3 Wash. 418, 419, 28 Pac. 747.

61. Cassidy *v.* Palo Alto County, 58 Iowa 125, 12 N. W. 231.

62. Dufur *v.* Paulson, 110 Wis. 281, 85 N. W. 965.

63. Arts *v.* Rocksien, 98 Iowa 536, 67 N. W. 409; Shepard *v.* Hoit, 7 Hill (N. Y.) 198.

Additional brief — Failure to file in time. — Where a party files an additional brief after the time allowed, he should be required to pay the cost of printing, although it is not stricken from the files on motion of the appellant. Smith *v.* McFadden, 56 Iowa 482, 9 N. W. 350.

This rule, however, does not apply to the cost of printing respondent's brief on the merits, although the case was dismissed on

(D) *Amount Allowable.* In one jurisdiction where the expense of printing briefs is held taxable, as a disbursement, the rule is that only reasonable expense, not exceeding one dollar per page, should be allowed.[64] On appeal against several respondents appellant on prevailing against one cannot tax as a disbursement against him the cost of those parts of the brief which relate only to the controversy between appellant and the other respondents.[65]

(III) *Additional, Amended, or Supplemental Abstracts* — (A) *In General.* Where an additional abstract is necessary to properly present the questions involved because of omissions, inaccuracies, or mistakes in the abstracts furnished by the appellant, the cost of printing the additional abstract will be taxed against the appellant whether successful or not.[66] It has also been held that costs of an additional abstract will be taxed against appellant, although the facts contained therein are not material to the issues in the case, if they are material to other issues which would have been considered if the decision on the main issue had been different.[67]

(B) *Unnecessary Abstracts.* When an additional abstract by the appellee is unnecessary he must pay the costs of printing thereof.[68]

(C) *Unnecessary Matter in Abstract.* Where an additional abstract, furnished by appellee, contains unnecessary matter, costs for the expense of printing

respondent's motion and the merits not inquired into. Dalbkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871.

64. Marks *v.* Culmer, 7 Utah 163, 25 Pac. 743.

65. Menzel *v.* Tubbs, 51 Minn. 364, 53 N. W. 1017, 53 Minn. 653, 17 L. R. A. 815.

66. Leverenz *v.* Elder, 65 Ill. App. 80; Haggard *v.* Petterson, 107 Iowa 417, 78 N. W. 53; Moller *v.* Gottsch, 107 Iowa 237, 77 N. W. 859; Fox *v.* Gray, 105 Iowa 433, 75 N. W. 339; Fuller *v.* Griffith, 91 Iowa 632, 60 N. W. 247; Riley *v.* Iowa Falls, 83 Iowa 761, 50 N. W. 33; Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737; King *v.* Mahaska County, 75 Iowa 329, 39 N. W. 636; Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520; Sorenson *v.* Donahue, 12 S. D. 204, 80 N. W. 179; Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

Instances. The costs of an additional abstract filed by appellee to supply evidence omitted from appellant's abstract and correct mistakes therein are taxable against the appellant. Walden *v.* Lewis, 71 Ill. 453; Harrison *v.* Addison, 86 Iowa 693, 53 N. W. 334. So where the question whether the divisions of appellant's answer constituted distinct and inconsistent defenses was material on the appeal and the verification of the answer was not such as the statute requires in the case of inconsistent defenses, and such verification was omitted from appellant's abstract, it was held that it was material, and that the cost of supplying it by appellee in his abstract was properly taxable to the losing party. Comes *v.* Chicago, etc., R. Co., 78 Iowa 391, 43 N. W. 235.

67. Fitzgerald *v.* Nolan, 102 Iowa 283, 71 N. W. 224.

The amount allowed will be the usual price paid for printing papers of that character. See Swenson *v.* Christopherson, 10 S. D. 342, 72 S. W. 96.

The cost of printing appellee's additional abstract will, under the rules of the supreme court, be taxed to appellant, but not the cost of preparation, unless appellant intentionally omits material matter from his abstract. Schneitman *v.* Noble, 75 Iowa 120, 39 N. W. 244, 9 Am. St. Rep. 467.

68. Hawkeye Loan, etc., Co. *v.* Gordon, 115 Iowa 516, 88 N. W. 1081; Newberry *v.* Newberry, 114 Iowa 704, 87 N. W. 658; Hageman *v.* Harrison, (Iowa 1899) 79 N. W. 275; Benjamin *v.* Flitton, 106 Iowa 417, 76 N. W. 737; Lakeman *v.* Smith, (Iowa 1897) 73 N. W. 347; McWhirter *v.* Crawford, (Iowa 1897) 72 N. W. 505; Boggs *v.* Douglass, 89 Iowa 150, 56 N. W. 412; Citizens' Bank *v.* Barnes, 70 Iowa 412, 30 N. W. 857; Brown *v.* Byam, 59 Iowa 52, 12 N. W. 770; Proctor *v.* Reif, 52 Iowa 592, 3 N. W. 618; Johnson *v.* McGrew, 42 Iowa 555; Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070; Dodge *v.* O'Dell, 106 Wis. 296, 82 N. W. 135. And see McLane *v.* Copper, 5 App. Cas. (D. C.) 276.

Where additional abstract denies that appellant's abstract contained all the evidence, and the appellant brings up the transcript of the record, such denial does not make the transcript necessary, and the appellee on that ground cannot be charged with the costs of the transcript. Brooks *v.* Chicago, etc., R. Co., 73 Iowa 179, 34 N. W. 805.

Where additional abstract is amended and no sufficient cause is shown for failure to incorporate in the additional abstract when prepared at first all the matter set out in the amendment costs will not be allowed for the amendment. So held in Bowman *v.* Western Fur Mfg. Co., 96 Iowa 188, 64 N. W. 775. But *compare* Haggard *v.* Petterson, 107 Iowa 417, 78 N. W. 53, holding that the fact that a supplement to appellee's amended abstract was not filed until after appellant's argument was made is no ground for taxing its costs to appellee, providing it is not superfluous and the matter therein contained is fairly material.

such matter are not taxable against the appellant,[69] and in one state at least the appellee will be chargeable with the costs of printing the whole abstract, although some of the matter therein contained is material and proper.[70]

(D) *Effect of Laches in Serving Abstracts.* Where an additional abstract is not filed within the time required by rule no costs therefor will be allowed.[71]

(E) *Amount Recoverable.* Amount recoverable for printing should be the usual rate recoverable for such work,[72] unless it appears that more has been paid and a greater liability incurred.[73] If, however, the rate for copies of cases on appeal is fixed by statute no greater amount can be allowed.[74] Where the appellant has paid a certain sum to the clerk for the transcript he cannot recover any larger amount than that paid.[75] If more copies of a case on appeal are printed than are required by rule or statute, the appellant will only be entitled to his disbursements for the expense of printing the requisite number of copies.[76]

c. Attorney's Fees — (I) *In General.* Attorney's fees on appeal are not allowable unless authorized by statute[77] or stipulation between the parties.[78] In some jurisdictions, however, the statutes are held to authorize allowance of attorney's fees on appeal.[79] Where the amount of the attorney's fee is fixed by stat-

69. Commercial State Bank *v.* Hayes, (Iowa 1900) 82 N. W. 454; Deering *v.* Beatty, 107 Iowa 325, 77 N. W. 325; McDermott *v.* Abney, 106 Iowa 749, 77 N. W. 505; Fillmore *v.* Hintz, 90 Iowa 758, 57 N. W. 882; Lindsay *v.* Carpenter, 90 Iowa 529, 58 N. W. 900; Neeley *v.* Roberts, 12 S. D. 225, 80 N. W. 1078; Swenson *v.* Christoferson, 10 S. D. 342, 73 N. W. 96; Aldrich *v.* Wilmarth, 4 S. D. 38, 54 N. W. 1051; Dalbkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871.

Instances.— Thus upon affirmance of appeal appellee cannot tax costs for printing in his abstract matter contained also in appellant's abstract. Lindsay *v.* Carpenter, 90 Iowa 529, 58 N. W. 900; Dalbkermeyer *v.* Scholtes, 3 S. D. 183, 52 N. W. 871. So when appellant's additional abstract contains matters not necessary to a determination of the questions argued, the costs, except as to that portion containing necessary matter, will be taxed to him. McDermott *v.* Abney, 106 Iowa 749, 77 N. W. 505.

70. Harnish *v.* Hicks, 71 Ill. App. 551.

71. Gutherless *v.* Ripley, 98 Iowa 290, 67 N. W. 109; Cruver *v.* Chicago, etc., R. Co., 62 Iowa 460, 17 N. W. 661.

72. Dickinson *v.* Rogers, 44 Mich. 632, 7 N. W. 910; Dickinson *v.* Seaver, 44 Mich. 624, 7 N. W. 182. See also Marks *v.* Culmer, 7 Utah 163, 25 Pac. 743.

73. Dickinson *v.* Seaver, 44 Mich. 624, 7 N. W. 182.

74. Stratton *v.* Upton, 36 N. H. 581.

75. Tingley *v.* Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055, where it was further held that this was so, although the clerk's charges were reduced by appellant's performance of part of the work himself.

76. Byrnes *v.* Labagh, 12 N. Y. Civ. Proc. 417.

77. Kirkpatrick *v.* Dakota Cent. R. Co., 4 Dak. 481, 33 N. W. 103; Wilson *v.* Ruthrauff, 87 Mo. App. 226.

78. See Case *v.* Dewey, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911, where it was held that a counsel fee, as per agreement, will not be allowed in taxing costs, if the brief of the prevailing party, although printed, was neither served in advance on the opposing counsel nor given to the court when the case was reached.

79. Curtis *v.* Williams, 27 Ill. App. 497; Galbraith *v.* McCollum, 98 Mich. 219, 57 N. W. 115; Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60. See also Pollard *v.* Wheelock, 20 Vt. 270, holding that when a case is heard in the supreme court but not decided, the prevailing party in that court is entitled to tax an attorney's fees for such hearing. To the same effect see Walker *v.* Sargeant, 13 Vt. 352.

Statutes held to authorize or not to authorize allowance.— In the federal courts a statute (U. S. Rev. Stat. (1878) § 824 [U. S. Comp. Stat. (1901) p. 632]) authorizing the allowance of a docket-fee of twenty dollars on a trial before a jury in all civil or criminal cases or on a final hearing in equity or admiralty authorizes the allowance of a docket-fee of twenty dollars to the prevailing party in an appeal to the circuit court of appeals. Shillito Co. *v.* McClung, 66 Fed. 22, 13 C. C. A. 284; Kansas City, etc., R. Co. *v.* McDonald, 60 Fed. 522, 9 C. C. A. 129. But the contrary conclusion has been reached in one of the territorial courts. Marks *v.* Culmer, 7 Utah 163, 25 Pac. 743. In another jurisdiction a statute provides that in the appellate court costs shall be recovered by the party substantially prevailing, and that in the court of appeals the court shall tax the costs of the prevailing party at thirty dollars, which in practice is treated as an attorney's fee. It was held in taxing costs on overruling a motion to dismiss an appeal that the court should include the thirty dollars. Workman *v.* Doran, 34 W. Va. 604, 12 S. E. 770. On the other hand a statute authorizing an appellate court to adjudge as costs in favor of the successful party a reasonable sum for expenses of abstract does

ute the court cannot enlarge it.[80] If several causes are tried together and only one brief presented by the prevailing party only one attorney's fee will be allowed.[81]

(II) *Fees For Arguments.* In the absence of some special statutory provision no fees for argument of an appeal are allowable, but special provision is made therefor in some jurisdictions.[82] While of course nothing can be allowed where there is no argument of any character,[83] an oral argument is not necessary.[84] So it has been held that a provision allowing costs for argument also includes reargument,[85] especially where a reargument is ordered upon the application of the losing party.[86] And where a party takes separate appeals from the judgment against him and also from an order denying a motion for new trial, the respondent is entitled to tax the fee for argument, on affirmance of the order with costs, although he has taxed the same amount on the prior affirmance of the appeal from the judgment.[87] In one jurisdiction the statute extends to appeals from interlocutory orders;[88] and it has been held to apply to appeals in proceedings for contempt.[89] Where two defendants appeal and the judgment is affirmed as to one, but reversed as to the other, the successful defendant is entitled to his costs for the argument on appeal.[90] The court has no discretion to change the amount of the allowance as fixed by statute.[91] Where by stipulation it is agreed that the decision on one appeal and several similar cases brought by different plaintiffs against the same defendant, and appealed by the defendant, should stand as the decision in all, and the appeal in one of the cases is argued, the appellant in whose favor the decision was rendered is entitled to costs of argument in all the cases.[92]

d. Stenographer's Fees. Under the statutes and rules of court of some jurisdictions stenographer's fees for a copy of minutes or a transcript of the evidence are taxable as costs in the case if necessary for the purpose of an appeal;[93] but

not include attorney's fees (Wilson *v.* Ruthrauff, 87 Mo. App. 226), and a statute providing that an attorney shall be entitled to three dollars for a suit prosecuted to judgment does not authorize an attorney's fee as part of the costs on appeal from an award of arbitrators, since an award when appealed from is not a judgment but an undetermined cause pending in court to be tried (Drake *v.* Parker, 1 Pa. Co. Ct. 675).

80. Sedgwick *v.* Dixon, 18 Nebr. 545, 26 N. W. 247.

81. Hannah, etc., Mercantile Co. *v.* Mosser, 105 Mich. 18, 62 N. W. 1120. But *compare* Morgan *v.* Currie, 3 A. K. Marsh. (Ky.) 293, holding that where a statute in chancery embraces various defendants deriving title under distinct claims, on a dismissal of the appeal, an attorney's fee should be taxed for each class of claims.

Where two appeals are taken from a judgment, and respondents file only one brief, and the judgment is reversed as to one appellant and affirmed as to the other, the cost of respondent's brief may properly be taxed to the appellant, against whom the judgment was affirmed. Commercial Nat. Bank *v.* Johnson, 17 Wash. 264, 49 Pac. 488.

82. Cusick *v.* Adams, 47 Hun (N. Y.) 455; Van Gelder *v.* Van Gelder, 13 Hun (N. Y.) 118; Kame *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 366, 7 N. Y. Suppl. 653, 28 N. Y. St. 399; Kirby *v.* Western Union Tel. Co., 8 S. D. 54, 65 N. W. 482.

83. Kanouse *v.* Martin, 2 Sandf. (N. Y.) 739; Searle *v.* Lead, 10 S. D. 405, 73 N. W. 913.

84. The statutes are considered broad enough to comprise a submission of the reasons on which counsel relies in a printed form as well as by spoken address. Malcolm *v.* Hamill, 65 How. Pr. (N. Y.) 506.

85. Roberson *v.* Rochester Folding Box Co., 68 N. Y. App. Div. 528, 73 N. Y. Suppl. 898; Kirby *v.* Western Union Tel. Co., 8 S. D. 54, 65 N. W. 482.

86. Sweet *v.* Chapman, 53 How. Pr. (N. Y.) 253.

87. Keeler *v.* Barretts, etc., Dyeing Establishment, 12 N. Y. Civ. Proc. 121, 18 Abb. N. Cas. (N. Y.) 459.

88. Cusick *v.* Adams, 47 Hun (N. Y.) 455.

89. People *v.* Sturtevant, 3 Duer (N. Y.) 616.

90. Kame *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 366, 7 N. Y. Suppl. 653, 28 N. Y. St. 399.

91. Roberson *v.* Rochester Folding Box Co., 68 N. Y. App. Div. 528, 73 N. Y. Suppl. 898.

92. Hauselt *v.* Godfrey, 11 Daly (N. Y.) 276, 3 N. Y. Civ. Proc. 116.

93. *Dakota.*— Canton First Nat. Bank *v.* North, 6 Dak. 136, 41 N. W. 736, 50 N. W. 621.

Indiana.— Wright *v.* Wilson, 98 Ind. 112.

Iowa.— Palmer *v.* Palmer, 97 Iowa 454, 66 N. W. 734.

not otherwise.[94] Statutory authority for such allowance, either express or implied, is necessary.[95] So it has been held that in the absence of statutory authority fees paid a stenographer for taking dictation of briefs for the supreme court and typewriting the same are not taxable to the defeated party;[96] and that stenographer's fees in preparing affidavits in the appellate court cannot be allowed in an appeal of costs.[97] Stenographer's fees for preparing a petition for rehearing[98] or in preparing the case on appeal[99] will not be allowed where the clerical work might have been done by counsel.

e. Motion Costs — (I) *In General.* Where on reversal the supreme court directed that respondent should have costs of motion denied, but failed to fix the amount in taxing the costs, it is proper to award the customary allowance.[1] Where an appeal taken to the court of appeals is heard on a motion as authorized by statute, costs allowable are "general costs" and not "motion costs" only.[2]

(II) *Motion to Dismiss Appeal.* Ordinarily, on dismissal of an appeal or writ of error, the appellee or defendant in error is entitled to the costs of the motion;[3] and if the motion is overruled the court may award costs of motion against the moving party.[4] Costs of a successful motion by appellant to dismiss his appeal will not be allowed him, although appellee had refused appellant's offer to dismiss the appeal without costs to either party, the appeal having been dis-

Michigan.— Turner *v.* Muskegon Mach., etc., Co., 97 Mich. 634, 57 N. W. 192; French *v.* Fitch, 68 Mich. 115, 35 N. W. 707; Maynard *v.* Vinton, 59 Mich. 155, 27 N. W. 2.

New York.— Park *v.* New York Cent., etc., R. Co., 57 N. Y. App. Div. 569, 68 N. Y. Suppl. 460, 1145; Ridabock *v.* Metropolitan El. R. Co., 8 N. Y. App. Div. 309, 40 N. Y. Suppl. 938; Stevens *v.* New York El. R. Co., 58 N. Y. Super. Ct. 569, 9 N. Y. Suppl. 707, 31 N. Y. St. 404, 18 N. Y. Civ. Proc. 350; Varnum *v.* Wheeler, 9 N. Y. Civ. Proc. 421; Sebley *v.* Nichols, 32 How. Pr. 182.

Oregon.— Young *v.* Hughes, 39 Oreg. 586, 65 Pac. 987, 66 Pac. 272.

South Dakota.— Novotny *v.* Danforth, 9 S. D. 412, 69 N. W. 585; Ellis *v.* Wait, 4 S. D. 504, 57 N. W. 232.

Wyoming.— Rock Springs Nat. Bank *v.* Luman, (1896) 47 Pac. 73.

See 13 Cent. Dig. tit. "Costs," § 974.

Illustrations.— Thus where a copy of the evidence is necessary to enable the party procuring it to make a case on appeal (Varnum *v.* Wheeler, 9 N. Y. Civ. Proc. 421), or to make amendments of a proposed case (Park *v.* New York Cent., etc., R. Co., 57 N. Y. App. Div. 569, 68 N. Y. Suppl. 460, 1145; Stevens *v.* New York El. R. Co., 58 N. Y. Super. Ct. 569, 9 N. Y. Suppl. 707, 31 N. Y. St. 404; Sebley *v.* Nichols, 32 How. Pr. (N. Y.) 182), such expenses will be taxable as a legitimate disbursement.

In Minnesota the expense of procuring a copy of the reporter's minutes of the trial is not a disbursement in the supreme court but should be taxed in the trial court. Matter of Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

94. Gallagher *v.* Baird, 60 N. Y. App. Div. 29, 69 N. Y. Suppl. 676 [*reversing* 33 Misc. (N. Y.) 354, 68 N. Y. Suppl. 659].

95. Baldwin *v.* Boulware, 82 Mo. App. 321; Brown *v.* Winehill, 4 Wash. 98, 29 Pac. 927.

96. State *v* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402.

97. Sonerson *v.* Donohoe, 12 S. D. 204, 80 N. W. 179.

98. Young *v.* Hughes, 39 Oreg. 586, 65 Pac. 987, 66 Pac. 272.

99. Ferguson *v.* Byers, 40 Oreg. 468, 67 Pac. 1115, 69 Pac. 32.

1. Burnell *v.* Coles, 26 Misc. (N. Y.) 378, 56 N. Y. Suppl. 208.

2. Hall *v.* Emmons, 40 How. Pr. (N. Y.) 137.

3. Place *v.* Hayward, 8 N. Y. Civ. Proc. 352; *Ex p.* Davis, 5 Cow. (N. Y.) 33; Bradstreet Co. *v.* Higgins, 114 U. S. 262, 5 S. Ct. 880, 29 L. ed. 176; Patton *v.* Cilley, 50 Fed. 337, 1 C. C. A. 522. But where a motion to dismiss in the supreme court on the ground that appellant obtained satisfaction of his judgment, on execution, before suing out a writ of error, is made by appellee after the reversal of the judgment, he will be taxed with costs of the supreme court. Bradford *v.* Bush, 10 Ala. 274.

In New York the amount designated by statute as "motion costs" is the amount to be awarded to appellee on dismissal of an appeal on his motion. Place *v.* Hayward, 8 N. Y. Civ. Proc. 352.

4. Workman *v.* Doran, 34 W. Va. 604, 12 S. E. 770.

Although a motion to dismiss for want of a return is denied because the return was filed before the calling of the motion, the appellant will be adjudged to pay the costs of the motion, if he neglected to file it within the proper time, without sufficient excuse (Woodmansie *v.* Hollon, 16 Mich. 379; Babcock *v.* Twist, 16 Mich. 282); but where the party taking the appeal, on learning of the irregularity of the return, immediately takes such steps as he could to have the mistake rectified, the appeal cannot be dismissed on that ground and no costs will be awarded against him (Covell *v.* Mosely, 15 Mich. 514).

missed on the ground that the order from which it was taken was non-appealable, and the question of the appealability of same order being in doubt.[5]

f. Costs Before Argument. In New York statutes provide for the allowance of a designated amount as costs before argument in certain classes of appeals therein enumerated.[6]

g. Term Fees. On appeal to the New York court of appeals but one term fee can be charged for each calendar year that the cause is on the calendar, exclusive of the term at which the case is argued or disposed of;[7] and no term fee is allowable in any case before the appeal is properly on the calendar.[8] Under the Michigan statutes it has been held that the discretion of the circuit court on appeal from justices of the peace and court commissioners to allow costs, including term fees, cannot be overcome by a rule of court not to allow them in certain cases.[9]

h. Trial Fees. Where the statute authorizing a trial fee on appeal fixes the amount no greater amount than that so fixed can be allowed.[10]

i. Extra Allowance. The New York statute relating to extra allowance of costs is held to authorize such allowance only in a court of original jurisdiction. It gives the same by way of indemnity for the expense of the trial in such court.[11]

5. Porter *v.* Jones, 7 How. Pr. (N. Y.) 192.

6. N. Y. Code Civ. Proc. § 3251, subds. 4, 5. These provisions are held to authorize the allowance on an appeal from an order overruling a demurrer (Wright *v.* Flemming, 18 Hun (N. Y.) 360; Van Gelder *v.* Van Gelder, 13 Hun (N. Y.) 118), from an order granting or refusing a new trial (Cusick *v.* Adams, 47 Hun (N. Y.) 455; Jackett *v.* Judd, 18 How. Pr. (N. Y.) 385), or upon an application for judgment on a special verdict (Walsh *v.* Bowery Sav. Bank, 9 N. Y. Civ. Proc. 177). So a dismissal of an appeal from the supreme court with costs entitles the party to the sum fixed by statute as costs before argument (Peterson *v.* Dickel, 8 Abb. Pr. (N. Y.) 259); and where two defendants appeal and the judgment is confirmed as to one and reversed as to the other, the successful defendant is entitled to costs before argument (Kame *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 366, 7 N. Y. Suppl. 653, 28 N. Y. St. 399). The statute has also been held to apply to an appeal from a judgment or order of the supreme court in a proceeding against defendant as for a contempt. People *v.* Sturtevant, 3 Duer (N. Y.) 616.

7. Degener *v.* Underwood, 30 N. Y. Suppl. 399, 62 N. Y. St. 121, 31 Abb. N. Cas. (N. Y.) 479; Powell *v.* New York Cent., etc., R. Co., 3 N. Y. Suppl. 763, 14 N. Y. Civ. Proc. 125; Palmer *v.* De Witt, 42 How. Pr. (N. Y.) 466. *Contra*, Macy *v.* Nelson, 49 How. Pr. (N. Y.) 204.

Appeal to county court.— N. Y. Code Civ. Proc. § 3251, subd. 3, relating to costs, which provides that ten dollars shall be allowed "for each term of . . . a county court, not exceeding five, at which the cause is necessarily on the calendar," does not apply to a cause in the county court on appeal from a justice of the peace, where a new trial is not demanded in the appellate court. In such case costs are regulated by section 3067, which provides that on such appeals there shall be awarded "to the appellant, upon reversal, thirty dollars." Horning *v.* Smith County Ct., 11 N. Y. Suppl. 790, 19 N. Y. Civ. Proc. 142.

In Illinois it has been held that where a continuance is granted in the supreme court to enable the appellee to obtain an amendment of the record in the court below he will be required to pay the costs of that term. Shipley *v.* Spencer, 40 Ill. 105.

In Kansas it has been held that where defendant at the first term after taking his appeal to the district court obtained a continuance over another term he was properly taxed with the costs of the term. Hodgin *v.* Barton, 23 Kan. 740.

In Vermont it has been held that where plaintiffs appeal to the supreme court but do not appear defendants are entitled to the full term fee in the supreme court, as of an original entry, the proceedings in such court being in the nature of a writ of error. North Bank *v.* Wood, 11 Vt. 194.

8. Reformed Protestant Dutch Church *v.* Brown, 24 How. Pr. (N. Y.) 89.

9. Voight Brewery Co. *v.* Hosmer, 108 Mich. 356, 66 N. W. 217.

10. Shaver *v.* Eldred, 86 Hun (N. Y.) 51, 33 N. Y. Suppl. 158, 66 N. Y. St. 783.

11. People *v.* New York Cent. R. Co., 29 N. Y. 418; Wolfe *v.* Van Nostrand, 2 N. Y. 570; Hays *v.* Gourley, 3 Thomps. & C. (N. Y.) 115; Martin *v.* McCormick, 3 Sandf. (N. Y.) 755, Code Rep. N. S. (N. Y.) 214; Monnet *v.* Merz, 24 N. Y. Suppl. 485, 54 N. Y. St. 322, 30 Abb. N. Cas. (N. Y.) 281; Van Rensselaer *v.* Kidd, 5 How. Pr. (N. Y.) 242, 3 Code Rep. (N. Y.) 224.

As to extra allowance generally see *supra*, XX, X.

Exceptions to rule.— There is an exception to the rule stated in the text in the case of an appeal from the surrogate's court. It is held that such an appeal is for all purposes of costs an action at issue on a question of law, and its determination constitutes a trial within the meaning of the section authorizing an extra allowance. Dupuy *v.* Wurts, 1 Hun

j. Number of Bills of Costs Allowable. In New York where an appeal is taken from a judgment and also an order denying a new trial, the successful party is only entitled to one bill of costs.[12] In Wisconsin, where separate appeals are taken from several orders when all might have been embraced in one appeal, appellant, if successful, will be entitled to costs of one appeal only.[13] In Connecticut, where two appeals are taken, one of which is unnecessary, no costs on appeal will be allowed, although the cause be reversed on one of the appeals.[14]

k. Other Items. Money paid to a surety company for becoming surety on an appeal-bond is not taxable as costs.[15] Nor is the expense of expressing briefs to

(N. Y.) 119, 47 How. Pr. (N. Y.) 225; Seguine *v.* Seguine, 3 Abb. Pr. N. S. (N. Y.) 442 [*affirmed* in 53 How. Pr. (N. Y.) 48]. The additional allowance given to public officers by statute is not limited to costs in the court of original jurisdiction, but extends to those on appeal. Burkle *v.* Luce, 1 N. Y. 239; Porter *v.* Cobb, 25 Hun (N. Y.) 184; Wood *v.* Board of Excise Com'rs, 9 Misc. (N. Y.) 507, 30 N. Y. Suppl. 344, 61 N. Y. St. 80.

On reversal by the United States supreme court.— Where a decision of the supreme court sustained at general term and by the court of appeals is reversed by the supreme court of the United States and remanded to the subordinate court for further proceedings not inconsistent with the judgment, the mandate being silent as to costs, the subordinate court has power to grant costs and an additional allowance in the same manner as if the record had never been removed from its files. Stevens *v.* Boston Cent. Nat. Bank, 24 Misc. (N. Y.) 344, 53 N. Y. Suppl. 193.

12. Syms *v.* New York, 105 N. Y. 153, 11 N. E. 369; Van Alen *v.* American Nat. Bank, 10 Abb. Pr. N. S. (N. Y.) 331; Bullard *v.* Pearsall, 46 How. Pr. (N. Y.) 383 [*affirmed* in 46 How. Pr. (N. Y.) 530]; West *v.* Lynch, 1 N. Y. City Ct. 174. *Contra*, Lennox *v.* Eldred, 65 Barb. (N. Y.) 526; Matthews *v.* Wood, 10 Abb. Pr. N. S. (N. Y.) 328, 33 N. Y. Super. Ct. 335; Ahern *v.* Standard L. Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 69.

Limitation of rule.— It has been held that N. Y. Code Civ. Proc. § 3239, subd. 2, which denies to either party costs of an appeal from an order refusing a new trial, where an appeal is also taken from a judgment, relates only to new trials on the minutes and does not apply to a motion made on the ground of newly discovered evidence. In this case it was said that an appeal from an order denying a motion for new trial based on newly discovered evidence is an application independent of the trial itself and does not depend for its success upon the accuracy or inaccuracy of the judgment, while an appeal based upon an order denying a new trial on the minutes is embraced in the same notice as the appeal from the judgment and printed in the same book, under which circumstances there is consequently but one bill of expense. Streep *v.* McLoughlin, 36 Misc. (N. Y.) 165, 72 N. Y. Suppl. 1061.

Where appeals are taken from a judgment, from an independent order made after judgment denying a motion to vacate it, and from an independent order striking out a part of the answer, respondent, if successful, is entitled to the costs of three appeals. Brassington *v.* Rohrs, 3 Misc. (N. Y.) 262, 22 N. Y. Suppl. 1053, 52 N. Y. St. 252. And see Stanton *v.* King, 76 N. Y. 585.

Where defendants jointly sued to recover a joint judgment from which an appeal is taken and the judgment is affirmed they will be deemed to have jointly succeeded on appeal, although appearing by different attorneys after the appeal was taken, and cannot recover separate bills of costs. Wilbur *v.* Wiltsey, 13 How. Pr. (N. Y.) 506. And see Fischer *v.* Langbein, 31 Hun (N. Y.) 272, holding that where two defendants answered separately and were allowed separate bills of costs, and on appeal the same counsel argued the case of each and judgment was affirmed "with costs of said appeal to the defendants" they could tax but one bill of costs.

Where several defendants who appeared by different attorneys and set up substantially the same defense succeeded in the action, and separate bills of costs were taxed, and the judgment was affirmed on appeal on one argument, they could only recover one bill of costs on appeal. De Lamater *v.* Carman, 2 Daly (N. Y.) 182.

Where there is but one set of papers, one argument, and one judgment there is but one appeal, and the successful party is entitled to but one bill of costs, notwithstanding the fact that the several appellants appeared by separate attorneys. There is in such case but one appeal. Everson *v.* Gehrman, 2 Abb. Pr. (N. Y.) 413.

13. Harrison Mach. Works *v.* Hosig, 73 Wis. 184, 41 N. W. 70.

So where several appeals are based on a single notice costs should be taxed as on a single appeal. State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942.

Where on appeal from two orders appellant is sustained as to one, whereby consideration of the other becomes unnecessary, he will be entitled to but one bill of costs. Ellis *v.* Barron County, 111 Wis. 576, 87 N. W. 552.

14. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

15. Somerville *v.* Wabash R. Co. 111 Mich. 51, 69 N. W. 90; Bick *v.* Reese, 52 Hun (N. Y.) 125, 5 N. Y. Suppl. 121, 23 N. Y. St. 404, 17 N. Y. Civ. Proc. 110; Lee Injector Mfg. Co. *v.* Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760. See also Osborn *v.* Newberg Orchard Assoc., 36 Oreg. 444, 59 Pac. 711, 60 Pac. 994.

the supreme court.[16] The expense of unnecessary notice of appeal should be taxed to appellant.[17] No appearance fee can be allowed without statutory authority.[18]

9. Increased Costs. By express statutory provision in some states double costs are allowed in cases under certain circumstances.[19] Statutes of this character have no application to cases coming up by appeal.[20] The statute of Massachusetts also allows double costs on a frivolous appeal,[21] or on frivolous exceptions;[22] and the question whether the exceptions are frivolous is for the court upon the bill of exceptions without other evidence or argument by either party.[23] The proper method of doubling costs is to tax the single costs and multiply them by two.[24]

10. Damages Awarded on Appeal or Error — a. In General. A decree for damages against an appellant cannot be rendered in any case in the absence of statutory authority therefor.[25] In a number of states, however, statutes have been enacted which authorize the award of damages in certain cases against the appellant when the judgment appealed from is affirmed;[26] in others damages may be awarded where the judgment is either affirmed or the appeal dismissed;[27] and in others where the judgment is affirmed or the appellant fails to prosecute his appeal.[28]

b. Damages Awarded For Frivolous Appeal — (i) *In General.* So in many jurisdictions statutes or rules of court (most of which are still in force) have been enacted authorizing the imposition of damages or a penalty upon a party appealing or suing out a writ of error in case such appeal or writ of error is frivolous or sued out for the purpose of delay. These statutes have been strictly enforced in a very large number of cases.[29] Nevertheless to put them into operation it

16. State *v.* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402, also holding that since by statute, the clerk of the court to which a writ of certiorari is directed must return the transcript required by the writ to the court out of which the writ issued the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense. *Compare* State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573, holding that where it was necessary to send the ballots by express in order to produce them in court, the expense is properly taxed as costs.

17. Keller *v.* Boatman, 49 Ind. 101; Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

18. State *v.* Second Judicial Dist. Co., 25 Mont. 1, 63 Pac. 402.

19. In **Massachusetts** where the judgment is affirmed on writ of error the plaintiff in error is entitled to double costs. Butler *v.* Fessenden, 12 Cush. (Mass.) 78.

Under a statute of New Jersey providing that if any person shall prosecute a writ of error to reverse a judgment given after verdict in any court of record, and the judgment shall be affirmed, he shall pay double costs, the plaintiff in error who is unsuccessful is not liable to double costs when the trial was before the judge alone without a jury (Shields *v.* Lozear, 34 N. J. L. 530), nor where error is brought upon a judgment by confession since by the express terms of the statutes double costs are liable only after verdict (Hastings *v.* Mayberry, 1 N. J. L. 35). It applies, however, on affirmance of a verdict rendered on exceptions to a referee's report. Paulison *v.* Halsey, 38 N. J. L. 488.

20. Delaney *v.* Towns, 1 Allen (Mass.) 407. And see St. Martin *v.* Desroyer, 1 Minn. 156, 61 Am. Dec. 494, where the same holding was made under a similar statute since repealed.

21. Howland *v.* Rooke, 158 Mass. 590, 33 N. E. 652.

22. Connor *v.* Harlan, 130 Mass. 265; Ames *v.* Stevens, 120 Mass. 218.

23. Blackington *v.* Johnson, 126 Mass. 21.

24. Shields *v.* Lozear, 34 N. J. L. 530; Mairs *v.* Sparks, 4 N. J. L. 369.

25. Redd *v.* Thompson, 56 Miss. 230; State *v.* Fifth Dist. Ct., 18 Nev. 286, 3 Pac. 417. And see Cady *v.* Scaniker, 1 Ida. 168, where the court refused to impose damages in the absence of a rule of court on the subject. *Compare* Rohig *v.* Pearson, 15 Colo. 127, 24 Pac. 1083; Bolles *v.* Bird, 12 Colo. App. 53, 54 Pac. 403, where the question is not decided, but which contain expressions from which a contrary doctrine might be inferred.

26. Ala. Civ. Code (1896), § 478; Thornton Stat. Ind. § 681; Va. Code, § 3486; Clements *v.* Crawford, 1 Ala. 531; Heart *v.* Judson, Minor (Ala.) 135; Richards *v.* Comstock, 1 Conn. 150; Eno *v.* Frisbie, 5 Day (Conn.) 122. See also Jeter *v.* Langhorne, 5 Gratt. (Va.) 193; Skipwith *v.* Clinch, 3 Call (Va.) 86.

27. Whitehead *v.* Boorom, 7 Bush (Ky.) 399; Connelly *v.* Magowan, 2 T. B. Mon. (Ky.) 152; Louisville, etc., R. Co. *v.* Schmidt, 47 S. W. 583, 104 Ky. L. Rep. 599; Bullitt's Code Ky. § 764.

28. Miss. Ann. Code (1892), § 4360.

29. *Arkansas.*— Jackson *v.* Giles, 26 Ark. 656; Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 656; Lester *v.* Hoskins, 26 Ark. 63.

must clearly appear that the delay was frivolous or taken merely for the purpose

California.— McFadden *v.* Dietz, 115 Cal. 697, 47 Pac. 777; Koelling *v.* Rutz, 108 Cal. 664, 41 Pac. 781; Duncan *v.* Grady, 99 Cal. 552, 34 Pac. 112; Lemon *v.* Rucker, 80 Cal. 609, 22 Pac. 471; Magruder *v.* Melvin, 12 Cal. 559; Russell *v.* Williams, 2 Cal. 158; Buckley *v.* Stebbins, 2 Cal. 149.

Florida.— Redmond *v.* Donaldson, 35 Fla. 167, 17 So. 70.

Georgia.— Southern R. Co. *v.* Lasseter, 115 Ga. 689, 42 S. E. 41; Braswell *v.* Brown, 112 Ga. 740, 38 S. E. 51; North Rome *v.* Hall, 111 Ga. 833, 36 S. E. 219; Southern R. Co. *v.* Hooper, 110 Ga. 779, 36 S. E. 232; Dilda *v.* Smith, 110 Ga. 308, 35 S. E. 122; Blue *v.* McCorkle, 110 Ga. 275, 34 S. E. 847; Gilbert *v.* British-American Mortg. Co., 110 Ga. 274, 34 S. E. 845; Buchanan *v.* De Loach Mill Mfg. Co., 105 Ga. 840, 32 S. E. 121; Purity Ice Works *v.* Rountree, 104 Ga. 676, 30 S. E. 885; Craton *v.* Hackney, 91 Ga. 192, 17 S. E. 124; Steadman *v.* Simmons, 39 Ga. 591.

Illinois.— Wallen *v.* Moore, 187 Ill. 388, 58 N. E. 1095 [*affirming* 88 Ill. App. 287]; Simms *v.* Klein, 1 Ill. 371; Town *v.* Alexander, 85 Ill. App. 512.

Louisiana.— Daniel *v.* Harrison, 23 La. Ann. 473; Pendleton *v.* Eaton, 23 La. Ann. 435; Bayly *v.* McKnight, 23 La. Ann. 423; Mithoff *v.* Weiss, 20 La. Ann. 376; Lamothe *v.* Lamarque, 17 La. Ann. 77; Menard *v.* Cox, 7 La. 167; Arnold *v.* Dean, 3 Mart. N. S. 248; Clark *v.* Parham, 3 Mart. 405.

Massachusetts.—Demelman *v.* Bristoll, 179 Mass. 163, 60 N. E. 478; Phillips *v.* Granger, 134 Mass. 475; Connor *v.* Harlan, 130 Mass. 265; Burbank *v.* Woodward, 124 Mass. 357.

Michigan.— Foran *v.* Allen, 67 Mich. 188, 34 N. W. 548; Fisher *v.* Dowling, 66 Mich. 370, 33 N. W. 521; Port Huron, etc., R. Co. *v.* Callanan, 61 Mich. 22, 34 N. W. 678; Schmemann *v.* Rothfuss, 46 Mich. 453, 9 N. W. 489; Goodenow *v.* Curtis, 33 Mich. 505; Meyerfield *v.* Stettheimer, 20 Mich. 418.

Minnesota.— West *v.* Eureka Imp. Co., 40 Minn. 394, 42 N. W. 87.

Missouri.— Banister *v.* Henn, 45 Mo. 567; Darby *v.* Jorndt, 85 Mo. App. 274; August Gast Bank Note, etc., Co. *v.* Fennimore Assoc. No. 5, 84 Mo. App. 228; Taylor *v.* Scott, 26 Mo. App. 249.

Montana.— Burns *v.* Paulsen, 16 Mont. 333, 40 Pac. 789; Helena Second Nat. Bank *v.* Kleinschmidt, 7 Mont. 146, 14 Pac. 667; Ramsey *v.* Cortland Cattle Co., 6 Mont. 498, 13 Pac. 247; Clark *v.* Nichols, 3 Mont. 372.

Nevada.— Kercheval *v.* McKenney, 4 Nev. 294; Lehane *v.* Keyes, 2 Nev. 361.

New Mexico.— Alliance Assur. Co. *v.* Bartlett, 9 N. M. 554, 58 Pac. 351; Shafer *v.* New Mexico Second Nat. Bank, 4 N. M. 292, 13 Pac. 179; Dold *v.* Robertson, 3 N. M. 313, 9 Pac. 302.

New York.— Warner *v.* Lessler. 33 N. Y. 296.

North Dakota.— Phœnix Assur. Co. *v.* McDermont, 7 N. D. 172, 73 N. W. 91.

Ohio.— Brady *v.* Holderman, 19 Ohio 26.

Pennsylvania.— Smead *v.* Stuart, 194 Pa. St. 578, 45 Atl. 343; Bromley *v.* Lippincott, 184 Pa. St. 462, 39 Atl. 220, 41 Wkly. Notes Cas. 420; Martin *v.* Rider, 181 Pa. St. 265, 37 Atl. 403; Pennypacker *v.* Dear, 166 Pa. St. 284, 31 Atl. 89; Bachman *v.* Gross, 150 Pa. St. 516, 24 Atl. 712; O'Donnell *v.* Broad, 149 Pa. St. 24, 27 Atl. 305; Brannan *v.* Bond, 18 Pa. Super. Ct. 535; Radigan's Estate, 13 Pa. Super. Ct. 131.

South Dakota.— Himebaugh *v.* Crouch, 3 S. D. 409, 53 N. W. 862.

Texas.— Fitzgerald *v.* Compton, 28 Tex. Civ. App. 202, 67 S. W. 131; Fife *v.* Netherlands F. Ins. Co., (Civ. App. 1901) 61 S. W. 160; Limberger *v.* Engle, (Civ. App. 1898) 47 S. W. 1025; Lanier *v.* Schwartz, (Civ. App. 1898) 46 S. W. 380; Bozman *v.* Masterson, (Civ. App. 1898) 45 S. W. 758; Langholz *v.* C. Z. Kroh Co., (Civ. App. 1895) 29 S. W. 831; International, etc., R. Co. *v.* Neira, (Civ. App. 1894) 28 S. W. 95.

Wisconsin.— Perkins *v.* Jacobs, 99 Wis. 409, 75 N. W. 76; Sweet *v.* Davis, 90 Wis. 409, 63 N. W. 1047; Northwestern Mut. L. Ins. Co. *v.* Irish, 38 Wis. 361; Ramsay *v.* Davis, 20 Wis. 31; Slocum *v.* Carlton, 2 Pinn. 203, 1 Chandl. 165.

Wyoming.— Gramm *v.* Sterling, 8 Wyo. 527, 59 Pac. 156; Syndicate Imp. Co. *v.* Bradley, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532; Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

United States.— Nelson *v.* Flint, 166 U. S. 276, 17 S. Ct. 576, 41 L. ed. 1002; Whitney *v.* Cook, 131 U. S. Appendix cxcvii, 26 L. ed. 560; Gibbs *v.* Diekma, 131 U. S. Appendix clxxxvi, 26 L. ed. 176; Phelps *v.* Edgerton, 131 U. S. Appendix lxxi, 16 L. ed. 749; Amory *v.* Amory, 91 U. S. 356, 23 L. ed. 436.

See 13 Cent. Dig. tit. "Costs," § 983.

Practice in Illinois court of appeals.— The Illinois statute authorizing damages where an appeal is prosecuted only for delay is limited in its terms to the supreme court and was enacted before the creation of the appellate court. But under a statute providing that the process, practice, and pleadings in the appellate court shall be the same as is prescribed or which may hereafter be prescribed for the supreme court so far as applicable the appellate court has jurisdiction to award damages on an appeal taken for delay. Wallen *v.* Cummings, 187 Ill. 451, 58 N. E. 1095 [*affirming* 88 Ill. App. 45]; Town *v.* Alexander, 185 Ill. 254, 56 N. E. 1111 [*affirming* 85 Ill. App. 512]; Baker *v.* Prebis, 185 Ill. 191, 56 N. E. 1110 [*affirming* 86 Ill. App. 334; Hough *v.* Wells, 86 Ill. App. 186].

Advice of counsel of appellant to appeal will not protect appellant from liability to damages for a frivolous appeal. Cauthen *v.* Barnesville Sav. Bank, 68 Ga. 287.

Effect of payment of judgment.— Where appellants fail to prosecute their appeal, manifestly taken for delay, a ten per cent

of delay.[30] So damages will not be awarded as for delay where the record does not show that any judgment has been rendered by the trial court;[31] where counsel for the appellee has filed no answer;[32] nor where the judgment appealed from is without evidence to support it.[33]

(II) *When Appeal Considered Frivolous*— (A) *In General.* An appeal is frivolous when it is entirely without merit and entered merely to delay the creditor in the collection of his debt;[34] or when it is taken from an interlocutory order which is not appealable.[35] So it will be considered frivolous where it appears that counsel for appellant urged the successful party to take less than the amount of the judgment and stated that delay was all he wanted.[36] And the fact that a defendant, after pleading, absented himself from the trial, will be held to be corroborated by circumstances indicating that his appeal was frivolous.[37]

(B) *When Error Is of Trivial Character.* Where the error complained of is of a trivial character, or such as might have been easily corrected without resort to an appellate court, damages will be allowed, as for a frivolous appeal.[38]

(C) *Absence of Grounds to Anticipate Reversal.* So where there is an entire absence of any ground to anticipate a reversal damages will be allowed.[39]

penalty may be added, although they suggest that they have paid the judgment since the transcript was filed. Anderson *v.* Goodwin, (Tex. 1889) 13 S. W. 31.

30. *Florida.*— Dzialynski *v.* Jacksonville Bank, 23 Fla. 346, 2 So. 696.

Georgia.— Georgia R. Co. *v.* Beatie, 68 Ga. 293; Gunnels *v.* Deavours, 57 Ga. 177.

Illinois.— Arentz *v.* Reilly, 67 Ill. App. 307.

Michigan.— Hopkins Mfg. Co. *v.* Reuggles, 51 Mich. 474, 16 N. W. 862; Story *v.* Bird, 8 Mich. 316.

Missouri.—Jaco *v.* Southern Missouri, etc., R. Co., 94 Mo. App. 567, 68 S. W. 379.

Oregon.— Hawkins *v.* Jones, 21 Oreg. 502, 28 Pac. 548; Nelson *v.* Oregon R., etc., Co., 13 Oreg. 141, 9 Pac. 321.

Washington.— Seattle, etc., R. Co. *v.* Joergenson, 3 Wash. 622, 29 Pac. 88.

Wisconsin.— Ossowski *v.* Wiesner, 101 Wis. 238, 77 N. W. 184; Tourville *v.* Nemadji Boom Co., 70 Wis. 81, 35 N. W. 330; Northwestern Mut. L. Ins. Co. *v.* Irish, 38 Wis. 361; Rice *v.* Garnhart, 34 Wis. 470; Morse *v.* Buffalo F. & Mar. Ins. Co., 30 Wis. 534, 11 Am. Rep. 587.

See 13 Cent. Dig. tit. "Costs," § 983.

31. Dozier *v.* Williams, 57 Ga. 600.

32. Verdes *v.* Noel, 17 La. Ann. 67.

33. Sabine Land & Imp. Co. *v.* Perry, (Tex. Civ. App. 1899) 54 S. W. 327.

34. Clark *v.* Fee, 86 Ga. 9, 12 S. E. 181.

35. Richardson *v.* Richardson, 193 Pa. St. 279, 44 Atl. 445.

36. Koelling *v.* Rutz, 108 Cal. 664, 41 Pac. 781.

37. Goepper *v.* Lusse, 30 La. Ann. 392.

38. *California.*— Rountree *v.* I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16.

Kentucky.— Gentry *v.* Hutchcraft, 7 T. B. Mon. 241, 18 Am. Dec. 172; Speed *v.* Hann, 1 T. B. Mon. 16, 5 Am. Dec. 78.

Massachusetts.— Boswell *v.* Cutter, 117 Mass. 69.

Michigan.— Wagar *v.* Bowley, 109 Mich. 388, 67 N. W. 512; Snow *v.* McCracken, 107 Mich. 49, 64 N. W. 866; Waterman *v.* Toms, 7 Mich. 78.

Missouri.— Harrison *v.* St. Louis, etc., R. Co., 58 Mo. App. 463.

Texas.— Wortham *v.* Harrison, 8 Tex. 141.

United States.— Hall *v.* Jordon, 19 Wall. 271, 22 L. ed. 47; Jenkins *v.* Banning, 23 How. 455, 16 L. ed. 580.

See 13 Cent. Dig. tit. "Costs," § 991.

But see Simons *v.* Burrows, 6 La. Ann. 358, holding that if there is error in the judgment the court will not award damages, even though they are so small that the court refuses to disturb the judgment.

Instances.— Thus an appeal from a judgment upon a trivial error in the computation of interest is frivolous. Rountree *v.* I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16; Wortham *v.* Harrison, 8 Tex. 141. And where the error assigned from a judgment taken by confession on a note consisted of irregularities in entering up the judgment, it was held a proper cause under the statute for awarding damages for appealing. Waterman *v.* Toms, 7 Mich. 78.

39. *California.*— Grogan *v.* Nolan, (1894) 36 Pac. 397. See also Dunphy *v.* Heinmann, (1888) 17 Pac. 5.

Georgia.— Collins *v.* Mobile Fruit, etc., Co., 108 Ga. 752, 32 S. E. 667; Hall *v.* Atlanta Consol. St. R. Co., 103 Ga. 570, 29 S. E. 931.

Illinois.— Calumet Electric St. R. Co. *v.* Lewis, 168 Ill. 249, 48 N. E. 249.

Louisiana.— Fisk *v.* Callaghan, 10 La. Ann. 722.

Massachusetts.— Gallagher *v.* Galletly, 128 Mass. 367; Bouve *v.* Cottle, (1887) 13 N. E. 728.

Michigan.— Heath *v.* Waters, 40 Mich. 457.

Minnesota.— Burr *v.* Crichton, 51 Minn. 343, 53 N. W. 645.

New York.— Cohen *v.* New York, 128 N. Y. 594, 27 N. E. 1074, 38 N. Y. St. 846 [*affirming* 58 Hun 609, 12 N. Y. Suppl. 270, 35 N. Y. St. 555].

(D) *Where Elementary or Well-Settled Questions Involved.* Damages will be awarded for a frivolous appeal when the questions raised have been theretofore decided or are of an elementary character.[40]

(III) *WHERE APPEAL NOT CONSIDERED FRIVOLOUS*—(A) *In General.* Damages will not be allowed as for a frivolous appeal where there is palpable error in the judgment.[41]

(B) *Where Question Involved Debatable.* So where the questions involved are fairly debatable, or the appellant may have reason to doubt the correctness of the judgment, no damages will be allowed.[42]

North Dakota.— Sigmund *v.* Minot Bank, 4 N. D. 164, 59 N. W. 966.

Pennsylvania.—Ankermiller *v.* O'Byrne, 2 Mona. 766.

Texas.— Patterson *v.* Bryan, Dall. 529; Missouri Pac. R. Co. *v.* Nicholson, 2 Tex. App. Civ. Cas. § 168.

See 13 Cent. Dig. tit. "Costs," § 983.

But *compare* Taylor *v.* Ketchum, 57 Wis. 41, 14 N. W. 873, holding that although appellee's case is clear and supported by testimony overwhelmingly preponderating, the statutory penalty given when an appeal is taken in bad faith or for delay will not be assessed where appellant's counsel seems to have had confidence in his case.

Instances, in general.— Where the error relied on to reverse a judgment was that the trial was by reference and that the reference was not authorized, and the record showed that the reference was duly made on appellant's own motion, judgment was affirmed with ten per cent damages. Bates *v.* Vischer, 2 Cal. 355. So an appeal prosecuted on the ground that the plaintiff and the defendant testifies to an opposite state of things has been held frivolous. Utz *v.* Hoerr, 20 Mo. App. 36. In an action for the conversion of a horse exceptions to the evidence will be overruled with double costs, where plaintiff proved that defendant obtained possession of plaintiff's horse by process against a third party with intention of fraudulently depriving plaintiff thereof, afterward taking it out of the commonwealth. Seavey *v.* Potter, 121 Mass. 297.

Absence of defense.— Damages will be allowed on an appeal by defendant, where it is obvious that he has no defense. Lovejoy *v.* Middlesex R. Co., 128 Mass. 480; Cassidy *v.* Hyland, 120 Mass. 221; Maywood *v.* Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431; Owens *v.* McBride, 32 Mo. 221; Yeoman *v.* Mueller, 33 Mo. App. 343; Gregory Consol. Mon. Co. *v.* Starr, 141 U. S. 222, 11 S. Ct. 914, 35 L. ed. 715 [*affirming* 6 Mont. 485, 491, 13 Pac. 195, 198].

Failure to make defense.— Defendant appealed from a judgment by default on notes amounting to fifteen hundred dollars. In his brief he claimed to have a good defense, but gave no reason why the defense was not made in the trial court, and more than the usual delays occurred before the judgment was made final. It was held a proper case for damages. Ewing *v.* Roote, 21 La. Ann. 683. But *compare* Gilmore *v.* Wright, 20 Ga. 198, holding that the failure on the part of the appellant to submit evidence to the jury in support of some legal defense is not of itself conclusive to show his appeal frivolous.

Where evidence sustains verdict.— Where an appeal is taken from a verdict which is fully sustained by the evidence damages may be awarded as for an appeal taken for delay. Mercier *v.* Mercier, 46 Ga. 643; Howland *v.* Rooke, 158 Mass. 590, 33 N. E. 652. See also Boyd *v.* Brisban, 11 Wend. (N. Y.) 529. *Compare* Hullen *v.* Connolly, 4 La. 18 (holding that although the case presents but a question of fact which was correctly decided, damages will not necessarily be given as for a frivolous appeal); Austin *v.* Moore, 16 La. Ann. 218, holding that in cases involving questions of fact and in which the evidence does not fully concord no damages as for a frivolous appeal will be allowed.

40. *California.*— Foote *v.* Hayes, (1895) 39 Pac. 601; Pinkham *v.* Wemple, 12 Cal. 449.

Georgia.— Brown *v.* Brown, 51 Ga. 554.

Illinois.— West Chicago St. R. Co. *v.* Nash, 166 Ill. 528, 46 N. E. 1082.

Missouri.— President Min., etc., Co. *v.* Coquard, 40 Mo. App. 40.

New York.— Jackson *v.* Rochester, 124 N. Y. 624, 26 N. E. 326, 35 N. Y. St. 73.

Texas.—Alamo F. Ins. Co. *v.* Brooks, (Civ. App. 1895) 32 S. W. 714; Casey *v.* Chaytor, 5 Tex. Civ. App. 385, 23 S. W. 1114.

Contra, Barbarin *v.* Daniels, 7 La. 479.

See 13 Cent. Dig. tit. "Costs," § 989.

Where prior decision not reported.— Damages should not be allowed on the ground that the questions raised had been previously adjudicated, where the case in which the question was raised had never been officially reported and where the appellant's counsel had no knowledge of it. Doyle *v.* Wurdeman, 35 Mo. App. 330.

41. Mechanics', etc., Ins. Co. *v.* Lozano, 39 La. Ann. 321, 1 So. 608. See also Wolf *v.* Philadelphia Traction Co., 181 Pa. St. 399, 37 Atl. 555. And see Kinsella *v.* Cahn, 185 Ill. 208, 56 N. E. 1119, where it was held that this is so, even where the court is compelled to deny relief because objection was not made in the court below. But *compare* Walker *v.* Burbridge, 17 Tex. 650.

42. *Georgia.*—Waxelbaum *v.* Limberger, 78 Ga. 43, 3 S. E. 257.

Illinois.— Chicago City R. Co. *v.* Morse, 197 Ill. 327, 64 N. E. 304 [*affirming* 98 Ill. App. 662].

(IV) *Determination Whether Appeal Frivolous.* Where damages are authorized in case of a frivolous appeal to a court of last resort, it is for the court to determine whether the appeal is frivolous;[43] and only the court or courts authorized by statute to impose damages have the power to do so.[44] The court should be satisfied that the appeal was frivolous before allowing damages.[45]

c. Effect of Failure to Prosecute. Where the appellant fails to prosecute the appeal the appellee may bring up the record, and on motion he will be allowed damages as for a frivolous appeal.[46]

d. Effect of Dismissal of Appeal. Whether or not damages will be awarded on the dismissal of appeal depends on the wording of the statute. In some jurisdictions it has been held that damages may be awarded on the dismissal of an appeal for want of prosecution under a statute providing for allowance of damages, when it shall appear that the appeal was taken for delay.[47] Under other

Louisiana.— Davis *v.* Jonti, 14 La. 95; Henderson *v.* Bryan, 12 La. 10; Noirette *v.* Diggs, 9 La. 172; Mayor *v.* Davis, 4 Mart. 533.

Massachusetts.— Tufts *v.* Waxman, 181 Mass. 120, 63 N. E. 132.

Michigan.— *In re* Middlings Purifier Co., 86 Mich. 149, 48 N. W. 864.

Missouri.— Chilton *v.* St. Joseph, 143 Mo. 192, 44 S. W. 766; Fulkerson *v.* Murdock, 123 Mo. 292, 27 S. W. 555; Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073; Tobin *v.* Missouri Pac. R. Co., (Sup. 1891) 18 S. W. 996; Bobb *v.* Pennsylvania Ins. Co., 32 Mo. App. 256.

New York.— Tisdale *v.* Delaware, etc., Canal Co., 116 N. Y. 416, 22 N. E. 700, 26 N. Y. St. 857.

Pennsylvania.— Thirteenth Ward Bldg., etc., Assoc. *v.* Coyle, 19 Pa. Super. Ct. 238; Jacoby *v.* German American Ins. Co., 10 Pa. Super. Ct. 193; Jacoby *v.* Providence Washington Ins. Co., 10 Pa. Super. Ct. 185, 44 Wkly. Notes Cas. 224.

South Dakota.— Hall *v.* Fisher, 14 S. D. 321, 85 N. W. 591.

Wisconsin.— McCormick *v.* Ketchum, 51 Wis. 323, 8 N. W. 208.

See 13 Cent. Dig. tit. "Costs," § 988.

Limitation of rule.— It has been said in one decision that where the appellant has been grossly negligent in the prosecution of his appeal and has caused considerable delay thereby, he should be mulcted in damages, even though there is some merit in his claim of error. State *v.* Brooke, 29 Mo. App. 286.

43. Blackington *v.* Johnson, 126 Mass. 21.

44. Ingram *v.* Greenwade, 12 Ky. L. Rep. 942.

45. Storey *v.* Bird, 8 Mich. 316; Egyptian Levee Co. *v.* Jester, 42 Mo. App. 322.

Appeal to intermediate court.— Where as in some jurisdictions statutes provide for allowance of damages for a frivolous appeal to an intermediate court and clothe the jury with power to determine whether or not the appeal is frivolous they must in arriving at their determination consider all the evidence in the case (Garrison *v.* Wilcoxson, 11 Ga. 154), and they should not award damages unless satisfied that the appeal was frivolous (Hartridge *v.* McDaniel, 20 Ga. 398).

Rule under Alabama statute.— Under a statute providing that on appeal from a justice's court, fifteen per cent damages may be allowed if the appeal was taken for delay, the court may leave to the jury the decision of the question whether the appeal was taken for delay merely. Crump *v.* Battles, 49 Ala. 223. But see Shorter *v.* Hightower, 48 Ala. 526, which seems to hold the opposite doctrine.

46. *Georgia.*— Fields *v.* Alley, 65 Ga. 637; Avera *v.* Vason, 42 Ga. 233.

Louisiana.— Lusse *v.* Mische, 22 La. Ann. 256; Piper *v.* Pickens, 21 La. Ann. 386; Hohl *v.* Meyer, 7 La. Ann. 18.

Missouri.—St. Joseph Mfg. Co. *v.* Pershing, 50 Mo. 427; Rice *v.* McElhannon, 48 Mo. 224.

New Mexico.— Dold *v.* Robertson, 3 N. M. 313, 9 Pac. 302.

North Dakota.— Phœnix Assur. Co. *v.* McDermont, 7 N. D. 172, 73 N. W. 91.

Pennsylvania.— Serfass *v.* Stevenson, 8 Pa. Super. Ct. 519.

Texas.— Ernst *v.* Anheuser-Busch Brewing Assoc., (Civ. App. 1894) 26 S. W. 457.

Washington.— Chehalis Flume, etc., Co. *v.* Reinhart, 3 Wash. 428, 28 Pac. 256.

See 13 Cent. Dig. tit. "Costs," § 985.

But see Hawkins *v.* Jones, 21 Oreg. 502, 28 Pac. 548 (where the contrary doctrine seems to be maintained); Coffin *v.* Hanner, 1 Oreg. 236 (where it was held that where the plaintiff fails to prosecute his writ of error, but the evidence is such as to leave it doubtful whether the verdict was right, and it is uncertain whether the writ of error was not taken in good faith, a discretionary penalty will not be imposed on motion for affirmance with penalty).

47. Duncan *v.* Grady, 99 Cal. 552, 34 Pac. 112; Pacheco *v.* Bemal, 2 Cal. 150; Buckley *v.* Stebbins, 2 Cal. 149; Long *v.* Herrick, 28 Fla. 755, 10 So. 17; Williams *v.* La Penotiere, 25 Fla. 473, 6 So. 167; Stafford *v.* Anders, 10 Fla. 211; Richards *v.* Nall, 8 Fla. 369. But see Vaughn *v.* Werley, 62 Cal. 181, which seems to hold the contrary doctrine.

In Illinois the same holding has been made under a statute authorizing the award of damages on dismissal as well as affirmance of an appeal. Woolley *v.* Lyon, 115 Ill. 296, 6 N. E. 30; Anonymous, 11 Ill. 487.

statutes authorizing the award of damages on affirmance of a judgment a right to damages on dismissal of an appeal for want of prosecution has been denied.[48] In another jurisdiction it was held, under a statute authorizing an award of damages, if the court was satisfied by the record that the appeal was taken for delay only, that on dismissal for want of prosecution damages will not be allowed in the absence of some special showing that the appellee suffered injury.[49] Where an appeal is dismissed for want of jurisdiction it has been held that damages are allowable under a statute authorizing the allowance of damages on dismissal of an appeal,[50] and denied under a statute authorizing the award of damages where the judgment is confirmed[51] or affirmed.[52] Even though a statute authorizes an award of damages on the dismissal of an appeal damages will not be allowed on the dismissal of an appeal from a void judgment.[53] So it has been held under a statute authorizing the allowance of damages only where the judgment is confirmed that damages will not be allowed when a dismissal is insisted on or has been claimed by appellee.[54]

e. Effect of Failure to File Brief, Assign Errors, Etc. Any one or more of the following acts of omission on the part of the appellant, it has been held, will authorize an award of damages: Failure to file a brief or argument;[55] failure to assign error;[56] failure to file bill of exceptions;[57] or failure to file paper-books.[58] Under these circumstances the appeal will ordinarily be considered frivolous.[59]

f. Who Is Liable For and Who Is Entitled to Damages. If a judgment is rendered against several persons damages will be awarded only against the one who appeals where the appeal is dismissed or the judgment is affirmed.[60] Where the

48. Collins *v.* Turner, 9 Ga. 112; Estey *v.* Post, 75 Mo. 411; Treadway *v.* Parker, 37 Mo. App. 453.

In Wisconsin it was held without mentioning the provisions of the statute that the court would not award damages, although the appeal was not prosecuted where it is satisfied that the appeal was taken in good faith. Loucheine *v.* Strouse, 46 Wis. 487, 50 N. W. 595. See also Northwestern Mut. L. Ins. Co. *v.* Irish, 38 Wis. 361.

49. Cady *v.* Case, 10 Wash. 140, 38 Pac. 880. See also Wheeler *v.* Commercial Invest. Co., 22 Wash. 546, 61 Pac. 715. In this state it was held that a motion for damages on the ground that an appeal was taken for delay only will not be granted by an appellate court, where there is no transcript before it by which to determine whether or not the appeal was taken for such purpose. Walter *v.* Maresch, 3 Wash. 624, 29 Pac. 205.

50. American Acc. Co. *v.* Slaughter, 40 S. W. 675, 101 Ky. L. Rep. 269.

51. McLeod *v.* Simonton, 39 La. Ann. 853, 2 So. 608; Munday *v.* Lyons, 35 La. Ann. 990; Thomas *v.* Guilbeau, 35 La. Ann. 927.

52. Garneau *v.* Omaha Printing Co., 42 Nebr. 847, 61 N. W. 100.

53. Fuller Watchman's Electrical Detector Co. *v.* Louis, 50 Ill. App. 428.

54. Allen *v.* Arnouil, 18 La. 437.

When an appeal appears clearly as having been taken for delay, appellant will not be allowed to have it dismissed so as to deprive appellee of damages, although there may be no statement of facts, bill of exceptions, etc. In such case it is held that the judgment below will be presumed correct and affirmed with damages. Stephens *v.* Smith, 12 Mart. (La.) 333; Shannon *v.* Barnwell, 4 Mart. (La.) 35; Clark *v.* Parham, 3 Mart. (La.) 405.

55. *California.*—Meyers *v.* Trujillo, (1892) 30 Pac. 579; De Pena *v.* Trujillo, (1892) 30 Pac. 560.

Indiana.— Kramer *v.* Warth, 66 Ind. 548.

Montana.— McGuire *v.* Sweeney, 17 Mont. 541, 43 Pac. 924.

Texas.— Goode *v.* Carrell, (Civ. App. 1896) 34 S. W. 350.

Washington.— Chehalis Flume, etc., Co. *v.* Reinhart, 3 Wash. 428, 28 Pac. 256.

Wisconsin.— Kelly *v.* West Wisconsin R. Co., 37 Wis. 357.

See 13 Cent. Dig. tit. "Costs," § 986.

See also Kilbourne *v.* St. Louis State Sav. Inst., 22 How. (U. S.) 503, 16 L. ed. 370. *Compare* Emhoff *v.* McMann, (Cal. 1890) 23 Pac. 302, holding that no damages should be allowed where it appears that failure to file a brief was due to appellant's ignorance, that his cause was on the calendar, and the record shows that the appeal was not frivolous.

56. Uter *v.* Dumonteil, 22 La. Ann. 197; Kennedy *v.* Hynes, 8 La. Ann. 439; Trier *v.* Holmes, 15 La. 435; Warner *v.* Lessler, 33 N. Y. 296; Chambers *v.* Hodges, 3 Tex. 517; Goode *v.* Carrell, (Tex. Civ. App. 1896) 34 S. W. 350; Sutton *v.* Bancroft, 23 How. (U. S.) 320, 16 L. ed. 454.

57. Meyers *v.* Trujillo, (Cal. 1892) 30 Pac. 579; De Pena *v.* Trujillo, (Cal. 1892) 30 Pac. 560; Uter *v.* Dumonteil, 22 La. Ann. 197; Chambers *v.* Hodges, 3 Tex. 517.

58. O'Donnell *v.* Broad, 149 Pa. St. 24, 27 Atl. 305.

59. See cases cited *supra*, notes 55–58.

60. McMillan *v.* Vischer, 14 Cal. 232; McClelland *v.* Com., Hard. (Ky.) 290.

appellee is not the real party in interest damages will not be awarded him on the affirmance of the judgment.[61]

g. Necessity For Money Judgment. Most of the statutes providing for the allowance of damages expressly require a money judgment, and of course under these statutes no damages can be allowed where the judgment is of any other character.[62] These statutes do not authorize the allowance of damages on appeals from judgments in claim cases,[63] from judgments of condemnation in trials of the right of property,[64] from a judgment in a proceeding to charge the wife's statutory separate estate with the payment of her husband's debts incurred for household supplies,[65] or from a decree cutting off appellant's equity of redemption in realty no personal judgment being rendered against him;[66] but where a person who has a judgment for the recovery of specific personal property may by virtue of statute take execution for the value of the property recovered if he elects to do so, such judgment will be considered a money judgment on the affirmance of which damages may be allowed.[67]

h. Necessity For Delay of Execution. Under some statutes damages will be awarded irrespective of whether or not the execution has been stayed;[68] but under most statutes it is believed a stay is prerequisite to the right to damages;[69] and in one jurisdiction it has been held that damages will not be allowed when the appellee has not suffered from delay.[70]

i. Necessity For and Requisites of Demand For Damages. In the absence of any claim made or motion presented for damages on account of an appeal, which

61. Adams *v.* Dupuy, 2 La. 259. See also Hendrick *v.* Posey, 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, 20 Ky. L. Rep. 359, holding that the fund, "the collection of which was superseded, being payable to appellee as master commissioner and he having no personal or pecuniary interest therein, he is not entitled to damages on the affirmance of the judgment.

62. *Alabama.*— Wright *v.* Preston, 55 Ala. 570; Hooks *v.* Montgomery Branch Bank, 18 Ala. 451.

Arkansas.— Block *v.* Valley Mut. Ins. Co., 52 Ark. 340, 12 S. W. 702; Stephens *v.* Shannon, 44 Ark. 178.

Georgia.— Adams *v.* Carnes, 111 Ga. 505, 36 S. E. 597; Street *v.* Fudge, 110 Ga. 277, 34 S. E. 845; Collins Park, etc., R. Co. *v.* Short Electric R. Co., 95 Ga. 570, 20 S. E. 495; Brantley *v.* Buck, 62 Ga. 172.

Illinois.— Hamburger *v.* Glover, 157 Ill. 521, 42 N. E. 46.

Iowa.— Branscomb *v.* Gillian, 55 Iowa 235, 7 N. W. 523; Berryhill *v.* Keilmeyer, 33 Iowa 20.

Kentucky.— Rowan *v.* Pope, 14 B. Mon. 102; Graham *v.* Swigert, 12 B. Mon. 522; Worth *v.* Smith, 5 B. Mon. 504; Shuck *v.* McElroy, 3 S. W. 906, 8 Ky. L. Rep. 866.

Louisiana.— Arrowsmith *v.* Rappelge, 19 La. Ann. 327; Long *v.* Robinson, 13 La. Ann. 465.

See 13 Cent. Dig. tit. "Costs," § 992.

Practice in Mississippi.— See Clark *v.* German Security Bank, 61 Miss. 614; Johnson *v.* Devens, 60 Miss. 200.

63. Adams *v.* Carnes, 111 Ga. 505, 36 S. E. 597; Brantley *v.* Buck, 62 Ga. 172.

64. Hooks *v.* Montgomery Branch Bank, 18 Ala. 451.

65. Wright *v.* Preston, 55 Ala. 570.

66. Berryhill *v.* Keilmeyer, 33 Iowa 20.

67. Rennebaume *v.* Atkinson, 52 S. W. 828, 21 Ky. L. Rep. 587.

68. Tigner *v.* McGehee, 60 Miss. 242.

69. *Indiana.*— Indianapolis, etc., R. Co. *v.* Ferguson, 42 Ind. 243.

Kentucky.— Phœnix Ins. Co. *v.* McKernan, 104 Ky. 224, 46 S. W. 698, 20 Ky. L. Rep. 337; Reed *v.* Lander, 5 Bush 598.

Louisiana.— Berges *v.* Daverede, (1898) 23 So. 891; Chaffe *v.* Carroll, 35 La. Ann. 115; Crofts *v.* Moynihan, 26 La. Ann. 727.

Missouri.— Haley *v.* Scott, 18 Mo. 202.

Texas.— Benson *v.* Phipps, (Civ. App. 1894) 28 S. W. 359.

See 13 Cent. Dig. tit. "Costs," § 994.

In Kentucky the appellee is not entitled to damages on the affirmance of a superseded judgment where there was at the time of the affirmance no copy of the supersedeas in the record. Monarch *v.* Farmers', etc., Bank, 106 Ky. 206, 50 S. W. 33, 20 Ky. L. Rep. 1788.

70. Capdevielle *v.* Erwin, 13 La. Ann. 286; McCabe *v.* Gentes, 18 La. 31. Thus damages will not be awarded if appellant by taking his appeal to the wrong court hasten the time within which appellee may have execution. Draper *v.* Terrell, 11 La. 81.

In New York it has been held that where on appeal a new trial is awarded defendant for error in rejecting evidence offered by him, and the judgment for plaintiff is affirmed on a second appeal, and no delay has been caused by defendant in bringing the cause to a final determination, damages by way of costs will not be awarded, although the evidence for defendant on the new trial fell far short of substantiating the offer. Blazy *v.* McClean, 146 N. Y. 390, 40 N. E. 733.

is frivolous or taken merely for delay, such damages will not be allowed;[71] and where the statute requires that the demand be made by answer no damages will be allowed unless the demand is so made.[72] So if a statute prescribes the time in which the application must be made damages will not be allowed unless the statute is complied with.[73] It has also been held on a motion to affirm a judgment that the bare statement that the appeal was not taken in good faith but for delay, without showing any facts from which the truth of such averment may be determined, is insufficient to support a recovery of damages sustained thereby;[74] and that on the dismissal of an appeal damages will not be allowed on respondent's *ex parte* affidavit that he has been informed and believes that the appeal is without merit.[75]

j. Opposing Demand For Damages. If an appeal appears to be frivolous, the mere oral assurance in argument of counsel that it was taken in good faith is insufficient to avoid the imposition of damages. Such assurance must find some support in the record.[76] Under a statute providing for the allowance of damages on affirmance of an appeal, unless a judge of the appellate court shall certify that in his opinion such cause was not taken up for delay, it has been held that the application must be made at the term at which the decision is rendered.[77]

k. Amount of Damages Allowed. Where the statute allows a certain per cent[78] on the judgment recovered below, the amount awarded as damages must be computed upon the judgment exclusive of costs,[79] and exclusive of interest on the judgment up to the time of affirmance;[80] and it must be computed only to the date of the final order of the reviewing court.[81] If no definite amount is fixed by statute the amount to be awarded is within the discretion of the court.[82] Under a statute allowing as damages a designated per cent interest on the original debt, the interest must be computed from the date of the execution and not of the original judgment.[83] If the judgment allow interest, the reviewing court will not allow by way of damages the full amount which in their discretion the statute authorizes them to award.[84] If the percentage which the statute authorizes to be awarded is very large the full amount of the penalty should not be imposed

71. *Illinois.*— Dorn *v.* Smith, 85 Ill. App. 516.

Louisiana.— Siegel *v.* Drumm, 21 La. Ann. 8; Beatty *v.* Schwartz, 17 La. Ann. 10; Johnson *v.* Bailey, 12 Rob. 177; Benton *v.* Roberts, 12 Rob. 112; Hall *v.* Gaiennie, 15 La. 439; Bogart *v.* Drake, 13 La. 427.

Massachusetts.—Norris *v.* Lynch, 121 Mass. 586. But see Rev. Laws, p. 1375, § 13, which changes the rule.

Michigan.— Underhill *v.* Muskegon Booming Co., 45 Mich. 496, 8 N. W. 100.

South Dakota.— Himebaugh *v.* Crouch, 3 S. D. 409, 53 N. W. 862.

Texas.— And see Pridgen *v.* Bonner, 28 Tex. 799.

Contra, Collins *v.* Mohile Fruit, etc., Co., 108 Ga. 752, 32 S. E. 667.

See 13 Cent. Dig. tit. "Costs," § 998.

72. Frost *v.* Garrett, 17 La. Ann. 134; Roman *v.* Denney, 17 La. Ann. 126; Beatty *v.* Schwartz, 17 La. Ann. 10.

73. Poydras *v.* Bell, 14 La. 391; Gay *v.* Ardry, 14 La. 288; Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155; Mead *v.* Oakley, 7 Mart. N. S. (La.) 264.

74. Osborn *v.* Newberg Orchard Assoc., 36 Oreg. 444, 59 Pac. 711, 60 Pac. 994.

75. Kirby *v.* Harrington, (Cal. 1887) 13 Pac. 218.

76. Younglove *v.* Cunningham, (Cal. 1896) 43 Pac. 755.

77. Goodwyn *v.* Goodwyn, 31 Ga. 265; Turner *v.* Collins, 8 Ga. 436.

78. Where the statute makes it discretionary with the court to award a designated per cent by way of damages, the court cannot award a greater amount, but on the other hand it may give less. West Wisconsin R. Co. *v.* Foley, 94 U. S. 100, 24 L. ed. 71. See also Hawkins *v.* Jones, 21 Oreg. 502, 28 Pac. 548.

79. Patterson *v.* Brown, 1 Ind. 567; Mulliday *v.* Machir, 4 Gratt. (Va.) 1; Hudson *v.* Johnson, 1 Wash. (Va.) 10.

80. Lawrence *v.* Jones, 37 Ala. 388; Popp *v.* Louisville, etc., R. Co., 101 Ky. 157, 40 S. W. 254, 19 Ky. L. Rep. 328; Degener *v.* Underwood, 30 N. Y. Suppl. 399, 62 N. Y. St. 121, 31 Abb. N. Cas. (N. Y.) 479; Adams *v.* Perkins, 25 How. Pr. (N. Y.) 368.

81. Syndicate Imp. Co. *v.* Bradley, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532.

82. Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

83. Bellamy *v.* Corban, 1 Tyler (Vt.) 372.

84. Gollain *v.* Jamet, 16 La. 565; Wilds *v.* Barrett, 15 La. 445; McCoy *v.* Pritchard, 13 La. 428; Darramon *v.* Follin, 13 La. 426; Vawter *v.* Gill, 12 La. 423.

The full amount of damages authorized will not be awarded where the appellant consents to submit the case out of its regular turn. Opdyke *v.* Corles, 16 La. 569.

except in extreme cases.[85] Where a statute authorizes the allowance of "just damages for the delay" interest may be allowed pending a writ of error.[86]

l. Loss of Right to Damages. It has been held that appellee waived his right to damages where he asks an amendment of the judgment,[87] where he joins in the appeal,[88] or where before the time in which the appeal has expired he refuses an offer to pay the amount of the judgment.[89] If the judgment has been fully paid and satisfied before the appeal is taken no damages will be allowed.[90]

B. On Appeal From or Certiorari to Justice's Court — 1. Appeal From Justice's Court — a. Character of Statutes Governing Costs. Statutes relating to costs on appeal from justice's court are mandatory in their character, and no party, other than the one provided by law to pay costs, can be required to do so.[91]

b. Statutes Providing That Costs Shall Abide Event. In a number of jurisdictions statutes, some of which contain designated exceptions, provide that costs on appeal shall abide the event or follow the judgment. Under these statutes the party in whose favor the judgment is rendered on appeal, if not within these exceptions, is entitled to costs, whether the amount of the judgment is increased or reduced.[92] So where a party appeals from a judgment in favor of his adversary and obtains a judgment on appeal in his favor he will be entitled to costs.[93] On the other hand if plaintiff fails to recover before the justice and fails again on appeal, defendant is entitled to judgment for costs.[94]

c. Statutes Making Costs Discretionary With Appellate Court. In some jurisdictions costs are in the discretion of the appellate court.[95] In one jurisdiction on appeal from a justice's court the appellate court may award costs to either party, as it may deem advisable, in view of the particular circumstances of the case;[96]

85. McMillan *v.* Lawrence, 25 Ga. 189. See also Hull *v.* Tommy, 30 Ga. 762.

86. Cochran *v.* Schell, 107 U. S. 625, 2 S. Ct. 827, 27 L. ed. 543.

In Kentucky, where a writ coram vobis is prosecuted in the court below and ten per cent damages awarded from which award an appeal is taken, the amount on which the damages are to be computed is the ten per cent damages allowed by the trial court and not the amount of the original judgment which was not appealed from. Lansdale *v.* Findley, Hard. (Ky.) 203.

87. The reason assigned for this is that by so doing he recognizes the propriety of the appeal. Davis *v.* Levy, 28 La. Ann. 834; Gorham *v.* Hayden, 6 Rob. (La.) 450; Lay *v.* Irwin, 1 Rob. (La.) 121; Mahan *v.* Michel, 27 La. 96; Parkhill *v.* Caldwell, 15 La. 352; Le Blanc *v.* Dashiell, 14 La. 274; Parmely *v.* Bradbury, 13 La. 351; Desblieux *v.* Darbonneaux, 2 Mart. N. S. (La.) 215. But *compare* Marx *v.* Brown, 42 Tex. 111, which holds that the defendant in error does not waive his right to damages by procuring a correction of the judgment (as to the amount) after the writ of error has been obtained.

88. Whetstone *v.* Rawlins, 26 La. Ann. 474. See also Wade *v.* Franklin First Nat. Bank, 11 Bush (Ky.) 697.

89. Lester *v.* Elwert, 25 Oreg. 102, 35 Pac. 29.

Part payment of judgment relieves the plaintiff in error from liability for damages only *pro tanto*. Brady *v.* Holderman, 19 Ohio 26.

90. Northwestern Mut. L. Ins. Co. *v.* Starkweather, 40 Wis. 341.

91. Flores *v.* Coy, 1 Tex. App. Civ. Cas. § 804.

92. Hartwell *v.* Harris, 36 N. H. 430; Barker *v.* McCreary, 66 Pa. St. 162; King *v.* Boyles, 31 Pa. St. 424; McMaster *v.* Rupp, 22 Pa. St. 298; Cameron *v.* Paul, 11 Pa. St. 277; Bogart *v.* Rathbone, 1 Pa. St. 188; Holman *v.* Fesler, 7 Watts & S. (Pa.) 313; Lindsay *v.* Corah, 7 Watts (Pa.) 235; Vance *v.* Lee, 8 Pa. Co. Ct. 356; Root *v.* Miller, 1 Woodw. (Pa.) 81. *Contra*, Brinzer *v.* Shartzer, 6 Pa. Co. Ct. 590.

Extent of rule.— It has been held that the rule of the text applies, although there has been an intermediate award of arbitrators for a greater amount than the verdict and judgment on appeal. Newhouse *v.* Kelly, 5 Watts (Pa.) 508.

Rule applicable to trespass and trover.— The Pennsylvania act of April 9, 1833, which provides that the costs on appeals from justice of the peace shall "abide the event of the suit and be paid by the unsuccessful party, as in other cases," applies to appeals in cases of trespass and trover. King *v.* Boyles, 31 Pa. St. 424; McCurdy *v.* Thompson, 2 Lanc. L. Rev. 297.

93. Castle *v.* House, 41 Ind. 333; Topf *v.* Kins, 26 Ind. 391; Black *v.* Dale, 18 Ind. 335; Brinnaman *v.* Grover, 16 Ind. 347; Sutherland *v.* Flynn, 16 Ind. 36; Cones *v.* Vanodsol, 4 Ind. 248; Waterhouse *v.* Fickle, Smith (Ind.) 353.

If on defendant's appeal from a judgment for plaintiff he receives judgment he will be entitled to costs, although the appeal was taken from a default judgment. Hall *v.* Reynolds, 14 Ind. 472.

94. Scary *v.* Brush, 42 Ind. 172.

95. See *infra*, XXV, B, 1, e.

96. Evers *v.* Sager, 28 Mich. 47. It has been held that if a judgment be given for

and in another, where a judgment is modified on appeal from a justice's court, the question of costs is in the discretion of the court.[97]

d. Right as Affected by Offer of Judgment. In a number of jurisdictions there are special statutory enactments which under certain circumstances make the right to costs on appeal from a justice's court depend on an offer of judgment. Under the Arkansas statute, if on appeal from the justice's court the appellee recovers any amount, although less than the amount appealed from, appellant must pay the costs, unless he shall have tendered as much or more than the amount recovered in the circuit court.[98] Under the Iowa statute, if the party against whom judgment is rendered appeals and desires to avoid the costs of appeal in case appellee recovers some amount, he must offer judgment for a certain amount with costs.[99] The New York statutes on this subject are involved and very difficult of construction; under these provisions, if neither party makes offer of judgment,[1] the party who recovers, whether the amount be larger or smaller than that recovered in the justice's court, is entitled to costs;[2] if the successful party recovers fifty dollars or more on appeal he is entitled to costs whether he made any offer of judgment or not;[3] but where he fails to recover fifty dollars, and makes no offer of judgment himself he is not entitled to costs, although he recovers a greater amount than the opposite party offered judgment for;[4] the only effect, so far as costs are concerned, of the statute relating to offers of judgment on appeals from justices' courts is to entitle the party making the offer to costs, if the recovery in the appellate court is less favorable to his adversary than the offer.[5] Under the Ohio statute, on a recovery by plaintiff in the court of common pleas, on appeal, of a sum not equal to that offered, it is error for the appellate court on proof of such offer to enter judgment against defendant for costs accrued after such offer.[6] Under a statute of Pennsylvania of a similar character, if the defendant offers a judgment for a certain sum and costs to the plaintiff, and on appeal the latter does not recover as much as the

plaintiff by a justice in excess of his demand on defendant's default, the circuit judge may award costs against plaintiff on appeal. Mitchell *v.* Shuert, 16 Mich. 444.

This discretion will not be reviewed.— Hewett *v.* Ingram Cir. Judge, 44 Mich. 153, 6 N. W. 217.

What judge may exercise.— The discretion authorized by the statutes can only be exercised by the judge who tried the case. Steinhauser *v.* Wayne Cir. Judge, 42 Mich. 463, 4 N. W. 168.

97. Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 22 Pac. 129.

98. Latta *v.* Dodd, 23 Ark. 59 [*overruling* Hicks *v.* Maness, 19 Ark. 701]. To the same effect see Jones *v.* Spencer, 36 Ark. 82.

Where, however, plaintiff on appeal recovers less than defendant offered to confess judgment for in the justice's court, all costs subsequent to the offer must be taxed to the plaintiff. Petsinger *v.* Beaver, 44 Ark. 562.

99. Cohen *v.* Gibson, 78 Iowa 214, 42 N. W. 654.

If the judgment for appellee on appeal is for less than the amount of judgment offered appellee must pay the costs of appeal. Best *v.* Dean, 8 Iowa 519; Powell *v.* Western Stage Co., 2 Iowa 50.

The offer must include costs or it will not be effectual. Powell *v.* Western Stage Co., 2 Iowa 50.

1. **The offer may be signed by the attorney** of the party. Sherman *v.* Shisler, 6 Misc. (N. Y.) 203, 27 N. Y. Suppl. 215.

2. Pierano *v.* Merritt, 148 N. Y. 289, 42 N. E. 718; Clark *v.* Malzacher, 20 N. Y. App. Div. 301, 46 N. Y. Suppl. 1081; Vogel *v.* Schlueter, 73 Hun (N. Y.) 595, 26 N. Y. Suppl. 435, 56 N. Y. St. 141; Munson *v.* Curtis, 49 Hun (N. Y.) 606, 1 N. Y. Suppl. 828, 17 N. Y. St. 349, 15 N. Y. Civ. Proc. 131; Munson *v.* Curtis, 43 Hun (N. Y.) 214; Sheehan *v.* Butler, 40 Hun (N. Y.) 634. But see Rhodes *v.* Carr, 88 Hun (N. Y.) 219, 34 N. Y. Suppl. 722, 68 N. Y. St. 541.

3. Fowler *v.* Dearing, 6 N. Y. App. Div. 221, 39 N. Y. Suppl. 1034.

4. McKuskie *v.* Hendrickson, 128 N. Y. 555, 28 N. E. 650, 40 N. Y. St. 690; Fowler *v.* Dearing, 6 N. Y. App. Div. 221, 39 N. Y. Suppl. 1034; Birdsall *v.* Keyes, 66 Hun (N. Y.) 233, 21 N. Y. Suppl. 87, 49 N. Y. St. 299; Zoller *v.* Smith, 45 Hun (N. Y.) 319.

5. Birdsall *v.* Keyes, 66 Hun (N. Y.) 233, 21 N. Y. Suppl. 87, 49 N. Y. St. 299.

Where plaintiff accepts an offer of judgment for a specified sum he is entitled to recover in addition thereto the amount paid to perfect his appeal. Hollenback *v.* Knapp, 42 Hun (N. Y.) 207.

6. Carpenter *v.* Kent, 11 Ohio St. 554.

Judgment should be rendered against plaintiff for defendant's costs accruing after such offer. Courtright *v.* Staggers, 15 Ohio St. 511.

amount offered he must pay the costs;[7] and if the record states that the offer is absolute it cannot be shown to be conditional.[8]

e. Right as Affected by Reduction of Judgment. In Alabama, where the judgment is reduced on defendant's appeal, the court may award costs of appeal against either party according to the justice of the case.[9] In Colorado, Illinois, and Vermont, where a judgment is reduced on appeal, the court may award costs against the defendant for costs of appeal, although the judgment be reduced and its discretion in so doing is not reversible;[10] it may also require each party to pay a portion of the costs.[11] In the District of Columbia costs on appeal from a justice of the peace are within the discretion of the court, where the judgment is partially affirmed, and costs may be awarded the appellee on reduction of the amount of the judgment.[12] In Indiana if either party appeal and reduce the judgment against him five dollars or more he will be entitled to costs of appeal,[13] provided that he has appeared before the justice;[14] if, however, the defendant does not reduce the judgment five dollars or more on his appeal he is liable for full costs.[15] In Kentucky if the defendant succeeds in reducing the amount of the judgment the appellate court may adjudge or withhold from him his own costs, but cannot give judgment against him for plaintiff's costs.[16] In Minnesota if the defendant reduces the plaintiff's judgment by one half of its amount he is entitled to costs and disbursements, and in other cases the successful party is

7. Park *v.* Sweeny, 39 Pa. St. 111; Driesbach *v.* Morris, 1 Kulp (Pa.) 301; Dellone *v.* Gerber, 3 York Leg. Rec. (Pa.) 23.

But to render the statute effective the offer must be of a judgment and not a sum on money (Dickerson *v.* Anderson, 4 Whart. (Pa.) 78; McDowell *v.* Glass, 4 Watts (Pa.) 389), and be made during the trial of the cause before the justice or before the appeal is taken (Bogart *v.* Rathbone, 1 Pa. St. 188). Defendant must cause the offer to be entered on the justice's record (Bogart *v.* Rathbone, 1 Pa. St. 188), it being the duty of the justice to enter the offer on his docket when requested so to do (Seibert *v.* Kline, 1 Pa. St. 38; Magill *v.* Tomer, 6 Watts (Pa.) 494).

Necessity of record evidence of offer.— The certificate in a transcript that the defendant offered to confess judgment is not evidence of such fact. Clemens *v.* Gilbert, 12 Pa. St. 255. The only evidence thereof is the record. Seibert *v.* Kline, 1 Pa. St. 38.

Offer may be made by an agent of the defendant in his absence. Randall *v.* Wait, 48 Pa. St. 127.

Plaintiff must have notice of the offer of judgment by defendant in the action to be affected thereby. Driesbach *v.* Morris, 1 Kulp (Pa.) 301.

8. Gardner *v.* Davis, 15 Pa. St. 41.

9. Hornsby *v.* Crossland, 22 Ala. 625; Dill *v.* Phillips, 13 Ala. 350.

10. Murphy *v.* Cunningham, 1 Colo. 467; Wickersham *v.* Hurd, 72 Ill. 464; Lee *v.* Quirk, 20 Ill. 392; Hawkins *v.* Hewitt, 56 Vt. 430.

Error without prejudice.— Where plaintiff recovered five dollars before a justice of the peace in an action for trespass on land over which defendant claimed a right of way, and recovered only one cent on appeal by defendant, an apportionment of costs requiring plaintiff to pay one fifth of the costs is not an error of which defendant can complain. Drda *v.* Schmidt, 47 Ill. App. 267.

11. Patrick *v.* Perryman, 52 Ill. App. 514.

12. Mead *v.* Scott, 16 Fed. Cas. No. 9,368, 1 Cranch C. C. 401.

13. Polk *v.* Nickens, 63 Ind. 439; Brown *v.* Duke, 46 Ind. 343; Crist *v.* Glidewell, 25 Ind. 396; Hall *v.* Reynolds, 14 Ind. 472; Holcomb *v.* McDonald, 12 Ind. 566; Indiana Cent. R. Co. *v.* Atkinson, 6 Ind. 149; Hunt *v.* Lewis, 4 Ind. 174; Moody *v.* Drum, 2 Ind. 288; Patty *v.* Moore, Smith (Ind.) 399, 563; Allen *v.* Hardesty, 8 Blackf. (Ind.) 589; Lewis *v.* Masters, 8 Blackf. (Ind.) 244.

Effect of amendment.— The rule stated in the text applies where defendant appeals and reduces the judgment more than five dollars, although he amends his set-off by adding a bill of particulars. Anthony *v.* Fulhart, 68 Ind. 559.

What is not a reduction.— The judgment before a justice in a replevin suit was for return of the property and costs, and in the circuit court for return of the property and eight dollars damages. It was held that the latter was not such a reduction of the former judgment as that costs could be taxed in accordance with 2 Ind. Rev. Stat. (1876), p. 627, § 70. Balliett *v.* Humphreys, 78 Ind. 388.

Certiorari.— The same rule applies where the judgment is reduced on certiorari. Chance *v.* Haley, 6 Ind. 367.

On appeal from city courts in cases where jurisdiction is conferred on them greater than that of a justice of the peace, the party recovering is entitled to costs in accordance with the general rule. The rule applicable to cases appealed from a justice of the peace does not govern under such circumstances. Dotson *v.* Bailey, 76 Ind. 434.

14. Louisville, etc., R. Co. *v.* Hagen, 87 Ind. 30; Beall *v.* Rowland, 32 Ind. 368.

15. Brown *v.* Snavely, 24 Ind. 270.

16. Gentry *v.* Doolin, 1 Bush (Ky.) 1.

entitled to costs.[17] In New Jersey if a judgment for plaintiff is reduced on appeal by the defendant neither party is allowed costs of appeal, on the theory that the error was that of the justice;[18] if the plaintiff appeals from a judgment in his own favor and recovers the same amount or less, on appeal, each party must pay his own costs of appeal; if he recovers more he will be entitled to costs of appeal; but in neither case is the appellee entitled to costs of appeal, as he is not successful in reversing the judgment.[19] In Texas if the judgment is reduced on appeal, the appellant will be entitled to costs thereof, unless the court adjudge otherwise for good cause stated in the record,[20] which it is expressly empowered to do;[21] and it is accordingly erroneous to adjudge costs against appellant on reduction of the judgment where no cause is stated in the record for so doing.[22]

f. Right as Affected by Recovery of More Favorable Judgment. In Connecticut and Kentucky if the appellant obtains a more favorable judgment he is entitled to costs of appeal.[23] In Indiana if the plaintiff appeal from a judgment in his favor and does not recover at least five dollars more than the justice's judgment, the appellee has costs of appeal.[24] In Iowa and Pennsylvania if the plain-

17. Flaherty *v.* Rafferty, 51 Minn. 341, 53 N. W. 644, where, in an action commenced before a justice to recover eighty dollars, defendant admitted an indebtedness of fifty-three dollars. A judgment was rendered for plaintiff and on appeal the judgment was reduced to the sum which defendant admitted to be due. It was held that defendant did not reduce the amount of recovery one half, and that plaintiff was entitled to costs and disbursements on appeal. For another case in which it was held that plaintiff's recovery was not reduced one half see Olson *v.* Rushfeldt, 81 Minn. 381, 84 N. W. 123.

Effect of default in justice's court.—Where the defendant reduces the plaintiff's recovery by one half he is entitled to costs and disbursements on appeal, although he made default in the justice's court. Conrad *v.* Swanke, 80 Minn. 438, 83 N. W. 383.

Necessity of showing error.— To obtain the reversal in this court of a judgment on the ground that the judge of a district court erred when, on appeal from the clerk's taxation of costs and disbursements, he held that a defendant was not entitled to costs and disbursements, under Minn. Gen. Stat. (1894), § 5511, last clause, it must be clearly made to appear from the record that the amount originally recovered by the plaintiff was reduced more than one half on appeal to the district court, or that the defendant was the successful party on the only matter litigated in the action. Thompson *v.* Ferch, 78 Minn. 520, 81 N. W. 520.

Notwithstanding this provision a defendant who appeals from a judgment of the justice to the district court and who, although he does not reduce the recovery against him one half, succeeds on the only matter litigated in the action and appeal (a counter-claim disputed by plaintiff) is entitled to costs. Foster *v.* Hansman, 55 Minn. 157, 56 N. W. 592.

18. Robinson *v.* Hedges, 3 N. J. L. 688.

19. Housel *v.* Higgins, 47 N. J. L. 72. *Compare* Cheeseman *v.* Cade, 24 N. J. L. 632, where it was held that if the judgment of the appellate court is for less than the amount recovered before the justice it is erroneous to allow costs below.

20. Jackson *v.* Phillips, (Tex. Civ. App. 1896) 35 S. W. 745; Mexican Cent. R. Co. *v.* Charman, (Tex. Civ. App. 1894) 24 S. W. 958; Priutt *v.* Kelley, (Tex. App. 1890) 15 S. W. 119; Gulf, etc., R. Co. *v.* Sumrow, (Tex. App. 1887) 18 S. W. 135; Gallagher *v.* Finlay, 2 Tex. App. Civ. Cas. § 623; Texas, etc., R. Co. *v.* Taylor, 2 Tex. App. Civ. Cas. § 416; Moore *v.* Gore, 2 Tex. App. Civ. Cas. § 75; International, etc., R. Co. *v.* Johnson, 1 Tex. App. Civ. Cas. § 354; Phillips *v.* Sass, 1 Tex. App. Civ. Cas. § 246.

Certiorari.— The same rule applies where the recovery is reduced on certiorari. Foreman *v.* Gregory, 17 Tex. 193.

21. Austin *v.* Erwin, 2 Tex. App. Civ. Cas. § 290.

22. Southern Pac. R. Co. *v.* Duncan, 3 Tex. App. Civ. Cas. § 234; Phillips *v.* Adkins, 1 Tex. App. Civ. Cas. § 292.

Instance.— Thus on appeal by defendant from a judgment of a justice enforcing a lien on cotton, or, in the alternative, for the value of the goods, where the district court gives judgment only for the value of the cotton and for a sum smaller than that included in the justice's judgment without any order of foreclosure, the costs on the appeal are taxable against plaintiff. Conner *v.* Elkins, 66 Tex. 551, 1 S. W. 798.

Extent of rule.— The fact that the record contained sworn statements of the jurors that they intended to give a larger verdict does not alter the rule that the appellant is entitled to costs of appeal on reducing the judgment (Rogers *v.* Fox, (Tex. App. 1890) 16 S. W. 781); nor is his right to costs under these circumstances affected by the fact that defendant failed to make any defense in the justice's court (Gulf Coast, etc., R. Co. *v.* Kluge, (Tex. App. 1886) 17 S. W. 944).

23. Anderson *v.* New Canaan, 66 Conn. 54, 33 Atl. 593; Kellar *v.* Bate, 3 Metc. (Ky.) 130.

24. Robinson *v.* Skipworth, 23 Ind. 311; Carter *v.* Berkshire, 8 Blackf. (Ind.) 193.

tiff takes an appeal from a judgment in his favor and does not obtain a more favorable judgment he must pay the costs of appeal.[25] In Nebraska, where the statutes provide that if on appeal by plaintiff he shall not recover a larger sum than twenty dollars, he shall be adjudged to pay all costs in the district court, it is immaterial whether the judgment appealed from by plaintiff is for or against him.[26] In New Jersey, where a judgment for plaintiff is increased on defendant's appeal, the plaintiff has costs of appeal, although the amount of costs allowed in the justice's court is decreased.[27] In Washington the expression, "a more favorable judgment," used in the statute regulating the recovery of costs on appeal from a justice's court, means one that shows the judgment below was substantially wrong, not one more favorable by a few dollars or cents merely.[28]

g. Calculation of Amount of Judgment For Purposes of Awarding Costs. In a number of jurisdictions it is held that in determining whether a judgment on appeal from the justice's court is for a larger or smaller amount than that recovered in the justice's court, interest accruing on the justice's judgment pending appeal should not be included.[29] In other jurisdictions, however, the contrary view obtains.[30] A judgment on appeal will be considered more favorable, although for a less amount, where it is rendered so by the extinguishment of a counter-claim set up by amendment after the appeal was taken.[31] Where the plaintiff remits part of the judgment in the justice's court, the judgment will be regarded as standing at that sum at the time an appeal is taken from it, in determining for the purpose of fixing the liability for costs whether the judgment has been reduced on appeal.[32] So it has been held that attorney's fees stipulated for a note sued on and included in the judgment of the circuit court cannot be deducted before comparing it with the judgment appealed from to determine whether the latter has been reduced.[33]

h. Statutes Awarding Costs to Successful or Prevailing Party. In some jurisdictions costs are awarded to the prevailing or successful party on appeal. Under these statutes, if plaintiff recovers as much on appeal as he recovered in the justice's court, costs should not be allowed defendant, but should be awarded to plaintiff.[34] On the other hand it has been held that if plaintiff appeals and fails to recover a larger judgment he is not successful within the meaning of the statute and cannot recover costs.[35]

25. Richey *v.* Adlefinger, 102 Iowa 144, 71 N. W. 205; Howder *v.* Overholser, 48 Iowa 365; Wheeler *v.* Potter, 13 Pa. Super. Ct. 420.

The Iowa statute only applies, however, to an appeal taken by the party in whose favor judgment is rendered. Howder *v.* Overholser, 48 Iowa 365.

Where the plaintiff on an appeal from a judgment against him recovers a judgment in his favor he is entitled to full costs. Adams *v.* McIlheny, 1 Watts (Pa.) 53.

26. Weast *v.* Sheppard, 10 Nebr. 508, 7 N. W. 284.

27. Romaine *v.* Norris, 8 N. J. L. 80.

28. Baxter *v.* Scoland, 2 Wash. Terr. 86, 3 Pac. 638.

29. That is to say, if the judgment on appeal exclusive of interest is for a smaller sum than the amount of the judgment below, the judgment will, for the purposes of costs, be considered a judgment for a smaller amount. Richey *v.* Adelfinger, 102 Iowa 144, 71 N. W. 205; Traer *v.* Filkins, 10 Iowa 563; Kelly *v.* Bonesteel, 29 Hun (N. Y.) 546; Humiston *v.* Ballard, 39 How. Pr. (N. Y.) 93; Smith *v.* May, 32 How. Pr. (N. Y.) 222; Galveston, etc., R. Co. *v.* Weimers, 74 Tex. 564, 12 S. W. 281; Conner *v.* Elkins, 66 Tex. 551, 1 S. W. 798; Bailey *v.* James, 64 Tex. 546.

Interest recovered in the county court for the time anterior to the justice's judgment is properly added in ascertaining on whom costs should fall in the county court. Mills *v.* Haas, (Tex. Civ. App. 1894) 27 S. W. 674.

30. Widup *v.* Gibson, 53 Ind. 484; Turner *v.* Simpson, 12 Ind. 413; Groves *v.* Wiles, 1 Ind. App. 174, 27 N. E. 309; Barker *v.* McCreary, 66 Pa. St. 162; Johnston *v.* Perkins, 1 Penr. & W. (Pa.) 23. See also Park *v.* Sweeny, 39 Pa. St. 111. But *compare* Davidson *v.* Smith, 2 Pa. L. J. Rep. 24, 3 Pa. L. J. 239.

31. Adolph *v.* De Cen, 13 N. Y. Civ. Proc. 5.

32. Clark *v.* Milburn, 62 Ind. 203.

33. Grover *v.* Wiles, 1 Ind. App. 174, 27 N. E. 309.

34. Nurse *v.* Justus, 6 Oreg. 75.

Certiorari.— The same rule applies where on certiorari the judgment is not increased. Williams *v.* Cosby, 2 Heisk. (Tenn.) 644.

35. Parham *v.* Gibbs, 16 Lea (Tenn.) 296.

But in Wisconsin the view is taken, and properly, it is believed, that whether the

i. Statutes Providing For Costs on Remand For New Trial. In Indiana, where a new trial is granted, generally without any order in relation thereto, costs abide the event of the suit.[36] Under the statutes of Kansas and Ohio, where the appellate court reverses and retains the cause for final adjudication, it should enter up judgment against the defendant in error for costs accruing up to that time.[37] Where the cause is reversed and remanded to the justice for a new trial, the appellate court can only render judgment for costs of appeal. It cannot render judgment for either party for costs made in the justice's court.[38]

j. Specification of Errors in Notice of Appeal. A statement of the ground of appeal as being "because the verdict was contrary to the law and the evidence, in that the jury did not find for the defendant" is not a sufficient statement of the particulars complained of within the requirements of a statute providing that in the notice of the appeal appellant shall state in what particular he claims judgment should have been more favorable to him.[39]

k. Costs of Amendment After Taking Appeal. In one jurisdiction, where plaintiff has been permitted to amend, the court may make such award in relation to costs as may be just,[40] and this, it has been held, may be the costs of the amendment.[41] In another, where defendant is allowed on appeal to plead satisfaction *puis darrein continuance*, he may be subject to all previous costs, including those of trial.[42] And in another, where the judgment is reversed on defendant's appeal, the costs to abide the event, and on the second trial defendant objects to the sufficiency of the complaint, whereupon plaintiff is allowed to amend on payment of a specified sum as costs, he should also be required to pay the costs awarded on the appeal.[43]

l. Want of Jurisdiction of Justice. Where the appellate court on appeal by defendant from a justice's judgment abates the action for want of jurisdiction in the justice's court defendant is entitled to costs.[44]

m. Want of Jurisdiction of Appellate Court. On the dismissal of an appeal from a justice's court for want of jurisdiction the appellant is entitled to costs.[45]

2. CERTIORARI TO JUSTICE'S COURT. In Indiana, Tennessee, and Texas, the rule in relation to costs in cases removed on certiorari is the same as in cases taken up by appeal or writ of error.[46] In New Jersey it has been held that if the party removing a cause by certiorari sustains any one of his assignments he has prosecuted

plaintiff on such an appeal recovers more or less, he is nevertheless the successful party, if he recovers judgment, and is entitled to costs. Norwegian Evangelical Lutheran Church *v.* Thorson, 21 Wis. 34; Smithbeck *v.* Larson, 18 Wis. 183. See also Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552.

So in North Carolina, under a similar statute providing that if the appellant recovers judgment in the appellate court he shall recover costs of that court and in the court below, it was held that defendant should pay costs of appeal where in an action on a note before a justice of the peace defendant's claim of a credit was found against him, and on appeal to the superior court the credit was allowed but plaintiff recovered a balance. Kincaid *v.* Graham, 92 N. C. 154.

36. Bergman *v.* Ashdill, 48 Ind. 489.

37. Loring *v.* Rockwood, 13 Kan. 178; Belford *v.* Parrish, 22 Ohio St. 371.

38. Stager *v.* Harrington, 27 Kan. 414.

39. If he claimed that the amount of the judgment is less favorable than it should have been he should state what should have been its amount. Wall *v.* Davis, 19 S. C. 455.

40. Miller *v.* Beal, 26 Ind. 234.

41. Indianapolis, etc., R. Co. *v.* Clark, 21 Ind. 150; Murray *v.* Fry, 6 Ind. 371. *Compare* Maxam *v.* Wood, 4 Blackf. (Ind.) 297.

42. Campbell *v.* Reeves, 3 Sneed (Tenn.) 52. See also Cannon *v.* Blakemore, 10 Humphr. (Tenn.) 227.

43. Ireland *v.* Metropolitan El. R. Co., 8 N. Y. St. 127.

44. McKitrick *v.* Peter, 5 Dana (Ky.) 587. But see Harrington *v.* Heath, 15 Ohio 483, holding that where a cause brought in a justice's court which had no jurisdiction of it is appealed to the common pleas which acquires jurisdiction by the appearance and submission of the parties, costs before the justice cannot be included in the judgment of the appellate court, the proceedings before the justice being void.

45. Bassett *v.* Oldham, 7 Dana (Ky.) 168; Call *v.* Mitchell, 39 Me. 465; Byran *v.* Smith, 10 Mich. 229. But see Vance County *v.* Gill, 126 N. C. 86, 35 S. E. 228, holding that where an appeal is dismissed because the cause of action has expired, pending appeal, the appellant is not entitled to costs against the appellee, under a statute providing that no costs can be adjusted against an appellee, unless the judgment is reversed.

46. See *supra*, XXV, B, 1, e, h.

his writ to effect, and that if an award or execution be set aside for error and the principal judgment be affirmed to the end that it may be executed in the upper court, plaintiff in error shall not pay costs, nor shall defendant in error be entitled to sue on the certiorari bond.[47] In Pennsylvania, where a cause is reversed on certiorari, no judgment for costs is entered in the appellate court; costs follow the case back to the justice and abide the event of the suit,[48] and the right of recovery is made by statute to depend on the relative amount recovered or abated by the subsequent judgment.[49]

XXVI. COSTS ON AWARD OR REFUSAL OF NEW TRIAL.

A. Costs of Former Trial — 1. Right to Costs. Where a new trial is asked on the ground that the verdict is against the evidence,[50] on the ground of misbehavior or mistake on the part of the jury,[51] or on the ground of newly discovered evidence,[52] it is the practice in some jurisdictions to award it only on condition that the party moving therefor pay the costs of the former trial. In

47. Hinchman *v.* Cook, 20 N. J. L. 271.

48. Brennan *v.* Taylor, 2 Wkly. Notes Cas. (Pa.) 16; Pennsylvania Anthracite Coal Co. *v.* Ranch, 2 Chest. Co. Rep. (Pa.) 488; Backus *v.* Foy, 2 Chest. Co. Rep. (Pa.) 488; Munshower *v.* Evans, 2 Chest. Co. Rep. (Pa.) 489.

49. Atkinson *v.* Crossland, 4 Watts (Pa.) 450.

Extent of application of statute.— This statute does not entitle the party removing the cause by certiorari to costs where a reversal is obtained on grounds fatal to the action, thereby precluding a subsequent trial. Hartman *v.* Bechtel, 1 Woodw. (Pa.) 140. So the statute is applicable only to cases where there is a judgment which may be compared with the preceding one as a final test of the merits, and it is consequently not applicable to the reversal of an execution. Atkinson *v.* Crossland, 4 Watts (Pa.) 450.

50. Lyons *v.* Connor, 53 N. Y. App. Div. 475, 65 N. Y. Suppl. 1085; Young *v.* Stone, 77 Hun (N. Y.) 395, 28 N. Y. Suppl. 881, 60 N. Y. St. 419; Bailey *v.* Park, 5 Hun (N. Y.) 41; North *v.* Sergeant, 33 Barb. (N. Y.) 350; Ward *v.* Woodburn, 27 Barb. (N. Y.) 346; Peck *v.* Fonda, etc., R. Co., 3 Silv. Supreme (N. Y.) 10, 6 N. Y. Suppl. 379, 25 N. Y. St. 95; Fleischman *v.* Yagel, 16 Misc. (N. Y.) 511, 39 N. Y. Suppl. 523, 74 N. Y. St. 43; Sewell *v.* Lathrop, 23 N. Y. Suppl. 1154, 51 N. Y. St. 942; O'Shea *v.* McLear, 15 N. Y. Civ. Proc. 69; Kelly *v.* Frazier, 2 N. Y. Civ. Proc. 322; East River Bank *v.* Hoyt, 22 How. Pr. (N. Y.) 478; Jackson *v.* Thurston, 3 Cow. (N. Y.) 342. And see Anderson *v.* Jenkins, 99 Ga. 299, 25 S. E. 648.

The theory on which the costs of the former trial are awarded against the party obtaining a new trial is that the party against whom the favor is granted shall be fully restored to all of his rights as they existed before the trial. Fleischman *v.* Yagel, 16 Misc. (N. Y.) 511, 38 N. Y. Suppl. 523, 74 N. Y. St. 43.

This rule has been held not to apply in case of the setting aside of a receiver's report as against the weight of evidence and ordering a new trial. It was held in such case that the court should exercise its discretion on the subject of costs with regard to the peculiar circumstances of each case. Wentworth *v.* Candee, 17 How. Pr. (N. Y.) 405.

In Wisconsin it has been held that a verdict wholly unsupported by evidence must be deemed to be perverse, and that the costs of the trial should not be charged to the party moving to set it aside. Becker *v.* Holm, 100 Wis. 281, 75 N. W. 999.

51. O'Brien *v.* Long, 49 Hun (N. Y.) 80, 1 N. Y. Suppl. 695, 17 N. Y. St. 510; Mahar *v.* Simmons, 47 Hun (N. Y.) 479. But see Knapp *v.* Curtis, 9 Wend. (N. Y.) 60; La Farge *v.* Kneeland, 7 Cow. (N. Y.) 456.

Error of judge.— The practice of requiring a party given a new trial for mistake or misbehavior to pay costs is not strictly applicable in case a new trial is granted because of error committed by the judge. O'Brien *v.* Long, 49 Hun (N. Y.) 80, 1 N. Y. Suppl. 695, 17 N. Y. St. 510. Costs should be made to abide the event (Williams *v.* Smith, 2 Cai. (N. Y.) 253. See also Smith *v.* New York City, 55 N. Y. App. Div. 90, 66 N. Y. Suppl. 1046) or refused absolutely (Randall *v.* Albany City Nat. Bank, 1 N. Y. St. 592).

Inadequate verdict.— Where a party obtains a new trial on the ground that the verdict is inadequate he must pay the costs of the former trial. Riegelman *v.* Brunnings, 36 N. Y. App. Div. 351, 56 N. Y. Suppl. 755; Brown *v.* Foster, 1 N. Y. App. Div. 578, 37 N. Y. Suppl. 502, 73 N. Y. St. 94.

In New Jersey it has been held that no costs should be awarded in such case. Burlington County *v.* Fennimore, 1 N. J. L. 293. See also Anonymous, 16 N. J. L. 496.

52. Comstock *v.* Dye, 13 Hun (N. Y.) 113; Bayne *v.* Waterbury, 12 Hun (N. Y.) 534; Simmons *v.* Fay, 1 E. D. Smith (N. Y.) 107; Hosley *v.* Colerick, 9 N. Y. Civ. Proc. 43; Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193.

other jurisdictions, however, where a new trial is granted, costs of the former trial abide the event of the suit.[53]

2. ITEMS ALLOWABLE. In New York it has been held that an item allowable for proceedings subsequent to notice and before trial is allowable under an order for new trial which grants costs of the former trial,[54] and also disbursements for stenographer's minutes,[55] and a trial fee.[56] In Rhode Island it has been held that where a new trial is granted because of newly discovered evidence consisting of papers in defendant's possession which he had mislaid, and which are material only on a set-off pleaded by defendant, and plaintiff is a resident of another state, defendant will be required to pay plaintiff's costs and expenses in coming to attend the trial and returning home.[57] In Massachusetts it has been held that where judgment is arrested after verdict for plaintiff and leave to amend and a new trial granted, costs will be allowed defendant from the time the case went to the jury.[58]

3. METHODS OF ENFORCEMENT. In most jurisdictions where an order grants a new trial on payment of costs the payment of costs is not a condition precedent to the right to a new trial. Failure to pay costs within the time specified does not forfeit the right to a new trial.[59] In some jurisdictions, however, an order granting a new trial on payment of costs renders the payment thereof a condition precedent to the new trial.[60]

B. Costs of Motion — 1. RIGHT TO COSTS. Under the New York statutes the

In Vermont upon the granting of a new trial solely on the ground of the discovery of new and material evidence, the court will not tax costs against the adverse party from the commencement of the suit, but merely those costs which have accrued after the granting of the new trial. Hogg *v.* Wolcott, 1 Tyler 141.

53. Palmer *v.* Palmer, 97 Iowa 454, 66 N. W. 734; Richardson *v.* Curtis, 2 Gray (Mass.) 497; Fitch *v.* Stevens, 2 Metc. (Mass.) 506.

Disqualification of judge.— If a new trial is granted because of the disqualification of the judge, and a new trial before another judge is also in favor of the same party, he is entitled to costs of both trials. Cregin *v.* Brooklyn Crosstown R. Co., 19 Hun (N. Y.) 349.

Where the rule for new trial is silent as to costs, the party ultimately successful recovers costs of the former trial. Johnson *v.* Morris, 8 N. J. L. 213.

In Indiana it has been held that the court on granting a new trial should make the proper order as to accrued costs, considering the reasons for granting the new trial. Swingle *v.* State Bank, 41 Ind. 423.

In Michigan if a judgment is set aside because of a mistrial no costs will be awarded either party. Adams *v.* Champion, 31 Mich. 233.

54. Spring *v.* Day, 44 How. Pr. (N. Y.) 390; Keil *v.* Rice, 24 How. Pr. (N. Y.) 228. *Compare* Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212.

Expense of taking depositions is not taxable although used on the second trial. Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212.

Extra allowance is not part of the costs to be paid. McQuade *v.* New York, etc., R. Co., 5 Duer (N. Y.) 613; Hicks *v.* Waltermire, 7 How. Pr. (N. Y.) 370. *Contra,* Mobile Bank *v.* Phœnix Ins. Co., 8 N. Y. Civ. Proc. 212; Ellsworth *v.* Gooding, 8 How. Pr. (N. Y.) 1.

55. Riegelman *v.* Brunnings, 36 N. Y. App. Div. 351, 56 N. Y. Suppl. 755. *Compare* Spring *v.* Day, 44 How. Pr. (N. Y.) 390.

56. Hamilton *v.* Butler, 19 Abb. Pr. (N. Y.) 445.

57. Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250.

58. Carlisle *v.* Weston, 1 Metc. (Mass.) 26.

Where a new trial was granted to defendant on the ground of a misdirection by the judge as to several of plaintiff's counts, and the direction was overruled as to some of the counts and confirmed as to the others, plaintiff was held entitled to costs as the prevailing party. Fowler *v.* Shearer, 7 Mass. 14.

59. *Indiana.*— Ammerman *v.* Gallimore, 50 Ind. 131 [*overruling* Chambers *v.* Bass, 18 Ind. 3; Moberly *v.* Davar, 5 Blackf. 409]. See also Murray *v.* Ebright, 50 Ind. 362.

Kentucky.— Dana *v.* Gill, 5 J. J. Marsh. 242, 20 Am. Dec. 255.

Mississippi.—Johnson *v.* Taylor, 3 Sm. & M. 92.

North Carolina.— Rodgers *v.* Cherry, 52 N. C. 539.

Ohio.— Heffner *v.* Scranton, 27 Ohio St. 579.

See 13 Cent. Dig. tit. "Costs," § 1044.

A stipulation in reference to costs may be enforced by execution or as any other order may be. Heffner *v.* Scranton, 27 Ohio St. 579.

60. Sloan *v.* Somers, 18 N. J. L. 46, 35 Am. Dec. 526; Jackson *v.* Eddy, 2 Cow. (N. Y.) 598; Pugsley *v.* Van Alen, 8 Johns. (N. Y.) 252.

Rule in Alabama.— Where a new trial is

costs of a motion for new trial are within the discretion of the court, whether the motion be made upon a "case," [61] or on the judge's minutes without a case.[62] In Montana the prevailing party is entitled to costs and disbursements of motion for new trial.[63] In North Carolina, where a new trial is granted on motion in the supreme court on the ground of newly discovered evidence, the costs in such court will ordinarily fall on the moving party.[64]

2. Necessity For Award. Where the costs of motion for a new trial are in the discretion of the court, no costs can be allowed unless the court exercises its discretion by awarding them.[65]

3. Items Allowable. Under the New York statutes, where a motion is not made on a case, "motion costs"—ten dollars—only are allowable.[66] Where a motion is made on a case[67] the same costs as are allowed on appeal is the measure of recovery of costs by the successful party.[68] In Minnesota where a bill of exceptions is prepared for and used on a motion for a new trial, which is granted, with costs of motion, the expense of preparing such bill is not taxable in the supreme court on an appeal from the order granting the new trial.[69] In Montana the

granted on payment of costs within a specified time, no means being provided for compelling the payment thereof, the effect of the order is to leave it at the party's option to pay the costs within the prescribed time and get a new trial, or to fail to pay them within that time and fail to get a new trial. *Ex p.* Jones, 35 Ala. 706; Screws *v.* Upshaw, 34 Ala. 496. But an order granting a new trial on payment of costs within a specified time, accompanied by a direction for the issuance of an execution to enforce collection, amounts to an unconditional grant of a new trial. *Ex p.* Beavers, 34 Ala. 71.

61. Miller *v.* Bush, 29 N. Y. App. Div. 117, 51 N. Y. Suppl. 486; Hadley *v.* Pethcal, 24 N. Y. Suppl. 803, 23 N. Y. Civ. Proc. 216; Siegrist *v.* Holloway, 7 N. Y. Civ. Proc. 58; Naugatuck Cutlery Co. *v.* Rowe, 5 Abb. N. Cas. (N. Y.) 142. *Contra*, Garvey *v.* U. S. Horse, etc., Show Soc., 1 N. Y. Annot. Cas. 406, 38 N. Y. Suppl. 171; Whitney *v.* Saxe, 15 N. Y. Civ. Proc. 450; Wilcox *v.* Daggett, 15 N. Y. Wkly. Dig. 208.

Where the discretion of the court as to the award of costs of motion for new trial has been fairly exercised, and the order thereupon made is not appealed from, the determination is final. Hadley *v.* Pethcal, 23 N. Y. Civ. Proc. 216.

62. Naugatuck Cutlery Co. *v.* Rowe, 5 Abb. N. Cas. (N. Y.) 142. See also Outwater *v.* New York, 20 How. Pr. (N. Y.) 213.

63. Waite *v.* Vinson, 18 Mont. 410, 45 Pac. 552.

64. Herndon *v.* North Carolina R. Co., 121 N. C. 498, 28 S. E. 144.

65. Miller *v.* Bush, 29 N. Y. App. Div. 117, 51 N. Y. Suppl. 486; Lennox *v.* Eldred, 65 Barb. (N. Y.) 526; Hadley *v.* Pethcal, 24 N. Y. Suppl. 803, 23 N. Y. Civ. Proc. 216.

66. Hosley *v.* Colerick, 9 N. Y. Civ. Proc. 43, 3 How. Pr. N. S. (N. Y.) 169. See also Anderson *v.* Market Nat. Bank, 66 How. Pr. (N. Y.) 8.

Trial fee.—On a motion for new trial made on the judge's minutes the successful party is not entitled to a trial fee. Naugatuck Cutlery Co. *v.* Rowe, 5 Abb. N. Cas. (N. Y.) 142.

Where more than one fee allowable.—On hearing a motion at special term for a new trial, the justices without deciding it ordered a reargument before another justice by whom the motion was denied. It was held that the winning party was properly allowed two argument fees, as the reargument was not caused by any act or motion on his part. Guckenheimer *v.* Angevine, 16 Hun (N. Y.) 453.

67. What is motion on case.—A motion made upon a judge's minutes is not a motion on a case. Muller *v.* Higgins, 44 How. Pr. (N. Y.) 224. But where the moving parties ask for a new trial on the ground of newly discovered evidence and for such other or further relief as may be just the motion is on a case. Davis *v.* Grand Rapids F. Ins. Co., 15 Misc. (N. Y.) 78, 36 N. Y. Suppl. 791, 71 N. Y. St. 591; Perkins *v.* Brainerd Quarry Co., 11 Misc. (N. Y.) 337, 32 N. Y. Suppl. 236, 65 N. Y. St. 417. *Contra*, Hosley *v.* Colerick, 9 N. Y. Civ. Proc. 43. So it has been held that where neither the order to show cause on which a motion for a new trial was made, nor any of the papers used on the motion, are presented to the court on appeal from an order resettling costs, a recital therein that the motion made, and which was decided was for a new trial on a "case," is conclusive. Atkinson *v.* Truesdell, 57 N. Y. Super. Ct. 600, 7 N. Y. Suppl. 801, 28 N. Y. St. 585.

68. Scudder *v.* Gori, 3 Rob. (N. Y.) 629; Davis *v.* Grand Rapids F. Ins. Co., 15 Misc. (N. Y.) 78, 36 N. Y. Suppl. 791, 71 N. Y. St. 591; Christ *v.* Chetwood, 8 Misc. (N. Y.) 81, 28 N. Y. Suppl. 1148, 58 N. Y. St. 815; Garvy *v.* U. S. Horse, etc., Show Soc., 38 N. Y. Suppl. 171, 1 N. Y. Annot. Cas. 406; Whitney *v.* Saxe, 15 N. Y. Civ. Proc. 450; Pilgrim *v.* Donnelly, 15 Abb. N. Cas. (N. Y.) 240; Stitt *v.* Rowley, 37 How. Pr. (N. Y.) 179; Selover *v.* Wisner, 37 How. Pr. (N. Y.) 176; Wilcox *v.* Daggett, 15 N. Y. Wkly. Dig. 208.

69. Linne *v.* Forrestal, 51 Minn. 249, 53 N. W. 547, 653, which was an appeal from the clerk's taxation of costs.

expense of a stenographer's transcript of the evidence in preparing a motion for a new trial is a necessary disbursement within the meaning of a statute, giving the prevailing party his costs and necessary disbursements.[70]

C. Construction of Orders. Where a motion for a new trial is granted "with costs to defendant to abide the event" plaintiff on succeeding on the new trial cannot tax the costs of such motion.[71] Where a plaintiff prepares a case for new trial which is granted "without costs to either party" and the order on appeal is affirmed "with costs" plaintiff is not entitled to costs for making and serving the case. The order of affirmance includes only the costs on appeal.[72] If on plaintiff's motion a new trial is granted "costs to abide the event," and the verdict in the second trial is for defendant, defendant is entitled to his costs of opposing the motion for new trial.[73]

XXVII. ENFORCEMENT OF PAYMENT OF COSTS.

A. By Action — 1. When Maintainable. In the absence of a special statute authorizing it, an independent action is not maintainable for the recovery or interlocutory costs. They are recoverable only by proceedings in the cause in which they are awarded.[74] But an action will lie on a judgment for costs rendered in another state or country.[75] It will also lie on a domestic judgment in jurisdictions where the right to bring an action on an ordinary judgment is not affected by the fact that the party also has a remedy by execution.[76] An action may also be maintained to recover costs where the court trying the cause refuses to enter a judgment for costs;[77] or where one who has sued before a trial justice, whose commission has expired, is denied a trial (in jurisdictions where costs are recoverable under such circumstances);[78] and also in proceedings in which the

70. Waite *v.* Vinson, 18 Mont. 410, 45 Pac. 552.

71. Hadley *v.* Pethcal, 23 N. Y. Civ. Proc. 216.

If granted on condition of paying "costs after notice of trial" this includes costs for making and serving amendments to the case and before and for argument of the motion for new trial, but not costs of an appeal from the judgment previously taken where an action to enforce the costs on appeal is still pending. Fleischman *v.* Yagel, 16 Misc. (N. Y.) 511, 38 N. Y. Suppl. 523, 74 N. Y. St. 43.

In Minnesota it has been held that where a new trial is awarded without providing for costs of the first trial, such costs shall abide the event of the suit and be awarded to the party ultimately successful. Walker *v.* Barron, 6 Minn. 508.

72. Wilson *v.* Abbott, 68 N. Y. Suppl. 867.

73. Koon *v.* Thurman, 2 Hill (N. Y.) 357.

74. Knight *v.* Hurley, 155 Mass. 486, 29 N. E. 1149; McDougall *v.* Richardson, 3 Hill (N. Y.) 558; Carpenter *v.* Thornton, 3 B. & Ald. 52, 22 Rev. Rep. 299, 5 E. C. L. 40; Sheehy *v.* Professional L. Assur. Co., 2 C. B. N. S. 211, 3 Jur. N. S. 748, 26 L. J. C. P. 301, 89 E. C. L. 211; Emerson *v.* Lashley, 2 H. Bl. 248; *dictum* in Fry *v.* Malcolm, 4 Taunt. 705. *Compare* Higgins *v.* Callahan, 10 Daly (N. Y.) 420, holding that where there is no provision regulating the collection of costs of a motion made after judgment an action may be maintained for their recovery. See also McDougall *v.* Richardson, 3 Hill (N. Y.) 558, holding that where costs are not recoverable by attachment, because a defendant is out of the jurisdiction, an action of debt may be maintained.

75. Davis *v.* Cohn, 85 Mo. App. 530; Pearson's Estate, 6 Pa. Co. Ct. 298; Woodward *v.* Hall, 30 Fed. Cas. No. 18,005, 2 Cranch C. C. 235. See also Russell *v.* Smyth, 1 Dowl. P. C. N. S. 929, 11 L. J. Exch. 308, 9 M. & W. 810, in which it is held that assumpsit or debt may be maintained against a defendant, in the English courts, for costs awarded against him by a decree in Scotland.

Where the action is against several defendants such judgment must be valid as to all. Davis *v.* Cohn, 85 Mo. App. 530.

76. Ives *v.* Finch, 28 Conn. 112. See also Morton *v.* Bailey, 2 Ill. 213, 27 Am. Dec. 767; Frankel *v.* Chicago, etc., R. Co., 70 Iowa 424, 30 N. W. 679, 32 N. W. 488; Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452.

In Louisiana, although the party defeated is liable for costs, which include the mileage and *per diem* of witnesses, he cannot be sued in a direct action by those not summoned by himself. The remedy is by execution at the instance of the party who controls the judgment, or of the officers of court, in cases provided by law. Smith *v.* Sleaveport, 10 La. Ann. 582.

In Tennessee it has been held that an officer of court may maintain an action against a plaintiff for his lawful fees where they cannot be collected from defendant. Ewing *v.* Lusk, 4 Yerg. 459.

77. Peralta *v.* Adams, 2 Cal. 594.

78. Wentworth *v.* Wyman, 80 Me. 463, 15 Atl. 33.

party entitled to costs is expressly authorized by statute to maintain an action therefor.[79] So one who brings an action in the name of another is liable in assumpsit on an express promise to pay costs;[80] and a stranger to a suit who has entered into an agreement to pay costs is liable in an action therefor.[81]

2. Prerequisites to Action. No action will lie to recover costs before they have been taxed as such;[82] and if suit is brought against a stranger to the suit, on his agreement to pay costs, he is entitled to notice before suit brought of the amount taxed.[83]

3. Form of Action. Where suit is brought by a clerk of court for his fees against a plaintiff assumpsit lies.[84] So it has been held that assumpsit or debt will lie against one against whom a judgment for costs has been rendered in another state or country.[85] It has also been held that where the party cast has failed to pay all the costs, a bill in equity will lie to enforce the judgment for costs.[86]

4. Evidence. It has been held that a bill of fees taxed without notice to the party chargeable is not competent evidence in an action to recover them.[87] It has further been held that the correctness of the items of bills of costs will not be examined on the trial of a suit to recover them.[88]

B. By Attachment — 1. In Absence of Statute — a. In General. The courts of the United States may enforce by attachment the payment of costs due to the officers of the court.[89] In New Jersey it has been held that where the lessor of plaintiff in ejectment refuses to join in the consent rule, and is non-prossed, the remedy for collecting costs adjudged against the lessor is by attachment.[90] In North Carolina it has been held that the supreme court has no power to compel, by process of attachment, a defendant to pay a judgment against him for costs recovered by plaintiff in the supreme court.[91]

b. Interlocutory Costs. The ordinary method of enforcing the payment of interlocutory costs is by attachment, in the absence of some statutory prohibition

79. Cary *v.* Marston, 56 Barb. (N. Y.) 27.

80. Brewer *v.* Hayes, 2 Watts (Pa.) 12.

81. Safford *v.* Stevens, 2 Wend. (N. Y.) 158.

82. Kellogg *v.* Howes, 93 Cal. 586, 29 Pac. 230.

83. Safford *v.* Stevens, 2 Wend. (N. Y.) 158.

He need not be served with a copy of the tax bill, nor need payment be demanded of him. Safford *v.* Stevens, 2 Wend. (N. Y.) 158.

84. Ewing *v.* Lusk, 4 Yerg. (Tenn.) 459.

Assumpsit lies to recover costs against one bringing an action in the name of another. Brewer *v.* Hayes, 2 Watts (Pa.) 12.

85. Russell *v.* Smyth, 1 Dowl. P. C. N. S. 929, 11 L. J. Exch. 308, 9 M. & W. 810.

86. Frankel *v.* Chicago, etc., R. Co., 70 Iowa 424, 30 N. W. 679, 32 N. W. 488. *Compare* Sanderlin *v.* Thompson, 17 N. C. 539, in which it is held that a bill will not lie in any case for the costs alone of a suit at law.

87. Mumford *v.* Hawkins, 5 Den. (N. Y.) 355. But see Hughes *v.* Mulvey, 1 Sandf. (N. Y.) 92, holding that a taxed bill of costs is admissible without proof that it was taxed on notice.

88. Brady *v.* New York, 1 Sandf. (N. Y.) 569. And see Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452, in which it is held that an entry in a justice's docket, as follows: "Execution returned wholly unsatisfied. Costs on execution, $19.50," is not sufficient to establish *prima facie* plaintiff's right to recover in an action upon the judgment nineteen dollars and fifty cents, as accrued costs on execution. But see Woodward *v.* Hall, 30 Fed. Cas. No. 18,005, 2 Cranch C. C. 235, holding that the amount may be proved by parol.

89. Caldwell *v.* Jackson, 7 Cranch (U. S.) 276, 3 L. ed. 341; Bowne *v.* Arbuncle, 3 Fed. Cas. No. 1,742, Pet. C. C. 233; Hoyt *v.* Byrd, 12 Fed. Cas. No. 6,807, Hempst. 436. See also Anonymous, 1 Fed. Cas. No. 445, 2 Gall. 101.

A witness may have an attachment for his fees, but to entitle him to it he must have obtained an order of court for the payment thereof and show service of the order to the party refusing to obey it. Sadler *v.* More, 21 Fed. Cas. No. 12,208, 1 Cranch C. C. 212. See also Nally *v.* Lambell, 17 Fed. Cas. No. 10,006, 1 Cranch C. C. 365.

Intervention.— Where, on stipulation for a settlement by the parties, others are allowed to intervene on filing bond for future costs, the court will, on determining the cause against the interveners, order an attachment against them and their sureties, if they fail to pay the costs. Craig *v.* Leitensdorfer, 127 U. S. 764, 8 S. Ct. 1393, 33 L. ed. 322.

90. Den *v.* Hayne, 21 N. J. L. 245.

91. Phillips *v.* Trezevant, 70 N. C. 176.

or a statute authorizing a different method of recovery;[92] and such costs are not enforceable by execution.[93]

c. Costs on Final Judgment. A final judgment for costs is only recoverable by execution and not by attachment.[94]

2. Under Special Statutory Provisions. A statute[95] providing that "no person shall be arrested or imprisoned on any civil process issued out of any court . . . in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract, excepting in proceeding, as for contempt, to enforce civil remedies, actions for fines or penalties, or on promises to marry, on moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment" applies alike to judgments at law and to decrees in equity, and prohibits arrest in every case in an action upon contract which is not included in the exceptions.[96]

C. By Stay of Proceedings — 1. To Enforce Payment of Costs of Prior Action — a. In Absence of Statute or Under Statutes Declaratory of Common Law — (i) *Introductory Statement.* One of the methods of enforcing payment of costs awarded by a final judgment is by staying a second action based on the same cause of action. The practice originated in ejectment suits;[97] but the scope of the rule was subsequently enlarged, and now embraces all classes of actions.[98]

92. *Kentucky.*— Mahoney *v.* Holland, 2 Bibb 243.

Michigan.— Barney *v.* Love, 101 Mich. 543, 60 N. W. 58.

New Jersey.— State *v.* Kunkle, 39 N. J. L. 618; Gilliland *v.* Rappleyea, 15 N. J. L. 138.

New York.— McDougall *v.* Richardson, 3 Hill 558; Fulton *v.* Brunk, 18 Wend. 509; Jackson *v.* Pell, 19 Johns. 270; Jackson *v.* Larroway, 2 Johns. Cas. 114.

Ohio.— Kellogg *v.* Graham, Wright 87.

England.— Carpenter *v.* Thornton, 3 B. & Ald. 52, 22 Rev. Rep. 299, 5 E. C. L. 40; *dictum* in Fry *v.* Malcolm, 4 Taunt. 705; Sheehy *v.* Professional L. Assur. Co., 2 C. B. N. S. 211, 3 Jur. N. S. 748, 26 L. J. C. P. 301, 89 E. C. L. 211; Emerson *v.* Lashley, 2 H. Bl. 248.

See 13 Cent. Dig. tit. "Costs," § 1043.

Setting aside verdict.— See Gilliland *v.* Rappleyea, 15 N. J. L. 138.

Continuance.— See Mahoney *v.* Holland, 2 Bibb (Ky.) 243; Barney *v.* Love, 101 Mich. 543, 60 N. W. 58; Fulton Bank *v.* Stafford, 2 Wend. (N. Y.) 483. *Contra*, McGill *v.* Shehee, 16 Fed. Cas. No. 8,797, 1 Cranch C. C. 62. And it has been held that such costs are not enforceable by attachment, where there is no personal service of the order to pay costs, and where the bill of costs does not state the particulars. Dyson *v.* White, 8 Fed. Cas. No. 4,231, 1 Cranch C. C. 359.

93. See *infra*, XXVII, D, 1, b.

94. State *v.* Jaynes, 19 Nebr. 697, 28 N. W. 295. See also State *v.* Kunkle, 39 N. J. L. 618.

95. Pa. Act July 12, 1842, § 1.

96. Pierce's Appeal, 103 Pa. St. 27, 29.

Breach of trust.—A decree in equity adjudging that defendant is guilty of a breach of trust and of actual fraud in respect to the matters complained of in the bill, and directing that he pay the costs of the proceeding, will be enforced by attachment. Wilson *v.* Wilson, 142 Pa. St. 247, 21 Atl. 807; Duff *v.* McDonough, 2 Pa. Super. Ct. 373, 38 Wkly. Notes Cas. (Pa.) 496. See also Church's Appeal, 103 Pa. St. 263.

Suit founded on contract.—A judgment or decree for payment of costs incident to a suit founded on contract, and not involving fraud or breach of trust on the part of the losing parties, cannot be enforced by attachment any more than a judgment or decree for the debt which was the foundation of the suit. Pierce's Appeal, 103 Pa. St. 27; Fetters *v.* Barker, 11 Pa. Co. Ct. 366; Tarr's Estate, 4 Pa. Co. Ct. 182; Cochran *v.* Gowen, 9 Phila. (Pa.) 299, 31 Leg. Int. (Pa.) 252. See also Peterson *v.* Geary, 3 Pa. Co. Ct. 49.

Interlocutory costs.— The statute prohibits an attachment for the collection of interlocutory costs. Peterson *v.* Geary, 3 Pa. Co. Ct. 49; McCain *v.* Jewell, 24 Pittsb. Leg. J. (Pa.) 185. See also Pierce's Appeal, 103 Pa. St. 27.

Appeal from award of arbitrators.— The power to enforce by attachment payment of costs taxed subsequently to an appeal from an award of arbitrators exists. Carr *v.* McGovern, 66 Pa. St. 457; Williams *v.* Hazlep, 14 Pa. St. 157. See also Fraley *v.* Nelson, 5 Serg. & R. (Pa.) 234.

97. Buckles *v.* Chicago, etc., R. Co., 47 Fed. 424.

Bar to action.— Failure to pay costs of a former action is not a bar to a subsequent action for the same cause of action between the same parties. Werrels *v.* Boettcher, 142 N. Y. 212, 36 N. E. 883; Patchen *v.* Delaware, etc., Canal Co., 62 N. Y. App. Div. 543, 71 N. Y. Suppl. 122; Foster *v.* Bowen, Code Rep. N. S. (N. Y.) 236; Purnell *v.* McBreen, 9 Pa. Dist. 232, 23 Pa. Co. Ct. 442.

98. Gerety *v.* Reading R. Co., 9 Phila. (Pa.) 153, 30 Leg. Int. (Pa.) 305; Buckles *v.* Chicago, etc., R. Co., 47 Fed. 424.

(II) *Power of Court to Grant Stay* — (A) *In General.* The court may and ordinarily will stay proceedings in a second action, legal or equitable, between the same parties for the same cause of action, until the costs of the first action are paid.[99] This is true irrespective of the manner in which the action terminates; as where plaintiff is nonsuited;[1] or where he dismisses or discontinues his action, or takes a voluntary nonsuit;[2] or the suit is dismissed for failure of the complaint to state a cause of action;[3] or where the complaint is dismissed for failure to pay the costs imposed on opening a default.[4] It also applies although the situation of the parties is reversed; in other words plaintiff in a second ejectment suit may be required to pay costs awarded against him as defendant in the first suit.[5]

(B) *Exceptions and Limitations of Rule.* The rule does not apply where the second suit is rendered necessary by the act of defendant himself,[6] as for

99. *Alabama.*— *Ex p.* Street, 106 Ala. 102, 17 So. 779; Brown *v.* Brown, 81 Ala. 508, 2 So. 95.

Delaware.— Tarney *v.* Metropolitan L. Ins. Co., 2 Marv. 368, 43 Atl. 255.

Indiana.— Trogdon *v.* Brinegar, (1901) 59 N. E. 1066; Carrothers *v.* Carrothers, 107 Ind. 530, 8 N. E. 563; State *v.* Howe, 64 Ind. 18.

Minnesota.— See Gerrish *v.* Pratt, 6 Minn. 53.

New Jersey.— Anonymous, 16 N. J. L. 415; Den *v.* Thompson, 14 N. J. L. 193; Swing *v.* Upper Alloways Creek, 10 N. J. L. 58; Cooper *v.* Sheppard, 9 N. J. L. 96; Sooy *v.* McKean, 9 N. J. L. 86; Updike *v.* Bartles, 13 N. J. Eq. 231.

New York.— Farrell *v.* New York Juvenile Asylum, 2 N. Y. App. Div. 496, 37 N. Y. Suppl. 1118, 74 N. Y. St. 414; Vetterlein *v.* Barnes, 43 Hun 437; *Ex p.* Stone, 3 Cow. 380; Jackson *v.* Carpenter, 3 Cow. 22; Jackson *v.* Edwards, 1 Cow. 138; Saxton *v.* Stowell, 11 Paige 526; Cummins *v.* Bennett, 8 Paige 79; Kerr *v.* Davis, 7 Paige 53.

Ohio.— Arnold *v.* Pittsburg Coal Co., 7 Ohio S. & C. Pl. Dec. 414.

Pennsylvania.—Koons *v.* Patterson, 1 Phila. 288, 9 Leg. Int. 11.

Rhode Island.—Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 217, 14 Atl. 860.

Washington.— Schwede *v.* Hemrich, 29 Wash. 124, 69 Pac. 643.

Wisconsin.— McIntosh *v.* Hoben, 11 Wis. 400.

United States.—Henderson *v.* Griffin, 5 Pet. 151, 8 L. ed. 79; Buckles *v.* Chicago, etc., R. Co., 53 Fed. 566; Hurst *v.* Jones, 12 Fed. Cas. No. 6,933, 4 Dall. 353.

England.— Roberts *v.* Cook, 4 Mod. 379; Spires *v.* Sewell, 5 Sim. 193, 9 Eng. Ch. 193; Keene *v.* Angel, 6 T. R. 740; Pickett *v.* Loggon, 5 Ves. Jr. 702, 31 Eng. Reprint 814.

See 13 Cent. Dig. tit. "Costs," § 1045.

Dismissal on exception.— In Louisiana it has been held that where a suit is not discontinued, but suffered to go by default and dismissed on exception, another suit may be brought without first paying the costs of the former. Howard *v.* Copley, 10 La. Ann. 504.

On removal to federal court.—A state court is without jurisdiction to award costs in an action, or to make any order whatever, after the cause is duly removed to the federal circuit court; and therefore a motion for a stay of proceedings in the circuit court, because costs have not been paid, will be denied. Penrose *v.* Penrose, 1 Fed. 479.

1. Noonan *v.* New York, etc., R. Co., 68 Hun (N. Y.) 387, 22 N. Y. Suppl. 860, 52 N. Y. St. 203; Richardson *v.* White, 27 How. Pr. (N. Y.) 155; Edwards *v.* Ninth Ave. R. Co., 22 How. Pr. (N. Y.) 444; Flemming *v.* Pennsylvania Ins. Co., 4 Pa. St. 475; Newton *v.* Bewley, 1 Browne (Pa.) 38; McDowell *v.* Delaware River R. Co., 19 Wkly. Notes Cas. (Pa.) 568; Mullin *v.* Jackson, 2 Chest. Co. Rep. (Pa.) 264; Hartman *v.* Quay, 1 Chest. Co. Rep. (Pa.) 542; Robinson *v.* Merchants', etc., Transp. Co., (R. I. 1888) 14 Atl. 860; Weston *v.* Withers, 2 T. R. 511; Baldwin *v.* Richards, 2 T. R. 511, note *a*.

Mistake in form of action.— Where plaintiff in ejectment is nonsuited because he has mistaken his form of action he will not necessarily be compelled to pay the costs of the action before being permitted to bring another action in the same form for the same cause of action. Cochran *v.* Perry, 2 Pa. L. J. Rep. 521.

2. Hipes *v.* Griner, (Ind. 1902) 62 N. E. 500; Citizens' St. R. Co. *v.* Shepherd, (Ind. 1901) 59 N. E. 349; Carrothers *v.* Carrothers, 107 Ind. 530, 5 N. E. 563; Clemans *v.* Buffenbarger, 106 Ind. 16, 5 N. E. 548; State *v.* Howe, 64 Ind. 18; Flewelling *v.* Brandon, 4 Daly (N. Y.) 333; Cummins *v.* Bennett, 8 Paige (N. Y.) 79; Buckles *v.* Chicago, etc., R. Co., 47 Fed. 424; Wheaton *v.* Love, 29 Fed. Cas. No. 17,485, 1 Cranch C. C. 451. See also Mills *v.* Webber, 7 Rob. (La.) 108.

3. Gerrish *v.* Pratt, 6 Minn. 53.

4. Farrell *v.* New York Juvenile Asylum, 2 N. Y. App. Div. 496, 37 N. Y. Suppl. 1118, 74 N. Y. St. 414.

5. Altman *v.* Altman, 12 Pa. St. 246, 247, in which it was said: "If the plaintiff is unsuccessful in the first case, and wishes to try his hand the second time, he is compelled to pay the defendant his costs of his first effort. Why should not the defendant, if he is unsuccessful in resisting the plaintiff's claim in one trial, pay costs before he has another chance?"

6. Drake *v.* New York Iron Mine, 71 Hun (N. Y.) 211, 24 N. Y. Suppl. 518, 54 N. Y.

instance by defendant's fraud or perjury in procuring a nonsuit;[7] where the cause of abatement is the death of the party;[8] or where the former suit was dismissed through the attorney's neglect;[9] or where plaintiff is in execution for costs.[10] So the rule is not enforceable in a justice's court;[11] and defendant, who has assigned the costs due him, is not entitled to a stay of proceedings to enforce payment.[12]

(III) *Discretion of Court in Granting Stay.* Unless expressly so provided by statute, the right to a stay of proceedings to compel payment of costs of a former suit is not an absolute one, but rests in the sound discretion of the court.[13] In some jurisdictions the view is taken that the discretion of the court in granting or refusing a stay is not reviewable;[14] in others an appeal lies from an order granting or refusing a motion for a stay.[15]

(IV) *Presumptions on Application For Stay.* For the purposes of the application to stay the proceedings the second action will be deemed vexatious until the inference be removed by some showing on the part of plaintiff; or in other words the burden is on plaintiff to show that the suit is not vexatious, if he desires to take himself outside of the operation of the rule.[16]

(V) *Necessity For Termination of Former Suit.* Ordinarily, to render the rule operative, it is essential that the former action shall have terminated, and

St. 211; Lawrence *v.* Dickenson, 2 Cow. (N. Y.) 580.

7. Richardson *v.* White, 27 How. Pr. (N. Y.) 155.

8. Sears *v.* Jackson, 11 N. J. Eq. 45.

Effect of failure to pay costs on motion to revive.— The fact that plaintiff has failed to pay the costs of an order made therein, and that such failure stayed plaintiff's proceedings, does not bar a motion to revive and continue the action after his death. Clute *v.* Emmerich, 2 N. Y. Suppl. 874, 19 N. Y. St. 710, 16 N. Y. Civ. Proc. 123.

9. Dare *v.* Murphy, 12 N. Y. Civ. Proc. 388, 18 Abb. N. Cas. (N. Y.) 466. But see Mullin *v.* Jackson, 2 Chest. Co. Rep. (Pa.) 264, which holds the contrary.

10. Richardson *v.* White, 27 How. Pr. (N. Y.) 155; Eaton *v.* Wyckoff, 4 Wend. (N. Y.) 203.

11. Youle *v.* Brotherton, 10 Johns. (N. Y.) 363.

12. Simpson *v.* Brewster, 9 Paige (N. Y.) 245.

13. Trogden *v.* Brinegar, (Ind. 1901) 59 N. E. 1066; Harless *v.* Petty, 98 Ind. 58; Morgenstern *v.* Zink, 6 Misc. (N. Y.) 418, 27 N. Y. Suppl. 299; Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465; Miller *v.* Grice, 2 Rich. (S. C.) 27, 44 Am. Dec. 271; Cocke *v.* Henson, 6 Fed. Cas. No. 2,929*a*, Hempst. 236.

The power of granting a stay is equitable in its nature, and intended to prevent the vexatious multiplication of suits. Sooy *v.* McKean, 9 N. J. L. 86; Dare *v.* Murphy, 12 N. Y. Civ. Proc. 388; McMahon *v.* Mutual Ben. L. Ins. Co., 12 Abb. Pr. (N. Y.) 28; Sanford *v.* Chase, 3 Cow. (N. Y.) 381; McIntosh *v.* Hoben, 11 Wis. 400. It is founded upon the necessary control which courts have over their own proceedings, and their duty to prevent them being made the means of oppression and vexation. Gerety *v.* Reading R. Co., 9 Phila. (Pa.) 153, 30 Leg. Int. (Pa.) 305.

To authorize stay suit must be vexatious. — Harless *v.* Petty, 98 Ind. 53; Skeels *v.* Bodine, 68 N. Y. App. Div. 217, 73 N. Y. Suppl. 1093; Helm *v.* Katerman, 2 Woodw. (Pa.) 433.

14. Hennies *v.* Vogel, 87 Ill. 242; Withers *v.* Haines, 2 Pa. St. 435; Gerety *v.* Reading R. Co., 9 Phila. (Pa.) 153, 30 Leg. Int. (Pa.) 305.

15. Trogden *v.* Brinegar, (Ind. 1901) 59 N. E. 1066; McMahon *v.* Mutual Ben. L. Ins. Co., 12 Abb. Pr. (N. Y.) 28.

The judgment, if not conclusive, should at least not be disturbed without special reasons for the interference of the reviewing court. Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465. See also Daniels *v.* Moses, 12 S. C. 130.

16. Hipes *v.* Griner, (Ind. 1902) 62 N. E. 500; Carrothers *v.* Carrothers, 107 Ind. 530, 12 N. E. 563; Harless *v.* Petty, 98 Ind. 53; Kitts *v.* Willson, 89 Ind. 95; Eigenman *v.* Eastin, 17 Ind. App. 580, 45 N. E. 795; Sellers *v.* Myers, 7 Ind. App. 148, 34 N. E. 496; Gardenier *v.* Oswego Mut. Sav., etc., Assoc., 17 N. Y. Suppl. 394, 41 N. Y. St. 30; Lawrence *v.* Dickenson, 2 Cow. (N. Y.) 580; Kerr *v.* Davis, 7 Paige (N. Y.) 53; Demarest *v.* Wynkoop, 2 Johns. Ch. (N. Y.) 461; Stiles *v.* Woodruff, 1 Phila. (Pa.) 67, 7 Leg. Int. (Pa.) 66. But *compare* Hewitt *v.* Steele, 136 Mo. 327, 38 S. W. 82 (in which it is held that a motion to stay proceedings in a second suit for the same cause of action until the costs of the first suit are paid is properly refused, where the only evidence to support the allegation that the suit is vexatious is the record of a former action, which discloses that plaintiff recovered a judgment therein, which the trial court set aside for error of law on the trial); Daniels *v.* Moses, 12 S. C. 130 (in which it is held that where the first action is not tried on its merits the court shall not stay a second action unless satisfied that it is vexatious).

The slightest countervailing evidence will be sufficient to overcome the presumption. Hipes *v.* Griner, (Ind. 1902) 62 N. E. 500; Citizens' St. R. Co. *v.* Shepherd, (Ind. 1901) 62 N. E. 300; Sellers *v.* Myers, 7 Ind. App. 148, 34 N. E. 496.

that in such suit defendant is entitled to receive and plaintiff bound to pay costs.[17]

(VI) *Necessity For Same Cause of Action in Both Suits.* It is essential to the operation of the rule that the cause of action be the same in both suits;[18] and some decisions maintain that the causes of action must be identical.[19]

(VII) *Operation of Rule as Affected by Question of Parties.* The rule does not apply if the parties defendant are not the same as those in the first suit, and have no interest in the cause;[20] nor where plaintiff had no interest in the former suit.[21] The rule applies where the party plaintiff claims through or under plaintiff in the first action,[22] and notwithstanding there is an additional plaintiff[23] or defendant,[24] or one less defendant than in the first action.[25] It also applies, although the nominal parties are different, provided the real parties in interest are the same.[26]

(VIII) *Operation of Rule as Affected by Bringing Suits in Different Courts*—(A) *Courts in Same State.* It has never been doubted that the rule is in no way affected by the fact that the two actions are brought in different courts, provided the courts are of the same character, that is to say, both being

17. Bishop *v.* Bishop, 7 Rob. (N. Y.) 194; Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465.

But where plaintiff has been adjudged to pay interlocutory costs as a condition of leave to amend his complaint, the court may stay a second suit for the same cause of action until such costs are paid, notwithstanding the former action remains undetermined, because in such case the costs are actually due and payable. Barton *v.* Speis, 73 N. Y. 133.

18. Nichols *v.* Nichols, 50 N. Y. Super. Ct. 251; State *v.* Outcalt, 8 Ohio Cir. Ct. 10; Stiles *v.* Woodruff, 1 Phila. (Pa.) 67, 7 Leg. Int. (Pa.) 66; Pusey *v.* Wickersham, 1 Chest. Co. Rep. (Pa.) 147; Helm *v.* Katerman, 2 Woodw. (Pa.) 433.

This does not necessarily mean that they shall be of that identical character necessary to constitute a bar to the second action. The general rule is to be applied where the character of the action is the same, arises out of the same transaction, and like relief is asked for, although it may differ in degree and the evidence to establish it may be different. Morgenstern *v.* Zink, 6 Misc. (N. Y.) 418, 27 N. Y. Suppl. 299. The rule applies, although an additional cause of action is stated. Morse *v.* Mayberry, 48 Me. 161; Ripley *v.* Benedict, 4 Cow. (N. Y.) 19.

Illustrations.—Where A and B bring ejectment, and there is judgment against them for costs, although C afterward brings ejectment for a portion of the same premises under the same title, the court will not stay proceedings in the second suit until the costs of the first are paid. Jackson *v.* Clark, 1 Cow. (N. Y.) 140. So it has been held that the causes of action are not the same, where the declaration in the former action is in tort and in the latter assumpsit (Long *v.* Woodman, 65 Me. 56), or where the declaration in the first action is on an indenture and in the second in assumpsit (Brunswick Gas Light Co. *v.* United Gas, etc., Co., 88 Me. 552, 34 Atl. 416). But see Koons *v.* Patterson, 1 Phila. (Pa.) 288, 9 Leg. Int. (Pa.) 11, in which it is held that proceedings in the suit will be stayed until the costs of a previous suit between the same parties for the same cause of action, but different in form, are paid.

19. Arnold *v.* Clark, 9 Daly (N. Y.) 259; Gardenier *v.* Oswego Mut. Sav., etc., Assoc., 17 N. Y. Suppl. 394, 41 N. Y. St. 30; Beemer *v.* McCoy, 2 N. Y. City Ct. 296.

20. Bolton *v.* Corse, 47 N. Y. Super. Ct. 493.

A slight variation in the names of the parties does not affect the operation of the rule. *Ex p.* Street, 106 Ala. 102, 17 So. 779; Flemming *v.* Pennsylvania Ins. Co., 4 Pa. St. 475; Gerety *v.* Reading R. Co., 9 Phila. (Pa.) 153, 30 Leg. Int. (Pa.) 305.

21. Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

22. Warren *v.* Homested, 32 Me. 36; Barton *v.* Speis, 73 N. Y. 133; Richardson *v.* White, 27 How. Pr. (N. Y.) 155; Jackson *v.* Livingston, 1 Cow. (N. Y.) 140.

An assignee of a chose in action not negotiable takes the demand subject to all equities existing between the parties to the contract, and plaintiff may be required to pay the costs of the former action by his assignor brought upon the same cause of action. Griffin *v.* Round Lake Camp Meeting Assoc., 26 Hun (N. Y.) 314.

23. Lampley *v.* Sands [*cited* in 1 Tidd Pr. 539].

24. Kentish *v.* Tatham, 6 Hill (N. Y.) 372.

25. Barton *v.* Speis, 73 N. Y. 133.

26. Sears *v.* Jackson, 11 N. J. Eq. 45; Taylor *v.* Vandervoort, 9 Wend. (N. Y.) 449; Hartman *v.* Quay, 1 Chest. Co. Rep. (Pa.) 542; Henderson *v.* Griffin, 5 Pet. (U. S.) 151, 8 L. ed. 79.

If the party plaintiff or defendant is the same in both suits, and the cause of action the same, the rule applies, although he sues or is sued in a different capacity in the second suit. Newton *v.* Bewley, 1 Browne (Pa.) 38; Zimmerman *v.* Kuebler, 9 Pa. Co. Ct. 128. *Compare* Vetterlein *v.* Barnes, 43 Hun (N. Y.) 437.

law or both being equity courts.[27] Many of the earlier decisions, however, take the view that a suit at law cannot be stayed to compel payment of costs in a former suit in equity based on the same cause of action or *vice versa*.[28]

(B) *Courts of Different States.* The rule has no application where the first suit is brought in another state or country.[29]

(IX) *Operation of Rule as Affected by Suing In Forma Pauperis.* The rule authorizing a stay of proceedings in a second action brought for the same cause between the same parties applies, although plaintiff sues *in forma pauperis*,[30] except where there is some special statutory provision to the contrary.[31]

(X) *Requisites of Application* — (A) *In General.* As the granting of the application is largely a matter of discretion, some evidence should be presented by the moving papers of the merits of defendant's position.[32]

(B) *Time of Making.* According to the earlier decisions an application for a stay of proceedings might be made at any time before trial,[33] or even after verdict,[34] but not after judgment,[35] unless in conjunction with a motion to vacate the judgment.[36] Such laxity of practice is not now permitted. The application comes too late when made after the second action has been called for trial,[37] or after pleading to the merits.[38] The application should be made at as early a period as is practicable, to prevent surprise and the unnecessary accumulation of costs.[39]

(XI) *Opposing Application.* Where an order was made to stay proceedings on defendant's affidavit, it was held proper to refuse to allow plaintiff to file a counter-affidavit after an unexplained delay of seventeen days.[40]

(XII) *Order Granting Stay.* The order granted should be that proceedings in the second suit be stayed until the costs of the first suit shall be paid, and to dismiss unless plaintiff shall pay such costs within a designated time.[41]

27. Jackson *v.* Allen, 3 Cow. (N. Y.) 220; Perkins *v.* Hinman, 19 Johns. (N. Y.) 237; Flemming *v.* Pennsylvania Ins. Co., 4 Pa. St. 475; Kimble *v.* Western Union Tel. Co., 99 Fed. 892; Kimble *v.* Western Union Tel. Co., 70 Fed. 888; Holbrooke *v.* Cracroft, 5 Ves. 706 note, 31 Eng. Reprint 816; Melchart *v.* Halfey, 3 Wils. K. B. 149.

28. Davis *v.* Duffie, 5 Duer (N. Y.) 688; Stebbins *v.* Grant, 19 Johns. (N. Y.) 196; Kerr *v.* Davis, 7 Paige (N. Y.) 53; Demarest *v.* Wynkoop, 2 Johns. Ch. (N. Y.) 461; Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465; Wild *v.* Hobson, 2 Ves. & B. 105. But see Spaulding *v.* American Wood Board Co., 58 N. Y. App. Div. 314, 68 N. Y. Suppl. 945; Sprague *v.* Bartholdi Hotel Co., 68 Hun (N. Y.) 555, 22 N. Y. Suppl. 1090, 52 N. Y. St. 663, in which cases the rule was held to apply, although the suits were brought one in a court of law and the other in a court of equity. And see Silvis *v.* Clous, 6 Pa. Dist. 614, 3 Lack. Leg. N. (Pa.) 358, where it was held that a suit at law cannot be stayed to enforce the payment of costs in the prior suit in equity, or *vice versa*, but only after inquiry whether upon all the circumstances of the case the second proceeding is vexatious and oppressive.

Such a change in the remedy destroys the presumption of vexation. Demarest *v.* Wynkoop, 2 Johns. Ch. (N. Y.) 461.

29. Folan *v.* Lary, 60 Me. 545; Julio *v.* Ingalls, 15 Abb. Pr. (N. Y.) 429.

30. Langston *v.* Marks, 68 Ga. 435; Lyons *v.* Murat, 4 Abb. N. Cas. (N. Y.) 13; Kimble *v.* Western Union Tel. Co., 70 Fed. 888; Buckles *v.* Chicago, etc., R. Co., 53 Fed. 566.

31. Herbert *v.* Drake, 2 N. Y. City Ct. 175.

32. Faulkner *v.* Cody, 28 Misc. (N. Y.) 66, 59 N. Y. Suppl. 807.

In Indiana it has been held that a plea of abatement by defendant, setting up non-payment of costs, will be deemed a motion to stay the proceedings until such costs shall be paid. Hipes *v.* Griner, (1902) 62 N. E. 500.

33. Cuyler *v.* Vanderwerk, 1 Johns. Cas. (N. Y.) 247.

34. Jackson *v.* Miller, 3 Cow. (N. Y.) 57.

35. Fifield *v.* Brown, 2 Cow. (N. Y.) 503.

36. Salters *v.* Ralph, 15 Abb. Pr. (N. Y.) 273.

37. Daniels *v.* Moses, 12 S. C. 130.

38. Gerrish *v.* Pratt, 6 Minn. 53.

Renewal of motion. — Where a motion for a stay is denied, on the ground that the former suit has not been terminated by a final judgment, the motion may be renewed without leave of court on the entry of such judgment. Noonan *v.* New York, etc., R. Co., 68 Hun (N. Y.) 387, 22 N. Y. Suppl. 860, 52 N. Y. St. 203.

Where a motion to stay is filed before service of answer and joinder of issues, the fact that it was not heard until after the time to answer had expired does not waive the right to a stay. Spaulding *v.* American Wood Board Co., 58 N. Y. App. Div. 314, 68 N. Y. Suppl. 945.

39. Miller *v.* Grice, 2 Rich. (S. C.) 27, 44 Am. Dec. 271.

40. Jones *v.* Johnson, 96 Ind. 202.

41. Williams *v.* Getz, 17 App. Cas. (D. C.) 388; Kitts *v.* Willson, 89 Ind. 95; Cummins

b. Under Special Statutory Provisions. Under a statute providing that two actions may be brought for the recovery of land, but that the costs of the first action be first paid, and the second action be brought within two years from the granting of a continuance in the first action, a second action after order of discontinuance in the first action cannot be brought, unless the costs of the first action be first paid.[42] Under a statute authorizing the court to impose reasonable costs upon denying a motion for a new trial, and to make their payment a condition precedent to further proceedings, the court may properly impose terms on denying such a motion.[43]

2. To Enforce Costs of Prior Appeal. The court may stay a second appeal until the costs of a former appeal are paid;[44] and on reversal of a judgment the trial court may stay further proceedings until the costs of the appeal are paid.[45]

3. To Enforce Payment of Interlocutory Costs — a. In Absence of Statutory Authorization. While the court may restrain parties from the prosecution of a second action for the same cause until the costs of the first suit are paid, a party will not be restrained in the prosecution of his suit until he pays the costs of an interlocutory order therein, unless there is some statute authorizing it.[46]

b. Under Special Statutory Authorization — (I) *Where Costs Directed by Order to Be Paid* — (A) *Right to Stay.* A New York statute[47] provides that where costs of a motion, or any other sum of money directed by an order to be paid, are not paid within the time fixed by the order, or, if no time is so fixed, within ten days after service of a copy of the order,[48] all proceedings on the part of the party required to pay them, except to review or vacate the order, are stayed without further direction of the court until the payment thereof; but the adverse party may at his election waive the stay of proceedings. The stay pro-

v. Bennett, 8 Paige (N. Y.) 79. See also Brown *v.* Brown, 81 Ala. 508, 2 So. 95.

An order that the second suit be dismissed unless the costs of the first suit be paid immediately (Williams *v.* Getz, 17 App. Cas. (D. C.) 388. See also Cummins *v.* Bennett, 8 Paige (N. Y.) 79), or perpetually enjoining the prosecution of the suit (Kitts *v.* Willson, 89 Ind. 95), is improper.

42. Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 20 S. E. 378, 540.

If a second action is brought without payment of costs of the first, and the second complaint is dismissed for failure to pay costs of the second action, the same plaintiff cannot then bring another action for the same purpose against the same defendant on paying costs of the first action. Columbia Water Power Co. *v.* Columbia Land, etc., Co., 47 S. C. 117, 25 S. E. 48.

Insolvent defendant.—A statute which expressly requires that before renewing a dismissed action plaintiff must pay the costs accruing therein applies, although defendant was insolvent at the time plaintiff filed his second petition. Sweeney *v.* Malloy, 107 Ga. 80, 32 S. E. 858.

43. Winn *v.* Sanborn, 10 S. D. 642, 75 N. W. 201.

44. Dresser *v.* Brooks, 5 How. Pr. (N. Y.) 75; McIntosh *v.* Hoben, 11 Wis. 400. See also Dade *v.* Smith, 1 Tex. App. Civ. Cas. § 701.

45. Jackson *v.* Schauber, 4 Wend. (N. Y.) 216; Felt *v.* Amidon, 48 Wis. 66, 3 N. W. 825.

Where a bill of review is dismissed as having been improvidently granted, it is unreasonable to impose on complainant the payment of the costs in a limited time as a condition of his filing a plea in the original suit, the matter of which it was the object of the bill of relief to present. Ellzey *v.* Lane, 4 Munf. (Va.) 66.

46. McIntosh *v.* Helborne, 37 Iowa 420; Pinney *v.* Johnson, 2 Wend. (N. Y.) 623.

47. N. Y. Code Civ. Proc. § 779.

The assignee of a cause of action or judgment takes it subject to all the disabilities affecting the assignor, and the payment of costs of a motion, or any other sum of money directed to be paid by the assignor, is a condition precedent to his right to take any further proceedings. MacWhinnie *v.* Cameron, 57 Hun (N. Y.) 463, 11 N. Y. Suppl. 20, 32 N. Y. St. 985, 19 N. Y. Civ. Proc. 168; Gardenier *v.* Eldred, 15 N. Y. Suppl. 819, 40 N. Y. St. 225, 21 N. Y. Civ. Proc. 221; Murray *v.* Cameron, 15 N. Y. Suppl. 13, 38 N. Y. St. 792.

48. To render the statute operative it is not necessary that the order directing payment of costs should fix any time for payment. Hazard *v.* Wilson, 3 Abb. N. Cas. (N. Y.) 50. Where no time for payment of costs is fixed in an order, the costs become due ten days after personal service of the order, or twenty days after service by mail, and the stay becomes operative from the time such costs become due. Reeder *v.* Lockwood, 30 Misc. (N. Y.) 531, 62 N. Y. Suppl. 531.

vided for applies in case of a failure to pay costs imposed by the appellate division on an order denying a motion for reargument.[49] There is a conflict of authority as to whether the statute applies to costs of an appeal.[50] Some decisions hold that the statute has no application as regards the defensive rights of a party, but applies only to an "onward movement" in the action by such party.[51] It has also been held not to apply to any proceedings necessary to enable the party in default to review the order imposing costs by an appeal;[52] to a motion by plaintiff for leave to enter final judgment dismissing the complaint after an order sustaining a demurrer thereto has been affirmed on appeal;[53] nor to a motion to substitute a living for a deceased party, in order that proceedings in the action might be taken.[54]

(B) *Waiver of Right to Stay.* The stay provided for by the statute is waived by serving notice of trial or accepting such notice from the opposite party after the order granting costs is made;[55] by an appearance of the opposite party in an argument for further proceedings on their merits without objection to the non-payment of costs;[56] by giving notice to a receiver;[57] or by an agreement that the costs could be paid later, and by proceeding with the argument, and by an acceptance of the costs paid on the day of the agreement.[58] It is not waived by answering an amended complaint served before the stay became operative.[59]

(II) *Where Costs Directed to Abide Event.* The statute further provides that when an order directs that the costs of a motion abide the event of the action, they may be taxed as a part of the costs of the action, or set off against costs awarded to the adverse party, as the case may require. Under this clause non-payment of costs of a motion directed to abide the event does not operate as a stay of the action.[60]

D. By Execution — 1. Right to Execution For Costs — a. Costs Awarded on Final Judgment. A judgment for debt or damages and costs is an entirety. The costs follow as an incident the judgment for the debt or damages, and are collectable by execution in the same manner as the amount awarded for debt or damages.[61]

b. Interlocutory Costs. In the absence of special statutory authorization interlocutory costs are not recoverable by execution;[62] but in some states it has been held that after final judgment they may be properly included, by an order of court, in an execution issued for the costs of the action.[63] Under a statute author-

49. Margulies *v.* Damrosch, 23 Misc. (N. Y.) 77, 51 N. Y. Suppl. 833.

50. **Statute held applicable.**— See Phipps *v.* Carman, 26 Hun (N. Y.) 518; Cohu *v.* Husson, 57 N. Y. Super. Ct. 222, 6 N. Y. Suppl. 512, 25 N. Y. St. 811, 17 N. Y. Civ. Proc. 434.

Statute held not applicable.— See Van Woert *v.* Ackley, 56 Hun (N. Y.) 375, 10 N. Y. Suppl. 673, 32 N. Y. St. 383; Eisenlord *v.* Clum, 52 Hun (N. Y.) 461, 5 N. Y. Suppl. 512, 24 N. Y. St. 102, 17 N. Y. Civ. Proc. 147; Verplanck *v.* Kendall, 47 N. Y. Super. Ct. 513.

51. Farber *v.* Flauman, 30 Misc. (N. Y.) 627, 62 N. Y. Suppl. 784; Randell *v.* Abrisqueta, 20 Abb. N. Cas. (N. Y.) 292, 2 N. Y. City Ct. 303. But see Lyons *v.* Murat, 54 How. Pr. (N. Y.) 23, in which it is held that a plaintiff who owes motion costs will not be permitted to serve a reply to a counterclaim pleaded by defendant until payment of the costs. And see Brown *v.* Griswold, 23 Hun (N. Y.) 618, in which it was held that if a defendant fails to pay motion costs, he cannot move for a dismissal of the complaint because of plaintiff's default.

52. Marsh *v.* Woolsey, 14 Hun (N. Y.) 1.

53. Ten Eyck *v.* Warwick, 30 N. Y. Suppl. 859, 63 N. Y. St. 165, 24 N. Y. Civ. Proc. 6.

54. Van Brocklin *v.* Van Brocklin, 17 N. Y. App. Div. 226, 45 N. Y. Suppl. 541.

55. Reeder *v.* Lockwood, 30 Misc. (N. Y.) 531, 62 N. Y. Suppl. 713.

56. Atty.-Gen. *v.* Continental L. Ins. Co., 38 Hun (N. Y.) 521.

57. Verplanck *v.* Kendall, 47 N. Y. Super. Ct. 513.

58. Moore *v.* Moore, 44 N. Y. App. Div. 253, 60 N. Y. Suppl. 653.

59. Robinson *v.* Klein, 30 N. Y. Suppl. 262, 62 N. Y. St. 73, 31 Abb. N. Cas. (N. Y.) 481.

60. Van Woert *v.* Ackley, 56 Hun (N. Y.) 375, 10 N. Y. Suppl. 673, 32 N. Y. St. 383.

61. Church *v.* Hay, 93 Ind. 323; Martindale *v.* Tibbetts, 16 Ind. 200.

62. Henderson *v.* Allen, 56 Wis. 177, 13 N. W. 928; Fenwick *v.* Voss, 8 Fed. Cas. No. 4,736, 1 Cranch C. C. 106.

63. Sanborn *v.* Sanborn, 41 N. H. 306; Stackhouse *v.* Lyon, 17 Pa. Super. Ct. 397.

izing issuance of execution where costs of a motion, directed by an order to be paid, are not paid within the time specified, costs of an appeal from an order are costs of a motion.[64] On the other hand costs allowed at the close of an examination in supplementary proceedings are not motion costs within the rule.[65] So an application for judgment on the pleadings is not a motion, within the statute.[66]

2. In Whose Favor Issued. In the absence of express statutory authority an execution for costs, it is apprehended, can only be issued by a party to the suit.[67] Officers of court have no right to issue an execution for their fees.[68] In some jurisdictions, however, it has been held that the officers and witnesses can issue execution in the name of the prevailing party for the collection of their costs.[69]

3. Against Whom Issued. Execution ordinarily issues against the unsuccessful party in the suit.[70] Unless there is statutory authority for so doing, an execution cannot issue against the successful party for costs, although they cannot be made out of the unsuccessful party.[71] But in a number of jurisdictions there are statutes providing under certain circumstances for execution against the successful party for costs, where the same cannot be made out of the unsuccessful party, against whom they have been awarded.[72] Under a statute giving to defendant, entitled to costs, an execution against an equitable plaintiff, a judgment for defendant for costs warrants the issue of execution against all the plaintiffs of record, legal as well as equitable.[73]

4. Prerequisites to Issuance. The rule seems to be well settled that before an execution can issue for the collection of costs there must be a judgment,[74]

64. McIntyre *v.* German Sav. Bank, 59 Hun (N. Y.) 536, 13 N. Y. Suppl. 674, 37 N. Y. St. 545, 20 N. Y. Civ. Proc. 209.

Waiver of continuance.— When a continuance conditioned on payment of costs has been waived, execution will not lie to enforce the order to pay the costs. People *v.* Wayne Cir. Judge, 40 Mich. 244.

65. Valiente *v.* Bryan, 65 How. Pr. (N. Y.) 203.

66. Wesley *v.* Bennett, 6 Abb. Pr. (N. Y.) 12.

67. See *infra*, XXVII, E.

In Louisiana costs are to be collected by execution issued by the party who controls the judgment or by the officers of the court in cases provided by law. A witness cannot maintain an action for his fees against a party who did not summon him merely because such party was cast. Smith *v.* Shreveport, 10 La. Ann. 582.

68. *Ex p.* Hampton, 2 Greene (Iowa) 137.

69. Howard Bldg., etc., Assoc. *v.* Philadelphia, etc., R. Co., 102 Pa. St. 220; Ranck *v.* Hill, 3 Pa. St. 423; McCain *v.* Jewell, 24 Pittsb. Leg. J. (Pa.) 185. See also Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298. And see Clerk's Office *v.* Allen, 52 N. C. 156, holding that where plaintiff in a suit was ordered to pay certain costs of witnesses, and fees to the clerk and sheriff, an execution might issue for the same in the name of the clerk's office.

70. Anderson *v.* McKinney, 22 Tex. 653.

71. Janes *v.* Robinson, Dudley (Ga.) 1.

72. **Georgia.**—An execution for costs, issued under Civ. Code, § 5395, against a successful plaintiff in ejectment, cannot be enforced against the land involved in such ejectment, as against the holder of a security deed executed by plaintiff to such land, of older date than the judgment in ejectment, without paying or tendering to the holder of the security deed the amount of his debt, in the manner prescribed in section 5433. Jordan *v.* Central City L. & T. Assoc., 108 Ga. 495, 34 S. E. 132.

North Carolina.— Where a statute authorizes the clerk of court to issue an execution for unpaid costs on the termination of a suit he may issue an execution against the successful party to recover costs due from him, without previously issuing execution against the defeated party. Davidson County *v.* Wagoner, 26 N. C. 131.

Texas.— Rev. Stat. art. 2491, provides that each party to a suit shall be liable for the costs incurred by him, and where they cannot be collected of the party against whom they had been adjudged, execution may issue against any party to a suit for his costs. It was held that after final judgment for costs against one of the parties an officer is not entitled to execution for his costs against the opposite party, at whose instance the costs were incurred, without any attempt to collect from the party against whom they were adjudged. Beauchamp *v.* Withers, (Civ. App. 1901) 62 S. W. 1084. The execution must be issued to the county of the residence of the party. Simpson *v.* Trimble, 44 Tex. 310.

73. Gifford *v.* Gifford, 27 Pa. St. 202.

This statute does not relieve a nominal plaintiff from his liability for costs. The act merely extends the remedy of non-payment of costs by a plaintiff who brought the suit to an equitable plaintiff, whether marked on the record or not. Kinly *v.* Donnelly, 6 Phila. (Pa.) 120, 23 Leg. Int. (Pa.) 101.

74. Brookfield *v.* Morse, 12 N. J. L. 331; Criswell *v.* Ragsdale, 18 Tex. 443.

or order of court,[75] awarding costs, and the amount legally ascertained by taxation.[76] No demand for costs is necessary before issuance of execution, unless so required by statute;[77] and where a statute authorizes the issuance of an execution against personal property for the collection of costs founded on an order of court, execution may issue without application to the court, on the expiration of the time prescribed for payment.[78] The decisions are conflicting as to whether execution for interlocutory costs may be issued without application to the court.[79]

5. What Is Subject to Execution — a. In General. Costs awarded are an incident of the judgment, and any property which is subject to execution on the judgment is also subject to execution for the costs.[80]

b. Body of Defendant. In a number of jurisdictions statutes have been enacted which authorize the issuance of an execution against the body, under circumstances designated in the statutes, and it is only under the circumstances enumerated that such an execution is proper.[81] An action of debt for the value of merchandise forfeited for entry by means of fraudulent practices is not an

75. Hulsaver *v.* Wiles, 11 How. Pr. (N. Y.) 446 (in which it is held that a mere chamber order for payment of costs will not authorize an execution); Sadler *v.* More, 21 Fed. Cas. No. 12,208, 1 Cranch C. C. 212. But see Marysville *v.* Buchanan, 3 Cal. 212, holding that where a cause is remitted from the supreme court to the district court, the clerk of the latter court may issue an execution for the costs accrued thereon, without the order of the district court.

An order of court granting a new trial on payment of costs of the term is not a judgment for which execution may issue for such costs. Herndon *v.* Rice, 21 Tex. 455. But a general and standing order of court directing the clerk to issue execution for his own benefit, or at the instance of any person entitled to costs, is sufficient, without any special order, under a statute authorizing him to issue execution on order of court. Elliott *v.* Ellery, 11 Ohio 306.

76. Reynolds *v.* Baylor, 3 C. Pl. (Pa.) 54; Baker *v.* Slobig, 5 Pa. Co. Ct. 382. See also Eckerson *v.* Spoor, 4 How. Pr. (N. Y.) 361, 3 Code Rep. (N. Y.) 70. *Compare* Irwin *v.* Hanthorn, 6 Pa. Super. Ct. 165, in which it is held that an execution for sheriff's fees will not be set aside on the ground that the costs have not been taxed, where there is no allegation that the fees charged are illegal, that any exception to them has been filed, or any effort made to have them legally adjudicated. And see Eckstein *v.* Strauss, 31 Cinc. L. Bul. 70, holding under a statute providing that the clerk, if the costs are not collected of the unsuccessful party, shall issue execution against the prevailing party for his proportion of the costs, that such execution may issue without a judgment being entered against the successful party.

77. Lucas *v.* Johnson, 6 How. Pr. (N. Y.) 121, Code Rep. N. S. (N. Y.) 301.

78. Lucas *v.* Johnson, 6 How. Pr. (N. Y.) 121, Code Rep. N. S. (N. Y.) 301.

A statute requiring the clerk's oath and the judge's approval before execution can issue against plaintiff for costs has been held to apply only to their collection every six months before termination of suit, and not to their collection by fieri facias under the final judgment. Copley *v.* Edwards, 5 La. Ann. 647.

79. **Application held necessary.**— See Boyce *v.* Bates, 8 How. Pr. (N. Y.) 495; Eckerson *v.* Spoor, 4 How. Pr. (N. Y.) 361.

Application not necessary.— See Wetzel *v.* Schultz, 13 How. Pr. (N. Y.) 191; Mitchell *v.* Westervelt, 6 How. Pr. (N. Y.) 265; Lucas *v.* Johnson, 6 How. Pr. (N. Y.) 121, Code Rep. N. S. (N. Y.) 301.

80. Church *v.* Hay, 93 Ind. 323; Schouton *v.* Kilmer, 8 How. Pr. (N. Y.) 527.

Land may be sold by virtue of a fieri facias on a judgment for costs as well as on any other judgment, where a statute expressly provides that lands may be sold in satisfaction of all judgments. Cox *v.* Joiner, 4 Bibb (Ky.) 94.

81. *Ex p.* Thayer, 11 R. I. 160. See also Mount *v.* Heister, 17 N. J. L. 438.

The word "defendant," as used in statutes of this character, means defendant in execution, and includes a plaintiff against whom a judgment has been obtained by a defendant. *Ex p.* Thayer, 11 R. I. 160. See also Parker *v.* Spear, 62 How. Pr. (N. Y.) 394; Brown *v.* Brockett, 55 How. Pr. (N. Y.) 32, which cases hold that where plaintiff fails in an action of tort, in which defendant was liable to arrest, he may be arrested on an execution against his person for the costs of such action.

Judgment for debt.—A judgment for defendant for his costs, whatever the form of action may be, is to be treated as a judgment for a debt, within the meaning of the provisions under consideration. *Ex p.* Thayer, 11 R. I. 160.

Time of arrest.—A statute providing that no arrest shall be made in a civil action after sunset, except by special authority of the magistrate making the certificate, applies only to arrests on motion process, and not to arrests on execution, as it expressly declares that the writ is not to be subject to the conditions and limitations imposed in the case of executions for debt or damages. *In re* Stone, 129 Mass. 156.

action "to recover a fine or penalty," or "an action upon contract, express or implied," within a statute authorizing body execution against the defendant in such case.[82]

6. Requisites of Execution. Costs being incident to the judgment must be included in the execution to insure collection.[83] It has been held, however, that an execution for costs generally, without stating the amount, is good, if the amount, items, and persons to whom costs are due are indorsed on the execution by the clerk.[84]

7. Setting Aside or Recalling Execution. An execution for costs not properly taxable may be set aside [85] or recalled.[86]

8. Stay of Execution. An execution is stayed by appeal [87] or writ of error;[88] but the fact that a motion to retax has never been decided does not stay it.[89]

9. Alias Writs. Although a portion of the costs have been omitted, another execution cannot issue after return of execution satisfied, without some judicial action to ascertain the costs, and an order made for their collection.[90]

E. By Fee Bill. Under the Illinois and Missouri statutes the officers of court are entitled, in the cases specified in the statutes, to collect their costs by the issuance of a fee bill.[91]

82. U. S. *v.* Reid, 17 Fed. 497, 21 Blatchf. 429.

83. Bradley *v.* Clearfield, etc., Co., 8 Pa. Dist. 493, 22 Pa. Co. Ct. 526, in which it is held that this is true even if the costs are in controversy when the execution for collection of the debt and interest is issued.

If the execution creditor is erroneously described as an administrator in the execution, the description may be rejected as surplusage. Buswell *v.* Eaton, 76 Me. 392.

84. McKnight *v.* Spain, 13 Mo. 534.

One execution against several defendants. — In trespass *quare clausum fregit* the two defendants severed in their pleas, and the jury assessed several damages against them. It was held that one execution should issue against both for costs only, and several executions for the several damages. Kempton *v.* Cook, 4 Pick. (Mass.) 305. So it has been held that process in the nature of a fieri facias issued against several defendants to collect the costs of the denial of a motion is regular, although one of the defendants died previous to making the motion. Lucas *v.* Johnson, 6 How. Pr. (N. Y.) 121, Code Rep. N. S. (N. Y.) 301.

85. Vadakin *v.* Soper, 2 Aik. (Vt.) 248.

It is ground to quash an execution that the amount and items are not shown (Brainard *v.* Harrison, 53 Ala. 360), or that it has been issued after the time therefor has expired, the judgment not having been revived (Price *v.* Nesbitt, 37 Md. 618).

Premature issuance. — If the execution has been prematurely issued, the party proceeded against will be relieved by motion or can enforce his remedy by action. Wetzel *v.* Schultz, 13 How. Pr. (N. Y.) 191.

86. Chase *v.* De Wolf, 69 Ill. 47; Allen *v.* Conlon, 2 Ill. App. 166.

87. Copley *v.* Edwards, 5 La. Ann. 647; Carroll *v.* Hardy, 21 Mo. 66.

88. Jackson *v.* Smith, 6 Cow. (N. Y.) 580.

89. State *v.* Lander County, 22 Nev. 71, 35 Pac. 300.

90. Brooks *v.* Hardwick, 5 La. Ann. 675.

But where costs have been collected from the successful party, because they could not be made out of the unsuccessful party, an alias execution may thereafter be issued against him. Montgomery *v.* Montgomery, 20 Ala. 350.

Under the Illinois practice, whenever an alias writ issues, the costs attendant on the first writ are included with the additional costs in the second writ, and those of an alias, in like manner, in a pluries, if it issue. Therefore the alias and pluries cannot correspond with the original writ, and a variance between them in the amount of costs is not material. Bryan *v.* Smith, 3 Ill. 47.

91. Eads *v.* Couse, 35 Ill. 534; Neal *v.* Blanchard, 32 Ill. 503; Reddick *v.* Cloud, 7 Ill. 670; Hoover *v.* Missouri Pac. R. Co., 115 Mo. 77, 21 S. W. 1076; Beedle *v.* Mead, 81 Mo. 297. The fact that an appeal has been taken does not deprive them of the right to issue a fee bill for fees earned in the case. State *v.* Emmerson, 74 Mo. 607. But a fee bill cannot issue against the unsuccessful party in a suit for the costs made by the successful party, and for which the latter has obtained judgment. Neal *v.* Blanchard, 32 Ill. 503. And a party to the cause has no right to issue a fee bill to collect costs on a judgment rendered in his favor. Eads *v.* Couse, 35 Ill. 534.

The officers of court are not entitled to an execution for their costs, as this is the process of the parties to the suit, who alone have the right to control it. Reddick *v.* Cloud, 7 Ill. 670; Hoover *v.* Missouri Pac. R. Co., 115 Mo. 77, 21 S. W. 1076; Beedle *v.* Mead, 81 Mo. 297.

Referees. — In Missouri it has been held that a referee is not one of the persons in whose behalf a fee bill may issue before final determination of the suit. Dempsey *v.* Shawacker, 62 Mo. App. 166; Conroy *v.* Frost, 38 Mo. App. 351.

F. By Proceedings For Contempt. Where a judgment sets aside a conveyance and awards costs, it is enforceable by proceedings for contempt, under a statute providing that where a judgment is final and part of it cannot be enforced by execution the part which cannot be so enforced is enforceable by serving a copy of the judgment on the party cast, and in case he refuses or wilfully neglects to obey it by punishment for contempt.[92]

XXVIII. IN WHAT PAYMENT MADE.

Costs should be paid in money, and not in any kind of credit or representation of money.[93] Payment by check,[94] by draft,[95] by note,[96] or by charging them to counsel,[97] is not sufficient; and it has been held that payment should be made in coin or legal tender treasury notes.[98]

XXIX. RECOVERY BACK OF COSTS PAID.

A. Right to Recover Back Costs. Costs voluntarily paid cannot be recovered back, although the party paying them is not liable therefor.[99] The rule is

92. Smith *v.* Duffy, 8 N. Y. Civ. Proc. 191.

Misconduct of attorney.— The institution of proceedings by one attorney from improper motive and without just grounds, to disbar another attorney, is "misconduct as such" attorney, within the meaning of a statute excepting such a case from the general provision abolishing imprisonment for non-payment of costs; and in case of the non-payment of costs so ordered to be paid an order and a precept in pursuance thereof may be properly granted and issued committing the attorney to the county jail until payment is made. *In re* Kelly, 62 N. Y. 198.

Special proceedings.—A statute providing that on non-payment upon demand of the costs awarded by a final order made in a special proceeding instituted by a state writ the person required to pay such costs may be punished for contempt of court is merely directory. The court will inflict such punishment only when in its discretion it is deemed proper to do so. People *v.* Masonic Guild, etc., Assoc., 18 N. Y. Suppl. 806, 22 N. Y. Civ. Proc. 74.

Surrogate's decree for costs.—A statute providing that in certain cases the decree of the surrogate's court, directing the "payment of money," or requiring the performance of any other act, may be enforced by proceedings for contempt, does not apply to decrees for the payment of "costs" only, and in respect to such decree the surrogate is subject to the general provisions of another statute, prohibiting imprisonment for non-payment of costs, except in the cases specified therein. *In re* Humfreville, 154 N. Y. 115, 47 N. E. 1086 [*reversing* 19 N. Y. App. Div. 381, 46 N. Y. Suppl. 439].

Under a statute providing that costs may be adjudged against a person beneficially interested in an action, but not a party thereto, and that he may be proceeded against for contempt on failure to pay the same, it has been held that a person so refusing to pay costs adjudged against him as assignee of plaintiff may be adjudged liable for contempt, without showing that such refusal impairs or prejudices any rights of defendant, and that he may be fined for the amount of such costs, to be paid to defendant's attorney. Tucker *v.* Gilman, 14 N. Y. Suppl. 392, 37 N. Y. St. 958, 20 N. Y. Civ. Proc. 397.

93. Walker *v.* Graham, 74 Pa. St. 35; Carr *v.* McGovern, 66 Pa. St. 457; Lagen *v.* Cadwell, 1 Walk. (Pa.) 175.

Where a contract is made payable in a specific kind of money, the judgment may enforce payment of costs and interest in the kind of money mentioned in the contract (Carpentier *v.* Atherton, 25 Cal. 564), unless the statute expressly excepts costs from its operation (Coffin *v.* Coulson, 2 Oreg. 205).

94. Richter *v.* Cummings, 1 Leg. Chron. (Pa.) 49.

95. Walker *v.* Graham, 74 Pa. St. 35.

96. George *v.* Bischoff, 68 Ill. 236; Ellison *v.* Buckley, 42 Pa. St. 281.

97. Carr *v.* McGovern, 66 Pa. St. 457.

98. Crews *v.* Ross, 44 Ind. 481; Armsworth *v.* Scotten, 29 Ind. 495 (in which it was held that payment to the clerk of the amount due in national bank-notes was insufficient).

Acceptance of other medium.— Payment of costs in a prior suit to the officers and persons entitled thereto will be sufficient if accepted by such persons, although not made in money. Defendant cannot complain of the character of the payment, as he is thereby released from liability for such costs. Jordan *v.* Black, 1 Rob. (La.) 575. And under a statute making payment of costs a condition precedent to an appeal from an award, if the record recites the payment of costs, without showing that they were not paid in the manner required by law, extrinsic evidence will be admissible to show such fact. Rice *v.* Constein, 89 Pa. St. 477.

99. Powell *v.* Bunger, 79 Ind. 468; Thompson *v.* Doty, 72 Ind. 336; Clague *v.* Hodgson, 16 Minn. 329; Bobb *v.* Dillon, 20 Mo. App. 309. See, generally, PAYMENT.

Illustrations.— Costs paid as a condition of obtaining a continuance or a new trial

otherwise where the costs have not been voluntarily paid,[1] or where costs are procured to be paid by the fraud of the opposite party.[2]

B. Methods of Recovery. There is some difference of opinion as to the method of recovering back costs for which the party paying them was not liable.[3]

XXX. SET-OFF OF COSTS.

A. In General. Costs in different suits, and recovered before different courts, between the same parties, may on motion be offset in a court of law[4] or equity.[5]

cannot be recovered back, although the party paying them be eventually successful in the action. Tarpy *v.* Crutchfield, 38 Ind. 58. So costs paid into court to render a witness competent are absolutely paid, and are not recoverable. Clement *v.* Bixler, 3 Watts (Pa.) 248. And if a party pays costs not taxed in consideration of a discharge of a judgment and execution rendered against him he cannot recover back the money so paid. Chace *v.* May, Brayt. (Vt.) 25.

1. Davis *v.* Bell, 57 Miss. 320; Clinton *v.* Strong, 9 Johns. (N. Y.) 370; Kennedy *v.* Hughey, 3 Watts (Pa.) 265; Hamilton *v.* Aslin, 3 Watts (Pa.) 222; Leonard *v.* Smith, 4 Pa. Dist. 249.

Illustrations.— Where plaintiff, to secure a remittitur, has paid the prothonotary's fees, the prothonotary having a lien on the record therefor, he may recover them again of defendant, because in so doing he is not a volunteer. Hamilton *v.* Aslin, 3 Watts (Pa.) 222; Leonard *v.* Smith, 4 Pa. Dist. 249. And if plaintiff retain a suit before a justice without any jurisdiction, and which comes into the court of common pleas by appeal, and is there referred to arbitrators, from whose award defendant appeals, and the cause is afterward dismissed for want of original jurisdiction, defendant may recover the costs which he paid on the appeal from the award. Under these circumstances plaintiff may be considered to have been compelled to pay his costs for the purpose of obtaining relief. Kennedy *v.* Hughey, 3 Watts (Pa.) 265. So where an attachment is unlawful the payment of costs to procure its release will not be voluntary. Hunter *v.* Penland, (Tex. Civ. App. 1895) 32 S. W. 421.

Costs on reversal.—As the supreme court gives no costs on reversal of a judgment, if costs are levied on execution the court will order the money refunded. Smith *v.* Sharp, 5 Watts (Pa.) 292; Wright *v.* Small, 5 Binn. (Pa.) 204. But where in a civil case before a justice his costs were paid to him, and the case carried to the superior court, where his judgment was reversed, the costs could not be recovered from him. Abrams *v.* Ryan, 61 Ga. 597.

2. Fischer *v.* Burns, 30 N. Y. Suppl. 437, 61 N. Y. St. 476.

3. Thus some decisions hold that an independent action cannot be maintained to recover back such costs. Robinson *v.* Clarke, Smith (N. H.) 147; Allen *v.* Hickson, 6 N. J. L. 409; Onondaga *v.* Briggs, 2 Den. (N. Y.) 26. This would be trying in an action for money had and received, the merits of a judgment obtained in another suit. Robinson *v.* Clarke, Smith (N. H.) 147. So it has been held that where a collected judgment for costs is set aside, and a new trial had, resulting in a verdict in favor of the party paying the judgment, the proper mode of enforcing an order for restitution of the costs previously paid is by execution, as on a money judgment. O'Gara *v.* Kearney, 57 How. Pr. (N. Y.) 439. Another decision holds that where plaintiff by execution recovers costs to which he is not entitled, the court may by rule compel him to refund them, even after they have been distributed by the sheriff. Harris *v.* Fortune, 1 Binn. (Pa.) 125. On the other hand it has been held that where a suit is discontinued by plaintiff without any decision of the court costs exacted may be recovered back by suit against the officer. Thompson *v.* Doty, 72 Ind. 336; Clinton *v.* Strong, 9 Johns. (N. Y.) 370. Again it has been held that a losing party against whom costs have been adjudged, and who has paid a witness of the successful party his taxed attendance, cannot, upon a retaxation of the costs, recover the payment from the witness, the right of action, if the correction were legally made, being against the successful party. Gray *v.* Alexander, 7 Humphr. (Tenn.) 16.

4. Conable *v.* Bucklin, 2 Aik. (Vt.) 221.

This is so, although one of the judgments be for costs only. Fitch *v.* Baldwin, Clarke (N. Y.) 426. *Contra,* Carleton *v.* Goldman, 5 N. Y. Civ. Proc. 153 note.

If in the same suit each party is awarded costs on different issues these costs may be offset against each other. Jordan *v.* Cummings, 43 N. H. 134. And where, on a recovery of a money demand by plaintiff, defendant is entitled to costs, the costs should be set off against plaintiff's recovery. Johnson *v.* Farrell, 10 Abb. Pr. (N. Y.) 384.

Judgment against two parties.— Where the granting of costs is discretionary, the court on giving them to a party may direct them to be set off upon a judgment held against him and another by the adverse party, although such joint judgment be not the subject of a legal set-off. Wheeler *v.* Heermans, 3 Sandf. Ch. (N. Y.) 597.

5. Stuyvesant *v.* Davies, 3 Edw. (N. Y.) 537.

Necessity for liquidation of costs.— Costs will not be set off against a judgment in another suit unless liquidated at the time the right of set-off attached. Ainslie *v.* Boynton, 2 Barb. (N. Y.) 258.

B. Interlocutory Costs. Motion costs awarded plaintiff should be set off against costs previously awarded in the same action to defendant against plaintiff, especially where the latter is insolvent;[6] and the court may set off interlocutory costs against the judgment finally rendered in an action.[7]

C. Effect of Lien of Attorney. According to the weight of authority, a set-off of costs will not be permitted where it interferes with an attorney's lien therefor.[8]

D. Costs of Appeal. If a judgment is modified on appeal, the costs of appeal may be set off against the successful party's judgment against the costs which he has recovered below.[9]

XXXI. COSTS IN CRIMINAL CASES.

A. Source of Right To, or Liability For, Costs. At common law costs as such were unknown.[10] As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions — that no right to or liability for costs exists in the absence of statutory authorization.[11] In the language of the books, "It is indispensable for every claimant to be able to point to the statute which entitles him to receive what he claims;"[12] and the statutes must be strictly construed.[13]

6. Catlin *v.* Adirondack Co., 22 Hun (N. Y.) 493.

A party to whom costs have erroneously been awarded cannot complain that costs awarded the other party are offset against those awarded him. Cook *v.* Mills, 6 Allen (Mass.) 556.

7. Hoyt *v.* Godfrey, 3 N. Y. Civ. Proc. 118.

Costs awarded a party "to abide the event" are only collectable in case the party is ultimately successful, and in such case he is not entitled to offset such costs. Murphy *v.* Gold, etc., Tel. Co., 9 N. Y. Suppl. 28, 27 N. Y. St. 30, 18 N. Y. Civ. Proc. 43.

8. Hendrickson *v.* Brown, 39 N. J. L. 239; Ainslie *v.* Boynton, 2 Barb. (N. Y.) 258; Naylor *v.* Lane, 5 N. Y. Civ. Proc. 149; Purchase *v.* Bellows, 16 Abb. Pr. (N. Y.) 105; Cooper *v.* Bigalow, 1 Cow. (N. Y.) 206; Devoy *v.* Boyer, 3 Johns. (N. Y.) 247. But see Hoyt *v.* Godfrey, 11 Daly (N. Y.) 278, holding that although an insolvent client agrees that his attorney shall have such costs as may be awarded, the court may order that interlocutory costs allowed the client be deducted from the judgment rendered against him, notwithstanding such agreement.

9. Fredenburg *v.* Turner, 37 Mich. 402; Goodrich *v.* Church, 20 Vt. 187; McCrillis *v.* Banks, 19 Vt. 442.

Where plaintiff in the supreme court recovers less than the amount required to carry costs, defendant may set off his costs against the damages recovered. Abernathy *v.* Abernathy, 2 Cow. (N. Y.) 413; Wood *v.* Gibson, 1 Cow. (N. Y.) 597; Spence *v.* White, 1 Johns. Cas. (N. Y.) 102, Col. Cas. (N. Y.) 72. And plaintiff may set off his damages against the costs allowed defendant. Ross *v.* Dole, 13 Johns. (N. Y.) 306.

In the federal courts costs in the appellate court cannot be set off against the unpaid costs of the district court, so as to prevent the officers of the latter from collecting the sums due them from the claimant. Aiken *v.* Smith, 57 Fed. 423, 6 C. C. A. 414.

10. Eisen *v.* Multnomah County, 31 Oreg. 134, 49 Pac. 730; U. S. *v.* Gaines, 131 U. S. Appendix clxix, 25 L. ed. 733.

11. *District of Columbia.*— District of Columbia *v.* Lyon, 7 Mackey 222.

Georgia.— Hyden *v.* State, 40 Ga. 476.

Illinois.—Moore *v.* People, 37 Ill. App. 641.

Missouri.— Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

New Hampshire.— State *v.* Kinne, 41 N. H. 238.

New York.— Tillotson *v.* Smith, 12 N. Y. St. 331.

Oklahoma.— Greer County *v.* Watson, (1898) 54 Pac. 441.

Oregon.— Eisen *v.* Multnomah County, 31 Oreg. 134, 49 Pac. 730.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 570, 26 Atl. 245, 32 Wkly. Notes Cas. 113; Huntingdon County *v.* Com., 72 Pa. St. 80; Franklin County *v.* Conrad, 36 Pa. St. 317; Com. *v.* Moore, 21 Pa. Co. Ct. 321; Zink *v.* Schuylkill County, 1 Leg. Chron. 191; Wilson *v.* York County, 11 Lanc. Bar 170.

Tennessee.— Mooneys *v.* State, 2 Yerg. 578.

Texas.— Huizar *v.* State, (Crim. 1901) 63 S. W. 329.

United States.— U. S. *v.* Gaines, 131 U. S. Appendix clxix, 25 L. ed. 733; Henry *v.* U. S., 15 Ct. Cl. 162.

See 13 Cent. Dig. tit. "Costs," § 1082.

12. State *v.* Union Trust Co., 70 Mo. App. 311; Huntingdon County *v.* Com., 72 Pa. St. 80; Franklin County *v.* Conrad, 36 Pa. St. 317; Berks County *v.* Pile, 18 Pa. St. 493.

13. Dawson *v.* Matthews, 105 Ala. 485, 17 So. 19; State *v.* Union Trust Co., 70 Mo. App. 311; Crawford County *v.* Barr, 92 Pa. St. 359; Kirkendall *v.* Luzerne County, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313; Zink *v.* Schuylkill County, 1 Leg. Chron. (Pa.) 191.

B. By What Law Governed. Statutes regulating the taxation and payment of costs have no application to cases in which judgment is rendered before their passage;[14] but, according to the weight of authority, if such statutes are in force at the time of rendition of judgment costs in such prosecution are regulated thereby, although enacted subsequently to the commencement of the prosecution,[15] or to the time the costs accrued.[16]

C. Constitutionality of Statutes. Statutes imposing liability for costs or designated items of costs, under circumstances prescribed by the statutes, on defendant,[17] on the prosecutor,[18] on the county,[19] or on the state[20] have been uniformly held constitutional.

D. Liability For Costs — 1. Liability of Defendant — a. Where One Defendant Is Tried — (I) *On Acquittal.* Defendant is not liable to pay costs on acquittal, unless it is so provided by the statute.[21] Under some statutes, when defendant is acquitted, he cannot be adjudged to pay costs in any prosecution, no matter what may be the grade.[22] In others he cannot be adjudged to pay costs on acquittal of a felony.[23] It has been held that so far as the recovery or imposition of costs is concerned the entry of a *nolle prosequi*,[24] or the dismissal of an appeal from a conviction in a justice's court taken to a court having no jurisdiction, is equivalent to an acquittal.[25]

(II) *On Conviction* — (A) *In General.* Independently of special statutory

14. Black *v.* Fite, 88 Ga. 238, 14 S. E. 563. And see Fite *v.* Black, 92 Ga. 363, 17 S. E. 349.

15. State *v.* Dorland, 106 Iowa 40, 75 N. W. 654; Drake *v.* Jordan, 73 Iowa 707, 36 N. W. 653; Meigs *v.* Parke, Morr. (Iowa) 378; Com. *v.* Cambridge, 4 Metc. (Mass.) 35; State *v.* Darr, 63 N. C. 516. See also Pelham *v.* Aldrich, 8 Gray (Mass.) 515, 69 Am. Dec. 266. But see State *v.* Berry, 25 Mo. 355; Stout *v.* State, 91 Tenn. 405, 19 S. W. 19.

Statute not embodied in code.— The court may in its discretion order costs to be paid in accordance with the provisions of a statute not embodied in the code, if such statute is not inconsistent with any of the provisions thereof. Gault *v.* Wallis, 53 Ga. 675.

16. State *v.* Hill, 72 Mo. 512; State *v.* Holladay, 70 Mo. 137.

17. State *v.* Wright, 13 Mo. 243; Shaw *v.* State, 17 Nebr. 334, 22 N. W. 772.

18. Lowe's Appeal, 46 Kan. 255, 26 Pac. 749; State *v.* Cannady, 78 N. C. 539.

19. Marion County *v.* Lear, 108 Ill. 343; Boggs *v.* Washington County, 10 Nebr. 297, 4 N. W. 984; Henley *v.* State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126; Fears *v.* Ellis County, (Tex. Civ. App. 1898) 49 S. W. 139.

20. Buckman *v.* Alexander, 24 Fla. 46, 3 So. 817; Henley *v.* State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126.

21. State *v.* Whitehed, 7 N. C. 223; State *v.* Hargate, 1 N. C. 196.

If defendant is acquitted under some counts and convicted under others, he is not liable for costs included in the counts under which he is acquitted, but should recover costs thereunder. State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547; State *v.* Plum, 49 Kan. 679, 31 Pac. 308; State *v.* Brooks, 33 Kan. 708, 7 Pac. 591.

22. McArthur *v.* Artz, 129 Ill. 352, 21 N. E. 802; Wells *v.* McCullock, 13 Ill. 606; Heitz *v.* People, 56 Ill. App. 391; Spears *v.* State, (Nebr. 1902) 89 N. W. 624.

In Missouri, where the state dismisses a criminal case, the defendant is entitled to be discharged and to recover judgment for all legitimate costs made by him in the case, and it is error to tax such costs against him. State *v.* Krueger, 69 Mo. App. 31.

23. Wayne County *v.* Com., 26 Pa. St. 154; Braddee *v.* Com., 6 Watts (Pa.) 530; Com. *v.* Stritzman, 6 Pa. Co. Ct. 390.

Acquittal of misdemeanor.— In Pennsylvania a jury may impose all or a part of the costs on defendant on acquittal of a misdemeanor. Baldwin *v.* Com., 26 Pa. St. 171; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393. Thus costs may be imposed upon a defendant, although he be acquitted, in misdemeanor cases, where the circumstances show that he was somewhat in fault (Com. *v.* Bishop, 14 Pa. Co. Ct. 404), or was formerly convicted and sentenced for the same offense (Com. *v.* Huggins, 2 Pa. Dist. 329, 12 Pa. Co. Ct. 496). So a jury may direct defendant to pay costs where he was acquitted because the indictment was defective (Wright *v.* Com., 77 Pa. St. 470; Com. *v.* Tilghman, 4 Serg. & R. (Pa.) 127; Com. *v.* Linderman, 1 Woodw. (Pa.) 370), or on a plea of the statute of limitations (Baldwin *v.* Com., 26 Pa. St. 171).

Determination of grade of offense.— Where the legislature does not denominate a statutory offense to be a felony, it will be construed a misdemeanor. Com. *v.* Schall, 12 Pa. Co. Ct. 554.

24. Miami County *v.* Blake, 21 Ind. 32.

25. Ferrier *v.* Deutchman, 111 Ind. 330, 12 N. E. 497.

Acquittal on appeal from justice.— Where by statute defendant is liable for certain costs, when a fine is imposed, and is acquitted on appeal from a sentence of the justice im-

authorization the court has no power to award costs against defendant on conviction.[26] There are, however, in most jurisdictions statutes which in designated prosecutions authorize the imposition of costs on a defendant on conviction.[27]

(B) *Effect of Death of Defendant Pending Appeal.* In some jurisdictions it is held that where defendant dies pending an appeal from conviction this does not abate or destroy the judgment for costs.[28]

(C) *Effect of Pardon.* If a pardon is pleaded before conviction, on which defendant is discharged, this will bar a judgment against defendant for costs.[29]

b. Liability of Joint Defendants — (I) *On Conviction of All.* In some jurisdictions, where persons are jointly indicted and tried, and are convicted, each is liable to pay the whole amount of costs.[30] Nevertheless but one payment can be enforced;[31] and in the event of unequal payments contribution may be recovered one from another.[32] But where there is a severance and one pleads guilty and the other is convicted only the costs of the cause up to the severance are taxable against the one pleading guilty.[33]

(II) *Where Some Defendants Are Acquitted.* Where part of the defendants jointly indicted and tried are acquitted, the defendant or defend-

posing a fine, he is not liable for such costs. Com. *v.* Bundy, 5 Gray (Mass.) 305. See also Gribble *v.* State, 3 Iowa 217.

26. Moore *v.* People, 37 Ill. App. 641; Com. *v.* Moore, 21 Pa. Co. Ct. 321; Faust *v.* State, 45 Wis. 273; Taylor *v.* State, 35 Wis. 298. *Contra,* Com. *v.* Horner, 34 Pa. St. 440; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393.

27. *Illinois.*— Kitchell *v.* Madison County, 5 Ill. 163.

Kansas.— State *v.* Granville, 26 Kan. 158; Shawnee County *v.* Hanback, 4 Kan. 282; Shawnee County *v.* Whiting, 4 Kan. 273.

Louisiana.— State *v.* Chapman, 38 La. Ann. 348; State *v.* Hyland, 36 La. Ann. 709; Shaw *v.* Howell, 18 La. Ann. 195; Parker *v.* Robertson, 14 La. Ann. 249.

Pennsylvania.— Com. *v.* Edwards, 135 Pa. St. 474, 19 Atl. 1064, 26 Wkly. Notes Cas. 242.

Tennessee.— State *v.* Odom, 93 Tenn. 446, 25 S. W. 105.

In justices' courts.— In North Carolina, in prosecutions before a justice, defendant shall always be adjudged to pay costs on acquittal. Merrimon *v.* Henderson County, 106 N. C. 369, 11 S. E. 267.

Excusing defendant from payment of costs on conviction.— Under a statute which provides that when defendant is found guilty the court shall render judgment accordingly, and defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise, when defendant is found guilty of a criminal offense the jury may in their discretion exempt him from costs. State *v.* Sevier, 117 Ind. 338, 20 N. E. 245. See also State *v.* Rackley, 2 Blackf. (Ind.) 249.

28. State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547; State *v.* Fisher, 37 Kan. 404, 15 Pac. 606; Whitley *v.* Murphy, 5 Oreg. 228, 20 Am. Rep. 741.

In Texas it has been held that under these circumstances neither the sureties on defendant's appeal-bond nor his estate can be held for any costs which may afterward accrue. Kelly *v.* State, (Tex. Crim. 1902) 66 S. W. 774.

29. White *v.* State, 42 Miss. 635.

The same is true where the pardon is pleaded after conviction, but before sentence. York County *v.* Delhousen, 45 Pa. St. 372. The rule is otherwise where a pardon is granted after conviction and after rendition of judgment for costs (*Ex p.* Gregory, 56 Miss. 164; State *v.* McO'Blenis, 21 Mo. 272), or subsequent to execution issued for costs (Anglea *v.* Com., 10 Gratt. (Va.) 696).

Waiver of plea of pardon.— If after pleading pardon a prisoner pleads not guilty, and goes on trial on this latter plea without objection, if found guilty, it is not error for the court to render judgment against him for costs. Michael *v.* State, 40 Ala. 361.

30. *Alabama.*— Dawson *v.* Sayre, 80 Ala. 444, 2 So. 479.

Arkansas.— Calico *v.* State, 4 Ark. 430.

Indiana.— Woodruff *v.* State, 8 Ind. 521.

Kansas.— See State *v.* Granville, 26 Kan. 158.

New Jersey.— Johnson *v.* State, 29 N. J. L. 453.

Pennsylvania.— Com. *v.* Schall, 12 Pa. Co. Ct. 554.

Wisconsin.— Von Reuden *v.* State, 96 Wis. 671, 71 N. W. 1048.

See 13 Cent. Dig. tit. "Costs," § 1099.

In Illinois the rule seems to be that judgment for costs is an incident following the judgment in the cause; that if in an indictment against several the conviction is joint, the judgment for costs must be joint, otherwise if the conviction is not joint. Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213; Moody *v.* People, 20 Ill. 315.

In Missouri it has been held that defendant on conviction is not liable for the costs of others jointly indicted with him. State *v.* McO'Blenis, 21 Mo. 272.

31. Dawson *v.* Sayre, 80 Ala. 444, 2 So. 479; Coleman *v.* State, 55 Ala. 173.

32. Dawson *v.* Sayre, 80 Ala. 444, 2 So. 479.

33. Woodruff *v.* State, 8 Ind. 521. See also Calico *v.* State, 4 Ark. 430.

ants convicted cannot be required to pay the costs of prosecution of those acquitted.[34]

2. Liability of Prosecutor — a. Grounds of Liability. Independently of statute the prosecutor is under no circumstance liable to pay any costs;[35] but in many jurisdictions he is by statute made liable for costs in designated classes of proceedings and under certain circumstances. Thus in a number of jurisdictions statutes have been enacted making the prosecutor liable for costs in certain proceedings when one or more of the following grounds designated by statute appear: When the prosecution is frivolous,[36] malicious,[37] without probable cause,[38] or is not required by the public interest.[39]

b. Prosecutions or Proceedings in Which Prosecutor Liable. Inasmuch as the prosecutor's liability is dependent solely on statute, the payment of costs cannot be imposed on him except in such proceedings or prosecutions as are designated by statute. In some jurisdictions the proceedings or prosecutions designated are all criminal actions;[40] in others misdemeanor cases;[41] in others trials on indictment or information, except in capital cases, and those in which imprisonment in the penitentiary is the sole punishment;[42] in others examining trials before com-

34. Murphy *v.* People, 3 Colo. 147; Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213; Searight *v.* Com., 13 Serg. & R. (Pa.) 301. *Contra*, People *v.* Peacock, 5 Utah 237, 14 Pac. 332.

Statutes of Pennsylvania provide that in case of acquittals in prosecutions for misdemeanor the jury shall determine by their verdict whether the county or the prosecutor or defendant shall pay the costs; that in all cases of conviction of any crime all costs shall be paid by the party convicted; and that where two or more persons have committed an indictable offense, the names of all shall be included in one indictment, for which no more costs shall be allowed than if one only was contained therein. Under these statutes, where two are joined in an indictment for misdemeanor and only one is convicted, the jury have no power to order that the costs or any portion of them shall be paid by the county, the acquitted defendant, or the prosecutor. Com. *v.* Edwards, 135 Pa. St. 474, 19 Atl. 1064.

35. Burton *v.* State, 34 Nebr. 125, 51 N. W. 601; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393.

36. Merrimon *v.* Henderson County, 106 N. C. 369, 11 S. E. 267; State *v.* Dunn, 95 N. C. 697.

37. Merrimon *v.* Henderson County, 106 N. C. 369, 11 S. E. 267; State *v.* Dunn, 95 N. C. 697.

Sufficiency of evidence to show malice.— Where a tenant, prosecuted by his landlord for moving a crop without notice before payment of rent, testified that the landlord refused to take corn for the rent, and said that he was going to indict him and had fifty dollars to spend on it, this was held sufficient evidence that the prosecution was malicious. State *v.* Whitley, 123 N. C. 728, 31 S. E. 392.

38. State *v.* Donnell, 11 Iowa 452; State *v.* Carlton, 107 N. C. 956, 12 S. E. 44.

Sufficiency of evidence to show probable cause.— Where defendant is convicted in a justice's court, such conviction is a bar to any inquiry in a district court on appeal as to whether there was probable cause for the prosecution, so as to render the prosecuting witness liable for costs. State *v.* Hodgson, 79 Iowa 462, 44 N. W. 708.

39. State *v.* Baker, 114 N. C. 812, 19 S. E. 145; State *v.* Carlton, 107 N. C. 956, 12 S. E. 44; State *v.* Roberts, 106 N. C. 662, 10 S. E. 900.

40. Code N. C. (1883), § 737. Formerly costs could only be imposed in cases where the punishment did not extend to life, limb, or member. State *v.* Cockerham, 23 N. C. 381; State *v.* Lumbrick, 4 N. C. 156.

On appeal from justice.— Under N. C. Code (1883), § 737, as amended by Acts (1889), c. 34, which provides that the prosecutor may be taxed with costs whenever the prosecution is adjudged not based on reasonable ground, or required by the public interest, applies as well to cases appealed from a justice of the peace as to those originating in the superior court. State *v.* Carlton, 107 N. C. 956, 12 S. E. 44.

41. Tuck *v.* State, 8 Ala. 644; Burns *v.* State, 5 Ala. 227; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393.

42. Rev. Stat. Mo. (1899), § 4398; *Ex p.* Cain, 9 Mo. 769.

Failure of prosecution.— Under a statute making the prosecutor liable under certain circumstances in case of "an information or indictment" for a trespass or other misdemeanor, it has been held that a person on whose information a "presentment" is made is not liable for costs on failure of the prosecution. Com. *v.* Oliver, 3 Bibb (Ky.) 474.

In cases requiring indorsement of indictment.— Under Mo. Rev. Stat. § 1768, the prosecuting witness is made liable for the costs in the event of an acquittal only in cases "in which, by law, an indictment is required to be indorsed by a prosecutor." The instance in which such indorsement is required is that of indictment for any trespass against the person or property of another not

mitting magistrates where the accused is discharged for want of sufficient evidence to convict or bind over.[43]

c. Who Are Liable as Prosecutors. Some decisions hold that married women may be prosecutors, and as such are liable for costs;[44] but this is denied in others.[45] An infant, it has been held, may be a prosecutor and liable for payment of costs.[46] On the other hand statutes authorizing the imposition of costs on prosecutors in certain cases have no application to prosecutions by a peace officer, whose duty requires him on information from others to commence prosecution;[47] nor to an officer making an arrest.[48] There is a conflict of authority as to whether a person who at the request of a prosecuting officer verifies by affidavit the information filed by the officer may become liable for costs as prosecutor.[49]

d. Requisites of Liability — (i) *In General.* It is of course necessary to fix the prosecutor's liability for costs that one or more of the grounds enumerated by statute should appear,[50] and there must be an express finding that such ground or grounds exist.[51] So where the statute requires the prosecutor to be named in the verdict, in order to fix his liability for costs, he cannot be required to pay costs where this is not done.[52] Under a statute authorizing the imposition of costs on the prosecutor under certain circumstances, when defendant is "acquitted by a jury," he cannot be ordered to pay costs on acquittal by a jury of six. The trial must have been by a jury of twelve.[53]

(ii) *Marking Prosecutor's Name on Indictment.* Where it is provided by statute that the prosecutor's name shall be marked on the indictment, no judgment can be rendered against him for costs if this be not done;[54] and the provision as to the time when this should be done must be strictly complied with.

amounting to a felony. State *v.* Huiatt, 31 Mo. App. 302.

43. Shields *v.* Shawnee County, 5 Kan. 589.

On trial and acquittal.— Wash. Code (1881), § 2103, authorizing the imposition of costs on the prosecutor under certain circumstances, on examinations before committing magistrates, does not authorize the imposition of costs on the prosecutor upon the acquittal of defendant in a trial in the superior court. Ilwaco *v.* Miller, 8 Wash. 449, 36 Pac. 269; *In re* Permstick, 3 Wash. 672, 29 Pac. 350, 28 Am. St. Rep. 80.

44. State *v.* Shaw, 45 Mo. App. 383; Errickson *v.* State, 10 Nebr. 585, 7 N. W. 333. See, generally, Husband and Wife.

45. Wattingham *v.* State, 5 Sneed (Tenn.) 64; Moyers *v.* State, 11 Humphr. (Tenn.) 40.

46. State *v.* Dillon, 1 Head (Tenn.) 389; Beasley *v.* State, 2 Yerg. (Tenn.) 481. See, generally, Infants.

Father of infant.— One who makes affidavit before a magistrate for assault and battery on his minor child is prosecutor, and liable on acquittal for costs not otherwise adjudged. State *v.* Hodges, 53 Mo. App. 532.

47. Com. *v.* Jackson, 13 Lanc. Bar (Pa.) 59.

48. Hammond *v.* People, 32 Ill. 446, 83 Am. Dec. 286; Com. *v.* Hargesheimer, 1 Ashm. (Pa.) 413.

49. That person making information is liable see State *v.* Bante, 34 Mo. App. 311.

That person making information is not liable see State *v.* Manlove, 33 Kan. 483, 6 Pac. 905.

50. State *v.* Reisner, 20 Kan. 548; State *v.* Roberts, 106 N. C. 662, 10 S. E. 900. See also Burns *v.* State, 5 Ala. 227, in which it was held that the record must disclose that the prosecution appeared to the court to be frivolous or malicious.

To authorize a taxation of costs against a prosecutor, the proof should be clear and conclusive that the prosecution was frivolous or malicious, and known to be without foundation by the prosecutor. State *v.* Greene, 2 Head (Tenn.) 356.

Evidence to show who was prosecutor.— Where a presentment stated that it was "on the information of Philip Stultz," and at the foot of the information were the words, "This Information is filed by the order of Court, on the Presentment of the Grand Jury," this was held sufficient evidence that P was prosecutor. Com. *v.* Dove, 2 Va. Cas. 29.

51. Orchard *v.* Osborne, 43 Kan. 76, 22 Pac. 1002; Little *v.* Evans, 41 Kan. 578, 21 Pac. 630 [*overruling* State *v.* McGillvray, 21 Kan. 680; Shields *v.* Shawnee County, 5 Kan. 589]; State *v.* Reisner, 20 Kan. 548; State *v.* Roberts, 106 N. C. 662, 10 S. E. 900. See also Burns *v.* State, 5 Ala. 227.

A finding that the prosecution "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." State *v.* Baker, 114 N. C. 812, 19 S. E. 145.

52. Clemens *v.* Com., 7 Watts (Pa.) 485; Com. *v.* Lersch, 3 Pa. Dist. 417, 14 Pa. Co. Ct. 496; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393.

53. Sovereign *v.* State, 4 Ohio St. 489.

54. McAllister *v.* Johnson, 108 Iowa 42, 78 N. W. 790; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Crosset, 81 N. C. 579; State *v.* Hodson, 74 N. C. 151; State *v.* Lupton, 63 N. C. 483; Com. *v.* Madden, 1

If there be no statute authorizing it the court cannot, after indictment found and *nolle prosequi* entered, indorse a person as prosecutor upon the bill of indictment.[55]

(III) *Acquittal, Nolle Prosequi, Etc.* Where by statute the prosecutor's liability for costs is made to depend "on an acquittal" of defendant, an acquittal is of course necessary to fix such liability.[56] No liability thereunder for costs can be imposed on the prosecutor in case of a *nolle prosequi*,[57] where the indictment is quashed,[58] nor where the grand jury return a bill "Not a true bill."[59] But an acquittal will render the prosecutor liable notwithstanding the indictment did not set out any offense.[60] If the statute makes it a prerequisite of liability that there be a finding of want of probable cause, no liability attaches when the prosecution is dismissed on motion of the county attorney.[61] In the absence of statute authorizing it, costs cannot be imposed on the prosecutor on dismissal of the complaint for failure to state a cause of action,[62] or for failure of the prosecuting witness to appear.[63]

e. Conclusiveness of Court's Findings as to Prosecutor's Liability. In North Carolina where the court decides whether grounds exist for imposing costs on the prosecutor, its finding that the facts warrant the imposition is conclusive.[64]

f. Power to Set Aside Verdict For Costs. In jurisdictions where the jury determine the prosecutor's liability, the court may set aside that part of the verdict which places the costs upon the prosecutor if the facts warrant it.[65] In

Pa. Dist. 129, 11 Pa. Co. Ct. 459; Com. *v.* Madden, 3 Lack. Jur. (Pa.) 411. See also *In re* Winne, 41 Kan. 127, 21 Pac. 176.

In Pennsylvania it is held that the jury has power to designate the real prosecutor and impose costs on him, although someone else be named as prosecutor on the indictment (Com. *v.* Holop, 23 Pa. Co. Ct. 417; Com. *v.* Anderson, 17 Pa. Co. Ct. 89; Com. *v.* Jackson, 1 Pa. Co. Ct. 38; Com. *v.* Ream, 1 Pa. Co. Ct. 33; Com. *v.* Bennett, 1 Pittsb. 261), but the jury cannot select a witness without notice and without his assent put costs on him, as this would be condemning him without notice (Com. *v.* Jackson, 1 Pa. Co. Ct. 38).

55. State *v.* Hodson, 74 N. C. 151. See also State *v.* Crosset, 81 N. C. 579, in which it was held that the person prosecuting should be marked as such on the bill and sent to the grand jury, in default of which he would not be liable.

In North Carolina a statute provides that the court may determine who the prosecutor is at any stage of the proceedings, whether before or after indictment found or acquittal, if notice be given the person sought to be charged as prosecutor to show cause why he should not be made such of record. Under this statute notice must be given. State *v.* Sanders, 111 N. C. 700, 11 S. E. 320; State *v.* Hamilton, 106 N. C. 660, 10 S. E. 854. It need not be in writing (State *v.* Norwood, 84 N. C. 794), and may be given on motion of defendant's attorney (State *v.* Jones, 117 N. C. 768, 23 S. E. 247). A notice actually given by defendant (State *v.* Hughes, 83 N. C. 665), or in the presence of the party, when the motion to mark him as prosecutor is made, is sufficient notice (State *v.* Hamilton, 106 N. C. 660, 10 S. E. 854. See also State *v.* Norwood, 84 N. C. 794). If defendant has been acquitted, and the trial court has not determined a motion to mark the prosecutor and tax him with costs, a judge holding a subsequent term of the same court may do so. State *v.* Sanders, 111 N. C. 700, 11 S. E. 320.

56. Margrave *v.* U. S., Morr. (Iowa) 452.

57. Taylor *v.* State, 39 Ark. 291; State *v.* Branum, 23 Ark. 540; State *v.* Campbell, 19 Kan. 481.

Where a statute makes the prosecutor liable unless there be a judgment against defendant he is liable on *nolle prosequi*. Com. *v.* St. Clair, 1 Gratt. (Va.) 556.

58. Office *v.* Gray, 4 N. C. 307.

59. State *v.* Horton, 89 N. C. 581; State *v.* Cockerham, 23 N. C. 381; Frazer *v.* State, 2 Swan (Tenn.) 535.

60. Com. *v.* Harkness, 4 Binn. (Pa.) 194.

61. Burton *v.* State, 34 Nebr. 125, 51 N. W. 601.

62. *In re* Stoneberger, 31 Kan. 638, 3 Pac. 416.

63. State *v.* Holliday, 22 Iowa 397; State *v.* Leathers, 16 Iowa 406.

In Georgia, where the prosecution is abandoned before trial, the prosecutor is liable for costs. Pen. Code, § 1082; Underwood *v.* Harvey, 106 Ga. 268, 32 S. E. 124.

64. State *v.* Baker, 114 N. C. 812, 19 S. E. 145; State *v.* Lance, 109 N. C. 789, 14 S. E. 110; State *v.* Hamilton, 106 N. C. 660, 10 S. E. 854; State *v.* Dunn, 95 N. C. 697; State *v.* Owens, 87 N. C. 565; State *v.* Adams, 85 N. C. 560. *Compare* State *v.* Green, 2 Head (Tenn.) 356.

65. Guffy *v.* Com., 2 Grant (Pa.) 66; Com. *v.* Shindell, 9 Pa. Dist. 298; Com. *v.* Yerger, 3 Pa. Dist. 237; Com. *v.* Showers, 7 Pa. Co. Ct. 179; Com. *v.* Bain, 1 Pa. Co. Ct. 25; Com. *v.* Farrell, 2 Chest. Co. Rep. (Pa.) 381; Com. *v.* Mundis, 2 Chest. Co. Rep. (Pa.) 381; Com. *v.* Steele, 2 Chest. Co. Rep. (Pa.) 380; Reardon *v.* Pierce, 1 Chest. Co.

other jurisdictions it is considered that the court has no power to set aside a verdict against the prosecutor for costs.[66]

g. Grounds to Set Aside Verdict or Judgment For Costs. A verdict imposing costs on a person as prosecutor will be set aside, where there is no evidence submitted to show that he acted in that capacity;[67] where it appears that the prosecution was instituted in good faith;[68] where there was probable cause for the charge and no evidence of malice;[69] where the name of the prosecutor is not stated in the verdict, as required by statute;[70] or where the grand jury place costs on a person not marked on an indictment as prosecutor, and who has not appeared before them.[71] The court will not, however, disturb the action of the grand jury in requiring the prosecutor to pay costs, on the ground that defendant had previously been committed to trial by the court for the same charge;[72] nor will such action be disturbed on the mere affidavit of the prosecutor and without full knowledge of all the facts in the case.[73] So it has been held no ground to set aside a judgment for costs that the judgment was rendered in his absence.[74]

3. Liability of County — a. Introductory Statement. At common law counties are never liable to pay any costs,[75] and where this rule is changed by statute the county is liable only to the extent and in the manner provided thereby.[76]

Rep. (Pa.) 323. But see Com. *v.* Ziegler, 9 Kulp (Pa.) 531.

The view taken is that the right is derived from the common-law supervision of a court in the administration of justice. Guffy *v.* Com., 2 Grant (Pa.) 66; Com. *v.* Bain, 1 Pa. Co. Ct. 25.

66. Jacobs *v.* State, 20 Ga. 839; State *v.* Zimmerman, 31 Kan. 85, 1 Pac. 257.

67. Com. *v.* Baltzby, 3 Pa. Co. Ct. 73.

68. Com. *v.* Harkness, 4 Binn. (Pa.) 194; Com. *v.* Bannon, 1 Pa. Dist. 130; Com. *v.* Hunter, 11 Pa. Co. Ct. 637.

69. Guffy *v.* Com., 2 Grant (Pa.) 66; Com. *v.* Ream, 13 Lanc. Bar (Pa.) 134.

70. Com. *v.* Lehrsch, 3 Pa. Dist. 417, 14 Pa. Co. Ct. 496.

71. Com. *v.* Madden, 11 Pa. Co. Ct. 459.

72. Com. *v.* Gilgallon, 1 Lack. Leg. N. (Pa.) 172.

73. Com. *v.* Huddell, 10 Pa. Co. Ct. 548.

74. State *v.* Owens, 87 N. C. 565; State *v.* Spencer, 81 N. C. 519.

75. *Alabama.*— Greene County *v.* Hale County, 61 Ala. 72.

Arkansas.— Stalcup *v.* Greenwood Dist., 44 Ark. 31.

Colorado.— Boykin *v.* People, 23 Colo. 183, 46 Pac. 635.

Illinois.— Kitchell *v.* Madison County, 5 Ill. 163.

Indiana.— Rawley *v.* Vigo County, 2 Blackf. 355.

Iowa.— State *v.* Rainsbarger, 74 Iowa 539, 38 N. W. 403; Donnelly *v.* Johnson County, 7 Iowa 419.

Kansas.— Shawnee County *v.* Ballinger, 20 Kan. 590; Johnson County *v.* Wilson, 19 Kan. 485; State *v.* Campbell, 19 Kan. 481.

Michigan.— Miner *v.* Shiawassee Sup'rs, 49 Mich. 602, 14 N. W. 562.

Missouri.— Henry County *v.* St. Clair County, 81 Mo. 72.

Nebraska.— Dodge County *v.* Gregg, 14 Nebr. 305, 15 N. W. 741.

New Jersey.— Morris County *v.* Freeman, 44 N. J. L. 631.

Ohio.— Raber *v.* Wayne County, 12 Ohio St. 429.

Oklahoma.— Greer County *v.* Watson, 7 Okla. 174, 54 Pac. 441.

Pennsylvania.— Codding *v.* Bradford County, 116 Pa. St. 47, 9 Atl. 153; Crawford County *v.* Barr, 92 Pa. St. 359; Berks County *v.* Pile, 18 Pa. St. 493; Irvin *v.* Northumberland County, 1 Serg. & R. 505; Greenawalt *v.* Eshelman, 8 Pa. Dist. 447; Sipler *v.* Clarion County, 8 Pa. Dist. 253; Sloan *v.* Delaware County, 19 Pa. Co. Ct. 320; Rice *v.* Schuylkill County, 14 Pa. Co. Ct. 541; Com. *v.* Curren, 2 Chest. Co. Rep. 393.

United States.— U. S. *v.* Gaines, 100 U. S. 420, 25 L. ed. 733.

See 13 Cent. Dig. tit. "Costs," § 1109.

76. *Alabama.*— Greene County *v.* Hale County, 61 Ala. 72.

Colorado.— Bransom *v.* Larimer County, 5 Colo. App. 231, 37 Pac. 957.

Nebraska.— Boggs *v.* Washington County, 10 Nebr. 297, 4 N. W. 984.

New Hampshire.— Powers *v.* Sullivan County, 63 N. H. 275.

North Carolina.— Merrimon *v.* Henderson County, 106 N. C. 369, 11 S. E. 267.

Oklahoma.— Greer County *v.* Watson, 7 Okla. 174, 54 Pac. 441.

Tennessee.— *Compare* State *v.* Farris, 4 Lea 183.

See 13 Cent. Dig. tit. "Costs," § 1109.

Offenses against city ordinances are not "criminal" cases, within a statute making the county liable for the expenses of such cases. People *v.* Manistee County, 26 Mich. 422.

Conclusiveness of complaint.— Under a statute providing that if it appear that a complaint was made for felony, when it should have been for a misdemeanor only, the county commissioners may in their discretion disallow the entire bill for costs, or

b. On Acquittal of Defendant. In some jurisdictions a county is liable where defendant is acquitted, no matter what may be the grade of the crime.[77]

c. On Conviction of Defendant. In Pennsylvania the county is liable for costs on defendant's conviction of a felony, unless defendant pays the costs;[78] and in misdemeanor cases not tried in the courts of quarter sessions the county is liable for costs on conviction of defendant after he has been discharged, according to law, without paying the costs.[79] In Washington the county is primarily liable for costs in all criminal prosecutions.[80] In Arkansas the county is liable where defendant is convicted of a felony and is unable to pay costs.[81] In Colo-

any part thereof, the fact that a complaint charged a felony is not conclusive upon the liability of the county for costs. Boggs *v.* Washington County, 10 Nebr. 297, 4 N. W. 984.

On appeal without bond in criminal cases. — In the absence of statute a county is not liable for costs due the attorney-general and clerk of the supreme court in a criminal case wherein defendant was permitted to appeal without bond, and without an order allowing him to appeal as a pauper, and is insolvent. Clerk's Office *v.* Carteret County, 121 N. C. 29, 27 S. E. 1003.

77. *Arkansas.*— Bradley County *v.* Bond, 37 Ark. 226; Ouachita County *v.* Sanders, 10 Ark. 467.

Iowa.— See Labour *v.* Polk County, 70 Iowa 568, 31 N. W. 873.

Tennessee.— See Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430.

Washington.— State *v.* Grimes, 7 Wash. 445, 35 Pac. 361.

Wisconsin.— See Ives *v.* Jefferson County, 18 Wis. 166.

See 13 Cent. Dig. tit. "Costs," § 1116.

In Missouri it has been held under a statute providing that where proceedings are commenced on information of the injured party his name shall be entered on the docket as prosecutor, and he shall be adjudged to pay costs if defendant be discharged or acquitted, and that in other cases of discharge or acquittal the costs shall be paid by the county, that the costs should have been adjudged against the county, on the ground that the informant was not the injured party, where a minor filed a complaint, charging defendant with disturbing the peace of the family of another, and the trial resulted in a verdict of acquittal. State *v.* Lavelle, 78 Mo. 104. But the justice's neglect to enter on his docket the prosecutor's name will not devolve on the county the liability for the costs. State *v.* Hodges, 53 Mo. App. 532.

In Pennsylvania the county is liable where defendant is acquitted of a felony. Com. *v.* Benscoter, 7 Luz. Leg. Reg. 191; Zink *v.* Schuylkill County, 1 Leg. Chron. 191. Under the act of May 19, 1887, the county is primarily liable for costs of prosecution of a misdemeanor in courts of quarter sessions, whether defendant is convicted or acquitted. Defendant must be sentenced, and a verdict of guilty alone is not sufficient to fix the liability of the county for costs. Rice *v.* Schuylkill County, 14 Pa. Co. Ct. 541. In prosecutions for misdemeanors tried in other courts than quarter sessions courts, this statute does not apply, and by virtue of other provisions it is necessary, to render the county liable, that the jury shall find, as required by statute, that the county should pay the costs (York County Com'rs *v.* Jacobs, 3 Penr. & W. 365), and there must be a judgment on such verdict (Com. *v.* Tack, 3 Brewst. 532).

78. Kirkendall *v.* Luzerne County, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313.

79. Patterson *v.* Franklin County, 5 Pa. Co. Ct. 471; Beidelman *v.* Northampton County, 4 Leg. Gaz. (Pa.) 212. These cases were decided under Act March 3, 1860, § 64. Since that time a different rule is provided in case of trial of misdemeanors in the court of quarter sessions. See Act May 19, 1887. For decisions construing sections existing prior to Act March 3, 1860, § 64, see Com. *v.* Philadelphia County Com'rs, 4 Serg. & R. (Pa.) 541; Mark *v.* Clinton County, 4 Pa. L. J. Rep. 15, 6 Pa. L. J. 237; Wilson *v.* County, 11 Lanc. Bar (Pa.) 170.

The discharge must be under the insolvent laws of the state. Where the prisoner escapes no liability attaches for costs. Schonawolff *v.* Schuylkill County, 5 Pa. Co. Ct. 329. So an order by a justice at chambers discharging defendant is not a discharge according to law, because the judge had no power at chambers to make such order. Mark *v.* Clinton County, 4 Pa. L. J. Rep. 15, 6 Pa. L. J. 237.

In the court of quarter sessions the costs of prosecution in misdemeanor cases shall, on the termination of the prosecution by a verdict of a traverse jury and sentence of the court, be immediately chargeable to and paid by the proper county. Act May 19, 1887. This statute renders the county primarily liable for costs in the first instance, and it may then reimburse its treasury by the diligence of its officers against the parties ultimately liable. Allen *v.* Delaware County, 161 Pa. St. 550, 29 Atl. 288, 34 Wkly. Notes Cas. (Pa.) 374. Suspension of sentence indefinitely by the court on conviction and discharge of defendant constitutes a termination of the prosecution. Wright *v.* Donaldson, 158 Pa. St. 88, 27 Atl. 867, 33 Wkly. Notes Cas. (Pa.) 235.

80. State *v.* Grimes, 7 Wash. 445, 35 Pac. 361.

The county receives in return all fines and costs collected in criminal cases. State *v.* Grimes, 7 Wash. 445, 35 Pac. 361.

81. Stalcup *v.* Greenwood Dist., 44 Ark. 31, in which it was held that the county was

rado the county is liable in all prosecutions where defendant has been convicted and is unable to pay costs.[82] In Missouri the county is liable where defendant is sentenced to imprisonment in the county jail or to pay a fine, or both, and is unable to pay costs.[83] In Illinois and New Jersey it has been held that the statutes do not authorize the imposition of costs on the county on conviction of defendant.[84]

d. On Nolle Prosequi, Dismissal, Quashal, Etc. If under a statute liability of the county for costs attaches "on acquittal" the county is not liable on a *nolle prosequi*;[85] nor under such a statute is the county liable where the indictment is quashed;[86] where the prosecution is dismissed by the consent of the prosecutor and the district attorney with the court's approval;[87] nor where defendant dies before trial.[88] Under a statute providing that if any person is brought before a court on a charge of crime, and such charge shall appear to be unfounded, the costs shall be paid by the county, the county is liable for costs where *nolle prosequi* has been entered before bill found.[89]

e. On Discharge of Defendant on Hearing Before Committing Magistrate. In Pennsylvania where a defendant is discharged after the hearing on an unfounded prosecution for either a felony or misdemeanor by a justice of the peace the county is liable for costs.[90] In Kansas on the discharge by a justice of one accused

not liable for costs in a misdemeanor case, except when defendant was acquitted and there was no judgment against the prosecutor for the costs.

Misdemeanor of same generic class.— Under a statute providing that in cases of felony, if defendant be convicted and shall not have property to pay the costs, they shall be paid by the county, it was held that where a defendant is indicted for felony and convicted of a misdemeanor of the same generic class included in the indictment, the county is liable for costs, if defendant has no property out of which costs can be made. Boone County *v.* Mitchell, 64 Ark. 125, 40 S. W. 784. But see Stalcup *v.* Greenwood Dist., 44 Ark. 31; Ouachita County *v.* Sanders, 10 Ark. 467.

82. See Bransom *v.* Larimer County, 5 Colo. App. 231, 37 Pac. 957.

83. State *v.* Carpenter, 51 Mo. 555, in which it was held that this rule applied where defendant was sentenced to imprisonment in the penitentiary, but afterward the verdict was set aside, and on a new trial he was sentenced to confinement in the county jail and to a fine, and was insolvent.

What amounts to conviction and sentence. — An agreement between defendant and the prosecuting attorney that the prosecution should be dismissed at defendant's cost amounts to a conviction and sentence. State *v.* Buchanan County Ct., 41 Mo. 254.

84. Kitchell *v.* Madison County, 5 Ill. 163 (construing a statute providing that the court shall give judgment in criminal cases that the person convicted shall pay the costs of prosecution, and that liens shall be created on his estate from the time of his arrest for costs of prosecution, etc.); Morris County *v.* Freeman, 44 N. J. L. 631 (construing a statute providing that all costs of conviction are payable out of the state treasury).

85. Craighead County *v.* Cross County, 50 Ark. 431, 8 S. W. 183; Stalcup *v.* Greenwood Dist., 44 Ark. 431; Morgan County *v.* Johnson, 31 Ind. 463; Williams *v.* Luzerne County, 8 Kulp (Pa.) 15; Com. *v.* Winskey, 1 Pa. Co. Ct. 77; Com. *v.* Torrey, 12 Lanc. Bar (Pa.) 72; Zink *v.* Schuylkill County, 1 Leg. Chron. (Pa.) 191. *Contra*, State *v.* Platte County, 40 Mo. App. 503.

A promise of the county commissioners to pay costs in a case where a *nolle prosequi* was entered after the promise does not bind the county. Berks County *v.* Pile, 18 Pa. St. 493.

86. Com. *v.* Huntingdon County, 3 Rawle (Pa.) 487.

87. Com. *v.* McCuen, 75 Pa. St. 215. But *compare* Cassidy *v.* Palo Alto County, 58 Iowa 125, 12 N. W. 231, in which it was considered that a dismissal of a prosecution was equivalent to acquittal.

Dismissal of indictment for misdemeanor and acquittal of felony.— Under a statute making a county liable for costs in case of an acquittal of defendant of a misdemeanor, if witnesses are subpœnaed for the prosecution on two indictments, one for felony and the other for misdemeanor, and the misdemeanor is settled between the prosecutor and defendant, and defendant acquitted of the felony, the county is not liable for costs of the witnesses for prosecution, it appearing that they were incurred in the prosecution of the misdemeanor and not of the felony. Com. *v.* Horner, 34 Pa. St. 440.

88. Com. *v.* Gallagher, 4 L. T. N. S. (Pa.) 53.

89. Gallagher *v.* Franklin County, 5 Pa. Co. Ct. 431. See also Bonney *v.* Van Buren County, 2 Greene (Iowa) 230; U. S. *v.* Switzer, Morr. (Iowa) 302, both construing a similar statute, since repealed.

90. Lehigh County *v.* Schock, 113 Pa. St. 373, 7 Atl. 52; Kirkendall *v.* Luzerne County, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313; Beaverson *v.* York County, 1 Pa. Co. Ct. 606; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393.

of an offense less than felony for want of sufficient evidence to convict or bind over, it is error to tax costs against the county, in view of the statute making the prosecuting witness liable under such circumstances.[91]

f. Where Grand Jury Ignore Bill. In Pennsylvania in all cases of felony, where the grand jury ignore the indictment, the county is liable for costs.[92] In cases of misdemeanor triable in the court of quarter sessions, the county is immediately liable where the indictment is ignored by the grand jury.[93] In prosecutions for misdemeanors in other courts, where the bill is returned "Ignoramus," and the prosecutor is ordered to pay costs and is sentenced to pay them, and is discharged according to law, payment not being made, the county is not liable to pay such costs.[94] In North Carolina the county cannot be taxed with fees of the officers of court where the grand jury return "Not a true bill."[95]

g. On Failure to Require Security For Costs From Prosecutor. Under a statute providing that where defendant is convicted the county shall pay the costs, except where the prosecutor is adjudged so to do, and that in prosecutions less than felony the prosecutor shall give bond for payment of costs of prosecution, but that he may be excused from so doing when there is strong reason for believing that he has been maltreated, in plain violation of the criminal laws, and he shall make affidavit that he is unable to give security for costs, it has been held that the county is not liable for costs on an acquittal of misdemeanor in any case in which the justice should have required a bond for costs, but did not.[96]

h. On Discharge of Insolvent Prosecutor. In North Carolina, where a judge orders an insolvent prosecutor to pay costs, and he is unable to pay them, the county in which the offense was committed becomes liable to pay the same.[97]

i. Effect on Liability of Change of Venue — (i) *In General.* In nearly all jurisdictions, in cases where counties are by statute liable for costs, the liability continues, although the venue is changed to another county.[98] The doctrine stated,

91. Shields *v.* Shawnee County, 5 Kan. 589.

92. Com. *v.* March, 1 Pa. Co. Ct. 81. See also Kirkendall *v.* Luzerne County, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313.

This is true where the indictment charges both a felony and a misdemeanor. Com. *v.* March, 1 Pa. Co. Ct. 81.

The courts have power in a proper case to relieve the county from the payment of costs imposed by the grand jury. Connolly *v.* Lackawanna County, 1 Pa. Co. Ct. 26.

93. Pa. Act, May 19, 1887.

Necessity for sentence.— Where the grand jury ignore the bill and direct the costs to be paid by the prosecutor, it has been held that the county becomes immediately liable for the costs without any order of the court sentencing the prosecutor to pay them. Allen *v.* Delaware County, 161 Pa. St. 550, 29 Atl. 288, 34 Wkly. Notes Cas. (Pa.) 374. But see Com. *v.* Bishoff, 13 Pa. Co. Ct. 503.

94. Com. *v.* Philadelphia County Com'rs, 4 Serg. & R. (Pa.) 541.

Costs of quashed bill.—Although it is sometimes necessary, owing to informalities and omissions in indictments for offenses below felony, which an amendment cannot cure, to quash the original bill, and send another one before a new grand jury, no matter how great the costs of the original bill, the county is not liable therefor, if the grand jury return the new one "Ignoramus" and direct the costs to be paid by the county, such direction only extending to the costs of that particular new trial. Kirkendall *v.* Luzerne County, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313.

95. Guilford *v.* Beaufort County, 120 N. C. 23, 27 S. E. 94.

96. Harvey *v.* Crawford County, 52 Ark. 192, 12 S. W. 240. But see People *v.* Kent County, 4 Mich. 481, which reaches the opposite conclusion, under a very similar statute.

97. Pegram *v.* Guilford County Com'rs, 75 N. C. 120.

98. *Arkansas.*— Ouachita County *v.* Sanders, 10 Ark. 467; Pulaski *v.* Irvin, 4 Ark. 473.

California.— Sargent *v.* Cavis, 36 Cal. 552.

Indiana.— Lawrence County *v.* Floyd County, 28 Ind. 538; *Ex p.* Taylor, 4 Ind. 479.

Iowa.— Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; Jones County *v.* Linn County, 68 Iowa 63, 25 N. W. 930.

Maryland.— Howard County *v.* Frederick County, 30 Md. 432.

Missouri.— Berry *v.* St. Francois County, 9 Mo. 360.

Nevada.— Washoe County *v.* Humboldt County, 14 Nev. 123.

South Carolina.— There is no statute providing for payment by a county in which a crime is committed of the costs of the trial for such crime in another county to which venue has been changed. Kershaw County *v.* Richland County, 61 S. C. 75, 39 S. E. 263.

See 13 Cent. Dig. tit. "Costs," § 1124.

This is true, although a new prosecution is

however, has no application to a case where a county voluntarily assumes jurisdiction of an offense committed in another county;[99] where the charge is taken to a court which is prohibited by the constitution from assuming jurisdiction;[1] where the statute regulating the question of costs is declared unconstitutional;[2] nor to cases where the county from which the charge is taken would not be liable for costs in any event.[3]

(II) *Which County Is Primarily Liable.* Under the statutes of many jurisdictions the county where a case is tried pays the costs, and has recourse for the amount so paid against the county from which the change was taken;[4] while in others the latter is liable to pay the costs in the first instance,[5] and if the former pays them it is a voluntary payment for which no recovery lies.[6]

4. Liability of State — a. Introductory Statement. In the absence of statute expressly so providing, the state is never liable for costs, whether defendant be acquitted or convicted.[7] It is of course competent for the legislature to subject the state to liability for costs under certain circumstances.[8] But the liability is *strictissimi juris.* It does not attach except in the special cases provided for, and cannot be enforced except in the particular manner prescribed.[9]

b. On Conviction of Defendant. In a number of jurisdictions statutes have been enacted which make the state liable for costs on conviction of defendant

instituted, where the statute so provides. Trant *v.* State, 140 Ind. 414, 39 N. E. 513.

Statute authorizing only costs of removal. — Under statutes which provide that on change of venue the principal court of the county from which such removal is made shall allow and pay the costs therefor out of the county levy, and that on change of venue all costs of removal shall be paid by the county from which the removal is had, such county is liable only for the costs of removal, and not for the costs of trial. Com. *v.* Comes, 98 Ky. 4, 32 S. W. 139, 17 Ky. L. Rep. 553.

99. Floyd County *v.* Cerro Gordo County, 47 Iowa 186.

1. State *v.* Logston, 3 Heisk. (Tenn.) 276.

2. Henry County *v.* St. Clair County, 81 Mo. 72.

3. *Ex p.* Harrison, 112 Ind. 329, 14 N. E. 225.

4. *Indiana.*— Trant *v.* State, 140 Ind. 114, 39 N. E. 513; Lawrence County *v.* Floyd County, 28 Ind. 538.

Iowa.— Lockhart *v.* Montgomery County, 76 Iowa 79, 49 N. W. 104; Floyd County *v.* Cerro Gordo County, 47 Iowa 186.

Kansas.— Davis County *v.* Riley County, 9 Kan. 635.

Michigan.— Kent County *v.* Mecosta County, 126 Mich. 299, 85 N. W. 739.

Ohio.— Gallia County *v.* Meigs County, 14 Ohio Cir. Ct. 26.

See 13 Cent. Dig. tit. "Costs," § 1124.

5. Greene County *v.* Hale County, 61 Ala. 72; Stoll *v.* Johnson County, (Wyo. 1896) 44 Pac. 58.

6. Greene County *v.* Hale County, 61 Ala. 72.

7. *Alabama.*— State *v.* Brewer, 59 Ala. 130.

Colorado.— Boykin *v.* People, 23 Colo. 183, 46 Pac. 635.

District of Columbia.— District of Columbia *v.* Lyon, 7 Mackey 222.

Florida.— Buckman *v.* Alexander, 24 Fla. 46, 3 So. 817.

Illinois.— People *v.* Pierce, 6 Ill. 553; Kitchell *v.* Madison County, 5 Ill. 163; Moore *v.* People, 37 Ill. App. 641.

Indiana.— Miami County *v.* Blake, 21 Ind. 32; Rawley *v.* Vigo County, 2 Blackf. 355.

Kansas.— Shields *v.* Shawnee County, 5 Kan. 589.

Maine.— State *v.* Harlow, 26 Me. 74.

Michigan.— Courtright *v.* Atty.-Gen., 43 Mich. 411, 5 N. W. 546.

Oregon.— Eisen *v.* Multnomah County, 31 Oreg. 134, 49 Pac. 730.

Pennsylvania.— McKeehan *v.* Com., 3 Pa. St. 151.

Tennessee.— State *v.* Davidson County, (Ch. App. 1899) 52 S. W. 477; Aiken *v.* State, 99 Tenn. 657, 42 S. W. 927; Morgan *v.* Pickard. 86 Tenn. 208, 9 S. W. 690; State *v.* Wormick, 1 Lea 559; Avery *v.* State, 7 Baxt. 328; Tucker *v.* State, 2 Head 555; Prince *v.* State, 7 Humphr. 137.

Wisconsin.— Noyes *v.* State, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710.

United States.— U. S. *v.* Gaines, 131 U. S. Appendix clxix, 25 L. ed. 733.

See 13 Cent. Dig. tit. "Costs," § 1105.

"Those who accept public offices, which require them to render services to the State, must take the office *cum onere* — the rendition of such services gratuitously, unless by express statutory provision, compensation is fixed, and an express liability for its payment imposed on the State." State *v.* Brewer, 59 Ala. 130, 134.

8. State *v.* Brewer, 59 Ala. 130.

9. Dawson *v.* Matthews, 105 Ala. 485, 17 So. 19; Greene County *v.* Hale County, 61 Ala. 72; State *v.* Carpenter, 51 Mo. 555; State *v.* Odom, 93 Tenn. 446, 25 S. W. 105; Morgan *v.* Picard, 86 Tenn. 208, 9 S. W. 690; State *v.* Wormick, 1 Lea (Tenn.) 559; Avery

under circumstances therein enumerated. Thus some statutes require payment of costs by the state if defendant, although convicted, be insolvent.[10] Before any judgment can be rendered for costs, however, all the requirements of the statutes must be strictly complied with.[11] There must be an adjudication of defendant's insolvency or an execution issued and returned *nulla bona*, and such facts should appear of record.[12] And under a statute of this character the insolvency of the prosecutor, against whom costs have been awarded, is no ground to fasten costs on the state.[13]

c. On Acquittal of Defendant. In some jurisdictions the state is made liable for costs in case of acquittal under circumstances enumerated therein.[14] If the statute imposes liability in case of acquittal of a felony the state will be liable in case of acquittal of felony, although defendant is convicted of a misdemeanor on the same indictment;[15] but a statute making the state liable on acquittal does not impose any liability on a dismissal of the prosecution.[16] On the other hand under a statute of this character the state will be liable, on acquittal of defendant, although the prosecutor's name was not marked on the indictment, as required by statute.[17] A statute which makes the state liable for costs, when "defendant is discharged by the court or magistrate before indictment preferred or found," is intended to provide for costs, where defendant is discharged by the court or magistrate on his judicial responsibility, without reference to the action of the grand jury.[18]

d. Effect on Liability of Voluntary Payment by County. Where a county pays costs for which the state is liable, in felony cases, it cannot recover the costs so paid.[19]

5. Liability of United States. In the absence of statute expressly so providing, the United States is never liable for costs.[20]

6. Liability of Municipality. A city, town, or village is never liable for costs of proceedings under its ordinances, whether defendant be acquitted or convicted, unless a statute so provides, and this is true, whether the proceeding is considered civil or criminal.[21] This rule is not affected by the fact that the ordinance under

v. State, 7 Baxt. (Tenn.) 328; State *v.* Delap, Peck (Tenn.) 91.

10. Shaw *v.* Howell, 18 La. Ann. 195; Parker *v.* Robertson, 14 La. Ann. 249. See also State *v.* Carpenter, 51 Mo. 555; State *v.* Odom, 93 Tenn. 446, 25 S. W. 105; Colorado County *v.* Beethe, 44 Tex. 447.

Where costs worked out in county jail.— In cases where the state is required by statute to pay the costs, it cannot recover costs from the county worked out by defendant in the county jail. State *v.* Davidson County, 96 Tenn. 178, 33 S. W. 924.

11. State *v.* Odom, 93 Tenn. 446, 25 S. W. 105; Avery *v.* State, 7 Baxt. (Tenn.) 328; U. S. *v.* Gaines, 131 U. S. Appendix clxix, 25 L. ed. 733.

12. Shaw *v.* Howell, 18 La. Ann. 195; State *v.* Odom, 93 Tenn. 446, 25 S. W. 105; State *v.* Martin, 10 Lea (Tenn.) 549; State *v.* Delap, Peck (Tenn.) 91.

13. Morgan *v.* Pickard, 86 Tenn. 208, 9 S. W. 690; State *v.* Wormick, 1 Lea (Tenn.) 559.

14. Buckman *v.* Alexander, 24 Fla. 46, 3 So. 817; State *v.* Holladay, 67 Mo. 299; Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430; State *v.* Shropshire, 4 Yerg. (Tenn.) 52.

15. State *v.* Arnold, 100 Tenn. 307, 308, 47 S. W. 221 [*citing* Lloyd *v.* State].

16. Colorado County *v.* Beethe, 44 Tex. 447.

17. Towle *v.* State, 3 Fla. 202.

18. State *v.* Treadway, 3 Lea (Tenn.) 55.

19. State *v.* Ledford, 93 Tenn. 451, 25 S. W. 106; State *v.* Odom, 93 Tenn. 446, 25 S. W. 105.

20. U. S. *v.* Barker, 2 Wheat. (U. S.) 395, 4 L. ed. 271; Henry *v.* U. S., 15 Ct. Cl. 162; Nabb *v.* U. S., 1 Ct. Cl. 173. And see *Ex p.* Johnson, 13 Fed. Cas. No. 7,367, 1 Wash. 47.

21. *Alabama.*— Selma *v.* Stewart, 67 Ala. 338; Montgomery *v.* Foster, 54 Ala. 62.

Illinois.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; Anderson *v.* Schubert, 158 Ill. 75, 41 N. E. 853; Petersburg *v.* Whitnack, 48 Ill. App. 663; Nokomis *v.* Harkey, 31 Ill. App. 107.

Ohio.— Gibson *v.* Zanesville, 31 Ohio St. 184.

West Virginia.— Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152.

Wisconsin.— Preston *v.* Koshkonong, 55 Wis. 202, 12 N. W. 440.

See 13 Cent. Dig. tit. "Costs," § 1125.

Rules of court imposing costs.— There being no statutes authorizing the imposition of costs on a municipality, a court has no power to make rules imposing costs on a municipality. Pekin *v.* Dunkleberg, 40 Ill. App. 184.

which the prosecution is had is invalid;[22] nor by the fact that defendant worked out his costs in the city's prison or on the city's streets, the labor being performed for the benefit of the city.[23] In some jurisdictions the prosecution under an ordinance is a civil action, and the matter of costs governed by statutes relating to costs in civil actions generally.[24] In a greater number of jurisdictions, however, the proceeding is considered criminal in its nature,[25] and statutes giving costs to the successful party in a civil action have no application.[26]

7. ALLOWANCE OUT OF FUNDS PROVIDED BY STATUTE. In some jurisdictions provision is made for the payment of certain items of cost under designated circumstances out of funds derived from fines or forfeitures or from the labor of convicts. These statutes are to be strictly construed. No items of cost will be allowed except such as are clearly within the meaning of the statute, and the circumstances designated by statute as a prerequisite to their allowance must appear.[27]

E. Amount and Items Recoverable — 1. AGAINST DEFENDANT — a. In General. Costs taxable against a defendant are the costs incurred in establishing guilt and not those made in connection with an accusation shown to be groundless.[28] Nor can he be held responsible for all the costs the prosecution sees fit to make. He is only liable for such costs as there was actual, apparent, or probable necessity for making.[29] Under express statutory authority, it has been held that the compensation of jurors is taxable as costs against defendant.[30] So costs incurred

22. Monmouth *v.* Popel, 183 Ill. 634, 56 N. E. 348 [*reversing* 81 Ill. App. 512].

23. Fosselman *v.* Springfield, 139 Ill. 185, 28 N. E. 916 [*affirming* 38 Ill. App. 296]; Young *v.* Murphysboro, 45 Ill. App. 561; Tuley *v.* Logansport, 53 Ind. 508; Gibson *v.* Zanesville, 31 Ohio St. 184. *Contra*, Paducah *v.* Calhoun, 78 Ky. 323.

24. Iola *v.* Harris, 40 Kan. 629, 20 Pac. 521. See also Horn *v.* People, 26 Mich. 221.

25. Montgomery *v.* Foster, 54 Ala. 62; Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152; and cases cited *supra*, note 21.

26. Montgomery *v.* Foster, 54 Ala. 62.

Effect of reversal of conviction on appeal. — In jurisdictions where the proceeding is considered criminal, in an action to enforce a city ordinance, the appellate court should not adjudge costs against a city and award execution on reversal of the judgment of conviction. Centralia *v.* Nagele, 181 Ill. 151, 55 N. E. 128 [*reversing* 81 Ill. App. 334]. But in a jurisdiction where the proceeding is considered civil, if defendant is acquitted on appeal from a judgment of conviction in the police court or the district court, and judgment entered that he recover of the city his costs, and that execution issue therefor, such judgment, until reversed or modified, is a valid judgment and enforceable in defendant's name, although he had paid none of the costs. Mariner *v.* Mackey, 25 Kan. 669.

27. See Bilbro *v.* Drakeford, 78 Ala. 318; McPherson *v.* Boykin, 76 Ala. 602; Fite *v.* Black, 92 Ga. 363, 17 S. E. 349; Black *v.* Fite, 88 Ga. 238, 14 S. E. 563.

Under a statute providing for payment of witness' fees from the fine and forfeiture fund, fees of witnesses at preliminary examinations or applications for bail are not chargeable against the fund. Bilbro *v.* Drakeford, 78 Ala. 318. So where a prosecution commenced before a justice is removed into the circuit court, the justice is not an officer of court within the statute making fees only of officers of court payable out of the fine and forfeiture fund. McPherson *v.* Boykin, 76 Ala. 602. No costs are allowable out of the fund under a statute providing therefor, when defendant has been convicted and is insolvent, or when the state enters a *nolle prosequi*, or the indictment has been withdrawn, or the prosecution abated by the death of defendant. Bilbro *v.* Drakeford, 78 Ala. 318.

28. Biester *v.* State, (Nebr. 1902) 91 N. W. 416, holding that costs made by the state in a futile effort to prove that an assault was felonious cannot be taxed against defendant, although convicted of an assault and battery.

29. Biester *v.* State, (Nebr. 1902) 91 N. W. 416.

In determining what costs were actually, apparently, or probably necessary, the trial court is vested with a large discretion which will not be interfered with if fairly exercised. Biester *v.* State, (Nebr. 1902) 91 N. W. 416.

Upon a confession of judgment by defendant and his sureties for the fine and costs, it is not error for the court to refuse to enter an order on the docket at defendant's request to limit the confession as to the costs to such as had been incurred on behalf of the state; the judgment entry without such express limitation would include only the costs of the state, and any taxation by the clerk of the costs of defendant would be illegal. Yeldell *v.* State, 100 Ala. 26, 14 So. 570, 46 Am. St. Rep. 20.

30. Souther *v.* Com., 7 Gratt. (Va.) 673. *Compare* People *v.* Kennedy, 58 Mich. 372, 377, 25 N. W. 318, in which it was held that the *per diem* of jurors should not be included in the costs assessed against defendant convicted of a misdemeanor. The court said: "It would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the Constitu-

before a grand jury have been held taxable against him as costs of the prosecution.[31] But costs incurred in an unsuccessful attempt to arrest defendant are not taxable against him in the absence of statutory authorization,[32] nor are stenographer's fees taxable unless a statute permits.[33]

b. Witness' Fees. Under the statutes in some jurisdictions, in cases where defendant is liable to pay costs, the fees of his own witnesses are taxable against him.[34] So fees of witnesses for the prosecution are taxable in cases where defendant is liable for the costs of the prosecution,[35] that is to say, to a reasonable amount. Independently of any statutory regulation, if an unnecessarily large number of witnesses are summoned and examined, the fees of so many as are in excess of a reasonable number are not taxable against defendant.[36] The traveling expenses of a witness from another state have been held to be taxable.[37]

c. Costs of Continuance. Where the statute provides that the party granted a continuance shall pay the costs thereof, defendant will be liable therefor, although acquitted, when it was granted at his request.[38]

d. Fees of Prosecuting Attorney. In the absence of special statutory authorization a fee for the services of a prosecuting attorney cannot be assessed as costs.[39]

tion of the State gives them — a trial by jury."

Under a statute making defendant liable for all costs when convicted, he may be taxed with the clerk's fees for issuing subpœnas and docketing a cause. State *v.* Armstrong, 29 Wash. 57, 69 Pac. 392.

31. State *v.* Fife, (Me. 1886) 3 Atl. 461.

32. Com. *v.* Cane, 1 Pa. Dist. 820, 12 Pa. Co. Ct. 11.

33. Petty *v.* San Joaquin County Ct., 45 Cal. 245.

34. Corbin *v.* People, 52 Ill. App. 355; Schlicht *v.* State, 56 Ind. 173; Shawnee County *v.* Whiting, 4 Kan. 273; Com. *v.* Smith, 4 Pa. Co. Ct. 321. See also Hall *v.* Doyle, 35 Ark. 445, which holds defendant liable for fees of his witnesses without mentioning any statute.

35. Corbin *v.* People, 52 Ill. App. 355; Schlicht *v.* State, 56 Ind. 173; State *v.* Smith, 6 N. C. 60.

Costs for witness held in custody during vacation are not taxable against defendant, under a statute allowing a *per diem* "for every witness attending a court." State *v.* Walsh, 44 N. J. L. 470. But see Wickwire *v.* State, 19 Conn. 477, holding that where it is necessary to arrest the witnesses to procure their attendance, the expenses so incurred are taxable against defendant.

Costs for witnesses summoned before time allowed by statute has expired are not taxable against defendant. State *v.* Nichols, 55 Vt. 211.

Costs for witnesses subpœnaed at suggestion of private counsel, such practice being immemorial, and the district attorney not being a resident of the town where the prosecution is had, are taxable against defendant. Com. *v.* Smith, 4 Pa. Co. Ct. 321.

Effect of failure to examine.— Where witnesses are duly summoned, and defendant is convicted, he is taxable with the costs of their attendance, although they are not examined. Barrett *v.* State, 24 Ala. 74. But in Georgia, by express statutory provision, it is unlawful to charge the accused in a criminal case on his conviction with the costs of any witness who was not subpœnaed and examined. Herrington *v.* Flanders, 115 Ga. 823, 42 S. E. 222.

Testifying on counts on which no verdict was found.— Fees of witnesses testifying exclusively in relation to counts on which no verdict is found are not taxable against defendant. Com. *v.* Ewers, 4 Gray (Mass.) 21.

36. Com. *v.* Wood, 3 Binn. (Pa.) 414; Com. *v.* Eichenlaub, 1 Pa. Co. Ct. 642; Com. *v.* Worrall, 1 Pa. Co. Ct. 42; Com. *v.* Bitzer, 3 Lanc. L. Rev. 78. And see Biester *v.* State, (Nebr. 1901) 91 N. W. 416.

In some jurisdictions the question of necessary or unnecessary witness' fees is regulated by special statutory enactment. See Brown *v.* State, 86 Ga. 375, 12 S. E. 649; State *v.* A. B. C., 68 N. H. 441, 40 Atl. 1065.

Overpayment of witnesses.— The fact that a county has overpaid a witness in a criminal case does not render defendant liable to pay excessive fees. Com. *v.* Hess, 18 Pa. Co. Ct. 542.

37. Reid *v.* State, 19 Nebr. 695, 28 N. W. 300.

38. State *v.* Barker, 63 Mo. App. 535.

The rule is otherwise where defendant is by statute exempt from the payment of any costs on acquittal. Heist *v.* People, 56 Ill. App. 391.

39. Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787; Anglea *v.* Com., 10 Gratt. (Va.) 696.

If specially provided for by statute, such fee is taxable as costs against defendant, under the circumstances therein mentioned (Wellington *v.* State, 52 Ark. 447, 13 S. W. 134; Hall *v.* Doyle, 35 Ark. 445. See also State *v.* Arnold, 98 Iowa 253, 67 N. W. 252; Arbuthnot *v.* State, (Tex. Crim. 1898) 43 S. W. 1024), but under no other circumstances (State *v.* Beard, 31 Mo. 34; Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23; Fox *v.* Whitney, 33 N. H. 516. See also State *v.* Middleton, 13 Mont. 368, 34 Pac. 184).

Effect of remission of forfeitures by gov-

e. Costs of Other Proceedings or Prosecutions. On assessment of costs against defendant on conviction, costs of an entirely distinct prosecution for another offense in the same court,[40] or in a different court,[41] are not taxable against defendant. So the costs of a preliminary examination, on which defendant is discharged, are not taxable against defendant when he is afterward indicted and convicted on the same charge;[42] and the same rule applies where a person accused of a crime before a justice is recognized to appear in the circuit court and is convicted in that court.[43] On the same principle it has been held that if an indictment is quashed,[44] or dismissed for defects therein,[45] and on the trial of a second indictment for the same offense defendant is ordered to pay costs, the costs of the first indictment cannot be included.

f. Expense of Boarding Convict. Where the expense of boarding a convict is made a public charge on the county[46] or state,[47] it is not taxable as costs against defendant under any circumstances, nor is the expense of supporting a convict after he is sentenced to imprisonment and to pay part of the "costs."[46]

g. State Tax in Litigation. There are rulings both ways on the question whether a state tax on litigation is costs and chargeable against defendant as such.[49]

h. Costs of Appeal — (i) *To Court of Last Resort.* As is the case with costs made in a trial court, costs on appeal is a matter entirely of statutory regulation. In the absence of statute costs of an appeal taken to the court of last resort are not taxable against defendant, irrespective of the outcome of the appeal,[50] but on conviction[51] or on dismissal such costs are recoverable against him as are provided for.[52]

(ii) *To Intermediate Court.* On appeal, by complainant in a criminal prosecution before a justice, from a taxation of costs against him on dismissal of the complaint, the state and complainant alone are parties, and if the appeal is successful the costs thereof cannot be taxed against defendant.[53]

ernor.— Where commissions due the state's attorneys on adjudged forfeitures of recognizances are not collected by reason of the governor remitting the forfeitures they are not taxable as costs. State *v.* Dyches, 28 Tex. 535.

Reasonableness of fee.— Where the statute authorizes "A reasonable attorney's fee to be assessed by the court," it will not be retaxed on appeal, in the absence of any evidence to show that it is excessive. State *v.* Arnold, 98 Iowa 253, 67 N. W. 252.

40. McArthur *v.* State, 41 Tex. Crim. 635, 57 S. W. 847; McKinney *v.* State, 41 Tex. Crim. 413, 55 S. W. 337.

41. Burch *v.* Dooley, 123 Ind. 288, 24 N. E. 110; Com. *v.* Peiffer, 80 Pa. St. 191.

42. U. S. *v.* Leopold, 43 Fed. 785.

43. State *v.* Thurston, 7 Blackf. (Ind.) 148.

44. Com. *v.* Linderman, 1 Woodw. (Pa.) 370. To the same effect see Baldwin *v.* Com., 26 Pa. St. 171. *Contra,* Com. *v.* Brady, 5 Pa. Dist. 46.

45. Bazell *v.* State, 89 Ala. 14, 8 So. 22. But see State *v.* Hashan, 4 N. C. 230, which seems to conflict with this view.

46. Com. *v.* Curren, 9 Phila. (Pa.) 623, 29 Leg. Int. (Pa.) 53.

47. *Ex p.* State, 121 Ala. 327, 25 So. 563. The contrary was the rule under a former statute. See State *v.* Brewer, 61 Ala. 318.

48. Holland *v.* State, 23 Fla. 123, 1 So. 521.

49. That it is "costs."— In Arkansas it is held that the tax imposed on a criminal conviction is a mode of making persons convicted of crime contribute to defray the expense of criminal prosecution, and that it is taxable as costs. Wellington *v.* State, 52 Ark. 447, 13 S. W. 134; Murphy *v.* State, 38 Ark. 514.

That it is not "costs."— See State *v.* Davidson County, 96 Tenn. 178, 33 S. W. 924; Johnson *v.* State, 85 Tenn. 325, 2 S. W. 802; State *v.* Hartman, 5 Lea (Tenn.) 118. But *compare* State *v.* Howran, 8 Heisk. (Tenn.) 824.

50. Yankton *v.* Douglass, 8 S. D. 590, 67 N. W. 630; Finch *v.* Com., 14 Gratt. (Va.) 643. See also Bradley *v.* State, 69 Ala. 318.

51. Wellington *v.* State, 52 Ark. 447, 13 S. W. 134; Peoples *v.* Com., 88 Ky. 174, 10 S. W. 642, 10 Ky. L. Rep. 846.

52. Bonn *v.* State, 12 Tex. App. 100.

Reversal which does not terminate action. — In criminal cases in the supreme court, where there is a reversal of the judgment, which does not put an end to the cause, but leaves it to further action in the court below, the costs in the supreme court are to be paid by defendant, but in all cases where a reversal on appeal puts an end to the prosecution, defendant must not pay costs, the statute providing that "when the defendant is acquitted in a criminal action he is not liable for any costs, except when otherwise provided by the act." Smith *v.* State, 5 Ind. 541.

53. State *v.* Powell, 44 Mo. App. 21.

A statute providing that the appellant from a justice or police court shall, on con-

i. On Conviction of Lesser Offense. Where the prosecution is for a felony and the conviction only of a misdemeanor included therein, only such costs are taxable as would have been taxed had the prosecution been for the misdemeanor.[54]

j. Where There Are Several Defendants. Where several persons are included in the same indictment, but one fee for the indictment and the capias can be taxed.[55]

2. Against Prosecutor. If the prosecutor is made liable on acquittal, he will be liable for costs of both courts, where defendant is acquitted on appeal from a justice's court.[56] He cannot, however, be taxed as prosecutor in the court of one county for the costs of a like prosecution in the court of another county.[57] A solicitor's fee is not chargeable against a prosecutor on acquittal, where by statute fees are only given solicitors "on conviction."[58]

3. Against County — a. In General. A county is not liable for fees of an officer executing process in the absence of statutory authorization. He takes the office *cum onere*,[59] and it is not liable for the expense incurred in an unsuccessful attempt to arrest a fugitive from justice who has taken refuge in another state.[60] A county, however, has been held liable, in the absence of a statute so providing, for board and lodging of a jury provided in pursuance of an order of court;[61] and for fees of a stenographer for making a transcript of the notes taken on the trial of a cause, when expressly provided by statute.[62] If the statute imposes certain conditions on the liability of the county for fees of witnesses in behalf of the

viction in the higher court, pay and suffer double the amount of fines, penalties, and imprisonment awarded against him by the former tribunal has no reference to the costs of the prosecution taxed before such justice or police court. Lord *v.* State, 37 Me. 177. But a statute which provides that "if the judgment of the justice shall be affirmed, or, upon any trial in the district court, the defendants shall be convicted, and any fine assessed, judgment shall be rendered for such fine, and costs in both courts, against the defendant and his sureties," applies to cases taken up from a justice court by certiorari, as well as to those taken up by appeal. Baker *v.* U. S., 1 Minn. 207.

54. State *v.* Granville, 26 Kan. 158; State *v.* O'Kane, 23 Kan. 244. See also Biester *v.* State, (Nebr. 1902) 91 N. W. 416; Com. *v.* Peiffer, 80 Pa. St. 191. *Contra*, State *v.* Belle, 92 Iowa 258, 60 N. W. 525, in which it is held that costs cannot be apportioned.

55. State *v.* Gwynn, 61 N. C. 445. See also Com. *v.* Rice, 3 Pa. Dist. 259; Com. *v.* McArdle, 3 Pa. Dist. 258, holding, under a statute providing that in all cases where two or more persons have committed an indictable offense, the names of all shall be contained in one bill of indictment, "for which no more costs shall be allowed than if the name of one person was contained therein," that where several defendants are indicted separately for a joint offense, it is error to tax full costs on each bill of indictment, excepting only witness fees and mileage.

Only one docket-fee can be taxed in each case, whatever the number of joint defendants under a statute providing that no more than one docket-fee shall be charged upon or for the trial of any one indictment. Bunday *v.* State, 6 Ind. 398.

56. *Ex p.* Perrin, 41 Ark. 494.

Under a statute providing that on due notice after the successful termination, the court shall mark the prosecutor as prosecutor of record, and on finding that the prosecution was malicious and that defendant's witnesses were proper for the defense, tax such prosecutor with the costs, including costs of such witnesses, it is error to tax costs of such witnesses on the finding that the prosecution was not malicious and not for the public good, in the absence of a finding that the witnesses were proper for the defense. State *v.* Jones, 117 N. C. 768, 23 S. E. 247.

57. State *v.* Horton, 89 N. C. 581.

58. State *v.* Dunn, 95 N. C. 697.

59. Com. *v.* Buccieri, 153 Pa. St. 570, 26 Atl. 245; Huntingdon County *v.* Com., 72 Pa. St. 80.

Under a statute providing that where the fees in criminal cases for sheriff, clerk, etc., are not paid by defendant or prosecutor, they shall be paid by the county, the clerk is entitled to his fees from the county where a *nolle prosequi* has been entered, and no judgment for costs against defendant or prosecuting witness. Bedilion *v.* Cowley County, 27 Kan. 592.

60. Kirkendall *v.* Luzerne County, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313.

61. Watson *v.* Moniteau County, 53 Mo. 133. And see Lycoming County Com'rs *v.* Hall, 7 Watts (Pa.) 290.

62. Clinton County *v.* Martin, 65 Ohio St. 287, 62 N. E. 129.

A stenographer's report of testimony filed by him at the trial court is no part of the record, and if copied into the transcript the costs thereof are not taxable against the county and no recovery can be had against the county therefor. Brown *v.* State, (Fla. 1902) 32 So. 107.

state, no liability for the costs of these witnesses attaches, unless these conditions are complied with.[63]

b. Costs Made by Defendant — (I) *In General.* Ordinarily statutes imposing payment of costs on a county do not render it liable for costs made by defendant.[64]

(II) *Witness' Fees.* The liability of a county for payment of witness' fees and costs in defending a prosecution arises only by virtue of legislative enactment. It cannot arise by implication but must be by express statutory provision,[65] and even then liability only attaches when the conditions rendering it liable have been fully complied with.[66] In cases where the county is liable for defendant's witnesses' fees on acquittal of defendant, if he is convicted but obtains a new trial on appeal and is acquitted, the county is liable for the witnesses' fees for defendant in both cases.[67]

(III) *Costs of Appeal.* In the absence of special statutory authorization costs made on appeal by defendant in a criminal prosecution are not taxable

63. Rice *v.* Schuylkill County, 14 Pa. Co. Ct. 541.

Thus a statute providing for payment of witness' fees by the county on termination of a prosecution for misdemeanor in the court of quarter sessions, either by the indictment being ignored by the grand jury or by the verdict of a traverse jury and sentence of the court thereon, does not authorize the allowance of witness' fees where the indictment was quashed on motion. Ogden *v.* Greene County, 3 Pa. Dist. 572.

Expenses of prosecuting witness.— Unless his circumstances are disclosed and he is an object of charity, a prosecuting witness is not allowed from the county the expenses of a trial. *Ex p.* Manning, 1 Cai. (N. Y.) 59.

Where an unnecessary number of indictments are presented against one defendant, and they have been ignored by the grand jury and the costs placed on the county, the court will relieve the county from the payment of costs on all unnecessary indictments. Conolly *v.* Lackawanna County, 1 Pa. Co. Ct. 26.

64. Worthen *v.* Johnson County, 62 Nebr. 754, 87 N. W. 909; Codding *v.* Bradford County, 116 Pa. St. 47, 9 Atl. 153; Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636; Com. *v.* Lindsey, 2 Chest. Co. Rep. (Pa.) 268; Colorado County *v.* Beethe, 44 Tex. 447.

These items of costs are not taxable against a county, under a statute designating the costs for which the county shall be liable as "costs of prosecution" (Huntingdon County *v.* Com., 72 Pa. St. 80; Franklin County *v.* Conrad, 36 Pa. St. 317), as "all costs" (Williams *v.* Northumberland County, 110 Pa. St. 48, 20 Atl. 405; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393), or as "costs" (Shawnee County *v.* Whiting, 4 Kan. 273; Fremont County *v.* Wilson, 3 Colo. App. 492, 34 Pac. 265. And see Hutt *v.* Winnebago County, 19 Wis. 116).

65. Worthen *v.* Johnson County, 62 Nebr. 754, 87 N. W. 909; Hewerkle *v.* Gage County, 14 Nebr. 18, 14 N. W. 549; Com. *v.* Buccieri, 153 Pa. St. 570, 26 Atl. 245; Huntingdon County *v.* Com., 72 Pa. St. 80. See also Kelly *v.* Lehigh County, 1 Lehigh Val. L. Rep. 23.

The witness must attend at his own expense because of the duty he owes the community. Com. *v.* Buccieri, 153 Pa. St. 570, 26 Atl. 245.

Provisions held not to impose liability.— A constitutional provision that the accused shall have the right to compulsory process to obtain witnesses in his favor in all criminal prosecutions does not make the county liable for fees of defendant's witnesses in misdemeanor cases, under statutes providing that each county shall pay witness' fees in state cases, and a further statute providing that in felonies and no other cases the witnesses for the accused shall receive the same pay as the state witnesses. *Ex p.* Henderson, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 426.

Provisions giving court discretionary power as to allowance.—A statute which provides that, when defendant shall be acquitted of a criminal charge, the fees of his witnesses in attendance shall be directed by the court to be paid by the county, is not mandatory, and the action of the trial court in refusing to allow such fees will not be reviewed on appeal, since another statute provides that the judge may in his discretion direct that witnesses or any of them shall receive no pay. State *v.* Hicks, 124 N. C. 829, 32 S. E. 957; State *v.* Ray, 122 N. C. 1095, 29 S. E. 948.

66. Worthen *v.* Johnson County, 62 Nebr. 754, 87 N. W. 909. And see Kennedy *v.* Delaware County, 59 Iowa 123, 12 N. W. 804.

Necessity for affidavits and order of court. — Under the provisions of Nebr. Comp. Stat. § 461, as amended, a county is liable for the *per diem* and mileage of witnesses for defendant in prosecutions for a felony, when defendant has been convicted and is unable to pay such fees, or where he is acquitted, only when there has been filed in the case the affidavits required by that section, and an order of court entered that such witnesses, not exceeding the number limited, be summoned, and paid their witness' fees from the county treasury. Worthen *v.* Johnson County, 62 Nebr. 754, 87 N. W. 909.

67. State *v.* Horne, 119 N. C. 853, 26 S. E. 36.

against the county, although the judgment of conviction be reversed by the appellate court.[68]

(IV) *Fees and Expenses of Counsel Appointed to Defend Poor Person*— (A) *In Absence of Statutory Authorization.* In a few jurisdictions the rule has been settled by repeated adjudications that the county is liable for services performed by counsel appointed by the court in defending a poor person charged with an offense in the absence of statutory authorization therefor,[69] on the theory that the power conferred by statute to appoint counsel to defend a poor person carries with it the power to make an allowance for the services.[70] The great weight of authority, however, is opposed to this view, the rule in most jurisdictions being directly to the contrary.[71] In these jurisdictions the rule is that without special statutory authority the county is not liable for such services,[72] nor even the expense incurred in the preparation and course of the trial.[73] This rule proceeds upon the theory that the law confers on attorneys rights and privileges and with them imposes duties and obligations to be reciprocally enjoyed and performed,[74] and that among them is the obligation to defend persons charged with crime when required by the court.[75]

(B) *Under Statutes.* In a number of jurisdictions special statutory authority

68. State *v.* Rainsbarger, 74 Iowa 539, 38 N. W. 403; Red *v.* Polk County, 56 Iowa 98, 9 N. W. 106; Com. *v.* Buccieri, 153 Pa. St. 570, 26 Atl. 245, 32 Wkly. Notes Cas. (Pa.) 113; Stowe *v.* State, 2 Wash. 124, 25 Pac. 1085.

Costs of printing briefs.— Under a statute providing that a defendant in a criminal prosecution shall be entitled to recover the costs of printing abstracts and briefs when he receives a reversal or modification of a judgment in his favor to be paid by the county, such allowance is to be taxed as costs against the county, under the circumstances mentioned in the statute. State *v.* Dorland, 106 Iowa 40, 75 N. W. 654.

69. Barr *v.* State, 148 Ind. 424, 47 N. E. 829; Montgomery County *v.* Courtney, 105 Ind. 311, 4 N. E. 896; Tull *v.* State, 99 Ind. 238; Gordon *v.* Dearborn County, 44 Ind. 475; Fountain County *v.* Wood, 35 Ind. 70; Baker *v.* Knox County, 18 Ind. 170; Webb *v.* Baird, 6 Ind. 13; Houk *v.* Montgomery County, 14 Ind. App. 662, 41 N. E. 1068; Hall *v.* Washington County, 2 Greene (Iowa) 473 [*overruling* Whicher *v.* Cedar County, 1 Greene (Iowa) 217]; Dane County *v.* Smith, 13 Wis. 585, 80 Am. Dec. 754; Carpenter *v.* Dane County, 9 Wis. 274. See also Weisbrod *v.* Winnebago County, 20 Wis. 418.

70. Houk *v.* Montgomery County, 14 Ind. App. 662, 41 N. E. 1068. See also Dane County *v.* Smith, 13 Wis. 585, 18 Am. Dec. 754, in which it was held that the legislature cannot leave with the courts the authority to order counsel to defend poor person and at the same time require that the services of counsel shall be rendered in such case without compensation.

71. *Alabama.*— Posey *v.* Mobile County, 50 Ala. 6.

Arkansas.—Arkansas County *v.* Freeman, 31 Ark. 266.

California.— Lamont *v.* Solano County, 49 Cal. 158; Rowe *v.* Yuba County, 17 Cal. 61.

Georgia.— Elam *v.* Johnson, 48 Ga. 348.

Illinois.— Johnson *v.* Whiteside County, 110 Ill. 22; Vise *v.* Hamilton County, 19 Ill. 78.

Kansas.— Case *v.* Shawnee County, 4 Kan. 511, 96 Am. Dec. 190.

Louisiana.— State *v.* Simmons, 43 La. Ann. 991, 10 So. 382.

Michigan.— Bacon *v.* Wayne County, 1 Mich. 461.

Mississippi.—Dismukes *v.* Noxubee County, 58 Miss. 612, 38 Am. Rep. 339.

Missouri.— Kelley *v.* Andrew County, 43 Mo. 338.

Montana.— Johnston *v.* Lewis County, 2 Mont. 159.

New York.— People *v.* Niagara County, 78 N. Y. 622; People *v.* Albany County, 28 How. Pr. 22.

Ohio.— Handy *v.* Hamilton County, 1 Disn. 263, 12 Ohio Dec. (Reprint) 611.

Pennsylvania.— Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636.

Tennessee.— Wright *v.* State, 3 Heisk. 256.

Washington.— Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

See 13 Cent. Dig. tit. "Costs," § 1120.

72. See cases cited *supra*, in note 71.

Counsel must trust to the possible future ability of the prisoner for his compensation. Rowe *v.* Yuba County, 17 Cal. 61.

73. Lamont *v.* Solano County, 49 Cal. 158; Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636.

Statutory power to charge for disbursements of counsel.— The legislature may authorize a board of county supervisors to audit and pay as a county charge disbursements actually incurred by counsel appointed by the court for the defense of a destitute person indicted for crime. People *v.* Erie County, 5 N. Y. 517.

74. Arkansas County *v.* Freeman, 31 Ark. 266; Vise *v.* Hamilton County, 19 Ill. 78.

75. Posey *v.* Mobile County, 50 Ala. 6; Johnson *v.* Whiteside County, 110 Ill. 22.

exists for imposing on counties fees of attorneys appointed to defend indigent prisoners. Some of these statutes are limited to particular grades of crime, while others contain no such limitation.[76]

(c) *How Attorney Appointed.* There being no statutory authority therefor the supreme court has no power to appoint an attorney to defend an indigent prisoner at the expense of the county.[77] Where a change of venue is made the court to which the cause is removed may appoint an attorney to defend the prisoner and the county from which the cause is removed will be liable to the same extent as if the appointment had been made and the case tried in that county.[78]

(d) *By Whom Compensation Fixed.* In Ohio the amount of the compensation is to be fixed by the county commissioners whose decision in the matter is final.[79] In Michigan it is the duty of the presiding judge to fix the amount of compensation.[80] In Nebraska the claim for services must be presented in the trial court both for services in the trial court and on appeal.[81] In Wisconsin the trial court fixes the compensation for services whether rendered in the trial court or on appeal.[82]

(e) *Amount Allowable.* Under a statute providing that the amount allowed "shall in no case exceed fifteen dollars per day for each day actually occupied in such trial or proceeding," no allowance can be made for days spent out of court in preparation for trial.[83] Under a statute providing that where counsel is assigned in a capital case the court besides counsel fees may allow him his personal and incidental expenses, expenses for an interpreter, in order that counsel may understand his client and witnesses but not expenses for a daily transcript of the evidence, are allowable.[84]

(v) *On Change of Venue* — (a) *In General.* Where the county in which the trial is had pays the costs it can recover from the county from which the change was taken all items which the law requires a county to pay.[85] Liability,

76. See for example statutes of Iowa, Maryland, Michigan, Nebraska, New York, Ohio, Wisconsin.

77. Baker *v.* State, 84 Wis. 584, 54 N. W. 1003; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185; State *v.* Wentler, 76 Wis. 89, 44 N. W. 841, 45 N. W. 816; Wiesbrod *v.* Winnehago County. 20 Wis. 418.

Where defendant in a criminal prosecution applies to the circuit court for the appointment of an attorney to defend him and the order of the court made thereon stated that the application was denied "because this court holds it has no jurisdiction to make such an order; but it is further ordered that if the supreme court shall hold that this court has jurisdiction," then it is ordered as of this date that the said attorney is hereby appointed to defend defendant at the public expense, and the supreme court did not decide whether or not the circuit court had jurisdiction to make that particular appointment, it was held that the order was a refusal to appoint counsel and the attorney could not recover from the county for services performed in the defense after the making of the order. Hopper *v.* Ashland County, 84 Wis. 655, 54 N. W. 1024.

78. State *v.* Miller, 107 Ind. 39, 7 N. E. 758; Montgomery County *v.* Courtney, 105 Ind. 311, 4 N. E. 896.

79. Geauga County *v.* Ramey, 13 Ohio St. 388; Crawford County *v.* Hall, 2 Ohio Dec. (Reprint) 313, 2 West. L. Month. 390. See also Handy *v.* Hamilton County, 1 Disn. (Ohio) 263, 12 Ohio Dec. (Reprint) 611.

80. Withey *v.* Osceola Cir. Judge, 108 Mich. 168, 65 N. W. 668 [*distinguishing* People *v.* Hanifan, 99 Mich. 516, 59 N. W. 611].

81. Edmonds *v.* State, 43 Nebr. 742, 62 N. W. 199.

The certificate of the court as to compensation is *prima facie* evidence that the amount allowed is just and correct but is not conclusive on the county board. Boone County *v.* Armstrong, 23 Nebr. 764, 34 N. W. 626.

82. State *v.* Wentler, 76 Wis. 89, 44 N. W. 841, 45 N. W. 816.

83. Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549.

Services in appellate court.— In Iowa it has been held that the attorney appointed to defend a poor person is entitled to compensation for his services in the appellate court graduated on the scale corresponding to the price fixed for the trial in the district court. Baylies *v.* Polk County, 58 Iowa 357, 12 N. W. 311.

84. People *v.* Grout, 75 N. Y. Suppl. 290.

Stenographer's minutes may, in the case of an indigent prisoner taking an appeal, be directed by the judge to be furnished counsel and the expense charged on the county. People *v.* Willett, 3 N. Y. Crim. 54.

85. Howard County *v.* Frederick County, 30 Md. 432.

however, is limited to such items. Recovery cannot be had from the county from which the change was taken for any other items.[86]

(B) *Specific Items.* In jurisdictions where fees of attorneys appointed by court to defend a poor person are taxable against a county, the fees of an attorney appointed by the court of the county to which a cause is removed are taxable against the county from which the change of venue is taken.[87] So the expense of guarding the jail in the county to which the cause is removed is taxable,[88] and also the expense of boarding the jurors and fees of the bailiff who takes charge of them.[89] Fees of jurors are also taxable in some jurisdictions,[90] but in others they are not taxable.[91] Fees of the sheriff of the county to which the action has been removed are allowed in some jurisdictions,[92] but are not allowable in others.[93] Fees of defendant's witnesses have been held taxable if their evidence was material, although they attended without subpœnas.[94] On the other hand it has been held in some jurisdictions that the expense of hiring a building for court and jury rooms,[95] or the expenses incurred in securing a jury to try the case, are not recoverable as costs.[96] Nor is it permissible to include in the clerk's fees a charge of "judgment-roll," as a judgment-roll exists only in civil cases.[97]

4. Against State — a. In General. In cases where the state is liable for costs it will be liable for the fees of its own witnesses,[98] and if so provided by statute the sheriff's fee for taking a bail-bond is taxable to the state.[99]

b. Costs Made by Defendant — (I) *In General.* No costs made by defendant are allowable against the state in cases where it is liable for costs, unless there is some statutory or constitutional provision imposing on it the payment of costs

86. Kent County *v.* Mecosta County, 126 Mich. 299, 85 N. W. 739.

Claim barred by statute.— One county cannot recover from another fees paid after they are barred by the statute of limitation. Davis County *v.* Riley County, 9 Kan. 635.

87. State *v.* Miller, 107 Ind. 39, 7 N. E. 758; Montgomery County *v.* Courtney, 105 Ind. 311, 4 N. E. 869; Washoe County *v.* Humboldt County, 14 Nev. 123.

Assistant to prosecuting attorney.— In Iowa under Code (1873), § 4381, on a change of venue in a criminal case, all the expenses of the removal and trial shall be paid by the county from which the change was taken, but this confers no authority on the board of supervisors of the county to which the venue was changed to bind the former county by the employment of assistance for the prosecution of causes so removed. Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222.

88. Hart *v.* Vigo County, 1 Ind. 309; Macon County *v.* Jackson County, 75 N. C. 240; State *v.* Anson County, 33 N. C. 135.

89. Allegany County *v.* Howard County, 57 Md. 393.

90. Jones County *v.* Lynn County, 68 Iowa 63; Shawnee County *v.* Wabaunsee County, 4 Kan. 312; Wasboe County *v.* Humboldt County, 14 Nev. 123.

Where a nolle prosequi is entered a charge for fees of jurors for one day is not taxable where the *nolle prosequi* is entered on the first day of the term. Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549.

91. Independence County *v.* Dunkin, 40 Ark. 329 (holding that the compensation of jurors is no part of the costs, but is part of the current expense of holding court to be paid by the county in which court is held); Hennepin County *v.* Wright County, 84 Minn. 267, 87 N. W. 846; Stanton County *v.* Madison County, 10 Nebr. 304, 4 N. W. 1055.

92. Needham *v.* Thresher, 49 Cal. 392; Washoe County *v.* Humboldt County, 14 Nev. 123.

93. Ross County *v.* State, 49 Ohio St. 373, 37 N. E. 735, holding that the only compensation which sheriffs are entitled to receive in cases where the state fails to convict, or defendant proves insolvent, is the allowance, not exceeding three hundred dollars, provided for by statute.

94. Jones County *v.* Linn County, 68 Iowa 63, 25 N. W. 930.

95. Stanton County *v.* Madison County, 10 Nebr. 304, 4 N. W. 1055.

96. Gallia County *v.* Meigs County, 14 Ohio Cir. Ct. 26.

97. Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549.

98. State *v.* Oliver, 116 Mo. 188, 22 S. W. 637. See also State *v.* Hill, 72 Mo. 512.

Unnecessary witnesses.— Under a statute providing that in no case shall the costs of more than three witnesses to establish any one fact be taxed, but the costs of witnesses unnecessarily summoned and not examined shall in the discretion of the court be taxed against the party summoning them, the allowance of fees of three witnesses to the same fact is within the discretion of the court, and mandamus will not lie to compel it to allow additional fees. State *v.* Oliver, 116 Mo. 188, 22 S. W. 637. To the same effect see State *v.* Hill, 72 Mo. 512.

99. Parkinson *v.* State, 16 Lea (Tenn.) 132.

made by defendant, or of particular items so made.[1] A statute making the state liable under certain circumstances for costs "accrued on behalf of the state,"[2] or for "costs,"[3] has been held not to render the state liable for costs made by defendant. A statute providing for the payment of costs by the state on acquittal refers only to costs that have accrued at the trial and have not been already adjudged against either party, and a continuance fee paid by defendant cannot be recovered on acquittal.[4] The maintenance of a person while in jail is taxable against the state if there is statutory authority therefor.[5]

(II) *Witness' Fees.* The state is not liable for the costs of defendant's witnesses, in the absence of statutory or constitutional provisions making it so.[6]

(III) *Fees of Attorney Appointed to Defend Poor Person.* The state is not liable for compensation of an attorney appointed by the court to defend a poor person charged with a crime.[7]

(IV) *Costs of Appeal.* In the absence of statute the costs of abstracts prepared and printed by defendant in criminal cases are not taxable against the state.[8]

5. Against Municipality. In the absence of any statute so providing costs of an appeal to an intermediate court from a judgment for violation of an ordinance or on certiorari to such court are not taxable against a municipality.[9]

F. Security For Costs — 1. By Prosecutor. In the absence of statute the prosecutor cannot be required to give security for costs.[10] But in a number of jurisdictions there is statutory authority therefor.[11] These statutes are to be strictly construed and will not be extended beyond their natural import to fasten liability on the prosecutor or his sureties.[12] A bond when required should com-

1. Carpenter *v.* People, 8 Ill. 147; Prince *v.* State, 7 Humphr. (Tenn.) 137; State *v.* Barton, 3 Humphr. (Tenn.) 13.

2. Avery *v.* State, 7 Baxt. (Tenn.) 328; Tucker *v.* State, 2 Head (Tenn.) 555.

3. Prince *v.* State, 7 Humphr. (Tenn.) 137. But see Buckman *v.* Alexander, 24 Fla. 46, 3 So. 817, where the court held that a constitutional provision for payment by the state "of costs and expenses" in criminal prosecutions in certain cases made the state liable for defendant's costs.

4. State *v.* Brigham, 63 Mo. 258.

5. State *v.* Shropshire, 4 Yerg. (Tenn.) 52.

6. Israel *v.* State, 8 Ind. 467; State *v.* Barton, 3 Humphr. (Tenn.) 13.

Provisions authorizing allowance.— The constitutional provision that a defendant shall have the right to compulsory process to secure attendance of witnesses has been held to make the state subject to taxation for costs of defendant's witnesses. State *v.* Grimes, 7 Wash. 445, 35 Pac. 361.

Provisions not authorizing allowance.— A statute making the state liable in certain cases for "the costs accrued on behalf of the State" does not authorize taxation against it of costs of witnesses for defendant. Tucker *v.* State, 2 Head (Tenn.) 555; State *v.* Barton, 3 Humphr. (Tenn.) 13.

Expert witnesses.— Under a statute providing that a person charged with a capital crime shall have process to summon such witnesses as are necessary for his defense at the expense of the commonwealth, and a statute defining the costs in criminal prosecutions, and providing for the taxation of witness' fees, and that no fees shall be taxed except such as the court shall deem reasonable, one accused of a capital crime is not on his acquittal entitled to tax the expenses and fees of expert witnesses not appointed by the court and employed without the authority or approval of the attorney-general. *In re* Attorney-General, 104 Mass. 537.

7. Wright *v.* State, 3 Heisk. (Tenn.) 256.

8. State *v.* Rainsbarger, 74 Iowa 539, 38 N. W. 403.

Under a statute providing that in case of a discharge of plaintiff on writ of error "the legal costs shall be borne by the commonwealth," travel being a part of the legal costs, plaintiff is entitled to it. Britton *v.* Com., 1 Cush. (Mass.) 302. It has also been held that defendant in a criminal case who obtains a reversal by writ of error and is thereupon sentenced to lesser punishment is entitled to costs. Com. *v.* Haynes, 107 Mass. 194.

9. Camden *v.* Bloch, 65 Ala. 236; Montgomery *v.* Foster, 54 Ala. 62.

10. State *v.* Bowling, 14 Mo. 508. See also White *v.* State, 13 Ohio St. 569; Baker *v.* State, 12 Ohio St. 214.

11. State *v.* Cahaba, 30 Ala. 66; Respublica *v.* Prior, 1 Yeates (Pa.) 206; U. S. *v.* Dulany, 3 Fed. Cas. No. 1,500, 1 Cranch C. C. 571.

12. State *v.* Parker, 39 Ark. 174. See also Quincy *v.* Ballance, 30 Ill. 185; Lewistown *v.* Proctor, 27 Ill. 483, in which cases it was held that a statute requiring security for costs in actions under penal statutes does not apply to proceedings for violation of ordinances, the view being taken that ordinances are not statutes.

ply with the statute at least substantially.[13] A bond "for all the costs which may accrue in said prosecution" covers proceedings on appeal.[14] If no liability on the bond attaches, unless the prosecution was without probable cause, no action will lie thereon, where the justice fails to make the entry of "Want of probable cause."[15] The failure of the prosecutor to give bond is not a matter of which defendant can complain,[16] at least after he has entered a plea of not guilty.[17]

2. By Defendant. In Illinois defendant cannot be required to advance costs before trial; if he does he can recover them back on acquittal.[18]

G. Judgment or Award of Costs. Ordinarily the costs in a criminal case abide and follow the final judgment.[19] A judgment for costs may be rendered against the prosecutor in his absence,[20] and the fact that in a justice's judgment the name of the prosecutor is not given will not render a judgment for costs against him void for uncertainty.[21]

H. Certificate. To make a county liable for costs it is necessary in some jurisdictions for the judge to make a certificate of the county's liability and transmit the same to the county court for allowance. The certificate is obligatory and conclusive as to the amount of costs and charges to be allowed,[22] unless the fees

13. Bonds held sufficient.— A bond "to prosecute the complaint with effect, or in default thereof to pay all lawful costs which may accrue therefrom," sufficiently complies with a statute requiring a bond "to prosecute such complaint to final judgment with effect, or in default thereof to pay the costs which may accrue thereon to the State, or to the person or persons accused." State *v.* Palmer, 15 R. I. 6, 22 Atl. 944. So a bond "to prosecute such complaint to final judgment with effect, or, in default," etc., complies with a statute requiring a bond "to prosecute the complaint with effect, or in default thereof to pay the costs that may accrue thereon." State *v.* McCarthy, 4 R. I. 82.

Bond held insufficient.—A bond signed in blank by a surety and left with a justice to be filled in by him and used by him as he sees fit after the arrest of an alleged offender is not a compliance with a statute providing that no warrant shall issue unless security for costs shall have been filed with the justice. Hutchinson *v.* Ionia County, (Mich. 1902) 89 N. W. 561.

14. Taylor *v.* State, 39 Ark. 291.

15. Cobbey *v.* Berger, 13 Nebr. 463, 14 N. W. 396.

16. People *v.* Griswold, 64 Mich. 722, 31 N. W. 809. And see Com. *v.* Hill, 9 Leigh (Va.) 601, in which it was held that where a prosecutor is insolvent and security for costs is not given, the court may refuse to dismiss the indictment for this reason, as provided by the statute, if in their opinion public justice requires that the prosecution should proceed.

17. Mann *v.* State, 37 Ark. 405.

18. McArthur *v.* Artz, 129 Ill. 352, 21 N. E. 802.

This rule "applies only to proceedings in the Circuit Court, and has no reference to costs in the Appellate and Supreme Courts, or to costs made in the Circuit Court in taking cases to the Appellate and Supreme Courts." McArthur *v.* Artz, 129 Ill. 352, 21 N. E. 802; Carpenter *v.* People, 8 Ill. 147.

19. Patton *v.* State, 41 Ark. 486.

If interlocutory costs are adjudged against defendant he must pay them, although he be acquitted on the trial and general judgment for costs rendered against the county. Patton *v.* State, 41 Ark. 486.

Entry of judgment.—A verdict of not guilty, and that the county pay costs on an indictment for a misdemeanor, is not a finality as to the costs, but a judgment must be entered on the verdict. Com. *v.* Tack, 3 Brewst. (Pa.) 532. On a conviction of a felony, when no time is definitely fixed within which to tax costs and disbursements, judgment for costs must be entered in the judgment-lien docket within a reasonable time to entitle the state to a lien. What constitutes a reasonable time depends on the circumstances of the case, but entry after the beginning of the next ensuing term is not within a reasonable time. State *v.* Munds, 7 Oreg. 80.

20. State *v.* Owens, 87 N. C. 565; State *v.* Spencer, 81 N. C. 519.

21. State *v.* Green, 2 Head (Tenn.) 356.

22. Ouachita County *v.* Sanders, 10 Ark. 467, holding further that to make the allowance of the costs imperative upon the county court, it must also be certified that defendant has been acquitted or has been convicted and that the costs cannot be made out of his property as one or the other of these facts is a prerequisite to the county's liability. The county court cannot allow a bill for costs on the certificate of the circuit court that it is just and that defendant has escaped.

In Wisconsin as the judge of the court in which a cause is tried on change of venue has exclusive cognizance of the taxation and allowance of costs by him, a taxation at a certain amount, "subject, however, to an investigation by the county board of the county liable therefor," is ineffectual and void. Waushara County *v.* Portage County, 83 Wis. 5, 52 N. W. 1135. The supreme court will not certify for services rendered in prosecuting the case therein, but it is the duty of the trial court to make such certificate upon notice to the district attorney and due proof of

for services rendered are not fixed by law,[23] but is not conclusive of the county's liability.[24]

I. Right of Appeal. To entitle one to appeal from a judgment or order imposing costs on him in a criminal case, there must be some general or special statute authorizing it. Thus the prosecutor has no right of appeal unless there is some statutory authorization.[25] Some decisions hold that taxing him in a criminal action with costs is in the nature of a civil judgment or order, from which an appeal lies, under statutes authorizing appeals from civil judgments or orders.[26] In other decisions the view is maintained that a judgment awarding costs against the prosecutor is "in a criminal action," and that a statute authorizing an appeal from a judgment in a civil case has no application.[27]

J. Taxation. Costs in a criminal case must be taxed by the court in which the case is tried or by the clerk. If no application for taxation or cost bill is required by statute to be filed the taxation of costs will be valid, although none is filed.[28]

K. Correction of Erroneous Taxation — 1. In Trial Court. The proper procedure to obtain a correction of an erroneous taxation is by motion to retax in the court where the cause is pending[29] or by replevin of the fee bill.[30] Error

the services rendered. State *v.* Wentler, 76 Wis. 89, 44 N. W. 841, 45 N. W. 816.

23. Chicot County *v.* Kruse, 47 Ark. 80, 14 S. W. 469; Union County *v.* Smith, 34 Ark. 684; Jefferson County *v.* Hudson County, 22 Ark. 595.

24. Craighead County *v.* Cross County, 50 Ark. 431, 8 S. W. 183; Chicot County *v.* Kruse, 47 Ark. 80, 14 S. W. 469; Ouachita County *v.* Sanders, 10 Ark. 467.

25. Heiderer *v.* People, 2 Colo. 672; O'Chander *v.* Hansen, 48 Nebr. 485, 67 N. W. 604; State *v.* Ensign, 11 Nebr. 529, 10 N. W. 449; State *v.* Rusch, 44 Wis. 582.

In Illinois it has been held that the right of the prosecutor to appeal from a judgment imposing costs on him is given by a statute providing that "defendant may appeal," etc. Berman *v.* People, 101 Ill. 322.

In Iowa an erroneous taxation of costs may be modified on appeal by the state, the view being taken that costs are merely incidental to the proceedings. State *v.* Belle, 92 Iowa 258, 60 N. W. 525; State *v.* Rainsbarger, 74 Iowa 539, 38 N. W. 403. See also State *v.* Speele, 112 Ga. 39, 37 S. E. 174, in which the state is held to have a right of appeal where the judgment against a prosecutor for costs is sought to be enforced only by execution against his property. An appeal also lies on behalf of the county. State *v.* Belle, 92 Iowa 258, 60 N. W. 525; State *v.* Rainsbarger, 74 Iowa 539, 38 N. W. 403. And a statute providing that either party may appeal, "the state in the same manner as defendant," allows an appeal by a prosecuting witness in the name of the state from a judgment imposing costs. State *v.* Roney, 37 Iowa 30.

In Kansas it has been held, under a statute allowing an appeal on "a question reserved by the state," that the district attorney, having excepted to an order relieving the prosecutor from the payment of costs and adjudging the county to pay the same, the state may appeal from the order. State *v.* Forney, 31 Kan. 635, 3 Pac. 305; State *v.* Zimmerman, 31 Kan. 85, 1 Pac. 257.

26. Whitley *v.* State, 123 N. C. 728, 31 S. E. 392; State *v.* Morgan, 120 N. C. 563, 26 S. E. 634; State *v.* Powell, 86 N. C. 640. See also State *v.* Powell, 44 Mo. App. 21, in which a prosecutor was held entitled to appeal from a taxation of costs to obtain a review by him of items objected to as not being properly taxable against him, the court holding that the taxation of costs was in the nature of an independent proceeding.

27. People *v.* Carr, 54 Hun (N. Y.) 443, 7 N. Y. Suppl. 724, 28 N. Y. St. 287. See also People *v.* Norton, 33 Hun (N. Y.) 277, holding that a judgment of a court of special sessions charging a prosecutor with costs is not a "judgment upon conviction," within a statute allowing an appeal from such judgment.

28. State *v.* Second Judicial Dist. Ct., 16 Nev. 76. See also Jones County *v.* Linn County, 68 Iowa 63, 25 N. W. 930.

Where a change of venue is had and costs are taxed in the court in which the cause was tried, such taxation should only be on notice to the district attorney of the county liable for the costs, since the debtor county should in some way have its day in court. Waushara County *v.* Portage County, 83 Wis. 5, 52 N. W. 1135.

29. Petty *v.* San Joaquin County Ct., 45 Cal. 245; Corbin *v.* People, 52 Ill. App. 355; State *v.* Second Judicial Dist. Ct., 16 Nev. 76; State *v.* Davidson County, (Tenn. Ch. App. 1899) 52 S. W. 477. But see Whitley *v.* Murphy, 5 Oreg. 328, 20 Am. Rep. 741, in which the court said that admitting that a party might have a remedy in that way, he is not bound to take that course. The party injured is entitled to relief in equity from the illegal and fraudulent taxation of a county clerk of the costs and disbursements in a criminal case.

30. Corbin *v.* People, 52 Ill. App. 355.

in allowing items not properly taxable is not an excess of jurisdiction and certiorari will not lie to correct such error.[31] The motion should be made by the party or other person interested in obtaining a correction of the taxation.[32] The time of making a motion to correct errors in taxation is ordinarily a matter of statutory regulation.[33] On a motion to retax the merits of the verdict cannot be inquired into and evidence is not admissible to contradict the verdict or to show that it was rendered through prejudice or corruption.[34]

2. IN APPELLATE COURT — a. Prerequisites of Review. As a general rule objection to an improper taxation of costs is not available in an appellate court in the absence of a motion made in the trial court to retax the same,[35] and of a presentation of the question by assignments of error.[36] So no objection which is not raised by the motion to retax will be considered.[37]

b. Hearing and Determination. Error in the taxation of costs must be affirmatively shown by the record or it will be presumed that the motion to retax was properly overruled.[38] On appeal by a prosecutor from an order taxing him with costs, the court cannot review the findings of fact by the trial court upon which the prosecutor is taxed with costs.[39] Where the trial court erroneously apportions costs in a criminal prosecution and denies a motion to retax, the supreme court may on appeal correct the error by taxing all the costs to defendant.[40]

L. Methods of Enforcing Liability For Costs — 1. AGAINST DEFENDANT — a. As in Civil Actions. A judgment for costs against defendant may be enforced in the same manner as a judgment in a civil action, when there is statutory authority therefor.[41] To authorize the issuance of an execution for costs the

31. Petty *v.* San Joaquin County Ct., 45 Cal. 245; State *v.* Second Judicial Ct., 16 Nev. 76.

32. Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430, holding that where the county objects to the taxation, the motion to retax is properly made by the county and the judge of the county representing it.

Motion by sureties.— Where defendant confesses judgment for costs and the clerk in taxing costs includes costs not properly taxable against defendant, defendant's sureties may move to retax costs. Blankenship *v.* State, 105 Ala. 128, 17 So. 99.

33. Under a statute providing that if the judge of the county court, when a bill of costs certified by the trial judge and attorney-general is presented to him, and his warrant demanded for its payment, conceives that the costs are not chargeable to the county, he may defer issuance of the warrant until he has moved the court for a correction, such a motion is not filed too late after the bill of costs has been certified by the trial judge and attorney-general. Henderson *v.* Walker, 101 Tenn. 229, 47 S. W. 430.

34. State *v.* Baldwin, 79 Mo. 243.

35. State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547; *In re* Lowe, 46 Kan. 255, 26 Pac. 749; Harris *v.* Monroe Cattle Co., 84 Tex. 674, 19 S. W. 869. See also *supra*, XXII, G, 2, d.

In Nebraska it has been held that a motion to retax is only necessary as a prerequisite to review on appeal by the prosecutor where the costs are taxable by the clerk, that such a motion is unnecessary where the court itself enters up judgment for costs. Burton *v.* State, 34 Nebr. 125, 51 N. W. 601.

36. Harris *v.* Monroe Cattle Co., 84 Tex. 674, 19 S. W. 869.

37. People *v.* Peacock, 5 Utah 237, 14 Pac. 332.

38. Murphy *v.* State, 71 Ala. 15; Parker *v.* People, (Colo. 1895) 42 Pac. 172.

Thus the ruling of the trial court on a motion to retax will not be reversed on appeal on the ground of excess of number of witnesses, in the absence of a showing for what purpose and at whose instance the witnesses were summoned. Murphy *v.* State, 71 Ala. 15. Nor will the appellate court presume from the mere fact that certain witnesses were summoned to prove a person's habit of intoxication, material to the issue, that the process of the court was abused. Fromer *v.* State, 49 Ind. 580. So where defendant in a criminal case objected to some of the items of costs taxed against him, and paid others without objection, it would be presumed that he knew the items of the bill of costs and assented to those which he paid. State *v.* Oden, 101 Tenn. 669, 49 S. W. 750.

39. Whitley *v.* State, 123 N. C. 728, 31 S. E. 392; State *v.* Morgan, 120 N. C. 563, 26 S. E. 634; State *v.* Powell, 86 N. C. 640.

40. State *v.* Belle, 92 Iowa 258, 60 N. W. 525.

41. Whitley *v.* Murphy, 5 Oreg. 328, 20 Am. Rep. 741; McNamara *v.* Earley, 2 Pa. Co. Ct. 491. See also State *v.* Second Judicial Dist. Ct., 16 Nev. 76, holding that there is no reason why it should not be so enforced, independently of any special statutory authorization.

"Cost incurred by a defendant in making defense to a charge of crime constitute[s] a mere debt, recoverable by execution against his property or by separate civil proceeding, from him to the persons who have served him in that behalf, and he can neither be put to

judgment must show the amount.[42] No execution for costs can issue while an appeal with stay of proceedings is pending.[43]

b. By Imprisonment. The decisions are not harmonious as to the power of the courts to imprison a convicted defendant for non-payment of costs, and this, it is apprehended, results from a difference of opinion as to whether costs imposed in a criminal case are a part of the punishment or nothing more than an ordinary debt. In a number of cases it has been held that the imprisonment of defendant for costs is unconstitutional, as being in violation of the clause prohibiting imprisonment for debt.[44] The weight of authority, however, is clearly to the contrary. While it is very generally held that defendant cannot be imprisoned for costs in the absence of express statutory authority therefor,[45] it is usually considered competent for the legislature to authorize the commitment of defendant to prison for the non-payment of costs, and statutes have been enacted in a number of states authorizing it.[46] But after one has been convicted and sentenced, and has complied with the sentence, he cannot be rearrested to compel payment of a bill of costs filed subsequent to his discharge.[47] To authorize a discharge there must be a strict compliance with the statutes prescribing the methods by which it may be obtained.[48]

hard labor for their payment nor be required as another alternative to confess judgment with surety therefor. The judgment to be confessed in such case is for the fine and the costs of prosecution, not those of the defense." Blankenship *v.* State, 105 Ala. 128, 129, 19 So. 99 [*citing* Bowen *v.* State, 98 Ala. 83, 12 So. 808; Bradley *v.* State, 69 Ala. 318].

Execution on escape of defendant.—Where a defendant has been committed for payment of costs and escapes an execution may issue against his property. State *v.* Dodge, 24 N. J. L. 671.

42. State *v.* Jameson, 13 Nev. 429; Harger *v.* Washington County Com'rs, 12 Pa. St. 251.

43. State *v.* McO'Blenis, 21 Mo. 272.

44. Shafer *v.* State, 18 Ind. 444; Sohm *v.* State. 18 Ind. 389; Thompson *v.* State, 16 Ind. 516; State *v.* Second Judicial Dist. Ct., 16 Nev. 76. See also State *v.* Kenny, 1 Bailey (S. C.) 375.

45. *Alabama.*— Nelson *v.* State, 46 Ala. 186.

Arkansas.— State *v.* Jackson, 46 Ark. 137.

California.— Petty *v.* San Joaquin County Ct., 45 Cal. 245.

Iowa.— State *v.* Erwin, 44 Iowa 637; Gray *v.* Ferreby, 36 Iowa 146; State *v.* Gray, 35 Iowa 503.

Kansas.— See *In re* Heitman, 41 Kan. 136, 21 Pac. 213.

Montana.— State *v.* Sullivan, 9 Mont. 490, 24 Pac. 23.

Ohio.— Brown *v.* State, 11 Ohio 276; Bonsal *v.* State, 11 Ohio 72; Luetzler *v.* Perry, 18 Ohio Cir. Ct. 826.

Texas.— Landa *v.* State, (Crim. 1898) 45 S. W. 713.

See 13 Cent. Dig. tit. "Costs," § 1202.

Contra.— Schuylkill County *v.* Reifsnyder, 46 Pa. St. 446; Keefhaver *v.* Com., 2 Penr. & W. (Pa.) 240, in which cases it was held that the power to commit, if the costs are not paid, is an incident of the power to sentence, although there is no statutory authority for the power to commit.

46. *Ex p.* Tongate, 31 Ind. 370; McCool *v.* State, 23 Ind. 127 [*overruling* Thompson *v.* State, 16 Ind. 516]. And see People *v.* Weeks, 99 Mich. 86, 57 N. W. 1091; *Ex p.* Parker, 106 Mo. 551, 17 S. W. 658; *In re* Dobson, 37 Nebr. 449, 85 N. W. 1071; Luetzler *v.* Perry, 18 Ohio Cir. Ct. 826; Eaton *v.* State, 15 Lea (Tenn.) 200; Com. *v.* Webster, 8 Gratt. (Va.) 702; Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459.

Form of judgment.—A judgment that "it is considered by the court that the defendant do make his fine to the State of Indiana in the sum of," etc., pay his costs and stand committed, has been held sufficient. Strong *v.* State, 57 Ind. 428.

A statute authorizing imprisonment as a means of enforcing a judgment for costs where defendant is adjudged to pay "any fine and costs" does not authorize imprisonment for costs where defendant is sentenced to imprisonment. *In re* Grinstead, 64 Kan. 780, 68 Pac. 638.

47. Com. *v.* Love, 3 Pa. Co. Ct. 19. See also Beidelman *v.* Northampton County, 4 Leg. Gaz. (Pa.) 212, in which it was held that a statute providing for the discharge of prisoners at the end of their sentence, although they have not paid the costs and fine imposed, but that the right of persons interested in such costs to collect the same shall be preserved, does not authorize the imprisonment of a convict after discharge without payment of fine and costs at the instance of persons entitled to such costs, but merely preserves to them the right to collect costs. But *compare* Kirkendall *v.* Luzerne, 11 Phila. (Pa.) 575, 33 Leg. Int. (Pa.) 313.

48. *In re* Curley, 34 Iowa 184; *Ex p.* Parker, 106 Mo. 551, 17 S. W. 658; *In re* Dobson, 37 Nebr. 449, 55 N. W. 1071.

Escape.— Where a defendant is ordered into custody on a conviction of an indictment until he shall pay the fine and costs imposed by the judgment, and is permitted by the sheriff to escape, this is no discharge of the judgment. State *v.* Simpson, 46 N. C. 80.

c. By Requiring Labor. In the absence of express statutory authorization a defendant cannot be made to work out costs at hard labor.[49] It is, however, competent for the legislature to impose hard labor on defendant for payment of costs, and this is done in a number of states.[50] Under these statutes, however, it is usually considered that defendant can be made to work out only the costs of prosecution and not the costs made by himself.[51] He cannot be required to work out the costs of maintenance in the county jail during the time between sentence and transfer to the workhouse.[52] So notwithstanding a statute of this character a convict pardoned during the time of imprisonment cannot be held in confinement to compel payment of costs.[53]

d. Under Statutes Imposing Lien on Defendant's Realty. In a number of jurisdictions statutes impose a lien for costs on defendant's realty in cases of conviction.[54] The time when the lien attaches depends of course on the wording of the statute;[55] and while these statutes do not divest the prisoner of the right to the possession and use of his property,[56] the lien necessarily supersedes any convey-

49. Kanouse *v.* Lexington, 12 Ill. App. 318; State *v.* Sibley, 4 Lea (Tenn.) 738.

50. *Alabama.*— *Ex p.* Joice, 88 Ala. 128, 7 So. 3; *Ex p.* State, 87 Ala. 46, 6 So. 328; Nelson *v.* State, 46 Ala. 186.

Kentucky.— Berry *v.* Brislan, 86 Ky. 5, 4 S. W. 794, 8 Ky. L. Rep. 223.

Louisiana.— State *v.* Brannon, 34 La. Ann. 942.

Mississippi.— *Ex p.* Meyer, 57 Miss. 85.

Tennessee.— Eaton *v.* State, 15 Lea 200.

See 13 Cent. Dig. tit. "Costs," § 1203.

Form and sufficiency of judgment.—A judgment on conviction of defendant for a fine and costs is not invalid for failure to direct that defendant work it out. A judgment for fine and costs would be valid, and the court on application might amend by adding the direction required by statute. Murphy *v.* State, 38 Ark. 514. So a judgment directing defendant to perform hard labor for the county for a given period and also for "a sufficient length of time to pay all the costs and officers' fees in the case, not exceeding forty cents per day," has been held sufficiently certain in the absence of any objection in the trial court. McIntosh *v.* State, 52 Ala. 355. It has also been held that a judgment in the following form is sufficient: "That said defendant perform hard labor for the county for —— days, at 33 cents a day, to pay and satisfy the costs of this prosecution, but not to exceed eight months;" but the court said that it would greatly tend to prevent abuse if the judgment was made to express the amount of the costs and the number of days defendant is required to serve. Hill *v.* State, 78 Ala. 1. Form of judgments in similar language held sufficient see Walker *v.* State, 58 Ala. 393; McIntosh *v.* State, 52 Ala. 355.

51. Hill *v.* State, 78 Ala. 1; State *v.* Brewer, 61 Ala. 318; *Ex p.* Meyer, 57 Miss. 85; Knox *v.* State, 9 Baxt. (Tenn.) 202.

A litigation tax is not within these provisions. *Ex p.* Griffin, 88 Tenn. 547, 13 S. W. 75.

**A statute limiting the time during which a defendant may be made to work for non-payment of costs does not operate to release the residue of costs, where the labor at the rate fixed requires a longer time than defendant can be held to pay the full amount. *In re* Pierce, 89 Ala. 177, 8 So. 74.

52. Knox County *v.* Fox, 107 Tenn. 724, 65 S. W. 404.

53. *Ex p.* Gregory, 56 Miss. 164, in which it was held that it must be collected like other judgments, after expiration of the term of imprisonment.

54. *Georgia.*— Morgan *v.* Collier, 13 Ga. 493.

Illinois.— Hitchcock *v.* Roney, 17 Ill. 231.

Missouri.—McKnight *v.* Spain, 13 Mo. 534.

Oregon.— State *v.* Munds, 7 Oreg. 80; Whitley *v.* Murphy, 5 Oreg. 328, 20 Am. Rep. 741.

Washington.— Clallam County *v.* Hall, 23 Wash. 85, 62 Pac. 443.

See 13 Cent. Dig. tit. "Costs," § 1209.

Property subject to lien.— Under a statute providing that "no lands acquired under the provision of this chapter shall in any event become liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor," a homestead is not subject to a lien for costs in a case of felony committed by the homesteader before receipt of patent therefor. State *v.* O'Neil, 7 Oreg. 141.

Where cash funds of defendant are in the hands of the arresting officer these funds may be subjected to the payment of costs on conviction. Peters *v.* State, 9 Ga. 109. But such officer has no authority to seize property of defendant and hold it for the payment of costs, unless directed to do so by the court issuing the warrant. Whaley *v.* State, 11 Ga. 128.

55. Morgan *v.* Collier, 13 Ga. 493 (on the day of arrest); Hitchcock *v.* Roney, 17 Ill. 231 (on the day indictment found); McKnight *v.* Spane, 13 Mo. 534 (on the finding of the indictment or the arrest, whichever happens first, or the arrest by the officer without warrant); Whitley *v.* Murphy, 5 Oreg. 328, 20 Am. Rep. 741 (on the commission of the offense).

56. Lawson *v.* Johnson, 5 Ark. 168.

ance made after it has attached.[57] If the property has not been sold the lien for costs is enforceable by execution issued on the judgment, but if the property has been conveyed the lien, it has been held, must be enforced by a suit in equity.[58]

2. AGAINST PROSECUTOR. In no event can a prosecutor be imprisoned for non-payment of costs without statutory authority therefor.[59]

3. AGAINST COUNTY. After judgment for costs against a county an execution is of right.[60]

M. Proceedings to Enforce Liability of County From Which Cause Removed. It has been held that where the costs and expenses of the trial were certified by the court in which the trial was held and the clerk certified the same to the auditor of the county, who drew his warrant on the treasurer of the county from which the cause was removed for the fees of the sheriff, mandamus will lie to compel the treasurer to pay it.[61]

COSTS DE INCREMENTO. Increased costs, costs of increase; costs adjudged by the court in addition to those assessed by the jury.[1] (See, generally, COSTS.)

COSTS OF THE DAY. Costs which are incurred in preparing for the trial of a cause on a specified "day" consisting of witnesses' fees, and other fees of attendance.[2] (See, generally, COSTS.)

COSURETY. See PRINCIPAL AND SURETY.

COT. In old Saxon, a COTTAGE,[3] *q. v.*

57. Hitchcock *v.* Roney, 17 Ill. 231; McKnight *v.* Spane, 13 Mo. 534.

58. State *v.* Munds, 7 Oreg. 80. See also Silver Bow County *v.* Strumbaugh, 9 Mont. 81, 22 Pac. 453.

When property has been sold, it is chargeable with the encumbrance for costs in the inverse order of alienation — that is, the property last sold is to be first charged. Knott *v.* Shaw, 5 Oreg. 482.

59. *In re* Heitman, 41 Kan. 136, 21 Pac. 213.

Statutory authorization.— It is proper, under a statute so providing, to imprison the prosecutor for non-payment of costs. State *v.* Zimmerman, 31 Kan. 85, 1 Pac. 257. But see State *v.* Ensign, 11 Nebr. 529, 10 N. W. 449.

60. Com. *v.* Tack, 3 Brewst. (Pa.) 532.

If an action is brought against a county by an assignee of a claim for costs, the complaint must allege every fact which is requisite under the statute to fasten liability on the county. Billings First Nat. Bank *v.* Custer County, 7 Mont. 464, 17 Pac. 551.

61. Needham *v.* Tresher, 49 Cal. 392. But see Trant *v.* State, 140 Ind. 414, 39 N. E. 513 [*overruling* State *v.* Miller, 107 Ind. 39, 7 N. E. 758], holding that the allowance of the trial court does not conclusively determine the amount the county shall pay nor the persons to whom it is liable, and that in an action to compel the payment of the amount allowed, the county may controvert both the amount allowed and plaintiff's right to recover; but that the amounts allowed will be presumed to be correct both as to the amounts and the persons to whom they were allowed. And see Washoe County *v.* Humboldt County, 14 Nev. 123, holding that the county from which the cause was transferred has the right to show that the services charged for were never rendered and that the fees charged were unauthorized by the statute.

In Wisconsin it was held erroneous for the court in making the certificate to tax the costs at a certain amount "subject, however, to an investigation" by the debtor county "and the correction of any and all errors." The allowance by the court in which the cause is tried is conclusive. The debtor county will be given an opportunity to object to the taxation and allowance in the court making it. Waushara County *v.* Portage County, 83 Wis. 5, 52 N. W. 1135.

1. Black L. Dict. And see Day *v.* Woodworth, 13 How. (U. S.) 363, 371, 14 L. ed. 181, where it is said: "This doctrine . . . seems to have been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover he was amerced *pro falso clamore*. If he recovered judgment, the defendant was *in misericordia* for his unjust detention of the plaintiff's debt, and was not therefore punished with the *expensa litis* under that title. But this being considered a great hardship, the Statute of Gloucester (6 Edw. I, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause."

2. Burrill L. Dict. [*citing* Archbold N. Prac. 281].

3. Jacob L. Dict.

"Cote" and "cot."— The names of places which begin or end with these words or syllables have the signification of a little house or cottage. Jacob L. Dict.

COTA. In old English law, a Cot (*q. v.*) or hut.[4]

COTAGIUM or COTTAGIUM. In old English law, a Cottage, *q. v.*; a small house or Cot,[5] *q. v.*

COTARIUS. In old English law, a cottager, or cotter.[6]

COTELLUS. In old records, a small cottage.[7]

COTEMPORANEA EXPOSITIO EST FORTISSIMA IN LEGE. A maxim meaning "In law a contemporaneous exposition (construction) is the strongest."[8] (See Contemporanea Expositio Est Optima Et Fortissima In Lege.)

COTENANT. A tenant in common with another or others; a joint tenant.[9] (See, generally, Joint Tenancy; Tenancy in Common.)

COTERELLI. Anciently, a kind of peasantry who were outlaws; robbers.[10]

COTERELLUS. In old English law, a cottager.[11]

COTERIA. In old records, a Cot (*q. v.*), house or home-stall.[12]

COTERIE. A fashionable association; or a knot of persons forming a particular circle.[13]

COTERMINOUS. Having the same limits or common boundary lines.[14]

COTESWOLD. A place where there is no wood.[15]

COTLAND. In old English law, land held by a cottager, whether in socage or villenage.[16]

COTMANNUS. In old English law, a cotman, or cotter.[17]

COTSETHLAND. The seat of a cottage, including any land belonging to it.[18]

COTSETUS. A cottager or cottage-holder who held by servile tenure and was bound to do the work of the lord.[19] (See Coscez.)

COTTAGE. A small house;[20] a hut; a mean habitation; a cot; a little house;[21] a small dwelling-house.[22] Cottage, as defined by Coke, meant a little

4. Burrill L. Dict.

5. Burrill L. Dict.

It must have had four acres of land to it. Burrill L. Dict. See Rex *v.* Cane, 2 Show. 279. But see Doe *v.* Sotheron, 2 B. & Ad. 620, 638, 22 E. C. L. 263, note *b*.

6. Burrill L. Dict.

7. Burrill L. Dict.

8. Morgan *v.* Crawshay, L. R. 5 H. L. 304, 315, 40 L. J. M. C. 202, 24 L. T. Rep. N. S. 889, 20 Wkly. Rep. 554 [*citing* 2 Inst. 11, 136; 4 Inst. 138], where it is said that this is "a favourite maxim of Coke's as applied to statutes."

9. Century Dict.

10. Black L. Dict.

11. Burrill L. Dict. "Considered by Spelman and others, the same with *cotarius*. But Cowell makes the distinction that the *cotarius* had a free socage tenure, and paid a stated firm (rent) in provisions or money, with some occasional customary service; whereas the *coterellus* seemed to have held in mere villenage, and had his person and issue and goods disposed of at the pleasure of his lord." Burrill L. Dict.

12. Burrill L. Dict.

13. The original of the term was purely commercial, signifying an association, in which each member furnished his part, and bore his share in the profit and loss. Wharton L. Lex.

14. English L. Dict.

15. Jacob L. Dict.

16. Black L. Dict.

17. Burrill L. Dict.

In Domesday Book, *cotmanni* are often mentioned; and their dwellings were probably called cots or cottages, of whatever size or howsoever constructed. Doe *v.* Hubbard, 15 Q. B. 227, 244, 69 E. C. L. 227.

18. Burrill L. Dict.

19. Black L. Dict.

20. Johnson Dict. [*quoted* in Doe *v.* Hubbard, 15 Q. B. 226, 240, 69 E. C. L. 227, per Wightman, J.].

Applied to several cottages.— In Doe *v.* Hubbard, 15 Q. B. 226, 239, 69 E. C. L. 227, Wightman, J., said: "There is no definition of a cottage which is inconsistent with the rooms occupied by those persons respectively as separate dwellings being described as cottages, though originally they formed parts of larger cottages. A large dwelling-house or cottage may be divided into two or more distinct dwelling-houses or cottages, and each part may be so described."

21. Johnson Dict. [*quoted* in Doe *v.* Hubbard, 15 Q. B. 226, 244, 69 E. C. L. 227, per Lord Campbell, C. J.].

22. Doe *v.* Sotheron, 2 B. & Ad. 628, 638, 22 E. C. L. 263.

Cottages equivalent to dwelling-houses.— "Any number of cottages may, therefore, satisfy the allegation of a number of dwelling-houses; and there is not any repugnance in common speech between calling a dwelling-house a messuage in one instrument and a cottage in another. A doubt is to be found in some books whether a fine can be levied of a cottage *eo nomine*. In practice, cottages are frequently mentioned in fines; and in West's Symboleography, part 2, fo. 7 b, it is said 'by the name of a messuage may pass a curtelage, a garden, an orchard, a dove-house, a shop, a mill, as parcel of a house. The like

house without land to it but it seems that the term was often used to include some land.[23] (See Cot; Cotagium.)

COTTAGE HOSPITAL. An institution of purely public charity.[24] (See, generally, Hospitals.)

COTTAGIUM. See Cotagium.

COTTIER TENANCY. A species of tenancy in Ireland.[25] (See Cottier Tenure.)

COTTIER TENURE. One where a laborer makes his contract for land without the intervention of a capitalist farmer, and where the conditions of the contract, especially the amount of rent, are determined not by custom, but by competition.[26] (See Cottier Tenancy.)

COTTOLENE. A substitute for lard composed of cotton-seed oil and the product of beef fat.[27] (See, generally, Food.)

COTTON. The white fibrous substance clothing the seeds of the cotton-plant.[28] (See, generally, Agriculture; Customs Duties; Manufactures.)

COTTON CLOTH.[29] All woven fabrics of cotton in the piece, whether figured, fancy, or plain, not specially provided for in the revenue act, the warp and filling threads of which can be counted by unraveling or other practicable means.[30] (See, generally, Customs Duties.)

of a cottage, a toft, a chamber, a cellar, &c., yet may they be demanded by their single names.'" Doe *v.* Sotheron, 2 B. & Ad. 628, 638, 22 E. C. L. 263. And see Doe *v.* Hubbard, 15 Q. B. 226, 240, 69 E. C. L. 227, where it is said: "Any small dwelling place may without impropriety of language be described as a cottage." But see Rex *v.* Pattle, 1 Str. 405, where it was said that a house was not a cottage.

23. Coke Litt. 56 [*quoted* in Gibson *v.* Brockway, 8 N. H. 465, 470, 31 Am. Dec. 200; Doe *v.* Hubbard, 15 Q. B. 227, 244, 69 E. C. L. 227].

May include a portion of land.—"Properly, however, a cottage seems to have always had a small portion of land attached to it, (*fundi ascriptam portiunculam,*) as appears also from the terms cot*land,* cotseth*land.*" Burrill L. Dict. In Emerton *v.* Selby, Holt K. B. 174, 2 Ld. Raym. 1015, 6 Mod. 115, Salk. 169, it is said: "A cottage containeth a curtilage, and so there may be a levancy and couchancy upon a cottage, and it has been so settled. There is no difference between a messuage and cottage as to this matter. The statute *de extentis manerii* says, a cottage contains a curtilage. If there be four acres laid to it, it is a lawful cottage within the statute of 31 Eliz. c. 7. We will suppose that a cottage has at least a court to it." In Rex *v.* Pattle, 1 Str. 405, it is said that a cottage must have four acres of land. And see Scholes *v.* Hargreaves, 5 T. R. 46, 48, where Butler, J., defining the words "messuage and cottage," annexed to which the right of common was claimed, said that "they will intend that land was included therein." But see Gibson *v.* Brockway, 8 N. H. 465, 470, 31 Am. Dec. 200 [*citing* Shepard Touch. 91], where it is said that "the grant of a cottage will pass a little dwelling-house, that has no land belonging to it."

24. County of Hennepin *v.* Gethsemane Church, 27 Minn. 460, 462, 8 N. W. 595, 38 Am. Rep. 298, construing Minn. Const. art. 9, § 3.

25. Constituted by an agreement in writing, and subject to the following terms: That the tenement consist of a dwelling-house with not more than half an acre of land; at a rental not exceeding £5 a year; the tenancy to be for not more than a month at a time; the landlord to keep the house in good repair. Black L. Dict. [*citing* Landlord and Tenant Act, Ireland (23 & 24 Vict. c. 154, § 81)].

26. Wharton L. Lex. [*citing* 1 Mill Pol. Econ. 383].

27. N. K. Fairbank Co. *v.* Central Lard Co., 64 Fed. 133, 134.

28. Century Dict.

"Cotton" considered in an indictment as equivalent to "a product or commodity" see State *v.* Borroum, 23 Miss. 477, 482.

"Cotton house" as a subject of arson see 3 Cyc. 988. May include a "gin-house." Waters *v.* Jones, 3 Port. (Ala.) 442, 447, 29 Am. Dec. 261.

"Cotton in the seed" as used in a statute see Mangan *v.* State, 76 Ala. 60, 66.

29. **"Cotton fabric"** as used in combination with steel for the purpose of making an article known as crinoline steel see Whymper *v.* Harney, 18 C. B. N. S. 243, 254, 11 Jur. N. S. 269, 11 L. T. Rep. N. S. 711, 34 L. J. M. C. 113, 13 Wkly. Rep. 440, 114 E. C. L. 243.

30. U. S. *v.* Einstein, 78 Fed. 797, 798, 24 C. C. A. 346, construing the act of Aug. 28, 1894.

"Cotton braids" or "cotton hat braids" as used in a tariff act see Arthur *v.* Herman, 96 U. S. 141, 24 L. ed. 812; Zimmerman *v.* U. S., 61 Fed. 938, 939 [*affirmed* in 96 U. S. 124, 24 L. ed. 770].

"Cotton elastic webbing" as used in tariff acts see Beard *v.* Nichols, 120 U. S. 260, 7 S. Ct. 548, 30 L. ed. 652; U. S. *v.* Shattuck, 59 Fed. 454, 455, 8 C. C. A. 176.

"Cotton wearing apparel" as used in a

COTTON LACES. Laces made of cotton.[31] (See, generally, CUSTOMS DUTIES.)

COTTON NOTE. A warehouse receipt which represents the cotton itself.[32]

COTUCHANS. A term used in Domesday for peasants, boors, husbandmen.[33]

COTURE. An enclosure.[34]

COUCHANT. In old English law, lying down.[35]

COUCHANT ET LEVANT. Lying down and rising up.[36] (See, generally, ANIMALS; COMMON LANDS.)

COUCHER or **COURCHER.** A factor who continues abroad for traffic; also the general book wherein any corporation, etc., register their acts.[37]

COUNCIL. An assembly of persons for the purpose of concerting measures of state or municipal policy.[38] (Council: City, see MUNICIPAL CORPORATIONS. Governor's, see STATES.)

COUNCILMAN. A member of a municipal council.[39] (See, generally, MUNICIPAL CORPORATIONS.)

COUNSEL.[40] As a noun, advice; purpose; design; information;[41] also an ADVOCATE, *q. v.*; a COUNSELOR (*q. v.*), or pleader;[42] the counselor who is asso-

tariff law see Oppenheimer *v.* U. S., 66 Fed. 740.

31. Sidenberg *v.* Robertson, 41 Fed. 763, 765; Claflin *v.* Robertson, 38 Fed. 92.

"Cotton inserting" and "cotton trimming laces" do not embrace thread laces and lawn laces as used in the tariff laws. See Steegman *v.* Maxwell, 22 Fed. Cas. No. 13,344, 3 Blatchf. 365.

32. Fourth Nat. Bank *v.* St. Louis Cotton Compress Co., 11 Mo. App. 333, 341.

A pledge of the cotton-note is as effective as a pledge of the cotton itself. Fourth Nat. Bank *v.* St. Louis Cotton Compress Co., 11 Mo. App. 333, 341.

33. Black L. Dict.

34. Burrill L. Dict.

35. Burrill L. Dict.

36. This seems to have been the original phrase instead of *levant et couchant*. Burrill L. Dict.

Applied to animals trespassing on the land of one other than their owner, for one night or longer. Black L. Dict. [*citing* 3 Bl. Comm. 9]. And see Emerton *v.* Selby, Holt K. B. 174, 2 Ld. Raym. 1015, 6 Mod. 115, Salk. 169, where it is said: "It is good to 'a messuage' or to 'a cottage,' for cattle 'levant' or 'couchant;' but it was questioned in the year 1653, whether it could be good of common without number."

37. Wharton L. Lex. [*citing* 3 & 4 Edw. VI, c. 10; 37 Edw. III, c. 16].

38. Wharton L. Lex.

39. Century Dict.

Equivalent to "alderman."— Where the statute authorized the election of a stated number of "aldermen who shall be known as the 'city council,'" and declared that "two-thirds of the council may expel a member of the same,'" and an ordinance regulating municipal elections uses the word "councilman," instead of "alderman," the meaning of the ordinance is the same as if the latter word had been used. State *v.* Anderson, 26 Fla. 240, 255, 8 So. 1.

Town trustee may be included in the term. Utah Rev. Stat. (1898), § 2498.

40. Originated under Roman law.— See 1 Kent Comm. 307, 308.

This word has no plural, and is used to denote either one or more counsel. It is by some supposed to be an abbreviation of "counsellor," but seems rather to be derived from the Norman French "conseil," which occurs as a distinct word, at an early period, in the sense of "pleader." Burrill L. Dict.

41. English L. Dict.

42. Burrill L. Dict. [*citing* 3 Bl. Comm. 26; 1 Kent Comm. 307].

In English practice.— The general name "counsel" in the practice of the courts is common to all barristers, whether they are at or within the bar; but a barrister simply is a junior counsel, and one who pleads from outside, or beyond the bar, from which fact is derived the term of "outer" or "utter" barrister; and further to distinguish them from Queen's counsel and serjeants-at-law, utter barristers wear a stuff or bombazine gown and short horse hair wig, in place of the silk gown and full bottom wig which is worn on certain occasions by the former. Queen's counsel are appointed by the Lord Chancellor from among the members of the junior bar of ten years' standing; in court they sit within the bar immediately in front of the utter barristers, to whom they act as "leaders" in any case in which both are engaged. Queen's counsel in the Chancery Division usually confine themselves to practicing in one court before a particular judge, and but rarely practice before any other; but in the courts of the Queen's Bench Division this custom is not adopted. 19 Am. L. Rev. 685.

In American practice.— "The division of advocates into attorneys and counsel has been adopted from the prevailing usage in the English courts. The business of the former is to carry on the practical and more mechanical parts of the suit, and of the latter to draft or review and correct the special pleadings, to manage the cause at the trial, and also during the whole course of the suit to apply established principles of law to the exigencies of the case. In the Supreme Court of the United States, the two degrees of attorney and counsel are kept separate, and no person is permitted to practise both as attorney and counsellor in that court. This was by a rule of

ciated in the management of a particular cause, or who acts as the legal adviser in reference to any matter requiring legal knowledge and judgment;[43] one who assists his client with advice, and pleads for him in open court;[44] and sometimes, used in a broad sense, the term may include an attorney.[45] As a verb, to give advice to; to admonish; to propose to be done; to recommend.[46] (Counsel: Advice of, see CONTEMPT; CRIMINAL LAW; FALSE IMPRISONMENT; INJUNCTIONS; LIBEL AND SLANDER; MALICIOUS PROSECUTION. See also ADVOCATE; AMICUS CURIÆ; ATTORNEY AND CLIENT; OF COUNSEL.)

COUNSELER. To COUNSEL, *q. v.*; to ADVISE,[47] *q. v.*

COUNSELLOR, COUNSELOR, COUNSELLOR AT LAW, or **COUNSELOR AT LAW.**[48] An ADVOCATE (*q. v.*) or barrister; an attorney.[49] (See ADVOCATE; COUNSEL; and, generally, ATTORNEY AND CLIENT.)

the court in February, 1790; and when, afterwards, in August, 1801, the court declared that counsellors might be admitted as attorneys, on taking the usual oath, this did not mean or imply, that if a counsellor was thus admitted as attorney, he could continue to act as counsellor. He must make his election between the two degrees." 1 Kent Comm. 307, 308. But he may now act in either capacity. *Ex p.* Garland, 4 Wall. (U. S.) 333, 375, 18 L. ed. 366. "In all the other courts of the United States, as well as in the courts of New York and the other states, the same person can be admitted to the two degrees of attorney and counsel, and exercise the powers of each." 1 Kent Comm. 307, 308.

43. Bouvier L. Dict. [*quoted* in State *v.* Russell, 83 Wis. 330, 332, 53 N. W. 441], where it is said: "It is generally used 'of counsel' in a particular case, to distinguish him from the attorney of record; or as the office means in the supreme court of the United States, and in the English practice, he is a counselor at law, in contradistinction as an attorney at law. The counselor conducts the trial and presents the law, while the attorney carries on the practical and formal parts of the suit. . . . In the states where these distinctions are disregarded, the one who acts as counsel, or of counsel, is supposed to have superior knowledge and experience in the law and ability to advise in the conduct of the causes. The counselor is a lawyer of the highest dignity."

"Counsel in the cause" as applied to attorneys who were witnesses and were not entitled to certain exceptions under a statute, but were entitled to witness' fees, see Abbott *v.* Johnson, 47 Wis. 239, 245, 2 N. W. 332.

Distinguished from "barrister" and "counselor."—"'Counsel' is not used as a title of office, like 'barrister' and 'serjeant' in England, and 'counsellor' in the United States, but as a general professional designation; and is particularly applied to a client's professional adviser or advocate (one or more) in a particular matter or suit, e. g. in the expressions 'a party's counsel,' and 'the counsel in a cause'; in which the use of the term 'counsellor' would in strictness be improper. To a certain extent, however, the terms are synonymous." Burrill L. Dict.

44. Burrill L. Dict.

45. Thus, where a statute provided that the interrogatories "shall be drawn and signed by the parties or their counsel in the cause," the court said: "But can we suppose the legislature intended to restrict the drawing of the interrogatories to the hand of the party, or of a counsellor of this court? And yet, if the objection is a valid one, it would be equally fatal, if it could be shown that the party had employed any clerk, attorney or scrivener, to draw the interrogatories, other than one who has his counsellor in the cause. Nor are we to suppose, that the legislature intended to use the word 'counsel' in this place, in that peculiar and restricted sense, in which it is used at Westminster Hall, in dictinction from attorney. In our courts, a man's attorney is usually his counsel; even though he is not a counsellor of this court." Ludlam *v.* Broderick, 15 N. J. L. 269, 271.

46. Worcester Dict. [*quoted* in U. S. *v.* Hendric, 26 Fed. Cas. No. 15,346, 2 Sawy. 476].

"Aid, abet, counsel, or procure" the commission of any offense as used in a statute see Howells *v.* Wynne, 15 C. B. N. S. 3, 17, 9 Jur. N. S. 1041, 32 L. J. M. C. 241, 109 E. C. L. 2. "If a person aids, abets, counsels, or procures the commission of an act which is unlawful, I think that he ought to be convicted of the aiding, abetting, counselling, and procuring." *In re* Smith, 3 H. & N. 227, 235, 27 L. J. M. C. 186, 6 Wkly. Rep. 440.

"Counsel" or "procure" compared with **"cause"** as used in a statute in relation to cruelty to animals see Benford *v.* Sims, 47 Wkly. Rep. 46, 47.

47. Burrill L. Dict. [*citing* Y. B. 10 Edw. III, 23].

48. The term itself is exclusively an official or professional title, the use of which is not rare in England, although very common in the United States. Burrill L. Dict.

49. Black L. Dict.

Courts may take judicial notice of the fact that the attorney whose name is appended to legal documents is a counselor of the court. Ludlam *v.* Broderick, 15 N. J. L. 269, 271 [*citing* Arnold *v.* Renshaw, 11 N. J. L. 317, 318; Middleton *v.* Taylor, 1 N. J. L. 445].

Distinguished from attorney see 6 Cyc. 897, note 4. And *compare* Anonymous, 6 Mod. 137. See also COUNSEL.

Distinguished from "counsel" see *supra*, note 43.

COUNSELLOR NEST DESTRE OYE QUE PARLE ENVER LE PRESIDENTS. A maxim meaning "A counselor ought not to be heard who speaks against precedent." [50]

COUNT. As a noun, reckoning; the act of numbering; [51] also in pleading,[52] a statement of a plaintiff's case in court, being the first in the series of the pleadings in an action; a declaration, particularly in a real action; [53] a statement which if it stood alone would make a declaration; a statement of everything which is necessary to constitute a declaration; [54] a part, section or division of a declaration, embracing a distinct statement of a cause of action.[55] And in criminal pleading, a particular charge in an indictment.[56] As a verb in pleading, to declare; to recite; to state a case; to narrate the facts constituting a plaintiff's cause of action; and in a special sense, to set out the claim or count of the demandant in a real action; [57] also to plead orally; to plead or argue a matter in court; to recite or read there; to recite a count.[58] (Count: In Civil Pleading, see COMMON COUNTS; PLEADING. In Criminal Pleading, see INDICTMENTS AND INFORMATIONS.)

COUNTABLE CLAUSES. Those portions of the revenue laws which require a count of the threads in certain fabrics in order to determine the rate of duty on importation from foreign countries.[59] (See, generally, CUSTOMS DUTIES.)

COUNTE. A count or earl. Also a county; a county court.[60] (See, generally, COUNTIES; COURTS.)

COUNTENANCE. As a noun, credit; estimation.[61] As a verb, to encourage by a favoring aspect; to sanction; to favor; to approve; to aid; to support; to abet.[62] (See ABET; AID; and, generally, CRIMINAL LAW; TREASON; TRESPASS.)

50. Morgan Leg. Max.

51. Century Dict.

Count of ballots at an election.— Where a statute required that certain officers should "take part in the count" of ballots cast at a public election, the court said: "To the word 'count' must therefore be given, not its narrowest and most technical meaning, but that wider meaning, reasonably applied, which embraces all those acts of the counter which are within the natural and proper scope of his duties, and which bring to him any opportunity to perpetrate a fraud." Grelle *v.* Pinney, 62 Conn. 478, 483, 26 Atl. 1106.

52. "Count, i. e. narratio, cometh of the French word *conte*, which in Latyne is *narratio*, and is vulgarly called a declaration." Coke Litt. 17*a*, 303*a*. The word was anciently called the "tale." 3 Bl. Comm. 393.

53. Burrill L. Dict. [*citing* 3 Bl. Comm. 293; Coke Litt. 17*a*, 303*a*]. Finch calls it "a large declaration of the substance of the original writ." Burrill L. Dict.

In old language "count" meant everything that the countor stated as his claim. Gell *v.* Burgess, 18 L. J. C. P. 153.

The use of this term was anciently confined, for the most part, to real actions, though not exclusively. Burrill L. Dict. [*citing* Termes de la Ley].

54. Gell *v.* Burgess, 18 L. J. C. P. 153, 155.

A count is sometimes considered as synonymous with a declaration, and this was its original signification in the law-French; but it is now most generally considered as a part of a declaration, wherein the plaintiff sets forth a distinct cause of action. **And it frequently contains several counts, in which the plaintiff assigns different *gravamens*, so that if he fail in the proof of any, and substitute one only, he may still recover;** and if one of his counts be good, and the others vicious, he may, by taking a verdict on the good count, avoid a reversal of the judgment. Cheetham *v.* Tillotson, 5 Johns. (N. Y.) 430, 436. And see Gell *v.* Burgess, 18 L. J. C. P. 153, 155, where Maule, J., said: "A count formerly meant a declaration."

55. Burrill L. Dict.

A declaration now usually consists of several of these counts; being either statements of different causes of action; or of the same cause in different forms. Burrill L. Dict.

56. Burrill L. Dict. Thus the word is used when, in one finding by the grand jury, the essential parts of two or more separate indictments, for causes apparently distinct, are combined, the allegations for each being termed a count, and the whole an indictment. Boren *v.* State, 23 Tex. App. 28, 33, 4 S. W. 463 [*citing* 1 Bishop Crim. Proc. 421, 422], where it is said: "And an indictment in several counts, therefore, is a collection of separate bills against the same defendant, for offenses which on their faces appear distinct, under one caption, and found and endorsed collectively as true by the grand jury."

57. Black L. Dict.

58. Burrill L. Dict.

59. Hedden *v.* Robertson, 151 U. S. 520, 525, 14 S. Ct. 434, 38 L. ed. 257; Newman *v.* Arthur, 109 U. S. 132, 137, 3 S. Ct. 88, 27 L. ed. 883 [*quoted* in U. S. *v.* Einstein, 78 Fed. 797, 798].

60. Burrill L. Dict.

61. Wharton L. Lex.

62. Webster Dict. [*quoted* in Cooper *v.* Johnson, 81 Mo. 483, 490].

Applied to trespass.— In Cooper *v.* Johnson, 81 Mo. 483, 489, the court said: "That one was present and witnessed the trespass, but neither by word, sign nor act, nor in any

COUNTER. As an adverb, contrary to; contrary way; opposition to.[63] As a noun, a pleader.[64] As a verb, to COUNT, *q. v.*; to plead.[65] (Counter: Abstract,[66] see APPEAL AND ERROR. Affidavit,[67] see AFFIDAVITS. Case,[68] see APPEAL AND ERROR. Letter, see COUNTER LETTER. Schedule,[69] see APPEAL AND ERROR.)

COUNTER BOND. In old practice, a bond of indemnity.[70] (See, generally, BONDS.)

COUNTER-CLAIM. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

COUNTER DEED. A secret writing, either before a notary or under a private seal, which destroys, invalidates, or alters a public one.[71] (See, generally, DEEDS.)

other manner, signified his approval of it does not render him liable. He is not by his mere silence to be held as countenancing the act and jurors are supposed to know the meaning of ordinary English words, and not one of a hundred men of ordinary intelligence but knows that to 'countenance' an act means something more than to witness it." The term is applicable to any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way or by any means countenances or approves of an unlawful act. McMannus *v.* Lee, 43 Mo. 206, 208, 97 Am. Dec. 386 [*quoted* in Cooper *v.* Johnson, 81 Mo. 483, 489]. And see Brown *v.* Perkins, 1 Allen (Mass.) 89, 98.

63. Silliman *v.* Eddy, 8 How. Pr. (N. Y.) 122, 123.

64. Burrill L. Dict.

65. Burrill L. Dict.

66. **Counter abstract** for the purpose of setting out additional matter and a full understanding of questions presented to the appellate court for its decision see 3 Cyc. 84.

67. **Counter-affidavit** in opposition to a motion see 2 Cyc. 37.

Counter-affidavit required of the debtor to raise an issue for trial see 2 Cyc. 69.

68. **Proposed amendments or counter** case or statement see 3 Cyc. 63.

69. **Counter schedule** time of filing see 3 Cyc. 94, note 39.

70. Burrill L. Dict.

Counter bond for restitution see APPEAL AND ERROR, 2 Cyc. 916.

71. Wharton L. Lex.

COUNTERFEITING

By Chester A. Fowler

CROSS-REFERENCES

For Matters Relating to:
Forgery, see FORGERY.
Obtaining Property by Means of Counterfeit Money, see FALSE PRETENSES.
Payment in Counterfeit Money, see PAYMENT.

I. DEFINITIONS.

A. Counterfeit. As a noun, a counterfeit is a likeness or resemblance, intended to deceive, and to be taken for that which is original and genuine.[1] As a verb, to counterfeit is to make something falsely and fraudulently in imitation or the semblance of that which is true.[2]

B. Counterfeiter. In legal parlance a counterfeiter is one who unlawfully makes base coin in imitation of the true metal, or forges false currency, or any instrument of writing, bearing a likeness and similitude to that which is lawful and genuine, with an intention of deceiving and imposing upon mankind.[3]

C. Counterfeiting. A counterfeiting of coin is the making of false or spurious coin, to imitate — or, as the phrase commonly is, in the similitude of — the genuine.[4]

II. OFFENSES AND RESPONSIBILITY THEREFOR.

A. In General — 1. At Common Law. By the ancient common law making counterfeit coin of the realm was treason and subsequently a felony;[5] and passing,[6] having in possession with intent to pass as true and procuring with such intent,[7]

1. Thirman *v.* Matthews, 1 Stew. (Ala.) 384, 386.

Other definitions are: "A thing made falsely and fraudulently in imitation of the semblance of that which is true." Abbott L. Dict.

"A spurious imitation intended to resemble something which [it] is not." Reg. *v.* Hermann, 4 Q. B. D. 284, 287, 14 Cox C. C. 279, 48 L. J. M. C. 106, 40 L. T. Rep. N. S. 263, 27 Wkly. Rep. 475.

"An imitation of something made without lawful authority, and with a view to defraud by passing the false for the true." Rapalje & L. L. Dict.

"That which is made in imitation of something, but without lawful authority, or contrary to law, and with a view to defraud, by passing the false for the true." Burrill L. Dict.

The term "counterfeit," both by its etymology and common intendment, signifies the fabrication of a false image or representation. U. S. *v.* Marigold, 9 How. (U. S.) 560, 568, 13 L. ed. 257. It imports an imitation. State *v.* Calvin, R. M. Charlt. (Ga.) 151.

A counterfeit bill is one printed from a false plate, and not a bill printed legitimately or illegitimately, from the genuine plate. Kirby *v.* State, 1 Ohio St. 185. The expression, "shall counterfeit, or procure to be counterfeited, or assist in counterfeiting," as used in a statute, means the making or procuring to be made, or assisting to make a false and counterfeit bill, in imitation of a true bill, issued, etc. State *v.* Randall, 2 Aik. (Vt.) 89.

A counterfeit coin is one made in imitation of some genuine coin. U. S. *v.* Hopkins, 26 Fed. 443; U. S. *v.* Bogart, 24 Fed. Cas. No. 14,617, 9 Ben. 314. It is coin not genuine, but resembling or apparently intended to resemble or pass for genuine coin, including genuine coin prepared or altered so as to resemble or pass for coin of a higher denomination. Black L. Dict.; Rapalje & L. L. Dict.; Sweet L. Dict. Both the coin made and that in imitation of which it is made are said to be "counterfeited." State *v.* Griffin, 18 Vt. 198.

2. Abbott L. Dict.

Other definitions are: "To make something falsely and fraudulently in the semblance of that which is true." Anderson L. Dict.

"To make something in the resemblance or similitude of another." U. S. *v.* Otey, 31 Fed. 68, 69, 12 Sawy. 416.

"To make something false in the semblance of that which is true." Bouvier L. Dict.

To copy or imitate without authority or right and with a view to deceive or defraud by passing the imitation for the original. Webster Dict. [*quoted* in State *v.* McKenzie, 42 Me. 392, 394; Mattison *v.* State, 3 Mo. 421].

Anciently applied to the forging of the great or privy seal. Burrill L. Dict. [*citing* 4 Bl. Comm. 83].

3. Thirman *v.* Matthews, 1 Stew. (Ala.) 384, 386.

Another definition is: "One who personates another, an impostor, a forger." Walker Dict. [*quoted* in Thirman *v.* Matthews, 1 Stew. (Ala.) 384, 386].

4. Bishop New Crim. L. § 289.

5. U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

6. Wilson *v.* State, 1 Wis. 184; U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

7. Rex *v.* Parker, 1 Leach 48.

having possession of an instrument for counterfeiting current coin,[8] and procuring an instrument with intent to use in making foreign coin,[9] were misdemeanors. The passing in one state of a counterfeit note of a bank in another state,[10] and the making in one state of counterfeit bills current in another,[11] are punishable in the former as common-law misdemeanors. It has been held that having counterfeit in possession with intent to pass as true,[12] and uttering with such intent,[13] are not indictable as common-law offenses, on the ground that no act having been done, no "cheat" has been perpetrated. Passing a false note purporting to be that of a bank having no existence[14] or passing an unsigned bank-bill[15] is punishable as a common-law cheat.

2. UNDER UNITED STATES CONSTITUTION. Counterfeiting the securities of a foreign government is an offense against the "law of nations" within the meaning of section 1, article 8, of the constitution of the United States.[16] Passing is not an "infamous crime" within the meaning of the fifth amendment to the constitution prohibiting prosecutions of such crimes except upon indictment by a grand jury.[17]

B. Elements of Offenses — 1. In General — a. Subject-Matter Imitated or Altered — (I) *In General.* Counterfeiting refers usually to imitating coin or paper money, but gold dust, gold and silver bullion, etc.,[18] securities and obligations of the United States other than money,[19] trade-marks,[20] trade-union labels,[21] state warrants,[22] and certificates of indebtedness[23] are subjects of counterfeiting; a military land-warrant is not as "an indent or public security";[24] nor is a certificate of deposit of an insurance company, payable on demand to bearer, although circulating as money to some extent, as a bank-note.[25]

(II) *Validity of Subject-Matter* — (A) *In General.* If the original instrument is void on its face counterfeiting it is no offense.[26]

(B) *Money Prohibited From Circulation or Not Current.* Where the circulation of bills of banks of another state, generally or of specified denominations,

8. *In re* Dorsett, 5 City Hall Rec. (N. Y.) 77; *In re* Murphy, 4 City Hall Rec. (N. Y.) 42.

9. Reg. *v.* Roberts, 7 Cox C. C. 39.

10. Lewis *v.* Com., 2 Serg. & R. (Pa.) 551.

11. State *v.* Knight, 1 N. C. 44.

12. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168; Rex *v.* Stewart, R. & R. 214; Rex *v.* Heath, R. & R. 137.

13. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

It is not obvious why such acts would not be indictable as attempts to cheat. Rex *v.* Fuller, R. & R. 229; Bishop Crim. L. § 768.

Uttering and tendering in payment counterfeit coins of base metal was held not indictable under an old English statute mentioning coin generally on the ground that the term so used referred only to gold and silver coin. Cirwan's Case, 1 East P. C. 182.

14. Com. *v.* Speer, 2 Va. Cas. 65.

15. State *v.* Grooms, 5 Strobh. (S. C.) 158.

16. U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728; U. S. *v.* White, 27 Fed. 200, which hold that a statute defining the offense is valid without in terms describing it as an offense against the law of nations.

17. *In re* Wilson, 18 Fed. 33; U. S. *v.* Field, 16 Fed. 778, 21 Blatchf. 300; U. S. *v.* Yates, 6 Fed. 861. See also *infra*, V, A.

Nor is it a "felony" within the meaning of the act of congress entitling a defendant to ten peremptory challenges. U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

18. See Ida. Pen. Code, § 4944; 1 Hawkins P. C. 42.

19. U. S. Rev. Stat. (1872), § 5414.

20. See, generally, TRADE-MARKS AND TRADE-NAMES.

21. See, generally, LABOR UNIONS.

22. Pagaud *v.* State, 5 Sm. & M. (Miss.) 491.

23. People *v.* Brie, 43 Hun (N. Y.) 317.

24. U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178.

25. Robinson *v.* State, 6 Wis. 585.

A draft signed by the president and cashier of the Bank of the United States was held not a subject of counterfeiting under a statute against uttering a false bill purporting to be issued by order of the president, directors, and company of the bank. U. S. *v.* Brewster, 7 Pet. (U. S.) 164, 8 L. ed. 645.

A bank-note is such subject, although the signatures of the officers are not in writing but printed from a plate with the rest of the note, as an "instrument or writing being or purporting to be the act of another." People *v.* Rhoner, 4 Park. Crim. (N. Y.) 166.

26. People *v.* Head, 1 Ida. 531; State *v.* Gutridge, 1 Bay (S. C.) 285 (where on this ground, two judges dissenting, it was held no offense to make a counterfeit state note (under articles of confederation) purporting to bear the signatures of only two commissioners, the law requiring three upon the gen-

is prohibited by law, the passing of counterfeits of such bills is not punishable, such act not being with intent to defraud within the meaning of the law;[27] and where the law chartering a bank was held invalid it was held no offense to pass the counterfeit notes of such bank with intent to defraud the bank.[28] The California gold pieces, being made contrary to the provisions of the constitution of the United States giving to congress the sole power to coin money, cannot be "current by law or usage," although circulating to some extent as money, and the passing of counterfeits of them is no offense under a statute against passing coins so current.[29] So the head pistareen, a Spanish coin of one-fifth the value of the Spanish milled dollar, was held not a subject of counterfeiting as a coin current by law because not "a part" of the latter coin within the meaning of the statute making such coin "and parts thereof" current, the parts one half and one fourth in which the dollar of the United States is issued being meant by such statute.[30]

(c) *Bills of Non-Existent Banks*—(1) Banks Never Existing. It is not in general necessary that there be such a bank in existence as the note purports to be issued by to constitute the offense of passing counterfeit notes,[31] or of possessing them with intent to pass;[32] but under a statute against passing bills purporting to be issued by a bank when no such bank exists, passing counterfeit bills of a bank in existence is no offense.[33]

(2) Banks Out of Existence. It was held an offense to pass a counterfeit note of the Bank of the United States, bearing date while the bank was in existence, after the expiration of the bank's charter, notes of the bank being still receivable in payment of customs, in circulation to some extent, and former directors of the bank being liable upon them.[34] Possessing a note of a duly authorized state bank worthless through insolvency of the bank, with intent to pass it as a note of a national bank, was held an offense under the act of congress against possessing counterfeits of obligations and securities of the United States;[35] but the interpretation given to the statute[36] by this case is repudiated in later cases, and upon their authority such possession or the passing or using of such note is not an offense against the United States.[37]

(d) *Bills With Fictitious Signatures.* A note purporting to be signed by the proper officers of the Bank of the United States, but the names being in fact those of other persons, was held within a statute against uttering counterfeit notes purporting to be issued by the president and directors of the bank;[38] but uttering

uine). See also State *v.* Calvin, R. M. Charlt. (Ga.) 151; Pagaud *v.* State, 5 Sm. & M. (Miss.) 491; People *v.* Brie, 43 Hun (N. Y.) 317; State *v.* Neale, 1 Ohio Dec. (Reprint) 153, 2 West. L. J. 570, in which cases, however, the subject-matter was held not to be void.

27. Rex *v.* Humphrey, 1 Root (Conn.) 53; Gutchins *v.* People, 21 Ill. 642; People *v.* Wilson, 6 Johns. (N. Y.) 320; Jonte *v.* State, 1 Ohio Dec. (Reprint) 52, 1 West. L. J. 360. *Contra*, State *v.* Van Hart, 17 N. J. L. 327; Thompson *v.* State, 9 Ohio St. 354.

To utter a counterfeit note of a private unauthorized bank has been held punishable when the issue of such notes is prohibited by law; but the opinion states that had it appeared that it was the intention of the legislature by the act prohibiting the issue to also prohibit the circulation the ruling would have been otherwise. Butler *v.* Com., 12 Serg. & R. (Pa.) 237, 14 Am. Dec. 679.

28. De Bow *v.* People, 1 Den. (N. Y.) 9. But whether or not the act incorporating the Bank of the United States was constitutional was held immaterial, there being such a bank *de facto*, and its notes passing as currency. Hendrick *v.* Com., 5 Leigh (Va.) 707.

29. Com. *v.* Bond, 1 Gray (Mass.) 564.

30. U. S. *v.* Gardner, 10 Pet. (U. S.) 618, 9 L. ed. 556.

31. U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,787, Baldw. 366.

32. People *v.* Davis, 21 Wend. (N. Y.) 309. But under a statute against possessing notes in the similitude of those issued by any bank established by law it was held otherwise. Com. *v.* Morse, 2 Mass. 138.

33. Gutchins *v.* People, 21 Ill. 642; Cahoon *v.* State, 8 Ohio 537.

34. White *v.* Com., 4 Binn. (Pa.) 418; Buckland *v.* Com., 8 Leigh (Va.) 732.

35. U. S. *v.* Stevens, 52 Fed. 120.

36. U. S. Rev. Stat. (1878) § 5430 [U. S. Comp. Stat. (1901) p. 3671].

37. U. S. *v.* Pitts, 112 Fed. 522; U. S. *v.* Conners, 111 Fed. 734; U. S. *v.* Barrett, 111 Fed. 369.

38. U. S. *v.* Turner, 7 Pet. (U. S.) 132, 8 L. ed. 633.

a bill signed with the name of a fictitious cashier was held not indictable as uttering a counterfeit bank-note.[39]

b. Intent. A fraudulent intent is necessary in general to constitute counterfeiting or the cognate offenses. In counterfeiting the intent to fraudulently pass or put in circulation must appear;[40] in passing there must be an intent to deceive or defraud;[41] in having in possession, an intent to pass or put in circulation, knowing it to be false;[42] and in possessing counterfeiting tools there must be a criminal intent.[43]

c. Similitude — (I) *In General.* The similitude or imitation necessary is that the counterfeit be so exact as to impose on persons of ordinary observation, using such caution as is ordinarily exercised by prudent men in the particular transaction in which they are engaged;[44] such a likeness as is calculated to deceive an honest and unsuspecting man of ordinary care and observation when dealing with a man supposed to be honest,[45] although it would not deceive an expert or one having particular experience;[46] but the counterfeit need be only such as to be *prima facie* fitted to pass as true.[47] In some statutory offenses against the currency, as photographing United States notes, etc., the similitude need not be such as to deceive.[48]

(II) *In Bills.* In bank-bills counterfeits must have the external appearance of the genuine, and merely containing the words and figures of the true, without other similitude, is not sufficient;[49] but vignettes may be different, if the resemblance on the whole is sufficient to impose on the public.[50] The similitude may exist, although the bank never issued any bill of the denomination of the false bill.[51]

39. Com. *v.* Boynton, 2 Mass. 77.

40. Mattison *v.* State, 3 Mo. 421; People *v.* Molins, 7 N. Y. Crim. 51; U. S. *v.* King, 26 Fed. Cas. No. 15,535, 5 McLean 208. But in U. S. *v.* Russel, 22 Fed. 390, it was held that in the offense of changing, by plating or otherwise, inferior coin or other metal into the resemblance of some current coin, the intent is immaterial.

41. People *v.* Page, 1 Ida. 190; People *v.* Sloper, 1 Ida. 158; Hooper *v.* State, 8 Humphr. (Tenn.) 93; State *v.* O'Niel, Thomps. Cas. (Tenn.) 62; U. S. *v.* Hopkins, 26 Fed. 443; Reg. *v.* Page, 8 C. & P. 122, 34 E. C. L. 644.

42. Gabe *v.* State, 6 Ark. 540; People *v.* Ah Sam, 41 Cal. 645; Com. *v.* Core, 2 Mass. 132; Sizemore *v.* State, 3 Head (Tenn.) 26; Owen *v.* State, 5 Sneed (Tenn.) 493. But in U. S. *v.* Barrett, 111 Fed. 369, and U. S. *v.* Kuhl, 85 Fed. 624, the intent to defraud is held unnecessary under U. S. Rev. Stat. (1878) § 5430 [U. S. Comp. Stat. (1901) p. 3671], against possessing counterfeit obligations and securities of the United States; but in the former case it was held that this section does not cover cases of counterfeiting in general, which fall under U. S. Rev. Stat. (1878) § 5114, and U. S. Rev. Stat. (1878) § 5431 [U. S. Comp. Stat. (1901) p. 3671], and that in prosecutions under the latter sections the intent to defraud must exist.

43. People *v.* White, 34 Cal. 183.

Under a statute against possession of a die impressed with the resemblance of current coin without lawful authority only knowledge of the possession and want of authority are necessary. Reg. *v.* Harvey, 11 Cox C. C. 662.

44. State *v.* Carr, 5 N. H. 367; Dement *v.* State, 2 Head (Tenn.) 505, 75 Am. Dec. 747; U. S. *v.* Hopkins, 26 Fed. 443; U. S. *v.* Abrams, 18 Fed. 823, 21 Blatchf. 553; U. S. *v.* Aylward, 24 Fed. Cas. No. 14,482, 24 How. Pr. (N. Y.) 142; U. S. *v.* Bogart, 24 Fed. Cas. No. 14,617, 9 Ben. 314; U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23.

45. U. S. *v.* Kuhl, 85 Fed. 624; U. S. *v.* Sprague, 48 Fed. 828.

46. U. S. *v.* Hopkins, 26 Fed. 443.

47. State *v.* Carr, 5 N. H. 367; State *v.* Dourdon, 13 N. C. 443.

48. *Ex p.* Holcomb, 12 Fed. Cas. No. 6,598, 2 Dill. 392.

49. State *v.* McKenzie, 42 Me. 392.

50. People *v.* Osmer, 4 Park. Crim. (N. Y.) 242.

51. Com. *v.* Smith, 7 Pick. (Mass.) 137; State *v.* Carr, 5 N. H. 367.

Confederate and state bank-notes.—In U. S. *v.* Kuhl, 85 Fed. 624, a prosecution under U. S. Rev. Stat. (1878) § 5430 [U. S. Comp. Stat. (1901) p. 3671], against possessing any obligation or security issued under authority of the United States with intent to sell or use the same, etc., it was held that a Confederate bank-note may have the similitude to a national bank-note and yet not be forged or counterfeited; that it is sufficient if such note, on the whole, bears a marked resemblance to the national currency; but in U. S. *v.* Pitts, 112 Fed. 522, and U. S. *v.* Conners, 111 Fed. 734, possession of worthless bills of an insolvent state bank was held not to be within said section, upon

(III) *In Coin.* A round blank, like smooth coin in circulation, from which the impression has been effaced by wear, may possess the necessary similitude.[52] It has been held that both sides must possess the likeness;[53] although where the face resembled the genuine, and the reverse did not, the intent of the maker that it pass as true was held to be the test.[54]

2. Particular Offenses — a. Alteration and Debasement. To remove an appreciable amount of the metal from a coin and plug the hole with base metal is an act of counterfeiting, but to so plug a hole made by a sharp instrument, so that no metal is removed, is not; and to pass a coin mutilated as first specified constitutes the offense of passing counterfeit, while to pass one mutilated as last specified does not.[55] To take a genuine note of an insolvent bank and merely alter the location of the bank from one place to another, there being a solvent bank of the same name in the latter place, constitutes the offense of counterfeiting; and pasting the name of the latter place over the former constitutes the offense, although by close examination it can be discerned.[56]

b. Counterfeiting. The offense of counterfeiting is complete, although the false coin be in an unfinished state, if it be so far finished or in such condition that it is calculated to deceive.[57] Brightening a piece of base metal by boiling in lye and rubbing with a cloth, thereby increasing the resemblance to the true coin and making it more readily acceptable as such, constitutes the offense;[58] as does changing, by plating or other process, inferior coins or base metal into resemblance of coin;[59] and, under a statute against "coloring" metal to make it resemble coin, to coat a sixpence with gold so that it resembles a half crown,[60] to immerse a silver alloy in a wash which eats away the base metal on the surface leaving it in the resemblance of true coin,[61] or to immerse a base metal in a fluid which so acts upon it that on being rubbed it will resemble the true coin,[62] constitutes the offense. Actual participation in making counterfeit is not necessary to the offense of counterfeiting.[63]

the authority and reasoning of U. S. *v.* Barrett, 111 Fed. 369, where it was held that the instrument in possession must in its inception have been intended to simulate some obligation or security of the United States; that possessing the general likeness that one form of paper money bears to another is not sufficient; and that a Confederate States note was not within the statute. It was held in U. S. *v.* Wilson, 44 Fed. 751, that a Confederate States note did not possess the necessary similitude to national currency to be within this section.

A bond issued by the United States Milling Company, and resembling a United States bond, but not purporting to be executed by any party, is not in the similitude of "any obligation or security of the United States." U. S. *v.* Sprague, 48 Fed. 828.

52. Rex *v.* Wilson, 1 Leach 320.

53. Roberts *v.* State, 2 Head (Tenn.) 501.

54. Reg. *v.* Byrne, 6 Cox C. C. 475. And in U. S. *v.* Brickler, 3 Phila. (Pa.) 426, 16 Leg. Int. (Pa.) 190, it was held that if the artifice of laying on the counter so as to exhibit only the side in likeness is used it may not be necessary that the other be in imitation.

55. U. S. *v.* Lissner, 12 Fed. 840.

56. State *v.* Robinson, 16 N. J. L. 507. But it was held that passing a note of the Bank of East Tennessee from which the word "East" had been erased did not constitute the offense of passing a counterfeit note of the Bank of Tennessee, the altered note not having, in a legal sense, resemblance to the genuine note of the latter bank, and not being such as to deceive any one of ordinary observation. Dement *v.* State, 2 Head (Tenn.) 505, 75 Am. Dec. 747.

57. *In re* Quin, 6 City Hall Rec. (N. Y.) 63; U. S. *v.* Abrams, 18 Fed. 823, 21 Blatchf. 553.

58. Rasnick *v.* Com., 2 Va. Cas. 356.

59. U. S. *v.* Russell, 22 Fed. 390.

60. Reg. *v.* Turner, 2 Moody C. C. 42.

61. Rex *v.* Lavey, 1 East P. C. 166, 1 Leach 153.

62. Rex *v.* Case, 1 East P. C. 165, 1 Leach 154 note.

To make circular metal tokens not purporting to be money or obligations to pay, but containing the names of business houses and purporting to be good, at such houses, for merchandise to a specified value, not intended to circulate as money, although of the color of United States coin, is not within the provisions of U. S. Rev. Stat. (1878) §§ 3583, 5462 [U. S. Comp. Stat. (1901) pp. 2398, 3686]. U. S. *v.* Roussopulous, 95 Fed. 977.

63. U. S. *v.* Tarr, 28 Fed. Cas. No. 16,434, 4 Phila. (Pa.) 405, 18 Leg. Int. (Pa.) 214, holding that one who leases the house where counterfeiting is carried on, knowing that counterfeiting is conducted by others there, and knowing their guilty purpose facilitates the making by harboring them, commits the offense.

c. Having Possession of Counterfeit Money, Etc.—(i) *What Constitutes Possession.* To constitute possession the counterfeit need not be found on the person. It is sufficient if it is under the control of the accused;[64] and it may be hidden in some secret and distant place within his knowledge and control.[65] When two are together in passing counterfeit, and when arrested one has two pieces and the other more than three, the possession is joint, and both are guilty of the offense of having in possession more than three pieces;[66] and in general the personal possession of one is the personal possession of his accomplice;[67] and the offense of having possession may be committed jointly, although the actual possession is in one.[68]

(ii) *Intent.* Where a specific intent is made an ingredient of the offense by statute the existence of the statutory intent must be shown.[69] On the other hand where the statutory intent exists no other or further intent is essential.[70] Under some statutes having blank or unsigned bills with intent to fill them up is sufficient.[71]

(iii) *Character of Money, Etc.* Under a statute against having in possession "any blank or unfinished note in the form and similitude of any" note of a bank, it is not necessary that the blanks be genuine, unsigned notes;[72] and when a statute is against the possession of "counterfeit tokens of value, or what purports to be a counterfeit token of value," it is not necessary that the "token" be in the similitude of any issued.[73]

d. Making or Having in Possession Counterfeiting Tools, Etc.—(i) *In General.* As a rule joint operation of act and criminal intent, or criminal negligence, is necessary to constitute these offenses.[74] The possession is sufficient where the engraver of a plate had the police present at delivery and the arrest was then made.[75] The offense is committed if the instrument be adapted and designed to make only one side of a coin;[76] and the possession of a half mold is sufficient.[77] The offense of making a "mold impressed with the obverse side" of a coin is complete when the mold is made and a part only of the impression.[78] Possession of a press such as is used for coinage violates a statute against possession of an instrument with intent to make counterfeit "coin of the realm," although the specific intent be to use it to make counterfeit foreign pieces only.[79] Possession of a plate for making counterfeit national bank-notes is punishable, although such notes are not specifically mentioned in the statute, as they fall under the head of "obligations and securities of the United States";[80] and a

64. *In re* Connor, 5 City Hall Rec. (N. Y.) 115.

65. State *v.* Washburn, 11 Iowa 245.

66. Reg. *v.* Williams, C. & M. 259, 41 E. C. L. 145.

67. Rogers' Case, 2 Lewin C. C. 297.

68. Van Houton's Case, 2 City Hall Rec. (N. Y.) 73. In Rex *v.* Else, R. & R. 105, where a wife uttered counterfeit and her husband was not present at the time, and the husband had a large quantity of counterfeit in his possession, it was held that the wife did not commit the offense of having possession of the counterfeit found on the husband, nor the husband that of uttering that uttered by the wife.

69. Thus possession with intent to pass does not constitute the offense of having in possession for the purpose of selling. Bevington *v.* State, 2 Ohio St. 160; Hutchins *v.* State, 13 Ohio 198.

Possession with intent to sell is within a statute against possession "with intent to pass as true or to permit, cause, or procure to be passed with intent to defraud." *In re* Moses, 2 City Hall Rec. (N. Y.) 84; Galbrant's Case, 1 City Hall Rec. (N. Y.) 109.

70. Thus under the United States statute against possession with intent to sell or use, neither intent to defraud by using or the poor character of the imitation is material. U. S. *v.* Kuhl, 85 Fed. 624.

71. People *v.* Ah Sam, 41 Cal. 645.

72. Stone *v.* State, 20 N. J. L. 401.

73. Reg. *v.* Corey, 33 N. Brunsw. 81.

74. People *v.* White, 34 Cal. 183. But under a statute against possession without lawful authority or excuse no unlawful intent other than knowledge of possession without authority or excuse is necessary. Reg. *v.* Harvey, 11 Cox C. C. 662.

75. People *v.* McDonnell, 80 Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159.

76. Com. *v.* Kent, 6 Metc. (Mass.) 221.

77. State *v.* Griffin, 18 Vt. 198.

78. Rex *v.* Foster, 7 C. & P. 495, 32 E. C. L. 726.

79. Bell's Case, 1 East P. C. 169.

80. U. S. *v.* Rossvally, 27 Fed. Cas. No. 16,197, 3 Ben. 157.

statute against possessing a plate for making "bank-notes and bills" covers a plate for making Bank of England counterfeits, as it is not to be implied that foreign bank-notes would have been specifically mentioned had it been intended to include them.[81]

(II) *What Are Tools, Etc.* A press,[82] a mold, and a collar of iron with the inside grooved for milling edges[83] are "tools or instruments" for counterfeiting; and a galvanic battery is a "machine" for such purpose;[84] but a crucible is not within the meaning of the words "die, stamp, or other instrument or tool."[85] An instrument will be considered a puncheon for the making of counterfeit coin if it will impress a resemblance such as will impose on the world, whether it have on it the letters of the coin or not.[86]

e. Passing[87] and Uttering Counterfeit Money, Etc.— (I) *In General*— (A) *What Constitutes Passing*— (1) In General. To pass is to deliver as money or as a known substitute for money;[88] to put off in payment or exchange.[89] The offense is not complete until the counterfeit is accepted by the person to whom it is offered.[90]

(2) Selling.[91] Selling is not passing, the intent to defraud not existing;[92] but under some statutes this constitutes an offense.[93]

(3) Character of Money, Etc. Under a statute against passing "any coins, . . . whether in the resemblance of coins of the United States or of foreign countries, or of original design," it was held not an offense to pass an octagon metal having one side impressed with an Indian and the other with "One Quarter Dollar, Cal.," on the ground that the piece did not purport to be a coin within the legal meaning of the word.[94] But under a statute making it an offense to pass a coin made in violation of another statute prohibiting the counterfeiting of any coin "at the time current," it is an offense to pass a counterfeit coin not current at the time of passing if it was current when made.[95] So too uttering a counterfeit bank-bill constitutes the offense of uttering a "forged promissory note," the bill being no less a promissory note because issued by a bank,[96] and

81. People *v.* McDonnell, 80 Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159.

82. Bell's Case, 1 East P. C. 169.

83. Reg. *v.* Moore, 2 C. & P. 235, 1 Moody C. C. 122, 12 E. C. L. 546; Lennard's Case, 1 East P. C. 170, 1 Leach 90, 2 W. Bl. 807.

84. Reg. *v.* Gover, 9 Cox C. C. 282.

85. State *v.* Bowman, 6 Vt. 594.

86. Ridgeley's Case, 1 East P. C. 171, 1 Leach 189.

87. Does not constitute obtaining goods by false pretenses.— Passing counterfeit being a substantive felony of a higher grade does not constitute the offense of obtaining goods by a false pretense. Roberts *v.* State, 2 Head (Tenn.) 501.

88. Com. *v.* Starr, 4 Allen (Mass.) 301; Hopkins *v.* Com., 3 Metc. (Mass.) 460.

Delivery to another to be passed off generally for the benefit of the one so delivering is not a passing in payment. U. S. *v.* Venable, 28 Fed. Cas. No. 16,615, 1 Cranch C. C. 416.

89. U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,787, Baldw. 366.

Giving in payment to a servant having no interest in the transaction is sufficient. Com. *v.* Starr, 4 Allen (Mass.) 301.

90. Com. *v.* Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

"Putting off" means actually getting rid of the counterfeit. Wooldridge's Case, 1 East P. C. 179, where it was held that where one had sold counterfeit and was in the act of delivering it when arrested, but the purchaser was counting it and had not yet taken it, the offense of "putting off" was not complete.

Pledging a counterfeit bank-note, to be redeemed at a future day, is not a passing, although the pledger knows it to be spurious. Gentry *v.* State, 3 Yerg. (Tenn.) 451.

91. See also *infra*, II, B, 2, g.

92. Hooper *v.* State, 8 Humphr. (Tenn.) 93.

93. State *v.* Harris, 27 N. C. 287 (holding where there was a statute against "passing as true" and another against "passing or attempting to pass by one person to another," that the latter had in view putting into circulation, and not defrauding the party receiving, and included a sale); U. S. *v.* Venable, 28 Fed. Cas. No. 16,615, 1 Cranch C. C. 416. See also People *v.* Stewart, 5 Mich. 243, where it was held that a single statute against having in possession counterfeit "with intent to utter or pass the same, or to render the same current as true," embraced two distinct offenses — possession with intent to pass as true and possession with intent to sell as counterfeit to be rendered current or passed as true.

94. U. S. *v.* Bogart, 24 Fed. Cas. No. 14,617, 9 Ben. 314.

95. State *v.* Shoemaker, 7 Mo. 177.

96. Com. *v.* Paulus, 11 Gray (Mass.) 305; Com. *v.* Carey, 2 Pick. (Mass.) 47; State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168; Murry

passing a counterfeit United States treasury note is punishable as the passing of a "forged moneyed obligation." [97] But where there is a statute against passing counterfeit bank-bills and another against passing forged promissory notes, with different terms of punishment, the legislature has evidenced an intent to distinguish and the rule is otherwise.[98]

(4) SCIENTER. While passing must of course be with knowledge that the money is counterfeit; yet one receiving counterfeit innocently and passing it after having reasonable grounds to infer it to be spurious commits the offense.[99] The offense is committed although one offers to take a note back if it is not good, if he then knows it to be spurious.[1]

(5) WHETHER PERSONAL PARTICIPATION NECESSARY. Passing counterfeit by an agent employed for that purpose is the same as passing it personally;[2] and procuring it to be passed by an ignorant servant boy is sufficient.[3] So too the offense of passing is committed by being present, aiding, and assisting the one who actually does the passing.[4]

(6) TIME OF COMMITTING OFFENSE. The offense is committed although done on Sunday, it being immaterial that the act constitutes another offense also.[5]

(B) *What Constitutes Uttering*—(1) IN GENERAL. To utter is to declare to be good with intent to pass;[6] to so assert, directly or indirectly, by word or action;[7] or to attempt to pass a spurious article, knowing it to be such, with intent to defraud.[8] Acceptance of the proffered counterfeit is not essential to the offense.[9]

(2) JOINT UTTERING. To constitute a joint uttering it is held that there must be a previous concert and presence together at the time of uttering;[10] that the test is whether the one was so near the other as to help him get rid of the counterfeit;[11] and that if two utterers, with a general community of purpose, go dif-

v. Com., 5 Leigh (Va.) 720; Com. *v.* Hensley, 2 Va. Cas. 149.

97. Riggins *v.* State, 4 Kan. 173; *In re* Truman, 44 Mo. 181.

98. Com. *v.* Dole, 2 Allen (Mass.) 165; State *v.* Hayden, 15 N. H. 355; State *v.* Ward, 6 N. H. 529. Although if the statute against possession of counterfeit bank-notes only covers banks of the state, possessing a counterfeit note of a bank of another state is within a statute against possession of a forged promissory note. Com. *v.* Thomas, 10 Gray (Mass.) 483; Com. *v.* Wood, 10 Gray (Mass.) 477.

99. *In re* Gallaher, 5 City Hall Rec. (N. Y.) 1.

1. Perdue *v.* State, 2 Humphr. (Tenn.) 494.

2. U. S. *v.* Morrow, 26 Fed. Cas. No. 15,819, 4 Wash. 733.

3. Com. *v.* Hill, 11 Mass. 136. In Rouse *v.* State, 4 Ga. 136, it was held that passing in payment to B was not committed by so passing to B through A, an innocent agent, the opinion indicating that this would not be the holding as to "putting off" as distinguished from "passing in payment," or if A were the agent of B.

4. *Connecticut.*— State *v.* Stutson, 1 Kirby 52.

Missouri.— State *v.* Mix, 15 Mo. 153.

Tennessee.— State *v.* Young, 1 Overt. 230.

Virginia.— Martin *v.* Com., 2 Leigh 745.

United States.— U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,787, Baldw. 366.

Whether actual presence necessary.— In Reg. *v.* Greenwood, 5 Cox C. C. 521, 2 Den. C. C. 453, it was held that if two are engaged in the common purpose of uttering counterfeit, and in pursuance of that purpose one passes in the absence of the other, the latter is guilty, an absent participator in a misdemeanor being a principal. But in U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,787, Baldw. 366, it was held that the participator must be actually present.

5. Harman *v.* State, 11 Ind. 311.

6. U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,787, Baldw. 366.

7. State *v.* Horner, 48 Mo. 520; Com. *v.* Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

Giving to a woman for intercourse is an uttering and passing. Reg. *v.* ——, 1 Cox C. C. 250 [*questioning* Reg. *v.* Page, 8 C. & P. 122, 34 E. C. L. 644, where giving in charity was held not to be].

Receiving a good coin and pretending that it is bad, handing back a counterfeit as the one received, is an uttering, although not a "tendering in payment." Rex *v.* Franks, 2 Leach 736.

Staking counterfeit at a gaming-table as good money is an uttering, and losing it at play is a passing. State *v.* Beeler, 1 Brev. (S. C.) 42.

To ask to purchase articles and to lay down a counterfeit piece as payment is an uttering. Reg. *v.* Welch, 4 Cox C. C. 430.

8. People *v.* Page, 1 Ida. 190.

9. State *v.* Horner, 48 Mo. 520.

10. Reg. *v.* West, 2 Cox C. C. 237.

11. Reg. *v.* Jones, 9 C. & P. 761, 2 Lewin C. C. 119, 297, 2 Moore C. C. 85, 38 E. C. L. 441.

ferent ways and separately utter coin apart from each other, their utterings are not joint.[12] But when one of two in company utters counterfeit, and counterfeit is found on the other, both are guilty of the aggravated offense of uttering while having counterfeit in possession, if they act in concert and both know of the possession.[13]

(3) CHARACTER OF MONEY, ETC. The offense of having possession of or uttering counterfeit bank-notes is committed by having or uttering genuine notes which have been altered.[14] Although the alteration be by substituting 20 for 1 as the denominating numeral and erasing the word "one" in the body of the note so that the note reads as a promise to pay —— dollars, the note may nevertheless be in the similitude of a genuine note, as the word denoting the sum might be obliterated by wear or otherwise and the amount left designated by the numerals only; and uttering such a note constitutes the offense of uttering counterfeit.[15]

(II) *GOLD DUST.* To constitute the offense of passing counterfeit gold dust, etc., no definite amount of difference between the value of the true and the counterfeit is required; it is sufficient that the article is debased, and that the one uttering knows it and passes it as genuine.[16]

f. Photographing Currency. In the offense of photographing currency, under a United States statute, similitude [17] or intent to defraud not being elements of the offense, the size of the photograph is immaterial and it may be in miniature.[18]

g. Selling [19] or Exchanging Counterfeit Money. To constitute the offense of selling counterfeit money, an intent to defraud is not necessary;[20] and it is not necessary that one part with his whole interest for a consideration; a sale on credit, or a delivery on the understanding that the counterfeit will be returned in case it is not sold, is sufficient.[21] Exchanging counterfeit bank-notes as genuine for other notes does not constitute the offense of selling and bartering such notes.[22] The offense of offering to purchase counterfeit notes is not committed by offering to purchase genuine unsigned notes, although done in the supposition that they are counterfeit;[23] but selling as genuine violates a statute against selling counterfeit bank-notes, notwithstanding the purchaser's belief that they are genuine;[24] and such a statute is violated, although no notes of the denomination sold were ever issued.[25]

III. DEFENSES.

If a person be so intoxicated at the time of passing counterfeit that he actually did not know it to be so, this constitutes a full defense, as the crime consists in knowingly passing.[26]

12. Rex *v.* Manners, 7 C. & P. 801, 32 E. C. L. 880. But in Reg. *v.* Hurse, 2 M. & Rob. 360, it was held that if two together make counterfeit and pass it separately, but in concert and intending to share the proceeds, the utterings are joint; and in Rex *v.* Skerrit, 2 C. & P. 427, 12 E. C. L. 656, that if two go together to a shop and one enters and passes a counterfeit piece, the other remaining outside with other pieces in his possession, the uttering is joint, and both are also guilty of the offense of having possession of the counterfeit found on the second.

13. Reg. *v.* Gerrish, 2 M. & Rob. 219.

14. Com. *v.* Woods, 10 Gray (Mass.) 477; State *v.* Dourdon, 13 N. C. 443. But it was held that in the absence of a statute specifically covering it it was no offense to cut a piece out of a bank-note with intent to put the piece with pieces of other similar cut notes and thus form other notes and pass the same. Com. *v.* Hayward 10 Mass. 34.

15. State *v.* Dourdon, 13 N. C. 443.

16. People *v.* Page, 1 Ida. 190.

17. See *supra*, II, B, 1, c, (I).

18. *Ex p.* Holcomb, 12 Fed. Cas. No. 6,598, 2 Dill. 392.

19. See also *supra*, II, B, 2, e, (I), (A), (2).

20. Streep *v.* U. S., 160 U. S. 128, 16 S. Ct. 244, 40 L. ed. 365.

21. State *v.* Fitzsimmons, 30 Mo. 236.

22. Vanvalkenburgh *v.* State, 11 Ohio 404.

23. Reg. *v.* Atwood, 20 Ont. 574.

24. Leonard *v.* State, 29 Ohio St. 408.

25. State *v.* Fitzsimmons, 30 Mo. 236.

26. Pigman *v.* State, 14 Ohio 555, 45 Am. Dec. 558. See, generally, CRIMINAL LAW.

IV. JURISDICTION.

A. In General. The counterfeiting outside of a state of bank-bills current in that state is not punishable by the courts of the latter, but must be left to those of the state where the act was committed.[27] The possession of counterfeit bank-notes with intent to utter as true is not indictable in the United States courts without a statute expressly making it so.[28]

B. Of Federal and State Courts. It has been much mooted whether under the constitutional provision vesting in congress the power to "coin Money, regulate the Value thereof, and of foreign Coin," and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States,"[29] state laws against the various offenses relating to counterfeit currency are valid, and whether state courts have jurisdiction of these offenses. The great preponderance of authority is in favor of the affirmative of these propositions, and it may be considered as settled, both that such laws are valid and that the jurisdiction of the two classes of courts is concurrent.[30]

V. INDICTMENT OR INFORMATION.[31]

A. Prosecution by Information. Passing a counterfeit obligation of the United States may be prosecuted in the federal courts by information instead of indictment, it not being an "infamous crime" within the fifth amendment to the constitution of the United States,[32] and so as to passing counterfeit money generally.[33]

27. State *v.* Knight, 1 N. C. 44.

28. U. S. *v.* Wright, 28 Fed. Cas. No. 16,772, 2 Cranch C. C. 68. See also U. S. *v.* Barrett, 111 Fed. 369, where it was held that the use as money of any instrument which does not possess the requisite similitude to some particular form of money to perpetrate a common-law cheat is not an offense against the United States, but is solely within state authority.

29. U. S. Const. art. 1, § 8.

30. As to counterfeiting.— *California.*— People *v.* White, 34 Cal. 183.

Georgia.— *Contra,* Rouse *v.* State, 4 Ga. 136.

Indiana.— Dashing *v.* State, 78 Ind. 357; Snoddy *v.* Howard, 51 Ind. 411, 19 Am. Rep. 738; State *v.* Moore, 6 Ind. 436; Chess *v.* State, 1 Blackf. 198.

Iowa.— State *v.* McPherson, 9 Iowa 53.

Michigan.— Harlan *v.* People, 1 Dougl. 207.

Missouri.— *In re* Truman, 44 Mo. 181 [*overruling* Mattison *v.* State, 3 Mo. 421].

Ohio.— Sutton *v.* State, 9 Ohio 133.

Oregon.— *Contra,* State *v.* Brown, 2 Oreg. 221.

Tennessee.— Sizemore *v.* State, 3 Head 26.

Texas.— Stroube *v.* State, 40 Tex. Crim. 581, 51 S. W. 357; Martin *v.* State, 18 Tex. App. 224.

Vermont.— State *v.* Randall, 2 Aik. 89.

United States.— U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728; *Ex p.* Geisler, 50 Fed. 411.

See 13 Cent. Dig. tit. "Counterfeiting," § 22.

As to uttering and passing.—*Pennsylvania.* — *Contra,* Com. *v.* Dale, 3 Pa. Co. Ct. 30.

South Carolina.— State *v.* Tutt, 2 Bailey 44, 21 Am. Dec. 508; State *v.* Pitman, 1 Brev. 32, 2 Am. Dec. 645.

Tennessee.— Sizemore *v.* State, 3 Head 26.

Texas.— Stroube *v.* State, 40 Tex. Crim. 581, 51 S. W. 357; Martin *v.* State, 18 Tex. App. 224.

Vermont.— State *v.* Randall, 2 Aik. 89.

Virginia.— Jett *v.* Com., 18 Gratt. 933; Hendrick *v.* Com., 5 Leigh 707.

United States.— Fox *v.* Ohio, 5 How. 410, 12 L. ed. 213. *Contra, Ex p.* Houghton, 7 Fed. 657, 8 Fed. 897.

As to having counterfeit in possession.— Com. *v.* Fuller, 8 Metc. (Mass.) 313, 41 Am. Dec. 509.

As to having in possession tools for making. — People *v.* McDonnell, 80 Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159; State *v.* Brown, 2 Oreg. 221; U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728; U. S. *v.* ——, 24 Fed. Cas. No. 14,414.

31. Under U. S. Rev. Stat. (1878) §§ 3708, 5188 [U. S. Comp. Stat. (1901) pp. 2482, 3484], the penalties provided for the making and uttering business cards in the likeness of a government bond or national bank-note is only recoverable by a *qui tam* action, brought by an informer, and cannot be recovered by indictment at the instance of the government. U. S. *v.* Læscki, 29 Fed. 699.

32. *In re* Wilson, 18 Fed. 33.

33. U. S. *v.* Field, 16 Fed. 778, 21 Blatchf. 330; U. S. *v.* Yates, 6 Fed. 861. See also *supra,* II, A, 2.

B. Requisites and Sufficiency in General. An indictment is sufficient in general if it includes the essential ingredients of the offense; if the offense is so stated that it cannot be misunderstood by the jury.[34] Under a state statute the offense should be charged as against the sovereignty of the state and not that of the United States.[35] If the offense is purely statutory the words "contrary to the form of the statute" must be used; it is otherwise if the offense was indictable at common law before the passing of the statute.[36]

C. Following Language of Statute — 1. In General. It is sufficient in general to charge the various offenses relating to counterfeiting in the language of the statute,[37] or in words which are its equivalent or more comprehensive.[38] It has been held, however, that if any essential element is omitted from the statute it must be included in the indictment.[39]

2. Matters Excepted From Statute. If a person "innocently, ignorantly, &c.," possessing notes is excepted by the enacting clause of a statute, the indictment must allege that the accused did not so keep them;[40] and where the statute is against possession without "lawful authority or excuse," the possession alleged must be so qualified.[41]

D. Description of Subject-Matter. The indictment must contain such a description of the counterfeit as to enable the accused to plead it as a bar to another prosecution for the same offense.[42] It is not necessary to allege of what

34. Swain *v.* People, 5 Ill. 178.

All essential elements of the offense must be alleged. State *v.* McKenzie, 42 Me. 392; Benson *v.* State, 5 Minn. 19; Scott *v.* Com., 14 Gratt. (Va.) 687.

Form of indictment in whole, in part, or in substance is set out in:

Arkansas.— Gabe *v.* State, 6 Ark. 540.

California.— People *v.* Ah Sam, 41 Cal. 645; People *v.* White, 34 Cal. 183.

Delaware.— State *v.* Johnson, 3 Harr. 561.

Georgia.— Gentry *v.* State, 6 Ga. 503.

Illinois.— Miller *v.* People, 3 Ill. 233.

Indiana.— Wilkinson *v.* State, 10 Ind. 372.

Massachusetts.— Com. *v.* Woods, 10 Gray 477; Com. *v.* Fuller, 8 Metc. 313, 41 Am. Dec. 509; Com. *v.* Kent, 6 Metc. 221.

New York.— People *v.* Albow, 71 Hun 123, 24 N. Y. Suppl. 519; Tomlinson *v.* People, 5 Park. Crim. 313.

North Carolina.— State *v.* Dourdon, 13 N. C. 443; State *v.* Collins, 10 N. C. 191.

Ohio.— Leonard *v.* State, 29 Ohio St. 408.

Rhode Island.— State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Tennessee.— McKinley *v.* State, 8 Humphr. 72; Fergus *v.* State, 6 Yerg. 345.

Vermont.— State *v.* Griffin, 18 Vt. 198; State *v.* Randall, 2 Aik. 89.

Virginia.— Murry *v.* Com., 5 Leigh 720.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302.

35. Harlan *v.* People, 1 Dougl. (Mich.) 207.

36. Com. *v.* Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

37. *California.*— People *v.* White, 34 Cal. 183.

Iowa.— State *v.* Williams, 8 Iowa 533; State *v.* Callendine, 8 Iowa 288; Buckley *v.* State, 2 Greene 162.

Massachusetts.— Hopkins *v.* Com., 3 Metc. 460.

Missouri.— Hobbs *v.* State, 9 Mo. 855.

New Hampshire.— State *v.* Keneston, 59 N. H. 36.

Ohio.— Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Texas.— Long *v.* State, 10 Tex. App. 186.

United States.— U. S. *v.* Peters, 27 Fed. Cas. No. 16,035, 2 Abb. 494.

See 13 Cent. Dig. tit. "Counterfeiting," § 24 *et seq.*

The language of the statute should be followed closely. State *v.* Petty, Harp. (S. C.) 59 (holding that "dispose of and put away" is not sufficient instead of "utter and publish"); State *v.* Bowman, 6 Vt. 594 (holding "current silver coins of this state and of the United States" to be insufficient instead of "which shall be made current by the laws of this or the United States"). See also State *v.* Nicholson, 14 La. Ann. 785, holding that omitting the words "knowing the same to be forged and counterfeited" is fatal, and that charging a general intent to defraud will not cure the defect.

38. Brown *v.* Com., 8 Mass. 59; Peck *v.* State, 2 Humphr. (Tenn.) 78.

39. Bell *v.* State, 10 Ark. 536.

Thus in an indictment for uttering, if the indictment fails to allege scienter, i. e., that the accused knowingly uttered it, is bad. State *v.* Seran, 28 N. J. L. 519; Owen *v.* State, 5 Sneed (Tenn.) 493; U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135.

40. Matthews *v.* State, 2 Yerg. (Tenn.) 233.

41. Reg. *v.* Harvey, 11 Cox C. C. 662, although "without excuse" is sufficient as including "without authority."

42. Waller *v.* Com., 97 Ky. 509, 30 S. W. 1023, 17 Ky. L. Rep. 348; Mount *v.* Com., 1 Duv. (Ky.) 90; Com. *v.* Fields, 5 Ky. L. Rep. 610.

A full description should be given or the failure to describe excused. State *v.* Calendine, 8 Iowa 288; Com. *v.* Houghton, 8

material the counterfeit is made,[43] although it should be stated whether the coin counterfeited is gold or silver.[44] It is not necessary to give the number of a bill.[45] Under a statute including "bank-bills and promissory notes" it is sufficient to charge the passing of a counterfeit "bank-note," the words "bill" and "note" being synonymous.[46] A bill being copied into the indictment and purporting by its terms to be the note of a bank, it is not necessary to aver that it purports to be the note of any specified bank.[47]

E. Description of Tools For Counterfeiting. An indictment for having in possession tools for counterfeiting must describe the tools.[48]

F. Setting Out Copy — 1. In General. The indictment should give the tenor of a bill,[49] and should profess to do so,[50] unless the bill is destroyed by the accused, or other reason or excuse for not setting it out exists,[51] in which case the facts must be stated.[52] It is not sufficient to set out the "purport and effect;" an exact copy must be given.[53]

2. Material and Immaterial Parts, Indorsements, Etc. Material parts of the contract only need be set out in the indictment; ornamental devices, bill numbers, denominational figures, letters or words, marginal words, engravers' names, seals and recitals as to capital stock, etc., may be omitted therefrom;[54] as may

Mass. 107; State *v.* Potts, 9 N. J. L. 26, 17 Am. Dec. 449. But see People *v.* Stewart, 4 Mich. 655.

43. State *v.* Griffin, 18 Vt. 198.

44. Nicholson *v.* State, 18 Ala. 529, 54 Am. Dec. 168.

It is sufficient to describe counterfeit coin as in the similitude of "coin, currently passing in this state, called Spanish Dollars" (Fight *v.* State, 7 Ohio 180, 28 Am. Dec. 626), or as a dollar, without further description (Com. *v.* Stearns, 10 Metc. (Mass.) 256; Peek *v.* State, 2 Humphr. (Tenn.) 78; U. S. *v.* Otey, 31 Fed. 68, 12 Sawy. 416), or as "fifty-cent pieces" instead of "half dollars" as denominated on the coin (U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23). So "Coinage of the United States" is the exact equivalent of "coins coined at the mint of the United States." U. S. *v.* Otey, 31 Fed. 68, 12 Sawy. 416. And in an indictment for having possession of a counterfeiting machine it is a sufficient description of the coin to be counterfeited to describe it merely as "coin current by law and usage." Bradford *v.* State, 3 Humphr. (Tenn.) 369. And charging that the accused "caused to be printed certain impressions in the likeness of . . . the face, except signatures" of Brazil treasury notes is sufficient under the act of May 16, 1884, the statute containing the words "obligation . . . or any part thereof, of any foreign government." U. S. *v.* White, 25 Fed. 716.

45. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357. But see State *v.* Calendine, 8 Iowa 288, holding that description by both number and letter is necessary, on the ground that it takes both to identify.

The number of bills included in the act charged, whether one or more, must be stated. U. S. *v.* Weikel, 8 Mont. 124, 19 Pac. 396; U. S. *v.* Fisler, 25 Fed. Cas. No. 15,105, 4 Biss. 59.

46. Brown *v.* Com., 8 Mass. 59; State *v.* Griffin, 18 Vt. 198.

47. U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302.

Nor in such case need a United States treasury note be referred to by that name, nor need it be charged to be made in the resemblance to the genuine, as these matters appear from the copy. U S. *v.* Trout, 28 Fed. Cas. No. 16,542, 4 Biss. 105.

48. Chamberlain *v.* State, 5 Blackf. (Ind.) 573.

In case of a mold, an indictment will be bad for uncertainty unless it alleges the mold to be impressed with the stamp of a current coin (Reg. *v.* Richmond, 1 C. & K. 240, 1 Cox C. C. 9, 47 E. C. L. 240), and describing a die as "for the purpose of producing and impressing the stamp and similitude" of current coin is insufficient, as the instrument must be capable of producing such stamp and similitude (Com. *v.* Scott, 1 Rob. (Va.) 695).

49. Com. *v.* Bailey, 1 Mass. 62, 2 Am. Dec. 3; McMillen *v.* State, 5 Ohio 268; Hooper *v.* State, 8 Humphr. (Tenn.) 93. But see Bostick *v.* State, 34 Ala. 266; State *v.* Johnson, 3 Harr. (Del.) 561; Tomlinson *v.* People, 5 Park. Crim. (N. Y.) 313, holding that it is not necessary to give the tenor.

50. State *v.* Twitty, 9 N. C. 248.

51. U. S. *v.* Fisler, 25 Fed. Cas. No. 15,105, 4 Biss. 59.

52. Hooper *v.* State, 8 Humphr. (Tenn.) 93.

Alleging the bill to be in the possession of the accused is sufficient excuse. Armitage *v.* State, 13 Ind. 441.

53. State *v.* Atkins, 5 Blackf. (Ind.) 458.

To omit the names of the president and cashier in the copy renders the indictment insufficient (Com. *v.* Clancy, 7 Allen (Mass.) 537), and pasting the counterfeited note in the indictment as part of it is probably insufficient (U. S. *v.* Fisler, 25 Fed. Cas. No. 15,105, 4 Biss. 59).

54. *Arkansas.*— Gabe *v.* State, 6 Ark. 519.

indorsements,[55] and certificates of registration required to be indorsed, or notices required by law to be put upon bills.[56] The word "tenor" does not imply setting out these, but only material parts of the contract and the face of the bill.[57]

3. ALTERED BILLS. In case of an altered bill it should be set out exactly as it was when uttered, with all changes and omissions then appearing.[58]

G. Particular Allegations — 1. IN GENERAL. It is not necessary to state that the bill set out is "for the payment of money," this being a matter of common knowledge, and the face of the bill so showing;[59] or, the charge being upon a "false, forged and counterfeited obligation of the United States," and a copy being set out, to allege that there is a genuine obligation authorized by law of which the counterfeit is in likeness;[60] or to state the value of the counterfeit money.[61] Under a statute against having in possession a specified number of counterfeits "at the same time," it is not sufficient to allege such possession on a specified day, but possession at the same time must be particularly alleged;[62] under one against advertising or aiding a "scheme to sell or exchange" counterfeit, both the existence of the scheme and the commission of the offense must be charged;[63] and under one against the fraudulent use of an instrument intended for counterfeiting it is not enough to charge fraudulent use generally, but the manner of using must be charged.[64]

2. INTENT TO DEFRAUD AND SCIENTER. Intent to defraud must in general be alleged,[65] although where there are no words in the statute making such intent essential to the offense this is held unnecessary.[66] Scienter must of course be alleged.[67]

3. NAME OF PERSON DEFRAUDED. In an indictment for uttering or passing counterfeit it is necessary to set out the name of the person to whom the counterfeit was, or was intended to be, passed,[68] or to set out the name of the person

Indiana.— Hampton *v.* State, 8 Ind. 336.

Massachusetts.— Com. *v.* Taylor, 5 Cush. 605; Com. *v.* Stevens, 1 Mass. 203; Com. *v.* Bailey, 1 Mass. 62, 2 Am. Dec. 3.

New Hampshire.— State *v.* Carr, 5 N. H. 367.

Ohio.— Griffin *v.* State, 14 Ohio St. 55; State *v.* Kinny, Tapp. 169; State *v.* Ankrim, Tapp. 112.

Vermont.— State *v.* Wheeler, 35 Vt. 261.

United States.— U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357.

See 13 Cent. Dig. tit. "Counterfeiting," § 27.

55. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; State *v.* Tutt, 2 Bailey (S. C.) 44, 21 Am. Dec. 508; Buckland *v.* Com., 8 Leigh (Va.) 732.

56. Wilson *v.* People, 5 Park. Crim. (N. Y.) 178.

57. U. S. *v.* Marcus, 53 Fed. 784.

58. State *v.* Dourdon, 13 N. C. 443, holding, however, that it was not necessary to aver that the bill was for any specific sum, the denominating word being erased.

59. Townsend *v.* People, 4 Ill. 326.

60. U. S. *v.* Owens, 37 Fed. 112. In Tait *v.* State, 3 Yerg. (Tenn.) 449, an indictment for passing a counterfeit note giving its tenor as follows: "This note of seventy-five cents is payable to the bearer at the treasury of North Carolina, agreeably to the act of Assembly, . . . John Haywood, Public Treasurer," was held bad for not averring the existence of the act, and that by its terms the treasurer was bound to pay, without which no obligation to pay appeared.

61. State *v.* Williams, 8 Iowa 535.

62. State *v.* Bonney, 34 Me. 223; Edwards *v.* Com., 19 Pick. (Mass.) 124; Scott *v.* Com., 14 Gratt. (Va.) 687.

63. People *v.* Albow, 140 N. Y. 133, 35 N. E. 438.

64. Bell *v.* State, 10 Ark. 536.

65. Mattison *v.* State, 3 Mo. 421; State *v.* Seran, 28 N. J. L. 519; Owen *v.* State, 5 Sneed (Tenn.) 493; Williams *v.* State, 9 Humphr. (Tenn.) 80; State *v.* O'Niel, Thomps. Cas. (Tenn.) 62.

66. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; U. S. *v.* Peters, 27 Fed. Cas. No. 16,035, 2 Abb. 494. In State *v.* Calvin, R. M. Charlt. (Ga.) 151, and U. S. *v.* Otey, 31 Fed. 68, 12 Sawy. 416, it is held that if such intent be necessary to allege it is implied by and embraced in the words "falsely" or "falsely and fraudulently" used in averring the making of counterfeit.

67. People *v.* Stanton, 39 Cal. 698 (holding that alleging that the accused "wilfully, feloniously and knowingly" possessed counterfeit is sufficient); Sutton *v.* State, 9 Ohio 133 (holding that an allegation that the accused "secretly" kept instruments for counterfeiting sufficiently alleges it). See also Waller *v.* Com., 97 Ky. 509, 30 S. W. 1023, 17 Ky. L. Rep. 348; State *v.* Martin, 8 Wis. 352.

68. Buckley *v.* State, 2 Greene (Iowa) 162, holding that the name of the person to whom counterfeit money was passed should be set forth in the indictment with certainty unless the name of such person is unknown, and if so that fact should be stated.

whom it was intended to defraud, unless the name of such person is unknown, in which case the fact that the name is unknown should be stated.[69]

4. CURRENCY OF COIN. The indictment must in general allege the coin counterfeited to have been current at the time of the act charged,[70] especially whenever its circulation is made an ingredient of the offense by statute.[71] An allegation of currency under the laws of the United States being made, it is unnecessary to allege currency according to the law or custom of the state.[72]

5. INTENT TO PASS AS TRUE. In an indictment for counterfeiting or for having counterfeit in possession it should be alleged that the making[73] or having in possession[74] was with intent to pass as true. Passing or uttering must also be charged to have been done with such intent.[75]

6. INTENT TO PASS WITHIN COUNTY. Intent to pass within the county or state where the indictment is laid need not be charged, it being immaterial where the accused intended to pass the counterfeit.[76]

7. SIMILITUDE. It must be charged that the counterfeit is in the similitude of the genuine;[77] but a bill being set out it is not necessary to allege similitude to the genuine notes authorized by act of congress, as the court will take judicial notice both of the act and of issues under it.[78]

8. FELONIOUSNESS. It is not necessary to charge the act as "feloniously" done in such offenses as were misdemeanors at common law;[79] and where an indictment is good if according to the common law, the word may be omitted, although the offense has been raised by statute to the grade of felony.[80]

9. EXISTENCE AND INCORPORATION OF BANK. In an indictment relating to counterfeit bank-bills it is not necessary to allege the incorporation of the bank of which the false bill is a counterfeit.[81] It has also been held that it is not necessary in

If words implying an intent to defraud a particular person are not in the statute the person defrauded, or whom it was intended to defraud, need not be named. Gentry *v.* State, 6 Ga. 503; State *v.* Callendine, 8 Iowa 288; State *v.* Keneston, 59 N. H. 36; State *v.* Morton, 8 Wis. 352.

69. State *v.* Weller, 20 N. J. L. 521; State *v.* Odel, 3 Brev. (S. C.) 552; U. S. *v.* Bejando, 24 Fed. Cas. No. 14,561, 1 Woods 294; U. S. *v.* Shellmire, 27 Fed. Cas. No. 16,271, Baldw. 370. In Wilkinson *v.* State, 10 Ind. 372, it is questioned whether the intent to defraud must be toward the person to whom passed, or may not be toward a third person. In Brown *v.* Com., 2 Leigh (Va.) 769, naming a slave as the person to whom counterfeit was passed, with intent to defraud a bank, was held good.

70. Waller *v.* Com., 97 Ky. 509, 30 S. W. 1023, 17 Ky. L. Rep. 348.

In case of bank-notes, when currency is not expressly specified in the statute, the allegation is not necessary. Bostick *v.* State, 34 Ala. 266.

71. Nicholson *v.* State, 18 Ala. 529, 54 Am. Dec. 168; Mathena *v.* State, 20 Ark. 70; State *v.* Shelton, 7 Humphr. (Tenn.) 31; State *v.* Bowman, 6 Vt. 594.

72. State *v.* Griffin, 18 Vt. 198.

73. U. S. *v.* King, 26 Fed. Cas. No. 15,535, 5 McLean 208. *Contra*, U. S. *v.* Peters, 27 Fed. Cas. No. 16,035, 2 Abb. 494.

74. Fergus *v.* State, 6 Yerg. (Tenn.) 345.

It is not enough to charge generally a fraudulent keeping (Gabe *v.* State, 6 Ark. 519), but charging an intent to get into circulation instead is sufficient (Sizemore *v.* State, 3 Head (Tenn.) 26).

75. McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510 (where "uttered and paid as true" was held the equivalent of "uttered and passed as true"); Benson *v.* State, 5 Minn. 19.

If the statute does not contain the words "as true" they need not be inserted. State *v.* Wilkins, 17 Vt. 151.

76. Spence *v.* State, 8 Blackf. (Ind.) 281; Clark *v.* Com., 16 B. Mon. (Ky.) 206; Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668; Com. *v.* Cone, 2 Mass. 132.

77. State *v.* McKenzie, 42 Me. 392, holding that the words "similar to" are not the equivalent of "in the similitude of."

78. U. S. *v.* Owens, 37 Fed. 112.

79. Perdue *v.* State, 2 Humphr. (Tenn.) 494; Wilson *v.* State, 1 Wis. 184.

Where the word is not in the statute it is not necessary to use it. Quigley *v.* People, 3 Ill. 301; Miller *v.* People, 3 Ill. 233.

80. Peek *v.* State, 2 Humphr. (Tenn.) 78.

81. *California.*— People *v.* McDonnell, 80 Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159; People *v.* Ah Sam, 41 Cal. 645.

Illinois.— Quigley *v.* People, 3 Ill. 301.

Missouri.— Hobbs *v.* State, 9 Mo. 855.

New Hampshire.— State *v.* Hayden, 15 N. H. 355.

New Jersey.— State *v.* Weller, 20 N. J. L. 521; State *v.* Van Hart, 17 N. J. L. 327.

Virginia.— Murry *v.* Com., 5 Leigh 720.

See 13 Cent. Dig. tit. "Counterfeiting," § 32.

The place where a bank is located need not be named, if it is alleged to be within the United States. State *v.* Carr, 5 N. H. 367.

Proof of allegation.— If the indictment alleges that the bank was "a corporation duly

such case to allege that such bank has a legal existence,[82] unless the statute under which the indictment is drawn so requires.[83]

H. Joinder of Counts. It is proper to include in an indictment several counts, each stating a separate offense, if all relate to the same transaction, in order to meet every possible contingency of the proof.[84] Each count, however, must be sufficient and complete in itself; one alleging facts essential to the offense only by reference to another count is bad.[85]

I. Repugnancy, Duplicity, and Uncertainty. The indictment for uttering, passing, or having in possession must not be repugnant,[86] duplicitous,[87] or

authorized for that purpose," it is incumbent upon the state to prove the fact as alleged. State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444. See also State *v.* Pierce, 8 Iowa 231.

82. Hobbs *v.* State, 9 Mo. 855; State *v.* Hayden, 15 N. H. 355; People *v.* Davis, 21 Wend. (N. Y.) 309. See also People *v.* Peabody, 25 Wend. (N. Y.) 472.

Where the bank is within and chartered by the state in which the indictment is laid, an averment of corporate existence is unnecessary, as the court will take judicial notice of its corporate existence. Owen *v.* State, 5 Sneed (Tenn.) 493. See also U. S. *v.* Williams, 28 Fed. Cas. No. 16,706, 4 Biss. 302.

83. *Kentucky.*— Kennedy *v.* Com., 2 Metc. 36.

Massachusetts.— Com. *v.* Simonds, 11 Gray 306. *Compare* Com. *v.* Carey, 2 Pick. 47.

Minnesota.— See Benson *v.* State, 5 Minn. 19.

North Carolina.— State *v.* Twitty, 9 N. C. 248.

Rhode Island.— State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Tennessee.— Jones *v.* State, 5 Sneed 346; Fergus *v.* State, 6 Yerg. 345. See also Williams *v.* State, 9 Humphr. 80.

Vermont.— State *v.* Wheeler, 35 Vt. 261; State *v.* Wilkins, 17 Vt. 151.

Wisconsin.— State *v.* Morton, 8 Wis. 352. See also Snow *v.* State, 14 Wis. 479.

See 13 Cent. Dig. tit. "Counterfeiting," § 32.

Sufficiency of allegation of incorporation see Johnson *v.* State, 35 Ala. 370; State *v.* Johnson, 3 Harr. (Del.) 561; State *v.* Ward, 9 N. C. 443. See also People *v.* Stewart, 4 Mich. 655.

84. State *v.* McPherson, 9 Iowa 53. In this case there were joined counts for counterfeiting coin, for having in possession more than five pieces, for having in possession less than five, and for passing. See also McGregor *v.* State, 16 Ind. 9.

As to joinder of counts generally see INDICTMENTS AND INFORMATIONS.

As to election between counts see *infra*, VII, A.

Where the same act constitutes an offense under two different statutes counts under both statutes may be joined. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357.

85. Rex *v.* Kelly, 3 Esp. 28, in which, in a count charging possession, the time was fixed by reference to the time of an uttering charged in a separate count.

86. State *v.* Shoemaker, 7 Mo. 177; Kirby *v.* State, 1 Ohio St. 185.

It is not repugnant to describe a bill as a treasury note when the copy set out shows it to be a United States note (U. S. *v.* Marcus, 53 Fed. 784), to describe as a promissory note when the copy shows a bank-bill (Com. *v.* Thomas, 10 Gray (Mass.) 483), to describe as "blanks in the form and similitude of bills" as unfinished bills may have similitude to finished ones (People *v.* Ah Sam, 41 Cal. 645), or to describe a note as that of the P. & M. Bank, this being the corporate name, while the tenor, as set out, was "The President, Directors & Co. of the P. & M. Bank" (State *v.* Calvin, R. M. Charlt. (Ga.) 151. See also State *v.* Harris, 27 N. C. 287; State *v.* Pitman, 1 Brev. (S. C.) 32, 2 Am. Dec. 645).

Repugnancy in statute.—A statute against uttering or publishing as true "any false, forged or counterfeit bill or note issued by order of the president, directors," etc., and "signed by the president, and countersigned by the cashier," is void for repugnancy, as such a note would necessarily be genuine. U. S. *v.* Cantril, 4 Cranch (U. S.) 167, 2 L. ed. 584. But a statute describing the offense in the words "who shall falsely and fraudulently make any counterfeit note" (State *v.* Calvin, R. M. Charlt. (Ga.) 151), a statute against counterfeiting any note "issued under authority," or "uttering such counterfeit note" (U. S. *v.* Howell, 11 Wall. (U. S.) 432, 20 L. ed. 195), and a statute against making "counterfeited" bills, although the word implies, strictly speaking, altered and not false bills (State *v.* Randall, 2 Aik. (Vt.) 89) are not repugnant.

87. An indictment is not bad for duplicity which charges the possession of "sundry" counterfeit bills which it sets out (Com. *v.* Thomas, 10 Gray (Mass.) 483), which charges an uttering and passing (McGregor *v.* State, 16 Ind. 9; Com. *v.* Hall, 4 Allen (Mass.) 305), which charges a making and having in possession (State *v.* Myers, 10 Iowa 448), which charges conjunctively the offense of "selling, exchanging or delivering" (State *v.* Fitzsimmons, 30 Mo. 236), which charges counterfeiting, causing and procuring the same and assisting in the same, although in a single count, the words of the statute being followed (Rasnick *v.* Com., 2 Va. Cas. 356), which charges, in different counts, making counterfeit, possession with intent to pass five or more pieces, and possessing with such intent less than five, all referring to the same

uncertain in its material allegations.[88] Vice in these respects is fatal to its validity.

J. Variance. The proofs must correspond with the allegations of the indictment, and where unnecessary allegations are inserted they cannot be rejected as surplusage, but must be proved as alleged.[89]

VI. EVIDENCE.

A. Presumptions. While in prosecutions for counterfeiting there can be no presumption of guilty knowledge as matter of law, yet from the existence of facts there may be presumptions of fact.[90] Thus the making of counterfeit being proved, the intent to use it for an unlawful purpose will be presumed;[91] and the act of knowingly passing being proved, the conclusion of intent to defraud necessarily follows[92] or will be presumed.[93] So in a prosecution for counterfeiting bank-notes, proof that the notes mentioned in the indictment and others of like kind, together with plates and implements for making them, were found in the

transaction (State *v.* McPherson, 9 Iowa 53), or which charges that the accused "forged or counterfeited" (Johnson *v.* State, 35 Ala. 370).

88. Jones *v.* State, 11 Ind. 357 (holding bad an indictment charging the accused with having in possession several counterfeits purporting to be genuine five-dollar bills of a certain bank "of which the following is a copy of one"); State *v.* Halder, 2 McCord (S. C.) 377, 13 Am. Dec. 738 (holding that an indictment is bad for uncertainty which omits the word "did" in charging that the accused "feloniously [did] utter and publish").

89. State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444; Clark *v.* Com., 16 B. Mon. (Ky.) 206; State *v.* Smith, 31 Mo. 120; Griffin *v.* State, 14 Ohio St. 55; State *v.* Aukrim, Tapp. (Ohio) 112.

The following variances were held fatal:

Proof of passing bills of a different bank than the one charged. Clark *v.* Com., 16 B. Mon. (Ky.) 206.

Proof of passing to a different person than the one named. Rouse *v.* State, 4 Ga. 136. But under an allegation of passing "with intent to defraud A," it is sufficient to prove passing to A in payment of goods bought of A & Co., A being a member of the firm. Stoughton *v.* State, 2 Ohio St. 562.

Producing a bill of a different number than that charged. Griffin *v.* State, 14 Ohio St. 55; U. S. *v.* Mason, 36 Fed. Cas. No. 15,736, 12 Blatchf. 497.

A difference in the initial letter of the president of the bank between the bill as alleged and produced. State *v.* Smith, 31 Mo. 120.

Producing a bill purporting to be of the Bank of South Carolina, while the indictment gave the name of the bank as "The President and Directors of the Bank of South Carolina." State *v.* Waters, 3 Brev. (S. C.) 507. But an averment of possession of a counterfeit bill "purporting to be issued by the president, directors and company" of an "incorporated banking company duly established" in another state was held to be sustained by proof of passing a counterfeit bill of a national bank under the United States statutes. Com. *v.* Hall, 97 Mass. 570.

Proof of a die of iron and steel under an allegation of one of zinc and antimony. *In re* Dorsett, 5 City Hall Rec. (N. Y.) 77.

Proof that a counterfeit was of "base metal" under an allegation that it was a "counterfeit gold coin." Rouse *v.* State, 4 Ga. 136.

Proof of "paying out" upon a check drawn upon the accused of a draft in the similitude of a bank-bill under an allegation of "issuing" such draft. People *v.* Wells, 8 Mich. 104.

Failure to prove some of the tools specified under an indictment specifying certain tools and "other apparatus and instruments." Peoples *v.* State, 6 Blackf. (Ind.) 95.

The following were held immaterial variances:

Where the abbreviations of Latin words on the seal on a note were incorrectly given in an indictment, and so as to form no words, Latin or English. U. S. *v.* Mason, 26 Fed. Cas. No. 15,736, 12 Blatchf. 497.

"J. N. Thonpson," and "J. N. Thompson." State *v.* Wheeler, 35 Vt. 261. "Droun" and "Drown." Com. *v.* Woods, 10 Gray (Mass.) 477. "F. E. Spinner" and "P. E. Spinner." Com. *v.* Hall, 97 Mass. 570. "B. Aymar or bearer" and "B. Amar, bearer." Quigley *v.* People, 3 Ill. 301. "Except on duties" and "except duties." U. S. *v.* Mason, 26 Fed. Cas. No. 15,736, 12 Blatchf. 497. "Promise" and "promises." May *v.* State, 14 Ohio 461, 45 Am. Dec. 548. "Pay to bearer" and "Pay bearer." U. S. *v.* Mason, 26 Fed. Cas. No. 15,736, 12 Blatchf. 497. See also Gentry *v.* State, 6 Ga. 503; Com. *v.* Stearns, 10 Metc. (Mass.) 256; Buckland *v.* Com., 8 Leigh (Va.) 732.

90. Wash *v.* Com., 16 Gratt. (Va.) 530.

91. State *v.* McPherson, 9 Iowa 53.

92. People *v.* Page, 1 Ida. 190.

93. U. S. *v.* Shellmire, 27 Fed. Cas. No. 16,271, Baldw. 370.

possession of defendant constitutes *prima facie* evidence that defendant was the counterfeiter;[94] and the same is true in case of counterfeiting coin.[95]

B. Admissions. The passing of the counterfeit being proved, defendant's agency may then be shown by his own confession. This does not violate the rule that the *corpus delicti* cannot be proved by the confession of the accused.[96]

C. Proof of Scienter — 1. In General. Facts bearing directly or indirectly on the question of scienter or intent may generally be shown.[97]

2. Possession of Counterfeit — a. By Accused. In prosecutions for passing or uttering counterfeit it is competent to prove, as bearing on the questions of scienter or guilty knowledge and of guilty intent, that the accused had in his possession, at, before, or after the time of the commission of the act charged, other counterfeit of the same kind as, or similar to, that passed or uttered;[98] that he had previously uttered or passed other such counterfeit;[99] and that he had in

94. Spencer *v.* Com., 2 Leigh (Va.) 751.

Place of counterfeiting.— The fact that counterfeit bills with instruments for making them were found in the possession of the accused in a certain county is *prima facie* evidence that the counterfeiting was done in that county (Spencer *v.* Com., 2 Leigh (Va.) 751), and the counterfeiting of a bill being proved, possession in a certain county is sufficient to support the inference that they were made in that county (Johnson *v.* State, 35 Ala. 370).

95. U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23; U. S. *v.* King, 26 Fed. Cas. No. 15,535, 5 McLean 208.

96. U. S. *v.* Marcus, 53 Fed. 784.

Admissions of co-conspirator.— In a case of a conspiracy to make and utter counterfeit, the admissions of a co-conspirator were held admissible against a defendant upon proof that such defendant was a relative of others of the defendants, that he resided with one of them six weeks while counterfeit was being made, that he wrote a letter ordering the machine with which it was made, and that on the arrest of one of the defendants he wrote offering assistance in getting bail. Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449.

Statements of defendant made at the time of the commission of the act charged are admissible as part of the *res gestæ*. McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510. And it may be shown that the accused made conflicting statements in accounting for his possession of counterfeit (Com. *v.* Starr, 4 Allen (Mass.) 301), or made no explanation of how he got it, nor any assertion of innocence (U. S. *v.* Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122).

97. Thus it is competent to show that the accused had, at about the time of the commission of the offense alleged, passed another note of the same kind which was thought to be counterfeit and which he took back (Martin *v.* Com., 2 Leigh (Va.) 745); that he had attempted to pass the same note at different times, and on its being challenged as false had declared it to be good (State *v.* Smith, 5 Day (Conn.) 175, 5 Am. Dec. 132); that a recipe was found on the person of the accused purporting to give ingredients of a compound suitable for counterfeiting which experts testify would be suitable for the purpose, the prosecution being for having possession of counterfeiting tools (Long *v.* State, 10 Tex. App. 186); and where several tools were found, that although each might be used for purposes other than counterfeiting there was no other business in which all could be used (U. S. *v.* Tarr, 28 Fed. Cas. No. 16,434, 4 Phila. (Pa.) 405, 18 Leg. Int. (Pa.) 214). Defendant may show how he received the counterfeit, or his good character. U. S. *v.* Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122. But in a prosecution for having counterfeit in possession it is not competent to show that the accused received from the post-office a letter containing counterfeit which was taken from him before being opened. Com. *v.* Edgerly, 10 Allen (Mass.) 184.

Hearsay evidence is inadmissible on the question of scienter. Thus it may not be shown that while the accused, upon his arrest, was yet in the custody of the officer, a bunch of counterfeit was handed to the officer with the statement that one in the company of the accused who was arrested with him had thrown it away on the way to prison. Cantor *v.* People, 5 Park. Crim. (N. Y.) 217.

98. *Indiana.*— McGregor *v.* State, 16 Ind. 9.

Massachusetts.— Com. *v.* Price, 10 Gray 472, 71 Am. Dec. 668.

Pennsylvania.— U. S. *v.* Goughnour, 2 Pittsb. 369.

South Carolina.— State *v.* Williams, 2 Rich. 418, 45 Am. Dec. 741 [*overruling* State *v.* Odel, 3 Brev. 552]; State *v.* Petty, Harp. 59.

Virginia.— Hendrick *v.* Com., 5 Leigh 707.

England.— Reg. *v.* Forster, 3 C. L. R. 681, 6 Cox C. C. 521, Dears. C. C. 456, 1 Jur. N. S. 407, 24 L. J. M. C. 134.

See 13 Cent. Dig. tit. "Counterfeiting," § 45.

The extent of the rule seems to go only to admitting evidence of possession of counterfeit similar in kind; that is, possession of counterfeit coin may only be shown under indictments relating to coin and *vice versa*. Stalker *v.* State, 9 Conn. 341; Bluff *v.* State, 10 Ohio St. 547; U. S. *v.* Goughnour, 2 Pittsb. (Pa.) 369. But see Lane *v.* State, 16 Ind. 14; *In re* Quin, 6 City Hall Rec. (N. Y.) 63.

99. *Delaware.*— State *v.* Tindal, 5 Harr. 488.

possession or had passed spurious notes, as distinguished from counterfeit.[1] The possession or passing so proved may be in another state,[2] or a long time prior,[3] the time elapsing being immaterial as a matter of law, but the inference of scienter being weaker as the lapse is longer.[4] The rule applies in case of altered bills,[5] in prosecutions for counterfeiting trade-marks,[6] and for having possession of counterfeit[7] or counterfeiting tools.[8] The fact of such possession may be proved, although the accused was prosecuted for the offense.[9] The proof necessary to rebut the presumption of unlawful intent on the part of one making counterfeit may be introduced by him, or it may be shown from the circumstances as disclosed by the state.[10]

b. By Third Persons, Confederates, Etc. It may be shown, as bearing on the question of scienter, that a third person, in the presence of the accused and for the benefit of both, passed counterfeit similar to that passed by the accused;[11] that such counterfeit was in the possession of a confederate;[12] that the accused was in the company of another at the time the latter passed such counterfeit, both before and after the act of the accused was committed;[13] or that other persons with whom the accused has been first connected in the general transaction had machines for counterfeiting in their possession.[14] It may be shown that the accused was in conversation with one who had passed other counterfeit bills of the same bank;[15] that on the same evening, in the same town, other counterfeit

Indiana.— McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510.

Maine.— State *v.* McAllister, 24 Me. 139.

Massachusetts.— Com. *v.* Stearns, 10 Metc. 256; Com. *v.* Bigelow, 8 Metc. 235.

Missouri.— State *v.* Mix, 15 Mo. 153.

New Jersey.— State *v.* Robinson, 16 N. J. L. 507; State *v.* Van Houten, 3 N. J. L. 672, 4 Am. Dec. 407.

North Carolina.— State *v.* Twitty, 9 N. C. 248.

South Carolina.— State *v.* Williams, 2 Rich. 418, 45 Am. Dec. 741. But see State *v.* Houston, 1 Bailey 300.

Tennessee.— Peek *v.* State, 2 Humphr. 78.

United States.— U. S. *v.* Doebler, 25 Fed. Cas. No. 14,977, Baldw. 519; U. S. *v.* Noble, 27 Fed. Cas. No. 15,895, 5 Cranch C. C. 371.

See 13 Cent. Dig. tit. "Counterfeiting," § 45.

1. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

2. Van Houton's Case, 2 City Hall Rec. (N. Y.) 73.

3. State *v.* Twitty, 9 N. C. 248.

4. U. S. *v.* Doebler, 25 Fed. Cas. No. 14,977, Baldw. 519.

In a prosecution for counterfeiting notes of one bank it was held incompetent to prove the uttering, three years previous, of counterfeit notes of another bank. Morris *v.* State, 8 Sm. & M. (Miss.) 762.

5. Mount *v.* Com., 1 Duv. (Ky.) 90.

6. People *v.* Molins, 10 N. Y. Suppl. 130, 7 N. Y. Crim. 51.

7. Com. *v.* Stearns, 10 Metc. (Mass.) 256; Galbrant's Case, 1 City Hall Rec. (N. Y.) 109; Reg. *v.* Jarvis, 7 Cox C. C. 53, Dears. C. C. 552, 1 Jur. N. S. 1114, 25 L. J. M. C. 30.

8. People *v.* White, 34 Cal. 183; Reg. *v.* Weeks, 8 Cox C. C. 455, 7 Jur. N. S. 472, 30 L. J. M. C. 141, 4 L. T. Rep. N. S. 373, L. & C. 18, 9 Wkly. Rep. 553, where the rule was held to hold, although there was no proof that the counterfeit in possession was made with the tools.

Under a count for possession of counterfeit with the "intent to render current as true," interpreted as meaning to sell for passing, the possession of counterfeit other than that charged was held incompetent, although it was stated the rule would be otherwise under a count for possession with intent to pass as true. People *v.* Stewart, 5 Mich. 243.

9. State *v.* Tindal, 5 Harr. (Del.) 488. But see Reg. *v.* Goodwin, 10 Cox C. C. 534; Reg. *v.* Martin, L. R. 1 C. C. 214, 11 Cox C. C. 343, 39 L. J. M. C. 31, 21 L. T. Rep. N. S. 469, 18 Wkly. Rep. 72, holding that a previous conviction cannot be shown.

10. State *v.* McPherson, 9 Iowa 53.

Defendant may rebut the proof of scienter by proving any circumstances tending to show that he supposed the bill to be genuine; e. g., that he consulted a pamphlet commonly known as a "counterfeit detector." State *v.* Morton, 8 Wis. 352.

11. Reed *v.* State, 15 Ohio 217.

12. U. S. *v.* Taranto, 74 Fed. 219; U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,787, Baldw. 366.

13. State *v.* Spalding, 19 Conn. 233, 48 Am. Dec. 158.

14. U. S. *v.* Craig, 25 Fed. Cas. No. 14,883, 4 Wash. 729. In Griffin *v.* State, 14 Ohio St. 55, it was held not competent to show such possession by an accomplice fifty days after the act charged. In Goldsby's Case, 1 City Hall Rec. (N. Y.) 81, it was held incompetent to show that at the time of his arrest the accused was in the company of one who had been convicted of the same offense, or that he boarded at the house where counterfeit and instruments for counterfeiting were found and with one who had been convicted of such keeping, without connecting him with the business of counterfeiting.

15. State *v.* Smith, 5 Day (Conn.) 175, 5 Am. Dec. 132.

was passed, although the person so passing it could only be identified with the accused in general appearance;[16] that defendant's wife at the time of his arrest delivered up a quantity of counterfeit;[17] or that defendant's wife, about the time of the act charged, in his absence, sold other counterfeit, and that he afterward had knowledge of and sanctioned such sale.[18]

3. CONCEALMENT OF COUNTERFEIT. It may be shown, on the question of scienter, that on his arrest the accused attempted to conceal the fact of possession of bills similar to those he is charged with uttering;[19] that he at such time swallowed,[20] or had just before concealed similar bills;[21] that similar bills were found hidden near a house in which he formerly lived;[22] or that before the alleged concealment the accused had seen persons who had seen him publicly whipped for counterfeiting on a former occasion.[23]

4. PREVIOUS OCCUPATION. It is competent to show, on the point of scienter, that the accused had been employed in the business of printing genuine bills;[24] and his previous statements that he had been engaged in passing or handling counterfeit,[25] or that he had endeavored to engage a person to procure counterfeit for him, asked him if he had got it, and declared that he intended to make the acquaintance of a counterfeiter, may be shown.[26]

D. Proof of Spuriousness — 1. IN GENERAL. The fact that bills are counterfeit may be proved by expert evidence. It is not necessary to produce an officer of the bank by which the bill purports to be issued.[27] Officers of other banks,[28] brokers and merchants who have habitually received the notes of the bank so long as to have become acquainted with them,[29] persons who have before seen the genuine bills of the bank and are skilled in the detection of counterfeit money,[30] or persons acquainted with the signatures of the officers of the bank[31] are competent. The testimony may be based not only on knowledge of the signatures to the bill, but also on that as to the paper, engraving, type, and general appearance.[32] Experts may testify as to bills being genuine without proof of the existence of a bank issuing bills, of which the bills in question purport to be.[33] A witness is not competent to testify upon the subject who has never seen a

16. People *v.* Clarkson, 56 Mich. 164, 22 N. W. 258.

17. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

18. Bersch *v.* State, 13 Ind. 434, 74 Am. Dec. 263. But in People *v.* Thoms, 3 Abb. Dec. (N. Y.) 571, 3 Park. Crim. (N. Y.) 256, it was held incompetent to show the possession by the wife of the accused of fragments of bank-bills appropriately cut for the purpose of making alterations similar to those of altered bills which the husband was charged with having the possession of.

19. Johnson *v.* State, 35 Ala. 370.

20. Com. *v.* Hall, 4 Allen (Mass.) 305.

21. State *v.* Spring, Tapp. (Ohio) 167.

22. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

23. State *v.* Spring, Tapp. (Ohio) 167.

24. Com. *v.* Hall, 4 Allen (Mass.) 305.

25. Com. *v.* Edgerly, 10 Allen (Mass.) 184. But see Com. *v.* Bigelow, 8 Metc. (Mass.) 235.

26. Finn *v.* Com., 5 Rand. (Va.) 701.

27. May *v.* State, 14 Ohio 461, 45 Am. Dec. 548; State *v.* Anderson, 2 Bailey (S. C.) 565; State *v.* Hooper, 2 Bailey (S. C.) 37.

Where there is a statute requiring the testimony of officers of the bank if residing within a certain distance, the officers need not be produced if without the state, although within the distance. Com. *v.* Carey, 2 Pick. (Mass.) 47.

28. *Alabama.*— Johnson *v.* State, 35 Ala. 370.

Michigan.— Atwood *v.* Cornwall, 28 Mich. 336, 15 Am. Rep. 219.

North Carolina.— State *v.* Harris, 27 N. C. 287.

Ohio.— Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Pennsylvania.— Com. *v.* Smith, 6 Serg. & R. 568.

See 13 Cent. Dig. tit. "Counterfeiting," § 43.

29. Johnson *v.* State, 35 Ala. 370; Watson *v.* Cresap, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; State *v.* Cheek, 35 N. C. 114; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568.

30. State *v.* Calvin, R. M. Charlt. (Ga.) 151; Furber *v.* Hilliard, 2 N. H. 480; State *v.* Woodruff, Tapp. (Ohio) 26; Martin *v.* Com., 2 Leigh (Va.) 745.

31. State *v.* Carr, 5 N. H. 367; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568; State *v.* Stalmaker, 2 Brev. (S. C.) 1; State *v.* Lawrence, Brayt. (Vt.) 78; State *v.* Ravelin, 1 D. Chipm. (Vt.) 295.

32. State *v.* Harris, 27 N. C. 287; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568.

33. Jones *v.* State, 11 Ind. 357.

genuine bill of the bank, but whose knowledge is obtained wholly from printed descriptions and *facsimiles*.[34] A "Bank-Note Detector," that is, a pamphlet describing counterfeits, is not admissible to prove bills counterfeit.[35]

2. Production of Counterfeit. In prosecutions for counterfeiting it is incompetent to give evidence as to spuriousness until the counterfeit itself has been produced,[36] unless the prosecutor is unable to produce the counterfeit.[37] Production may be dispensed with and secondary evidence of spuriousness introduced on proof that defendant destroyed or mutilated the alleged counterfeit.[38] If the counterfeit is in the possession of the accused, secondary evidence on the subject will not be admitted except upon notice to defendant to produce, as in civil cases.[39] Defendant cannot be made to produce counterfeit and thus furnish evidence against himself.[40]

E. Weight and Sufficiency — 1. In General. All facts necessary to constitute the offense charged must be proved,[41] such as scienter,[42] circulation of the money counterfeited,[43] and the existence of a genuine bank-bill such as is charged to have been counterfeited.[44] Intent to defraud a particular person must be proved when alleged.[45] Where the statute grades the offense according to the number of counterfeits in possession, the evidence must show the number to support conviction of the higher offense.[46] It is not necessary to prove that the notes described in the indictment and the ones given in evidence are the same;[47] or that such genuine coin exists as the counterfeit purports to be in imitation

Being a stock-holder of the bank does not disqualify a witness from testifying upon the subject. State *v.* Kinny, Tapp. (Ohio) 169.

34. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

35. Payson *v.* Everett, 12 Minn. 216.

36. State *v.* Orsborn, 1 Root (Conn.) 152.

37. State *v.* Phelps, 2 Root (Conn.) 87.

38. State *v.* Ford, 2 Root (Conn.) 93; State *v.* Potts, 9 N. J. L. 26, 17 Am. Dec. 449.

39. Armitage *v.* State, 13 Ind. 441.

The same rules apply in case of proof of scienter by proving possession or the passing of other counterfeit. Such other counterfeit must be produced, or its destruction, or that it is in the hands of the defendant, shown. Com. *v.* Bigelow, 8 Metc. (Mass.) 235. Notice to produce must be given to the accused, if the counterfeit is in his possession, or proof made that it is beyond the reach of the court if it is not. State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678. It has been held, however, that it may be proved that the money passed was counterfeit without producing it or accounting for its non-production (Kirk *v.* Com., 9 Leigh (Va.) 627), and, in proving scienter, that the money in possession may be proved to be counterfeit without producing it or giving notice to produce it, that other circumstances must appear to make such course error (McGregor *v.* State, 16 Ind. 9).

40. Armitage *v.* State, 13 Ind. 441.

41. Brown *v.* People, 9 Ill. 439; U. S. *v.* Fitzgerald, 91 Fed. 374.

Evidence held sufficient.— Evidence that defendant passed the coin as charged, that it was spurious, that he gave different accounts as to where he received it, and that he offered no explanation on the trial is sufficient to sustain a conviction. Perdue *v.* State, 2 Humphr. (Tenn.) 494. So proof that defendant had counterfeit bills in his possession knowing them to be counterfeit and knowing that the person to whom he sold them intended to pass them as true, supports a conviction for "passing with intent to render current as true." Com. *v.* Davis, 11 Gray (Mass.) 4. And proof that defendant had in possession counterfeit coin for sale and that he sold it to A, who bought merely to secure evidence against defendant, satisfies an indictment for having in possession "with intent to defraud A or others." People *v.* Farrell, 30 Cal. 316.

42. Wash *v.* Com., 16 Gratt. (Va.) 530; State *v.* Morton, 8 Wis. 352.

43. State *v.* Shelton, 7 Humphr. (Tenn.) 31.

When circulation is not necessary to prove, it is material on the question of fraudulent intent. Johnson *v.* State, 35 Ala. 370.

44. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

45. Wilkinson *v.* State, 10 Ind. 372. But see U. S. *v.* Moses, 27 Fed. Cas. No. 15,825, 4 Wash. 726, holding that where the act charged is proved proof of intent to defraud some person or corporation is unnecessary. And where the offense was "knowingly having in his possession, and secretly keeping a plate for the purpose of striking or printing any false or counterfeit," it was held that knowingly having and secretly keeping completed the offense, and that proof of intent to use in counterfeiting was unnecessary. Sasser *v.* State, 13 Ohio 453, 483.

An intent to defraud a particular person will be presumed where passing to a slave was alleged and the master was in fact the person defrauded. Com. *v.* Starr, 4 Allen (Mass.) 301.

46. State *v.* Pepper, 11 Iowa 347.

47. U. S. *v.* Moses, 27 Fed. Cas. No. 15,825, 4 Wash. 726.

of;[48] and the ingredients of counterfeit coin need not be proved, even though alleged.[49]

2. EXISTENCE OF BANK. Where the existence of a bank is necessary to be proved, proof of general reputation is sufficient;[50] and incorporation may be so proved.[51] It is not necessary to prove such facts by production of the articles of incorporation, or an authenticated copy,[52] or the "best evidence."[53]

3. INTENT. Intention to pass may be proved by circumstances, although possession must be established by positive testimony.[54]

4. TESTIMONY OF ACCOMPLICES. The evidence of an accomplice that he received the counterfeit from the accused, unsupported by corroborating evidence connecting him with it, is insufficient to sustain a conviction.[55]

VII. TRIAL.

A. Election Between Counts. Upon a joinder of a count for making counterfeit with one for having in possession with intent to pass, the prosecutor will be required to elect on which count he will proceed if the punishment of the two offenses is different.[56]

B. Operating Machine Before Jury. It is proper to produce a plating machine with which it is alleged that counterfeiting was done and have it worked before the jury by an expert to show that it would make the counterfeit.[57]

C. Questions For Jury. The questions of similitude,[58] uttering,[59] intent and

48. U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23. The reason for the rule is that the court takes judicial notice of United States coins and coins current by law.

49. State *v.* Beeler, 1 Brev. (S. C.) 482; State *v.* Griffin, 18 Vt. 198.

50. People *v.* Ah Sam, 41 Cal. 645; State *v.* Fitzsimmons, 30 Mo. 236; People *v.* Chadwick, 2 Park. Crim. (N. Y.) 163; Reed *v.* State, 15 Ohio 217. See also State *v.* McAllister, 24 Me. 139; State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

51. State *v.* Tindal, 5 Harr. (Del.) 488; State *v.* Pierce, 8 Iowa 231; Jennings *v.* People, 8 Mich. 81.

Proof that the bills of a bank are in general circulation is sufficient evidence of the due organization of the bank. Jennings *v.* People, 8 Mich. 81; State *v.* Carr, 5 N. H. 367.

52. People *v.* Chadwick, 2 Park. Crim. (N. Y.) 163; Sarles' Case, 4 City Hall Rec. (N. Y.) 107. It has been held, however, that incorporation cannot be proved by parol, but only by the memorandum required by the statute to be entered of record upon incorporating or certified copy thereof (Trice *v.* State, 2 Head (Tenn.) 591), and in case of a bank of another state, by authenticated copy of the articles or the act of incorporation (Stone *v.* State, 20 N. J. L. 401); but the certificate of the secretary of the other state to the fact of incorporation has been held sufficient (Mount *v.* Com., 1 Duv. (Ky.) 90).

53. People *v.* Davis, 21 Wend. (N. Y.) 309.

The fact that the person whose name is on the bill as president is the president of the bank may be proved by parol. It is not necessary to produce the books of the bank as the best evidence. The best evidence is the best which the nature of the case affords. State *v.* Smith, 5 Day (Conn.) 175, 5 Am. Dec. 132.

54. People *v.* Gardner, 1 Wheel. Crim. (N. Y.) 23.

Possession of counterfeit is sufficient evidence of procuring with intent to pass it as genuine. Rex *v.* Fuller, R. & R. 229.

55. State *v.* Pepper, 11 Iowa 347. But in Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668, a verdict of guilty based on the unsupported testimony of accomplices was permitted to stand, where the trial judge advised the jury to acquit, but instructed them that if upon the whole case they were satisfied beyond a reasonable doubt of the guilt of the accused they should convict.

Who are accomplices.— A detective (People *v.* Molins, 10 N. Y. Suppl. 130, 7 N. Y. Crim. 51), one who feigns to be an accomplice to secure evidence (People *v.* Farrell, 30 Cal. 316), or one who acts as an innocent agent after reporting to the government officers an order received for making counterfeiting tools and who is directed by them to fill the order (Reg. *v.* Banner, 2 Moody C. C. 309) is not an accomplice within the rule.

Sufficiency of corroboration.— It is not necessary, in a prosecution for having in possession with intent to pass, that the corroborating circumstances go to the fact of uttering. It is sufficient if there be such circumstances tending to establish the intent. People *v.* Davis, 21 Wend. (N. Y.) 309.

56. State *v.* Johnson, 3 Harr. (Del.) 561; Quin's Case, 6 City Hall Rec. (N. Y.) 63. See also Burges *v.* State, 81 Miss. 482, 33 So. 499. But see McGregor *v.* State, 16 Ind. 9.

57. Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449.

58. U. S. *v.* Stevens, 52 Fed. 120; Reg. *v.* Robinson, 10 Cox C. C. 107, 11 Jur. N. S. 452, 34 L. J. M. C. 176, 12 L. T. Rep. N. S. 501, L. & C. 604, 13 Wkly. Rep. 727; Rex *v.* Welsh, 1 East P. C. 87, 164, 1 Leach 364.

59. State *v.* Horner, 48 Mo. 520.

guilty knowledge,[60] and variance, when properly submitted,[61] are for the jury; and it is for the jury to say whether an instrument for coining will make a coin such as to impose on the world.[62]

D. Verdict. Several notes being set out in an indictment for having counterfeit in possession a verdict of guilty may be rendered on the whole or a part;[63] and when there are several counts charging the accused with having counterfeit in possession and a verdict is rendered "guilty on the first count for having in possession counterfeit coin" the verdict is good as a general verdict.[64]

E. Sentence. As an indictment may properly charge in different counts an offense against obligations of the United States and against national bank-notes, a defendant on conviction on both counts may be separately sentenced for each offense.[65]

COUNTER LETTER. See MORTGAGES.

COUNTERMAND. In practice, a new or opposite direction; an order made contrary to a former one, for the purpose of avoiding or suspending it; the revocation of a thing before done, or directed to be done.[1]

COUNTERMARK. A sign put upon goods already marked; also the several marks put upon goods belonging to several persons, to show that they must not be opened, but in the presence of all the owners or their agents.[2]

COUNTERPART. In conveyancing, the corresponding part of an instrument; a duplicate or COPY,[3] *q. v.*

COUNTERPLEA. A plea of an incidental kind, and now of rare occurrence,

60. State *v.* Horner, 48 Mo. 520; People *v.* Haggerty, 1 Wheel. Crim. Cas. (N. Y.) 195; Pierce's Case, 1 City Hall Rec. (N. Y.) 2; Perdue *v.* State, 2 Humphr. (Tenn.) 494; U. S. *v.* Stevens, 52 Fed. 120.

61. State *v.* Potts, 9 N. J. L. 26, 17 Am. Dec. 449.

62. State *v.* Collins, 10 N. C. 191.

Although no impression is discernible on counterfeit coin passed, the jury by their verdict having found a sufficient similitude, the verdict will stand. Rex *v.* Welsh, 1 East P. C. 87, 164, 1 Leach 364.

63. Com. *v.* Thomas, 10 Gray (Mass.) 483.

64. Statler *v.* U. S., 157 U. S. 277, 15 S. Ct. 616, 39 L. ed. 700.

Where there is a statute making it an offense to have in possession at one time several counterfeit bank-notes, all such notes in possession at the same time are included in a single offense, although different indictments be laid on the several notes specifying the different banks as the persons defrauded, and a verdict of guilty on one such indictment is a bar to the prosecution of the others (State *v.* Benham, 7 Conn. 414), although an acquittal on a charge of having in possession a single counterfeit note is no bar to a prosecution for having in possession a large quantity at the same time, although at the first trial the latter was shown to prove scienter (Van Houton's Case, 2 City Hall Rec. (N. Y.) 73).

65. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357.

As common utterer on several convictions. — Under a provision for sentencing one as a common utterer of counterfeit when he is convicted at the same term of three distinct offenses of uttering or having in possession less than ten pieces with intent to utter, such single sentence cannot be passed upon two convictions for uttering and one for the higher offense of having in possession more than ten pieces. Murray *v.* Com., 13 Metc. (Mass.) 514.

1. Burrill L. Dict.

This term was formerly applied to wills, leases, etc., in the sense of revocation. Burrill L. Dict. [*citing* Termes de la Ley; Forse *v.* Hembling, 4 Coke 60*b*, 61*b*, where it was said that the taking of a husband by a woman, and coverture at the time of her death, countermanded her will].

2. Wharton L. Lex.

3. Burrill L. Dict.

Where an instrument of conveyance, as a lease, is executed in parts, that is, by having several copies or duplicates made and interchangeably executed, that which is executed by the grantor is usually called the original, and the rest are "counterparts"; although where all the parties execute every part, this renders them all originals. Burrill L. Dict. [*citing* 2 Bl. Comm. 296].

Distinguished from duplicate.—"A counterpart is not strictly the same as a duplicate; but the stamp which is proper for one is so for the other, and both are under the seal of the lessee." Per Littledale, J., in Doe *v.* Smith, 8 A. & E. 255, 262, 35 E. C. L. 579. "A counterpart and a duplicate, though not the same, are stamped alike." Per Patterson, J., in Doe *v.* Smith, 8 A. & E. 255, 262, 35 E. C. L. 579.

"A counterpart is, properly, executed by the grantee only. If the instrument is executed by both parties, it is either the only document that exists, or a duplicate: but, to use it as a duplicate, you must show that there was an original, properly stamped."

diverging from the main series of the allegations in a cause.[4] (See, generally, PLEADING.)

COUNTER ROLL. In old English law and practice, a roll kept by an officer as a check upon another officer's roll.[5] (See COMPTROLLER; CONTROLLER.)

COUNTER SECURITY. See PRINCIPAL AND SURETY.

COUNTERSIGN.[6] As a noun, the signature of a secretary or other subordinate officer to any writing signed by the principal or superior to vouch for the authenticity of it;[7] also, a military watchword.[8] As a verb, to sign what has already been signed by a superior; to authenticate by an additional signature.[9] (See SIGNATURES.)

COUNTERVAILING EQUITY. A contrary and balancing equity; an equity or right opposed to that which is sought to be enforced or recognized, and which ought not to be sacrificed or subordinated to the latter, because it is of equal strength and justice, and equally deserving of consideration.[10] (See, generally, EQUITY.)

COUNTERVAIL LIVERY. An act which supplies the place of and renders unnecessary that open and notorious delivery of the possession which the common law requires in cases of transfer of lands.[11]

COUNTEZ. Count or reckon. In old practice, a direction formerly given by the clerk of a court to the crier, after a jury was sworn, to number them.[12]

Doe *v.* Smith, 8 A. & E. 255, 262, 35 E. C. L. 579.

4. Burrill L. Dict. [*citing* Stephen Pl. 72]. And see 2 Saund. 45*h*.

Counterpleas in the old actions were a kind of replication, and were used particularly as answers to aid prayer. Burrill L. Dict. [*citing* Termes de la Ley].

5. Burrill L. Dict.

6. **This word has a well defined meaning** both in the law and in the lexicon. New York Fifth Nat. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 231, 240, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331.

7. Wharton L. Lex.

8. English L. Dict.

9. Gurnee *v.* Chicago, 40 Ill. 165, 167; Worcester Dict. [*quoted* in New York Fifth Nat. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 231, 240, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331].

The word usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and it denotes the complete execution of the paper. New York Fifth Nat. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 231, 240, 35 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331.

10. Black L. Dict.

11. Miller *v.* Emans, 19 N. Y. 384, 387.

12. Burrill L. Dict.

When the jury are all sworn, the officer bids the crier number them, for which the word in law-French is "countez"; but we now hear it pronounced in very good English, "count these." 4 Bl. Comm. 340 note.

COUNTIES

By S. Blair Fisher

CROSS-REFERENCES

For Matters Relating to:
Attachment by County, see ATTACHMENT.
Condemnation of Property by County, see EMINENT DOMAIN.
County Attorney, see PROSECUTING ATTORNEYS.
County Bridge, see BRIDGES.
County Court, see COURTS.
County Drain, see DRAINS.
County Poor, see POOR PERSONS.
County Road, see STREETS AND HIGHWAYS.
Dedication by County, see DEDICATION.
Garnishment by County, see GARNISHMENT.
Implied Contract by County, see CONTRACTS.
Liability of County to:
Attachment, see ATTACHMENT.
Garnishment, see GARNISHMENT.
Municipal Corporation, see MUNICIPAL CORPORATIONS.
Special Legislation Affecting County, see CONSTITUTIONAL LAW; STATUTES.
Town or Township, see TOWNS.

I. DEFINITION.

Originally the term "county" designated the district or portion of a country under the immediate government of a count or earl.[1] In modern use the word

1. 1 Bl. Comm. 116; Black L. Dict.; Bouvier L. Dict.

Origin and history.— "The idea of a government by means of counties, comes down from the remotest period of Anglo Saxon history. It was imported to the American colonies with the common law, and entered, naturally and of course, into the frame of all their colonial governments; from whence it passed, by easy transition and necessary consequence, into the governments of the States. Our constitutions do not expressly provide for the organization of the territory into counties. This division is taken for granted, The idea of counties underlies all American constitutions. They presuppose both the existence and necessity of counties, and starting from that foundation, proceed to base thereon frames of government, in which the counties act all efficient parts. The political power is composed of representatives from counties. Through them justice is administered, the revenue collected, and the local police rendered effective. Neither the courts of justice, nor the Executive of the State, can perform any important function, except in the tribunals, or through the offices of the counties." Eagle *v.* Beard, 33 Ark. 497, 502.

The county court was sometimes anciently termed the county. Patterson *v.* Temple, 27 Ark. 202.

"An English county was not a corporation. It had no board or court which stood for the inhabitants and administered their local af-

denotes a distinct portion of the country organized by itself for judicial[2] and political purposes.[3] It may denote either the territory marked off to form a county, or the citizens resident within such territory, taken collectively and considered as invested with political rights, or the county regarded as a municipal corporation possessing subordinate governmental powers, or an organized rural society invested with specific rights and duties.[4]

II. NATURE, STATUS, AND FUNCTIONS.

A. In General. Counties are not in any respect business corporations for private purposes;[5] nor are they organized exclusively for the common benefit of

fairs. It had no power of taxation, and therefore had no corporate fund. It was merely a convenient division of the kingdom, comprising a number of quasi corporations, such as parishes, hundreds, or wapentakes, for judicial and representative purposes, in which the king, in his executive character, was represented by the *vice-comes*, or sheriff, on whom, in process of time, the civil administration was almost wholly devolved." Eastman *v.* Clackamas County, 32 Fed. 24, 29 [*citing* 1 Bl. Comm. 116, 339; Whart. L. Lex.].

2. A new county cannot be created for judicial purposes only. It is impossible from the very nature and incidents of a county organization, that it can exist alone for such purposes. If it be a county it must be embraced within the proper legal definition and description of what constitutes a county, and the judicial powers exercised within a county is but one incident attaching to a county organization. Opinion of Justices, 14 Fla. 320.

3. Black L. Dict.; Bouvier L. Dict. And for similar definitions see Opinion of Justices, 14 Fla. 320; Talbot County Com'rs *v.* Queen Anne's County Com'rs, 50 Md. 245; Clark *v.* Adair County, 79 Mo. 536.

Other definitions are: "A mere local subdivision of a state, created by it without the request or consent of the people residing therein." Woods *v.* Colfax County, 10 Nebr. 552, 7 N. W. 269.

"An involuntary political and civil division of the Territory, created by statute to aid in the administration of governmental affairs, and possessed of a portion of the sovereignty." Per Burford, C. J., in Greer County *v.* Watson, 7 Okla. 174, 54 Pac. 441 [*quoted* in Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976].

"The largest political division of the State having corporate powers." Cal. Pol. Code, § 3901.

"A municipal corporation created by law for public and political purposes and constitutes a part of the government of the State." Gooch *v.* Gregory, 65 N. C. 142, 143.

"A municipal corporation covering a certain portion or district of country, instituted as a department of the state for the purposes of the more convenient administration of justice, and the better government of the territory included." State *v.* Dudley, 1 Ohio St. 437, 452.

"A government within a government." James County *v.* Hamilton County, 89 Tenn. 237, 242, 14 S. W. 601.

"**The United States** are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England States, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned." Bouvier L. Dict.

4. Black L. Dict.

"**City**" may be included within the meaning of the term. O'Brien *v.* Vulcan Iron-Works, 7 Mo. App. 257, 259. See also 1 Md. Pub. Laws (1888), art. 1, § 11.

"**County**" and "**people of the county**" may be regarded as interchangeable or convertible terms. So too "the county" and the "commissioners of the county." St. Louis County Ct. *v.* Griswold, 58 Mo. 175. And see Carder *v.* Fayette County, 16 Ohio St. 353.

Includes "parish" or other equivalent subdivision.— In the Revised Statutes of the United States or in any act or resolution of congress the word "county" shall include a "parish" or any other equivalent subdivision of a state or territory. U. S. Rev. Stat. (1878) § 2 [U. S. Comp. Stat. (1901) p. 4].

5. They are territorial corporations or quasi-corporations created by the state as a means of exercising a portion of its political power by local administrations, on which are imposed a part of the sovereign's authority and duty to insure domestic tranquillity and promote the general welfare within the territorial limits to which they are assigned.

Alabama.— Marengo County *v.* Coleman, 55 Ala. 605; Chambers County *v.* Lee County, 55 Ala. 534; Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Missouri.— Barton County *v.* Walser, 47 Mo. 189.

North Carolina.— Dare County *v.* Currituck County Com'rs, 95 N. C. 189; White *v.* Chowan, 90 N. C. 437, 47 Am. Rep. 534; Mills *v.* Williams, 33 N. C. 558.

Ohio.— Hamilton County *v.* Mighels, 7 Ohio St. 109.

Pennsylvania.— Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713.

Tennessee.—Maury County *v.* Lewis County, 1 Swan 236.

Texas.— Heigel *v.* Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63.

citizens and property holders within their respective limits. They are of a purely political character, constituting the machinery and essential agency by which free governments are upheld and through which for the most part their powers are exercised.[6] Their functions are wholly of a public nature.[7] Counties are subordinate agencies for the orderly government of the state within the scope of their authority; hence they are subject to the control and direction of the legislature in which chiefly the sovereignty of the state is represented and exercised.[8]

B. Corporate Capacity. Although counties are frequently called "public" as distinguished from "private" corporations,[9] and although there are a number of decisions holding that a county is a municipal corporation equally with cities and towns,[10] the weight of authority is to the effect that they are not municipal corporations,[11] that they are not corporations proper but at most merely quasi-corporations,[12] because not in terms declared by statute to be corporations, and

United States.— Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566.

See 13 Cent. Dig. tit. "Counties," § 1.

6. Eagle *v.* Beard, 33 Ark. 497; Hughes *v.* Dubbs, 84 Tex. 502, 19 S. W. 684. "Counties are a political division of the State Government, organized as part and parcel of its machinery, like townships, school districts and kindred sub-divisions." Granger *v.* Pulaski County, 26 Ark. 37, 39.

"Parishes, like counties in other States, are involuntary political or civil divisions of the State, designed to aid in the administration of government, as State auxiliaries or functionaries, possessing no other powers than those delegated," etc. West Carroll Parish *v.* Gaddis, 34 La. Ann. 928, 931.

7. Granger *v.* Pulaski County, 26 Ark. 37; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

The property of a county belongs to the county as an organization and the people inhabiting it have no right to or personal interest in its property as corporators that they can use and control for their private benefit or advantage independent of legislative authority. Dare County *v.* Currituck County Com'rs, 95 N. C. 189.

8. Marengo County *v.* Coleman, 55 Ala. 605; Talbot County Com'rs *v.* Queen Anne's County Com'rs, 50 Md. 245; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

Existence not dependent upon compact.— They "cannot have the least pretension to sustain their privileges or their existence upon anything like a compact between them and the Legislature of the State, because there is not and cannot be any reciprocity or stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact." Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

9. Henry *v.* Steele, 28 Ark. 455; Patterson *v.* Temple, 27 Ark. 202; Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

10. Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976; Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Tippecanoe County *v.* Lucas, 93 U. S. 108, 23 L. ed. 822; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

11. Dunn *v.* County Revenues Court, 85 Ala. 144, 4 So. 661; People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; People *v.* Sacramento County, 45 Cal. 692; *In re* College Ave. Bridge, 9 Pa. Dist. 15. And see cases cited *supra*, note 10.

Distinguished from municipal corporations. —"A county is a governmental agency or political subdivision of the state, organized for the purpose of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." San Mateo County *v.* Coburn, 130 Cal. 631, 636, 63 Pac. 78, 621. See also Com'rs *v.* Mighels, 7 Ohio St. 110, 118.

As to what constitute municipal corporations see, generally, the title MUNICIPAL CORPORATIONS.

12. *Alabama.*— Dunn *v.* Wilcox County, 85 Ala. 144, 4 So. 661; Marengo County *v.* Coleman, 55 Ala. 605; Chambers County *v.* Lee County, 55 Ala. 534; Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Arkansas.— Granger *v.* Pulaski County, 26 Ark. 37.

California.— People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; People *v.* Sacramento County, 45 Cal. 692; Price *v.* Sacramento County, 6 Cal. 254.

Colorado.— Stermer *v.* La Plata County, 5 Colo. App. 379, 38 Pac. 839.

Illinois.— Hedges *v.* Madison County, 6 Ill. 567.

Iowa.— Soper *v.* Henry County, 26 Iowa 264.

Kentucky.— Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225.

Maryland.—Talbot County Com'rs *v.* Queen Anne's County Com'rs, 50 Md. 45.

Massachusetts.— Hampshire County *v.* Franklin County, 16 Mass. 76; Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

Minnesota.— Dowlan *v.* Sibley County, 36 Minn. 430, 31 N. W. 517; Williams *v.* Lash, 8 Minn. 441.

Mississippi.— Brabham *v.* Hinds County, 54 Miss. 363, 28 Am. Rep. 352.

that they have a corporate capacity only for particular specified ends.[13] It has been said, however, that "so long as they are invested with corporate attributes, even if it be *sub modo*, the distinction is without a substantial difference within the limits of the corporate powers conferred."[14]

III. CREATION.

A. Power of Legislature — 1. In General. Legislative power over counties is supreme, except as restricted by the constitution, either in express terms or by necessary implication,[15] and the creation or establishment of a county which is the setting apart of certain territory to be in the future organized as a political community or a quasi-corporation for political purposes[16] is within the scope of such power,[17] where the territory from which the county is to be created is owned by the state;[18] but in exercising such power the legislature should inform itself of the existence of all the facts prerequisite to enable it to act.[19] It has been

Missouri.— Clark *v.* Adair County, 79 Mo. 536; State *v.* Leffingwell, 54 Mo. 458; Ray County *v.* Bentley, 49 Mo. 236; Reardon *v.* St. Louis County, 36 Mo. 555; Lincoln County *v.* Magruder, 3 Mo. App. 314.

Nebraska.— Woods *v.* Colfax County, 10 Nebr. 552, 7 N. W. 269.

Nevada.— Schweiss *v.* First Judicial Dist. Ct., 23 Nev. 226, 45 Pac. 289, 34 L. R. A. 602.

New Mexico.— Donalson *v.* San Miguel County, 1 N. M. 263.

New York.— People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Jackson *v.* Cory, 8 Johns. 385.

North Carolina.—Dare County *v.* Currituck County Com'rs, 95 N. C. 189; White *v.* Chowan, 90 N. C. 437, 47 Am. Rep. 534.

Ohio.— Carder *v.* Fayette County, 16 Ohio St. 353; Hamilton County *v.* Mighels, 7 Ohio St. 109; Gallia County *v.* Holcomb, 7 Ohio 232.

Pennsylvania.— Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713; Allegheny County *v.* Western Pennsylvania Hospital, 48 Pa. St. 123; Kittaning Academy *v.* Brown, 41 Pa. St. 269. And see Com. *v.* Krickbaum, 199 Pa. St. 351, 49 Atl. 68 [*reversing* 10 Kulp 238].

Texas.— Heigel *v.* Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63.

Washington.— State *v.* Tyler, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207.

Wyoming.— Johnson County *v.* Searight Cattle Co., 3 Wyo. 777, 31 Pac. 268.

United States.— Sherman County *v.* Simonds, 109 U. S. 735, 3 S. Ct. 502, 27 L. ed. 1093; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566.

See 13 Cent. Dig. tit. "Counties," § 1.

13. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566.

14. People *v.* Ingersoll, 58 N. Y. 1, 28, 17 Am. Rep. 178.

15. State *v.* McFadden, 23 Minn. 40.

16. Detroit First Nat. Bank *v.* Beltrami County, 77 Minn. 43, 79 N. W. 591; State *v.* Parker, 25 Minn. 215.

17. *Idaho.*— Allen *v.* Curtis, 3 Ida. 671, 32 Pac. 1133; Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130.

Minnesota.— State *v.* McFadden, 23 Minn. 40.

New York.— Rumsey *v.* People, 19 N. Y. 41; People *v.* Draper, 15 N. Y. 532; Matter of McGinness, 13 Misc. 714, 35 N. Y. Suppl. 820.

North Carolina.— Dare County *v.* Currituck County Com'rs, 95 N. C. 189.

Pennsylvania.— Com. *v.* Judges, 6 L. T. N. S. 195.

Tennessee.— Speck *v.* State, 7 Baxt. 46; Humphreys County *v.* Houston County, 4 Baxt. 591.

West Virginia.— Lusher *v.* Scites, 4 W. Va. 11.

Wyoming.— Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

See 13 Cent. Dig. tit. "Counties," § 2.

Without an express grant of power by the constitution it is competent, it seems, for a legislature to form new counties and alter the boundaries of others. Portwood *v.* Montgomery County, 52 Miss. 523.

Time or mode of exercising power discretionary with legislature.— The New York constitution gives to the legislature general power to erect new counties without restricting its discretion as to the time or mode of exercising such power. Rumsey *v.* People, 19 N. Y. 41.

Necessity for amendment to constitution.— In Florida "the territorial subdivisions of a judicial circuit are described as counties in the Constitution. The name is given to each subdivision, and the jurisdiction is necessarily limited to such named subdivisions. A new subdivision constituting a new county could not be the same as that named in the Constitution. It is not within the power of the Legislature to create a new and different county and extend to such new county the jurisdiction of the Circuit Court, as its jurisdiction can neither be enlarged nor diminished by the Legislature. It would require, therefore, an amendment of the Constitution to create a new county with 'all the rights and privileges of a county.'" Opinion of Justices, 14 Fla. 320, 322.

18. Cameron *v.* State, 95 Tex. 545, 68 S. W. 508 [*reversing* (Tex. Civ. App. 1902) 67 S. W. 348].

19. Lusher *v.* Scites, 4 W. Va. 11.

held, however, that the manner of informing itself as to the existence of the facts as to area, population, etc., prerequisite to enable it to create a proposed county and on what evidence, is for the legislature to determine, and when so determined will conclude all further inquiry by all other departments of the government.[20]

2. Constitutional Restriction Upon Power of Legislature — a. As to Area. State constitutions very frequently contain provisions as to the area of counties requiring that no new county shall contain less than a certain number of square miles, and prohibiting the reduction of any county below a certain amount,[21] or the taking of any territory from any county containing less than the prescribed area.[22] These provisions are not merely directory to the legislature but are mandatory.[23]

b. As to Population. Other limitations found in the constitutions of some states are to the effect that the proposed county must contain a certain population,[24] that in the creation thereof the population of no other county shall be reduced below the number required by the constitution,[25] and that no county con-

20. The courts cannot go into an inquiry as to the truth or falsity of the facts upon which the act of the legislature is predicated, where the latter has sole jurisdiction of the subject. Lusher *v.* Scites, 4 W. Va. 11. Thus in Farquharson *v.* Yeargin, 24 Wash. 549, 64 Pac. 717, it was held that a bond issue by a county created from the territory of another county cannot be enjoined on the ground that the territory included in the new county did not contain two thousand inhabitants at the time of its creation, as required by Wash. Const. art. 11, § 3, since the passage and approval of the act creating such county is a legislative determination of the sufficiency of its population, although there is no finding to such effect in the act, and is conclusive.

21. *Arkansas.*— Bittle *v.* Stuart, 34 Ark. 224; State *v.* Dorsey County, 28 Ark. 378; Patterson *v.* Temple, 27 Ark. 202; Howard *v.* McDiarmid, 26 Ark. 100.

Iowa.— Garfield *v.* Brayton, 33 Iowa 16; Duncombe *v.* Prindle, 12 Iowa 1.

Kansas.—Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560; State *v.* Garfield County, 54 Kan. 372, 38 Pac. 559; State *v.* St. John, 21 Kan. 591.

Minnesota.—State *v.* Honerud, 66 Minn. 32, 68 N. W. 323; State *v.* McFadden, 23 Minn. 40.

Mississippi.— Portwood *v.* Montgomery County, 52 Miss. 523.

Missouri.— Woods *v.* Henry, 55 Mo. 560; State *v.* Scott, 17 Mo. 521.

Nebraska.— State *v.* Armstrong, 30 Nebr. 493, 46 N. W. 618, 9 L. R. A. 382.

Tennessee.— McMillan *v.* Hannah, 106 Tenn. 689, 61 S. W. 1020; Roane County *v.* Anderson County, 89 Tenn. 259, 14 S. W. 1079; James County *v.* Hamilton County, 89 Tenn. 237, 14 S. W. 601; Macon, etc., County *v.* Trousdale County, 2 Baxt. 1; Bridgenor *v.* Rodgers, 1 Coldw. 259; Marion County *v.* Grundy County, 5 Sneed 490; Bradley *v.* Powell County, 2 Humphr. 428, 37 Am. Dec. 563; Cheatham County *v.* Dickson County, (Ch. App. 1896) 39 S. W. 734.

West Virginia.— Lusher *v.* Scites, 4 W. Va. 11.

Wisconsin.— State *v.* Cram, 16 Wis. 343; Perry *v.* State, 9 Wis. 19; State *v.* Merriman, 6 Wis. 14; State *v.* Larrabee, 1 Wis. 200.

Wyoming.— Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

See 13 Cent. Dig. tit. "Counties," §§ 2, 3.

Provision as to minimum number of townships.— By Mich. Const. art. 10, § 2, it is provided that a county shall not, by the organization of new counties, be reduced to less than sixteen townships as surveyed by the United States. Bay County *v.* Bullock, 51 Mich. 544, 16 N. W. 896; Rice *v.* Ruddiman, 10 Mich. 125, both cases holding that the provision is not violated by the reduction of an old county to fifteen townships and a half township.

22. Lusher *v.* Scites, 4 W. Va. 11.

Act diminishing area.— Where a state constitution thus prescribes the area of counties, an act of the legislature diminishing such area is unconstitutional and may be treated as null and void by a county court. Woods *v.* Henry, 55 Mo. 560.

23. State *v.* Merriman, 6 Wis. 14.

A limitation of the rule, however, has been recognized in one jurisdiction, where it was held that the state legislature has the power to restore to a county territory lost by it through laches and long acquiescence in the claim and possession thereof by another county, and that for such purpose it may detach territory from the latter county, although the area is thereby reduced below the constitutional minimum. Roane County *v.* Anderson County, 89 Tenn. 259, 14 S. W. 1079.

24. *New York.*— De Camp *v.* Eveland, 19 Barb. 81; Matter of McGinness, 13 Misc. 714, 35 N. Y. Suppl. 820.

Tennessee.— James County *v.* Hamilton County, 89 Tenn. 237, 14 S. W. 601.

Washington.— Farquharson *v.* Yeargin, 24 Wash. 549, 64 Pac. 717.

West Virginia.— Lusher *v.* Scites, 4 W. Va. 11.

Wyoming.— Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

25. State *v.* Scott, 17 Mo. 521; Bridgenor *v.* Rodgers, 1 Coldw. (Tenn.) 259; Marion County *v.* Grundy County, 5 Sneed (Tenn.) 490; Lusher *v.* Scites, 4 W. Va. 11.

taining less than a designated number of inhabitants shall thereby be reduced in area.[26] These provisions, it has been held, refer to population at the time of the erection of a new county, and the legislature in determining the question of population is not confined to the last state census.[27]

c. As to Election of County Officers. The election of county officers is not a prerequisite to the creation of a county, and by the terms of an act of the legislature creating it such county may become a body corporate and politic long before the officers to be elected could enter upon their duties.[28]

d. Consent of Inhabitants. The creation of counties being a matter of public convenience and governmental necessity,[29] whether they will assume their corporate powers and perform the duties and obligations imposed are questions as to which they have no choice, but their assumption is wholly involuntary,[30] and the power of the legislature to create is independent of the consent of the inhabitants of the proposed county.[31]

3. Validity and Construction of Statutes Creating Counties — a. In General. A county cannot be created by implication and intendment merely, and a statute passed apparently for the purpose of creating a county is invalid for such purpose when it fails to declare in express language the creation of such proposed county.[32] Statutes forming new counties are not to be construed with the same strictness which is to be observed in the construction of a grant or a contract between individuals affecting rights of property; but a more liberal rule should be adopted.[33]

b. Constitutionality. Although an act creating a new county may contain provisions for the appointment or election of officers in an unauthorized manner, this fact will not necessarily invalidate the rest of the act.[34] A state having through each of its coördinate branches of government repeatedly recognized a county as a county and legal subdivision of the state, is estopped, after the lapse of several years, from questioning the regularity of the passage of the act of the legislature creating such county.[35] The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county.[36]

B. Boundaries — 1. Necessity For and Power to Fix. There cannot be a county without boundaries; and in organizing a county that which is first to be done is to define its boundaries and to make out the territorial extent and limit of the political subdivision to be designated by the name of the county.[37] A state

26. Lusher *v.* Scites, 4 W. Va. 11.

27. De Camp *v.* Eveland, 19 Barb. (N. Y.) 81. See also Rumsey *v.* People, 19 N. Y. 41.

28. Carleton *v.* People, 10 Mich. 250.

29. Granger *v.* Pulaski County, 26 Ark. 37.

30. Granger *v.* Pulaski County, 26 Ark. 37; Trinity County *v.* Polk County, 58 Tex. 321.

31. People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66.

32. Holmberg *v.* Jones, 7 Ida. 752, 65 Pac. 563. An act to create a new county, which fixes its boundaries, names its temporary county-seat, provides for the selection of county and precinct officers, designates the terms of courts therein, the congressional and other districts to which it is attached, assigns it to a class for the purpose of fixing the fees of its officers, and provides for transcribing the record affecting land therein, is sufficiently full to effect its purpose. Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147. And see State *v.* Parker, 25 Minn. 215.

33. The object should be to ascertain the true meaning and intention in any given act by considering the same in connection with all others *in pari materia*, and with the general policy of the legislature, and to effectuate such intention. Hamilton *v.* McNeil, 13 Gratt. (Va.) 389. And see Brown *v.* Hamlett, 8 Lea (Tenn.) 732.

34. Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147. And see Matter of Noble, 25 Misc. (N. Y.) 49, 53 N. Y. Suppl. 922 [*affirmed* in 34 N. Y. App. Div. 55, 54 N. Y. Suppl. 42].

35. People *v.* Alturas County, 6 Ida. 418, 55 Pac. 1067.

36. State *v.* Rich, 20 Mo. 393; Speck *v.* State, 7 Baxt. (Tenn.) 46.

It would seem that such inquiry must be by a direct proceeding for that purpose, so that the judgment of the court may operate, as it were, *in rem* and have the direct effect of settling the question permanently in such manner that it cannot afterward be made the subject of judicial investigation. State *v.* Rich, 20 Mo. 393.

37. Opinion of Justices, 14 Fla. 320. In State *v.* Baker, 129 Mo. 482, 31 S. W. 924, it was held that under Mo. Const. (1875),

legislature creating a county has the power to fix the boundary lines where it pleases, and for that purpose to adopt any description deemed proper to express its intention,[38] provided it locates the boundaries with reasonable certainty;[39] and an act of the legislature defining the boundary lines between counties may be operative to establish the boundary as indicated at once upon its passage, independent of the surveys.[40]

2. FIXED BY USAGE. Until reliable marks can be found to indicate where the statutory line between counties should be run, the safest guide will be the line as hitherto practically adopted by the people in the locality.[41]

3. EXTENT WHERE BOUNDED BY STREAM. Where a stream forms the boundary between two counties the line is usually held to be in the middle of such stream.[42] An artificial change in the course of a stream forming the boundary between counties which causes a new channel does not operate to change the legal boundary between the counties.[43]

4. EXTENT FIXED BY LOW-WATER MARK. The city and county of New York includes the whole of the rivers and harbors adjacent to the city, to actual low-water mark on the opposite shores as the same may be formed from time to time by docks, wharves, and other permanent erections.[44]

5. ESTABLISHMENT OR REËSTABLISHMENT — a. Legislative Provisions. It rests with the legislature of the state not only to define the boundaries of counties, but also to provide the means whereby the true localities of such boundaries on the ground may be finally determined;[45] and the settling of the boundary lines of a

art. 9, § 1, recognizing the several counties of the state "as they now exist," only such counties were recognized as existed, the boundaries of which were fixed by valid enactments.

As to boundaries generally see BOUNDARIES, 5 Cyc. 861.

38. San Bernardino County *v.* Reichert, 87 Cal. 287, 25 Pac. 692.

39. Baker County *v.* Benson, 40 Oreg. 207, 66 Pac. 815.

40. People *v.* Henderson, 40 Cal. 29.

Effect of variance from statutory description.— The boundary lines of counties, when run, although varying from the descriptive boundary designated in the statute, are binding upon all private individuals and county officers, until a different position is given them by the public authorities. Board *v.* Head, 3 Dana (Ky.) 489.

Requirement of survey before recognition as land district.—A statute providing that before any county not already organized as a land district under existing laws shall be recognized as such the county court shall cause the boundary lines of the county to be surveyed and marked, and the field-notes and map duly recorded and returned to the general land-offices, as provided in the act, is sufficiently embraced in the subject of an act which is as follows: "An act establishing and prescribing the manner of ascertaining the boundaries of counties," and is therefore constitutional. Marsalis *v.* Creager, 2 Tex. Civ. App. 368, 21 S. W. 545.

41. Union County *v.* Essex County, 43 N. J. L. 391.

42. Com. *v.* Ellis, 11 Ky. L. Rep. 402; *In re* Spier, 3 N. Y. Suppl. 438. And see Rock Island County *v.* Sage, 88 Ill. 582.

Under the Kentucky statutes the counties of Madison and Fayette extend to the middle of the stream of the Kentucky river, along that part of the river of which the margin is within such counties. Hart *v.* Rogers, 9 B. Mon. (Ky.) 418. But see Johns *v.* Davidson, 16 Pa. St. 512.

Center of lake.— St. Tammany Parish *v.* Tranchina, 105 La. 610, 30 So. 109.

The middle of the main stream is to be taken and not the middle between the extreme banks of all streams in cases where there are side streams to a river named as a boundary. *In re* Spier, 3 N. Y. Suppl. 438.

43. Waters *v.* Pool, 130 Cal. 136, 62 Pac. 385.

But subsequent acts of the legislature repealing the former acts establishing the boundary and indicating an intent to define the boundary anew, and to make the changed course of the river the true boundary, has the legal effect to change the location of the land lying between the old and new channels of the river from one county to the other. Waters *v.* Pool, 130 Cal. 136, 62 Pac. 385.

44. Orr *v.* Brooklyn, 36 N. Y. 661; Stryker *v.* New York, 19 Johns. (N. Y.) 179. And see Atlantic Dock Co. *v.* Brooklyn, 1 Abb. Dec. (N. Y.) 24.

Kings county only extends to the low-water mark of Long Island, whether formed by natural or artificial means, all below that line being within the county of New York. Orr *v.* Brooklyn, 36 N. Y. 661; Udall *v.* Brooklyn, 19 Johns. (N. Y.) 175.

45. Jones *v.* Powers, 65 Tex. 207.

When a county line has been once run, marked, and established in accordance with law, it cannot be said to be indefinite. It may be incorrect, but nevertheless well defined. Jones *v.* Powers, 65 Tex. 207. And see Kaufman County *v.* McGaughey 11 Tex. Civ. App. 551, 33 S. W. 1020.

county by an unauthorized survey may be ratified by a curative act of the legislature.[46]

b. Settlement by Commissioners. In some states provision is expressly made for the appointment of commissioners to settle the boundary line between counties.[47] All so appointed must unite in the execution of such duties.[48] They should cause the line of partition or such part thereof as shall be specified in or become necessary by their appointment to be run, surveyed, marked, and ascertained, and the survey certified under their hands to be recorded and filed in the proper office.[49] The duty of approval by a court of the report of county-line commissioners is judicial and not arbitrary or wilful.[50] Certiorari will lie to remove to the supreme court for review the proceedings of commissioners appointed to settle boundary lines between counties;[51] but the official certificates of the commissioners under their oath in the line of their duty are entitled to much weight as evidence, and only clear proof that they are wrong will justify the court in disturbing the report of the commissioners.[52]

46. Wright *v.* Jones, 14 Tex. Civ. App. 423, 38 S. W. 249.

47. Burlington County *v.* Atlantic County, 49 N. J. L. 408, 8 Atl. 111; Union County *v.* Essex County, 43 N. J. L. 391; State *v.* Coleman, 13 N. J. L. 98; Pardee *v.* Orvis, 103 Pa. St. 451; Keller *v.* Young, 78 Pa. St. 166; Smith *v.* Brotherline, 62 Pa. St. 461; Cross *v.* Sweeney, 9 Lea (Tenn.) 689.

Need not regard previous surveys or marks.— Commissioners appointed by virtue of an act of the legislature to correctly run and mark boundary lines between counties have the power, and it is their duty, to run and mark such boundary line where it ought of right to have been, without regard to previous surveys or marks of such boundary line made under prior acts of assembly. Pardee *v.* Orvis, 103 Pa. St. 451.

Restraining commissioners — Parties.— In an action by the commissioners of a county to restrain commissioners appointed by the legislature to locate the boundary line between such county and another, the latter county is a necessary party. Chatham County *v.* Thorn, 117 N. C. 211, 23 S. E. 184.

48. State *v.* Coleman, 13 N. J. L. 98, holding that although the aid of professional men may be necessary, the work nevertheless must be done under the inspection and direction of the commissioners.

Effect of withdrawal of commissioner.— Approval of a boundary commission report will not be withheld for lack of the signature of one commissioner who voluntarily withdrew from the commission shortly after it was organized, and thereafter refused to take any part in the work. Each county is entitled to its full representation on a boundary commission, but if either fail short through its own connivance or acquiescence, it can have no standing to be heard to complain of that which it encouraged and promoted. *In re* County Line Case, 6 Pa. Dist. 712.

49. State *v.* Coleman, 13 N. J. L. 98; Cross *v.* Sweeney, 9 Lea (Tenn.) 689.

Collateral attack.— The line so ascertained and certified is to be valid and effectual as the boundary line between the counties, and is not open to collateral attack. State *v.* Coleman, 13 N. J. L. 98; Cross *v.* Sweeney, 9 Lea (Tenn.) 689.

Line determined by commissioners' marks. — Where the commissioners under an act of the legislature have run and marked the boundary lines between two counties and have made drafts thereof, in which are laid down the tracts of land through which the lines passed, the marks on the ground made by the commissioners must control in case of discrepancy between them and the drafts. Keller *v.* Young, 78 Pa. St. 166.

50. It must be exercised upon facts and circumstances before the court after they have been heard and duly considered, and in proceedings on a petition for confirmation of report, etc., of county-line commissioners the court is obliged to fix a time for hearing the petitions, and it may not arbitrarily make a rule returnable forthwith fixing the same day of filing as a time for hearing argument on the exceptions filed. *In re* Huntingdon County Line, 11 Pa. Super. Ct. 386, 8 Pa. Super. Ct. 380.

Finality or conclusiveness of order approving or refusing to approve.—An order refusing approval of the report of the county-line commissioners on a boundary between two counties, pending consideration of exceptions by the court of the adjoining county, is interlocutory in its nature, and no appeal lies until final decree has been made. *In re* Huntingdon County Line, 8 Pa. Super. Ct. 380. "The approval of the report by the court of quarter sessions of one county is not such a conclusive adjudication of the questions of law and of fact as precludes the court of other county from inquiring into them and refusing its approval." *In re* Huntingdon County Line, 14 Pa. Super. Ct. 571, 577.

51. Burlington County *v.* Atlantic County, 49 N. J. L. 408, 8 Atl. 111; Union County *v.* Essex County, 43 N. J. L. 391; State *v.* Coleman, 13 N. J. L. 98. *Compare In re* Huntingdon County Line, 14 Pa. Super. Ct. 571, 11 Pa. Super. Ct. 386, 8 Pa. Super. Ct. 380.

52. Burlington County *v.* Atlantic County, 49 N. J. L. 408, 8 Atl. 111.

c. Settlement by Surveyors. In other states the statutes provide for the establishment and determination of county boundaries by surveyors.[53] The usual method is by joint surveys made by surveyors respectively representing the counties; such surveyors are appointed by or act at the instance of designated county authorities; and provision is sometimes made for instructions from, or approval of the surveys by, certain officers or boards.[54] So it has been provided that a survey for this purpose may be made by some state officer,[55] such as the surveyor-general, on the application of the proper county authorities.[56]

d. Suits to Determine and Settle. In some states provision is expressly made by statute that in case the method of surveying and determining county boundaries is not satisfactory to either county suit may be brought in a court of competent jurisdiction to settle and determine such boundary.[57] In determining the territorial boundaries of counties maps of such territory made out and published by authority of law may properly be referred to as evidence on the question.[58] The testimony of parties running county lines, and those present and assisting therein, and of those present and seeing the line as it was run, is entitled to the greatest weight.[59]

6. Interpretation of Statutes — a. In General. Although the lines must as a rule conform to the act defining the boundary,[60] yet the letter of an act of the

53. See cases cited *infra*, note 54 *et seq.*

54. Rice *v.* Trinity County, 110 Cal. 247, 42 Pac. 809; Eureka County *v.* Lander County, 21 Nev. 144, 24 Pac. 871, 26 Pac. 63; Rockwall County *v.* Kaufman County, 69 Tex. 172, 6 S. W. 431; Wise County *v.* Montague County, 21 Tex. Civ. App. 444, 52 S. W. 615; Kaufman County *v.* McGaughey, 11 Tex. Civ. App. 551, 33 S. W. 1020, 3 Tex. Civ. App. 655, 21 S. W. 261.

Notice to other county of appointment of surveyor.—Wise County *v.* Montague County, 21 Tex. Civ. App. 444, 52 S. W. 615; Marsalis *v.* Garrison, (Tex. Civ. App. 1894) 27 S. W. 929.

55. In Colorado in case of uncertainty as to the boundary lines of any county, and where territory is in dispute, the state engineer may be called on to run the line and determine the question. Hinsdale County *v.* Mineral County, 9 Colo. App. 368, 48 Pac. 675; Routt County *v.* Grand County, 4 Colo. App. 306, 35 Pac. 1061; Gunnison County *v.* Saguache County, 2 Colo. App. 412, 31 Pac. 183. The statute requires an actual survey by the engineer, and the lines are not "run out" and "established" within the meaning of the statute where the engineer, after examining the ground and the statute, designates the summit of a mountain-range as the boundary fixed therein. Mineral County *v.* Hinsdale County, 25 Colo. 95, 53 Pac. 383.

Under a Georgia statute, where the grand jury of either county shall present that the boundary requires to be marked out and defined, it is the duty of the clerk of the superior court in the county where such presentment was made to notify the governor, and the latter must then appoint some suitable surveyor not residing in either of the counties to survey, mark out, and define the line in dispute. See Rabun County *v.* Habersham County, 79 Ga. 248, 5 S. E. 198.

56. Rice *v.* Trinity County, 110 Cal. 247, 42 Pac. 809.

Constitutionality of statute making such line conclusive.— People *v.* Boggs, 56 Cal. 648. And see San Bernardino County *v.* Reichert, 87 Cal. 287, 25 Pac. 692.

The surveyor-general may delegate the mechanical part of the work to others, and it is not necessary that the field-work should be done by or under the direct supervision of a deputy. Rice *v.* Trinity County, 110 Cal. 247, 42 Pac. 809.

57. Routt County *v.* Grand County, 4 Colo. App. 306, 35 Pac. 1061; Gunnison County *v.* Saguache County, 2 Colo. App. 412, 31 Pac. 183; Rockwell County *v.* Kaufman County, 69 Tex. 172, 6 S. W. 431. But *compare* Guadalupe County *v.* Wilson County, 58 Tex. 228.

Such statute is not retrospective.— Rockwall County *v.* Kaufman County, 69 Tex. 172, 6 S. W. 431.

58. Hamilton *v.* McNeil, 13 Gratt. (Va.) 389.

59. Davidson County *v.* Cheatham County, (Tenn. Ch. App. 1901) 63 S. W. 209.

The testimony of a private surveyor to prove the dividing line between two counties is clearly competent evidence, where such line has never been run or located either by the commissioner appointed for that purpose or by any other authorized person. Kinley *v.* Crane, 34 Pa. St. 146.

Where the evidence is conflicting the judgment of the trial court will not be disturbed. Gunnison County *v.* Saguache County, 2 Colo. App. 412, 31 Pac. 183. And see, generally, Appeal and Error.

60. Rabun County *v.* Habersham County, 79 Ga. 248, 5 S. E. 198.

Effect of divergence of range lines.—Where an act of the legislature defining the boundaries of a county describes a line as following the line between certain ranges the line so described follows such range line, although the latter may diverge either to the east or west at the correction line. Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77.

legislature fixing the boundaries of a county must yield to the evident intention of the legislature[61] as deduced from the whole act, taken together, giving due consideration to the title of the act and the situation of the territory to be affected,[62] and clerical errors may be corrected and the proper words substituted.[63]

b. Rules as to Monuments, Courses, and Lines.[64] In tracing county lines as defined by statutes the general rule applies that monuments[65] control courses, and a specific course will control a general course.[66] In an act fixing the boundaries of a county, a call for course yields to a call to run with the designated line, even if the line is unsurveyed, provided it is susceptible of definite location.[67]

7. Effect of Long Acquiescence. County lines are subject to the general rule that in the ascertainment of the location of ancient lines long acquiescence[68] of the parties interested in the location of a line at a particular place should have great, if not controlling, weight, where there are no existing marks or living witnesses to show original location, and the calls and traditions are themselves vague and indefinite.[69]

C. Alteration, Consolidation, and Division of Counties — 1. In General. Unless the constitution of the state otherwise provides, a state legislature has authority to extend or limit the boundaries of a county, enlarge or diminish its area, divide the same into two or more counties, or consolidate two or more counties into one.[70]

61. The court may look to the acts forming other counties both before and subsequently, for the purpose of ascertaining the intention of the legislature as to such line. Hamilton *v.* McNeil, 13 Gratt. (Va.) 389.

It will be presumed to have been the intention of a legislature to adopt a line that could then be definitely fixed, and it will not be presumed that the intention was to describe a line that could not properly be ascertained until the lapse of some indefinite period. San Bernardino County *v.* Reichert, 87 Cal. 287, 25 Pac. 692.

62. Perry County *v.* Jefferson County, 94 Ill. 214.

Due weight should be given to contemporaneous interpretation placed upon the act by the courts, and other lawful authorities, and by the population at large. Warren County *v.* Butler County, 6 Ohio S. & C. Pl. Dec. 533; Hamilton *v.* McNeil, 13 Gratt. (Va.) 389.

63. Rabun County *v.* Habersham County, 79 Ga. 248, 5 S. E. 198. And see Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77.

Degree sign instead of decimal notation.— Where the calls for distance in the lines and the quantity in the area are put in figures, with the usual sign of a degree instead of a decimal point between the figures, the calls being altogether meaningless if the sign be taken in its ordinary sense, but entirely consistent if read as a decimal notation, the latter reading will prevail. Brown *v.* Hamlett, 8 Lea (Tenn.) 732.

64. See, generally, Boundaries, 5 Cyc. 861.

65. Where a monument is uncertain a general course may be taken into consideration in connection with other facts and circumstances for the purpose of ascertaining and identifying such monument. Hollenbeck *v.* Sykes, 17 Colo. 317, 29 Pac. 380.

66. Hollenbeck *v.* Sykes, 17 Colo. 317, 29 Pac. 380; Grand County *v.* Larimer County, 9 Colo. 268, 11 Pac. 193; Link *v.* Jones, 15 Colo. App. 281, 62 Pac. 339. And see Baker County *v.* Benson, 40 Oreg. 207, 66 Pac. 815.

67. Roane County *v.* Anderson County, 89 Tenn. 259, 14 S. W. 1079.

68. In order that common usage may control the dividing line there must be clear and explicit proof of an uninterrupted usage and consent of the authorities of the counties interested. No such common usage or consent can affect a title to land older than the usage itself. Beale *v.* Patterson, 3 Watts & S. (Pa.) 379.

69. Roane County *v.* Anderson County, 89 Tenn. 259, 14 S. W. 1079.

Where the public authorities for a long series of years have recognized a certain line as the boundary between their respective counties, public policy forbids that such line shall be changed, even though such line was not the one originally intended. Edwards County *v.* White County, 85 Ill. 390 [*citing* Hecker *v.* Sterling, 36 Pa. St. 423; Hamilton *v.* McNeil, 13 Gratt. (Va.) 389]. See also Humboldt County *v.* Lander County, 24 Nev. 461, 56 Pac. 228.

70. *Alabama.*— Drummond *v.* State, 61 Ala. 64; State *v.* Mobile, 24 Ala. 701.

Arkansas.— Reynolds *v.* Holland, 35 Ark. 56; Eagle *v.* Beard, 33 Ark. 497.

California.— People *v.* McGuire, 32 Cal. 140.

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; Willimantic School Soc. *v.* Windham First School Soc., 14 Conn. 457.

Idaho.— Allen *v.* Curtis, 3 Ida. 671, 32 Pac. 1133; Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130.

Illinois.— Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161.

Indiana.— Buckinghouse *v.* Gregg, 19 Ind. 401; Jasper County *v.* Spitler, 13 Ind. 235.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1.

2. LIMITATIONS AND RESTRICTIONS UPON POWER OF LEGISLATURE[71] — a. As to Distance of County Line From Court-House. The constitution may provide that no line of a new county shall approach the court-house of an old county from which it may be taken nearer than a certain prescribed distance.[72]

b. New Counties to Be Composed of Contiguous Territory. It is sometimes provided that new counties created out of territory to be detached from a county already organized must be composed of contiguous territory, and leave the remaining part of the original county one contiguous portion of territory.[73]

c. Interference With Judicial or Legislative Districts — (I) *In General.* Although an act of the legislature dividing or abolishing a county and distributing its territory to other counties is void, if in conflict with constitutional provisions as to judicial and representative districts,[74] yet, while the same counties are left organized to fulfil the conditions of the senatorial and representative apportionments as counties, the boundaries may still be subject to alteration within the constitutional restrictions.[75]

(II) *Effect of Constitutional Limitation as to Number of Representatives in Legislature.* A constitutional provision that no new county shall

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Opinion of Justices, 6 Cush. 578; Ashby *v.* Wellington, 8 Pick. 524; Hampshire County *v.* Franklin County, 16 Mass. 76.

Michigan.— People *v.* Maynard, 15 Mich. 463.

Minnesota.— State *v.* Pioneer Press Co., 66 Minn. 536, 68 N. W. 769; State *v.* Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745; State *v.* Honerud, 66 Minn. 32, 68 N. W. 323; State *v.* Clough, 64 Minn. 378, 67 N. W. 202.

New Hampshire.— Union Baptist Soc. *v.* Candia, 2 N. H. 20.

North Carolina.— Granville County Com'rs *v.* Ballard, 69 N. C. 18; Lander *v.* McMillan, 53 N. C. 174; Mills *v.* Williams, 33 N. C. 558.

Texas.— Trinity County *v.* Polk County, 58 Tex. 321.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

United States.— Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

See 13 Cent. Dig. tit. "Counties," § 7.

As public corporations counties can be changed, modified, enlarged, restrained, or repealed to suit the ever varying exigencies of the state — they are completely under legislative control. Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161.

The New York legislature has no power under the constitution to alter county lines by taking from one county and adding to another, but only to divide a county into two or more where the original county has grown too large for the convenience of the people. So held in Matter of McGinness, 13 Misc. (N. Y.) 714, 35 N. Y. Suppl. 820.

71. As to area and population see *supra*, III, A, 2, a, b.

72. Union County *v.* Knox County, 90 Tenn. 541, 18 S. W. 254; Marion County *v.* Grundy County, 5 Sneed (Tenn.) 490; Maury County *v.* Lewis County, 1 Swan (Tenn.) 236; Cash *v.* State, 10 Humphr. (Tenn.) 111; Gotcher *v.* Burrows 9 Humphr. (Tenn.) 585.

Such a provision is absolutely prohibitory of the power of the legislature either in the establishment of a new county or in taking from one county a portion of its territory and attaching it to another, or in changing the lines of adjoining counties to approach the court-house of a county whose territory is taken nearer than the prescribed distance; and if this prohibition is violated the court of chancery will restore the old county to its constitutional limits. Gotcher *v.* Burrows, 9 Humphr. (Tenn.) 585.

73. Duckstad *v.* Polk County, 69 Minn. 202, 71 N. W. 933.

74. Bittle *v.* Stuart, 34 Ark. 224, where it was held that the principles of the decision in Howard *v.* McDiarmid, 26 Ark. 100, do not support, but plainly militate against, the idea that a state legislature may strike a county out of a district altogether.

N. Y. Laws (1895), c. 934, incorporating a part of the county of Westchester into the city of New York, violates the provisions of the state constitution which recognize the existing counties, apportion members of the assembly to the several counties, and divide the state into senatorial districts, but provide that in the formation of a district no county shall be divided. Matter of McGinness, 13 Misc. (N. Y.) 714, 35 N. Y. Suppl. 820.

75. Bittle *v.* Stuart, 34 Ark. 224; Howard *v.* McDiarmid, 26 Ark. 100; Granville County Com'rs *v.* Ballard, 69 N. C. 18.

Under Ohio Const. art. 9, § 7, the state was divided into thirty-three senatorial districts. The counties of Washington and Morgan constitute the fourteenth district, the counties of Guernsey and Monroe the nineteenth. By the act of March, 1851, the county of Noble was created from these two districts. It was held that the act creating the latter county was not in violation of the constitution from the mere fact that a part of the citizens of the county thus created continued to vote and be represented in the senate in one of these districts and the rest in another. State *v.* Dudley, 1 Ohio St. 437.

be "hereafter" erected unless its population "shall" entitle it to a member refers to the population at the time of the erection of the new county, and in determining the question of population the legislature is not confined to the last state census.[76] An act purporting to create a new parish out of an existing parish, which will thereby increase the number of representatives beyond the maximum allowed by the constitution, is void.[77] So a law establishing a new county by which an old one was reduced below the ratio of representation has been held unconstitutional, notwithstanding a proviso that for the purposes of representation the inhabitants of the new county should continue to vote as in the old one until the population of the new county should entitle it to a representative.[78]

(iii) *Effect of Prohibition Against Division of Counties in Creating Senatorial Districts.* A constitutional prohibition that "no county shall be divided in creating senatorial districts" does not prevent the legislature from annexing part of a county in one senatorial district to another county in a different senatorial district; the former county not being divided for the purpose of creating a senatorial district.[79]

d. Submission of Question to Popular Vote. A usual provision of the various state constitutions is that the legislature shall not abolish, divide, consolidate, or annex territory to counties or change their boundaries without submitting the proposed act to the voters of the territory to be affected for their approval;[80] and that the proposed change must to become a law receive the majority vote of such

76. De Camp *v.* Eveland, 19 Barb. (N. Y.) 81.

77. Adams *v.* Forsyth, 44 La. Ann. 130, 10 So. 622.

78. State *v.* Scott, 17 Mo. 521.

79. Baker County *v.* Benson, 40 Oreg. 207, 66 Pac. 815.

Transferring a part of a county from one senatorial district to another county in a different senatorial district constitutes no change in those districts. They are composed of the same counties as before. Counties, not territory or inhabitants, are the constituents of the district. Pulaski County *v.* Saline County Judge, 37 Ark. 339.

80. *Dakota.*— Van Dusen *v.* Fridley, 6 Dak. 322, 43 N. W. 703; Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135.

Idaho.— People *v.* George, 3 Ida. 72, 26 Pac. 983.

Illinois.— Rock Island County *v.* Sage, 88 Ill. 582; Erlinger *v.* Boneau, 51 Ill. 94; People *v.* Salomon, 51 Ill. 37; People *v.* Marshall, 12 Ill. 391; People *v.* Reynolds, 10 Ill. 1.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1.

Michigan.— People *v.* Burns, 5 Mich. 114.

Nebraska.— State *v.* Clark, 59 Nebr. 702, 82 N. W. 8; Wayne County *v.* Cobb, 35 Nebr. 231, 52 N. W. 1102; State *v.* Painter, 34 Nebr. 173, 51 N. W. 652; State *v.* Nelson, 34 Nebr. 162, 51 N. W. 648; State *v.* Armstrong, 30 Nebr. 493, 46 N. W. 618, 9 L. R. A. 382; State *v.* Newman, 24 Nebr. 40, 38 N. W. 40.

New York.— People *v.* Morrell, 21 Wend. 563.

North Dakota.— Schaffner *v.* Young, 10 N. D. 245, 86 N. W. 733. And see *supra*, Dakota cases cited in this note.

Oregon.— Baker County *v.* Benson, 40 Oreg. 207, 66 Pac. 815.

South Carolina.—Segars *v.* Parrott, 54 S. C. 1, 30 S. E. 273, 30 S. E. 353, 31 S. E. 677, 865; State *v.* Parler, 52 S. C. 207, 29 S. E. 651.

South Dakota.— Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147. And see *supra*, Dakota cases cited in this note.

Texas.— Trinity County *v.* Polk County, 58 Tex. 321.

Wyoming.— Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

See 13 Cent. Dig. tit. "Counties," § 8.

In Wisconsin a county with an area of nine hundred square miles or less cannot be constitutionally divided without submitting the question of the division to a vote of the people of the county and obtaining a majority of the votes in favor of the division. State *v.* Cram, 16 Wis. 343; State *v.* Elwood, 11 Wis. 17; State *v.* Merriman, 6 Wis. 14; Atty.-Gen. *v.* Fitzpatrick, 2 Wis. 542; State *v.* Larrabee, 1 Wis. 200.

Such portions of any large body of water as lie within the county limits are to be computed in determining the area of a county. State *v.* Larrabee, 1 Wis. 200.

Sufficient provision as to manner of holding election.—A provision that the election shall be held on a day certain and the votes taken and canvassed as those for a state senator sufficiently prescribes the manner of holding the election. State *v.* Elwood, 11 Wis. 17.

Submission of question of annexation of adjoining territory.— In People *v.* Nally, 49 Cal. 478, it was held that an act was constitutional which submitted to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county should be annexed to it and provided that if a majority of the votes were for annexation then the organization of the adjoining county should be abandoned and its territory be divided and annexed in part to the county in which the vote was taken and in part to another adjoining county. See also People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66.

voters.[81] A state legislature has, however, the power to take measures to ascertain and definitely determine and mark a boundary of a county, where there is uncertainty as to where the line is, without submitting such question to the voters for approbation,[82] and in some states the constitutions do not prohibit the legislature from acting without a submission of the question to the voters.[83]

e. Presentation of Petition by Voters. Again it may be provided that upon the presentation to the secretary of state of a petition signed by a certain per cent of the residents and voters of an organized county, praying that certain territory be detached from adjoining unorganized counties, and also a petition signed by the residents and voters of the territory proposed to be attached to such organized county, the governor and state auditor shall meet and consider such petitions, and if they conform to law the governor shall issue his proclamation setting out the facts and declaring the territory described to be detached from the unorganized counties and attached to and incorporated within the organized county.[84]

3. Operation and Effect — a. In General. On the establishment of the boundaries of a new county formed by the division of another county, such new county becomes simply a political organization entitled to rights pertaining to similar organizations.[85] The creation of new counties by the division of old counties does no more than provide for the organization of such counties, and until the new county is actually organized and its officers qualified, the territory remains subject to the jurisdiction of the old county;[86] and the circumstances of

81. *Dakota.*—Van Dusen *v.* Fridley, 6 Dak. 322, 43 N. W. 703.

Idaho.— People *v.* George, 3 Ida. 72, 26 Pac. 983.

Illinois.— Rock Island County *v.* Sage, 88 Ill. 582.

Nebraska.— State *v.* Painter, 34 Nebr. 173, 51 N. W. 652; State *v.* Nelson, 34 Nebr. 162, 51 N. W. 648.

New York.— People *v.* Morrell, 21 Wend. 563.

Wyoming.— Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

See 13 Cent. Dig. tit. "Counties," § 8.

82. Rock Island County *v.*, Sage, 88 Ill. 582.

83. Opinion of Justices, 14 Fla. 320; State *v.* Pioneer Press Co., 66 Minn. 536, 68 N. W. 769; State *v.* Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745.

Imposing conditions on submission to voters.— In Minnesota it is a mere matter of favor when it submits to the voters the question of creating new counties or changing the county lines, and may impose any terms or conditions it sees fit to prescribe on submission of such question. State *v.* Pioneer Press Co., 66 Minn. 536, 68 N. W. 769.

Change by two-thirds vote of legislature.— In Florida the boundary lines of a county may be changed upon a two-thirds vote of both houses of the legislature without an amendment to the constitution. Opinion of Justices, 14 Fla. 320.

84. State *v.* Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745; State *v.* Clough, 64 Minn. 378, 67 N. W. 202.

Manner of withdrawing name from petition.— It is not necessary that one who had signed a petition to change a territory from one county to another, but wished to withdraw his name, should appear in person before the commission. It is sufficient if, before the commission had acted, he communicated to them in writing, so authenticated as to show its genuineness, the fact that he wished his name withdrawn. State *v.* Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745.

The presumptions in favor of the finding of a commission acting under Minn. Laws (1895), c. 298, that petitions annexing territory to a county are conformable to law, when followed by the governor's proclamation annexing such territory, may be rebutted by competent evidence. State *v.* Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745.

Signature to two or more petitions by one elector.— Under Minn. Laws (1893), c. 143, an elector may legally sign two or more non-competing petitions for the creation of a new county. State *v.* Red Lake County, 67 Minn. 352, 69 N. W. 1083.

85. Milk *v.* Kent, 60 Ind. 226.

86. Meehan *v.* Zeh, 77 Minn. 63, 79 N. W. 655; Clark *v.* Goss, 12 Tex. 395, 62 Am. Dec. 531; O'Shea *v.* Twohig, 9 Tex. 336. See also Milk *v.* Kent, 60 Ind. 226 [*following* Buckinghouse *v.* Gregg, 19 Ind. 401], where it was held that the division of a county is not complete until a court in the new county is so far organized as to enable suits to be commenced in the new county.

Collection of taxes.— The act creating the county of Nassau did not deprive the treasurer of the county of Queens of the power of proceeding with the collection of taxes for the year 1897 on lands situated in the new county by the sale of such lands for taxes delinquent. Nassau County *v.* Phipps, 43 N. Y. App. Div. 595, 60 N. Y. Suppl. 249.

The acts of officers of the old county throughout the territory designated for the

the inclusion of the new county by name in another judicial district and of an act apportioning senators and representatives among several counties of the state have been held not to affect the rule.[87]

b. As to Territory Improperly Embraced Within New County. Territory improperly embraced within the lines of a new county formed from another county belongs to the new county until the old county in some proper proceeding asserts its right to have the line changed.[88]

c. On Application of Special Statutes. A special statute applicable to the territory of a certain county continues applicable to the part of such territory afterward set off for the formation of another county, in the absence of a repeal express or implied of such statute.[89]

d. Upon Original Judicial Districts. Until a county organized from portions of various other counties is annexed to some judicial district the inhabitants of such new county will be held to belong to their original counties for judicial purposes.[90]

e. Upon Attachment Sale. Where, after an attachment has been levied on land, the county is divided so as to include such land in a new county, such subsequent division will not divest the lien of the attachment or deprive the officers of the power to finish by a sale the process already begun.[91]

f. Inclusion of Former County-Seat Within New County. If in the formation of a new county by setting off a portion of an existing county the county-seat of the original county falls within the territory of the new county, it will not for that reason become the county-seat of such new county.[92]

g. Upon Officers of Original Counties. Where a new county is created by setting off for that purpose organized townships from existing counties, the supervisors and the other township officers of the townships detached to form the new county occupy the same relation to the latter as they previously held to the original counties;[93] but on the formation of a new county the county commissioners of any of the counties from which the new county is formed who reside within the limits of such new county cease to be commissioners of the old county unless they remove within the latter.[94] A mandamus against the police jury of a division of a parish may be enforced after a consolidation of the divisions of the same parish against the police jury of the parish thus formed.[95]

h. Upon Property Rights. Although counties are capable of holding the title

new county, done after the passage of the law and before the actual organization of the new county, are valid; and *prima facie* it is presumed in favor of the acts of the officers of the old county that the former organization continues until the new organization is proved. Clark *v.* Goss, 12 Tex. 395, 62 Am. Dec. 531.

87. O'Shea *v.* Twohig, 9 Tex. 336.

88. Speck *v.* State, 7 Baxt. (Tenn.) 46.

But where a legislature has unconstitutionally detached certain towns of one county and attached them to another, such towns form no part of the latter county from which its jurors should be taken. Perry *v.* State, 9 Wis. 19.

89. Lackawanna County *v.* Stevens, 105 Pa. St. 465.

90. Laning *v.* Carpenter, 12 How. Pr. (N. Y.) 191.

91. Tyrell *v.* Rountree, 7 Pet. (U. S.) 464, 8 L. ed. 749.

A foreclosure suit begun in a proper county is not defeated by a subsequent division of the county. Buckinghouse *v.* Gregg, 19 Ind. 401.

92. Atty.-Gen. *v.* Fitzpatrick, 2 Wis. 542.

93. Carleton *v.* People, 10 Mich. 250.

94. State *v.* Walker, 17 Ohio 135.

County judges.—Where a county is divided and two separate counties formed therefrom by an act of the legislature, to one of which a new name is given, while the other is declared to be and remain a separate county under the name of the county as it existed previous to the division, judges of the county courts appointed before the division happening to reside in that portion of the territory distinguished as a county with a new name lose their offices under the operation of an act requiring judges of county courts to reside within the county for which they are appointed; but those of the judges who reside in the portion of the territory retaining the original name continue in office until the expiration of the term for which they were originally appointed, in the absence of express enactment continuing them in office. People *v.* Morrell, 21 Wend. (N. Y.) 563.

95. State *v.* Police Jury, 39 La. Ann. 979, 3 So. 88; Police Jury *v.* U. S., 60 Fed. 249, 8 C. C. A. 607.

in fee to such lands as may be donated to them for their own use yet the legislature may, upon alteration of county boundaries, and where it does not interfere with the vested rights of individuals, transfer from the old to the new county the title of lands falling in the latter.[96]

4. Adjustment of Rights and Liabilities — a. On Creation of New County — (I) *Power of Legislature to Apportion.* On the creation of a new county from the territory of a contiguous county or counties, it is for the legislature to apportion between the new and old counties, in such manner as may seem just and equitable, the property rights and liabilities of the county or counties of which the new county formed a part;[97] and no part of such power is devolved upon the judicial department.[98]

(II) *Necessity For Statute Providing For Apportionment* — (A) *In General.* Provisions for an apportionment of the character under consideration are usually found in the acts of the legislature creating the new county, or in general statutory provisions as to the creation of new counties;[99] but in the absence

96. Abernathy *v.* Dennis, 49 Mo. 468.

Public property of a parish is not converted into private property by the legislative territorial division of the parish to which such property belongs, and the consequent cessation of the public use to which it is dedicated; such property, notwithstanding the change of territory and of use, remains what it was before, public property, *extra commercium*, and not subject to seizure. Police Jury *v.* McCormack, 32 La. Ann. 624.

97. *Alabama.*— Chambers County *v.* Lee County, 55 Ala. 534; Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Arkansas.— Lee County *v.* Phillips County, 46 Ark. 156; Pulaski County *v.* Saline County Judge, 37 Ark. 339; Monroe County *v.* Lee County, 36 Ark. 378; Lee County *v.* State, 36 Ark. 276; Eagle *v.* Beard, 33 Ark. 497.

California.—Tulare County *v.* Kings County, 117 Cal. 195, 49 Pac. 8; People *v.* Alameda County, 26 Cal. 641.

Connecticut.— Willimantic School Soc. *v.* Windham First School Soc., 14 Conn. 457.

Florida.— Canova *v.* State, 18 Fla. 512.

Indiana.— State *v.* Votaw, 8 Blackf. 2.

Kansas.— State *v.* Kiowa County, 41 Kan. 630, 21 Pac. 601; Sedgwick County *v.* Bunker, 16 Kan. 498.

Kentucky.— Marshall County Ct. *v.* Calloway County Ct., 2 Bush 93.

Maryland.— Wicomico County School Com'rs *v.* Worcester County School Com'rs, 35 Md. 201.

Massachusetts.— Hampshire County *v.* Franklin County, 16 Mass. 76.

Mississippi.— Chickasaw County *v.* Sumner County, 58 Miss. 619; Portwood *v.* Montgomery County, 52 Miss. 523; Tate County *v.* De Soto County, 51 Miss. 588.

North Carolina.—Dare County *v.* Currituck County Com'rs, 95 N. C. 189; Craven County *v.* Pamlico County, 73 N. C. 298; Love *v.* Schenck, 34 N. C. 304.

Ohio.— Putnam County Com'rs *v.* Auditor, 1 Ohio St. 322.

Oregon.— Gilliam County *v.* Wasco County, 14 Oreg. 525, 13 Pac. 324.

Texas.— Reeves County *v.* Pecos County, 69 Tex. 177, 7 S. W. 54.

Wisconsin.— Land, etc., Co. *v.* Oneida County, 83 Wis. 649, 53 N. W. 491; Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598; Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

United States.— Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552 [*affirming* 1 Wyo. 137]; Robertson *v.* Blaine County, 85 Fed. 735.

See 13 Cent. Dig. tit. "Counties," § 12.

A general law providing for the apportionment of debts and credits in all cases where new counties are created does not deprive subsequent legislatures of the power to provide otherwise as to counties created by them. Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598.

Adoption of subsequent statute adjusting rights and liabilities.—After a county was divided by the legislature and new counties had been created it was subsequently enacted that the new counties should receive a certain portion of the money and the credits belonging to the old county and provided for the appointment of commissioners by the courts of sessions of the several counties to compute and adjust the amounts to be received by each county. These courts appointed commissioners who performed the duties of their appointment. It is held that although the last statute of the legislature was originally binding yet the several counties having provided to execute its provisions by their agents, the courts of sessions must be considered to have adopted the statute and to be bound thereby. Hampshire County *v.* Franklin County, 16 Mass. 76.

98. Tulare County *v.* Kings County, 117 Cal. 195, 49 Pac. 8; Sedgwick County *v.* Bunker, 16 Kan. 498.

99. *Alabama.*— Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Arkansas.— Garland County *v.* Hot Spring County, 68 Ark. 83, 56 S. W. 636.

California.— San Diego County *v.* Riverside County, (1898) 55 Pac. 7; Tulare County *v.* Kings County, 117 Cal. 195, 49 Pac. 8; Los Angeles County *v.* Orange County, 97 Cal. 329, 32 Pac. 316; Beals *v.* Evans, 10 Cal. 459.

Colorado.— Cheyenne County *v.* Bent

of express legislative or constitutional provision as to rights and liabilities, the general rule is that the new county will be entirely freed of any of the burdens of the counties from which its territory was taken.[1] No liability attaches because of the former relations of the inhabitants of the respective counties.[2] The old county owns all the public property within its new limits; and is responsible for all debts contracted by it before the passage of the act of separation, and such debts it must pay without any right of contribution from the new county.[3]

County, 15 Colo. 320, 25 Pac. 508; Cooke *v.* School Dist. No. 12, 12 Colo. 453, 21 Pac. 496, 719; Washington County *v.* Weld County, 12 Colo. 152, 20 Pac. 273; *In re* House Bill No. 231, 9 Colo. 624, 21 Pac. 472.

Idaho.— Elmore County *v.* Alturas County, 4 Ida. 145, 37 Pac. 349; Nez Perces County *v.* Latah County, 3 Ida. 413, 31 Pac. 800.

Kansas.— Sedgwick County *v.* Bunker, 16 Kan. 498.

Kentucky.— Montgomery County *v.* Menefee County Ct., 93 Ky. 33, 18 S. W. 1021, 13 Ky. L. Rep. 891.

Mississippi.— Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975; Chickasaw County *v.* Clay County, 62 Miss. 325; Chickasaw County *v.* Sumner County, 58 Miss. 619.

Montana.—Holliday *v.* Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586.

New Mexico.— Sierra County *v.* Dona Ana County, 5 N. M. 190, 21 Pac. 83.

North Carolina.—Dare County *v.* Currituck County Com'rs, 95 N. C. 189; Craven County *v.* Pamlico County, 73 N. C. 298.

Ohio.— Fulton County *v.* Lucas County, 2 Ohio St. 508.

Oregon.— Morrow County *v.* Hendryx, 14 Oreg. 397, 12 Pac. 806.

Tennessee.— Blount County *v.* Loudon County, 8 Baxt. 74, 8 Heisk. 854.

Texas.— Mills County *v.* Brown County, 87 Tex. 475, 29 S. W. 650; Jeff Davis County *v.* Paducah City Nat. Bank, 22 Tex. Civ. App. 157, 54 S. W. 39; Hardeman County *v.* Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536.

Wisconsin.— State *v.* Holland, 91 Wis. 646, 65 N. W. 370; Forest County *v.* Langlade County, 91 Wis. 543, 63 N. W. 760, 65 N. W. 182, 76 Wis. 605, 45 N. W. 598; Land, etc., Co. *v.* Oneida County, 83 Wis. 649, 53 N. W. 491; Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

Wyoming.— *In re* Fremont County, 9 Wyo. 1, 54 Pac. 1073.

United States.—Robertson *v.* Blaine County, 85 Fed. 735.

See 13 Cent. Dig. tit. "Counties," § 12 *et seq.*

The constitutions of California, Colorado, and Texas provide that in all cases of the creation of a new county from territory taken from another county, such new county shall be liable for its proportion of the existing liability of the old county. Los Angeles County *v.* Orange County, 97 Cal. 329, 32 Pac. 316; Washington County *v.* Weld County, 12 Colo. 152, 20 Pac. 273; *In re* House Bill No. 231, 9 Colo. 624, 21 Pac. 472; Mills County *v.* Brown County, 87 Tex. 475, 29 S. W. 650.

To what counties such provision applicable.—A provision in an act creating a new county from portions of other counties that such county shall pay its proportional part of the debt of the counties from which it was formed has been held to apply only to those counties out of which it was originally created and not to territory afterward detached from another county and attached to such county. Chickasaw County *v.* Sumner County, 58 Miss. 619.

1. *Alabama.*— Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

Arkansas.— Lee County *v.* State, 36 Ark. 276; Phillips County *v.* Lee County 34 Ark. 240; Eagle *v.* Beard, 33 Ark. 497.

Massachusetts.— Hampshire County *v.* Franklin County, 16 Mass. 76; Windham *v.* Portland, 4 Mass. 384.

Mississippi.— Chickasaw County *v.* Sumner County, 58 Miss. 619.

Montana.— Territory *v.* Cascade County, 8 Mont. 396, 20 Pac. 809, 7 L. R. A. 105; Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586.

North Carolina.— Dare County *v.* Currituck County Com'rs, 95 N. C. 189; Watson *v.* Pamlico County, 82 N. C. 17; Currituck County *v.* Dare County, 79 N. C. 565.

South Dakota.— Lawrence County *v.* Meade County, 6 S. D. 528, 62 N. W. 131.

See 13 Cent. Dig. tit. "Counties," § 12 *et seq.*

"If the legislature omit to make any provision as to the property and the debts of the old county, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed." Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

2. Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

3. *California.*— Kings County *v.* Tulare County, 119 Cal. 509, 51 Pac. 866; Colusa County *v.* Glenn County, 117 Cal. 434, 49 Pac. 457, 124 Cal. 498, 57 Pac. 477; Tulare County *v.* Kings County, 117 Cal. 195, 49 Pac. 8; Los Angeles County *v.* Orange County, 97 Cal. 329, 32 Pac. 316.

Colorado.— Cheyenne County *v.* Bent County, 15 Colo. 320, 25 Pac. 508; Cooke *v.* School Dist. No. 12, 12 Colo. 453, 21 Pac. 496,

(B) *Under Constitutional Provisions Requiring Apportionment.* It has been held that a constitutional provision that every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken is not an enlargement or grant of power, but is restrictive of and a limitation upon the power which still remains with the legislature, and that the question of what, if any, proportion of the debts of the old should be paid by the new county, is with such body.[4]

(III) *Liabilities Within Statutory Provisions.* Within the meaning of statutes imposing on a new county proportional liability for the debts of the county or counties of which it was originally a part are debts, part of which are not due,[5] bonded indebtedness, such as bridge, railroad, court-house, jail, and other bonds,[6] interest on bonded indebtedness,[7] claims allowed by authority of parent counties, until adjudged illegal or set aside by a competent tribunal,[8] and judgments against parent counties.[9] On the other hand a contingent liability arising out of a breach of duty is not within the statutes;[10] nor is any other disputed claim, until judgment thereon has been recovered.[11]

719; Washington County *v.* Weld County, 12 Colo. 152, 20 Pac. 273.

Maine.— Jones *v.* Oxford County, 45 Me. 419.

Massachusetts.— Hampshire County *v.* Franklin County, 16 Mass. 76.

Texas.— Trinity County *v.* Polk County, 58 Tex. 321.

Wisconsin.—State *v.* Harshaw, 73 Wis. 211, 40 N. W. 641.

United States.— Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

See 13 Cent. Dig. tit. "Counties," § 12 *et seq.*

A statute which imposes liability on the new county for its *pro rata* share of the debt of the county to which its territory formerly belonged, but which contains no provision giving it any interest in the property of the old county, does not entitle it to a *pro rata* share of such property. Dare County *v.* Currituck County Com'rs, 95 N. C. 189.

4. Tulare County *v.* Kings County, 117 Cal. 195, 49 Pac. 8; Washington County *v.* Weld County, 12 Colo. 152, 20 Pac. 273.

In Texas, however, a provision to the effect that "when any part of a county is stricken off and attached to or created into another county, the part stricken off shall be holden for and obliged to pay its portion of all the liabilities then existing of the county from which it was taken, in such manner as the law shall provide (Tex. Const. art. 9, § 1) has been held to be definite in its terms, leaving no room for construction and making it the imperative duty of the legislature to provide a method by which a new county may be forced to pay its proportionate part of the indebtedness of the old existing at the time of its creation. Mills County *v.* Brown County, 87 Tex. 475, 29 S. W. 650.

Mont. Const. art. 16, § 3, expressly provides that a new county shall pay its ratable proportion of all the old county's liabilities. Holliday *v.* Sweet Grass County, 19 Mont. 364, 48 Pac. 553.

5. Cheyenne County *v.* Bent County, 15 Colo. 320, 25 Pac. 508.

6. *Arizona.*— Coconino County *v.* Yavapai County, (1898) 52 Pac. 1127.

Kansas.— State *v.* Kiowa County, 41 Kan. 630, 21 Pac. 601.

Kentucky.— Montgomery County *v.* Manefee County Ct., 93 Ky. 33, 18 S. W. 1021, 13 Ky. L. Rep. 891.

New Mexico.— Sierra County *v.* Dona Ana County, 5 N. M. 190, 21 Pac. 83.

United States.— Carter County *v.* Sinton, 120 U. S. 517, 7 S. Ct. 650, 30 L. ed. 701.

Effect of failure of consideration.—Where a new county formed out of an old one is required to issue bonds to the latter in payment of its share of bonded indebtedness of the old county, it is no defense to an action by the latter county to compel the issuance of such bonds that the consideration for the bonded indebtedness of the original county has partially failed. Canova *v.* State, 18 Fla. 512.

Liability is confined to proper proportion of the amount of bonds negotiated when the act creating the new county was passed. Hempstead County *v.* Howard County, 51 Ark. 344, 11 S. W. 478.

7. Hempstead County *v.* Howard County, 51 Ark. 344, 11 S. W. 478; Holliday *v.* Sweet Grass County, 19 Mont. 364, 48 Pac. 553. But see Beals *v.* Amador County, 35 Cal. 624 (holding that the legislature may nevertheless provide by subsequent enactment for the payment of interest on such debt); Beals *v.* Amador County, 28 Cal. 449 (holding that a new county is not bound to pay interest in the absence of express statutory provision to that effect).

8. *In re* Fremont County, 8 Wyo. 1, 54 Pac. 1073.

9. *In re* Fremont County, 8 Wyo. 1, 54 Pac. 1073.

10. Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

11. Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975.

Liability for portion of unascertained indebtedness.— In the act of organization of a new county out of territory included in an

(iv) *Property Within Statutory Provisions.* The term "property" as used in acts apportioning liabilities and property upon the creation of new counties may, in the absence of a showing of a contrary intent, be held to include money as well as other assets.[12]

b. On Detachment of Territory From One County and Attachment to Another. In the absence of express provision to the contrary transferred territory loses all claim to share in the property belonging to the county from which it is taken,[13] and is relieved of the indebtedness resting upon the latter,[14] except in the case of debts contracted before the separation and which are a lien upon the detached territory;[15] but it incurs the liabilities and shares in the property of the county to which it is attached and is equally subject to assessment and taxation for that purpose.[16] Where a portion of the territory of one county is annexed to another, the county gaining territory neither acquires any rights nor comes under any obligations to the county losing it, unless the legislative act so provides.[17]

c. On Change of Boundaries. A law providing for a change of county boundaries is not invalid for failure of the legislature to provide for the apportionment of the indebtedness of the counties whose boundaries are sought to be changed thereunder, but it will be presumed that the legislature did not deem such provisions necessary.[18]

d. Computation and Determination of Amounts — (i) *In General.* It is for the legislature and not for the courts to determine how the property and debts shall be apportioned between the old county and the detached territory;[19] and when it has done so the courts cannot interfere.[20] And although the legislature

old one, it was provided that the debt of the old county should be ascertained and apportioned by the district court. This was done, but there existed at the time an unascertained indebtedness from the old county to another county, and the court found that when the amount of such indebtedness was ascertained the new county would be liable for its portion thereof. It was held that the new county was liable for its portion of such indebtedness. Bingham County *v.* Bannock County, 5 Ida. 627, 51 Pac. 769.

12. Washington County *v.* Weld County, 12 Colo. 152, 20 Pac. 273.

Delinquent taxes.—Where a new county is formed out of parts of others, delinquent general taxes due from persons and property therein continue enforceable by the parent county; hence in apportioning the debts and assets between the old and the new counties such taxes are to be treated as assets. *In re* Fremont County, 8 Wyo. 1, 54 Pac. 1073.

13. Watson *v.* Pamlico County Com'rs, 82 N. C. 17.

14. Hodgeman County *v.* Garfield County, 42 Kan. 409, 22 Pac. 430; State *v.* Kiowa County, 41 Kan. 630, 21 Pac. 601; Watson *v.* Pamlico County Com'rs, 82 N. C. 17.

15. Marion County *v.* Harvey County, 26 Kan. 181.

Under an act limiting the liability of a new county to bonds "legally authorized and issued by a vote of the electors of such county" previous to the change of boundary lines, refunding bonds issued without a vote of the electors are not a liability against territory subsequently detached from such county and attached to another, and no tax can be levied on the detached territory to pay such bonds. Hodgeman County *v.* Garfield County, 42 Kan. 409, 22 Pac. 430.

16. Watson *v.* Pamlico County Com'rs, 82 N. C. 17. Thus where additional territory has been added to a county after the issuance of bonds by it the taxable property in such additional territory is liable like other property in the county to taxation for the payment of such obligation. Chicago, etc., R. Co. *v.* Cuming County, 31 Nebr. 374, 47 N. W. 1121.

Curative act providing for apportionment. — Where the act detaching territory from one county and attaching it to another fails to provide for payment by the latter county of an equitable proportion of the other county's debt existing at the time the act was passed, the legislature has power to provide for apportionment by a subsequent enactment. Perry County *v.* Conway County, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665.

Change of boundary not the creation of a new county.— Where county lines are changed and territory is detached from one county and attached to another, the county acquiring the additional territory is not entitled to demand of the other any portion of the funds in its treasury under the Ohio act of 1820, authorizing creation of new counties, since such a change of boundary is not the erection of a new county. Crawford County *v.* Marion County, 16 Ohio 466.

17. Chickasaw County *v.* Sumner County, 58 Miss. 619.

18. Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147.

19. Tulare County *v.* Kings County, 117 Cal. 195, 49 Pac. 8; Sedgwick County *v.* Bunker, 16 Kan. 498. And see Pulaski County *v.* Saline County Judge, 37 Ark. 339.

20. Sedgwick County *v.* Bunker, 16 Kan. 498.

may itself ascertain or determine what proportion of the existing liabilities of the original county or counties is to be paid by a new county created therefrom, and the apportionment of property, yet it is eminently proper and is the practice in many jurisdictions to remit such matters to the local authorities of the county.[21] The legislature may, however, by the act apportioning the property and indebtedness, provide for the appointment of a special board or commission to determine the value of the property and the amount of indebtedness to be assumed.[22] And it has been held that such adjustment should be made on just and equitable principles rather than according to technical rules of law.[23] The settlement made by such commissioners will not be disturbed in the absence of a showing of fraud or mistake,[24] but may be impeached upon such grounds.[25]

(11) *Comparison of Taxable Property.* In some jurisdictions it is expressly provided that in the adjustment of the respective rights and liabilities of the two counties the method of ascertaining the *pro rata* share of a new county of the indebtedness of the county from which it was created shall be

21. A very usual provision of this sort is to the effect that the boards of commissioners or supervisors of counties, sometimes spoken of as the county court, shall have full power to apportion the indebtedness of the old and new counties.

Arkansas.— Hempstead County *v.* Grave, 44 Ark. 317; Monroe County *v.* Lee County, 36 Ark. 378; Lee County *v.* State, 36 Ark. 276; Phillips County *v.* Lee County, 34 Ark. 24.

Colorado.— Cheyenne County *v.* Bent County, 15 Colo. 320, 25 Pac. 508; *In re* House Bill, No. 231, 9 Colo. 624, 21 Pac. 472.

Idaho.— Canyon County *v.* Ada County, 5 Ida. 686, 51 Pac. 748; Elmore County *v.* Alturas County, 4 Ida. 145, 37 Pac. 349.

Montana.—Holliday *v.* Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Custer County *v.* Yellowstone County, 6 Mont. 39, 6 Pac. 586.

North Carolina.— Vance County *v.* Granville County, 107 N. C. 291, 12 S. E. 39.

South Dakota.— Lawrence County *v.* Meade County, 6 S. D. 528, 62 N. W. 131.

See 13 Cent. Dig. tit. "Counties," § 13.

Power of county boards to agree on compromise.—A statute organizing the county of M, out of territory theretofore embraced in the old county, provided that each county should be the exclusive owner of all real property within its boundaries, and that the treasurer of old county should on demand of the treasurer of M county "assign to said county of Marinette all tax certificates in his office upon land situated in said county of Marinette." It was held that such statute did not make such statutory disposition of tax certificates as to preclude the county boards of the two counties from agreeing that they might be retained by the old county in settlement of claims which it had against M county. Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

Resort to court upon refusal of commissioners to act.—An act creating a county and providing for the apportionment to it of part of the debt of the original county does not, by providing that the county commissioners should meet and adjust the indebtedness, give them exclusive power and jurisdiction, but on their refusing to act the courts may be resorted to. Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586.

22. *California.*— Riverside County *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788; San Diego County *v.* Riverside County, 125 Cal. 495, 58 Pac. 81; Beals *v.* Evans, 10 Cal. 459.

Colorado.— Washington County *v.* Weld County, 12 Colo. 152, 20 Pac. 273.

Idaho.— Blaine County *v.* Lincoln County, 6 Ida. 57, 52 Pac. 165.

Oregon.— Morrow County *v.* Hendryx, 14 Oreg. 397, 12 Pac. 806.

Wisconsin.— State *v.* Holland, 91 Wis. 646, 65 N. W. 370; Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598.

See 13 Cent. Dig. tit. "Counties," § 13.

Demands not submitted or adjudicated.— Under the California act of March 11, 1889, creating O county out of a part of L county, which provides that certain commissioners shall ascertain and adjust the respective liabilities of the two counties, the commissioners are charged with the performance of quasi-judicial duties, and an award by them is not a bar to a future action for a demand, not actually submitted to nor adjudicated by them, although it was in existence when the submission was made, and although the agreement was to submit all demands. Orange County *v.* Los Angeles County, 114 Cal. 390, 46 Pac. 173.

Duties merely clerical.—A board of accountants appointed under the Idaho act of Feb. 7, 1889, and whose duty it is to ascertain the amount of indebtedness of a certain county at a certain time, and apportion such indebtedness among said and other named counties on a given basis, performs clerical acts, and cannot pass, directly or indirectly, on the validity of such indebtedness. Blaine County *v.* Smith, 5 Ida. 255, 48 Pac. 286.

23. Forest County *v.* Langlade County, 91 Wis. 543, 63 N. W. 760, 65 N. W. 182.

24. Canyon County *v.* Ada County, 5 Ida. 686, 51 Pac. 748.

25. Blaine County *v.* Lincoln County, 6 Ida. 57, 52 Pac. 165.

ascertained by the relative valuation of taxable property in each county at the time of the division.[26]

e. Payment — (I) *Of Liability of New County to Old* — (A) *Manner of Payment.* A state legislature may itself provide the method for the payment by a new county of its proper proportion of the indebtedness of the original county or counties,[27] as by the issuance of bonds;[28] or it may require certain officials of the new county to provide for the payment of such ascertained proportion by a reasonable method and within a reasonable time.[29]

(B) *Manner of Enforcing Payment* — (1) By Action. While it is not competent for the legislature to release a county from its liability to its existing creditors and to transfer their claims to a new county, it may authorize the old county to have its recourse for indemnity upon the new county in a proper proceeding instituted for that purpose,[30] and an action at law will lie in some jurisdictions against a new county in favor of the old county or counties from which it was taken for its *pro rata* share of existing debts of the old county as ascertained by the proper authorities of the new county upon neglect or refusal to pay the same.[31] A county sued on a demand for which, if it were liable, two other

26. *Florida.*— Canova *v.* State, 18 Fla. 512.
Minnesota.— State *v.* Demann, 83 Minn. 331, 86 N. W. 352.
Mississippi.— Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975.
Oregon.— Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447.
Texas.— Mills County *v.* Brown County, 87 Tex. 475, 29 S. W. 650.
Wyoming.— *In re* Fremont County, 8 Wyo. 1, 54 Pac. 1073.
See 13 Cent. Dig. tit. "Counties," § 13.
In California it is held that in creating new counties out of territory taken from counties already organized it is but just that the legislature should apportion the debts already accrued between the new and old counties in the ratio of the territory, population, taxable property, and benefits conferred on the respective counties or portions of counties affected by the change. People *v.* Alameda County, 26 Cal. 641.
The phrase "taxable property" as used in these provisions has been held to mean property liable to taxation, and property exempt by law from taxation, although appearing on the assessment, should not be estimated. Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586. But the fact that some of the territory may have been government land and not taxable when it was detached will not relieve it from taxation in accordance with the rule of an act apportioning liability when such territory is no longer exempt. State *v.* Kiowa County, 41 Kan. 630, 21 Pac. 601.

27. In some jurisdictions it has been held that under an act providing that the fractions taken from several counties to form a new county shall continue liable for their proportion of all existing debts in their respective counties, the parent counties have, for the purpose of enforcing the liabilities of said prospective fractions by the levy and assessment of taxes, the same jurisdiction as they had before the separation, but the remedy of any one of the old counties is against the citizens and property of the fractional part **of the new county formerly belonging to it** and not against the new county. Blount County *v.* Loudon County, 8 Baxt. (Tenn.) 74, 8 Heisk. (Tenn.) 854.

28. Lawrence County *v.* Meade County, 6 S. D. 528, 62 N. W. 131.
No application to floating indebtedness.— A provision for issuing bonds by the new county to the old does not apply to floating indebtedness of the original county represented by past-due warrants, but the new county is required to make payment of such floating indebtedness in the usual manner of paying matured indebtedness. Lawrence County *v.* Meade County, 6 S. D. 528, 62 N. W. 131.

29. Lee County *v.* State, 36 Ark. 276.
Interpretation and effect of such provisions.— Provisions to this effect are not to be construed, however, as allowing the new county an unlimited discretion as to the time and manner of its discharging its obligations, but it should proceed to provide some reasonable mode for a discharge in a reasonable time of the burden imposed as a condition of its existence, upon its inhabitants and owners of property, and the courts have power to enforce the performance of the duty, judging themselves of the reasonable nature of the delay or of the mode. Lee County *v.* State, 36 Ark. 276.

30. Howard *v.* Horner, 11 Humphr. (Tenn.) 532.

31. Chambers County *v.* Lee County, 55 Ala. 534; Vance County *v.* Granville County, 107 N. C. 291, 12 S. E. 39; Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447.
Condition precedent.— In order, however, that an action may be maintained against a new county to recover its proportionate share of the indebtedness of the parent county, such amount must be ascertained in the manner prescribed by law, usually by the county court of the new county. Iowa County *v.* Green County, 1 Pinn. (Wis.) 518.
Limitation of action.—An action against a county to enforce a liability arising from an indebtedness of a former county charged upon

counties, formerly a part of it, were liable over to it under statute, is entitled to make them parties defendant, and settle the entire controversy in the same action.[32] Where two counties contribute territory for the formation of a third, one of the two parent counties may sue the new county for an adjustment of liabilities between them without joining the other parent county.[33] Where a law provides for the payment of a share of taxes collected by one county to the treasurer of another county, a counter-claim in an action between the counties by the latter county is not demurrable on the ground that the cause of action accrued to the treasurer and not to the county, since the money if collected belongs to the county, and the latter is the real party in interest.[34]

(2) By Mandamus. In some jurisdictions where the county board or court of a new county is required to provide for the payment of its proportion of the debt of the parent county such action may be compelled by mandamus.[35]

(II) *Of New County's Proportion of Assets.* The legislature of a state may as incident to its power to create two counties out of one, and to direct the division of funds previously raised by levies on the inhabitants of both the counties in common, provide for enforcing payment thereof by suit after demand against those having the same in hand.[36] Where the act creating a new county provides that such new county shall receive certain taxes upon lands situated in such new county, and proceeds of tax-sales of lands so situated, it has been held that payment thereof may be compelled by mandamus.[37]

f. Appeal From County Tribunals.[38] The actions of county tribunals in adjusting their rights and liabilities are subject to appeal;[39] and on such appeal the whole matter is triable *de novo*.[40]

the new county by the act creating it is upon a specialty created by the statute, and as no liability against the new county could arise from the original obligation alone, such obligation is but an element in the cause of action, the statute being the other and indispensable element; hence limitation against such action runs only from the creation of the new county, and not from the maturity of the original debt. Robertson *v.* Blaine County, 90 Fed. 63, 32 C. C. A. 512, 47 L. R. A. 459.

Venue of action.—A suit by a parent county to recover a portion of its indebtedness from other counties created therefrom is in some states authorized to be brought in the district court of either the old or new county. Jeff Davis County *v.* Paducah City Nat. Bank, 22 Tex. Civ. App. 157, 54 S. W. 39, under Tex. Rev. Stat. (1895), art. 764.

32. Jeff Davis County *v.* Paducah City Nat. Bank, 22 Tex. Civ. App. 157, 54 S. W. 39.

In proceedings to enforce the levy and collection of a tax to pay the bonds issued by a county, a portion of which was subsequently detached and formed into new counties with the provision that the new counties should compensate the original county according to the assessed valuation of the property in the detached territory, it is not necessary to make the new counties parties. Columbia County *v.* King, 13 Fla. 451.

33. Vance County *v.* Granville County, 107 N. C. 291, 12 S. E. 39.

34. Lincoln County *v.* Oneida County, 80 Wis. 267, 50 N. W. 344.

35. Hempstead County *v.* Grave, 44 Ark. 317; Pulaski County *v.* Saline County Judge, 37 Ark. 339; Monroe County *v.* Lee County, 36 Ark. 378.

As to mandamus generally see Mandamus.

Application for mandamus.— The application should, where the new county is composed of more than one county, be in behalf of all the old counties; or if made by one should show that separate action could be had with regard to its own claim without injustice to others, if there be others still unsettled; and the petition should show a demand for action and a refusal. Lee County *v.* State, 36 Ark. 276. A petition for mandamus against one of the organized counties need not aver that all the other counties are organized, where it makes such averment with regard to the defendant county. Dubuque *v.* Clayton County, 3 Greene (Iowa) 604.

36. Love *v.* Ramsour, 34 N. C. 328; Love *v.* Schenck, 34 N. C. 304.

It is not necessary in such a case to sue for a particular specified amount if the amount to which the new county is entitled is uncertain. Love *v.* Schenck, 34 N. C. 304.

37. State *v.* Holland, 91 Wis. 646, 65 N. W. 370.

38. See, generally, Appeal and Error.

39. Phillips County *v.* Lee County, 34 Ark. 240; Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598.

May contest correctness of adjustment.— When the act of the legislature designates the time for the adjustment of the amount by the court of a county from which territory is severed, the other county to which it is attached has notice and may contest the correctness of the adjustment and appeal it to the supreme court. Pulaski County *v.* Saline County Judge, 37 Ark. 339.

40. Phillips County *v.* Lee County, 34 Ark. 240.

D. Annexation or Attachment of Territory For Special Purposes — 1. IN GENERAL. Territory or unorganized counties are often attached by statute to another county for special purposes such as judicial, election, revenue, etc., and for such purposes are treated as constituting a part of the county to which they are attached.[41]

2. LIABILITY OF ATTACHED TERRITORY. The people of two counties attached for special purposes should alike enjoy the benefits and bear the burdens of the county administration.[42] And where an unorganized county is attached by statute to another county for revenue purposes, the authorities of the latter county are the proper persons to levy and collect taxes on property situated in such unorganized county for revenue purposes.[43] Where, however, an unorganized county, attached to another for the purpose of county government, is duly organized, the property within its limits is no longer subject to be taxed by the county to which it was attached. The taxes during the period of annexation should therefore be limited to defraying the ordinary expenses of county administration.[44]

E. Precincts or Divisions For Special Purposes — 1. CREATION. In some states the duty of dividing counties into precincts[45] or districts is imposed on the legislature by the constitution;[46] but such division may be, and is often delegated by the legislature to county officials, such as county courts, commissioners, and supervisors.[47]

41. *Idaho.*— Nez Perces County *v.* Latah County, 3 Ida. 413, 31 Pac. 800.

Kansas.— Millar *v.* State, 2 Kan. 174.

Nebraska.— State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113.

Nevada.— State *v.* Blasdel, 6 Nev. 40.

New York.— De Camp *v.* Eveland, 19 Barb. 81.

Pennsylvania.— McCullough's Appeal, 34 Pa. St. 248; Russel *v.* Reed, 27 Pa. St. 166.

South Dakota.— State *v.* Hughes County, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588.

Texas.— Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Alford *v.* Jones, 71 Tex. 519, 9 S. W. 470.

Wisconsin.— Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77; Crawford County *v.* Iowa County, 2 Pinn. 368, 2 Chandl. 14.

See 13 Cent. Dig. tit. "Counties," § 16.

There may be a county without a government of its own; as happens when a new county, created out of another, continues to be attached to and controlled by the government of such other until its own government may be organized. State *v.* Blasdel, 6 Nev. 40.

Statutes of this character are constitutional and valid. De Camp *v.* Eveland, 19 Barb. (N. Y.) 81; Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77.

Where the statute specially designates the purpose for which the territory or unorganized county will be considered annexed, it is at once a grant and a limit of jurisdiction, and the territory will not be deemed annexed for any other purpose than the one so specified. State *v.* Hughes County, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588.

42. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823. See also Nez Perces County *v.* Latah County, 3 Ida. 413, 31 Pac. 800, attachment for judicial purposes. But see Crawford County *v.* Iowa County, 2 Pinn. (Wis.) 368, 2 Chandl. (Wis.) 14, as to liability for court expenses in absence of statutory provision where two counties were attached for judicial purposes under a statute providing that certain courts should be held exclusively in a particular one of these counties, but no provision was made relating to the expense of holding such courts by the two counties.

43. Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77.

44. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823.

Effect of subsequent organization of attached county after levy of taxes.—Where an unorganized county is attached to an organized county for election, judicial, and revenue purposes, and the proper officers of the organized county levy taxes upon the property in the unorganized one, but prior to the time such taxes became due the unorganized county becomes organized by the election and qualification of proper officers, such taxes are to be paid to the treasurer of the new county. Morse *v.* Hitchcock County, 19 Nebr. 566, 27 N. W. 637 [*following* Fremont, etc., R. Co. *v.* Brown County, 18 Nebr. 516, 26 N. W. 194].

45. **Precincts have been defined** as being mere territorial divisions or districts created for certain political and administrative purposes, and without a semblance of corporate character. State *v.* Dodge County, 10 Nebr. 20, 4 N. W. 370.

Such precincts or districts can neither plead nor be impleaded in actions, nor are they capable of imposing upon themselves any obligation or liability, except in pursuance of express legislative authority. State *v.* Dodge County, 10 Nebr. 20, 4 N. W. 370.

46. Britton *v.* Moody, 2 Coldw. (Tenn.) 15, holding that such provisions are mandatory.

47. Dunn *v.* Wilcox County, 85 Ala. 144, 4 So. 661; State *v.* Dodge County, 10 Nebr. 20, 4 N. W. 370; People *v.* Queens County,

2. PRECINCT BONDS — a. Issuance. Bonds may be issued by a county on behalf of a precinct thereof, where such issuance is authorized by law;[48] and such bonds, when issued by the proper officers of the county, are in legal effect bonds of the county, although voted by the inhabitants of the precinct.[49] The issuance of such bonds must be made in the manner[50] and for the purpose prescribed, and bonds issued for an unauthorized purpose are void.[51]

b. Proceedings to Enforce Payment. Although in some states the remedy provided by statute for enforcing the liability of a county on bonds issued by it in behalf of precincts of said county is by mandamus to compel the levy of a tax,[52] yet in the courts of the United States, even when sitting in a state whose statutes contain such a provision, an action at law will lie on such bonds against the county, and is the only remedy, and an action thereon should be brought against the county.[53]

F. Classification According to Population. In many states provision is made for the classification of counties according to their population.[54] The usual method of determining the population of a county for such classification is by the census taken by the United States.[55]

10 N. Y. St. 286; State *v.* Rigsby, 17 Tex. Civ. App. 171, 43 S. W. 271.

Acts of this character do not violate constitutional provisions forbidding the legislature to authorize any municipal corporation to pass laws inconsistent with the general laws of the state, as counties are not municipal corporations. Dunn *v.* Wilcox County, 85 Ala. 144, 4 So. 661.

A state statute requiring the county court to subscribe for a certain number of shares of the capital stock of a railroad company in behalf of a certain precinct in the county, and to issue in payment therefor coupon bonds of that precinct, recited in its preamble that it was passed upon the petition of a majority of the voters and taxpayers in the precinct. This statute was held not to be unconstitutional as compelling a precinct to become a stock-holder in a private corporation. Allison *v.* Louisville, etc., R. Co., 10 Bush (Ky.) 1.

Order at special term of commissioners' court.— The fact that an order of the commissioners' court changing the boundaries of precincts was made at a special term is no objection to it. State *v.* Rigsby, 17 Tex. Civ. App. 171, 43 S. W. 271.

48. State *v.* Babcock, 21 Nebr. 187, 31 N. W. 682; Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356; State *v.* Dodge County, 10 Nebr. 20, 4 N. W. 370; Nemaha County *v.* Frank, 120 U. S. 41, 7 S. Ct. 395, 30 L. ed. 584; Blair *v.* Cuming County, 111 U. S. 363, 4 S. Ct. 449, 28 L. ed. 457; Davenport *v.* Dodge County, 105 U. S. 237, 26 L. ed. 1018; Ogden *v.* Daviess County, 102 U. S. 634, 26 L. ed. 263; Deland *v.* Platte County, 54 Fed. 823; Osborne *v.* Adams County, 7 Fed. 441, 2 McCrary 97; Blair *v.* West Point Precinct, 5 Fed. 265, 2 McCrary 459.

49. Blair *v.* West Point Precinct, 5 Fed. 265, 2 McCrary 459.

But judgment on such bonds must be satisfied out of the tax levied on such precincts alone. Breckinridge County *v.* McCracken, 61 Fed. 191, 9 C. C. A. 442. See also Blair *v.* West Point Precinct, 5 Fed. 265, 2 McCrary 459.

50. State *v.* Babcock, 21 Nebr. 599, 33 N. W. 247.

Necessity for presentation of petition for election.— State *v.* Babcock, 21 Nebr. 187, 31 N. W. 682, construing Nebr. Comp. Stat. (1885), c. 45, § 14.

The mere fact that precinct bonds do not show upon their face that they were issued on behalf of the precinct is immaterial, when such fact appears in the statute authorizing their issuance on the face of the bond. Blair *v.* West Point Precinct, 5 Fed. 265, 2 McCrary 459.

51. Osborne *v.* Adams County, 7 Fed. 441, 2 McCrary 97.

52. State *v.* Dodge County, 10 Nebr. 20, 4 N. W. 370.

53. Nemaha County *v.* Frank, 120 U. S. 41, 7 S. Ct. 395, 30 L. ed. 584; Blair *v.* Cuming County, 111 U. S. 363, 4 S. Ct. 449, 28 L. ed. 457; Davenport *v.* Dodge County, 105 U. S. 237, 26 L. ed. 1018.

54. Gett *v.* Sacramento County, 111 Cal. 366, 43 Pac. 1122; Kumler *v.* San Bernardino County, 103 Cal. 393, 37 Pac. 383; Sanders *v.* Sehorn, 98 Cal. 227, 33 Pac. 58; Donlon *v.* Jewett, 88 Cal. 530, 26 Pac. 370; People *v.* Williams, 64 Cal. 87, 27 Pac. 939; People *v.* Gaulter, 149 Ill. 39, 36 N. E. 576; Worcester Nat. Bank *v.* Cheney, 94 Ill. 430; Lewis *v.* Lackawanna County, 17 Pa. Super. Ct. 25; Com. *v.* McMichael, 8 Pa. Dist. 157, 22 Pa. Co. Ct. 182, 2 Dauph. Co. Rep. (Pa.) 107; Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343; Nelson *v.* Edwards, 55 Tex. 389.

The legislature has no constitutional authority to place in the first class, for the purpose of regulating the fees and compensation of different officers, a county whose population is such as to place it among counties of the second class; and an act so placing it out of its class is to that extent inoperative and void. Worcester Nat. Bank *v.* Cheney, 94 Ill. 430.

55. People *v.* Williams, 64 Cal. 87, 27 Pac. 939; Lewis *v.* Lackawanna County, 17 Pa. Super. Ct. 25; Nelson *v.* Edwards, 55 Tex. 389. But see Kumler *v.* San Bernardino County, 103 Cal. 393, 37 Pac. 383.

IV. GOVERNMENT AND OFFICERS OF COUNTIES.

A. Organization and Governmental Powers in General — 1. ORGANIZATION — a. Defined and Explained. The establishing of a county is the setting apart a certain territory to be in the future organized as a political community or quasi-corporation for political purposes; and the organizing of a county is the vesting in the people of such territory such corporate rights and powers.[56]

b. Method of Organization or Reorganization. Both the establishing and organizing of counties is, with some restrictions as to area, population, and assessable property,[57] left exclusively with the legislature of the state;[58] and until some act of the legislature authorizing it the people of a district have no right to act as an organized county.[59] The legislature need not, however, itself exercise this power, but may, and frequently does, delegate the same to officers or commissioners appointed for the purpose.[60] In some jurisdictions it is expressly provided that where an unorganized or disorganized county desires to be organized or reorganized, a memorial or petition expressing such desire and signed by a certain number of qualified voters or freeholders residing in such unorganized or disorganized county shall be presented to the governor,[61] or to the commissioners' court of the old county, where authority to organize is conferred upon such commissioners.[62]

c. Subsequent Recognition or Ratification of Defective Organization. Although the original organization of a county was illegal, without constitutional authority, or even fraudulent, such organization is a *de facto* one, which a subsequent recognition and confirmation by the legislature will render valid.[63] When a

The court will take judicial notice of what such population is according to the preceding census in ascertaining to what class a county may belong. Worcester Nat. Bank *v.* Cheney, 94 Ill. 430.

56. State *v.* Parker, 25 Minn. 215; State *v.* McFadden, 23 Minn. 40. And see Ryan *v.* Evans, 49 Tex. 364.

An "organized county" is a county which is organized in fact and has its lawful officers, legal machinery, and means for carrying out the powers and performing the duties pertaining to it as a quasi-corporation. State *v.* Honerud, 66 Minn. 32, 68 N. W. 323.

After county officers appointed by the governor qualify and enter on the discharge of their duties, an unorganized county becomes duly organized under Kan. Comp. Laws (1885), p. 256, c. 24, and amendments thereto relating to organization of new counties. Keating *v.* Marble, 39 Kan. 370, 18 Pac. 189.

"The organization of a county is so incident to its creation, and flows so naturally therefrom, that it partakes of the special proceeding which brings the county into existence to so great a degree, that it is difficult, if not impossible, to effect it without more or less of special legislation, in order to have the law applicable." State *v.* Irwin, 5 Nev. 111.

57. Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

58. State *v.* Pawnee County, 12 Kan. 426; State *v.* Parker, 25 Minn. 215; State *v.* McFadden, 23 Minn. 40; State *v.* Cook, 78 Tex. 406, 14 S. W. 996.

Such acts not within the prohibition against special legislation.— People *v.* Glenn County, 100 Cal. 419, 35 Pac. 302, 38 Am. St. Rep. 305; People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66.

59. State *v.* Honerud, 66 Minn. 32, 68 N. W. 323; State *v.* Parker, 25 Minn. 215.

60. State *v.* Pawnee County, 12 Kan. 426; State *v.* Piper, 17 Nebr. 614, 24 N. W. 204; Merchants' Nat. Bank *v.* McKinney, 2 S. D. 106, 48 N. W. 841; State *v.* Cook, 78 Tex. 406, 14 S. W. 996; Ryan *v.* Evans, 49 Tex. 364.

61. State *v.* Robertson, 41 Kan. 200, 21 Pac. 382; Martin *v.* Lacy, 39 Kan. 703, 18 Pac. 951; State *v.* Blasdel, 6 Nev. 40; Merchants' Nat. Bank *v.* McKinney, 2 S. D. 106, 48 N. W. 841. *Compare* State *v.* Sillon, 21 Kan. 207, where the memorial was insufficient both as to the signatures and as to the census return.

The object of appointing a census taker in the organization of new counties is to ascertain the truth of the statements contained in the memorial presented to the governor; and in ascertaining the names and ages of the *bona fide* inhabitants of an unorganized county the census taker should confine himself to those who were *bona fide* inhabitants in the county at the time of the presentation of the memorial. State *v.* Robertson, 41 Kan. 200, 21 Pac. 382.

62. State *v.* Cook, 78 Tex. 406, 14 S. W. 996.

63. Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560, 58 Kan. 299, 49 Pac. 85; State *v.* Robertson, 41 Kan. 200, 21 Pac. 382; State *v.* Hamilton, 40 Kan. 323, 19 Pac. 723; State *v.* Harper County, 34 Kan. 302, 8 Pac. 417; *In re* Holcomb, 21 Kan. 628; State *v.* Stevens, 21 Kan. 210; State *v.* Pawnee County, 12

county has been illegally organized, but its validity is not challenged or corrected for a long time, the acts of the county and its officers cannot be repudiated by them on account of the illegality of such organization.[64]

d. Attack Upon Organization — (I) *Collateral Attack.* The validity of the organization of a county cannot be collaterally attacked.[65]

(II) *Proceedings to Restrain or Vacate Organization.* A court of equity may under the proper circumstances and upon a proper application[66] restrain commissioners of a county from organizing a county.[67] When, however, the county has been organized, the court of chancery has no power to abolish it or to restrain existing officers from executing their several functions.[68] So where a county organization has been obtained through falsehood and fraud, by the presentation of a false and fraudulent memorial, and by false and fraudulent census returns, the supreme court may, in an action in the nature of quo warranto[69] against the persons assuming to act as officers of such organization, inquire into

Kan. 426; Harper County *v.* Rose, 140 U. S. 71, 11 S. Ct. 710, 35 L. ed. 344; Comanche County Com'rs *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604 [*affirming* 35 Fed. 343]; Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455.

In absence of de facto organization recognition is ineffective. State *v.* Ford County, 12 Kan. 441.

Liability of township as successor of de facto county.— The township of Garfield, in Finney county, is as a public municipal corporation, the legal successor of Garfield county, and therefore is liable for the valid debts created by that county during its *de facto* organization or existence. State *v.* Garfield County, 54 Kan. 372, 38 Pac. 559; Kan. Sess. Laws (1893), c. 98.

64. Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455.

Effect of abandonment and subsequent reorganization upon liability of de facto county. — The fact that a *de facto* organization of a county recognized by the legislature was, after the issuance of bonds, abandoned, and the county treated as unorganized, does not release such county from liability on its bonds, when it is afterward reorganized, no change of political organization being sufficient to release a county from debts theretofore contracted. Comanche County Com'rs *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604.

Presumption as to existence of necessary facts.— In the absence of evidence to the contrary, it will be presumed that the facts necessary to the legal organization of a county existed. Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455. And see Rice *v.* Ruddiman, 10 Mich. 125.

65. *In re* Williams, 47 Kan. 383, 27 Pac. 1006; *In re* Rabbitt, 47 Kan. 382, 27 Pac. 1006; *In re* Short, 47 Kan. 250, 27 Pac. 1005 (habeas corpus); Presidio County *v.* City Nat. Bank, 20 Tex. Civ. App. 511, 44 S. W. 1069; Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455 (action on county bonds).

66. **Parties complainant.**— In accordance with the rule that when an injury is common to all, and results from the invasion of the right enjoyed by a party in common with the public, a private action cannot be maintained, a citizen, taxpayer, or qualified voter of an unorganized county has no such interest in its proposed organization as to enable him to maintain a suit to restrain or avoid such organization (Hughes *v.* Dubbs, 84 Tex. 502, 19 S. W. 684); nor can a citizen and taxpayer of a county from which a portion of territory has been taken for the purpose of establishing a new county file a bill to inquire into the validity of the act creating a new county, if it is so far organized as to have become a political organization of the state (Bridgenor *v.* Rodgers, 1 Coldw. (Tenn.) 259 [*following* Ford *v.* Farmer, 9 Humphr. (Tenn.) 152]).

67. As where the act creating the county is unconstitutional and void (Henry *v.* Steele, 28 Ark. 455; Ford *v.* Farmer, 9 Humphr. (Tenn.) 152; Bradley *v.* Com'rs, 2 Humphr. (Tenn.) 428, 37 Am. Dec. 563); or where one of the constitutional requirements necessary to authorize the formation of a new county has not been complied with (Segars *v.* Parrott, (S. C. 1898) 30 S. E. 273).

Injunctions generally see INJUNCTIONS.

Where such organization does not interfere with some individual right courts of equity have no jurisdiction to enjoin the proceedings of the officer of the county and vacate its organization. Henry *v.* Steele, 28 Ark. 455.

An action to perpetually enjoin the government of a state from organizing a county, on the grounds that the memorial upon which the census taker was appointed was insufficient, and that the returns made by the census taker were fraudulent and false, cannot be maintained, when it is shown that the charges of insufficiency and fraud have not been brought to the notice of the governor, who is invested with full power, and is specially enjoined by law to inquire into the truth of such charges before proceeding with the organization. Martin *v.* Lacy, 39 Kan. 703, 18 Pac. 951 [*following* Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162].

68. Ford *v.* Farmer, 9 Humphr. (Tenn.) 152.

69. **The state by quo warranto proceedings** is the only proper party to inquire into the right of county officers exercising their official functions in a disputed territory or to determine the number of square miles con-

such falsehood and fraud and declare the organization of the county illegal and void.[70]

2. DISORGANIZATION. A legislature has without doubt the power to abolish a county organization, and such power has at times been exercised.[71] So it has been held that the mere existence of a legislative act declaring organized a county previously established, and providing for the appointment of county officers, does not of itself make an organized county, and accordingly whenever for any cause a county in fact organized under such an act becomes depopulated organization is lost.[72]

3. LEGISLATIVE CONTROL OVER FUNDS OF COUNTIES. A county being a public corporation existing only for public purposes connected with the administration of a state government, its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created upon the county.[73] Except as specially restricted the legislative power of appropriation of moneys raised is coextensive with the power of taxation, and the power of appropriation which the legislature can exercise over the revenues of a state for any purpose which it may regard as calculated to promote the public good it can exercise over the revenues of a county for any purpose connected with its present or past condition,[74] and this power is not affected by the fact that other counties may derive some benefit therefrom,[75] or by the fact that the fund when raised is to be expended free from the control of the county authorities.[76] It cannot, however, compel a county to pay the personal debt of one of its officers,[77] and in at least one jurisdiction it has been held that it cannot impose upon a county a liability which had no previous existence.[78]

4. UNIFORMITY OF COUNTY GOVERNMENTS. It is expressly provided by the constitution of many of the states that county governments established by the legislature shall be as nearly uniform throughout the state as may be practicable;[79] and

tained in a county. Henry *v.* Steele, 28 Ark. 455.

70. State *v.* Ford County, 12 Kan. 441.

Quo warranto generally see QUO WARRANTO.

71. State *v.* Hamilton, 40 Kan. 323, 19 Pac. 723; State *v.* Osborn, 36 Kan. 530, 13 Pac. 850; *In re* Howard County, 15 Kan. 194; State *v.* McFadden, 23 Minn. 40.

72. State *v.* Honerud, 66 Minn. 32, 68 N. W. 323, in which case it was held that Minn. Laws (1872), c. 87, detaching from Wilkin county, which, although once organized, had become in fact disorganized by reason of its depopulation as a result of the Indian massacre of 1862, certain townships which it attached to Otter Tail county, did not violate Minn. Const. art. 11, § 1, requiring laws changing lines of organized counties to be submitted to the electors of the counties affected for adoption.

73. Sangamon County *v.* Springfield, 63 Ill. 66.

74. Napa Valley R. Co. *v.* Napa County, 30 Cal. 435; People *v.* Alameda County, 26 Cal. 641; People *v.* Burr, 13 Cal. 343; Guilder *v.* Dayton, 22 Minn. 366; Kimball *v.* Mobile County, 14 Fed. Cas. No. 7,774, 3 Woods 555 [*affirmed* in 102 U. S. 691, 26 L. ed. 238].

Necessity for consent of county.— In People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480, it was held that a mandatory statute compelling a town or other municipal corporation to become a stock-holder, in a railroad or other corporation, by exchanging its bonds for stock upon the terms prescribed by the statute, without its consent in any way given, was unconstitutional.

75. Napa Valley R. Co. *v.* Napa County, 30 Cal. 435.

76. State *v.* Hamilton County, 5 Ohio Dec. (Reprint) 471, 6 Am. L. Rec. 106; Kimball *v.* Mobile County, 14 Fed. Cas. No. 7,774, 3 Woods 555 [*affirmed* in 102 U. S. 691, 26 L. ed. 238].

77. Faas *v.* Warner, 96 Pa. St. 215.

78. Sadsbury Tp. Sup'rs *v.* Dennis, 96 Pa. St. 400. But *compare* Napa Valley R. Co. *v.* Napa County, 30 Cal. 435, holding that a state legislature in the absence of clear and positive prohibition may compel a county to become a subscriber to a railroad already built, for the purpose of paying its debts, to become a stock-holder therein, to issue its bonds for the stock, and to raise money by taxation and appropriate it to the payment of the bonds.

Question of indebtedness between counties. — While a legislature cannot by a mere legislative act create an indebtedness from one county to another, yet if, in consequence of hasty legislation, money rightfully belonging to one county is paid to another, the legislature will prescribe the manner in which the mistake can be corrected. Jackson County *v.* La Crosse County, 13 Wis. 490.

79. *California.*— *Ex p.* Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236; Hale *v.*

where such provision exists any enactment of the legislature which destroys the unity of the system,[80] or which unnecessarily interferes with its uniformity in any material respect, is not a valid law.[81]

B. County-Seats — 1. Definition. A county-seat or county town is the chief town of a county, where the county buildings and courts are located and county business transacted.[82]

2. Location and Establishment — a. In General. The location and establishment of county-seats pertain to the legislative department of the state;[83] and such department may act directly, or as is the usual custom, through agents appointed by it for that purpose.[84] If the legislature acts directly in locating a county-seat,

McGettigan, 114 Cal. 112, 45 Pac. 1049; Bloss *v.* Lewis, 109 Cal. 493, 41 Pac. 1081; San Luis Obispo County *v.* Graves, 84 Cal. 71, 23 Pac. 1032; People *v.* San Luis Obispo County, 50 Cal. 561.

Georgia.— Conley *v.* Poole, 67 Ga. 254.

Maryland.— Board of Public School Com'rs *v.* Allegany County Com'rs, 20 Md. 449.

Nevada.— Singleton *v.* Eureka County, 22 Nev. 91, 35 Pac. 833; State *v.* Boyd, 19 Nev. 43, 5 Pac. 735.

Utah.— State *v.* Standford, 24 Utah 148, 66 Pac. 1061.

Wisconsin.— Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598; Rooney *v.* Milwaukee County Sup'rs, 40 Wis. 23; Single *v.* Marathon County Sup'rs, 38 Wis. 363; State *v.* Abert, 32 Wis. 403; State *v.* Dousman, 28 Wis. 541; State *v.* Milwaukee County Sup'rs, 25 Wis. 339; State *v.* Riordan, 24 Wis. 484.

See 13 Cent. Dig. tit. "Counties," § 23.

80. But unless it can be said that such act breaks the unity of a system or unnecessarily disregards the rule of uniformity in some material respect it must be held valid. State *v.* Abert, 32 Wis. 403.

81. State *v.* Abert, 32 Wis. 403.

For acts held not to violate such provision see the following cases: People *v.* San Luis Obispo County, 50 Cal. 561; Conley *v.* Poole, 67 Ga. 254; Board of Public School Com'rs *v.* Allegany County Com'rs, 20 Md. 449; Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598; Single *v.* Marathon County Supr's, 38 Wis. 363.

82. Way *v.* Fox, 109 Iowa 340, 80 N. W. 405; Whallon *v.* Gridley, 51 Mich. 503, 16 N. W. 876; Black L. Dict.

Another definition.— "The county-seat is where the business of the county is transacted, where local tribunals sit for the transaction of local and county business, and where county officers have their offices." State *v.* Hughes, 104 Mo. 459, 471, 16 S. W. 489. And see State *v.* Porter, 15 S. D. 387, 89 N. W. 1012.

A county is not necessarily coextensive with the town where located. State *v.* Atchison County, 44 Kan. 186, 24 Pac. 87; State *v.* Harwi, 36 Kan. 588, 14 Pac. 158; State *v.* Smith, 46 Mo. 60.

83. *Kansas.*— *In re* Howard County, 15 Kan. 194.

Michigan.— Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539.

Minnesota.— Jewell *v.* Weed, 18 Minn. 272.

Mississippi.— Monet *v.* Jones, 10 Sm. & M. 237.

Texas.— Walker *v.* Tarrant County, 20 Tex. 16.

See 13 Cent. Dig. tit. "Counties," § 25.

Right to establish a different place at subsequent sessions.— The fact that a state legislature has at one session established the seat of justice of a county does not at all militate against the validity of an act establishing a definite place for such seat of justice at a subsequent session. This is a subject at all times under legislative control and discretion. Monet *v.* Jones, 10 Sm. & M. (Miss.) 237.

84. *Arkansas.*— Edwards *v.* Hall, 30 Ark. 31; McNair *v.* Williams, 28 Ark. 200.

Georgia.— Mitchell *v.* Lasseter, 114 Ga. 275, 40 S. E. 287; Hamrick *v.* Rouse, 17 Ga. 56.

Indiana.— Elwell *v.* Tucker, 1 Blackf. 285.

Michigan.— Rice *v.* Shay, 43 Mich. 380, 5 N. W. 435.

Missouri.—State *v.* Smith, 46 Mo. 60; Wood *v.* Phelps County Ct., 28 Mo. 119; Johnson *v.* Clark County Ct., 20 Mo. 529; Tetherow *v.* Grundy County Ct., 9 Mo. 118.

North Carolina.— Merrimon *v.* Sanderson, 60 N. C. 277; State *v.* King, 20 N. C. 661.

Oklahoma.— Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

Texas.— Walker *v.* Tarrant County, 20 Tex. 16.

Wisconsin.— *In re* La Fayette County, 2 Pinn. 523, 2 Chandl. 212.

See 13 Cent. Dig. tit. "Counties," § 25.

"There are many laws for the establishment of the seats of justice of the different counties, in which the act, instead of fixing the location, has prescribed a mode for its accomplishment by commissioners, or by popular vote, or by the selection of two or more places, and a popular election between them." *Ex p.* Hill, 40 Ala. 121, 122.

Power of commissioners to adjourn and fix time for next meeting.—A statute providing that commissioners to locate a county-seat shall meet at a time and place provided for; that a majority constitute a quorum to do the business; that the "commissioners may adjourn to some other place or time, and may adjourn from day to day until the business before them may be completed," is directory merely, and the commissioners have the power to elect a chairman and empower him to fix the time of the next meeting. Edwards *v.* Hall, 30 Ark. 31.

no judicial question can be made as to the propriety or validity of its action;[85] and if it acts through the medium of officers or agents, no judicial question can be made as to the propriety or validity of the acts of the officers or agents, unless the legislature makes special provision therefor, but redress must be had through the legislature.[86]

b. Selection of Temporary County-Seat. It being impossible to get the business of a county efficiently started without some place where it is temporarily centralized, this is sometimes done by requiring courts and other bodies to meet at some place named or appointed until a county-seat is established, and sometimes by naming some place directly as a temporary county-seat for all purposes, or by delegating such selection to agents.[87]

c. Donations to Obtain Location. Donations made to a county to obtain the location of a county-seat, either originally or as an inducement to its removal from any place are very common, and offers of such donations do not amount to a bribe, such as will invalidate an election held for the purpose of locating the county-seat.[88]

d. Submission of Location to Popular Vote. Although in the absence of a constitutional provision to the contrary, a state legislature has the power to locate a county-seat at any place in the county without submitting the question of such location to the votes of the electors,[89] the usual method of determining the location of a permanent county-seat is by the submission of the question to a popular vote of the electors of the county;[90] and the place receiving the majority of all

Power of commissioners to make a conditional selection.— Where commissioners are appointed to select and determine a site for a permanent county-seat, and are directed when they have selected a site to give notice thereof to other commissioners appointed by the same act for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection; and if the condition be broken by the owner of the land selected as a site the commissioners may make a new selection. Merrimon *v.* Sanderson, 60 N. C. 277.

Right of commissioners to rescind their action.—In accordance with the rule that where a public act is to be done by commissioners for that purpose appointed, after decision once made the commissioners have nothing further to do, when special commissioners are appointed to select a site for a county-seat, meet and make a selection by a majority vote and adjourn *sine die*, they cannot afterward meet and rescind their action. State *v.* King, 20 N. C. 661.

85. Walker *v.* Tarrant County, 20 Tex. 16.

86. Hamrick *v.* Rouse, 17 Ga. 56; McClelland *v.* Shelby County, 32 Tex. 17; Walker *v.* Tarrant County, 20 Tex. 16.

Whether the act be done the one way or the other, it in all its parts is no less an act pertaining to the political and not to the judicial authority. Walker *v.* Tarrant County, 20 Tex. 16.

87. McNair *v.* Williams, 28 Ark. 200; Lake County *v.* State, 24 Fla. 263, 4 So. 795; Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539; *In re* La Fayette County, 2 Pinn. (Wis.) 523, 2 Chandl. (Wis.) 212.

Grant of power to a board of county commissioners or a majority of them to locate the temporary county-seat of a new county is not a delegation of law-making power, nor is it prohibited by the constitution in legislation organizing a new county. Lake County *v.* State, 24 Fla. 263, 4 So. 795.

Such a temporary selection is in no sense an establishment and does not exhaust the power of the legislature, nor make the establishment of a permanent county-seat a removal, and therefore subject to the laws concerning the removal of county-seats. Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539.

88. *Arkansas.*— Neal *v.* Shinn, 49 Ark. 227, 4 S. W. 771.

Florida.— Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776.

Iowa.— Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307; Dishon *v.* Smith, 10 Iowa 212.

Kansas.— State *v.* Harwi, 36 Kan. 588, 14 Pac. 158; State *v.* Elting, 29 Kan. 397; Yoxall *v.* Osborne County, 20 Kan. 581; Setter *v.* Alvey, 15 Kan. 157.

Montana.— Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255.

See 13 Cent. Dig. tit. "Counties," § 25 *et seq.*

89. Jewell *v.* Weed, 18 Minn. 272; State *v.* Larrabee, 1 Wis. 200.

A county judge upon petition has power to order an election to remove a county-seat; and when a county has been organized, and no county-seat located, he has the power without petition to order an election to locate one. Caruthers *v.* State, 67 Tex. 132, 2 S. W. 91.

90. *Alabama.*—Clifton *v.* Cook, 7 Ala. 114.

Colorado.— *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790; Coleman *v.* People, 7 Colo. App. 243, 42 Pac. 1041.

Florida.— Lake County *v.* State, 24 Fla. 263, 4 So. 795.

Georgia.— Smith *v.* Magourich, 44 Ga. 163.

the votes cast at an election held for this purpose is to be the county-seat of the county.[91]

e. Site. A legislature has no power to establish a county-seat of a new county outside of the boundaries of the state.[92] Nevertheless agents appointed by it to select a county-seat are clothed with the sovereign power and discretion of the state, which discretion so far as it depends upon the exercise of their judgment, no court has a right to control unless they violate private rights.[93] A site selected for a county-seat is usually near the center of the county,[94] and in some states this is expressly required by statute.[95] In the selection of a county-seat the choice is not limited to existing cities or towns, but a site may be chosen for a new town and the county-seat located therein.[96]

f. Assailing Validity of Location. The question of the location of a county-seat cannot be tried in a collateral proceeding, but only on a direct proceeding for that purpose.[97] Where a county-seat has been located over ten years, during which time a majority of the electors of the county have on two occasions voted against removal, a taxpayer will be estopped from maintaining mandamus in behalf of himself and other taxpayers to have it changed to a place which he claims is the proper county-seat.[98]

3. Effect of Destruction of County or Change of County Lines. Whenever a county is destroyed by the legislature the county-seat thereof is also discontinued.[99] The county-seat of an old county need not be made the county-seat of a new county, or indeed of any county, new or old, in which such county-seat may be placed by a change of county lines, or by a creation of a new county, since if this were the case a county might by such change of county lines have two or more county-seats.[1]

4. Effect Upon Legal Proceedings of Mistake as to County-Seat. The fact that a court is mistaken in its conclusions as to which of two places is the legal

Idaho.— Doan *v.* Logan County, 3 Ida. 38, 26 Pac. 167.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1; U. S. *v.* Dubuque County, Morr. 31.

Kansas.— Brown *v.* State, 44 Kan. 291, 24 Pac. 345; State *v.* Harwi, 36 Kan. 588, 14 Pac. 158; State *v.* Hamilton County, 35 Kan. 640, 11 Pac. 902; Conley *v.* Fleming, 14 Kan. 381.

Michigan.— Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539.

Nebraska.— Laws *v.* Vincent, 16 Nebr. 208, 20 N. W. 213.

South Dakota.— State *v.* Lien, 9 S. D. 297, 68 N. W. 748.

Texas.— Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000; State *v.* Cook, 78 Tex. 406, 14 S. W. 996; State *v.* Alcorn, 78 Tex. 387, 14 S. W. 663; Scarborough *v.* Eubank, (Civ. App. 1899) 52 S. W. 569; Rayner *v.* Forbes, (Civ. App. 1899) 52 S. W. 568.

See 13 Cent. Dig. tit. "Counties," § 29.

91. *Alabama.*—Clifton *v.* Cook, 7 Ala. 114.

Iowa.— U. S. *v.* Dubuque County, Morr. 31.

Kansas.— Brown *v.* State, 44 Kan. 291, 24 Pac. 345; State *v.* Harwi, 36 Kan. 588, 14 Pac. 158.

Texas.— State *v.* Alcorn, 78 Tex. 387, 14 S. W. 663.

Wisconsin.— *In re* La Fayette County, 2 Pinn. 523, 2 Chandl. 212.

See 13 Cent. Dig. tit. "Counties," § 29.

92. Reddy *v.* Timkum, 60 Cal. 458.

93. State *v.* Woody, 17 Ga. 612; Hamrick *v.* Rouse, 17 Ga. 56.

94. State *v.* Woody, 17 Ga. 612.

95. Mitchell *v.* Lasseter, 114 Ga. 275, 40 S. E. 287; Beazely *v.* Stinson, Dall. (Tex.) 537.

96. State *v.* Atchison County, 44 Kan. 186, 24 Pac. 87; Conley *v.* Fleming, 14 Kan. 381. See also State *v.* Harwi, 36 Kan. 588, 14 Pac. 158.

Selection of unplatted settlement.— It is not indispensable that a settlement or locality to be selected as the place of the county-seat shall have definite, exact, and distinct boundaries, but a particular settlement may be selected, although it be at the time unplatted, and with no fixed and definite exterior boundaries. Fall River County *v.* Powell, 5 S. D. 49, 58 N. W. 7.

97. Robinson *v.* Moore, 25 Ill. 135. See also *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

98. Coleman *v.* People, 7 Colo. App. 243, 42 Pac. 1041.

Inference of legal establishment from lapse of time.— Where a town has for ten years been recognized as the county-seat, and while there is no record of any election for the location of a county-seat, there is other evidence tending to show the holding of such election, and that the town in question had been selected and courts held, and county records kept there during such time, the inference is that the county-seat was legally established in such town. Caruthers *v.* State, 67 Tex. 132, 2 S. W. 91.

99. *In re* Howard County, 15 Kan. 194.

1. *In re* Howard County, 15 Kan. 194.

county-seat and holds court at the wrong place will not render the proceedings and judgment nullities.[2]

5. Removal — a. Power of Removal — (I) *In General.* After a county-seat has been located it may be changed or removed upon proper proceedings for such purpose.[3] The relocation of a county-seat is not in violation of a constitutional prohibition against local legislation.[4]

(II) *Limitations on Power* — (A) *In General.* In some jurisdictions it is expressly provided that after an election for a county-seat there shall be no election for a relocation within a specified time.[5] However, the power of removal is never affected by the fact that the legislature may have enacted that the county-seat shall be permanently located at a certain place.[6]

2. Robinson *v.* Moore, 25 Ill. 135.

3. *Alabama.*— State *v.* Crook, 126 Ala. 600, 28 So. 745.

Colorado.— *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790; Coleman *v.* People, 7 Colo. App. 243, 42 Pac. 1041.

Georgia.— Hamrick *v.* Rouse, 17 Ga. 56.

Illinois.— Adams *v.* Logan County, 11 Ill. 336.

Indiana.— Elwell *v.* Tucker, 1 Blackf. 285.

Kansas.— State *v.* Burton, 47 Kan. 44, 27 Pac. 141; State *v.* Harper County, 34 Kan. 302, 8 Pac. 417; Benton *v.* Nason, 26 Kan. 658; *In re* Osage County, 16 Kan. 296.

Louisiana.— Edwards *v.* Police Jury, 39 La. Ann. 855, 2 So. 804.

Michigan.— People *v.* Wands, 23 Mich. 385.

Minnesota.— Todd *v.* Rustad, 43 Minn. 500, 46 N. W. 73.

Mississippi.— Monet *v.* Jones, 10 Sm. & M. 237.

Ohio.— Peck *v.* Weddell, 17 Ohio St. 271.

Pennsylvania.—Blood *v.* Mercelliott, 53 Pa. St. 391.

Tennessee.— Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500.

Texas.— Caruthers *v.* State, 67 Tex. 132, 2 S. W. 91; Fowler *v.* Brown, 5 Tex. 407.

West Virginia.— Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

See 13 Cent. Dig. tit. "Counties," §§ 30, 31.

A statute locating the seat of justice in any county is subject to repeal like any other statute. Monet *v.* Jones, 10 Sm. & M. (Miss.) 237.

The power to remove a county-seat is not temporarily exhausted or suspended by a single exercise, whether completed or commenced only. People *v.* Wands, 23 Mich. 385.

When a town has been recognized as the county-seat for a number of years, although the record of its selection is lost, proceedings to locate the county-seat elsewhere are proceedings to remove the county-seat and not merely to originally locate it, and they must therefore conform to the law concerning the removal of county-seats. Caruthers *v.* State, 67 Tex. 132, 2 S. W. 91.

Effect of removal by legislature for a specified time.— Where the county-seat of a county had been located at a particular place, and was afterward removed by an act of the territorial legislature to another place for the period of five years, after the lapse of such period it will not revert to the place where it was first located unless further legislation should intervene to locate it there, and at the expiration of that time there would be no established location of it. State *v.* Washington County, 2 Pinn. (Wis.) 552, 2 Chandl. (Wis.) 247.

Limitation on power of territorial legislature.— The location and changing of county-seats is a legislative function and is a rightful subject of territorial legislation within the provisions of the organic act of the territory, in the absence of any federal law upon the subject. But when congress legislates directly upon any subject for the government of the people of a territory, then it ceases to be a rightful subject of territorial legislation, and any law enacted by the legislature upon the same subject is void. Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

Proposition for removal originating with supervisors.—Under the constitution and laws of Michigan the proposition for the removal of a county-seat may originate with the board of supervisors, and no previous action of the legislature is necessary to give the board authority to act. Bagot *v.* Antrim Sup'rs, 43 Mich. 577, 5 N. W. 1018.

4. Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

5. Cochran *v.* Edwards, 38 Ark. 136; Varner *v.* Simmons, 33 Ark. 212; State *v.* Burton, 47 Kan. 44, 27 Pac. 141; Streissguth *v.* Geib, 67 Minn. 360, 69 N. W. 1097.

Power of legislature to legalize election held before expiration of time.— It has been held that, although an election for the relocation of a county-seat is illegal, and has been held before the expiration of the prescribed time, yet if a majority of the electors vote for another place, there is such an expression of consent by the majority that the legislature may legalize the election and declare the town voted for the county-seat. State *v.* Burton, 47 Kan. 44, 27 Pac. 141.

In Nebraska it is provided that if at the election for the change of a county-seat more than two-fifths of the votes are in favor of the place where the county-seat is then located, the question of relocation shall not be again submitted for two years, and in case the county-seat shall be relocated, the question of relocation shall not be again submitted for five years. Solomon *v.* Fleming, 34 Nebr. 40, 51 N. W. 304.

6. Hamrick *v.* Rouse, 17 Ga. 56; Bagot *v.* Antrim Sup'rs, 43 Mich. 577, 5 N. W. 1018; Fowler *v.* Brown, 5 Tex. 407.

(B) *Imposition of Conditions by Legislature.* A state legislature may if it sees fit impose certain conditions precedent to the removal of a county-seat;[7] such for instance as the raising of a specified sum of money to pay the expenses of removal, and to be applied to the erection of county buildings,[8] the conveyance to the county of certain land in the town of the proposed site,[9] or the turning over of the old county buildings to the committee appointed by the citizens of the new location.[10] It is also sometimes provided in acts relative to removal of county-seats that no relocation shall be made unless the county-seat shall be removed a certain distance.[11]

(C) *Effect of Donation of Land.* The power to remove is not abridged by the fact that in consideration of the location of the county-seat at a certain place its citizens have donated land or buildings for county purposes.[12]

b. Damages and Compensation For Removal. The establishment of a county-seat is an act of sovereignty at all times under the control of the sovereign power, and the change of such county-seat cannot give the right to an action of damages,[13] even though the citizens of the former location have made a donation of lands or money to obtain its location at such place.[14] The legislature may, however, make special provision for compensation for damages sustained by the owners of property by the removal of a county-seat,[15] or for the reconveyance of lands and buildings to the donors thereof, in proportion to their several donations;[16] and

Effect of establishment by special act.— The fact that a county-seat was originally established by a special act does not take such county outside the scope of the general law setting forth the proper proceedings for the removal of county-seats. Benton *v.* Nason, 26 Kan. 658.

7. **In addition to the conditions imposed by a state constitution** as precedent to the removal of a county-seat the legislature may impose a condition that after the vote is taken in favor of removal to a certain city such city shall place at the control of the county supervisors a specified sum of money. State *v.* Portage County Sup'rs, 24 Wis. 49.

8. Calaveras County *v.* Brockway, 30 Cal. 325; State *v.* Portage County Sup'rs, 24 Wis. 49.

Such funds beyond control of donors.— Where the money required by statute as a condition precedent is raised and deposited as prescribed, the citizens raising the money have no further power over it, and cannot designate for what purpose it shall be applied. Calaveras County *v.* Brockway, 30 Cal. 325.

9. Clay County *v.* Markle, 46 Ind. 96; Condit *v.* Newton County, 25 Ind. 422. And see Harris *v.* Shaw, 13 Ill. 456.

10. Justices Twiggs County Inferior Ct. *v.* Griffin, 36 Ga. 398.

11. Moffit *v.* State, 40 Ind. 217.

12. *Illinois.*— Adams *v.* Logan County, 11 Ill. 336.

Indiana.— Armstrong *v.* Dearborn County, 4 Blackf. 208.

Iowa.— Twiford *v.* Alamakee County, 4 Greene 60.

Louisiana.— Megret *v.* Vermillion Parish, 10 La. Ann. 670.

Texas.— Gilmore *v.* Hayworth, 26 Tex. 89.

United States.— Newton *v.* Mahoning County, 100 U. S. 548, 25 L. ed. 710.

13. Megret *v.* Vermillion Parish, 10 La. Ann. 670.

14. Harris *v.* Shaw, 13 Ill. 456; Adams *v.* Logan County, 11 Ill. 336.

Right to land by donor on removal.— The acceptance by a county of a donation of land for a county-seat does not constitute a contract that the county will continue its county-seat thereon, and the removal of the county-seat therefrom will not entitle the donor to recover the land unless the donation was limited to that particular use or purpose. Gilmore *v.* Hayworth, 26 Tex. 89. If, however, land is granted upon condition that it shall be used for a particular purpose it will revert to the donor when it shall cease to be so used. Harris *v.* Shaw, 13 Ill. 456.

15. Hamrick *v.* Rouse, 17 Ga. 56; Strange *v.* Bell, 11 Ga. 103; Blackwell *v.* Lawrence County, 2 Blackf. (Ind.) 143.

Compensation in money or lots in new town.—An act authorizing the removal of a county-seat sometimes provides that compensation should be made to those citizens whose property may be injured by the removal in money or lots to be laid off in the new town. Hamrick *v.* Rouse, 17 Ga. 56; Blackwell *v.* Lawrence County, 2 Blackf. (Ind.) 143.

Assessment of damages by commissioners. — Where an act of the legislature authorized certain commissioners to assess the damages which the owners of town property might sustain by the removal of a county-seat, it was held under the constitution of Georgia that such commissioners had no jurisdiction to try the question of title to land, that jurisdiction being vested in the superior court. Strange *v.* Bell, 11 Ga. 103.

16. Harris *v.* Whiteside County, 105 Ill. 445, 44 Am. Rep. 808.

Moral obligation upon county to surrender property or make compensation.—A board of commissioners duly appointed by law to locate a county-seat located the same at N upon condition that the citizens should furnish the buildings, which condition was complied with. The legislature then by joint

where such provision is made for compensation or reconveyance the party injured by a failure to comply with such requirements has his remedy by a suit at law for a breach of contract,[17] or by a resort to a court of chancery for an order of conveyance.[18]

c. Proceedings For Removal — (I) *PETITION* — (A) *In General.* The usual method for commencing proceedings for the removal and relocation of a county-seat is by a petition,[19] the object of which is to save the public from the expense, loss of time, and excitement incident to an election, unless there is a reasonable probability that the required majority of electors will vote for the change.[20]

(B) *Requisites of Petition.* Such a petition must in its allegations follow closely the requirements of the statute authorizing it.[21] It must be signed by a

resolution declared the location permanent; and afterward by vote changed the county-seat. The citizens then claimed from the county commissioners the right to retain possession of the buildings until the amount of money advanced for their erection was refunded with interest, which amount the commissioners agreed to pay without interest on the condition that the citizens release all claims. The release was made and county orders issued, but the board of commissioners being changed, a bill was filed to enjoin payment of orders on the new board. It was held that after the removal of a county-seat the county was morally obliged either to give up the property or make compensation, and that there was a sufficient consideration for the compromise. Lucas County *v.* Hunt, 5 Ohio St. 488, 67 Am. Dec. 303.

17. Blackwell *v.* Lawrence County, 2 Blackf. (Ind.) 143.

18. Harris *v.* Whiteside County, 105 Ill. 455, 44 Am. Rep. 808.

19. *Arkansas.*—Dunn *v.* Lott, 67 Ark. 591, 58 S. W. 375; Butler *v.* Mills, 61 Ark. 477, 33 S. W. 632; Russell *v.* Jacoway, 33 Ark. 191.

California.— Fox *v.* San Mateo County, 49 Cal. 563.

Florida.— McKinney *v.* Bradford County, 26 Fla. 267, 4 So. 855; Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; Lanier *v.* Padgett, 18 Fla. 842.

Idaho.— Wilson *v.* Bartlett, 7 Ida. 271, 62 Pac. 416.

Indiana.— Kent *v.* Sigler, 158 Ind. 214, 62 N. E. 491; Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908; Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727; Peelle *v.* Wayne County, 48 Ind. 127; Clay County *v.* Markle, 46 Ind. 96.

Iowa.— Way *v.* Fox, 109 Iowa 340, 80 N. W. 405; Luce *v.* Fensler, 85 Iowa 596, 52 N. W. 517; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; Loomis *v.* Bailey, 45 Iowa 400; Bennett *v.* Hetherington, 41 Iowa 142; Ellis *v.* Harrison County, 40 Iowa 301; Baker *v.* Louisa County, 40 Iowa 226; Mather *v.* Converse, 12 Iowa 352.

Kansas.—State *v.* Rawlins County, 44 Kan. 528, 24 Pac. 955; Stafford County *v.* State, 40 Kan. 21, 18 Pac. 889; State *v.* Stock, 38 Kan. 154, 16 Pac. 106; Eggleston *v.* State, 37 Kan. 426, 15 Pac. 608, 34 Kan. 714, 10 Pac. 3; State *v.* Phillips County, 26 Kan. 419; *In re* Linn County, 15 Kan. 500.

Minnesota.— Streissguth *v.* Geib, 67 Minn. 360, 69 N. W. 1097; State *v.* Geib, 66 Minn. 266, 68 N. W. 1081; Slingerland *v.* Norton, 59 Minn. 351, 61 N. W. 322; Currie *v.* Paulson, 43 Minn. 411, 45 N. W. 854; State *v.* Scott County, 43 Minn. 322, 45 N. W. 614.

Missouri.— Wood *v.* Phelps County Ct., 28 Mo. 119; State *v.* Garrett, 76 Mo. App. 295.

Nebraska.— Crews *v.* Coffman, 36 Nebr. 824, 55 N. W. 265; Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501; Ellis *v.* Karl, 7 Nebr. 381.

Nevada.— State *v.* Eureka County, 8 Nev. 309, 359; State *v.* Humboldt County Com'rs, 6 Nev. 100.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

Texas.— Whitaker *v.* Dillard, 81 Tex. 359, 16 S. W. 1084; Alley *v.* Denson, 8 Tex. 297; Scarborough *v.* Eubank, (Civ. App. 1899) 52 S. W. 569; Rayner *v.* Forbes, (Civ. App. 1899) 52 S. W. 568.

Virginia.—Crafford *v.* Warwick County, 87 Va. 110, 12 S. E. 147, 10 L. R. A. 129.

Washington.— Rickey *v.* Williams, 8 Wash. 479, 36 Pac. 480.

West Virginia.—Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

Wisconsin.— State *v.* Polk County, 88 Wis. 355, 60 N. W. 266; La Londe *v.* Barron County, 80 Wis. 380, 49 N. W. 960.

See 13 Cent. Dig. tit. "Counties," §§ 34, 35.

20. Currie *v.* Paulson, 43 Minn. 411, 45 N. W. 854.

21. Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501.

Age, place, and time of residence of each petitioner must be stated in the petition in Nebraska. Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501.

Designation of name of precinct.— Where on a petition for an election to determine the removal of a county-seat, certain electors, in place of writing the name of their precincts in full after their signatures, have made ditto marks, signifying that their precinct is the same as that written above, such designation of the name of the precinct is sufficient. Wilson *v.* Bartlett, 7 Ida. 271, 62 Pac. 416.

Necessity for date of signature.— It will be sufficient if the petition complies with the

designated proportion of the voters of the county,[22] must ask for a change of location,[23] and must be verified by affidavit.[24] Such petitions may be amended, however, so as to correct clerical errors and omissions, such for instance as the omission of the names of the officers before whom the affidavits were sworn to.[25]

(II) *Remonstrance.* At the meeting by the board upon a petition for the removal of a county-seat, a remonstrance against such removal may be presented to the board signed by those objecting thereto,[26] which remonstrance should be

requirements, although it be undated and no proof is offered to show either when the petition was signed by any of the signers, or whether any of them were voters at the time it was signed. Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

22. Butler *v.* Mills, 61 Ark. 477, 33 S. W. 632; Fox *v.* San Mateo County, 49 Cal. 563; State *v.* Stock, 38 Kan. 154, 16 Pac. 106; Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501. And see cases cited *supra*, note 19.

More than a majority of the electors may be required to sign. State *v.* Butler County, 31 Kan. 460. 2 Pac. 562.

Number of signers must be greater than the number of remonstrants.— Loomis *v.* Bailey, 45 Iowa 400.

Registration is not necessary to enable a voter to sign a petition. Wilson *v.* Bartlett, 7 Ida. 271, 62 Pac. 416.

Several petitions in proper form signed in the aggregate by the proper number of voters of a county will be sufficient (McKinney *v.* Bradford County, 26 Fla. 267, 4 So. 855), even though such petitioners ask for removal to different places (Butler *v.* Mills, 61 Ark. 477, 33 S. W. 632).

Signer's ignorance of contents.— It is no excuse for one signing a petition for the removal of a county-seat to say after such petition has been acted upon that he did not know what such petition contained. If able to read, he must do so, unless prevented from so doing, or the circumstances must be such as to show the perpetration of fraud difficult of detection, or some other such circumstances as a court of equity will deem a sufficient excuse. Eggleston *v.* State, 37 Kan. 426, 15 Pac. 608.

Where signatures are procured by bribery or by offer of a bonus such names cannot be counted. Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501.

Where the names of persons appear both upon a petition for the submission of the question of relocating the county-seat, and upon remonstrance against such submission, such names must be counted as those of remonstrance and not upon the petition. Duffees *v.* Sherman, 48 Iowa 287; Jamison *v.* Louisa County, 47 Iowa 388.

Withdrawal of signature.—A signer of a petition for the removal of a county-seat may withdraw his name from the petition at any time before final action by the county board thereon (Slingerland *v.* Norton, 59 Minn. 351, 61 N. W. 322; State *v.* Polk County, 88 Wis. 355, 60 N. W. 266; La Londe *v.* Barron County, 80 Wis. 380, 49 N. W. 960), and where before such final action signers of the petition request that their names be struck off such names cannot be counted as of the proportion of the voters required by statute to have signed the petition (State *v.* Eggleston, 34 Kan. 714, 10 Pac. 3).

23. McKinney *v.* Bradford County, 26 Fla. 267, 4 So. 855; Lanier *v.* Padgett, 18 Fla. 842; Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

The omission to pray for a change of county-seat is not cured by a recital in the order calling the election that it appeared to the satisfaction of the board that the petition was "regular and in conformity to the statute," where such defect is apparent in the order. McKinney *v.* Bradford County, 26 Fla. 267, 4 So. 855.

Designation of proposed site.— It is a sufficient designation of the place to which the petitioners desire the county-seat removed when it was called a certain city or town, and there should be no designation of the particular locality in such city or town as the place where the county-seat is to be located, no matter how much of the land is covered by the boundaries of such city or town, or how sparsely portions of these boundaries may be populated. Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

Rejection of petition for removal to place not a town.—Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

24. Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; Duffees *v.* Sherman, 48 Iowa 287.

Sufficient averment that signers were legal voters.— It is sufficient in an affidavit to such petition that the person procuring the signatures states that the signers "were" all legal voters of the county "at the time of signing," and it need not state that such persons "are" legal voters when the affidavit is made. Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781.

25. Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781.

26. Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727; Way *v.* Fox, 109 Iowa 340, 80 N. W. 405; Luce *v.* Fensler, 85 Iowa 596, 52 N. W. 517; Duffees *v.* Sherman, 48 Iowa 287; Jamison *v.* Louisa County, 47 Iowa 388; Loomis *v.* Bailey, 45 Iowa 400.

Necessity and time of filing remonstrance. — A remonstrance against relocation of a county-seat cannot be first filed or offered in evidence on appeal from the decision of the county commissioners under the act of 1889, page 299, section 2, providing that every filer of any petition or remonstrance

accompanied by proof of the qualifications of the signers and the genuineness of their signatures.[27]

(III) *Hearing and Determination*— (A) *Jurisdiction.* The removal of a county-seat being a matter of local concern,[28] boards of county commissioners or supervisors or county courts have jurisdiction to hear and determine applications for removal[29] upon presentation to them by petition in the proper manner,[30] at the proper time,[31] after due notice of such presentation has been given,[32] and after notice of a meeting of such commissioners has been published and posted where required by statute.[33] The decision of such tribunal as to the sufficiency of the petition is judicial, and is conclusive until set aside or reversed upon appeal, writ of error, certiorari, or other method provided for direct review.[34]

(B) *Question Considered.* Such county boards have the power in determining the question to pass upon the sufficiency of the petition, and the signatures thereto,[35] and their determination in respect to what signatures if any should be withdrawn is conclusive, at least in the absence of fraud.[36] So they may enter-

shall be liable to action by the grand jury for the false filing of names, which is the only provision as to filing. Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

27. Loomis *v.* Bailey, 45 Iowa 400.

Withdrawal of signatures.— In Loomis *v.* Bailey, 45 Iowa 400, it was held that after a petition and remonstrance have been presented to a county board for the removal of a county-seat, such tribunal cannot entertain an application of persons signing a petition call a "re-petition" to have their names stricken from the remonstrance, and to be regarded as petitioners for the relocation of the county-seat.

28. Russell *v.* Jacoway, 33 Ark. 191.

The circuit court has no authority to determine the result of an election for removal in the first instance, and before the county court has acted in the premises, and where it assumes to do so a writ of prohibition will lie from the supreme court. Russell *v.* Jacoway, 33 Ark. 191.

29. *Arkansas.*— Russell *v.* Jacoway, 33 Ark. 191.

Idaho.— Rupert *v.* Alturas County, 2 Ida. (Hasb.) 21, 2 Pac. 718.

Indiana.— Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727; Scott County *v.* Smith, 40 Ind. 61; Bosley *v.* Ackelmire, 39 Ind. 536.

Iowa.— Luce *v.* Fensler, 85 Iowa 596, 52 N. W. 517; Herrick *v.* Carpenter, 54 Iowa 340, 6 N. W. 574; Loomis *v.* Bailey, 45 Iowa 400; Bennett *v.* Hetherington, 41 Iowa 142.

Kansas.—State *v.* Rawlins County, 44 Kan. 528, 24 Pac. 955.

Michigan.— Atty.-Gen. *v.* Lake County, 33 Mich. 289.

Nebraska.— Crews *v.* Coffman, 36 Nebr. 824, 55 N. W. 265.

Nevada.— State *v.* Eureka County, 8 Nev. 309, 359.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

Washington.—Lawry *v.* Snohomish County, 12 Wash. 446, 41 Pac. 190.

See 13 Cent. Dig. tit. "Counties," § 37.

30. See *supra*, IV, B, 5, c, (I).

31. A petition for the submission of the question of the relocation of a county-seat must be presented at a regular session of the board of supervisors, and such board is not authorized to entertain it at an adjourned session. Luce *v.* Fensler, 85 Iowa 596, 52 N. W. 517; Ellis *v.* Harrison County, 40 Iowa 301.

Presentation to board in session as board of canvassers.— When a petition is filed with the county clerk and presented to the board of county commissioners while in session as a canvassing board, said commissioners would have no authority to entertain or act on the said petition, but the knowledge so received of the filing of the petition with the clerk, and what it contains, could not be disregarded by them; and the fact that the petition was not presented to the board when regularly in session as a board of county commissioners would be no excuse for them to say that the board had no knowledge of a request contained in said petition. Eggleston *v.* State, 37 Kan. 426, 15 Pac. 608.

32. Luce *v.* Fensler, 85 Iowa 596, 52 N. W. 517; Bennett *v.* Hetherington, 41 Iowa 142.

33. State *v.* Butler, 81 Minn. 103, 83 N. W. 483; State *v.* Scott County, 43 Minn. 322, 45 N. W. 614.

34. Baker *v.* Louisa County, 40 Iowa 226.

35. *Iowa.*— Herrick *v.* Carpenter, 54 Iowa 340, 6 N. W. 574; Jamison *v.* Louisa County, 47 Iowa 388; Baker *v.* Louisa County, 40 Iowa 226.

Kansas.—State *v.* Rawlins County, 44 Kan. 528, 24 Pac. 955.

Minnesota.— Currie *v.* Paulson, 43 Minn. 411, 45 N. W. 854.

Montana.— Buck *v.* Fitzgerald, 21 Mont. 482, 54 Pac. 942; State *v.* Ravalli County, 21 Mont. 469, 54 Pac. 939.

Nebraska.— Ellis *v.* Karl, 7 Nebr. 381.

Nevada.— State *v.* Eureka County, 8 Nev. 309, 359; State *v.* Humboldt County Com'rs, 6 Nev. 100.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

Washington.—Rickey *v.* Williams, 8 Wash. 479, 36 Pac. 480.

See 13 Cent. Dig. tit. "Counties," § 37.

36. Currie *v.* Paulson, 43 Minn. 411, 45 N. W. 854.

tain remonstrances against removal, and hear evidence for or against relocation,[37] and they may require that the evidence introduced in opposition to the petition shall be in writing.[38] If the statute limits the character of evidence to affidavits accompanying the petition and remonstrance no other evidence can be considered.[39]

(IV) *Submission of Question to Popular Vote*—(A) *Necessity For Submission.* Although in the absence of constitutional prohibition to the contrary, the legislature having plenary control of the relocation of county-seats[40] may change the same without submitting the question of removal to a vote of the people;[41] yet in most if not all jurisdictions there are either constitutional prohibitions against the exercise of this power,[42] or it is provided for by general or special acts of the legislature that the question shall be submitted to the vote of the people;[43] and under these provisions there can be no removal without the

37. Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501.

Consideration of assessment rolls.—Where it is required that a petition must contain three fifths of the names of the electors of the county as shown by the last assessment rolls of the several township and city supervisors of a county, the rolls of both real and personal property are to be considered in determining the sufficiency of such petition where both kinds of property are assessed by township and city supervisors. State *v.* Rawlins County, 44 Kan. 528, 24 Pac. 955.

Consideration of extrinsic evidence as to persons represented by signatures see State *v.* Polk County, 88 Wis. 355, 60 N. W. 266.

May allow a reasonable time to enable remonstrants to prove charges. Ayres *v.* Moan, 34 Nebr. 210, 51 N. W. 830, 15 L. R. A. 501.

Right to reasonable time to examine poll lists.— The presentation of a petition signed by a certain number of legal voters being necessary to confer jurisdiction on the board, the legislature is entitled to a reasonable time to examine the poll lists and ascertain whether the requisite proportion of voters have signed such petition. La Londe *v.* Barron County, 80 Wis. 380, 49 N. W. 960.

38. Mather *v.* Converse, 12 Iowa 352.

39. Herrick *v.* Carpenter, 54 Iowa 340, 6 N. W. 574.

40. Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908.

41. Hall *v.* Marshall, 80 Ky. 552.

42. *Alabama.*—Marengo County *v.* Matkin, 134 Ala. 275, 32 So. 669; State *v.* Crook, 126 Ala. 600, 28 So. 745; Clarke *v.* Jack, 60 Ala. 271.

Arkansas.— Dunn *v.* Lott, 67 Ark. 591, 58 S. W. 375; Blackshear *v.* Turner, 53 Ark. 533, 14 S. W. 897; Vance *v.* Austell, 45 Ark. 400; Willeford *v.* State, 43 Ark. 62; Maxey *v.* Mack, 30 Ark. 472.

Colorado.— Eagle County *v.* People, 26 Colo. 297, 57 Pac. 1080; People *v.* Grand County, 7 Colo. 190, 2 Pac. 912; Alexander *v.* People, 7 Colo. 155, 2 Pac. 894.

Georgia.— Wells *v.* Ragsdale, 102 Ga. 53, 29 S. E. 165.

Illinois.— Knox County *v.* Davis, 63 Ill. 405; Boren *v.* Smith, 47 Ill. 482; People *v.* Warfield, 20 Ill. 159; People *v.* Marshall, 12 Ill. 391.

Kansas.— State *v.* Atchison County, 44 Kan. 186, 24 Pac. 87; State *v.* Sanders, 42 Kan. 228, 21 Pac. 1073; State *v.* Sherman County, 39 Kan. 293, 18 Pac. 179; State *v.* Stock, 38 Kan. 154, 16 Pac. 106; Scott *v.* Paulen, 15 Kan. 162; Conley *v.* Fleming, 14 Kan. 381; Gossard *v.* Vaught, 10 Kan. 162.

Louisiana.— Edwards *v.* Police Jury, 39 La. Ann. 855, 2 So. 804.

Michigan.— Peck *v.* Berrien County, 102 Mich. 346, 60 N. W. 985; People *v.* Presque Isle County Sup'rs, 36 Mich. 377; Atty.-Gen. *v.* St. Clair County, 11 Mich. 63.

Minnesota.— Bayard *v.* Klinge, 16 Minn. 249.

Missouri.— State *v.* White, 162 Mo. 533, 63 S. W. 104; State *v.* Garrett, 76 Mo. App. 295.

Tennessee.—Combs *v.* Stumple, 11 Lea 26; Stuart *v.* Bair, 8 Baxt. 141; Bouldin *v.* Lockhart, 3 Baxt. 262; State *v.* Hicks, (Ch. App. 1899) 52 S. W. 691.

See 13 Cent. Dig. tit. "Counties," § 38.

43. *California.*— Calaveras County *v.* Brockway, 30 Cal. 325.

Florida.— Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; State *v.* Padgett, 19 Fla. 518.

Indiana.— Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908.

Iowa.— Luce *v.* Fensler, 85 Iowa 596, 52 N. W. 517; Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307; Mather *v.* Converse, 12 Iowa 352; Dishon *v.* Smith, 10 Iowa 212.

Kentucky.— Hall *v.* Marshall, 80 Ky. 552.

Mississippi.— Barnes *v.* Pike County, 51 Miss. 305.

Montana.— Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255.

Nebraska.— Thomas *v.* Franklin, 42 Nebr. 310, 60 N. W. 568; People *v.* Hamilton County Com'rs, 3 Nebr. 244.

Nevada.— State *v.* Washoe County Com'rs, 6 Nev. 104.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

Ohio.— State *v.* Perry County Com'rs, 5 Ohio St. 497.

Oklahoma.— Territory *v.* Neville, 10 Okla. 79, 60 Pac. 790.

Texas.— Scarbrough *v.* Eubank, 93 Tex. 106, 53 S. W. 573; Whitaker *v.* Dillard, 81 Tex. 359, 16 S. W. 1084; Caruthers *v.*

affirmative vote of at least a majority of the inhabitants of the county in favor of such removal,[44] cast in the manner and at the time prescribed.[45]

(B) *The Order.* Upon the presentation of a petition in proper form, signed by the requisite number of voters, for the removal of a county-seat, it is the duty of the proper tribunal, usually the board of commissioners of a county, to order an election to determine the question of such removal.[46] It is not necessary that the order shall enumerate the places to be voted for. The voters may select any place whether noted in the order or not.[47]

(C) *Notice of Election.* Due notice should be given of the time, place, and purpose of an election to determine upon the question of removal of a county-seat;[48] but the election will not be invalidated where the people are actually notified thereof, merely for the reason that the notice does not in all particulars comply with the statutory requirements as to time and manner of giving it.[49]

State, 67 Tex. 132, 2 S. W. 91; *Ex p.* Towles, 48 Tex. 413; Fowler *v.* Brown, 5 Tex. 407.

West Virginia.—Davis *v.* Brown, 46 W. Va. 716, 34 S. E. 839; Minear *v.* Tucker County Ct., 39 W. Va. 627, 20 S. E. 659; Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337; Conley *v.* Calhoun County Sup'rs, 2 W. Va. 416.

Wisconsin.— State *v.* Fetter, 12 Wis. 566.

See 13 Cent. Dig. tit. "Counties," § 38.

The general statutes regulating elections in Alabama apply only to elections of public officers, and have no application and are not intended to regulate elections authorized by act of the legislature to determine the permanent location of the court-house of a county. State *v.* Crook, 126 Ala. 600, 28 So. 745.

44. Vance *v.* Austell, 45 Ark. 400; Alexander *v.* People, 7 Colo. 155, 2 Pac. 894; People *v.* Marshall, 12 Ill. 391.

45. State *v.* Sherman County, 39 Kan. 293, 18 Pac. 179; Fowler *v.* Brown, 5 Tex. 407; Conley *v.* Calhoun County Sup'rs, 2 W. Va. 416.

In Kansas an election for the relocation of a county-seat must be held within fifty days after the presentation of the petition therefor or it will be void. State *v.* Sherman County, 39 Kan. 293, 18 Pac. 179; Gossard *v.* Vaught, 10 Kan. 162.

In Nevada the election must be held within fifty days after the establishment of the fact of a petition by the proper number of voters. If the commissioners fix the period at seventy days thereafter their action is void. State *v.* Washoe County Com'rs, 6 Nev. 104.

46. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; Shaw *v.* Hill, 67 Ill. 455; Luce *v.* Fenslér, 85 Iowa 596, 52 N. W. 517; Loomis *v.* Bailey, 45 Iowa 400; Rickey *v.* Williams, 8 Wash. 479, 36 Pac. 480.

Order by county judge of county court.— Whitaker *v.* Dillard, 81 Tex. 359, 16 S. W. 1084; McClelland *v.* Shelby County, 32 Tex. 17; Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

Prior to election of the board of county commissioners provided for in counties not under township organization the county court, composed of the county judge and two associates, was the proper tribunal to order an election to determine the question of the removal of the county-seat of their county. Shaw *v.* Hill, 67 Ill. 455.

Printed copies of an order of the county court for a county-seat election, made out by a clerk and certified to by him, are substantially in compliance with a statute requiring the clerk to make out and certify copies of an order of the court for a county-seat election, and cause the same to be posted. Such copy and certification need not be in writing. Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

Recording order.— It has been held that although the statute provides that a record shall be made of the proceedings of the commissioners' court the mere fact that an order of election by such court was not recorded does not invalidate the election held thereunder, there being no provision in the statute that an order not entered of record shall be a nullity. Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000.

47. Whitaker *v.* Dillard, 81 Tex. 359, 16 S. W. 1084.

48. *Florida.*— State *v.* Padgett, 19 Fla. 518, posting written notice sufficient.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Kansas.— State *v.* Sherman County, 39 Kan. 293, 18 Pac. 179; Scott *v.* Paulen, 15 Kan. 162.

Michigan.— Peck *v.* Berrien County, 102 Mich. 346, 60 N. W. 985; People *v.* Presque Isle County Sup'rs, 36 Mich. 377; Atty.-Gen. *v.* Lake County, 33 Mich. 289.

Nebraska.— Ellis *v.* Karl, 7 Nebr. 381; People *v.* Hamilton County, 3 Nebr. 244.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

See 13 Cent. Dig. tit. "Counties," § 40.

49. *Alabama.*— Clifton *v.* Cook, 7 Ala. 114.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Kansas.— State *v.* Sherman County, 39 Kan. 293, 18 Pac. 179; Scott *v.* Paulen, 15 Kan. 162.

Michigan.— Atty.-Gen. *v.* Lake County, 33 Mich. 289.

Nebraska.— Ellis *v.* Karl, 7 Nebr. 381. *Contra,* People *v.* Hamilton County, 3 Nebr. 244.

(D) *Votes* — (1) NUMBER OF VOTES NECESSARY. If the constitution[50] prescribes the minimum number of votes which must be cast in the affirmative to authorize the removal of a county-seat the legislature may nevertheless require a larger number of affirmative votes than is so fixed;[51] but it cannot require a less number.[52] On the other hand where the constitution provides that a certain number of affirmative votes shall be sufficient to authorize a removal, the legislature has no power to enact a statute requiring a greater number.[53]

(2) QUALIFICATIONS OF VOTERS. The qualifications of voters for the removal of a county-seat may be regulated by a general or a special election statute;[54] but it has been held that the general registry laws of a state do not apply to an election for determining the removal of a county-seat.[55]

(3) DEPRIVATION OF RIGHT OF SUFFRAGE. The fact that some of the legal voters at an election for determining the removal of a county-seat are deprived of their right of suffrage does not render the election void.[56]

(E) *Form of Submitting Proposition.* There are several forms of submitting the proposition to remove a county-seat,[57] and the effect of the election depends upon the method prescribed for or employed in submitting the question to the voters.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

See 13 Cent. Dig. tit. "Counties," § 40.

In Michigan it has been held that where a statute requires an election to determine a county-seat to be at the next general state election, such election cannot be rendered nugatory by any failure to give notice of the same, since everyone is bound to take notice of what the statute requires. Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539.

50. In the absence of constitutional restriction upon the power of the legislature, a removal of a county-seat may be authorized upon any vote great or small which such body may deem advisable. Alexander *v.* People, 7 Colo. 155, 2 Pac. 894.

In Illinois, in elections for the removal of a county-seat, when held at the same time with another election, the proposition for removal must be supported by the affirmative vote of the required proportion of those voting at the election, and not merely of those voting on the particular question of removal. People *v.* Wiant, 48 Ill. 263.

In Tennessee under a constitutional provision that the seat of justice of a county shall not be removed without the concurrence of two thirds of the qualified voters of the county, there must be an active concurrence and not a passive acquiescence, and therefore two thirds of the qualified voters must actually vote in favor of the removal. Braden *v.* Stumph, 16 Lea 581.

In West Virginia it is specially provided that it will be sufficient if the proposition for removal receives the affirmative vote of the required proportion of those voting upon the question of removal. Davis *v.* Brown, 46 W. Va. 716, 34 S. E. 839.

51. Vance *v.* Austell, 45 Ark. 400; Alexander *v.* People, 7 Colo. 155, 2 Pac. 894; State *v.* White, 162 Mo. 533, 63 S. W. 104.

52. Bayard *v.* Klinge, 16 Minn. 249; Combs *v.* Stumple, 11 Lea (Tenn.) 26; Bouldin *v.* Lockhart, 1 Lea (Tenn.) 195; Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262.

The provision of a state constitution declaring that a plurality of votes cast at an election shall determine the result applies to general elections only, and an act of the legislature providing that in county-seat elections a majority of votes shall control is not in conflict with such constitutional provision, in the absence of any provision of the constitution regulating elections for the location of county-seats. State *v.* Padgett, 19 Fla. 518.

53. Wells *v.* Ragsdale, 102 Ga. 53, 29 S. E. 165.

54. Knox County *v.* Davis, 63 Ill. 405; State *v.* Stock, 38 Kan. 154, 16 Pac. 106.

Necessity for provisions for cities holding charter election at different time from township meeting.—A law providing for the submission to electors of a county at the township meetings the question of removing the county-seat if applicable to cities at all is incomplete in failing to provide for a vote of the electors of such cities as hold charter elections at a different time from the township meeting. Atty.-Gen. *v.* St. Clair County, 11 Mich. 63.

55. Knox County *v.* Davis, 63 Ill. 405; Boren *v.* Smith, 47 Ill. 482.

56. Knox County *v.* Davis, 63 Ill. 405, where it is held that in such a case the restriction on the right of suffrage is a wrong to the elector deprived of his vote, for which he has a complete remedy against the judges of election.

57. In Florida the election contemplated by statute, regulating changes in county-seats, is an election at which the voters of the county may vote for any place within such county, and where an election ordered and given notice of is one between two particular designated places, it is contrary to the policy of the statute and illegal. State *v.* Baker County, 22 Fla. 29. See also Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776.

In Alabama and Michigan where the legislature has the power to remove without the consent of the people, it may in ordering an election for such purpose limit the choice to

(F) *Form and Requisites of Ballots.* With regard to form and requisites of ballots upon an election for the removal of a county-seat it may be stated that it is only necessary that the ballots should indicate unmistakably the intention of the voters.[58]

(G) *Canvass and Returns.* After an election for the removal of a county-seat the votes cast are to be canvassed and the result determined, declared, and entered of record by the proper county authority, usually the county court,[59] the county board of commissioners,[60] or the county board of canvassers.[61] The decision of such boards in canvassing and determining the vote is conclusive[62] where no judicial review is provided by law.[63]

two designated places (State *v.* Crook, 126 Ala. 600, 28 So. 745; *Ex p.* Hill, 40 Ala. 121), or it may authorize the board of supervisors of the county, to designate a place to which the proposed removal is to be made, and submit such proposed location to the electors of the county (Peck *v.* Berrien County, 102 Mich. 346, 60 N. W. 985; People *v.* St. Clair, 15 Mich. 85). Specification of particular land to which the removal is proposed is unnecessary. Peck *v.* Berrien County, 102 Mich. 346, 60 N. W. 985.

In Missouri the method is by submitting the question of removal to the voters, and if the required number are in favor of the same the site is selected by commissioners appointed for the purpose. State *v.* White, 162 Mo. 533, 63 S. W. 104.

58. Hawes *v.* Miller, 56 Iowa 395, 9 N. W. 307.

Ballots were held sufficiently certain as to intent in the following cases: Blackshear *v.* Turner, 53 Ark. 533, 14 S. W. 897; Conley *v.* Fleming, 14 Kan. 381; Whitaker *v.* Dillard, 81 Tex. 359, 16 S. W. 1084.

Specification of different sites in same place.— Upon a vote to remove a county-seat to a place known as Grand Lake, votes cast for a location at "Grand Lake — West side," should be counted with the others, the exact site being matter for the board of commissioners to determine, if a majority of the votes favor a removal. People *v.* Grand County, 7 Colo. 190, 2 Pac. 912.

Where votes cast for different place in close proximity.— In elections held in sparsely populated counties votes cast for places within a short distance of each other should be counted together as being for the same location. Coleman *v.* People, 7 Colo. App. 243, 42 Pac. 1041. See also Smith *v.* Magourich, 44 Ga. 163, where it was held that where a minority of the ballots are cast in favor of the center of the county as a site, the majority being for other places which are contiguous to each other, the commissioners are not authorized to select the place situated at the center.

59. Willeford *v.* State, 43 Ark. 62; Worsham *v.* Richards, 46 Tex. 441; Brown *v.* Randolph County Ct., 45 W. Va. 827, 32 S. E. 165; Minear *v.* Tucker County Ct., 39 W. Va. 627, 20 S. E. 659; Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

Limitation of power of county clerk.— Upon the question of relocating a county-seat, the law only authorizes the clerk of a county to canvass the votes cast upon the question of relocation, and certify the result without regard to other votes cast at the same election. He cannot give a certificate which will afford legal evidence that the county-seat has been changed in conformity with the requirements of the constitution. People *v.* Warfield, 20 Ill. 159.

Where the certificate required of the county clerk omitted to state the number of votes cast at the election, so that it might be seen whether the proposition had been carried or lost, the returns of the judges and clerks of election may be resorted to for the purpose of ascertaining that fact. The object of such an election will not be defeated for the want of such a statement in the certificate. People *v.* Wiant, 48 Ill. 263.

60. Calaveras County *v.* Brockway, 30 Cal. 325; Pinkerton *v.* Staninger, 101 Mich. 273, 59 N. W. 611; Hipp *v.* Charlevoix County, 62 Mich. 456, 29 N. W. 77; Heffner *v.* Snohomish County, 16 Wash. 273, 47 Pac. 430.

61. State *v.* Hardin County Judge, 13 Iowa 139; State *v.* Jones, 11 Iowa 11; State *v.* Fetter, 12 Wis. 566.

Canvass according to provisions of general law.—A statute authorizing an election to determine upon the removal of a county-seat is not inoperative for failure to make provision for canvassing board. The votes at such election are to be canvassed according to the provisions of the general election, and by a canvassing board provided by such general law. Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255.

Canvass and determination by police jury. — See State *v.* Judge, 43 La. Ann. 125, 9 So. 348.

62. Pinkerton *v.* Staninger, 101 Mich. 273, 59 N. W. 611; Hipp *v.* Charlevoix County, 62 Mich. 456, 29 N. W. 77; Heffner *v.* Snohomish County, 16 Wash. 273, 47 Pac. 430.

63. Express provision is, however, made in some states for the review of such decision (Willeford *v.* State, 43 Ark. 62), and to compel a recanvass of such votes when necessary (State *v.* Hardin County Judge, 13 Iowa 139).

A writ of certiorari is not a writ of right, but the issuing of it is dependent on a sound judicial discretion, and a refusal of the circuit court to award it on a proper petition to review the proceedings of the county court in ascertaining and declaring the result of

(H) *Operation and Effect of Election*—(1) In General. The result of an election to determine the question of relocating a county-seat is decisive thereof until properly contested,[64] and when the result of such election is contested, or pending a suit to revise an election, the apparent result of which is to approve of a change of county-seats, the county affairs are to be transacted at the place *prima facie* selected by the election.[65]

(2) Removal of Records. Where the proper proportion of the votes cast at an election for the removal of a county-seat are in favor of such proposition the county records and documents should be removed to such new location as soon thereafter as practicable;[66] but an injunction may be granted to prevent removal of the records, where fraud or illegality in the election is alleged and the validity of the election tried in such proceedings.[67]

(I) *Contest of Election*—(1) In General. The right to contest an election being statutory, an election for the removal of a county-seat cannot be contested, unless such right is conferred in the act authorizing such election, or unless the provisions of the general election law give the right.[68] Statutes expressly authorizing such contest exist, however, in a number of the states.[69]

(2) Necessity For Direct Proceedings. In the absence of a jurisdictional question the validity of an election by which a county-seat is located can be contested only in a direct proceeding,[70] and alleged irregularities cannot be considered and determined collaterally.[71]

(3) Who May Contest. In some jurisdictions it has been held that an elector of a county has such an interest in the removal of a county-seat as will entitle him to contest an election for such removal.[72] In other states, however, it

the vote on a relocation of a county-seat may be reviewed by writ of error issued by the supreme court of appeals. Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

64. Williams *v.* Reutzel, 60 Ark. 155, 29 S. W. 374; State *v.* Hardin County Judge, 13 Iowa 139; People *v.* Benzie County, 41 Mich. 6, 2 N. W. 181; Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255; Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8.

A county board after issuing its order for the removal of a county-seat has no power to afterward set aside the order because of fraud and irregularity in its procurement. Clarke County *v.* State, 61 Ind. 75.

65. Maxey *v.* Mack, 30 Ark. 472; Du Page County *v.* Jenks, 65 Ill. 275; State *v.* Piper, 17 Nebr. 614, 24 N. W. 204.

In mandamus proceedings to compel county officers to return their offices to the county-seat after an election for change of county-seat, and pursuant to which the offices were moved, has been adjudged invalid, the fact that the county commissioners ordered the offices to be so moved will constitute no defense. State *v.* Porter, 15 S. D. 387, 89 N. W. 1012.

66. Clarke County *v.* State, 61 Ind. 75; Cole *v.* Jackson County, 11 Iowa 552; Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255.

Holding court at old location before erection of suitable buildings under special statutory provision see Bouldin *v.* Ewart, 63 Mo. 330.

Review of action of board in ordering removal.— The action of a county board in canvassing the vote cast at an election for the removal of a county-seat is ministerial, but its action in ordering a removal in accordance with the declared result of the vote is judicial and may be reviewed on certiorari. Herrick *v.* Carpenter, 54 Iowa 349, 6 N. W. 577.

67. Sweatt *v.* Faville, 23 Iowa 321; Rice *v.* Smith, 9 Iowa 570.

68. Clarke *v.* Jack, 60 Ala. 271; Willeford *v.* State, 43 Ark. 62; Maxey *v.* Mack, 30 Ark. 472; Calaveras County *v.* Brockway, 30 Cal. 325; Sweatt *v.* Faville, 23 Iowa 321.

69. Adams *v.* Smith, 6 Dak. 94, 50 N. W. 720; Sebering *v.* Bastedo, 48 Nebr. 358, 67 N. W. 148; Thomas *v.* Franklin, 42 Nebr. 310, 60 N. W. 568; Poteet *v.* Cabell County, 30 W. Va. 58, 5 S. E. 97.

Contest of vote upon any legal cause.—A voter or taxpayer of a county may contest before the county court, for any legal cause, a vote upon the relocation of a county-seat. Brown *v.* Randolph County Ct., 45 W. Va. 827, 32 S. E. 165.

70. Remington *v.* Higgins, 6 S. D. 313, 60 N. W. 73.

71. State *v.* Piper, 17 Nebr. 614, 24 N. W. 204; Remington *v.* Higgins, 6 S. D. 313, 60 N. W. 73.

72. Adams *v.* Smith, 6 Dak. 94, 50 N. W. 720; Scarborough *v.* Eubank, (Tex. Civ. App. 1899) 52 S. W. 569; Rayner *v.* Forbes, (Tex. Civ. App. 1899) 52 S. W. 568; Brown *v.* Randolph County Ct., 45 W. Va. 827, 32 S. E. 165; Poteet *v.* Cabell County, 30 W. Va. 58, 5 S. E. 97.

In West Virginia citizens and taxpayers of a county have such an interest in the matter of the relocation of the county-seat that they may interpose proceedings in such matter,

has been held that in the absence of express authorization, proceedings for contesting a county-seat election cannot be maintained by an elector of a county in his own name and on his own behalf.[73]

(4) EQUITABLE RELIEF. Where the law authorizing a county-seat election fails to provide any mode for contesting the election, a court of equity will take jurisdiction of a bill impeaching the election for illegally holding such election, or for unfairness in the conduct of the same, in order to relieve against fraud, and to carry out the intention of the law in submitting the question of removal to a vote of the county.[74]

(J) *Second Election.* When an election is held for the removal of a county-seat, and a majority of the electors vote in favor of retaining the old location, the county commissioners or supervisors may at any time upon the presentation of the proper petition therefor order a second election for the same purpose, and the number of elections which may be held is not restricted so long as the location of the county-seat is not changed.[75] In some jurisdictions it is expressly provided that when it is ascertained that no place has received a majority of all the votes cast at the county-seat election such result shall be proclaimed,[76] and the county court or county commissioners shall order a new election at which the balloting shall be confined to the two places having the highest number of votes at the first election.[77]

6. SELECTION, ERECTION, AND CHANGE OF LOCATION OF COUNTY BUILDINGS. The location and erection of county buildings upon the location or relocation of a county-seat, and the acquirement of land for such purpose, is intrusted to the board of county commissioners or supervisors,[78] or to commissioners appointed for the

and maintain an appropriate legal process touching it. Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8; Poteet *v.* Cabell County, 30 W. Va. 58, 3 S. E. 97; Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

73. Sebering *v.* Bastedo, 48 Nebr. 358, 67 N. W. 148; Thomas *v.* Franklin, 42 Nebr. 310, 60 N. W. 568; Caruthers *v.* Harnett, 67 Tex. 127, 2 S. W. 523; Harrell *v.* Lynch, 65 Tex. 146; *Ex p.* Towles, 48 Tex. 413; Walker *v.* Tarrant County, 20 Tex. 16.

Remedy by certiorari.—When an election is contested without authority of law before a probate judge, and is by him held void, a certiorari lies from the circuit court to remove and vacate the proceedings; and the writ may be sued out by persons who were made defendants to the proceeding before the probate judge. Clarke *v.* Jack, 60 Ala. 271.

74. Willeford *v.* State, 43 Ark. 62; People *v.* Wiant, 48 Ill. 263; Boren *v.* Smith, 47 Ill. 482; People *v.* Warfield, 20 Ill. 159; Sweatt *v.* Faville, 23 Iowa 321; Rice *v.* Smith, 9 Iowa 570; Braden *v.* Stumph, 16 Lea (Tenn.) 581.

75. Atherton *v.* San Mateo County, 48 Cal. 157.

Duty of commissioners to order second election within a specified time after an ineffectual election. Coleman *v.* People, 7 Colo. App. 243, 42 Pac. 1041; Lake County *v.* State, 24 Fla. 263, 4 So. 795.

76. Jones *v.* State, 1 Kan. 273.

77. Blackshear *v.* Turner, 53 Ark. 533, 14 S. W. 897; Light *v.* State, 14 Kan. 489; Conley *v.* Fleming, 14 Kan. 381; Jones *v.* State, 1 Kan. 273.

Nomination of former location improper.—Where a majority of the votes at the first election were given in favor of removal, but more votes were given against removal than in favor of any one of the proposed new locations, the second election must be between the two places in favor of removal, for which the largest number of votes were cast, and the old county-seat should not be nominated as one of the places to be voted upon in such second election. Blackshear *v.* Turner, 53 Ark. 533, 14 S. W. 897.

Under the Kansas statute requiring that the election for the relocation of a county-seat must be within fifty days after the presentation of a petition therefor, a second election, when necessary to determine the question, need not be within that period. Conley *v.* Fleming, 14 Kan. 381.

78. *Indiana.*— Swartz *v.* Lake County, 158 Ind. 141, 63 N. E. 31.

Kansas.— State *v.* Atchison County, 44 Kan. 186, 24 Pac. 87.

Mississippi.— Rotenberry *v.* Yalobusha County, 67 Miss. 470, 7 So. 211.

New York.— People *v.* Oneida County, 36 Misc. 597, 73 N. Y. Suppl. 1098 [*affirmed* in 68 N. Y. App. Div. 650, 74 N. Y. Suppl. 1142].

North Carolina.— Burwell *v.* Vance County Com'rs, 93 N. C. 73, 53 Am. Rep. 454.

Texas.— Knippa *v.* Stewart Iron Works, (Civ. App. 1902) 66 S. W. 322.

Virginia.— Norfolk County *v.* Cox, 98 Va. 270, 36 S. E. 380.

United States.—Washington County *v.* Sallinger, 119 U. S. 176, 7 S. Ct. 161, 30 L. ed. 377.

express purpose.[79] And in the absence of limitations upon such power[80] a board of county commissioners having exclusive power over the property of the county may remove and designate new sites for county buildings,[81] within the limits prescribed for the county-seat.[82] In exercising such power want of discretion and sound judgment on the part of a county board will not warrant interference by the courts,[83] but an abuse of discretion amounting to fraud will do so.[84]

C. County Board — 1. Nature and Status — a. In General. Boards of county commissioners, or, as they are called in some states, supervisors, are officers of a county charged with a variety of administrative and executive duties, but principally with the management of the financial affairs of the county, its police regulations, and its corporate business.[85] Such boards have a perpetual existence, continued by members who succeed each other, and the body remains the same, notwithstanding a change in the individuals who compose it.[86]

b. Status as a Corporation. A county board is usually considered to be a quasi-corporation.[87] Its official duties and powers partake more of the character

79. Spangler *v.* Clark County Ct., 44 Mo. 207.

Creation of board for erection of court-house.— N. Y. Laws (1901), c. 89, constituting certain residents of the county a board to erect a court-house for the county, does not unduly deprive the county board of supervisors of its legitimate duties. People *v.* Oneida County, 36 Misc. (N. Y.) 597, 73 N. Y. Suppl. 1098 [*affirmed* in 68 N. Y. App. Div. 650, 74 N. Y. Suppl. 1142].

80. Change by a majority vote.— Williams *v.* Boynton, 71 Hun (N. Y.) 309, 25 N. Y. Suppl. 60, 54 N. Y. St. 748.

Effect of extension of boundaries of city where county-seat located.—A county-seat will remain precisely where it was originally located until changed or removed under the provisions of the constitution and statutes of the state, and where a county-seat is located upon the territory of an incorporated city, and afterward the boundaries of such city are enlarged, this extension does not have the effect to extend the boundaries of the county-seat, but the latter remains precisely where it was originally located, and the county commissioners have no authority to remove the county buildings and locate them in the addition to such city. State *v.* Atchison County, 44 Kan. 186, 24 Pac. 87. See also State *v.* Smith, 46 Mo. 60.

Necessity for board to act in conjunction with justices of the peace.— Washington County *v.* Sallinger, 119 U. S. 176, 7 S. Ct. 161, 30 L. ed. 377.

Necessity for unanimous vote of board.— Washington County *v.* Sallinger, 119 U. S. 176, 7 S. Ct. 161, 30 L. ed. 377.

81. Colburn *v.* El Paso County, 15 Colo. App. 90, 61 Pac. 241; Crow *v.* Warren County, 118 Ind. 51, 20 N. E. 642; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Way *v.* Fox, 109 Iowa 340, 80 N. W. 405; Mahon *v.* Norton, 175 Pa. St. 279, 34 Atl. 660 [*affirming* 8 Kulp (Pa.) 249]; Bennett *v.* Norton, 7 Kulp (Pa.) 443.

Board of police in each county has the power to build and repair court-houses and to levy taxes for that purpose. Odineal *v.* Barry, 24 Miss. 9.

Power not exhausted by single exercise.— The power of a board of county commissioners to change the location of county institutions, and to do all acts necessary to effect such change, is a continuing one, not exhausted by a single exercise. Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544.

82. Allen *v.* Lytle, 114 Ga. 275, 40 S. E. 238; Way *v.* Fox, 109 Iowa 340, 80 N. W. 405.

83. Rotenberry *v.* Yalobusha County, 67 Miss. 470, 7 So. 211.

84. Crow *v.* Warren County, 118 Ind. 51, 20 N. E. 642.

Action of board ministerial not judicial.— A board of county commissioners in determining upon a change in the location of county buildings, and in settling matters incidental thereto, acts in a ministerial and not in a judicial capacity. Crow *v.* Warren County, 118 Ind. 51, 20 N. E. 642.

85. Black L. Dict.

86. Chapman *v.* York County Com'rs, 79 Me. 267, 9 Atl. 728; Pegram *v.* Cleaveland County Com'rs, 65 N. C. 114.

Completion of proceedings by successor.— A board of county commissioners constitutes a court which is not dissolved by one member going out, and another coming in. One county commissioner may therefore act with his associate, and his successor may act afterward in his place in completing the proceedings, provided their acts are separable. Chapman *v.* York County Com'rs, 79 Me. 267, 9 Atl. 728.

Duty of successor to obey writ of mandamus.— When a writ of mandamus is obtained against a board of commissioners, and there is a change in the individual members between the time when the writ is ordered and when it is served, those who compose the board at the time of service must obey such writ. Pegram *v.* Cleaveland County Com'rs, 65 N. C. 114.

87. Martin *v.* Townsend, 32 Fla. 318, 13 So. 887; Hawkins *v.* Carroll County, 50 Miss. 735; State *v.* Hancock County, 11 Ohio St. 183; Hamilton County *v.* Mighels, 7 Ohio St. 109; Com. *v.* Read, 2 Ashm. (Pa.) 261. *Com-*

istics of corporate acts and powers than those of mere trustees,[88] and as a quasi-corporation it is governed by the fundamental rules which the common law has provided for the better government of corporate bodies, and for the proper exercise of the corporate functions.[89] When exercising jurisdiction under a special power the supervisors must act strictly on the conditions under which such jurisdiction is given.[90]

2. Constitution of Board. In the absence of constitutional prohibition[91] a state legislature has the power to establish a board of supervisors in each county of the state, with such representation therein from the several townships, villages; and cities constituting the county as it may deem proper,[92] and it has the power to change the construction of such tribunal when it sees fit,[93] as for instance by increasing or decreasing the membership thereof, and that too notwithstanding a constitutional provision requiring the legislature to provide for the election of a board of commissioners.[94] And it may even abolish the board.[95]

3. Appointment, Qualification, and Tenure — a. Appointment or Election — (1) *In General.* Where a state constitution authorizes the legislature to provide for the creation of county boards without limiting such power or pointing out the manner of choosing such officers, the whole matter is left to the discretion of the legislature, and they may provide any method they may see fit for such choice.[96] Thus in some jurisdictions it is provided that members of county boards shall be chosen by the grand jury of the county.[97] In some states members of county boards are appointed by the governor,[98] by special commissioners,[99] or by the judge of the superior court where additional commissioners are required.[1] The most usual method, however, for choosing members of county boards is their election by the voters of the county;[2] and when one has been duly elected and has quali-

pare Brady *v.* New York, 2 Sandf. (N. Y.) 460.

"Neither a county nor the board of commissioners of a county is a corporation proper; it is at most but a local organization which, for purposes of civil administration, is invested with a few functions characteristic of a corporate existence." Hamilton County *v.* Mighels, 7 Ohio St. 109, 115.

88. Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

89. Com. *v.* Read, 2 Ashm. (Pa.) 261.

90. Hawkins *v.* Carroll County, 50 Miss. 735; State *v.* Hancock County, 11 Ohio St. 183; Hamilton County *v.* Mighels, 7 Ohio St. 109.

91. Constitutional limitation.—In the constitutions of some states express provision is made for the establishment of county boards, and the representation therein is prescribed. Atty.-Gen. *v.* Preston, 56 Mich. 177, 22 N. W. 261; Miller *v.* Cumberland County, 58 N. J. L. 501, 33 Atl. 948; Mich. Const. art. 10, § 6. In other states, however, the constitution simply requires that the legislature shall provide by law for the election of a county board in each county. State *v.* Woodbury, 17 Nev. 337, 30 Pac. 1006.

92. Atty.-Gen. *v.* Preston, 56 Mich. 177, 22 N. W. 261.

93. State *v.* Steele, 39 Oreg. 419, 65 Pac. 515.

94. State *v.* Woodbury, 17 Nev. 337, 30 Pac. 1006.

95. Hawkins *v.* Roberts, 122 Ala. 130, 27 So. 327.

96. Board of Revenue *v.* Barber, 53 Ala. 589; Waller *v.* Perkins, 52 Ga. 233.

97. Waller *v.* Perkins, 52 Ga. 233.

98. Carolina Grocery Co. *v.* Burnet, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687. And see Board of Revenue *v.* Barber, 53 Ala. 589.

Appointment of first board.— A law creating and organizing a new county, and authorizing the governor to appoint the first board of county commissioners, is not in violation of Wash. Const. art. 11, § 5, requiring the legislature to enact a general and uniform law governing the election of county boards and officers, since such provision does not apply to the organization of new counties. Farquharson *v.* Yeargin, 24 Wash. 549, 64 Pac. 717.

99. Territory *v.* Cass County, 6 Dak. 39, 50 N. W. 479.

1. Waller *v.* Sikes, 120 N. C. 231, 26 S. E. 925.

2. *Alabama.*— State *v.* Nicholson, 66 Ala. 181.

Arizona.— Hawke *v.* McAllister, (1894) 36 Pac. 170.

Georgia.— White *v.* Screven County, 112 Ga. 802, 38 S. E. 89.

Idaho.— Cunningham *v.* George, 3 Ida. 456, 31 Pac. 809.

Indiana.— Barrett *v.* State, 112 Ind. 322, 13 N. E. 677; Jones *v.* State, 112 Ind. 193, 13 N. E. 416; Smith *v.* State, 24 Ind. 101.

Kansas.— Demaree *v.* Scates, 50 Kan. 275, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97; State *v.* Plymell, 46 Kan. 294, 26 Pac. 479; Brungardt *v.* Leiker, 42 Kan. 206, 21

fied, the other members of the board cannot refuse to recognize such person as a member, and mandamus will lie to compel such recognition.[3]

(II) *To Fill Vacancies.* Appointment is the usual method for filling vacancies occurring in boards of county commissioners, such appointment being made by the governor,[4] or, as is the practice in some states, the board may itself fill a vacancy in its membership.[5]

(III) *Division of Counties Into Commissioner Districts*—(A) *In General.* In some jurisdictions provision is expressly made for the division by county boards of counties into commissioner or supervisor districts, and for the election of one person as county commissioner or supervisor, by the votes of each district, in which district such person shall reside.[6]

(B) *Change of District Boundaries.* The boundaries of such districts are subject to change from time to time for the purpose of adjusting them to the

Pac. 1065; Keating *v.* Marble, 39 Kan. 370, 18 Pac. 189.

Maine.— Opinion of Justices, 50 Me. 607; Opinion of Justices, 38 Me. 598.

Michigan.—Robinson *v.* Cheboygan County, 49 Mich. 321, 13 N. W. 622.

Minnesota.—State *v.* Wilder, 75 Minn. 547, 78 N. W. 83; Norwood *v.* Holden, 45 Minn. 313, 47 N. W. 971.

Nebraska.— State *v.* Westcott, 34 Nebr. 84, 51 N. W. 599; State *v.* Harlan County, 25 Nebr. 33, 40 N. W. 593; State *v.* Skirving, 19 Nebr. 497, 27 N. W. 723.

New Jersey.— Mortland *v.* Christian, 52 N. J. L. 521, 20 Atl. 673.

New York.— *In re* Noble, 34 N. Y. App. Div. 55, 54 N. Y. Suppl. 42 [*modifying* 25 Misc. 49, 53 N. Y. Suppl. 922]; People *v.* Essex County, 69 Hun 406, 23 N. Y. Suppl. 654; People *v.* Wende, 25 Misc. 330, 53 N. Y. Suppl. 1039.

Oklahoma.—Stone *v.* Reynolds, 7 Okla. 397, 54 Pac. 555.

Pennsylvania.— *In re* Clifton Tp., 4 C. Pl. 177; Com. *v.* Gaige, 1 C. Pl. 141.

Wisconsin.—State *v.* Milwaukee County, 21 Wis. 443.

See 13 Cent. Dig. tit. "Counties," § 50.

Necessity for certificate of election.— A commissioner who has received a majority of the votes at an election held according to law is "a commissioner elect" within the meaning of the Indiana act of 1885, whether he has received his certificate of election or not. Jones *v.* State, 112 Ind. 193, 13 N. E. 416.

3. Hawke *v.* McAllister, (Ariz. 1894) 36 Pac. 170; Robinson *v.* Cheboygan Sup'rs, 49 Mich. 321, 13 N. W. 622.

As to mandamus generally see MANDAMUS.

4. Myers *v.* Alameda County, 60 Cal. 287; Opinion of Justices, 50 Me. 607; Opinion of Justices, 38 Me. 598; Peck *v.* Berrien County, 102 Mich. 346, 60 N. W. 985.

5. People *v.* Gillespie, 1 Ida. 52; State *v.* West, 62 Nebr. 461, 87 N. W. 176.

In Arizona the method is by an election by the remaining supervisors and the probate judge for the purpose of filling a vacancy caused by the resignation of a supervisor. Hawke *v.* Wentworth, (1895) 39 Pac. 809.

6. *Alabama.*— State *v.* Nicholson, 66 Ala. 181.

California.— Bergevin *v.* Curtz, 127 Cal. 86, 59 Pac. 312; Tuohy *v.* Chase, 30 Cal. 524.

Dakota.— Territory *v.* Cass County, 6 Dak. 39, 50 N. W. 479.

Idaho.— Cunningham *v.* George, 3 Ida. 456, 31 Pac. 809.

Indiana.— Smith *v.* State, 24 Ind. 101.

Kansas.— Keating *v.* Marble, 39 Kan. 370, 18 Pac. 189; Hayes *v.* Rogers, 24 Kan. 143.

Minnesota.— Norwood *v.* Holden, 45 Minn. 313, 47 N. W. 971.

Nebraska.—State *v.* Skirving, 19 Nebr. 497, 27 N. W. 723.

New Jersey.— Mortland *v.* Christian, 52 N. J. L. 521, 20 Atl. 673.

New York.— Williams *v.* Boynton, 71 Hun 309, 25 N. Y. Suppl. 60; People *v.* Essex County, 69 Hun 406, 23 N. Y. Suppl. 654.

Pennsylvania.— *In re* Clifton Tp., 4 C. Pl. 177; Com. *v.* Gaige, 1 C. Pl. 141.

Wisconsin.— State *v.* Milwaukee County, 21 Wis. 443.

See 13 Cent. Dig. tit. "Counties," § 48 *et seq.*

Commissioners although voted for by the whole county are nevertheless elected for a particular district. To accomplish this the voter's ballot must not only express the name of the person for whom it is cast, but must go further and designate the number of the district for which he proposes to elect such person. State *v.* Nicholson, 66 Ala. 181.

Election of a certain number of commissioners from each township.— The Pennsylvania act of April 15, 1834, providing that the election of three supervisors for each township of Luzerne county, was repealed by the act of March 4, 1842, providing for the election of two supervisors annually for each township of the county except the township of Falls. *In re* Clifton Tp., 4 C. Pl. (Pa.) 177.

The temporary or special county commissioners appointed by the governor have power to divide the county into commissioner districts, and the commissioners elected to succeed the special or temporary county commissioners after such division are to be elected by the districts and not by the votes of the entire county. Keating *v.* Marble, 39 Kan. 370, 18 Pac. 189.

changing population,[7] but in some jurisdictions it is provided that such changes shall not be made oftener than once in three years.[8] Where a county has been redistricted and the number of its commissioner districts increased, an entirely new board of county commissioners must be elected at the first ensuing election.[9]

(IV) *Determination of Contested Election.* The board of county supervisors has no authority to go behind the statutory certificate of election of a specified person as supervisor, and to determine his right to a seat in the board where the election thereto is contested. A question for judicial cognizance is presented.[10]

b. Eligibility. As has already been said a candidate for the office of county supervisor or commissioner must be a resident of the district for which he is elected at the time of election.[11] In some states it is expressly provided that no person holding any state, county, township, or city office shall be eligible to the office of county commissioner or supervisor;[12] but in other states the contrary rule obtains.[13] Again there may be a provision to the effect that no person who is an employer, officer, or stock-holder of any railroad in which the county owns stock shall be eligible to a position on the county board.[14]

c. Qualification — (I) *Oath.* County commissioners are officers, and as such are required to take an oath of office.[15]

7. State *v.* Haverly, 62 Nebr. 767, 87 N. W. 959.

At what session of board power to be exercised.—A provision that boards of supervisors in certain counties shall have authority at their last session, before the general election in each year, to change the boundaries of the supervisor districts in their respective counties is merely directory, and does not restrain the exercise of the same power at other sessions. Tuohy *v.* Chase, 30 Cal. 524.

The redistricting or change of the boundaries of commissioner districts is prospective in its operation as to elections of members of the board of county commissioners, and the office of a member elected for the regular term is not vacated by such redistricting or change of boundaries, where he still resides in the county, although in a different district. Brungardt *v.* Leiker, 42 Kan. 206, 31 Pac. 1065; Norwood *v.* Holden, 45 Minn. 313, 47 N. W. 971; State *v.* Haverly, 62 Nebr. 767, 87 N. W. 959; State *v.* Milwaukee County, 21 Wis. 443.

8. Territory *v.* Cass County, 6 Dak. 39, 50 N. W. 479; Brungardt *v.* Leiker, 42 Kan. 206, 21 Pac. 1065; Van Den Bos *v.* Douglas County, 11 S. D. 190, 76 N. W. 935.

9. State *v.* Wilder, 75 Minn. 547, 78 N. W. 83.

10. Robinson *v.* Cheboygan County, 49 Mich. 321, 13 N. W. 622. See also Williams *v.* Boynton, 71 Hun (N. Y.) 309, 25 N. Y. Suppl. 60, where it was held that mandamus would lie to compel the board to admit the person so declared elected.

11. See *supra*, IV, C, 3, a, (III).

Effect of removal from the district in which elected.— In Indiana it has been held that the statute providing that the election of one commissioner from each commissioner district does not require that a member of the board should continue to reside in the district of the county for which he was elected, and his removal into another district of the same county does not operate to vacate his office. Smith *v.* State, 24 Ind. 101. In Nebraska, however, where the statute provides that every civil office shall be vacant upon the incumbent "ceasing to be a resident of the state, district, county, township, precinct or ward in which the duties of his office are to be exercised, or for which he may have been elected," the office of a county commissioner who removes from a district in which he was elected before the expiration of his term thereby becomes vacant. State *v.* Skirving, 19 Nebr. 497, 27 N. W. 723.

12. Demaree *v.* Scates, 50 Kan. 275, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97; State *v.* Plymell, 46 Kan. 294, 26 Pac. 479.

13. Atty.-Gen. *v.* Preston, 56 Mich. 177, 22 N. W. 261; Bruner *v.* Madison County, 111 Ill. 11.

14. Demaree *v.* Scates, 50 Kan. 275, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97.

Date at which test of eligibility applied.— In Demaree *v.* Scates, 50 Kan. 275, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97, it is held that under the statute to the effect set out in the text the word "eligible" did not mean "eligible to be elected" to the office of county commissioner at the date of election, but "eligible or legally qualified" to hold the office after the election; that is, at the commencement of the term of office.

15. Keyser *v.* McKissan, 2 Rawle (Pa.) 139; Cassin *v.* Zavalla County, 70 Tex. 419, 8 S. W. 97. And see State *v.* Bemenderfer, 96 Ind. 374.

Members elect have thirty days after election in which to qualify. Cassin *v.* Zavalla County, 70 Tex. 419, 8 S. W. 97.

Oath as to interest in claims or contracts with county.— See Knippa *v.* Stewart Iron Works, (Tex. Civ. App. 1902) 66 S. W. 322.

Time for qualification after notice of election.— See People *v.* Shaver, 127 Cal. 347, 59 Pac. 784.

(11) *Bonds.* The person elected a county commissioner is usually required to execute an official bond before entering upon the discharge of his duties as such officer,[16] and where a bond has been executed, as required by law, and the same has been approved by the judge authorized so to do, he has no power to require the commissioner to give him a new bond with further sureties.[17]

d. Tenure and Holding Over. The duty of providing for the election of the members of county boards, and of fixing the commencement and duration of their terms of office, is usually left to the legislature,[18] subject, however, to the limitation that acts fixing such term shall not be in contravention of the constitutional provisions as to the terms of county officers generally.[19] A county commissioner is not divested of his office and may properly exercise the duties of such office

A supervisor does not, however, by failing to take the oath in the time prescribed by law vacate his office. Where no steps are taken to declare and fill the vacancy and the officer subsequently qualifies he holds the office. Smith *v.* Cronkhite, 8 Ind. 134.

16. People *v.* Washington County Dist. Ct., 18 Colo. 293, 32 Pac. 819; States *v.* Plambeck, 36 Nebr. 401, 54 N. W. 667; Cassin *v.* Zavalla County, 70 Tex. 419, 8 S. W. 97.

17. People *v.* Washington County Dist. Ct., 18 Colo. 293, 32 Pac. 819.

Mandamus to compel approval of bond.— While mandamus is not the appropriate mode of trying the question of strict title to an office, yet, in such a proceeding brought to compel the respondent to approve the official bond, tendered by the relator, sufficient inquiry may be made to ascertain whether or not the relator's certificate of election or appointment is *prima facie* evidence of title to the office. State *v.* Plambeck, 36 Nebr. 401, 54 N. W. 667.

18. State *v.* Twichell, 9 Wash. 530, 38 Pac. 134.

Effect of appointment or election to fill vacancies caused by resignation.—Where a person who has been elected to and has entered upon a full three years' term of the office of county commissioner resigns said office, his appointed successor will hold by virtue of his appointment for such portion of the remainder of such full term as may elapse before the next general election, and a person elected at such next general election as successor in such vacancy, said full term not then having expired, will hold by virtue of his election not for three years from his said election, but for the unexpired portion of such resigned officer's full term. Parmater *v.* State, 102 Ind. 90, 3 N. E. 382; Opinion of Justices, 50 Me. 608. And see also Parcel *v.* State, 110 Ind. 122, 11 N. E. 4.

Provision for retirement of one member yearly.— In some states the policy is that the term of county commissioners should be so regulated that one member of the board should retire each year, and it is provided that at the first election to choose the first board of commissioners of any county the person having the highest number of votes shall continue in office three years; the next highest two years; and the next highest thereafter one year; but when two or more persons have the same number of votes their term shall be determined by lot, and that annually thereafter one commissioner shall be elected. Bell *v.* State, 129 Ind. 1, 28 N. E. 302; State *v.* Barlow, 103 Ind. 563, 3 N. E. 245; Parmater *v.* State, 102 Ind. 90, 3 N. E. 382; Opinion of Justices, 50 Me. 607; State *v.* McColl, 9 Nebr. 203, 2 N. W. 213.

The term of office is applied to the office itself, and not to the person filling it, and it ends with the expiration of each period of three years regardless of the time when the officer commenced service in the term to which he was elected: "As the term of county commissioner is fixed by law in such a manner that it applies to the office and not to the person, no amount of confusion in the holding can change the term, which expires with the expiration of each period of three years, regardless of the time when the officer commenced service in the term to which he was elected. State *v.* Barlow, 103 Ind. 563, 3 N. E. 245; Parmater *v.* State, 102 Ind. 90, 3 N. E. 382." Jones *v.* State, 112 Ind. 193, 196, 13 N. E. 416. See also Bell *v.* State, 129 Ind. 1, 28 N. E. 302; Barrett *v.* State, 112 Ind. 322, 13 N. E. 677.

The fact that the election notice does not show that an unexpired term of such office is to be filled at the election will not affect the elected commissioner's tenure of office. Parmater *v.* State, 102 Ind. 90, 3 N. E. 382.

Time for questioning validity of statute.— The Ohio act of May 19, 1894, changing the commencement of the term of office of county commissioners, was, when passed, invalid by reason of the resulting vacancy from the first Monday in January to the third Monday of September in the years 1895, 1896, and 1897, to be filled by appointment and not by election. Such vacancies were filled by appointment without objection on the part of the state or any citizen, and no action was brought to test the validity of the statute, or to oust from office any one who was filling such vacancy, until more than a year after all such vacancies had expired. It was held that it was then too late to test the validity of the statute by proceedings in quo warranto, and that the term of office of each county commissioner now in office must be regarded and held to have commenced on the third Monday of September next after his election. State *v.* Brown, 60 Ohio St. 499, 54 N. E. 467.

19. Leavenworth County Com'rs *v.* State, 5 Kan. 688; State *v.* Alter, 5 Ohio Cir. Ct. 253.

until his successor has not only been elected but has qualified,[20] but after an incoming board has been commissioned, the old board is out of office and has no right to correct its own acts done while in office.[21] So where one is elected a county commissioner and duly qualified but dies before his term begins his predecessor cannot hold over.[22]

e. Resignation. It may be expressly provided that the resignation of a county commissioner must be tendered to the board of which he is a member, and that the vacancy must be filled by the commissioners.[23]

f. Removal. Members of a county board may be removed by proper proceedings for incompetency, misconduct, or neglect of official duty.[24] Express provision is made in some jurisdictions for summary proceedings to secure the removal of members of county boards, which proceedings are usually instituted by means of a written and verified information or complaint presented by any person,[25] or by a petition or upon the relation of citizens asking for such removal.[26] Provisions of this character have been held constitutional.[27] A statute giving exclusive juris-

20. *Colorado.*— People *v.* Reid, 11 Colo. 138, 17 Pac. 302, 11 Colo. 141, 18 Pac. 341.

Illinois.— People *v.* Barnett Tp., 100 Ill. 332.

Indiana.— State *v.* Clendenning, 117 Ind. 111, 19 N. E. 623; Jones *v.* State, 112 Ind. 193, 13 N. E. 416; Parcel *v.* State, 110 Ind. 122, 11 N. E. 4; Parmater *v.* State, 102 Ind. 90, 3 N. E. 382; State *v.* Bemenderfer, 96 Ind. 374.

Louisiana.— State *v.* Montgomery, 25 La. Ann. 138.

Nebraska.— State *v.* McColl, 9 Nebr. 203, 2 N. W. 213.

North Carolina.— State *v.* Jones, 80 N. C. 127.

Pennsylvania.— Com. *v.* Gaige, 94 Pa. St. 193; York County *v.* Small, 1 Watts & S. 315.

See 13 Cent. Dig. tit. "Counties," § 51.

A police jury is not a legislative body, and its members are not legislators who become *functi officio* with the expiration of terms for which they were elected or appointed, but can lawfully administer the powers confided to them until their successors are elected and qualify. State *v.* Montgomery, 25 La. Ann. 138.

In a county which has adopted the township organization, the board of county commissioners continue to act until the board of supervisors has met and organized. State *v.* Kinzer, 20 Nebr. 174, 29 N. W. 307.

Retired members of a board of chosen freeholders hold office until the organization of the board at their annual meeting. *In re* Highway, 16 N. J. L. 91.

Where a commissioner is elected his own successor, a second term of service will be determined to have commenced at the regular period, and he cannot by holding over after the expiration of his first term, and failing to qualify until one year of his second term has passed, extend the latter term or make his second term commence at an irregular period. Parcel *v.* State, 110 Ind. 122, 11 N. E. 4.

21. State *v.* Knight, 31 S. C. 81, 9 S. E. 692; State *v.* Bryce, 11 S. C. 342.

22. State *v.* Bemenderfer, 96 Ind. 374.

23. People *v.* Gillespie, 1 Ida. 52.

24. Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824; Eberstadt *v.* State, 20 Tex. Civ. App. 164, 49 S. W. 654; McDonald *v.* Guthrie, 43 W. Va. 595, 27 S. E. 844.

The plea of ignorance of the law will not protect a member from removal from office when it is shown that he has repeatedly violated the plain provisions of the law. Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824.

25. See Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824.

26. See McDonald *v.* Guthrie, 43 W. Va. 595, 27 S. E. 844.

In Texas express provision is made for proceedings in the name of the state to remove county officers by the judges of the district court upon the relation of citizens. Eberstadt *v.* State, 20 Tex. Civ. App. 164, 49 S. W. 654.

Provision for temporary suspension of officer and appointment of another.— Tex. Rev. Stat. (1895), art. 3550, being part of the chapter prescribing the procedure for removal of public officers for misconduct, authorizes the court to temporarily suspend the officer proceeded against and appoint another to discharge the duties who shall give bond conditioned to pay all damages sustained in case it should appear that the causes of removal are insufficient or untrue. Eberstadt *v.* State, 20 Tex. Civ. App. 164, 49 S. W. 654.

Joinder of defendants.— In a proceeding in the name of the state to remove several county commissioners under Tex. Const. art. 5, § 24, and Tex. Rev. Stat. (1895), art. 3531, they may be joined in the same action under allegations that they conspired together in the acts complained of, and alleged, as grounds of removal. Eberstadt *v.* State, 92 Tex. 94, 45 S. W. 1007.

Quo warranto.— In Washington it seems that an information in the nature of quo warranto will lie, and it has been held that it must state the facts upon which the action is based as definitely as such facts are required to be alleged in the information in a criminal action. State *v.* Friars, 10 Wash. 348, 39 Pac. 104.

27. McDonald *v.* Guthrie, 43 W. Va. 595, 27 S. E. 844.

diction to the board of county commissioners of proceedings to remove county officers does not empower two members of the board to remove from office a third member.[28]

4. Compensation — a. Right to and Amount of Compensation. In some states members of a county board in counties of a certain class are allowed a gross sum as an annual salary in full payment for all services rendered and travel performed by them in discharge of their duties.[29] So in some jurisdictions it is provided that in counties of a certain class, the pay of members of the board for their services including regular and special sessions shall not exceed a specified sum to each commissioner in any one year;[30] and in one jurisdiction this is the rule in respect to counties of all classes.[31] As a general rule, however, the compensation of members of county boards is a fixed sum *per diem*, together with mileage for each day actually employed in the discharge of the duties of their office.[32] Ordi-

28. Hutchinson *v.* Ashburn, 5 Nebr. 402, 404, where it is said: "From the nature of the case, county commissioners must be excepted from the operation of the act." See also Hawke *v.* McAllister, (Ariz. 1894) 36 Pac. 170, holding that two members of a board cannot declare a person who is elected and qualified as a third member of such board not a member and elect another person to fill the supposed vacancy.

29. Tulare County *v.* Jafferds, 118 Cal. 303, 50 Pac. 427; Ellis *v.* Tulare County, (Cal. 1896) 44 Pac. 575; McCollom *v.* Shaw, 21 Ind. App. 63, 51 N. E. 488; Bristol County *v.* Gray, 140 Mass. 59, 2 N. E. 789; Martin *v.* Ivins, 59 N. J. L. 364, 36 Atl. 93; Com. *v.* Lloyd, 178 Pa. St. 308, 35 Atl. 816.

In California, under the county government act, supervisors were allowed in some cases a gross sum, and in others a *per diem* and mileage. Ellis *v.* Tulare County, (Cal. 1896) 44 Pac. 575.

Effect of enactment changing salaries pending term.— A supervisor of a county of the eleventh class, who was elected under the county government act of 1893, under which his salary was fixed at the sum of eighteen hundred dollars per annum, and who was in office at the time of the enactment of the county government act of 1897, under which his county became one of the thirteenth class and by which the salary of supervisors was fixed at one thousand dollars per annum, continues to be entitled, under section 233 of the latter act, to the salary provided by the act of 1893, and the fact that since the passage of the latter act he had received warrants only for the amount of the salary therein provided, upon the refusal of the auditor to issue them for the amount provided by the act of 1893, does not estop him from demanding the balance. Ellis *v.* Jefferds, 130 Cal. 478, 62 Pac. 734. One elected supervisor in 1892 for a four-year term is not entitled to the increased compensation provided by a statute taking effect in 1895, in view of a provision in such latter statute providing that the compensation therein fixed "shall not affect the present incumbents." Tulare County *v.* Jefferds, 118 Cal. 303, 50 Pac. 427.

30. Chapin *v.* Wilcox, 114 Cal. 498, 46 Pac. 457; State *v.* Corning, 44 Kan. 442, 24 Pac. 966; Burroughs *v.* Norton County, 29 Kan. 196.

31. Fisher *v.* Bannock County, 4 Ida. 381, 39 Pac. 552.

32. *California.*— White *v.* Hayden, 126 Cal. 621, 59 Pac. 118; Ellis *v.* Tulare County, (1896) 44 Pac. 575; Howes *v.* Abbott, 78 Cal. 270, 20 Pac. 572; Andrews *v.* Pratt, 44 Cal. 309.

Idaho.— Rankin *v.* Jauman, 4 Ida. 394, 39 Pac. 1111; Fisher *v.* Bannock County, 4 Ida. 381, 39 Pac. 552.

Illinois.— Wulff *v.* Aldrich, 124 Ill. 591, 16 N. E. 886; Bruner *v.* Madison County, 111 Ill. 11; Cook County *v.* Wren, 43 Ill. App. 388.

Indiana.— Waymire *v.* Jasper County, 105 Ind. 600, 4 N. E. 890.

Michigan.— Ewing *v.* Ainger, 97 Mich. 381, 56 N. W. 767.

Nevada.— State *v.* Trousdale, 16 Nev. 357.

New York.— Richmond County *v.* Ellis, 59 N. Y. 620; Van Sicklen *v.* Queens County, 32 Hun 62; Richmond County *v.* Van Clief, 1 Hun 454, 3 Thomps. & C. 458.

North Carolina.— State *v.* Norris, 111 N. C. 652, 16 S. E. 2.

Ohio.— Higgins *v.* Logan County, 62 Ohio St. 621, 57 N. E. 504; Richardson *v.* State, 19 Ohio Cir. Ct. 191, 10 Ohio Cir. Dec. 458 [*affirmed* in 66 Ohio St. 108, 63 N. E. 593]; State *v.* Richardson, 9 Ohio S. & C. Pl. Dec. 826.

Pennsylvania.— Mansel *v.* Nicely, 175 Pa. St. 367, 34 Atl. 793, 38 Wkly. Notes Cas. 264; Albright *v.* Bedford County, 106 Pa. St. 582.

Utah.— Christopherson *v.* Stanton, 13 Utah 85, 44 Pac. 648.

See 13 Cent. Dig. tit. "Counties," § 54.

Limitation of mileage.—In several decisions it has been held that members of county boards are not entitled to mileage each day, but only to one mileage each way for the session of the board. Howes *v.* Abbott, 78 Cal. 270, 20 Pac. 572; State *v.* Norris, 111 N. C. 652, 16 S. E. 2.

Wash. Code (1881), § 2670, allowing mileage is repealed by Wash. Laws (1889–1890), p. 305, § 2, which provides that they shall receive five dollars per day for each day employed in the performance of their duties, and which expressly declares that its pur-

narily members of county boards are entitled to no other allowance or emolument whatever outside of the compensation fixed by law for their services, while actually engaged in county business;[33] and they cannot, as a board or as individual members thereof, perform the duties imposed by law on any other county officer and draw compensation as county commissioners therefor.[34] In some cases, however, compensation in excess of the amount prescribed by law has been allowed to members of a county board for the performance of special services.[35]

b. By Whom Fixed. As a general rule the compensation of members of county boards is fixed by an act of the legislature,[36] but in some cases it is provided that such compensation shall be fixed by the board themselves.[37]

5. EXPENSES. In a number of jurisdictions in addition to compensation provision is made for the allowance to members of the board of certain items of reasonable and necessary expenses incurred in the performance of their duties,[38]

pose is to fix the salaries of county officers and that all acts in conflict with its previous provisions are repealed. State *v.* Beman, 15 Wash. 24, 45 Pac. 652.

33. *Arizona.*— Reilly *v.* Cochise County, (1898) 53 Pac. 205.

California.— Shepherd *v.* Keagle, (1898) 53 Pac. 702; Irwin *v.* Yuba County, 119 Cal. 686, 52 Pac. 35; Andrews *v.* Pratt, 44 Cal. 309.

Idaho.— Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824.

Illinois.— Bruner *v.* Madison County, 111 Ill. 11; Cook County *v.* Wren, 43 Ill. App. 388.

Massachusetts.— Bristol County *v.* Gray, 140 Mass. 59, 2 N. E. 789.

Michigan.— Ewing *v.* Ainger, 96 Mich. 587, 55 N. W. 996.

Nevada.— State *v.* Tronsdale, 16 Nev. 357.

New York.— Richmond County *v.* Ellis, 59 N. Y. 620; Van Sicklen *v.* Queens County, 32 Hun 62; Richmond County *v.* Van Clief, 1 Hun 454, 3 Thomps. & C. 458.

North Carolina.— People *v.* Green, 75 N. C. 329.

Tennessee.— Hope *v.* Hamilton County, 101 Tenn. 325, 47 S. W. 487.

Washington.— Hartson *v.* Dale, 9 Wash. 379, 37 Pac. 475.

See 13 Cent. Dig. tit. "Counties," § 54.

Allowances by board to member for services. — A board of county commissioners cannot make a contract of any kind with one of its members or make a legal allowance to such member for services voluntarily rendered or things voluntarily furnished the county by him (Waymire *v.* Powell, 105 Ind. 328, 4 N. E. 886), nor can a board allow one of its own members compensation for voluntarily attending the trial of an action against the county as a witness and otherwise assisting in the defense (Waymire *v.* Jasper County, 105 Ind. 600, 4 N. E. 890).

Compensation for committee work.— Howell's Stat. Mich. § 502, instead of prohibiting a supervisor from receiving pay as a member of a committee while the board of supervisors is in session fixes the amount of compensation for committee work while the board is actually in session, and prohibits the taking of compensation for such work while the board is not in session. Ewing *v.* Ainger, 97 Mich. 381, 56 N. W. 767 [*affirming* 96 Mich. 587, 55 N. W. 996].

Demand or acceptance of commission for selling property for county.— In Dorsett *v.* Garrard, 85 Ga. 734, 11 S. E. 768, it was held that a county commissioner could not legally demand or accept a commission or profit for selling property for the county, whether he performed his duties as commissioner with or without compensation, and that other county commissioners could not authorize him to charge such commission for making the sale.

Recovery by county of compensation illegally received.— If a member of a county board receives illegal compensation for his services,. or wrongfully receives from the county money for articles or materials never furnished, an action will lie in favor of the county against such supervisor to recover back such money. Land, etc., Lumber Co. *v.* McIntyre, 100 Wis. 258, 75 N. W. 964, 69 Am. St. Rep. 925.

34. Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824.

35. Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507. As for instance additional compensation while attending meetings to equalize assessments, to levy taxes, or to canvass election returns. State *v.* Corning, 44 Kan. 442, 24 Pac. 966. See also Burroughs *v.* Norton County, 29 Kan. 196.

Rendition of services outside of county.— A county warrant issued to a county commissioner for special services rendered "in certain county-seat contest case" will not be rendered invalid merely by the fact that the services in question were rendered outside the county, nor can it be said that the county could in no event have such an interest in a county-seat contest that the commissioners would have authority to incur expenses in connection therewith. Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507.

36. See cases cited *supra*, IV, C, 4, a.

37. Wulff *v.* Aldrich, 124 Ill. 591, 16 N. E. 886; Cook County *v.* Wren, 43 Ill. App. 388.

38. Bristol County *v.* Gray, 140 Mass. 59, 2 N. E. 789; Richardson *v.* State, 66 Ohio St. 108, 63 N. E. 593; McKean County *v.*

as for instance traveling expenses,[39] expenses incurred in the sale of goods manufactured in the county house of correction,[40] or any other reasonable and necessary expenses in addition to compensation and mileage incurred when necessarily traveling on official business outside of the county.[41]

6. Organization — a. Election of Presiding Officer. A county board should organize at the time fixed by law, usually an annual meeting, by electing a presiding officer or chairman,[42] who shall preside at such meeting and all other meetings held during his term of office if present.[43]

b. Necessity For Existence of County Clerk. A county board is a constitutional body, and is not dependent for its lawful existence or power to perform the duties imposed upon it upon the existence of a county clerk constitutionally elected.[44]

7. Powers and Duties — a. Exercise of Corporate Powers of County. A board of county commissioners or county supervisors ordinarily exercises the corporate powers of the county.[45] It is for all financial and ministerial purposes the

Young, 11 Pa. Super. Ct. 481; Cumberland County *v.* Beltzhoover, 6 Pa. Dist. 625, 19 Pa. Co. Ct. 614.

39. Cumberland County *v.* Beltzhoover, 6 Pa. Dist. 625, 19 Pa. Co. Ct. 614.

Traveling expenses incurred in official duties which are allowed a county commissioner will not entitle him to expenses incurred in going each day from his home to his office and returning, but these come under the head of individual expenses, the collection of which from the county is forbidden by the Pennsylvania act of May 7, 1889. Mansel *v.* Nicely, 175 Pa. St. 367, 34 Atl. 793, 38 Wkly. Notes Cas. (Pa.) 264.

40. Bristol County *v.* Gray, 140 Mass. 59, 2 N. E. 789.

41. Richardson *v.* State, 66 Ohio St. 108, 63 N. E. 593.

Petition for allowances for services and expenses.— The claim of a county commissioner for services and expenses in attending a session of the state board of equalization, in the interests of his county to prevent an increase in the county valuation by the state board, must be presented to the superior court for allowance by petition under Wash. Laws (1893), p. 176, § 3, and the allowance of such claim by the board of county commissioners is illegal and unauthorized. Hartson *v.* Dale, 9 Wash. 379, 37 Pac. 475.

42. Ottawa *v.* La Salle County, 11 Ill. 654; Fuller *v.* Miller, 32 Kan. 130, 4 Pac. 175; Farrier *v.* Dugan, 48 N. J. L. 613, 7 Atl. 881.

In New Jersey formerly a director elected by the people was by virtue of his office the lawful president of the board. Dugan *v.* Farrier, 47 N. J. L. 383, 1 Atl. 751 [*affirmed* in 48 N. J. L. 613, 7 Atl. 881]; Greene *v.* Hudson County, 44 N. J. L. 392; Billings *v.* Fielder, 44 N. J. L. 381; Feurey *v.* Roe, 35 N. J. L. 123. This office of director was abolished, but the office of president was not abolished. Farrier *v.* Dugan, 47 N. J. L. 383, 1 Atl. 751 [*affirmed* in 48 N. J. L. 613, 7 Atl. 881].

Judge of probate ex officio president of board.— By Fla. Acts (1845), c. 11, § 3, "the judge of probate in each county shall be *ex officio* a member and the president of said board, and shall keep or cause to be kept a regular record of its proceedings at each session thereof." Martin *v.* Townsend, 32 Fla. 318, 325, 13 So. 887.

43. Ottawa *v.* La Salle County, 11 Ill. 654; Fuller *v.* Miller, 32 Kan. 130, 4 Pac. 175.

In case of the absence of such presiding officer at any meeting, the members of the board present may choose one of their number as temporary chairman. Ottawa *v.* La Salle County, 11 Ill. 654; Fuller *v.* Miller, 32 Kan. 130, 4 Pac. 175; Clayton *v.* Green, 61 N. J. L. 340, 39 Atl. 667.

In the case of the death or resignation of the chairman, they may at any regular or special meeting after such vacancy elect one of their number chairman to fill the same. Fuller *v.* Miller, 32 Kan. 130, 4 Pac. 175.

Election of temporary chairman.— In Ottawa *v.* La Salle County, 11 Ill. 654, it was held that a board of supervisors may select a temporary chairman, whether there is a regular chairman in existence or not.

44. Carleton *v.* People, 10 Mich. 250.

Although it be provided by law that the county clerk shall be the clerk of the board the latter may if there be no county clerk appoint a person to act as its clerk, so as to enable the board to discharge its duties. Carleton *v.* People, 10 Mich. 250.

45. *California.*— *Ex p.* Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236.

Colorado.— Colburn *v.* El Paso County, 15 Colo. App. 90, 61 Pac. 241.

Illinois.— Jackson County *v.* Rendleman, 100 Ill. 379, 39 Am. Rep. 44; Bouton *v.* McDonough County, 84 Ill. 384; Neal *v.* Franklin, 43 Ill. App. 267.

Indiana.—Duncan *v.* Lawrence County, 101 Ind. 403; Moon *v.* Howard County, 97 Ind. 176; Nixon *v.* State, 96 Ind. 111; Hoffman *v.* Lake County, 96 Ind. 84.

Kansas.—Stafford County *v.* State, 40 Kan. 21, 18 Pac. 889.

New Jersey.— Cory *v.* Somerset County, 44 N. J. L. 445.

New York.— Orleans County *v.* Bowen, 4 Lans. 24.

county,[46] and is clothed with authority to do whatever the corporate or political entity, the county, might do if capable of rational action, except in respect to matters, the cognizance of which is exclusively vested in some other officer or person. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests,[47] and having original and exclusive jurisdiction over all matters pertaining to county affairs,[48] and courts will not interfere with such boards in the lawful exercise of the jurisdiction committed to them by law, on the sole ground that their actions are characterized by lack of wisdom or sound discretion.[49]

b. Judicial Powers. In some jurisdictions county boards are given limited judicial powers and duties of a judicial nature are imposed upon them;[50] in

United States.— Kankakee County *v.* Ætna L. Ins. Co., 106 U. S. 668, 2 S. Ct. 80, 27 L. ed. 309.

See 13 Cent. Dig. tit. "Counties," § 55.

46. Levy Court *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851.

47. *California.*—Andrews *v.* Pratt, 44 Cal. 309.

Indiana.— State *v.* Clark, 4 Ind. 315 [*quoted* in Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544].

Iowa.— Wilhelm *v.* Cedar County, 50 Iowa 254; Hawk *v.* Marion County, 48 Iowa 472.

Kansas.— Leavenworth County Com'rs *v.* Keller, 6 Kan. 510.

Maine.— Walton *v.* Greenwood, 60 Me. 356.

Massachusetts.— Hampshire County *v.* Franklin County, 16 Mass. 76.

Minnesota.— Cushman *v.* Carver County, 19 Minn. 295.

New Hampshire.—Brown *v.* Grafton County, 69 N. H. 130, 36 Atl. 874.

Ohio.—Shanklin *v.* Madison County Com'rs, 21 Ohio St. 575; State *v.* Cappeller, 8 Ohio Dec. (Reprint) 546, 8 Cinc. L. Bul. 311.

Oregon.— Crossen *v.* Wasco County, 10 Oreg. 111.

Pennsylvania.— Com. *v.* Krickbaum, 199 Pa. St. 351, 49 Atl. 68.

Wisconsin.— Washburn County *v.* Thompson, 99 Wis. 585, 75 N. W. 309.

See 13 Cent. Dig. tit. "Counties," § 55.

County boards as successors of boards of road commissioners see State *v.* Tucker, 54 S. C. 251, 32 S. E. 361.

County boards as successors of county courts see Prettyman *v.* Tazewell County, 19 Ill. 406, 71 Am. Dec. 230; Green *v.* Wardwell, 17 Ill. 278, 63 Am. Dec. 366; People *v.* Thurber, 13 Ill. 554; Kankakee County *v.* Ætna L. Ins. Co., 106 U. S. 668, 2 S. Ct. 80, 27 L. ed. 309.

County boards substituted for county judges see Yant *v.* Brooks, 19 Iowa 87.

County courts as successors of county boards see Dodson *v.* Ft. Smith, 33 Ark. 508.

Division of powers between county convention and board.—In New Hampshire the powers in relation to county government formerly vested in the court of common pleas are divided between the county convention and the county commissioners. Brown *v.* Grafton County, 69 N. H. 130, 36 Atl. 874.

Fiscal courts as successors of county boards see Joyes *v.* Jefferson County Fiscal Ct., 106 Ky. 615, 51 S. W. 435, 21 Ky. L. Rep. 199.

48. *Georgia.*—Clarke County *v.* Smith, 108 Ga. 327, 33 S. E. 944.

Idaho.— Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824.

Illinois.— Morrison *v.* People, 196 Ill. 454, 63 N. E. 989.

Indiana.— Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544.

South Carolina.— Jennings *v.* Abbeville County, 24 S. C. 543.

Texas.— And see Ranken *v.* McCallum, 25 Tex. Civ. App. 83, 60 S. W. 975.

See 13 Cent. Dig. tit. "Counties," § 55.

Jurisdiction limited to county business.— Ranken *v.* McCallum, 25 Tex. Civ. App. 83, 60 S. W. 975.

The jurisdiction of roads and other matters of county buildings is conferred by statute exclusively upon the county court, and the court has no power to refer the determination of facts to a jury. Evans *v.* Shields, 3 Head (Tenn.) 70.

Publication of tax-lists and treasurer's notices.— The board of county commissioners of a county may designate in what paper the county treasurer shall publish the delinquent tax-lists and treasurer's notices, but cannot declare the time when such notice shall be published, this being fixed by law. Petillon *v.* Ford County, 5 Kan. App. 794, 48 Pac. 1002.

49. Monroe County *v.* Strong, 78 Miss. 565, 29 So. 530; Rotenberry *v.* Yalobusha County, 67 Miss. 470, 7 So. 211; State *v.* Public Bldgs. Com'rs, 12 Rich. (S. C.) 300. And see Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544.

50. *California.*— People *v.* Bircham, 12 Cal. 50; People *v.* El Dorado County Sup'rs, 8 Cal. 58.

Georgia.— Cox *v.* Whitfield County, 65 Ga. 741.

Illinois.— Hardin County *v.* McFarlan, 82 Ill. 138; Betts *v.* Menard, 1 Ill. 395.

Indiana.— Garrigus *v.* State, 93 Ind. 239; Doctor *v.* Hartman, 74 Ind. 221; English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215; La Grange County *v.* Cutler, 7 Ind. 6; State *v.* Conner, 5 Blackf. 325.

Maine.— Chapman *v.* York County Com'rs, 79 Me. 267, 9 Atl. 728.

some of these jurisdictions they are empowered to summon witnesses, but cannot punish a refusal to attend as for a contempt.[51] In others, however, it has been held that the board of commissioners of a county is not a court within the provisions of the constitution.[52]

c. Other Powers. Provisions are found in the statutes of various states conferring other powers in addition to those already enumerated; as for instance the power to legislate on local matters,[53] the right to supervise the conduct of county officers,[54] and to adopt such health regulations as may seem necessary.[55]

d. Statutory Limitation of Powers. A county board of supervisors or commissioners or a county court being created for special purposes can exercise only such powers as are conferred upon it by the constitution or statutes of the state,[56]

See 13 Cent. Dig. tit. "Counties," § 55 *et seq.*

A court of record.— In Indiana the board of commissioners of a county is a court of record, and whatever they do must be presumed to be entered of record. La Grange County *v.* Cutler, 7 Ind. 6.

An "inferior tribunal."— In West Virginia a board of supervisors is held not to be a common-law court, but is and cannot be otherwise than an inferior tribunal in the strictest sense of the word, within the meaning of section 6, article 6, of the constitution. Cunningham *v.* Squires, 2 W. Va. 422, 98 Am. Dec. 770.

Exercise of functions of mayor and aldermen.— Where commissioners are created for a county in which a certain town is located, it is unconstitutional to impose upon them the exercises of the functions of mayor and aldermen of such town. Churchill *v.* Walker, 68 Ga. 681.

51. *In re* Blue, 46 Mich. 268, 9 N. W. 441. And see *In re* Bradner, 87 N. Y. 171; Matter of Superintendent of Poor, 6 N. Y. App. Div. 144, 39 N. Y. Suppl. 878; People *v.* Rice, 57 Hun (N. Y.) 62, 10 N. Y. Suppl. 270, 32 N. Y. St. 7.

In New Jersey the board of freeholders have no power to compel the attendance of parties or witnesses, nor power to swear and examine the latter, should they attend voluntarily, even upon the public question submitted to them. Brown *v.* Morris Canal, etc., Co., 27 N. J. L. 648.

52. Betts *v.* New Hartford, 25 Conn. 180; Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190; Brumfield *v.* Douglas County, 2 Nev. 65.

Cannot pass upon validity of statute.— Boards of county commissioners are not clothed with judicial functions, and are not authorized to pass upon the validity of a statute. Howell *v.* Ada County, 6 Ida. 154, 53 Pac. 542.

53. People *v.* McIntyre, 154 N. Y. 628, 49 N. E. 70.

54. Modoc County *v.* Madden, 120 Cal. 555, 52 Pac. 812; House *v.* Los Angeles County, 104 Cal. 73, 37 Pac. 796. And see Liles *v.* Cawthorn, 78 Miss. 559, 29 So. 834. Under its power to supervise the official conduct of all county officers and direct prosecutions for delinquencies, a board of county supervisors may employ an expert for the examination of the books and accounts of county officers. Harris *v.* Gibbins, 114 Cal. 418, 46 Pac. 292.

55. Haupt *v.* Maricopa County, (Ariz. 1902) 68 Pac. 525.

56. *Alabama.*— *Ex p.* Selma, etc., R. Co., 46 Ala. 230; Wightman *v.* Karsner, 20 Ala. 446.

California.— Modoc County *v.* Spencer, 103 Cal. 498, 37 Pac. 483; Foster *v.* Coleman, 10 Cal. 278.

Idaho.— Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824; Conger *v.* Latah County, 5 Ida. 347, 48 Pac. 1064.

Illinois.— Hardin County *v.* McFarlan, 82 Ill. 138; Betts *v.* Menard, 1 Ill. 395; Dahnke *v.* People, 57 Ill. App. 619.

Indiana.— Doctor *v.* Hartman, 74 Ind. 221; English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215.

Louisiana.— West Carroll Parish *v.* Gaddis, 34 La. Ann. 928; Lodds *v.* Vermilion Parish, 28 La. Ann. 618; Bertrand *v.* Vermilion Parish, 28 La. Ann. 588; Sterling *v.* West Feliciana Parish, 26 La. Ann. 59; Fagot *v.* Graderigo, 3 La. 13.

Mississippi.— Jefferson County *v.* Grafton, 74 Miss. 435, 21 So. 247, 60 Am. St. Rep. 516, 36 L. R. A. 798; Howe *v.* State, 53 Miss. 57.

Missouri.— Butler *v.* Sullivan County, 108 Mo. 630, 18 S. W. 1142; Sturgeon *v.* Hampton, 88 Mo. 203; Saline County *v.* Wilson, 61 Mo. 237; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87.

New York.— Case *v.* Cayuga County, 88 Hun 59, 34 N. Y. Suppl. 595.

Ohio.— State *v.* Wilson, 9 Ohio Dec. (Reprint) 39, 10 Cinc. L. Bul. 217; McGill *v.* Hamilton County, 8 Ohio Dec. (Reprint) 439, 8 Cinc. L. Bul. 9.

Oregon.— Crossen *v.* Wasco County, 10 Oreg. 111.

Pennsylvania.— Close *v.* Berks County, 2 Woodw. 453.

South Carolina.— Jennings *v.* Abbeville County, 24 S. C. 543.

Tennessee.— Grant *v.* Lindsay, 11 Heisk. 651.

Texas.— Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343; Bland *v.* Orr, 90 Tex. 492, 39

or such powers as arise by necessary implication from the express grant of constitutional or statutory powers.[57]

e. Manner of Exercise — (i) *In General.* The powers of county boards must be exercised by them as boards and not as individuals.[58] An individual member, unless expressly authorized, cannot bind the county by his acts,[59] and

S. W. 558; Edwards County *v.* Jennings, (Civ. App. 1895) 33 S. W. 585.

Sec 13 Cent. Dig. tit. "Counties," § 55 *et seq.*

A legislature may take away the statutory powers of a board of supervisors, even though such board exist by virtue of a constitutional provision. Queens County *v.* Petry, 54 N. Y. App. Div. 115, 66 N. Y. Suppl. 447 [*affirmed* in 66 N. Y. Suppl. 1142].

A board of supervisors is bound by the acts of its predecessors only when within the scope of their authority. Jefferson County *v.* Grafton, 74 Miss. 435, 21 So. 247, 60 Am. St. Rep. 516, 36 L. R. A. 798.

Submission to legislature of amounts required exceeding the authority of board to expend.— When the additions and improvements upon a court-house and jail, necessary for the convenience and accommodation of all courts, officers, and persons whose duty requires them to resort there, and for the preservation of the records and public papers of the county, would exceed in expense the amount which the county commissioners are authorized by law to expend, it is their duty to submit to the legislature a statement of the amount required, with evidence of the exigency for such improvements. Southern Dist. *v.* Bristol County Com'rs, 14 Gray (Mass.) 138.

57. *California.*— Frandzen *v.* San Diego County, 101 Cal. 317, 35 Pac. 897.

Illinois.— Wheeler *v.* Wayne County, 132 Ill. 599, 24 N. E. 625; Dahnke *v.* People, 57 Ill. App. 619.

Indiana.— Badger *v.* Merry, 139 Ind. 631, 39 N. E. 309; Tippecanoe County *v.* Barnes, 123 Ind. 403, 24 N. E. 137; Gavin *v.* Wells County, 104 Ind. 201, 3 N. E. 846; Hight *v.* Monroe County, 68 Ind. 575; McCollom *v.* Shaw, 21 Ind. App. 63, 51 N. E. 488.

Iowa.— Hawk *v.* Marion County, 48 Iowa 472.

Mississippi.— Jefferson County *v.* Grafton, 74 Miss. 435, 21 So. 247, 60 Am. St. Rep. 516, 36 L. R. A. 798.

Missouri.— Sheidley *v.* Lynch, 95 Mo. 487, 8 S. W. 434; Walker *v.* Linn County, 72 Mo. 650; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294.

Nevada.—Sadler *v.* Eureka County, 15 Nev. 39.

New Jersey.— State *v.* Hudson County, 37 N. J. L. 254.

New York.— People *v.* McIntyre, 154 N. Y. 628, 49 N. E. 70.

Washington.— State *v.* Friars, 10 Wash. 348, 39 Pac. 104.

See 13 Cent. Dig. tit. "Counties," § 55 *et seq.*

Power over public moneys is not unlimited. — Boards of freeholders have no right to vote away *ad libitum* the funds of the county, and the courts have power, upon the complaint of a taxpayer, to set aside any wrongful, illegal, or fraudulent appropriation by such boards of the moneys in the county treasury. State *v.* Hudson County, 37 N. J. L. 254.

Power to adopt and rescind resolutions is confined to matters which are within the general local control of the board, and does not extend to the exercise of any special power. Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

Denial by county of board's authority as agent.— Where the orders of a county court and board of supervisors as to the use of county property are beyond the scope of their powers, the county is not estopped to deny the authority of such court or board as its agent. Alleghany County *v.* Parrish, 93 Va. 615, 25 S. E. 882.

58. *Connecticut.*— Buell *v.* Cook, 4 Conn. 238.

Idaho.— Conger *v.* Latah County, 5 Ida. 347, 48 Pac. 1064.

Illinois.—Bouton *v.* McDonough County, 84 Ill. 384.

Indiana.— Cass County *v.* Ross, 46 Ind. 404; McCabe *v.* Fountain County, 46 Ind. 380; Fayette County *v.* Chitwood, 8 Ind. 504.

Iowa.— Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344.

Massachusetts.— Reed *v.* Scituate, 5 Allen 120.

See 13 Cent. Dig. tit. "Counties," §§ 56, 57.

59. *Illinois.*— Bouton *v.* McDonough County, 84 Ill. 384.

Iowa.— Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344; Tatlock *v.* Louisa County, 46 Iowa 138.

Kansas.— Hamilton County *v.* Webb, 47 Kan. 104, 27 Pac. 825.

Louisiana.—Hoffpauir *v.* Wise, 38 La. Ann. 704; Police Jury *v.* Monroe, 38 La. Ann. 630.

Massachusetts.— Merrill *v.* Berkshire, 11 Pick. 269.

Minnesota.— Gardner *v.* Dakota County Com'rs, 21 Minn. 33.

Oklahoma.— Cleveland County *v.* Seawell, 3 Okla. 281, 41 Pac. 592.

Pennsylvania.— Treichler *v.* Berks County, 2 Grant 445; Cooper *v.* Lampeter Tp., 8 Watts 125.

See 13 Cent. Dig. tit. "Counties," § 57.

Ratification of individual contracts.—Since the county courts by W. Va. Code, c. 39, are made corporations for the purposes of contracting, etc., a contract by members of a county court as individuals, although within the power of the court, will not bind it unless

notice to or knowledge by an individual member not shown to have been imparted to the board is not binding upon the latter.[60]

(II) *Meetings*—(A) *Necessity For.* It follows as a natural consequence of the rule that a county board can act only as a body, that such boards must in order to perform any official act be regularly convened either in a regular meeting, in a regular meeting adjourned, or in a special meeting properly called.[61]

(B) *Time.* The time for the regular meetings of county boards is often fixed by statute,[62] and the duration of their sessions is also sometimes so fixed.[63] Another statutory provision is to the effect that county boards must by ordinance provide for the holding of regular meetings.[64] In the absence of statutory provisions on the question, it is a usual custom of county boards to have stated days in each month for regular meetings;[65] and to hold special meetings at other times, when the public interest seems to demand.[66]

(C) *Place.* Provision is sometimes specially made as to the place of holding meetings of county boards,[67] and an order of the board made at another than the prescribed place without legal excuse is unauthorized and void.[68]

(D) *Quorum.* The number of members of a county board or court necessary

ratified by the court as a corporate body. Goshorn *v.* Kanawha County Ct., 42 W. Va. 735, 26 S. E. 452.

60. Ilsley *v.* Essex County, 7 Gray (Mass.) 465; Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311; Clayton *v.* Galveston County, 20 Tex. Civ. App. 591, 50 S. W. 737.

61. *California.*— San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644; People *v.* Dunn, 89 Cal. 228, 26 Pac. 761; El Dorado County *v.* Reed, 11 Cal. 130.

Illinois.— Bouton *v.* McDonough County, 84 Ill. 384.

Indiana.— Torr *v.* State, 115 Ind. 188, 17 N. E. 286; Fahlor *v.* Wells County, 101 Ind. 167; Cass County *v.* Ross, 46 Ind. 404; Fayette County *v.* Chitwood, 8 Ind. 504; Potts *v.* Henderson, 2 Ind. 327; Campbell *v.* Brackenridge, 8 Blackf. 471; Archer *v.* Allen County, 3 Blackf. 501; Indianapolis Hotel Co. *v.* Marion County, Wils. 84.

Kansas.— Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302.

Montana.— Missoula County *v.* McCormick, 4 Mont. 115, 5 Pac. 287.

Nebraska.— Morris *v.* Merrell, 44 Nebr. 423, 62 N. W. 865.

Nevada.—State *v.* Washoe County, 22 Nev. 15, 34 Pac. 1057.

North Carolina.— Mauney *v.* Montgomery County, 71 N. C. 486.

Ohio.—Hamilton County *v.* Wilder, 8 Ohio Dec. (Reprint) 223, 6 Cinc. L. Bul. 377.

Pennsylvania.— Pike County *v.* Rowland, 94 Pa. St. 238.

See 13 Cent. Dig. tit. "Counties," § 57.

62. *Florida.*— Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

Indiana.— Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829.

Kansas.— Marion County *v.* Barker, 25 Kan. 258.

Mississippi.— State *v.* Harris, (1895) 18 So. 123; Tierney *v.* Brown, 67 Miss. 109, 6 So. 737; Wolfe *v.* Murphy, 60 Miss. 1; Smith *v.* Nelson, 57 Miss. 138.

Nebraska.— Merrick County *v.* Batty, 10 Nebr. 176, 4 N. W. 959.

North Carolina.— People *v.* Green, 75 N. C. 329.

See 13 Cent. Dig. tit. "Counties," § 57 *et seq.*

Provision directory.— People *v.* Green, 75 N. C. 329. See also as holding provisions as to time to be merely directory Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829.

63. Mossett *v.* Newport, etc., Bridge Co., 106 Ky. 518, 50 S. W. 63, 20 Ky. L. Rep. 1969; Tierney *v.* Brown, 67 Miss. 109, 6 So. 737.

64. People *v.* Dunn, 89 Cal. 228, 26 Pac. 761; Central Irr. Dist. *v.* De Lappe, 79 Cal. 351, 21 Pac. 825; San Luis Obispo County *v.* Hendricks, 71 Cal. 242, 11 Pac. 682; Santa Clara County *v.* Southern Pac. R. Co., 66 Cal. 642, 6 Pac. 744; *Ex p.* Benjamin, 65 Cal. 310, 4 Pac. 23; *Ex p.* Benninger, 64 Cal. 291, 30 Pac. 846.

65. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776.

66. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776.

67. People *v.* Dunn, 89 Cal. 228, 26 Pac. 761; Marion County *v.* Barker, 25 Kan. 258; Harris *v.* State, 72 Miss. 960, 18 So. 387, 33 L. R. A. 85; State *v.* Harris, (Miss. 1895) 18 So. 123; Wolfe *v.* Murphy, 60 Miss. 1; Merrick County *v.* Batty, 10 Nebr. 176, 4 N. W. 959.

Provision for meetings in addition to those at county-seat see Mossett *v.* Newport, etc., Bridge Co., 106 Ky. 518, 50 S. W. 63, 20 Ky. L. Rep. 1969.

68. State *v.* Harris, (Miss. 1895) 18 So. 123.

When there is no court-house in a county, or the same is for any reason unfit for use, the board may, under Miss. Code (1892), § 306, provide and designate some suitable building in which courts and the meetings of such board may be held. Harris *v.* State, 72 Miss. 960, 18 So. 387, 33 L. R. A. 85.

to constitute a quorum for the transaction of official business is usually fixed by statute, and varies in the different jurisdictions. The usual rule would seem to be that a majority constitutes a quorum,[69] unless a greater number is expressly required by law.[70] In some states two thirds of all the members elected constitute a quorum.[71] Again there may be a provision to the effect that certain business shall not be transacted unless the full board be present and acting.[72] Such statutory requirements as to a quorum must be complied with in order that the acts of the board may be valid, and the record should show such fact.[73]

(E) *Vote*—(1) NUMBER. Ordinarily the majority of a quorum of the county board present can perform any act which a majority of the board could perform if all were present,[74] where all the members composing the quorum are competent to act upon the question before them.[75]

69. *Indiana.*— Catterlin *v.* Frankfort, 87 Ind. 45.

Kentucky.— Bath County *v.* Daugherty, 68 S. W. 436, 24 Ky. L. Rep. 350.

Michigan.—Atty.-Gen. *v.* Trombly, 89 Mich. 50, 50 N. W. 744.

New York.—People *v.* Brinkerhoff, 68 N. Y. 259.

North Carolina.— State *v.* Woodside, 30 N. C. 104.

Ohio.— Cupp *v.* Seneca County Com'rs, 19 Ohio St. 173.

Tennessee.— Brooks *v.* Claiborne County, 8 Baxt. 43.

Wisconsin.— St. Aemilianus Orphan Asylum *v.* Milwaukee County, 107 Wis. 80, 82 N. W. 704.

See 13 Cent. Dig. tit. "Counties," § 58.

A statutory provision that a majority shall constitute a quorum cannot be altered by a rule of the board. People *v.* Brinkerhoff, 68 N. Y. 259.

Quorum of fiscal court.— Under the Ky. Const. § 144, providing that the fiscal court shall "consist of the judge of the county court and the justices of the peace, in which court the judge of the county court shall preside, if present," and that "a majority of the members of said court shall constitute a quorum for the transaction of business," the judge of the county court is a member of the fiscal court, and not merely a presiding officer, and therefore, where there are five justices of the peace, the fiscal court consists of six members, and three members do not constitute a quorum for the transaction of business, even though the legislature may have attempted to limit the duty of the judge of the county court to that of presiding. Bath County *v.* Daugherty, 68 S. W. 436, 24 Ky. L. Rep. 350.

70. Catterlin *v.* Frankfort, 87 Ind. 45.

Two commissioners form a board.— Jefferson County *v.* Slagle, 66 Pa. St. 202.

Any three of the board, including the president.— Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

Any three members of a county commissioner's court, including the county judge, shall constitute a quorum under Tex. Laws (1876), p. 53, § 12, but in the absence of the judge no number of the county commissioners less than the whole will constitute a court in Texas. West *v.* Burke, 60 Tex. 51. And see District School Trustees *v.* Wimberly, 2 Tex. Civ. App. 404, 21 S. W. 49.

Rule as to quorum in absence of express provision.— When by an act of the legislature a new power is vested in the county court, or a new duty devolved upon it, and no particular number of justices is specified, any number which may constitute a legal court can perform it. Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424. See also Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663; Ezell *v.* Giles County Ct., 3 Head (Tenn.) 583.

71. Inavale Tp. *v.* Bailey, 35 Nebr. 453, 53 N. W. 465; State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587.

72. Joslyn *v.* Franklin County, 15 Gray (Mass.) 567.

73. Coleman *v.* Smith, Mart. & Y. (Tenn.) 36. *Compare* Com. *v.* Read, 2 Ashm. (Pa.) 261, holding that the presence of a quorum of the members of a county board, when certain official action is said to have taken place, is not required to be proved by the legal votes actually given, but may be established by other proof, like any other fact in the cause.

74. *California.*— People *v.* Harrington, 63 Cal. 257.

Massachusetts.— Reed *v.* Scituate, 5 Allen 120.

Michigan.— People *v.* Wands, 23 Mich. 385.

Nebraska.— Inavale Tp. *v.* Bailey, 35 Nebr. 453, 53 N. W. 465.

New Jersey.— Billings *v.* Fielder, 44 N. J. L. 381.

New York.—People *v.* Brinkerhoff, 68 N. Y. 259.

Pennsylvania.—Allegheny County *v.* Lecky, 6 Serg. & R. 166, 9 Am. Dec. 418.

Wisconsin.— St. Aemilianus Orphan Asylum *v.* Milwaukee County, 107 Wis. 80, 82 N. W. 704.

See 13 Cent. Dig. tit. "Counties," § 60.

75. People *v.* Harrington, 63 Cal. 257, Oconto County *v.* Hall, 47 Wis. 208, 2 N. W. 291.

In Illinois, however, a majority of the whole number of the board must act in certain cases, as upon the appropriation of county funds or the levying of a tax to raise the same. Cumberland County *v.* Webster, 53 Ill. 141.

(2) FORMALITY. Unless the statutory provision as to the manner in which a county board shall exercise its power is mandatory, an informal and irregular ballot upon a resolution will not vitiate the proceedings.[76]

(F) *Adjournment.* In the absence of any express provision to the contrary, when a county board is once lawfully convened, either in regular or special session, it may adjourn or take a recess to a subsequent day or from day to day until the business before it is finished.[77] Of course a limitation necessarily implied from this right of adjourning over is that a session cannot be extended beyond the commencement of the next session fixed by law.[78]

(G) *Special Meetings* — (1) IN GENERAL. In addition to the regular meetings of the county board special meetings may be called whenever the public interests require it.[79] The statutes of the various states usually prescribe the manner in which a special meeting of a county board shall be called, and where this is the case such manner must be followed, and a special meeting held without the observance of such statutory requirements will not be legal.[80]

76. People *v.* Kings County, 23 How. Pr. (N. Y.) 89.

The board may even agree upon their action without any formal vote, the order being duly recorded and the record approved. Rock *v.* Rinehart, 88 Iowa 37, 55 N. W. 21.

77. *Alabama.*— Hays *v.* Ahlrichs, 115 Ala. 239, 22 So. 465; Lewis *v.* Gainesville, 7 Ala. 85.

California.— *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888.

Florida.— Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

Indiana.— Madison County *v.* Brown, 28 Ind. 161.

Kansas.— Masters *v.* McHolland, 12 Kan. 17.

Kentucky.— Garrard County Ct. *v.* McKee, 11 Bush 234.

Maine.— Bethel *v.* Oxford County Com'rs, 60 Me. 535; Waterville *v.* Kennebec County Com'rs, 59 Me. 80.

Minnesota.— Banning *v.* McManus, 51 Minn. 289, 53 N. W. 635.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

New Hampshire.— *In re* Edgerly, 50 N. H. 416.

Contra, Wolfe *v.* Murphy, 60 Miss, 1; Smith *v.* Nelson, 57 Miss. 138.

See 13 Cent. Dig. tit. "Counties," § 59.

An adjourned meeting is but the continuation of the regular session. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; Butterfield *v.* Treichler, 113 Iowa 328, 85 N. W. 19; Waterville *v.* Kennebec County, 59 Me. 80; Banning *v.* McManus, 51 Minn. 289, 53 N. W. 635.

A special meeting of a board of county commissioners, of which each commissioner has been duly notified, may be adjourned to a subsequent day by the members present, a majority of the entire board, and it would seem that less than a majority may do so. The members present at such meeting have actual notice of adjournment, and those not present are charged in law with notice thereof, and the adjourned meeting is but a continuation of the original one. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

78. Banning *v.* McManus, 51 Minn. 289, 53 N. W. 635. And see Hays *v.* Ahlrichs, 115 Ala. 239, 22 So. 465; Lewis *v.* Gainesville, 7 Ala. 85.

Effect of statutory limitation of session.— In Arkansas it is held that where by statute the sessions of a county board are limited to a certain number of days, the board has no power to adjourn its sessions to another day beyond the specified number, and all the proceedings at such adjourned terms will be *coram non judice* and void. Grimmett *v.* Askew, 48 Ark. 151, 2 S. W. 707. In Minnesota, however, it has been held that such a statutory provision as to the duration of a session does not require that the session shall be continuous from day to day, nor deprive the board of the power to adjourn a session to a date more than the prescribed number of days from its commencement. Banning *v.* McManus, 51 Minn. 289, 53 N. W. 635, upon the ground that such statutory limitation on the length of sessions is merely directory, the manifest purpose being to limit the amount of compensation, or *per diem* of county commissioners.

79. People *v.* Carver, 5 Colo. App. 156, 38 Pac. 332; Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487; Jussen *v.* Lake County, 95 Ind. 567; Wilson *v.* Hamilton County, 68 Ind. 507; Oliver *v.* Keightley, 24 Ind. 514; Smith *v.* Nelson, 57 Miss. 138.

Distinction between special and regular or adjourned terms.— According to Wightman *v.* Karsner, 20 Ala. 446, a special term is a term held at an unusual time for the transaction of some particular business, while by a regular or adjourned term is meant a term begun at the time appointed by law and continued at the discretion of the court to such time as it may appoint, consistent with law.

80. Columbus, etc., R. Co. *v.* Grant County, 65 Ind. 427; Goedgen *v.* Manitowoc County, 10 Fed. Cas. No. 5,501, 2 Biss. 328. And see Smith *v.* Nelson, 57 Miss. 138.

Presumption that board was duly convened.— It will be presumed in a collateral proceeding that a special meeting of a county board was duly and regularly convened (Torr *v.* State, 115 Ind. 188, 17 N. E. 286; Prezinger

(2) WHO MAY CALL. In some jurisdictions express provision is made for the calling of special meetings of county boards by designated county officers,[81] who shall determine whether such special session is required by the public interests, and whether such an emergency exists as will justify a shorter notice than that usually required.[82] In other jurisdictions a special meeting may be called by the president or chairman of the board,[83] or by a majority of the board.[84]

(3) NOTICE. Where a special meeting of a county board is called proper notice thereof must be given.[85] Such notice should state the objeet of the meet-

v. Fording, 114 Ind. 599, 16 N. E. 499; Prezinger *v.* Harness, 114 Ind. 491, 16 N. E. 495; Allen *v.* Cerro Gordo County, 34 Iowa 54; Wayne County *v.* Wayne Cir. Judges, 106 Mich. 166, 64 N. W. 42; Corburn *v.* Crittenden, 62 Miss. 125); and the burden of proving the contrary rests upon him who assails the validity of the meeting (Wayne County *v.* Wayne Cir. Judge, 106 Mich. 166, 64 N. W. 42).

81. By direction of probate judge see *Ex p.* Selma, etc., R. Co., 46 Ala. 230; Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487; Gosman *v.* State, 106 Ind. 203, 6 N. E. 349; State *v.* Pike County, 104 Ind. 123, 3 N. E. 807; Jussen *v.* Lake County, 95 Ind. 567; Wilson *v.* Hamilton County, 68 Ind. 507; Madison County *v.* Brown, 28 Ind. 161; Oliver *v.* Keightley, 24 Ind. 514; Johnson *v.* Cavanah, 54 S. W. 853, 21 Ky. L. Rep. 1246.

It is not necessary that the record of a county board should show the call of the auditor for a special session. This may be shown by other evidence. Madison County *v.* Brown, 28 Ind. 161.

82. Jussen *v.* Lake County, 95 Ind. 567.

83. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; Canova *v.* State, 18 Fla. 512.

The president or any two members may call a meeting, and the presence of three alone is necessary to its validity. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; Canova *v.* State, 18 Fla. 512.

Special meeting of justices upon call of commissioners.— Under N. C. Code, § 717, the justices of the peace of the county can lawfully meet, organize, and act only at the time of their regular annual meeting, and on such days as the board of commissioners may appoint for special meetings, not oftener than once in three months. And a meeting of the justices held on a day other than that of the regular annual meeting, and called, not by the commissioners, but by the chairman of the board of justices, is not a lawful meeting, and its proceedings are unauthorized and without force. Moore *v.* Pitt County, 113 N. C. 128, 18 S. E. 84.

84. Douglass *v.* Baker County, 23 Fla. 419, 2 So. 776; Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302; Bartlett *v.* Eau Claire County, 112 Wis. 237, 88 N. W. 61.

85. *Indiana.*— Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487; State *v.* Pike County, 104 Ind. 123, 3 N. E. 807; Jussen *v.* Lake County, 95 Ind. 567; Watson *v.* Hamilton County, 68 Ind. 507.

Iowa.— Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394.

Kansas.— Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302.

Michigan.— Wayne County *v.* Wayne Cir. Judges, 106 Mich. 166, 64 N. W. 42.

Nebraska.— State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587; Kearney County *v.* Kent, 5 Nebr. 227.

New York.— Ely *v.* Connolly, 7 Abb. Pr. N. S. 8.

Pennsylvania.— Pike County *v.* Rowland, 94 Pa. St. 238.

West Virginia.—Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8.

See 13 Cent. Dig. tit. "Counties," § 64.

This notice is not to the public but to the individual members of the board. White *v.* Fleming, 114 Ind. 560, 16 N. E. 487.

Necessity for new notice of adjourned meeting.— Where county commissioners, after notice to all persons interested, view the route for a highway and adjourn to a certain time and place for the purpose of locating the way and assessing damages to individuals, it is not necessary to give notice of the time and place so appointed for the adjourned meeting. Com. *v.* Berkshire County, 8 Pick. (Mass.) 343.

Notice of a meeting of highway commissioners, for the purpose of viewing the route of a highway, signed "By order of the commissioners, A. B., chairman," is sufficient, notwithstanding the objection that it did not appear that the notice was issued at a meeting of three or more of the commissioners. Com. *v.* Berkshire County, 8 Pick. (Mass.) 343.

Nature and manner of notice and service is immaterial and unimportant, if pursuant to such notice the board actually meet at the time therein indicated in special session. Jussen *v.* Lake County, 95 Ind. 567; Wilson *v.* Hamilton County, 68 Ind. 507 [*followed* in State *v.* Pike County, 104 Ind. 123, 3 N. E. 807]; Madison County *v.* Brown, 28 Ind. 161; Oliver *v.* Keightley, 24 Ind. 514.

Oral notice given by the county auditor to the board of county commissioners of a special session is sufficient. Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487.

Estoppel to deny sufficiency of notice.— Members of the board who are present at a special meeting and take part in business transacted are estopped to deny the suffi-

ing,[86] and if practicable must be personally served upon every member of the board;[87] but provision is also made in some states for notice by publication or by posting.[88]

(H) *Powers at Special or Adjourned Meetings.* There is some conflict of authority as to the powers which may be exercised by a county board at a special meeting, and this is due perhaps to the difference in the provisions of the statutes.[89] However, it cannot be doubted that no business can be transacted at a special meeting which is expressly required to be transacted at a regular meeting.[90] There is also a conflict of authority as to whether any other than special business can be transacted at a special meeting.[91] Ordinarily any business may be transacted at an adjourned meeting which might have been transacted at the meeting of which it is a continuation.[92]

(III) *Delegation of Authority.* The right of a county board to delegate

ciency of the notice, although they protested against its sufficiency. Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394.

Remedy of member failing to receive notice. — A member of a county board, who by the wrongful act of his associates in failing to give him the proper notice, is excluded from being present at a meeting, cannot on that ground maintain an action to enjoin other officers from proceeding to fulfil authority conferred upon them by the proceedings of the board at such meeting. His remedy should be directly against the offending members. Ely *v.* Connolly, 7 Abb. Pr. N. S. (N. Y.) 8.

86. *California.*—El Dorado County *v.* Reed, 11 Cal. 130. See also Coleman *v.* Marin County, 50 Cal. 493.

Iowa.—Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394.

Nebraska.— Kearney County *v.* Kent, 5 Nebr. 227.

Washington.— State *v.* Headlee, 19 Wash. 477, 53 Pac. 948.

West Virginia.—Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8.

Contra, Oliver *v.* Keightley, 24 Ind. 514.

See 13 Cent. Dig. tit. "Counties," § 64.

87. Paola, etc., R. Co. *v.* Anderson County Com'rs, 16 Kan. 302; Wayne County *v.* Wayne Cir. Judges, 106 Mich. 166, 64 N. W. 42; Pike County *v.* Rowland, 94 Pa. St. 238.

Notice in writing must be sent by the clerk to each of the members of the board. Goedgen *v.* Manitowoc County, 10 Fed. Cas. No. 5,501, 2 Biss. 328.

Presumption as to proper service.— Where the members of a county board meet in special session at the time and place specified in a summons issued by the auditor and given by him to a sheriff for service, such meeting will not be illegal, although the return of the sheriff showing service is not signed and omits to give the date of service. It will be presumed that the sheriff discharged his official duty according to law and duly served the summons on each member of the board. State *v.* Pike County, 104 Ind. 123, 3 N. E. 807.

88. Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394; State *v.* Scott County, 43 Minn. 322, 45 N. W. 614; Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8. And see *Ex p.* Selma, etc., R. Co., 46 Ala. 230.

89. Thus it has been held or said in a number of cases that as a general rule, in the absence of statutory provisions to the contrary, the board can transact at a special meeting only such business as is specified in the notice of the meeting. El Dorado County *v.* Reed, 11 Cal. 130; Vincennes *v.* Windman, 72 Ind. 218; Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394. But in Indiana, where this general rule is said to prevail, it is also said that under the construction of its statutes the rule does not prevail in full vigor in the state (Vincennes *v.* Windman, 72 Ind. 218) and that the board is not confined to the consideration of the subjects specified in the notice (Oliver *v.* Keightley, 24 Ind. 514).

In Nebraska it is laid down generally that the board is not confined strictly to the business specified in the notice, but may make orders respecting the property of the county. Kearney County *v.* Kent, 5 Nebr. 227.

90. Free *v.* Scarborough, 70 Tex. 672, 8 S. W. 490.

91. **In Arkansas** it is held that only special business can be transacted at a special meeting. Pulaski County *v.* Lincoln, 9 Ark. 320.

In Indiana and Iowa it has been held that the board may transact ordinary business at a special meeting (Madison County *v.* Brown, 28 Ind. 161; Oliver *v.* Keightley, 24 Ind. 514; Mitchell County *v.* Horton, 75 Iowa 271, 39 N. W. 394), except in cases where from the nature of the business or the provisions of the law in regard to it the purpose or policy of the law or the rights of others require that it be done at a regular meeting (Mitchell County *v.* Horton, 75 Iowa 231, 39 N. W. 394). And see Vincennes *v.* Windman, 72 Ind. 218. See also Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Jussen *v.* Lake County, 95 Ind. 567.

In all matters relating to establishing and constructing free gravel roads, a board of commissioners in Indiana has power to act when in special session. Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 877; Fleener *v.* Claman, 126 Ind. 166, 25 N. E. 900; Stipp *v.* Claman, 123 Ind. 532, 24 N. E. 131; Anderson *v.* Claman, 123 Ind. 471, 24 N. E. 175; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487.

92. Butterfield *v.* Treichler, 113 Iowa 328, 85 N. W. 19; Banning *v.* McManus, 51 Minn.

its authority depends upon the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent.[93] Duties which are purely ministerial and executive and not involving the exercise of discretion may be delegated by the board to a committee or to an agent, employee, or servant.[94]

(IV) *RATIFICATION.* If the county board has authority to order expenditures or the performance of services in behalf of the county, it may cure informalities or irregularities in the procedure for ordering the making of such expenditures or the performance of such services, by a subsequent ratification of the acts done in pursuance of the order and recognition of its liability therefor.[95]

8. RECORDS AND MINUTES — a. Necessity For. County boards are usually required to keep a regular record of their proceedings at each session,[96] and, when

289, 53 N. W. 635; Hull *v.* Winnebago County, 54 Wis. 291, 11 N. W. 486.

93. *California.*—People *v.* Linden, 107 Cal. 94, 40 Pac. 115; Scollay *v.* Butte County, 67 Cal. 249, 7 Pac. 661.

Indiana.— Potts *v.* Henderson, 2 Ind. 327.

Iowa.— Denison *v.* Watts, 97 Iowa 633, 66 N. W. 886; Call *v.* Hamilton County, 62 Iowa 448, 17 N. W. 667; Cooledge *v.* Mahaska County, 24 Iowa 211.

Michigan.— People *v.* St. Clair County, 15 Mich. 85.

New York.— Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105; Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; People *v.* Rensselaer County, 52 Hun 446, 5 N. Y. Suppl. 600; People *v.* Hagadorn, 36 Hun 610 [*overruling* Tallmadge *v.* Rensselaer County, 21 Barb. 611].

Texas.— Russell *v.* Cage, 66 Tex. 428, 1 S. W. 270.

United States.— Coquard *v.* Chariton County, 14 Fed. 203, 4 McCrary 539.

See 13 Cent. Dig. tit. "Counties," § 61.

For example it has been held that the following powers cannot be delegated: The power to make contracts for the county. Potts *v.* Henderson, 2 Ind. 327; Russell *v.* Cage, 66 Tex. 428, 1 S. W. 270. The power to compromise an indebtedness of the county. Coquard *v.* Chariton, 14 Fed. 203, 4 McCrary 539. The power to conduct litigation. Scollay *v.* Butte County, 67 Cal. 249, 7 Pac. 661.

94. *Florida.*— Holland *v.* State, 23 Fla. 123, 1 So. 521.

Illinois.— Gillet *v.* Logan County, 67 Ill. 256.

Indiana.— Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Miller *v.* Dearborn County, 66 Ind. 162.

Iowa.— Call *v.* Hamilton County, 62 Iowa 448, 17 N. W. 667; Wilhelm *v.* Cedar County, 50 Iowa 254.

Louisiana.— McGuire *v.* Bry, 3 Rob. 196.

Minnesota.— Cushman *v.* Carver County, 19 Minn. 295.

Missouri.—Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294.

New York.— Robert *v.* Kings County, 3 N. Y. App. Div. 366, 38 N. Y. Suppl. 521. People *v.* Rensselaer County, 52 Hun 446, 5 N. Y. Suppl. 600; Edwards *v.* Watertown, 24 Hun 426; People *v.* Meach, 14 Abb. Pr. N. S. 429.

Wisconsin.— Duluth, etc., R. Co. *v.* Douglas County, 103 Wis. 75, 79 N. W. 34.

United States.— Cass County *v.* Gibson, 107 Fed. 363, 46 C. C. A. 341; Coquard *v.* Chariton County, 14 Fed. 203, 4 McCrary 539.

See 13 Cent. Dig. tit. "Counties," § 61.

For example it has been held that the following powers may be delegated: The sale of county property. Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544. The negotiation of county bonds. Cushman *v.* Carver County, 19 Minn. 295. The collection of claims due from the state. Power *v.* May, 114 Cal. 207, 46 Pac. 6; Lassen County *v.* Shinn, 88 Cal. 510, 26 Pac. 365. The fixing of details to carry out the determination of the board to enforce a statute. Holland *v.* State, 23 Fla. 123, 1 So. 521. So the county board can employ an attorney to take and perfect an appeal. Duluth, etc., R. Co. *v.* Douglas County, 103 Wis. 75, 79 N. W. 34.

95. Power *v.* May, 114 Cal. 207, 46 Pac. 6; Hawk *v.* Marion County, 48 Iowa 472; Taymouth Tp. *v.* Koehler, 35 Mich. 22; Cory *v.* Somerset County, 44 N. J. L. 445.

An offer of reward made by supervisors while not in session may be afterward ratified by the board while in session. Hawk *v.* Marion County, 48 Iowa 472.

Facts insufficient to sustain inference of ratification.— The ratification of a contract for compensation with an agent to assist in collecting taxes, made by the treasurer and county attorney, cannot be inferred from the fact that the treasurer reported it to the board who acquiesced therein. It should not only appear that the treasurer reported such contract in full, but that the board examined the report upon this point. Wilhelm *v.* Cedar County, 50 Iowa 254.

96. *Florida.*— Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

Indiana.— Fayette County *v.* Chitwood, 8 Ind. 504.

Mississippi.— Brookhaven *v.* Lawrence County, 55 Miss. 187.

New York.—People *v.* Schenectady County, 35 Barb. 408.

Tennessee.— Brooks *v.* Claiborne County, 8 Baxt. 43.

Texas.— Whitaker *v.* Dillard, 81 Tex. 359, 16 S. W. 1084; Gordon *v.* Denton County,

they are so required to keep a regular record of their proceedings, they can speak only by such record.[97]

b. What Record Must Show — (I) *Jurisdictional Facts.* County boards are bodies with special and limited jurisdiction, and all facts necessary to give jurisdiction must affirmatively appear upon the record of their proceedings;[98] otherwise the presumption is against their jurisdiction.[99]

(II) *Acts of Board* — (A) *In General.* It is the usual rule that the action of county boards or county courts in order to be binding upon the county must be shown by the record of their proceedings.[1] It has been so held in respect to contracts made by them,[2] and agreements to pay claims barred by the statutes of

(Civ. App. 1899) 48 S. W. 737; Waggoner *v.* Wise County, (Civ. App. 1897) 43 S. W. 836.

Washington.— Olympian-Tribune Pub. Co. *v.* Byrne, 28 Wash. 79, 68 Pac. 335, kept by county auditor as clerk of the board.

Wisconsin.— Bartlett *v.* Eau Claire County, 112 Wis. 237, 88 N. W. 61.

United States.— Pacific Bridge Co. *v.* Clackamas County, 45 Fed. 217.

See 13 Cent. Dig. tit. "Counties," § 66.

Signature and attestation.—Tex. Rev. Stat. (1879), art. 1527, requiring the minutes of the commissioners' court to be signed by the county judge and attested by the clerk, is directory, and failure of the clerk to attest them will not invalidate them. Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

97. Fayette County *v.* Chitwood, 8 Ind. 504. But see Waggoner *v.* Wise County, (Tex. Civ. App. 1897) 43 S. W. 836, where it was held though that an order properly made and acted on by the parties for several years is not void, because not recorded as required by statute.

98. *Alabama.*—Lowndes County *v.* Hearne, 59 Ala. 371.

California.— Finch *v.* Tehama County, 29 Cal. 453.

Indiana.— Rhode *v.* Davis, 2 Ind. 53.

Maine.— Plummer *v.* Waterville, 32 Me. 566.

Michigan.— McGregor *v.* Gladwin County, 37 Mich. 388.

Nevada.— Johnson *v.* Eureka County, 12 Nev. 28; State *v.* Ormsby County Com'rs, 6 Nev. 95.

Ohio.— Reed *v.* Harlan, 2 Ohio Dec. (Reprint) 553, 3 West. L. Month. 632.

Tennessee.— Coleman *v.* Smith, Mart. & Y. 36.

Virginia.— Chesterfield County *v.* Hall, 80 Va. 321.

See 13 Cent. Dig. tit. "Counties," § 66.

Incorporation of proofs on which judgment founded.— In Miller *v.* Hamilton County, 9 Ohio Dec. (Reprint) 312, 12 Cinc. L. Bul. 152, it is held that boards of commissioners are not required to incorporate in their record the proofs on which their judgments are founded.

In establishing county roads county commissioners act as a tribunal of inferior, statutory, and limited jurisdiction, and the record of their proceedings will be inadmissible to show an establishment of a road by them which does not show that a notice of the application therefor was published. Reed *v.* Harlan, 2 Ohio Dec. (Reprint) 553, 3 West. L. Month. 632.

99. State *v.* Ormsby County Com'rs, 6 Nev. 95.

1. Dennison *v.* St. Louis County, 33 Mo. 168.

Order calling election.— An election ordered by a board of county commissioners is not void merely because the county clerk failed to enter of record the order of the board calling such election, where the order was made and published, the election was in fact held in pursuance of such order, the people of the county generally voted at such election, and the proposition received a majority of all the votes cast. State *v.* Pratt County, 42 Kan. 641, 22 Pac. 722.

2. Conger *v.* Latah County, 5 Ida. 347, 48 Pac. 1064; Crump *v.* Colfax County, 52 Miss. 107; Dennison *v.* St. Louis County, 33 Mo. 168; Athens County *v.* Baltimore Short Line R. Co., 37 Ohio St. 205; Hamilton County *v.* Wilder, 8 Ohio Dec. (Reprint) 223, 6 Cinc. L. Bul. 377. *Contra,* Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344; Tatlock *v.* Louisa County, 46 Iowa 138. And *compare* Power *v.* May, 123 Cal. 147, 55 Pac. 796, holding that a person who has performed important services for a county under the direction of the majority of the supervisors, who approved his claim for the services, is entitled to compensation, although no formal resolution to employ him was spread on the supervisors' minutes.

After fixing a salary they cannot change the same without recording the fact. People *v.* Wayne County, 41 Mich. 4, 2 N. W. 180.

Authority of agent.— Where a contract of the construction or repair of roads is made with an agent or officer of the county his authority must appear of record. Dennison *v.* St. Louis County, 33 Mo. 168.

Limitation of rule.— Where a county board has appointed a deputy and fixed his salary, and he has actually rendered the service, those facts may be proved, even if there is no record of the order in the minutes of the county board. Ragoss *v.* Cuming County, 36 Nebr. 375, 54 N. W. 683.

Record of subscription as to capital stock of railroad.— It constitutes no objection to a recovery upon a bond issued by the county to a railroad company that the record does not show that the county actually subscribed for the stock; such fact would not be of

limitation.[3] Where, however, county boards are under that name authorized by statute to perform certain duties, in doing which they act as individuals and not judicially, no entry of their acts need be made upon the records of the board.[4] So it has been held that a county board, when acting as a corporation merely, need not enter its action of record to make it binding upon the county.[5]

(B) *Ordinances.* Although provision is expressly made for recording all laws or ordinances passed by a county board,[6] such recording has been held not to be essential to the validity of an ordinance.[7]

(C) *Vote.* The mere omission to record a vote actually had upon a certain question will not invalidate an act of the board taken in accordance with such vote.[8]

(D) *Service of Notice of Meetings.* Ordinarily proof of service of notice of a special meeting need not be spread upon the record if there is no provision requiring it, the presumption being that such meeting was legally convened.[9]

c. Form and Requisites. If the orders of the board of commissioners are right in substance, their form is of little consequence; they will not be rendered invalid by mere informalities.[10] The fact that the records or minutes are not duly signed will not render the proceedings void.[11] So it has been held that the omission of the clerk to add the seal of the board of supervisors to the record on the ordinance imposing a tax does not render the ordinance invalid.[12]

record, and the purchaser of the bond may presume it from the fact of the issue of such bond. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

In Louisiana where an act of the legislature authorizes a parish to issue its bonds for a certain purpose, in such form and denomination as the police jury of the parish may prescribe, the police jury must specifically authorize the issue of such bonds, and in default of this action of the police jury all bonds issued under color of such act are invalid. Lisso *v.* Red River Parish, 29 La. Ann. 590. In State *v.* Police Jury, 32 La. Ann. 1022, it was held, however, that under La. Acts (1876), No. 80, requiring the board of audit to pass favorably upon a claim against the parish of Caddo before the police jury could issue bonds therefor, it is not necessary, in addition to such favorable report, that the police jury should also pass an ordinance before issuing bonds under the act.

3. Hackleman *v.* Henry County, 94 Ind. 36.

4. Machias River Co. *v.* Pope, 35 Me. 19.

5. Halstead *v.* Lake County, 56 Ind. 363; McCabe *v.* Fountain County, 46 Ind. 380.

The employment of agents and attorneys by a board of county commissioners acting as a corporation need not be made a matter of record. McCabe *v.* Fountain County, 46 Ind. 380.

6. San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644.

7. Central Irr. Dist. *v.* De Lappe, 79 Cal. 351, 21 Pac. 825; People *v.* Cole, 70 Cal. 59, 11 Pac. 481.

8. Long *v.* Boone County, 36 Iowa 60; Clark *v.* Polk County, 19 Iowa 248.

Requirement merely directory.—It has been held that a statutory requirement to this effect is merely directory (Brooks *v.* Claiborne County, 8 Baxt. (Tenn.) 43), and that the omission may be supplied at any time *nunc pro tunc* (Bathurst *v.* Course, 3 La. Ann. 260).

9. Wayne County *v.* Wayne Cir. Judges, 106 Mich. 166, 64 N. W. 42. To the same effect see Williams *v.* Cammack, 7 Miss. 209, 61 Am. Dec. 508, where it was said that it would be better, however, that the records should contain such entry.

In West Virginia, however, under a statute requiring the posting of notice for a special session of a county court, in order to give such special session jurisdiction, it must appear upon the record that such notice was so posted. Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8.

10. Bittinger *v.* Bell, 65 Ind. 445. "The law does not contemplate that the orders of a board of commissioners shall be drafted with much precision of statement, and if they are right in substance, they will be sustained." Stingley *v.* Nichols, 131 Ind. 214, 220, 30 N. E. 34; Million *v.* Carroll County, 89 Ind. 5; Bittinger *v.* Bell, 65 Ind. 445.

11. *California.*— People *v.* Eureka Lake, etc., Canal Co., 48 Cal. 143.

Indiana.— Goddard *v.* Stockman, 74 Ind. 400.

Louisiana.— Fanchonette *v.* Grange, 5 Rob. 510.

Michigan.— Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Mississippi.— Beck *v.* Allen, 58 Miss. 143; Arthur *v.* Adam, 49 Miss. 404.

See 13 Cent. Dig. tit. "Counties," § 68.

Even if a statute requiring the signature is not considered directory, an approval and signing at a later meeting will be sufficient. Beck *v.* Allen, 58 Miss. 143. See also Goddard *v.* Stockman, 74 Ind. 400.

12. Santa Clara County *v.* Central Pac. R. Co., (Cal. 1885) 6 Pac. 745; Santa Clara

d. Construction and Aider by Presumption. In passing judicially upon the records of county boards where authority appears or is implied by law, such records will be construed according to their intent and it will be assumed that the proceedings were rightfully had in the absence of all suggestion in the record to the contrary.[13] It will be presumed that the members of such board as public officers have done their duty;[14] that their meeting was properly convened and at the time designated by law;[15] that they acted in accordance with rules adopted for the transaction of their business;[16] and that a quorum of the board was present.[17] And where the record recites the adoption of a certain resolution without disclosing the majority, it will be presumed that such resolution received the necessary majority.[18]

e. Amendment or Alteration. County boards have authority to amend their records to accord with the facts,[19] at least where the rights of third persons have not intervened.[20] The power to make such corrections or alterations is to be exercised by the board alone,[21] upon application to them for that purpose.[22]

f. Records as Evidence.[23] The records of county boards are not only competent evidence as to their acts, but are *prima facie* proof of what appears therein;[24]

County *v.* Southern Pac. R. Co., 66 Cal. 642, 6 Pac. 744.

13. State *v.* Crawford County Sup'rs, 39 Wis. 596. And see People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186.

The record of the finding by county commissioners as to the necessity of employing an expert accountant to examine books and vouchers of the various county officers is sufficient to authorize such employment, without entering of record the facts causing such necessity. Garrigus *v.* Howard County, 157 Ind. 103, 60 N. E. 948.

14. Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 877.

15. Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 877; Green *v.* Lancaster County, 61 Nebr. 473, 85 N. W. 439; Bartlett *v.* Eau Claire County, 112 Wis. 237, 88 N. W. 61.

16. Higgins *v.* Curtis, 39 Kan. 283, 18 Pac. 207; Masters *v.* McHolland, 12 Kan. 17; Hundley *v.* Finney County, 2 Kan. App. 41, 42 Pac. 59.

17. Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524; Halfin *v.* State, 18 Tex. App. 410; State *v.* Crawford County Sup'rs, 39 Wis. 596.

18. Giddings *v.* Wells, 99 Mich. 221, 58 N. W. 64.

19. White *v.* Burkett, 119 Ind. 431, 21 N. E. 1087; Lapan *v.* Cumberland County Com'rs, 65 Me. 160; Dresden *v.* Lincoln County Com'rs, 62 Me. 365; Gloucester *v.* Essex County Com'rs, 116 Mass. 579; Olympian-Tribune Pub. Co. *v.* Byrne, 28 Wash. 79, 68 Pac. 335.

20. Jaquith *v.* Putney, 48 N. H. 138.

After the board has been impartially changed by the retirement of one member and the election of another, and after the lapse of a year, a resolution of the board of county supervisors, which according to the minutes of the board's proceedings was duly adopted and at a subsequent meeting approved, cannot without notice to parties affected thereby be repealed on the ground that according to the memory of the members of the board it was erroneously entered. Ridley *v.* Doughty, 85 Iowa 418, 52 N. W. 350.

21. White *v.* Burkett, 119 Ind. 431, 21 N. E. 1087.

22. White *v.* Burkett, 119 Ind. 431, 21 N. E. 1087; Jenkins *v.* Stetler, 118 Ind. 275, 20 N. E. 788; Wells *v.* Rhodes, 114 Ind. 467, 16 N. E. 830; Bittinger *v.* Bell, 65 Ind. 445.

The clerk of a county board has no power to alter or amend the record of the board, even though he made the correction in accordance with the true state of the facts and had personal knowledge that the entry was erroneous. Swamp-land Reclamation Dist. No. 407 *v.* Ruble, (Cal. 1887) 14 Pac. 846; Swamp-land Reclamation Dist. No. 407 *v.* Wilcox, (Cal. 1887) 14 Pac. 843; Dyer *v.* Brogan, 70 Cal. 136, 11 Pac. 589.

Mandamus to compel correction.— Mandamus to compel a county auditor to correct errors in the record of the board does not lie. White *v.* Burkett, 119 Ind. 431, 21 N. E. 1087. But see People *v.* Brinkerhoff, 68 N. Y. 259.

23. See, generally, EVIDENCE.

24. *California.*— San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644.

Florida.— Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

Illinois.— La Salle County *v.* Simmons, 10 Ill. 513.

Indiana.— Weir *v.* State, 96 Ind. 311.

Kansas.— Mosteller *v.* Mosteller, 40 Kan. 658, 20 Pac. 464.

Massachusetts.— Brewer *v.* Boston, etc., R. Co., 113 Mass. 52.

Missouri.— Dennison *v.* St. Louis County, 33 Mo. 168.

See 13 Cent. Dig. tit. "Counties," § 67.

For example a record of the board is competent evidence of the allowance of a claim (Mosteller *v.* Mosteller, 40 Kan. 658, 20 Pac. 464), of the receipt of money (La Salle County *v.* Simmons, 10 Ill. 513), or of the passage of an ordinance (San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644). So a record reciting that an ordinance was passed is *prima facie* proof of that fact (San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644),

and there are decisions to the effect that as a county board constitutes a judicial tribunal and is a court of record, the acts of such board can only be proved by the record.[25]

g. Parol Evidence to Prove Acts of Board.[26] It has been expressly held in some decisions that in accordance with the rule that the action of a county board must be shown by its record, where such record is required to be kept, oral testimony is inadmissible to prove the making of a contract with a county,[27] and that a party suing upon a contract made with the county and entered upon the minutes of the commissioners' court, cannot prove by parol additional stipulations adding to or varying the effect of the minute entry of such contract.[28] In some jurisdictions, however, the rule is that in the absence of a statute making the record of the proceedings of the board the only evidence thereof, a transaction by the board not entered upon its minutes may be proved by parol;[29] and there are numerous decisions to the effect that in the absence of a statutory requirement that a record must be made of a contract in order to render the same valid and binding, where a contract or agreement within their jurisdiction has been entered into by a county board, and has been executed, the same may be established by parol testimony, although there be no record in the minutes of the board.[30]

and where it recites that personal notice of the time and meeting was given it is sufficient evidence of this fact in the absence of allegations and proof of the contrary (Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42).

A book kept in the clerk's office of the county commissioners under their direction respecting the affairs of the county, although not a public record, is yet *prima facie* evidence against the county of the facts stated therein. La Salle County *v.* Simmons, 10 Ill. 513.

Improperly certified copy of record.— The clerk of the board of county commissioners and not their chairman is the proper officer to attest copies of their records; and when an improperly certified copy of such a record has been admitted in evidence at a trial before a sheriff's jury, a production of a properly certified copy at the argument of a question of law in the supreme court will not cure the defect. Rich *v.* Lancaster R. Co., 114 Mass. 514.

The caption of the minutes of the meeting of the board of county supervisors, and not the orders made at the meeting, should show the organization of the board according to law; and where the orders only of such board, not made at the regular meeting, are introduced in evidence in the case, and there is no proof of notice given for a special meeting, it is presumed that the caption of the minutes, if produced, should show that such notice was given. Corburn *v.* Crittenden, 62 Miss. 125.

Unsigned record showing election.—In Weir *v.* State, 96 Ind. 311, the question was raised as to whether or not the record of a commissioners' court showing an election was without force for the reason that it was not signed. It is held that where the attack is a collateral one such record is not void, but supplies competent evidence of the action of the board.

25. Phelan *v.* San Francisco County, 6 Cal. 531; Buell *v.* Cook, 4 Conn. 238; State *v.* Conner, 5 Blackf. (Ind.) 325; Dennison *v.* St. Louis County, 33 Mo. 168.

26. See, generally, EVIDENCE.

27. Dennison *v.* St. Louis County, 33 Mo. 168; Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135.

28. Gano *v.* Palo Pinto County, 71 Tex. 99, 8 S. W. 634, in which it was held that if the entry did not express the agreement of the parties, they should have had the same corrected on motion before acting upon it. And see Llano County *v.* Moore, 77 Tex. 515, 14 S. W. 152, holding that where the question at issue is as to whether or not the plaintiff as county treasurer received compensation in excess of the statutory limit — two thousand dollars *per annum* — it is not error in the trial court to permit the treasurer to testify that he received as such six hundred dollars a year. If the exact amount received by such officer had been material and in controversy, the records of the county court would have been better evidence and could have been insisted upon.

29. Duluth, etc., R. Co. *v.* Douglas County, 103 Wis. 75, 79 N. W. 34, holding that an appeal taken by a county from a judgment adverse to it may be shown by parol to have been authorized by the county board, where there is no record of any proceeding directing the taking of the appeal.

30. *Illinois.*— Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094; Vermilion County *v.* Knight, 2 Ill. 97.

Indiana.— McCabe *v.* Fountain County, 46 Ind. 380.

Iowa.— Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344; Baker *v.* Johnson County, 33 Iowa 151.

Kansas.— Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121, 12 Pac. 593.

Nebraska.— Green *v.* Lancaster County, 61 Nebr. 473, 85 N. W. 439; Ragoss *v.* Cuming County, 36 Nebr. 375, 54 N. W. 683.

Where a claim against a county has been

9. Orders, Ordinances, Resolutions, and Decisions — a. In General. County boards proceed in the exercise of their powers by means of orders, ordinances, or resolutions passed by the required number of votes of the body and entered upon their records.[31]

b. Inclusion of More Than One Subject in Legislation. A constitutional provision that no private or local bill passed by the legislature shall embrace more than one subject is limited to acts of the legislature and does not apply to the legislation of a county board passed in the exercise of its powers of local legislation granted to it by the legislature.[32]

c. Attestation. In some states it is expressly provided that orders and ordinances of county boards must be duly signed and attested.[33]

d. Specification of Funds on Which Warrants Drawn. An order of a board of supervisors directing issuance of a warrant by the auditor need not specify on what fund it is to be drawn.[34]

e. Provision For Payment in Ordinances Creating Debt. In Louisiana police juries are prohibited from contracting debts without fully providing in the ordinance creating them the means of paying the principal and interest of the debt so created.[35]

f. Publication. The publication of an order or ordinance of a county board is sometimes expressly required by statute,[36] and in at least one jurisdiction the

presented to the county board and has not been allowed, the party presenting the same will not be defeated in his right of action by the failure or refusal of the board to make a record of its action, but the presentation and refusal of such claim may be proved by parol. Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906; White *v.* Polk County, 17 Iowa 413; Brookhaven *v.* Lawrence County, 55 Miss. 187.

31. People *v.* Counts, 89 Cal. 15, 26 Pac. 612; People *v.* Kings County Ct., 38 Hun (N. Y.) 373; Ball *v.* Presidio County, 88 Tex. 60, 29 S. W. 1042.

Proceedings by agreement instead of resolution see People *v.* Kings County, 38 Hun (N. Y.) 373.

Right to proceed by order instead of by ordinance see People *v.* Counts, 89 Cal. 15, 26 Pac. 612.

Where the power to issue bonds of a county has been conferred by the legislature upon the commissioners' court (as in case of the court-house and jail bonds), such power cannot be exercised by such court except by an order of the court duly made and evidenced by the minutes of the court. Ball *v.* Presidio County, 88 Tex. 60, 29 S. W. 1042.

32. Roberts *v.* Kings County, 3 N. Y. App. Div. 366, 38 N. Y. Suppl. 521, 74 N. Y. St. 41.

33. San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644; Tinkham *v.* Greer, 11 Kan. 299.

Question of attestation one of fact.— The question whether an ordinance was passed, signed, and attested is one of fact to be found by the court or duly upon legal evidence. San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644.

34. It is sufficient when the order specifies the liability for which it is to be drawn. Babcock *v.* Goodrich, 47 Cal. 488.

35. Such provision does not, however, apply to ordinances not creating a debt, but merely recognizing an existing obligation of the parish. Davis *v.* Caldwell Parish, 28 La. Ann. 860.

36. People *v.* Linden, 107 Cal. 94, 40 Pac. 115; San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644; People *v.* Russell, 74 Cal. 578, 16 Pac. 395; San Luis Obispo County *v.* Hendricks, 71 Cal. 242, 11 Pac. 682; People *v.* Williams, 64 Cal. 87, 27 Pac. 939; People *v.* Bailhache, 52 Cal. 310; Miller *v.* Smith, 7 Ida. 204, 61 Pac. 824; Kingsley *v.* Bowman, 33 N. Y. App. Div. 1, 53 N. Y. Suppl. 426; Wentworth *v.* Racine County, 99 Wis. 26, 74 N. W. 551.

In California orders for the establishment of boundaries are not ordinances under the provision of the county government act, but are orders to be entered on the minutes of the board in accordance with the provisions of the statute with regard to such proceedings. People *v.* Linden, 107 Cal. 94, 40 Pac. 115.

In New York publication of an act or resolution is only required where the proceedings are legislative in their character. Kingsley *v.* Bowman, 33 N. Y. App. Div. 1, 53 N. Y. Suppl. 426.

Distribution of papers containing publication.— Where an order of a county board affecting a town and attaching its territory to another town was passed in due form pursuant to a power conferred upon the board by Wis. Rev. Stat. c. 13, § 28, and was published as prescribed by section 30 of said chapter, it had the force of law, and the fact that the clerk of the board did not order a number of papers containing such publication sufficient to distribute one to each of the town clerks of the county, and did not so distribute them as provided by section 31 of the same chapter, does not destroy the legal effect of such order. The provisions of section 31 are held to be only directory, while

names of members voting for or against a county ordinance must also be published.[37] It has also been held that the publication must be by order of the board, and that otherwise it will be of no effect;[38] and that a publication in the newspaper of the proceedings of the board in which an order appeared is not a sufficient publication.[39]

g. Reconsideration and Rescission — (I) *In General.* Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action;[40] but in no event has such court or board the power to set aside or modify a judicial decision or order made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision.[41] The same is the case after an appeal has been allowed,[42] or where some special statutory power is exercised, the time and mode of the exercise thereof being prescribed by statute.[43] A county board or court may, however, at the term or session at which such an order is made, revise or rescind it, provided this is done before any rights accrue thereunder,[44] but ordinarily they have no power to do such act subsequent to such term or session.[45]

(II) *Limitation Upon Power.* The power of a county board to reconsider, modify, or repeal its actions is subject to the limitation that such reconsideration, rescission, or change shall not affect or in any way prejudice any vested rights lawfully acquired under its previous action.[46] Where such previous action is in the nature of a contract which has been accepted by the other party, or upon the faith of which the latter has acted, it cannot be rescinded by the board[47]

that requiring publication is mandatory. State *v.* Pierce, 35 Wis. 93.

37. Summit County *v.* Gustaveson, 18 Utah 351, 54 Pac. 977, provision mandatory.

The object of requiring the publication of an ordinance is to impart notice to those who are or may be affected by its provisions; and if an error appears in the publication and it does not affect the provisions of the ordinance affecting the liability of the party thereunder, or his defense against such liability, it should be held immaterial. San Diego County *v.* Seifert, 97 Cal. 594, 32 Pac. 644.

38. People *v.* Bailhache, 52 Cal. 310.

39. People *v.* Williams, 64 Cal. 87, 27 Pac. 939.

40. Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722; Crittenden County Ct. *v.* Shanks, 88 Ky. 475, 11 S. W. 468, 11 Ky. L. Rep. 8.

The appropriation of money to build bridges by the county court is not a judicial act and may be set aside at a subsequent term of the court, unless individual rights have become involved. Crittenden County Ct. *v.* Shanks, 88 Ky. 475, 11 S. W. 468, 11 Ky. L. Rep. 8.

41. Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722; Beckwith *v.* English, 51 Ill. 147; Wren *v.* Fargo, 2 Oreg. 19. See *infra*, IV, C, 9, g, (II).

County ordinance adopting statute.—When a county has once by ordinance come within the provisions of an act to establish law libraries, it is there for all purposes, and therefore cannot evade the force and effect of the statute by a repeal of the ordinance adopting its provisions. Orange County *v.* Orange County, 99 Cal. 571, 34 Pac. 244.

42. Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722.

43. Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722.

44. Matthews *v.* Cook County, 87 Ill. 590; Beckwith *v.* English, 51 Ill. 147; Neal *v.* Franklin County, 43 Ill. App. 267; Higgins *v.* Curtis, 39 Kan. 283, 18 Pac. 207; Makemson *v.* Kauffman, 35 Ohio St. 444.

Presumption that rescission was during term.— The action of comissioners in rescinding an order dismissing a petition for want of jurisdiction will be presumed, there being no averment to the contrary, to have been taken at the same session at which the order of dismissal was made. Makemson *v.* Kauffman, 35 Ohio St. 444.

45. Graham *v.* Parham, 32 Ark. 676; Cass County *v.* Logansport, etc., Gravel Road Co., 88 Ind. 199; Doctor *v.* Hartman, 74 Ind. 221; Clarke County *v.* State, 61 Ind. 75; Lexington, etc., Turnpike Road Co. *v.* McMurtry, 6 B. Mon. (Ky.) 214.

46. Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722; Crittenden County Ct. *v.* Shanks, 88 Ky. 475, 11 S. W. 468, 11 Ky. L. Rep. 8.

47. *California.*—McDaniel *v.* Yuba County, 14 Cal. 444.

Indiana.— Funk *v.* Hetfield, 27 Ind. 503; Adams County *v.* Mertz, 27 Ind. 103.

New York.— Delaware County *v.* Foote, 9 Hun 527; Orleans County *v.* Bowen, 4 Lans. 24; People *v.* Queens County, 10 N. Y. St. 286.

North Carolina.—McCoy *v.* Harnett County, 53 N. C. 272.

Virginia.—Redd *v.* Henry County, 31 Gratt. 695.

See 13 Cent. Dig. tit. "Counties," § 73.

An order appropriating a certain sum to the support of the families of soldiers is a contract with those who enlist on faith of the

without the consent of the other party.[48] Rescission without such consent is ineffectual.

(III) *Making Rules as to Reconsideration.* Under the general power to make reasonable rules and regulations for the government of its proceedings, a county board may adopt rules governing its reconsideration of former acts.[49]

(IV) *Reviewing Acts of Prior Board.* In the absence of express statutory authority a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law.[50]

(V) *Removal of Appointees.* With regard to the power of a county board to rescind its action in appointing an officer it has been held that a board is not prohibited from rescinding or revoking such appointment at will.[51] According to other decisions, however, where a vacancy in the office, the term of which is fixed by statute, has been filled by a county board, the vacancy cannot be recreated by a resolution of the commissioners attempting to rescind their action,[52] and the board cannot remove at pleasure one whom they have appointed to fill the vacancy.[53]

h. Operation and Effect of Decisions — (I) *In General.* Ordinarily a decision of a county board in the exercise of its judicial discretion is conclusive and will not be controlled or reviewed, unless there is a clear abuse of such discretion,[54] or unless there is evidence of collusion or fraud.[55]

order and cannot be rescinded by the board. Funk *v.* Hetfield, 27 Ind. 503; Adams County *v.* Mertz, 27 Ind. 103.

Withdrawal of proposition to settle before acceptance.—A resolution of the county board to pay a claimant under a contract a certain amount of his demand, if he has a proposition to settle a controversy as to the amount due the claimant, and by way of compromise, may be restricted or rescinded by the board at any time before it is acted on and accepted. Such a proposition is not binding as a contract until accepted. People *v.* Klokke, 92 Ill. 134.

48. People *v.* Queens County, 10 N. Y. St. 286.

49. Higgins *v.* Curtis, 39 Kan. 283, 18 Pac. 207; Masters *v.* McHolland, 12 Kan. 17; People *v.* Delaware County, 48 N. Y. App. Div. 428, 63 N. Y. Suppl. 317; People *v.* Mills, 32 Hun (N. Y.) 459. See also Matthews *v.* Cook County, 87 Ill. 590.

Presumption.— In the absence of proof to the contrary a reconsideration of its action taken on a former day of the same session on any matter before the board will be presumed to have been done in conformity with such regulations. Higgins *v.* Curtis, 39 Kan. 283, 18 Pac. 207.

50. Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190; Orleans County *v.* Bowen, 4 Lans. (N. Y.) 24.

51. People *v.* Shear, (Cal. 1887) 15 Pac. 92; Smith *v.* Brown, 59 Cal. 672; People *v.* Hill, 7 Cal. 97; Greene *v.* Hudson County, 44 N. J. L. 388; Griggs *v.* Weston County, 5 Wyo. 274, 40 Pac. 304. *Contra,* Weir *v.* State, 96 Ind. 311.

Extent of rule.— The rule has been held to apply, even though the incumbent was appointed for a certain term (Greene *v.* Hudson County, 44 N. J. L. 388), and the act authorizing such an appointment provides that such officer shall be removed for just and sufficient legal cause after due investigation by the board (People *v.* Shear, (Cal. 1887) 15 Pac. 92).

52. People *v.* Reid, 11 Colo. 138, 17 Pac. 302.

53. State *v.* Chatburn, 63 Iowa 659, 19 N. W. 816, 50 Am. Rep. 760.

54. *Illinois.*— People *v.* McCormick, 106 Ill. 184.

Indiana.— State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; Pulaski County *v.* Shield, 130 Ind. 6, 29 N. E. 385.

Maine.— Walton *v.* Greenwood, 60 Me. 356.

Nebraska.— Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356.

North Carolina.— Harrington *v.* King, 117 N. C. 117, 23 S. E. 92.

Pennsylvania.— Bradford County *v.* Horton, 6 Lack. Leg. N. 306.

South Carolina.—State *v.* Georgetown Dist., 2 Rich. 413.

Wisconsin.— State *v.* Prince, 45 Wis. 610; Stato *v.* McGarry, 21 Wis. 496.

See 13 Cent. Dig. tit. "Counties," § 74.

It has been so held in respect of a decision as to the sufficiency of a sheriff's bond (Harrington *v.* King, 117 N. C. 117, 23 S. E. 92), the removal of officers (State *v.* McGarry, 21 Wis. 496), and an allowance for medical attendance (Rio Grande County *v.* Lewis, 28 Colo. 378, 65 Pac. 51).

55. Walton *v.* Greenwood, 60 Me. 356; Jersey City *v.* Hudson County, 53 N. J. L. 531, 22 Atl. 343.

Sufficient evidence of fraud.— In Jersey City *v.* Hudson County, 53 N. J. L. 531, 24 Atl. 343, a resolution by a board of freeholders to purchase land under the act of 1887 was set aside, the price agreed to be paid being so excessive as to show that the resolution was in fraud of the said act and not a legal exercise of the power conferred by it.

(II) *On Successors.* Where the commissioners of a county do public business according to the discretion confided to them new commissioners are bound by their acts.[56]

(III) *Collateral Attack.* Decisions, judgments, or orders of a county board, acting judicially in a proceeding in which they have jurisdiction, being conclusive as the judgments of a court of record,[57] cannot be collaterally attacked,[58] and are only reviewable upon appeal or other appropriate proceeding.[59] Where, however, a board or court exceeds its jurisdiction and makes an order without authority, such order being void is subject to collateral attack.[60]

(IV) *Review Upon Mandamus.* A writ of mandamus will not lie against a board of commissioners when acting in a judicial capacity to direct the performance of a judicial duty resting in the discretion of the board in any particular mode or to render any particular judgment.[61] Where, however, a board of commissioners refuses to act in a matter upon which it is their duty to take some action, the writ will issue to compel action, but will not dictate the kind of judgment to be rendered.[62]

(V) *Appeal*[63]—(A) *In General.* In the absence of statutory authorization of some character no appeal can be taken to a judicial tribunal from the decisions and orders of county boards;[64] but in most jurisdictions express statutory provision is made for the taking of appeals from such decisions and orders,[65] where

56. Scioto County *v.* Gherky, Wright (Ohio) 493; Richland County *v.* Miller, 16 S. C. 236.

While the personnel of its membership changes, the corporation continues unchanged. Its contracts are the contracts of the board and not of its members. Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385.

57. Waugh *v.* Chauncey, 13 Cal. 11.

58. Stingley *v.* Nichols, 131 Ind. 214, 30 N. E. 34; Anderson *v.* Claman, 123 Ind. 471, 24 N. E. 175; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487; Knox County *v.* Barnett, 106 Ind. 599, 7 N. E. 205; Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; Argo *v.* Barthand, 80 Ind. 63; Reynolds *v.* Faris, 80 Ind. 14; Ricketts *v.* Spraken, 77 Ind. 371; Brocaw *v.* Gibson County, 73 Ind. 543; Brewer *v.* Boston, etc., R. Co., 113 Mass. 52; Blanchard *v.* Bissell, 11 Ohio St. 96; Bartlett *v.* Eau Claire County, 112 Wis. 237, 88 N. W. 61.

An order of a police board directing the issuance of a warrant on the treasurer is not a judicial act, and is subject to collateral attack. Beaman *v.* Leake County, 42 Miss. 237.

59. *California.*— Waugh *v.* Chauncey, 13 Cal. 11.

Indiana.— Anderson *v.* Claman, 123 Ind. 471, 24 N. E. 175; Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; State *v.* Benson, 70 Ind. 481; Snelson *v.* State, 16 Ind. 29.

Iowa.— Bennett *v.* Hetherington, 41 Iowa 142.

Mississippi.— Beaman *v.* Leake County, 42 Miss. 237; Attala County *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102; Yalabusha County *v.* Carbry, 3 Sm. & M. 529.

Ohio.— State *v.* McClymon, 7 Ohio Dec. (Reprint) 109, 1 Cinc. L. Bul. 116.

See 13 Cent. Dig. tit. "Counties," § 75.

60. Fremont County *v.* Brandon, 6 Ida. 482, 56 Pac. 264; Harris County *v.* Farmer, 23 Tex. Civ. App. 39, 56 S. W. 555.

Test as to conclusiveness of findings.— In State *v.* McClymon, 7 Ohio Dec. (Reprint) 109, 1 Cinc. L. Bul. 116, it was held that where the jurisdiction of an inferior tribunal of limited and special jurisdiction depends, not on the existence of a certain fact, but on the finding of such tribunal that a certain fact exists, its finding is conclusive until regularly reversed or vacated, and cannot be inquired into in a collateral proceeding. Where, however, the jurisdiction of such tribunal depends upon the existence of a certain fact, its finding and jurisdiction can be inquired into in a collateral proceeding.

61. People *v.* McCormick, 106 Ill. 184; State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; People *v.* Livingston County, 26 Barb. (N. Y.) 118, 12 How. Pr. (N. Y.) 204.

62. State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892.

The determination of the sufficiency of a notice of a special meeting of the commissioners to consider a petition for the removal of a county-seat is not an act involving the exercise of judicial discretion, and the determination of the board may be reviewed by mandamus. State *v.* Scott County, 43 Minn. 322, 45 N. W. 614.

63. See, generally, Appeal and Error.

64. *Ex p.* Boothe, 64 Ala. 312; Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142; State *v.* Bethea, 43 Nebr. 451, 61 N. W. 578.

Appeals are not matters of right, but are lawful only in cases and on terms prescribed by the statute, which are conditions precedent that must be complied with in order to give the appellate court jurisdiction. Bridges *v.* Clay County, 57 Miss. 252.

65. *Idaho.*— Reynolds *v.* Oneida County, 6 Ida. 787, 59 Pac. 730; Ravenscroft *v.* Blaine County, 5 Ida. 178, 47 Pac. 942; Fisher *v.*

they are final,[66] judicial in their character,[67] and are made in regard to matters affecting the rights of an individual as distinguished from the public.[68] If, how-

Bannock County, 4 Ida. 381, 39 Pac. 552; Meller *v.* Logan County, 4 Ida. 44, 35 Pac. 712; Gorman *v.* Boise County, 1 Ida. 655.

Indiana.— Huntington County *v.* Beaver, 156 Ind. 450, 60 N. E. 150; State *v.* Burgett, (1898) 49 N. E. 884; Potts *v.* Bennett, 140 Ind. 71, 39 N. E. 518; Indiana Imp. Co. *v.* Wagner, 134 Ind. 698, 34 N. E. 535; Farley *v.* Hamilton County, 126 Ind. 468, 26 N. E. 174; Donalson *v.* Lawson, 126 Ind. 169, 25 N. E. 903; Sharp *v.* Malia, 124 Ind. 407, 25 N. E. 9; Bunnell *v.* White County, 124 Ind. 1, 24 N. E. 370; Freshour *v.* Logansport, etc., Turnpike Co., 104 Ind. 463, 4 N. E. 157; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Waller *v.* Wood, 101 Ind. 138; Shirk *v.* Moore, 96 Ind. 199; Meehan *v.* Wiles, 93 Ind. 52; Matter *v.* Stout, 93 Ind. 19; Crumpey *v.* Hickman, 92 Ind. 388; Irwin *v.* Lowe, 89 Ind. 540; Peed *v.* Brenneman, 89 Ind. 252; Bryan *v.* Moore, 81 Ind. 9; O'Boyle *v.* Shannon, 80 Ind. 159; Grusenmeyer *v.* Logansport, 76 Ind. 549; Baltimore, etc., R. Co. *v.* St. Joseph County, 73 Ind. 213; State *v.* Benson, 70 Ind. 481; Fontain County *v.* Loeb, 68 Ind. 29; Moffit *v.* State, 40 Ind. 217; Indianapolis *v.* Sturm, 39 Ind. 159; Princeton *v.* Manck, 35 Ind. 51; Hanna *v.* Putnam County, 29 Ind. 170; Fordyce *v.* Montgomery County, 28 Ind. 454; Graham *v.* Daviess County, 25 Ind. 333; Allen *v.* Hostetter, 16 Ind. 15; Warren County *v.* State, 15 Ind. 250; Harlan *v.* Carroll, 13 Ind. 247; Jasper County *v.* Spitler, 13 Ind. 235; Wells County *v.* Weasner, 10 Ind. 259; Huntington County *v.* Boyle, 9 Ind. 296; Davis *v.* Huff, 8 Blackf. 276; Hanna *v.* Tippecanoe County, 7 Blackf. 256; Hedley *v.* Franklin County, 4 Blackf. 116; McCollom *v.* Shaw, 21 Ind. App. 63, 51 N. E. 488; Floyd County *v.* Scott, 19 Ind. App. 227, 49 N. E. 395; Holman *v.* Robbins, 5 Ind. App. 436, 31 N. E. 863; Farman *v.* Marion County, Wils. 315.

Iowa.— Young *v.* Rann, 111 Iowa 253, 82 N. W. 785; David *v.* Hardin County, 104 Iowa 204, 73 N. W. 576; Lippencott *v.* Allander, 25 Iowa 445; Garber *v.* Clayton County, 19 Iowa 29; Prosser *v.* Wapello County, 18 Iowa 327; Umbarger *v.* Bean, 15 Iowa 256; McCune *v.* Swafford, 5 Iowa 552; Myers *v.* Simms, 4 Iowa 500; U. S. *v.* Dubuque County, Morr. 31.

Kansas.— Fulkerson *v.* Harper County, 31 Kan. 125, 1 Pac. 261; Hayes *v.* Rogers, 24 Kan. 143.

Kentucky.— Garrard County Ct. *v.* McKee, 11 Bush 234.

Maryland.— Miles *v.* Stevenson, 80 Md. 358, 30 Atl. 646.

Mississippi.— Monroe County *v.* Strong, 78 Miss. 565, 29 So. 530; Bridges *v.* Clay County, 57 Miss. 252; Deberry *v.* Holly Springs, 35 Miss. 385; Attala County *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102.

Montana.— Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

Nebraska.— Haskell *v.* Valley County, 41 Nebr. 234, 59 N. W. 680.

North Carolina.— Brown *v.* Plott, 129 N. C. 272, 40 S. E. 45.

Ohio.— Bowersox *v.* Seneca County Com'rs, 20 Ohio St. 496; Stewart *v.* Logan County, 1 Ohio Cir. Dec. 404.

Oklahoma.— Monroe *v.* Beebe, 10 Okla. 581, 64 Pac. 10; Hadlock *v.* G. County, 5 Okla. 570, 49 Pac. 1012; Washita County *v.* Haines, 4 Okla. 701, 46 Pac. 561.

Oregon.— Carothers *v.* Wheeler, 1 Oreg. 194.

Tennessee.— Carey *v.* Campbell County, 5 Sneed 513; Obion County Ct. *v.* Marr, 8 Humphr. 634.

Washington.— Morath *v.* Gorham, 11 Wash. 577, 40 Pac. 129; Baum *v.* Sweeny, 5 Wash. 712, 32 Pac. 778.

See 13 Cent. Dig. tit. "Counties," § 76.

Appeal from county court.— In Illinois it is held that appeals may be taken from any decision or order of the county courts made while performing the duties heretofore conferred on the county commissioners' court by any person feeling himself aggrieved. People *v.* Garner, 47 Ill. 246. In Arkansas an appeal lies to the circuit court from a judgment of the county court granting or refusing an application to annex territory to a municipal corporation. Dodson *v.* Ft. Smith, 33 Ark. 508.

The provisions of the Ohio act of March 12, 1853, allowing appeals from decisions of the board of county commissioners, apply only to cases founded upon the claims and demands against the county in its quasi-corporate capacity, and not to an order made by the county board appropriating private property for public improvements and assessing the costs and expense of such public improvements upon lands specially benefited thereby. Bowersox *v.* Seneca County Com'rs, 20 Ohio St. 496.

66. Indiana Imp. Co. *v.* Wagner, 134 Ind. 698, 34 N. E. 535; Freshour *v.* Logansport, etc., Turnpike Co., 104 Ind. 463, 4 N. E. 157; Hanna *v.* Putnam County, 29 Ind. 170.

67. Farley *v.* Hamilton County, 126 Ind. 468, 26 N. E. 174; Bunnell *v.* White County, 124 Ind. 1, 24 N. E. 370; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Waller *v.* Wood, 101 Ind. 138; Grusenmeyer *v.* Logansport, 76 Ind. 549; Farman *v.* Marion County, Wils. (Ind.) 315; Fulkerson *v.* Harper County, 31 Kan. 125, 1 Pac. 261; Obion County Ct. *v.* Marr, 8 Humphr. (Tenn.) 634.

The approval by the county board of the report of a county officer, made in compliance with Nebr. Comp. Stat. (1899), c. 28, § 43, is not a judicial order. It has not the force or conclusiveness of a judgment and is not appealable. Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941.

68. Lippencott *v.* Allander, 25 Iowa 445 [*distinguishing* 23 Iowa 536]; Garber *v.* Clayton County, 19 Iowa 29; Prosser *v.* Wapello

ever, in rendering its decision the board acts in a purely ministerial or administrative capacity no appeal will lie.[69] So where the matter involves no question of legal right, but simply a matter for the exercise of the discretion of the board, an appeal from its action on such matter is not authorized.[70] And to give a court jurisdiction of an appeal from a county board it is essential that the board itself should have had jurisdiction of the matters in controversy.[71]

(B) *To What Court Taken.* The statutes authorizing an appeal from decisions of the county board usually prescribe the court to which the appeal shall be taken.[72]

(C) *Time.* So the time within which and the term to which such appeals are taken is ordinarily expressly prescribed by statute.[73]

(D) *Parties.* Although in the absence of statutory authorization an appeal from an order of a county board can be prosecuted only by one who is a party to the proceedings before the board,[74] the statutes of some jurisdictions provide that

County, 18 Iowa 327; Umbarger *v.* Bean, 15 Iowa 256; McCune *v.* Swafford, 5 Iowa 552; Myers *v.* Simms, 4 Iowa 500; Ball *v.* Humphrey, 4 Greene (Iowa) 204; U. S. *v.* Dubuque County, Morr. (Iowa) 31; Fulkerson *v.* Harper County, 31 Kan. 125, 1 Pac. 261; Hayes *v.* Rogers, 24 Kan. 143; Carothers *v.* Wheeler, 1 Oreg. 194; Carey *v.* Campbell County, 5 Sneed (Tenn.) 515.

In matters affecting the public as distinguished from individuals the order of a board of supervisors cannot be appealed from. Lippencott *v.* Allander, 23 Iowa 536 (awarding of a ferry license to one of two or more applicants therefor); Hayes *v.* Rogers, 24 Kan. 143 (mere political and governmental order of the county board); Obion County Ct. *v.* Marr, 8 Humphr. (Tenn.) 634 (order for the levying of the county tax touching the interest of every taxpayer).

69. Huntington County *v.* Beaver, 156 Ind. 450, 60 N. E. 150; Potts *v.* Bennett, 140 Ind. 71, 39 N. E. 518; Farley *v.* Hamilton County, 126 Ind. 468, 26 N. E. 174; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Hamilton County *v.* Cottingham, 56 Ind. 559; Scott County *v.* Leftwich, 145 Mo. 26, 46 S. W. 963. And see cases cited *supra*, note 64 *et seq.*

70. Dudley *v.* Blountsville, etc., Turnpike Co., 39 Ind. 288; Sims *v.* Monroe County, 39 Ind. 40. See also Indianapolis *v.* Sturm, 39 Ind. 159; Princeton *v.* Manck, 35 Ind. 51.

71. Myers *v.* Gibson, 152 Ind. 500, 53 N. E. 646; David *v.* Hardin County, 104 Iowa 204, 73 N. W. 576.

72. *Idaho.*— Fisher *v.* Bannock County, 4 Ida. 381, 39 Pac. 552.

Indiana.— Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102; State *v.* Burgett, (1898) 49 N. E. 884; Indiana Imp. Co. *v.* Wagner, 134 Ind. 698, 34 N. E. 535; Huntington County *v.* Boyle, 9 Ind. 296; Hanna *v.* Tippecanoe County, 7 Blackf. 256. And see Fountain County *v.* Wood, 35 Ind. 70 [*overruling* Huntington County *v.* Brown, 10 Ind. 545; Wells County *v.* Weasner, 10 Ind. 259].

Iowa.— Lippencott *v.* Allander, 25 Iowa 445; Garber *v.* Clayton County, 19 Iowa 29; Prosser *v.* Wapello County, 18 Iowa 327; Umbarger *v.* Bean, 15 Iowa 256; U. S. *v.* Dubuque County, Morr. 31.

Kansas.— Fulkerson *v.* Harper County, 31 Kan. 125, 1 Pac. 261; Hayes *v.* Rogers, 24 Kan. 143.

Maryland.— Miles *v.* Stevenson, 80 Md. 358, 30 Atl. 646.

Mississippi.— Deberry *v.* Holly Springs, 35 Miss. 385; Attala County *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102.

Montana.— Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

Nebraska.— Haskell *v.* Valley County, 41 Nebr. 234, 59 N. W. 680; State *v.* Furnas County, 10 Nebr. 361, 6 N. W. 434.

Oregon.— Carothers *v.* Wheeler, 1 Oreg. 194.

See 13 Cent. Dig. tit. "Counties," § 77.

In Massachusetts an appeal is allowed from the decision of a county board disallowing a claim to the court of common pleas which latter court acts as an auditing board. Adams *v.* Hampden County, 13 Gray (Mass.) 439.

Under Ohio Rev. Stat. § 896, providing that if any person is aggrieved by the decision of the county commissioners he may appeal to the court of common pleas, on refusal of the county commissioners to allow an auditor compensation for making out special road-improvement duplicates, his only remedy is by appeal to the common pleas. Stewart *v.* Logan County, 1 Ohio Cir. Dec. 404.

73. *Indiana.*— Within thirty days after the decision. Shirk *v.* Moore, 96 Ind. 199; Matter *v.* Stout, 93 Ind. 19.

Kentucky.— See Ditto *v.* Meade County Ct., 14 Bush 213.

Maryland.— Miles *v.* Stevenson, 80 Md. 358, 30 Atl. 646, within sixty days after the time of making such decision or order.

Mississippi.— Bridges *v.* Clay County, 57 Miss. 252, to next term of circuit court.

North Carolina.— Brown *v.* Plott, 129 N. C. 272, 40 S. E. 45, to next term of appellate court.

South Carolina.— Pickens County *v.* Day, 45 S. C. 161, 22 S. E. 772, within five days after notice of action.

Washington.— Baum *v.* Sweeny, 5 Wash. 712, 32 Pac. 778, within three months.

See 13 Cent. Dig. tit. "Counties," § 76 *et seq.*

74. Morath *v.* Gorham, 11 Wash. 577, 40 Pac. 129.

an appeal may be taken by any person who is aggrieved by any decision, judgment, or order of a county board,[75] whether he be a party to the record or not.[76]

(E) *Notice of Appeal.* In some jurisdictions the party appealing from a decision of a board of commissioners must notify the commissioners that the appeal is taken at least a designated number of days before the first day of the next term of the court appealed to.[77] Service of the notice may be accepted by writing thereon,[78] and defects therein are waived by appearance.[79] In other jurisdictions it is held that the members of a board of county commissioners are bound to take notice of an appeal from the commissioner's court, and a service of summons upon them is unnecessary.[80]

(F) *Papers Necessary to Be Filed*— (1) IN GENERAL. An appeal from an order of the county board is properly dismissed when there are no papers on file.[81]

(2) AFFIDAVIT. In at least one state it is expressly provided that if the person aggrieved by any decision of the county board is not a party to the proceeding he must in order to appeal file in the office of the county auditor his affidavit setting forth that he is interested in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest.[82]

(3) BOND. No appeal-bond is necessary, unless expressly required by some provision of the statute;[83] but in some jurisdictions an appeal-bond is required to be filed subject to the examination and approval of the county auditor,[84] or county

One who is not a party to proceedings before the board of county commissioners cannot appeal from a decision of such board, unless he shall file in the office of the county auditor his affidavit, showing that he has an interest in the matter decided, and that he is aggrieved by such decision. Robinson *v.* Vanderburg County, 37 Ind. 333.

75. *Kansas.*— Fulkerson *v.* Harper County, 31 Kan. 125, 1 Pac. 261.

Maryland.— Miles *v.* Stevenson, 80 Md. 258, 30 Atl. 646.

Mississippi.— Wilson *v.* Wallace, 64 Miss. 13, 8 So. 128; Deberry *v.* Holly Springs, 35 Miss. 385.

Montana.— Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

Ohio.— Stewart *v.* Logan County, 1 Ohio Cir. Dec. 404.

Oklahoma.— Monroe *v.* Beebe, 10 Okla. 581, 64 Pac. 10.

See 13 Cent. Dig. tit. "Counties," § 77.

Any person whose existing rights are cut off or destroyed by a decision of the board may have his appeal to the district court. Carothers *v.* Wheeler, 1 Oreg. 194.

76. Deberry *v.* Holly Springs, 35 Miss. 385.

Strangers who can show by evidence apart from the proceedings before the board that they are injured by a judgment can appeal therefrom. Deberry *v.* Holly Springs, 35 Miss. 385.

77. Carothers *v.* Wheeler, 1 Oreg. 194. See also Morath *v.* Gorham, 11 Wash. 577, 40 Pac. 129.

In Idaho the party appealing should state in his notice of appeal the fact of his appeal and the grounds of it. Gorman *v.* Boise County, 1 Ida. 655.

78. Libbey *v.* McIntosh, 60 Iowa 329, 14 N. W. 354; Greeley County *v.* Gebhardt, (Nebr. 1902) 89 N. W. 753.

79. Libbey *v.* McIntosh, 60 Iowa 329, 14 N. W. 354.

80. Cass County *v.* Adams, 76 Ind. 504.

When an appeal is taken in vacation from an order of the county board, while the appellant could summon the appellee to answer, a failure to summon one of the appellees to appear at the next term of the court is not a ground for dismissal. Hanna *v.* Tippecanoe County, 7 Blackf. (Ind.) 256.

81. Wheatley *v.* Hanna, 23 Ind. 518.

If a part of the necessary papers are wanting, their absence is ground for a motion to cause them to be supplied but not to dismiss the appeal. Fountain County *v.* Loeb, 68 Ind. 29.

If an appeal is taken in due time and the proper bond filed, failure to file the transcript in time is not ground to dismiss the appeal. Barnett *v.* Gilmore, 33 Ind. 199; Day *v.* Herod, 33 Ind. 197.

82. Myers *v.* Gibson, 147 Ind. 452, 46 N. E. 914; Matter *v.* Stout, 93 Ind. 19; Breitweiser *v.* Fuhrman, 88 Ind. 28; Fordyce *v.* Montgomery County, 28 Ind. 454; Graham *v.* Daviess County, 25 Ind. 333; Harlan *v.* Carroll, 13 Ind. 347; Odell *v.* Jenkins, 8 Ind. 522; Robbins *v.* Marshall County, 24 Ind. App. 341, 56 N. E. 729; Van Auken *v.* Rainier, 6 Ind. App. 700, 34 N. E. 105; Van Auken *v.* Hook, 6 Ind. App. 610, 34 N. E. 104; Holman *v.* Robbins, 5 Ind. App. 436, 31 N. E. 863.

It is not sufficient to state in the affidavit in general terms that the appellant has an interest, but the nature of his interest must be shown. Fordyce *v.* Montgomery County, 28 Ind. 454.

83. Ravenscraft *v.* Blaine County, 5 Ida. 178, 47 Pac. 942; Monroe County *v.* Strong, 78 Miss. 565, 29 So. 530.

84. Shirk *v.* Moore, 96 Ind. 199; Meehan *v.* Wiles, 93 Ind. 52; Matter *v.* Stout, 93 Ind. 19; Crumley *v.* Hickman, 92 Ind. 388; Fountain County *v.* Loeb, 68 Ind. 29.

An appeal-bond need not be approved when no appeal lies. Moffit *v.* State, 40 Ind. 217.

clerk.[85] Defects in the form or substance of the bond will not authorize a dismissal, if the appellant, when required by the court to which the appeal was taken, files a sufficient bond.[86]

(4) BILLS OF EXCEPTIONS. In some states the statute authorizing appeals from the decisions of the county boards provides that the person appealing shall embody the facts and evidence in a bill of exceptions.[87]

(G) *Hearing and Determination* — (1) NECESSITY FOR HEARING DE NOVO. The general rule is that on an appeal from an order or decision of the county board the cause shall be tried *de novo* upon the merits,[88] and upon issues formed and submitted to the jury;[89] and a judgment by default upon non-appearance of the board is unauthorized.[90]

(2) ISSUES AND EVIDENCE CONSIDERED. In some jurisdictions the matters in controversy must be heard and determined on the evidence and issues as submitted to the county board.[91] In other jurisdictions parol evidence may be

Necessity for transcript to set out or refer to bond or affidavit.— Where the transcript of proceedings before the board of county commissioners, as certified by the auditor, in no manner set out or referred either to the appeal-bond or affidavit required for an appeal from the board's decision, the transcript was not complete, and hence the appeal was not perfected. Whisenand *v.* Belle, 154 Ind. 38, 55 N. E. 950.

85. Monroe *v.* Beebe, 10 Okla. 581, 64 Pac. 10 (holding that the approval of such bond is discretionary with the clerk, and will not be interfered with by mandamus unless exercised in an arbitrary manner); Barnes *v.* Washington County, 5 Wis. 442; Conover *v.* Washington County, 5 Wis. 438.

86. Meehan *v.* Wiles, 93 Ind. 52; Crumley *v.* Hickman, 92 Ind. 388.

Filing in circuit court for first time.— The rule stated in the text does not, however, authorize an appeal-bond to be filed in the circuit court where none was filed with the county auditor. Crumley *v.* Hickman, 92 Ind. 388.

That the bond is payable to the county instead of to the board is not ground for dismissing the appeal, but may be reached by motion. Fountain County *v.* Loeb, 68 Ind. 29.

87. Bridges *v.* Clay County, 57 Miss. 252, holding that such bills must be signed by the president or chairman of the board, and that the proceedings must be transmitted by the clerk to the circuit court, which must hear and determine the same upon the case presented by the bill of exceptions, and affirm or reverse the judgment, and that in such case the board has no power to consent to any other mode of trial, or to give the circuit court jurisdiction to render a judgment not authorized by the statute, and it cannot waive a bill of exceptions.

Must be signed, settled, and allowed by chairman.— A bill of exceptions of the evidence offered before the board of county commissioners must be signed, settled, and allowed by the chairman of such board. Union Stockyards Nat. Bank *v.* Thurston County, (Nebr. 1902) 91 N. W. 286.

88. *Idaho.*— Mahoney *v.* Shoshone County, (1902) 69 Pac. 108; Clyne *v.* Bingham County, 7 Ida. 75, 60 Pac. 76; Campbell *v.* Canyon County, 5 Ida. 53, 46 Pac. 1022; Fisher *v.* Bannock County, 4 Ida. 381, 39 Pac. 552.

Indiana.— Myers *v.* Gibson, 152 Ind. 500, 53 N. E. 646; Sharp *v.* Malia, 124 Ind. 407, 25 N. E. 9; Irwin *v.* Lowe, 89 Ind. 540; Gavin *v.* Decatur County, 81 Ind. 480; Bryan *v.* Moore, 81 Ind. 9; Ralston *v.* Radcliff, 34 Ind. 513; Hedley *v.* Franklin County, 4 Blackf. 116.

Missouri.— Scott County *v.* Leftwich, 145 Mo. 26, 46 S. W. 963.

Montana.— State *v.* Minar, 13 Mont. 1, 31 Pac. 723.

Nebraska.— Box Butte County *v.* Noleman, 54 Nebr. 239, 74 N. W. 582.

Ohio.— Clermont County *v.* Robb, Wright 48.

South Carolina.— Buttz *v.* Charleston County, 17 S. C. 586.

See 13 Cent. Dig. tit. "Counties," § 79.

The cause should be decided on the merits, although no evidence be offered. Ralston *v.* Radcliff, 34 Ind. 513.

"Fair" and "adequate" compensation.— Where a statute allows a jailer a "fair and adequate" compensation, it is for the reviewing court to determine how much he is entitled to. Randall *v.* Lyon County, 20 Nev. 35, 14 Pac. 583.

Where a claim against a county is disallowed the court may adjust the amount thereof, on determining that it was improperly disallowed. Franklin County *v.* Ottawa, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396.

89. Fisher *v.* Bannock County, 4 Ida. 381, 39 Pac. 552. In Mansel *v.* Fulmer, 175 Pa. St. 377, 34 Atl. 794, 38 Wkly. Notes Cas. (Pa.) 269, it was held that it was proper to submit to the jury the question whether any specified charge for which compensation is allowed, but not fixed by law, is a reasonable charge.

90. State *v.* Minar, 13 Mont. 1, 31 Pac. 723.

91. Lowen *v.* Ryan, 94 Ind. 450; Irwin *v.* Lowe, 89 Ind. 540; Peed *v.* Brenneman, 89 Ind. 252; Breitweiser *v.* Fuhrman, 88 Ind. 28; Green *v.* Elliot, 86 Ind. 53; Aull *v.* New-

introduced.[92] So in jurisdictions where new issues cannot be submitted it is permissible to amend the issues in the appellate court.[93]

(3) RIGHT TO OPEN AND CLOSE. On appeal from proceedings before a board of commissioners in reference to the location of a highway, where the remonstrance, having been amended in the circuit court, is for damages only, the remonstrant is entitled to open and close because he has the burden of the issue.[94]

(4) FINDINGS. Where the action of a county board of commissioners is set aside on appeal, the facts on which the finding of an abuse of discretion is based must be specifically found by the court, and an opinion stating that there has been an abuse of discretion is not sufficient.[95]

(H) *Appeal From Judgment on Appeal.* It has been held that under a statute giving an appeal or writ of error to any party to a judgment or decree of an inferior tribunal, error will lie at the suit of the one aggrieved by the decision of the circuit court upon an appeal from the decision of the county board.[96]

(VI) *REVIEW ON CERTIORARI.* The proceedings of a county board of supervisors so far as they are judicial are reviewable on certiorari, but when they are merely ministerial or legislative they cannot be so reviewed.[97]

10. EXAMINATION OF COMMISSIONERS' ACCOUNTS. Where the report of a committee appointed upon appeal to examine into the doings of county commissioners is required by statute to be made at the term of the district court next after their appointment, a subsequent acceptance of such report by the district court is irregular and void.[98] When the county auditors adjudge against the legality or honesty of an expenditure of county funds by the commissioners, they may surcharge the commissioners with the amount.[99]

berry County, 42 S. C. 321, 20 S. E. 61; Tinsley *v.* Union County, 40 S. C. 276, 18 S. E. 794.

Where the evidence establishes the claim, the judge in reversing the order of disallowance should not order a new trial but should give judgment on the claim. Aull *v.* Newberry, 42 S. C. 321, 20 S. E. 61.

Presumption on appeal from rejection of portion of claim.— On appeal from judgment of county commissioners rejecting a portion of claim, it is not error to refuse judgment for the full amount, although there is no testimony against it, and claim is sworn to, because, in absence of evidence to contrary, it must be presumed that commissioners did their duty. Pickens County *v.* Day, 45 S. C. 161, 22 S. E. 772 [*distinguishing* Aull *v.* Newberry, 42 S. C. 321, 20 S. E. 61].

92. Bunch *v.* Fluvanna County, 86 Va. 452, 10 S. E. 532.

93. Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102; Hardesty *v.* Hine, 135 Ind. 72, 34 N. E. 701; Stockwell *v.* Brant, 97 Ind. 474; Goodwin *v.* Smith, 72 Ind. 113, 37 Am. Rep. 144.

94. Peed *v.* Brenneman, 89 Ind. 252.

95. Reynolds *v.* Oneida County, 6 Ida. 787, 59 Pac. 730, so held under Ida. Rev. Stat. § 4405.

96. Crump *v.* Colfax County, 52 Miss. 107.

Circuit court's findings of fact not reviewable.— In Tinsley *v.* Union County, 40 S. C. 276, 18 S. E. 794, it was held that the board of county commissioners has exclusive jurisdiction of county claims, subject to the right of appeal to the circuit court; and on such appeal findings of fact by the circuit judge are final and cannot be reviewed in the supreme court.

In Ohio the decision of a court of common pleas rendered on an appeal from that of county boards may be reviewed on a petition in error to the district court. Mannix *v.* Hamilton County, 43 Ohio St. 210, 1 N. E. 322.

Objections not raised below.—Where an appeal has been taken from the rejection of a claim to the circuit court and from thence to the supreme court, an objection not taken at the circuit court cannot be raised in the supreme court. Warner *v.* Outagamie County, 19 Wis. 611.

97. Robinson *v.* Sacramento, 16 Cal. 208; People *v.* El Dorado County Sup'rs, 8 Cal. 58; Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

As to review on certiorari generally see CERTIORARI.

98. *In re* Windham, 32 Me. 452. But *compare* Irish *v.* Com., 3 Binn. (Pa.) 91, holding that if the auditors of commissioners' accounts, appointed by a court of common pleas to audit and settle public accounts of the treasurer and commissioners of a county, do not make return of their report at the next term of the common pleas after the settlement, the commissioners are entitled to sixty days' actual notice of such return to enter an appeal.

99. Cumberland County *v.* Beltzhoover, 6 Pa. Dist. 625, 19 Pa. Co. Ct. 614; *In re* County Auditors' Report, 8 Kulp (Pa.) 415.

Surcharge for costs paid after statute of limitations has run.— Where county commissioners pay a bill of costs which, although ordinarily a charge against the county, was barred by limitations, they cannot be sur-

11. Disabilities — a. Appointment to Another Office. Where a board of supervisors has the power or is under obligation to supervise the selection of the members of another board, the duties of the two offices are incompatible, and the board of supervisors have no power to appoint members of such inferior board from their own number.[1]

b. Dealings With Member of Board. A contract between a board of supervisors and one of its members [2] for legal services to be rendered the board cannot be made the basis of a legal charge against the county.[3] It has been held, however, that while if a contract were intended to be made by a member of the county justices in their official capacity, such contract would be void, yet, when such justices sitting as a county court make a contract for work on county buildings such contract may be made with a member of the board as with a private person.[4]

12. Civil Liabilities of Members — a. For Judicial Acts. Members of county boards cannot be made personally liable in a civil suit for any damages occasioned by their acts while exercising the judicial or quasi-judicial functions of their office,[5]

charged therefor. Wyoming Co. *v.* Wheelock, 8 Pa. Dist. 343.

Where county commissioners had notice of the auditors' sessions, and occasionally appeared before them, the remedy for an improper surcharge of the commissioners for an expenditure of county funds adjudged illegal is by appeal from the judgment to the common pleas. *In re* County Auditors' Report, 8 Kulp (Pa.) 415.

1. Kinyon *v.* Duchene, 21 Mich. 497.

2. **Reason of rule.**— The principle that it is contrary to good morals and public policy to permit municipal officers of any county to enter into contractual relations with the municipality of which they are officers applies with particular force to members of a board, such as a board of supervisors, which not only makes the contract but subsequently audits the bill. Beebe *v.* Sullivan County, 64 Hun (N. Y.) 377, 19 N. Y. Suppl. 629.

3. Beebe *v.* Sullivan County, 64 Hun (N. Y.) 377, 19 N. Y. Suppl. 629, 46 N. Y. St. 222. But *compare* Washington County *v.* Boyd, 64 Mo. 179, holding that where members of a county court acting as trustees for a school fund become securities on an injunction bond in a suit for the benefit of such fund, and judgment is rendered against them on such bond upon the dissolution of the injunction, being entitled to reimbursement out of the school funds, they may vote themselves such reimbursement.

4. Tyrrel County *v.* Simmons, 48 N. C. 187, 189, where the court say: "In such a case, there will be no more objection to one of the justices becoming a party to the contract with the county, as a corporation, than there would be for a stockholder in a bank or rail-road company, making a contract with the bank or company. The individual members of the corporation, and the corporation itself, are distinct persons, and there is no incongruity, therefore, in their entering into contracts with each other."

A penal offense to contract with municipality.— A county board cannot, even upon the advice of the district attorney, settle a suit pending against it on a claim for rent arising out of a contract with its municipal judge to pay him a monthly rent for his office for a municipal court-room, the contract being prohibited by Wis. Rev. Stat. 1898, § 4549, making it a penal offense for any public officer to contract with the municipality and therefore absolutely void and not a sufficiently disputed matter with which the county board can deal. Quayle *v.* Bayfield County, 114 Wis. 108, 89 N. W. 892.

5. *Indiana.*— Boseker *v.* Wabash County, 88 Ind. 267; Pike County *v.* Norrington, 82 Ind. 190; Halloran *v.* McCullough, 68 Ind. 179.

Iowa.— Wasson *v.* Mitchell, 18 Iowa 153.

Maryland.— State *v.* Dunnington, 12 Md. 340.

Mississippi.— Paxton *v.* Arthur, 60 Miss. 832; Paxton *v.* Baum, 59 Miss. 531.

Missouri.— Sparks *v.* Purdy, 11 Mo. 219; McDonald *v.* Franklin County, 2 Mo. 217.

New York.— People *v.* Stocking, 50 Barb. 573, 32 How. Pr. 48.

North Carolina.— Board of Education *v.* Bladen County, 113 N. C. 379, 18 S. E. 661; Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

Ohio.— Thomas *v.* Wilton, 40 Ohio St. 516.

South Carolina.—Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

Tennessee.— Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569; State *v.* Goddard, 3 Lea 99.

See 13 Cent. Dig. tit. "Counties," § 83.

Liability for approval or rejection of bonds. — County commissioners are not liable for honest mistakes or errors of judgment whether of law or fact in approving official bonds (Held *v.* Bagwell, 58 Iowa 139, 12 N. W. 226; Wasson *v.* Mitchell, 18 Iowa 153; State *v.* Dunnington, 12 Md. 340), unless such bond is known by them to be worthless (Wasson *v.* Mitchell, 18 Iowa 153); nor are they liable for such error of judgment in determining the sufficiency of a bond tendered by the bidder for a public building (Boseker *v.* Wabash County, 88 Ind. 267).

unless done wilfully, maliciously, or corruptly.[6] They cannot be held personally liable for errors of judgment.[7]

b. For Legislative Acts. The same reasons which exempt members of county boards or courts acting in a judicial capacity from liability to injured parties growing out of mistaken judgment, uninfluenced by malice or corruption, apply with equal force to such boards acting as legislative bodies in the case of honest mistake as to their powers.[8]

c. For Ministerial Acts. Members of county boards are liable for their ministerial acts of misfeasance or nonfeasance resulting in injury.[9] This liability exists at common law as well as under statutes.[10]

d. For Acts of Persons Appointed to Office. Boards of county commissioners while bound by their public duty to appoint to office persons of capacity and honesty are not, however, responsible for their delinquency in this particular to the sureties on the official bond of such appointee,[11] even though the latter was known to such board to have previously been a defaulter,[12] at least where the sureties make no inquiry of the board or any of its members in regard to the facts.[13]

e. For Unauthorized Offer of Reward. Supervisors of a county who, without authority of law, offer a reward in the name of the county, do not thereby render themselves personally liable thereon.[14]

f. Actions to Enforce Liability. In an action against the members of a county

Misconstruction of law.— Thus individual members of the board are not liable for errors proceeding from misconstruction of the law. Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

The exemption of judicial officers from civil liability has been held to extend to all officers and boards of officers charged with the decision of matters of a quasi-judicial nature. Wasson *v.* Mitchell, 18 Iowa 153; Boseker *v.* Wabash County, 88 Ind. 267.

6. Gorman *v.* Boise County, 1 Ida. 655; Wasson *v.* Mitchell, 18 Iowa 153; Paxton *v.* Baum, 59 Miss. 531; Grant *v.* Lindsay, 11 Heisk. (Tenn.) 651.

The wrongful and malicious rejection of the official bond of the sheriff will not render the members of a county court personally liable in Texas. Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

7. Boseker *v.* Wabash County, 88 Ind. 267; Grant *v.* Lindsay, 11 Heisk. (Tenn.) 651.

And this is true even where, as is the case in some states, it is provided that the members of county boards appropriating money to illegal objects shall be personally liable at the suit of a taxpayer, such members will not be liable where the object is within the jurisdiction, but there has been a mistake in the exercise of legal power (Paxton *v.* Baum, 59 Miss. 531), or if the appropriation was made under an honest although mistaken belief that the facts justified it (Paxton *v.* Arthur, 60 Miss. 832).

8. Grant *v.* Lindsay, 11 Heisk. (Tenn.) 651.

9. *Missouri.*—Sparks *v.* Purdy, 11 Mo. 219.

New York.— Morris *v.* People, 3 Den. 381; Caswell *v.* Allen, 7 Johns. 63.

North Carolina.— Bray *v.* Barnard, 109 N. C. 44, 13 S. E. 729.

Texas.— Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

United States.— Amy *v.* Barkholder, 11 Wall. 136, 20 L. ed. 101; Newark Sav. Inst. *v.* Panhorst, 18 Fed. Cas. No. 10,142, 7 Biss. 99.

See 13 Cent. Dig. tit. "Counties," § 83.

Action for refusal of just claim.— Under Miss. Rev. Code, p. 419, art. 34, authorizing any person having a just claim against the county, which the board of police refuses to allow to bring suit against the board, it is questionable whether a demand is contemplated against the county for unliquidated damages founded on a tort. Sutton *v.* Carroll County, 41 Miss. 236.

Expulsion of a person from public buildings under the charge of county judges, by such judges, is ministerial and not judicial, and therefore the judges are not exempt from liability in the case of illegal expulsion. Sparks *v.* Purdy, 11 Mo. 219.

Liability for costs improperly paid.— County commissioners are personally liable for costs paid by their direction before the county has become legally fixed for the payment. Lycoming County Com'rs *v.* Lycoming County, 46 Pa. St. 496. See also County *v.* Myers, 3 Lanc. L. Rev. 297.

10. Amy *v.* Barkholder, 11 Wall. (U. S.) 136, 20 L. ed. 101.

Mistake as to duty and honest intention will not excuse the offender. Avery *v.* Pima County, (Ariz. 1900) 60 Pac. 702; Amy *v.* Barkholder, 78 U. S. 136, 20 L. ed. 101.

11. Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

12. Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410 [*approved* in Held *v.* Bagwell, 58 Iowa 139, 12 N. W. 226], where it was held that the duty of a board of supervisors to approve a county treasurer's bond is a public one, for negligence in discharging which a surety on the bond can claim no special damage, even when rendered liable by the treasurer's defalcation.

13. Cawley *v.* People, 95 Ill. 249.

14. Hite *v.* Goodman, 21 N. C. 364; Huthsing *v.* Bousquet, 7 Fed. 833, 3 McCrary 569.

board to recover illegal claims alleged to have been unlawfully allowed, the complaint must aver the nature of such claims in order that it may be determined whether the acts complained of are illegal.[15] The highest damages which will be allowed in the United States courts against county supervisors for non-performance of a duty to put a judgment on a tax-list, even though a mandamus shall have issued from such court, will not exceed an amount sufficient to cover fees and costs.[16]

13. Criminal Responsibility of Members — a. In General. In many of the states misconduct or malfeasance of the members of a county board or court in their official acts is by statute made an offense punishable on indictment or information;[17] and in some jurisdictions they may be indicted for wilful neglect in the discharge of their official duties.[18]

15. Hedges *v.* Dam, 72 Cal. 520, 14 Pac. 133, holding that a mere allegation that the members of a board "misappropriated, wrongfully, unlawfully and illegally allowed and paid out, large sums of money," and that the demands "were wrongfully, unlawfully and without authority of law allowed and ordered paid," states merely a legal conclusion and is insufficient as an allegation of a cause of action.

Failure to exercise authority.— Where a statute does not make it the imperative duty of the board of county commissioners to bring suit on the official bonds of officers, but provides that they may do so, it is left to their sound discretion whether they will bring such suit or not, and a plaintiff claiming under such statutory provisions should at least allege facts showing that the board negligently failed or wilfully refused to exercise their authority and the members had neglected to perform their duties as required by law. Bray *v.* Barnard, 109 N. C. 44, 13 S. E. 729.

Findings.— In an action against members of a county board for damages caused by the erection of a dam, the unlawful contract for which was let by such board, a finding that a certain defendant was a member of the board and took part in "the proceeding" under which the unlawful contract was awarded will not justify a judgment against him, since it does not necessarily follow therefrom that he favored the contract. Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613.

16. Newark Sav. Inst. *v.* Panhorst, 7 Fed. 833, 2 McCrary 152.

17. *Indiana.*— State *v.* Robertson, 23 Ind. App. 424, 55 N. E. 491; State *v.* Trueblood, 23 Ind. App. 31, 54 N. E. 822, 25 Ind. App. 437, 57 N. E. 975.

Iowa.— State *v.* Conlee, 25 Iowa 237.

Kansas.— State *v.* Pierce, 52 Kan. 521, 35 Pac. 19; State *v.* Corning, 44 Kan. 442, 24 Pac. 966; State *v.* Spidle, 44 Kan. 439, 24 Pac. 965; State *v.* Kimball, 43 Kan. 337, 23 Pac. 482; State *v.* Scates, 43 Kan. 330, 23 Pac. 479.

Kentucky.— Com. *v.* South, 2 A. K. Marsh. 237; Com. *v.* Boyle County Fiscal Ct., 68 S. W. 116, 24 Ky. L. Rep. 234.

Missouri.— State *v.* Frazer, 57 Mo. 288; State *v.* Gilmore, 57 Mo. 280; State *v.* Pinger, 57 Mo. 243.

New Jersey.— State *v.* Halsted, 39 N. J. L. 402; State *v.* Crowley, 39 N. J. L. 264.

New York.— People *v.* Stocking, 50 Barb. 573, 32 How. Pr. 48.

Ohio.— Hatch *v.* St. Clair, 2 Ohio Cir. Ct. 163.

Pennsylvania.— Com. *v.* Hurd, 177 Pa. St. 481, 35 Atl. 682; Com. *v.* Rupp, 9 Watts 114; Com. *v.* Thum, 10 Serg. & R. 418; Respublica *v.* Meylin, 3 Yeates 1; Com. *v.* Rentz, 20 Pa. Co. Ct. 568; Kirkendall *v.* Luzerne County, 33 Leg. Int. 313.

Washington.— State *v.* Friars, 10 Wash. 348, 39 Pac. 104.

See 13 Cent. Dig. tit. "Counties," § 85.

For corruptly voting the allowance of an account presented against the county, as a county charge, a supervisor of a county may be indicted and punished. People *v.* Stocking, 50 Barb. (N. Y.) 573, 32 How. Pr. (N. Y.) 48.

Mistakes or errors of law made by the county board will not render them liable as for corrupt acts or subject them to forfeiture of office. State *v.* Kimball, 43 Kan. 337, 23 Pac. 482; State *v.* Scates, 43 Kan. 330, 23 Pac. 479. To the same effect see Hatch *v.* St. Clair, 2 Ohio Cir. Ct. 163.

Necessity for fraudulent motive.— N. C. Code (1892), § 1090, provides that if it shall be proved that any officer required to take the oath of office shall have violated his said oath "and wilfully and corruptly" have done anything contrary to the true intent and meaning thereof, he shall be guilty of a misdemeanor, the acts of county commissioners in auditing accounts for and receiving a greater amount of mileage than was due them was not a violation of this section, where it appeared that the money was not taken by the commissioners "with any fraudulent motive." State *v.* Norris, 111 N. C. 652, 16 S. E. 2.

In Texas there is no statute under which a county court can be indicted for unlawfully approving an account against the county as a criminal offense and by Paschal Dig. art. 1605, it is declared "that no person shall be punished for any act or omission as a penal offense, unless the same is expressly defined, and the penalty affixed by a written law of the state." State *v.* Kingsbury, 37 Tex. 159.

18. McDaniel *v.* State, 31 Ala. 390; State *v.* Sanders, 2 Ind. 578; Com. *v.* Boyle County Fiscal Ct., 68 S. W. 116, 24 Ky. L. Rep. 234; State *v.* Norris, 111 N. C. 652, 16 S. E. 2; State *v.* Lenoir County, 11 N. C. 194.

b. Indictment[19] — (I) *Description of Offense.* The indictment must describe the offense and the facts constituting it.[20] It will be sufficient to state the offense in such a manner as to enable a person of common understanding to know what is intended.[21]

(II) *Alleging Intent.* With regard to the necessity for averring intent in an indictment against members of county boards, it may be stated that the usual rule prevails that in all cases where a statute creates an offense and mentions some intent as an element therein, the indictment must follow the statute and specify the intent.[22] If, however, the statute is silent concerning the intent, it would seem that there need be no allegation of intent in the indictment.[23]

(III) *Alleging Time and Place.* In an indictment against members of a county board for misfeasance in office, not only the facts and circumstances, but also the time and place which rendered the act unlawful, should be set out.[24]

c. Evidence. In accordance with the general rule, in a criminal proceeding against county commissioners for misconduct in office, it is error to permit the introduction of evidence other than that in support of the charges made in the indictment,[25] and there must be no variance between the charge in the indictment and the proof offered.[26]

D. Officers and Agents — 1. Definition of County Officer. An officer of a

Defense that statutory limit of taxation has been reached.— Members of a county board of commissioners cannot be indicted for the failure to levy a tax for the purpose of building a jail where the highest county tax allowed by law has been levied and proves insufficient to pay for the erection of such jail, after defraying the ordinary expenses of the county. McDaniel *v.* State, 31 Ala. 390.

19. See, generally, Indictments and Informations.

An indictment charging commissioners with neglect to examine and report on the accounts of auditors as required by statute, it seems, should show the existence of circumstances which rendered it possible for them to perform the act, the omission of which is complained of, and therefore should show that the annual report was furnished them by the auditors as required by statute. State *v.* Sanders, 2 Ind. 578. And see Com. *v.* South, 2 A. K. Marsh. (Ky.) 237.

Mode of election.—In an indictment against county commissioners for misfeasance in office, it has been held in some jurisdictions that the mode of their election must be distinctly set out. Com. *v.* Rupp, 9 Watts (Pa.) 114.

20. State *v.* Lenoir County, 11 N. C. 194; Com. *v.* Rupp, 9 Watts (Pa.) 114.

Following the language of the statute is unnecessary. The use of equivalent language will be sufficient. State *v.* Conlee, 25 Iowa 237.

An indictment for neglect of duty must show what duties have been neglected. State *v.* Lenoir County, 11 N. C. 194.

Sufficient indictment for unlawfully obtaining money from the county.— An indictment which states that the defendant was an officer of the county of B, that is to say, a chosen freeholder for the township of W; that he, while he continued such officer, wilfully and unlawfully, did obtain from said board of chosen freeholders, that is to say, from the county of B, a certain sum of money not lawfully and justly due him at the time of obtaining the same, sufficiently describes the offense against the statute; it is not necessary to state the means and methods of obtaining such money; nor is such statement necessary for the just protection of the defendant. The wrong which is prohibited by the statute is obtaining money not due and owing; the means whereby a wrong-doer gets it is in no way material as an element in the statutory misdemeanor. State *v.* Crowley, 39 N. J. L. 264.

21. State *v.* Conlee, 25 Iowa 237.

22. State *v.* Halsted, 39 N. J. L. 402; State *v.* Norris, 111 N. C. 652, 16 S. E. 2; State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50.

Allegation of scienter insufficient.— An indictment against a county court of justices under the Missouri act of 1872 for the abuse of public trust in voting for a certain appropriation, which charged them, "well knowing that the appropriation and payment were illegal, etc.," is insufficient. A further averment is necessary to the effect that such officer was actuated by some dishonest or corrupt motive. State *v.* Pinger, 57 Mo. 243.

23. State *v.* Halsted, 39 N. J. L. 402.

Presumption as to intent.— Where an act is declared to be unlawful and is expressly made indictable, an evil intent will be presumed in its commission and need not be averred. State *v.* Halsted, 39 N. J. L. 402.

24. Com. *v.* Rupp, 9 Watts (Pa.) 114, where it is held that a special finding of facts by a traverse jury would not supply the want of form and substance in the indictment.

25. State *v.* Corning, 44 Kan. 442, 24 Pac. 966; State *v.* Spidle, 44 Kan. 439, 24 Pac. 965.

26. State *v.* Corning, 44 Kan. 442, 24 Pac. 966.

county is one by whom the county performs its usual political functions or government functions.[27]

2. Creation, Acquisition, and Tenure of Office — a. Creation, Existence, and Abolition of Offices — (i) *In General.* The power to create county offices, prescribe the duties, and fix the number thereof is as a general rule vested in the legislatures of the various states, and is to be exercised by them alone.[28] And county boards or courts have no power to create such offices,[29] unless there is special statutory authorization therefor;[30] and in any event they cannot exercise such power if there is a constitutional prohibition against it.[31] So also the legislature of a state may abolish or authorize the abolition of county offices not established by the constitution,[32] and the incumbent cannot retain his office for the balance of his term by virtue of a general statute providing that the repeal of a statute shall not affect any right which accrued under it, where the repealing statute provides that it shall go into effect on publication.[33]

(ii) *Providing For Election and Appointment of Officers.* The duty of providing for the election or appointment of all necessary county officers is as

27. Sheboygan County *v.* Parker, 3 Wall. (U. S.) 93, 18 L. ed. 33.

28. People *v.* Wheeler, 136 Cal. 652, 69 Pac. 435; San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797; Ventura County *v.* Clay, 112 Cal. 65, 44 Pac. 488; Farrell *v.* Sacramento, 85 Cal. 408, 24 Pac. 868; State *v.* Dickinson, 26 Mont. 391, 68 Pac. 468; Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

Act essential to creation of office.— The county government act of March 14, 1883, did not go into effect for the purpose of creating county offices until Jan. 1, 1885, and therefore prior to that date there was no such office as county assessor of Alameda county. Robinson *v.* Boardman, (Cal. 1885) 7 Pac. 264; Rosborough *v.* Boardman, 67 Cal. 116, 6 Pac. 449, 7 Pac. 261.

The appointment of a deputy for the clerk of the district court, *ex officio* auditor, recorder, and clerk of the board of commissioners is not the creation of an office, under Ida. Const. art. 18, § 6, authorizing "the auditor and recorder and clerk of the district court" to appoint such deputies and clerical assistants as may be required, and providing that "no other county officers shall be established." Dunbar *v.* Canyon County, 6 Ida. 725, 728, 59 Pac. 536.

29. Los Angeles County *v.* Lopez, 104 Cal. 257, 38 Pac. 42; El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716 [*disapproving* People *v.* Ferguson, 65 Cal. 288, 4 Pac. 4]; Robinson *v.* Sacramento, 16 Cal. 208; Meller *v.* Logan County, 4 Ida. 44, 35 Pac. 712; Ryan *v.* New York, 50 How. Pr. (N. Y.) 91.

30. People *v.* Gallup, 12 Abb. N. Cas. (N. Y.) 64, 65 How. Pr. (N. Y.) 108.

Power of board to limit number of superintendents of the poor.— By the N. Y. Sess. Laws (1847), c. 498, which is constitutional, the legislature provided that the boards of supervisors might limit the number of county superintendents of the poor to one, and that when no resolution to that effect was passed the number should be three. If therefore a board of supervisors pass a resolution, under this statute, declaring that thereafter there shall be but one superintendent of the poor for the county (there being three at the time), they have no power thereafter, by resolution or otherwise, to declare that thereafter there shall be three such superintendents elected for the county. They have power only to reduce the number, none to increase it after it is reduced. If under a resolution to restore the number from one to three an election is had, and three candidates are voted for, the election is void, because the resolution authorizing it is a nullity. People *v.* Ames, 19 How. Pr. (N. Y.) 551.

31. People *v.* Wheeler, 136 Cal. 652, 69 Pac. 435; Ventura County *v.* Clay, 112 Cal. 65, 44 Pac. 488; Meller *v.* Logan County, 4 Ida. 44, 35 Pac. 712. And see Farrell *v.* Sacramento, 85 Cal. 408, 24 Pac. 868.

32. State *v.* Harris, 1 N. D. 190, 45 N. W. 1101; Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

Abolition of a board terminates the office of clerk of the board. People *v.* Sutton, 9 N. Y. App. Div. 250, 41 N. Y. Suppl. 398.

Abolition of office of county auditor in counties of less than certain population.— After Kan. Laws (1891), c. 87, was passed and took effect there could be no such officer as county auditor in any county with less than forty-five thousand inhabitants, except in Leavenworth county. Lawson *v.* Reno County, 47 Kan. 271, 27 Pac. 998. See also as to the abolition of the office of county auditor in counties below the third class by the Montana act of March 18, 1895, State *v.* Dickinson, 26 Mont. 391, 68 Pac. 468.

Abolition and restoration of office by county justices.— The power conferred upon the board of justices of the peace by section 768 of the North Carolina code, in respect to the abolition and restoration of the office of county treasurer, may be exercised at any time and whenever in the discretion of the board it may be thought desirable. State *v.* Hampton, 101 N. C. 629, 8 S. E. 219.

33. Lawson *v.* Reno County, 47 Kan. 271, 27 Pac. 998.

a rule devolved upon the legislature of the state,[34] and this duty in some jurisdictions cannot because of constitutional prohibition be delegated to county boards.[35] Where, however, the office has been created and its term and the compensation thereof fixed the legislature may and often does delegate the power of filling the same by appointment to county tribunals.[36]

(III) *Power of Legislature as to Ex Officio Officers.* A state legislature may by law devolve the office and duties of a certain county office upon the incumbent of any other elective office, provided such law precedes the election of such officer.[37] So also it has the power to divest an officer of an *ex officio* office by a repeal of the law under which he became invested therewith, provided, when such office is created under the constitution, such repeal does not in effect abolish such office.[38]

b. Appointment or Election — (I) *Election.* The constitutions of some states require the legislature to provide for the election of county officers by the people of the respective counties,[39] but it has been held that such provisions do not apply

34. *California.*— People *v.* Wheeler, 136 Cal. 652, 69 Pac. 435; San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797; El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716; Welsh *v.* Bramlet, 98 Cal. 219, 33 Pac. 66; Ford *v.* Board of State Harbor Com'rs, 81 Cal. 278, 22 Pac. 19.

Indiana.— Jones *v.* Cavins, 4 Ind. 305.

Massachusetts.— Opinion of Justices, 3 Gray 601.

Montana.— State *v.* Dickinson, 26 Mont. 391, 68 Pac. 468.

Wyoming.— Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

Existence of office without duties.— In Jones *v.* Cavins, 4 Ind. 305, it was held that the office of county auditor may exist without any duties attached to it.

The legislature may change the duties of the incumbent of a non-constitutional office. Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

35. People *v.* Wheeler, 136 Cal. 652, 69 Pac. 435.

36. Bath County *v.* Daugherty, 68 S. W. 436, 24 Ky. L. Rep. 350.

37. People *v.* Kelsey, 34 Cal. 470; People *v.* Placer County, 17 Cal. 411; Huddleston *v.* Pearson, 6 Ind. 337.

Effect of constitutional provision as to ex officio offices.— In Vesey *v.* Hermann, 1 Nev. 36, under the laws of the territory as then existing, the county clerk was *ex officio* county auditor, and the plaintiff appellant claimed that by the adoption of the constitution he, as county recorder, became *ex officio* county auditor. It was held that the fact that a recorder was elected after the adoption of the constitution would not entitle him to the office of auditor when he was not elected by virtue of any law passed after its adoption.

38. People *v.* Kelsey, 34 Cal. 470.

Creation of office of recorder.— In State *v.* McDiarmid, 27 Ark. 176, it was held that it was competent for the legislature to repeal the Arkansas act of July 9, 1868, making the county clerks of the several counties *ex officio* recorders thereof and confer the duties of recorder upon another officer.

Repeal of act making judge of county court ex officio commissioner of revenue.— By the second section of the Alabama act of Jan. 27, 1845, "the laws now in force, requiring the Judge of the County Court of Mobile county, to perform any duties as commissioner of revenue, *ex officio*, or otherwise, be and the same are hereby repealed." Stickney *v.* Judge Mobile County Ct., 10 Ala. 35, 36, where it was held that since the passage of the act of Jan. 27, 1845, to organize a board of commissioners of roads and revenue for Mobile county, the judge of the county court has no power to appoint commissioners to examine the office of the county treasurer.

39. *California.*— People *v.* Wheeler, 136 Cal. 652, 69 Pac. 435. *Compare* Barton *v.* Kalloch, 56 Cal. 95.

Minnesota.— State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; Spencer *v.* Griffith, 74 Minn. 55, 76 N. W. 1018.

Nevada.— State *v.* Irwin, 5 Nev. 111.

Ohio.— State *v.* Halliday, 61 Ohio St. 171, 55 N. E. 175; State *v.* Kendle, 52 Ohio St. 346, 39 N. E. 947; State *v.* Brennan, 49 Ohio St. 33, 29 N. E. 593; State *v.* Staley, 5 Ohio Cir. Ct. 602; Wood County *v.* Pargillis, 6 Ohio Cir. Dec. 717; State *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 371.

Pennsylvania.— Porter *v.* Shields, 200 Pa. St. 241, 49 Atl. 785.

See 13 Cent. Dig. tit. "Counties," § 87.

Agents appointed by the legislature to take subscriptions and issue bonds are not county officers within the constitutional provisions. Sheboygan County *v.* Parker, 3 Wall. (U. S.) 93, 18 L. ed. 33.

Commissioners of jurors are not county officers within the meaning of the constitutional provisions under discussion, but are mere officers of the court as are jurors themselves. State *v.* Kendle, 52 Ohio St. 346, 39 N. E. 947.

In Wisconsin it is provided by the constitution that "all county officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties, or appointed by the Board of Supervisors, as the Legislature shall direct." Sheboygan County *v.* Parker, 3 Wall. (U. S.) 93, 18 L. ed. 33.

Legislative grant of power to hold election

to cases of emergency or special occasion, as the creation of a new office by the creation of a new county,[40] or prevent the legislature from authorizing appointment to fill vacancies in county offices temporarily.[41]

(II) *APPOINTMENT*— (A) *By County Board or Officer.* State legislatures are frequently authorized to and do confer the power of appointing certain county officers upon the county boards of commissioners or supervisors,[42] police boards,[43] courts,[44] or other county authorities.[45] So also the power to fill vacancies in county offices temporarily by appointment is frequently given to county boards.[46]

(B) *By Governor.* A state legislature may authorize the governor to appoint county officers for a newly created county to serve until the election and qualifi-

necessary.— The right to hold an election for county officers cannot exist or be exercised without an express grant of power by the legislature. Stone *v.* Reynolds, 7 Okla. 213, 54 Pac. 555; Brewer *v.* Davis, 9 Humphr. (Tenn.) 208, 49 Am. Dec. 706.

40. Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130; State *v.* Irwin, 5 Nev. 111.

The power to fill county offices provisionally by legislative appointment is a necessary incident of the legislative power to create new counties, although the constitution provides generally for the election or appointment of such officers otherwise than by the legislature. State *v.* Mayhew, 21 Mont. 93, 52 Pac. 981.

No application to office not existing at adoption of constitution.— In People *v.* Palmer, 52 N. Y. 83, it was held that although under N. Y. Const. art. 10, § 2, all county offices then in existence must be filled by the county authorities or by the electors, where the constitution does not provide otherwise, yet the legislature may appoint commissioners of records for a county, as that is a new office, and is not in any sense the same as the existing office of register.

41. Hedley *v.* Franklin County, 4 Blackf. (Ind.) 116.

42. *Indiana.*— State *v.* McFarland, 149 Ind. 266, 49 N. E. 5, 39 L. R. A. 282.

Kentucky.— Bath County *v.* Daugherty, 68 S. W. 436, 24 Ky. L. Rep. 350.

New York.— Dunphy *v.* New York, 8 Hun 479. And see People *v.* Gallup, 30 Hun 501.

Pennsylvania.— Kershner *v.* Stoltz, 1 Pa. Co. Ct. 72.

South Dakota.—Tillotson *v.* Potter County, 10 S. D. 60, 71 N. W. 754, 13 S. D. 460, 83 N. W. 623.

Washington.— Dillon *v.* Whatcom County, 12 Wash. 391, 41 Pac. 174.

Wyoming.— Laramie County *v.* Stone, 7 Wyo. 280, 51 Pac. 605.

See 13 Cent. Dig. tit. "Counties," § 88.

43. Ray *v.* Murdock, 36 Miss. 692.

44. State *v.* King, 20 N. C. 661; *Ex p.* Carey, 3 Leg. Gaz. (Pa.) 78, where it was held that the power to fill an office confers the right to inquire into the facts and cause of the vacancy, and, being satisfied that the office of county auditor was vacated by the acceptance by respondent of the office of controller of public schools, it was the plain duty of the court to fill it by appointment.

Vacancies in office of county clerk filled by county justices.— In State *v.* Campbell, 8 Lea (Tenn.) 74, it was held that the power to fill a vacancy in the office of county court clerk belongs to the justices of the county and not to the county judge.

45. People *v.* Oneida County, 170 N. Y. 105, 62 N. E. 1092.

Appointment by president pro tem of board. — In *In re* Carboy, 27 Hun (N. Y.) 82, it was held that the president *pro tempore* of a board of supervisors is a "county authority" within N. Y. Const. art. 10, § 2, giving the legislature power to confer upon "county authorities" the power to appoint certain county officers.

The jury commissioner of Kings county is a county officer, within the meaning of N. Y. Const. art. 10, § 2, prohibiting the appointment of county officers by other than the board of supervisors or other county authority; and N. Y. Laws (1901), c. 602, authorizing the appointment thereof by a justice of the supreme court is unconstitutional. Matter of Brenner, 67 N. Y. App. Div. 375, 73 N. Y. Suppl. 689 [*reversing* 35 Misc. 212, 70 N. Y. Suppl. 744].

46. *California.*— People *v.* Wells, 11 Cal. 329.

Colorado.— *In re* House Bill No. 38, 9 Colo. 631, 21 Pac. 474.

Indiana.— Hedley *v.* Franklin County, 4 Blackf. 116.

Kansas.— Rossel *v.* Greenwood County, 9 Kan. App. 638, 58 Pac. 1020.

Ohio.— State *v.* Brewster, 44 Ohio St. 589, 9 N. E. 849; State *v.* Hopkins, 10 Ohio St. 509; State *v.* Muskingum County, 7 Ohio St. 125; State *v.* Thompson, 9 Ohio Cir. Ct. 161; Robbins *v.* Preble County, 2 Ohio Cir. Ct. 23.

See 13 Cent. Dig. tit. "Counties," § 50 *et seq.*

Anticipation of future vacancy.— A board of supervisors cannot by its action either create a vacancy, nor by anticipation fill one which is to arise in future during the term of a newly elected board of supervisors, and the appointment of a district attorney by an outgoing board of supervisors to fill a vacancy in the office of district attorney before such vacancy arises is in excess of its power and void; and such vacancy is properly filled by a succeeding board of supervisors by another appointment made after the vacancy has arisen. People *v.* Ward, 107 Cal. 236, 40 Pac. 538.

cation of officers.[47] So also where a state passes from a government under military rule to a normal one under a written constitution, such constitution may[48] require the governor to appoint all county officers in the state within a certain period after the ratification of the constitution whose term of office shall continue until the legislature shall have provided by law for an election of such officers.[49] Another provision is to the effect that when any office shall become vacant the governor unless otherwise provided by law shall appoint a person to fill such vacancy until a successor has been duly elected or appointed and has qualified.[50]

(III) *Time of Election or Appointment.* The power to fix the times of holding such elections is usually vested by the constitution in the legislature of the state,[51] subject to limitations therein contained,[52] and where the time has been so fixed the provisions as to the time of election must be strictly complied with and elections held at any other than the prescribed time are unauthorized and void.[53] Where the power of appointing county officers is given to the county authorities, as for instance to the board, and the time of making such appointment is pre-

47. Territory *v.* Hand, 1 Dak. 437, 46 N. W. 685; Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130; Com. *v.* Fowler, 10 Mass. 290; Walsh *v.* Com., 89 Pa. St. 419, 33 Am. Rep. 771.

Appointment before act takes effect void.— In Com. *v.* Fowler, 10 Mass. 290, where the legislature had created a new county, and in the act had provided that it should not take effect until a future day mentioned, it was held that an appointment by the executive of the commonwealth to an office for such county before such day was void.

48. As in the case of Miss. Const. art. 12, § 6.

49. Newsom *v.* Cocke, 44 Miss. 352, 7 Am. Rep. 686.

50. Montgomery *v.* Little, 69 Ark. 392, 63 S. W. 993; State *v.* Heidorn, 74 Mo. 410.

Acts changing mode of appointment not retroactive.— The Louisiana act of March 9, 1874, repealing the statute providing for the appointment of district attorneys *pro tempore* for the parishes by the police juries, and providing for their appointment by the governor, cannot be construed so as to make it retroactive. It must be understood to apply to parishes where appointments to such offices had not been made by the police juries, or where vacancies existed. State *v.* Parlange, 26 La. Ann. 548.

51. State *v.* Dombaugh, 20 Ohio St. 167; State *v.* Wyman, 2 Pinn. (Wis.) 360, 2 Chandl. (Wis.) 5. In Com. *v.* Gaige, 1 C. Pl. (Pa.) 141, it was held that as the Pennsylvania constitution provides that the people shall have at least three months' notice of a vacancy to be filled before any election can take place, and as the county of Lackawanna was not organized till within three months of the general election of 1878, an election of county officers for that county could not take place in 1878, although it could have taken place if the county had been organized over three months before an election. In Staude *v.* Board of Election Com'rs, 61 Cal. 313, it was held that the provisions of the California act of March 7, 1881, known as the "Hartson Act," directing elections of city and county officers in the even numbered years, apply to San Francisco as well as to other cities and counties. An election of such officers therefore must be held in November, 1882, notwithstanding that the "consolidation act" provides for elections in San Francisco in the odd numbered years.

Need not fix same day for election of all county officers.— The Ohio Const. art. 10, § 2, providing that county officers shall be elected on the second Tuesday of October "until otherwise directed by law," does not require the legislature to fix the same day for the election of all county officers. State *v.* Brown, 6 Ohio Dec. (Reprint) 740, 7 Am. L. Rec. 652, 4 Cinc. L. Bul. 174.

Where a special election to fill vacancy is not authorized a vacancy in the office of county clerk cannot be supplied by election until the first general election after it occurs. State *v.* Pierpont, 29 Wis. 608.

Where no time is prescribed for an election by a law organizing a county, the officers should be elected at the regular election for choosing county officers in the state. State *v.* Saxton, 13 Wis. 168.

Construction of provisions as to time.— A law must be understood as beginning to speak at the moment it takes effect and not before. If passed to take effect at a future day it must be construed as if passed on that day and ordered to take immediate effect. Rice *v.* Ruddiman, 10 Mich. 125, where it was held that the act organizing the county of Muskegon, approved Feb. 4, 1859, not being ordered to take immediate effect, went into operation under the Michigan constitution, May 16, 1849. The act provided for an election of county officers "at the annual township meeting to be held in April next." This must be construed to mean the April next after the law took effect; and in the absence of proof to the contrary individuals acting as county officers in October, 1860, must be presumed to have been elected in April, 1860, and not in April, 1859.

52. State *v.* Fiala, 47 Mo. 310.

53. *Ex p.* Dodd, 11 Ark. 152; People *v.* Col, 132 Cal. 334, 64 Pac. 477; State *v.* Dombaugh, 20 Ohio St. 167.

scribed, the general rule has been applied that when time is prescribed to a public body in the exercise of a function in which the public is concerned the period designated is not of the essence of the authority but is a mere directory provision.[54]

c. Eligibility. In some states the constitution expressly provides that county officers shall actually reside in their respective counties.[55] In others they are required to be qualified electors.[56] So it is sometimes provided that no county officer shall be eligible to his office for more than two consecutive terms.[57] Statutes of this character have been held to be prospective and not retrospective.[58] A statutory provision for the appointment of persons in the place of those failing to qualify does not even by implication negative the authority of county commissioners to reappoint a person who may have failed to qualify under a previous appointment.[59]

d. Official Bonds — (i) *Necessity For.* It is a usual provision of the statutes of the various states that a county officer shall, within a time prescribed, file a bond for the faithful performance of the duties of his office;[60] but the county

54. People *v.* Murray, 15 Cal. 221. See also State *v.* Bosworth, 13 Vt. 402, where it was held that under an act requiring the appointment of a county officer at the first session after the first day of December, the appointment may be made at a term which commences in November, but continues into December.

55. Relender *v.* State, 149 Ind. 283, 49 N. E. 30; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Com. *v.* Blackwell, 97 Ky. 314, 30 S. W. 642, 17 Ky. L. Rep. 183.

The terms "inhabitant" and "citizen" are not synonymous, and one who is eligible to a county office because he is an inhabitant of said county as required by law need not necessarily be a citizen thereof. State *v.* Kilroy, 86 Ind. 118.

Vacation of office by enlistment see State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367.

56. Jeffries *v.* Harrington, 11 Colo. 191, 17 Pac. 505.

Where neither the constitution nor statutes require that county officers shall be voters of the county, any citizen of the state is eligible to a county office, although not a legal voter of the county where elected by reason of not having resided therein for the required time previous to the election. Steusoff *v.* State, 80 Tex. 428, 15 S. W. 1100, 12 L. R. A. 364.

Eligibility of females to appointment as deputies.— A constitutional provision that none but electors shall be chosen as county officers will not prevent the appointment of women as deputy county clerks. Jeffries *v.* Harrington, 11 Colo. 191, 17 Pac. 505; Wilson *v.* Genesee Cir. Judge, 87 Mich. 493, 49 N. W. 869, 24 Am. St. Rep. 173.

57. Davis *v.* Patten, 41 Kan. 480, 21 Pac. 677; Horton *v.* Watson, 23 Kan. 229; State *v.* Stein, 13 Nebr. 529, 14 N. W. 481; Smalley *v.* Snell, 6 Wash. 161, 32 Pac. 1062.

Effect of vacancy by change in terms of office see Horton *v.* Watson, 23 Kan. 229.

Effect of continuance in office of territorial officers.—A prosecuting attorney holding office under the provisions of Wash. Const. art. 27, § 6, which continues in office all territorial officers until suspended by authority of the state, does not fill a term in contemplation of article 11, section 7, of the constitution, which prohibits a county officer from holding more than two terms in succession. Smalley *v.* Snell, 6 Wash. 161, 32 Pac. 1062.

58. State *v.* Stein, 13 Nebr. 529, 14 N. W. 481.

59. Pumphrey *v.* State, 17 Md. 57.

60. *Alabama.*— *Ex p.* Plowman, 53 Ala. 440.

California.— Sacramento County *v.* Bird, 31 Cal. 67; People *v.* Marin County Sup'rs, 10 Cal. 344.

Dakota.— Clay County *v.* Simmonsen, 1 Dak. 403, 46 N. W. 592.

Florida.— State *v.* Saxon, 25 Fla. 792, 6 So. 858.

Georgia.— Foster *v.* Justices Cherokee County Inferior Ct., 9 Ga. 185.

Idaho.— People *v.* Slocum, 1 Ida. 62.

Illinois.— Cawley *v.* People, 95 Ill. 249.

Indiana.— State *v.* Blair, 32 Ind. 313.

Kansas.— State *v.* Matheny, 7 Kan. 327.

Maryland.— Davidson *v.* Brice, 91 Md. 681, 48 Atl. 52.

Minnesota.— State *v.* Ring, 29 Minn. 78, 11 N. W. 233; State *v.* Sanderson, 26 Minn. 333, 3 N. W. 984; McCormick *v.* Fitch, 14 Minn. 252.

Mississippi.— Taylor *v.* Arthur, 9 Sm. & M. 183.

Missouri.— State *v.* Churchill, 41 Mo. 41.

Nebraska.— State *v.* Sheldon, 10 Nebr. 452, 6 N. W. 757.

New York.— McRoberts *v.* Winant, 15 Abb. Pr. N. S. 210.

North Carolina.— People *v.* Latham, 81 N. C. 312.

Ohio.— State *v.* Hopkins, 10 Ohio St. 509.

Pennsylvania.— Com. *v.* Read, 2 Ashm. 261.

South Carolina.— *Ex p.* Charles, 48 S. C. 279, 26 S. E. 605.

Wisconsin.— State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137; Milwaukee County *v.* Pabst, 70 Wis. 352, 35 N. W. 337; State *v.* McCarty, 65 Wis. 163, 26 N. W. 609; Atty.-Gen. *v.* Elderkin, 5 Wis. 300.

may receive from one of its officers collaterals as additional security to the required bond.[61]

(II) *Requisites.* The bond should contain a penalty,[62] be executed by sufficient sureties,[63] and be duly signed and acknowledged.[64] Where proper in form and substance, signed and sealed by the officer and his sureties, and approved by the proper officer and filed in the office appointed by law, it is both executed and delivered.[65] Where the condition of the bond is in the language prescribed by statute it will be sufficient;[66] and although the form does not comply with the statutory requisites, it has been held sufficient if the bond is lawful in itself and intended to protect the public.[67]

(III) *Filing.* Although the time within which the bond of a county officer shall be filed is usually fixed by the statute requiring such bond,[68] yet the effect of the failure to file a sufficient bond within such time is not the same in all jurisdictions. Thus in some states the giving of a sufficient bond and security is made by statute a condition precedent to the officer entering upon the duties of his office, and not having done so he does not legally hold the office.[69] In other jurisdictions the failure to file a proper bond within the time prescribed vacates

Sec 13 Cent. Dig. tit. "Counties," § 92 *et seq.*

Bonds by agents appointed by board.— When county commissioners are authorized by law to appoint agents to keep a certain fund and loan it, official bonds given by such agents are valid. Kitchens *v.* Greene County Com'rs, 5 Ill. 485.

Bond valid although not required.— A bond given by the treasurer of a county for the faithful performance of his official duties to the board of supervisors of the county is valid, although the statute does not require a bond to be given in such a case. St. Joseph County *v.* Coffenbury, 1 Mich. 355.

In Iowa is has been held that the county board may take a promissory note in place of a bond. Sac County *v.* Hobbs, 72 Iowa 69, 33 N. W. 368.

61. Bay City State Bank *v.* Chapelle, 40 Mich. 447; Turner *v.* Clark County, 67 Mo. 243; Oconto County *v.* Hall, 42 Wis. 59.

62. *Ex p.* Plowman, 53 Ala. 440, holding that the officer whose duty it is to approve the bonds of county officers is by law the arbiter as to the amount of the penalty of such bonds; and that the recommendation of the grand jury in that respect, although valuable as information, cannot control the judgment of such approving officer.

63. By constitutional provisions in Arkansas the sureties on official bonds of county officers shall reside in counties where such officers reside. Hyner *v.* Dickinson, 32 Ark. 776.

A married woman cannot act as such surety. Hyner *v.* Dickinson, 32 Ark. 776.

64. Hyner *v.* Dickinson, 32 Ark. 776; State *v.* Blair, 32 Ind. 313.

Sufficient signature.— Where a statute provides that the bond of a certain county officer shall be signed and acknowledged by such treasurer and his sureties in the presence of the county commissioners, this does not require the actual writing of the names in their presence, and if a name has been previously signed the adoption of it as the party's signature is a sufficient signing. State *v.* Blair, 32 Ind. 313.

The signing of an official bond by additional sureties after it has been filed is not warranted by law. Delivery is an essential part in the execution of the bond and there could be no delivery after its filing. Hyner *v.* Dickinson, 32 Ark. 776.

65. Sacramento County *v.* Bird, 31 Cal. 67.

66. Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455.

Deputy's bond payable to treasurer.— In the absence of any statute directing a deputy county treasurer's bond to be made payable to the state, such a bond made payable to the county treasurer is good as between the parties thereto. Lucas *v.* Shepherd, 16 Ind. 368.

67. People *v.* Slocum, 1 Ida. 62; State *v.* Fredericks, 8 Iowa 553.

A bond which is more comprehensive than the law requires, inasmuch as the condition thereof is that the officer giving it shall impartially discharge all duties of the office, is a good statutory bond for so much as is prescribed by the statute and comprehended in the condition, even though it may be void for the residue. State *v.* Findley, 10 Ohio 51.

Sufficiency of bond of probate judge to secure performance of duties as treasurer.— Dak. Laws (1862), c. 23, § 23, provided that the judge of probate should before entering on the duties of his office give bond in the sum of four thousand dollars; and section 25 made him a county treasurer *ex officio*, but no provision required him to give bond as such, although the act relating to revenue made frequent reference to the county treasurer and his liability on his official bond. It was held that the bond required by section 22 secured the performance of his duties as treasurer. Clay County *v.* Simonson, 1 Dak. 403, 46 N. W. 592.

68. See *supra*, IV, D, 2, d, (I).

69. Foster *v.* Justices Cherokee County Inferior Ct., 9 Ga. 185.

the office.[70] In still other states it is held that the failure to give bond within the prescribed time is not of itself a forfeiture of office, but only a ground therefor,[71] and the subsequent approval of a bond filed at a later day is a waiver of the right to declare the office vacant.[72] Still another view entertained by the courts of some of the states is that statutory provisions requiring the giving of bonds within a prescribed time are merely directory,[73] and that the bond may be filed by the officer at any time before entering upon the duties of his office.[74]

(IV) *Requirement of Additional Security.* It is usually provided that all county officers who are compelled to give official bonds may be required, by the same authorities whose duty it is to take or approve such bonds, to give additional security or new bonds in their discretion whenever they deem it necessary,[75] and for a failure to comply therewith such authorities may declare a vacancy in office.[76] This power is usually vested in the county board,[77] but not always.[78] Where the statutes vest the boards with power to require new surety, they must exercise a sound and not an arbitrary discretion in determining the necessity for further security.[79]

70. State *v.* Matheny, 7 Kan. 327; State *v.* Hopkins, 10 Ohio St. 509; State *v.* McCarty, 65 Wis. 163, 26 N. W. 609.

Failure to file new bond in prescribed time. — Minn. Gen. Stat. (1878), c. 8, § 163, authorizes the county commissioners to require a new bond from the county treasurer when the sureties on the original bond are deemed insufficient, and section 164 provides that upon failure of the treasurer to give such bond within ten days his office shall be considered vacant and a new treasurer shall be appointed. State *v.* Sanderson, 26 Minn. 333, 3 N. W. 984.

And it has been held to be immaterial that the failure was occasioned by the neglect of the officer himself or by the act of God (State *v.* Hopkins, 10 Ohio St. 509), or that he received no notice of his election (Atty.-Gen. *v.* Elderkin, 5 Wis. 300).

71. State *v.* Saxon, 25 Fla. 792, 6 So. 858; Cawley *v.* People, 95 Ill. 249; State *v.* Sheldon, 10 Nebr. 452, 6 N. W. 757; People *v.* Latham, 81 N. C. 312.

Due notice of removal proceedings must be given the officer before he can be legally removed. State *v.* Sheldon, 10 Nebr. 452, 6 N. W. 757.

72. Cawley *v.* People, 95 Ill. 249.

Waiver of condition of appointment. — In State *v.* Ring, 29 Minn. 78, 11 N. W. 233, the appointment of a county treasurer by a resolution of county commissioners was "upon express condition" that he should give bond and qualify within two days. His bond was not presented to the board until three days afterward, but was then accepted and approved. It was held that this was a modification of the resolution and the appointment was valid.

73. State *v.* Churchill, 41 Mo. 41; McRoberts *v.* Winant, 15 Abb. Pr. N. S. (N. Y.) 210; Com. *v.* Read, 2 Ashm. (Pa.) 261.

Bond need not be filed in prescribed time if the county court accept and approve it when it is filed. State *v.* Churchill, 41 Mo. 41.

74. McRoberts *v.* Winant, 15 Abb. Pr. N. S. (N. Y.) 210.

75. *California.* — People *v.* Marin County Sup'rs, 10 Cal. 344.

Iowa. — Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

Kansas. — Neosho County *v.* Leahy, 24 Kan. 54.

Nebraska. — Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311.

North Carolina. — People *v.* Green, 75 N. C. 329.

South Carolina. — *Ex p.* Charles, 48 S. C. 279, 26 S. E. 605.

Wisconsin. — State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137; Milwaukee County *v.* Pabst, 45 Wis. 311.

See 13 Cent. Dig. tit. "Counties," § 95.

Thus an additional bond may be required, where the taxable property of a county is largely increased (Neosho County *v.* Leahy, 24 Kan. 54), or where a statute creates a special fund to be raised by the issue and sale of county bonds (Milwaukee County *v.* Pabst, 45 Wis. 311).

76. People *v.* Green, 75 N. C. 329; State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137. See also Clark *v.* People, 15 Ill. 213.

Application only to those actually in office see State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137.

In determining whether a county officer by failure to comply with the requisition of county supervisors to file a new bond vacates his office, the supervisors exercise powers of a judicial character. People *v.* Marin County Sup'rs, 10 Cal. 344.

77. See cases cited *supra*, note 75.

78. *In re* Wickersham, 6 Coldw. (Tenn.) 333, judge of the circuit court.

In Oregon a board of county commissioners is a tribunal of limited jurisdiction having no power to require a sheriff to execute a new bond, when the prior bond has become insufficient, or to declare his office vacant in case of a failure to file the new bond required. Ruckels *v.* State, 1 Oreg. 347.

79. People *v.* Marin County Sup'rs, 10 Cal. 344.

(v) *Approval of Bonds.* The statutes of the various states requiring bonds to be given by county officers also as a rule prescribe their approval by some specified authority, such as the county court[80] or the county board.[81] It has been held that a statute requiring a county officer to give bond on or before a certain day next after his election, and that his bond shall be approved by the county commissioners, confers a power on such commissioners to approve of the bond before or at the first session thereafter.[82] County commissioners are impliedly at least required to act with reasonable promptness in passing upon the sufficiency of the sureties to the official bond of a county officer, when properly applied to for that purpose, and on their refusal so to do they may be compelled by mandamus to either approve or disapprove of the sufficiency of the sureties.[83] It seems that the officer or board upon whom the power is conferred to approve the bonds of county officers in exercising such power acts judicially.[84]

(vi) *Discharge or Release of Sureties.* The sureties on the official bond of a county officer can be discharged from further obligation on the same only upon proceedings had before the board or officer which at the time of the

An order requiring a new bond is fatally defective, unless it specifies the ground upon which it is made. So held in People *v.* Marin County Sup'rs, 10 Cal. 344.

80. *Ex p.* Talbot, 32 Ark. 424; State *v.* Lafayette County Ct., 41 Mo. 221.

Duty of county judge where affidavit is insufficient.— A county judge to whom is presented for approval during the vacation of the circuit court the official bond of the county treasurer should see that the affidavits of the bondsmen comply with the statutory requirements, and in case of their insufficiency should require affidavits complying therewith to be furnished, and should not reject the bond if it appears sufficient in all other respects. Hyner *v.* Dickinson, 32 Ark. 770.

81. *California.*— People *v.* Evans, 29 Cal. 429; Miller *v.* Sacramento County, 25 Cal. 93; People *v.* Breyfogle, 17 Cal. 504.

Colorado.— People *v.* Brown, 23 Colo. 425, 48 Pac. 661.

Indiana.— Sullivan *v.* State, 121 Ind. 342, 23 N. E. 150; Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430; Ham *v.* State, 7 Blackf. 314.

Iowa.— Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768; Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; Wasson *v.* Mitchell, 18 Iowa 153.

Ohio.— State *v.* Belmont County Com'rs, 31 Ohio St. 451; State *v.* Tool, 4 Ohio St. 553.

Wisconsin.— State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137 [*following* State *v.* Dahl, 65 Wis. 510, 27 N. W. 343].

See 13 Cent. Dig. tit. "Counties," § 94.

Approval of a bond carries with it approval as to the penalty, the form, and the sufficiency of the sureties. People *v.* Breyfogle, 17 Cal. 504.

Approval directory.— It has been held in Iowa that a statute requiring such approval is merely directory. Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229. See also Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768, holding that want of approval by the board does not render the bond invalid.

82. **Time of approval.**— Ham *v.* State, 7 Blackf. (Ind.) 314. In State *v.* Tool, 4 Ohio St. 553, the treasurer elect on the last day prescribed by statute executed a bond with proper securities and delivered the same to the county commissioners who on the day following at a regular session approved it, and the treasurer elect immediately took the necessary oath and had the same indorsed on the bond. It was held that he thereby became the legal treasurer of the county.

83. State *v.* Belmont County Com'rs, 31 Ohio St. 451.

The fact that a defeated party is proceeding in good faith to obtain a reversal of a decision on error constitutes no valid excuse for declining to act on the sufficiency of sureties to the official bond of the successful party who has received his commission for the office. State *v.* Belmont County Com'rs, 31 Ohio St. 451.

The wilful or unjust refusal of an officer or officers required to approve the official bond of a county officer to give such approval cannot deprive such person of his office or create a vacancy therein. State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137 [*following* State *v.* Dahl, 65 Wis. 510, 27 N. W. 343].

84. Miller *v.* Sacramento County, 25 Cal. 93. *Contra,* State *v.* Lafayette County, 41 Mo. 221.

Such officer or board has, however, no jurisdiction to reject an official bond except for the reason that it is not in form and substance in compliance with the requirements of the statute or is not executed by sufficient and responsible sureties, and the supreme court will review on certiorari and annul an order of a board rejecting a bond for any other than one or more of said reasons. Miller *v.* Sacramento County, 25 Cal. 93.

Duties of approving tribunal.— In reference to bonds of treasurer, it is the duty of the board of commissioners, before accepting or approving them, to ascertain that the sureties possess the qualifications required by law, that the bonds were duly executed, and that the sureties are in the aggregate worth

discharge has the power to approve of the official bonds of such officer.[85] While sureties may be discharged from future liability they cannot be discharged from past liability.[86]

e. Commission and Oath. As in the case of public officers generally county officers must be duly commissioned by the proper authorities.[87] And in addition to giving bonds county officers are also required to take the oath of office.[88]

f. Tenure and Holding Over — (I) *Generally as to Terms.* In the case of county offices if the constitution fails to provide for the term of office the legislature has power to provide for the commencement[89] and for the duration and ending of the terms of such offices.[90]

(II) *Power of Legislature to Alter Terms of Office.* Where the constitution fixes the term of office, the legislature has no power to alter it either by way of abridgment or extension.[91] In the absence of constitutional restric-

enough to make the bond sufficient in that respect. Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430.

85. People *v.* Evans, 29 Cal. 429.

Bond approved by wrong authority.— The sureties on the official bond of county officers are liable under the statute, notwithstanding such bond was approved by the wrong officer or board. People *v.* Evans, 29 Cal. 429.

86. *Ex p.* Talbot, 32 Ark. 424.

87. Adams *v.* Harper, 20 Mo. App. 684.

As to commissions of public officers generally see OFFICERS.

Effect of issuance pending contest.—A commission issued to a county officer pending a contest of his election is irregular but not void, and its operative power is suspended during the pendency of the contest, but if it is decided in his favor then the commission takes effect and no second commission is necessary. Luzerne County *v.* Trimmer, 95 Pa. St. 97.

88. State *v.* Tool, 4 Ohio St. 553; Riddle *v.* Bedford County, 7 Serg. & R. (Pa.) 386; State *v.* McCarty, 65 Wis. 163, 26 N. W. 609.

A form of oath which is in violation of the bill of rights cannot be prescribed by the legislature. Davidson *v.* Brice, 91 Md. 681, 48 Atl. 52.

89. *In re* House Bill No. 38, 9 Colo. 631, 21 Pac. 474; State *v.* Harris, 152 Ind. 699, 52 N. E. 168; Scott *v.* State, 151 Ind. 556, 52 N. E. 163.

Effect of change of time by statute.— Where an act changes the time for the commencement of the term of office of county treasurers, a vacancy is created upon the expiration of the terms of the then incumbents, extending from the date of such expiration to the commencement of the term as fixed by the new law, which vacancy the county commissioners have power to fill under Colo. Const. art. 14, § 9. *In re* House Bill No. 38, 9 Colo. 631, 21 Pac. 474.

Under Wash. Const. art. 6, § 8, and under section 14 of the schedule to that instrument, the term of office for county officers is fixed at two years, commencing on the second Monday of January next succeeding their election, and prior statutory provisions on the subject are thereby abrogated. McMurray *v.* Hollis, 5 Wash. 458, 32 Pac. 293.

90. People *v.* Perry, 79 Cal. 105, 21 Pac. 423.

Duration as governed by general law after first election.— In People *v.* Colton, 6 Cal. 84, it was held that where the California act organizing a county provides for the term of office of the officers first elected, but makes no provision as to their successors, the duration of the term of the latter is governed by the general law.

Terms of officers elected at special election. — An act organizing a new county, fixing a special day for the first election of county officers, and providing that they shall hold office for two years, and until their successors are elected and qualified, must be construed in connection with the general law requiring such officers to be elected on the same day throughout the state. People *v.* Church, 6 Cal. 76. In the Missouri act of 1849, organizing McDonald county, which provided for the immediate election of county officers "to serve until the general election," the words "general election" refer to the next general election for officers throughout the state, in August, 1850, and not to the several elections of the same county officers in other counties of the state. State *v.* King, 17 Mo. 511. In Wheeler *v.* State, 32 Nebr. 472, 49 N. W. 442, it was held that where a new county is created the county commissioners elected at the election ordered by the governor for the organization of the county merely continue in office until the next general election for such officers and until their successors are elected and qualified. In Wright *v.* Adams, 45 Tex. 134, it was held that the legislature under Tex. Const. art. 5, § 19, is authorized, in the organization of such new counties, to provide for the election of justices of the peace therein, who should only hold their offices until the next general election, as if such newly elected officers were elected to fill vacancies. See also State *v.* Cook, 78 Tex. 406, 14 S. W. 996.

91. *California.*— People *v.* Perry, 79 Cal. 105, 21 Pac. 423; Treadwell *v.* Yolo County, 62 Cal. 563.

Colorado.— *In re* House Bill No. 38, 9 Colo. 631, 21 Pac. 474.

Illinois.— People *v.* La Salle County, 100 Ill. 495.

Indiana.— Pursel *v.* State, 111 Ind. 519, 12

tions, however, the legislature or those to whom it has delegated its power may change the terms of office of county officers;[92] but statutes making such changes are entirely prospective in their operation and will have no effect upon the incumbent of the office at the time unless such intention is evident.[93]

(III) *Holding Over Until Qualification of Successor.* As a general rule county officers hold their offices not only for the usual term of such offices but also, in the absence of constitutional or statutory prohibition, express or implied, until their successors are chosen and have qualified,[94] except where the

N. E. 1003; Griebel *v.* State, 111 Ind. 369, 12 N. E. 700.

Kentucky.— Offutt *v.* Com., 10 Bush 212.

Missouri.— State *v.* McGovney, 92 Mo. 428, 3 S. W. 867.

Ohio.— State *v.* Brewster, 44 Ohio St. 589, 9 N. E. 849.

See 13 Cent. Dig. tit. "Counties," § 97.

Extension under constitutional amendment. — A county treasurer who was elected at the general election held in November, 1879, continued to hold the office until the 27th day of February, 1881, at which time he died. Under the constitution and law in force at the time of his election, the term for which he was elected would have expired on the first Monday of December, 1881. But the amendment of 1880 of section 8 of article 10 of the constitution of 1870, with the legislation in pursuance thereof, operated to extend the terms of office of the then present incumbents of the office of county treasurer, and of certain other county offices, until the first Monday of December, 1882. So the unexpired part of the term in this case was more than one year, and it was directed that a special election be ordered to fill the vacancy, it not being competent for it to be filled by appointment except when the unexpired portion of the term is less than one year. People *v.* Kingsbury, 100 Ill. 509. See also to same effect People *v.* La Salle County, 100 Ill. 495.

92. Taft *v.* Adams, 3 Gray (Mass.) 126. *Compare* Bartch *v.* Meloy, 8 Utah, 424, 32 Pac. 694, where it was held that a clause of an act which by general words repeals all acts and parts of acts in so far as they provide for holding county elections for certain offices or fix the tenure of such offices otherwise than as in the said act stated repeals the former act or acts in regard to elections, being wholly inconsistent therewith.

93. Farrell *v.* Pingree, 5 Utah 443, 16 Pac. 843.

94. *California.*— People *v.* Col, 132 Cal. 334, 64 Pac. 477; Dillon *v.* Bicknell, 116 Cal. 111, 47 Pac. 937; Treadwell *v.* Yolo County, 62 Cal. 563.

Indiana.— Aikman *v.* State, 152 Ind. 567, 53 N. E. 836; Weaver *v.* State, 152 Ind. 479, 53 N. E. 450; Scott *v.* State, 151 Ind. 566, 52 N. E. 163; Smith *v.* State, 2 Ind. 432; Ham *v.* State, 7 Blackf. 314.

Kansas.— State *v.* Foster, 36 Kan. 504, 13 Pac. 841; State *v.* Hodgeman County, 23 Kan. 264; Hagerty *v.* Arnold, 13 Kan. 367.

Maryland.— Davidson *v.* Brice, 91 Md. 681, 48 Atl. 52.

Michigan.— Lawrence *v.* Hanley, 84 Mich. 399, 47 N. W. 753.

Nebraska.— Wheeler *v.* State, 32 Nebr. 472, 49 N. W. 442; State *v.* Field, 26 Nebr. 393, 41 N. W. 988.

Nevada.— Cordiell *v.* Frizell, 1 Nev. 130.

Pennsylvania.— Com. *v.* Troxell, 4 Pa. Co. Ct. 449.

Texas.— State *v.* Cook, 78 Tex. 406, 14 S. W. 996.

Utah.— Farrel *v.* Pingree, 5 Utah 443, 16 Pac. 843.

United States.— Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991.

See 13 Cent. Dig. tit. "Counties," § 97.

Applies only to regular term.— A provision that "all county officers shall hold their offices for the term of two years, and until their successors shall be qualified," applies only to the regular term of the office, and not to vacancies or exceptional cases. Hagerty *v.* Arnold, 13 Kan. 367.

Holding over for indefinite time.—A county treasurer being elected for three years, and until his successor is elected and qualified, may hold over for an indefinite period, if no successor be elected and qualified. State *v.* Spears, 1 Ind. 515.

In a newly organized county the county officers elected at the first election will hold their offices only until the next general election to be held thereafter, and until their successors shall be elected and qualified, although such first election may be held on the same day on which the general election in the state is held. Killion *v.* Herman, 43 Kan. 37, 22 Pac. 1026. Minn. Const. art. 4, § 4, requires county officers ordinarily to be elected by the people, and the legislature cannot provide for passing by a general election, and allowing appointed officers to hold over to the next succeeding election, unless there is some substantial reason therefor. But when a sparsely settled, unorganized county is first organized there may be such a reason in the fact that it will take nearly all of that time to organize the county government and get it into fair working order. Spencer *v.* Griffith, 74 Minn. 55, 76 N. W. 1018.

Effect of failure of reëlected officer to qualify.— In Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370, it was held that where a treasurer was reëlected and continued in office during the second term without being qualified he did not legally hold over after the expiration of the time fixed for qualification but remained treasurer *de facto* only.

Qualification of incumbent upon ineligibil-

incumbent of the office has served the full period of years for which he is eligible under the constitution.[95]

(IV) *Completion of Unexpired Terms.* As a general rule county officers chosen either by election or appointment to fill a vacancy in a county office which is elective hold only for the unexpired term,[96] and until the next general election for such office;[97] but if the person appointed to fill the unexpired term has already been elected for the succeeding term he holds office for the unexpired term and the succeeding term also.[98] So where subsequent to the extension by special act of the term of a person elected to office he resigns, another who is appointed to fill the office holds for the balance of the term as extended.[99]

(V) *Interpretation of Provisions as to Duration of Term.* When the duration or term of an elective county office is a question of doubt or uncertainty that interpretation should be followed which limits such office to the shortest time.[1]

g. Abandonment of Office — (I) *In General.* The acceptance by a county officer of another office incompatible therewith operates as an abandonment of the county office.[2] And so under some statutes does a refusal to perform the duties of the office.[3] Where a county officer violates a provision prohibiting his absence

ity of successor elect.— Under Nebr. Comp. Stat. c. 10, § 17, and c. 26, § 101, a county board is not authorized to declare vacant a county office, and make an appointment to fill such vacancy, because an officer elect is ineligible; but the incumbent of such office may qualify within ten days after it is ascertained that his successor elect is ineligible, and on qualifying as provided by law may hold over until a successor is elected and has qualified. Richards *v.* McMillin, 36 Nebr. 352, 54 N. W. 566.

95. Aikman *v.* State, 152 Ind. 567, 53 N. E. 836; Gosman *v.* State, 106 Ind. 203, 6 N. E. 349, where it was held that where one has held by election the office of clerk of the circuit court for eight years consecutively, he cannot, under the state constitution, hold over upon the death, without qualifying, of the person elected to succeed him, but upon the expiration of such period a vacancy arises which the board of commissioners may fill by appointment.

96. *California.*— People *v.* Col, 132 Cal. 334, 64 Pac. 477.

Indiana.— Beale *v.* State, 49 Ind. 41; Douglass *v.* State, 31 Ind. 429.

Kansas.— State *v.* Foster, 36 Kan. 504, 13 Pac. 841; Bond *v.* White, 8 Kan. 333.

North Carolina.— State *v.* McKee, 65 N. C. 257.

Ohio.— State *v.* Muskingum County, 7 Ohio St. 125.

See 13 Cent. Dig. tit. "Counties," § 98.

Effect of failure to elect at subsequent election.— In Atty.-Gen. *v.* Trombly, 89 Mich. 50, 50 N. W. 744, it was held that where a person was appointed by the governor to fill a vacancy in a county office, the failure of the electors of the county to elect for such office at subsequent elections did not confirm such appointment for the unexpired term.

Extension of term into that of successor.— An appointment by the commissioners' court of Randolph county, after the passage of the act of Jan. 15, 1852, and before the passage of the subsequent act of the same session suspending the operation of the former act (Ala. Acts (1851–1852), p. 477), could not confer on the person appointed a right to hold the office of county treasurer beyond the next general election; and the fact that his immediate successor, elected in August, 1854, allowed him to retain the office until the expiration of three years from the time of his appointment does not confer on the latter the right to extend his term or office an equal length of time into the term of his successor. Taylor *v.* State, 31 Ala. 383.

97. Taylor *v.* State, 31 Ala. 383; People *v.* Col, 132 Cal. 334, 64 Pac. 477. See also Walsh *v.* Com., 1 Lack. Leg. Rec. (Pa.) 283.

98. State *v.* Long, 91 Ind. 351.

99. People *v.* Wells, 11 Cal. 329.

1. Wright *v.* Adams, 45 Tex. 134.

Where a county officer has himself construed the provisions as to the term of an office, by taking possession at a certain time and holding possession for the full time prescribed by law, he is estopped thereby as against his properly elected and duly qualified successor from denying that his term has expired. Boyles *v.* State, 112 Ind. 147, 13 N. E. 415; Pursel *v.* State, 111 Ind. 519, 12 N. E. 1003; Griebel *v.* State, 111 Ind. 369, 12 N. E. 700.

2. Beazely *v.* Stinson, Dall. (Tex.) 537.

The election of a county officer as controller of public schools and his induction to such office works an abandonment of his office of county auditor, even though he may have resigned the former office. *Ex p.* Cary, 3 Leg. Gaz. (Pa.) 78.

3. Under statutes authorizing the appointment of commissioners for certain purposes, and providing that when any commissioner shall refuse to perform any of the duties imposed by such statute his office shall become vacant, and upon proof the county judge shall appoint another to fill his place, the county court is the proper tribunal to determine whether the commissioner has refused to perform the duties of his office. People *v.* Eddy, 57 Barb. (N. Y.) 593.

from the state for longer than a designated period and for no period without the consent of the board, his absence *ipso facto* creates a vacation and that too, although it was rendered necessary by ill health.[4] A statute providing for the filling of an office by appointment which has become vacant, by death, resignation, removal, or otherwise does not authorize the county court to declare vacant the office of one temporarily absent because of sickness.[5]

(II) *By Removal From County.* It is the usual rule that where a county officer removes from and ceases to reside in the county, he thereby abandons his office, and it may properly be declared vacant.[6] When so abandoned the officer cannot afterward resume such office.[7]

h. Removal and Suspension — (I) *Power of Legislature to Provide For.* Whenever the constitution has created an office and fixed its terms, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or suspend him from office for any other reason or by any other mode than the constitution itself has furnished;[8] but a county officer not being a state officer liable to impeachment, if the constitution is silent as to the cause and manner of his removal or suspension from office, the legislature has plenary power and can determine and provide what shall be causes for and the mode of removal or suspension from office,[9] and when they do so determine their commands must be enforced.[10]

(II) *In Whom Authority Vested* — (A) *Power of Removal as Incident to Power of Appointment.* Where the power of appointment of county officers or agents is conferred in general terms without restriction, the power of removal in the discretion and at the will of the appointing power is implied and always exists unless restrained and limited by some provision of the law.[11] This rule, however, applies only where the tenure is not fixed by law and the office is held at the pleasure of the appointing power.[12]

4. People *v.* Shorb, 100 Cal. 537, 35 Pac. 163, 38 Am. St. Rep. 310.

5. State *v.* Baird, 47 Mo. 301.

Temporary insanity of a county officer, not shown to be incurable, will not authorize the permanent appointment of another person in his place. State *v.* Pidgeon, 8 Blackf. (Ind.) 132, where it was further held that an appointment in such case only during the insanity of the officer (supposing such appointment can be made) will cease on his recovery.

6. *California.*— People *v.* Shorb, 100 Cal. 537, 35 Pac. 163, 33 Am. St. Rep. 310.

Georgia.— Jones *v.* Collier, 65 Ga. 553.

Illinois.— Clark *v.* People, 15 Ill. 213.

Indiana.— Relender *v.* State, 149 Ind. 283, 49 N. E. 30; Yonkey *v.* State, 27 Ind. 236; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Mehringer *v.* State, 20 Ind. 103.

Texas.— Ehlinger *v.* Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240.

See 13 Cent. Dig. tit. "Counties," § 99.

A county officer who absconds from the state and is a fugitive from justice abandons his office. Washington County Sup'rs *v.* Selma, 41 Wis. 374.

A county officer who enlists in the United States army for a period of three years and goes to the front without appointing a deputy thereby abandons the office, and it is properly declared vacant. State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367. See also Megringer *v.* State, 20 Ind. 103.

Mere temporary absence from the county, however, is not such a change of residence as to forfeit an office. Yonkey *v.* State, 27 Ind. 236.

Self-executing provision.— A constitutional provision that county officers shall reside within their districts or counties and that non-compliance therewith shall vacate the office is self-executing and requires no legislative action to put it in force. Ehlinger *v.* Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240.

7. Yonkey *v.* State, 27 Ind. 236.

8. Lowe *v.* Com., 3 Metc. (Ky.) 237 [*followed* in Brown *v.* Grover, 6 Bush (Ky.) 1].

9. *Ex p.* Wiley, 54 Ala. 226.

10. *Ex p.* Wiley, 54 Ala. 226.

11. Campbell County *v.* Trapp, 67 S. W. 369, 23 Ky. L. Rep. 2356; Johnson *v.* Cavanah, 54 S. W. 853, 21 Ky. L. Rep. 1246; Johnson *v.* Ginn, 105 Ky. 654, 49 S. W. 470, 20 Ky. L. Rep. 1475; Newsom *v.* Cocke, 44 Miss. 352, 7 Am. Rep. 686.

Removal by parish police jury.— A parish police jury has the power to remove a treasurer appointed by it, and this right is not in conflict with the constitutional provisions relating to certain parish and municipal officers elected by the people or appointed by the executive. Richard *v.* Rousseau, 35 La. Ann. 933.

12. Collins *v.* Tracy, 36 Tex. 546, holding that under the act of June 28, 1870, authorizing the governor to appoint county treasurers to hold office until the next general

(B) *Courts or Boards Vested With Power.* In a number of jurisdictions power of removal is expressly given to county boards or county courts.[13]

(III) *GROUNDS.* The grounds upon which a county officer may be removed are fixed by statute and are not altogether uniform in the various states. The grounds usually designated, however, are nonfeasance or misfeasance and official misconduct or wilful maladministration in office.[14] Within the general descriptions the following have been held grounds for removal: Demand of illegal fees;[15] allowing the abstraction of ballots committed to the care of the officer;[16] wrongful removal by officer of the government quarter-section stones;[17] neglect to make returns or pay over money;[18] a deficiency found in the county funds by the examiners;[19] failure to file report and make a settlement as ordered by the board;[20] and failure to file a sufficient bond within the time allowed by law.[21] Where, as is the case in some states, power is given to county supervisors to remove from office for incompetency, improper conduct, or other cause satisfactory to the board, "other cause" must be construed to mean other kindred causes.[22] A county clerk not being responsible for the action of the county board, the fact that he signs an order upon a claim allowed by the board upon the acceptance of a written contract on file with the clerk without any special account or voucher being filed as prescribed by law, is not sufficient ground to forfeit his office or remove him in the absence of any testimony showing corruption on his part or any benefit thereby.[23]

(IV) *PROCEEDINGS FOR REMOVAL.* The supreme court can by mandamus compel a board of county supervisors to act upon a complaint against the county officers, but it can in no way control the judgment or legal discretion of such board.[24] A county board in proceedings to remove a county officer does not act

election, or until otherwise provided by law, an appointee to such office acquires the vested right and is not removable except for cause amounting to a forfeiture of his office.

13. *Illinois.*— Donahue *v.* Will County, 100 Ill. 94; Clark *v.* People, 15 Ill. 213; *Ex p.* Thatcher, 7 Ill. 167; Randolph *v.* Pope County, 19 Ill. App. 100.

Kansas.— Loper *v.* State, 48 Kan. 540, 29 Pac. 687; State *v.* Majors, 16 Kan. 440.

Montana.— Carland *v.* Custer County, 5 Mont. 579, 6 Pac. 24.

Nebraska.— State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587.

Ohio.— State *v.* Hay, Wright 96.

Texas.— Saunders *v.* Wagener, 42 Tex. 562.

See 13 Cent. Dig. tit. "Counties," § 100.

In Louisiana it is provided by the constitution that for cause district attorneys, clerks of courts, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal, and ward officers, may be removed by the judgment of the district court of the domicile of such officers. Richard *v.* Rousseau, 35 La. Ann. 933.

Compensation.— Minn. Gen. Stat. (1894), § 897, is the only authority providing for compensation of commissioners appointed by the governor to hear and report evidence in proceedings for the removal of a county officer, which is five dollars per day during the time of service of such commissioners, to be paid by the county whose official is investigated. Hillman *v.* Hennepin County, 84 Minn. 130, 86 N. W. 890.

Removal of agent without notice or cause. — A manager of the workhouse, appointed by the county court, under Ky. Stat. § 4868, may be removed by that court without notice or cause, the appointee being the mere agent of the court, and subject to its orders, no qualifications or term for the appointee being prescribed by the statute. Johnson *v.* Cavanah, 54 S. W. 853, 21 Ky. L. Rep. 1246.

Under Ala. Const. art. 7, § 3, tax assessors may be removed from office for certain causes by the circuit, city, or criminal court of the county in which such officers hold their office, under such regulations as may be prescribed by law, and a statute undertaking to authorize the governor to suspend them is void. Nolen *v.* State, 118 Ala. 154, 24 So. 251.

14. See Gager *v.* Chippewa Sup'rs, 47 Mich. 167, 10 N. W. 186; Minkler *v.* State, 14 Nebr. 181, 15 N. W. 330; Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

15. Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

16. Stewart *v.* Bole, 61 Nebr. 193, 85 N. W. 33.

17. Minkler *v.* State, 14 Nebr. 181, 15 N. W. 330.

18. State *v.* Hay, Wright (Ohio) 96.

19. State *v.* Majors, 16 Kan. 440.

20. Randolph *v.* Pope County, 19 Ill. App. 100.

21. Carland *v.* Custer County, 5 Mont. 579, 6 Pac. 24.

22. State *v.* McGarry, 21 Wis. 496.

23. State *v.* Leisure, 42 Kan. 272, 21 Pac. 1070.

24. State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587.

as an ordinary court, but as a public board authorized to use its own time and methods, subject to the condition that no one shall be removed without a trial upon specific charges, a reasonable notice thereof, and a full opportunity to be heard.[25] It has, however, been held that under special statutes applying to certain officers, and authorizing removal upon particular grounds, a county board may remove an officer or agent without charges, notice, or hearing.[26] A person has the right, in a proceeding to remove him from a county office, to present as many legal questions for decision by the county board as he may think necessary for his proper defense; but the board has the authority and right to decide such question either with or without argument, as it may deem proper.[27] An appeal from an order of removal acts as a supersedeas of the order, and therefore no vacancy exists during the pendency of the appeal.[28]

3. Compensation and Fees — a. Manner of Allowance or Determination. The compensation of a county officer is dependent either directly upon statutory provision,[29] or is fixed by the county board in pursuance of statutory authority[30] or

As to mandamus generally see Mandamus.

25. Trainor *v.* Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; Gager *v.* Chippewa Sup'rs, 47 Mich. 167, 10 N. W. 186; State *v.* Sheldon, 10 Nebr. 452, 6 N. W. 757; Poe *v.* State, 72 Tex. 625, 10 S. W. 737; State *v.* McCarty, 65 Wis. 163, 26 N. W. 609.

Inclusion of several grounds in one petition.— Tex. Const. art. 5, § 24, providing that county officers may be removed for incompetency, etc., upon a cause therefor, if set forth in writing, will not prevent more than one ground for such removal being included in a petition filed therefor. Where several causes are alleged in a petition, it is not necessary in order to sustain a jugdment of removal that all such grounds should be found to be true, and such petition is amendable. Poe *v.* State, 72 Tex. 625, 10 S. W. 737.

26. Sweeney *v.* Stevens, 46 N. J. L. 344 (so held under a provision that a county jailer "may at any time be removed from office, by a vote of two-thirds of all the chosen freeholders"); State *v.* McGarry, 21 Wis. 496.

Removals for incompetency may be made by a county board without charges, notice or hearing under Howell Anno. Stat. Mich. § 483, subd. 17, authorizing a board of supervisors to remove any officer or agent appointed by them "when, in their opinion, he was incompetent, . . . or when, on charges and evidence, they shall be satisfied that he has been guilty of official misconduct," etc. Trainor *v.* Board of Auditors, 89 Mich. 162, 168, 50 N. W. 809, 15 L. R. A. 95.

27. State *v.* Saline County, 18 Nebr. 423, 25 N. W. 587, where it is also said that the board is not required to waste time in listening to unnecessary arguments.

28. *Ex p.* Thatcher, 7 Ill. 167.

29. *Arkansas.*— Independence County *v.* Young, 66 Ark. 30, 48 S. W. 676.

California.— San Joaquin County *v.* Jones, 18 Cal. 327.

Illinois.— Brissenden *v.* Clay County, 161 Ill. 216, 43 N. E. 977; Purcell *v.* Parks, 82 Ill. 346; Knox County *v.* Christianer, 68 Ill. 453.

Indiana.— Legler *v.* Paine, 147 Ind. 181, 45 N. E. 604.

Kansas.— Hiner *v.* Miami County, 9 Kan. App. 542, 59 Pac. 382; Darby *v.* Washington County, 7 Kan. App. 235, 52 Pac. 902.

Michigan.— Board of Auditors *v.* Reynolds, 121 Mich. 99, 79 N. W. 1121.

Ohio.— State *v.* Craig, 22 Ohio Cir. Ct. 217, 12 Ohio Cir. Dec. 351.

Oregon.— Bird *v.* Wasco County, 3 Oreg. 282.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

Members of the board of public instruction are "county officers" within the state constitution of Florida. Gadsden County *v.* Green, 22 Fla. 102.

The fact that a provision is invalid as to the salaries of certain officers does not invalidate the whole act, inasmuch as there is no such dependency or connection between the salaries of the different officials that it may justly be concluded that the act would have failed to pass with the invalid portion detached. State *v.* Sullivan, 72 Minn. 126, 75 N. W. 8. See also Hale *v.* McGettigan, 114 Cal. 112, 45 Pac. 1049; Blanchard *v.* Chaffee County, 15 Colo. App. 410, 62 Pac. 579; Pearson *v.* Stephens, 56 Ohio St. 126, 46 N. E. 511.

30. *Indiana.*— Tippecanoe County *v.* Mitchell, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520.

Massachusetts.—Hibbard *v.* Suffolk County, 163 Mass. 34, 39 N. E. 285.

Michigan.— Gardner *v.* Newaygo County, 110 Mich. 94, 67 N. W. 1091; People *v.* Bay County, 38 Mich. 307.

Missouri.— Givens *v.* Daviess County, 107 Mo. 603, 17 S. W. 998.

New York.— People *v.* Kings County, 105 N. Y. 180, 11 N. E. 391; Matter of Snyder, 12 N. Y. App. Div. 139, 42 N. Y. Suppl. 1065; Wines *v.* New York, 9 Hun 659; Dolan *v.* New York, 6 Hun 506, holding that the clerk of the grand juries of the courts of oyer and terminer and general sessions is an officer of the county within such statute. So too a subpœna server would be such officer. Reilly *v.* New York, 57 Hun 588, 10 N. Y. Suppl. 847.

constitutional provisions.[31] Where, however, the duty of fixing the salaries of county officers is by the constitution devolved upon the legislature, it has been held that such body cannot delegate the regulation of compensation to county boards.[32] This power of county boards to regulate the compensation of county officers and to make allowances for services, since it exists only by virtue of constitutional or statutory provisions,[33] can be exercised only in the manner and in direct accordance with the language used therein;[34] hence if the salary of a certain official is definitely fixed or the maximum determined by statute, the board have no power to increase it, although they conceive it to be inadequate or believe that extra compensation should be allowed;[35] but where the maximum is fixed by statute the board may in its discretion fix a less amount.[36]

b. Statutory Specification of Amount. Where the salary or compensation of a county official is definitely fixed by law, it is generally held that such sum is intended to include his entire official remuneration, and to preclude extra charges for any services whatsoever,[37] unless it is clear that the statute contemplated and

Ohio.— Matter of Holliday, 13 Ohio Cir. Ct. 672.

Oklahoma.— Grant County *v.* McKinley, 8 Okla. 128, 56 Pac. 1044.

Pennsylvania.—Merwine *v.* Monroe County, 141 Pa. St. 162, 21 Atl. 509 [*following* Crawford County *v.* Nash, 99 Pa. St. 253]; *In re* County Auditor's Report, 1 Woodw. 270.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

Effect of failure to make regulation.— Where the commissioners have for a long time allowed the same percentage, a failure to make a regulation in a particular case raises an implied agreement on the part of the county to continue payment of the same amount. Bastrop County *v.* Hearn, 70 Tex. 563, 8 S. W. 302.

Where a minimum is fixed by the legislature, and provision is made that the salary shall be estimated by the supervisors, no salary can be collected until the board determines the amount. Peachy *v.* Redmond, 59 Cal. 326.

31. The term "county board" as used in Ill. Const. (1870), art. 10, § 10, requiring such boards to fix the compensation of county officers, means the body authorized to transact county business, whether the counties are or are not under township organization. Hughes *v.* People, 82 Ill. 78; Broadwell *v.* People, 76 Ill. 554.

Finality of determination.—Generally speaking the award of compensation made by a county board in the exercise of its discretion is final, and not reviewable by the courts. Merwine *v.* Monroe County, 141 Pa. St. 162, 21 Atl. 509; *In re* County Auditors, 14 York Leg. Rec. 181; *In re* County Auditors' Report, 1 Woodw. (Pa.) 270. And the same rule applies where by virtue of the statute the determination is made by the judge of the circuit court of the county. *In re* Stroh, 149 Ind. 164, 48 N. E. 792; Merwine *v.* Monroe County, 141 Pa. St. 162, 21 Atl. 509.

32. Dougherty *v.* Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161.

A statute of this nature is not invalid as a delegation of legislative functions, except so far as it authorizes the county commissioners to fix their own salaries. Stookey *v.* Nez Perces County, 6 Ida. 542, 57 Pac. 312.

33. Lee *v.* Huntington County, 124 Ind. 214, 24 N. E. 986; Tippecanoe County *v.* Barnes, 123 Ind. 403, 24 N. E. 137.

34. State *v.* Windle, 156 Ind. 648, 59 N. E. 276; Hunter *v.* Ripley County, 48 Ind. 177; Keightley *v.* Putnam County, 42 Ind. 576; Stiffler *v.* Delaware County, 1 Ind. App. 368, 27 N. E. 641; Ripley *v.* Gifford, 11 Iowa 367; Peter *v.* Prettyman, 62 Md. 566.

35. Marshall County *v.* Johnson, 127 Ind. 238, 26 N. E. 821; Fawcett *v.* Woodbury County, 55 Iowa 154, 7 N. W. 483; Libby *v.* Anoka County, 38 Minn. 448, 38 N. W. 205; Jones *v.* Lucas County, 57 Ohio St. 189, 48 N. E. 882, 6 Am. St. Rep. 710.

36. Hall *v.* Beveridge, 81 Ill. 128; Naylor *v.* Gray County, 8 Kan. App. 761, 61 Pac. 763; Staples *v.* Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569.

37. *California.*—Humboldt County *v.* Stern, 136 Cal. 63, 68 Pac. 324; Davis *v.* Post, 125 Cal. 210, 57 Pac. 901; Sacramento County *v.* Colgan, 114 Cal. 246, 46 Pac. 175; Mitchell *v.* Stoner, 9 Cal. 203.

Colorado.— Garfield County *v.* Leonard, 26 Colo. 145, 57 Pac. 693.

Illinois.— People *v.* Long, 13 Ill. 629.

Indiana.— Gross *v.* Whitley County, 158 Ind. 531, 64 N. E. 25; Wright *v.* Hancock County, 98 Ind. 108; Donaldson *v.* Wabash County, 92 Ind. 80; Nowles *v.* Jasper County, 86 Ind. 179; Stropes *v.* Greene County, 84 Ind. 560; Hanlon *v.* Floyd County, 53 Ind. 123; Scott *v.* Henry County, 51 Ind. 502; La Grange County *v.* Cutler, 6 Ind. 354.

Iowa.— Tracy *v.* Jackson County, 115 Iowa 254, 88 N. W. 362. See Madison County *v.* Holliday, 43 Iowa 251.

Michigan.— Wayne County *v.* Reynolds, 126 Mich. 231, 85 N. W. 574, 86 Am. St. Rep. 541; Board of Auditors *v.* Reynolds, 121 Mich. 99, 79 N. W. 1121; Gardner *v.* Newaygo County, 110 Mich. 94, 67 N. W. 1091; People *v.* Calhoun County Sup'rs, 36 Mich. 10; People *v.* Gies, 25 Mich. 83.

Minnesota.— State *v.* Smith, 84 Minn. 295, 87 N. W. 775 (holding that a custom or usage otherwise did not make the charge lawful); Bruce *v.* Dodge County Com'rs, 20 Minn. 388.

intended additional compensation for certain extra services.[38] Generally speaking it may be said that when enumerating the fees which a particular officer may charge, it will be presumed that the legislature meant to designate with precision the services for which he should receive fees, and that such fees should be his full compensation for services incidental to his office.[39]

c. Prerequisites of Claim For Compensation — (1) *STATUTORY AUTHORIZATION.* One claiming compensation or fees must be able to show, not only that the services were performed for the county as such,[40] but also a statute authorizing compensation for the particular services in question,[41] or authorizing a valid contract therefor by a party duly empowered to bind the county.[42]

Missouri.— Callaway County *v.* Henderson, 139 Mo. 510, 41 S. W. 241, 119 Mo. 32, 24 S. W. 437.

Montana.— Wade *v.* Lewis, etc., County, 24 Mont. 335, 61 Pac. 879; Raymond *v.* Madison County, 5 Mont. 103, 2 Pac. 306.

Nebraska.— Barnes *v.* Red Willow County, 62 Nebr. 505, 87 N. W. 319; Hayes County *v.* Christner, 61 Nebr. 272, 85 N. W. 73.

New Jersey.— Powell *v.* Camden County, 59 N. J. L. 117, 35 Atl. 755.

New York.— People *v.* Westchester County, 73 N. Y. 173 [*modifying* 11 Hun 306]; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377.

Ohio.— Franklin County *v.* Dun, 6 Ohio S. & C. Pl. Dec. 348, 4 Ohio N. P. 210.

Pennsylvania.— Pittsburg *v.* Anderson, 194 Pa. St. 172, 44 Atl. 1092; Schuylkill County *v.* Pepper, 182 Pa. St. 13, 37 Atl. 835; Centre County *v.* Gramley, 155 Pa. St. 325, 26 Atl. 654; Russell *v.* Luzerne County, 7 Kulp 279, 3 Pa. Dist. 493.

Texas.— Presidio County *v.* Walker, (Civ. App. 1902) 69 S. W. 97.

Wisconsin.— Quaw *v.* Paff, 98 Wis. 586, 74 N. W. 369; Kewaunee County Sup'rs *v.* Knipfer, 37 Wis. 496; Jones *v.* Grant County Sup'rs, 14 Wis. 518.

United States.— Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507, construing Kansas statute.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

38. State *v.* Silver, 9 Nebr. 85, 2 N. W. 215.

39. Sipler *v.* Clarion County, 8 Pa. Dist. 253.

40. Knox *v.* Los Angeles County, 58 Cal. 59.

41. *California.*— People *v.* El Dorado County, 11 Cal. 170.

Colorado.— Garfield County *v.* Leonard, 26 Colo. 145, 57 Pac. 693; Leonard *v.* Garfield County, 8 Colo. App. 338, 46 Pac. 216.

Georgia.— Fite *v.* Black, 92 Ga. 363, 17 S. E. 349.

Idaho.— Cunningham *v.* Moody, 3 Ida. 125, 28 Pac. 395.

Illinois.— Farley *v.* Chicago, etc., R. Co., 36 Ill. App. 517.

Indiana.—Ellis *v.* Steuben County, 153 Ind. 91, 54 N. E. 382; State *v.* Roach, 123 Ind. 167, 24 N. E. 106; Severin *v.* Dearborn County, 105 Ind. 264, 4 N. E. 680; Noble *v.* Wayne County, 101 Ind. 127; Donaldson *v.* Wabash County, 92 Ind. 80; Harrison County *v.* Leslie, 63 Ind. 492; Fifield *v.* Porter County, 29 Ind. 593; Eley *v.* Miller, 7 Ind. App. 529, 34 N. E. 836.

Iowa.—Merrill *v.* Marshal County, 74 Iowa 24, 36 N. W. 778; Jefferson County *v.* Wollard, 1 Greene 430.

Kentucky.— Morgantown Deposit Bank *v.* Johnson, 108 Ky. 507, 56 S. W. 825, 22 Ky. L. Rep. 210.

Minnesota.—Yost *v.* Scott County, 25 Minn. 366.

Missouri.— Huhbard *v.* Texas County, 101 Mo. 210, 13 S. W. 1065.

Montana.— Wight *v.* Meagher County, 16 Mont. 479, 41 Pac. 271.

Nebraska.— State *v.* Meserve, 58 Nebr. 451, 78 N. W. 721. See State *v.* Allen, 23 Nebr. 451, 36 N. W. 756.

New Jersey.— Troth *v.* Camden County, 60 N. J. L. 190, 37 Atl. 1017.

New York.— Walsh *v.* Albany County, 20 N. Y. App. Div. 489, 47 N. Y. Suppl. 35; Chenango County *v.* Birdsall, 4 Wend. 453.

Ohio.— Jones *v.* Lucas County, 57 Ohio St. 189, 48 N. E. 882, 6 Am. St. Rep. 710; Debolt *v.* Cincinnati Tp., 7 Ohio St. 237; Butler County *v.* Welliver, 12 Ohio Cir. Ct. 440, 1 Ohio Cir. Dec. 569; Jones *v.* Lucas County, 11 Ohio Cir. Ct. 136, 1 Ohio Cir. Dec. 152 [*affirming* 1 Ohio N. P. 279]; Stokes *v.* Logan County, 2 Ohio Dec. (Reprint) 122, 1 West. L. Month. 448.

Pennsylvania.— Kittanning *v.* Mast, 15 Pa. Super. Ct. 51; Pittsburgh *v.* Anderson, 7 Pa. Dist. 714, 29 Pittsb. Leg. J. N. S. 115; Lewis *v.* Montgomery County, 2 Pa. Dist. 678.

South Carolina.—State *v.* Baldwin, 14 S. C. 135.

South Dakota.— Herron *v.* Lyman County, 11 S. D. 414, 78 N. W. 996.

Texas.— Ellis County *v.* Thompson, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48; Wharton County *v.* Ahldag, 84 Tex. 12, 19 S. W. 291 [*approving* State *v.* Moore, 57 Tex. 307].

Washington.— School Dist. No. 81 *v.* Cole, 4 Wash. 395, 30 Pac. 448.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

42. *Arizona.*— Reilly *v.* Cochise County, (1898) 53 Pac. 205.

Georgia.— White County *v.* Bell, 98 Ga. 400, 25 S. E. 558.

Indiana.— Oren *v.* St. Joseph County, 157 Ind. 158, 60 N. E. 1019; Severin *v.* Dearborn County, 105 Ind. 264, 4 N. E. 680; Dearborn County *v.* Wood, 5 Blackf. 182.

(II) *Actual Performance of Official Duties.* So too it may be said that it is in general necessary and incumbent upon the claimant to show that he actually performed the services for which he claims compensation,[43] that the services were within the official and ordinary scope of his office,[44] and necessary in the proper performance of his lawful duties.[45] But this does not preclude an official whose lawful duty it is to make certain disbursements from recovering his lawful compensation therefor, if such moneys are unlawfully handled by another officer;[46] nor from recovery of a *pro rata* compensation for the time he may have held over after the expiration of his term till the qualification of his successor.[47]

d. Of Particular Officers — (I) *Auditor.* The county auditor is under some statutes compensated by the allowance of fees for his duties, such as transcribing or registering papers or documents,[48] or the service of notices when this is one of the duties of his office,[49] or a percentage as commission for the management of funds.[50] So under some statutes he is allowed a salary, the amount thereof depend-

Iowa.— Harvey *v.* Tama County, 46 Iowa 522.

New York.— People *v.* Dutchess County, 24 Wend. 181.

Ohio.— Strawn *v.* Columbiana County, 47 Ohio St. 404, 26 N. E. 635; Deters *v.* Hamilton County, 1 Ohio Cir. Dec. 162, holding that where a competent watchman for a recorder's office had been duly appointed by the county commissioners, a watchman appointed by the recorder could recover nothing from the county.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

43. *Dakota.*— Sandager *v.* Walsh County, 6 Dak. 31, 5 N. W. 196; Territory *v.* Cavanaugh, 3 Dak. 325, 19 N. W. 413.

Illinois.— Keily *v.* Sangamon County, 53 Ill. 494.

Indiana.— Stuckey *v.* Bartholomew County, 27 Ind. 251.

New Jersey.— Lum *v.* McCarty, 39 N. J. L. 287 [*overruling* Flemming *v.* Hudson County, 30 N. J. L. 280], holding that inasmuch as the records of a county clerk's office are free to those who desire to search them, such officer could not demand fees for searches of the same, unless he or his clerks actually performed such service.

Pennsylvania.— Centre County *v.* Gramley, 155 Pa. St. 325, 26 Atl. 654.

Texas.— Bates *v.* Thompson, 61 Tex. 335; Crossland *v.* Cherokee County, 31 Tex. 141; Hays *v.* Stewart, 8 Tex. 358.

Wyoming.—Union Pac. R. Co. *v.* Donnellan, 2 Wyo. 478.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

44. *Arkansas.*—Prairie County *v.* Vaughan, 64 Ark. 203, 41 S. W. 420; Fry *v.* Chicot County, 37 Ark. 117, holding that a county was not liable to an officer for attorney's fees paid by him in defending the validity of his bond.

Colorado.— Garfield County *v.* Leonard, 26 Colo. 145, 57 Pac. 693.

Michigan.— Gardner *v.* Newaygo County, 110 Mich. 94, 67 N. W. 1091.

Minnesota.— Stuart *v.* Walker, 10 Minn. 296.

Pennsylvania.— Brown *v.* Com., 2 Rawle 40.

Wyoming.— Pease *v.* Territory, 1 Wyo. 392.

See 13 Cent. Dig. tit. "Counties," § 104 *et seq.*

If absent on business not connected with one's office, which absence necessitates the appointment of a deputy, the county will not be liable for such deputy's compensation. Woodward *v.* Idaho County, 5 Ida. 524, 51 Pac. 143.

45. Leonard *v.* Garfield County, 8 Colo. App. 338, 46 Pac. 216; Ellis *v.* Steuben County, 153 Ind. 91, 54 N. E. 382; Sumner County *v.* Simmons, 51 Kan. 304, 33 Pac. 13; Walsh *v.* Albany County, 20 N. Y. App. Div. 489, 47 N. Y. Suppl. 35.

46. Fell *v.* McLean County, 43 Ill. 216; Bastrop County *v.* Hearn, 70 Tex. 563, 8 S. W. 302; Wall *v.* McConnell, 65 Tex. 397 [*followed* in Trinity County *v.* Vickery, 65 Tex. 554]. To similar effect see Presidio County *v.* Walker, (Tex. Civ. App. 1902) 69 S. W. 97; Waller County *v.* Rankin, (Tex. Civ. App. 1896) 35 S. W. 876.

47. Dillon *v.* Bicknell, 116 Cal. 111, 47 Pac. 937; Finley *v.* Laurens County, 58 S. C. 273, 36 S. E. 588; Davenport *v.* Eastland County, 94 Tex. 277, 60 S. W. 243.

48. Miami County *v.* Jay, 18 Ind. 423; State *v.* Wallichs, 16 Nebr. 110, 20 N. W. 27. See also Gallup *v.* Lorain County Com'rs, 20 Ohio St. 324.

49. Parker *v.* Wayne County, 56 Ind. 38.

50. Fifield *v.* Porter County, 29 Ind. 593. See also Greene County *v.* Stropes, 58 Ind. 54, holding that, under a statute allowing an auditor one per cent for managing the school fund of the county, he was not limited to one per cent on the amount he actually loaned, but that his percentage must be reckoned on the whole amount of such fund. But this statute refers only to the school fund which is made permanent, and not to state taxes for school purposes or interest on the common school fund. Hanlon *v.* Floyd County, 53 Ind. 123.

Proportionate compensation.— An auditor who performs duties in the management of a fund, the apportionment of which cannot be made till after his term expires, is entitled to a proportionate compensation. Wright *v.* McGinnis, 37 Ind. 421.

ing partially upon the population of the county[51] or the value of the property therein.[52]

(II) *Clerk.* The usual compensation of the county clerk, under the various statutes, consists of fees for the performance of his various duties;[53] but in some jurisdictions he is paid a stated salary[54] or a salary and fees.[55] And where by virtue of statute the fees above a certain amount go to the county, a clerk cannot legally charge less than the statutory fee prescribed.[56]

(III) *Treasurer.* The compensation of the county treasurer, when not a fixed and definite salary, usually consists of a certain percentage of the moneys[57] handled by him as treasurer,[58] and in some jurisdictions fees for certain

51. Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222; Parker *v.* Wayne County, 84 Ind. 340; Edger *v.* Randolph County, 70 Ind. 331; State *v.* Akins, 18 Ohio Cir. Ct. 349, 10 Ohio Cir. Dec. 121.

52. Cook County *v.* Fisher, 79 Minn. 380, 82 N. W. 652; Mower County *v.* Williams, 27 Minn. 25, 6 N. W. 377; Bunn *v.* Kingsbury County, 3 S. D. 87, 52 N. W. 673.

53. *Colorado.*—Leonard *v.* Garfield County, 8 Colo. App. 338, 46 Pac. 216.

Nebraska.— Bastedo *v.* Boyd County, 57 Nebr. 100, 77 N. W. 387; Radford *v.* Dixon County, 29 Nebr. 113, 45 N. W. 275; Richardson County *v.* Mussleman, 25 Nebr. 624, 41 N. W. 553; Jackson *v.* Washington County, 10 Nebr. 381, 6 N. W. 463; Lamb *v.* Stanton County, 8 Nebr. 279.

New York.— Matter of Snyder, 12 N. Y. App. Div. 139, 42 N. Y. Suppl. 1065; Wilson Collegiate Inst. *v.* Van Horne, 3 Den. 171.

Oregon.— Baker County *v.* Benson, 40 Oreg. 207, 66 Pac. 815.

South Carolina.— Richland County *v.* Miller, 16 S. C. 236, holding under the statute of the state that the compensation of the clerk was not necessarily limited to services performed when the board was in session.

Virginia.— Stone *v.* Caldwell, 99 Va. 492, 39 S. E. 121.

See 13 Cent. Dig. tit. "Counties," § 105.

A warrant is not an "account" with the county, the same having been paid by the treasurer when presented in settlement by the treasurer with the county, so as to entitle the county clerk to a fee for the settlement of it. Johnson County *v.* Bunch, 63 Ark. 315, 38 S. W. 518.

Compensation for services as clerk of board. — Under the Colorado statute the compensation of the county clerk for services performed in that capacity is dependent directly upon the statute; but for services performed under the direction of the county board he is entitled, in the absence of statutory fees for such services, to reasonable compensation therefor. Leonard *v.* Garfield County, 8 Colo. App. 338, 46 Pac. 216.

54. Callaway County *v.* Henderson, 119 Mo. 32, 24 S. W. 437; State *v.* Neal, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135.

55. Ellis County *v.* Thompson, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48.

56. State *v.* Scott, 41 Nebr. 263, 59 N. W. 893; State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 891.

57. County or jury scrip is not money within the meaning of such statutes, although such scrip may be used in the payment of taxes, and the treasurer is not entitled to his commissions for handling it the same as though it were money. McKinney *v.* Robinson, 84 Tex. 489, 19 S. W. 699 [*overruling dicta* to the contrary in Wharton County *v.* Ahldag, 84 Tex. 12, 19 S. W. 291]. Nor is he entitled to commission for reporting such scrip to the county court for cancellation, such act being neither a payment nor a disbursement. Wharton County *v.* Ahldag, 84 Tex. 12, 19 S. W. 291. So too under the same statute he would not be entitled to commission on bonds issued by the county to contractors as payment for the building of a bridge. McKinney *v.* Robinson, 84 Tex. 489, 19 S. W. 699; Baylor County *v.* Taylor, 3 Tex. Civ. App. 523, 22 S. W. 982. And an issuance of new bonds by a county to a party in consideration of his redeeming an equal amount of old bonds with his individual capital is not a "receipt and disbursement of money," authorizing the retention of commission. Farmer *v.* Aransas County, 21 Tex. Civ. App. 549, 53 S. W. 607. See also Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311; Pittsburg *v.* Anderson, 194 Pa. St. 172, 44 Atl. 1092.

58. *Colorado.*— Denver *v.* Hart, 10 Colo. App. 452, 51 Pac. 533.

Illinois.— Hunsacker *v.* Alexander County, 42 Ill. 389.

Indiana.— Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101, holding that under Rev. Stat. (1881), § 5928, providing that the treasurer should receive a certain percentage on delinquent taxes collected, he would be entitled to such percentage on taxes collected for a road fund, they being delinquent. And to similar effect see Morgan County *v.* Gregory, 74 Ind. 218; Foresman *v.* Johnson, 65 Ind. 132; Pulaski County *v.* Vurpillat, 22 Ind. App. 422, 53 N. E. 1049.

Mississippi.— Adams *v.* Watt, 76 Miss. 667, 26 So. 364; Harrisson *v.* Board of Police, 35 Miss. 74.

New York.— Otsego County *v.* Hendryx, 58 Barb. 279.

Oregon.— Multnomah County *v.* State, 1 Oreg. 358.

Tennessee.— Monroe County *v.* Hudson, 90 Tenn. 741, 18 S. W. 405.

Texas.— Presidio County *v.* Walker, (Civ. App. 1902) 69 S. W. 97.

services.[59] Under a statute allowing him a percentage of the aggregate amount of certain funds coming into his hands, it was held that he was entitled to commissions on such funds received from his predecessor.[60] Where he holds office for only a part of a year he is entitled to the statutory percentage on the amount collected, although it exceeds the proportionate amount of the maximum yearly compensation allowed.[61] Nor will the fact that the act of the auditor in issuing orders was unlawful,[62] or that the bonds, the moneys from the sale of which passed through his hands, were afterward shown to be void,[63] defeat his right to compensation.

(IV) *Assistants and Deputies.* In some jurisdictions the statutes either expressly or by implication authorize the payment of necessary assistants and deputies of certain county officials from the funds of the county.[64] In others deputies are to be paid by the principal out of the fees received by him in excess of the amount which he is to retain for himself, and the county is not liable for the salaries of such deputies.[65] And in others the officer is allowed a percentage for clerk hire and can pay the clerk whatever price is agreed upon, in which case the percentage is part of the officer's salary which he is entitled to receive, although he himself performs all the duties.[66] Again the manner of payment may depend upon the class of the county; deputies being provided for at a fixed salary payable from the county treasury in some classes, while in others the officer is allowed a fixed amount out of which he must pay all deputies as well as himself.[67] Where

Virginia.— Allen *v.* Com., 83 Va. 94, 1 S. E. 607, construing section 30 of the act of 1878–1879, and holding that the twenty per cent commission authorized therein applied only when no taxes had been voluntarily paid.

See 13 Cent. Dig. tit. "Counties," § 106 *et seq.*

If no limitation is prescribed by the statute he is entitled to the full amount of the prescribed percentages, regardless of their amount. Doe *v.* Washington County, 30 Minn. 392, 15 N. W. 679.

"Moneys collected."— A statute allowing a treasurer a commission "on all moneys collected by him" refers solely to such taxes as he has collected from the taxpayers, and does not include moneys paid him by township treasurers in those counties where such officers are the tax-collectors of their respective towns. Taylor *v.* Kearney County, 35 Nebr. 381, 53 N. W. 211.

"Receiving and paying out" public funds. — A statute allowing a treasurer a certain per cent for "receiving and paying out" public funds will be construed to mean that the percentage applies to the transaction as a whole, and he cannot receive such percentage for both the "receiving" and the "paying out." Monroe County *v.* Proctor, 54 Ga. 172. So too under a statute allowing him a certain per cent on all ordinary county funds "received and paid by him for county purposes" he is not entitled to commissions upon the undisbursed balance remaining in his hands at the close of the term. Cotner *v.* Montour County, 13 Pa. Super. Ct. 514.

59. Bingham *v.* Winona County, 8 Minn. 441; Bedwell *v.* Custer County, 51 Nebr. 387, 70 N. W. 945; People *v.* Baldwin, 19 Hun (N. Y.) 308.

60. Lawrence County *v.* Hudson, 41 Ark. 494. And this was true before the passing of the act of March 12, 1895, although he succeeded himself and had received commissions on such funds during his former term. Shaver *v.* Sharp County, 62 Ark. 76, 34 S. W. 261. See also Stephens *v.* Com., 4 Watts (Pa.) 173. And *compare* Scheffer's Appeal, 13 York Leg. Rec. 142, where under a statute allowing a county treasurer a certain per cent for moneys paid out by him it was held that he was not entitled to such percentage on moneys turned over by him to his successor in office.

61. Beatty *v.* Sibley County, 32 Minn. 470, 21 N. W. 548.

62. Graham *v.* State, 66 Ind. 386. See also State *v.* Sheboygan County, 29 Wis. 79.

63. Llano County *v.* Moore, 77 Tex. 515, 14 S. W. 152.

64. Dunbar *v.* Canyon County, 6 Ida. 725, 59 Pac. 536; Cook County *v.* Hartney, 169 Ill. 566, 48 N. E. 458 (holding that an assistant to the recorder of deeds must be paid by the county, although the fees of the office were insufficient to cover all the expenditures thereof); Wheelock *v.* People, 84 Ill. 551; Schuyler County *v.* Bogue, 38 Ill. App. 48; State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454; Gamble *v.* Marion County, 85 Iowa 675, 52 N. W. 556; Harris *v.* Chickasaw County, 77 Iowa 345, 42 N. W. 313 (all three cases construing Code (1873), § 771, as authorizing payment of necessary deputies to county officials from funds of county); Bradley *v.* Jefferson County, 4 Greene (Iowa) 300; Bright *v.* Chenango County, 18 Johns. (N. Y.) 242.

65. Gage County *v.* Wilson, 38 Nebr. 165, 56 N. W. 810.

66. Bruce *v.* Dodge County Com'rs, 20 Minn. 388.

67. McPhail *v.* Jefferds, 130 Cal. 480, 62 Pac. 735; San Francisco *v.* Broderick, 125

no provision is made for the employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement.[68]

(v) *Incidental Expenses of County Officers.* In most jurisdictions it is held that a proper interpretation of the statutes authorizes the payment of necessary incidental expenses of the county officials, such as postage, stationery, mileage, and kindred expenditures from the county funds.[69] Nevertheless such expenses must be necessary and reasonable in cost,[70] and to warrant their allowance it has been held that there must be a full and complete statement thereof, accompanied by vouchers.[71]

(vi) *Officials Holding Two Offices.* Ordinarily when an official is allowed a definite salary, he cannot claim compensation for services rendered *ex officio* in other capacities;[72] but where the salaries of two officers are payable out of separate and distinct funds and the statute creating them is positive, an official performing the duties of both has been held entitled to both salaries.[73]

(vii) *Upon Discharge or Abolition of Office* If a county officer is legally discharged or his office abolished, he is not entitled to compensation for the balance of his term.[74]

e. Change — (i) *By Legislature.* County officials whose fees or salaries are fixed by law take their offices *cum onere*, and, in the absence of constitutional provisions to the contrary,[75] the legislature may attach additional duties to an

Cal. 188, 57 Pac. 887; Tulare County *v.* May, 118 Cal. 303, 50 Pac. 427; Farnum *v.* Warner, 104 Cal. 677, 38 Pac. 421.

68. Benton *v.* Decatur County, 36 Iowa 504.

A county treasurer cannot recover against the county for money paid as compensation to a deputy. The county is liable directly to the deputy and not to the principal. Mahaska *v.* Ingalls, 14 Iowa 170.

69. *Idaho.*— Clyne *v.* Bingham County, 7 Ida. 75, 60 Pac. 76.

Illinois.— Briscoe *v.* Clark County, 95 Ill. 309.

Missouri.— Thomas *v.* Callaway County, 43 Mo. 228.

Ohio.— State *v.* Hamilton County, 26 Ohio St. 364.

Pennsylvania.— See *In re* County Office Expenses, 19 Pa. Co. Ct. 159.

Texas.— Harris County *v.* Clarke, (Civ. App. 1896) 37 S. W. 22.

See 13 Cent. Dig. tit. "Counties," § 114.

Attorney's fees paid by a county treasurer in the prosecution of suits which it was his official duty to bring are within a statute allowing reimbursements of his reasonable expenses. State *v.* Hamilton County, 26 Ohio St. 364.

Living expenses, such as items for bed and board, are not allowable. Clyne *v.* Bingham County, 7 Ida. 75, 60 Pac. 76.

Postage is allowable. Williams *v.* Henry County, 27 Ind. App. 207, 60 N. E. 1099; *In re* County Office Expenses, 19 Pa. Co. Ct. 159.

Stationery.— Expense of printing formal parts of deeds and mortgages is not authorized by a statute allowing "stationery required" to an officer. Plummer *v.* Blair County, 6 Pa. Dist. 640. But the term may include other than bail-bond and complaint blanks, under Tex. Rev. Stat. (1895), art. 2475. Harris County *v.* Clarke, (Tex. Civ. App. 1896) 37 S. W. 22.

No allowance to certain officers.— In Hower *v.* Wayne County, 21 Pa. Co. Ct. 289, 4 Lack. Leg. N. 203, it was held that a county superintendent was not entitled to stationery on the ground that he was not a county officer. And in Clark *v.* Crawford County, 21 Pa. Co. Ct. 247, it was held that the clerk of the court of quarter sessions was not entitled to an allowance for postage.

70. Harris County *v.* Clarke, (Tex. Civ. App. 1896) 37 S. W. 22.

71. Clyne *v.* Bingham County, 7 Ida. 75, 60 Pac. 76.

72. *Arizona.*— Dysart *v.* Graham County, (1897) 48 Pac. 213.

Colorado.— Henderson *v.* Pueblo County, 4 Colo. App. 301, 35 Pac. 880.

Illinois.—Madison County *v.* Bruner, 13 Ill. App. 599. See also Kilgore *v.* People, 76 Ill. 548; Keily *v.* Sangamon County, 58 Ill. 494.

Nevada.— State *v.* Boyd, 19 Nev. 356, 11 Pac. 36.

Utah.— Bartch *v.* Cutter, 6 Utah 409, 24 Pac. 526.

See 13 Cent. Dig. tit. "Counties," § 113.

73. Territory *v.* Wingfield, (Ariz. 1887) 15 Pac. 139. See also State *v.* Lewis, 10 Ohio S. & C. Pl. Dec. 537, 8 Ohio N. P. 84.

74. Campbell County *v.* Trapp, 67 S. W. 369, 22 Ky. L. Rep. 2356; Koontz *v.* Franklin County, 76 Pa. St. 154; Smith *v.* Philadelphia County, 2 Pars. Eq. Cas. (Pa.) 293. See also Gross *v.* Whitley County, 158 Ind. 531, 64 N. E. 25; People *v.* Board of Police Com'rs, 8 N. Y. Suppl. 725, 29 N. Y. St. 384.

75. In California the constitution prohibits the increase of compensation of any county of-

office without increasing the compensation, or may diminish the amount thereof at its option.[76]

(II) *By County Board.* Even though the board has the original fixing of compensation, the increase of compensation of an officer during his term is forbidden by statute in some jurisdictions,[77] and in others either the increase or diminution in compensation during the term of office is prohibited by the organic law[78] or by statute.[79] In others the board may diminish the compensation during the term upon notice to the officer.[80]

f. Source of Payment. Under some statutes salary of designated officials is payable only out of the fees and emoluments of the office;[81] while under other statutes that of other officials is payable from the general fund in the treasury.[82]

g. Actions to Recover Compensation. If the county board or court refuses to appropriate enough to pay a county official the amount due him he has a right of action against the county.[83] To authorize the bringing of an action it is necessary that demand shall have been made and payment refused,[84] and in one jurisdiction it has been held that he cannot maintain an action before taking oath of office.[85]

ficer during his term of office. Larew *v.* Newman, 81 Cal. 588, 23 Pac. 227.

In **Wyoming** the constitution forbids any increase or diminution of a county official's salary after his election or appointment. Converse County *v.* Burns, 3 Wyo. 691, 29 Pac. 894, 30 Pac. 415.

76. Turpen *v.* Tipton County, 7 Ind. 172; Harvey *v.* Rush County, 32 Kan. 159, 4 Pac. 153; Knappen *v.* Barry County Sup'rs, 46 Mich. 22, 8 N. W. 579.

A county officer has no such vested interest in the salary as will prevent the legislature from diminishing it during his term of office. Harvey *v.* Rush County, 32 Kan. 159, 4 Pac. 153.

77. Sweeny *v.* New York, 5 Daly (N. Y.) 274.

78. Brissenden *v.* Clay County, 161 Ill. 216, 43 N. E. 977; Jennings *v.* Fayette County, 97 Ill. 419; Wheelock *v.* People, 84 Ill. 551.

What constitutes retroactive regulation.— Under a provision authorizing the county board to fix the compensation of its county officers, but providing that such compensation should not be increased or diminished during an official's term, the fixing of a county clerk's fees after his election is not a violation thereof, since until his compensation be fixed it cannot be either increased or diminished. Purcell *v.* Parks, 82 Ill. 346.

79. Hawkins *v.* Watkins, 34 Minn. 554, 27 N. W. 65.

Applies only to salaries fixed by law.— In Collingsworth County *v.* Myers, (Tex. Civ. App. 1896) 35 S. W. 414, it was held that Tex. Rev. Stat. art. 4853, providing that the salaries of officers shall not be increased or diminished during their term of office, applies only to officers whose salaries are fixed by law and not to orders of the commissioners' court fixing the amount to be paid to county officers for *ex officio* services.

80. Givens *v.* Daviess County, 107 Mo. 603, 17 S. W. 998.

81. Powell *v.* Durden, 61 Ark. 21, 31 S. W. 740 (holding that therefore such county officials could refuse to accept county scrip when tendered as fees); Arapahoe County *v.* Hall, 9 Colo. App. 538, 49 Pac. 370 (holding, however, that this was not confined alone to the statutory charges of services, but embraced all legitimate income of the office); Cook County *v.* Hartney, 169 Ill. 566, 48 N. E. 458; Hamilton County *v.* Buck, 8 Ill. App. 248. See also James *v.* Henry County, 27 Ind. App. 491, 61 N. E. 691.

In **Pennsylvania** it has been held that if in any year the fees are insufficient to pay the officer his salary, he is entitled to credit for an excess received and earned in a preceding year of his term. Wiegand *v.* Luzerne County, 7 Kulp 183.

82. Welch *v.* Strother, 74 Cal. 413, 16 Pac. 22; Sewell *v.* Placer County, 42 Cal. 650; Com. *v.* Philadelphia County, 9 Serg. & R. (Pa.) 250.

83. Toronto *v.* Salt Lake County, 10 Utah 410, 37 Pac. 587. See also Bradley *v.* Jefferson County, 4 Greene (Iowa) 300.

Proof of value of services.— If the resolution of county supervisors employing persons to perform certain services does not fix their compensation they must, in an action therefor, prove the nature thereof. Conway *v.* New York, 6 Daly (N. Y.) 515. And while it is competent for a party upon the issue of the value of the services rendered to prove his efficiency, the criterion of recovery is reasonable compensation. Henderson County *v.* Dixon, 63 S. W. 756, 23 Ky. L. Rep. 1204.

84. Atchison, etc., R. Co. *v.* Kearny County, 58 Kan. 19, 48 Pac. 583.

85. Riddle *v.* Bedford County, 7 Serg. & R. (Pa.) 386. *Compare* Havird *v.* Boise County, 2 Ida. (Hasb.) 687, 24 Pac. 542, holding that one in possession or performing the duties of his office under a certificate of election issued by the canvassing board may maintain an action to recover his salary, although a contest of the election is pending, and although a statute forbids the county commissioners to issue warrants for the salary of any officer during the pendency of a contest.

While the amount which a county has overpaid an official[86] may be pleaded in set-off against him, if the services rendered were duly authorized by the county, the illegality of the purpose for which they were rendered cannot be set up as a defense.[87]

h. Actions to Recover Back Compensation. In an action by a county to recover money allowed a county officer as compensation in violation of law, specific acts of fraud or deception need not be alleged in the complaint.[88]

4. Powers and Duties[89]**— a. Of Clerks.** County clerks must perform all duties imposed upon those holding the office by constitution or statute, and also the duties of such other offices as they hold *ex officio*.[90] A county clerk, among the powers incident to the office, may administer oaths taken in transacting the business of the office,[91] issue process and attest proceedings of the courts of which he is *ex officio* clerk, over his signature as such,[92] attest and sign as county clerk certificates of acknowledgment, affixing thereto the seal of court of which he is *ex officio* clerk,[93] assign under the seal of the county court notes given to the county,[94] take subscriptions for the erection of public buildings,[95] collect fees due the county,[96] and enter therein all items of fees received or earned by him, and make report of the same to the county board.[97] And he may, as the custodian of the bond of an assignee, certify to such bond or a copy thereof to be offered in evidence.[98] He should perform all clerical services which naturally attach to that position in connection with matters controlled by the board and within its authority, and which would be necessary to enable it to fully perform its duties

86. Cook County *v.* Wren, 43 Ill. App. 388; Keightley *v.* Putnam County, 42 Ind. 576.

87. Lagrange County *v.* Newman, 35 Ind. 10; Llano County *v.* Moore, 77 Tex. 515, 14 S. W. 152. See also Garrigus *v.* Howard County, 157 Ind. 103, 60 N. E. 948.

Pleadings.— An allegation by a sheriff, in an action to recover for commissions, that he had accounted for all moneys received and disbursed by him is not an admission that the county had allowed, audited, or paid his commissions, especially where he subsequently expressly alleged the contrary. Koonce *v.* Jones County, 106 N. C. 192, 10 S. E. 1038. See also Laws *v.* Harlan County, 12 Nebr. 637, 12 N. W. 114.

Evidence.— In a suit by a county or parish officer for his fees, where his account has been approved according to law, the burden of showing that certain of the charges are illegal is upon the county or parish. Lyons *v.* Calcasieu Parish, 33 La. Ann. 1170.

88. Fremont County *v.* Brandon, 6 Ida. 482, 56 Pac. 264. And see, generally, Payment.

89. The powers and duties of county officers being fixed by the constitution or statutes of the various states, it is impossible to lay down any general rules further than to set out some of the most usual of the powers and duties imposed upon such officers. See *infra*, IV, D, 4, a *et seq.*

90. The New Jersey constitution of 1844 fixes the rights and duties of county clerks as those which were at that time required of them by law, and directs that such rights and duties shall continue "until otherwise ordained by the legislature." Middlesex County *v.* Conger, 67 N. J. L. 444, 51 Atl. 488.

Duty as clerks of common pleas and quarter sessions to record deeds and mortgages see Middlesex County *v.* Conger, 67 N. J. L. 444, 51 Atl. 488.

As to duties of clerks of court see Clerks of Court.

91. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

92. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

93. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108, where it was held that the seal affixed with its inscription will sufficiently designate the court of which, in that particular matter, he is acting as clerk.

94. Galtton *v.* Dimmitt, 27 Ill. 400.

95. Harris *v.* Wood, 6 T. B. Mon. (Ky.) 641, holding that where the clerk of a court is appointed to receive subscriptions for erecting the public buildings of a county he acts as a revenue officer, and the subscribers become debtors to the county, as for county assessments.

96. But under a statute providing that where fees are due a county, and not collected during the fiscal year when they became due, they shall be collected by the officer to whose office the fees accrued, who shall be entitled to a certain per cent of the fees so collected, a county clerk has no right to collect delinquent fees after the expiration of his term of office, he having then ceased to be "the officer to whose office the fees accrued." Ellis County *v.* Thompson, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48.

97. State *v.* Russell, 51 Nebr. 774, 71 N. W. 785; Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717; State *v.* Boyd, 49 Nebr. 303, 68 N. W. 510; State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 891.

98. Keating *v.* Vaughn, 61 Tex. 518.

in relation thereto,[99] attend meetings of the board,[1] and keep records of its proceedings,[2] in accordance with its directions.[3] A county clerk, so far as he is a ministerial officer,[4] has no discretion in acting under orders from the proper authorities, in proper form, and in matters over which they have jurisdiction, and a refusal to execute such orders can only be justified on the ground that to do so would violate the constitution of the state.[5]

b. Of Treasurer — (i) *In General.* As a general rule a county treasurer is the proper officer to receive,[6] have custody of,[7] and disburse the moneys of the county arising from ordinary sources of revenue.[8] So among other powers and duties usually imposed upon county treasurers, it is his right and duty to procure extensions of time on payment of indebtedness and to renew the same,[9] to contract for the publication of delinquent tax-lists,[10] to administer oaths in connection with the business of the office,[11] to maintain actions to recover moneys due

99. Garfield County *v.* Leonard, 26 Colo. 145, 57 Pac. 693; Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

Affidavit for writ of certiorari for county. — The county commissioners' clerk may make affidavits for a writ of certiorari for the county, under Purdon Dig. Pa. p. 604, § 2, providing that the affidavit may be made by the party or his agent. Lehigh County *v.* Yingling, 6 Pa. Co. Ct. 594.

Conveyance of land by county clerk as agent.— Where by statute the duties of the county agent for the sale of real estate belonging to the county have been devolved upon the clerk of the county commissioners' court, a conveyance of such real estate properly made in the name of the county, and signed "Stephen B. Gardner, agent of the county," is sufficient *prima facie*; and is certainly good, when supported by proof that such person was in fact the clerk of the county at the time, for the presumption will be that he executed it as such officer. Gourley *v.* Hankins, 2 Iowa 75.

1. In a county without a court-house the county clerk must attend the sessions of the board of county commissioners in any suitable room at the county-seat they may designate. Stafford County *v.* State, 40 Kan. 21, 18 Pac. 889.

2. Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690.

3. Ellis *v.* Bristol County, 2 Gray (Mass.) 370.

4. Mix *v.* People, 72 Ill. 241.

5. Mix *v.* People, 72 Ill. 241, where it was held that a county clerk can justify his refusal to extend taxes on the equalization of the board of supervisors only by showing that to do so would be a violation of the constitution of the state.

Refusal to issue a distress warrant to pay for a bridge, in accordance with a judgment of the commissioners made in a case over which they had jurisdiction, is not justified by showing mistake or error of judgment of the commissioners, nor does it raise the question of the sufficiency of the bridge, which had been accepted by the commissioners. Adams *v.* Ulmer, 91 Me. 47, 39 Atl. 347.

6. *Alabama.*— Barnes *v.* Hudman, 57 Ala. 504.

Georgia.— Aaron *v.* German, 114 Ga. 587, 40 S. E. 713.

Kentucky.— Berry *v.* Com., 14 S. W. 589, 12 Ky. L. Rep. 462.

Louisiana.— Helluin *v.* Maurin, 8 La. 111.

Nebraska.— Tecumseh *v.* Phillips, 5 Nebr. 305.

North Carolina.— State *v.* Clarke, 73 N. C. 255.

Pennsylvania.— Hayes *v.* Grier, 4 Binn. 80.

Texas.— Bastrop County *v.* Hearn, 70 Tex. 563, 8 S. W. 302; Carothers *v.* Presidio County, 4 Tex. Civ. App. 529, 23 S. W. 491.

See 13 Cent. Dig. tit. "Counties," § 119.

Where an officer receives money from his predecessor, the same being proceeds of bonds sold by his predecessor, he has no authority to disburse the money but must turn it over to the treasurer. Aaron *v.* German, 114 Ga. 587, 40 S. E. 713.

7. Barnes *v.* Hudman, 57 Ala. 504; Cole County *v.* Schmidt, (Mo. 1889) 10 S. W. 888.

8. Aaron *v.* German, 114 Ga. 587, 40 S. E. 713; Cole County *v.* Schmidt, (Mo. 1889) 10 S. W. 888.

The court cannot authorize a county judge to receive and disburse county funds, although raised by the county for his special purpose, where the statute provides that this fund is for the county treasury. Bastrop County *v.* Hearn, 70 Tex. 563, 8 S. W. 302.

9. Clark *v.* Saratoga County, 107 N. Y. 553, 14 N. E. 428; Parker *v.* Saratoga County, 106 N. Y. 392, 13 N. E. 308.

May not insert unauthorized conditions.— When a county treasurer is authorized by statute to advertise for bids for the surrender of county bonds, in order that he may redeem them with money in the treasury, he has no authority, in the advertisement, to insert a condition upon which bids will be received, which is not to be implied from the duty to advertise, and which is not necessary to the exercise of his authority; such as that the bond must accompany the bid. It is his duty to accept the most favorable bid, even if not accompanied by the bonds. Mills *v.* Bellmer, 48 Cal. 124.

10. De Rackin *v.* Lincoln County, 19 Wash. 360, 53 Pac. 351.

11. Malonny *v.* Mahar, 1 Mich. 26.

the county,[12] to keep the auditor and commissioners informed when there is no money in the treasury,[13] to receive and file in his office reports of delinquent taxes,[14] to forward to the auditor-general certified lists of lands returned as delinquent for unpaid taxes,[15] to make reports to the grand juries of their respective counties,[16] and to transmit to the state treasurer verified statements of all moneys received by him during the preceding year, and which are payable to the state treasurer for licenses, fines, and penalties.[17]

(II) *Power to Take Notes or Securities.* Unless power be given him by law so to do, a county treasurer has no power to take notes or securities in his official character from any person.[18] This power is, however, sometimes expressly conferred,[19] and the right to prosecute an action thereon given to his successor in office.[20]

c. Of Auditor. Among the duties required of a county auditor are the following: To prescribe and fix the compensation for all services rendered for, and to adjust all claims against, their respective counties;[21] to publish an exhibit of the

12. White *v.* Lincoln, 5 Nebr. 505; Tecumseh *v.* Phillips, 5 Nebr. 305.

Suit against tax-collector and bondsmen.—Where the tax-collector fails to turn over taxes to the county treasurer, and the latter is thereby entitled to sue the collector and his bondsmen for commissions which he failed to realize, he has no cause of action against the county by reason of an attempted release of the bondsmen, and of the county's refusal to compel the collector to pay to the treasurer the taxes collected. Carothers *v.* Presidio County, 4 Tex. Civ. App. 529, 23 S. W. 491.

Suit on sheriff's bond on failure to account for taxes.—It is the duty of the county treasurer to receive payment of the county taxes from the sheriff, and to bring suit on his bond on his failure to account. If the county treasurer fails to bring suit the county commissioners are required to do so. State *v.* Clarke, 73 N. C. 255. The Kentucky act of March 9, 1868, creating the office of county treasurer of Franklin county, provided that no one but said treasurer might receive any money due or to become due to said county, although the sheriff might pay off claims against the county out of the county levy; that the sheriff should settle with the treasurer; and that the treasurer should bring suit against the sheriff if delinquent. It was held in Berry *v.* Com., 14 S. W. 589, 12 Ky. L. Rep. 462, that in case of the sheriff's failure to pay county creditors, the county treasurer might sue him on his bond for the money due them.

13. State *v.* Windle, 156 Ind. 648, 59 N. E. 276.

14. Jackson *v.* Jackson County Treasurer, 117 Mich. 305, 75 N. W. 617, holding that a county treasurer has no judicial authority to pass on the regularity of tax proceedings, and cannot refuse to file tax records because of irregularities appearing on their face.

15. Houghton County Sup'rs *v.* Rees, 34 Mich. 481.

16. The commissions allowed to county treasurers under Ga. Code, § 3703, viz., two and one-half per cent on all sums received and paid out up to ten thousand dollars and one and one-quarter per cent on all sums in excess of that amount, are to be computed upon their annual receipts and disbursements; hence the fact that these officers are required by section 508*a* to make returns to the grand juries of their respective counties at each term of the superior court does not authorize a county treasurer to strike a balance at every such term, charge two and one-half per cent on all sums received and paid up to ten thousand dollars, as shown by his account thus balanced, and then begin a new account and charge the same rate of commissions on amounts included in it up to ten thousand dollars, and in this manner realize that rate of commissions on amounts received and disbursed in the same year in excess of ten thousand dollars. Burks *v.* Dougherty County, 99 Ga. 181, 25 S. E. 270.

17. State *v.* Miles County, 52 Wis. 488, 9 N. W. 403, where it was held to be the county treasurer's duty to transmit such statement, whether he collects any moneys for fines, etc., or not.

18. Berry *v.* Hamby, 2 Ill. 468.

19. Packard *v.* Nye, 2 Metc. (Mass.) 47.

Notes taken for fines and costs under Me. Rev. Stat. (1841), c. 175, in the case of a party too poor to pay the fines, cannot be transferred by the indorsement of the county treasurer; and the indorsee will acquire no right thereby to maintain an action in his own name. Bates *v.* Butler, 46 Me. 387.

Securities impressed with lien and trust in favor of county.—Under an agreement between a county treasurer and a bank, pursuant to which the treasurer lends county funds to the bank, and the bank transfers to the treasurer a note and draft in payment of or as security for the loan, the treasurer takes the note and draft for the purpose of restitution of the money illegally loaned, and he cannot divert them to any other use without the consent of the county. Greene *v.* Niagara County, 8 N. Y. App. Div. 409, 40 N. Y. Suppl. 862.

20. Packard *v.* Nye, 2 Metc. (Mass.) 47.

21. See Taggart *v.* Wayne County, 73 Mich. 53, 40 N. W. 852.

receipts and expenditures of the past year, under the direction of the board;[22] to institute suits for all moneys due the congressional township fund and unpaid in the name of the obligee or payee of the instrument sued on;[23] to levy a tax to pay a subscription by the county to the stock of a railroad company upon neglect or refusal without proper cause so to do by the county authorities;[24] to preserve tax statements in his office for a certain time;[25] to plat lands so as to facilitate assessment after notice to the owners so to do and failure by them to comply;[26] to order and contract for supplies for inspectors of election to be used during his term of office;[27] to canvass election returns and issue certificates of election;[28] and to administer oaths.[29] So it has been held that an account current, kept by a county auditor with the treasurer, is a perfect record, and if it is erroneously kept, the treasurer may by proper proceedings require its correction by the auditor.[30] Where instructions by the auditor of state to a county auditor embrace and command the performance of a number of acts, some of which are proper and others not, the county auditor must follow the former, but may disregard the latter.[31]

d. Of Controllers.[32] All books, receipts, papers, and accounts kept by any county officer must be open to the inspection of the county controller who shall have power to examine the same at any time he may wish to do so,[33] and among his other duties a county controller is required to countersign warrants drawn by the sheriff on the county treasurer for the payment of a deputy sheriff, even though there has been no appropriation by councils.[34]

e. Of County Surveyors. It is the duty of a county surveyor to execute all surveys ordered by the proper authorities, such as the court, the board of county commissioners, or the town supervisors,[35] to return the field-notes of the survey

22. State *v.* Holmes, 44 Ohio St. 489, 8 N. E. 870.

23. **Suit by clerk as ex officio auditor.**— By Ind. Rev. Stat. c. 13, § 108, it is provided that for all moneys due the congressional township fund, remaining unpaid, the county auditor shall cause suits to be instituted in the name of the obligee or payee of the instrument sued on, and the money recovered to be paid to the school commissioner of his county, etc. In Bowman *v.* State, 3 Ind. 524, it was held that by the Indiana act of 1844 the clerk of the Carroll circuit court became *ex officio* the auditor of that county, and it was his duty to bring the suit in the name of the payee of the note.

24. Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677.

25. Stokes *v.* Logan County, 2 Ohio Dec. (Reprint) 122, 1 West. L. Month. 448.

26. Parker *v.* Wayne County, 56 Ind. 38.

27. Morrison *v.* Decatur County, 16 Ind. App. 317, 44 N. E. 65, 1012, holding that a contract entered into by a county auditor after his successor is elected, and but a short time before the expiration of his term of office, for election supplies to be used at an election which will not be held until eighteen months thereafter, is void as against public policy.

28. Crowell *v.* Lambert, 10 Minn. 369.

29. Garneau *v.* Port Blakeley Mill Co., 8 Wash. 467, 36 Pac. 463.

30. Wells *v.* State, 22 Ind. 241.

31. State *v.* Halliday, 61 Ohio St. 352, 56 N. E. 118, 49 L. R. A. 427.

32. **In Pennsylvania** the duties of county auditors are by statute transferred to the county controllers. The Pennsylvania act of June 27, 1895, which does this, is prospective and takes effect on the expiration of the terms of the then county auditors. Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199, 38 Wkly. Notes Cas. 363.

33. Cantlin *v.* Hancock, 12 Phila. (Pa.) 464, 34 Leg. Int. (Pa.) 158.

34. Cantlin *v.* Hancock, 12 Phila. (Pa.) 464, 34 Leg. Int. (Pa.) 158.

35. Haynes *v.* Blue Earth County, 65 Minn. 384, 67 N. W. 1005, holding, however, that Minn. Gen. Stat. (1894), § 831, which provides that the county surveyor shall execute all surveys which shall be ordered by any court, board of county commissioners, or town supervisors, does not authorize a county surveyor, whenever a county or town lets a contract for public improvements, the plans of which in his opinion necessitate the service of a surveyor or civil engineer, to do the work at the expense of the county or town, on his own motion.

Duty in unorganized counties.— In Texas Mexican R. Co. *v.* Locke, 63 Tex. 623, it was held that deputy surveyors in unorganized counties attached to surveying districts are but aids to the district surveyor as such; it was not the purpose of the legislature in providing for their appointment to make them independent of the district surveyor, nor does their appointment relieve him from the duty of making surveys in such unorganized counties.

The venue of suit to compel performance of official duties by a surveyor is in the county of the latter's residence. Texas Mexican R. Co. *v.* Locke, 63 Tex. 623.

to the general land-office,[36] to certify his plats, and cause them to be recorded in the general land-office,[37] and to furnish in reasonable time, when demanded, copies of all surveys not specially excepted in the land laws.[38] It is not, however, the duty of the county surveyor to furnish warrants to persons desiring to enter waste and vacant land, nor to make an entry for them, but merely to record their entry and survey their location.[39]

f. Of Deputies. As a general rule deputies of any officers heretofore mentioned may perform any purely ministerial duties of such officers,[40] when duly appointed and qualified;[41] but where a county officer is empowered to perform quasi-judicial duties, a deputy cannot perform such duties unless expressly authorized by statute.[42]

5. Accounting and Settlement — a. Funds Accountable For — (i) *In General.* It is incumbent upon a county official to properly account for all moneys, whether in fees, commissions, or otherwise, received by him in his official capacity, which he is not authorized to retain, as compensation; or when paid a salary, then for all his official collections.[43] The fact that he has not given bond or been duly qualified does not dispense with the necessity of so doing;[44] and the county commissioners have no authority to release him from such obligation.[45] So he must pay over the same to the officer duly authorized by law to receive it.[46]

(ii) *For Interest on Funds.* A county officer is chargeable with interest on any moneys which he omits or neglects to account for at the proper time to

For allegations in mandamus to compel survey by county surveyor see Texas Mexican R. Co. *v.* Locke, 63 Tex. 623.

36. Texas Mexican R. Co. *v.* Locke, 63 Tex. 623.

37. Bates *v.* Thompson, 61 Tex. 335.

38. Preston *v.* Bowen, 6 Munf. (Va.) 271.

39. Hale *v.* Crow, 9 Gratt. (Va.) 263.

40. *California.*— Muller *v.* Boggs, 25 Cal. 175; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

Colorado.— Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

New York.— Lynch *v.* Livingston, 6 N. Y. 422 [*affirming* 8 Barb. 463].

Michigan.— Malonny *v.* Mahar, 1 Mich. 26.

Minnesota.— Crowell *v.* Lambert, 10 Minn. 369.

In the absence of the county clerk, his deputy is empowered by statute in Kansas to perform all his duties. Missouri River, etc., R. Co. *v.* Morris, 7 Kan. 210; Amrine *v.* Kansas Pac. R. Co., 7 Kan. 178.

41. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

42. State *v.* Smith, 1 Oreg. 250.

43. *California.*— San Luis Obispo County *v.* King, 69 Cal. 531, 11 Pac. 178.

Idaho.— People *v.* Slocum, 1 Ida. 62.

Indiana.— Nixon *v.* State, 96 Ind. 111.

Iowa.— Delaware County *v.* Griffin, 17 Iowa 166.

Kansas.— Spratley *v.* Leavenworth County, 56 Kan. 272, 43 Pac. 232; State *v.* Obert, 53 Kan. 106, 36 Pac. 64; Graham County *v.* Van Slyck, 52 Kan. 622, 35 Pac. 299.

Minnesota.— Gerken *v.* Sibley County, 39 Minn. 433, 40 N. W. 508.

Missouri.— Clark County *v.* Hayman, 142 Mo. 430, 44 S. W. 237; Hickory County *v.* Dent, 121 Mo. 162, 25 S. W. 924; State *v.* Rechtien, 7 Mo. App. 339.

Nebraska.— Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399; State *v.* Allen, 23 Nebr. 451, 36 N. W. 756; State *v.* Sovereign, 17 Nebr. 173, 22 N. W. 353.

New York.— Seneca County *v.* Allen, 99 N. Y. 532, 2 N. E. 459; Richmond County *v.* Wandel, 6 Lans. 33; Matter of New York Cent., etc., R. Co., 7 Abb. N. Cas. 408.

Pennsylvania.— Biehn *v.* Bucks County, 132 Pa. St. 561, 19 Atl. 280, 25 Wkly. Notes Cas. 427. See also Com. *v.* Porter, 21 Pa. St. 385.

Wisconsin.— Milwaukee County *v.* Hackett, 21 Wis. 613.

See 13 Cent. Dig. tit. "Counties," § 122 *et seq.*

Unlawful use of funds by recipients.— It is not a defense for an action against the treasurer for failure to turn over certain moneys that the county court and school-board, the recipients thereof, were about to divide the sum in an unlawful manner. State *v.* Rechtien, 7 Mo. App. 339.

44. People *v.* Slocum, 1 Ida. 62.

45. Briscoe *v.* Clark County, 95 Ill. 309; Cumberland County *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284; State *v.* Clarke, 73 N. C. 255.

46. *California.*— Smith *v.* Dunn, 68 Cal. 54, 8 Pac. 625; McKee *v.* Monterey County, 51 Cal. 275; Patton *v.* Placer County, 30 Cal. 175.

Colorado.— Henderson *v.* Pueblo County, 4 Colo. App. 301, 35 Pac. 880.

Illinois.— Hughes *v.* People, 82 Ill. 78.

Indiana.— Taggart *v.* State, 49 Ind. 42.

New York.— Tompkins County *v.* Bristol, 15 Hun 116.

Pennsylvania.— Keyser *v.* McKissan, 2 Rawle 139.

See 13 Cent. Dig. tit. "Counties," § 122 *et seq.*

the county board,[47] but where the refusal is to pay to a successor in office, interest accrues only from the qualification of the latter.[48] So it has been held that he is not liable, in the absence of statute, for interest on public moneys which he may have loaned during his tenure of office,[49] but by virtue of statute the rule is otherwise in one jurisdiction.[50]

(III) *For Moneys Misappropriated or Illegally Disbursed.* A county officer is liable to the county for money which he has converted or failed to pay over or account for,[51] and also for money paid out on orders or warrants illegal on their face[52] or the invalidity of which he could have ascertained by the exercise of reasonable diligence,[53] or which he should have known had not been properly authorized,[54] or that he had no authority to pay;[55] but where no irregularity or invalidity appears on the face of the orders, or could not be detected by reasonable diligence, and they are for lawful purposes, and within the scope of the powers of the authorities issuing them, he is protected in their payment.[56]

b. Authority to Audit or Settle. The authority to audit and conclude settlements with county officials is usually conferred upon some designated court,[57] or upon county commissioners, commissioners of revenues,[58] the ordinary,[59] or in some jurisdictions, the auditor,[60] who may be invested with power to compel set-

47. Gartley *v.* People, 28 Colo. 227, 64 Pac. 208; Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Thomssen *v.* Hall County, 63 Nebr. 777, 89 N. W. 389; Maloy *v.* Bernalillo County, 10 N. M. 638, 62 Pac. 1106, 52 L. R. A. 126; Chenango County *v.* Birdsall, 4 Wend. (N. Y.) 453. See also Com. *v.* Porter, 21 Pa. St. 385.

48. Lewis *v.* Lee County, 73 Ala. 148; Monroe County *v.* Clarke, 25 Hun (N. Y.) 282.

49. The reason is that a public official of this nature is not a mere bailee or custodian of such money, but it becomes his own, and he can only be required to account for it and pay it over as provided by law and by the terms of his official bond. Shelton *v.* Morgan County, 53 Ind. 331, 21 Am. Rep. 197; Com. *v.* Godshaw, 92 Ky. 435, 17 S. W. 737, 13 Ky. L. Rep. 572. See also Maloy *v.* Bernalillo County, 10 N. M. 638, 62 Pac. 1106, 52 L. R. A. 126.

50. Kent County *v.* Verkerke, 128 Mich. 202, 87 N. W. 217.

51. *California.*— Solano County *v.* Neville, 27 Cal. 465.

Georgia.— Lumpkin County *v.* Williams, 89 Ga. 388, 15 S. E. 487.

Iowa.— Taylor County *v.* Standley, 79 Iowa 666, 44 N. W. 911.

Michigan.— People *v.* St. Clair County, 30 Mich. 388.

Minnesota.— McLeod County Com'rs *v.* Gilbert, 19 Minn. 214.

Missouri.— Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687.

Nebraska.— Valley County *v.* Robinson, 32 Nebr. 254, 49 N. W. 356; Thorne *v.* Adams County, 22 Nebr. 825, 36 N. W. 515.

New Hampshire.—Belknap County *v.* Clark, 58 N. H. 150.

Pennsylvania.— Stebbins *v.* Crawford County, 92 Pa. St. 289, 37 Am. Rep. 687; Lycoming County Com'rs *v.* Lycoming County, 46 Pa. St. 496.

See 13 Cent. Dig. tit. "Counties," § 339.

52. Merkel *v.* Berks County, 81 Pa. St. 505 [*affirming* 2 Wkly. Notes Cas. 87]; Richter *v.* Pennsylvania Tp., 9 Pa. St. 79.

53. Ramsey County *v.* Nelson, 51 Minn. 79, 52 N. W. 991, 38 Am. St. Rep. 492 [*distinguishing* Sweet *v.* Carver County Com'rs, 16 Minn. 106]. See also Montgomery County *v.* American Emigrant Co., 47 Iowa 91; Mogel *v.* Berks County, 12 Pa. Co. Ct. 498.

54. Jackson County *v.* Derrick, 117 Ala. 348, 23 So. 193; Board of Education *v.* Sheridan, 42 N. J. L. 64; Harris County *v.* Farmer, 23 Tex. Civ. App. 39, 56 S. W. 555.

55. Cook *v.* Putnam County, 79 Mo. 668.

56. Montgomery County *v.* American Emigrant Co., 47 Iowa 91; State *v.* Obert, 53 Kan. 106, 36 Pac. 64; Mogel *v.* Berks County, 12 Pa. Co. Ct. 498; Harris County *v.* Farmer, 23 Tex. Civ. App. 39, 56 S. W. 555.

57. Lee County *v.* Abrahams, 31 Ark. 571 (holding that the county court might compel an auditing with the clerk of the circuit court, if such latter court failed to require such settlement); McCoy *v.* State, 22 Ark. 308; Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687 (holding, however, that the statute authorizing the county court to enter up judgment for the amount it found due from a county official on settlement did not contemplate a judgment against the personal representative of a deceased officer); McFalls *v.* Essex County, 79 Va. 137.

58. Russel *v.* Patton, 54 Ga. 498; Kearney County *v.* Tuttle, 16 Nebr. 34, 19 N. W. 637; Law *v.* Harlan County, 12 Nebr. 637, 12 N. W. 114, where the commissioners are the sole judges as to when the necessity of an accounting exists.

59. Smith *v.* Outlaw, 64 Ga. 677.

60. Clegg *v.* Board of Auditors, 96 Mich. 188, 35 N. W. 621; Rowland *v.* Allegheny County, 111 Pa. St. 309, 2 Atl. 96; Glatfelter *v.* Com., 74 Pa. St. 74 (holding that the settlement concerning the military fund could be made with county auditors); Nason *v.* Directors of Poor, 24 Wkly. Notes Cas. (Pa.)

tlements with regard to taxes collected for the state as well as the county.[61] Provisions providing for such settlements must, however, be strictly followed,[62] and an auditor has no authority to settle with officers other than those designated by statute.[63]

c. Notice to Officer. Under the statutes of some states it would seem that notice must be given to an official, or if he be dead, to his executor, before settlement can be made;[64] and in any event notice to the official is necessary before judgment can be entered against him for the amount found due.[65]

d. Conclusiveness and Effect — (I) *In General.* County authorities in making settlements with the officials act ministerially rather than judicially, and their determination is no more conclusive than a settlement between private persons.[66]

(II) *Upon County.* Hence such settlement is not conclusive and binding on the county in case of fraud or mistake,[67] and may be successfully attacked on such grounds in a suit on the official's bond.[68] It has been held, however, that

60 (holding that the county auditors were authorized to settle the accounts of the directors of poor); Com. *v.* Laub, 3 Watts & S. (Pa.) 435; Goehrig *v.* Lycoming County, 13 Pa. Super. Ct. 67; *In re* County Auditors' Report, 8 Kulp (Pa.) 415.

Notice of authority of auditor.— A statute giving an auditor authority to audit and settle the accounts of a county officer is of itself sufficient notice to such officers of the authority to audit. Casby *v.* Thompson, 42 Mo. 133.

61. Com. *v.* Minnick, 2 Pa. Dist. 669; Com. *v.* Griffith, 1 Lanc. L. Rev. 201.

62. Cole County *v.* Schmidt, (Mo. 1889) 10 S. W. 888; Sidwell *v.* Birney, 69 Mo. 144.

63. Schuylkill County *v.* Minogue, 160 Pa. St. 164, 28 Atl. 643, 34 Wkly. Notes Cas. 80.

Nor can he acquire jurisdiction by the voluntary appearance of such parties, and their submission of their accounts for settlement. Mansel's Appeal, 4 Pa. Dist. 487.

Such officer is not, however, confined to the accounts for the year next preceding the settlement, if prior accounts have not been audited. Richter *v.* Pennsylvania Tp., 9 Pa. St. 79; Luzerne County *v.* Rhoads, 1 Kulp (Pa.) 437. See also Godshalk *v.* Northampton County, 71 Pa. St. 324.

64. Cole County *v.* Schmidt, (Mo. 1889) 10 S. W. 888; Centre County *v.* Kline, 9 Pa. Dist. 738.

65. Trice *v.* Crittenden County, 7 Ark. 159; Wilson *v.* Clarion County, 2 Pa. St. 17; Snyder County's Appeal, 3 Grant (Pa.) 38; Brown *v.* Com., 2 Rawle (Pa.) 40.

66. Washington County *v.* Parlier, 10 Ill. 232; Sudbury *v.* Monroe County, 157 Ind. 446, 62 N. E. 45; Rush County *v.* State, 103 Ind. 497, 3 N. E. 165; Hunt *v.* State, 93 Ind. 311; Christian County *v.* Gideon, 158 Mo. 327, 59 S. W. 99; Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717.

67. *Arkansas.*— White County *v.* Key, 30 Ark. 603.

Illinois.— Satterfield *v.* People, 104 Ill. 448; Kinney *v.* People, 4 Ill. 357; Kingman *v.* Peoria County, 96 Ill. App. 417; Crawford County *v.* Lindsay, 11 Ill. App. 261.

Indiana.— Sudbury *v.* Monroe County, 157 Ind. 446, 62 N. E. 45. *Compare* Hancock County *v.* Bradley, 53 Ind. 422; Posey County *v.* Saunders, 17 Ind. 437.

Iowa.— Powesheik County *v.* Stanley, 9 Iowa 511.

Missouri.— Christian County *v.* Gedeon, 158 Mo. 327, 59 S. W. 99; Callaway County *v.* Henderson, 139 Mo. 510, 41 S. W. 241; Scotland County *v.* Ewing, 116 Mo. 129, 22 S. W. 476; State *v.* Roberts, 62 Mo. 388.

Montana.— Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

Nebraska.— Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399; Hayes County *v.* Christner, 61 Nebr. 272, 85 N. W. 73; Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717; Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 673, 32 L. R. A. 223.

New Jersey.— Burlington County *v.* Fennimore, 1 N. J. L. 190.

South Carolina.— Richland County *v.* Miller, 16 S. C. 244.

Washington.— Ferry *v.* King County, 2 Wash. 337, 26 Pac. 537.

Wisconsin.— Sexton *v.* Richland County Sup'rs, 27 Wis. 349; Jefferson County *v.* Jones, 19 Wis. 51.

See 13 Cent. Dig. tit. "Counties," §§ 131, 132.

68. *Alabama.*— Moore *v.* Madison County, 38 Ala. 670.

Illinois.— Cumberland County *v.* Edwards, 76 Ill. 544.

Indiana.— Rogers *v.* State, 99 Ind. 218.

Iowa.— Palo Alto County *v.* Burlingame, 71 Iowa 201, 32 N. W. 259.

Kentucky.— See Graham *v.* Blount, 12 B. Mon. 243.

Mississippi.— Howe *v.* State, 53 Miss. 57.

Nebraska.— Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 673, 32 L. R. A. 223. But see Ragoss *v.* Cuming County, 36 Nebr. 375, 54 N. W. 683.

New York.— Richmond County *v.* Wandel, 6 Lans. 33.

North Carolina.— Moore County Com'rs *v.* MacRae, 89 N. C. 95.

a settlement is binding on the county in case the only mistake made therein is one of law.[69]

(III) *UPON OFFICIAL.* Where an officer accepts an amount allowed him for services by the county board, he is precluded from afterward disputing the correctness of the amount allowed,[70] except as to items, the right to which was not in issue or included in the settlement.[71] In the absence of such acceptance, he is not concluded by the settlement if mistake or fraud is shown.[72] Nevertheless in the absence of fraud or mistake the settlement is conclusive.[73]

e. Medium of Payment on Settlement. While it has been held that a county official may make payment to his successor or the county upon a settlement with it in any medium of exchange which is recognized by the county as legal tender,[74] a county or the successor of the official can as a rule accept money only upon settlement with such official.[75]

f. Appeal From Settlement. Provision is made for appeal from the settlement with the tribunal or officer acting on behalf of the county, in some jurisdictions.[76] And such appeal may, under some statutes, be made by the taxpayers.[77] In other

Texas.— Coe *v.* Nash, (Civ. App. 1897) 40 S. W. 235.

See 13 Cent. Dig. tit. "Counties," §§ 131, 132.

So in Pennsylvania it is held under a special statute relating to the settlement of accounts by the county auditor that the decision of the special tribunal created by the act, if not appealed from, is final and conclusive, and cannot be opened for the correction of errors or again inquired into by the auditors or by the court. Westmoreland County *v.* Fisher, 172 Pa. St. 317, 33 Atl. 571, 37 Wkly. Notes Cas. 441; Siggins *v.* Com., 85 Pa. St. 278; Glatfelter *v.* Com., 74 Pa. St. 74; Blackmore *v.* Allegheny County, 51 Pa. St. 160; Northumberland County *v.* Bloom, 3 Watts & S. 542; *In re* Butler Tp. School Dist., 40 Wkly. Notes Cas. 189; Com. *v.* Griffith, 2 Lanc. L. Rev. 17; Com. *v.* Griffith, 1 Lanc. L. Rev. 201; County *v.* Sheaffer, 13 Lanc. Bar 115.

69. State *v.* Shipman, 125 Mo. 436, 28 S. W. 842; Scotland County *v.* Ewing, 116 Mo. 129, 22 S. W. 476.

70. Gila County *v.* Thompson, (Ariz. 1894) 37 Pac. 22.

71. Shaver *v.* Sharp County, 62 Ark. 76, 34 S. W. 261; Llano County *v.* Moore, 77 Tex. 515, 14 S. W. 152.

72. Harrison County *v.* Benson, 83 Ind. 469; Adams *v.* Whitley County, 46 Ind. 454; Boom County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; Montmorency County *v.* Putnam, 122 Mich. 581, 81 N. W. 573; Adams *v.* Harper, 20 Mo. App. 684.

Limitation of rule.— In Arkansas, in an action on a treasurer's bond, he is concluded by the settlement, unless an appeal was taken to the circuit court. Hunnicutt *v.* Kirkpatrick, 39 Ark. 172.

73. Luzerne County *v.* Rhoads, 1 Kulp (Pa.) 437.

74. State *v.* Rives, 12 Ark. 721.

Effect of depreciation of bills.— A county official who receives bank-bills in discharge of his official duties, which at the time are current and good, may turn the identical bills over to the county on settlement, although they have since become depreciated. Peck *v.* James, 3 Head (Tenn.) 75.

75. Missoula County *v.* McCormick, 4 Mont. 115, 5 Pac. 287; Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 709, 32 L. R. A. 223; Cedar County *v.* Jenal, 14 Nebr. 254, 15 N. W. 369; Board of Justices *v.* Fennimore, 1 N. J. L. 242.

Prima facie lands cannot be taken by a county ordinary as payment by a defaulting treasurer. It is necessary for the party acting on behalf of the county to show that it was necessary to take the land to save the debt, or that such land was taken for some specific public purpose for which the county authorities might purchase lands. Phipps *v.* Morrow, 49 Ga. 37.

The officer cannot discharge his liability to the county by payment in promissory notes, checks, drafts, or other paper, and if such paper comes into the hands or control of the county after the officer has defaulted and absconded, it will operate as a credit or set-off only so far as money has been received on them. Cawley *v.* People, 95 Ill. 249.

76. Carnall *v.* Crawford County, 11 Ark. 604; Gifford *v.* Erie County, 142 Pa. St. 408, 21 Atl. 877; Luzerne County *v.* Whitaker, 100 Pa. St. 296; Mifflin County Com'rs *v.* Brisbin, 2 Penr. & W. (Pa.) 430; Wyoming County *v.* Wyoming County Com'rs, 7 Pa. Dist. 756; Luzerne County *v.* Rhoads, 1 Kulp (Pa.) 437; State *v.* Sheboygan County, 29 Wis. 79. But see Midland County *v.* Auditor-Gen., 27 Mich. 165.

77. An affidavit that injustice will be done, as required by statute upon the intervention in a suit by the taxpayers of a county, need not accompany an appeal from a report of county auditors on settlement of an officer's account. Mansel's Appeal, 4 Pa. Dist. 487. But under this statute the court will not direct an issue to be tried by a jury, where the facts can be satisfactorily ascertained by the court. Morley's Appeal, 2 Pa. Co. Ct. 417.

jurisdictions no appeal will lie from orders of this nature.[78] And in any event an appeal can only be taken in the manner provided by statute.[79]

6. Personal Liability — a. For Breach of Duty Independent of Bond. A county officer is liable to the county independently of his bond for any breach of the duties imposed upon him by statute.[80]

b. For Acts of Predecessor. A county officer cannot be held liable for the wrongful act of his predecessor in office.[81]

c. To Public or to Individuals. The personal liability of a county officer depends not only upon the nature of the duty but also upon the person or body of persons in whom the corresponding right inheres. Where the duty is owing to the individual, as for instance in the case of filing mortgages, articles of incorporation, etc., the right inheres in the individual injured. If on the other hand the duty is owing to the public only, it is held that an individual has no right of action for a breach thereof, although the individual be specially injured thereby.[82]

d. For Acts of Deputy.[83] Where by statute an official is made liable for the

78. Scott County *v.* Leftwich, 145 Mo. 26, 46 S. W. 963.

79. County *v.* Geisinger, 1 Lehigh Val. L. Rep. (Pa.) 113; Schuylkill County Auditors *v.* Commissioners, 2 Leg. Chron. (Pa.) 49.

The time for appeal under the Pennsylvania statute begins to run from the filing of the auditor's report. And where such report has been given by the auditor to the prothonotary and by him marked "filed," the running of such time will not be affected by an individual afterward procuring an order of the court for such filing. Armstrong County *v.* McKee, 172 Pa. St. 64, 33 Atl. 192, 37 Wkly. Notes Cas. (Pa.) 230.

80. Marshall *v.* State, 8 Blackf. (Ind.) 162; McLeod County Com'rs *v.* Gilbert, 19 Minn. 214; Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687; State *v.* Gates, 67 Mo. 139.

Liability for public moneys.— Under the laws of Minnesota a county treasurer is absolutely responsible, independent of his official bond, for all money coming into his hands as such treasurer, although stolen from him without his fault or negligence. McLeod County Com'rs *v.* Gilbert, 19 Minn. 214.

In a suit by a county against a county treasurer for conversion of funds belonging to the county, it is not necessary that the complaint should allege that there was an accounting and settlement by the treasurer, nor to state wherein the accounts of the treasurer are incorrect, this being matter of defense. Mower County *v.* Smith, 22 Minn. 97.

81. Jones *v.* Duras, 14 Nebr. 40, 14 N. W. 537.

82. Nemaha County School Dist. No. 80 *v.* Burress, (Nebr. 1902) 89 N. W. 609.

Liability for damage by illegal authorization of claim.— A statute providing that a county officer authorizing or aiding to authorize or auditing or allowing any claim or demand upon the county treasury, or any fund thereof in violation of law, shall be liable in person and upon his bond to the person damaged by such illegal authorization to the extent of his loss by reason of the non-payment of his claim, does not make such officers personally liable to one who never had a legal claim against the county nor to his assignee. Santa Cruz County Bank *v.* Bartlett, 78 Cal. 301, 20 Pac. 682.

Liability of agent for negligence.—A county not being liable for the negligent acts of its agent, the agent himself cannot be held liable, although in the manner of performing the work he acts maliciously. Packard *v.* Voltz, 94 Iowa 277, 62 N. W. 757, 58 Am. St. Rep. 396.

Liability of county surveyor for damage caused by want of professional skill.— The undertaking of a county surveyor employed by a highway commissioner being that he will bring to his work the necessary knowledge and skill to perform the same properly, if he fails to do so he will be liable to his employer for the damage caused thereby. Highway Com'rs *v.* Beebe, 55 Mich. 137, 20 N. W. 826.

Liability to assignee of warrants.— The Washington act of March 10, 1893, which makes it the duty of a county treasurer not to register and indorse warrants issued by school-district officers, unless the signatures thereon shall correspond with the signatures of the officers of the district on file in his office, was passed for the benefit of the school districts and of the county treasurer's office, and not at all for the benefit of the public at large; and hence a county treasurer's indorsement of a warrant is not a guaranty of its genuineness on which he is liable to an assignee of the warrant. Roberts *v.* Prescott, 15 Wash. 462, 46 Pac. 642.

Penalty for fees illegally charged.— Any excessive charge of fees by county officers will, under the statute of some of the states, render them liable to forfeit to the party injured a certain amount, usually several times the amount of the excess, and an action to recover such penalty may be instituted by any party injured by the charge, and is not confined to parties in the cause in which the fees were taxed. Richland County *v.* Miller, 16 S. C. 244.

83. Liability of deputy.— Under the Colorado statutes neither a deputy treasurer nor clerk gives bond to the public for the faithful performance of his duties, and there is no

wrongful acts of his deputy, the penalty for such wrongful acts may be recovered from such official.[84]

7. Disabilities. The general rule that no executive or administrative officer shall take official action in a matter involving the rights of others in which he is personally interested applies to county officers, and express provision is usually made for temporarily supplying the place of such officers when disqualified by interest or relationship by the appointment of deputies.[85] County officers are usually forbidden to take action in matters involving rights of others in which they are personally interested,[86] and cannot become parties to contracts with the county in relation to public work.[87] Where a statute forbids county officers to purchase or speculate in any claim allowed by the court of claims of his county, such officers cannot buy county claims either for themselves or for others.[88]

8. Liability on Official Bonds[89] **— a. Prerequisites to** — (i) *Valid Election.* To render a county official liable on a bond it is not necessary that he should have been legally elected;[90] he is liable, although in possession by usurpation only.[91]

(ii) *Bond Conforming to Statute.* If a bond is conditioned in the manner and for the purposes authorized by law, a slight omission or immaterial variance from the language of the statute or in the amount of penalty contemplated therein will not affect the liability thereon;[92] and it has been held that the insertion in

such privity between the county or the public and the deputy treasurer or clerk as to create an implied contract between them, in the face of an express contract between the treasurer and the public. Goss *v.* Boulder County, 4 Colo. 468.

84. Hilboldt *v.* Caraker, 41 Ill. App. 595, wrongful issue of marriage license by deputy. *Compare* Whyte *v.* Mills, 64 Miss. 158, 8 So. 171, where it was held that although the clerk of a board of supervisors gives his deputy entire charge of his office, he is not liable to the purchaser of county warrants fraudulently issued by the deputy, who used for that purpose the blanks furnished by the county, signing thereto the names of the clerk and the president of the board, and attaching the clerk's official seal.

85. Markley *v.* Rudy, 115 Ind. 533, 18 N. E. 50.

86. Markley *v.* Rudy, 115 Ind. 533, 18 N. E. 50.

87. Atchison County *v.* De Armond, 60 Mo. 19; Quayle *v.* Bayfield County, 114 Wis. 108, 89 N. W. 892.

Contracts for purchase of public lands.— County surveyors, being agents for the sale of swamp and overflowed lands, are sometimes prohibited through consideration of public policy from becoming the purchaser of such lands, directly or indirectly, and agreements to this effect are void. Edwards *v.* Estell, 48 Cal. 194.

Imposition of penalties.— In some states penalties are imposed by statute upon any county officer who shall contract directly or indirectly, or become in any way interested in any contract for the purchase of any draft or order on the treasury of the county, or for any jury certificate or any debt, claim, or demand for which said county may or can in any event be made liable (Read *v.* Smith, 60 Tex. 379, under Tex. Rev. Code, art. 248, punishing a violation by fine of from ten to twenty times the amount of the debt, etc.); or who shall become interested in the purchase or sale of anything made for or on account of such county (Rigby *v.* State, 27 Tex. App. 55, 10 S. W. 760, under Tex. Rev. Code, art. 250).

88. Moore *v.* Lawson, 102 Ky. 126, 42 S. W. 1136, 43 S. W. 409, 19 Ky. L. Rep. 1104, where it was held that where a deputy sheriff has bought with his own money a county claim which it was the duty of the sheriff to pay out of the county levy, it must be regarded as a payment of the claim by the deputy for his principal, and he is entitled to a credit therefor in his settlement with his principal.

89. See, generally, Bonds.

90. Duncan *v.* Pendleton County Ct., 4 Ky. L. Rep. 829.

91. People *v.* Slocum, 1 Ida. 62.

92. *Alabama.*— Wilson *v.* Cantrell, 19 Ala. 642.

Arkansas.— State *v.* Wood, 51 Ark. 205, 10 S. W. 624; *In re* Read, 34 Ark. 239.

Georgia.— Smith *v.* Taylor, 56 Ga. 292, bond not conditioned as prescribed.

Iowa.— Taylor County *v.* King, 73 Iowa 153, 34 N. W. 774, 5 Am. St. Rep. 666; Carroll County *v.* Ruggles, 69 Iowa 269, 28 N. W. 590, 58 Am. Rep. 223; Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

Kentucky.— Carter *v.* Carter County Ct., 3 B. Mon. 334.

Nebraska.— Clark *v.* Douglas, 58 Nebr. 571, 79 N. W. 158; Perkins County *v.* Miller, 55 Nebr. 141, 75 N. W. 577.

New York.— Schoharie County *v.* Pindar, 3 Lans. 8; Allegany County *v.* Van Campen, 3 Wend. 48.

Pennsylvania.— Clarke *v.* Potter County, 1 Pa. St. 159.

Texas.— Kempner *v.* Galveston County, 73 Tex. 216, 11 S. W. 188.

the bond of words not authorized by the statute will be rejected as surplusage if inconsistent with the liability imposed by the statutory language.[93] So bonds, although not good under the statute, are frequently held valid and binding as common-law bonds.[94]

b. Grounds and Accrual of Liability — (i) *In General.* Every failure of a county official to pay over moneys which it is his official duty to so disburse, or his failure to turn over to his successor the public moneys, books, records, accounts, papers, and documents, gives a right of action on the bond.[95] So also does a payment to a party or body other than those lawfully authorized to receive payments,[96] a payment in excess of what is lawfully authorized,[97] a negligent failure to cancel county warrants paid by the officer,[98] or an unlawful conversion of public moneys.[99] Sureties on official bonds are liable only for such acts of their principals as are done *virtute officii*, and if under a proper construction of a statute it is determined that the act, the omission of which is complained of, is not officially

Wisconsin.—Milwaukee County *v.* Pabst, 45 Wis. 311.

See 13 Cent. Dig. tit. "Counties," § 137 *et seq.*

Misnomer or misdescription of the obligee will not as a rule invalidate the bond. Hubert *v.* Mendheim, 64 Cal. 213, 30 Pac. 633 (where by virtue of the statute it was held that a bond of a deputy, executed by a treasurer instead of the state, could nevertheless be sued on as an official bond); Custer County *v.* Albien, 7 S. D. 482, 64 N. W. 533 (holding that the fact that a treasurer's bond ran to the county commissioners and their successors instead of to the county did not invalidate it); Smith *v.* Wingate, 61 Tex. 54; Jefferson County *v.* Jones, 19 Wis. 51 (holding that a bond running "unto the board of supervisors of said county," instead of to "the county board of supervisors," was sufficient). But a bond running to the state for the disbursement of a fund in which the county alone is interested is void. Marshall *v.* State, 8 Blackf. (Ind.) 162; St. Joseph County *v.* Coffenbury, 1 Mich. 355.

Signature.— A bond of a county official reciting that he and his sureties "are each severally held and firmly bound," and do bind themselves "severally and firmly by these presents," is a several bond, and the failure of the official to sign the same does not discharge the sureties who have subscribed thereto. Douglas County *v.* Bardon, 79 Wis. 641, 48 N. W. 969. See also Hall *v.* State, 69 Miss. 529, 13 So. 38.

The approval of a county treasurer's bond by a county judge instead of the supervisors who are authorized to make such approval does not affect its validity. Mendocino County *v.* Morris, 32 Cal. 145.

93. Clay County *v.* Simonsen, 1 Dak. 403, 46 N. W. 592.

94. State *v.* Sappington, 67 Mo. 529; State *v.* Thomas, 17 Mo. 503; Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Edmiston *v.* Concho County, 21 Tex. Civ. App. 339, 51 S. W. 353.

95. *Alabama.*— Briggs *v.* Coleman, 51 Ala. 561.

Dakota.— Stutsman County *v.* Mansfield, 5 Dak. 78, 37 N. W. 304.

Illinois.— Stern *v.* People, 102 Ill. 540; Kingman *v.* Peoria County, 96 Ill. App. 417.

Indiana.— Madison County *v.* Wood, 126 Ind. 168, 25 N. E. 190 [*distinguishing* Jay County *v.* Fempler, 34 Ind. 322]; Halbert *v.* State, 22 Ind. 125.

Iowa.—Cedar Rapids, etc., R. Co. *v.* Cowan, 77 Iowa 535, 42 N. W. 436; Madison County *v.* Tullis, 69 Iowa 720, 27 N. W. 487.

Kansas.—Fuller *v.* Jackson County, 2 Kan. 445.

Nebraska.— Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 411.

New York.— Tompkins County *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

North Carolina.— Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

Pennsylvania.— Elder *v.* Juniata County, 55 Pa. St. 485.

South Dakota.— Custer County *v.* Tunley, 13 S. D. 7, 82 N. W. 84, 79 Am. St. Rep. 870.

Tennessee.— Anderson County *v.* Hays, 99 Tenn. 542, 42 S. W. 266.

Texas.— Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67; Dunson *v.* Nacogdoches County, 15 Tex. Civ. App. 9, 37 S. W. 978.

Washington.— Snohomish County *v.* Ruff, 15 Wash. 637, 47 Pac. 35, 441.

Wisconsin.— Iowa County *v.* Vivian, 31 Wis. 217.

United States.—Spurlock *v.* West Virginia, 52 Fed. 382, 3 C. C. A. 151, construing the West Virginia code.

See 13 Cent. Dig. tit. "Counties," § 41 *et seq.*

96. Mahaska County *v.* Searle, 44 Iowa 492; Howard *v.* Horner, 11 Humphr. (Tenn.) 532.

97. Allen *v.* State, 6 Kan. App. 915, 51 Pac. 572; Custer County *v.* Tunley, 13 S. D. 7, 82 N. W. 84, 79 Am. St. Rep. 870.

98. The same having afterward been stolen and put into circulation. Johnson County *v.* Hughes, 12 Iowa 360. See also Blake *v.* Johnson County Com'rs, 18 Kan. 266.

99. Drawing extra salary without authority (People *v.* Treadway, 17 Mich. 480), although the amount thus drawn be obtained on warrants payable to himself (Mahaska *v.* Ruan, 45 Iowa 328; Jones *v.* Lucas County,

required, his bondsmen are not liable, although the party for whom he performed the service may have believed it to be his official duty, or although such services have often or habitually been performed by such official.[1]

(II) *For Special or Particular Funds.* If the bond of a county official is so conditioned that it is intended to cover all moneys coming into his hands in his official capacity, and of which he is the lawful custodian, his failure to properly account for the same would be a breach, regardless of the fact that such funds were for a special purpose or were not a part of the county fund;[2] and under such bond he has been held liable for a faithful accounting of school funds.[3] It is held, however, that where statutory provision is made for the protection of this or any other special fund by a special bond or security, the sureties on his general bond would not be liable therefor.[4]

(III) *In Case of Accidental Loss or Failure of Depositary.* In a few jurisdictions the rule of responsibility of bailees for hire has been applied to county officers having charge of county funds, exonerating them from liability for loss when guiltless of negligence, and the doctrine has been applied in the case of loss by theft or robbery,[5] or by the failure of a savings-bank which was in good standing at the time the moneys were placed there on deposit.[6] The weight of authority is, however, that the law of bailments is not the proper measure of the officer's responsibility.[7] The general proposition with respect to the liability of such officers and their sureties for the loss of public moneys is well settled, that where the statute in direct terms or from its general tenor imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon

57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710; Cricket *v.* State, 18 Ohio St. 9) would be a conversion, the fact that such warrants were made payable to himself not changing the issuance from an official to a private act (Spindler *v.* People, 154 Ill. 637, 39 N. E. 580 [*affirming* 51 Ill. App. 613]. But see State *v.* Kent, 53 Ind. 112). So too if a county officer unlawfully converts moneys he is liable on his bond, regardless of his right to lawfully distribute the same. Henry *v.* State, 98 Ind. 381.

1. *Idaho.*— Ada County *v.* Ellis, 5 Ida. 333, 48 Pac. 1071.

Indiana.— Scott *v.* State, 46 Ind. 203.

Iowa.— Mahaska County *v.* Ruan, 45 Iowa 328.

Missouri.— State *v.* Bonner, 72 Mo. 387.

Nebraska.— Ottenstein *v.* Alpaugh, 9 Nebr. 237, 2 N. W. 219.

Nevada.— State *v.* Fish, 4 Nev. 216.

Texas.— Coe *v.* Nash, 91 Tex. 113, 41 S. W. 473; Henderson County *v.* Richardson, (Sup. 1897) 40 S. W. 38.

See 13 Cent. Dig. tit. "Counties," § 141 *et seq.*

But where a county officer is authorized by law to issue genuine bonds by affixing his seal and signature thereto, a signing and sealing of fraudulent bonds is an official act for which his sureties are liable. Redemption Nat. Bank *v.* Rutledge, 84 Fed. 400.

2. *Alabama.*—Lewis *v.* Lee County, 66 Ala. 480.

Florida.— Perry *v.* Woodberry, 26 Fla. 84, 7 So. 483.

Illinois.— Prickett *v.* People, 88 Ill. 115.

Iowa.— Warren County *v.* Ward, 21 Iowa 84.

Kansas.— Jackson County Com'rs *v.* Craft, 6 Kan. 145.

Michigan.— Marquette County *v.* Ward, 50 Mich. 174, 15 N. W. 70.

New York.— Livingston County *v.* White, 30 Barb. 72.

Tennessee.— State *v.* McDannel, (Ch. App. 1900) 59 S. W. 451.

See 13 Cent. Dig. tit. "Counties," § 146.

3. Perry *v.* Woodberry, 26 Fla. 84, 7 So. 483; Hall *v.* State, 69 Miss. 529, 13 So. 38; State *v.* Mayes, 54 Miss. 417; Wake County *v.* Magnin, 86 N. C. 285.

4. *Alabama.*— Morrow *v.* Wood, 56 Ala. 1.

Minnesota.— Swift County *v.* Knudson, 71 Minn. 461, 74 N. W. 158; Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907; State *v.* Young, 23 Minn. 551.

Mississippi.—State *v.* Felton, 59 Miss. 402; State *v.* Hall, (1891) 8 So. 464.

Missouri.— State *v.* Johnson, 55 Mo. 80.

North Carolina.— State *v.* Bateman, 102 N. C. 52, 8 S. E. 882, 11 Am. St. Rep. 708.

Wisconsin.— Milwaukee County *v.* Pabst, 70 Wis. 352, 35 N. W. 337.

Compare Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455; Kempner *v.* Galveston County, 73 Tex. 216, 11 S. W. 188.

See 13 Cent. Dig. tit. "Counties," § 146.

5. Ross *v.* Hatch, 5 Iowa 149 (this case being difficult to reconcile with the later case of Lowry *v.* Polk County, 51 Iowa 50, 49 N. W. 1049, 33 Am. Rep. 114); Cumberland County *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284.

6. York County *v.* Watson, 15 S. C. 1, 40 Am. Rep. 675.

7. Perley *v.* Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; Board of Education *v.*

and assumed by the officer will be deemed to be absolute. Accordingly it has been held that the fact that such moneys have been stolen without any fault or negligence on the part of the officer will not exonerate him or his securities from liability on the bond,[8] and that it makes no difference that the county has failed to provide a safe or suitable place where its funds might be kept.[9] It is also well settled that if funds are lost by failure of a bank in which an officer has deposited them, the officer and his bondsmen are liable, notwithstanding the fact that he was guilty of no negligence in selecting the bank,[10] and notwithstanding the further fact that the county has failed to provide a safe place of deposit for the public fund.[11] Some decisions have even gone so far as to declare that the officer and his securities are not excused from loss, even though occasioned by

Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586; Maloy *v.* Bernalillo County, 10 N. M. 638, 62 Pac. 1106, 52 L. R. A. 126. And see cases cited *infra*, note 8 *et seq.*

8. *Illinois.*—Thompson *v.* Township No. 16, 30 Ill. 99.

Indiana.— Linville *v.* Leininger, 72 Ind. 491; Morbeck *v.* State, 28 Ind. 86; Halbert *v.* State, 22 Ind. 125.

Iowa.— Union Dist. Tp. *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39.

Massachusetts.— Hancock *v.* Hazzard, 12 Cush. 112, 59 Am. Dec. 171.

Minnesota.— Board of Education *v.* Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586; Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907; McLeod County Com'rs *v.* Gilbert, 19 Minn. 214; Hennepin County Com'rs *v.* Jones, 18 Minn. 199.

Mississippi.—Arnold *v.* State, 77 Miss. 463, 27 So. 596, 78 Am. St. Rep. 533.

Montana.— Jefferson *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

Nevada.— State *v.* Nevin, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 873.

New Jersey.— New Providence Tp. *v.* McEachron, 33 N. J. L. 339.

New York.— Muzzy *v.* Shattuck, 1 Den. 233 [*overruling* in effect Albany County *v.* Dorr, 25 Wend. 440].

Ohio.— State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363.

Texas.— Coe *v.* Foree, 20 Tex. Civ. App. 550, 50 S. W. 616.

United States.— U. S. *v.* Prescott, 3 How. 578, 11 L. ed. 734.

See 13 Cent. Dig. tit. "Counties," § 143.

Reason for rule.— The rule on which these decisions have been based has been well stated in a leading case in the federal supreme court as follows: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense." U. S. *v.* Prescott, 3 How. (U. S.) 578, 588, 11 L. ed. 734.

9. Lowry *v.* Polk County, 51 Iowa 50, 49 N. W. 1049, 33 Am. Rep. 114 [*citing* and attempting to *distinguish* Ross *v.* Hatch, 5 Iowa 149].

10. *Colorado.*— Gartley *v.* People, 24 Colo. 155, 49 Pac. 272.

Georgia.— Lamb *v.* Dart, 108 Ga. 602, 34 S. E. 160.

Kansas.— Rose *v.* Douglass Tp., 52 Kan. 451, 34 Pac. 1046, 39 Am. St. Rep. 354.

Minnesota.— Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907.

Mississippi.— Griffin *v.* Mississippi Levee Com'rs, 71 Miss. 767, 15 So. 107.

Missouri.— State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322.

Nebraska.— Tomssen *v.* Hall County, 63 Nebr. 777, 89 N. W. 389; Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 673, 32 L. R. A. 223.

New York.— Tillinghast *v.* Merrill, 151 N. Y. 135, 45 N. E. 375, 56 Am. St. Rep. 612, 34 L. R. A. 678 [*affirming* 77 Hun 481, 28 N Y. Suppl. 1089].

Oklahoma.— Van Trees *v.* Territory, 7 Okla. 353, 54 Pac. 495.

Pennsylvania.—Nason *v.* Directors of Poor, 126 Pa. St. 445, 17 Atl. 616, 24 Wkly. Notes Cas. 60.

Texas.— McKinney *v.* Robinson, 84 Tex. 489, 19 S. W. 699; Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67.

Washington.— Kittitas County *v.* Travers, 16 Wash. 528, 48 Pac. 340; Fairchild *v.* Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851.

Wisconsin.— Omro *v.* Kaime, 39 Wis. 468.

See 13 Cent. Dig. tit. "Counties," § 143.

11. Gartley *v.* People, 24 Colo. 155, 49 Pac. 272; Bush *v.* Johnson County, 48 Nebr. 1, 66 N. W. 1023, 58 Am. St. Rep. 673, 32 L. R. A. 223; Fairchild *v.* Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851. See also Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462, holding it no defense to an action on a bond that the office and safe furnished by the county were broken open and robbed without any want of any reasonable care on the part of the treasurer.

the act of God and the public enemy;[12] but it has been said in others that loss so caused should not be visited upon the officer and his bondsmen.[13]

c. Liability of Sureties[14]—(i) *Accrual and Extent of*—(a) *In General.* The sureties are liable to the full extent of the statutory penalty for which the bond is conditioned;[15] their liability is limited, however, to the amount prescribed by statute,[16] and they cannot be held for a penalty which is intended to operate upon the official as an individual punishment[17] or for a default in moneys unlawfully borrowed by the county board and placed in his hands.[18] But the mere fact that an officer officially received more moneys than his sureties contemplated does not affect their liability.[19]

(b) *On Successive Bonds.* Where a county official is his own successor in office, the sureties on his bond for his second term are liable for a conversion of moneys officially held by him at the time of the execution thereof,[20] as well as that which may subsequently come into his hands.[21] Nor is it material that such funds are misappropriated to cover previous delinquencies;[22] but they would not be liable for moneys received by him during his first term, which he had not charged himself as having received on entering on his second term,[23] or for deficiencies in his accounts occurring after his settlement with the commissioners whereupon a new bond was accepted in lieu of the first.[24]

(c) *For Official Duties Ex Officio.* Inasmuch as making a holder of one office *ex officio* officer as to the duties of another does not merge the two into one, it has been held that the sureties on an officer's bond are not liable for malfeasance in his *ex officio* duties.[25]

(d) *Period Over Which Liability Extends.* As a general rule the sureties on a county officer's bond are liable only for acts done during the term for which the bond was given,[26] notwithstanding it may be provided by statute that the term

12. Clay County *v.* Simonsen, 1 Dak. 402, 46 N. W. 592; State *v.* Clarke, 73 N. C. 255.

13. Thompson *v.* Township No. 16, 30 Ill. 99; Arnold *v.* State, 77 Miss. 463, 27 So. 596, 78 Am. St. Rep. 533; Maloy *v.* Bernalillo County, 10 N. M. 638, 62 Pac. 1106, 52 L. R. A. 126.

14. See, generally, BONDS; PRINCIPAL AND SURETY.

15. People *v.* Slocum, 1 Ida. 62; Jerauld County *v.* Williams, 7 S. D. 196, 63 N. W. 905.

16. Graham *v.* State, 66 Ind. 386.

17. State *v.* Hall, 68 Miss. 719, 10 So. 54.

18. Mason *v.* De Kalb County Road, etc., Com'rs, 104 Ga. 35, 30 S. E. 513; Frost *v.* Maxsell, 38 N. J. Eq. 586. See also Lewis *v.* Lee County, 66 Ala. 480; Rensselaer County *v.* Bates, 17 N. Y. 242.

19. Simons *v.* Jackson County, 63 Tex. 428.

20. Moore *v.* Madison County, 38 Ala. 670; Com. *v.* Sweigart, 9 Pa. Super. Ct. 455, 16 Lanc. L. Rev. 219.

Necessity of accounting before approval of successive bond.—It is sometimes provided that an official having public funds in his control shall not upon reëlection have his bond approved, until he has produced and fully accounted for all funds and property under his control. Woodward *v.* State, 58 Nebr. 598, 79 N. W. 164.

21. Moore *v.* Madison County, 38 Ala. 670.

A report made by a treasurer as part of his official duty showing the amount of funds in his hands at the execution of his second bond is binding upon the sureties thereto. Cawley *v.* People, 95 Ill. 249.

22. Cook *v.* State, 13 Ind. 154; Pine County *v.* Willard, 39 Minn. 125, 39 N. W. 71, 12 Am. St. Rep. 622, 1 L. R. A. 118.

23. Custer County *v.* Tunley, 13 S. D. 7, 82 N. W. 84, 79 Am. St. Rep. 870.

24. Missoula County *v.* Edwards, 3 Mont. 60.

25. Territory *v.* Ritter, 1 Wyo. 318. But *compare* Clay County *v.* Simonsen, 1 Dak. 403, 46 N. W. 592, where it was held that the judge of probate should, before entering on the duties of his office, give bond in the sum of four thousand dollars; that section 25 made him county treasurer *ex officio*; and that while no provision required him to give bond, as such, although the act relating to revenue made frequent reference to the county treasurer and his liability on his official bond, that the bond required by section 22 secured the performance of his duties as treasurer.

26. Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370 (even when the principal holds over after expiration of his term, but without qualifying anew by giving new bond); Rice County *v.* Lawrence County, 23 Kan. 283; Johns *v.* Hastings, 22 Kan. 464; Monger *v.* Harvey County, 22 Kan. 318; Riddle *v.* Cherokee County School Dist. No. 72, 15 Kan. 168; Bigelow *v.* Bridge, 8 Mass. 275. Hence they would not be liable for moneys lost by a treasurer before the execution of the bond. Coe *v.* Nash, 91 Tex. 113, 41 S. W. 473.

Limitation of rule.—In Minnesota it has

of office shall be for a certain period "and until a successor is elected and qualified."[27] According to some decisions, however, the sureties upon the bond of a county officer are liable thereon after the expiration of his term, so long as he remains in possession of the office in accordance with the law, and until he delivers it over to his successor.[28] So also the particular wording of the condition of the obligation may render the sureties liable upon the bond of a county officer after the expiration of his term.[29]

(II) *Discharge of Sureties.* Where some of the sureties are in any manner discharged from their liability on the bond this will operate to release the others, inasmuch as it impairs their right to contribution.[30] They are also released where, subsequent to execution of the bond, the duties and responsibility of their principal are greatly increased by an act of the legislature.[31] But their liability is not affected by the fact that the bond was approved by one having no authority so to do,[32] by the failure of the board to advise them that the principal had defaulted in office during his previous term,[33] by representations as to the conditions of a bond, made by one having no authority to bind the state or county,[34] by the fact that they understood their liability to be different from that incurred according to the terms and legal effect of the bond,[35] or by the fact that additional sureties are subsequently required by the board which is by statute empowered so to do.[36] So a delay of three months allowed the treasurer of a parish in which to settle the amount due of a certain fund does not operate as a discharge of the sureties on a bond conditioned that such treasurer should account for and pay over all such funds coming to his hands.[37]

been held that the obligation of the sureties does not extend to a period subsequent to the end of the first term, unless under some circumstances for such further time as might be reasonably necessary for the purpose of filling the office by appointment, notwithstanding the fact that the statute provides that the term of office should "continue for two years, and until a successor is elected and qualified." Scott County *v.* Ring, 29 Minn. 398, 13 N. W. 181.

Reason of rule.— Where the incumbent in accordance with statute continues in office till his successor is elected and qualified, he is simply regarded as filling a part of his successor's term. Riddel *v.* Cherokee County School Dist. No. 72, 15 Kan. 168.

27. Scott County *v.* Ring, 29 Minn. 398, 13 N. W. 181.

28. Placer County *v.* Dickerson, 45 Cal. 12; Thompson *v.* State, 37 Miss. 518.

29. Thus sureties on the bond of a county officer remain liable after the expiration of his term where the bond is conditioned that the officer shall render an account of all funds in his hands (Clements *v.* Biossat, 26 La. Ann. 243; Jefferson County *v.* Jones, 19 Wis. 51), or shall properly pay over to his successor all money which officially came into his hands (Plymouth County *v.* Kersehom, 108 Iowa 304, 79 N. W. 67, 75 Am. St. Rep. 257). So where the sureties on the bond of a deputy county official appointed by his principal obligate themselves for the faithful performance by such deputy of the duties of his office during his continuance therein their obligation is general for a term solely dependent upon the will of the principal and will continue unless revoked during his entire term. Kruttschnitt *v.* Hauck, 6 Nev. 163. See also State *v.* Baldwin, 14 S. C. 135, holding that if there is no law limiting the tenure of his office the sureties on the bond of a county officer are liable until his removal.

30. People *v.* Buster, 11 Cal. 215.

31. Monroe County *v.* Clarke, 25 Hun (N. Y.) 282, holding, however, that where the duties of a county treasurer were increased by requiring him to handle an additional fund, and defaults arose in connection with the funds usually handled by him, as well as in the additional fund, his sureties, while not responsible for the default in the latter, were not discharged from liability as to the former.

What constitutes change in obligation.— Where four parties who had agreed to become sureties to a county treasurer each signed a separate blank bond, the amount for which the same should be given being unknown at the time, with the understanding that the treasurer should subsequently fill up the blanks, his so doing as to one of the bonds, and the pasting of the signatures of the other three thereto, does not change the obligation intended to be assumed. Lee County *v.* Welsing, 70 Iowa 198, 30 N. W. 481. Nor would the mere enlargement of an official's duties in degree, but not in kind, discharge his sureties. Territory *v.* Carson, 7 Mont. 417, 16 Pac. 569. See also Smith *v.* Peoria, 59 Ill. 412; State *v.* Young, 23 Minn. 551.

32. People *v.* Evans, 29 Cal. 429.

33. Cawley *v.* People, 95 Ill. 249.

34. McLean *v.* State, 8 Heisk. (Tenn.) 22.

35. Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455.

36. Holt County *v.* Scott, 53 Nebr. 176, 73 N. W. 681.

37. Clements *v.* Biossat, 26 La. Ann. 243.

d. Enforcement of Liability — (I) *By Action* — (A) *Demand or Permission to Institute.* Where there has been a misappropriation of funds, or a refusal to pay them over to one's successor, or the loss has been occasioned through the official's misfeasance, it is generally held that no express demand of payment is necessary before instituting suit,[38] although in some jurisdictions the opposite rule prevails.[39] So too under some statutes leave of the court or other proper authorities must first be obtained,[40] but in others this is unnecessary.[41] It has been held that suit may be maintained on the bond of an official without the previous auditing of his accounts, where repeated efforts had been made to obtain a settlement with him, and he had also refused to pay over a sum designated by the county to the treasurer.[42]

(B) *Limitations.* The time within which an action for breach of a county official's bond must be brought is a matter of statutory regulation.[43]

(C) *Parties*[44] — (1) Plaintiff. If the bond of a county official is good only as a common-law obligation, suit must be brought in the name of the obligee only;[45] and in some jurisdictions it is still held that an action on the bond of a county official to recover public moneys must be prosecuted in the name of the obligee of the bond.[46] Under the statutes of some states actions for the breach of official bonds or for official misconduct or neglect may be brought by "the person aggrieved" in his own name, assigning the appropriate breach,[47] "by any person injured" thereby,[48] or by the real party in interest, although the state be the obligee in the bond.[49] In some jurisdictions actions upon the official bonds of any

38. *Arkansas.*— McCoy *v.* State, 22 Ark. 308.

Dakota.— Clay County *v.* Simonsen, 1 Dak. 403, 46 N. W. 592.

Kansas.— Blake *v.* Johnson County Com'rs, 18 Kan. 266.

Minnesota.— Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907.

New York.— Allegany County *v.* Van Campen, 3 Wend. 48.

Texas.— Coe *v.* Nash, (Civ. App. 1897) 40 S. W. 235.

See 13 Cent. Dig. tit. "Counties," § 153.

39. Owens *v.* Ballard County Ct., 8 Bush (Ky.) 611; Hickory County *v.* Dent, 121 Mo. 162, 25 S. W. 924. But see Clark County *v.* Hayman, 142 Mo. 430, 44 S. W. 237.

40. Hickory County *v.* Dent, 121 Mo. 162, 25 S. W. 924; Crook County *v.* Bushnell, 15 Oreg. 169, 13 Pac. 886. See also Com. *v.* Tilton, 48 S. W. 148, 20 Ky. L. Rep. 1056.

41. People *v.* Madden, 133 Cal. 347, 65 Pac. 741; Hunt *v.* State, 93 Ind. 311; Carver County *v.* Bongard, 82 Minn. 431, 85 N. W. 214; Waseca County *v.* Sheehan, 42 Minn. 57, 43 N. W. 690, 5 L. R. A. 785; Wall *v.* McConnell, 65 Tex. 397.

42. Cullom *v.* Dalloff, 94 Ill. 330.

43. *California.*— San Diego County *v.* Dauer, 131 Cal. 199, 63 Pac. 338, holding that the statute began to run from the time the treasurer lost control of the funds and not from the expiration of his office.

Indiana.— Ware *v.* State, 74 Ind. 181, three years.

Iowa.— Poweshiek County *v.* Ogden, 7 Iowa 177, holding, however, that the failure of a county judge to pay over to the county money received by him for the sale of county lands was not an "omission of an official duty," and hence the action on his bond was not barred within three years from each breach.

Kansas.— Graham County *v.* Van Slyck, 52 Kan. 622, 35 Pac. 299, action must be brought in three years.

Louisiana.— See Clements *v.* Biossat, 26 La. Ann. 243.

North Carolina.— Moore County Com'rs *v.* MacRae, 89 N. C. 95, holding that the statute began to run from the breach and not from the date of the bond.

See also, generally, Limitations of Actions.

44. See, generally, Parties.

45. Wilson *v.* Cantrell, 19 Ala. 642. And see Hunnicutt *v.* Kirkpatrick, 39 Ark. 172.

46. Albertson *v.* State, 9 Nebr. 429, 2 N. W. 742, 892; Hunter *v.* Mercer County, 10 Ohio St. 515.

47. Jackson County *v.* Derrick, 117 Ala. 348, 23 So. 193; Lewis *v.* Lee County, 66 Ala. 480 (holding that a county might be such person, after the expiration of the officer's term); Morrow *v.* Wood, 56 Ala. 1 (holding that the county superintendent of education, being authorized to receive the school moneys, was such person).

Transfer of order after refusal of payment. — The mere fact that the party aggrieved has exchanged the warrant on which the treasurer refused payment for others before commencing his action on the treasurer's bond to recover the statutory penalty for failure to pay county warrants does not preclude him from prosecuting the same. Dale *v.* Payne, 62 Ark. 357, 35 S. W. 786.

48. Cedar Rapids, etc., R. Co. *v.* Cowan, 77 Iowa 535, 42 N. W. 436; Mower County *v.* Smith, 22 Minn. 97.

49. Hunnicutt *v.* Kirkpatrick, 39 Ark. 172, holding that under such statute a county treasurer might maintain an action against his predecessor on the bond of the latter for school funds.

county officer are to be brought in the name of the county,[50] even though the bond runs to the commissioners and their successors,[51] or runs in the name of the state for the use and benefit of the county.[52] In other jurisdictions actions on bonds should be brought in the name of the board of commissioners or supervisors for the benefit of the party interested.[53] Generally where the state is the obligee in the bond, an action on such bond may be brought in the name of the state for the use and benefit of the county;[54] upon the relation of the proper county authorities,[55] and where the bond of a county treasurer is payable to the governor the action should be in the name of the governor for the use of the party in interest.[56] Where a county fiscal court after notice refuses to sue on behalf of the county for a breach of the bond of the county judge, a single taxpayer may sue for the benefit of all the taxpayers.[57]

(2) DEFENDANT. The principal and sureties on a county official's bond may be sued either jointly or severally,[58] and where a county treasurer gave two bonds during his term of office, the sureties on both bonds may properly be joined as defendants in a bill by the county for an accounting.[59]

(D) *Pleadings*[60] — (1) COMPLAINT. The complaint must show a breach of the bond.[61] It need not allege that the bond was approved and deposited with the proper authorities,[62] or that the official took the oath of office.[63] In actions for failure of duty facts must be stated showing that the officer was in a situation making it possible for him to perform the duty in question.[64] In an action against

50. *California.* — Sacramento County *v.* Bird, 31 Cal. 67.

Montana. — Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

South Carolina. — Aiken County *v.* Murray, 35 S. C. 508, 14 S. E. 954; Greenville County *v.* Runion, 9 S. C. 1.

Texas. — Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455; Smith *v.* Wingate, 61 Tex. 54.

Wyoming. — Sweetwater County *v.* Young, 3 Wyo. 684, 29 Pac. 1002.

51. Custer County *v.* Albein, 7 S. D. 482, 64 N. W. 533.

52. Kingman *v.* Peoria County, 96 Ill. App. 417; Blake *v.* Johnson County Com'rs, 18 Kan. 266.

53. Johr *v.* St. Clair County, 38 Mich. 532; Tompkins County *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

54. *Arkansas.* — McCoy *v.* State, 22 Ark. 308.

Idaho. — People *v.* Slocum, 1 Ida. 62.

Indiana. — Graham *v.* State, 66 Ind. 386; State *v.* Votaw, 8 Blackf. 2.

Iowa. — State *v.* Henderson, 40 Iowa 242.

Kansas. — Harvey *v.* Munger, 24 Kan. 205, county attorney has full power to use the name of the state in such actions.

Mississippi. — Kemp *v.* State, (1899) 24 So. 695 (by board in name of state); State *v.* Mayes, 54 Miss. 417.

Missouri. — State *v.* Sappington, 68 Mo. 454.

North Carolina. — State *v.* Thees, 89 N. C. 55; State *v.* McIntosh, 31 N. C. 307.

See 13 Cent. Dig. tit. "Counties," § 156.

55. Upon relation of county auditor. — Hostetler *v.* State, 62 Ind. 183; Yater *v.* State, 58 Ind. 299; Cabel *v.* McCafferty, 53 Ind. 75; Taggart *v.* State, 49 Ind. 47; Snyder *v.* State, 21 Ind. 77.

Upon relation of commissioners. — Graham *v.* State, 66 Ind. 386; Westcott *v.* Thees, 89 N. C. 55; State *v.* Magnin, 78 N. C. 181.

In Nebraska a suit in behalf of the public against a county treasurer for a breach of the conditions of his bond must be instituted by the county clerk at the direction of the state auditor or county commissioners, and the petition should allege that it is so instituted. Albertson *v.* State, 9 Nebr. 429, 2 N. W. 742, 892.

56. Perry *v.* Woodberry, 26 Fla. 97, 7 So. 483.

57. Com. *v.* Tilton, 54 S. W. 11, 21 Ky. L. Rep. 1079.

58. State *v.* Roberts, 40 Ind. 451, holding that the code had not modified the common law in this respect.

59. Self *v.* Blount County, 124 Ala. 191, 27 So. 554.

60. See, generally, PLEADING.

61. Patrick *v.* Rucker, 19 Ill. 428; Annapolis Sav. Inst. *v.* Bannon, 68 Md. 458, 13 Atl. 353; State *v.* Thomas, 17 Mo. 503. And that it is the proximate cause of the loss or injury complained of. Sacramento County *v.* Bird, 31 Cal. 67; People *v.* Myers, (Colo. App. 1901) 65 Pac. 409; State *v.* Bottorff, 8 Blackf. (Ind.) 337; State *v.* Hall, 68 Miss. 719, 10 So. 54.

62. State *v.* Fredericks, 8 Iowa 553. See also White Pine County *v.* Herrick, 19 Nev. 34, 5 Pac. 276.

63. Schoharie County *v.* Pindar, 3 Lans. (N. Y.) 8.

64. Houghton County Sup'rs *v.* Rees, 34 Mich. 481. Thus in an action against a county treasurer upon his bond for failure to pay over funds coming into his hands, it should appear that funds had come into the official's hands during his term whereby he was enabled to comply with this requirement.

a county officer for failure to pay over balances found to be due from him, the declaration should aver either that such officer had settled with the county court and had failed to pay the amount due, or that he failed to settle and the county court had proceeded to adjust his accounts and render judgment against him.[65] In actions for non-payment of money, it should appear to whom he refused to make the payment in question,[66] but an allegation that he refused to pay over money to his successor in office has been held sufficient;[67] yet if his successor holds by virtue of appointment, the authority of the county to make the same should appear.[68] Where it is the duty of county commissioners to bring suit against the sheriff for failure to account for county taxes only where the county treasurer fails to bring such suit, the complaint when the commissioners are the relators should allege the failure of the county treasurer to sue, and the reason of their doing so.[69]

(2) ANSWER. The answer must clearly and specifically deny the breach alleged,[70] or state matters in avoidance, not amounting to conclusions of law.[71] And while a plea that the principal therein was not such official would be good,[72] if the execution of his bond is a matter of record a plea of *non est factum* cannot be made.[73]

(E) *Defenses.* In an action on a county official's bond for failure to account for all money actually received or collected by him in his official capacity, the obligors cannot defend upon the ground that the money did not belong to the county,[74] that it had been irregularly collected or receipted for,[75] that the funds received by him were illegal or exacted without authority of law,[76] or that the

State *v.* Votaw, 8 Blackf. (Ind.) 2. And that the money remained in the officer's hands at the expiration of his term. Pickett *v.* Hamilton County, 24 Ind. 366.

65. Jones *v.* State, 15 Ark. 261. But see Clay County *v.* Simonsen, 1 Dak. 403, 46 N. W. 592.

Sufficient averment of settlement by court. — An averment that a certain sum remained in a treasurer's hands, that he was summoned to appear in court and settle, but failed so to do, that the court struck a certain sum as the balance against him, and that he is justly indebted as the records of the court show, is a sufficient averment of settlement. State *v.* Croft, 24 Ark. 550.

66. State *v.* Bottorff, 8 Blackf. (Ind.) 337.

67. Graves *v.* State, 136 Ind. 406, 36 N. E. 275; State *v.* Spears, Smith (Ind.) 360; State *v.* Bottorff, 8 Blackf. (Ind.) 337; Hickory County *v.* Fugate, (Mo. 1898) 44 S. W. 789; Crook County *v.* Bushnell, 15 Oreg. 169, 13 Pac. 886.

As to sufficient allegation of the existence of a successor see Redwood County *v.* Tower, 28 Minn. 45, 8 N. W. 907.

68. Washington County Sup'rs *v.* Semler, 41 Wis. 374.

As to sufficient averment of due appointment see Carver County *v.* Bongard, 82 Minn. 431, 85 N. W. 214.

Alleging that money belonged to county. — Where the complaint shows that the officer received money in his official capacity and failed to deliver the same to his successor in office, it is not necessary to allege that the money belonged to the county whose officer he was. Crook County *v.* Bushnell, 15 Oreg. 169, 13 Pac. 886.

69. State *v.* Clarke, 73 N. C. 255.

70. Kindle *v.* State, 7 Blackf. (Ind.) 586; McKinney *v.* State, 68 Miss. 284, 8 So. 648.

71. Perry *v.* Woodberry, 26 Fla. 84, 7 So. 483.

72. Taylor *v.* Arthur, 9 Sm. & M. (Miss.) 183.

73. Stuart *v.* Com., 91 Va. 152, 21 S. E. 246.

74. Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746. See also Helm *v.* Com., 79 Ky. 67.

75. *California.* — Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833.

Illinois. — Campbell *v.* People, 154 Ill. 595, 39 N. E. 578 [*affirming* 52 Ill. App. 338].

Kansas. — Doolittle *v.* Atchison, etc., R. Co., 20 Kan. 329.

Michigan. — Montmorency County *v.* Wiltse, 125 Mich. 47, 83 N. W. 1010.

Texas. — Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455.

See 13 Cent. Dig. tit. "Counties," § 154.

A former recovery against a county treasurer and sureties on his first bond for a default occurring after its execution, and before the execution of a second bond, is no defense to an action on the latter for a default occurring after its execution, but during the same term of office. Warren County *v.* Ward, 21 Iowa 84.

76. *Alabama.* — Coleman *v.* Pike County, 86 Ala. 393, 5 So. 481.

Iowa. — Mahaska County *v.* Ingalls, 14 Iowa 170.

Mississippi. — McKinney *v.* State, 68 Miss. 284, 8 So. 648.

New York. — Seneca County *v.* Allen, 99 N. Y. 532, 2 N. E. 459; Rensselaer County *v.* Bates, 17 N. Y. 242.

commissioners had not complied with the statute in respect to their supervisory duties.[77] Nor will ignorance of the law relieve the official from a penalty for failing to submit his bond to the commissioners within the time specified.[78] And the county's liability to the state for misapplied state taxes will not absolve him from his liability to the state therefor.[79] So the sureties cannot defend upon the ground that the treasurer did not receive the money,[80] or that the commissioners knew of the loss for which the sureties are sought to be charged, before their execution of the bond.[81] In such action a plea of set-off is bad which fails to show that the claim sought to be set off has been presented to the board as required by statute.[82]

(F) *Evidence.*[83] In an action on a county official's bond the best evidence of default must of course be produced,[84] but the certificates, receipts, or vouchers of a county official for public moneys,[85] entries in his official books,[86] or duly and properly executed settlements or reports with the county official are admissible as against the obligors on his bond, upon the question of what funds came to his hands;[87] and evidence that payments had been made to a county treasurer which had not been credited affects only the weight to be given to such settlements as *prima facie* evidence of the state of his accounts.[88] On the other hand any evidence tending to rebut the evidence of his default would be admissible on behalf of the official.[89] If it appears that in the account of a county treasurer settled by

Ohio.— State *v.* Kelly, 32 Ohio St. 421; Feigert *v.* State, 31 Ohio St. 432.

Pennsylvania. — Boehmer *v.* Schuylkill County, 46 Pa. St. 452.

Tennessee.— Anderson County *v.* Hays, 99 Tenn. 542, 42 S. W. 266; Wilson *v.* State, 1 Lea 316.

See 13 Cent. Dig. tit. "Counties," § 154.

77. *Alabama.*— See Jackson County *v.* Derrick, 117 Ala. 348, 23 So. 193.

Iowa.— Muscatine County *v.* Carpenter, 33 Iowa 41.

Kansas.— Loper *v.* State, 48 Kan. 540, 29 Pac. 687.

Minnesota.— Waseca County *v.* Sheehan, 42 Minn. 57, 43 N. W. 690, 5 L. R. A. 785.

Pennsylvania. — Boehmer *v.* Schuylkill County, 46 Pa. St. 452; Wylie *v.* Gallagher, 46 Pa. St. 205.

Utah.— State *v.* Stanton, 14 Utah 180, 46 Pac. 1109.

See 13 Cent. Dig. tit. "Counties," § 154.

78. Wimbish *v.* Com., 75 Va. 839.

79. Hughes *v.* Com., 48 Pa. St. 66.

80. The auditor's report shows that such amounts actually came into his hands. Com. *v.* Sweigart, 9 Pa. Super. Ct. 455, 16 Lanc. L. Rev. 219.

81. Coe *v.* Nash, (Tex. Civ. App. 1897) 40 S. W. 235.

82. State *v.* Banks, 66 Miss. 431, 6 So. 184; Botetourt County *v.* Burger, 86 Va. 530, 10 S. E. 264.

83. See, generally, EVIDENCE.

84. Thus where the law directs the money to be paid only on the warrants or receipts of other public officers, such warrants or receipts must be produced or their loss explained. State *v.* Teague, 9 S. C. 149. See also Clements *v.* Boissat, 26 La. Ann. 243.

85. Butte County *v.* Morgan, 76 Cal. 1, 18 Pac. 115; Placer County *v.* Dickerson, 45 Cal. 12; Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455. See also Albertson *v.* State, 9 Nebr. 429, 2 N. W. 742, 892.

86. Cawley *v.* People, 95 Ill. 249.

Books of account, provided for by statute to be kept by the county clerk with the county treasurer, are evidence of the amount due the county in case of default by the treasurer. Rizer *v.* Callen, 27 Kan. 339; State *v.* Teague, 9 S. C. 149.

87. Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; Monroe County *v.* Clarke, 25 Hun (N. Y.) 282; Tompkins County *v.* Bristol, 15 Hun (N. Y.) 116 (holding, however, that statements made by him to his successor after the expiration of his term would not be admissible); State *v.* McDannel, (Tenn. Ch. App. 1900) 59 S. W. 451. See also Clark County *v.* Hayman, 142 Mo. 430, 44 S. W. 237.

A report of an expert who had examined a treasurer's accounts is not error, where the expert testifies orally at the instance of the objecting party to the facts stated in his report. Doll *v.* People, 145 Ill. 253, 34 N. E. 413 [*affirming* 48 Ill. App. 418].

But a mere synopsis of the settlement with the county of a sheriff who was authorized to take in payment for swamp lands cash, notes, and county railroad bonds, without distinguishing between the amounts of each received, is not sufficient on which to found a judgment in a suit on the sheriff's bond. State *v.* Roberts, 62 Mo. 388. See also Scott County *v.* Ring, 29 Minn. 398, 13 N. W. 181.

88. Montmorency County *v.* Putnam, 122 Mich. 581, 81 N. W. 573.

89. As for instance payments and expenditures during the term subsequent to that during which the default is alleged to have occurred. Moore *v.* Madison County, 38 Ala. 670.

As to sufficiency of evidence in general see the following cases:

the auditor the treasurer has charged himself and credited the county which was indebted to him with a sum of money, for the amount of which he has drawn an order on the treasurer of another county, it is decisive evidence, in an action brought for the use of the county against the person on whom the order was drawn, that the county has received the money, whether the order was paid or not.[90]

(G) *Judgment.*[91] Where the finding on a county official's bond is for the full penalty, judgment will not be arrested for failure to make special entry of the amount of the execution.[92] Nor will a judgment against him for the amount for which he has failed to account be reversed because of an irregularity in charging such amount.[93] It is proper in an action on a bond of a county official to enter judgment against each of the sureties for the amount for which he is liable.[94]

(II) *By Summary Proceedings*[95] — (A) *Right to Institute* — (1) In General. In many jurisdictions proceedings of a summary nature are provided for by statute by which a county official or his sureties may on default be proceeded against in a more expeditious manner than the usual judicial proceedings.[96] Such provisions must, however, be strictly followed,[97] and are not extended by implication or intendment.[98]

(2) By County. In some jurisdictions a motion may be maintained in the name of the state for the use of a county against a delinquent trustee and his sureties to recover moneys collected by him.[99]

(3) By Creditor of County. Express statutory provision is made in some states for summary proceedings against county treasurers or trustees and their sureties on their official bonds for failure to pay allowed claims against the county, by the holders of such claims or their assignees.[1] In others a county creditor can

California.— Sonoma County *v.* Stofen, 125 Cal. 32, 57 Pac. 681; Los Angeles County *v.* Lankershim, 100 Cal. 525, 35 Pac. 153, 556; Butte County *v.* Morgan, 76 Cal. 1, 18 Pac. 115.

Michigan.— Montmorency County *v.* Putnam, 127 Mich. 36, 86 N. W. 398; Montmorency County *v.* Wiltse, 125 Mich. 47, 83 N. W. 1010.

New York.— Tompkins County *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

Texas.— Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455.

West Virginia.—State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

See 13 Cent. Dig. tit. "Counties," § 158.

90. Boggs *v.* Miles, 8 Serg. & R. (Pa.) 407.

91. See, generally, Judgments.

92. State *v.* Bonner, 5 Mo. App. 13.

93. Beaver *v.* State, 124 Ind. 324, 24 N. E. 242.

94. Custer County *v.* Albien, 7 S. D. 482, 64 N. W. 533. See also People *v.* Rooney, 29 Cal. 642.

95. See, generally, Summary Proceedings.

96. Lamb *v.* Dart, 108 Ga. 602, 34 S. E. 160 (holding that by virtue of such statute the county board were authorized to issue execution against the estate of a deceased defaulting treasurer); Jones *v.* Collier, 65 Ga. 553; Com. *v.* Jackson, 10 Bush (Ky.) 424 (holding that a trustee of a jury fund is an officer "authorized to collect public money" within such statute); McGuire *v.* Owsley County, 7 B. Mon. (Ky.) 340; Derrick *v.* State, 3 Lea (Tenn.) 396.

By officer against deputy and sureties.— In Virginia a county treasurer may proceed by motion, and upon due notice against his deputy and the sureties of the latter for failure of the deputy to pay over on account money for tax tickets placed in his hands for collection, and in such a proceeding formal pleadings are not required, but any proper defense may be made as well without as with a plea. Hall *v.* Ratliff, 93 Va. 327, 24 S. E. 1011.

97. Judson *v.* Smith, 104 Mo. 61, 15 S. W. 956.

98. Caldwell *v.* Dunklin, 65 Ala. 461. See also Lamb *v.* Dart, 108 Ga. 602, 34 S. E. 160, where it was held that a proper construction of the statutory provisions allowing the remedy against a county treasurer authorized a recovery of twenty per cent interest upon the amount for which execution is issued.

99. Jernegan *v.* Gray, 14 Lea (Tenn.) 536.

Amendment.— The sureties cannot, in the absence of fraud or collusion, object to the changing of the party plaintiff from chairman of the county court to that of the state. Jernegan *v.* Gray, 14 Lea (Tenn.) 536.

1. Enloe *v.* Reike, 56 Ala. 500.

Necessity for written transfer of claim.— Under the statutes of Alabama providing that such proceedings against a treasurer for failure to pay an allowed claim may be instituted by "the party to whom the claim is payable, his legal representative, or assigns," the assignee should be one who had received such claim by a transfer in writing and not by mere delivery (Enloe *v.* Reike, 56 Ala.

maintain a motion in his own name against a county official or his sureties for failure to pay a county claim, but cannot maintain it against both.[2] The statutes authorizing such proceedings must be strictly followed in all matters of substance, and the record must affirmatively show every material fact necessary to sustain the proceeding.[3]

(B) *Notice to Official.* Notice is required to be given, under most of the statutory provisions, permitting a summary remedy.[4]

9. Criminal Responsibility — a. What Constitutes Offense. In many of the states certain acts of malfeasance or nonfeasance by county officers are made criminal offenses or misdemeanors punishable by indictment or information, as for instance the wilful omission by a county officer to perform any duty enjoined upon him by law;[5] the obtaining of county funds not belonging to him;[6] the taking of illegal fees;[7] failure to give notice of funds available to redeem county warrants;[8] failure to deliver to his successor all money, securities, property, books, papers, etc., belonging to the county or appertaining to the office;[9] or speculation in county warrants, orders, or demands on the county by buying up the same for less than par value.[10] And it is no defense to an indictment for this latter offense that the person from whom he purchased it did not have a good title,[11] or that the official intended to purchase it for another, it not being shown that the money of such other was used.[12] So also members of a county board of civil-service commissioners may be indicted for a violation of the county civil-service act by irregularly issuing a certificate of appointment without regular examination of the appointee.[13] It is not compounding a felony for a county treasurer to account for moneys as received from his predecessor, which he has not in fact received, and

500), but in Tennessee his possession of the claim is *prima facie* evidence of his ownership (Howard *v.* Horner, 11 Humphr. (Tenn.) 532).

2. Ridener *v.* Rogers, 6 B. Mon. (Ky.) 594.

3. Enloe *v.* Reike, 56 Ala. 500.

Thus it should be made to clearly appear upon what claim the motion is founded (Howard *v.* Horner, 11 Humphr. (Tenn.) 532); that the claim, payment of which is sought to be enforced, has been duly allowed (Cohen *v.* Coleman, 71 Ala. 496); and that funds for its liquidation are in the officer's hands or could be secured by the exercise of his official powers (Thompson *v.* Healy, 4 Metc. (Ky.) 257. See also Caldwell *v.* Guinn, 54 Ala. 64).

4. Caldwell *v.* Guinn, 54 Ala. 64; Foster *v.* Justices Cherokee County Inferior Ct., 9 Ga. 185; Adams *v.* Arnold, 76 Miss. 655, 24 So. 868; Hall *v.* Ratliff, 93 Va. 327, 24 S. E. 1011.

Under a later provision of the Georgia statute this requirement was omitted. Price *v.* Douglas County, 77 Ga. 163, 3 S. E. 240.

5. *Ex p.* Harrold, 47 Cal. 129; Kennedy *v.* State, 34 Ohio St. 310.

Application of statute.— In *Ex p.* Harrold, 47 Cal. 129, it was held that Cal. Pen. Code, § 176, which makes a wilful omission by an officer to perform a duty enjoined by law a misdemeanor, does not apply to conditions or qualifications upon which the incumbent's right to hold an office depends; but to duties pertaining to the office while in the discharge of official duties, and that the failure of a county treasurer to reside at the county-seat of his county, as required by Cal. Pol. Code, § 4119, is not an "omission to perform any duty enjoined by law upon a public officer," within the meaning of Cal. Pen. Code, § 176, and is not made a misdemeanor.

6. State *v.* Crowley, 39 N. J. L. 264.

Fraudulent taking or misapplication of money belonging to county.— The term "money" as used in Tex. Pen. Code, art. 103, which provides for the punishment of any county officer who shall fraudulently take or misapply any "money" belonging to the county, means legal-tender metallic coins or legal-tender currency of the United States; the definition of the term in articles 789, 792, being confined to the offenses of embezzlement and swindling. Lewis *v.* State, 28 Tex. App. 140, 12 S. W. 736.

7. McCarthy *v.* Territory, 1 Wyo. 311.

8. *Ex p.* Howe, 26 Oreg. 181, 37 Pac. 536.

9. State *v.* Hebel, 72 Ind. 361; Howze *v.* State, 59 Miss. 230.

10. Wilder *v.* State, 47 Ga. 522; Vanhook *v.* State, 5 Blackf. (Ind.) 450; Marks *v.* State, 71 Miss. 206, 14 So. 459.

Amount must appear on face of order.— Under Ind. Rev. Stat. (1838), p. 154, making it an indictable offense for a county officer to receive an order on demand against his county for an amount less than that expressed on its face, the order or demand must express its amount on its face. It is not sufficient that it may be arrived at by calculation. Vanhook *v.* State, 5 Blackf. (Ind.) 450.

11. Wilder *v.* State, 47 Ga. 522.

12. Marks *v.* State, 71 Miss. 206, 14 So. 459.

13. Morrison *v.* People, 196 Ill. 454, 63 N. E. 989.

himself assume their payment upon the predecessor's assurance that he will make the amount good if his accounts are incorrect.[14]

b. Indictment and Trial.[15] Where the indictment is for failure to pay over moneys to the defendant's successor in office it must be alleged that his term of office had expired, and that at the expiration of the term there remained in his possession moneys received by him as such officer, and that he failed to pay over the same to his successor.[16] An indictment for buying up county orders at less than par sufficiently charges the offense when it alleges that this was done either by himself or his agents, directly or indirectly.[17] An indictment for taking illegal fees, which merely alleges that the defendant "was then and there unlawfully and corruptly guilty of malfeasance" is insufficient.[18] An indictment against an officer of a county for obtaining county funds not belonging to him need not state the means and methods of obtaining the money.[19] A county treasurer, when prosecuted for embezzlement of county funds, may, in order to establish a defense that the embezzlement in fact occurred more than three years previous to the finding of the indictment, impeach the previous settlements made by him, and show that in such settlements the certificates of deposit and other vouchers produced by him were false, and that the amounts of cash represented thereby were not to his credit in the banks at the time of such settlements.[20]

V. PROPERTY.

A. Acquisition and Tenure — 1. In General. In accordance with the general rule already stated, that counties have a corporate capacity only for particular specified purposes, and such powers only as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted,[21] they have only such powers with regard to the acquisition of real estate as are given them either expressly or impliedly by statute.[22] They may be, and generally are, expressly empowered to acquire and hold both real and personal estate,[23] but usually with some such limitation as that the acqui-

14. Van Ness *v.* Hadsell, 54 Mich. 560, 20 N. W. 585.

15. See, generally, CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

16. State *v.* Hebel, 72 Ind. 361.

17. Wilder *v.* State, 47 Ga. 522.

18. McCarthy *v.* Territory, 1 Wyo. 311.

19. State *v.* Crowley, 39 N. J. L. 264, where it was held that an indictment which states that the defendant was an officer of the county of B, that is to say, a chosen freeholder for the township of W; that he, while he continued such officer, wilfully and unlawfully did obtain from said board of chosen freeholders, that is to say, from the county of B, a certain sum of money not lawfully and justly due him at the time of obtaining the same, sufficiently describes the offense against the statute.

20. State *v.* Hutchinson, 60 Iowa 478, 15 N. W. 298.

21. Williams *v.* Lash, 8 Minn. 496.

22. Shelley *v.* Lash, 14 Minn. 498; Williams *v.* Lash, 8 Minn. 496.

People of county incompetent to take by grant.— In Jackson *v.* Cory, 8 Johns. (N. Y.) 385, it was held that the people of a county not being a corporate body, have no capacity to take by grant, and that the act of 1801 enabling supervisors of counties to take conveyances of land apply only to conveyances made to the supervisors by name.

23. *Indiana.*— Holten *v.* Lake County, 55 Ind. 194; Hayward *v.* Davidson, 41 Ind. 212.

Minnesota.— Shepard *v.* Murray County, 33 Minn. 519, 24 N. W. 291; James *v.* Wilder, 25 Minn. 305; Shelley *v.* Lash, 14 Minn. 498; Williams *v.* Lash, 8 Minn. 496.

New York.— People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

Texas.— Scalf *v.* Collins County, 80 Tex. 514, 16 S. W. 314; Milam County *v.* Bateman, 54 Tex. 153.

Wisconsin.— French *v.* Dunn County, 58 Wis. 402, 17 N. W. 1.

See 13 Cent. Dig. tit. "Counties," § 161.

Delegation of power to committee.— Under a statute giving a county board power to purchase land for a poor farm, the county board may delegate to a committee of its members the power to purchase such land and under a resolution authorizing it "to purchase a suitable farm for a county poor-farm," the committee may in its discretion purchase unimproved land. French *v.* Dunn County, 58 Wis. 402, 17 N. W. 1.

Grant of land to remain unbuilt on with reservation of use to grantor.—In 1772 plaintiff's predecessor in title granted a strip of land eight feet in width to the commissioners of Berks county, adjoining the county jail, reserving the use of the same for an open yard, garden, or grass lot, for the purpose that the same should "be and remain for-

sition shall be for the public use of the county.[24] In some jurisdictions, however, the statutes confer the right of counties to take title to and enjoy real estate without any limitation as to the purpose for which the same shall be used.[25]

2. Devise, Donation, or Dedication. A county may take and hold property for such purposes as are authorized by statute, by donation,[26] devise,[27] or dedica-

ever hereafter unbuilt on, in order to prevent any prisoner or prisoners making their escape over the said prison wall, by reason or means of any building to be erected contiguous to the said wall." In 1848 the commissioners, by act of assembly, were authorized to sell the jail property, a new jail having been erected in another place, and they did so sell it to defendant's predecessors in title. Plaintiff filed a bill praying for the cancellation of the deed of 1772, alleging that "she was anxious to sell the property, but was unable to secure an adequate price for the same for the reason that defendants alleged that they had succeeded to the rights of the county commissioners under the deed of 1772 and would assert the same." It was held that the estate in the county under the deed of 1772 was a base fee which determined upon the sale of the jail property, and that plaintiff was entitled to a cancellation of the instrument of 1772. Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547.

Land encumbered or granted conditionally. — Under a statute prohibiting county commissioners from receiving conveyances of land in fee simple to the county with a reservation or condition, such commissioners have no power to receive a donation of land with a reservation or limitation in the deed; and so a contract of reconveyance in the event that the county court should not build a court-house upon land conveyed, or that it should be used for other purposes than a site for a court-house, cannot be lawfully made. Rogers *v.* Sebastian County, 21 Ark. 440. The words "a good unincumbered title" in the eighteenth section of the New York act of April 14, 1854, erecting the county of Schuyler, means a title in fee simple absolute, free and clear from any legal exception or charge thereon. They import an estate without any prior claim, to continue forever, and having no qualifications or conditions in regard to its continuance. It is accordingly held that a deed conveying land to the supervisors so long as said property should be occupied for a county site for the court-house, jail, etc., and when it ceased to be used for the purposes aforesaid, then to revert to the grantor, was not a compliance with the act, and did not convey such a title as was contemplated by the act. Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

Power given to a county board or county court by statute to erect a court-house, jail, or other public building, carries with it by implication power to acquire the necessary land on which to erect such buildings. De Witt *v.* San Francisco, 2 Cal. 289; Sheidley *v.* Lynch, 95 Mo. 487, 8 S. W. 434; Culpeper *v.* Gorrell, 20 Gratt. (Va.) 484.

24. Shepard *v.* Murray County, 33 Minn. 519, 24 N. W. 291: James *v.* Wilder, 25 Minn. 305; Williams *v.* Lash, 8 Minn. 496; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422; Vankirk *v.* Clark, 16 Serg. & R. (Pa.) 286; Alleghany County *v.* Parrish, 93 Va. 615, 25 S. E. 882. In Hayward *v.* Davidson, 41 Ind. 212, it was held that counties are expressly empowered to acquire and hold title to real estate for the location of county buildings and for a poor farm, and there may be other instances. See also Holten *v.* Lake County, 55 Ind. 194, in which it was held that the commissioners of a county have a right *prima facie* to purchase a tract of land to be used as a home for the poor of their county, which right cannot be questioned in a collateral proceeding.

Purchase of real estate sold on execution. — A county has no capacity to become the purchaser of real estate sold on execution in its favor, where the purchase is not made for the public use of the county within the meaning of Minn. Comp. Stat. p. 109, § 251. Shelley *v.* Lash, 14 Minn. 498; Williams *v.* Lash, 8 Minn. 496.

Who may raise question as to acquisition for unauthorized use. — Where a corporation is authorized to acquire and hold title to real estate for some purposes, the state only can question whether or not real estate acquired by such corporation has been acquired for the authorized uses or not. Hayward *v.* Davidson, 41 Ind. 212; Quitman County *v.* Stritze, 69 Miss. 460, 13 So. 35; New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233.

25. Scalf *v.* Collins County, 80 Tex. 514, 16 S. W. 314.

A county holding stock in a railroad company by authority of a legislative act not restricting the nature of its ownership holds it as a private corporation, and not for a public governmental purpose, and hence the interests of the county therein are not subject to the Mississippi laws of 1894, page 29, authorizing the state revenue agent to sue on obligations or debts to a county. Adams *v.* Natchez, etc., R. Co., 76 Miss. 714, 25 So. 667.

26. Quitman County *v.* Stritze, 69 Miss. 460, 13 So. 35; Abernathy *v.* Dennis, 49 Mo. 468; Gumpert *v.* Luzerne County, 202 Pa. St. 340, 51 Atl. 968; Milam County *v.* Bateman, 54 Tex. 153; Gilmore *v.* Hayworth, 26 Tex. 89.

Donation vesting absolute title. — A donation of real estate to a county for a county-seat, "or for what other use the county may see proper to convert the same," vests in the donee an absolute title to the same and there is no reversion to the donor or to his heirs in case the county-seat is removed. Gilmore *v.* Hayworth, 26 Tex. 89.

27. Hayward *v.* Dodson, 41 Ind. 212; Fulbright *v.* Perry County, 145 Mo. 432, 46 S. W.

tion.[28] The fact that a devise to a county omits to designate the uses to which the property is to be applied will not render such devise void.[29]

3. Proceedings — a. Compliance With Statutory Requirements. The power of a county to acquire and hold real property being derived from statutes, statutory provisions as to the board or officer by whom such power is to be exercised must be strictly followed.[30] So also provisions as to the mode to be pursued are not simply directory, but operate as a limitation upon the power to purchase and must be followed,[31] as for instance, where it is provided that property shall not be purchased unless the taxpayers shall petition therefor,[32] that the question shall be submitted to a popular vote of the county,[33] that notice of intention to purchase is published for a certain time and in a certain manner,[34] or that two successive grand juries shall report that the necessities of the county require ground at the county-seat for the purpose of erection of county buildings.[35]

955; Christy *v.* Ashtabula County Com'rs, 41 Ohio St. 711; Carder *v.* Fayette County, 16 Ohio St. 353; Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

A devise to the county is a devise to the commissioners of the county and vests the title in them. Carder *v.* Fayette County, 16 Ohio St. 353.

28. Kent County *v.* Grand Rapids, 61 Mich. 144, 27 N. W. 888. See also Mahon *v.* Luzerne County, 9 Kulp (Pa.) 453, where it was held that a county has no inherent right of property in a public square which has been dedicated to the use of all the citizens of the commonwealth. Such a public square resembles a public highway, and no one can block it up.

29. Carder *v.* Fayette County, 16 Ohio St. 353.

30. Pulaski County *v.* Lincoln, 9 Ark. 320; Casady *v.* Woodbury County, 13 Iowa 113.

Commissioners appointed "to locate and establish a seat of justice" in a county have no authority to make contracts in behalf of the county with the owner of land which they decide upon, for the location of such county-seat. Overman *v.* Kerr, 17 Iowa 485.

Right of county convention to act with county commissioners.— Under N. H. Gen. Stat. c. 22, § 2, giving a county convention power to raise county taxes and to authorize the repair of public buildings costing more than one thousand dollars in a single year, the convention cannot by committee or otherwise act with the county commissioners in the purchase of furniture and other personal property for the use of a county poor farm. Brown *v.* Reding, 50 N. H. 336.

The county judge and justices are the sole judges of the need of a poor-house, and can purchase land therefor and make necessary improvements under Ky. Gen. Stat. c. 86, § 4. Jones *v.* Pendleton County Ct., (Ky. 1892) 19 S. W. 740.

Two of three commissioners appointed by the county court to select and contract for a site for a poor-house cannot make a valid purchase. Pulaski County *v.* Lincoln, 9 Ark. 320.

Where it is necessary for the county court to approve the purchase of land by special commissioners, and a presiding judge by reason of his interest in the sale as vendor cannot vote on such approval, the other judges cannot proceed without him, and the act of a court in approving the purchase without the vote of such presiding judge is void. Pulaski County *v.* Lincoln, 9 Ark. 320.

31. Hudson *v.* Jefferson County Ct., 28 Ark. 359; Winn *v.* Shaw, 87 Cal. 631, 25 Pac. 968.

32. Hudson *v.* Jefferson County Ct., 28 Ark. 359.

33. Ball *v.* Bannock County, 5 Ida. 602, 51 Pac. 454; Casady *v.* Woodbury County, 13 Iowa 113.

Necessity of acceptance by board after vote. — Where a building is leased to a county board with the stipulation that the county might at any time purchase it after the majority vote in favor of purchasing it, this vote does not constitute a complete contract of sale, but the same must be consummated by a ratification by the act of the board. Starr *v.* Des Moines County, 22 Iowa 492.

34. Winn *v.* Shaw, 87 Cal. 631, 25 Pac. 968.

Ohio Rev. Stat. § 877, which requires commissioners to publish notice of their intentions in purchasing land to erect any building, do not apply to proceedings under section 929 for the purpose of lands for the Children's Home. State *v.* Darke County, 43 Ohio St. 311, 1 N. E. 209.

35. Sharp *v.* Wike, (Pa. 1887) 9 Atl. 454; Bennett *v.* Norton, 171 Pa. St. 221, 32 Atl. 1112 [*affirming* 7 Kulp (Pa.) 443]; Northampton County Com'rs' Appeal, 57 Pa. St. 452; York *v.* Commissioners, 6 Watts (Pa.) 229. But see Gumpert *v.* Luzerne County, 202 Pa. St. 340, 51 Atl. 968.

The Pennsylvania act of April 15, 1837, authorizing county commissioners to erect public buildings, on procuring the sanction of two successive grand juries, is not applicable merely to new counties, but such sanction is necessary before the commissioners can be authorized to rebuild a court-house where the one in use is too small for the accommodation of the public. York *v.* Commissioners, 6 Watts (Pa.) 229.

Power of quarter sessions to reverse its action.— Where two successive grand juries recommended the erection of county buildings and such recommendation was approved by the court of quarter sessions, the authority to erect such buildings is completely vested

b. Power to Purchase Without Previous Appropriation. In one state it is expressly provided by statute that where a board of freeholders is authorized to purchase sites for public buildings, to purchase toll-roads, to build bridges, or to erect public buildings, the extraordinary expenditures so authorized may be in addition to and in excess of the annual appropriation previously made by such board.[36]

c. Failure to Levy Tax For Purchases at Proper Time. Where the county votes the levy of a tax for the purchase of real property upon the valuation of taxable property of the county for a certain year and the land in question is purchased during that year, the failure to levy the tax at the proper time will not invalidate the purchase nor prevent the commissioners from levying such tax afterward.[37]

d. Implied Acceptance of Property From Use Under Protest. Where a lot and the building thereon are donated to county commissioners for a court-house, an occupation of such building by the board as their place of meeting, although under protest, is a sufficient acceptance of the building as a court-house by the county.[38]

e. Effect of Deed, Conveyance, or Mortgage to County Commissioners. According to a number of decisions a conveyance of land to the county commissioners vests in the county a legal title to such property;[39] so also a mortgage given to county commissioners instead of to the county has been held to be good.[40]

B. Construction, Maintenance, and Repair of Public Buildings — 1. In General. The authority to provide, construct, improve, maintain, and repair court-houses, jails, and other public county buildings is usually vested in the county board of commissioners of each county,[41] or the county court, or a judge

in the county commissioners, and the quarter sessions have no power subsequently to suspend or reverse its action. Northampton County Com'rs' Appeal, 57 Pa. St. 452.

36. Quackenbush *v.* State, 57 N. J. L. 18, 29 Atl. 431, holding that the New Jersey act of April 2, 1888, to the effect stated in the text, applies to the county of Passaic.

37. State *v.* Pratt County, 42 Kan. 641, 22 Pac. 722.

38. Stafford County *v.* State, 40 Kan. 21, 18 Pac. 889.

39. Street *v.* McConnell, 16 Ill. 125; Sumner *v.* Darnell, 128 Ind. 38, 27 N. E. 162, 12 L. R. A. 173. See also Skipwith *v.* Martin, 50 Ark. 141, 6 S. W. 514.

By Pa. Pub. Laws (1834), p. 537, § 9, the titles to all court-houses, jails, etc., theretofore vested in county commissioners are declared to be vested in the respective counties. Prior to the passage of the above act the commissioners and their successors in office were regarded as corporations. As such they had power to accept a grant of land for such purposes as were lawful, having no power to hold land for other than a lawful purpose. In case land were taken and the purpose ceases the right to hold the land would determine. Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547. See also Slegel *v.* Herbine, 10 Pa. Co. Ct. 347.

40. Rood *v.* Winslow, 2 Dougl. (Mich.) 68 [*affirming* Walk. (Mich.) 340].

A deed for an interest in land for the use and benefit of a county made to individuals as commissioners appointed by an act creating a county, but whose duties under the act were to determine when county commissioners should be elected and qualified, is valid and effective, although executed after the election and qualification of others as county commissioners. Elk County *v.* Earley, 121 Pa. St. 496, 15 Atl. 602.

41. *Illinois.*— Randolph County Com'rs *v.* Jones, 1 Ill. 237.

Indiana.— Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; Potts *v.* Bennett, 140 Ind. 71, 39 N. E. 518; Kitchel *v.* Union County, 123 Ind. 540, 24 N. E. 366; Nash *v.* State, 33 Ind. 78.

Iowa.— Way *v.* Fox, 109 Iowa 340, 80 N. W. 405; Miller *v.* Merriam, 94 Iowa 126, 62 N. W. 689; Merchant *v.* Tama County, 32 Iowa 200.

Kentucky.— Hollenbeck *v.* Winnebago County, 1 Ky. L. Rep. 198.

Michigan.— Thomas *v.* Kent Cir. Judge, 116 Mich. 106, 74 N. W. 381; Wayne County *v.* Carpenter, 114 Mich. 44, 72 N. W. 19.

Mississippi.— Allgood *v.* Hill, 54 Miss. 666.

New Hampshire.— Whitcher *v.* Grafton County, 67 N. H. 582, 39 Atl. 441.

New York.— Roach *v.* O'Dell, 33 Hun 320; People *v.* Opdyke, 40 Barb. 306.

Ohio.— *Ex p.* Black, 1 Ohio St. 30; State *v.* Williams County, 2 Ohio Cir. Dec. 227; State *v.* Urner, 9 Ohio Dec. (Reprint) 271, 12 Cinc. L. Bul. 34; State *v.* Ottawa County, 7 Ohio S. & C. Pl. Dec. 34, 5 Ohio N. P. 260.

Pennsylvania.— Sharp *v.* Wike, (1887) 9 Atl. 454; Mogel *v.* Berks County, 154 Pa. St. 14, 26 Atl. 227; Northampton County Com'rs' Appeal, 57 Pa. St. 452; York *v.* Commissioners, 6 Watts 229.

thereof,[42] and under such authority the question as to the necessity for the erection or repair of a county building, the amounts necessary, whether or not such buildings are sufficiently constructed, etc., are usually left to the discretion of the board or county court,[43] and their decision is final in the absence of an abuse of discretion amounting to fraud.[44]

2. SUBMISSION TO POPULAR VOTE. In some jurisdictions it is expressly provided by statute that the question of the erection of county buildings must be submitted to the vote of the electors of the county.[45] So in one jurisdiction the authorities

Texas.— Robertson *v.* Breedlove, 61 Tex. 316; Cresswell Ranch, etc., Co. *v.* Roberts County, (Civ. App. 1894) 27 S. W. 737.

Virginia.— Norfolk County Sup'rs *v.* Cox, 98 Va. 270, 36 S. E. 380; Manly Mfg. Co. *v.* Broaddus, 94 Va. 547, 27 S. E. 438.

United States.— Montgomery *v.* Orr, 27 Fed. 675.

See 13 Cent. Dig. tit. "Counties," § 165.

A suitable building for a jail may be acquired instead of building one. Roach *v.* O'Dell, 33 Hun (N. Y.) 320; *Ex p.* Black, 1 Ohio St. 30.

Appropriations and disbursements of appropriations for county asylums.— Under Wis. Laws (1881), c. 233, § 8, amounts to be appropriated for the improvement of the grounds and buildings of the county insane asylums are to be determined by the board in its discretion, but moneys so appropriated are to be disbursed by the trustees of the asylum, who may exercise their discretion as to the nature and character of the improvements. Milwaukee County *v.* Paul, 59 Wis. 341, 18 N. W. 321.

Necessity for separate estimate as to cost of the building and grounds.— In Iowa the board of supervisors may order the erection of a public building, the cost of which does not exceed five thousand dollars, and may also order the purchase of grounds on which to erect the same, but the cost of the building and grounds are not to be estimated together. Merchant *v.* Tama County, 32 Iowa 200.

Power to insure county property is included in the power to take care of and improve it. Potts *v.* Bennett, 140 Ind. 71, 39 N. E. 518; Walker *v.* Linn County, 72 Mo. 650.

Power to make expenditures for setting out shade trees is included in the power to maintain a good and convenient court-house. Allgood *v.* Hill, 54 Miss. 666.

Where prison inspectors without authority from the county commissioners or the court of quarter sessions add a building to a county prison, and there is no bill or document to show the expenditures upon the building, a claim for its erection is properly disallowed by the county auditors. Mogel *v.* Berks County, 154 Pa. St. 14, 26 Atl. 227.

42. *Arkansas.*— Armstrong *v.* Truitt, 53 Ark. 287, 13 S. W. 934; *In re* Buckner, 9 Ark. 73.

Missouri.— Walker *v.* Linn County, 72 Mo. 650; Vitt *v.* Owens, 42 Mo. 512.

Tennessee.— Nelson *v.* Carter County, 1 Coldw. 207.

Vermont.— Campbell *v.* Franklin County, 27 Vt. 178.

West Virginia.— Hanly *v.* Randolph County Ct., 50 W. Va. 439, 40 S. E. 389.

See 13 Cent. Dig. tit. "Counties," § 165.

Assent of all the justices unnecessary.—By Tenn. Acts (1856), c. 253, a county judge, as such, has the power to bind the county court by his individual contract for repairs done and improvements made upon the court-house when necessary and proper, without the direction or assent of all the justices. Nelson *v.* Carter County, 1 Coldw. (Tenn.) 207.

Effect of failure of commissioners of public buildings to take bond.— A statute requiring the commissioners of public buildings to take bond of the person who undertakes the erection of a court-house is directory, and his failure so to do does not affect the jurisdiction of the county court over the subject-matter. *Ex p.* Buckner, 9 Ark. 73.

Necessity for attendance of justices.— A county court under Ark. Dig. c. 42, have authority to order the building of a court-house without notifying all the justices of the county to attend, providing they have sufficient funds with which to build such court-house. But a tax for such purpose cannot be levied without an order of the court made after a notification to all the justices of the county to attend for that purpose. *Ex p.* Buckner, 9 Ark. 73.

The power to improve and repair county property may under the Vermont statutes be delegated by the county court judges to a committee. Campbell *v.* Franklin County, 27 Vt. 178.

43. Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; Kitchell *v.* Union County, 123 Ind. 540, 24 N. E. 366; *Ex p.* Black, 1 Ohio St. 30; State *v.* Urner, 9 Ohio Dec. (Reprint) 277, 12 Cinc. L. Bul. 34; Robertson *v.* Breedlove, 61 Tex. 316; Cresswell Ranch, etc., Co. *v.* Roberts County, (Tex. Civ. App. 1894) 27 S. W. 737.

44. Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; Kitchell *v.* Union County, 123 Ind. 540, 24 N. E. 366; Robertson *v.* Breedlove, 61 Tex. 316; Cresswell Ranch, etc., Co. *v.* Roberts County, (Tex. Civ. App. 1894) 27 S. W. 737; Montgomery *v.* Orr, 27 Fed. 675. And see Mahon *v.* Luzerne County, 9 Kulp (Pa.) 453.

Method of reviewing proceedings of quarter sessions.— The proper method of bringing before the supreme court the proceedings of the court of quarter sessions in the erection of a new jail is by certiorari sued out by the county commissioners. Northampton County Com'rs' Appeal, 57 Pa. St. 452.

45. State *v.* Harrison, 24 Kan. 268; Pauly Jail-Bldg., etc., Co. *v.* Kearney County, 68

of the county cannot, without submitting the question to vote, contract for expenditures for the erection of a court-house in excess of funds on hand and the proceeds of taxation applicable for the object for the year in which the contract is made;[46] and in others, they cannot contract for the erection of a county building involving an expenditure of more than a designated amount.[47] The question must be submittted at a general or special election, as the statute may provide.[48] It has been held, however, that such provisions do not require the submission to a public vote of the question of making repairs or alterations in a public building already existing.[49]

C. Control and Disposition — **1. In General.** The control and management of all property, real and personal, for the use of a county, is usually expressly vested by statute in the county board or county court of each county.[50] They cannot, however, authorize the use of county property for purposes other than those provided by law.[51]

2. Regulation and Use of Property — **a. Control Over County Buildings.** Under a general authority given to county boards to provide county buildings

Fed. 171, 15 C. C. A. 351; Brown *v.* Sherman County, 5 Fed. 274, 2 McCrary 469; Lewis *v.* Sherman County, 5 Fed. 269, 2 McCrary 464, construing Nebraska statute.

In Maine it is provided (Rev. Stat. c. 78, § 14) that county commissioners shall not remove a county building or erect a new one instead of it more than one-half mile from the former location, without first giving notice of their intention and of the place where they propose to locate it, to the municipal officers of each town in the county who shall present the same to the town at its next annual meeting for choice of state or town officers and receive, sort, and count the votes for and against the proposal. See also Hubbard *v.* Woodsum, 87 Me. 88, 32 Atl. 802.

46. Lewis *v.* Lofley, 92 Ga. 804, 19 S. E. 57. See also Habersham County *v.* Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547.

47. Way *v.* Fox, 109 Iowa 540, 80 N. W. 405; Miller *v.* Merriam, 94 Iowa 126, 62 N. W. 689; Rock *v.* Rinehart, 88 Iowa 37, 55 N. W. 21; Cook *v.* Des Moines County, 70 Iowa 171, 30 N. W. 394; Gray *v.* Mount, 45 Iowa 591; Marine Ruffner, etc. *v.* Hamilton County Com'rs, 1 Disn. (Ohio) 39, 12 Ohio Dec. (Reprint) 473. In Miller *v.* Merriam, 94 Iowa 126, 62 N. W. 689, under section 311 of the code, providing when the question submitted involves the borrowing or the expenditure of money, the proposition must be accompanied by a proposition to levy tax for the payment, it is not necessary to submit the proposition for the levy of the tax when there is available money in the county treasury sufficient to pay for the proposed building.

48. Miller *v.* Merriam, 94 Iowa 126, 62 N. W. 689; Gray *v.* Mount, 45 Iowa 591; Pauly Jail-Bldg., etc., Co. *v.* Kearney County, 68 Fed. 171, 15 C. C. A. 351.

Sufficient submission of question.— A submission to the voters of a county of the question whether the county judge shall levy a specified tax for the purpose of constructing a court-house, the tax to be levied from year to year until a sufficient amount is raised for the purpose, is a sufficient submission of the question whether money shall be borrowed to build a court-house and negotiable bonds be sold for obtaining the same. Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6, 21 L. ed. 272.

Inclusion of more than one object in proposition.— In the submission to the electors of a proposition for the outlay of money for public buildings, two distinct objects, such for instance as the building of a court-house and also a school-house, each calling for a certain specified amount, cannot be included in one proposition, thus preventing the voter from voting for the one and against the other. Gray *v.* Mount, 45 Iowa 591. See also Hubbard *v.* Woodsum, 87 Me. 88, 32 Atl. 802. In Rock *v.* Rinehart, 88 Iowa 37, 55 N. W. 21, a ballot submitting the question whether a court-house to cost not exceeding fifty thousand dollars shall be erected "from the proceeds arising from the sale of land belonging to said county" was held not objectionable as containing two propositions — the erection of the court-house and the sale of the land.

49. State *v.* Harrison, 24 Kan. 268; Pauly Jail-Bldg., etc., Co. *v.* Kearney County, 68 Fed. 171, 15 C. C. A. 351. See also Cook *v.* Des Moines County, 70 Iowa 171, 30 N. W. 394.

50. *Arkansas.*— State *v.* Baxter, 50 Ark. 447, 8 S. W. 188.

Illinois.— McDonough County *v.* Thomas, 84 Ill. App. 408; Hardin *v.* Sangamon County, 71 Ill. App. 103; Dahnke *v.* People, 57 Ill. App. 619.

Indiana.— State *v.* Hart, 144 Ind. 107, 43 N. E. 7, 32 L. R. A. 118.

Kansas.— Brown County Com'rs *v.* Barnett, 14 Kan. 627.

Missouri.— Sparks *v.* Purdy, 11 Mo. 219.

New Mexico.— Agna Pura Co. *v.* Las Vegas, 10 N. M. 6, 60 Pac. 208.

See 13 Cent. Dig. tit. "Counties," § 170.

51. Franklin County *v.* Gills, 96 Va. 330, 31 S. E. 507.

Powers of sheriff as custodian.— Ill. Rev. Stat. c. 34, § 25, providing that the county board shall have power "to take and have the care and custody of all the real and personal estate owned by the county," does not curtail the common-law powers of the sheriff, as custodian of the court-house and jail, to employ

and suitable rooms for county purposes and to control the same, such boards have the power to designate and appropriate rooms in the county court-house for the use of county officers.[52] Where county commissioners are empowered, in case there are no county buildings, to provide suitable rooms for county purposes, they may under such authority provide rooms for county officers, even though the county may possess a court-house which is unsuitable for the occupation or inadequate to the wants of the county; and the judgment of the commissioners is ordinarily conclusive as to unfitness or insufficiency of such buildings.[53]

b. Abandonment of Use of Public Buildings. Where a county abandons the use of public buildings situated on a public square of a county town, it has no equity against the citizens or trustees of such town therefor, and can confer no such equity by sale to a private individual.[54]

3. Renting or Leasing — a. Of County Property — (I) *Statutory Authority.* In accordance with the general rule heretofore stated that county boards or county courts have no other powers than those conferred expressly or by necessary implication,[55] such courts or boards have no power to rent or lease property or franchises owned by the county in the absence of statutory authority so to do.[56]

(II) *Distress For Rent Due County.* Under a code provision conferring upon the several counties of the state all the rights of private parties in

a janitor to take care of the same. McDonough County *v.* Thomas, 84 Ill. App. 408.

52. *California.*— San Joaquin County *v.* Budd, 96 Cal. 47, 30 Pac. 967.

Illinois.— Dahnke *v.* People, 57 Ill. App. 619.

Kansas.— Butler *v.* Neosho County Com'rs, 15 Kan. 178.

Kentucky.— Marshall *v.* Com., Ky. Dec. 326.

Nevada.— Owen *v.* Nye County, 10 Nev. 338.

See 13 Cent. Dig. tit. "Counties," § 169.

Mandate to compel board to provide library room.— Where a board of supervisors of a county which has once adopted the provisions of the California act of March 31, 1891, establishing law libraries, fails to provide a suitable or sufficient library room, the board of law library trustees of the county may by mandate compel the board of supervisors to provide such room. Board of Law Library Trustees *v.* Orange County, 99 Cal. 571, 34 Pac. 244.

Power not exhausted by one designation.— The power of county supervisors to designate rooms in a court-house for the use of county officers is not exhausted by one designation, but they may assign to the district attorney rooms occupied by the judges of the superior court, although such rooms were designated on the building plans as "judges chambers." San Joaquin County *v.* Budd, 96 Cal. 47, 30 Pac. 967.

Right of the court or judge to provide accommodations upon the failure of the supervisors.— It is expressly provided by Cal. Code Civ. Proc. § 144, that if suitable rooms for holding the superior courts are not provided in any county by the supervisors thereof together with the furniture, fuel, and lights sufficient for the transaction of business, the courts or the judge or judges thereof may direct the sheriff to provide such room, etc. It has been held, however, that such provision will not authorize a judge to anticipate the action of the county court or board in completing and furnishing a room of a county court-house designed for him, although the board are unreasonably delaying such work. Los Angeles County *v.* Los Angeles County Super. Ct., 93 Cal. 380, 28 Pac. 1062.

Right to change courts from one room to another.— The control by a county board over such of the court-rooms in a court-house as have been set apart for and used by the circuit and superior courts, arising from its legal duty to have the care and custody thereof, does not extend so far as to permit it to compulsorily require the judges to change their courts from one room to another at the pleasure of the board. Dahnke *v.* People, 57 Ill. App. 619.

Under the authority given to judges of county courts to control county buildings they have the power to expel intruders therefrom, yet, where a person has had possession of a public building by consent or permission of the court, he should be notified and have a reasonable time to leave. Sparks *v.* Purdy, 11 Mo. 219, where it was held that if such person be summarily expelled by order of the justices the latter will be liable.

53. Brown County Com'rs *v.* Barnett, 14 Kan. 627.

54. Augusta *v.* Perkins, 8 B. Mon. (Ky.) 207.

After the public use has ceased the right to the ground and buildings belongs to the trustees of the town for the benefit of the town and its citizens. Augusta *v.* Perkins, 8 B. Mon. (Ky.) 207; Com. *v.* Bowman, 3 Pa. St. 202

55. See *supra*, IV, C, 7.

56. State *v.* Hart, 144 Ind. 107, 42 N. E. 7, 33 L. R. A. 118; Roper *v.* McWhorter, 77 Va. 214.

Where such authority is conferred it must be strictly pursued, and where this is not done or the authority is exceeded, any lease

matters of litigation, a board of county supervisors may distrain for rent due the county from a lessee or his assignee.[57]

b. Of Buildings For County Use. Power to provide for the permanent location of a building by erecting the same has been held to authorize the hiring of a building for that purpose for a term of years.[58] If a demand by certain authorities on the county board for a building is by law made a prerequisite to their authority to provide it a lease of such building without such demand is void.[59] Where a statute provides that the county authorities shall not contract a debt without providing in the ordinance creating it the means of paying it, a lease of property for county purposes without making provisions for payment of the rent as so required is invalid.[60]

4. Power to Mortgage. Without statutory authority county commissioners cannot give a promissory note or mortgage the property of a county, such authority not being provided for in the statute.[61]

5. Alienation — a. Power to Alienate. Counties, like other municipal corporations, possess the right to alienate or dispose of the real or personal property of the corporation of a private nature, unless restrained by charter or statute,[62] and

of county property will not be binding and may be set aside. State *v.* Baxter, 50 Ark. 447, 8 S. W. 188; De Russy *v.* Davis, 13 La. Ann. 468.

In exercising the power conferred by statute to control county property, being the guardian of property interests of the county, they occupy in that respect a possession of trust, in which they are bound to the same measure of good faith toward the county which is required of an ordinary trustee toward the *cestui que trust*. State *v.* Baxter, 50 Ark. 447, 8 S. W. 188; Andrews *v.* Pratt, 44 Cal. 309.

57. Lewis *v.* Washington County, 62 Miss. 160.

58. People *v.* Earle, 47 How. Pr. (N. Y.) 370.

Effect of lease under seals of commissioners.— A lease of a building for a specified time by county commissioners under their own seals and not the county seal is binding on the county as an express contract, and if the possession be not delivered up at the end of the term, but the occupancy continued, an implied contract arises against the county. Dauphin County *v.* Bridenhart, 16 Pa. St. 458.

Liability for negligent destruction of property.— Where a building leased for county purposes is destroyed by fire through the negligence of its officers the county is responsible to the owner for its value. Williams *v.* Kearny, 61 Kan. 708, 60 Pac. 1046.

Recovery of rent under unauthorized lease. — Even though county commissioners are not bound by law to provide a building for certain purposes, yet it has been held that if they lease a house for such purpose, the lessor is not bound to inquire under what arrangement it is made; and if without knowledge of the illegal character of the act of the commissioners he may recover rent from the county. Dauphin County *v.* Bridenhart, 16 Pa. St. 458.

59. Ford *v.* New York, 63 N. Y. 640; Boller *v.* New York, 40 N. Y. Super. Ct. 523.

60. Destrehan *v.* Police Jury, 31 La. Ann. 179.

61. Stewart *v.* Otoe County, 2 Nebr. 177.

Power to sell is not a power to mortgage, and therefore express authority conferred by statute upon the county commissioners without the consent of the justices of the peace of a county to sell real estate of the county at a fair price does not imply power to encumber the same by mortgage. Vaughn *v.* Forsyth County, 118 N. C. 636, 24 S. E. 425.

62. Warren County *v.* Patterson, 56 Ill. 111; Shannon *v.* O'Boyle, 51 Ind. 565; Tippecanoe County *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Missouri River, etc., R. Co. *v.* Miami County Com'rs, 12 Kan. 482.

Conveyance of swamp lands to agent as compensation for recovery of same.— A county under its power to acquire and hold property and contract for the management, control, and improvement of the same may, through its board, where its title to swamp lands is in doubt, make a valid contract with an individual that in the event of his having the claim to the county established and allowed by the general government, it will allow him as compensation a certain proportion of the lands recovered or of the indemnity granted in lieu thereof. Grimes *v.* Hamilton County, 37 Iowa 290; Allen *v.* Cerro Gordo County, 34 Iowa 54.

Lands received by a county as swamp and overflowed or lands as indemnity therefor may be sold and the proceeds thereof applied to the erection of public buildings for the use of the town. Rock *v.* Rinehart, 88 Iowa 37, 55 N. W. 21; Page County *v.* American Emigrant Co., 41 Iowa 115.

Limitations of power.— In some jurisdictions the power to alienate is subject to some restrictions. Thus under some statutes no sale can be made without the consent of a majority of the electors. Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190, 50 Nebr. 127, 69 N. W. 849; Douglass County *v.* Kellar, 43 Nebr. 635, 62 N. W. 60.

may exercise such power through the proper county authorities.[63] They may even sell all or a part of property which has been purchased for a specific purpose expressed in the deed.[64] This power, however, is subject to the limitation that a county cannot alienate or dispose of for its own benefit property dedicated to or held by it in trust for the public use.[65]

b. By Whom Effected. The exercise of the power of alienation usually devolves upon the county board of commissioners or supervisors.[66] This power must, however, be exercised by the board as a board, and not by the members individually;[67] and it has been held that any number less than the whole has no power to execute a valid deed of sale.[68]

c. Manner of Making Sale. The power which a county possesses to alienate its property must not only be exercised by the proper officer, but where the mode is prescribed the same must be followed or a conveyance of such property will be void.[69] Where the mode of exercising a power by the subordinate agencies of

Sale of shares of railroad stock owned by county.— County commissioners may sell and transfer stock of a railroad company belonging to the county as well as any other personal property belonging to the county. Shannon *v.* O'Boyle, 51 Ind. 565; Missouri River, etc., R. Co. *v.* Miami County Com'rs, 12 Kan. 482.

63. Hunnicutt *v.* Atlanta, 104 Ga. 1, 30 S. E. 500; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Warren County *v.* Patterson, 56 Ill. 111; Allen *v.* Cerro Gordo County, 34 Iowa 54.

64. Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Warren County *v.* Patterson, 56 Ill. 111.

65. West Carroll Parish *v.* Giddis, 34 La. Ann. 928. See also Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871, where it was held that where a private individual conveys property to the public for a specified use or where the public authority plat and lay off grounds as dedicated to a public use and sell other adjacent property on the faith of such public use remaining, and in consideration of its benefits to the property sold, it would seem that such property so dedicated to the public cannot afterward be sold to private persons to the detriment of those who have purchased in consideration of the donation. It was further held, however, that a person buying a lot around a public square after the sale of one or more lots thereon cannot be heard to complain nor can any one else after the lapse of fifty years.

66. *Florida.*— Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

Illinois.— Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Warren County *v.* Patterson, 56 Ill. 111; Williams *v.* Doe, 2 Ill. 502.

Indiana.— Shannon *v.* O'Boyle, 51 Ind. 565.

Iowa.— Grimes *v.* Hamilton County, 37 Iowa 290.

Kansas.— Missouri River, etc., R. Co. *v.* Miami County Com'rs, 12 Kan. 482.

Ohio.— Reynolds *v.* Stark County Com'rs, 5 Ohio 204.

Virginia.—Alleghany County *v.* Parrish, 93 Va. 615, 25 S. E. 882.

Wisconsin.— McCrossen *v.* Lincoln County, 57 Wis. 184, 14 N. W. 925.

See 13 Cent. Dig. tit. "Counties," § 170 *et seq.*

Power of county board to prescribe terms of sale of tax certificates.— The provision of Wis. Laws (1861), c. 138, § 1, that the county board may "prescribe the terms of sale and the rate of interest chargeable" by the county treasurer on a sale of tax certificates does not empower the board to authorize him to sell on credit or for anything else than money or to make an executory or conditional contract of sale. Smith *v.* Barron County, 44 Wis. 686.

67. McCrossen *v.* Lincoln County, 57 Wis. 184, 14 N. W. 925.

In Texas, however, sales of county real estate can only be made by a commissioner appointed for the purpose by the county court. Ferguson *v.* Halsell, 47 Tex. 421.

68. Petrie *v.* Doe, 30 Miss. 698. See also Triecler *v.* Berks County, 2 Grant (Pa.) 445.

69. Ferguson *v.* Halsell, 47 Tex. 421.

Limitation as to price.— A county board has no right to give away any property or money of the county, or to dispose of its property for a sum less than its known value or than is offered for the same. McCord *v.* Pike, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85.

Sale at auction.— In some states it is required by statute that property of a county must be disposed of at public auction. Beals *v.* Evans, 10 Cal. 459; Crow *v.* Warren County, 118 Ind. 51, 20 N. E. 642; Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Llano County *v.* Knowles, (Tex. Civ. App. 1895) 29 S. W. 549. The Cal. Acts (1855), § 9, requiring boards of supervisors to dispose of county property at public auction, was not intended to apply to choses in action, and a county may therefor assign or transfer a warrant drawn in its favor by another county on its treasurer without selling the same at auction. Beals *v.* Evans, 10 Cal. 459. Under Ind. Rev. Stat. (1881), § 4248, a board of commissioners can sell county property only at public auction after an advertised notice giving the terms, time, and place of sale, a description of the property to be sold, and the kind of security which the purchaser will be required to give. Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E.

the government is prescribed it is usually held to be a restriction to that particular mode.[70]

d. Consideration. In one jurisdiction it has been held that under a statute providing that the county board shall prescribe the terms of sale of county property they have power to sell only for money;[71] but in the federal supreme court the view is taken that in the absence of some express provision of law restricting the power to sales for money only, the consideration need not be paid in money so long as it is adequate.[72]

e. Deeds — (I) *By Whom Executed.* Boards of county commissioners may execute deeds of public lands of their counties conveyed by them,[73] and in some jurisdictions they may authorize any officer or member to execute and deliver such deeds.[74]

(II) *Execution by Commissioners in Individual Names.* In executing a deed of county lands the members of boards of county commissioners do not act for themselves as individuals, but officially on behalf of their county,[75] and a deed by such commissioners executed in behalf of the county in their individual names under their private seals will pass the estate therein conveyed.[76]

6. Suits to Recover Possession of County Property. An action for money or property belonging to a county fraudulently or tortiously obtained or taken can be maintained only by the county to whom the money or property belongs and not by the state.[77] A county may pursue its property in the hands of any one who has it wrongfully, or recover its value from any one who has wrongfully converted it to his own use, in the same manner and to the same extent as it could if it were a private individual.[78] A county having the power to purchase and hold real estate, and capable of suing and being sued, may maintain ejectment for lands which it owns and of which it is entitled to possession,[79] and may bring a

544. Where a contract is made for the removal of old buildings and the furnishing of all necessary material in addition to the material that the old buildings may furnish, such old material does not cease to be the property of the county, and hence the provisions of Ind. Rev. Stat. (1881), § 4248, relating to the sale of county property, do not apply. Crow *v.* Warren County, 118 Ind. 51, 20 N. E. 642.

Stipulation as to mimimum price.— It is sometimes expressly provided that the property of a county shall not be sold at less than a specified price. Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544. In Iowa the price of the sale of county swamp lands is not limited to one and twenty-five one hundredth dollars per acre where the county devotes its swamp lands to the purposes prescribed by section 986 of the revision. Page County *v.* American Emigrant Co., 40 Iowa 460, 41 Iowa 115.

70. Ferguson *v.* Halsell, 47 Tex. 421.

71. Smith *v.* Barron County, 44 Wis. 686.

72. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873, where it was held that such lands might be sold for a consideration consisting in the construction of a railroad through the county and the making of improvements in the form of wharves, docks, and depots within the county for the public accommodation.

73. Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

74. Weston *v.* Moody, 37 Fla. 473, 19 So. 880; McCord *v.* Pike, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85; Wabash, etc., R. Co. *v.* McDougal, 113 Ill. 603; Dart *v.* Hercules, 34 Ill. 395; Haseltine *v.* Donahue, 42 Wis. 576.

75. Martin *v.* Townsend, 32 Fla. 318, 13 So. 887, where it was held that it was not necessary that to the name of each commissioner signing a deed his individual seal should be affixed.

76. Williams *v.* Doe, 2 Ill. 502, where it was so held under the Illinois act of 1835 making valid conveyances of county property made before that time by county commissioners.

Adoption of seal of probate court.— In the execution of a deed for county land by a county board in the absence of a provision for a distinctive "county seal" the board may properly adopt and affix the seal of the probate court, the judge of which was *ex officio* president of the board. Martin *v.* Townsend, 32 Fla. 318, 13 So. 887.

77. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178 [*affirming* 67 Barb. 472].

78. Taylor County *v.* Standley, 79 Iowa 666, 44 N. W. 911, where it was held that where defendant, by conspiracy with the treasurer of plaintiff, came into possession of plaintiff's money and refused to pay it to plaintiff, an action was properly begun and maintained against him therefor. Plaintiff was not confined to its remedy on the treasurer's bond.

79. Lincoln County *v.* Magruder, 3 Mo. App. 314.

forcible entry and detainer suit to recover possession of any part of its property which is illegally occupied.[80]

7. Actions to Recover For Injuries to County Property. A county, by reason of its control over them, has such an interest in its bridges and highways as to entitle it to maintain an action to recover damages for injuries thereto.[81] And where it has been compelled to pay damages for injuries caused by a defective bridge it may sue to recover such damages from a person or corporation who was under obligation to keep such bridge in a safe condition.[82] The record books of a county being purchased and paid for and owned by the county, it is entitled to sue to recover the value of such books when injured or destroyed through negligence.[83]

8. Actions to Rescind Sale of Property. In an action by taxpayers to annul a sale of county property on account of the inadequacy of the price and other alleged illegalities, the county is entitled to intervene and join the defendants in sustaining the sale, on the ground that it was advantageous to the county.[84]

D. Power of Legislature to Enforce Restitution of Property Exacted by Taxation. In the absence of constitutional provisions to the contrary a state legislature possesses the power to direct a restitution to the taxpayers of a county, of property exacted from them by taxation regardless of the form into which such property may be changed, so long as it remains in the possession of the county. The exercise of such power by the legislature infringes no provision of the federal constitution.[85]

VI. CONTRACTS.

A. Power to Contract — 1. In General. Counties are corporations to the extent that they may lawfully enter into contracts through their authorized officers or agents, usually the board of county commissioners,[86] the county

80. Hardin *v.* Sangamon County, 71 Ill. App. 103.

81. Louisville, etc., R. Co. *v.* Whitley County Ct., 95 Ky. 215, 24 S. W. 604, 15 Ky. L. Rep. 734, 44 Am. St. Rep. 220; Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225.

82. Chesapeake, etc., Canal Co. *v.* Alleghany County Com'rs, 57 Md. 201, 40 Am. Rep. 430.

Remedy for violation of ordinance as to obstruction of levy.— Under the ordinance of the police jury of the parish of Jefferson, that body have no right in their corporate capacity to sue for a violation of their ordinance relative to obstructing the space, in the rear of the levee of the Mississippi, reserved for public use; the parish judge is empowered, on the complaint of any riparian proprietor or other white person, to order the removal of such obstruction, and to impose the fine fixed by the ordinance on the party violating it. Police Jury *v.* Eastman, 9 Rob. (La.) 297.

83. Toncray *v.* Dodge County, 33 Nebr. 802, 51 N. W. 235.

84. McConnell *v.* Hutchinson, 71 Iowa 512, 32 N. W. 481.

85. Tippecanoe County *v.* Lucas, 93 U. S. 108, 23 L. ed. 822 [*affirming* 44 Ind. 524].

86. *Alabama.*— Hays *v.* Ahlrichs, 115 Ala. 239, 22 So. 465; Montgomery County *v.* Barber, 45 Ala. 237.

Idaho.— Jolly *v.* Latah County, 5 Ida. 301, 48 Pac. 1063.

Illinois.— Wheeler *v.* Wayne County, 132 Ill. 599, 24 N. E. 625; Sexton *v.* Cook County, 114 Ill. 174, 28 N. E. 608; Jackson County *v.* Rendleman, 100 Ill. 379, 39 Am. Rep. 44; Randolph County Com'rs *v.* Jones, 1 Ill. 237.

Indiana.— Duncan *v.* Lawrence County, 101 Ind. 403; Moon *v.* Howard County, 97 Ind. 176; State *v.* Sullivan, 74 Ind. 121.

Iowa.— Fonke *v.* Jackson County, 84 Iowa 616, 51 N. W. 71.

Kansas.— Neosho County Com'rs *v.* Stoddart, 13 Kan. 207.

Kentucky.— Field *v.* Stroube, 103 Ky. 114, 44 S. W. 363, 19 Ky. L. Rep. 1751; O'Mahoney *v.* Bullock, 97 Ky. 774, 31 S. W. 878, 17 Ky. L. Rep. 523; Whaley *v.* Com., 61 S. W. 35, 23 Ky. L. Rep. 1292.

Michigan.— Stamp *v.* Cass County, 47 Mich. 330, 11 N. W. 183.

Mississippi.— Jefferson County *v.* Arrighi, 54 Miss. 668.

Ohio.— Hamilton County *v.* Noyes, 35 Ohio St. 201; Deters *v.* Hamilton County, 1 Ohio Cir. Ct. 295.

Oklahoma.— Cleveland County *v.* Seawell, 3 Okla. 281, 41 Pac. 592.

Pennsylvania.— Treichler *v.* Berks County, 2 Grant 445; Close *v.* Berks County, 2 Woodw. 453.

South Carolina.— Edmondston *v.* Aiken County, 14 S. C. 622; Ostendorff *v.* Charleston County Com'rs, 14 S. C. 403.

Tennessee.— Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

court,[87] or the county clerk.[88] As in the case of other municipal corporations, the officers or agents of a county cannot bind the county by any contract which is beyond the scope of its lawful powers or foreign to its purpose;[89] nor can they extend their obligations so as to bind the county even by an express contract.[90]

2. Notice of Limitations on Power of County Officers to Make Contract. All persons dealing with officers or agents of counties are bound to ascertain the limits of their authority or power as fixed by statutory or organic law, and are chargeable with knowledge of such limits.[91] The acts of such officers or agents do not bind the county unless strictly within the limits so imposed;[92] and no

United States.—McLean *v.* Hamilton County, 16 Fed. Cas. No. 8,881.

See 13 Cent. Dig. tit. "Counties," § 174 *et seq.*

A contract, although not made at the office of the county commissioners, is valid and binding if within the scope of their authority. Jefferson County *v.* Slagle, 66 Pa. St. 202.

A statute prohibiting a member of the board from having an interest in designated county contracts includes both executed and executory contracts. Land, etc., Lumber Co. *v.* McIntyre, 100 Wis. 258, 75 N. W. 964.

Incompetency of county commissioners cannot be inquired into in a collateral proceeding to enjoin the erection of a vault under a contract let by them within the scope of their authority. Hays *v.* Ahlrichs, 115 Ala. 239, 22 So. 465.

Must act as a court.— County commissioners have power to contract only as a court. Randolph County Com'rs *v.* Jones, 1 Ill. 237. See also as to the necessity for a regular session of the commissioners' court Potts *v.* Henderson, 2 Ind. 327; Groton Bridge, etc., Co. *v.* Warren County, 80 Miss. 214, 31 So. 711; Bradford County *v.* Horton, 6 Lack. Leg. N. (Pa.) 306.

One county commissioner alone cannot bind the county by contract, unless he act by the authority of a majority of the board. Treichler *v.* Berks County, 2 Grant (Pa.) 445. And see Castle *v.* Bannock County, (Ida. 1901) 67 Pac. 35.

The legislature cannot impair the obligation of a contract made by the board. Slaughter *v.* Mobile County, 73 Ala. 134.

87. Lawrence County *v.* Coffman, 36 Ark. 641; Bauer *v.* Franklin County, 51 Mo. 205.

Ordinaries.— Paulding County *v.* Scoggins, 97 Ga. 253, 23 S. E. 845.

88. Under the Australian ballot law, which requires the county clerk to cause to be printed, and to furnish to the electors, all ballots, and the county court to audit and pay from the county treasury the necessary expenses incurred by the clerk and sheriff in carrying out the provisions of the act, a county clerk has power to bind the county by a contract for the printing of ballots, subject to the limitation that the price agreed to be paid must be reasonable. Flagg *v.* Marion County, 31 Oreg. 18, 48 Pac. 693.

89. Wheeler *v.* Wayne County, 31 Ill. App. 299; Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226; Putney Bros. Co. *v.* Milwaukee County, 108 Wis. 554, 84 N. W. 822. See also Shawnee County Com'rs *v.* Carter, 2 Kan. 115, where it was held that when the duties of the officers of a county are not only pointed out by law but the mode of performing them is laid down, there is no discretion in the officers as to the manner in which they are to act.

The measure of the duties and powers of county commissioners is the plain language of the act of the legislature that defines them, and beyond such measure they cannot be made liable on an implied contract for any services of the county officer, however meritorious. Close *v.* Berks County, 2 Woodw. (Pa.) 453.

90. Close *v.* Berks County, 2 Woodw. (Pa.) 453. And see Grannis *v.* Blue Earth County, 81 Minn. 55, 83 N. W. 495.

Defense of ultra vires.— There is a broad difference between a private corporation organized for a private purpose, although subserving a public interest, and a public corporation like a county or a city organization, for public purposes only. The latter class may always defend on the ground that the supposed contract was outside of the authority conferred on them by law. Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226.

91. *Arkansas.*— Barton *v.* Swepston, 44 Ark. 437.

Georgia.— Turner *v.* Fulton County, 109 Ga. 633, 34 S. E. 1024.

Illinois.— Barnard *v.* Sangamon County, 91 Ill. App. 98 [*reversed* in 190 Ill. 116, 60 N. E. 109].

Indiana.— Jay County *v.* Fertich, 18 Ind. App. 1, 46 N. E. 699.

Kentucky.— Murray *v.* Carothers, 1 Metc. 71.

Missouri.— Bauer *v.* Franklin County, 51 Mo. 205.

Montana.— Lehcher *v.* Custer County, 9 Mont. 315, 23 Pac. 713.

New York.— Freel *v.* Queens County, 9 N. Y. App. Div. 186, 41 N. Y. Suppl. 68.

South Dakota.— Meek *v.* Meade County, 12 S. D. 162, 80 N. W. 182.

West Virginia.— Davis *v.* Wayne County Ct., 38 W. Va. 104, 18 S. E. 373.

Wisconsin.— Endion Imp. Co. *v.* Evening Telegram Co., 104 Wis. 432, 80 N. W. 732.

See 13 Cent. Dig. tit. "Counties," § 55 *et seq.*

92. Turner *v.* Fulton County, 109 Ga. 633, 34 S. E. 1024; Meek *v.* Meade County, 12 S. D. 162, 80 N. W. 182.

estoppel can be created by the acts of such agents or officers in excess of their statutory powers.[93]

3. Power to Bind Successors by Contract. Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed,[94] yet the general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy,[95] at least in the absence of a showing of necessity of good faith and public interest.[96]

4. Powers in Respect to Particular Contracts — a. Construction of Buildings and Other Improvements. A county board of supervisors or county court have authority to erect a county building, or build bridges or highways, by contract,[97] and in the exercise of this authority they may employ such agents as they choose

93. Platter *v.* Elkhart County, 103 Ind. 360, 2 N. E. 544; Bazille *v.* Ramsey County, 71 Minn. 198, 73 N. W. 845; Bay St. Louis *v.* Hancock County, 80 Miss. 364, 32 So. 54; Storey *v.* Murphy, 9 N. D. 115, 81 N. W. 23.

Contract valid in part.— Where a county engages a physician for a stated time, at a stated salary, to perform certain services, and a part of the services it had not the power to engage him to perform, the contract is valid for that part for which it had the power to enter into, and it would be bound to that extent the same as a private individual. Galveston County *v.* Dncie, 91 Tex. 665, 45 S. W. 798.

Estoppel by receiving benefits.— Road commissioners appointed under Kan. Sess. Laws (1887), c. 214, since declared unconstitutional, were without authority; and road improvement certificates issued by them are not binding on the county, and it is not estopped to deny their validity because of having received the benefits of the labor and materials for which they were issued. Willis *v.* Wyandotte County, 86 Fed. 872, 30 C. C. A. 445.

94. Liggett *v.* Kiowa County, 6 Colo. App. 269, 40 Pac. 475; Webb *v.* Spokane County, 9 Wash. 103, 37 Pac. 282.

A contract by the board of commissioners employing a person as superintendent of a county asylum for a period of five years is valid and not contrary to public policy; but such a contract does not prohibit the board discontinuing the asylum. Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385.

Where a physician has been employed for the term of one year by county commissioners to attend the poor of the county and has accepted the employment and entered upon the discharge of his duties, the contract cannot be afterward rescinded by the county, although extending for a period beyond the terms of the commissioners making it. Webb *v.* Spokane County, 9 Wash. 103, 37 Pac. 282 [*citing* Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385].

95. *Illinois.*— Millikin *v.* Edgar County, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447 [*affirming* 42 Ill. App. 590].

Indiana.— Pulaski County *v.* Shields, 130 Ind. 6, 29 N. E. 385; Jay County *v.* Taylor, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160.

Iowa.— State *v.* Platner, 43 Iowa 140.

Kansas.— Coffey County *v.* Smith, 50 Kan. 350, 32 Pac. 30; Shelden *v.* Butler County, 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257; Medicine Lodge First Nat. Bank *v.* Peck, 43 Kan. 643, 23 Pac. 1077.

New Jersey.— Hudson County *v.* Layton, 28 N. J. L. 244.

New York.— Vacheron *v.* New York, 34 Misc. 420, 69 N. Y. Suppl. 608.

Ohio.— Franklin County *v.* Ranck, 9 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 269.

See 13 Cent. Dig. tit. "Counties," § 175.

Application of rule to contract for county printing.— A board of county commissioners about to be dissolved under operation of law cannot enter into a contract designating the official newspaper of the county, and providing for the county printing for another year so as to prevent the new board about to meet and organize, from selecting the official paper and contracting for county printing for the ensuing year. Coffey County *v.* Smith, 50 Kan. 350, 32 Pac. 30.

Employment of attorney.— In Jay County *v.* Taylor, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160 [*quoted* in Franklin County *v.* Ranck, 9 Ohio Cir. Ct. 301, 6 Ohio Cir. Dec. 133], it was held that "a board of county commissioners has not the power to appoint its successors by employing attorneys to act for a period beyond the time when the board will, by operation of law, have to be reorganized."

96. Franklin County *v.* Ranck, 9 Ohio Cir. Ct. 301, 6 Ohio Cir. Dec. 133.

97. *California.*— McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231; Babcock *v.* Goodrich, 47 Cal. 488.

Georgia.— Carruth *v.* Wagener, 114 Ga. 740, 40 S. E. 700.

Massachusetts.— Morse *v.* Norfolk County, 170 Mass. 555, 49 N. E. 925.

Michigan.— Wayne County Sup'rs *v.* Donovan, 111 Mich. 33, 69 N. W. 83; Plummer *v.* Kennedy, 72 Mich. 295, 40 N. W. 433.

Missouri.— Wolcott *v.* Lawrence County, 26 Mo. 272.

to execute what they have determined upon doing.[98] Such contracts must, however, be in conformity with the provisions of the acts of the legislature providing for the erection of such buildings.[99]

b. Contracts For County Printing, Records, Stationery, Etc. As a general rule it is within the power and is the duty of a county board or county court to contract for all county printing and stationery.[1] It is also usually the duty of county commissioners or courts to contract for indexing or transcribing county

New Jersey.— Ferguson *v.* Passaic County, 60 N. J. L. 404, 38 Atl. 676.

New York.— People *v.* McIntyre, 154 N. Y. 628, 49 N. E. 70 [*affirming* 21 N. Y. App. Div. 633, 47 N. Y. Suppl. 1146].

North Carolina.— Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818.

Ohio.— Wood County *v.* Pargallis, 10 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 717; Plessner *v.* Pray, 8 Ohio S. & C. Pl. Dec. 149, 6 Ohio N. P. 444.

See 13 Cent. Dig. tit. "Counties," § 177.

98. Plummer *v.* Kennedy, 72 Mich. 295, 40 N. W. 433.

Acquiescence by other member.— Where a board of supervisors passed a resolution to build a court-house, and appointed a committee to contract for and complete the building, and the contractor employed ceased work on the building, the act of a single member of the building committee in contracting for brick to complete the building, which was acquiesced in by the other members of the committee, is binding on the county as the act of the building committee, and hence of the board of supervisors, in the absence of fraud, collusion, or bad faith. Crawford County *v.* Walter, 89 Ill. App. 7.

Act of single member of commission.— A county is not liable for the acceptance of an order on the county, payable from the fund to be paid for a bridge by one member of the bridge commission, since he cannot bind the entire commission. Spring City Bank *v.* Rhea County, (Tenn. Ch. App. 1900) 59 S. W. 442.

Necessity for ratification of commissioners' contract.— While an order appointing commissioners to make a contract for the building of a court-house ought to provide for a ratification of the contract by the court, yet, as the omission of such a provision may be supplied by an amendment of the order, it does not authorize an injunction perpetually enjoining the commissioners from proceeding with the work. Field *v.* Stroube, 103 Ky. 114, 44 S. W. 363, 19 Ky. L. Rep. 1751.

A board of county commissioners may in some jurisdictions appoint a superintendent to let contracts for the construction of public works and to superintend the work and this, where it is done, makes him the agent of the county for the purpose of the construction of such public work, and he may bind the county by requiring work to be done beyond that contemplated by the contract. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16 [*citing* Gibson County *v.* Motherwell Iron, etc., Co., 123 Ind. 364, 24 N. E. 115]; Clinton County *v.* Hill, 122 Ind. 215, 23 N. E. 779; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234, 17 N. E. 593; Harrison County *v.* Byrne, 67 Ind. 21.

99. Wolcott *v.* Lawrence County, 26 Mo. 272; Mahon *v.* Luzerne County, 197 Pa. St. 1, 46 Atl. 894; Kinsey *v.* Little River County, 14 Fed. Cas. No. 7,829.

Where commissioners exceed their authority in selecting a site for county buildings, thereby invalidating such selection, the contract for the buildings upon such site is also void and no recovery can be had by the contractor thereunder. Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

1. *California.*— Frandzen *v.* San Diego County, 101 Cal. 317, 35 Pac. 897; Times Pub. Co. *v.* Alameda County, 64 Cal. 469, 2 Pac. 246; Maxwell *v.* Stanislaus County, 56 Cal. 114.

Illinois.—Piatt County *v.* Republican Printing Co., 99 Ill. App. 411.

Indiana.— Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40; Hoffman *v.* Lake County, 96 Ind. 84. And see Morrison *v.* Decatur County, 16 Ind. App. 317, 44 N. E. 65, 1012. *Compare* Washington County *v.* Kemp, 14 Ind. App. 604, 43 N. E. 314, holding that the act of letting the county printing is a ministerial or administrative act and may be performed by any ministerial officer of the county to whom such duty has been intrusted by the legislature, and that even if the duty has previously been enjoined upon the board of commissioners by express statute, the legislature may, by a later statute, relieve the board of such duty and confer it upon the auditor.

Kansas.— Harper County *v.* State, 47 Kan. 283, 27 Pac. 997.

Washington.—Olympian-Tribune Pub. Co. *v.* Byrne, (1902) 68 Pac. 335.

See 13 Cent. Dig. tit. "Counties," § 178.

Approval of contracts for purchase of county stationery.— County commissioners may at their option pay or refuse to pay a bill contracted by a county clerk for stationery furnished for the use of his office. Madison County *v.* Burford, 93 Ind. 383. See also Hancock County *v.* Mitchell, 93 Ind. 307.

No appeal from contract for stationery.— The act of a board of county commissioners in entering into a contract for the purchase of stationery for the county is an administrative one from which no appeal will lie. Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40.

Quality and cost of stationery in discretion of board.— Under an act authorizing county commissioners to direct the controller to advertise for tax receipts for use by the treasurer, the question as to quality of the paper to be used and the cost of the same is wholly within the discretion of the commissioners.

records,[2] and to make lists of all property within the county, its valuation, owners, etc.[3]

c. Power to Employ Counsel — (i) *In Civil Actions.* A county has the power through its proper officers or agents, usually the county board, to employ counsel other than the official attorney to represent the county in civil suits[4] in

Allegheny County *v.* Grier, 26 Pittsb. Leg. J. N. S. 380.

In New York it has been expressly held that county boards have no power to contract in advance for the official printing necessary for the several county officers, as it is the duty and privilege of such officers themselves to so contract. People *v.* Cortland County, 58 Barb. 139.

2. Hoffman *v.* Lake County, 96 Ind. 84; Leavenworth County Com'rs *v.* Keller, 6 Kan. 510; Boggs *v.* Caldwell County, 28 Mo. 586; Burnett *v.* Markley, 23 Oreg. 436, 31 Pac. 1050.

A verbal direction from the judges from the county court bench or from the presiding judge given to the clerk to have an index made to the books of the recorded deeds, and allow a reasonable compensation for the work out of the county funds, is binding upon the county. Boggs *v.* Caldwell County, 28 Mo. 586.

Compensation to be fixed by county court. — Wagner Stat. Mo. p. 420, which requires the judges of the several courts to examine and superintend their records and requires that the several dockets "and all indexes to the record be correctly made out at the proper time," does not authorize the circuit court to order the making of an index of the records of the court and fix the compensation for such services at the county's expense. Such compensation must be audited and paid by the county court, and if there were no provisions on the subject the county court, by virtue of its general powers and duties in regard to claims against the county, is the proper body to which the claim for compensation should be presented. Ward *v.* Cole County Ct., 50 Mo. 401.

Power of board to fix fees for copying.— Services for copying indices are not covered by a statute fixing the fees of registers of deeds at so much per folio for copying any deed or paper, but may be fixed by contract or by proper allowance by the board. Leavenworth County Com'rs *v.* Keller, 6 Kan. 510.

Power to contract for transcript of records of another county.— In the absence of statutory authority a county board cannot contract for a transcript of such records of another county, from whose territory such county was organized, as relates to the title of lands in its county, and a warrant given for the performance of such contract is void. Erskine *v.* Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645.

Transcribing of register books to be by contract.— Under the Pennsylvania act of May 1, 1861, providing that all writing and work shall be done by a contract, the work of transcribing the register books must be done by contract. Com. *v.* Mercer, 24 Pittsb. Leg. J. N. S. 377.

3. Tasker *v.* Garrett County, 82 Md. 150, 33 Atl. 407; Burnett *v.* Markley, 23 Oreg. 436, 31 Pac. 1050.

Effect of refusal by board to procure abstract books.— Where a board of commissioners of a county make an order refusing to allow the assessor to use a set of abstract books in making his assessment, but notwithstanding this the assessor uses such books and agrees that the county will pay for the same, the county will not be liable to the owner of such books for their use. Snohomish County Abstract Co. *v.* Anderson, 9 Wash. 349, 37 Pac. 471.

Procurement of ownership books for use of assessor.— Under the general power to manage county business conferred on county courts by Hill Code Oreg. § 896, those courts have authority to procure for the use of the assessor, present-ownership books of all the property in the county, and to employ competent persons to prepare such books. Burnett *v.* Markley, 23 Oreg. 436, 31 Pac. 1050.

4. *California.*— Colusa County *v.* Welch, 122 Cal. 428, 55 Pac. 243; Merced County *v.* Cook, 120 Cal. 275, 52 Pac. 721; Lamberson *v.* Jefferds, 118 Cal. 363, 50 Pac. 403; Merriam *v.* Barnum, 116 Cal. 619, 48 Pac. 727; Power *v.* May, 114 Cal. 207, 46 Pac. 6; Lassen County *v.* Shinn, 88 Cal. 510, 26 Pac. 365; Herrington *v.* Santa Clara County, 44 Cal. 496; Hornblower *v.* Duden, 35 Cal. 664.

Idaho.— Anderson *v.* Shoshone County, 6 Ida. 76, 53 Pac. 105; Conger *v.* Latah County, 5 Ida. 347, 48 Pac. 1064; Ravenscraft *v.* Blaine County, 5 Ida. 178, 47 Pac. 942; Hampton *v.* Logan County, 4 Ida. 646, 43 Pac. 324.

Illinois.— Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094 [*affirming* 43 Ill. App. 163]; Ottawa Gaslight, etc., Co. *v.* People, 138 Ill. 336, 27 N. E. 924.

Indiana.— Barr *v.* State, 148 Ind. 424, 47 N. E. 829; McCabe *v.* Fountain County, 46 Ind. 380; Holman *v.* Robbins, 5 Ind. App. 436, 31 N. E. 863.

Iowa.— Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; Taylor County *v.* Standley, 79 Iowa 666, 44 N. W. 911; Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344; Tatlock *v.* Louisa County, 46 Iowa 138; Chickasaw County *v.* Bailey, 13 Iowa 435.

Kansas.— Doster *v.* Howe, 28 Kan. 353; Thatcher *v.* Jefferson County Com'rs, 13 Kan. 182; Freeman *v.* Wyandotte County, 8 Kan. App. 72, 54 Pac. 294.

Kentucky.— Garrard County Ct. *v.* McKee, 11 Bush 234.

Mississippi.— Marion County *v.* Taylor, 55 Miss. 184; Lewenthall *v.* State, 51 Miss. 645; Cocke *v.* Board of Police, 38 Miss. 340.

Missouri.— State *v.* Butler County, 164 Mo. 214, 64 S. W. 176; Reynolds *v.* Clark County,

which the county is interested,[5] in the absence of any statute requiring such representation to be by the official attorney.[6] Where, however, statutes exist requiring the performance of such services by the county or district attorney, or by the attorney-general, a county has no authority to contract for the employment of other counsel.[7]

162 Mo. 680, 63 S. W. 382; Butler *v.* Sullivan County, 108 Mo. 630, 18 S. W. 1142; Thrasher *v.* Greene County, 87 Mo. 419; Henley *v.* Clover, 6 Mo. App. 181.

Nevada.— Clarke *v.* Lyon County, 8 Nev. 181, 7 Nev. 75; Ellis *v.* Washoe County, 7 Nev. 291.

New York.— Brady *v.* New York, 10 N. Y. 260 [*affirming* 2 Sandf. 460]; Gillespie *v.* Broas, 23 Barb. 370.

Oregon.— Taylor *v.* Umatilla County, 6 Oreg. 394.

Pennsylvania.— Chester County *v.* Barber, 97 Pa. St. 455.

Tennessee.— McHenderson *v.* Anderson County, 105 Tenn. 591, 59 S. W. 1016.

Texas.— Grooms *v.* Atascosa County, (Civ. App. 1895) 32 S. W. 188; Austin City Nat. Bank *v.* Presidio County, (Civ. App. 1894) 26 S. W. 775.

Wisconsin.— Eagle River *v.* Oneida County, 86 Wis. 266, 56 N. W. 644.

Wyoming.— Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015.

See 13 Cent. Dig. tit. "Counties," § 179.

A county judge has power to employ counsel to defend a suit against the county. Chickasaw County *v.* Bailey, 13 Iowa 435.

A temporary board of commissioners appointed under the laws of Kansas on the organization of a new county has power to employ attorneys to protect the interests of the county, and advise its officers, until the election of a county attorney. Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

Board the judge of the necessity for such employment and its determination thereon can only be attacked for fraud. Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015.

Necessity for concurrent act of majority of board.— McCabe *v.* Fountain County, 46 Ind. 380.

No authority to contract for services for fixed period.— Grooms *v.* Atascosa County, (Tex. Civ. App. 1895) 32 S. W. 188.

Right not dependent on consent of county attorney.— Taylor County *v.* Standley, 79 Iowa 666, 44 N. W. 911.

The chairman of the county board has no power to employ an attorney in actions by or against his county, but may be empowered by the board to make the contract as its agent. Tatlock *v.* Louisa County, 46 Iowa 138.

5. Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; Taylor County *v.* Standley, 79 Iowa 666, 44 N. W. 911. And see cases cited *supra*, note 4.

A committee appointed by a county convention of representatives to execute an unauthorized vote of the convention, requiring the committee to act in conjunction with the county commissioners in making purchases for the use of the county farm, cannot employ counsel at the expense of the county to try the question of authority. Hackett *v.* Rockingham County, 52 N. H. 617.

Employment of attorneys by collectors.— Simmes *v.* Chicot County, 50 Ark. 566, 9 S. W. 308; Butler *v.* Sullivan County, 108 Mo. 630, 18 S. W. 1142.

Limitation to suits pending or about to be instituted.— Marion County *v.* Taylor, 55 Miss. 184.

Necessity for assertion of adverse claim by county.— Henley *v.* Clover, 6 Mo. App. 181.

The employment of counsel to take an appeal is within the power of the county board. Eagle River *v.* Oneida County, 86 Wis. 266, 56 N. W. 644. See also Duluth, etc., R. Co. *v.* Douglas County, 103 Wis. 75, 79 N. W. 34.

To defeat collection of tax claimed to be illegal a county board has power to employ counsel under a statute empowering them to "do all other acts in relation to the concerns of the county." Franklin County *v.* Layman, 34 Ill. App. 606.

To defend board.— Doster *v.* Howe, 28 Kan. 353.

Question as to validity of county subscription.— Where a state court has taken one view of the validity of a county subscription and the federal court has taken another, it cannot be said that a suit to test such question is useless, so as to make it improper for the county to employ attorneys therein. Thrasher *v.* Greene County, 87 Mo. 419.

6. Austin City Nat. Bank *v.* Presidio County, (Tex. Civ. App. 1894) 26 S. W. 775. See also Brome *v.* Cuming County, 31 Nebr. 362, 47 N. W. 1050.

7. *Kansas.*— Waters *v.* Trovillo, 47 Kan. 197, 27 Pac. 822; Clough *v.* Hart, 8 Kan. 487.

Nebraska.— Brome *v.* Cuming County, 31 Nebr. 362, 47 N. W. 1050; Platte County *v.* Gerrard, 12 Nebr. 244, 11 N. W. 298.

North Dakota.— Storey *v.* Murphy, 9 N. D. 115, 81 N. W. 23.

Oklahoma.— Logan County *v.* Jones, 4 Okla. 341, 51 Pac. 565.

Wisconsin.— Frederick *v.* Douglas County, 96 Wis. 411, 71 N. W. 798; McDonald *v.* Milwaukee County, 41 Wis. 642.

See 13 Cent. Dig. tit. "Counties," § 179.

When circuit or district attorney resides within the county a county court is not authorized under Wagner Stat. Mo. p. 205, § 35, to employ a special attorney to attend to the county business, it being made the duty in such case of that officer to attend to the law business of the county. Dixon *v.* Livingston County, 70 Mo. 239. See also Herrington *v.* Santa Clara County, 44 Cal. 496, where it is held that it is not the duty of the district

(II) *In Criminal Cases.* In a number of states it is held that a county board is without authority to employ counsel other than the official attorney on behalf of the county to prosecute or assist in the prosecution of criminal cases,[8] and provisions are made for cases where the official attorney fails for any reason to appear at the trial or where it is deemed essential that he shall have assistance.[9] In other states, however, county boards are held to have the power to employ an attorney or attorneys to prosecute or defend in criminal cases properly belonging to the duties of the official attorney,[10] and the board may properly devolve on a committee of its own members the duty and power to carry out such contract of employment.[11]

d. Power to Employ Agents, Servants, Etc. County boards in the absence of positive legal authority so to do cannot in any case appoint an agent to exercise powers which such boards cannot themselves exercise.[12] Such boards in the exercise of powers conferred upon them may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion, but cannot go beyond this and delegate to others duties, the discharge of which calls for the use of reason and discretion, and which are regarded as public trusts.[13] With these limitations county boards or courts have power to appoint such agents, officers, and servants as may be required for county purposes and which are not otherwise provided for by law or by the state constitution.[14]

attorney to prosecute or defend civil actions in which the county is interested, which are pending in any other county than his own, and consequently the board of supervisors of a county have a right to decline the services of such district attorney when tendered in such action, and may employ other counsel.

When the commissioners are sued as the county board beyond the limits of their own county, and where the county attorney is not bound to go, they may employ counsel to defend the action. Thacher *v.* Jefferson County Com'rs, 13 Kan. 182.

8. Modoc County *v.* Spencer, 103 Cal. 498, 37 Pac. 483; Ripley County *v.* Ward, 69 Ind. 441; Hight *v.* Monroe County, 68 Ind. 575; McDonald *v.* Milwaukee County, 41 Wis. 642; Montgomery *v.* Jackson County, 22 Wis. 69.

9. In Sneed *v.* People, 38 Mich. 248, it was held that the prosecuting attorney has a right to employ counsel with leave of the court to assist in the prosecution of a case, and the services so rendered will constitute a proper charge against the county.

Designation by court.— In California, if the district attorney who is at once the law officer of the county and the public prosecutor, fails for any reason to appear at the trial in a criminal case for the discharge of his duty, the court is authorized to designate some competent attorney to take his place for the occasion, and if at any time it is deemed essential for the public services that he may have assistance in its behalf it is made the duty of the attorney-general to go to his aid. Modoc County *v.* Spencer, 103 Cal. 498, 27 Pac. 483.

No power except where county has a direct interest.— Under the constitution and laws of Ohio, a board of county commissioners has no power to employ an attorney to prosecute criminal complaints before the examining magistrates of the county except in cases in which the county in its quasi-corporate capacity has a direct interest; nor can a board of commissioners be compelled by mandamus to pay for such services out of the treasury of the county. State *v.* Franklin County Com'rs, 21 Ohio St. 648.

10. Hopkins *v.* Clayton County, 32 Iowa 15.

A county board of excise in New York has power to employ an attorney to conduct prosecutions for penalties, and as it acts as the agent of the county in so doing, the claim for such services is a county charge. People *v.* Delaware County, 45 N. Y. 196.

11. Hopkins *v.* Clayton County, 32 Iowa 15.

12. House *v.* Los Angeles County, 104 Cal. 73, 37 Pac. 796; Smith *v.* Los Angeles County, 99 Cal. 628, 34 Pac. 439. See also Potts *v.* Henderson, 2 Ind. 327.

13. House *v.* Los Angeles County, 104 Cal. 73, 37 Pac. 796; Scollay *v.* Butte County, 67 Cal. 249, 7 Pac. 661.

The act of receiving or collecting license-taxes is an official function to be performed only by a county officer invested for the purpose with a part of the sovereign power of the state; and a board of supervisors has no power to make a contract with a private individual to collect license-taxes for an agreed compensation. Ventura County *v.* Clay, 112 Cal. 65, 44 Pac. 488.

14. Wilhelm *v.* Cedar County, 50 Iowa 254; Ringgold County *v.* Allen, 42 Iowa 697; Tasker *v.* Garrett County, 82 Md. 150, 33 Atl. 407; Hall *v.* Lauderdale, 46 N. Y. 70.

For example it has been held that county boards or courts have power to employ agents to select swamp lands (Baker *v.* Washington County, 26 Iowa 148); to carry abstracts or lists of swamp lands to the state land-office and have them approved (Webster County *v.* Taylor, 19 Iowa 117); to hire an expert accountant to examine accounts of the county treasurer (Duncan *v.* Lawrence County, 101 Ind. 403. See also Perry County *v.* Gardner,

5. Limitations and Conditions Precedent to Power to Contract. In many states express limitations or conditions are imposed upon the making of contracts by counties through their proper agents, and such limitations and conditions must be complied with in order that such contracts may be valid and enforceable. Thus it is sometimes provided that no agent of a county shall make contracts on behalf of the county unless an appropriation has been previously made therefor, which is wholly or in part unexpended;[15] that county boards must not contract debts and liabilities which, added to the salaries of officers, etc., will exceed the revenue of the county for the year;[16] that no debt can be contracted or obligation binding upon the county incurred, unless the means of paying such debt shall be at the same time provided in the ordinance or resolution creating the debt;[17] that no contract for the erection of county buildings can be made until the county commissioners shall have procured a sum which is by them deemed adequate;[18] or that no contract shall be made for the erection of a public building

155 Ind. 165, 57 N. E. 908); to hire agents to discover and collect property due to the county, wrongfully withheld from it (Garrigus *v.* Howard County, 157 Ind. 103, 60 N. E. 948); to hire agent or attorney to aid in collecting taxes (Wilhelm *v.* Cedar County, 50 Iowa 254; State *v.* Hall, 37 Oreg. 479, 63 Pac. 13); to appoint a surveyor and necessary assistants to establish boundary lines between certain counties (Kornburg *v.* Deer Lodge County, 10 Mont. 325, 25 Pac. 1041); to appoint a custodian of county offices (Conway *v.* New York, 6 Daly (N. Y.) 515); to hire a janitor for a court-house (Hetsch *v.* Com., 86 Ky. 327, 5 S. W. 781, 9 Ky. L. Rep. 591; Deters *v.* Hamilton County, 1 Ohio Cir. Ct. 162; Ferriss *v.* Williamson, 8 Baxt. (Tenn.) 424), guards for a county jail (Mitchell *v.* Leavenworth County Com'rs, 18 Kan. 188), or agents to refund bonds (Lancaster County *v.* Green, 54 Nebr. 98, 74 N. W. 430); or to hire recruiting officers (Hall *v.* Lauderdale, 46 N. Y. 70).

Approval of compensation of employees by board of control.— State *v.* Fratz, 7 Ohio Dec. (Reprint) 623, 4 Cinc. L. Bul. 320.

Effect of resolution fixing compensation but specifying no time.— Arapahoe County *v.* Clapp, 9 Colo. App. 161, 48 Pac. 157.

Employment of court stenographer dependent upon population.— Randolph County *v.* Henry County, 27 Ind. App. 378, 61 N. E. 612.

Statutory authority not indispensable.— County commissioners are not necessarily prohibited from expending money for services of persons necessarily employed for a special purpose, although there is no statutory provision for such employment; and where there is no suspicion of collusion or fraud attached to such payments courts will decline to interfere by injunction. Barber *v.* Lucas County, 5 Ohio S. & C. Pl. Dec. 98, 7 Ohio N. P. 330.

Where a statute allows only six clerks for the board of equalization, a board of county commissioners have no authority to provide additional clerical assistance for such board. State *v.* Wilson, 9 Ohio Dec. (Reprint) 39, 10 Cinc. L. Bul. 217.

15. Hilliard *v.* Bunker, 68 Ark. 340, 58 S. W. 362; Durrett *v.* Buxton, 63 Ark. 397, 39 S. W. 56; Wiegel *v.* Pulaski County, 61 Ark. 74, 32 S. W. 116; Lawrence County *v.* Coffman, 36 Ark. 641; Worthen *v.* Roots, 34 Ark. 356.

Expenditures in excess of appropriation.— If an appropriation has been made the fact that the expenditures are in excess of the appropriation will not invalidate the contract, and the same will be binding upon the county. Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353; Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674 [*disapproving dictum* in Lawrence County *v.* Coffman, 36 Ark. 641].

16. Babcock *v.* Goodrich, 47 Cal. 488, where it was held that Cal. Pol. Code, § 170, to the effect stated in the text, does not mean by "revenue" the actual amount of money received in the treasury, but the estimate of the board of supervisors of what the revenue will be.

17. Lacey *v.* Police Jury, 28 La. Ann. 455; Hazie *v.* Police Jury, 28 La. Ann. 263; Rills *v.* Iberville Parish, 24 La. Ann. 146; Talbott *v.* Iberville Parish, 24 La. Ann. 135, where it was held, however, that if a parish is involved in heavy litigations, the police jury have the right to contract with experienced attorneys in addition to their regularly paid attorney to aid in the defense of such suits, and the parish is legally bound for the payment of their fees.

18. Ruggles *v.* Washington County, 3 Mo. 496, where it was held that where commissioners have been appointed by an act of the legislature with power to cause public buildings in a county to be erected as soon as sufficient funds shall have been obtained for the same by the sale of town lots and proceed to let out the said buildings before having the necessary funds in amount, they render themselves individually liable, and the county is not bound for their contracts for the buildings because they have not pursued their authority. Where, however, the act of the legislature makes the commissioners the judges of the county buildings to be erected, and whether the same is sufficient to accomplish the object, and an estimate is to be made on the sum procured and not on the sum raised and collected, they will be regarded as having pursued their authority and the county will be liable for the contract they have made.

at a price in excess of the estimates required to be made.[19] Another common provision is to the effect that certain contracts shall not be binding until they shall be submitted to and approved by certain specified county officers.[20] Where the statute fixes a limit to be paid by a county for the survey of school lands donated to such county, a higher price cannot be recovered, although contracted for.[21]

6. Validity of Specific Stipulations — a. In General. County boards having authority to contract for the county may in so contracting make such specific stipulations as they deem proper, provided the same are within the scope of their authority as fixed by law and are not contrary to public policy.[22]

b. Liability For Interest on Contracts and Orders. Counties are not liable for interest on their contracts after the completion of the work,[23] or on county orders,[24] in the absence of an express agreement to pay it.[25]

c. Promise to Defend Suits Against Grantees of County. Only y the record made by the board can a promise be made by a county, and no such promise can

19. State *v.* Franklin County, 1 Ohio Cir. Ct. 194, where it was held the county commissioners have no authority to enter into a contract for any particular branch of the work to be done on such building at a price in excess of the preliminary estimate.

20. **Approval by prosecuting attorney.**— Fornoff *v.* Nash, 23 Ohio St. 335, where it is further held that under such provision it is the duty of a prosecuting attorney to investigate and ascertain whether such contract accords with the provisions of the act, and if he so finds to indorse his certificate to that effect.

Approval by freeholders acting with commissioners.— Wood County *v.* Pargillis, 10 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 717.

Approval of expenditures by board of control.— State *v.* Fratz, 7 Ohio Dec. (Reprint) 623, 4 Cinc. L. Bul. 320.

Duty to report contract to court.— An order by the commissioners' court for the appointment of commissioners "to locate and let out the contract for building said bridge, at public outcry, and report to this court," does not require a ratification of the contract by the court before it becomes binding, but merely that the contract should be reported to it, in order that it may have on file the proper evidence of its transactions and obligations. Tuskaloosa County *v.* Logan, 57 Ala. 296.

21. Tomlinson *v.* Hopkins County, 57 Tex. 572, where it was held that a conveyance of part of the land under a contract for the survey thereof would be set aside.

22. **Contract to pay contingent attorney's fees.**— Millard *v.* Richland County, 13 Ill. App. 537.

Contracts to pay in county warrants for services rendered in the erection of county buildings. Babcock *v.* Goodrich, 47 Cal. 488, holding that such contract is in effect one payable in money.

Prohibition as to percentage and commission on contracts.— Weatherhogg *v.* Jasper County, 158 Ind. 14, 62 N. E. 477.

Provision for payments in instalments.— A contract made by the police jury of a parish in which payments for a court-house are provided for in instalments is not a bond, promissory note, or warrant, the issuing of which is prohibited by Act 30 of 1877 and by the organic law. Louisiana, etc., R. Co. *v.* Police Jury, 48 La. Ann. 331, 9 So. 282.

Stipulation as to disposition of land and buildings on removal of county-seat.— In Henderson *v.* Sibley County, 28 Minn. 515, 11 N. W. 91, the county board of S county entering into a contract with the borough of H in said county, agreed that the county should erect on county lands within such borough a court-house to cost not less than seven thousand five hundred dollars, provided the borough shall pay into the county treasury five thousand dollars toward the cost of such building. It was further agreed that the borough should have the use of a certain portion of the building when the same was not in use by the district court, and it was also provided that in case of a removal of the county-seat from the borough at any time the county should have the option of transferring the land and building to the borough on the payment to the county of three thousand dollars or the refunding of five thousand dollars, and that the county should not sell the land and building without the consent of the borough. It was held that such contract was beyond the scope of the county's power and that no rights were acquired thereunder by the borough.

Stipulation for payment of claims against contractor for work and material.— It is not *ultra vires* for a county board in contracting for a public building to stipulate that payments are not to be made to the contractors, so long as any claims for work or materials stand against them. Knapp *v.* Swaney, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397. See also as to the power of the county commissioners to agree with counsel for reasonable compensation. Chester County *v.* Barber, 97 Pa. St. 455.

23. Pike County *v.* Hosford, 11 Ill. 170. See also South Park Com'rs *v.* Dunlevy, 91 Ill. 49; Grundy County *v.* Hughes, 8 Ill. App. 34.

24. Madison County *v.* Bartlett, 2 Ill. 67.

25. **Contract to pay in county orders bearing interest.**— Jackson County *v.* Rendleman,

be made whereon a recovery can be had, except in so far as the county board can act in pursuance of the duties prescribed by law.[26]

7. RESTRAINT OF EXERCISE OF POWER. A court of equity will enjoin the award by county commissioners of an illegal contract,[27] or restrain them from carrying ont an unauthorized or *ultra vires* contract.[28]

B. Requisites as to Form and Manner — 1. IN GENERAL. Where the mode and manner of contracting are not prescribed or the persons or agents by and with whom contracts are to be made, counties may make contracts in all matters necessarily appertaining to them in the same manner as individuals or other corporations.[29] If, however, such mode and manner of contracting, or the officers or agents by and with whom contracts are to be made, are prescribed, the mode prescribed must be pursued.[30] It has been held, however, that the violation of statutory provisions in regard to the mode of making contracts by counties, designed for their protection, may be waived by a county and cannot be urged by the other party to defeat the contract.[31]

2. NECESSITY FOR WRITTEN CONTRACT. While it is perhaps a usual provision that contracts made on behalf of the county shall be in writing and entered on the minutes by the body making the contract as an agent of the county,[32] it has

100 Ill. 379, 39 Am. Rep. 44 [*affirming* 8 Ill. App. 287].

26. Thus for instance liability on the part of the county to pay the expenses of defending a suit brought against grantee of lands conveyed by the county must exist, if at all, by virtue of covenant for quiet enjoyment, and cannot arise in consequence of a promise subsequently made. Wheeler *v.* Wayne County, 31 Ill. App. 299.

27. Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40. And see Vaughn *v.* Forsyth County, 118 N. C. 636, 24 S. E. 425.

No injunction for mere irregularity.— Where the action of a board of county supervisors in awarding contracts for advertising is irregular, but no additional expense or cost is imposed on taxpayers thereby, a taxpayer cannot enjoin the performance of the contracts. Sperry *v.* Kretchner, 65 Iowa 525, 22 N. W. 660.

Time for such injunction.—Under the statute providing that the taxpayer may have an injunction in cases where "a contract in contravention of the laws of this state has been or is about to be entered into or has been or is being executed," the taxpayer is not compelled to enjoin an illegal contract at any particular time, but has such right until the completion of the contract. State *v.* Gibson, 11 Ohio S. & C. Pl. Dec. 90, 8 Ohio N. P. 367.

To prevent award to other than lowest bidder.— Mueller *v.* Eau Claire County, 108 Wis. 304, 84 N. W. 430. See also Davenport *v.* Walker, 57 N. Y. App. Div. 221, 68 N. Y. Suppl. 161.

28. Dyer *v.* Erwin, 106 Ga. 845, 33 S. E. 63; Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665; Grannis *v.* Blue Earth County, 81 Minn. 55, 83 N. W. 495.

29. Montgomery County *v.* Barber, 45 Ala. 237.

30. *Alabama.*—Montgomery County *v.* Barber, 45 Ala. 237.

California.— Murphy *v.* Napa County, 20 Cal. 497.

Indiana.— Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40.

Mississippi.— Jefferson County *v.* Arrighi, 54 Miss. 668.

Nevada.—Sadler *v.* Eureka County, 15 Nev. 39.

North Carolina.— Berlin Iron Bridge Co. *v.* Wilkes County, 111 N. C. 317, 16 S. E. 314.

See 13 Cent. Dig. tit. "Counties," § 183.

In Missouri it has been held that a statute providing that if a claim against a county be for work and labor done or material furnished, the claimant, if he has fulfilled his contract, shall be entitled to recover the just value of such work, labor, or material, although the prescribed form in making the contract may not have been pursued, refers only to such labor as the county may require in the ordinary and usual transaction of its business and does not include contracts for services performed in the compromise and settlement of township bonds. Woolfolk *v.* Randolph County, 83 Mo. 501. Nor does such statute authorize a recovery on a contract with a county official when he had no power to make it. Bryson *v.* Johnson County, 100 Mo. 76, 13 S. W. 239.

31. *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637.

32. Milburn *v.* Glynn County, 112 Ga. 160, 37 S. E. 178; Akin *v.* Bartow County, 54 Ga. 59; Pritchett *v.* Bartow County Inferior Ct., 46 Ga. 462; Marion County *v.* Woulard, 77 Miss. 343, 27 So. 619; Bridges *v.* Clay County, 58 Miss. 817; Woolfolk *v.* Randolph County, 83 Mo. 501; Athens County Com'rs *v.* Baltimore Short Line R. Co., 37 Ohio St. 205.

In Ohio it has been held that where the county has accepted the benefit of the contract executed to its commissioners for the conveyance of land it cannot avoid paying the consideration stipulated in such contract, on the ground of failure by the proper officer to enter the contract upon the minutes of the board as required by statute (Wilder *v.* Hamilton County Com'rs, 41 Ohio St. 601), and

been held that such a contract need not be in writing unless required by statute.[33]

3. Stipulation as to Hours of Labor. In some states provision is expressly made as to the number of hours of labor which shall constitute a legal day's work in all cases where the same is performed under the authority of any law of the state, and it is directed that a stipulation to that effect shall be made part of all contracts to which any municipal corporation within the state shall be a party.[34]

C. Construction and Operation of Contracts[35] — 1. Binding Effect of Terms and Conditions of Contract. Parties contracting with a county through its duly authorized agents must be held to be bound by the terms of such contract and by all the terms and stipulations which the agents of the county have seen fit to embody in such contracts, both as to the work to be done, the rate, and time of payment,[36] and the means by which such payment is to be secured;[37] so also all conditions precedent imposed by the county in making a contract must be performed by the other party thereto in order to entitle him to a recovery under such contract.[38]

2. When Contract Construed as Official and When as Personal to Agent. Whenever the contract or engagement of a county officer or agent is connected with a subject fairly within the scope of his authority, the extent of which is known to the other party, the same will be intended to have been made officially and in his public character, unless the contrary appears by satisfactory evidence of an express agreement to be personally liable;[39] but where the contract does not

that where the contract has been fully performed on the part of the county the other party to the contract cannot refuse performance on his part, on the ground of such failure to enter, for by accepting performance by the county board he is precluded from raising this question (Athens County Com'rs *v.* Baltimore Short Line R. Co., 37 Ohio St. 205).

33. Orange County *v.* Ritter, 90 Ind. 362. See also McCabe *v.* Fountain County, 46 Ind. 380; Talbot County Inferior Ct. Justices *v.* House, 20 Ga. 328.

34. It has been held, however, that this law being passed for the protection of the laborer an officer of the county cannot refuse to carry out a contract because of the omission of such stipulation, such omission in the contract being more favorable to the county. Babcock *v.* Goodrich, 47 Cal. 488.

35. It is sometimes expressly provided that an uncertainty in a contract between a public body and a private person shall be presumed to be caused by the latter, and most strongly construed against him. McPherson *v.* San Joaquin County, (Cal. 1899) 56 Pac. 802.

Where counties comprising a judicial circuit through their board of supervisors consent to the employment of a stenographer without stipulation as to compensation, thus leaving his salary at the statutory rate, and such sum was apportioned among the counties and paid for a number of years until one of the counties was detached, it was held that the previous assent of the counties did not continue to be binding after this change, but that they were entitled to make new arrangements. Hitchcock *v.* Blackman, 47 Mich. 146, 10 N. W. 176.

With respect to the interpretation of state statutes regulating the making of contracts by counties, the decisions of the state courts are binding upon the courts of the United States. Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674.

36. King *v.* Mahaska County, 75 Iowa 329, 39 N. W. 636; Quigley *v.* Sumner County, 24 Kan. 293; McKenzie *v.* Polk County, 61 Minn. 145, 63 N. W. 613.

37. Byrne *v.* East Carroll Parish, 45 La. Ann. 392, 12 So. 521; Moody *v.* Cass County, 74 Mo. 307; Pettis County *v.* Kingsbury, 17 Mo. 479.

Agreement for payment from particular fund.— Where a contractor agrees to be paid for his work for a county out of a particular fund which the county has no means of replenishing, he cannot, on the exhaustion of that fund, resort to other funds. Moody *v.* Cass County, 74 Mo. 307. See also Pettis County *v.* Kingsbury, 17 Mo. 479.

38. American Clock Co. *v.* Licking County Com'rs, 31 Ohio St. 415.

Effect of agreement by board to superintend work.— Although a contract to build a court-house in a workmanlike manner recites an agreement by the commissioners to superintend the erection of said building, such superintendence is not a matter precedent to a recovery on the contract, since such agreement is in reality only the recital of something to be done for the benefit or advantage of the county. Greene *v.* State, 8 Ohio 310. For other instances of cases in which certain facts were held not to be conditions precedent to the recovery see Hall *v.* Los Angeles County, 74 Cal. 502, 16 Pac. 313 [*reversing* (Cal. 1887) 13 Pac. 854]; Page County *v.* American Emigrant County, 41 Iowa 115.

39. Broadwell *v.* Chapin, 2 Ill. App. 511; Murray *v.* Carothers, 1 Metc. (Ky.) 71; Detroit First Nat. Bank *v.* Becker County,

upon its face purport to have been made by or with persons who could be recognized as public agents, the contract must be regarded as an individual undertaking, even though the parties making such contract describe themselves as county commissioners.[40]

D. Ratification of Unauthorized Contracts. Ordinarily unauthorized contracts made on behalf of the county may be ratified by such county through the agents who would have been authorized in the first place to make such contract;[41] but the ratification must be made by them in the same capacity in which they were required to act in making the contract in the first instance,[42] and with full knowledge of the existence and nature of the contract in question.[43] It is also essential that the contract be of such a nature that the body assuming to ratify it would have had power to make it in the first instance. A contract void because made under an unconstitutional statute,[44] or because made in disregard of the provisions and directions of the statutes regulating the making of such contracts, is not capable of being validated by a subsequent ratification.[45] The ratification of an unauthorized contract may be either express or implied.[46]

81 Minn. 95, 83 N. W. 468; Hall *v.* Lauderdale, 46 N. Y. 70. Thus a contract setting forth the official position of certain parties as commissioners appointed by the county court to make such contract and signed by them with the name of their office after their surnames is an official and not a personal act (Murray *v.* Carothers, 1 Metc. (Ky.) 71); so also a contract entered into by a board of supervisors for and on behalf of the county and signed by the chairman of the board is the contract of the county (Babcock *v.* Goodrich, 47 Cal. 488).

40. Potts *v.* Henderson, 2 Ind. 327. See also Warrick County *v.* Butterworth, 17 Ind. 129, holding that where a party makes a contract which in the introductory part purports to be made by him as agent of the county, but after describing the work to be done, etc., provides that said party shall pay the stipulated price, such an agreement binds the party making it and not the county for which he assumes to be acting to pay for such work, and an action cannot be maintained upon it against the county without the averment of other facts, as that the contract was accepted and adopted by the county as its own.

Primary liability of county tax assessor for printing.—The printing necessary for the office of the county tax assessor is not to be done at his expense; yet if he contract for it he is primarily liable to the printer, unless there is an understanding between them to the contrary. White *v.* Williams, 49 Ala. 130.

41. *Illinois.*— Jackson County *v.* Hall, 53 Ill. 440; La Salle County *v.* Hatheway, 78 Ill. App. 95.

Kansas.— Mitchell *v.* Leavenworth County Com'rs, 18 Kan. 188.

Minnesota.—True *v.* Crow Wing County, 83 Minn. 293, 86 N. W. 102.

Missouri.— Ruggles *v* Washington County, 3 Mo. 496.

Nevada.— Clarke *v.* Lyon County, 8 Nev. 181, 7 Nev. 75.

Oregon.— Steiner *v.* Polk County, 40 Oreg. 124, 66 Pac. 707.

Pennsylvania.— Upper Bern Tp. *v.* Berks County, 2 Woodw. 194.

Tennessee.— State *v.* Anderson County, 8 Baxt. 249.

Texas.— Boydston *v.* Rockwall County, 86 Tex. 234, 24 S. W. 272.

West Virginia.— Goshorn *v.* Kanawha County, 42 W. Va. 735, 26 S. E. 452.

See 13 Cent. Dig. tit. "Counties," § 185.

42. Johnson *v.* School Dist., 67 Mo. 319.

43. Phelan *v.* San Francisco County, 6 Cal. 531; Clarke *v.* Lyon County, 7 Nev. 75; Boydston *v.* Rockwall County, 86 Tex. 234, 24 S. W. 272.

44. Phelan *v.* San Francisco County, 6 Cal. 531; Hovey *v.* Wyandotte County, 56 Kan. 577, 44 Pac. 17.

45. *Arkansas.*— Wiegel *v.* Pulaski County, 61 Ark. 74, 32 S. W. 116.

Iowa.— King *v.* Mahaska County, 75 Iowa 329, 39 N. W. 636.

Mississippi.— Jefferson County *v.* Arrighi, 54 Miss. 668.

Missouri.— Maupin *v.* Franklin County, 67 Mo. 327.

Nebraska.— Tullock *v.* Webster County, 46 Nebr. 211, 64 N. W. 705.

Oregon.— Municipal Security Co. *v.* Baker County, 39 Oreg. 396, 65 Pac. 369.

United States.— Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040.

See 13 Cent. Dig. tit. "Counties," § 185.

46. Upper Bern Tp. *v.* Berks County, 2 Woodw. (Pa.) 194.

Ratification by election to carry out provisions of contract.— An unauthorized contract of the county judge to purchase county bonds for the permanent school fund is ratified by the election of the county commissioners' court with knowledge of the contract to carry out its provisions and to hold the bonds. Boydston *v.* Rockwall County, 86 Tex. 234, 24 S. W. 272.

What does not amount to ratification.— The fact that work not authorized by a resolution of the county board was paid for by the county does not constitute a contract on the part of the county to pay for other unauthorized work ordered by the architect of

E. Letting of Contracts — 1. **Request For Bids.** It is usually provided by statute that before the county through its proper agents shall let contracts for performing certain services for the county, such as the construction of county buildings[47] or bridges,[48] for the improvement of roads,[49] for county printing,[50] for the furnishing of goods[51] or stationery for the county,[52] or as is sometimes provided, for any work done for the county involving the expenditure of more than a certain amount of money,[53] due notice thereof shall be given,[54] usually by

the building which was being constructed. Sexton *v.* Cook County, 114 Ill. 174, 28 N. E. 608. Where the board of supervisors who had in their individual capacity consented to a change in the contract for the construction of a bridge, and afterward the bridge was completed, appointed a committee to examine the same, the power to accept or reject it, the appointment of the committee with the powers indicated, and the subsequent qualified acceptance by the board, will not amount to a ratification of the change in the contract. Mallory *v.* Montgomery County, 48 Iowa 681.

47. *California.*— McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231.

Indiana.—Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234, 17 N. E. 593; Eigemann *v.* Posey County, 82 Ind. 413.

Nebraska.— Townsend *v.* Holt County, 40 Nebr. 852, 59 N. W. 381; State *v.* Cunningham, 37 Nebr. 687, 56 N. W. 485.

Nevada.—Sadler *v.* Eureka County, 15 Nev. 39.

New York.— Moynahan *v.* Birkett, 81 Hun 395, 31 N. Y. Suppl. 293.

United States.—Richardson *v.* Grant County, 27 Fed. 495.

See 13 Cent. Dig. tit. "Counties," § 188.

A soldiers' monument authorized to be erected by county commissioners under the Pennsylvania act of May 22, 1895, is not a "county building" within the meaning of the Pennsylvania act of April 19, 1895, requiring county commissioners, in the erection of "a court house, jail, or other county building," to let the work to the lowest and best bidder. Spangler *v.* Leitheiser, 182 Pa. St. 277, 37 Atl. 832 [*following* Cincinnati Soc.'s Appeal, 154 Pa. St. 621, 26 Atl. 647, 20 L. R. A. 323].

48. *Indiana.*— Smith *v.* Miami County, 6 Ind. App. 153, 33 N. E. 243.

Missouri.— Heidelberg *v.* St. Francois County, 100 Mo. 69, 12 S. W. 914.

Nebraska.— Townsend *v.* Holt County, 40 Nebr. 852, 59 N. W. 381; State *v.* Cunningham, 37 Nebr. 687, 56 N. W. 485; Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356.

Ohio.—Buchanan Bridge Co. *v.* Campbell, 60 Ohio St. 406, 54 N. E. 372; State *v.* Biddle, I Ohio S. & C. Pl. Dec. 130, 3 Ohio N. P. 173.

United States.—Pacific Bridge Co. *v.* Clackamas County, 45 Fed. 217.

See 13 Cent. Dig. tit. "Counties," § 188.

Contracts for repairs of county bridges.— When such repairs do not amount to a substantial reconstruction, they may be let by the county court privately, so also modifications in the plan of a bridge in the course of construction involving labor and material in excess of that originally contracted for may be let privately so long as the same is done in good faith and not with the intention to supersede the original contract for the construction with another one not publicly let. Pacific Bridge Co. *v.* Clackamas County, 45 Fed. 217.

No application to erection of joint county bridges.—Westmoreland County's Appeal, 164 Pa. St. 355, 30 Atl. 288.

49. Follmer *v.* Nuckolls County, 6 Nebr. 204.

50. *California.*— Harris *v.* Cook, 119 Cal. 454, 51 Pac. 692; Maxwell *v.* Stanislaus County, 53 Cal. 389.

Colorado.— Saguache County *v.* Skinner, 8 Colo. App. 272, 45 Pac. 514.

Nebraska.— State *v.* Lincoln County, 35 Nebr. 346, 53 N. W. 147.

Pennsylvania.— Allegheny County *v.* Grier, 26 Pittsb. Leg. J. N. S. 380.

Washington.— Baum *v.* Sweeny, 5 Wash. 712, 32 Pac. 778.

See 13 Cent. Dig. tit. "Counties," § 188.

51. American Clock Co. *v.* Licking County Com'rs, 31 Ohio St. 415.

No application to furnishing of postage.— Ind. Acts (1875), Reg. Sess. p. 31, making the county board the purchasing agent of the county for all articles necessary for conducting the county offices, and requiring such board to give a certain notice to bidders for furnishing supplies, does not apply to the furnishing of postage. Williams *v.* Henry County, 27 Ind. App. 207, 60 N. E. 1099.

52. Barnard *v.* Sangamon County, 190 Ill. 116, 60 N. E. 109 [*reversing* 91 Ill. App. 98]; Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40.

53. **Work involving more than five hundred dollars.**— State *v.* Yeatman, 22 Ohio St. 546.

Work involving more than one hundred dollars.— Com. *v.* Mercer, 165 Pa. St. 1, 30 Atl. 501, 35 Wkly. Notes Cas. (Pa.) 411.

54. Williams *v.* Henry County, 27 Ind. App. 207, 60 N. E. 1099; Com. *v.* Mercer, 165 Pa. St. 1, 30 Atl. 501, 35 Wkly. Notes Cas. (Pa.) 411.

Ten days' notice.— Maxwell *v.* Stanislaus County, 53 Cal. 389 (county printing); Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40 (bids to furnish stationery).

Thirty days' notice.— Smith *v.* Miami County, 6 Ind. App. 153, 33 N. E. 243, bids for erection of bridge.

Sixty days' notice.— McGowan *v.* Ford, 107

advertising,[55] in a paper or papers published and of general circulation in the county,[56] stating the character of the work, supplies, etc., required, and asking for bids.[57] Where such statutory provisions exist they are usually held to be mandatory, and contracts let without complying with such provisions are held not to be binding.[58] Where, however, there is no law making it the duty of the county through its agents to advertise for bids and to let by contract to the lowest bidder, they will not be compelled by mandamus to take such action,[59] and may award a contract for work in the absence of fraud or collusion to one at any price within the legal rate, even though another offers to do such work for a much less amount.[60]

Cal. 177, 40 Pac. 231, contract for erecting or rebuilding court-house and other public buildings.

Advertising for four weeks.— State *v.* Cunningham, 37 Nebr. 687, 56 N. W. 485; Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356, erection of bridge.

In Washington a statute requiring notice for bids for county printing to be published for a certain time prior to the May session of the board of county commissioners is merely directory. Baum *v.* Sweeney, 5 Wash. 712, 32 Pac. 778.

55. *California.*— Smeltzer *v.* Miller, 125 Cal. 41, 57 Pac. 668; McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231.

Colorado.— Saguache County *v.* Skinner, 8 Colo. App. 272, 45 Pac. 514.

Georgia.— Manly Bldg. Co. *v.* Newton, 114 Ga. 245, 40 S. E. 274; Dyer *v.* Erwin, 106 Ga. 845, 33 S. E. 63.

Indiana.—Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234, 17 N. E. 593; Benton County *v.* Templeton, 51 Ind. 266.

Missouri.— Heidelberg *v.* St. Francois County, 100 Mo. 69, 12 S. W. 914.

Montana.— State *v.* Coad, 23 Mont. 131, 57 Pac. 1092.

Nebraska.— State *v.* Cunningham, 37 Nebr. 687, 56 N. W. 485; Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356.

Nevada.— Office Specialty Mfg. Co. *v.* Washoe County, 24 Nev. 359, 55 Pac. 22; Sadler *v.* Eureka County, 15 Nev. 39.

New York.— Moynahan *v.* Birkett, 81 Hun 395, 31 N. Y. Suppl. 293.

Ohio.— State *v.* Yeatman, 22 Ohio St. 546; State *v.* Butler County, 18 Ohio Cir. Ct. 275, 10 Ohio Cir. Dec. 118; State *v.* Biddle, 1 Ohio S. & C. Pl. Dec. 130, 3 Ohio N. P. 173.

Pennsylvania.— Allegheny County *v.* Grier, 26 Pittsb. Leg. J. N. S. 380.

See 13 Cent. Dig. tit. "Counties," § 188.

Discretion of board in selection of paper.— Where the county board act in good faith, their decision as to the selection of the paper in which to advertise for bids cannot be attacked in a collateral proceeding. Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356.

56. Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356; State *v.* Yeatman, 22 Ohio St. 546; Bradford County *v.* Horton, 6 Lack. Leg. N. (Pa.) 306.

Publication in papers of general circulation throughout the state is sometimes required. Brown *v.* Merrick County, 18 Nebr. 355, 25 N. W. 356.

57. Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665; State *v.* Cunningham, 37 Nebr. 687, 56 N. W. 485; American Clock Co. *v.* Licking County Com'rs, 31 Ohio St. 415.

Separate proposals.— State *v.* Williams County, 2 Ohio Cir. Dec. 227.

Sufficient for advertisement to refer to plans and specifications.— Notice by county commissioners for the letting of a contract for the county jail in the manner required by statute is sufficient which states the place where the building is to be erected, the terms of construction, the manner of payment, the bond required, the time, place, and terms of letting the contract, and which also refers to the plans and specifications on file in the auditor's office. It is not necessary that the advertisement shall set forth the plan of the building. Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079. See also Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665.

58. *Georgia.*— Dyer *v.* Erwin, 106 Ga. 845, 33 S. E. 63.

Indiana.— Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40.

Nebraska.— Townsend *v.* Holt County, 40 Nebr. 852, 59 N. W. 381.

Ohio.— State *v.* Yeatman, 22 Ohio St. 546; State *v.* Biddle, 1 Ohio S. & C. Pl. Dec. 130, 3 Ohio N. P. 173.

United States.—Richardson *v.* Grant County, 27 Fed. 495.

See 13 Cent. Dig. tit. "Counties," § 188.

59. State *v.* Lincoln County, 35 Nebr. 346, 53 N. W. 147; State *v.* Dixon County, 24 Nebr. 106, 37 N. W. 936.

Completion by board of an abandoned contract without letting new contract.—Where the contractor for the construction of a county building abandons his contract after a material portion of the work has been performed, the board of county commissioners has incidental power to take charge of the work and complete the building without adopting new plans and specifications or letting a new contract, and the county is liable for money, labor, or materials furnished at the request of the board and used in the construction of the building. Bass Foundry, etc., Works *v.* Parke County, 115 Ind. 234, 17 N. E. 593.

60. Journal Pub. Co. *v.* Whitney, 97 Cal. 283, 32 Pac. 237; Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40; Harper County *v.* State, 47 Kan. 283, 27 Pac. 997.

2. Character of Specifications Required in Advertising For Bids. In requesting or advertising for bids upon which to let a contract to perform work for a county, it is the duty of the county commissioners to adopt in advance of the letting, plans and specifications so definite and detailed as to disclose the thing to be undertaken with circumstantial fulness and precision as a basis on which bids may be received.[61] Such commissioners have no authority to require each bidder to accompany his bid with his own plans and specifications, adopting such plans as they see fit and accepting the accompanying bid, since this would do away with all competition or comparison of bids, which is the object of requiring a public letting, and would open the way to corruption, favoritism, and fraud,[62] and a statute authorizing such a letting is in violation of a constitutional provision that all such contracts shall be given to the lowest bidder.[63] The fact that a board of county commissioners have adopted what they denominate "general specifications" will not satisfy the requirement of detailed specifications where the board at the same time invite proposals and competitive plans and specifications.[64]

3. Waiver of Defects in Form. A board of county commissioners may waive defects in the form of a bid, where such waiver works no prejudice to the rights of the public for whom the board acts.[65]

4. Necessity of Furnishing Guaranty of Performance With Bid. It is sometimes required that every bidder shall give a bond for the faithful performance of the work according to the conditions stated in the advertisement,[66] or that each bid shall be accompanied by a sufficient guaranty of some disinterested person.[67]

5. Award — a. To Whom Contract Given. It is usually provided that county contracts shall be let to the lowest responsible bidder,[68] or to the "lowest and

61. *Arkansas.*— Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353; Armstrong *v.* Truitt, 53 Ark. 287, 13 S. W. 934.

Idaho.— Andrews *v.* Ada County, 7 Ida. 453, 63 Pac. 592.

Indiana.—Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982; Gibson County *v.* Cincinnati Steam Heating Co., 128 Ind. 240, 2 N. E. 612, 12 L. R. A. 502; Kitchel *v.* Union County, 123 Ind. 540, 23 N. E. 366; Eigemann *v.* Posey County, 82 Ind. 413.

Nebraska.— People *v.* Buffalo County, 4 Nebr. 150.

Ohio.— State *v.* Shelby County Com'rs, 36 Ohio St. 326; State *v.* Crawford County, 17 Ohio Cir. Ct. 370, 9 Ohio Cir. Dec. 715; Plessner *v.* Pray, 8 Ohio S. & C. Pl. Dec. 149, 6 Ohio N. P. 444.

See 13 Cent. Dig. tit. "Counties," § 188.

If the notice inviting proposals is defective in excluding fair competition, the commissioners cannot be required to award the contract to any of the bidders. American Clock Co. *v.* Licking County Com'rs, 31 Ohio St. 415.

No bar to incorporation of stipulation as to alteration and details.— Ind. Rev. Stat. § 4243, providing that it shall not be lawful for commissioners to make any contract for the construction of any court-house until plans and specifications have been adopted and deposited in the office of the auditor, is no bar to the incorporation in the specifications of a stipulation that the commissioners may alter the details of the work with corresponding changes in the contract price. Kitchel *v.* Union County, 123 Ind. 540, 24 N. E. 366.

62. Ertle *v.* Leary, 114 Cal. 238, 46 Pac. 1; People *v.* Buffalo County, 4 Nebr. 150; Price *v.* Passaic County, 96 Fed. 174, 37 C. C. A. 443.

63. Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

64. Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

65. State *v.* Board of Education, 42 Ohio St. 374.

66. Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079.

If the bond is not in compliance with the advertisement, a bond subsequently furnished, which is in compliance therewith, is enforceable. Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079.

67. So provided by Ohio Rev. Stat. § 3988. State *v.* Board of Education, 42 Ohio St. 374.

68. *Arkansas.*— Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

California.— Ertle *v.* Leary, 114 Cal. 238, 46 Pac. 1; McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231; Murphy *v.* Napa County, 20 Cal. 497.

Colorado.— Dawson *v.* Woodhams, 11 Colo. App. 394, 53 Pac. 238.

Indiana.— Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; Boseker *v.* Wabash County, 88 Ind. 267; Smith *v.* Miami County, 6 Ind. App. 153, 33 N. E. 243.

Iowa.— Vincent *v.* Ellis, 116 Iowa 609, 88 N. W. 836.

Kansas.— State *v.* Shawnee County, 57 Kan. 267, 45 Pac. 616.

Massachusetts.—Mayo *v.* Hampden County, 141 Mass. 74, 6 N. E. 757.

Mississippi.— Jefferson County *v.* Arrighi, 54 Miss. 668.

best" bidder,[69] on the terms in the notice mentioned and on the plans and specifications furnished,[70] provided the bid is in the proper form,[71] is received at the proper time,[72] and provided that such bidder has the qualifications prescribed by statute for executing the particular contract in question.[73] Where as is the case in some jurisdictions county commissioners are not required by statute to make a public letting of contracts affecting the county after due advertisement to the lowest bidder, it has been held that they must show on settlement of their accounts that the county paid no more than a fair market price for the things contracted for or purchased.[74]

b. Discretion of Board — (i) *In Determining Responsibility of Bidder.* Even though the requirement that a county contract shall be awarded to the

Montana.— State *v.* Coad, 23 Mont. 131, 57 Pac. 1092.

Nebraska.— State *v.* Cunningham, 37 Nebr. 687, 56 N. W. 485; People *v.* Buffalo County, 4 Nebr. 150.

New Jersey.— Connolly *v.* Hudson County, 57 N. J. L. 286, 30 Atl. 548.

New York.— People *v.* Kings County, 42 Hun 456.

Ohio.— State *v.* Board of Education, 42 Ohio St. 374; State *v.* Marion County Com'rs, 39 Ohio St. 188; State *v.* Shelby County Com'rs, 36 Ohio St. 326; State *v.* Hamilton County Com'rs, 20 Ohio St. 425; State *v.* Betts, 2 Ohio Cir. Dec. 434.

Oregon.— Springfield Milling Co. *v.* Lane County, 5 Oreg. 265.

Pennsylvania.— Van Baman *v.* Gallagher, 182 Pa. St. 277, 37 Atl. 832; Wilkes-Barre Record *v.* Luzerne County, 9 Kulp 26.

Wisconsin.— Mueller *v.* Eau Claire County, 108 Wis. 304, 84 N. W. 430.

United States.—Pacific Bridge Co. *v.* Clackamas County, 45 Fed. 217.

See 13 Cent. Dig. tit. "Counties," § 191.

The lowest "responsible bidder" is one who complies with all the requirements of the statute, and not merely one whose bid is less than his competitors. Boseker *v.* Wabash County, 88 Ind. 267; Jefferson County *v.* Arrighi, 54 Miss. 668.

Injunction against payment of more than amount of lowest bid.— Where an ordinary has let out the building of a bridge to one who is not the lowest bidder, an injunction against paying the contractor more than the amount of the lowest bid is sufficiently comprehensive, and a refusal to restrain any and all payment whatever is no abuse of discretion. Crabtree *v.* Gibson, 78 Ga. 230, 3 S. E. 10, where the ordinary upon refusal of the lowest bidder to give the required bond contracted with the second bidder.

60. Com. *v.* Mercer, 165 Pa. St. 1, 30 Atl. 501.

Letting to lowest and best separate bidder. — By the Ohio act of May 5, 1877, it is provided that contracts for public buildings may be let to separate bidders for different parts of the work, and the contracts are required to be let to the lowest and best separate bidder. State *v.* Marion County Com'rs, 39 Ohio St. 188; State *v.* Shelby County Com'rs, 36 Ohio St. 326. This act is not inconsistent with and did not repeal the act of April 27, 1869, requiring contracts let for the entire job to be awarded to the person offering to do the work at the lowest price and giving a sufficient bond for its faithful performance, and hence where bids are required to be such that the contract must be let for the entire job, county commissioners are allowed no discretion in awarding the contract otherwise than to the lowest bidder, provided he has good and sufficient bond. State *v.* Marion County Com'rs, 39 Ohio St. 188; Boren *v.* Darke County Com'rs, 21 Ohio St. 311.

Where a bid is uncertain as to whether it is for parts of a job as well as for the whole, and the bidder induces the board to construe the same as for all or none, such bidder cannot afterward complain that the board awarded the whole job to a lower bidder, although under a different construction the board would have been bound to award to such bidder a portion of the work. State *v.* Board of Education, 42 Ohio St. 374.

70. Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079.

Award not compulsory where notice defective.— Where a notice inviting proposals for furnishing goods to a county is so defective as to exclude fair competition, the commissioners cannot be required to award the contract to any of the bidders. American Clock Co. *v.* Licking County Com'rs, 31 Ohio St. 415.

Conditional award.— Where a contract was awarded by board of county commissioners on a condition which was not accepted, such condition not having been accepted, no contract existed. Olympian-Tribune Pub. Co. *v.* Byrne, (Utah 1902) 68 Pac. 335.

71. State *v.* Franklin County, 1 Ohio Cir. Ct. 194.

Modification of bid not permissible.— County commissioners who have advertised for the sale of county bonds under two plans, while they have the power to accept or reject any bid, have no power to permit a bidder to privately amend and modify his bid so as to make it better than that of another bidder or to render it acceptable to them. State *v.* Douglas County, 11 Nebr. 484, 9 N. W. 691.

72. Brumfield *v.* Douglass County, 2 Nev. 65.

73. Baum *v.* Sweeney, 5 Wash. 712, 32 Pac. 778.

74. Bradford County *v.* Horton, 6 Lack. Leg. N. (Pa.) 306.

lowest responsible bidder be held to be mandatory and not merely directory,[75] yet the agents through whom the county let such contracts have broad discretionary powers in determining the responsibility of the bidder as depending upon the sufficiency of the bond tendered.[76] They will not, however, be permitted to exercise such discretion to accomplish fraud and favoritism, and such abuse of discretion will be prevented by the courts.[77]

(II) *Right to Reject Any and All Bids.* County boards are in a number of jurisdictions empowered to reserve the right to reject any and all bids, if they think such a course to be for the public interest,[78] and to advertise anew for proposals.[79] If, however, such boards determine not to readvertise for further proposals, it has been held to be their duty to enter into a contract with the lowest bidder,[80] and to award the contract to the bidder offering to do the work and furnish the materials at the next lowest price where the lowest bidder failed to comply with the statute by entering into the contract and executing the requisite bond.[81]

(III) *Liability of County For Expenditure of Time and Money in Preparing Bids.* An unsuccessful bidder for a county contract cannot recover for time and money expended in preparing a bid when he knows that there are to be competing bidders. In such a case there is no implied contract to reimburse the bidder for the work of preparing and submitting bids.[82]

c. Appeal From Award. An award of a contract for the erection of a county building is not an "allowance" within the meaning of a constitutional provision giving the right to citizens and resident taxpayers to appeal from allowances made for or against counties.[83]

F. Contractors' Bonds — 1. For Faithful Performance of Contract — a. Necessity For Bond. It is frequently required by statute that a party under-

75. Boseker *v.* Wabash County, 88 Ind. 267; State *v.* Marion County Com'rs, 39 Ohio St. 188.

76. Boseker *v.* Wabash County, 88 Ind. 267; Connolly *v.* Hudson County, 57 N. J. L. 286, 30 Atl. 548; State *v.* Franklin County, 1 Ohio Cir. Ct. 194.

Bonds the only qualification.— Ind. Rev. Stat. 1894, § 5591, after providing for the letting of contracts to the lowest responsible bidder upon his giving a prescribed bond, provides further that "said bond shall be the only requirement said commissioners may demand of such lowest responsible bidder as a qualification for said work." Robling *v.* Pike County, 141 Ind. 522, 524, 40 N. E. 1079.

77. State *v.* Franklin County, 1 Ohio Cir. Ct. 194.

78. *Indiana.*—Henry County *v.* Gillies, 138 Ind. 667, 38 N. E. 40.

Massachusetts.— Connors *v.* Stone, 177 Mass. 424, 59 N. E. 71; Mayo *v.* Hampden County, 141 Mass. 74, 6 N. E. 757.

Nebraska.— State *v.* Douglas County, 11 Nebr. 484, 9 N. W. 691.

New Jersey.— Connolly *v.* Hudson County, 57 N. J. L. 286, 30 Atl. 548.

New York.— People *v.* Kings County, 42 Hun 456.

Ohio.— State *v.* Board of Education, 42 Ohio St. 374; State *v.* Franklin County, 1 Ohio Cir. Ct. 194, 1 Ohio Cir. Dec. 106.

See 13 Cent. Dig. tit. "Counties," § 191.

Rejection for alterations.— After rejecting specifications for a county building because of material alterations, the commissioners' court was not bound to accept any further propositions from the bidders, but could reject the plans entirely. Clayton *v.* Galveston County, 20 Tex. Civ. App. 591, 50 S. W. 737.

Right of bidder to be heard before rejection. — Where a question is raised as to the truth of statements in a bid which, being on its face in strict conformity with the advertised requirements and the lowest bid presented, would entitle the bidder to the contract, the board cannot decide that question against the bidder and award the contract to another without giving the first bidder an opportunity to be heard. Connolly *v.* Hudson County, 57 N. J. L. 286, 30 Atl. 548.

79. State *v.* Shelby County Com'rs, 36 Ohio St. 326; State *v.* Franklin County, 1 Ohio Cir. Ct. 194.

Waiver of objection to reservation of right. — Where the advertisement reserves this right to reject any and all bids, a party making his bids under such advertisement cannot object that under the statute the board had no authority to reserve the power to reject bids. People *v.* Kings County, 42 Hun (N. Y.) 456.

80. State *v.* Franklin County, 1 Ohio Cir. Ct. 194.

81. State *v.* Shelby County Com'rs, 36 Ohio St. 326.

82. Boseker *v.* Wabash County, 88 Ind. 267.

83. Armstrong *v.* Truitt, 53 Ark. 287, 13 S. W. 934.

taking a contract to erect county buildings or perform county work shall give a bond conditioned for the faithful performance of such contract,[84] in an amount fixed at the discretion of the county commissioners,[85] and with proper sureties.[86]

b. Actions on Bond. In an action on such bond it is proper to join all the parties as plaintiffs or defendants who have so participated in the transaction as to render them interested in the determination of the suit.[87] So it is not error to join in the same suit claims for property converted and for damages approximately resulting from a breach of the contract, when the matters relied on for a recovery are connected with and grew out of the same cause of action and subject-matter in dispute.[88] The declaration on such bond should state for what county's use it is taken.[89]

2. For Payment of Debts Incurred by Contractor. Although a county has not, unless expressly authorized by law, the power to take a bond for the security or benefit of third parties,[90] it is expressly provided by statute in a few states that the bond of a contractor for the construction or performance of any kind of work shall in addition to the faithful performance of the work guarantee that such contractor shall pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and boarding the laborers, etc.[91] Under

84. *Arkansas.*— Armstrong *v.* Truitt, 53 Ark. 287, 13 S. W. 934; *In re* Buckner, 9 Ark. 73.

Georgia.— Forsyth County *v.* Gwinnett County, 108 Ga. 510, 33 S. E. 892; Crabtree *v.* Gibson, 78 Ga. 230, 3 S. E. 10.

Indiana.— Robling *v.* Pike County, 141 Ind. 522, 40 N. E. 1079; State *v.* Hinsdale-Doyle Granite Co., 117 Ind. 476, 20 N. E. 437; Faurote *v.* State, 110 Ind. 463, 11 N. E. 472; Boseker *v.* Wabash County, 88 Ind. 267.

Minnesota.— Breen *v.* Kelly, 45 Minn. 352, 47 N. W. 1067.

Mississippi.— Jefferson County *v.* Arrighi, 54 Miss. 668.

Ohio.— Boren *v.* Darke County Com'rs, 21 Ohio St. 311; State *v.* Crawford County, 17 Ohio Cir. Ct. 370, 9 Ohio Cir. Dec. 715.

Tennessee.—Templeton *v.* Nipper, 107 Tenn. 548, 64 S. W. 889.

Texas.— Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

Washington.— Gilmore *v.* Westerman, 13 Wash. 390, 43 Pac. 345.

See 13 Cent. Dig. tit. "Counties," § 194.

Statute directory and not mandatory.— The Arkansas statute requiring the commissioner of public buildings to take a bond of the person who undertakes the erection of a court-house has been held directory, and his failure to do so does not render the contract invalid. *In re* Buckner, 9 Ark. 73. And in Indiana it has been held that the failure or neglect of the commissioners to require a bond of a bridge contractor does not make the county liable to a third party for damage occasioned by the neglect. Pike County Com'rs *v.* Norrington, 82 Ind. 190, 193.

85. McCormick *v.* Johnson County, 68 Ind. 214, where it was held that their decision is not reviewable.

86. Resident sureties.— In McCormick *v.* Johnson County, 68 Ind. 214, it was held that a statute requiring sureties on a contractor's bond to be "residents" merely requires sureties residing in the state and not necessarily those residing in the county. In Boren *v.* Darke County Com'rs, 21 Ohio St. 311, it was held that it is not an abuse of the discretionary powers vested in them for county commissioners in taking a bond for the faithful performance of a contract to erect county buildings to refuse to accept non-residents as sureties.

87. Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

88. Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

89. Governor *v.* Throckmorton, 3 Bibb (Ky.) 243.

Evidence.— In accordance with the general rule that all preliminary negotiations leading to the execution of a contract are deemed to have been merged into such contract, an order of a county commissioners' court of a county entered on the same day, but before a contract was signed, is merely a preliminary negotiation and cannot be introduced in an action on a contractors' bond to vary or extend the terms of such contract, the same being full and complete in all its parts. Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

90. Breen *v.* Kelly, 45 Minn. 352, 47 N. W. 1067.

91. *Indiana.*—State *v.* Hinsdale-Doyle Granite Co., 117 Ind. 476, 20 N. E. 437; Faurote *v.* State, 110 Ind. 463, 11 N. E. 472, 111 Ind. 73, 11 N. E. 476, 790, 119 Ind. 600, 21 N. E. 663; Secrist *v.* Delaware County, 100 Ind. 59.

Michigan.— Plummer *v.* Kennedy, 72 Mich. 295, 40 N. W. 433; Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649.

Missouri.— See also Erath *v.* Allen, 55 Mo. App. 107, under Nebraska statute.

Nebraska.— Korsmeyer Plumbing, etc., Co. *v.* McClay, 43 Nebr. 649, 62 N. W. 50.

Washington.— Rounds *v.* Whatcom County, 22 Wash. 106, 60 Pac. 139; Gilmore *v.* Westerman, 13 Wash. 390, 43 Pac. 345.

See 13 Cent. Dig. tit. "Counties," § 195 *et seq.*

these provisions any laborer, materialman, or person furnishing board to a contractor, and having a claim against such contractor, may bring suit against him and his bondsmen upon the bond given to secure a proper payment of the debts incurred by him in the prosecution of the work, including labor, materials furnished, etc.,[92] and this right of action cannot be defeated by any action done or omitted to be done by a county board in contracting for any county building or work.[93] It has been held, however, that the obligor upon such a bond is not liable for debts incurred by a subcontractor,[94] that a subcontractor cannot maintain an action on such a bond for a balance due him from the contractor for materials and wages paid to laborers, and that he cannot be subrogated to the rights of laborers and mechanics paid by him.[95]

G. Modification of Contracts — 1. By County Board or Court. There is some diversity of ruling as to the power of a county board or court to make alterations or modifications in a contract for the erection of county buildings, which is in the main accounted for by diversity in the statutory and constitutional provisions. Under a constitutional provision that the legislature cannot authorize a county to allow any extra compensation after a contract has been entered into, and performed in whole or in part, the county has no power to pay a contractor a greater sum than that contracted to be paid him for the work after it has been commenced,[96] and where a statute requires a popular vote of the electors to authorize the erection of a building when the probable cost will exceed a designated amount, and an election is accordingly held authorizing the expenditure of a greater amount, the county board has no power to so modify the contract as to allow the contractor a greater sum than that authorized by the vote.[97] Nevertheless in the absence of some constitutional or statutory prohibition the county board or court may make necessary changes in the matters of detail and increase or diminish the price accordingly;[98] but in no event can they make important general changes in the plan of the building.[99] So they have no power after the acceptance of a bid and the award of the contract to insert in the formal contract tendered to the contractor for his signature stipulations not in the advertisement and proposals, records, etc., relating to the subject of the contract.[1]

2. By Agents, Commissioners, or Engineers. Agents, commissioners, architects, or engineers appointed to superintend the erection of county buildings or bridges have no power to modify the contract in any respect or waive any of its provisions. The exercise of this power, provided it can be exercised at all, is vested solely in the county board or court,[2] and it has been held that the board have no

92. Faurote *v.* State, 110 Ind. 463, 11 N. E. 472; Secrist *v.* Delaware County, 100 Ind. 59; Dewy *v.* State, 91 Ind. 173; Gilmore *v.* Westerman, 13 Wash. 390, 43 Pac. 345.

Right of action assignable.— A materialman's right of action on such a bond is assignable. Gilmore *v.* Westerman, 13 Wash. 390, 43 Pac. 345.

In whose name brought.— The action on such a bond shall be in the name of the party claiming the benefit of the act. Erath *v.* Allen, 55 Mo. App. 107.

93. Dewey *v.* State, 91 Ind. 173.

94. State *v.* Hinsdale-Doyle Granite Co., 117 Ind. 476, 20 N. E. 437; Faurote *v.* State, 110 Ind. 463, 11 N. E. 472, 111 Ind. 73, 11 N. E. 476, 790, 119 Ind. 600, 21 N. E. 663.

95. Erath *v.* Allen, 55 Mo. App. 107.

96. Shelby County *v.* Gibson, 18 Tex. Civ. App. 121, 44 S. W. 302.

97. King *v.* Mahaska County, 75 Iowa 329, 39 N. W. 636. See also Burlington, etc., R. Co. *v.* Benton County, 56 Iowa 89, 8 N. W. 797; Reichard *v.* Warren County, 31 Iowa 381; Keith County *v.* Ogalalla Power, etc., Co., (Nebr. 1902) 89 N. W. 375.

98. Gibson County *v.* Cincinnati Steam-Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; Kitchel *v.* Union County, 123 Ind. 540, 24 N. E. 366. See also Benton County *v.* Patrick, 54 Miss. 240.

99. Gibson County *v.* Cincinnati Steam-Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502.

1. Highland County Com'rs *v.* Rhoades, 26 Ohio St. 411.

2. Bouton *v.* McDonough County, 84 Ill. 384; Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665; Benton County *v.* Patrick, 54 Miss. 240; Hague *v.* Philadelphia, 48 Pa. St. 527; Sullivan County *v.* Ruth, 106 Tenn. 85, 59 S. W. 138. It has accordingly been held that building commissioners and their engineers have no power to waive any of the requirements of the contract (Sullivan County *v.* Ruth, 106 Tenn. 85, 59 S. W. 138);

authority to delegate this power,[3] although in one jurisdiction at least this is denied.[4]

H. Extension of Time For Performance After Forfeiture. Where a contract with a county has been forfeited because not completed within the time stipulated therein, the county board of supervisors cannot extend the time for performance and thus revive and validate a dead contract.[5]

I. Release. The fact that a county court was authorized by the vote of the people of such county to make a contract does not by implication give the court authority to release such contract.[6]

J. Cancellation and Rescission. Where a county has by its properly constituted authorities entered into a valid contract, it cannot without good ground and without the consent of the other contractual party rescind such contract,[7] nor is it a valid ground to rescind such a contract that the people of the county by a subsequent vote decided that it was extravagant.[8] So it is not a ground to rescind a contract that a stipulation required by statute was omitted therefrom, where such omission renders the contract more favorable to the county, and the statute does not make it a consequence of such omission that the contract shall be void.[9] Where a contract for the sale of property to a county fails because of the latter's inability to pay all of the consideration, the other party is entitled to rescind it and to a reconveyance, on placing the county *in statu quo* as far as possible, by restoring what consideration has been received.[10]

K. Performance and Breach — 1. In General. As is the case with contracts generally, to authorize a recovery under a contract with a county performance in accordance with its terms must be shown,[11] or that failure to so perform was caused through the fault of the other party or parties to such contract.[12] Where a party has performed his contract with a county he is entitled to the specific performance of the contract as to payment by the county for such services in the absence of fraud or misrepresentation;[13] but fraud or misrepresentation is a good defense to an action against a county for a breach of contract.[14]

and although the county board accepts the building contracted for, when completed, on the report of the commissioners stating that he has authorized the extra work for which claim is made and recommending payment therefor, the county is not liable for such extra work, if it at the same time refused to receive the part of the commissioners' report relating to such extra work (Benton County *v.* Patrick, 54 Miss. 240).

3. Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665. See also Benton County *v.* Patrick, 54 Miss. 240.

4. Mueller *v.* Eau Claire County, 108 Wis. 304, 84 N. W. 430.

5. La Societe Francaise D'Epargne, etc. *v.* Fishel, (Cal. 1886) 10 Pac. 395; Fanning *v.* Schammel, 68 Cal. 428, 9 Pac. 427; Beveridge *v.* Livingstone, 54 Cal. 54.

6. People *v.* Louisville, etc., R. Co., (Ill. 1886) 5 N. E. 379.

7. Tippecanoe County *v.* Everett, 51 Ind. 543.

8. Cook *v.* Hamilton County Com'rs, 6 Fed. Cas. No. 3,158, 6 McLean 612.

9. Babcock *v.* Goodrich, 47 Cal. 488.

10. Chapman *v.* Douglas County, 107 U. S. 348, 2 S. Ct. 62, 27 L. ed. 378.

11. Dameron *v.* Irwin, 30 N. C. 421; Lillard *v.* Freestone County, 23 Tex. Civ. App. 363, 57 S. W. 338; Chenowith *v.* Ritchie County Ct., 32 W. Va. 628, 9 S. E. 910; Kinsley *v.* Monongalia County Ct., 31 W. Va. 464, 7 S. E. 445.

Duty of proper performance not altered by appointment of superintendent.—Although a contract for building a court-house in a workmanlike manner recites that the county commissioners will superintend the work, such superintendence is not a condition precedent to the progress of the work, nor does the appointment of a superintending agent relieve the contractors from the necessity of performing their contract in the proper manner. Greene *v.* State, 8 Ohio 310.

12. Foy *v.* Ripley County, 37 Ind. 347.

Recovery for deficient work done by order of county superintendent.— In Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16, it was held that where a contract to build a bridge for a county provided that the excavations should be made to such depth as the engineer might determine, the plaintiff might recover for a foundation put in over his protest, but by the requirement of the superintendent and with the concurrence of the commissioners, although the same was so deficient as to settle and cause the abutment of the bridge to fall when completed.

13. Allen *v.* Cerro Gordo County, 40 Iowa 349; Spring City Bank *v.* Rhea County, (Tenn. Ch. App. 1900) 59 S. W. 442.

14. Jennings County *v.* Verbarg, 63 Ind. 107.

In accordance with the general rule that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract, a contractor for county work is not liable to a third person for any defects resulting simply from a breach of his contract with the county and not due to any neglect or fault on his part.[15]

2. Conclusiveness of Acceptance by County. Where work done, material furnished, etc., under a contract with a county, have been accepted by the duly authorized agents of such county, such acceptance is conclusive on the county,[16] at least in the absence of evidence of imposition, fraud, or mistake.[17]

L. Actions Against County — 1. For Services Rendered — a. Declaration, Petition, or Complaint. In actions to recover for services rendered it must be alleged that they were rendered for and procured by the county.[18] Performance by the plaintiff and breach by the defendant should also be alleged,[19] and that the county received benefit from such performance.[20] There is a conflict of authority as to whether the complaint must allege that the contract was made at a regular meeting of the board.[21] If a statute requires the contract to be entered on the minutes of the proper authorities in charge of the financial affairs of the county, the petition must allege that the contract was duly entered on the minutes.[22] So it has been held that where it is provided by statute that certain contracts shall not be made in the absence of a previous appropriation to cover the expense thereof, a petition setting up such a contract should allege that at the time the contract was made there was money on hand available for the purpose.[23]

b. Plea or Answer. Where the complaint in an action against a county

15. Marvin Safe Co. *v.* Ward, 46 N. J. L. 19.

16. Guilder *v.* Dayton, 22 Minn. 366; Despard *v.* Pleasants County, 23 W. Va. 318. See also McCoy *v.* Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Hamilton County *v.* Noyes, 35 Ohio St. 201.

Acceptance by superintendent.— When county commissioners have an authorized superintendent upon the ground watching the progress of the work, and when it is done pursuant to his directions, with his approval and in substantial compliance with the plans and specifications, the commissioners not only waive their right to pass upon the workmanship and materials, but also their right to condemn either, unless there is collusion between the contractor and superintendent. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

17. Despard *v.* Pleasants County, 23 W. Va. 318.

18. Miner *v.* Solano County, 26 Cal. 115; Hoffman *v.* Lake County, 96 Ind. 84.

Allegations that county duly contracted implies compliance with law.— In an action to recover from a county the agreed price for the publication and printing in a newspaper the "delinquent tax-list" of the county, it is not necessary to specifically allege in the complaint that the newspaper in which the publication was made was of the quality and size required by Minn. Gen. Stat. (1878), c. 11, § 110. A general allegation that the county "duly contracted" with the plaintiff for the publication of the list in this newspaper, and that plaintiff duly and regularly printed and published said list according to law, is sufficient. Folsom *v.* Chisago County, 28 Minn. 324, 9 N. W. 881.

19. In Jennings County *v.* Verbarg, 63 Ind. 107, a complaint against a board of commissioners alleged that, pursuant to a proposition by the board for bids on certain work to be done for the county, the plaintiff had made a bid, which was accepted by the board, conditioned upon his giving bond, which he had done, and averred performance by him and a breach by the board. It was held on demurrer that the facts alleged constitute a contract and that the complaint is sufficient.

20. Miner *v.* Solano County, 26 Cal. 115.

21. That this is necessary see Archer *v.* Allen County, 3 Blackf. (Ind.) 501. For the contrary view see De Kalb County *v.* Auburn Foundry, etc., Works, 14 Ind. App. 214, 42 N. E. 689.

If the contract is entered into by an agent in behalf of the county it will be sufficient to allege that the county made the contract by and through its duly authorized agent. McPherson *v.* San Joaquin County, (Cal. 1899) 56 Pac. 802.

Presumption as to authority of chairman of board to contract.— Where a petition in an action by an attorney against a county for services alleges that the chairman of the county board, acting for the latter, employed plaintiff to defend an action against the county, it must be presumed on demurrer that the chairman was acting under legal authority of the board. Tatlock *v.* Louisa County, 46 Iowa 138.

22. Milburn *v.* Glynn County, 109 Ga. 473, 34 S. E. 848.

23. Tullock *v.* Webster County, 46 Nebr. 211, 64 N. W. 705. But *compare* Johnson *v.* Yuba County, 103 Cal. 538, 37 Pac. 528.

alleges that work was done under a contract with the county board, and the defendant's answer, while admitting a contract with the plaintiff and another person, avers this to be the only contract made by them, such complaint must be understood to aver a contract in accordance with the statute, and the answer is sufficient to put plaintiff upon proof of his alleged contract.[24] In an action on a contract made between plaintiff and a county judge, an answer which denies that the county made the contract raises the issue as to the power of the judge to make the contract in question.[25]

c. Evidence. In an action against a county for services the declarations of a director of the board of freeholders as to the amount of the appropriations ordered by the board are not admissible as proof thereof.[26] The claimant must introduce sufficient evidence to show *prima facie* the rendition of the services for which he seeks to recover,[27] and that such services were authorized.[28]

2. By Employee For Dismissal. If a county violate a contract of employment the employee has an adequate remedy at law, and equity will not enforce it and restrain his dismissal by injunction.[29]

3. By Contractor. Where contractors furnishing services to a county assign claims against the fund due them, before its maturity, more than sufficient to absorb it, the county cannot be made to pay until all the rights are adjudicated, and it is not liable for costs.[30] In a suit on warrants issued in compliance with the provisions of a contract for the full contract price, the contractor is entitled to recover the full price, although the work was worth less than such price, in the absence of a showing of fraud in procuring the contract or of a non-compliance with its terms.[31] Where a county sued upon a contract admits the fact of an agreement, but asserts that the same is void for violation of the law or failure to comply with a statutory provision, this is new matter which must be pleaded.[32] With respect to the bond it need not be alleged specifically that the same was approved by the board.[33]

4. By Subcontractor. Under a statute giving a subcontractor a right of action for labor or materials done or furnished against the principal contractor and the county for which they were furnished, jointly for the recovery thereof, the commencement of such action gives to the plaintiff priority over other subcontractors and creditors of principal contractors who may commence their actions later.[34]

24. Murphy *v.* Napa County, 20 Cal. 497.

25. Holtzclaw *v.* Hamilton County, 101 Tenn. 338, 47 S. W. 421.

26. Downie *v.* Passaic County, 54 N. J. L. 223, 23 Atl. 954.

27. The certificate of a coroner that services were rendered is, in an action against a county for the costs of an inquest, *prima facie* evidence that the services were rendered. Carmack *v.* Dade County, 127 Mo. 527, 30 S. W. 162.

28. A recital in a claim filed against a county of the date when the services were rendered on account of which the claim is made is merely evidence of such date to go to the jury, and a court is not justified in basing its charge on the assumption that such recital is conclusive. Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

Insufficient evidence to show that services were authorized.— In an action against a county by a road overseer to recover for services and money expended in the repair of county roads, testimony of the road commissioner that he had spoken to plaintiff in regard to working on the public roads and had always directed him not to run in debt in excess of the funds appropriated for such work, and that he did not know anything about plaintiff's doing the work on which his claim was based until the bills therefor came in, is insufficient to show that the work in question was authorized by the commissioner, so as to authorize plaintiff to recover therefor. Ludy *v.* Colusa County, (Cal. 1896) 45 Pac. 166.

29. Thomas *v.* Cook County, 56 Ill. 351.

30. Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

31. Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674.

32. San Juan County *v.* Tulley, (Colo. App. 1902) 67 Pac. 346. See also Johnson *v.* Yuba County, 103 Cal. 538, 37 Pac. 528.

33. Folson *v.* Chisago County, 28 Minn. 324, 9 N. W. 881, holding that an allegation that plaintiff "duly executed and delivered to defendant a bond as required by defendant, and in accordance with the laws of the state" was sufficient.

34. James *v.* Davidson, 81 Wis. 321, 51 N. W. 565.

Findings.— Subcontractors suing the principal contractor and the county for work

M. Actions by County. When the legally constituted business agent of a county contracts for work in respect to which he has no power to make contracts and executes a warrant for the amount thereof upon the treasurer of the county, which is voluntarily paid by the latter officer, the county cannot recover back the amount so voluntarily paid.[35] Although a contract has been improperly let and the contractor has been paid in advance, where it appears that the work is done by the contractor in substantial compliance with his contract, and that he tendered the proper bonds, he is not liable in an action by the county brought at the instance of the successor of the officer with whom he had contracted for the money received from the latter, although in the opinion of witnesses the prices paid to him were too large.[36] That a contract into which the plaintiff, a county, entered with defendant was *ultra vires* is no defense to an action by the county to recover the consideration paid therefor as the result of defendant's failure to carry out his work, although it may be a defense to the sureties on the contractor's bond.[37] When a penal bond for the payment of money, importing an executed consideration, has been taken by a county board, the obligor having authority to make the same, the right of the board to recover in an action on such bond cannot be denied on the ground of want of authority to take the same, where the money for the payment of which the bond was given is due the board as a corporation, in the exercise of its legitimate powers.[38] One who has borrowed from a county fund, giving a note and mortgage as security, cannot avoid liability on those instruments on the ground that the county had no authority to loan the money.[39]

VII. COUNTY EXPENSES, CHARGES, AND STATUTORY LIABILITIES.

A. Expenses and Charges — 1. In General. One who asks payment of a claim against a county must show some statute authorizing it or that it arises from some contract express or implied which finds authority of law.[40] No claims are chargeable on a county treasury or can be paid therefrom except such as the law imposes on the county or empowers it to contract for, either expressly or as a necessary incident, and no officer of the county can charge it with the payment of other claims, however meritorious the consideration, or whatever may be the benefit the county may derive from them,[41] and where a statute prescribes that certain things shall be done at the expense of the county by certain officials of

performed and material furnished for the erection of a county building cannot maintain that a finding of the trial court fixing the balance of the reserve fund from which they are to be paid is erroneous, as not including money paid to the principal contractor by the county from such reserve fund before the commencement of their actions, where they do not claim such payment to have been fraudulently made. James *v.* Davidson, 81 Wis. 321, 51 N. W. 565.

Necessity for actual indebtedness from county to principal contractor.— An action under this provision cannot be maintained until there is something actually due from the county to the principal contractor. James *v.* Davidson, 81 Wis. 321, 51 N. W. 565.

35. Long *v.* Boone County, 36 Iowa 60.

36. Paulding County *v.* Scoggins, 97 Ga. 253, 23 S. E. 845.

37. Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. 585.

38. Baker *v.* Washington County, 53 Ind. 497.

39. Albright *v.* Allday, (Tex. Civ. App. 1896) 37 S. W. 646.

40. Irwin *v.* Yuba County, 119 Cal. 686, 52 Pac. 35.

Implied liability.— Where a statute provides that a county, through its proper officers, shall have certain services performed and material furnished, the person furnishing such services and materials at the request of the proper officers is entitled to compensation from the county, although the statute does not expressly provide that the county shall be liable therefor. San Juan County *v.* Tulley, (Colo. App. 1902) 67 Pac. 346.

41. *Alabama.*— Jack *v.* Moore, 66 Ala. 184; Van Eppes *v.* Mobile Com'rs Ct., 25 Ala. 460. And see Mobile County *v.* Kimball, 54 Ala. 56.

Arkansas.— Desha County *v.* Newman, 33 Ark. 788.

California.— Irwin *v.* Yuba County, 119 Cal. 686, 52 Pac. 35.

Georgia.— Talbot County *v.* Mansfield, 115 Ga. 766, 42 S. E. 72; Howard *v.* Early County, 104 Ga. 669, 30 S. E. 880; Collier *v.* Elliott, 100 Ga. 363, 28 S. E. 117; Houston County *v.* Kersh, 82 Ga. 252, 10 S. E. 199; Kennedy *v.* Seamans, 60 Ga. 612; Maxwell *v.* Cumming, 58 Ga. 384.

the county, or by persons designated by them, only such officials or persons designated can put the county to expense for such items.[42] Wherever the state constitution imposes a duty upon a county,[43] such county must pay the compensation of all officers employed in the discharge of the duty imposed as well as all expenses incident thereto.[44] Where certain expenses are declared by statute to be county charges, a county board cannot by resolution or ordinance provide that such expenses shall not be paid unless incurred in a particular manner, or make anything a prerequisite to their performing the duty of auditing such accounts.[45]

2. County Office Expenses. In some jurisdictions it is the duty of the county board to provide offices at the expense of the county for certain of the county officers,[46] but this duty extends only to those officers specified by statute.[47] So also in some jurisdictions it is the duty of county boards to supply the furniture for the offices of county officers,[48] the fuel necessary for the heating of such offices[49] and lights therefor,[50] as well as janitor's service.[51] And the county is sometimes made liable for clerk hire.[52] Allowance for stationery, blanks, and record books for county offices is illegal in the absence of statute authorizing such

Illinois.— Peoria County *v.* Roche, 65 Ill. 77; Piatt County *v.* J. D. Knott, 99 Ill. App. 420.

Iowa.— Mousseau *v.* Sioux City, 113 Iowa 246, 84 N. W. 1027; Turner *v.* Woodbury County, 57 Iowa 440, 10 N. W. 827; Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207.

Minnesota.— Rasmusson *v.* Clay County, 41 Minn. 283, 43 N. W. 3.

Missouri.— Person *v.* Ozark County, 82 Mo. 491; Bright *v.* Pike County, 69 Mo. 519.

Montana.— Sears *v.* Gallatin County, 20 Mont. 462, 52 Pac. 204, 40 L. R. A. 405.

New York.— People *v.* Greene County, 39 Hun 299; People *v.* Hill, 36 Hun 619; People *v.* Albany County, 28 How. Pr. 22.

Oklahoma.— Greer County *v.* Watson, 7 Okla. 174, 54 Pac. 441.

Pennsylvania.— Cumberland County *v.* Directors of Poor, 7 Pa. Super. Ct. 614; Thomas *v.* County Com'rs, 6 Phila. 411, 24 Leg. Int. 100; Hinkle *v.* York County, 12 Lanc. Bar 175. *Contra*, McCalmont *v.* Allegheny County, 29 Pa. St. 417, where it was held that the usage which had prevailed for a county to defray certain expenses was sufficient to impose a liability therefor without an express statutory enactment.

Wisconsin.— Townsley *v.* Ozaukee County, 60 Wis. 251, 18 N. W. 840; Fernandez *v.* Winnebago County, 53 Wis. 247, 10 N. W. 447.

See 13 Cent. Dig. tit. "Counties," § 199 *et seq.*

Petition must show complete liability.— A petition in an action against a county to enforce a statutory obligation is demurrable, unless it states all the facts necessary to make the alleged liability complete. Clearwater *v.* Garfield, (Nebr. 1902) 91 N. W. 496.

42. Thompson *v.* Jo Daviess County, 98 Ill. App. 293.

43. Where there is no constitutional provision making an expense chargeable to the county, it has been held that it must be for a county purpose, in order to justify the legislature in authorizing a county to resort to taxation to defray the same. Opinion of Justices, 13 Fla. 687; Matter of Greene, 55 N. Y. App. Div. 475, 67 N. Y. Suppl. 291 [*affirmed* in 166 N. Y. 485, 60 N. E. 183].

44. Opinion of Justices, 13 Fla. 687.

45. People *v.* New York County, 21 How. Pr. (N. Y.) 322, 22 How. Pr. (N. Y.) 71.

46. Greene County *v.* Axtell, 96 Ind. 384; Owen *v.* Nye County, 10 Nev. 338.

Mandamus lies to compel a board to furnish a county official with an office. He cannot, however, on their refusal to act, rent an office and bind the county for the rent. Cleary *v.* Eddy County, 2 N. D. 397, 51 N. W. 586. See also Waldo *v.* Manitowoc, 54 Wis. 71, 11 N. W. 252.

47. Greene County *v.* Axtell, 96 Ind. 384.

48. Young *v.* Bradford County, 7 Pa. Co. Ct. 428, holding that the Pennsylvania act of April 25, 1889, in authorizing county commissioners to furnish office furniture, etc., to county officers is not open to the constitutional objection that it increases the emoluments of office.

49. De Kalb County *v.* Beveridge, 16 Ill. 312; Jackson County *v.* Kink, 7 Ind. 721; Townsley *v.* Ozaukee County, 60 Wis. 251, 18 N. W. 840; Jefferson County *v.* Besley, 5 Wis. 134. *Contra*, Thomas *v.* County Com'rs, 6 Phila. (Pa.) 411, 24 Leg. Int. (Pa.) 100.

Under the Pennsylvania acts of March 27, 1790, and April 15, 1834, requiring the county to keep the public buildings in convenient order and repair, the county is not bound to furnish fuel to heat the offices of the county officials (Swope *v.* Adams County, 31 Leg. Int. 325, 2 Walk. 498), except the court-room and the commissioner's office (Kirkendall *v.* Luzerne County, 1 Phila. 575, 33 Leg. Int. 313).

50. De Kalb County *v.* Beveridge, 16 Ill. 312; Jefferson County *v.* Besley, 5 Wis. 134. *Contra*, Thomas *v.* Bucks County Com'rs, 6 Phila. (Pa.) 411, 24 Leg. Int. (Pa.) 100.

51. Dalton *v.* Commissioners, 8 Ohio Dec. (Reprint) 770, 9 Cinc. L. Bul 322.

52. Arapahoe County *v.* Clapp, 9 Colo. App. 161, 48 Pac. 157; Unkrich *v.* Potter County, 19 Pa. Co. Ct. 548.

allowance,[53] but the furnishing of such supplies is by statute made a proper county charge in some jurisdictions.[54]

3. ELECTION EXPENSES. In some jurisdictions a county is liable for necessary election expenses in the case of certain elections within the county,[55] including registration expenses,[56] publication of election notices,[57] publication of nominations to office,[58] election tickets, cards of instruction, and sample ballots,[59] the printing and distribution of ballots,[60] the cost of serving notice upon a candidate in nomination proceedings,[61] the service of certificates of election by constables or school directors, judges and inspectors of election, and assessors,[62] the expenses of judges of election in coming to the commissioners' office to receive the ballots,[63] and the cost of articles necessary for the accommodation of persons conducting elections.[64] In some jurisdictions, where there is probable cause for inaugurating an election contest, the proper costs thereof will be ordered to be paid by the county.[65] A board of supervisors cannot, however, in the absence of statutory authority, lawfully engage a county in or bind it to the payment of the expenses of a litigation by an individual to establish his right to an office, and the audit and payment thereof is unlawful.[66] In the absence of statute providing therefor a county is

53. Desha County *v.* Newman, 33 Ark. 788; People *v.* Green, 2 Thomps. & C. (N. Y.) 23; Towsley *v.* Ozaukee County, 60 Wis. 251, 18 N. W. 840.

Expense of changing index.—Where a statute prescribes specifically the index to be kept by each county auditor in the state it is not within the power of the county commissioners to incur the expense of another and different method, either as a substitute for or as a supplement to the old one. Smith *v.* Lamping, 27 Wash. 624, 68 Pac. 195.

54. *Colorado.*—Arapahoe County *v.* Koons, 1 Colo. 160.

Illinois.— McClaughry *v.* Hancock County, 46 Ill. 356; Knox County *v.* Arms, 22 Ill. 175.

Indiana.— Greene County *v.* Axtell, 96 Ind. 384.

New York.— People *v.* Stout, 23 Barb. 349, 4 Abb. Pr. 22; People *v.* Earle, 47 How. Pr. 368.

Oklahoma.— Garfield County *v.* Isenberg, 10 Okla. 378, 61 Pac. 1067.

Pennsylvania.—Henrie *v.* Columbia County, 16 Pa. Super. Ct. 339 [*affirming* 24 Pa. Co. Ct. 171].

See 13 Cent. Dig. tit. "Counties," § 200 *et seq.*

Allowance of bill on clerk's certificate.— Under Ohio Rev. Stat. § 1264, providing that "the county commissioners shall furnish to the clerk all blank books, . . . blanks, stationery, and all things necessary to the prompt discharge of his duty, all which articles the clerk may procure, and shall be allowed for upon his certificate," all the clerk has power to do is to select or procure such books and supplies as he may need, when, in the discretion of the commissioners as to the amount paid and whether the supplies are necessary, the bill may be allowed upon the clerk's certificate. There is no binding obligation on the county until the bill has been allowed by the county commissioners. Lyle Printing Co. *v.* Highland County Com'rs, 10 Ohio S. & C. Pl. Dec. 89.

Blank forms peculiar to one office are not included under a statute providing that suitable books and stationery shall be furnished each county officer at the expense of the county. Arapahoe County *v.* Koons, 1 Colo. 160.

55. Marion County *v.* Center Tp., 107 Ind. 584, 8 N. E. 625; Fayette County *v.* Lexington, 63 S. W. 477, 23 Ky. L. Rep. 389.

56. Fayette County *v.* Lexington, 63 S. W. 477, 23 Ky. L. Rep. 389.

57. Kearney County *v.* Stein, 26 Nehr. 132, 41 N. W. 1071; Graham *v.* Schuylkill County, 16 Pa. Super. Ct. 180; Fernandez *v.* Winnebago County, 53 Wis. 247, 10 N. W. 447.

Liable only in case of general elections.— In Wilkes-Barre Record *v.* Luzerne County, 9 Kulp (Pa.) 26, it was held that since February municipal and local elections are not general elections, for which the sheriff is required to make proclamation, the county is not liable for advertising any proclamation therefor.

58. Johnson *v.* Yuba County, 103 Cal. 538, 37 Pac. 528; Washington County *v.* Nesbit, 7 Kan. App. 298, 53 Pac. 882.

59. Washington County *v.* Menaugh, 13 Ind. App. 311, 41 N. E. 605.

60. Packer *v.* Northampton County, 2 Pa. Dist. 514.

61. *In re* Howell's Nomination, 6 Pa. Dist. 690, 19 Pa. Co. Ct. 598.

62. Lehigh County *v.* Yingling, 6 Pa. Co. Ct. 594.

63. Mellott *v.* Fulton County, 7 Pa. Dist. 81.

64. Com. *v.* Philadelphia County, 2 Serg. & R. (Pa.) 193.

65. *In re* O'Neil, 98 Pa. St. 461; *In re* Stevens, 94 Pa. St. 281; Gressang *v.* Beard, 6 Pa. Co. Ct. 1; *In re* Kinnear's Contested Election, 2 Pa. Co. Ct. 666; McPherson's Case, 2 Leg. Rec. (Pa.) 135.

66. Richmond County *v.* Ellis, 59 N. Y. 620.

not liable even for the necessary expenses incurred in providing a place in which to hold an election, nor any other expenses incident to the election;[67] nor are the expenses of witnesses summoned before a board of registration held in a county by virtue of statute payable by the county unless such payment is authorized by the statute.[68]

4. Expenses of Administering Justice. In some jurisdictions the county commissioners are required by law to furnish everything necessary to be used and employed in the administration of justice,[69] and while in a few jurisdictions it is held that even in the absence of provisions for the necessary expenses of the judiciary in its official duties the county in which it is held is ordinarily liable,[70] yet in most of the states such expenses come under the general rule before stated that authority for paying out the public money should be found in some law, and the payment thereof is a county charge only by virtue of a constitutional or statutory provision for their payment.[71] Thus it is held that in the absence of statute a county is not liable for the payment of the costs of publishing the general presentments of the grand jury,[72] charges for publishing notices of terms of court,[73] the fees of officers for apprehending criminals,[74] or the expenses incurred in extradition proceedings;[75] expenses incurred in investigating a felony certified from another county,[76] the expenses of an unsuccessful attempt to arrest a fugitive from justice who has taken refuge in another state,[77] or the expenses of sureties in bringing back a defaulting county officer.[78] The salaries of deputy sheriffs appointed by a sheriff under authority from a county have been held a proper charge against a county.[79]

5. Court-Room Furniture and Records. While in a number of jurisdictions it is the duty of the county to provide the necessary buildings or rooms for the administration of justice,[80] yet this duty is limited to such cases as are clearly

67. Turner *v.* Woodbury County, 57 Iowa 440, 10 N. W. 827. In McBride *v.* Hardin County, 58 Iowa 219, 12 N. W. 247, it was held that a county being in no way interested in the voting of taxes in its various townships in aid of railroads, it cannot be required to pay any part of the expenses thereby incurred.

Special police serving at election.— Iowa Code, § 1129, declaring that the expenses of providing election booths, guard-rails, and other things required for elections shall be paid in the same manner as other election expenses, does not make the county liable for the services of special policemen appointed to serve at a general election. Mousseau *v.* Sioux City, 113 Iowa 246, 84 N. W. 1027.

68. Finney *v.* Sullivan County, 48 Mo. 350.

69. Trumbull County *v.* Hutchins, 11 Ohio 369.

70. Venango *v.* Durban, 3 Grant (Pa.) 66. See also McCalmont *v.* Allegheny County, 29 Pa. St. 417.

71. Houston County *v.* Kersh, 82 Ga. 252, 10 S. E. 199.

72. Houston County *v.* Kersh, 82 Ga. 252, 10 S. E. 199.

73. People *v.* Greene County, 39 Hun (N. Y.) 299. See also People *v.* Hill, 36 Hun (N. Y.) 619.

The expense of printing general term calendar as required by rule 34 is a county charge. People *v.* Monroe County, 15 How. Pr. (N. Y.) 225.

74. People *v.* Saginaw County Sup'rs, 35 Mich. 91.

Compensation in addition to expenses.— Under the Pennsylvania act of March 31, 1860, relating to the payment of expenses incurred in arresting persons who have escaped into another county, a person duly authorized by requisition papers to apprehend a person in another state is entitled, not only to reasonable expenses actually incurred, but also to reasonable compensation for services rendered. Fraser *v.* Allegheny County, 6 Pa. Dist. 380.

For the expenses of the arresting officer in carrying a person to the county where the alleged offense was committed a county is liable under Ga. Pen. Code, § 898. Harris County *v.* Brady, 115 Ga. 767, 42 S. E. 71.

75. Kroutinger *v.* Board of Examiners, (Ida. 1902) 69 Pac. 279; Walling *v.* New York, 49 How. Pr. (N. Y.) 383.

76. Henry County *v.* St. Clair County, 81 Mo. 72.

77. Steckman *v.* Bedford County, 84 Pa. St. 317; Andrus *v.* Warren County, 32 Pa. St. 540; O'Brien *v.* Luzerne County, 9 Kulp (Pa.) 195; Charters *v.* Dauphin County, 5 Pa. Dist. 145, 17 Pa. Co. Ct. 300.

78. Hooper *v.* Ely, 46 Mo. 505.

79. Taylor *v.* Canyon County, 7 Ida. 171, 61 Pac. 521. See also to the same effect Philips *v.* Christian County, 87 Ill. App. 481.

80. Adams *v.* Norfolk County, 166 Mass. 303, 44 N. E. 224; Trumbull County *v.* Hutchins, 11 Ohio 369; Mayhew *v.* Hamilton

within the statute imposing such duty,[81] and when a county board has provided suitable accommodations they cannot be compelled to pay for other accommodations.[82] So also it is the duty of county commissioners to furnish,[83] repair, and keep the same in order.[84] It is also sometimes made the duty of the county board or court to furnish or make allowances for the furnishing of books, records, stationery, postage, etc.,[85] unless such duty is imposed on the city in which the court is situated,[86] but a county is not liable for the expense of indexing records where this is a part of the duties of a clerk of the court.[87]

6. JURY FEES AND EXPENSES. The fees and expenses of jurors are to be paid in the manner fixed by law and are not a charge against a county unless by virtue of some statute making them so.[88] In some jurisdictions, however, the county is liable for jurors' expenses and fees,[89] mileage and attendance,[90] board and lodging,[91] and compensation for a survey of premises where a crime has been committed.[92]

County, 1 Disn. (Ohio) 186, 12 Ohio Dec. (Reprint) 565; Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197; Barnett *v.* Ashmore, 5 Wash. 163, 31 Pac. 466.

81. No application to trial justices.— A court is not bound to furnish to trial justices places in which to hold their courts. Adams *v.* Norfolk County, 166 Mass. 303, 44 N. E. 224.

A room for transacting business of the law commissioners' court of St. Louis county need not be furnished by the county under the act of 1851 concerning such court. Watson *v.* St. Louis County, 16 Mo. 91.

82. People *v.* Montgomery County, 34 Hun (N. Y.) 599.

83. Mayhew *v.* Hamilton County, 1 Disn. (Ohio) 186, 12 Ohio Dec. (Reprint) 565; Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197; Barnett *v.* Ashmore, 5 Wash. 163, 31 Pac. 466.

Power of judge to order.— Under Mo. Rev. Stat. (1879), § 1184, providing for the payment by the county of necessary expenses incurred by the probate court, the probate judge is authorized to order a necessary desk without first getting an order from the county court. Gammon *v.* Lafayette County, 79 Mo. 223.

84. People *v.* Stout, 23 Barb. (N. Y.) 349, 4 Abb. Pr. (N. Y.) 22, 13 How. Pr. (N. Y.) 314; Com. *v.* Philadelphia County Com'rs, 3 Serg. & R. (Pa.) 551; Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197.

85. Desha County *v.* Newman, 33 Ark. 788; Sayler *v.* Nodaway County, 159 Mo. 520, 60 S. W. 1057.

Recopy of records.— Where a statute provides that the board shall determine whether a recopy of books in the probate judge's office is necessary, the determination of the board is conclusive. Washington County *v.* Porter, 128 Ala. 278, 29 So. 185.

86. Bourne *v.* Marion County Ct., 15 Mo. 600.

87. Peoria County *v.* Roche, 65 Ill. 77; Rasmusson *v.* Clay County, 41 Minn. 283, 43 N. W. 3.

88. Payable by successful party in civil cases in California. Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784.

Board and lodging.— A county is not liable in the absence of statute for the food and lodging furnished a jury. Justices Richmond County Inferior Ct. *v.* State, 24 Ga. 82. Prior to the Missouri act of 1883 the expense of boarding and lodging juries kept together by order of the court in cases of felony was not a proper item of costs and could not be taxed against the county as such by the court. Person *v.* Ozark County, 82 Mo. 491; Bright *v.* Pike County, 69 Mo. 519.

Fees for striking jury.— Under Ind. Rev. Stat. (1881), § 527, providing that the party requiring a struck jury shall pay the fees for striking the same, and the *per diem* of the jurors, such jurors are not entitled to any compensation from the county. Randolph County *v.* Henry County, 27 Ind. App. 378, 61 N. E. 612.

Jurors' fees in city courts.— In Illinois the fees of grand and petit jurors for services in city courts are not made a charge upon the county treasury, but are required to be paid out of the treasuries of cities in which such courts are held. People *v.* Stookey, 98 Ill. 537.

89. People *v.* Treasurer, 40 Mich. 62; Corell *v.* Kent County, 36 Mich. 332; State *v.* Akins, 18 Ohio Cir. Ct. 19; Huddleston *v.* Noble County, 8 Okla. 614, 58 Pac. 749.

90. Salt Lake County *v.* Richards, 14 Utah 142, 46 Pac. 659.

When a jury is summoned by the county commissioners to determine the damages sustained by landowners from flowage caused by a dam erected across a river by a city for its waterworks, the county and not the city should bear the expenses of the jury and attending officer. Penobscot County *v.* Bangor, 70 Me. 497.

91. Lycoming County Com'rs *v.* Hall, 7 Watts (Pa.) 290.

92. Washoe County *v.* Humboldt County, 14 Nev. 123.

Effect of custom to allow carriage hire of grand jurors.— The hire of carriages procured by a sheriff under the direction of a circuit judge to convey grand jurors to a county jail for the purpose of inspecting the same is no charge against the county, although the commissioners' court may for a number of years have been in the habit of allowing such items. Van Epps *v.* Mobile Com'rs Ct., 25

Under a statute providing that in case of change of venue of a civil action the expenses caused thereby to the county to which the change is made shall be paid by the county from which it is made, the expense of the regular panel of jurors while in attendance during the trial should be so paid, although the case is tried by a struck jury.[93]

7. Prison and Jail Charges — a. Necessity For Statute Imposing Liability. A county is not liable, in the absence of statute, for expenses connected with jails,[94] not even for medical services rendered to prisoners therein.[95]

b. Custody, Maintenance, Clothing, and Medical Attendance of Prisoners — (i) *In General.* The custody, maintenance, board, and lodging of prisoners is, however, usually made a county charge,[96] as are the expenses of medical attendance furnished prisoners,[97] and the expense of clothing the prisoners.[98]

(ii) *Where Committed to Jail of Another County.* Where a prisoner is properly committed to the jail of some other county, the county from which he is taken is usually liable for his necessary expenses including board and lodging.[99]

Ala. 460, on the ground that the fixed *per diem* compensation of grand jurors is considered as extending to all services required of them.

93. Randolph County *v.* Henry County, 27 Ind. App. 378, 61 N. E. 612.

94. Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197.

95. Mitchell *v.* Tallapoosa County, 30 Ala. 130; Roberts *v.* Pottawatomie County Com'rs, 10 Kan. 29; Gray *v.* Coahoma County, 72 Miss. 303, 16 So. 903.

In Kansas by statute the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding, and medical attendance furnished to prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board. Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450.

96. *California.*— Sonoma County *v.* Santa Rosa, 102 Cal. 426, 36 Pac. 810; Fulkerth *v.* Stanislaus County, 67 Cal. 334, 7 Pac. 754.

Illinois.— Scott County *v.* Drake, 71 Ill. App. 280.

Michigan.— Detroit *v.* Wayne County, 43 Mich. 169, 5 N. W. 77.

New York.— People *v.* Columbia County, 67 N. Y. 330.

Oregon.— Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110.

Pennsylvania.— Boland *v.* Luzerne County, 186 Pa. St. 68, 40 Atl. 156.

Texas.—Galveston County *v.* Ducie, 91 Tex. 665, 45 S. W. 798.

Utah.— Taylor *v.* Salt Lake County Ct., 2 Utah 405.

Wyoming.— Albany County *v.* Boswell, 1 Wyo. 292.

See 13 Cent. Dig. tit. "Counties," § 205.

Liability for board and care at private house.— Where a person was wounded while resisting arrest by a city marshal, and was taken into custody by the sheriff, and an information was filed against him for resisting the arrest, the county was liable for the care and board of such prisoner at a private house, where he was directed by the sheriff to be kept on account of the dangerous character of his wounds, although the marshal was attempting the arrest for a violation of a city ordinance. Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31.

97. *Alabama.*—Malone *v.* Escambia County, 116 Ala. 214, 22 So. 503; Mitchell *v.* Tallapoosa County, 30 Ala. 130.

Arkansas.— Hart *v.* Howard County, 44 Ark. 560.

Indiana.— Lamar *v.* Pike County, 4 Ind. App. 191, 30 N. E. 912.

Iowa.— Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31.

Mississippi.— Gray *v.* Coahoma County, 72 Miss. 303, 16 So. 903.

New Hampshire.— Perkins *v.* Grafton County, 67 N. H. 282, 29 Atl. 541.

Oregon.— Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110.

See 13 Cent. Dig. tit. "Counties," § 205.

98. Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31; Feldenheimer *v.* Woodbury County, 56 Iowa 379, 9 N. W. 315; Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110.

99. *Colorado.*— Montezuma County *v.* San Miguel County, 3 Colo. App. 137, 32 Pac. 346.

Georgia.— Talbot County *v.* Mansfield, 115 Ga. 766, 42 S. E. 72.

Kansas.— Finney County *v.* Gray County, 8 Kan. App. 745, 54 Pac. 1100.

Michigan.— Detroit *v.* Wayne County, 43 Mich. 169, 5 N. W. 77.

Texas.— Gates *v.* Johnson County, 36 Tex. 144; White *v.* Mason County, 7 Tex. Civ. App. 441, 26 S. W. 1007.

Wisconsin.— Portage County *v.* Waupaca County, 15 Wis. 361.

See 13 Cent. Dig. tit. "Counties," § 205.

Limitations of rule.—A parish has no right to charge for the mere use of its jail to incarcerate prisoners sent from an adjacent parish under an order of the district judge, issued under statutory authority, when it has, through its authorized agent, given consent to the use, and it has acquiesced by that consent in the execution of the order. Caddo

The expenses of medical attendance have also been held to be a proper charge against such county.[1]

c. Wages or Compensation of Officials Charged With Custody of Prisoner. Where provision is made for charges for each prisoner committed or discharged from jail these may be paid the sheriff from the county treasury.[2] In the absence of statute a county is not liable for the wages of a jailer appointed by the sheriff, but he must look to the sheriff for compensation for his services.[3] If an extra guard is needed to keep a prisoner safely, it is the duty of the sheriff to furnish such, and of the county to pay the necessary expense,[4] and one county is not liable for the guard of a prisoner committed to jail therein for an offense committed in another county.[5] Where the expense of guarding a prisoner is necessary and consequent upon the change of venue, it must be paid by the county from which the case is removed.[6] The cost of a special guard for prisoners coming from different counties should be shared between the counties; hence the sheriff, in an action against one of them, can recover only its proportionate share.[7] In some jurisdictions it is provided by statute that the sheriff, marshal, or other officer who shall have in custody or under his charge any person "undergoing examination preparatory to commitment" shall, for transporting, safe-keeping, and maintaining such person, receive a certain amount for every day he may have such person under his charge,[8] and in some the fees of constables for conveying prisoners to the penitentiary and juvenile delinquents to the house of refuge are county charges.[9]

d. Other Charges. The furnishing of fuel, light, etc.,[10] and necessary supplies for use in the jail are often made county charges;[11] and where by statute it is made the duty of county commissioners to take all necessary precautions against sickness and infection in the common jails of the county, this implies that the necessary expense of such precautions shall be paid, in the first instance at least, by the county.[12] It has been held that an item for meals furnished the board of prison inspectors while at the prison, in discharge of their official labors, should be allowed the prison treasurer, in settling his accounts; for, although there is no express provision in the law for such expenditure, yet, since the duties of the inspectors require constant attendance in the prison, they have authority to pro-

Parish *v.* Bossier Parish, 42 La. Ann. 939, 8 So. 533.

For pleadings in action to recover board, etc., by one county against another see Montezuma County *v.* San Miguel County, 3 Colo. App. 137, 32 Pac. 346.

1. Hart *v.* Howard County, 44 Ark. 560; Perkins *v.* Grafton County, 67 N. H. 282, 29 Atl. 541.

2. McKee *v.* Tippecanoe County, 6 Ind. App. 700, 33 N. E. 251; Hawthorn *v.* Randolph County, 5 Ind. App. 280, 30 N. E. 16, 31 N. E. 1124; People *v.* Columbia County, 67 N. Y. 330.

3. Union County *v.* Patton, 63 Ill. 458; Seibert *v.* Logan County, 63 Ill. 155; Crossen *v.* Wasco County, 6 Oreg. 215; Hartwell *v.* Waukesha County, 43 Wis. 311.

4. Gage County *v.* Kyd, 38 Nebr. 164, 56 N. W. 964.

5. Perry County *v.* Logan, 4 Mo. 434.

6. Hart *v.* Vigo County, 1 Ind. 309; Baltimore *v.* Howard County Com'rs, 61 Md. 326. Where, however, a prisoner is removed by change of venue to another county not provided with a sufficient jail, the former county is not liable for the expenses of guarding the prisoner in the former, when the cost arose from the failure of the county to provide such jail. Ransom *v.* Gentry County, 48 Mo. 341.

7. James *v.* Lincoln County, 5 Nebr. 38.

8. State *v.* Wofford, 116 Mo. 220, 22 S. W. 486, holding that a county marshal is not entitled to such fee where a prisoner is in his custody as jailer, committed under authority of statute pending a continuance of his examination.

9. People *v.* Orange County, 18 Hun (N. Y.) 19.

10. Vigo County *v.* Weeks, 130 Ind. 162, 29 N. E. 776; Marion County *v.* Reissner, 58 Ind. 260; Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31; Richardson *v.* Clarion County, 14 Pa. St. 198.

A state charge.— In Vermont by Act No. 155 it is provided that the expense for warming a jail shall be paid by the state. Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197.

11. Marion County *v.* Reissner, 66 Ind. 568; Schenck *v.* New York, 67 N. Y. 44 [*affirming* 40 N. Y. Super. Ct. 165].

12. Slotts *v.* Rockingham County, 53 N. H. 598.

vide themselves with food out of the prison funds while in discharge of such duties.[13]

8. Maintenance of Children Committed to Houses of Correction, Etc. Whether the expense of the maintenance of children committed to houses of correction, industrial schools, etc., is a county charge depends upon statutory provisions.[14]

B. Statutory Imposition of Liability For Claim For Which No Liability Previously Existed. In accordance with the rule that a state legislature is not restrained in its powers to levy money by taxation to cases in which a legal demand exists against the state or county, but can make appropriations of public moneys for the payment of claims founded in equity or justice, or even in gratitude or charity, a legislature may by special act require a county board to audit and pay a claim for which no legal liability existed on the part of the county previous to the passage of such act,[15] in the absence of any constitutional limitation upon such power.[16]

C. Statutory Imposition of Liability For Injury Caused by Acts of Omission or Commission. So also a legislature may by statute give an action against a county for an injury arising from its act of omission or commission.[17] An action for such penalty imposed upon a county for doing that which the

13. Mogel *v.* Berks County, 154 Pa. St. 14, 26 Atl. 227, where it was also held that the expense of a journey taken by the inspectors to another prison, to become familiar with the use of a machine they were authorized to buy to enable the warden to make a registry of all convicts according to the Bertillon system, should be allowed.

14. A county is not liable for costs incurred in committing children to societies named in the Pennsylvania act of June 8, 1893, as provided thereby. Com. *v.* Watts, 21 Pa. Co. Ct. 556.

Infants committed to house of correction for "incorrigible conduct" are not committed for "offenses against a law of the state," under Ohio Stat. § 2071, and are therefore not subject to support by the county. State *v.* Schlatterbeck, 39 Ohio St. 268.

Maintenance of children committed to industrial schools.— The expense of maintaining children committed under Wis. Rev. Stat. §§ 1546, 1547, to industrial school corporations, is chargeable to the counties from which the commitments are made, unless otherwise specified therein. Wisconsin Industrial School *v.* Clark County, 103 Wis. 651, 79 N. W. 422.

15. People *v.* Erie County, Sheld. (N. Y.) 517 (an act authorizing a county board to audit and pay as a county charge disbursements of counsel assigned to defend one charged with murder); Civic Federation *v.* Salt Lake County, 22 Utah 6, 61 Pac. 222 (an act authorizing counties to refund moneys advanced by citizens to aid counties to enforce the laws).

Liability for damages for sheep killed by dogs.— By the Pennsylvania act of May 15, 1893, provision is made for the compensation by a county for any loss or damage to sheep by dogs, to be recovered by proceedings by the owner in a certain time and manner. Quemy *v.* Huntingdon County, 15 Pa. Co. Ct. 163, holding that a delay of nine months in beginning such proceeding was fatal to recovery. See also as to recovery for such damages under the act of March 28, 1873 (a special act for Wyoming county), the case of Vosburg *v.* County Com'rs, 7 Pa. Co. Ct. 646, in which it was held that county commissioners need not draw their warrant on the treasurer to pay such damages unless the certificate presented has been regularly and fairly obtained.

16. The rule as stated in the text was formerly followed in New York, but at the present time under N. Y. Const. (1874), art. 8, § 10, forbidding a county to give money or property to or in aid of any individual association or corporation, or to incur any indebtedness except for county purposes, it is held that a legal or at least an equitable claim must exist. Matter of Greene, 55 N. Y. App. Div. 475, 67 N. Y. Suppl. 291 [*affirmed* in 166 N. Y. 485, 60 N. E. 183].

A statute authorizing a defrayal by counties and states of expense of legal proceedings incurred by any one of their officials who shall successfully defend any action, to convict him of any crime in the performance of or in connection with his official duties, is not within the limitations imposed by N. Y. Const. art. 8, § 10, upon the power of the legislature to require the expenditure by counties, etc., of their money, and is of no effect. Matter of Straus, 44 N. Y. App. Div. 425, 61 N. Y. Suppl. 37. *Compare In re* Labrake, 29 Misc. (N. Y.) 87, 60 N. Y. Suppl. 571.

A statute providing for the payment of medical treatment of persons injured in mines out of certain contingencies by counties is in violation of a constitutional provision prohibiting the legislature from passing any act granting any corporation, association, or individual any special or exclusive privilege or immunity. La Ross *v.* Allegheny County, 8 Pa. Dist. 301.

17. Hoexter *v.* Judson, 21 Wash. 646, 59 Pac. 498; Eastman *v.* Clackamas County, 32 Fed. 24, 12 Sawy. 613. See also Cope *v.*

statute prohibits, or for omitting to do that which the statute requires, must of course be brought while the statute is in force, because the repeal of the statute takes away the right of action.[18]

VIII. LIABILITY FOR TORTS.

A. Necessity of Statutes Imposing Liability. Counties considered as quasi-corporations or incorporations established for specific and defined purposes are held to be liable only for wrongs committed in the use or misuse of their corporate powers,[19] and are not subject to liability for any tort, in the absence of statutes which either expressly or by implication impose such liability on them.[20] Some decisions, however, clearly recognize a limitation of this rule. They hold that it has no application to cases in which the property of another has been either wilfully or negligently appropriated by agents of the county to its use and benefit, and have held in applying this doctrine that counties are liable for a wrongful appropriation of another's patent.[21]

B. Arising From Condition of Public Buildings. In accordance with this rule counties are held not to be liable in the absence of statute for injuries arising from the failure to keep the county buildings, grounds, etc., in proper condition, or for the negligence of its agents in the care and control of the same,[22] as for

Hampton County, 42 S. C. 17, 19 S. E. 1018; Rose *v.* Pierce County, 25 Wash. 119, 64 Pac. 913.

18. Cope *v.* Hampton County, 42 S. C. 17, 19 S. E. 1018.

19. Barbour County *v.* Horn, 48 Ala. 649.

20. *Alabama.*— Barbour County *v.* Horn, 48 Ala. 649.

Delaware.— Carter *v.* Wilds, 8 Houst. 14, 31 Atl. 715.

Georgia.—Millwood *v.* De Kalb County, 106 Ga. 743, 32 S. E. 577; Haygood *v.* Justices Inferior Ct., 20 Ga. 845; Governor *v.* Justices Clark County Inferior Ct., 19 Ga. 97.

Idaho.— Davis *v.* Ada County, 5 Ida. 126, 47 Pac. 93.

Indiana.— Vigo County *v.* Daily, 132 Ind. 73, 31 N. E. 531; Morris *v.* Switzerland County, 131 Ind. 285, 31 N. E. 77; White *v.* Sullivan County, 129 Ind. 396, 28 N. E. 846; Abbett *v.* Johnson County, 114 Ind. 61, 16 N. E. 127; Schnurr *v.* Huntington County, 22 Ind. App. 188, 53 N. E. 425; Greene County *v.* Boswell, 4 Ind. App. 133, 30 N. E. 534.

Iowa.— Lindley *v.* Polk County, 84 Iowa 308, 50 N. W. 975; Kincaid *v.* Hardin County, 53 Iowa 430, 5 N. W. 589, 36 Am. Rep. 236.

Kentucky.— Hite *v.* Whitley County Ct., 91 Ky. 168, 15 S. W. 57, 12 Ky. L. Rep. 764, 11 L. R. A. 122; Downing *v.* Mason County, 87 Ky. 208, 8 S. W. 264, 10 Ky. L. Rep. 105; Layman *v.* Beeler, 67 S. W. 995, 24 Ky. L. Rep. 174; Sheppard *v.* Pulaski County, 18 S. W. 15, 13 Ky. L. Rep. 672; Mobley *v.* Carter County, 5 Ky. L. Rep. 694.

Minnesota.—Dosdall *v.* Olmsted County, 30 Minn. 96, 14 N. W. 458, 44 Am. Rep. 185.

Missouri.— Reardon *v.* St. Louis County, 36 Mo. 555.

New York.— Markey *v.* Queens County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46.

North Carolina.—Jones *v.* Franklin County, 130 N. C. 451, 42 S. E. 144; Manuel *v.* Cumberland County, 98 N. C. 9, 3 S. E. 829; White *v.* Chowan, 90 N. C. 437, 47 Am. Rep. 534.

Ohio.— Alexander *v.* Brady, 61 Ohio St. 174, 55 N. E. 173.

South Carolina.— Cope *v.* Hamilton, 42 S. C. 17, 19 S. E. 1018.

United States.—Jacobs *v.* Hamilton County, 13 Fed. Cas. No. 7,161, 1 Bond 500, 4 Fish. Pat. Cas. 81.

See 13 Cent. Dig. tit. "Counties," § 209.

21. May *v.* Logan County, 30 Fed. 250 [*disapproving* Jacobs *v.* Hamilton County, 13 Fed. Cas. No. 7,161, 1 Bond 500, 4 Fish. Pat. Cas. 81]; May *v.* Mercer County, 30 Fed. 246; May *v.* Fond du Lac County, 27 Fed. 691.

These decisions proceed upon the principle that the benefits secured cannot be retained and enjoyed by setting up the wrongful act in retaining it; that to allow this to be done would violate the plainest dictates of justice and common honesty. May *v.* Logan County, 30 Fed. 250.

22. *Georgia.*—Haygood *v.* Justices Inferior Ct., 20 Ga. 845. See also Governor *v.* Justices Clark County Inferior Ct., 19 Ga. 97.

Illinois.—Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151.

Indiana.— Vigo County *v.* Daily, 132 Ind. 73, 31 N. E. 531; Morris *v.* Switzerland County, 131 Ind. 285, 31 N. E. 77; White *v.* Sullivan County, 129 Ind. 396, 28 N. E. 846; Greene County *v.* Boswell, 4 Ind. App. 133, 30 N. E. 534.

Kentucky.— Sheppard *v.* Pulaski County, 18 S. W. 15, 13 Ky. L. Rep. 672; Mobley *v.* Carter County, 5 Ky. L. Rep. 694.

Minnesota.—Dosdall *v.* Olmsted County, 30 Minn. 96, 14 N. W. 458, 44 Am. Rep. 185.

Nebraska.— Wehn *v.* Gage County Com'rs, 5 Nebr. 494, 25 Am. Rep. 497.

New York.— Alamango *v.* Albany County, 25 Hun 551.

See 13 Cent. Dig. tit. "Counties," § 210.

instance where the health of prisoners is injured by the unsanitary condition of a jail,[23] where county buildings are kept in such condition as to become a nuisance to those living in the vicinity,[24] or where a pest-house is maintained in the vicinity of a person's dwelling and disease is thereby communicated to his family.[25] Contrary to the general rule, however, it has been held in one state that a county is answerable to the sheriff, where the latter has been subjected to the payment of damages for an escape rendered possible through the insufficiency of the jail.[26] And in another jurisdiction a county is directly liable to the person or persons who have sustained damages by the escape of a prisoner from the county jail through the insufficiency of such jail,[27] unless a clear and adequate remedy against some other person can be shown.[28]

C. Arising From Construction of Public Works, Etc. In the absence of statute a county is not liable for damages to private interests by the construction of public works and improvements.[29]

D. Acts of Officers, Agents, and Employees — 1. General Rule. The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, does not apply to counties.[30] Counties are usually held to be involuntary quasi-corporations, merely political or civil divisions of the state, created by general laws to aid in the administration of the government. The statutes prescribe all the duties which counties owe, and impose all

23. *Indiana.*— White *v.* Sullivan County, 129 Ind. 396, 28 N. E. 846.

Iowa.— Lindley *v.* Polk County, 84 Iowa 308, 50 N. W. 975.

Kansas.—Pfefferle *v.* Lyon County, 39 Kan. 432, 18 Pac. 506.

Michigan.— Webster *v.* Hillsdale County, 99 Mich. 259, 58 N. W. 317.

North Carolina.— Manuel *v.* Cumberland County, 98 N. C. 9, 3 S. E. 829.

See 13 Cent. Dig. tit. "Counties," § 210.

24. Wehn *v.* Gage County Com'rs, 5 Nebr. 494, 25 Am. Rep. 497.

25. Haag *v.* Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654.

26. Brown County Com'rs *v.* Butt, 2 Ohio 348. See also Stiles *v.* Dearborn, 6 N. H. 145.

27. Clark *v.* Litchfield County, Kirby (Conn.) 318.

Amount recoverable.— In an action against the county, for an escape on mesne process, damages may upon inquiry be recovered to the amount of the whole sum for which the person who has escaped was in custody and interest; but not of course as the consequence of a verdict for the plaintiff. Hubbard *v.* Shaler, 2 Day (Conn.) 195.

Where a prisoner escapes by means of external force and not through the insufficiency of the jail the county is not liable. Paul *v.* Tolland County, 2 Root (Conn.) 196.

28. Dutton *v.* Litchfield County, 1 Root (Conn.) 450; Clark *v.* Litchfield County, Kirby (Conn.) 318.

29. Coffey County Com'rs *v.* Venard, 10 Kan. 95 (vacating county road); Downing *v.* Mason County, 87 Ky. 208, 8 S. W. 264, 10 Ky. L. Rep. 105, 12 Am. St. Rep. 473 (obstruction of stream flooding premises); Walter *v.* Wicomico County Com'rs, 35 Md. 385 (repairs to highways resulting in damage); Tyson *v.* Batimore County Com'rs, 28 Md. 510 (erection of wall on side of public road causing overflow of river and injury to mill-dam); Swineford *v.* Franklin County, 73 Mo. 279 (filling up mill-race to prevent injury to county road).

For liabilities for injuries arising from defects in bridges, flowage of land by construction of bridges, etc., generally, see Bridges.

For liabilities for injuries arising from defective drains see, generally, Drains.

For liabilities for injuries on highways see, generally, Highways.

The police jury of a parish is liable for any actual damage caused to a neighboring inhabitant by building any work of public convenience that obstructs an unnavigable watercourse; but the jury will not, if the work be of great convenience to the inhabitants of the vicinage, be compelled to remove it. Lalanne *v.* Savoy, 29 La. Ann. 516.

Evidence.— If the action is for personal injuries from a defective bridge the jury cannot consider the wealth of the defendant or the poverty of the plaintiff in making up their verdict. Barbour County *v.* Horn, 48 Ala. 566. If the injury complained of is caused by the building of a wall upon a public county road, a statute recognizing the road as a public one is admissible in evidence where the person under whom plaintiff claimed title knew and approved of such law and acted under it as one of the commissioners. Tyson *v.* Baltimore County Com'rs, 28 Md. 510. In such an action opinions and views of persons appointed by the county commissioners to examine the wall complained of as to its probable effect upon the plaintiff's property unsupported by oath are inadmissible, although such parties might be called and examined as experts. Tyson *v.* Baltimore County Com'rs, 28 Md. 510.

30. Symonds *v.* Clay County, 71 Ill. 355; Summers *v.* Daviess County, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512.

the liabilities to which they are subject, and unless made so by express legislative enactment, they are not considered liable to persons injured by the wrongful neglect of duty or wrongful acts of their officers, agents, or employees done in the course of the performance of corporate powers, or in the execution of corporate duties,[31] unless authorized or ratified by them.[32]

31. *California.*— Santa Cruz R. Co. *v.* Santa Clara County, 62 Cal. 180; Crowell *v.* Sonoma County, 25 Cal. 313; Sherbourne *v.* Yuba County, 21 Cal. 113, 81 Am. Dec. 151.

Colorado.— Pitkin County *v.* Ball, 22 Colo. 125, 43 Pac. 1000.

Georgia.— Bailey *v.* Fulton County, 111 Ga. 313, 36 S. E. 596; Wilson *v.* Fannin County, 74 Ga. 818; Hammond *v.* Richmond County, 72 Ga. 188; Dougherty County *v.* Kemp, 55 Ga. 252.

Illinois.—Hollenbeck *v.* Winnebago County, 95 Ill. 148, 35 Am. Rep. 151; Symonds *v.* Clay County, 71 Ill. 355.

Indiana.— Smith *v.* Allen County, 131 Ind. 116, 30 N. E. 949; Vigo Tp. *v.* Knox County, 111 Ind. 170, 12 N. E. 305; Summers *v.* Daviess County, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; Browning *v.* Owen County, 44 Ind. 11; Schnurr *v.* Huntington County, 22 Ind. App. 188, 53 N. E. 425; Johnson County *v.* Reinier, 18 Ind. App. 119, 47 N. E. 642.

Iowa.— Packard *v.* Voltz, 94 Iowa 277, 62 N. W. 757, 58 Am. St. Rep. 396; Cedar Rapids, etc., R. Co. *v.* Cowan, 77 Iowa 535, 42 N. W. 436.

Kentucky.— Hollenbeck *v.* Winnebago County, 1 Ky. L. Rep. 198.

Michigan.— Larkin *v.* Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

Minnesota.—Schussler *v.* Hennepin County, 67 Minn. 412, 70 N. W. 6, 64 Am. St. Rep. 424, 39 L. R. A. 75.

Missouri.— Hannon *v.* St. Louis County, 62 Mo. 313; Swineford *v.* Franklin County, 6 Mo. App. 39.

Montana.— Territory *v.* Cascade County, 8 Mont. 396, 20 Pac. 809, 7 L. R. A. 105.

Nebraska.— Saline County School Dist. No. 2 *v.* Saline County, 9 Nebr. 403, 2 N. W. 877.

New York.— Hughes *v.* Monroe County, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33 [*affirming* 79 Hun 120, 29 N. Y. Suppl. 495]; Gray *v.* Tompkins County, 93 N. Y. 603; People *v.* Westchester County, 57 N. Y. App. Div. 135, 67 N. Y. Suppl. 981; Alamango *v.* Albany County, 25 Hun 551; De Grauw *v.* Queens County, 13 Hun 381.

North Carolina.— Burbank *v.* Beaufort County, 92 N. C. 257.

Ohio.— Hamilton County *v.* Mighels, 7 Ohio St. 109.

Pennsylvania.— Com. *v.* Brice, 22 Pa. St. 21, 60 Am. Dec. 79.

Tennessee.— Rhea County *v.* Sneed, 105 Tenn. 581, 58 S. W. 1063; McAndrews *v.* Hamilton County, 105 Tenn. 399, 58 S. W. 483.

Texas.— Floria *v.* Galveston County, (Civ. App. 1900) 55 S. W. 540; Crause *v.* Harris County, 18 Tex. Civ. App. 375, 44 S. W. 616.

Virginia.— Field *v.* Albemarle County, (1895) 20 S. E. 954; Fry *v.* Albemarle County, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879.

Wisconsin.— Randles *v.* Waukesha County, 96 Wis. 629, 71 N. W. 1034.

United States.— Smith *v.* Carlton County, 46 Fed. 340; May *v.* Juneau County, 30 Fed. 241; Jacobs *v.* Hamilton County, 13 Fed. Cas. No. 7,161, 1 Bond 500, 4 Fish. Pat. Cas. 81.

See 13 Cent. Dig. tit. "Counties," § 212.

For a misappropriation or conversion of funds by a county officer the county is not liable in the absence of express statutory provision to that effect (Vigo Tp. *v.* Knox County, 111 Ind. 170, 12 N. E. 305; Cedar Rapids, etc., R. Co. *v.* Cowan, 77 Iowa 535, 42 N. W. 436; Estep *v.* Keokuk County, 18 Iowa 199; Saline County School Dist. No. 2 *v.* Saline County, 9 Nebr. 403, 2 N. W. 877; Gray *v.* Tompkins County, 93 N. Y. 603; De Grauw *v.* Queens County, 13 Hun (N. Y.) 381); at least where the money has not passed to the credit of the county, nor been used for its benefit (Cedar Rapids, etc., R. Co. *v.* Cowan, 77 Iowa 535, 42 N. W. 436; Gray *v.* Tompkins County, 93 N. Y. 603).

That a tax-collector unlawfully collects taxes a second time on the same property creates no cause of action against the county, but is the personal tort of such collector. Burbank *v.* Beaufort County, 92 N. C. 257.

Unskilful treatment or maltreatment in county hospitals, jails, etc.— As a general rule a county is not liable for damage sustained by reason of the unskilful treatment of indigent sick persons in the county hospital, or by reason of insufficient food, etc. Sherbourne *v.* Yuba County, 21 Cal. 113, 81 Am. Dec. 151. Under Ga. Code, § 1864, a county is not liable for the maltreatment of a person while committed to jail preparatory to being sent to the lunatic asylum. Wilson *v.* Fannin County, 74 Ga. 818.

32. Schussler *v.* Hennepin County, 67 Minn. 412, 70 N. W. 6, 64 Am. St. Rep. 424, 39 L. R. A. 75.

Adoption or ratification of act of officer.— Where a member of a county board of supervisors in California, who was also *ex officio* a road commissioner, claiming to act in his official capacity, with the assistance of other citizens, repeatedly tore down a gate opening into private grounds, claiming that the road through such grounds was a public road by prescription or dedication, and thereafter the board of supervisors

2. WHEN SPECIAL DUTIES IMPOSED. It has been held, however, that the rule that counties as political subdivisions of the state are not liable for the laches or misconduct of their servants has no application to a neglect of those obligations incurred by counties when special duties are imposed upon them with their consent, or are voluntarily assumed by them.[33]

E. Murder or Personal Injury by Outlaws or Mobs. In several of the states liability is expressly imposed by statute or by the constitution upon counties in case of murder or personal injuries perpetrated by outlaws, mobs, disguised persons, or for political opinions, etc., such damages in the case of murder to be recovered by the husband or wife or next of kin of the deceased.[34] These statutes

adopted a resolution declaring such road a public road, and caused it to be surveyed and recorded as such, it was an adoption or ratification of said supervisor's acts, and rendered the county liable for the trespasses committed by him. Coburn *v.* San Mateo County, 75 Fed. 520.

33. Hannon *v.* St. Louis County, 62 Mo. 313. In this case where the county of St. Louis made a contract for laying water-pipe to the county insane asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen, it was held that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as the work was being done on its own property), and governed by the same rules as to its liability. In such case it is immaterial whether the performance of the work is voluntarily assumed in the first instance, or is a special duty imposed by the legislature, and assented to by the county. And municipal and quasi-corporations are subject to the same doctrine of liability. See also Lefrois *v.* Monroe County, 24 N. Y. App. Div. 421, 48 N. Y. Suppl. 519, to the effect that a county which owns and conducts a farm as a convenient but non-essential adjunct to an almshouse is liable for the injury done to adjoining owner by utilizing the sewage of the almshouse to fertilize its farm.

Trespass or damage in opening roads.— A county is liable for trespasses or damage done to private property by its officers, in the exercise of powers conferred for the benefit of the locality and its inhabitants, such as those relating to the opening and keeping open of roads, as distinguished from powers relating to the administration of the general laws and the enforcement of the general policy of the state. Coburn *v.* San Mateo County, 75 Fed. 520. A right of action exists against a county for damaging private property for public uses in causing public roads to be worked or drained in such manner as to injure or damage the adjacent premises of a landed proprietor. Barfield *v.* Macon County, 109 Ga. 386, 34 S. E. 596.

34. Dale County *v.* Gunter, 46 Ala. 118; Champaign County *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 737; Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821; Brown *v.* Orangeburg County, 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734.

The words "in disguise," etc., construed.— A person "in ambush, or concealed in the bushes," is not a person in disguise, within the purview and meaning of the act first above named, and the assassination or murder of a party by a person so ambushed or concealed does not inflict upon the county the penalty given by the first section of said act, unless said party is so assassinated or murdered "for past or present party affiliation or political opinion." Dale County *v.* Gunter, 46 Ala. 118.

The word "outlaw" as employed in the first section of said act is not to be understood in the sense of that term as used in the English statutes and common law, but is to be understood as referring to the character of person or persons named in the act entitled "An act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages," approved Dec. 26, 1868, and who by said act, while under cover of such disguise, and while in the act of committing, threatening, or attempting to commit the offenses therein named are put out of the protection of the law, and may lawfully be shot or killed by any person. Dale County *v.* Gunter, 46 Ala. 118; Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

Elements constituting a mob.— An essential element to change a collection of individuals into a "mob" is the intent to do damage or injury to someone, or the pretense to exercise correctional power over other persons by violence and without authority of law. Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821.

Element of unlawful assemblage.— To constitute the assembling of persons for an unlawful purpose there must be in the minds of the persons making up such assemblage, as an existent fact, a fixed purpose to do an unlawful act, formed either before or at the time of assembling, or with the agreement of mutual assistance after the assembling. Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821.

The existence and time of formation of the

have been uniformly held constitutional,[35] and are considered salutary because their effect is to protect human life and make communities law abiding.[36]

F. Injuries to Property by Mobs. In a few states statutes have been enacted which expressly impose liability upon counties to make compensation to parties whose property has been injured or destroyed in consequence of mobs or riots,[37] when such destruction is not occasioned or sanctioned by the owner or in any way aided by his negligence,[38] and when timely notice of such threatened

agreement to do an unlawful act, necessary to constitute an unlawful assemblage, are questions of fact for the jury. Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821.

No formal agreement to do an unlawful act necessary to constitute an unlawful assembly is necessary. It may be inferred from the circumstances and facts of the case. Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821.

Taking a prisoner from a jail and lynching him raises a *prima facie* presumption that the person doing so intended to do the prisoner damage or injury. Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821.

Essential allegations of complaint.— The complaint need not allege that the murder was on account of past or present party affiliation or political opinion, but it will be sufficient if it conforms to the statute by alleging the murder in the county by an outlaw, person or persons in disguise, riot or mob, and that it was done at least six months before the commencement of the suit. Gunter *v.* Dale County, 44 Ala. 639.

35. Champaign County Com'rs *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 738; Mitchell *v.* Champaign County, 10 Ohio Cir. Ct. 801, 9 Ohio S. & C. Pl. Dec. 821; Brown *v.* Orangeberg County, 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734. *Contra*, Caldwell *v.* Cuyahoga County Com'rs, 6 Ohio S. & C. Pl. Dec. 367, 4 Ohio N. P. 249.

36. Brown *v.* Orangeberg County, 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734.

37. Ely *v.* Niagara County, 36 N. Y. 297; Hill *v.* Rensselaer County, 53 Hun (N. Y.) 194, 6 N. Y. Suppl. 716; Paladino *v.* Westchester County, 47 Hun (N. Y.) 337; Loomis *v.* Oneida County, 6 Lans. (N. Y.) 269; Moody *v.* Niagara County, 46 Barb. (N. Y.) 659; Schiellein *v.* Kings County, 43 Barb. (N. Y.) 490; Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317; Wolfe *v.* Richmond County, 11 Abb. Pr. (N. Y.) 270, 19 How. Pr. (N. Y.) 370; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670; Lavery *v.* County, 2 Pa. St. 231; Donoghue *v.* County, 2 Pa. St. 230; St. Michael's Church *v.* Philadelphia County, Brightly (Pa.) 121, 4 Pa. L. J. Rep. 150, 7 Pa. L. J. 181; St. Augustine *v.* Philadelphia County, Brightly (Pa.) 116, 4 Pa. L. J. Rep. 120, 7 Pa. L. J. 124.

Extends to property in transitu belonging to non-residents. Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670.

Mere possession is evidence of ownership of personal property in a suit against a county for property destroyed by riot or violence, and in the absence of contrary evidence, is held conclusive. St. Augustine *v.* Philadelphia County, Brightly (Pa.) 116, 4 Pa. L. J. Rep. 120, 7 Pa. L. J. 124.

In Louisiana a parish is not liable for damages caused by the acts of a mob, although such acts result from the torts of its officers, under Rev. Stat. § 2453, providing that the different municipal corporations in the state shall be liable for damages done to property by mobs or riotous assemblages in their respective limits; a parish not being a municipal corporation within the intent of the act. Fischer Land, etc., Co. *v.* Bordelon, 52 La. Ann. 429, 27 So. 59.

Negation of provisions restricting right to recover.— In an action for injuries by a mob to property, the declaration need not exclude by averment any provision restricting the right to recover contained in a clause separate from the clause giving the right of action. Clark Thread Co. *v.* Hudson County, 54 N. J. L. 265, 23 Atl. 820.

38. Hill *v.* Rensselaer County, 53 Hun (N. Y.) 194, 6 N. Y. Suppl. 716.

If a mob be maddened by the voluntary unlawful act of the claimant, as by the sale of intoxicating liquors without any license, and the destruction of his property is the result, a good defense exists in favor of the county when sued for such injury. Paladino *v.* Westchester County, 47 Hun (N. Y.) 337.

The fact that a house was a bawdy-house and a rendezvous for criminals is not such an act of carelessness or negligence as will preclude recovery. Ely *v.* Niagara County, 36 N. Y. 297; Moody *v.* Niagara County, 46 Barb. (N. Y.) 659.

Plaintiff need not aver that he did not aid in, assist, or permit the destruction of his property. Wolfe *v.* Richmond County, 19 How. Pr. (N. Y.) 370.

Evidence.— In actions against counties for injury to property by a mob any evidence is competent which is a part of the *res gestæ*. In such actions it is not necessary for the plaintiff to prove every article destroyed, but it will be sufficient if a general estimate be submitted to the jury. St. Augustine *v.* Philadelphia County, Brightly (Pa.) 116, 4 Pa. L. J. Rep. 120, 7 Pa. L. J. 124. In Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317, which was an action against the county for damages for the destruction of property by a mob, the order of a superior officer of military forces, delivered to a captain shortly before the burning of plaintiff's

injury has been given to the county authorities,[39] if the owner has knowledge of such intention,[40] and there is time so to do.[41] Such notice is of course not essential to a recovery, when the owner of the property destroyed has no knowledge of the intended attack,[42] or if there is not sufficient time,[43] or where it would have been useless for the purpose of protection.[44] This liability is irrespective of any neglect on the part of the sheriff,[45] and is not limited by the fact that the county authorities are unable to quell the riot, or that the state renders assistance to the county.[46]

IX. FISCAL MANAGEMENT — DEBT AND SECURITIES.

A. General Indebtedness — 1. Power to Borrow Money or Contract Debts Generally. A state legislature has the power to make provisions to prevent the abuse by counties of their powers of borrowing money and contracting debts,[47] and this power to incur indebtedness cannot be exercised where there is any prohibition or limitation thereof, either express or implied,[48] as for instance where a statute provides taxation as a means for raising money.[49] So while expressions may be found in some cases, from which it might be inferred that the power of a county to borrow money may arise from statutory implication,[50] and a few decisions which apparently so hold,[51] the weight of authority from the adjudged cases is that counties being the creatures of statute have no powers except those granted by statute, and that the power to borrow money and issue bonds will not be implied but must be expressly granted to authorize its exercise.[52]

cars, directed him to guard the property of plaintiff. It was held properly received as belonging to the *res gestæ*, and as evidence that the captain came to the place by the order of the superior. So also the evidence of one of plaintiff's employees on duty near the car when burned that he was requested to join the mob, and on declining was assaulted, was properly received as part of the *res gestæ*.

39. Loomis *v.* Oneida County, 6 Lans. (N. Y.) 269; Schiellein *v.* Kings County, 43 Barb. (N. Y.) 490; Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670; St. Michael's Church *v.* Philadelphia County, Brightly (Pa.) 121, 4 Pa. L. J. Rep. 150, 7 Pa. L. J. 181.

Notice to be in writing.— St. Michael's Church *v.* Philadelphia County, Brightly (Pa.) 121, 4 Pa. L. J. Rep. 150, 7 Pa. L. J. 181.

40. Loomis *v.* Oneida County, 6 Lans. (N. Y.) 269; Lake Shore, etc., R. Co. *v.* Erie County, 2 N. Y. St. 317.

41. Schiellein *v.* Kings County, 43 Barb. (N. Y.) 490.

42. Ely *v.* Niagara County, 36 N. Y. 297; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670; Lavery *v.* County, 2 Pa. St. 231; Donoghue *v.* County, 2 Pa. St. 230.

43. St. Michael's Church *v.* Philadelphia County, Brightly (Pa.) 121, 4 Pa. L. J. Rep. 150, 7 Pa. L. J. 181.

44. Schiellein *v.* Kings County, 43 Barb. (N. Y.) 490.

45. Wolfe *v.* Richmond County, 11 Abb. Pr. (N. Y.) 270, 19 How. Pr. (N. Y.) 370.

46. Allegheny County *v.* Gibson, 90 Pa. St. 397, 3 Am. Rep. 670.

47. Monroe County *v.* Strong, 78 Miss. 565, 29 So. 530.

48. *Alabama.*— Simpson *v.* Lauderdale County, 56 Ala. 64.

Kansas.—Shawnee County Com'rs *v.* Carter, 2 Kan. 115.

Michigan.— Dickinson County *v.* Warren, 98 Mich. 144, 56 N. W. 1111.

Washington.— Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

United States.— Kinsey *v.* Little River County, 14 Fed. Cas. No. 7,829.

See 13 Cent. Dig. tit. "Counties," § 214.

49. Simpson *v.* Lauderdale County, 56 Ala. 64.

50. See Simpson *v.* Lauderdale County, 56 Ala. 64; Kinsey *v.* Little River County, 14 Fed. Cas. No. 7,829.

51. Fenton *v.* Blair, 11 Utah 78, 39 Pac. 485. See also Pennington *v.* Gammon, 67 Ga. 456.

52. *Illinois.*— Hardin County *v.* McFarlan, 82 Ill. 138; Strodtman *v.* Menard County, 56 Ill. App. 120.

Nevada.— Waitz *v.* Ormsby County, 1 Nev. 370.

North Carolina.— Daniel *v.* Edgecombe County, 74 N. C. 494.

Texas.— Robertson *v.* Breedlove, 61 Tex. 316.

Utah.— Daggett *v.* Lynch, 18 Utah 49, 54 Pac. 1095 [*overruling* without mention Fenton *v.* Blair, 11 Utah 78, 39 Pac. 485].

United States.— Wells *v.* Pontotoc County, 102 U. S. 625, 26 L. ed. 122; Police Jury *v.* Britton, 15 Wall. 566, 21 L. ed. 251; Kinsey *v.* Little River County, 14 Fed. Cas. No. 7,829.

See 13 Cent. Dig. tit. "Counties," § 214.

"Power to borrow money is not an incident to local political government, and upon prin-

2. Limitations Upon Power to Create Indebtedness — a. By Constitutional and Statutory Provisions — (I) *In General.* In many of the states the amount of indebtedness which may be contracted by a county is expressly limited by the constitution [53] or by the statutes of such states,[54] or as is sometimes the case both by constitution and by statute.[55] In the case of territories this limitation is sometimes imposed by act of congress.[56] A prohibition against incurring indebtedness for any single purpose exceeding a designated amount cannot be evaded by splitting the amount into several sums, the aggregate of which is greater than that

ciple, a county cannot exercise it in the absence of express authority of law so to do." Strodtman *v.* Menard County, 56 Ill. App. 120, 125.

Prominent text-writers on the subject also take this view. 2 Daniel Neg. Instr. 1527 *et seq.*; Dillon Mun. Corp. § 117 *et seq.*

53. *Alabama.*— Alabama, etc., R. Co. *v.* Reed, 124 Ala. 253, 27 So. 19, 82 Am. St. Rep. 166.

California.— Smilie *v.* Fresno County, 112 Cal. 311, 44 Pac. 556; Howland *v.* San Joaquin County, 109 Cal. 152, 41 Pac. 864; Babcock *v.* Goodrich, 47 Cal. 488.

Colorado.— Lake County *v.* Standley, 24 Colo. 1, 49 Pac. 23; People *v.* May, 9 Colo. 414, 15 Pac. 36, 9 Colo. 80, 10 Pac. 641; Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287.

Georgia.— Butts *v.* Little, 68 Ga. 272; Spann *v.* Webster County, 64 Ga. 498.

Idaho.— Dunbar *v.* Canyon County, 5 Ida. 407, 49 Pac. 409; Bannock County *v.* Bunting, 4 Ida. 156, 37 Pac. 277.

Illinois.— People *v.* Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280.

Indiana.— Monroe County *v.* Harrell, 147 Ind. 500, 46 N. E. 124; Burton *v.* State, 111 Ind. 600, 12 N. E. 486; Strieb *v.* Cox, 111 Ind. 299, 12 N. E. 481; Miller *v.* Dearborn County, 66 Ind. 162.

Iowa.— Anderson *v.* Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 348.

Kentucky.— O'Mahoney *v.* Bullock, 97 Ky. 774, 31 S. W. 878, 17 Ky. L. Rep. 523.

Missouri.—Mountain Grove Bank *v.* Douglas County, 146 Mo. 42, 47 S. W. 944; Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206; Book *v.* Earl, 87 Mo. 246; Potter *v.* Douglas County, 87 Mo. 239.

Montana.—Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973; Hefferlin *v.* Chambers, 16 Mont. 349, 40 Pac. 787; Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821.

New York.— Adams *v.* East River Sav. Inst., 136 N. Y. 52, 32 N. E. 622 [*affirming* 65 Hun 145, 20 N. Y. Suppl. 12].

Oregon.— Municipal Security Co. *v.* Baker County, 33 Oreg. 338, 54 Pac. 174; Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447.

Pennsylvania.— Van Baman *v.* Gallagher, 182 Pa. St. 277, 37 Atl 832; Pike County *v.* Rowland, 94 Pa. St. 238.

Utah.— Fenton *v.* Blair, 11 Utah 78, 39 Pac. 485.

Washington.— Strain *v.* Young, 25 Wash. 578, 66 Pac. 64; Farquharson *v.* Yeargin, 24 Wash. 549, 64 Pac. 717; Mullen *v.* Sackett, 14 Wash. 100, 44 Pac. 136; State *v.* Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318; Rehmke *v.* Goodwin, 2 Wash. 676, 27 Pac. 473.

West Virginia.— Neale *v.* Wood County, 43 W. Va. 90, 27 S. E. 370.

Wisconsin.— Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451; Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

United States.— Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060 [*overruling* 34 Fed. 845]; Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Ætna L. Ins. Co. *v.* Lyon County, 44 Fed. 329; Wilder *v.* Rio Grande County, 41 Fed. 512; Barnard *v.* Knox County, 37 Fed. 563, 2 L. R. A. 426; Kimball *v.* Grant County, 21 Fed. 145; Durant *v.* Iowa County, 8 Fed. Cas. No. 4,189, 1 Woolw. 69.

See 13 Cent. Dig. tit. "Counties," § 215 *et seq.*

54. *California.*— Smilie *v.* Fresno County, 112 Cal. 311, 44 Pac. 556; Babcock *v.* Goodrich, 47 Cal. 488.

Indiana.—Hamilton County *v.* Cottingham, 56 Ind. 559.

Kentucky.— Harrison County Ct. *v.* Smith, 15 B. Mon. 155.

Minnesota.— Rogers *v.* Le Sueur County, 57 Minn. 434, 59 N. W. 488.

Nebraska.— State *v.* Weir, 33 Nebr. 35, 49 N. W. 785.

North Dakota.— State *v.* Getchell, 3 N. D. 243, 55 N. W. 585.

Ohio.—Dexter *v.* Hamilton County Com'rs, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364.

Utah — Fenton *v.* Blair, 11 Utah 78, 39 Pac. 485.

Washington.— Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318.

United States.— Coffin *v.* Kearney County, 114 Fed. 518.

See 13 Cent. Dig. tit. "Counties," § 215 *et seq.*

55. See cases cited *supra*, notes 53, 54.

56. McRae *v.* Cochise County, (Ariz. 1896) 44 Pac 299; Catron *v.* Santa Fe County, 5 N. M. 203, 21 Pac. 60; Roger Mills County *v.* Rowden, 8 Okla. 406, 58 Pac. 624; Hall Lithographing Co. *v.* Roger Mills County, 8 Okla. 378, 58 Pac. 620.

limited by the provision.[57] It has been held, however, that a legislature possessing the power to raise the debt limit of a county when a warrant, void by reason of being issued in excess of such limit, is issued, may afterward validate such warrant,[58] and that constitutional or statutory limitations upon state indebtedness are not operative as a limit upon the right of counties to incur indebtedness.[59]

(II) *How Limits Fixed.* The methods of fixing the limits vary; one of the most usual provisions is that the indebtedness shall not exceed a designated amount;[60] other provisions are that the amount of indebtedness which the county may incur shall not exceed in any year the income and revenue provided for such year,[61] or shall not exceed a certain per cent on the value of the taxable property in the county.[62]

57. Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

58. Daggett *v.* Lynch, 18 Utah 49, 54 Pac. 1095.

59. *California.*— Pattison *v.* Yuba County, 13 Cal. 175.

Iowa.— Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene 1.

Kansas.— Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Nebraska.— Hallenbeck *v.* Hahn, 2 Nebr. 377.

United States.— Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. 667, 21 L. ed. 375.

See 13 Cent. Dig. tit. "Counties," § 215 *et seq.*

60. Harrison County Ct. *v.* Smith, 15 B. Mon. (Ky.) 155; Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973; Dexter *v.* Hamilton County, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364; Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447.

61. *California.*—Pacific Undertakers *v.* Widber, 113 Cal. 201, 45 Pac. 273; Smilie *v.* Fresno County, 112 Cal. 311, 44 Pac. 556; Howland *v.* San Joaquin County, 109 Cal. 152, 41 Pac. 864; McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231; Lewis *v.* Widber, 99 Cal. 412, 33 Pac. 1128; Shaw *v.* Statler, 74 Cal. 258, 15 Pac. 833; San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641; Babcock *v.* Goodrich, 47 Cal. 488.

Idaho.— Bannock County *v.* Bunting, 4 Ida. 156, 37 Pac. 277.

Kansas.— Webster *v.* Haskell County, 7 Kan. App. 764, 53 Pac. 529.

Mississippi.— Monroe County *v.* Strong, 78 Miss. 565, 29 So. 530.

Missouri.— State *v.* Johnson, 162 Mo. 621, 63 S. W. 390; State *v.* Allison, 155 Mo. 325, 56 S. W. 467; State *v.* Appleby, 136 Mo. 408, 37 S. W. 1122; Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206; Book *v.* Earl, 87 Mo. 246; Potter *v.* Douglas County, 87 Mo. 239.

Nebraska.—F. C. Austin Mfg. Co. *v.* Brown County, (1902) 90 N. W. 929; Union Pac. R. Co. *v.* Cheyenne County, (1902) 90 N. W. 917; State *v.* Weir, 33 Nebr. 35, 49 N. W. 785.

North Dakota.— State *v.* Getchel, 3 N. D. 243, 55 N. W. 585.

United States.—Gillette-Herzog Mfg. Co. *v.* Canyon County, 85 Fed. 396; Barnard *v.* Knox County, 37 Fed. 563, 2 L. R. A. 426.

See 13 Cent. Dig. tit. "Counties," § 215 *et seq.*

In Utah it is held that the amount of indebtedness which the county court can in any way create cannot at any time exceed the revenues of the current fiscal year beyond the amount of the county revenue and income for the two years immediately preceding. Fenton *v.* Blair, 11 Utah 78, 39 Pac. 485. See also Pleasant Valley Coal Co. *v.* Salt Lake County, 15 Utah 97, 48 Pac. 1032.

Reduction of amount by assets on hand.— The fact that a contract involves an expenditure in excess of the revenue provided for the year does not render it void, as the creation of an indebtedness in excess of such revenue, where the available assets on hand are sufficient to reduce the amount so as to bring it within the levy made. Field *v.* Stroube, 103 Ky. 114, 44 S. W. 363, 19 Ky. L. Rep. 1751.

62. *Alabama.*— Alabama, etc., R. Co. *v.* Reed, 124 Ala. 253, 27 So. 19, 82 Am. St. Rep. 166.

Arizona.—McRae *v.* Cochise County, (1896) 44 Pac. 299.

Colorado.— Lake County *v.* Standley, 24 Colo. 1, 49 Pac. 23; People *v.* May, 9 Colo. 80, 10 Pac. 641, 9 Colo. 404, 12 Pac. 838, 9 Colo. 414, 15 Pac. 36; Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287.

Georgia.— Butts *v.* Little, 68 Ga. 272.

Illinois.— Hodges *v.* Crowley, 186 Ill. 305, 57 N. E. 889; People *v.* Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280.

Indiana.— Miller *v.* Dearborn County, 66 Ind. 162; Hamilton County *v.* Cottingham, 56 Ind. 559.

Iowa.— Anderson *v.* Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 348.

New York.— Adams *v.* East River Sav. Inst., 136 N. Y. 52, 32 N. E. 622 [*affirming* 65 Hun 145, 20 N. Y. Suppl. 12].

Oklahoma.— D. County *v.* Gillett, 9 Okla. 593, 60 Pac. 277; Roger Mills County *v.* Rowden, 8 Okla. 406, 58 Pac. 624; Hall Lithographing Co. *v.* Roger Mills County, 8 Okla. 378, 58 Pac. 620; McMurtry *v.* Roger Mills County, 6 Okla. 60, 55 Pac. 1069.

Pennsylvania.—Pike County *v.* Rowland, 94 Pa. St. 238; Schuylkill County *v.* Snyder, 20 Pa. Co. Ct. 649.

South Dakota.—Lawrence County *v.* Meade County, 10 S. D. 175, 72 N. W. 405.

(III) *To What Debts Applicable.* In some jurisdictions statutory limitations on the amount of indebtedness which a county may create are held to apply to any and all indebtednesses created in any manner or for any purpose,[63] whether compulsory obligations imposed by law, or voluntary obligations entered into for any purpose.[64] In other jurisdictions, however, such limitations have been held to apply only to debts and liabilities voluntarily created and not to necessary

Utah.— Fritsch *v.* Salt Lake County, 15 Utah 83, 47 Pac. 1026.

Washington.— Mullen *v.* Sackett, 14 Wash. 100, 44 Pac. 136; State *v.* Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318; Rehmke *v.* Goodwin, 2 Wash. 676, 27 Pac. 473.

Wisconsin.— Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437.

Wyoming.— *In re* Fremont, etc., County, 8 Wyo. 1, 54 Pac. 1073; Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

United States.— Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060; Keene Five-Cent Sav. Bank *v.* Lyon County, 90 Fed. 523; Meade County *v.* Ætna L. Ins. Co., 90 Fed. 237, 32 C. C. A. 600; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585; Rollins *v.* Lake County, 34 Fed. 845; Durant *v.* Iowa County, 8 Fed. Cas. No. 4,189, 1 Woolw. 69.

See 13 Cent. Dig. tit. "Counties," § 215 *et seq.*

Deduction of cash assets, taxes assessed for current year and unpaid taxes.— In determining the indebtedness of a county within the meaning of the constitutional provision limiting the same, there should be deducted the cash assets of the county, the amount of taxes assessed for county purposes on the tax-roll for the current year, and the amount of taxes unpaid on the rolls for prior years. Kelley *v.* Pierce County, 15 Wash. 697, 46 Pac. 253.

In excess of funds in treasury and maximum amount assessable.—Although by Minn. Gen. Stat. (1878), c. 8, §§ 85, 86, it is made the duty of the board of county commissioners to furnish a county court-house, etc., under c. 11, §§ 49, 114, such board has no power to incur liability for the county for that purpose while the ordinary current yearly expenses and other liabilities payable within a year will exceed both the amount of funds in the county treasury and the maximum amount which can be assessed as one year's taxes for county purposes according to the tax-lists on file when the contract is made under which the liability will be incurred. Rogers *v.* La Sueur, 57 Minn. 434, 59 N. W. 488.

Last assessment before issue of bonds.— The limitation of the indebtedness of a county is measured by the last assessed valuation of the property therein before the bonds are issued, and not by the last assessed valuation before they are voted. Corning *v.* Meade County, 102 Fed. 57, 42 C. C. A. 154.

No limitation until assessment.— The provision that no county shall become indebted for an amount exceeding a designated per cent on the value of its taxable property will not become operative, until there has been an assessment in the county for county and territorial taxation. Hall Lithographing Co. *v.* Roger Mills County, 8 Okla. 378, 58 Pac. 620.

On what assessment amount computed.— Under the act of congress of July 30, 1886, the amount of taxable property is "to be ascertained by the last assessment of territorial and county taxes previous to the incurring of such indebtedness." McMurtry *v.* Roger Mills County, 6 Okla. 60, 55 Pac. 1069. In People *v.* Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, it was held that it is the value of the taxable property of the county, to be ascertained by the "last assessment for State and county taxes previous to the incurring of" an indebtedness, that is, the assessment made by the local assessor, upon which the five per cent is to be computed, which limits the power of the county to contract a debt, and not the equalized valuation as fixed by the state board of equalization.

63. *Colorado.*—People *v.* May, 9 Colo. 414, 15 Pac. 36, 9 Colo. 404, 12 Pac. 838, 9 Colo. 80, 10 Pac. 641.

Iowa.— Anderson *v.* Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 348.

Missouri.— Barnard *v.* Knox County, 105 Mo. 382, 16 S. W. 917, 13 L. R. A. 244 [*overruling* Potter *v.* Douglas County, 87 Mo. 239].

Montana.—Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

Wisconsin.— Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437 (indebtedness incurred for building court-house, and to redeem county orders).

United States.— Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060 [*reversing* 34 Fed. 845].

See 13 Cent. Dig. tit. "Counties," § 216.

64. D. County *v.* Gillett, 9 Okla. 593, 60 Pac. 277; Fritsch *v.* Salt Lake County, 15 Utah 83, 47 Pac. 1026; Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

Limitation applies to fees of officers, witnesses, jurors, etc.— People *v.* May, 9 Colo. 404, 12 Pac. 838; Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060.

Subscription by a magisterial district to an internal improvement, being a county debt, is to be regarded in determining the limits of the county indebtedness fixed by W. Va. Const. art. 10, § 8. Neale *v.* Wood County, 43 W. Va. 90, 27 S. E. 370.

county expenses or compulsory obligations,[65] as in the case of salaries of county officers,[66] or the erection of necessary county buildings.[67] So also such limitations and inhibitions as to incurring debt have been held not to apply to refunding bonds issued by a county for the purpose of taking up a prior valid indebtedness,[68] to warrants drawn against and not exceeding a special fund already provided and certain to be paid in during the fiscal year,[69] to bonds payable only from a particular fund derived from assessments,[70] to the apportionment of debts upon the division of counties,[71] or even to temporary loans to meet temporary emergencies.[72] Debts created before a constitution limiting the amount of indebtedness which a county may incur went into effect are not within its provisions.[73]

(IV) *Exceeding Constitutional or Statutory Limits.* When the limit prescribed by constitution or statute has been reached, the county has no further capacity to make contracts out of which additional burdens may arise. As to such contracts it may be said that the county has no existence.[74] A county by receiving benefits is not estopped to assert the invalidity of warrants issued in excess of the constitutional limit of indebtedness,[75] even though the claim for which it was issued was properly audited and the warrant duly issued and certified to be within the debt limit.[76] Nor will the fact of payment of claims allowed

65. Municipal Security Co. *v.* Baker County, 33 Oreg. 338, 54 Pac. 174; Grant County *v.* Lake County, 17 Oreg. 453, 21 Pac. 447; Farquharson *v.* Yeargin, 24 Wash. 549, 64 Pac. 717; Duryee *v.* Friars, 18 Wash. 55, 50 Pac. 583; Rauch *v.* Chapman, 16 Wash. 568, 48 Pac. 253, 58 Am. St. Rep. 52, 36 L. R. A. 407. See also Pacific Undertakers *v.* Widber, 113 Cal. 201, 45 Pac. 273; Lewis *v.* Widber, 99 Cal. 412, 33 Pac. 1128.

66. State *v.* Weir, 33 Nebr. 35, 49 N. W. 785. In McGrath *v.* Grout, 171 N. Y. 7, 63 N. E. 547 [*affirming* 74 N. Y. Suppl. 782] it was held that the affixing of salaries to the offices of sheriff, register, and county clerk of Kings county, in lieu of fees, under N. Y. Laws (1901), cc. 704, 706, was not in violation of N. Y. Const. art. 8, § 10, providing that when any city shall include in its boundaries more than one county the power of any county within such city to become indebted shall cease, as the obligation of the county for current expenses is not a debt which the county is thereby inhibited from incurring.

67. Hanley *v.* Randolph County Ct., 50 W. Va. 439, 40 S. E. 389.

68. Ætna L. Ins. Co. *v.* Lyon County, 44 Fed. 329. See also, as holding that the issuance of bonds to refund county indebtedness is not the creation of a new debt, but only a matter of fiscal administration, Lake County *v.* Standley, 24 Colo. 1, 49 Pac. 23; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585

69. Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287. See also Monroe County *v.* Harrell, 147 Ind. 500, 46 N. E. 124.

Appropriation of revenue uncollected.— A county which has reached the constitutional limit of indebtedness may constitutionally make assignments of the annual revenue accruing from taxes levied but uncollected for the current year, provided such assignments are not in excess of the amount covered by the annual levy for the year in which such assignment is made, and the warrant or instrument of assignment is expressly made payable out of the incoming revenue for the current year, and is an assignment *pro tanto*, without recourse by the county, of such fund. People *v.* May, 9 Colo. 404, 12 Pac. 838.

The allowance of claims equal to the tax revenue for the current year is not a creation of indebtedness against the county. Fenton *v.* Blair, 11 Utah 78, 39 Pac. 485. See also Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206, in which it was held that a county warrant duly issued for legitimate county expenses, and which together with prior warrants issued for the same purpose during the same year does not exceed in amount the revenue provided for that year, is valid, although a sufficient sum may not be collected from such levy to pay all warrants so issued.

70. Strieb *v.* Cox, 111 Ind. 299, 12 N. E. 481. See also Burton *v.* State, 111 Ind. 600, 12 N. E. 486.

71. *In re* Fremont, etc., County, 8 Wyo. 1, 54 Pac. 1073.

72. Miller *v.* Dearborn County, 66 Ind. 162.

Temporary loans payable from available current revenue.— It is lawful for county commissioners to make temporary loans, as the necessities of the county may require, to meet the usual and ordinary expenses of the county, provided they borrow no more than they can repay out of the current revenue of the county available within the year in which such money is borrowed. Schuylkill County *v.* Snyder, 20 Pa. Co. Ct. 649.

73. Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

74. Wilder *v.* Rio Grande County, 41 Fed. 512.

75. Municipal Security Co. *v.* Baker County, 33 Oreg. 338, 54 Pac. 174.

76. Fritsch *v.* Salt Lake County, 15 Utah 83, 47 Pac. 1026.

beyond the constitutional limit of a county's indebtedness estop taxpayers of the county from asserting the invalidity of other claims of the same nature outstanding, since county officials have no power of ratification as to such liabilities.[77] Nevertheless a constitutional limitation of county indebtedness is not self-acting, but the protection of its provisions must be invoked at the proper time and in the proper mode.[78] And in order that a county may defend against the payment of a judgment on the ground that the limitation of its indebtedness has been exceeded, it must be shown that the limit fixed had been reached when the original debt was contracted,[79] and where a *prima facie* case is made, as for instance in an action on county warrants by the introduction of such warrants properly executed and proof of their ownership by the plaintiff, the burden of proof devolves upon the county to prove such fact.[80]

b. By Necessity of Submitting Proposed Indebtedness to Popular Vote. Although in the absence of a constitutional inhibition, the legislature of a state may properly authorize a county to create a debt for a governmental purpose without a submission to a vote of the people,[81] yet it may, and in some states does, require an affirmative vote of the people of the county to authorize the county to borrow money;[82] and in a number of jurisdictions it is expressly provided that no indebtedness or liability shall be incurred by a county in excess of a certain amount or rate without submitting the question of such proposed indebtedness to a popular vote,[83] or unless such incurrence of debt or liability be subsequently

77. Municipal Security Co. *v.* Baker County, 33 Oreg. 338, 54 Pac. 174.

78. Ætna L. Ins. Co. *v.* Lyon County, 44 Fed. 329.

79. Lake County *v.* Standley, 24 Colo. 1, 49 Pac. 23; Perry County *v.* Gardner, 155 Ind. 165, 57 N. E. 908; Johnson *v.* Pawnee County, 7 Okla. 686, 56 Pac. 701; Wilder *v.* Rio Grande County, 41 Fed. 512; Barnard *v.* Knox County, 37 Fed. 563, 2 L. R. A. 426.

Liability for items furnished before funds exhausted.— A county which issued warrants exceeding the constitutional limit of indebtedness is liable for the items thereof that were furnished before the funds were exhausted, notwithstanding all the funds have been paid out on subsequently issued warrants, since the debt was created when the services or goods were furnished. Mountain Grove Bank *v.* Douglas County, 146 Mo. 42, 47 S. W. 944.

80. Custer County *v.* De Lana, 8 Okla. 213, 57 Pac. 162; Johnson *v.* Pawnee County, 7 Okla. 686, 56 Pac. 701; Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

Insufficient proof of issuance of warrants after limit reached.—A contention that county warrants in suit are void because issued after the limit in amount authorized by statute had been passed is not supported by proof that the warrants in suit were issued in the order of the numbers they bear, and that warrants bearing lower numbers than any in suit were issued to an aggregate amount, which still left a margin within which others might legally be issued. Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

81. St. Louis County Ct. *v.* Griswold, 58 Mo. 175; Sinton *v.* Carter County, 23 Fed. 535.

A constitutional prohibition of the loan of their credit by counties to companies or corporations without a vote of the people (Mo. Const. art. 11, § 14) does not affect the constitutionality of a law authorizing a county to create a debt to establish a public park without a vote. St. Louis County Ct. *v.* Griswold, 58 Mo. 175.

82. Strodtman *v.* Menard County, 56 Ill. App. 120; Johnson *v.* Wilson County, 34 Kan. 670, 9 Pac. 384; Doty *v.* Ellsbree, 11 Kan. 209; Theis *v.* Washita County, 9 Okla. 643, 60 Pac. 505.

83. *California.*—Pacific Undertakers *v.* Widber, 113 Cal. 201, 45 Pac. 273; McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231; Shaw *v.* Statler, 74 Cal. 258, 15 Pac. 833; San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641.

Colorado.— People *v.* May, 9 Colo. 414, 15 Pac. 36, 9 Colo. 404, 12 Pac. 838, 9 Colo. 80, 10 Pac. 641.

Georgia.— Dyer *v.* Erwin, 106 Ga. 545, 33 S. E. 63; Butts *v.* Little, 68 Ga. 272; Spann *v.* Webster County, 64 Ga. 498.

Idaho.—Bannock County *v.* Bunting, 4 Ida. 156, 37 Pac. 277.

Kentucky.— O'Mahoney *v.* Bullock, 97 Ky. 774, 31 S. W. 878, 17 Ky. L. Rep. 523; Whaley *v.* Com., 61 S. W. 35, 23 Ky. L. Rep. 1292.

Mississippi.— Monroe County *v.* Strong, 78 Miss. 565, 29 So. 530.

Missouri.— Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206; Gaston *v.* Lamkin, 115 Mo. 20, 31 S. W. 1100; Barnard *v.* Knox County, 105 Mo. 382, 16 S. W. 917, 13 L. R. A. 244; St. Louis, etc., R. Co. *v.* Apperson, 97 Mo. 300, 10 S. W. 478.

Montana.— Tinkel *v.* Griffin, 26 Mont. 426, 68 Pac. 859; Hefferlin *v.* Chambers, 16 Mont. 349, 40 Pac. 787; Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821.

ratified by a submission to popular vote for the purpose of validating the debt or ratifying the liability.[84]

c. By Neeessity of Making Provision For Payment — (i) *In General.* It is sometimes expressly provided by the constitution or statutes that counties incurring indebtedness shall at or before the time of so doing provide for the means of paying the same by the collection of a tax.[85] And when this is the case no vote adopting a proposition involving the borrowing or expending of money is of any effect unless the question submitted provides also for levying a tax to pay the same, and the vote adopt the tax also.[86] It is not, however, requisite that there should be a distinct proposition for levying a tax separate from the question of borrowing.[87] A debt contracted in violation of these provisions is incapable of judicial enforcement.[88]

(ii) *Creating Sinking Fund.* In some states in addition to requiring the proposition of increasing county indebtedness beyond the statutory limit, to be submitted to a popular vote, it is expressly provided that before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax to pay the interest thereon as it falls due, and also to constitute a sinking fund for the payment of the principal within a prescribed time.[89]

3. Right to Enjoin Creation of Debts in Excess of Limits. An injunction will issue at the instance of the taxpayers to restrain the creation of a debt in excess of the limit prescribed by the constitution.[90]

Nebraska.— State *v.* Cherry County, 58 Nebr. 734, 79 N. W. 825.

North Dakota.— State *v.* Getchell, 3 N. D. 243, 55 N. W. 585.

Pennsylvania.— Pike County *v.* Rowland, 94 Pa. St. 238.

Utah.— Fritsch *v.* Salt Lake County, 15 Utah 83, 47 Pac. 1026.

Washington.— Strain *v.* Young, 25 Wash. 578, 66 Pac. 64; Rauch *v.* Chapman, 16 Wash. 568, 48 Pac. 253, 58 Am. St. Rep. 52, 36 L. R. A. 407; Rehmke *v.* Goodwin, 2 Wash. 676, 27 Pac. 473.

United States.— Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060; Dudley *v.* Lake County, 80 Fed. 672, 26 C. C. A. 82.

See 13 Cent. Dig. tit. "Counties," § 218, and *infra*, note 84.

Assent of three fifths of those voting on proposition.— Wash. Const. art. 8, § 6, providing that no county shall become indebted exceeding a certain amount without the assent of three fifths of the voters therein voting at an election to be held for that purpose, only requires the assent of three fifths of those voting on the specific proposition submitted, and not three fifths of the votes cast at the general election at which the general question of the county indebtedness is submitted. Strain *v.* Young, 25 Wash. 578, 66 Pac. 64.

84. State *v.* Getchell, 3 N. D. 243, 55 N. W. 585.

Effect of joinder of indebtedness which cannot be validated with that which may.— Under Wash. Laws (1893), p. 181, § 1, provision is made for the ratification of such invalid county indebtedness only as was incurred prior to March 9, 1893, the date that said act took effect. The joinder in one proposition for submission to the voters for ratification of indebtedness which cannot be validated with that which may be vitiates and renders nugatory the entire proceeding. Under Wash. Laws (1893), p. 181, § 2, a proposition submitted to the voters of a county for the purpose of ratifying its invalid indebtedness is illegal, when it does not specify the dates at or between which the different items of indebtedness were attempted to be incurred. Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318.

85. Citizens' Bank *v.* Jennings, 107 La. 547, 32 So. 66; Schuylkill County *v.* Snyder, 20 Pa. Co. Ct. 649; Keystone Lumber Co. *v.* Bayfield, 94 Wis. 491, 69 N. W. 162.

86. McMillan *v.* Lee County, 3 Iowa 311; Theis *v.* Washita County, 9 Okla. 643, 60 Pac. 505.

87. McMillan *v.* Lee County, 3 Iowa 311; Hamlin *v.* Meadville, 6 Nebr. 227.

88. Citizens' Bank *v.* Jennings, 107 La. 547, 32 So. 66.

89. Howland *v.* San Joaquin County, 109 Cal. 152, 41 Pac. 864; Book *v.* Earl, 87 Mo. 246; State *v.* Gibson, 11 Ohio S. & C. Pl. Dec. 90, 8 Ohio N. P. 367; Mitchell County *v.* City Nat. Bank, 15 Tex. Civ. App. 172, 39 S. W. 628.

Under Tex. Const. art. 11, § 7, providing that no debt shall be incurred by any city or county unless provision is made for a tax to pay the interest thereon, and to provide a sinking fund, a contract made by a county for the building of bridges, to be paid for in county bonds, is void, in the absence of any provision for such a tax. Brazoria County *v.* Youngstown Bridge Co., 80 Fed. 10, 25 C. C. A. 306.

90. Womington *v.* Pierce, 22 Oreg. 606, 30 Pac. 450.

As to injunctions generally see Injunctions.

B. Administration, Appropriation, and Use of County Funds — 1. Division Into General and Special Funds — a. General County Funds. What shall constitute the general fund of a county and what taxes or proportion thereof shall be paid into the same is usually a matter of statutory regulation,[91] as is also the manner in which the same shall be paid out and expended;[92] and county commissioners have no authority to make changes in this respect.[93] With regard to the purpose of creating such fund it may be stated generally that it is created for the purpose of meeting all such expenses as the maintenance and conduct of the necessary business of the county.[94]

b. Special Funds — (i) *Creation.* In some jurisdictions the creation of separate or distinct funds out of the revenues or moneys belonging to the county is held to be unauthorized, and in fact forbidden by statute,[95] even where the purpose of such fund is to provide for the payment of current expenses.[96] In the absence of statutory provisions on this subject, however, there would seem to be no doubt that county boards as the fiscal agents of their counties may direct the

91. People *v.* Washoe County, 1 Nev. 460.

Money not otherwise appropriated belongs to the general fund. San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362.

Two thirds of the poll-tax must be paid into the general fund, and there is no authority for paying it all into the indigent sick fund. People *v.* Washoe County, 1 Nev. 460.

Two thirds of the property tax must be placed in the general fnnd. People *v.* Washoe County, 1 Nev. 460.

Effect of consolidation of several funds in general fund.— Where by statute the fines-and-forfeitures-fund of a county is consolidated with the general county fund, a claim or warrant subsequently drawn which would previously have been paid from the fines-and-forfeitures-fund is payable from such consolidated fund. Mobile County *v.* Powers, 103 Ala. 207, 15 So. 642; Scruggs *v.* Underwood, 54 Ala. 186; Michael *v.* Marengo County, 52 Ala. 159.

92. People *v.* Washoe County, 1 Nev. 460, where it was held that there can be no restraint on the treasurer as to the manner of paying out said fund except that imposed by law.

93. People *v.* Washoe County, 1 Nev. 460; State *v.* Hopkins, 12 Wash. 602, 41 Pac. 906.

Right to enjoin unauthorized appropriation. — If a county board demands an appropriation of money from the general fund for purposes not authorized by law, payment may be enjoined by a taxpayer of the county (Rothrock *v.* Carr, 55 Ind. 334) or by a creditor holding warrants against the general fund (Webster *v.* Fish, 5 Nev. 190).

94. State *v.* Allison, 155 Mo. 325, 56 S. W. 467; State *v.* Hopkins, 12 Wash. 602, 41 Pac. 906.

Payment of county's portion of state tax.— The obligation of the county to pay its portion of the state tax is a liability against the county in its corporate capacity, payable out of the funds received for general county purposes. Northum *v.* Hoyt, 31 Oreg. 524, 49 Pac. 754.

Payment of interest on funding bonds.— Under Nev. Stat. (1873), p. 54, § 9, requiring the treasurer of Lincoln county to draw on the general funds of the county to pay the interest on certain funding bonds, if the special fund provided therefor is insufficient he must pay out of such fund if such contingency occurs, although it is insufficient to meet the current expenses of the county. Odd Fellows Sav., etc., Bank *v.* Quillen, 11 Nev. 109.

Payment of judgment against county.— In determining whether a judgment against a county must be paid from the ordinary revenue, or whether a special tax may be levied for its payment, the character of the original claim may be considered as governing the character of the judgment. Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

Refunding order when taxes erroneously levied or collected.— Where taxes have been imposed for general revenue purposes any unexpended funds in the treasury may be drawn upon to refund taxes erroneously levied and collected. State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59.

Services rendered a county in one year may be paid from the levy of another year. State *v.* Furnas County, 10 Nebr. 361, 6 N. W. 434.

The cost of the construction and repair of roads and bridges may, under Nev. Stat. (1864–1865), 376, relating to the apportionment of county revenues, be properly considered such county expenditures as may be met by moneys in the "general fund." Webster *v.* Fish, 5 Nev. 190.

95. Laforge *v.* Magee, 6 Cal. 285; Montague *v.* Horton, 12 Wis. 599. The latter case was decided in accordance with the law that all money belonging to the county as such, and not coming into its hands in the capacity of trustee, is to be treated as one fund out of which all its liabilities are to be discharged, such intention being evidenced by Wis. Rev. Stat. c. 13, § 129, providing that "county orders properly attested . . . shall be entitled to a preference as to payment according to the order of time in which they may be presented to the county treasurer," etc.

96. Laforge *v.* Magee, 6 Cal. 285.

disposition of the county revenues;[97] and in a number of states express provision is made by statute for the setting apart of special funds for particular purposes.[98]

(II) *Use and Application.* Where special county funds are authorized, and are in fact raised for a particular purpose, they must be applied thereto and cannot be diverted to any other purpose,[99] or transferred to any other fund,[1] unless a surplus remains after satisfying the indebtedness or demands for which the fund was originally created;[2] and, where special funds are authorized and raised for a

97. Laforge *v.* Magee, 6 Cal. 285.

Use of funds voluntarily paid under illegal assessment.— It is not a misappropriation of moneys in the county treasury to devote a sum made up of the taxes voluntarily paid by taxpayers on an assessment under an illegal act to the purpose for which they were so paid. State *v.* Bader, 56 Ohio St. 718, 47 N. E. 564.

98. State *v.* Hortsman, 149 Mo. 290, 50 S. W. 811.

As for instance, for jurors' fees (Allen *v.* Watts, 88 Ala. 497, 7 So. 190; Enloe *v.* Reike, 56 Ala. 500; Com. *v.* Godshaw, 92 Ky. 435, 17 S. W. 737, 13 Ky. L. Rep. 572; Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517); for paying stenographers (Franklin County *v.* McRaven, 67 Ark. 562, 55 S. W. 930); for paying salaries (Esser *v.* Spaulding, 17 Nev. 289, 30 Pac. 896; Spokane, etc., Trust Co. *v.* Lavigne, 14 Wash. 681, 45 Pac. 664); for improving public roads (State *v.* Street, 117 Ala. 203, 23 So. 807); for building bridges (State *v.* Street, 117 Ala. 203, 23 So. 807) or ditches (Hall *v.* State, 54 Nebr. 280, 74 N. W. 590); for paying county commissioners (Enloe *v.* Reike, 56 Ala. 500); for creating fine-and-forfeiture-funds (State *v.* Coleman, 73 Ala. 550; Scruggs *v.* Underwood, 54 Ala. 186); or to pay orders drawn by the superintendent of the poor, and if the funds are wasted or lost to provide others to replace them (Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517).

99. *Alabama.*— Allen *v.* Watts, 88 Ala. 497, 7 So. 190.

Arkansas.— Franklin County *v.* McRaven, 67 Ark. 562, 55 S. W. 930; Lee County *v.* Robertson, 66 Ark. 82, 48 S. W. 901; Gray *v.* Matheny, 66 Ark. 36, 48 S. W. 678.

California.— Power *v.* May, 123 Cal. 147, 55 Pac. 796; Crocker *v.* Wolson, 30 Cal. 663.

Illinois.— Cook County *v.* McCrea, 93 Ill. 236.

Iowa.— Davis *v.* Muscatine County, Morr. 161.

Kansas.— Doty *v.* Ellsbree, 11 Kan. 209.

Nebraska.— Oakley *v.* Valley County, 40 Nebr. 900, 59 N. W. 368; Union Pac. R. Co. *v.* Dawson County, 12 Nebr. 254, 11 N. W. 307.

Ohio.—Jenifer *v.* Hamilton County, 2 Disn. 189.

Oregon.— Northup *v.* Hoyt, 31 Oreg. 524, 49 Pac. 754.

See 13 Cent. Dig. tit. "Counties," § 220.

Rule not altered by submission to arbitration.— County commissioners cannot by a submission to arbitration impose an obligation on the county to disburse a particular fund in a manner or for a purpose prohibited by statute. Jenifer *v.* Hamilton County, 2 Disn. (Ohio) 189.

1. Lee County *v.* Robertson, 66 Ark. 82, 48 S. W. 901; Crocker *v.* Wolson, 30 Cal. 663; State *v.* Hopkins, 12 Wash. 602, 41 Pac. 906.

2. *California.*— Crocker *v.* Wolson, 30 Cal. 663.

Missouri.— State *v.* Appleby, 136 Mo. 408, 37 S. W. 1122.

Nebraska.— Union Pac. R. Co. *v.* Dawson County, 12 Nebr. 254, 11 N. W. 307.

Nevada.— Esser *v.* Spaulding, 17 Nev. 289, 30 Pac. 896.

Tennessee.—Kennedy *v.* Montgomery County, 98 Tenn. 165, 38 S. W. 1075.

Washington.— Spokane, etc., Trust Co. *v.* Lavigne, 14 Wash. 681, 45 Pac. 664.

See 13 Cent. Dig. tit. "Counties," § 220.

Application of excess of road fund to payment for constructing jail.— N. Y. Laws (1898), c. 614, amending the Highway Law so as to authorize county commissioners to apply a balance of a fund not needed to improve a road for which the fund was created to the improvement of a different road, does not preclude the commissioners from appropriating such a balance to pay a debt for constructing a jail. Queens County *v.* Phipps, 35 N. Y. App. Div. 350, 54 N. Y. Suppl. 946.

Borrowing from general funds.— Under Nebr. Comp. Stat. c. 89, art. 1, creating a ditch fund, it is provided that whenever it is necessary the county commissioners are authorized to borrow from the county general funds for the benefit of said ditch fund, but all money so borrowed is to be returned as soon as possible. Hall *v.* State, 54 Nebr. 280, 74 N. W. 590.

No application to balances in funds for which yearly levy required.— In Union Pac. R. Co. *v.* Cheyenne County, (Nebr. 1902) 90 N. W. 917, 918, it was held by the court that "the statute providing for the transfer of an unexpended balance remaining in a fund to the general county fund probably has no application to balances remaining in funds for which, under the statute, a levy is required each year."

Surplus a part of general funds.— The surplus remaining after the object of a levy has been accomplished must be treated as a part of the general funds of the county, and available for general county purposes, notwithstanding Ky. Const. § 180, forbidding the diversion of taxes from the purposes for which they were levied. Field *v.* Stroube, 103 Ky. 114, 44 S. W. 363, 19 Ky. L. Rep. 1751.

particular purpose, their application to the original purpose may be compelled by a taxpayer.[8]

2. Appropriation and Disposition of Funds — a. What Constitutes an Appropriation. An appropriation is to set apart or vote a sum of money to a particular object.[4] There is no appropriation of any part of a common fund until the board by some proper method indicate the specific object to which it is to be applied.[5]

b. Necessity For. It is sometimes expressly provided that unless an appropriation therefor has been previously made no liability shall be incurred,[6] or that no money shall be paid out of the treasury until appropriated by law.[7]

c. By Whom Made. It is the duty of the county board, court, or police jury of a county, as its fiscal agent, to make specific appropriations for the several objects for which the county has to provide,[8] during their term of office, and at the time fixed by law,[9] and as a rule in the exercise of such power they have a reasonable discretion.[10] Where, however, the legislature directs the payment of a certain sum by a county the commissioners of such county have no discretion as to the appropriation of such money.[11] So where the constitution provides for the application of the proceeds of certain taxes to specified objects and in a fixed proportion, the county commissioners cannot make a different appropriation, even

3. Union Pac. R. Co. *v.* Dawson County, 12 Nebr. 254, 11 N. W. 307; Kennedey *v.* Montgomery County, 98 Tenn. 165, 38 S. W. 1075.

Appeal from order diverting funds.— A taxpayer who presents his protest to the quorum court of a county against the diversion of a fund from the purpose for which it was raised may appeal from the order making such appropriation. Lee County *v.* Robertson, 66 Ark. 82, 48 S. W. 901.

4. Pollock *v.* Lawrence County, 19 Fed. Cas. No. 11,255. And see 3 Cyc. 565.

Resolution held to sufficiently indicate appropriation.—Colo. Sess. Laws (1891), p. 111, § 1, requires the county commissioners, by resolution, to appropriate such sums as are necessary for the county expenses for the ensuing year; the resolution to specify the purposes for which the several appropriations are made. The resolution adopted provided that certain amounts were appropriated for the different purposes, one of which was "for ordinary county revenues, 6 mills, $40,446.23." It was held that such appropriation was not so defective as to enable the county to defend an action for the contract-price for the publication of the delinquent tax-list for the year for which the appropriation was made, on the ground that no appropriation was made for such purpose. Beshoar *v.* Las Animas County, 7 Colo. App. 444, 43 Pac. 912.

5. Pollock *v.* Lawrence County, 19 Fed. Cas. No. 11,255.

6. La Plata County *v.* Hampson, 24 Colo. 127, 48 Pac. 1101.

7. Durrett *v.* Buxton, 63 Ark. 397, 39 S. W. 56.

8. State *v.* Lewis, 8 Ohio S. & C. Pl. Dec. 575, 6 Ohio N. P. 198.

Duty of auditors to furnish estimate to board for specific appropriations.— Ohio Rev. Stat. § 1005, requiring the county auditor to furnish the commissioners a detailed estimate of money needed for county purposes, and section 1007, providing that the county commissioners shall make specific appropriations for the several objects for which the county has to provide, being mandatory, the failure of the officers to comply therewith invalidates their acts. State *v.* Lewis, 8 Ohio S. & C. Pl. Dec. 575, 6 Ohio N. P. 198.

Exclusive jurisdiction of county court.—By the Arkansas constitution of 1874 the county court has exclusive original jurisdiction in all matters pertaining to county taxes, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvements and local concerns of the county. *Ex p.* Turner, 40 Ark. 548.

9. State *v.* Halsted, 39 N. J. L. 402.

At the time of making annual tax levy.— La Plata County *v.* Hampson, 24 Colo. 127, 48 Pac. 1101.

10. People *v.* Baker, 29 Barb. (N. Y.) 81.

Appropriation in advance of excess over current expenses.— A police jury has the authority to appropriate the excess of the current expenses of the parish within the ten mills' limit, for the purpose of building a court-house, and can set apart the excess in advance for future collection to pay the instalments due as expressed in the contract. Louisiana, etc., R. Co. *v.* Police Jury, 48 La. Ann. 331, 19 So. 282.

11. Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287; Humboldt County *v.* Churchill County Com'rs, 6 Nev. 30.

Effect of statute applying appropriated fund to payment of past indebtedness.— A statute directing certain funds, then in the hands of the county treasurer, which were appropriated for building a court-house, to be applied in payment of the past indebtedness of the county, did not prevent the county treasurer from paying a warrant drawn for money due for building the court-house. Its effect was to place all the past indebtedness of the county, whether contracted for build-

though the same be authorized by statute.[12] When the appropriation has once been made the control of the county board or court is exhausted, and the duty of making the actual disbursement as a rule rests upon the county treasurer,[13] and should there be funds in the hands of a county treasurer which he should transfer to the county commissioners for disbursement, the proper method of obtaining such funds is by mandamus; and the board cannot maintain an action against the treasurer to compel distribution among the different departments of the county government.[14]

d. Limitations Upon Appropriations — (I) *As to Purpose.* In the absence of statutory authority so to do appropriations cannot be made from the funds of a county for other than county purposes.[15] A state legislature may, however, in the absence of constitutional restrictions,[16] authorize appropriations from a county fund for other than strictly county purposes, as for instance by an act authorizing appropriations in aid of charitable organizations[17] or agricultural societies,[18] or to pay for bounties for volunteers or substitutes required to satisfy the quota of troops assigned to be raised by a county[19] or for the protection and maintenance of the families of volunteers during their continuance in the armies of the United States, etc.[20]

(II) *Excessive Appropriations.* The permission given to eke out the deficiencies of one appropriation from the surplus of another when estimates

ing a court-house or otherwise, upon the same footing. Marco *v.* County Treasurer, 4 S. C. 96.

12. Forsyth County *v.* Forsyth County, 127 N. C. 263, 37 S. E. 261.

13. State *v.* Hortsman, 149 Mo. 290, 50 S. W. 811.

Right of commissioners to gross sum from county treasurer.— County commissioners have no right to demand and receive of the county treasurer a sum of money in gross; their duty is simply to audit legal demands upon the county and certify the same to the county treasurer for payment. The county treasurer is the legal custodian of the county funds, and the duty of disbursing the same is on him. Fairfield County *v.* Winnsboro Nat. Bank, 7 S. C. 78.

14. Sanders *v.* Colleton County Com'rs, 7 S. C. 359; Fairfield County *v.* Winnsboro Bank, 7 S. C. 78.

15. Perry *v.* Kinnear, 42 Ill. 160; Warren County Agricultural Joint Stock Co. *v.* Barr, 55 Ind. 30; Davis *v.* Ontonagon County, 64 Mich. 404, 31 N. W. 405; Paxton *v.* Arthur, 60 Miss. 832. And see Shelby County *v.* Tennessee Centennial Exposition Co., 96 Tenn. 653, 36 S. W. 694, 33 L. R. A. 717.

Erection of school building.— A county board cannot make an appropriation of any sum out of the general county fund for the erection of a school building. Rothrock *v.* Carr, 55 Ind. 334.

16. By N. Y. Const. art. 8, § 10, it is expressly provided that "no county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law." Matter of Greene, 55 N. Y. App. Div. 475, 481, 67 N. Y. Suppl. 291.

17. Lund *v.* Chippewa County, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131. In Lexington Orphan Soc. *v.* Fayette County, 6 Bush (Ky.) 413, it was held that the authority given to county courts to purchase land and establish poor-houses is not compulsive, and could not constructively abolish the power to provide for the poor in other modes, and that such court might rightfully contribute to aid in extending a building erected by the Lexington Orphan Society to accommodate a portion of the poor of the county who would not otherwise be provided for as well or at all. See, however, *In re* Northern Home for Friendless Children, 11 Phila. (Pa.) 192, 33 Leg. Int. (Pa.) 83, where it was held that the Pennsylvania act of April 12, 1875, making it the duty of county courts to appropriate money to aid the homes for friendless children, was of doubtful constitutionality, and hence such duty would not be enforced by the courts.

18. Nemaha Fair Assoc. *v.* Myers, 44 Kan. 132, 24 Pac. 71.

19. Young *v.* Franklin County, 25 Ind. 295; King *v.* Course, 25 Ind. 202; Miami County *v.* Bearss, 25 Ind. 110; Oliver *v.* Keightley, 24 Ind. 514; Coffman *v.* Keightley, 24 Ind. 509.

Appropriations to reimburse for voluntary contributions made by private citizens previous to such appropriations, for the same objects, are not within the curative statute of 1865, and are void. Miami County *v.* Bearss, 25 Ind. 110; Oliver *v.* Keightley, 24 Ind. 514.

20. Adams County *v.* Mertz, 27 Ind. 103.

have proved erroneous does not relieve from the duty of making an honest estimate of the probable expenditures necessary for the several items designated, or give the right to a board to make an excessive appropriation for one class of expenditure.[21] Nor can a board make a levy for a certain fund in excess of the amount required for the year in which the levy was made with the purpose of transferring the balance to the general fund.[22]

e. Power to Enjoin Unlawful Appropriation or Disposition of Funds. A court of equity has power to prevent the unlawful appropriation or disposition of the funds belonging to the county,[23] or to compel the restoration of the same.[24]

3. Collection and Custody of Funds — a. In General. Although county commissioners must see to the collection of the debts due the county, as well as provide for the payment of those which it owes, yet in the performance of these duties they have a wide discretion and are not bound to sue a debtor of the county where they know that nothing can be recovered.[25] In some jurisdictions it is held that a county treasurer is an officer who acts on his own responsibility, and independently of the board of commissioners of the county so far as the keeping of the funds of the state and county is concerned, that he is the proper custodian of such funds, and that the board of commissioners has no legal authority to direct him as to where or in what manner the same shall be kept.[26] In other states, however, the power of designating the bank in which the county funds shall be deposited is given to other officers of the county, as for instance to the board of county commissioners,[27] to the board of auditors,[28] or to such board

21. Paterson *v* Passaic County, 56 N. J. L. 459, 29 Atl. 331.

22. Union Pac. R. Co. *v.* Cheyenne County, (Nebr. 1902) 90 N. W. 917.

23. *California.*— Johnston *v.* Sacramento County, 137 Cal. 204, 69 Pac. 962.

Georgia.— Mitchell *v.* Lasseter, 114 Ga. 275, 40 S. E. 287.

Indiana.— Harney *v.* Indianapolis, etc., R. Co., 32 Ind. 244.

Iowa.— Snyder *v.* Foster, 77 Iowa 638, 42 N. W. 506.

Nebraska.—Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941.

New York.— Govers *v.* Westchester County, 55 N. Y. App. Div. 40, 67 N. Y. Suppl. 27.

Ohio.— State *v.* Cuyahoga County, 9 Ohio S. & C. Pl. Dec. 76, 6 Ohio N. P. 405.

Oregon.— Burness *v.* Multnomah County, 37 Oreg. 460, 60 Pac. 1005.

Pennsylvania.— Bennett *v.* Norton, 7 Kulp 443.

See 13 Cent. Dig. tit. "Counties," § 308; and, generally, Injunctions.

A taxpayer may interfere by injunction where county commissioners, acting in their official capacity, are being misled, or are about to be misled, into unlawfully paying out public money. State *v.* Cuyahoga County, 9 Ohio S. & C. Pl. Dec. 76.

24. Bailey *v.* Strachan, 76 Minn. 526, 80 N. W. 694; Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460.

25. Schwamble *v.* Sheriff, 22 Pa. St. 18; Com. *v.* Curren, 2 Chest. Co. Rep. (Pa.) 393.

Collection by execution.— Upon the refusal of a banker to pay over money which had been "collected for any county purpose whatever," and deposited with him by the county treasurer or tax-collector, the ordinary or other proper county authorities may issue execution against the banker for the purpose of obtaining from him the amount thus placed in his hands. Hobbs *v.* Dougherty County, 98 Ga. 574, 25 S. E. 579.

26. Halbert *v.* State, 22 Ind. 125; State *v.* Whipple, 60 Nebr. 650, 83 N. W. 921.

Effect of indorsement to treasurer of certificate of deposit.— Where a sheriff of a county indorses a bank certificate of deposit to a county treasurer as part of the county funds, the latter is not merely the custodian of such funds but the certificate becomes the property of the county as soon as received by him. Iredell County *v.* Wasson, 82 N. C. 308.

27. Medicine Lodge First Nat. Bank *v.* Peck, 43 Kan. 643, 23 Pac. 1077.

28. Meeker County *v.* Butler, 25 Minn. 363; Stillwater First Nat. Bank *v.* Shepard, 22 Minn. 196.

Necessity for bond by depositary.— Under Minn. Gen. Stat. (1878), § 150, a board of county auditors may designate the depositary for county funds before a bond has been filed by such depositary, but such designation does not become operative so as to authorize a deposit of such funds in pursuance thereof until the required bond is furnished and approved by the board of county commissioners. Meeker County *v.* Butler, 25 Minn. 363.

Warrant as condition precedent to making deposit.— The warrant of a county auditor required by statute as a condition precedent to deposits in the county treasury is not a muniment or condition of title in the county, but merely an element in the statutory system of bookkeeping devised for the protection of the county, and therefore the transfer of a banker's certificate of deposit in a mode otherwise sufficient to pass the property therein to the county, will not be avoided by

and the treasurer together.[29] Where this power of designation is given it is valid and binding only during the term of the officer or officers to whom it is given, or at most until their successors are qualified and enter upon their duties,[30] and no contract can be entered into binding the hands of the successors of such officers.[31]

b. Actions Against Insolvent Depositary. A county treasurer being merely a custodian or trustee of public moneys coming into his hands by nature of his office, if he deposits such funds with one who knows their trust character, and the latter afterward becomes insolvent, the county may sue to impress a trust on the insolvent estate.[32] The debt of a depositary of county funds is to the county and not to the state, and when such depositary fails, it is not proper for the state to bring an action against the depositary's assignee to recover them and claim a preference under an act, providing that debts due the state from an insolvent shall be preferred.[33]

4. Loan of Funds — a. Power to Make. In some states the loan of county funds either with or without interest is forbidden.[34] In a number of the states, however, counties are authorized to make loans of surplus county funds through their boards,[35] or agents appointed by the latter,[36] and under such reasonable rules and restrictions as such boards may see proper to impose.[37]

b. Power to Take and Foreclose Mortgages. Counties when authorized to loan money from their funds may also take a mortgage to secure the loan and

its deposit in the county treasury without the authority of such warrant. Shanklin *v.* Madison County Com'rs, 21 Ohio St. 575.

29. City Sav. Bank *v.* Huebner, 84 Mich. 391, 47 N. W. 690, where it was held that such designation should be as soon as may be convenient after the new treasurer qualifies and enters upon his duties, and that until a new depositary is so designated it is the duty of the treasurer to deposit the public funds with the existing depositary or depositaries.

30. City Sav. Bank *v.* Huebner, 84 Mich. 391, 47 N. W. 690.

31. Medicine Lodge First Nat, Bank *v.* Peck, 43 Kan. 643, 23 Pac. 1077; City Sav. Bank *v.* Huebner, 84 Mich. 391, 47 N. W. 690.

No power to contract for definite time.— No authority is given by Kan. Laws (1889), c. 189, to the board of county commissioners to designate a bank or banks for the deposit of the public moneys for a definite period of time; nor can the board make any order, or make any contract with the depository that will prevent the designation of a different depository whenever the board in its discretion determines that the public interest will be best subserved by such a change. Medicine Lodge First Nat. Bank *v.* Peck, 43 Kan. 643, 23 Pac. 1077.

32. State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226.

County not entitled to preference over other depositors.— Where a bank in which county funds are deposited fails, the county, in the absence of any legal right of preference in such cases, must stand on an equal footing with other depositors, and is not entitled to a lien on the assets in preference to the individual depositors. Glynn County *v.* Brunswick Terminal Co., 101 Ga. 244, 28 S. E. 604, where it was further held that if there is such a thing as prerogative right of preference on the part of the state, it cannot be divided among the counties of which the state is composed.

33. State *v.* Wilson, 77 Mo. 633; State *v.* Rubey, 77 Mo. 610.

34. Moulton *v.* McLean, 5 Colo. App. 454, 39 Pac. 78; State *v.* Rubey, 77 Mo. 610; Allibone *v.* Ames, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585.

A general deposit is not a loan within a statutory inhibition of loans of county funds. Moulton *v.* McLean, 5 Colo. App. 454, 39 Pac. 78; State *v.* Rubey, 77 Mo. 610; Allibone *v.* Ames, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585.

35. Kitchens *v.* Greene County Com'rs, 5 Ill. 485; Halstead *v.* Lake County, 56 Ind. 363; Emmet County *v.* Skinner, 48 Iowa 244; Haynes *v.* Covington, 13 Sm. & M. (Miss.) 408.

36. Kitchens *v.* Greene County Com'rs, 5 Ill. 485.

Loans by ex officio trustees of fund.— Under Ind. Rev. Stat. (1881), § 3784, the clerk, auditor, and recorder of the county are *ex officio* trustees of the county library, and as such trustees they are authorized by section 3788 to loan the surplus library fund for any term not exceeding five years with seven per cent interest, payable annually in advance. Traylor *v.* Dykins, 91 Ind. 229.

37. Emmet County *v.* Skinner, 48 Iowa 244.

Investment of funds pending litigation.— A state legislature may authorize a county to loan funds collected for the payment of interest on bonds, pending litigation as to the validity of such bonds, provided no contract be made which will tie up such funds and keep them out of the reach of the bondholders after the conclusion of the litigation. George *v.* Ralls County, 8 Fed. 647, 3 McCrary 181.

may enforce the same by the ordinary legal proceedings.[38] In some jurisdictions a county holding a mortgage on lands as a security for a loan of county funds cannot buy in such lands at the mortgage sale.[39] Nor, as it has been sometimes held, can the county authorities buy in for the use of the school fund an outstanding tax-title for the purpose of defeating the lien of a mortgage held by a third party which is prior to one existing on the same land in favor of the fund.[40]

c. Repayment of Loans. Under a statute making all debts due a county payable in county scrip or warrants a debt for money loaned by the county is payable in the same, and a tender of the amount due in county scrip or warrants is good.[41] Where a borrower of county funds has repaid the same and the money has actually reached the treasury of the county, the payment is complete, and he cannot be again held liable on the ground that the payment was not made to the proper officer.[42]

5. Adjustment of Accounts — a. With State — (i) *Payment of Moneys Into State Treasury.*[43] Taxes levied and collected for state purposes must be paid

38. *Indiana.*— Slaughter *v.* State, 132 Ind. 465, 31 N. E. 1112; Traylor *v.* Dykins, 91 Ind. 229.

Iowa.— Miller *v.* Gregg, 26 Iowa 75.

Missouri.— Walters *v.* Brooks, 115 Mo. 534, 22 S. W. 514; Walters *v.* Senf, 115 Mo. 524, 22 S. W. 511; Mitchell *v.* Nodaway County, 80 Mo. 257; Linville *v.* Bohanan, 60 Mo. 554; Holt County *v.* Harmon, 59 Mo. 165; Lincoln County *v.* McLellan, 3 Mo. App. 312.

New York.— Sherman *v.* Dodge, 6 Johns. Ch. 107.

Pennsylvania.— Vankirk *v.* Clark, 16 Serg. & R. 286.

United States.— Alexander *v.* Knox, 1 Fed. Cas. No. 170, 6 Sawy. 54.

See 13 Cent. Dig. tit. "Counties," § 225.

A circuit court has jurisdiction over proceedings for the foreclosure of a mortgage held by a county. Lincoln County *v.* McLellan, 3 Mo. App. 312.

Effect of defective advertisement of sale.— Where, under the New York act of April 18, 1786, loans of money were made by county loan officers, and the advertisements of sale on default in payment were not posted in the manner provided in the act, and did not correctly describe the land as to quantity and situation, the sale will be set aside. Sherman *v* Dodge, 6 Johns. Ch. (N. Y.) 107.

Foreclosure by ex officio trustees of fund.— The auditor, clerk, and recorder of a county being, under Ind. Rev. Stat. (1881), § 3784, *ex officio* trustees of the county library, they may sue in their own names to foreclose a mortgage taken to secure the loan of library funds. Traylor *v.* Dykins, 91 Ind. 229.

Purchase of mortgage.— Where the board of commissioners of a county, in regular session, as a loan of money, lying idle, belonging to a fund of such county to be used for building purposes, purchase and take an assignment of a mortgage on real estate, such transaction is not rendered void because no record thereof has been made. Halstead *v.* Lake County, 56 Ind. 363.

Satisfaction of mortgage by auditor without payment to treasurer.—Where the amount due on a school-fund mortgage was paid to the county auditor, who appropriated the same to his own use, and never paid any part of the same into the treasury of the county, a purchaser, in good faith, of the land, who paid full value therefor without any knowledge whatever that the loan had not in fact been paid, had a right to rely upon the satisfaction of said mortgage as it appeared in the recorder's office, without an examination of the offices of the treasurer and auditor. Finding the school-fund mortgage satisfied by the proper county officers, the only persons who could satisfy the same, the purchaser had the right to presume, without looking further, that the county auditor had proceeded regularly, and that the mortgage debt had in fact been paid to the county treasurer before said satisfaction was entered. Slaughter *v.* State, 132 Ind. 465, 31 N. E. 1112.

39. Holt County *v.* Harmon, 59 Mo. 165; Ray County *v.* Bentley, 49 Mo. 236.

No application to mortgage to secure price of swamp lands.— Under the Missouri act of Feb. 28, 1885, and various previous acts, the absolute title to swamp lands in the different counties was vested in them respectively, and where purchased of the county with a mortgage to secure the purchase-money, the county has the right to buy them in equally as in the case of a purchase by a private mortgagee. Such a purchase is not to be confounded with the purchase of lands, such as state school lands, to which the counties never had a title. Mitchell *v.* Nodaway County, 80 Mo. 257; Linville *v.* Bohanan, 60 Mo. 554.

40. Miller *v.* Gregg, 26 Iowa 75.

41. White *v.* State, (Ark. 1889) 11 S. W. 765.

42. Poweshiek County *v.* Allen, 90 Iowa 195, 57 N. W. 706.

43. All money raised by legislative authority upon a county's credit, and for which its corporate bonds had been issued and sold to *bona fide* purchasers, belong to the county, although the amount realized may be in excess of the amount necessary to accomplish the purpose contemplated by the legislative authorization. Such excess is not the property of the state or recoverable for, or pay-

into the state treasury[44] without any deductions for commissions or other charges,[45] unless provision is made for such deduction or allowance,[46] and a county in an action for such taxes by the state through the auditor-general cannot set up by way of a counter-claim a demand of its own against the state.[47] Nor can a county treasurer justify his act in withholding from the state treasury the amount received by him for a state tax, on the ground that the statute imposing the tax in question was void as being in violation of a constitutional provision, and that he is under obligation to refund the moneys collected to the taxpayers.[48]

(II) *Duty of County Board to Make Prompt Apportionment.* When a statement of account between a county and the state, showing a debt from the former to the latter, is correctly and regularly made, and the ascertained amount is seasonably certified in due form to the clerk, it is the duty of the county board to at once make the proper apportionment upon the taxable property in the county.[49]

(III) *When State Entitled to Interest.* Interest charges by a state to the several counties have been held proper upon taxes charged back to the county and upon items erroneously credited to the county and thereafter charged back,[50]

able into, the state treasury. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

In Indiana the docket-fees taxed to the losing party are to be paid by the clerk into the county treasury, and paid over to the state as her property by the county treasurer. State *v.* Newton County, 66 Ind. 216.

In Pennsylvania all fees receivable by officers of counties containing over one hundred and fifty thousand inhabitants belong to the respective counties, except such fees as are levied by the state. Com. *v.* Allegheny County, 168 Pa. St. 303, 31 Atl. 1061, 36 Wkly. Notes Cas. 303; Com. *v.* Mann, 168 Pa. St. 290, 31 Atl. 1003, 36 Wkly. Notes Cas. 297.

44. *Idaho.*— Cunningham *v.* Moody, 3 Ida. 125, 28 Pac. 395.

Michigan.— People *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847.

New York.—People *v.* Williams, 3 Thomps. & C. 338.

Pennsylvania.— Schuylkill *v.* Com., 36 Pa. St. 524.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

Negligence or default of officer.— The county is not relieved from liability for its quota of taxes, because of the negligence of its officers in failing to collect them. State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451. But *compare* Territory *v.* Bashford, (Ariz. 1887) 12 Pac. 671, holding that where on the default of a county treasurer there is a shortage of moneys collected both for the county and the territory, such shortage is to be apportioned according to the amount each is entitled to receive from the taxes collected.

Insufficiency of officer's bond.— A county's liability is not in any way affected by the insufficiency of the bond taken from the county treasurer, or the failure of the state treasurer to charge on his books against the county the amount remaining unpaid. Schuylkill County *v.* Com., 36 Pa. St. 524.

45. Cunningham *v.* Moody, 3 Ida. 125, 28 Pac. 395. See also Bartholomew County *v.* State, 116 Ind. 329, 19 N. E. 173, where it was held that a judgment of the board of commissioners rejecting a claim filed by a township trustee asking the board to pay into the county treasury, to the credit of the township, school funds unlawfully diverted to the payment of attorney's fees, is not a bar to an action by the state to compel the board to make good the amount so unlawfully diverted.

Settlement between officers and commissioners no bar.— A settlement between the board of commissioners and a county officer does not preclude the state from maintaining an action to recover school funds unlawfully paid to such officer. Jackson County *v.* State, 106 Ind. 270, 6 N. E. 623.

46. In Schuylkill County *v.* Com., 36 Pa. St. 524, 535, it was held that if a county's quota of the state tax be not paid by a certain time "the amount remaining unpaid, after deducting such commissions as are or shall be allowed by law for the collection of the same, shall be charged against said county," etc.

Allowance by state to county for collecting tax.— Nev. Stat. (1885), p. 85, § 21, provides that "the state shall allow the several counties, for services rendered, under the revenue act, by the auditor, assessor and treasurer of each county, a sum which shall be the proportion of the state tax to the whole tax levied by the county on the basis of the salaries allowed." The object of such section is to allow each county the stated proportion of the necessary expense it might incur in collecting the state and county tax and no more. State *v.* La Grave, 24 Nev. 147, 50 Pac. 796.

47. People *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847.

48. People *v.* Williams, 3 Thomps. & C. (N. Y.) 338.

49. People *v.* Jackson County, 24 Mich. 237.

50. Aplin *v.* Shiawassee County, 74 Mich. 536, 42 N. W. 143.

upon moneys paid for the use of the county for the benefit of the deaf and dumb,[51] and upon annual balances due from the county to the state.[52]

(IV) *Right of State to Withhold Funds of Indebted County.* A state may withhold the amount due a county on account of funds collected by the state for the several townships of such county, so long as the latter is shown to be indebted to the state.[53]

(V) *Recovery Back of Money Paid State.* In Indiana it is provided by statute that whenever it appears to the board doing county business in any county that improper or erroneous payments have been made by the county treasurer to the state treasurer, the county auditor is required, under the order and direction of the county board, to certify, under his seal of office, such improper or erroneous payments to the auditor of state, whose duty it is to audit and allow the same as a claim against the state treasurer, and he is required to pay such claim out of any money not otherwise appropriated.[54]

b. With Other Municipalities — (I) *Another County.* It has been held in one jurisdiction that a county that has illegally collected taxes in another county is liable for such money to the individuals from whom it was collected, but not to the county itself.[55] In another jurisdiction it has been held that where taxes are paid to the wrong county, it is liable therefor to the county to which they rightfully belong.[56] Under a statute conferring authority on county boards "to make such orders concerning the corporate property of the county as they may deem expedient," to "settle and allow all accounts, demands, or causes of action against the county," and to "have the care of the county property, and the management of the business and concerns of the county, in all cases," the respective county boards of two counties which have been created out of one county have authority to agree that tax certificates held by the old county shall be retained by it in settlement of claims which it has against the new one.[57]

(II) *Towns, Townships, or Villages.* Where taxes due a town, township, or village are by virtue of statute collected by the county treasurer, the county is liable to the township therefor when the treasurer refuses to pay them over.[58] A statute providing for the adjustment of certain taxes between townships and counties, wherein only a part of the territory is organized into townships, has no application to such municipal corporations as cities, towns, or villages.[59] A town-

51. Aplin *v.* Shiawassee County, 74 Mich. 536, 42 N. W. 143.

52. Auditor-Gen. *v.* Ottawa County, 76 Mich. 295, 42 N. W. 1101; Aplin *v.* Shiawassee County, 74 Mich. 536, 42 N. W. 143.

53. Ottawa County *v.* Alpin, 69 Mich. 1, 36 N. W. 702.

Contra, as to drainage fund from sale of swamp lands.— Where a county was indebted to the state for its proportion of taxes, and the state treasurer had in his possession moneys appropriated to the county, as part of the drainage fund arising from the sale of swamp lands, it was held that the treasurer could not retain the money in his hands to pay the county indebtedness to the state. The proceeds of the sales of the swamp and overflowed lands cannot be diverted from the purposes of the grant by the state authorities, under the constitution of the state, and the act of congress granting the lands. State *v.* Hastings, 11 Wis. 448. See also State *v.* Slavan, 11 Wis. 153.

54. Wolfe *v.* State, 90 Ind. 16.

55. Grant County *v.* Delaware County, 4 Blackf. (Ind.) 256, and a statute passed subsequently to the collection, directing the county by whom the same was made to pay the money to the other, cannot affect the rights or liabilities of the parties.

56. Humboldt County *v.* Lander County, 24 Nev. 461, 56 Pac. 228.

57. Hall *v.* Baker, 74 Wis. 118, 123, 42 N. W. 104.

58. White Sulphur Springs *v.* Pierce, 21 Mont. 130, 53 Pac. 103; Potter County *v.* Oswago Tp., 47 Pa. St. 162. And see Oneida *v.* Madison County, 136 N. Y. 269, 32 N. E. 852.

Mandamus lies by the trustee of a township to compel the auditor to issue a warrant for money apportioned to his township. Manor *v.* State, 149 Ind. 310, 49 N. E. 160.

Retention of delinquent taxes due county. — A county treasurer, required to pay all moneys shown by it to be due the township to the proper receiving officer, has no right to retain, out of money due a city, a sum equal to the delinquent personal taxes due the county, for collection of which he has issued his warrant to the city treasurer whose duty it is to collect them. Muskegon *v.* Soderberg, 111 Mich. 559, 69 N. W. 1116.

59. Parkston *v.* Hutchinson County, 10 S. D. 294, 73 N. W. 76.

ship which has suffered a loss of its funds by the defalcation of the county treasurer is entitled to its proportion of a sum recovered on his bond, but it cannot maintain an action therefor against the county unless its share has actually been covered into the county treasury to the credit of the general fund.[60] If township school-money be wrongfully paid out by the county court no claim arises for reimbursement from the county treasury. The court in managing the township fund does not represent the county, which has no responsibility in the matter.[61]

(III) *CITY.* Where a county treasurer who is also treasurer of a city mingles and keeps together the moneys of the two corporations, and a deficit occurs during his term of office, the moneys so commingled belong to the two corporations *pro rata.*[62] Where a city tax-collector, whose statutory duty was to pay over the taxes collected to the city and county treasurers, has paid to the county treasurer a sum he should have paid to the city treasurer, and the county treasurer retained custody of such sum in his official capacity, mandamus will lie to recover such sum, and the collector may proceed in his own name.[63] In Ohio the councils of cities of a certain grade and class are authorized by statute to demand and receive one half of the bridge tax collected upon the property within such cities.[64] Where a statute provides that certain damages caused by laying out roads or streets in cities or boroughs of a certain county shall be paid from the county treasury, the city is primarily liable regardless of further provisions as to the liability of the city to the county, and the property holder must resort to the county treasury and the county to the city, and the question of the city's liability can be raised only in a proceeding between the county and city.[65]

6. REPORTS AS TO COUNTY FINANCES. In some states the county commissioners are required by statute to make annually a detailed report in writing of their financial transactions during the year next preceding the time of making such report,[66] showing the date, amount, for what, and to whom each payment of money from the public funds was made.[67]

C. Aid to Corporations and Investments in Stock — 1. RIGHTS OF COUNTIES IN GENERAL. Although a county having no inherent right of legislation cannot aid public improvements by making appropriations or by subscribing for stock in the same, unless authorized to do so by the legislature, either expressly or by implication,[68] yet the legislatures of the various states have the right, unless restrained by the organic law of the state,[69] and within the limits thereby

60. Vigo Tp. *v.* Knox County, 111 Ind. 170, 12 N. E. 305. See also Guittard *v.* Marshall County Com'rs, 4 Kan. 388, holding that where a county collects taxes for the towns within its limits it is not liable to them for their *pro rata* share, until the taxes are paid into the county treasury.

61. Township Bd. of Education *v.* Boyd, 58 Mo. 276.

62. Clark County Com'rs *v.* Springfield, 36 Ohio St. 643.

63. Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657.

64. State *v.* Board of County Com'rs, 6 Ohio S. & C. Pl. Dec. 225.

65. Lancaster County *v.* Frey, 128 Pa. St. 593, 18 Atl. 478, 24 Wkly. Notes Cas. (Pa.) 568.

66. State *v.* Washington County, 56 Ohio St. 631, 47 N. E. 565; State *v.* Preble County, 6 Ohio S. & C. Pl. Dec. 268, 4 Ohio N. P. 177; State *v.* Gage, 2 Ohio S. & C. Pl. Dec. 613; Schuylkill County *v.* Snyder, 20 Pa. Co. Ct. 649.

67. State *v.* Gage, 2 Ohio S. & C. Pl. Dec. 613.

68. *Arkansas.*— Hancock *v.* Chicot County, 32 Ark. 575; English *v.* Chicot County, 26 Ark. 454.

Florida.— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362; Jefferson County *v.* Lewis, 20 Fla. 980.

Illinois.— Choisser *v.* People, 140 Ill. 21, 29 N. E. 546; Colton *v.* Hanchett, 13 Ill. 615.

Indiana.— Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226; Delaware County *v.* McClintock, 51 Ind. 325; Harney *v.* Indianapolis, etc., R. Co., 32 Ind. 244.

Iowa.— State *v.* Wapello County, 13 Iowa 388; Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Maryland.— Baltimore, etc., R. Co. *v.* Pumphrey, 74 Md. 86, 21 Atl. 559.

United States.— Thompson *v.* Lee County, 3 Wall. 327, 18 L. ed. 177.

See 13 Cent. Dig. tit. "Counties," § 228.

69. Reineman *v.* Covington, etc., R. Co., 7 Nebr. 310.

Prohibition of donations.— In some jurisdictions the state legislature has no power to

imposed,[70] to authorize counties to aid in the construction of railroads or other works of internal improvement, by appropriations, donations, or subscriptions to stock,[71] to borrow the money necessary for such purpose, and to levy taxes to

authorize donations by counties to railroads and such donations are absolutely void. Colorado Cent. R. Co. *v.* Lea, 5 Colo. 192; Ellis *v.* Northern Pac. R. Co., 77 Wis. 114, 45 N. W. 811; Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543; Whiting *v.* Sheboygan, etc., R. Co., 25 Wis. 167, 3 Am. Rep. 30.

Not within prohibitions of donations.—In Wisconsin a distinction is made between the case of donations of money or property to a railroad company and subscriptions to its stock and payment in money or bonds, and such subscriptions may be authorized by the legislature, notwithstanding the prohibitions of donations of money or credit. Ellis *v.* Northern Pac. R. Co., 77 Wis. 114, 45 N. W. 811; Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543; Single *v.* Marathon County Sup'rs, 38 Wis. 363; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

Prohibition of gift of money or property or loan of money or credit.— In a number of the states the constitution expressly provides that no county can be authorized to give any money or property or to loan its money or credit to or in aid of any individual, association, or corporation, etc.

Alabama.— Garland *v.* Board of Revenue, 87 Ala. 223, 6 So. 402.

New York.— *In re* Greene, 166 N. Y. 485, 60 N. E. 183 [*affirming* 55 N. Y. App. Div. 475, 67 N. Y. Suppl. 291].

Ohio.— Taylor *v.* Ross County Com'rs, 23 Ohio St. 22; Delaware County Com'rs *v.* Andrews, 18 Ohio St. 49.

Pennsylvania.— Wilkesbarre City Hospital *v.* Luzerne County, 84 Pa. St. 55.

Washington.— Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

Prohibition as to stock-holding.— In addition to the provisions above mentioned the constitutions of some states also prohibit a county from becoming a stock-holder either directly or indirectly in any association, company, or corporation. McClure *v.* Owen, 26 Iowa 243; State *v.* Wapello, 13 Iowa 388 [*overruling* Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene (Iowa) 1, and *approving* Stokes *v.* Scott County, 10 Iowa 166]; Whitney *v.* Kentucky Midland R. Co., 110 Ky. 955, 63 S. W. 24, 23 Ky. L. Rep. 472; Municipal Security Co. *v.* Baker County, 39 Oreg. 396, 65 Pac. 369; Wilkesbarre City Hospital *v.* Luzerne, 84 Pa. St. 55; Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817. See also Jefferson County *v.* Burlington, etc., R. Co., 66 Iowa 385, 16 N. W. 561, 23 N. W. 899.

In Iowa although, as has been seen, a county is prohibited from becoming a stockholder, this does not apparently affect the right of a county to vote a tax to aid in its construction (Harwood, etc., R. Co. *v.* Case, 37 Iowa 692) or to convey its swamp lands to a railroad company in aid of the construction of its road upon submitting the question to a popular vote (Cedar Rapids, etc., R. Co. *v.* Boone County, 34 Iowa 45).

A conveyance of land by a county to a railroad company in consideration of one dollar and the construction of a road through the county, and building of wharves, etc., is a sale and not a donation. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873 [*affirming* 42 Fed. 734].

Surrender of shares of a railroad company which are owned by the county constitutes a donation. Colorado Cent. R. Co. *v.* Lea, 5 Colo. 192.

70. As for instance the limits imposed by the constitution upon the amount of the subscription or donation. Reineman *v.* Covington, etc., R. Co., 7 Nebr. 310. See also Hedges *v.* Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. ed. 1044 [*affirming* 37 Fed. 204].

Application to single subscriptions only.— Where a state law confers a general power on a county to subscribe to the stock of any railroad in the state for any amount not exceeding one hundred thousand dollars, the county may subscribe to the stock of two or more railroads one hundred thousand dollars to each. Chicot County *v.* Lewis, 103 U. S. 164, 26 L. ed. 495.

Interest due on previous unpaid donations in aid of works of internal improvement should not be considered in determining whether the amount of such donations exceed the constitutional limitation. Jones *v.* Hurlburt, 13 Nebr. 125, 13 N. W. 5.

The limitation imposed by the Nebraska constitution applies only to indebtedness to aid in construction of works of internal improvement. Bridges built by a county on its highways and wholly within the county are not such works. De Clerq *v.* Hager, 12 Nebr. 185, 10 N. W. 697.

71. *California.*— Robinson *v.* Bidwell, 22 Cal. 379; Pattison *v.* Yuba County, 13 Cal. 175.

Florida.— Cotten *v.* Leon County Com'rs, 6 Fla. 610.

Illinois.— Scates *v.* King, 110 Ill. 456; Prettyman *v.* Tazewell County Sup'rs, 19 Ill. 406, 71 Am. Dec. 230.

Indiana.— Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185.

Kansas.—Morris *v.* Morris County Com'rs, 7 Kan. 576; State *v.* Nemaha County Com'rs, 7 Kan. 542; Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.— Allison *v.* Louisville, etc., R. Co., 9 Bush 247; Shelby County Ct. *v.* Cumberland, etc., R. Co., 8 Bush 209.

Missouri.— Spurlock *v.* Missouri Pac. R. Co., 90 Mo. 199, 2 S. W. 219; Osage Valley, etc., R. Co. *v.* Morgan County Ct., 53 Mo. 156; St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485.

Nebraska.— State *v.* Babcock, 19 Nebr. 230,

repay the same either with or without the sanction of a popular vote.[72] Such authority when conferred must be strictly pursued.[73]

2. Requisites and Validity of Subscriptions or Donations — a. Necessity For Compliance With Statute. Where authority is given by statute to counties to extend aid to railroads or other internal improvements by subscribing to the stock

27 N. W. 98; De Clerq *v.* Hager, 12 Nebr. 185, 10 N. W. 697; Reineman *v.* Covington, etc., R. Co., 7 Nebr. 310; Hamlin *v.* Meadville, 6 Nebr. 227.

Nevada.— Gibson *v.* Mason, 5 Nev. 283.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

North Carolina.— Hill *v.* Forsythe County Com'rs, 67 N. C. 367; Caldwell *v.* Burke County Justices, 57 N. C. 323.

South Carolina.— State *v.* Chester, etc., R. Co., 13 S. C. 290; Glenn *v.* York County Com'rs, 6 S. C. 412.

Tennessee.— Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Mulloy *v.* Nashville, etc., R. Co., 8 Lea 427; Lauderdale County *v.* Fargason, 7 Lea 153; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

Texas.— Austin *v.* Gulf, etc., R. Co., 45 Tex. 234.

Virginia.— Powell *v.* Brunswick County, 88 Va. 707, 14 S. E. 543; Taylor *v.* Board of Sup'rs, 86 Va. 506, 10 S. E. 433.

United States.— Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; Howard County *v.* Boonville Cent. Nat. Bank, 108 U. S. 314, 2 S. Ct. 689, 27 L. ed. 738; Moultrie County *v.* Fairfield, 105 U. S. 370, 26 L. ed. 945; Clay County *v.* Savings Soc., 104 U. S. 579, 26 L. ed. 856; Chicot County *v.* Lewis, 103 U. S. 164, 26 L. ed. 495; Macon County *v.* Shores, 97 U. S. 272, 24 L. ed. 889; Randolph County *v.* Post, 93 U. S. 502, 23 L. ed. 957; Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. 667, 21 L. ed. 375; Kenicott *v.* Wayne County, 16 Wall. 452, 21 L. ed. 319; Thompson *v.* Lee County, 3 Wall. 327, 18 L. ed. 177; Wilkes County *v.* Coler, 113 Fed. 725, 51 C. C. A. 399; Stanly County *v.* Coler, 96 Fed. 284, 37 C. C. A. 484 [*reversing* 89 Fed. 257]; Northern Pac. R. Co. *v.* Roberts, 42 Fed. 734; Bissit *v.* Kentucky R. Nav. Co., 15 Fed. 353; Stebbins *v.* Pueblo County, 4 Fed. 282, 2 McCrary 196; Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002.

See 13 Cent. Dig. tit. "Counties," § 228.

Legislature may authorize portion of county to issue bonds and subscribe to stock. Hancock *v.* Louisville, etc., R. Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. ed. 755.

Subscriptions toties quoties as required.— Under the charter of a railroad company providing that any counties through which the road passed might subscribe for any such amount of the capital stock as the majority of the voters of the county might approve such subscriptions may be made *toties quoties*, as the emergencies of the undertaking may require. Caldwell *v.* Burke County Justices, 57 N. C. 323.

Applicable to railroads organized under subsequent statute.— A statute authorizing counties to take stock in railroads is applicable to a railroad duly organized under a subsequent statute. Stebbins *v.* Pueblo County, 4 Fed. 282, 2 McCrary 196.

Aid to foreign corporations.— Unless prohibited by statute the legislature may empower a county to aid the construction of a road of a foreign corporation. St. Joseph, etc., Co. *v.* Buchanan County Ct., 39 Mo. 485; Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375.

Subscriptions to stock of coal-mining company.— A corporation with authority to construct, complete, and operate a railroad is not the less a railroad company within the statute authorizing municipal subscriptions because it is also a coal-mining, a furnace, or a manufacturing company. Randolph County *v.* Post, 93 U. S. 502, 23 L. ed. 957.

Aid in construction of branch roads.— A railroad constructed from the junction of the main line of one railroad with another, but extending in a different direction, is a branch road within the meaning of a statute authorizing the issue of bonds by a county through which it passes, for the construction of a branch. Howard County *v.* Boonville Cent. Nat. Bank, 108 U. S. 314, 2 S. Ct. 689, 27 L. ed. 738.

Aid by counties through which connecting lines run.— The charter of the Mt. Vernon Railroad Company, passed Feb. 15, 1855, provided that any county through which that road might run, and every county through which any other railroad might run, with which the Mt. Vernon railroad might be joined, connected, or intersected, were authorized to aid in the construction of the same, etc. In 1859 the Mt. Vernon Railroad Company issued certain construction bonds, to secure which the county of Wayne conveyed its swamp and overflowed lands, in trust. The Mt. Vernon railroad did not, and could not, under its charter, run through Wayne county, nor did any other railroad run through that county with which that road was joined, connected, or intersected. So the condition upon which Wayne county might aid in the construction of the Mt. Vernon railroad did not exist, and the deed of trust executed for that purpose was made without the power or authority in the county to do so, and was therefore void. Scates *v.* King, 110 Ill. 456.

72. Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002. And see State *v.* Chester, etc., R. Co., 13 S. C. 290.

73. Choisser *v.* People, 140 Ill. 21, 29 N. E. 546.

of the same, such statutes must be strictly followed, and such subscription can be made only for the purpose,[74] through the officers and agents authorized,[75] and in the manner and upon the terms provided by such statute.[76]

b. Validation or Ratification of Defective Proceedings. A state legislature has the power to pass a law remedying defects or irregularities in the exercise by a county of the power to give aid to railroads,[77] which will be effective, although

74. Winchester, etc., Turnpike Road Co. *v.* Clark County Ct., 3 Metc. (Ky.) 140.

75. County commissioners.—People *v.* Pueblo County, 2 Colo. 360; Com. *v.* Perkins, 43 Pa. St. 400; Mercer County *v.* Pittsburgh, etc., R. Co., 27 Pa. St. 389.

County court.— Mercer County Ct. *v.* Kentucky River Nav. Co., 8 Bush (Ky.) 300; Winchester, etc., Turnpike Road Co. *v.* Clark County Ct., 3 Metc. (Ky.) 140; Rubey *v.* Shain, 54 Mo. 207; Bates County *v.* Winters, 112 U. S. 325, 5 S. Ct. 157, 28 L. ed. 744; Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585; Bissit *v.* Kentucky River Nav. Co., 15 Fed. 353.

By agent appointed by county court to make a subscription to stock. Bates County *v.* Winters, 112 U. S. 325, 5 S. Ct. 157, 28 L. ed. 744.

Amount to be fixed by grand jury.— Mercer County *v.* Pittsburgh, etc., R. Co., 27 Pa. St. 389; Woods *v.* Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122. See also Curtis *v.* Butler County, 24 How. (U. S.) 435, 16 L. ed. 745.

Recommendation insufficient to confer authority.— In Frick *v.* Mercer County, 138 Pa. St. 523, 21 Atl. 6, it was held that under a statute authorizing subscriptions by a county to the stock of a railroad company, subject to the restriction *inter alia* that the amount should be designated by the grand jury, a recommendation by the grand jury of a subscription not exceeding a certain amount conferred upon the commissioners no authority to make any subscription whatever.

Right of grand jury to fix time and manner of payment.— Where a county is authorized to subscribe to the stock of a railroad company, the amount thereof not to exceed a certain amount to be determined and approved by the grand jury of the county, it is not necessary for the grand jury to fix the manner and terms of the payment of such subscription. Woods *v.* Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122.

Effect of subscribing less than amount recommended.— The fact that one grand jury requested the commissioners to subscribe twenty thousand shares to the capital stock of the Allegheny Valley Railroad Company, and the commissioners subscribed but fifteen thousand, in no way invalidates the subscription made. Com. *v.* Perkins, 43 Pa. St. 400.

76. Winchester, etc., Turnpike Road Co. *v.* Clark County Ct., 3 Metc. (Ky.) 140.

Actual manual subscription unnecessary.— An actual manual subscription on the books of a railroad company is not necessary to entitle a county to the stock of such company, nor to bind it as a subscriber thereto. Bates County *v.* Winters, 112 U. S. 325, 5 S. Ct. 157, 28 L. ed. 744; Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585.

Necessity for express contract.— A county, by voting to subscribe for stock in a railway company, and to issue bonds in payment therefor, does not thereby create a contract between the county and the railway company for that purpose. It makes no difference that the vote of the county is to subscribe for the stock and to issue the bonds upon certain conditions, which conditions the railway company afterward performs. Where stock has not been subscribed for, and no express contract is made by the county to subscribe therefor, the county is not bound to issue the bonds upon tender of the stock by the railway company to the county. Land Grant R., etc., Co. *v.* Davis County, 6 Kan. 256.

Payment in tax certificates.— Tax certificates are "other property" within the meaning of Wis. Rev. Stat. § 949, providing that a county may make a subscription to the capital stock of a railroad company, "to be paid in money, lands, or other property." Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

Publication of act authorizing subscription. — The provision of Md. Const. art. 3, § 54, that no county shall contract any debt or obligation in the construction of a railroad, or give or loan its credit to a corporation, unless authorized by an act of assembly which shall be published for two months before the next election for members of the house of delegates in the newspapers published in said counties, is mandatory. Baltimore, etc., R. Co. *v.* Pumphrey, 74 Md. 86, 21 Atl. 559.

Subscription executory till actually made. — The mere vote to subscribe does not of itself form such a contract with the railroad company as will be protected by article 1, section 10, of the constitution of the United States, but until the subscription is actually made the contract is unexecuted. Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604.

When subscription complete.— If the body or agency having authority to make such a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and on behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that ordinance or resolution to the company for acceptance as a subscription, and the company does in fact accept, and notifies the municipality or its proper agent to that effect, the contract of subscription is complete and binds the parties according to its terms. Bates County *v.* Winters, 112 U. S. 325, 3 S. Ct. 157, 28 L. ed. 744.

77. Bartholomew County *v.* Bright, 18 Ind. 93; McMillen *v.* Boyles, 6 Iowa 304; Atchi-

enacted after the commencement of a suit based on alleged defects in such proceedings.[78] It has been held, however, that such acts are designed merely to cure irregularities and to remove all technical hindrances to the carrying into effect of the will of the majority, and will not have the effect to legalize illegal votes,[79] or to authorize or validate a subscription made without the holding of the required election and submission of the question to a popular vote, as required by law,[80] since to do so would be to impose an obligation upon a municipality without its consent legally expressed.[81] It has also been held that when the original subscription is not binding by reason of its irregularity, the parties may by their subsequent conduct so ratify and acquiesce in the subscription as to estop the county to deny the validity thereof.[82]

c. By What Laws Validity Determined. The validity of a county subscription, donation, or other aid to internal improvements is to be determined by the laws in force when the same is made;[83] and a subsequent repeal of the authorizing laws after subscription or donation but before payment will not invalidate such donation or subscription or release the county.[84]

3. Submission to Popular Vote — a. Necessity For Submission. A state legislature may if it sees fit authorize a county to aid in works of internal improvement, such as railroads, turnpikes, river navigation companies, etc., by subscribing for stock in the same without requiring the proposition of thus extending aid to be submitted to a popular vote of the inhabitants of the county,[85] and where such submission is not required by the state constitution at the time of granting the charter to the company containing a provision granting this permission, such permission is not abrogated or affected by a subsequent constitutional provision or general act of the legislature, requiring a popular vote to authorize such sub-

son, etc., R. Co. *v.* Jefferson County Com'rs, 17 Kan. 29; Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

78. Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

79. Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 17 Kan. 29.

80. Choisser *v.* People, 140 Ill. 21, 29 N. E. 546; Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 17 Kan. 29; Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178.

81. Choisser *v.* People, 140 Ill. 21, 29 N. E. 546.

82. Bissit *v.* Kentucky River Nav. Co., 15 Fed. 353.

The county judge's voting the amount of stock proposed to be subscribed for by the county, in meetings of the stock-holders of a railroad company, does not bind the county to the subscription as by a ratification or estoppel. Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604.

83. Callaway County *v.* Foster, 93 U. S. 567, 23 L. ed. 911.

The saving clause in the proviso of separate section 2 of the Illinois constitution of 1870, in regard to municipal subscriptions, to the effect that the section shall not affect the right to make such subscriptions, where the same have been authorized "under existing laws, under a vote of the people," etc., prior to the adoption of the constitution, refers to and embraces subscriptions that had been authorized by a vote of the people, under laws existing at the time the vote was taken. Under this proviso, the subscription, to be saved, must have been authorized by a vote of the people, and therefore a subscription legalized by an act of the legislature, but not made in proper time, is excluded. All curative acts legalizing such votes, not acted upon by the municipality before the constitution took effect, were repealed by that instrument. Williams *v.* People, 132 Ill. 574, 24 N. E. 647.

84. Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Fairfield *v.* Gallatin County, 100 U. S. 47, 25 L. ed. 544; Callaway County *v.* Foster, 93 U. S. 567, 23 L. ed. 911; Moultrie County *v.* Rockingham Sav. Bank, 92 U. S. 631, 23 L. ed. 631.

Completion of contract by subsequent issue of bonds in payment of donation or of subscription to stock. Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Fairfield *v.* Gallatin County, 100 U. S. 47, 25 L. ed. 544; Moultrie County *v.* Rockingham Sav. Bank, 92 U. S. 631, 23 L. ed. 631.

85. Pattison *v.* Yuba County, 13 Cal. 175; Howard County *v.* Paddock, 110 U. S. 384, 4 S. Ct. 24, 28 L. ed. 171; Foster *v.* Callaway County, 9 Fed. Cas. No. 4,967, 3 Dill. 200 [*affirmed* in 93 U. S. 567, 23 L. ed. 911].

Where a special act provides for the subscription without a vote.— Where a special act provides for the subscription by a certain county to stock of a certain turnpike company, without a vote of the people, a general act of later date, providing that all counties may subscribe to stock in turnpike companies within their borders, upon a favorable vote of the people, does not repeal the special act and does not make a vote necessary for the subscription therein provided. Foreman *v.* Murphy, 7 Bush (Ky.) 303.

scriptions by the county.[86] So when the charter of a railway company permits counties to subscribe to its stock without a popular vote, such authority is not extinguished by the subsequent consolidation of that company with others.[87] In a number of the states, however, constitutional provisions or acts of the legislature expressly require submission to a popular vote as a condition precedent to the exercise of any authority or power on the part of a county to make a subscription or levy a tax.[88]

b. Application For Submission. The usual methods of securing such submission are by petition or proposal therefor, by the commissioners of the road, or its directors if organized,[89] or by a petition signed by the required proportion of

86. Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; State *v.* Greene County, 54 Mo. 540; Smith *v.* Clark County, 54 Mo. 58; State *v.* Sullivan County Ct., 51 Mo. 522; Howard County *v.* Paddock, 110 U. S. 384, 4 S. Ct. 24, 28 L. ed. 171; Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585; Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394; Scotland County *v.* Thomas, 94 U. S. 682, 24 L. ed. 219; Callaway County *v.* Foster, 93 U. S. 567, 23 L. ed. 911; Huidekoper *v.* Dallas County, 12 Fed. Cas. No. 6,850, 3 Dill. 171. *Contra*, State *v.* Dallas County Ct., 72 Mo. 329; State *v.* Garroutte, 67 Mo. 445, holding that Mo. Sess. Acts (1861), p. 60, withdrew the power conferred on the county courts by the charter of certain railroad companies to subscribe to the stock of such companies without first submitting the question to a vote of the people. In both these cases the opinion was by Sherwood, C. J., Henry and Norton, JJ., concurring, and Napton and Hough, JJ., dissenting, on the ground that the doctrine of *stare decisis* demanded an adherence to the decision in the case of Smith *v.* Clark County, 54 Mo. 58.

87. Schuyler County *v.* Thomas, 98 U. S. 169, 25 L. ed. 88 [*affirming* 23 Fed. Cas. No. 13,909, 3 Dill. 7].

88. *California.*— Robinson *v.* Bidwell, 22 Cal. 397.

Illinois.— Choisser *v.* People, 140 Ill. 21, 29 N. E. 546; Onstott *v.* People, 123 Ill. 489, 15 N. E. 34; People *v.* Logan County, 63 Ill. 374.

Indiana.— Nixon *v.* Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; Garrigus *v.* Parke County, 39 Ind. 66.

Kansas.— Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 17 Kan. 29; Morris *v.* Morris County Com'rs, 7 Kan. 576; Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.— Kentucky Union R. Co. *v.* Bourbon County, 85 Ky. 98, 2 S. W. 687, 8 Ky. L. Rep. 881; Madison County Ct. *v.* Richmond, etc., R. Co., 80 Ky. 16, 3 Ky. L. Rep. 501; Foreman *v.* Murphy, 7 Bush 303; Bullock *v.* Curry, 2 Metc. 171; Brown *v.* Tinsley, 21 S. W. 535, 14 Ky. L. Rep. 745.

Louisiana.—Vicksburg, etc., R. Co. *v.* Scott, 52 La. Ann. 512, 27 So. 137; Webster Parish *v.* Police Jury, 52 La. Ann. 465, 27 So. 102.

Maryland.—Baltimore, etc., R. Co. *v.* Pumphrey, 74 Md. 86, 21 Atl. 559.

Mississippi.— Hawkins *v.* Carroll County, 50 Miss. 735.

Missouri.— State *v.* Dallas County Ct., 72 Mo. 329; State *v.* Curators State University, 58 Mo. 178; State *v.* Sullivan County, 51 Mo. 522; State *v.* Saline County Ct., 51 Mo. 350, 11 Am. Rep. 454; Leavenworth, etc., R. Co. *v.* Platte County Ct., 42 Mo. 171; State *v.* Macon County Ct., 41 Mo. 453; St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485.

Nebraska.— Jones *v.* Hurlburt, 13 Nebr. 125, 13 N. W. 5.

North Carolina.— Claybrook *v.* Rockingham County, 114 N. C. 453, 19 S. E. 593, subscription to stock.

South Carolina.— Trimmier *v.* Bomar, 20 S. C. 354.

Tennessee.— Colburn *v.* Chattanooga Western R. Co., 94 Tenn. 43, 28 S. W. 298; Winston *v.* Tennessee, etc., R. Co., 1 Baxt. 60; Humphreys County *v.* McAdoo, 7 Heisk. 585; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

Virginia.— Taylor *v.* Board of Sup'rs, 86 Va. 506, 10 S. E. 433.

United States.—Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93; Meriwether *v.* Muhlenberg County Ct., 120 U. S. 354, 7 S. Ct. 563, 30 L. ed. 653; Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178; Olcott *v.* Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Stanly County *v.* Coler, 113 Fed. 705, 96 Fed. 284, 37 C. C. A. 484; Deland *v.* Platte County, 54 Fed. 823.

See 13 Cent. Dig. tit. "Counties," § 231.

Construction of railroad a county purpose. — The construction of a railroad through a county or a municipal corporation is a county or corporation purpose, within the meaning of Tenn. Const. art. 2, § 29; and the fact that the road runs into or through other counties or states, or is owned or managed in whole or in part by others, cannot deprive it of this character. Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

The issue of county bonds in aid of a school of mines and metallurgy supported by the state, although under the authority of a statute, is a loaning of the credit of the county to a corporation within the meaning of a constitutional provision requiring a two-thirds vote of the inhabitants of the county to authorize such a loan. State *v.* Curators State University, 57 Mo. 178.

89. Fayette County Ct. *v.* Lexington, etc., R. Co., 17 B. Mon. (Ky.) 335; Louisville,

the taxpayers of the county.[90] Such petition must be sufficiently definite and certain to prevent any misapprehension of the intention of the petitioners,[91] and must be presented to the board of commissioners or commissioners' court of the county at a regular or special session thereof.[92]

c. Requisites of Submission. Such submission must be by order of the proper county authorities,[93] and to render the election of any validity, and to confer any

etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Application by commissioners appointed to organize company.— The order of a county court for an election to determine whether or not the county shall subscribe for stock in a railroad company and issue bonds to pay therefor will not be vitiated by the fact that the application was made in the name of the commissioners appointed by the legislature to organize the company, although at the time the company had been organized and the directors elected, who were the proper agents of the company to make the application. Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663.

Subscription to stock and election of directors as requisite to proposal.— A railroad company, incorporated under the Alabama act entitled, "An act to provide for the creation and regulation of railroad companies in the State of Alabama," approved Dec. 29, 1868 (Pamphl. Acts, p. 462), is not in a condition to make a proposition for county subscriptions to the capital stock of said company, until ten per cent of its capital stock has been subscribed, and a board of directors elected by the stock-holders and qualified as provided by the ninth section of said act. Trammell *v.* Pennington, 45 Ala. 673.

90. Chicago, etc., R. Co. *v.* Chase County, 43 Kan. 760, 23 Pac. 1064.

91. Jussen *v.* Lake County, 95 Ind. 567, where it was held that such a petition for aid, asking for an appropriation by the "board of commissioners" rather than by "the township," is not so defective as to mislead any one, and also that such a petition is not invalid because of failure to state whether the amount shall be donated to the company or invested in its capital stock, nor because it asks for an appropriation to the company "or its successor by consolidation."

92. Jussen *v.* Lake County, 95 Ind. 567. See also to same effect *Ex p.* Selma, etc., R. Co., 46 Ala. 230.

93. County courts.— Richland County *v.* People, 3 Ill. App. 210; Bowling Green, etc., R. Co. *v.* Warren County Ct., 10 Bush (Ky.) 711; Fayette County Ct. *v.* Lexington, etc., R. Co., 17 B. Mon. (Ky.) 335; Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424. Under the Illinois act of March 1, 1867, vesting in the county court power to call an election for a subscription in excess of one hundred thousand dollars by a county in aid of a railroad, an election for such a subscription, at the call of the county supervisor, is void. Richland County *v.* People, 3 Ill. App. 210. Under the Kentucky act of Feb. 28, 1873, providing that whenever the president and directors of the company shall in writing request the county court of any county through which it is proposed to construct its railroad to do so, such court may submit to qualified voters of the county the question whether said court shall subscribe to the capital stock of the company for and in behalf of the county, either absolutely, or upon such terms and conditions as may be proposed by the company, the company is the judge of the character of the proposition it will present, and the county court has discretionary power to submit or not to submit the question of subscription to the voters of the county, they having the ultimate power of adoption or rejection. Madison County Ct. *v.* Richmond, etc., R. Co., 80 Ky. 16, 3 Ky. L. Rep. 501. It is not necessary for the county justices to sit with the county court. Brown *v.* Tinsley, 21 S. W. 535, 14 Ky. L. Rep. 745; Meriwether *v.* Muhlenburg County Ct., 120 U. S. 354, 7 S. Ct. 563, 30 L. ed. 653.

Duty of court to order election upon application of majority of commissioners or directors of road. Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Order by county judge while holding county court.— Where the time for holding an election to determine upon a subscription to the stock of a turnpike company is to be set by the county judge, the fact that the latter at the time he entered the order was sitting as judge of the county court will not affect the validity of the proceeding. Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

Call by county boards.— Under section 330 of the Iowa revision conferring upon boards of supervisors the jurisdiction and powers formerly possessed by county judges, a county board of supervisors has authority to call a special election for the ratification of a contract between the county and a railroad company, under which the swamp lands of the county are to be conveyed to the company in aid of the construction of a railroad. Cedar Rapids, etc., R. Co. *v.* Boone County, 34 Iowa 45.

Validity of unsigned order.— In Goddard *v.* Stockman, 74 Ind. 400, it was held to be no objection to the validity of an election for the purpose of voting aid to a railroad that the board of county commissioners did not sign the order for election at the time it was issued by them.

Specification of name of corporation.— An order submitting to the voters of a county a proposition to subscribe stock in aid of a railroad under the general railroad law of

authority by it, all the requisites of the statute must be complied with, in reference to each question or proposition submitted by them.[94] The proposition should be free from conditions and qualifications,[95] and should be definite and certain as to the property to be conveyed and its value,[96] and in its designation of the recipient of the proposed donation,[97] although it has been held that in submitting to the voters of a county the question whether the county shall extend aid in the construction of a railroad, it is improper to submit more than one project or proposition at one time,[98] yet it has also been held that the mere fact that there was a submission of several different questions at the same time will not of itself invalidate the proceedings under such submission where all the other steps are regular, and each proposition is complete in itself so as to afford to the voters an opportunity to express their opinion upon each question separately.[99] Where the submission contains an unlawful proposition, this will invalidate, and an election held in pursuance thereof will be void.[1] The commissioners of a county cannot properly submit to its voters a proposition to vote for or against an appropriation to two or more railroad companies at the same time, when the proposition is so submitted that the voters cannot vote for one and against the other, but must vote for or against both.[2]

d. Notice of Election. Due notice of the intended election should be given,[3] specifying the sum to be appropriated,[4] and in some jurisdictions stating the point

Missouri need not specify the name of the corporation, where the proposition describes the proposed route of the road with the requisite certainty. New York City Ninth Nat. Bank *v.* Knox County, 37 Fed. 75. See also Block *v.* Bourbon County, 99 U. S. 698, 25 L. ed. 491; Johnson County *v.* Thayer, 94 U. S. 631, 24 L. ed. 133.

94. McMillan *v.* Lee County, 3 Iowa 311.

95. Jones *v.* Hurlburt, 13 Nebr. 125, 13 N. W. 5.

96. Sufficient definiteness as to property and value.— A proposition by a railroad company that a county make a subscription to its capital stock, to be paid by conveying to the company all the lands which the county owned and which were not occupied for public purposes when the proposition should be accepted, and by transferring all the tax certificates which the county then owned and which should come to its possession before the completion of the road, was sufficiently definite as to the property and its value, although no lands or tax certificates were specifically described. Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104.

97. Jones *v.* Hurlburt, 13 Nebr. 125, 13 N. W. 5, holding that a proposition to extend aid "to the Lincoln & Northwestern Railroad Company, or the Blue Valley Railroad Company," upon the construction by either company of two distinct lines of railroad, is insufficient to support a vote in its favor, by reason of its failure to designate with reasonable certainty the recipient of the donation.

98. People *v.* Tazewell County, 22 Ill. 147; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Christian County *v.* Smith, 12 S. W. 134, 13 S. W. 276, 11 Ky. L. Rep. 834.

99. McMillan *v.* Lee County, 3 Iowa 311.

1. *Ex p.* Selma, etc., R. Co., 46 Ala. 230.

2. Clarke *v.* Hancock County, 27 Ill. 305; Finney *v.* Lamb, 54 Ind. 1; Bronenberg *v.* Madison County, 41 Ind. 502; Garrigus *v.* Parke County, 39 Ind. 66.

The vote should be taken separately on the appropriation for each road. Finney *v.* Lamb, 54 Ind. 1.

Under the Kentucky act of March 17, 1870, declaring that if more than one question of taxation is voted on at any one election such tax shall be void, an election upon county subscriptions to the capital stock of two different railroad companies at the same time is void, and the fact that the election is void as to one of the subscriptions voted on does not validate the other. Christian County *v.* Smith, 12 S. W. 134, 13 S. W. 276, 11 Ky. L. Rep. 834.

3. Harding *v.* Rockford, etc., R. Co., 65 Ill. 90; Cincinnati, etc., R. Co. *v.* Wells, 39 Ind. 539; Crooke *v.* Daviess County, 36 Ind. 320; Kleise *v.* Galusha, 78 Iowa 310, 43 N. W. 217; Allard *v.* Gaston, 70 Iowa 731, 29 N. W. 752.

Advertisement of election.—Under an order of the county court requiring notice of a special election upon a proposition of granting aid to a railroad to be given through a newspaper for five weeks, an advertisement in five successive weekly issues of the paper named is sufficient. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93.

Election not vitiated by omission of notice.— The failure to give the notice of election required by the Tennessee acts of 1852 and 1854, in submitting to a popular vote the question of a subscription to a railroad, will not operate to the prejudice but in favor of the negative voters and they cannot be heard to complain therefor, nor does such omission vitiate the election and subscription. Hord *v.* Rogersville, etc., R. Co., 3 Head (Tenn.) 208.

4. Crooke *v.* Daviess County, 36 Ind. 320.

to which the road must be completed before the proposed tax shall become due.[5]

e. Qualification of Voters and Number of Votes Required. The persons who shall be entitled to vote at an election called to determine the question of extending county aid to railroads, etc., is a matter which is usually regulated by the provisions authorizing such county aid and prescribing the conditions upon which it may be granted.[6] So also the number of votes which shall be required to be cast in favor of such a proposition is usually fixed by such provisions and varies in the different states.[7]

f. The Election. Although the statute authorizing the election prescribes the form of the ballots for and against the proposition submitted, a variance therefrom expressing the same meaning will be immaterial and will not vitiate the election.[8] Although the manner prescribed by statute for conducting such elections should be observed, a substantial compliance is sufficient, and the statutory provisions, in so far as unnecessary to determine the result, are directory and not mandatory.[9]

g. Necessity For Previous Incorporation or Location of Road. It is not essential to the validity of a vote extending aid to a railroad company that prior thereto a contract for its construction had been made,[10] that the road should have been incorporated,[11] that an estimate should have been made of the quantity of grading,[12] or even that there should have been a final and definite location of the entire line of the company's road.[13] All that is required is a substantial location,

5. Allard *v.* Gaston, 70 Iowa 731, 29 N. W. 752.

6. **Only those entitled to vote at general elections** can vote in Louisiana. McKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

A statute authorizing only male taxpayers to vote is not unconstitutional. Baltimore, etc., R. Co. *v.* Jefferson County, 29 Fed. 305.

Where only holders of real estate are by statute empowered to vote, an election submitting the question to all the voters of the county is invalid. Bullock *v.* Curry, 2 Metc. (Ky.) 171.

Submission to voters absent from state in military service.— In Cedar Rapids, etc., R. Co. *v.* Boone County, 34 Iowa 45, it was held that it cannot be successfully urged against the validity of a contract between the county and a railroad company under which the swamp lands of the county are to be conveyed to the company to aid in the construction of its road that the question of its ratification was not submitted to "all" the voters of the county, because at the time of the submission a portion thereof to whom no submission was made were engaged in the military service of the United States.

7. **Majority of all votes cast.**— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; St. Louis *v.* Alexander, 23 Mo. 483; Claybrook *v.* Rockingham County, 114 N. C. 453, 19 S. E. 593; Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Two thirds of qualified voters.— Hawkins *v.* Carroll County, 50 Miss. 735; State *v.* Saline County, 51 Mo. 350, 11 Am. Rep. 454; State *v.* Macon County Ct., 41 Mo. 453; Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585.

Insufficient record of county court as to vote.— The requirements of a railroad charter that "a majority of the taxable inhabitants" of a strip through which the road may pass may vote to tax themselves in payment of subscriptions to stock in the road is not satisfied by a record of the county court levying such tax that "the taxable inhabitants aforesaid voted," etc., without other recital or finding that a majority voted in favor. Deland *v.* Platte County, 54 Fed. 823.

8. Claybrook *v.* Rockingham County, 114 N. C. 453, 19 S. E. 593.

9. Trimmier *v.* Bomar, 20 S. C. 354.

Mere informalities in the returns of the election which cannot possibly prejudice any substantial right or a failure to conform to any direction of the statute which is directory only, or an error which is clearly clerical, are not sufficient to defeat the appropriation voted. Irwin *v.* Lowe, 89 Ind. 540.

10. Parks *v.* Iowa Cent. R. Co., 24 Iowa 188.

Subscription before articles of association filed void.— A subscription of stock ordered by a county court to a railroad company, before its articles of association have been executed or filed with the secretary of state, is illegal and void. But where the county court orders the levy of a tax to meet the subscription, and the collector proceeds to enforce its collection, a taxpayer cannot have his action to recover back the amount so collected from him. His remedy is by proceeding to arrest the execution of such illegal subscription, and the state may, through her legal representatives, arrest the issue of the bonds. Rubey *v.* Shain, 54 Mo. 207.

11. Coleman *v.* Marin County, 50 Cal. 493.

12. Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

13. Harwood, etc., R. Co. *v.* Case, 37 Iowa 692; Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488; Johnson

designating the *termini* and general direction of the road, and an estimate of the cost of constructing it.[14]

h. Operation and Effect of Favorable Vote. Since the people of a county can make no contract binding on such county, the vote of the legal electors of a county authorizing a subscription to the stock of a railroad goes for nothing until the proper authorities of the county take action thereon.[15] All county subscriptions or donations authorized by a vote of the people of the county must be executed strictly upon the terms and conditions as voted;[16] and unless authorized by statute a county through its officers empowered to make subscription has no power to modify or alter a stock subscription voted by the people of such county.[17] Whether or not the county authorities have discretion to withhold a subscription after the vote in favor thereof depends upon the statute under which the vote is taken. They cannot do so without either express or implied authority therefor.[18]

i. Contest of Election. The validity of an election held to determine the question of extending county aid to railroads, etc., may be contested by an individual interested by proper proceedings for that purpose,[19] instituted within the

County *v.* Thayer, 94 U. S. 631, 24 L. ed. 133; Woods *v.* Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122.

Location and performance of work as a condition of donation.— By Ind. Rev. Stat. (1881), § 4060, it is provided that "no donation of money shall be made to any railroad company by such board of county commissioners until the railroad to be constructed shall have been permanently located, and work thereon done and paid for by the company equal to the amount of the donation then made." It has been held that the word "donation" in this provision meant payment, and that the statute did not preclude a vote and order for a tax before the requisite amount of work had been done. Nixon *v.* Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258.

14. Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488.

15. People *v.* Pueblo County, 2 Colo. 360.

Subscription executory till actually made. — The mere vote to subscribe does not of itself form such a contract with the railroad company as will be protected by article 1, section 10, of the constitution of the United States, but until the subscription is actually made the contract is unexecuted. Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604.

16. Choisser *v.* People, 140 Ill. 21, 29 N. E. 546; Madison County Ct. *v.* Richmond, etc., R. Co., 80 Ky. 16, 3 Ky. L. Rep. 501.

Donation not authorized by vote authorizing subscription.— Where the vote of the people of a county authorized the county commissioners to "subscribe" for stock in a railroad company, it was held in Hamlin *v.* Meadville, 6 Nebr. 227, that such authority did not empower the commissioners to "donate" the bonds of the county to a railroad company. See also Sampson *v.* People, 140 Ill. 466, 30 N. E. 689; Choisser *v.* People, 140 Ill. 21, 29 N. E. 546.

17. Bell *v.* Mobile, etc., R. Co., 4 Wall. (U. S.) 598, 18 L. ed. 338. See also Douglas County *v.* Walbridge, 38 Wis. 179.

Limiting time for completion.— It has been held, however, that a county court making a subscription to the construction of a railroad may insert a limit of time for its completion, or any terms and conditions reasonable and prudent to protect the public, not contravening anything in the vote of the people or in the statute. West Virginia, etc., R. Co. *v.* Harrison County Ct., 47 W. Va. 273, 34 S. E. 786.

Power to authorize divergence from proposed line.— Under the California act of April 4, 1870, after a railroad company has proposed to build a road upon a certain route, and the question has been submitted to the electors who have voted to grant the aid, and the board of supervisors has accepted the proposition and resolved to extend the aid, it may authorize the railroad to diverge from the proposed line of road in part. Coleman *v.* Marin County, 50 Cal. 493.

18. People *v.* Cass County Bd., 77 Ill. 438.

Mo. Sess. Acts (1861–1862), p. 388, authorizing the county court of Buchanan county to subscribe to the stock of railroads terminating at or near said county, after submitting the matter to a vote of the taxable inhabitants of said county, left to the court the discretion of subscribing or refusing to subscribe to such railroads, notwithstanding a vote of the taxable inhabitants authorizing it to make such subscription. St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485.

19. Guillory *v.* Avoyelles R. Co., 104 La. 11, 28 So. 899; Goforth *v.* Rutherford R. Constr. Co., 96 N. C. 535, 2 S. E. 361; McDowell *v.* Massachusetts, etc., Constr. Co., 96 N. C. 514, 2 S. E. 351; Anderson County *v.* Houston, etc., R. Co., 52 Tex. 228.

Contest on ground of "fraud, illegality, and irregularity."— By the terms of La. Acts (1892), No. 106, a parish election held to take the sense of property taxpayers on a proposition to grant a tax in aid of a railway enterprise may be contested by taxpayers in interest on grounds of "fraud, illegality, and

proper time,[20] but not in collateral proceedings,[21] as for instance an action to enjoin the collection of the tax voted at such election.[22]

j. Second Submission. Where an election upon the question of a county subscription to the stock of a railroad company results unfavorably, such question may be again submitted to the electors of the county,[23] in the absence of any prohibition to that effect in the act authorizing the subscription.[24] On the other hand it has been held that when a railroad company has, in accordance with the law, proposed the conditions of a contemplated subscription which, upon submission to the people by the county court, have been adopted by a favorable vote, the county court cannot revoke its action and order a second vote, since to do so would be to assume legislative functions.[25]

4. Performance of Conditions Imposed — a. Necessity For. Where, as is usual, certain conditions are imposed either by statute, by a popular vote authorizing county aid to railroad companies, or by agreement of the company, they form a condition precedent to the right to receive such aid, and must be at least substantially complied with by the company claiming such aid or the subscription or donation may be withheld;[26] but a substantial compliance is sufficient.[27]

b. Effect of Failure to Comply With Conditions — (i) *As to Completion of Road.* In one state where a county court makes an order for the subscription of stock to a railroad company upon condition that such road shall be completed

irregularity." Guillory *v.* Avoyelles R. Co., 104 La. 11, 28 So. 899.

Right to appear before board and appeal from decision.— While the law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and inquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof. Goddard *v.* Stockman, 74 Ind. 400.

20. Anderson County *v.* Houston, etc., R. Co., 52 Tex. 228, within time prescribed for certiorari, bill of review, or writ of error.

The suit must be brought within three months after the promulgation of the result of the election. Guillory *v.* Avoyelles R. Co., 104 La. 11, 28 So. 899.

21. Goddard *v.* Stockman, 74 Ind. 400; Goforth *v.* Rutherford R. Constr. Co., 96 N. C. 535, 2 S. E. 361; McDowell *v.* Massachusetts, etc., Constr. Co., 96 N. C. 514, 2 S. E. 351; Anderson County *v.* Houston, etc., R. Co., 52 Tex. 228. *Compare* People *v.* Jackson County, 92 Ill. 441.

22. Goddard *v.* Stockman, 74 Ind. 400.

23. Caldwell *v.* Burke County Justices, 57 N. C. 323; Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410; Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002.

24. Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410.

So it has been held that a second supplementary and amendatory election may be held for the purpose of changing or removing certain conditions prescribed by a previous election. Mercer County *v.* Hubbard, 45 Ill. 139; Morris *v.* Morris County Com'rs, 7 Kan. 576.

25. Madison County Ct. *v.* Richmond, etc., R. Co., 80 Ky. 16, 3 Ky. L. Rep. 501.

26. *California.*— California Northern R. Co. *v.* Butte County, 18 Cal. 671.

Indiana.— Nixon *v.* Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; Marion County *v.* Center Tp., 105 Ind. 422, 2 N. E. 368, 7 N. E. 189.

Iowa.— Meeker *v.* Ashley, 56 Iowa 188, 9 N. W. 124.

Kansas.— Southern Kansas, etc., R. Co. *v.* Towner, 41 Kan. 72, 21 Pac. 221.

Maryland.— Baltimore, etc., R. Co. *v.* Pumphrey, 74 Md. 86, 21 Atl. 559.

See 13 Cent. Dig. tit. "Counties," § 237.

Company bound by agreement circulated prior to election.—Where, prior to an election to vote upon the question of aiding in the construction of a certain railroad by a township tax, a paper was circulated among the electors, signed by the president of the railway company and having the corporate seal attached, providing that in case a tax was voted it should be collectable only at specified times and on certain conditions, which paper was issued by and with the consent of a majority of the directors of the company, it was held that the company was bound by its provisions. Meeker *v.* Ashley, 56 Iowa 188, 9 N. W. 124.

27. Young *v.* Webster City, etc., R. Co., 75 Iowa 140, 39 N. W. 234; Chicago, etc., R. Co. *v.* Chase County, 49 Kan. 399, 30 Pac. 456; Southern Kansas, etc., R. Co. *v.* Towner, 41 Kan. 72, 21 Pac. 221.

What amounts to substantial compliance.— In Adams *v.* Douglas County, 1 Fed. Cas. No. 52, McCahon (Kan.) 235, an issue of county

within a certain time, it is within the power of the court by a subsequent order to suspend the delivery of county bonds issued in payment of such subscription and remaining in the hands of a trustee when it appears that the road has not been completed within the specified time.[28] In another it is held that there can be no forfeiture of a tax or donation voted to a railroad company by its failure to complete its road in the time specified unless and until so declared by the board of county commissioners, upon the application of twenty-five freeholders of the county and notice.[29]

(II) *As to Expenditures by Road.* In some jurisdictions the expenditure by a railroad company upon its road of a certain amount within a specified time is made a condition of the issuance of county bonds in its aid;[30] and in others if the required amount has not been expended within the prescribed time, the county commissioners may cancel the appropriation in their discretion on the application of twenty-five freeholders of the county.[31]

(III) *As to Private Subscriptions.* Where by statute private subscriptions to an amount sufficient with the aid of the county subscription of a certain amount to complete each mile of road to which such county subscriptions apply are indispensable to authorize a county court to bind the county by its subscription, any payment or levy on account of said void and unauthorized subscription may be enjoined on the petition of taxpayers of the county.[32]

c. Waiver of and Estoppel to Raise Objection. Counties may waive the condition as to the time of completion provided in the contract of subscription to a railroad, and estop itself from raising the objection of non-performance within the specified time.[33]

5. Payment of Interest on Unpaid Instalments of Subscription. When a county subscription to the stock of a railroad is to be paid in instalments with money raised by taxation, deferred instalments of the subscription are not upon the footing of past-due indebtedness bearing interest.[34]

6. Effect of Change in Corporation or Amendment to Charter. A subscription once made by a county in aid of a railroad company will not be annulled or the county released therefrom by subsequent changes in the corporation, its consolidation with another company,[35] agreement to sell and transfer its road after

bonds in aid of a railroad was authorized by a vote of the people, in the manner prescribed by law, with a condition that the railroad track should be completed and in full operation by a certain date, and that the road should run to Lawrence. The track was completed, but not equipped with turntables, water-tanks, etc., by the date fixed, and came within only a quarter of a mile of Lawrence. It was held, on application to enjoin the issue of the bonds and a tax levy to pay the first coupons, that there had been a substantial performance.

28. Cooper *v.* Sullivan County, 65 Mo. 542.

29. Nixon *v.* Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; Marion County *v.* Center Tp., 105 Ind. 422, 2 N. E. 368, 7 N. E. 189; Sellers *v.* Beaver, 97 Ind. 111; State *v.* Delaware County, 92 Ind. 499; Caffyn *v.* State, 91 Ind. 324; Tipton County *v.* Indianapolis, etc., R. Co., 89 Ind. 101; Wilson *v.* Hamilton County, 68 Ind. 507.

30. California Northern R. Co. *v.* Butte County, 18 Cal. 671.

31. Nixon *v.* Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258. See also Sellers *v.* Beaver, 97 Ind. 111.

Unless, however, there is such an adjudication of forfeiture because of a failure to make the required expenditure, the collection of the tax cannot be enjoined. Nixon *v.* Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258.

32. Clay *v.* Nicholas County Ct., 4 Bush (Ky.) 154.

33. Randolph County *v.* Post, 93 U. S. 502, 23 L. ed. 957, this being in accordance with the rule that municipal corporations have the power to alter their legally made contracts by waiving conditions found to be injurious to their interests, and can estop themselves like other parties to a contract.

34. Humphreys County *v.* McAdoo, 7 Heisk. (Tenn.) 585.

35. Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121, 12 Pac. 593; Bates County *v.* Winters, 112 U. S. 325, 5 S. Ct. 157, 28 L. ed. 744.

Payment to consolidated company.—Where a railroad company was organized under the general railroad law of Missouri, the subsequent consolidation of that company with another organized under the same law does not avoid a subscription made to its stock, and the bonds in payment of the subscription may be properly delivered to the consolidated company. Bates County *v.* Winters, 112 U. S. 325, 3 S. Ct. 157, 28 L. ed. 744.

completion,[36] or the partial asssignment of its franchises.[37] The subscription of a county to the stock of a railroad company is not released by amendments to the charter of such company which have not been acted upon.[38]

7. Rights of County or Taxpayers as Stock-Holders — a. Disability of County as Defense to Non-Performance of Contract by Corporation. The want of authority on the part of a county court to subscribe stock in a corporation is no reason for such corporation refusing, after receiving the money on the subscription, to comply with its agreement to issue and deliver to the county court certificates for the stock subscribed and paid for.[39]

b. Ownership and Right to Vote Stock. In the case of a subscription by a county to the stock of a corporation, the question as to who is the owner of such stock and who may, as such, exercise the rights and privileges of ownership, including the right to vote the stock, depends upon the provisions of the statute authorizing such subscription.[40] It is competent for the legislature in such statute authorizing subscriptions, and the imposition of taxes, to pay the same, to declare whether the stock subscribed for should belong to the county in its corporate capacity or to the taxpayer, and where it declares such stock to belong to the taxpayer he has the exclusive right to stock due from the company under a stock subscription made under the general railroad law, and the company cannot issue it to another person.[41]

c. Conversion of Tax Certificate Into Stock. In some states it is expressly provided by statute that in the case of taxes levied to pay a county subscription in aid of a railroad, certificates shall be issued to the taxpayer by the county court which shall be assignable and convertible into stock upon certain conditions.[42]

36. Southern Kansas, etc., R. Co. *v.* Towner, 41 Kan. 72, 21 Pac. 221.

37. Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585.

38. Taylor *v.* Board of Sup'rs, 86 Va. 506, 10 S. E. 433.

Presumption of action with reference to possible amendment.— Where a county subscribes under an act authorizing subscriptions to aid in the construction of a railroad such county and all the citizens thereof must be taken to have acted with reference to the fact that the charter was liable to be amended as occasion should require. Powell *v.* Brunswick County, 88 Va. 707, 14 S. E. 543.

39. Com. *v.* Springfield, etc., Turnpike Road Co., 10 Bush (Ky.) 254.

40. County ownership.— By the act incorporating the Pacific railroad the respective counties in which the railroad should be located were authorized to subscribe for the stock of the company and invest the funds of the county therein. The stock was to be held, owned, and treated as county property, and the stock subscribed by each county belonged to and is owned by the county, unless its title has been divested by acts and transactions subsequent to the original subscription. Ridings *v.* Hall, 48 Mo. 100.

Effect of payment by special tax.— Section 30 of the Missouri act of February, 1853, authorizing the formation of railroad associations (Sess. Acts (1853), p. 121), has in view subscriptions made after the passage of said act — not subscriptions made prior thereto. Section 33 of that act, which authorizes the levy of a special tax to pay the interest on bonds theretofore issued, and provides a sinking fund to pay the principal, grants no stock rights to individual taxpayers. The stock subscribed prior to the passage of this act, under the authority of section 14 of the act of 1849 (Sess. Acts (1849), p. 222), belonged to the county subscribing it and contracting to pay for it, notwithstanding it may have been paid for by the proceeds of special taxes levied under section 33 of the act of 1853. Ridings *v.* Hall, 48 Mo. 100.

41. Mastin *v.* Pacific R. Co., 83 Mo. 634.

42. Spurlock *v.* Missouri Pac. R. Co., 90 Mo. 199, 206, 2 S. W. 219 [*following* 61 Mo. 319], where the court held under the Missouri act of 1853 that "the stock paid by special taxation is not the property of the county. To the extent that it is paid by taxation, it is the property of the taxpayers. It is held by the county in trust for them. When not paid for by taxation, it is conceded the subscriber, whether an individual, or county, or city, would not be entitled to a stock certificate until the whole subscription is paid. But when paid by special taxes, the law under which the subscription was made distributes the stock to those who pay the taxes. They are entitled to their shares of stock whenever tax certificates are presented 'in amounts equal to one or more entire shares of stock.' The proviso is entirely consistent with this, for it only contemplates that the shares of stock to be issued from time to time, shall not exceed the amount actually paid to the railroad company. Payments to the tax collector is not sufficient. It must also be made by the court to the company. This section, to my mind, taken in its en-

d. Power of County to Sell Stock. In one state power is expressly given to commissioners of counties which have subscribed to the capital stock of any railroad company and have issued bonds for the payment of such subscription to sell the stock or any part of it on such terms as they shall deem to be for the interest of the county, and to apply the proceeds of the sale to the payment of the bonds of such county.[43]

e. Estoppel of County to Demand Interest on Subscription. Where a railroad charter provides for the allowance of interest on stock from the time of payment until the first dividend, the action of a county commissioner in voting for a resolution declaring a stock dividend for the purpose of stopping interest on payments of stock subscriptions, being unauthorized either by statute, by the county court, or by his co-commissioners, will not estop the county from demanding such interest.[44]

f. Estoppel of Commissioners by Acquiescence in County Court's Disposition of Stock. Although the control of certain railroad stock subscribed to by a county and the right to order its deduction from the first dividend declared may lay with the county commissioners instead of the county court, yet where the commissioners stand by and allow the stock to be disposed of in accordance with an order of such court, and no objection is entered for more than five years, they cannot then claim the stock from the railroad.[45]

D. County Warrants and Certificates of Indebtedness — 1. Definition and Nature. County warrants may be defined as orders directing the payment of a claim which has passed the scrutiny of the auditing board. While they are therefore *prima facie* evidence of an indebtedness, like a written admission of a debt made by a private individual, they are by no means conclusive

tire scope, means that the taxpayer is entitled to his certificate of stock upon the production of the proper tax certificates, and upon showing that the company had received the money, whether the whole subscription has been paid or not."

It is the certificate of stock and not the collector's tax receipt which is made assignable and convertible into stock, and where one does not show that any certificates for taxes paid were ever issued to him or to the taxpayers, he presents no right to have the railroad issue its stock to him. Spurlock *v.* Missouri Pac. R. Co., 90 Mo. 199, 2 S. W. 219.

Payment of taxes to discharge interest on bonds.— The Kentucky act of March 15, 1851, incorporated the Shelby Railroad Company, and authorized the county of Shelby to subscribe for stock, and to levy taxes to pay therefor, each person paying such tax to become entitled to his *pro rata* share of the stock. By an amendment of Feb. 3, 1869, a specified portion of Shelby county was authorized to subscribe for stock, issue bonds in payment thereof, and levy taxes, with the provision that stock for which certificates had been issued to taxpayers should be voted by the individuals holding the same. By the act of March 11, 1870, the charter was again amended, so as to provide that any county, or part of a county, which had delivered bonds in payment of stock should be entitled to representation and to vote the amount of such stock through the county judge and justices of the peace. It was held that taxes paid and used merely to discharge interest on the bonds did not entitle the taxpayer to stock, and the county or district thereof itself was entitled to vote the stock represented by the amount of bonds still outstanding. Hancock *v.* Louisville, etc., R. Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. ed. 755.

43. Knox County Com'rs *v.* McComb, 19 Ohio St. 320.

Effect of statutory pledge of profits and dividends of stock.— By the Ohio act of 1846, it was declared "that the net profits or dividends upon the stock subscribed by the county shall stand pledged for the payment of the indebtedness and interest which may become demandable from the county under this act." Upon suit brought by the county commissioners to compel payment of the price at which defendant had purchased a portion of said stock from the county in 1853, it was held that said statutory pledge of the profits and dividends of said stock was intended as a security to the holders of the county bonds issued in payment of said subscription; and, in the absence of any assertion by them of rights under this statutory pledge, the purchaser cannot invalidate his contract of purchase, on the ground that its terms impair the obligations of the bondholders' contract. Knox County Com'rs *v.* McComb, 19 Ohio St. 320.

44. Hardin County *v.* Louisville, etc., R. Co., 92 Ky. 412, 17 S. W. 860, 14 Ky. L. Rep. 401.

45. Simpson County *v.* Louisville, etc., R. Co., 19 S. W. 665, 14 Ky. L. Rep. 673.

evidence of an indebtedness, and do not bar a reinvestigation of the merits of the claim on which the warrant is founded when a suit is brought on the warrant.[46]

2. Issuance — a. Delivery. It has been held that to issue county orders or warrants means to send out, deliver, or put them into circulation, and that such order or warrant remaining in the hands of a county clerk cannot be said to have been issued.[47] The mere fact that a county order or warrant is issued and delivered in another county will not render the same illegal.[48]

b. Who May Direct. The authority to issue county orders and warrants is a statutory one,[49] and warrants or certificates issued without authority of law impose no legal debt or obligation upon a county or parish.[50] The power to make allowances and to order the issuance of county warrants is vested in the fiscal officers of the county, usually the board of county commissioners,[51] county board of revenue,[52] or county court,[53] to be exercised at a meeting of such board or court.[54] While in some jurisdictions such boards or courts are authorized to themselves draw and issue such warrants,[55] as a general rule the actual issuance is

46. Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507. See also Shawnee County Com'rs *v.* Carter, 2 Kan. 115; Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

County not estopped to question validity. — Where a county board agrees to pay superintendent of schools compensation provided by statute subsequently declared invalid, and the services are performed, the subsequent allowance of the claim and issue of warrants by the county board does not estop the county from questioning the validity of the warrants. Chehalis County *v.* Hutcheson, 21 Wash. 82, 57 Pac. 341, 75 Am. St. Rep. 818.

Not judicial decisions as to validity of claim. — Warrants issued by a county court, acting as fiscal agent of the county, in compromise of claims against the county for services rendered, are not judicial decisions upon the validity of the claims; hence the county treasurer is bound by a subsequent order issued by such court prohibiting their payment. Frankl *v.* Bailey, 31 Oreg. 285, 50 Pac. 186.

47. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19.

Delivery as essential to right of action. — Suit cannot be brought upon a county commissioners' warrant, where such warrant has never been delivered by the commissioners to the payee. Com. *v.* Crawford County Com'rs, 20 Pa. Co. Ct. 593.

Delivery to agent of payee. — It is not carelessness for the county auditor to deliver a warrant to the agent of the party in whose favor it is drawn, although such agent has no authority to collect in cash. State *v.* Lewis, 6 Ohio S. & C. Pl. Dec. 221, 4 Ohio N. P. 176.

48. Clark County *v.* Lawrence, 63 Ill. 32, 35, where the court said: "Those orders need not have attached to them any seal of office. They are properly executed when signed by the clerk and the treasurer. This mere clerical duty might be performed in one place as well as in another, if circumstances rendered it necessary or more convenient."

49. Stoddard *v.* Benton, 6 Colo. 508.

50. Edwards *v.* Bossier Parish, 24 La. Ann. 457; Smallwood *v.* Lafayette County, 75 Mo. 450, holding that county courts have no power to issue certificates of county indebtedness.

The police jury of a parish have no power to issue its warrants or paper of any kind, negotiable or otherwise, for any purpose unless specifically authorized to do it by the legislature, and the means of paying the debt are provided for in the ordinance creating it. Smith *v.* Madison Parish, 30 La. Ann. 461; Lodds *v.* Vermilion Parish, 28 La. Ann. 618; Bertrand *v.* Vermilion Parish, 28 La. Ann. 588; Citizens' Bank *v.* Police Jury, 28 La. Ann. 263; Mathe *v.* Plaquemines Parish, 28 La. Ann. 77; Flagg *v.* St. Charles Parish, 27 La. Ann. 319; Sterling *v.* West Feliciana Parish, 26 La. Ann. 59.

51. Stoddard *v.* Benton, 6 Colo. 508; Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690; State *v.* Buckles, 39 Ind. 272; Nave *v.* King, 27 Ind. 356.

Acting county commissioners appointed by the governor before the election of county officers have the same power to issue county warrants for the ordinary expenses of the county government that is exercised by other boards throughout the state. Kearney County *v.* McMasters, 68 Fed. 177, 15 C. C. A. 353.

Act of board valid, although erroneous. — Where the board of county commissioners have the power to act in relation to a given matter, their acts are valid and binding, even though erroneous, and the auditor cannot refuse to issue his warrant in accordance therewith, unless such acts are appealed from and legitimately annulled. State *v.* Buckles, 39 Ind. 272.

52. Parker *v.* Hubbard, 64 Ala. 203.

53. Parsel *v.* Barnes, 25 Ark. 261.

54. Stoddard *v.* Benton, 6 Colo. 508.

55. Parker *v.* Hubbard, 64 Ala. 203.

a ministerial duty to be performed by the clerk or other ministerial officers upon the direction of the proper authorities.[56]

c. Necessity For Audit, Allowance, and Order. As a general rule a county warrant can be issued only for claims against the county which have been audited and allowed by the proper officers,[57] or the amounts of which are fixed by law.[58] Whenever a claim has been duly examined, allowed, and ordered to be paid, the officer is in duty bound to draw his warrant in favor of the holder of such claim,[59]

56. Parker *v.* Hubbard, 64 Ala. 203; Parsel *v.* Barnes, 25 Ark. 261; Attala County *v.* Grant, 9 Sm. & M. (Miss.) 77, 47 Am. Dec. 102.

Clerk alone authorized.— The clerk of a board of police is authorized to issue a warrant on the county treasury for any allowance made by the board, and the treasurer is authorized to pay such warrant. But the board of police have no power to issue such warrant; and if they should the treasurer is not bound to pay it. Attala County *v.* Grant, 9 Sm. & M. (Miss.) 77, 47 Am. Dec. 102.

County auditor.— Sehorn *v.* Williams, 110 Cal. 621, 43 Pac. 8; Babcock *v.* Goodrich, 47 Cal. 488; Connor *v.* Morris, 23 Cal. 447; Draper *v.* Noteware, 7 Cal. 276; State *v.* Buckles, 39 Ind. 272; State *v.* Yeatman, 22 Ohio St. 546; Cricket *v.* State, 18 Ohio St. 9.

Issue of certificate in lieu of one lost.— Where an act of the legislature authorizes and requires the county commissioners to instruct the auditor of the county to issue to the owner of the original a certificate of indebtedness similar in amount and in lieu of one that has been lost, the issuance of the certificate cannot be restrained as the creation of an unjust indebtedness against the county, or in any just sense an injury to taxpayers. Hayes *v.* Davis, 23 Nev. 318, 46 Pac. 888.

No application to auditor's claim for compensation.— The amount due the auditor for his official services is not a claim against the county for which he is authorized to draw his own warrant under section 13 of the Ohio act of April 4, 1859, and the obtaining of money from the treasury as compensation to which he is not entitled, upon his own warrant, constitutes a misfeasance, for which, to the extent that the money obtained exceeds the amount due, his bond affords a remedy; and the fact that there had been a verbal allowance by the commissioners will be no defense. Cricket *v.* State, 18 Ohio St. 9.

Probate judge.— Jeffersonian Pub. Co. *v.* Hilliard, 105 Ala. 576, 17 So. 112; Jack *v.* Moore, 66 Ala. 184; Board of Revenue *v.* Barber, 53 Ala. 589; Commissioners Ct. *v.* Moore, 53 Ala. 25.

57. *Alabama.*— Board of Revenue *v.* Barber, 53 Ala. 589.

California.—Connor *v.* Morris, 23 Cal. 447; Draper *v.* Noteware, 7 Cal. 276.

Idaho.— Jolly *v.* Woodward, 4 Ida. 496, 42 Pac. 512.

Indiana.— Booth *v.* Cass County, 84 Ind. 428.

Iowa.— Polk County *v.* Sherman, 99 Iowa 60, 68 N. W. 562.

Kansas.— Shawnee County Com'rs *v.* Carter, 2 Kan. 115.

Nebraska.— Wilson *v.* State, 53 Nebr. 113, 73 N. W. 456.

Ohio.— State *v.* Merry, 34 Ohio St. 137; State *v.* Craig, 21 Ohio Cir. Ct. 180, 11 Ohio Cir. Dec. 557.

See 13 Cent. Dig. tit. "Counties," § 244.

Necessity for peremptory order to clerk.— When a county board of revenue have ordered the drawing of a warrant by their clerk, if he refuses to draw it in proper form, the claimant cannot have a mandamus from the circuit court to compel him, but must first ask for a peremptory order from the board. Until such application has been made and failed there is no right to appeal to the circuit court. Parker *v.* Hubbard, 64 Ala. 203.

Recording of order.— While the Mississippi code requires the order of the board directing the issuance of a warrant to be recorded, it need not be stated in the warrant. Clayton *v.* McWilliams, 49 Miss. 311. The Iowa code permits a county auditor to issue warrants only on the recorded vote or resolution of the board of supervisors, except in payment of jury fees; and the issuance of a warrant without such vote to a taxpayer for an amount claimed to have been paid by him to the treasurer on an excessive valuation of his property is without authority. Polk County *v.* Sherman, 99 Iowa 60, 68 N. W. 562.

Stipulation waiving audit and allowance.— The court of county commissioners in contracting for the support of the poor has no authority to make it a condition of the contract that the probate judge shall draw his warrant on the treasurer for the amount accruing monthly, without due audit and allowance by the commissioners' court in termtime. Board of Revenue *v.* Barber, 53 Ala. 589.

58. State *v.* Merry, 34 Ohio St. 137; State *v.* Hagerty, 5 Ohio Cir. Dec. 215; State *v.* Ratterman, 2 Ohio Cir. Dec. 364. See also Jolly *v.* Woodward, 3 Ida. 496, 42 Pac. 512, where it was held that the fact that the charge for the publication of a delinquent tax-list arose under an express contract definitely fixing the amount thereof, did not bring it within Ida. Rev. Stat. § 2005, requiring the auditor to draw warrants for all claims against the county, the amounts of which are "fixed by law."

59. Walton *v.* McPhetridge, 120 Cal. 440, 52 Pac. 731; Sehorn *v.* Williams, 110 Cal. 621, 43 Pac. 8.

and in the performance of such ministerial duty he has no discretion unless the order of allowance is itself void and on its face an absolute nullity, imposing no duty and conferring no rights,[60] in which case he may properly refuse to draw the required warrant and cannot be compelled to do so by mandamus.[61]

d. Rescission of Order Directing Issuance. In some jurisdictions it is held that where a county board has ordered the drawing of a warrant, its power over the public funds is exhausted and it cannot, in the absence of fraud, imposition, or failure of consideration, rescind it and direct the withholding of the warrant, and the auditor must issue the warrant in accordance with the original order, although the board has assumed to rescind it.[62] In others, however, it is held that where an order for a warrant has been rescinded by the county board, whether rightfully or wrongfully, the officer whose duty it is to issue county warrants has no authority to issue the warrant.[63]

e. Limitations as to Amount. In some jurisdictions the issue of warrants is limited by statute to a certain proportion of the amount levied by tax for the current year.[64]

60. Jack *v.* Moore, 66 Ala. 184 [*quoted* in Jeffersonian Pub. Co. *v.* Hilliard, 105 Ala. 576, 17 So. 112]; Babcock *v.* Goodrich, 47 Cal. 488.

Omission of clerk to certify items of claim, etc.— A statute requiring a claim presented to the board of supervisors to be itemized, "giving names, dates, and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and the auditor must draw his warrant in favor of every person whose claim has been legally examined, allowed, and ordered to be paid by the board of supervisors; and the statute does not justify him in withholding a warrant merely because the clerk has not certified the items of the claim, or the liability for which it was allowed. It is his duty in such case to ascertain by inquiry the nature of the liability in order to distinctly specify it in the warrant, and that the claim has been allowed and ordered paid by the board of supervisors, and, upon receiving such information from the county clerk, it is his duty to draw the warrant. Sehorn *v.* Williams, 110 Cal. 621, 43 Pac. 8.

61. Walton *v.* McPhetridge, 120 Cal. 440, 52 Pac. 731; Linden *v.* Case, 46 Cal. 171; State *v.* Yeatman, 22 Ohio St. 546. Thus an order omitting reference to the law under which it is made, which expressly requires this to be done, is within the rule (Land *v.* Allen, 65 Miss. 455, 4 So. 117); and so is an order for the payment of a sum allowed by the commissioners as being due on a contract made by them in disregard of a statute requiring them to award the contract to the lowest bidder (State *v.* Yeatman, 22 Ohio St. 546).

Excessive certificate as to jurors' compensation.— The certificate of the clerk is not conclusive, and if he certifies for days in excess of the number for which the jurors are legally entitled to compensation, the auditor may refuse to issue orders on the county treasurer for such excess. State *v.* Merry, 34 Ohio St. 137.

62. State *v.* Auditor, 43 Ohio St. 311, 1 N. E. 209.

63. People *v.* Klokke, 92 Ill. 134.

Dismissal of appeal as annulment of order. — Where a party claims an allowance by the board of commissioners for damages sustained by the location of a highway through his land, and appeals from such order to the circuit court, such appeal and a dismissal of the proceedings annul such allowance, and money thereafter paid to him by the county treasurer upon a warrant drawn by the auditor for such allowance may be recovered back by the county commissioners in an action therefor. Booth *v.* Cass County, 84 Ind. 428.

64. **Under Kan. Comp. Laws (1879), c. 1, § 8, rule 11,** providing that the word "year" alone shall be equivalent to the expression "year of our Lord" the word "year" as used in Kan. Comp. Laws (1879), c. 25, art. 1, § 1, making it unlawful for any board of county commissioners to issue county warrants "in any one year" to a greater amount than the county tax levied in the same year to defray county expenses, and as used in Kan. Comp. Laws (1879), c. 25, § 220, limiting the amount of taxes the board of county commissioners can levy for current expenses "in any one year" means a calendar, and not a fiscal, year; and hence, to determine whether there has been an overissue of county warrants in any one year, the computation should begin with January 1 of that year. Garfield Tp. *v.* Samuel Dodsworth Book Co., 9 Kan. App. 752, 58 Pac. 565.

Under the Nebraska statutes warrants may be issued to the extent of seventy-five per cent of the tax levied for the current year, and after the amount levied for the year has been exhausted and there are no funds in the treasury for the payment of the same, warrants drawn should not be chargeable against the county, but against the county board or any member thereof for the payment of the same. *In re* House Roll 284, 31 Nebr. 505, 48 N. W. 275.

Warrants in anticipation of revenues.—By Colo. Sess. Laws (1887), p. 247, § 2, "whenever there are no moneys in the county treasury of a county to the credit of the proper

f. Prohibition Against Issuance in Absence of Funds. In some jurisdictions it is provided by statute[65] that warrants payable on demand or checks on the county treasurer shall be drawn and issued only when there is sufficient money in the appropriate fund in the treasury to pay them, and warrants drawn in violation of this prohibition are invalid whether in the hands of the original holder or of an assignee.[66]

g. Issuance of Several Warrants For One Claim. In some states several warrants may be issued for one claim against a county, instead of issuing a single warrant.[67]

h. Mandamus to Compel Issuance of Warrants.[68] A writ of mandamus will lie at the relation of one showing himself entitled to a county warrant to compel the drawing and delivery to him of such warrant,[69] unless there be no money in the treasury applicable to the purpose,[70] and is the proper remedy instead of an action against the individual members of the county board for damages.[71] Since a warrant is not the subject of levy on execution, it is no answer to an application for a mandamus to compel the delivery thereof to the person in whose favor it was allowed, that it was made out, but before delivery was taken in execution against the relator and the money paid by the county treasurer thereon to the officer taking the same.[72]

i. Restraint of Issuance by Injunction.[73] A court of equity may restrain the issuance or payment of orders or warrants illegally drawn.[74]

3. Discount of Warrants. A county court or board has no power to discount its warrants in payment of a county debt.[75]

fund to meet and defray the necessary expenses of the county, it shall be lawful for the board of county commissioners of such county to provide that county warrants and orders of such county may be drawn and issued against, and in anticipation of, the collection of taxes already levied for the payment of such expenses, to the extent of eighty per centum of the total amount of the taxes levied; provided, that warrants and orders so drawn and issued under the provisions of this section shall show upon their face that they are payable solely from the fund upon which the same is drawn, and the taxes levied to form the same when collected, and not otherwise." People *v.* Austin, 11 Colo. 134, 135, 17 Pac. 485.

65. Starr & Curt. Anno. Stat. Ill. p. 2460; 17 S. C. Stat. at L. p. 891.

66. Cook County *v.* Lowe, 23 Ill. App. 649; Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

67. U. S. *v.* Macon County Ct., 45 Fed. 400, where it was held construing a Missouri statute that such act did not so change the administration of county finances as to impair the remedy for the collection of outstanding warrants.

Orders in fractions of appropriations.— Where a board of supervisors made an appropriation to assist a township in the construction of a bridge, having previously specifically rescinded a resolution that orders should not be issued in fractions in discharge of any appropriation, but should be for the whole amount, the rescinding of the resolution was held, by necessary implication, to sanction the issuing of county orders in small amounts in discharge of the appropriation. Lawrence County *v.* Sage, 89 Ill. 265.

68. See, generally, Mandamus.

69. *Alabama.*— Jeffersonian Pub. Co. *v.* Hilliard, 105 Ala. 576, 17 So. 112; Jack *v.* Moore, 66 Ala. 184.

California.— Babcock *v.* Goodrich, 47 Cal. 488.

Indiana.— State *v.* Buckles, 39 Ind. 272.

Michigan.— People *v.* Wayne County, 5 Mich. 223.

Ohio.— State *v.* Auditor, 43 Ohio St. 311, 1 N. E. 209.

South Carolina.— Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

United States.—U. S. *v.* Macon County Ct., 45 Fed. 400.

See 13 Cent. Dig. tit. "Counties," § 241 *et seq.*

Warrants drawn on other than specified funds.— Mandamus having been granted requiring the county court to draw warrants in favor of relators, payable out of "the general funds of the county," the warrants were drawn accordingly; but at relator's request other warrants were drawn on another fund in lieu of the warrants already drawn, and were issued to relators. It was held that the latter warrants were issued pursuant to the writ of mandamus. U. S. *v.* Macon County Ct., 45 Fed. 400.

70. Com. *v.* Philadelphia County Com'rs, 2 Whart. (Pa.) 286, 1 Whart. (Pa.) 1; Com. *v.* Lancaster County Com'rs, 6 Binn. (Pa.) 5.

71. Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

72. People *v.* Wayne County, 5 Mich. 223.

73. See, generally, Injunctions.

74. Andrews *v.* Pratt, 44 Cal. 309; Ackerman *v.* Thummel, 40 Nebr. 95, 58 N. W. 738; Broomfield *v.* Houser, 30 Oreg. 534, 49 Pac. 843.

75. Bauer *v.* Franklin County, 51 Mo. 205.

4. Requisites and Validity — a. In General. It is essential to the validity of a county warrant that it should have been issued in payment of a valid and authorized indebtedness,[76] without fraud on the part of the board,[77] and upon proper consideration,[78] and that the statutory prerequisites to the issuance shall have been complied with, such for instance as the provision for means of payment in the ordinance authorizing the issue;[79] the provision that the claims or accounts shall be itemized and verified;[80] or the provision that a written statement of expenses incurred, etc., shall be filed.[81] Where a proposition to incur unusual expenditures is required by statute to be submitted to a popular vote, warrants issued in payment of such expenditures are void unless authorized by such vote[82] or validated by a subsequent election.[83]

b. As to Form — (I) *In General.* So also there should be a compliance with all requirements as to the form of the warrant or order, such as its signature and attestation,[84] seal,[85] registration,[86] etc.

So when upon the adjustment and settlement of accounts they have ordered the clerk to issue a warrant, their power is extinct and they have no right to give an additional sum to raise the warrants to a cash standard. Bauer *v.* Franklin County, 51 Mo. 205; Erskine *v.* Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645.

Warrants void as to excess.— Erskine *v.* Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; Shirk *v.* Pulaski County, 21 Fed. Cas. No. 12,794, 4 Dill. 209.

76. Perry *v.* Ames, 26 Cal. 372; Waitz *v.* Ormsby County, 1 Nev. 370; Wall *v.* Monroe County, 103 U. S. 74, 26 L. ed. 430; Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507.

77. Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507.

78. Campbell *v.* Polk County, 3 Iowa 467; Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507.

Effect of cancellation and reissue as evidence of validity.—The cancellation and reissue of county warrants is not such a determination of the validity of the debt for which they were issued that the parties are estopped from raising the question. Wall *v.* Monroe County, 103 U. S. 74, 26 L. ed. 430.

Effect of issue and cancellation of duplicate.— In Royster *v.* Granville County, 98 N. C. 148, 3 S. E. 739, plaintiff claimed to have lost a county order, and the defendant county, pursuant to resolution, issued a duplicate, which was never taken by plaintiff, the original having been found. Subsequently the duplicate was canceled. It was held that the issue and cancellation of the duplicate was not an admission or recognition of the validity of the original.

79. Young *v.* Police Jury, 32 La. Ann. 392; Smith *v.* Madison Parish, 30 La. Ann. 461; Flagg *v.* St. Charles Parish, 27 La. Ann. 319; Sterling *v.* West Feliciana Parish, 26 La. Ann. 59.

80. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19; Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507, where it was held, however, that a warrant issued for an account not verified as required by Kan. Gen. Stat. (1889), c. 25, § 28, is not void, and a recovery may be had thereon unless it is shown to have been issued fraudulently, without consideration, or for an indebtedness which the board was not authorized to contract.

81. Thorne *v.* Washington County, 7 Minn. 150.

82. People *v.* Presque Isle County, 36 Mich. 377; Theis *v.* Washita County, 9 Okla. 643, 60 Pac. 505; Brown *v.* Sherman County, 5 Fed. 274.

83. Richards *v.* Klickitat County, 13 Wash. 509, 43 Pac. 647; Williams *v.* Shoudy, 12 Wash. 362, 41 Pac. 169.

84. Signature by clerk.— Parker *v.* Hubbard, 64 Ala. 203; Clark County *v.* Lawrence, 63 Ill. 32; Smeltzer *v.* White, 92 U. S. 390, 23 L. ed. 508.

To be countersigned by the clerk and sealed with county seal. State *v.* Maccuaig, 8 Nebr. 215.

Signature by chairman of board and attestation by clerk.— Stoddard *v.* Benton, 6 Colo. 508; State *v.* Maccuaig, 8 Nebr. 215.

Signature by clerk or judge.— Callaghan *v.* Salliway, 5 Tex. Civ. App. 239, 23 S. W. 837.

Signature by president and clerk of police jury under authority of jury.— Capmartin *v.* Police Jury, 19 La. Ann. 448.

Counter-signature by county treasurer.— Clark County *v.* Lawrence, 63 Ill. 32.

Counter-signature by controller.— Lee *v.* Davis, 22 Pa. Co. Ct. 492.

Indorsement of justices.— Wilkinson *v.* Cheatham, 43 Ga. 258.

Counter-signature of orders on militia fund. — Treasurer *v.* Shannon, 51 Pa. St. 221.

85. In Iowa it was held that a county warrant is invalid unless the seal of the county be attached. The seal of the district court of the county is insufficient. Springer *v.* Clay County, 35 Iowa 241. See also Prescott *v.* Gonser, 34 Iowa 175; State *v.* Maccuaig, 8 Nebr. 215; Smeltzer *v.* White, 92 U. S. 390, 23 L. ed. 508. In other jurisdictions no seal is necessary. Clark County *v.* Lawrence, 63 Ill. 32; Parker County *v.* Courts, 2 Tex. Unrep. Cas. 398.

86. Taylor *v.* Chickasaw County, 74 Miss. 23, 16 So. 907, 19 So. 834.

Non-presentation for examination no de-

(II) *Recitals.* Orders or warrants drawn upon a particular fund should specify upon their face upon what account and for what services they are drawn.[87] In some jurisdictions certain warrants and orders are required to show upon their faces that they are payable solely from the fund upon which the same are drawn, and even in a case where the statute does not require it there is no impropriety in making the designation so long as the correct fund is named.[88] The insertion of other words in a county warrant besides those in the statutory form will not vitiate the warrant, where the prescribed words are there and the other words do not destroy their effect.[89]

5. Assignment and Negotiability[90] — **a. Assignment** — (I) *Assignability.* County warrants are assignable so as to enable the assignee to sue thereon,[91] provided such assignment be made in the form prescribed by statute;[92] and a county treasurer cannot be compelled to pay a warrant to any other person than the one in whose favor it is drawn, without an assignment thereof by the payee.[93]

(II) *How Assignment Made.* As a general rule the written assignment or indorsement of the payee is essential to the valid assignment of a county warrant which will vest the legal title in the assignee,[94] unless payable to bearer, in which

fense for non-payment.— An order of a board of county commissioners requiring that county warrants previously issued shall be presented for reëxamination by the board, and providing that all such scrip not presented by a stated day shall be of no effect, or "repudiated," is, although published according to the terms of the order, no defense to the payment of warrants not presented. Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773.

87. Ventura County *v.* Clay, 114 Cal. 242, 46 Pac. 9; Territory *v.* Browne, 7 N. M. 568, 37 Pac. 1116; Treasurer *v.* Shannon, 51 Pa. St. 221.

88. San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362.

89. Young *v.* Camden County, 19 Mo. 309.

Unless a claim is required by law to be drawn on a particular fund, the validity of a warrant will not be affected, because it is drawn upon a fund not appropriate to the character of the allowance. Warren County *v.* Klein, 51 Miss. 807.

90. See, generally, Assignments.

91. *Arkansas.*— Crawford County *v.* Wilson, 7 Ark. 214.

California.— People *v.* Gray, 23 Cal. 125; Dana *v.* San Francisco, 19 Cal. 486.

Colorado.— People *v.* Hall, 8 Colo. 485, 9 Pac. 34.

Indiana.— Brownlee *v.* Madison County Com'rs, 81 Ind. 186.

Iowa.— McCormick *v.* Grundy County, 24 Iowa 382.

Kansas.— See School Dist. No. 73 *v.* Dudley, 28 Kan. 160.

Texas.— Leach *v.* Wilson County, 62 Tex. 331.

United States.— Wall *v.* Monroe County, 103 U. S. 74, 26 L. ed. 430.

See 13 Cent. Dig. tit. "Counties," § 249.

Mandamus to compel disallowance.—Where services have been rendered in good faith and a certificate of indebtedness, which was passed, was assigned to a *bona fide* holder for value before an application for mandamus was made to compel its disallowance, the only remedy, if the audit was incorrect, is by certiorari. People *v.* Greene County, 14 Abb. N. Cas. (N. Y.) 29.

The transferee of an invalid county warrant is under no obligation to demand payment thereof from the county, or to undertake to establish its validity as against the county, before seeking a return of the consideration paid therefor from the transferrer. Walsh *v.* Rogers, 15 Nebr. 309, 18 N. W. 135.

Warrant on a non-existent fund is nevertheless an acknowledgment of indebtedness by the county, and the assignment invests the assignee with the ownership of the debt. Blanchard *v.* Chaffee County, 15 Colo. App. 410, 62 Pac. 579.

92. International Bank *v.* Franklin County, 65 Mo. 105, 27 Am. Rep. 261.

Partial assignment.— The holder of a warrant cannot assign a part without the consent of the parish authorities. They are not bound to pay their debts in portions. Le Blanc *v.* East Baton Rouge Parish, 10 Rob. (La.) 25.

93. People *v.* Gray, 23 Cal. 125.

Although it is not an unwarranted stretch of authority for a county auditor to deliver a warrant drawn in payment of goods purchased to a mere selling agent of the vendor, the county treasurer has no authority to pay the warrant to such agent. State *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 545, 7 Ohio N. P. 116.

94. Garvin *v.* Wiswell, 83 Ill. 215; International Bank *v.* Franklin County, 65 Mo. 105, 27 Am. Rep. 261; Craig *v.* Mason, 64 Mo. App. 342 (holding that the indorsement must be written out as required by Mo. Rev. Stat. (1889), § 3194); Bradley County *v.* Surgoine, 9 Baxt. (Tenn.) 407; U. S. *v.* Macon County Ct., 45 Fed. 400 (indorsement in full essential).

Indorsement by agent of payee.— In the absence of a course of dealing between the parties authorizing it, a county treasurer pays a warrant indorsed by one assuming

case it is transferable by mere delivery.[95] Nevertheless the equitable title may pass by a sale and mere delivery,[96] or by an indorsement in blank.[97]

b. Negotiability.[98] It may be stated as a general rule that county warrants, certificates, and orders, although in form negotiable, are not negotiable in the sense of the law merchant so as to shut out in the hands of a *bona fide* purchaser inquiries as to their validity or preclude defenses or set-offs which could be made to them in the hands of the original parties,[99] even when they are payable to bearer;[1] and an assignee of such paper stands in the shoes of the original holder.[2]

6. Payment — a. Necessity For. Unless barred by a call for reissuance, county orders, warrants, or other county scrip must be paid by the county treasurer if he have funds on hand, regardless of how long the same may have been issued and outstanding;[3] nor can a county treasurer refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid when there is money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants, and any warrant so presented.[4]

to act as agent of the payee at his peril as to the authority of the agent to make the indorsement. State *v.* Lewis, 6 Ohio S. & C. Pl. Dec. 221, 4 Ohio N. P. 176.

95. Crawford County *v.* Wilson, 7 Ark. 214; Sweet *v.* Carver County Com'rs, 16 Minn. 106; Crawford *v.* Noble County, 8 Okla. 450, 58 Pac. 616; Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639. In McCormick *v.* Grundy County, 24 Iowa 382, which was an action by M on a county warrant, the petition set out a copy of a warrant purporting to have been issued to B or order, and by him assigned to S or bearer. It was held that the assignment to S or bearer, and the possession of the instrument by M were sufficient to enable him to maintain the action.

Due to holder as upon direct promise.— County warrants payable to bearer are not assignable within the meaning of the act of congress of 1875 regulating the jurisdiction of federal courts. They are taken to be due on an original and direct promise from the maker to the bearer and not by assignment from the first holder. Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639.

96. Garvin *v.* Wiswell, 83 Ill. 215.

97. Craig *v.* Mason, 64 Mo. App. 342.

98. See, generally, Commercial Paper.

99. *Alabama.*—Allen *v.* McCreary, 101 Ala. 514, 14 So. 320; Savage *v.* Mathews, 98 Ala. 535, 13 So. 328.

Arkansas.— Crawford County *v.* Wilson, 7 Ark. 214.

California.— Santa Cruz County Bank *v.* Bartlett, 78 Cal. 301, 20 Pac. 682; People *v.* Gray, 23 Cal. 125; Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78; Dana *v.* San Francisco, 19 Cal. 486; People *v.* El Dorado County, 11 Cal. 170.

Colorado.— People *v.* Hull, 8 Colo. 485, 9 Pac. 34; People *v.* Rio Grande County, 11 Colo. App. 124, 52 Pac. 748.

Illinois.— People *v.* Johnson, 100 Ill. 537; 39 Am. Rep. 63 [*affirming* 8 Ill. App. 395]; Garvin *v.* Wiswell, 83 Ill. 215; Cook County *v.* Lowe, 23 Ill. App. 649; Hall *v.* Jackson County, 5 Ill. App. 609.

Indiana.— State *v.* Benson, 70 Ind. 481.

Iowa.— Clark *v.* Polk County, 19 Iowa 248.

Kansas.— Garfield Tp. *v.* Crocker, 63 Kan. 272, 65 Pac. 273.

North Carolina.— McPeeters *v.* Blankenship, 123 N. C. 651, 31 S. E. 876. See also Gastonia First Nat. Bank *v.* Warlick, 125 N. C. 593, 34 S. E. 687.

North Dakota.— Erskine *v.* Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645.

Tennessee.—Donaldson *v.* Walker, 101 Tenn. 236, 47 S. W. 417; Camp *v.* Knox County, 3 Lea 199.

Texas.— Stringer *v.* Morris, 82 Tex. 39, 17 S. W. 926; Leach *v.* Wilson County, 62 Tex. 331; Lane *v.* Hunt County, 13 Tex. Civ. App. 315, 35 S. W. 10.

United States.— Wall *v.* Monroe County, 103 U. S. 74, 26 L. ed. 430; Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639; Kinsey *v.* Little River County, 14 Fed. Cas. No. 7,829; Shirk *v.* Pulaski County, 21 Fed. Cas. No. 12,794, 4 Dill. 209.

See 13 Cent. Dig. tit. "Counties," § 249.

No innocent holder of illegal warrant.— There can be no innocent holder of a warrant against a county issued without authority of law, if the record of such warrant provided for by a statute in such cases, discloses on its face the illegality of its issuance. Honea *v.* Monroe County, 63 Miss. 171.

1. People *v.* Gray, 23 Cal. 125; Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639.

2. Santa Cruz County Bank *v.* Bartlett, 78 Cal. 301, 20 Pac. 682; People *v.* Hall, 8 Colo. 485, 9 Pac. 34; Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. 938; Loomis *v.* Brown County, 15 S. D. 606, 91 N. W. 309.

3. Howell *v.* Hogins, 37 Ark. 110. And see Gamble *v.* Clark, 92 Ga. 695, 19 S. E. 54.

4. Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206.

The burden of proof to justify refusal of payment of a warrant is on the treasurer, when it appears that the claim was allowed and an order made to draw a warrant, and that it was regularly drawn by the auditor

b. From What Funds Payable.[5] No county order or warrant should be drawn on any fund not properly raised for its payment,[6] as claims against counties can be satisfied only out of the revenue available for the payment of such claims;[7] and as a general rule where a county order or warrant is on its face payable out of a special fund, the holder having accepted the same can look only to such fund for the payment of his claim,[8] and cannot recover payment after such fund has been exhausted,[9] unless the county has diverted the money of such fund from the payment of the warrants drawn against it and has used the same for other purposes.[10] A state legislature being the paramount political power can direct and control county officers in their disposition of the money of the county, and may forbid the payment by the treasurer of warrants issued on indebtedness occurring prior to a certain date, except with funds then on hand or subsequently received and belonging to the revenue of the county previous to such date.[11]

c. Order in Which Warrants Payable. The order in which county orders or warrants shall be paid is usually fixed by statute, and when so fixed cannot be

and delivered to the respondents. McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231.

5. Application to legislature for means of payment.—Where an act provides what taxes may be imposed by a county for county purposes, and designates the purpose to which each fund shall be devoted, no provision being made for that class of indebtedness to which certain warrants belong, except the funding provisions contained in the act, where there are no funds in the treasury applicable to the purpose for which a warrant was issued when the holder demanded payment of the treasurer, his only remedy is to apply to the legislature to provide means of paying his debt. Rose *v.* Estudillo, 39 Cal. 270.

6. Mitchell *v.* Speer, 39 Ga. 56.

7. Cooper *v.* Wait, 106 Ky. 628, 51 S. W. 161, 21 Ky. L. Rep. 229; Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477.

Payment from general fund of subsequent year.—A county warrant drawn on the general county fund of one year may be paid out of the general fund of a subsequent year, in Missouri (Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477; Reynolds *v.* Norman, 114 Mo. 509, 21 S. W. 845); but not until all warrants drawn for the expenses of the year for which the taxes were levied have been paid (Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206). In California and Kentucky each year's revenue must pay each year's indebtedness. McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231; Cooper *v.* Wait, 106 Ky. 628, 51 S. W. 161, 21 Ky. L. Rep. 229.

Payment of warrants for jurors' fees from general fund.— Under Kan. Comp. Laws (1879), pp. 445, 446, §§ 16, 20, 21, providing for the payment of jurors' fees out of the county treasury, warrants issued by the county in payment of such fees should be paid out of the general fund, if the treasurer has sufficient money on hand, although such payment will not leave sufficient funds to pay the fees and salaries of the county officers, clerks, and employees, and Laws (1876), c. 36, § 4, providing that no warrant of the county of Leavenworth shall be drawn or issued on the treasurer, in payment of any indebtedness to exceed the amount of funds on hand in the treasury, to the credit of the fund on which the order is drawn at the time, after reserving therefrom a sum sufficient to pay the fees and salaries of the county officers, clerks, and employees, is unconstitutional and void. Shepherd *v.* Helmers, 23 Kan. 504.

Warrant to defray the expenses of making assessments for taxation drawn by the county treasurer under S. C. Acts (1874), § 84, is payable "from the first collection of county funds" of the fiscal year for which the assessments were made, and not of the fiscal year in which they were made. State *v.* Ransom, 9 S. C. 199.

8. State *v.* Hortsman, 149 Mo. 290, 50 S. W. 811; Moody *v.* Cass County, 85 Mo. 477, 74 Mo. 307; Campbell *v.* Polk County Ct., 76 Mo. 57; Kingsberry *v.* Pettis County, 48 Mo. 207, 17 Mo. 479; State *v.* Seaman, 23 Ohio St. 389; Theis *v.* Washita County, 9 Okla. 643, 60 Pac. 505; Loomis *v.* Brown County, 15 S. D. 606, 91 N. W. 309.

9. Moody *v.* Cass County, 85 Mo. 477; Campbell *v.* Polk County Ct., 76 Mo. 57; Campbell *v.* Polk County, 49 Mo. 214; Hall *v.* State, 54 Nebr. 280, 74 N. W. 590; Redmon *v.* Chacey, 7 N. D. 231, 73 N. W. 1081.

Words descriptive of purpose only.— Under a provision that all moneys belonging to the county as such and not held by it in trust constitute one fund out of which all its liabilities are to be paid, an order on the county treasurer made payable out of the fund for jail purposes is payable out of the general county fund, and these words must be understood as simply descriptive of the purpose for which the order was drawn and not as a limitation. Montague *v.* Horton, 12 Wis. 599.

10. Valleau *v.* Newton County, 81 Mo. 591, 72 Mo. 593; State Sav. Bank *v.* Davis, 22 Wash. 406, 61 Pac. 43.

11. McDonald *v.* Maddux, 11 Cal. 187.

changed by county boards or courts.[12] While it has sometimes been provided that county orders or warrants shall be paid in the order of their issuance,[13] the usual provision is that such warrants or orders shall be paid in the order in which they shall be presented for payment,[14] or regularly reached in the order of their registration.[15]

d. Powers and Duties of Treasurer. A county treasurer is not required to pay all warrants drawn upon him, but only such as are founded on orders of the board of supervisors for the payment of demands legally chargeable against the county and allowed by the board;[16] and he may and should refuse to pay warrants known by him to have been drawn for claims not authorized by law, or expenditures beyond the power of the board to incur,[17] or to have been improvidently issued.[18] Where, however, a county board issues a warrant which they are authorized to issue, the treasurer can exercise no discretion, but it is his duty to pay the same.[19] It is the duty of a county treasurer upon refusal to pay a war-

12. Laforge *v.* Magee, 6 Cal. 285.

13. Mitchell *v.* Speer, 39 Ga. 56; Munson *v.* Mudgett, 15 Wash. 321, 46 Pac. 256.

14. *California.*— Laforge *v.* Magee, 6 Cal. 285; McCall *v.* Harris, 6 Cal. 281; Taylor *v.* Brooks, 5 Cal. 332.

Colorado.— People *v.* Austin, 11 Colo. 134, 17 Pac. 485; Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287.

Kansas.—Monroe *v.* Crawford, 9 Kan. App. 749, 58 Pac. 232.

Missouri.— State *v.* Johnson, 162 Mo. 621, 63 S. W. 390; State *v.* Hortsman, 149 Mo. 290, 50 S. W. 811; Andrew County *v.* Schell, 135 Mo. 31, 36 S. W. 206; State *v.* Trammel, (1889) 11 S. W. 747; Morrow *v.* Surber, 97 Mo. 155, 11 S. W. 48.

Montana.— Greeley *v.* Cascade County, 22 Mont. 580, 57 Pac. 274.

South Dakota.— Stuart *v.* Custer County, 14 S. D. 155, 84 N. W. 764.

United States.— U. S. *v.* Macon County Ct., 75 Fed. 259; Hamilton County *v.* Sherwood, 64 Fed. 103, 11 C. C. A. 507.

See 13 Cent. Dig. tit. "Counties," § 252.

Application to payment of old warrants from surplus.—State *v.* Johnson, 162 Mo. 621, 63 S. W. 390.

Applies only as between warrants of given year.— In Shaw *v.* Statler, 74 Cal. 258, 15 Pac. 883, it was held that section 77 of the California county government act, providing that claims against a county are entitled to payment "according to priority of time in which they were presented," must be construed as requiring priority of payment only as between the warrants of any given year.

Order not changed by recovery of judgment.—Monroe *v.* Crawford, 9 Kan. App. 749, 58 Pac. 232; Garden City First Nat. Bank *v.* Morton County, 7 Kan. App. 739, 52 Pac. 580.

Priority as affected by commencement of fiscal year.— Under Mo. Rev. Stat. (1889), § 3166, providing that county warrants "for any one year" shall be paid in the order in which they were registered with the county treasurer, warrants registered between January 1 and May 1 are entitled to priority of payment over those registered after May 1, since the fiscal year of a county begins January 1. State *v.* Allison, 155 Mo. 325, 56 S. W. 467, where it was further held that the provision that no warrant shall be paid out of the county's revenue for any one year until the expenses incurred in maintaining the county for that year are paid, a county treasurer cannot refuse to pay warrants issued for the current expenses of the county for the fiscal year because warrants issued prior to the fiscal year were unpaid.

15. Grayson *v.* Latham, 84 Ala. 546, 4 So. 200, 866.

Although warrants on a county fund are payable in the order of registration, it is not necessary, where several are registered at the same time, that enough to satisfy all be accumulated before there is any payment, but a reasonable amount being accumulated it should be distributed among them. U. S. *v.* Macon County Ct., 75 Fed. 259.

16. Keller *v.* Hyde, 20 Cal. 593.

17. Kelly *v.* Sersanous, (Cal. 1896) 46 Pac. 299; Ventura County *v.* Clay, 114 Cal. 242, 46 Pac. 9; Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; Los Angeles County *v.* Landershim, 100 Cal. 525, 35 Pac. 153, 556; Linden *v.* Case, 46 Cal. 171; Friedman *v.* Horning, 128 Mich. 606, 87 N. W. 752; Merkel *v.* Berks County, 81* Pa. St. 505. And see Jefferson County *v.* Arrighi, 54 Miss. 668.

Where a county warrant was issued during the Civil war by a county in one of the Confederate States to the sheriff for taxes overpaid during such war, the amount overpaid, undoubtedly in Confederate money, being taxes for the support of the war, the illegality of the allowance affords conclusive ground for its non-payment. Files *v.* McWilliams, 49 Miss. 578.

18. Priet *v.* Hubert, 62 Cal. 9.

19. Von Schmidt *v.* Widber, 105 Cal. 151, 38 Pac. 682; Friedman *v.* Horning, 128 Mich. 606, 87 N. W. 752; Hendricks *v.* Johnson, 45 Miss. 644; State *v.* McAlpin, 26 N. C. 140.

Personal liability for non-payment.—A teacher of a common school, in whose favor an order is drawn by the school commissioners on the county trustee for services actually rendered under a valid contract, is entitled to have the same paid by the trustee out

rant upon presentation for want of funds to indorse such warrant, "Not paid for want of funds," and for failure so to do he will be personally liable.[20] Where the order is drawn subject to the deduction of delinquent taxes due from the payee, the county treasurer may deduct delinquent taxes due from the payee on paying an order presented to him.[21]

e. Sufficiency and Effect of Payment.[22] It has been held that receiving county warrants in payment of taxes,[23] their purchase by the county treasurer,[24] or the parting with such warrants at a sacrifice on account of the failure of the county to pay them on demand, constitute a valid payment of such warrants.[25] Where county orders or warrants payable to bearer are presented, and the county treasurer pays the same in good faith and without notice of defect in the title of the one presenting the same, as it is his duty to do under such circumstances, the county will be discharged from any further liability thereon.[26] Where county orders or warrants have been paid by the county treasurer[27] they lose their vitality and are thereby extinguished as evidence of indebtedness, and cannot again become valid securities in the hands of an innocent holder.[28]

7. Interest on Warrants. As a general rule in the absence of statutory provision therefor, county orders or warrants in the usual form do not bear interest,[29] at least until after demand and refusal of payment,[30] and in some jurisdictions the

of any money in his hands, when the order is presented, belonging to the school district, or the first money which may come to his hands thereafter, whether the money be received on the apportionment for the year in which the services were rendered or any subsequent year, and the trustee is personally liable to the holder of the order for the amount called for if he fails to pay it in the order of its presentation. The holder of the order is not required to resort to a mandamus. Bayless *v.* Driskell, 5 Lea (Tenn.) 265.

Where a warrant is regular and legal in form, it is the duty of the treasurer to pay the same, and he is not liable for an illegal payment unless he has notice that it was not based upon a lawful demand or of facts sufficient to put an ordinarily prudent officer upon inquiry, which, if diligently prosecuted, would lead to a discovery of the illegality of the claim. Los Angeles County *v.* Lankershein, 100 Cal. 525, 35 Pac. 153, 556.

20. Marks *v.* Purdue University, 56 Ind. 288.

Mandamus to compel indorsement.— It has also been held in Montana that mandamus will lie to compel such indorsement as of the time the party presenting the warrant was entitled thereto. Territory *v.* Gilbert, 1 Mont. 371.

21. State *v.* Miller, 145 Ind. 598, 44 N. E. 309.

22. **The holder of a county warrant issued by a county in one of the Confederate States** during the Civil war can only require in payment the equivalent in lawful currency of the amount of the bond in Confederate money at the date of the warrant. Clayton *v.* McWilliams, 49 Miss. 311.

23. So held under a Kansas statute. Thorpe *v.* Cochran, 7 Kan. App. 726, 52 Pac. 107.

24. Allen *v.* McCreary, 101 Ala. 514, 14 So. 320, holding that the purchase by a county treasurer or his deputy of county certificates when he has county funds in his hands, and which he does not account for on the expiration of his office, is in law a payment of such certificates with the county funds which were unaccounted for, and a transferee of such officer cannot again collect them.

25. Crawford County *v.* Wilson, 7 Ark. 214, where it was held that although the original payee of county warrants may have parted with them at a sacrifice on account of the failure of the county to pay them on demand, by thus parting with them he elected to regard them as payment, and he cannot recover of the county the difference between the nominal amount of the warrants and the price at which he sold them.

26. Sweet *v.* Carver County Com'rs, 16 Minn. 106.

27. **Where, however, without any fraudulent intent** the holder of large county orders exchanges them with the treasurer for smaller ones which he had paid, but which had never been allowed in his accounts, the debt represented by the large orders is not extinguished. Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517.

28. Chemung Canal Bank *v.* Chemung County, 5 Den. (N. Y.) 517; Lane *v.* Hunt County, 13 Tex. Civ. App. 315, 35 S. W. 10.

29. *Illinois.*— Madison County *v.* Bartlett, 2 Ill. 67.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Oregon.— Seton *v.* Hoyt, 34 Oreg. 266, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634.

Pennsylvania.—Com. *v.* Philadelphia County Com'rs, 4 Serg. & R. 125.

Texas.— Ashe *v.* Harris County, 55 Tex. 49,

30. Skinner *v.* Platte County, 22 Mo. 437.

After demand of payment and refusal and indorsement thereof by treasurer in some jurisdictions warrants bear interest.

Iowa.—Rooney *v.* Dubuque County, 44 Iowa

allowance or payment of interest on county scrip is expressly forbidden,[31] even after such demand and refusal,[32] and even though the order contains a clause for the payment of interest where there is no authority for allowing interest.[33] Counties may, however, be authorized by an act of the legislature to issue interest-bearing orders payable in the future.[34]

8. Acceptance in Discharge of Obligations to County. County warrants have been held to be receivable in discharge of county or city revenue, license, tax, assessment, fine, penalty, or forfeiture,[35] etc.

9. Surrender For Examination, Redemption, Reissue, or Funding — a. Power to Require. A state legislature may by statute authorize the proper fiscal officers of

128; Brown *v.* Johnson County, 1 Greene 486.

Missouri.— Robbins *v.* Lincoln County Ct., 3 Mo. 57.

Montana.— Higgins *v.* Edwards, 2 Mont. 585; Territory *v.* Gilbert, 1 Mont. 371.

North Carolina.— Yellowly *v.* Pitt County Com'rs, 73 N. C. 164.

Oregon.— Seton *v.* Hoyt, 34 Oreg. 266, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634.

Change of legal rate of interest after a warrant is indorsed "not paid" for want of funds and before the time of payment does not affect the right of the holder to interest at the rate payable when the warrant was so indorsed. Seton *v.* Hoyt, 34 Oreg. 266, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634.

Effect of failure to indorse non-payment.— The neglect of the county treasurer to properly indorse a county warrant that has been duly presented to him for payment does not release the county from its liability to pay the interest authorized by the statute, and the court will regard the indorsement as made, because it should have been made. Territory *v.* Gilbert, 1 Mont. 371.

Necessity for actual tender to suspend accumulation.— Nothing but an actual tender of the amount due on outstanding county warrants, which have been indorsed by the treasurer, "Not paid for lack of funds," will suspend the accumulation of interest thereon. Mere publication of notice that the treasurer is ready to redeem them is not sufficient for that purpose. Rooney *v.* Dubuque County, 44 Iowa 128.

No interest till special fund created.— A county order, payable out of a special fund to be created, is not due until the fund is created; and judgment cannot be rendered upon it, unless that fact is established; nor does such an order draw interest before the fund is created. Brown *v.* Johnson County, 1 Greene (Iowa) 486.

On past-due instalment of donation.— Where the board of county commissioners made an order providing for a donation to a college, and that it should be paid in five instalments without interest, it was held that the fair construction was that none of the instalments should bear interest until they respectively became due. After an instalment became due and a warrant was issued for it, if it could not be paid for want of funds, there was no reason why it should not bear interest like any other county order not paid for want of funds. Marks *v.* Purdue University, 37 Ind. 155.

Until money in treasury to meet warrant. — In Davidson County *v.* Olwill, 4 Lea (Tenn.) 28, it was held that the county court, as the representative of the county, may, in consideration of forbearance to sue, contract with a creditor of the county for the payment of interest on a county warrant after its registration by the county trustee, until there is money in the treasury to meet it in its regular order, but no longer.

31. Jacks *v.* Turner, 36 Ark. 89; Hall *v.* Jackson County, 95 Ill. 352; Madison County *v.* Bartlett, 2 Ill. 67.

32. Jacks *v.* Turner, 36 Ark. 89; Camp *v.* Knox County, 3 Lea (Tenn.) 199; Alexander *v.* Oneida County, 76 Wis. 56, 45 N. W. 21.

33. Hall *v.* Jackson County, 95 Ill. 352. *Compare* San Patricio County *v.* McClane, 58 Tex. 243, holding that a county court may, under its authority to provide for public buildings and to allow and settle county accounts and direct their payment, issue interest-bearing warrants.

34. Frankford Real Estate, etc., Co. *v.* Jackson County, 98 Fed. 942, 39 C. C. A. 355.

In cases where interest is allowed, illegal county warrants subsequently ratified and validated by a popular vote will bear interest as though they were valid at their inception. Williams *v.* Shoudy, 12 Wash. 362, 41 Pac. 169.

35. U. S. *v.* Macon County Ct., 45 Fed. 400, receivable in payment of special tax levied for payment of county bonds, although the priority in which such warrants are required by law to be paid is thereby defeated.

For county taxes.— Howell *v.* Hogins, 37 Ark. 110; English *v.* Oliver, 28 Ark. 317; Thorpe *v.* Cochran, 7 Kan. App. 726, 52 Pac. 107; State *v.* Payne, 151 Mo. 663, 52 S. W. 412, not for any year other than that for which they were issued.

In payment of fine.— Lusk *v.* Perkins, 48 Ark. 238, 2 S. W. 847.

Parol evidence inadmissible to show agreement to pay in money.— All debts due a county, being by statute (Ark. Dig. 1884, § 1146) payable in its warrants, a county cannot prove by parol, in defense to a petition for the sheriff to receive such warrants in payment of a judgment recovered by it, that it was agreed that the note on which such

a county to issue an order calling in county warrants for redemption, funding, cancellation, and reissue, examination or classification[36] upon the giving of proper notice of such order.[37]

b. Effect of Non-Compliance With Order. In one state it has been held that warrants not presented after due notice of an order calling them in no longer exist as debts against the county, and such failure to present constitutes a good defense to an action thereon.[38] In another it has been held that while the legislature of a state cannot require the creditors of a county to surrender their evidences of indebtedness and accept new ones different in terms from the old,[39] it may refuse to provide funds to pay any portion of the old indebtedness unless the creditors will accept new evidence in place of the old.[40]

c. Remedy Where Warrants Surrendered For Void Bond. The owner of parish warrants who surrenders them to the parish in exchange for bonds of the parish which prove to be void acquires no right of action for damages against the parish because the warrants had been destroyed by the parish to the knowledge and with the tacit consent of the owner.[41] Where a county undertakes to fund its outstanding indebtedness into bonds, and on issuing such bonds, payable to bearer,

judgment was based should be paid in money, when neither note nor judgment specifies in what medium it is to be paid, since to do so would be to modify the terms of a written instrument by parol. Richie *v.* Frazer, 50 Ark. 393, 8 S. W. 143.

Use by assignee.— Where warrants have been received from an assignee thereof in payment of taxes, and such payment has been approved by the county court on the settlement of the accounts of the county treasurer, such payment will be considered sufficient, although the assignment was not in the form required by law. U. S. *v.* Macon County Ct., 45 Fed. 400.

36. *Arkansas.*— Crudup *v.* Richardson, 61 Ark. 259, 32 S. W. 684; Thompson *v.* Scanlan, (1891) 16 S. W. 197; Lusk *v.* Perkins, 48 Ark. 238, 2 S. W. 847; Goldsmith *v.* Stewart, 45 Ark. 149; Allen *v.* Bankston, 33 Ark. 740; Fry *v.* Reynolds, 33 Ark. 450; Seymour *v.* Jefferson County, 28 Ark. 254; Chicot County *v.* Campbell, 23 Ark. 699.

California.— People *v.* Morse, 43 Cal. 534; Soher *v.* Calaveras County, 39 Cal. 134; Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130.

Louisiana.— State *v.* Funding Bd., 39 La. Ann. 395, 1 So. 910; O'Connor *v.* East Baton Rouge Parish, 31 La. Ann. 221.

Montana.— Thomas *v.* Smith, 1 Mont. 21.

North Dakota.— Erskine *v.* Nelson County, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696.

United States.— Ouachita County *v.* Wolcott, 103 U. S. 559, 26 L. ed. 505; Cissell *v.* Pulaski County, 10 Fed. 891, 3 McCrary 446.

See 13 Cent. Dig. tit. "Counties," § 255.

Funding of auditor's warrants.— The constitutional ordinance of Louisiana for the relief of delinquent taxpayers, which authorizes the funding of auditor's warrants in "baby" bonds, only grants to the warrant holder the option of having his warrants exchanged for bonds, to be exercised prior to Jan. 1, 1886, the date therein fixed for their maturity. The power conferred upon the funding board continues subsequent to that date for the sole purpose of examining, auditing, and funding, *nunc pro tunc*, such warrants as shall have been presented to them, or to some officer of the board antecedent to that date. State *v.* Funding Bd., 39 La. Ann. 395, 1 So. 910.

Validation of warrants issued in excess of authority.— In Erskine *v.* Nelson County, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696, it was held that the act of March 13, 1885, authorizing Nelson county to fund its outstanding indebtedness and call in all outstanding warrants, validates county warrants theretofore issued in excess of authority.

37. Miller County *v.* Gazola, 65 Ark. 353, 46 S. W. 423; Crudup *v.* Richardson, 61 Ark. 259, 32 S. W. 684; Thompson *v.* Scanlan, (Ark. 1891) 16 S. W. 197; Lusk *v.* Perkins, 48 Ark. 238, 2 S. W. 847. And see cases cited *supra*, note 36.

County cannot object to want of notice.— The notice required by the statute to be given of the order of the county court calling in warrants for cancellation and reissue is for the benefit of the warrant holders, and the county cannot object that legal notice of such call was not given. Cissell *v.* Pulaski County, 10 Fed. 891, 3 McCrary 446.

Order allowing less than statutory time for presentaton.— An order of the county court calling in county warrants for reissue, which gives less than three months from its date to the time appointed for presenting the warrants, is invalid, and a scrip holder is not obliged to appeal from it or quash it by certiorari, but may compel the county collector by mandamus from the circuit court to receive his scrip for county taxes. Fry *v.* Reynolds, 33 Ark. 450.

38. Cope *v.* Collins, 37 Ark. 649; Ouachita County *v.* Wolcott, 103 U. S. 559, 26 L. ed. 505.

39. People *v.* Morse, 43 Cal. 534; Soher *v.* Calaveras County, 39 Cal. 134; Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130.

40. People *v.* Morse, 43 Cal. 534.

41. A suit on the discharged warrants to recover their amount is the form of action proper in such a case. O'Connor *v.* East Baton Rouge Parish, 31 La. Ann. 221.

takes up, cancels, and destroys the warrants evidencing such indebtedness, and the bonds are bought in the open market, and are afterward repudiated by the county, and are held by the court to be void, for want of power at the time in the county to issue them, the purchaser of the bonds for a valuable consideration, on offering to surrender them to the county, is entitled to be subrogated to the rights of the original holder of the warrants.[42] So also where county warrants, valid, but lacking a necessary recital, are delivered up in exchange for new warrants which prove to be void, the holder can compel a return of the original warrants and their reformation by inserting the necessary recital, and an assignee of one of the void warrants is entitled to the same relief.[43]

10. PROCEEDINGS TO ENFORCE — a. By Mandamus.[44] In a number of jurisdictions an action will not lie in the state courts for the refusal of payment of county warrants, but the proper remedy is by mandamus against the treasurer,[45] at least in all cases where the treasurer is in funds;[46] and it has been held that a statute giving the right to sue a county does not embrace cases where claims have been allowed and warrants issued, and that it is only where a county board has refused to allow a claim that suit may be brought on it.[47] Express provision is made in some states for the trial of issues of fact raised by traverse to the return upon

42. Coffin *v.* Kearney County, 114 Fed. 518 [*following* Irvine *v.* Kearney County, 75 Fed. 765].

The statute of limitations does not begin to run against such suit until denial by the county of its obligation on such bonds; and the action of the county commissioners of such county in adopting a resolution recognizing the obligation of the county on the warrants and directing the funding of the debt into bonds is tantamount to a new acknowledgment, and stops the running of the statute of limitations. Coffin *v.* Kearney County, 114 Fed. 518.

43. Goldsmith *v.* Stewart, 45 Ark. 149.

44. See, generally, MANDAMUS.

45. Day *v.* Callow, 39 Cal. 593; Dana *v.* San Francisco, 19 Cal. 486; Polk *v.* Tunica County, 52 Miss. 422; Klein *v.* Warren County, 51 Miss. 878; Greeley *v.* Cascade County, 22 Mont. 580, 57 Pac. 274. And see Commissioners Ct. *v.* Moore, 53 Ala. 25; Elmore County *v.* Long, 52 Ala. 277.

Not per se a proper subject of action.— In Port Royal *v.* Graham, 84 Pa. St. 426, it was held that although an ordinary county warrant drawn on the treasurer in payment of a debt is not *per se* a proper subject of an action, such an instrument of writing in the form of a warrant, and to be held as a voucher, may contain other matters which make it a contract and evidence of debt.

Liability of county on orders by military board.— Where orders were made upon the county treasurer by the military board under the provisions of the militia act of April 8, 1870, and its supplements, the county is not liable therefor, and the remedy of the holder is against the county treasurer to compel payment. Wyoming County *v.* Bardwell, 84 Pa. St. 104.

Doubtful claims.— Under Tex. Rev. Stat. art. 998, which provides that if the county treasurer has any doubt of the legality of a warrant presented for payment he shall not pay the same, but report it to the commissioners' court for their consideration, if he has doubts of its validity and has been ordered by the commissioners' court not to pay the warrant, he cannot be compelled by mandamus to act in violation of that discretion, unless there was evidence that he had acted arbitrarily and without any reason in the matter. Walker *v.* Barnard, 8 Tex. Civ. App. 14, 27 S. W. 726.

46. Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287; Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Wood *v.* State, 155 Ind. 1, 55 N. E. 959; Greeley *v.* Cascade County, 22 Mont. 580, 57 Pac. 274.

Must show funds at time of demand.— One seeking to compel a county treasurer to pay orders which sixteen months before were duly stamped "Paid" by respondent's predecessor, pursuant to Burns Rev. Stat. Ind. (1894), § 7998, must show not only non-payment but that at the time of demand the money liable to the payment was still in the treasury; there being no presumption that such money, shown to be there at the time the orders were drawn, remained in the treasury to the time of demand. Wood *v.* State, 155 Ind. 1, 55 N. E. 959.

47. Klein *v.* Warren County, 51 Miss. 878.

Necessity to show real foundation of indebtedness.— The holder of a county warrant cannot sue the county in an ordinary action, based upon the warrants. If the instrument upon which this action is based is declared on as a county warrant, the action cannot be maintained. If it is to be regarded as an action on a debt contracted by the board of police, out of the ordinary course of dealing, the declaration must show the circumstances which authorized the board to contract such a debt. In no case is the warrant, which is the act of the clerk, a cause of action. It is the order of the board allowing such claim which is the evidence of the claimant's right, and the foundation of any proceeding against the board. Polk *v.* Tunica County, 52 Miss. 422.

the writ.[48] It has been held in one state that no statute of limitation operates against the right to bring mandamus because the party entitled to payment cannot coerce satisfaction by suing out execution.[49]

b. By Action — (i) *Right to Maintain.* The weight of authority as shown in the decisions is, however, to the effect that upon the non-payment of county warrants or orders upon demand, a judgment may be obtained against the county in an ordinary action in the nature of assumpsit, debt, or covenant,[50] without going back to the original consideration.[51] It has been held in some jurisdictions that suit can be maintained thereon if not paid on presentation without regard to whether an appropriation adequate to pay such warrants has been made,[52] and although there is no money in the treasury to pay;[53] but in others it has been held that where a warrant is drawn upon a special fund no action can rightfully be brought thereon until such fund is raised, or at least until sufficient time has elapsed to enable the county to levy and collect it in the mode provided by law.[54] In the federal courts it has been held that the remedy of the holder of county warrants for non-payment is by action at law prosecuted to judgment as a foundation for a writ of mandamus to compel the levy and collection of a tax

48. Wood *v.* State, 155 Ind. 1, 55 N. E. 959; Greeley *v.* Cascade County, 22 Mont. 580, 57 Pac. 274.

49. Taylor *v.* Chickasaw County, 70 Miss. 87, 12 So. 210; Klein *v.* Smith County, 54 Miss. 254; Carroll *v.* Board of Police, 28 Miss. 38.

50. *Illinois.*— People *v.* Clark County, 50 Ill. 213.

Iowa.— Campbell *v.* Polk County, 3 Iowa 467; Steel *v.* Davis County, 2 Greene 469; Brown *v.* Johnson County, 1 Greene 486.

Kansas.— Atchison, etc., R. Co. *v.* Kearny County, 58 Kan. 19, 48 Pac. 583.

Missouri.— International Bank *v.* Franklin County, 65 Mo. 105, 27 Am. Rep. 261.

New York.— Staten Island Bank *v.* New York, 68 N. Y. App. Div. 231, 74 N. Y. Suppl. 284.

South Dakota.— Kane *v.* Hughes County, 12 S. D. 438, 81 N. W. 894; Heffleman *v.* Pennington County, 3 S. D. 162, 52 N. W. 851.

Wisconsin.—Markwell *v.* Waushara County, 10 Wis. 73; Pelton *v.* Crawford County Sup'rs, 10 Wis. 69; Savage *v.* Crawford County Sup'rs, 10 Wis. 49.

See 13 Cent. Dig. tit. "Counties," § 256.

In Tennessee the question as to whether county warrants are instruments of such character that suits can be maintained thereon seems not to be definitely settled. In Bradley County *v.* Surgoine, 9 Baxt. (Tenn.) 407, it seems to have been assumed that they were such instruments, while in the later case of Camp *v.* Knox County, 3 Lea (Tenn.) 199, this was seriously questioned. In Gibson County *v.* Rains, 11 Lea (Tenn.) 20, the court held that it was unnecessary to determine the question as no objection was taken in the court below.

County a necessary party defendant.— In Heritage *v.* Bronnenberg, 25 Ind. App. 692, 58 N. E. 1064, it was held that where the holder of a county warrant brought an action for its payment against the county treasurer without making the county a party defendant, he could not recover, since the county, and not the county treasurer, was the debtor.

51. Campbell *v.* Polk County, 3 Iowa 467; Brown *v.* Johnson County, 1 Greene (Iowa) 486.

Even in those jurisdictions where mandamus is the proper remedy for non-payment of warrants, where the treasurer is in funds, it has been held that if the fund appropriated for the payment of a warrant has been illegally withdrawn and appropriated to other purposes by the county authorities and a proceeding by mandamus would be useless, an action in assumpsit is maintainable. Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287.

52. Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674.

53. Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477; International Bank *v.* Franklin County, 65 Mo. 105, 27 Am. Rep. 261 [*overruling* Howells *v.* Reynolds County, 51 Mo. 154].

Action on warrants on ditch fund — Judgment when no such fund.— Where a ditch has been constructed by the county under statutory authority and warrants have been drawn on the ditch fund, and payment thereof is refused, when presented to the county treasurer, because the supervisors have not raised a fund by the levy of a tax, as contemplated by Iowa Code, § 1214, the holder of the warrant is entitled to a judgment against the county for the amount thereof, and to the enforcement of payment by the levy of a tax in obedience to the provisions of the statute. It is not necessary to the recovery of such judgment that a request be made upon the supervisors to raise a fund by the levy of the proper tax, and that such request be denied. Mills County Nat. Bank *v.* Mills County, 67 Iowa 697, 25 N. W. 884.

54. Forbes *v.* Grand County, 23 Colo. 344, 47 Pac. 388; Brewer *v.* Otoe County, 1 Nebr. 373; King Iron Bridge, etc., Co. *v.* Otoe County, 124 U. S. 459, 8 S. Ct. 582, 31 L. ed. 514; Chapman *v.* Douglass County, 107 U. S. 348, 2 S. Ct. 62, 27 L. ed. 378.

for the payment of such warrants,[55] when the sum in controversy and the character of the parties confer jurisdiction,[56] and that the remedy by mandamus is not lost by a merger of the warrant in a judgment recovered thereon in the federal court.[57]

(II) *Limitation of Action.* The period of limitation for bringing suit on county warrants depends of course on statutory provisions. If there are no statutes especially relating to warrants, the period of limitation will be that governing actions on written contracts generally.[58] In some jurisdictions, however, there are special provisions relating to county warrants.[59] There is some diversity of holding in respect to the time when the statute of limitations begins to run against the right to bring an action on a county warrant. In one state it has been held that the statute commences to run from the time of issuance and delivery of the warrant to those in whose favor they are drawn.[60] In others it is held that the statute does not begin to run from the date of issuance or refusal of payment, but only from the time when the money for payment is collected.[61] If the warrant is payable out of a particular fund, the county cannot avail itself of the statute of limitations without first showing that it had provided such fund.[62]

(III) *Jurisdiction of Federal Courts.* The federal courts have jurisdiction of an action on county warrants payable to certain payees or to bearer, where the holder or assignee of such warrants who brings the action is a non-resident of the state in which the county issuing the warrants is situated, whether the payees named were citizens of such state or not,[63] and without reference to the citizenship of the payee where the other jurisdictional facts appear.[64]

Order not due till creation of fund.— A county order payable out of a special fund to be created is not due until the fund is created, nor is an action maintainable until then. Brown *v.* Johnson County, 1 Greene (Iowa) 486.

55. Chickaming Tp. *v.* Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. ed. 307; Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639; Goldman *v.* Conway County, 10 Fed. 888, 2 McCrary 327; Shirk *v.* Pulaski County, 21 Fed. Cas. No. 12,794, 4 Dill. 209. In Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639, it was held that regardless of the proceedings in the state courts the practice in the federal courts is to proceed to judgment, as a foundation for a writ of mandamus to compel the levy of taxes to pay county warrants, and when the holder of such warrants is a citizen of another state he may maintain an action thereon in the federal court even when the payee cannot maintain such action.

56. Lyell *v.* Lapeer County, 15 Fed. Cas. No. 8,618, 6 McLean 446.

57. U. S. *v.* King, 74 Fed. 493.

58. See Crudup *v.* Ramsey, 54 Ark. 168, 15 S. W. 458; Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674; Goldman *v.* Conway County, 10 Fed. 888, 2 McCrary 327.

59. In Missouri the statutes provide that county warrants not presented within five years' time after being presented and protested for want of funds and not presented again within five years shall be barred. This statute will govern such action to the extent of the exclusion of the general statutes of limitation. State *v.* Holt County Ct., 135 Mo. 533, 37 S. W. 521; Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477 [*overruling* (Mo. 1894) 28 S. W. 896]; Knox County *v.* Morton, 68 Fed. 787, 15 C. C. A. 671 [*affirming* 65 Fed. 369].

In South Dakota, if county warrants are required by statute to be sealed, the period of limitations is governed by the statute relating to sealed instruments. Heffleman *v.* Pennington County, 3 S. D. 162, 52 S. W. 851.

60. Crudup *v.* Ramsey, 54 Ark. 168, 15 S. W. 458; Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674; Goldman *v.* Conway County, 10 Fed. 888, 2 McCrary 327.

In Iowa it was held in one case that the statutes do not begin to run until the fund out of which the warrant was payable came into existence (Wetmore *v.* Monona County, 73 Iowa 88, 34 N. W. 751); in another that, under a statute giving counties authority to make additional assessments to pay the costs of county ditches, limitations begin to run against actions on county warrants payable out of the ditch fund from the date of their issuance, and not from the date when they are assets actually in the fund out of which they are payable (Bodman *v.* Johnston County, 115 Iowa 296, 88 N. W. 331).

61. Apache County *v.* Barth, (Ariz. 1898) 53 Pac. 187; State *v.* Holt County Ct., 135 Mo. 533, 37 S. W. 521; Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477, 28 S. W. 896; Brewer *v.* Otoe County, 1 Nebr. 373; King Iron Bridge Mfg. Co. *v.* Otoe County, 124 U. S. 459, 8 S. Ct. 582, 31 L. ed. 514; Knox County *v.* Morton, 58 Fed. 787, 15 C. C. A. 671.

62. King Iron Bridge, etc., Co. *v.* Otoe County, 124 U. S. 459, 8 S. Ct. 582, 31 L. ed. 514.

63. Kearney County *v.* McMasters, 68 Fed. 177, 15 C. C. A. 353; Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639.

64. Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674.

(IV) *PLEADING*—(A) *Petition or Complaint.* In an action on a large number of warrants the petition need not fully describe them, where the aggregate amount is stated, and an exhibit attached sets forth the date, amount, and payee of each warrant.[65] An allegation that county warrants were issued and delivered to plaintiff is sufficient to show that he is the present owner thereof.[66] If the action is based on a warrant payable out of a certain fund as fast as it shall accrue, it should be alleged that the county has reserved money from such fund with which such order or part thereof might be paid, or that the order or warrant was fraudulently drawn on a fund in which the county had no assets; and a complaint alleging that no part of the fund has accrued is bad on demurrer.[67] If it is alleged that the county had absolutely refused to pay the warrants and that other warrants of a similar class and later date and registration had been paid, it need not also be alleged that the county treasurer had funds from which to pay the warrants sued on.[68]

(B) *Answer or Affidavit.* In an action on county warrants an answer averring that such warrants were issued without a recorded vote of the county board is insufficient if it fails to also aver that the warrants were not of a class which might be issued without a vote.[69] A county is not bound to file an affidavit denying the execution of warrants sued on in order to require proof by the holders thereof of the lawful execution of such warrants.[70] Where to a suit against a county to recover an amount unpaid under an order of the board, the defendant pleads by way of set-off that the plaintiff is indebted to the county for several county orders issued to him, such answer will be bad where it fails to aver that such orders were obtained through fraud or mistake, since the presumption will be that as the county is not authorized to loan its orders, such orders were issued for a purpose authorized by law.[71]

(V) *DEFENSES.* In a suit by the assignee of county orders issued to a county officer, it is no defense that the payment of such orders had been forbidden because of his official misconduct, since to permit such defense would be to allow a claim arising from a tort to be set up by way of counter-claim to a cause of action based on contract.[72] Warrants which have been issued to a county treasurer in settlement of his accounts are presumed to represent a balance due such treasurer, and in an action on such warrants an indebtedness alleged to be due from the treasurer to the county, at their issuance, cannot be set off against them in the absence of allegations attacking the settlement.[73] Where a person holding claims against a county assigns the same to another to whom a warrant was issued therefor, stating that it was subject to any delinquent taxes due by the party to whom it was issued, such warrant is issued to the assignee of the claims, and not

65. Sherwood *v.* La Salle County, (Tex. Civ. App. 1894) 26 S. W. 650.

66. Dorothy *v.* Pierce, 27 Oreg. 373, 41 Pac. 668.

Averment of extrinsic facts to show right or title has been held unnecessary. Pollock *v.* Stanton County, 57 Nebr. 399, 77 N. W. 1081. But see Bradley County *v.* Surgoine, 6 Baxt. (Tenn.) 108, holding that in the case of warrants negotiable only by indorsement or written assignment, a declaration in an order therein alleging title by delivery merely is defective and demurrable.

67. Union County *v.* Mason, 9 Ind. 97.

Allegation of funds or lapse of time for collection of tax.— In Brewer *v.* Otoe County, 1 Nebr. 373, it was held that a petition alleging the issue and non-payment of a county warrant without alleging that there is money in the treasury for its payment, or that the time has elapsed for the collection of the money by taxation, will be dismissed without prejudice.

Omission supplied in aid of verdict.— In Howell *v.* Reynolds County, 51 Mo. 154, it was held that while the petition was defective in not stating that there were funds in the treasury out of which the warrants might have been paid and that the treasurer refused to pay them, such omission will not, after a verdict has been rendered, impair the judgment, but will be supplied by the court in aid of the verdict.

68. Sherwood *v.* La Salle County, (Tex. Civ. App. 1894) 26 S. W. 650.

69. Clark *v.* Polk County, 19 Iowa 248.

70. Cook County *v.* Schaffner, 46 Ill. App. 611.

71. Adams County *v.* Mertz, 27 Ind. 103.

72. Trotter *v.* Swain County, 90 N. C. 455.

73. San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362.

to his assignor, and the treasurer has no right to deduct from the amount thereof delinquent taxes due the county from such assignor.[74]

(VI) *Evidence*—(A) *Presumptions and Burden of Proof.* In a suit against a county board on warrants issued under their order, if such warrants are valid on their face they are presumed to have been validly issued, and the burden of establishing their invalidity devolves upon the defendants.[75] Where a county seeks to avoid the payment of a warrant on the ground that at the time the debts were incurred and the obligations issued, the county was indebted beyond the limit fixed by law, the burden of proof is on it to establish such facts.[76]

(B) *Admissibility.* In a suit upon county warrants, a warrant issued for a proper allowance and under a regular order of the county board should be admitted when offered in evidence, and its exclusion is error.[77] If fraud and failure of consideration is set up as a defense, the minutes of the court showing the proceedings at the time the warrant was authorized are properly admitted in evidence, as tending to throw light on the entire transaction.[78] Where the records of the county commissioners have been destroyed by fire, it is competent to show by oral proof that no order had ever been made by such commissioners authorizing the issue of the county warrants sued upon.[79] And entries in the records of a county, made by the clerk in due course of business, either under the express provisions of a statute or in the usual course of official duty, are admissible in evidence in behalf of the county.[80]

74. Brink *v.* Coutts, 87 Iowa 199, 54 N. W. 207.

75. *Alabama.*— Grayson *v.* Latham, 84 Ala. 546, 4 So. 200, 866.

Arizona.— Apache County *v.* Barth, (1898) 53 Pac. 187.

California.— Keiley *v.* Sersanous, (1896) 46 Pac. 299.

Colorado.— San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362.

Nebraska.— Pollock *v.* Stanton County, 57 Nebr. 399, 77 N. W. 1081.

Oklahoma.— D County *v.* Sauer, 8 Okla. 235, 61 Pac. 367; Custer County *v.* De Lana, 8 Okla. 213, 57 Pac. 162; Johnson *v.* Pawnee County, 7 Okla. 686, 56 Pac. 701.

South Dakota.— Lyman County *v.* State, 11 S. D. 391, 78 N. W. 17.

United States.— Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

See 13 Cent. Dig. tit. "Counties," § 259.

For example where the plaintiff has proved by competent evidence the loss or destruction of records on which warrants were issued, and the warrants are shown to have been regularly issued, the burden is on defendant to show that the claims are illegal or fraudulent. Taylor *v.* Chickasaw County, 74 Miss. 231, 19 So. 834.

Resolutions of commissioners as to validity.— In State *v.* Gloyd, 14 Wash. 5, 44 Pac. 103, it was held that in an action by the holder of a county warrant to enforce payment from the county treasurer, the plaintiff may properly introduce in evidence a resolution of the county commissioners declaring certain warrants invalid and providing for their validation, which it was proposed to do under Wash. Laws (1895), p. 44, but whose validation had failed to carry, for the purpose of showing that such warrants, although prior in point of time to the one in suit, were not entitled to payment out of the funds in the county treasury.

76. Custer County *v.* De Lana, 8 Okla. 213, 57 Pac. 162; Johnson *v.* Pawnee County, 7 Okla. 686, 56 Pac. 701. In Mountain Grove Bank *v.* Douglas County, 146 Mo. 42, 47 S. W. 944, it was held that a general denial, with a special defense to an action on county warrants that the constitutional limit of indebtedness had been exceeded, imposes the burden on plaintiff to prove that the warrants were for debts created before the funds were exhausted, in order to make his *prima facie* case and then the burden shifts to defendant to prove its affirmative defense.

77. Taylor *v.* Chickasaw County, (Miss. 1895) 16 So. 907.

Effect as evidence of date of indebtedness. — Neither the date of a county warrant nor of the claim on which it was issued is evidence of the date of the creation of the indebtedness. Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

Orders admissible under general issue.— A county order signed by the county clerk and countersigned by the treasurer is evidence of indebtedness on the part of the county issuing the same, and is therefore admissible under the common counts. Clark County *v.* Lawrence, 63 Ill. 32.

Where the warrant sued on has been lost, a copy thereof may be offered and admitted in evidence, where the testimony furnishes sufficient basis for such admission. McCormick *v.* Grundy County, 24 Iowa 382.

78. Auerbach *v.* Salt Lake County, 23 Utah 103, 63 Pac. 907.

79. Grayson *v.* Latham, 84 Ala. 546, 4 So. 200, 866.

80. Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

(c) *Sufficiency.* Where a warrant is in form payable to bearer, its possession and presentation by plaintiff at the trial is *prima facie* evidence of the plaintiff's ownership, even though such ownership be denied in the defendant's answer, and is sufficient until the ownership is attacked by some evidence.[81] Where it is provided by statute that no action shall be brought upon a county order until a certain number of days after a demand for payment, an indorsement on an order dated more than the prescribed number of days before the bringing of the suit and purporting to be signed by the county treasurer, which recites that it was presented and payment refused for want of funds, is sufficient evidence of such presentation to justify the bringing of a suit thereon.[82] In an action on county warrants, a compilation of the taxable property found in the published reports of the county auditor, and a certificate of the clerk of the county in the state auditor's office, giving the valuation of the property claimed to have been furnished when bonds issued by the county were presented for registration, is inadmissible to show the taxable value of the property.[83]

(VII) *Instructions.* In an action on a county warrant, although there are facts tending very strongly to show that such warrant was without consideration and fraudulent, yet where such facts do not prove beyond controversy that the warrant may not have issued in consummation of a legitimate transaction, the plaintiff is entitled to have his theory of the transaction distinctly presented in the charge to the jury.[84]

(VIII) *Confession of Judgment.* Where the county or parish officers were without authority to issue certain warrants sued on, they are also without authority to bind their county or parish by confessing judgment for the amount of such warrants.[85]

11. Proceedings to Set Aside Judgment on Warrants. In an action to set aside a judgment alleged to have been fraudulently secured on warrants fraudulently issued, discovery of the fraud within the meaning of the statute of limitations is not to be imputed from the moment the fraud was perpetrated merely because it was known to the officer who committed it.[86]

E. Bills and Notes. The rule is well settled that in the absence of statutory authority therefor, express or implied, the fiscal agents of a county cannot issue commercial paper so as to charge the county,[87] and where such authority

81. Heffleman *v.* Pennington County, 3 S. D. 162, 52 N. W. 851.

Effect of verified answer denying execution. — Under Ariz. Rev. Stat. par. 735, providing that an answer denying the execution of the instrument sued on shall be verified, the verification itself does not throw the burden on plaintiff of establishing the validity of the instrument by affirmative evidence. Apache County *v.* Barth, (Ariz. 1898) 53 Pac. 187.

82. Alexander *v.* Oneida County, 76 Wis. 56, 45 N. W. 21.

83. Coffin *v.* Kearney County, 114 Fed. 518.

84. Leach *v.* Wilson County, 68 Tex. 353, 4 S. W. 613.

85. Benham *v.* Carroll Parish, 28 La. Ann. 343.

86. O'Brien County *v.* Brown, 18 Fed. Cas. No. 10,399, 1 Dill. 588.

87. *Kentucky.*— Crittenden County Ct. *v.* Shanks, 88 Ky. 475, 11 S. W. 468, 11 Ky. L. Rep. 8.

Louisiana.— Snelling *v.* Joffrion, 42 La. Ann. 886, 8 So. 609; Citizens' Bank *v.* Police Jury, 28 La. Ann. 263.

Nebraska.— Stewart *v.* Otoe County, 2 Nebr. 177.

New York.— Ballston Spa First Nat. Bank *v.* Saratoga County, 106 N. Y. 488, 13 N. E. 439; Parker *v.* Saratoga County, 106 N. Y. 392, 13 N. E. 308; Chemung Canal Bank *v.* Chemung County, 5 Den. 517.

Texas.— San Patricio County *v.* McClane, 44 Tex. 392.

West Virginia.— Exchange Bank *v.* Lewis County, 28 W. Va. 273.

See 13 Cent. Dig. tit. "Counties," § 260.

Discretionary power under authority to erect and pay for public buildings.— Under a statute authorizing county commissioners to erect necessary county buildings and raise by taxation the money to pay for the same, the board of commissioners may issue and sell or discount the notes of the county to provide the means to pay for a court-house. Vaughn *v.* Forsyth County, 117 N. C. 429, 23 S. E. 354.

Issuance by treasurer.— A county being largely indebted on account of county and town bounties to volunteers, represented by short loans for which annual taxes were levied, the treasurer was authorized to obtain extensions as the towns might desire, by resolutions of the board each year till 1875. The treasurer assumed the authority of borrowing money on notes of the county signed by himself officially, and giving new notes for old

is given to fiscal agents it must be strictly pursued or the county cannot be held for the payment thereof.[88]

F. Bonds — 1. Power to Issue — a. In the Absence of Statutory Authority. In the absence of authority conferred expressly or by necessary implication by the legislature, counties or parishes have no power to issue bonds,[89] and an injunc-

notes and bonds. The board being empowered under N. Y. Laws (1864), cc. 8, 72, to borrow money and renew its obligations for bounties, which statutes also ratified subsisting obligations of that nature, it was held that the treasurer's acts were binding on the county. Clark *v.* Saratoga County, 107 N. Y. 553, 14 N. E. 428; Parker *v.* Saratoga County, 106 N. Y. 392, 13 N. E. 308.

Power not limited to a single exercise.— Under a statute conferring upon boards of supervisors power to borrow money on the credit of their respective counties to pay bounties, etc., and to execute obligations for its payment, the power is not limited to a single exercise thereof, but the board is authorized to borrow money and to renew the county obligations from time to time for the purpose of paying or continuing the indebtedness created thereunder. Parker *v.* Saratoga County, 106 N. Y. 392, 13 N. E. 308.

88. Capmartin *v.* Police Jury, 23 La. Ann. 190.

Issue pursuant to order of police jury.— Notes given by the police jury without an ordinance of that body authorizing their issue impose no legal obligation on the parish to redeem them, and an ordinance of the police jury, passed subsequently to the issuing of notes, authorizing their issue, will not render valid those notes which were issued without the authority of the ordinance and before it was passed. Capmartin *v.* Police Jury, 23 La. Ann. 190.

89. *California.*— Sutro *v.* Pettit, 74 Cal. 332, 16 Pac. 7, 5 Am. St. Rep. 442.

Illinois.—Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048; Hardin County *v.* McFarlan, 82 Ill. 138.

Louisiana.— Breaux *v.* Iberville Parish, 23 La. Ann. 232.

Minnesota.— Rogers *v.* Le Sueur County, 57 Minn. 434, 59 N. W. 488; Goodnow *v.* Ramsey County, 11 Minn. 31.

Nebraska.— State *v.* Babcock, 23 Nebr. 802, 37 N. W. 645.

New York.— Ghiglione *v.* Marsh, 23 N. Y. App. Div. 61, 48 N. Y. Suppl. 604.

South Carolina.— Duke *v.* Williamsburg County, 21 S. C. 414.

South Dakota.— Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

Tennessee.— Colburn *v.* Chattanooga Western R. Co., 94 Tenn. 43, 28 S. W. 298 [*criticizing* State *v.* Anderson County, 8 Baxt. 24].

Texas.— Ball *v.* Presidio County, 88 Tex. 60, 29 S. W. 1042; Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Robertson *v.* Breedlove, 61 Tex. 316; Morrill *v.* Smith County, (Civ. App. 1895) 33 S. W. 899.

Virginia.— Bonsack *v.* Roanoke County, 75 Va. 585.

United States.—Claiborne County *v.* Brooks, 111 U. S. 400, 4 S. Ct. 489, 28 L. ed. 470; Police Jury *v.* Britton, 15 Wall. 566, 21 L. ed. 251; Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288; Francis *v.* Howard County, 50 Fed. 44; Lewis *v.* Sherman County, 5 Fed. 269, 2 McCrary 464; Whitwell *v.* Pulaski County, 29 Fed. Cas. No. 17,605, 2 Dill. 249.

See 13 Cent. Dig. tit. "Counties," § 261.

Bonds issued without authority not accommodation paper.— Counties issued to a railroad company bonds in payment of a subscription to the stock of the company, made on the condition of the construction of the railroad through such counties by way of certain towns therein. The company negotiated the bonds, and at maturity the counties were compelled by suit to pay them. It was supposed when the bonds were issued that the counties had authority to issue them, and it was intended that they should pay them; but it was subsequently decided that they had no such authority, whereupon the counties sued the company to recover the amount paid, alleging that the bonds were accommodation paper. It was held that as the company had constructed the road as agreed there was a consideration for the bonds, and as it was intended that the counties should pay them when due they could not be considered as accommodation paper. Jefferson County *v.* Burlington, etc., R. Co., 66 Iowa 385, 16 N. W. 561, 23 N. W. 899.

Effect of recognition of validity where right doubtful.— In Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 601, it was held that while obligations issued by a municipal corporation cannot acquire validity through the operation of the doctrine of estoppel, if the corporation was without statutory power to issue them in the first instance, yet, where the act from which the power is derived is susceptible of different constructions, and the right to issue bonds is doubtful, the fact that they have been recognized by the municipality and its citizens as valid for a long number of years, during which it has paid interest thereon without objection, will entitle the holders to a more liberal construction of the statute under which the power was claimed and exercised than would be given it if their validity had been challenged before their issuance or soon thereafter.

Prohibition of issuance by newly organized counties.— Kan. Laws (1886), p. 123, relating to the organization of new counties, provides that no bond of any kind shall be issued by any county organized thereunder within one year after the organization, and, as amended by Kan. Laws (1887), p. 186, directs that no bonds shall be voted for and issued by any county or township within one year

tion will issue to restrain their issuance in the absence of such statutory authority.[90]

b. Under Statutory Authority. The state legislatures may, however, and often do, authorize counties to issue bonds for certain purposes and upon certain conditions,[91] and in so doing they do not violate the prohibition of the federal constitution against the issuance by states of bills of credit,[92] etc., or the prohibition usual in state constitutions against the loaning or giving of their credit by counties.[93] There must be at least a substantial compliance with acts conferring such authority.[94] Such statutes may be not only permissive but mandatory, requiring the issuance and sale of bonds for certain purposes, in which case there is no discretion left to a county board as to such issuance.[95] Express authority is not in all cases required for the issuance of negotiable paper, but may be implied from other express powers granted.[96] There is, however, no room for any implication of such power where a statute makes other specific provision for the payment of indebtedness, as by taxation, etc.,[97] or by warrant on the treasurer for money

after the organization of such new county under the provisions of such act. Sage *v.* Fargo Tp., 107 Fed. 383, 46 C. C. A. 361, where it was held that railroad-aid bonds issued pursuant to a vote at an election held within a year after the organization of the county are void, although not issued until after the expiration of such year. A statutory provision that no bonds of any kind shall be issued by any county within one year after its organization, prohibits the issue or sending forth of bonds within the year; but it does not prohibit the presentation of a petition for the submission of a proposition to issue the bonds, or the calling and giving notice of an election thereon, within the year, and bonds based upon such a petition, call, and notice are valid. Corning *v.* Meade County, 102 Fed. 57, 42 C. C. A. 154.

The authority to issue "county orders" for a certain purpose given by Minn. Laws, Ex. Sess. (1857), p. 301, to county commissioners for a certain purpose, "subject to the same rules as other county orders," does not give them authority to issue bonds payable at a future time with interest coupons. Goodnow *v.* Ramsey County, 11 Minn. 31.

The power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent cannot be implied from the power of fiscal agents of a county to incur obligations for work done for the county and to give proper vouchers therefor. Colburn *v.* Chattanooga Western R. Co., 94 Tenn. 43, 28 S. W. 298; Police Jury *v.* Britton, 15 Wall. (U. S.) 566, 21 L. ed. 251.

90. Eagle *v.* Beard, 33 Ark. 497; Allison *v.* Louisville, etc., R. Co., 9 Bush (Ky.) 247.

91. *Alabama.*— Alabama Great Southern R. Co. *v.* Reed, 124 Ala. 253, 27 So. 19, 82 Am. St. Rep. 166.

California.— People *v.* San Luis Obispo County, 50 Cal. 561.

Georgia.— Neel *v.* Bartow County, 94 Ga. 216, 21 S. E. 516.

Iowa.— Witter *v.* Polk County, 112 Iowa 380, 83 N. W. 1041.

Kansas.— Doty *v.* Ellsbree, 11 Kan. 209.

Texas.— Mitchell County *v.* Paducah City Nat. Bank, 91 Tex. 361, 43 S. W. 880.

United States.— Wilkes County *v.* Coler, 113 Fed. 725, 51 C. C. A. 399; Corning *v.* Meade County, 102 Fed. 57, 42 C. C. A. 154.

See 13 Cent. Dig. tit. "Counties," § 261.

92. McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

93. State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

94. Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. 899.

95. People *v.* San Luis Obispo County, 50 Cal. 561.

96. Thus the power to borrow money has been held to give the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in future. Doty *v.* Ellsbree, 11 Kan. 209; State *v.* Anderson County, 8 Baxt. (Tenn.) 249; Bunch *v.* Fluvanna County, 86 Va. 452, 10 S. E. 532; Police Jury *v.* Britton, 15 Wall. (U. S.) 566, 21 L. ed. 251. And so does the power to subscribe for stock in corporations, to purchase property for public use, and other like powers incapable of being carried into execution without borrowing money or giving obligations payable in the future. Witter *v.* Polk County, 112 Iowa 380, 83 N. W. 1041; Police Jury *v.* Britton, 15 Wall. (U. S.) 566, 21 L. ed. 251. And it has been held that the power to make donations of money or other securities includes the power to issue bonds for that purpose. Lund *v.* Chippewa County, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131.

97. Hardin County *v.* McFarlan, 82 Ill. 138; Marionneaux *v.* Police Jury, 23 La. Ann. 251; Campbell County Justices *v.* Knoxville, etc., R. Co., 6 Coldw. (Tenn.) 598; Claiborne County *v.* Brooks, 111 U. S. 400, 4 S. Ct. 489, 28 L. ed. 470; Wells *v.* Pontotoc County, 102 U. S. 625, 26 L. ed. 122.

Aid to corporations limited to that from improvement fund.— Gould Dig. Ark. c. 101, art. 111, § 52, provides that counties having or controlling internal improvement funds, granted to them by the state, may subscribe to the capital stock of any valid and duly organized railroad company. This statute confers no general authority on the counties to subscribe for stock in railway companies;

payable out of a designated fund or any money in the treasury not otherwise appropriated.[98]

c. **Construction of Statutes Authorizing Issue.**[99] Where bonds are issued upon the authority of an ambiguously worded statute, the court will adopt a liberal construction in order to sustain their validity, although it would have prevented their issue had seasonable application therefor been made.[1]

d. **Statutory Validation.** Where bonds issued by counties are invalid merely for the want of legislative authority to issue the same, they may be validated by a subsequent act of the legislature,[2] and all irregularities in the proceedings under an act authorizing the issuance of bonds will be cured by an act recognizing the validity of all that has been done under such prior act;[3] and the validity of the bonds is not affected by the repeal of the validating act.[4]

e. **Effect of Consolidation or Division of Corporation.** Where a railroad corporation by subsequent amendment of its charter is divided into several corporations, a vote in favor of issuing bonds in aid of the original corporation will not authorize the issue of bonds in favor of one of the new corporations;[5] and if it is by statute consolidated with another, after a subscription of bonds in its aid but before issuance, its right to the bonds is not affected by the consolidation,[6] nor are such bonds rendered invalid.[7] Where the corporate organization of a company to which subscriptions were made has been abandoned and the franchise and subscriptions thereto transferred according to law, to a new corporation

the power given is to subscribe to the internal improvement fund. The act contemplates that the bonds should be issued on the credit of that fund, to which alone the holders of the bonds can look for payment; and bonds issued by a county independently of the limitations contained in the act are void. Hancock *v.* Chicot County, 32 Ark. 575. See also English *v.* Chicot County, 26 Ark. 454.

98. Shawnee County Com'rs *v.* Carter, 2 Kan. 115.

99. Whether county bonds were issued under a general statute or under a special act is a matter determinable in a suit on the bonds and one to be finally settled by the judgment thereon. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93.

1. Woodhull *v.* Beaver County, 30 Fed. Cas. No. 17,974, 20 Leg. Int. (Pa.) 76, 3 Wall. Jr. 274.

2. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Ball *v.* Presidio County, (Tex. Civ. App. 1894) 27 S. W. 702; Grenada County Sup'rs *v.* Brown, 112 U. S. 261, 5 S. Ct. 125, 28 L. ed. 704; Leavenworth County *v.* Barnes, 94 U. S. 70, 24 L. ed. 63.

An act assuming to validate bonds will not have that effect if not passed in the manner required by the constitution. Buncombe County *v.* Payne, 123 N. C. 432, 31 S. E. 711.

If, however, at the time of the attempted creation of such contract the legislature could not have authorized it, it may be doubted whether the legislature could make it valid, although in the meantime by a change in the constitution the restriction upon its power may have been removed. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823. And see Shearer *v.* Bay County, 128 Mich. 552, 87 N. W. 789.

3. *Arizona.*— Yavapai County *v.* McCord, (1899) 59 Pac. 99.

Iowa.— McMillan *v.* Lee County Judge, 6 Iowa 391.

Pennsylvania.— York County *v.* Small, 1 Watts & S. 315.

Virginia.— Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942; Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722.

United States.— Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331.

See 13 Cent. Dig. tit. "Counties," § 239.

Irregularity in the conduct of the election may be cured by a statute validating the election. Carpenter *v.* Greene County, 130 Ala. 613, 29 So. 194.

Variance from statute as to interest.— Where the board orders an election for the issuance of bonds bearing semiannual interest, under a statute authorizing an election for bonds bearing annual interest, and the election is favorable to the issuing of bonds, the legislature may pass a statute curing the defect. Cutler *v.* Madison County, 56 Miss. 115.

4. Duke *v.* Williamsburg County, 21 S. C. 414.

5. Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

6. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*affirming* (Civ. App. 1895) 33 S. W. 899].

7. Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56 [*affirming* (Civ. App. 1895) 33 S. W. 899]; Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102, 9 S. Ct. 18, 32 L. ed. 359; Schuyler County *v.* Thomas, 98 U. S. 169, 25 L. ed. 88; Leavenworth County *v.* Barnes, 94 U. S. 70, 24 L. ed. 63; Thomas *v.* Scotland County, 22 Fed. Cas. No. 13,909, 3 Dill. 7 [*affirmed* in 94 U. S. 682, 24 L. ed. 219].

organized for the same purpose, bonds issued to the new corporation in payment of the subscription are valid.[8]

f. Limitations and Conditions Precedent to Issuance — (I) *As to Amount* — (A) *In General.* In many if not all the states in which the issuance of bonds by counties is authorized, such issue is limited in amount either by express provision or by the constitutional or statutory limitations upon indebtedness generally.[9] The provisions imposing such limitations vary in the different jurisdictions, the most usual being to the effect that bonds shall not be issued in excess of a certain specified amount,[10] in excess of appropriations,[11] or in excess of a certain per cent of the assessed valuation of the taxable property in the county,[12] or that no larger amount of bonds shall be issued than a certain rate of taxation will liquidate within a specified time.[13]

(B) *Effect of Excessive Issue.* Where bonds are issued in excess of the amount limited by constitutional or statutory provisions, so much of the issue as is excessive is absolutely void,[14] and not enforceable even in the hands of a purchaser for value before maturity and without knowledge of the excessive issue.[15] Nevertheless that part of the bonds which are not in excess of the constitutional or statutory limit are valid and enforceable,[16] and where an issue of bonds in excess of the limit is delivered at the same or different times as part of one transaction the holders of the bonds should bear ratably their proportion of the loss of the invalid part.[17] So where bonds are issued at different times to pay for improvements, under an act limiting the total amount to be issued, the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached.[18]

8. Ray County *v.* Vansycle, 96 U. S. 675, 24 L. ed. 800. But *compare* Morgan County *v.* Thomas, 76 Ill. 120, where it was held that where a company to which an absolute and unconditional subscription has been made abandons its organization and its franchise which by statute is transferred to another company that completes the road, the county cannot donate and deliver to the latter a portion of its bonds issued on its subscription, to the new company as against creditors of the old, and that this could not be done even under legislative authority, as they were trust funds for the payment of debts.

9. As to limitations of indebtedness see *supra*, IX, A, 2.

10. Sutro *v.* Rhodes, 92 Cal. 117, 28 Pac. 98; Sutro *v.* Pettit, 74 Cal. 332, 16 Pac. 7, 5 Am. St. Rep. 442.

11. Siedler *v.* Hudson County, 39 N. J. L. 632.

12. State *v.* Babcock, 18 Nebr. 141, 24 N. W. 556; Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619; Crook County *v.* Rollins Invest. Co., 3 Wyo. 470, 27 Pac. 683; Hedges *v.* Dixon County, 150 U. S. 182, 14 S. Ct. 71, 27 L. ed. 1044 [*affirming* 37 Fed. 204]; U. S. *v.* Dodge County, 110 U. S. 156, 3 S. Ct. 590, 28 L. ed. 103; Valley County *v.* McLean, 79 Fed. 728, 25 C. C. A. 174 [*affirming* 74 Fed. 389].

13. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823, no larger amount than a tax of one quarter of one per cent annually will liquidate in ten years. To the same effect see Francis *v.* Howard County, 50 Fed. 44.

14. Sutro *v.* Rhodes, 92 Cal. 117, 28 Pac. 98; Daviess County Ct. *v.* Howard, 13 Bush (Ky.) 101; Hardeman County *v.* Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536; Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026; Ætna L. Ins. Co. *v.* Lyon County, 95 Fed. 325; Francis *v.* Howard County, 50 Fed. 44.

Where county receives no part of the proceeds.— The holders of bonds issued by a county in excess of its authority cannot, by an offer to surrender and cancel so much of such bonds as exceed the limit authorized, have relief in a court of equity, decreeing the residue of such bonds valid and enforcing the payment thereof against the county, where the county received no part of the proceeds of the bonds, but they were issued as a donation to a railroad company. Hedges *v.* Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. ed. 1044.

15. Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026; Francis *v.* Howard County, 50 Fed. 44.

16. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Ætna L. Ins. Co. *v.* Lyon County, 95 Fed. 325.

17. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Ætna L. Ins. Co. *v.* Lyon County, 95 Fed. 325; Francis *v.* Howard County, 50 Fed. 44.

18. Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577.

Loss sustained by those obtaining bonds after power exhausted.— In Gillim *v.* Daviess County, 14 S. W. 838, 12 Ky. L. Rep. 596, bonds were issued by a county to a railroad company in excess of the amount authorized. When the last issue was made, twenty-five thousand one hundred and fifty dollars was due from the county, and one hundred and

(II) *As to Time.* The power given to counties to issue bonds may be limited as to time.[19]

(III) *Conditions to Be Performed by Payee* — (A) *The Usual Provisions.* The issue and delivery of bonds in aid of certain internal improvements, railroads, etc., are very often conditioned upon the performance of certain acts by the payee of such bonds. While such conditions necessarily vary in each case, the following are among the most usual: That the road shall be permanently located along a certain route;[20] that the work shall be completed to or through a certain place;[21] that shops and other buildings shall be located at certain places;[22] that the bonds shall be payable only for work done in the county;[23] that delivery shall be at a specified rate for a certain amount of completed work,[24] or when sufficient stock to complete the road has been subscribed;[25] or that before delivery security shall be given for the faithful application of their proceeds of the bonds to the purpose intended.[26]

(B) *Effect of Failure to Comply With Provisions* — (1) In General. Where a railroad company fails to perform the condition upon which county bonds are to be issued in payment of its stock taken by the county, the county authorities have no power to issue such bonds, and if issued without authority of law taxes

eighty-five bonds for five hundred dollars each were then issued. It was held that the twenty-five thousand one hundred and fifty dollars due at the last issue was to be divided *pro rata* between the holders of the bonds then issued.

19. Thus where a statute gives to county boards the power to provide for the payment of any loan made by them by a tax upon the county which shall in all cases be within a certain number of years from the date of the loan, such statute limits the issue of all county bonds to such number of years. Alpena *v.* Simmons, 104 Mich. 305, 62 N. W. 292; McMullen *v.* Ingham Cir. Judge, 102 Mich. 608, 61 N. W. 260.

20. Alley *v.* Adams County, 76 Ill. 101.

21. German Sav. Bank *v.* Franklin County, 128 U. S. 526, 9 S. Ct. 159, 32 L. ed. 519; Mercer County *v.* Provident L., etc., Co., 72 Fed. 723, 19 C. C. A. 44.

Impracticable condition.— Where a statute prescribed that bonds should be issued to a railroad if it should pass a certain point, to entitle the road to the bonds it must pass such point notwithstanding this might prove to be impracticable. Virginia, etc., R. Co. *v.* Lyon County Com'rs, 6 Nev. 68.

22. Onstott *v.* People, 123 Ill. 489, 15 N. E. 34; Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585.

23. Morgan County *v.* Thomas, 76 Ill. 120; Thomas *v.* Morgan County, 59 Ill. 479, 39 Ill. 496.

Discretionary power of committee.— In Satterlee *v.* Strider, 31 W. Va. 781, 8 S. E. 552, a county subscribed a certain amount of its bonds to the stock of a railroad, to be expended on the portion of the road that lay within the county, and appointed three citizens to take charge of the bonds and deliver them to the company in such amounts as would in their judgment be a fair compensation for the work then done. It was held that the committee were mere agents of the county, and that the county court did not impair its contract by an ordinance requiring the bonds still undelivered to be countersigned by the president of the county court, who should concur in and approve their delivery.

Work by successors.— The work need not be done by the company with which the stipulation was entered into. If the work is done by its successors, endowed with all the rights, privileges, and franchises of the latter, this will be a substantial performance of the conditions. Thomas *v.* Morgan County, 59 Ill. 479.

24. Nevada Bank *v.* Steinmitz, 64 Cal. 301, 30 Pac. 970.

25. Knox County Com'rs *v.* Nichols, 14 Ohio St. 260.

26. Com. *v.* Chesapeake, etc., R. Co., 91 Ky. 118, 15 S. W. 53, 12 Ky. L. Rep. 709; Cumberland, etc., R. Co. *v.* Judge Washington County Ct., 10 Bush (Ky.) 564; Breckinridge County *v.* McCracken, 61 Fed. 191, 9 C. C. A. 442, no application where road completed before delivery.

Enforcement refused in absence of security.— Where there is danger of a misapplication of funds subscribed by a county in aid of a corporation, a court of equity, and also a court of law, should refuse to enforce the subscription until the corporation properly secures the appropriation of the bonds or their proceeds in accordance with the terms of the subscription. Cumberland, etc., R. Co. *v.* Judge Washington County Ct., 10 Bush (Ky.) 564.

Omission as rendering road or lessee indictable.— In Com. *v.* Chesapeake, etc., R. Co., 91 Ky. 118, 15 S. W. 53, 12 Ky. L. Rep. 709, it was held that the failure of a railroad company to give bond for the faithful application of the money arising from a county subscription to aid in building its road does not render it liable to indictment; and even if it were liable, its lessee could not be made liable for the lessor's wrong.

cannot be levied to pay the interest thereon,[27] and the county cannot be compelled by mandamus to issue its bonds if the condition is not complied with.[28] So if the delivery of county bonds issued in aid of a railroad company is made to depend upon the performance of certain conditions by the railroad company, the road cannot enforce the delivery of such bonds.[29] And if issued and improperly placed in the hands of trustees for the railroad company before the performance of the conditions, any disposition of such bonds except the delivery back to the county authorities may be enjoined.[30] It has been held that if county authorities issue and deliver the bonds of a county to a railroad company before performance of the conditions upon which they were to be issued and delivered, this will be a waiver of the condition by the county.[31]

(2) As Defense to Actions on Bonds. Where the recitals in county bonds issued to a railroad company do not import, either expressly or by necessary implication, a compliance with the condition precedent imposed by the popular vote for their issue, the county may, in an action on the bonds, show that such condition had never been performed, and that the bonds were therefore invalid.[32] Where bonds or coupons placed in the hands of an agent of the county to be issued conditionally are delivered in disregard of these conditions, one with knowledge of the facts cannot recover on such bonds or coupons in a suit against the county, although a *bona fide* holder may recover.[33] Where bonds are issued and delivered to the company on an understanding that they are to be applied in payment for work done in the county, such understanding is binding upon all persons affected with notice of what it was, and as to such persons the bonds can be applied to no other purpose than that indicated.[34]

(iv) *Provision For Payment.* In the absence of any constitutional or statutory requirement, an act authorizing the issuance of bonds need not provide for the levy and collection of taxes for their payment,[35] and the omission to make such provision is not a valid objection to the legality of such act, or to the issue of the bonds thereunder.[36] Where, however, a constitutional provision requires

27. Onstott *v.* People, 123 Ill. 489, 15 N. E. 34.

28. Virginia, etc., R. Co. *v.* Lyon County Com'rs, 6 Nev. 68.

29. Jackson County *v.* Brush, 77 Ill. 59; Alley *v.* Adams County, 76 Ill. 101.

30. Jackson County *v.* Brush, 77 Ill. 59. To the same effect see Wagner *v.* Meety, 69 Mo. 150.

Effect of unlawful delivery by trustee.— Where negotiable county bonds authorized to be issued and delivered to A, upon performance by him of a condition precedent, were unlawfully issued and delivered by B as trustee before the performance of the condition, in order to avoid the effect of a suit then about to be brought and which was thereafter brought against him to restrain the delivery of the bonds and have them declared void, and where the bonds were placed upon the market and sold it was held that they could not be enforced against the county by a purchaser with notice either of their infirmity or of the suit, or of their delivery in anticipation of the suit; but that they could be enforced by purchasers for value and without notice, even where purchased from a party who had purchased with notice; and that after passing through the hands of one or more innocent purchasers for value and without notice they could be enforced by a subsequent purchaser for value with notice. Hill *v.* Scotland County, 25 Fed. 395.

31. Chiniguy *v.* People, 78 Ill. 570.

32. Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585; Mercer County *v.* Provident L., etc., Co., 72 Fed. 623, 19 C. C. A. 44.

33. Hill *v.* Scotland County, 25 Fed. 395. Where certain county bonds and a number of detached coupons were placed in the hands of an agent of the county to be issued by him conditionally, and the agent issued them fraudulently and transferred the detached coupons to A, his brother-in-law, and where B, who, while the county was disputing the validity of said bonds and coupons, and negotiating for a compromise with the holders thereof, and with a full knowledge of the facts, entered into a contract with said county to procure said bonds and coupons for surrender, purchased the coupons transferred to A, in the name of C, and C brought suit thereon against the county, it was held that C was not a *bona fide* holder for value and could not recover. Whitford *v.* Clark County, 13 Fed. 837.

34. Thomas *v.* Morgan County, 39 Ill. 496.

35. Young *v.* Tipton County, 137 Ind. 323, 36 N. E. 118.

36. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; Hardeman County *v.* Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536; Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061. And

that provision shall be made at the time of incurring any debt by a county for levying a sufficient tax to pay the interest and create a sinking fund, such provision is essential to a valid issue, and county bonds issued without a compliance with such requirement are invalid,[37] even in the hands of an innocent purchaser,[38] and a legislature has no power to validate county bonds issued in violation of such constitutional provision alive and in force at the time of the validating act.[39]

(v) *Submission to Popular Vote*—(A) *Necessity For.* Counties may be authorized to issue bonds without a submission of the question to a popular vote, and may do so where no provision is made for such submission;[40] but the fact that bonds are issued pursuant to an election when not made necessary by statute will not invalidate such issue.[41] Statutes requiring the submission of a proposed bond issue to popular vote are, however, very common, usually in connection with provisions as to the incurring of indebtedness by counties, the extending of aid to corporations, etc.; and where this requirement exists the county officers have no authority to make a valid issue of bonds without a submission of the proposition to popular vote,[42] and the approval of the same by the qualified electors of the

see Marion County *v.* Coler, 67 Fed. 60, 14 C. C. A. 301.

37. Kyes *v.* St. Croix County, 108 Wis. 136, 83 N. W. 637; Wade *v.* Travis County, 72 Fed. 985.

Effect of failure to perform duty at time specified.— The fact that no tax was levied to pay interest and create a sinking fund before the issuance of bonds, as required by the Texas act of Feb. 22, 1873, providing for the construction of a court-house in Marion county, did not render the bonds void, for the commissioners had full power to contract the debt, and the duty was imposed on the county government to execute the bonds and provide for the interest and sinking fund, and the failure of the county authorities to perform their duty at the time specified could not affect the validity of the bonds. Marion County *v.* Coler, 67 Fed. 60, 14 C. C. A. 301.

Bonds issued under resolution of board a county charge.— A resolution of a board of supervisors, providing for the issuing of county bonds to each supervisor who may call for the same, to pay a bounty of a specified amount to each recruit that shall be mustered into the service of the United States, to the credit of their respective towns, is a provision to issue the bonds upon the credit of the county; and the bonds issued under it are a county charge and binding on the whole county. Such bonds, being issued under the authority of the board of supervisors, upon the credit of the county, are valid bonds of the county; and it is the right and duty of the board of supervisors to provide accordingly for their payment, as legitimate public debts of the county. Magee *v.* Cutler, 43 Barb. (N. Y.) 239. See also People *v.* Livingston County, 34 N. Y. 516 [*affirming* 43 Barb. (N. Y.) 298]; Faulkner *v.* Metcalf, 43 Barb. (N. Y.) 255.

Effect of insufficient levy.— Under the Texas act of April 2, 1871, authorizing railroad-aid bonds by counties, provided there was first levied an annual tax sufficient to pay the interest thereon, and two per cent annually as a sinking fund, but also provided that if the levy should prove insufficient the controller should have an additional tax levied, it was contemplated that the court in levying the tax should exercise its judgment as to the amount required; and the levy of an insufficient amount will not render the bond invalid. Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56.

38. Quaker City Nat. Bank *v.* Nolan County, 66 Fed. 883, 14 C. C. A. 157 [*affirming* 59 Fed. 660].

39. Quaker City Nat. Bank *v.* Nolan County, 59 Fed. 660.

40. Riley *v.* Garfield Tp., 58 Kan. 299, 49 Pac. 85; Jewell *v.* Weed, 18 Minn. 272; Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318; Rehmke *v.* Goodwin, 2 Wash. 676, 27 Pac. 473; Murry *v.* Fay, 2 Wash. 352, 26 Pac. 533; Dallas County *v.* McKenzie, 110 U. S. 686, 4 S. Ct. 184, 28 L. ed. 285; Ralls County *v.* Douglass, 105 U. S. 728, 26 L. ed. 957; Ritchie *v.* Franklin County, 22 Wall. (U. S.) 67, 22 L. ed. 825; Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250; Pratt County *v.* Savings Soc., 90 Fed. 233, 32 C. C. A. 596 [*affirming* 82 Fed. 573]; Howard *v.* Kiowa County, 73 Fed. 406.

41. Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318.

42. *Colorado.*—Packard *v.* Jefferson County, 2 Colo. 338.

Dakota.— Territory *v.* Steele, 4 Dak. 78, 23 N. W. 91.

Florida.— Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

Georgia.— Floyd County *v.* State, 112 Ga. 794, 38 S. E. 37; Kaigler *v.* Roberts, 89 Ga. 476, 15 S. E. 542.

Illinois.— Onstott *v.* People, 123 Ill. 489, 15 N. E. 34; Locke *v.* Davison, 111 Ill. 19.

Iowa.— Casady *v.* Woodbury, 13 Iowa 113; Hull *v.* Marshall County, 12 Iowa 142.

Kentucky.— Stone *v.* Gregory, 61 S. W. 1002, 23 Ky. L. Rep. 1.

county.[43] Where a statute provides that submission of the question to voters shall only be necessary on a petition by the voters asking it, assent to the proposed issue will be presumed in the absence of such petition.[44]

(B) *Requisites of Submission* — (1) In General. With regard to the manner of submitting such proposition for the issuance of bonds, the same general rules apply as have been already described in the case of the submission of other propositions, such as that of aid to railroads and other corporations,[45] and for incurring indebtedness and making expenditures generally,[46] and in submitting the question of a bond issue to the vote of the electors of a county, a substantial compliance with the formalities of the statute is sufficient.[47]

(2) By Whom Made. The submission must be upon the order of the proper county authorities,[48] ordinarily, the county board[49] or county court.[50]

(3) Contents. A proposition for the issuance of bonds should not cover

Minnesota.— Murphy *v.* Cook County, 74 Minn. 28, 76 N. W. 951.

Missouri.— State *v.* Conrad, 147 Mo. 654, 49 S. W. 857; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87.

Nebraska.— State *v.* Cornell, 54 Nebr. 72, 74 N. W. 432.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

North Carolina.— Buncombe County *v.* Payne, 123 N. C. 432, 31 S. E. 711; McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99; Wilmington, etc., R. Co. *v.* Onslow County, 116 N. C. 563, 21 S. E. 205; Blanton *v.* McDowell County, 101 N. C. 532, 8 S. E. 162.

Tennessee.— Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648.

Texas.— Hendrick *v.* Culberson, 23 Tex. Civ. App. 409, 56 S. W. 616.

United States.— Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Carpenter *v.* Buena Vista County, 5 Fed. Cas. No. 2,429, 5 Dill. 556.

See 13 Cent. Dig. tit. "Counties," § 269.

Does not prohibit issuance of bonds in lieu of orders for necessary expenses.— Under N. C. Const. art. 7, § 7, providing that a municipal corporation shall not contract any debt, "except for the necessary expenses thereof," unless by a majority vote of the people, the county board has authority to issue bonds in lieu of orders which have previously issued for the necessary expenses of the county without such vote. McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99.

Issuance for previous indebtedness.—A constitutional provision providing that a municipal corporation shall not contract any debt, except for the necessary expenses thereof, unless by a majority vote of the people, does not prohibit county commissioners from issuing county bonds in the place of orders previously issued for the necessary expenses of the county without obtaining the sanction of a majority vote. McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99.

43. See cases cited *supra*, note 42.

Qualification of voters.— Fla. Const. art. 6, § 8, provides that the legislature shall have power to make the payment of the capitation tax a prerequisite for voting. The law relating to general elections required the capitation tax to be paid as a prerequisite of voting, but the act of June 11, 1891, authorizing Duval county to vote bonds for the improvement of the navigation of the St. Johns river, did not expressly declare such payment a prerequisite of voting at such special election, and the act prescribed a complete system of procedure. It was held that such payment was not a prerequisite of voting at such election. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

Presumption that vote was that of all the voters.— Under a law authorizing a county to subscribe to the stock of a railroad company, upon condition that a majority of the votes cast at an election on the question should be in favor of it, an election was held resulting in a majority in favor of the subscription, and the subscription was made and bonds issued. It was held that the bonds were rightfully registered in the auditor's office under the funding act of April 16, 1869, which requires that the subscription upon which bonds sought to be registered were issued should have been voted for by a majority of the legal voters living in the county, it being the presumption that the vote cast at the election on the question of subscription was that of all the voters of the county. Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141.

44. People *v.* Burr, 13 Cal. 343.

45. See *supra*, IX, C, 3.

46. See *supra*, IX, A, 2, h.

47. Wilmington, etc., R. Co. *v.* Onslow County, 116 N. C. 563, 21 S. E. 205.

48. Gaddis *v.* Richland County, 92 Ill. 119.

49. People *v.* Counts, 89 Cal. 15, 26 Pac. 612; People *v.* Baker, 83 Cal. 149, 23 Pac. 364, 1112; Territory *v.* Steele, 4 Dak. 78, 23 N. W. 91; People *v.* Logan County, 63 Ill. 374; Marshall County *v.* Cook, 38 Ill. 44, 87 Am. Dec. 282.

50. Gaddis *v.* Richland County, 92 Ill. 119; Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Post *v.* Pulaski County, 47 Fed. 682, 1 C. C. A. 405.

By majority of justices at quarterly term. — Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663, where it was held, however, that such bonds will not be subject to attack after

more than one object or purpose.[51] Two or more questions cannot be connected, or the adoption of one be made to depend upon the adoption of the other.[52] The submission should state the purpose of the indebtedness,[53] and the amount of bonds proposed to be issued;[54] and if the bonds are to be voted in aid of a railroad the donee should be named.[55] If the proposition specifies the rate of interest on the bonds, the county authorities have no authority to issue bonds bearing a different rate.[56] But it has been held that the rate need not be specified, or the time for the payment of such interest, if the rate of tax proposed and the whole amount to be paid is stated, nor is it necessary to state at what time the proposition if carried will take effect.[57] Nor will the submission of a proposition for the issuing of notes or obligations of the county be void, because the proposition fails to state for what time the bonds shall be issued.[58]

(4) Notice of Election. Notice of election required by statute must be given or the election will be invalid,[59] and will not authorize an issue of bonds.[60] It has been held, however, that an irregularity in the election notice cannot be set up against an innocent person, where the county has paid interest on the bonds for fifteen years.[61]

(o) *Effect of Election.* Where at a proper election the requisite number of qualified voters of the county vote to issue bonds, it is the duty of the proper county authorities to issue such bonds,[62] unless discretionary power be vested in them.[63] Such vote does not, however, constitute a binding contract for the issu-

issue, because the order was made by a majority of the justices not at a quarterly term.

51. *California.*— People *v.* Counts, 89 Cal. 15, 26 Pac. 612.

Illinois.— Williams *v.* People, 132 Ill. 574, 24 N. E. 647; People *v.* Tazewell County, 22 Ill. 147; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338.

Iowa.— McMillan *v.* Lee County, 3 Iowa 311.

Maine.— Hubbard *v.* Woodsum, 87 Me. 88, 32 Atl. 802.

United States.— Union Pac. R. Co. *v.* Merrick County, 24 Fed. Cas. No. 14,383, 3 Dill. 359.

See 13 Cent. Dig. tit. "Counties," § 269.

For example a proposition in the alternative to issue bonds to a certain corporation named "or" to another designated corporation is ineffectual to authorize the issuing of bonds even if adopted by the legal voters (State *v.* Roggen, 22 Nebr. 118, 34 N. W. 108); and the issuing and delivering of bonds voted under such a proposition may be enjoined on timely application (North *v.* Platte, 29 Nebr. 447, 45 N. W. 692, 26 Am. St. Rep. 395). But a proposition submitted by county commissioners to be passed upon by the voters of their county, to see if such commissioners shall be authorized to construct new county buildings on a new site therefor, at a cost not to exceed thirty thousand dollars, and be further authorized to hire money on the credit of the county for the purpose of such construction, is not objectionable as covering more than the subject-matter or thing; the elements of site, construction, cost, and credit are no more than parts of one and the same proposition. Hubbard *v.* Woodsum, 87 Me. 88, 32 Atl. 802. And the specification of a purpose to construct two wagon-roads with the bonds to be issued is not objectionable as being expressive of more than one object or purpose. People *v.* Counts, 89 Cal. 15, 26 Pac. 612.

52. McMillan *v.* Lee County, 3 Iowa 311.

53. People *v.* Counts, 89 Cal. 15, 26 Pac. 612.

54. People *v.* Counts, 89 Cal. 15, 26 Pac. 612; People *v.* Baker, 83 Cal. 149, 23 Pac. 364, 1112.

55. State *v.* Roggen, 22 Nebr. 118, 34 N. W. 108; Spurck *v.* Lincoln, etc., R. Co., 14 Nebr. 293, 15 N. W. 701; Jones *v.* Hurlburt, 13 Nebr. 125, 13 N. W. 5.

56. People *v.* Ford County, 63 Ill. 42.

57. Whittaker *v.* Johnson County, 10 Iowa 161.

58. Hubbard *v.* Woodsum, 87 Me. 88, 32 Atl. 802.

59. Packard *v.* Jefferson County, 2 Colo. 338; Territory *v.* Steele, 4 Dak. 78, 23 N. W. 91; Wilbur *v.* Wyatt, 63 Nebr. 261, 88 N. W. 499; Post *v.* Pulaski County, 47 Fed. 282.

Thirty days' notice.— Williams *v.* People, 132 Ill. 574, 24 N. E. 647; Post *v.* Pulaski County, 47 Fed. 282.

60. Williams *v.* People, 132 Ill. 574, 24 N. E. 647.

61. Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648. See also Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208.

62. Wilmington, etc., R. Co. *v.* Onslow County, 116 N. C. 563, 21 S. E. 205.

63. Wadsworth *v.* St. Croix County, 4 Fed. 378.

Part subscription.— Where a statute provides that on a favorable vote the subscription authorized or any part thereof shall be made, the authorities are not compelled, when the electors have voted in favor of issuing bonds to aid in railroad construction, to issue the same or to subscribe for the whole stock, but they have a discretion in this regard. People *v.* Tazewell County, 22 Ill. App. 147.

ance of bonds, and until the action of the proper authorities the contract is unexecuted and obligatory upon neither party.[64]

g. By Whom Power Exercised — (i) *In General.* Unless county bonds are issued by the proper tribunal or officers no liability is imposed on the county by such issue,[65] and all who are required to participate in their issue must have performed their respective duties.[66] Ordinarily county bonds are to be issued by the county board[67] or county court,[68] acting as a body, and in a regular manner.[69]

(ii) *Authority of De Facto Officer, Etc.* County bonds issued by a *de facto* county court, sealed with the seal of the court, and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.[70] Although the organization of a county is unauthorized and invalid because such county contains less than the prescribed area, where it has a *de facto* organization, is recognized as a county, and the statute creating the county is not void upon its face, bonds issued by such county in regular form while its organization as a county was in existence, are valid obligations in the hands of *bona fide* purchasers.[71]

(iii) *Implied Power to Issue Negotiable Bonds.* A statute authorizing a county board to issue and market bonds which are to run for a long period of time and bear interest authorizes by implication the issuance of bonds negotiable in form.[72]

(iv) *Fixing Denomination by Agreement.* Where it is expressly provided in an act authorizing the issue of bonds in aid of a railroad company that such bonds shall be of such denomination as the commissioners' court and the company should agree on, the parties are not bound, except as to the total

64. Wadsworth *v.* St. Croix County, 4 Fed. 378 [*following* Aspinwall *v.* Daviess County, 22 How. (U. S.) 364, 16 L. ed. 296].

65. Dent *v.* Cook, 45 Ga. 323; Schuyler County *v.* People, 25 Ill. 181; Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

Necessity for specific order.— It has been held in Georgia that when the issue of bonds has been authorized by a popular vote and the result entered on the minutes the authority of the county court to issue such bonds is complete without any further entry or order of the court. Floyd County *v.* Shorter, 50 Ga. 489.

66. Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

67. Prettyman *v.* Tazewell County, 19 Ill. 406, 71 Am. Dec. 230; Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173; Polly *v.* Hopkins, 74 Tex. 145, 11 S. W. 1084; Kankakee County *v.* Ætna L. Ins. Co., 106 U. S. 668, 2 S. Ct. 80, 27 L. ed. 309 (as successors of county court); Curtis *v.* Butler County, 24 How. (U. S.) 435, 16 L. ed. 745.

68. Schuyler County *v.* People, 25 Ill. 181.

The presiding justice of the county court and the county clerk of Cass county, Missouri, were by the terms of the order of Oct. 20, 1871, of the county court, authorized to execute bonds which would bind the county for their payment under the law of that state authorizing counties "to fund any and all debts they may owe." Cass County *v.* Shores, 95 U. S. 375, 24 L. ed. 419.

69. Anderson County Com'rs *v.* Paola, etc., R. Co., 20 Kan. 534.

Bonds issued in pursuance of resolutions passed by two members of the board without notice to the other are invalid. Anderson County Com'rs *v.* Paola, etc., R. Co., 20 Kan. 534.

The presence of a majority of the county justices is necessary when a bond is executed; otherwise the bond will be void. Dinwiddie County *v.* Stuart, 28 Gratt. (Va.) 526.

70. This is in accordance with the rule that the acts of an officer *de facto* are valid, so far as they concern the public, or the rights of third persons who have an interest in the thing done. Ralls County *v.* Douglass, 105 U. S. 728, 26 L. ed. 957.

71. Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560.

So also, although the organization of a county was confessedly fraudulent, where it was afterward recognized as valid by the legislature, it is binding, and bonds of such county which are regular on their face are valid obligations in the hands of *bona fide* purchasers before maturity. Harper County *v.* Rose, 140 U. S. 71, 11 S. Ct. 710, 35 L. ed. 344; Comanche County Com'rs *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604.

72. Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 445.

Discretion of county court as to form and time.— Mo. Gen. Stat. (1865), c. 36, p. 221, provided there should be erected in each county a court-house and jail, and for these purposes the county courts might "issue bonds of their respective counties in such form, for such time and in such sums, as they may deem expedient." The county court of defendant county entered an order that a cer-

amount, by the sums specified in the proposition of the railroad company for subscription submitted to and voted upon by the company, and the bonds will not be void because not of the same denominations as those specified in such proposition.[73]

(v) *Provision For Payment in Gold.* When authority is conferred upon a county to issue bonds, in the absence of legislative restriction it is for the county to determine as to the kind of money in which they shall be payable, and it may make them payable in gold if it sees fit so to do.[74]

2. Restraining Issuance of Bonds. A court of equity at the instance of a taxpayer will enjoin the corporate authorities of a county from issuing its bonds without the sanction of the law.[75]

3. For What Purpose Issued. Where counties are authorized by a constitutional statute to extend aid to railroads or other corporations,[76] they may be and usually are also authorized to issue bonds for such purpose.[77] Where, however,

tain number of bonds of a certain sum each should be issued to a contractor, but did not prescribe their form or time. Negotiable bonds fixing the time and interest were issued under the seal of the court and signed by the presiding judge and attested by the clerk. It was held that the bonds were within the terms of the order and were within the authority of the county court. Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577.

Negotiability dependent on delivery by treasurer.— In Lewis *v.* Barbour County, 3 Fed. 191, 1 McCrary 458, it was held that it is competent for the legislature to make the negotiability of county bonds dependent upon their delivery by the state treasurer.

73. Greene County *v.* Daniel, 102 U. S. 187, 26 L. ed. 99.

74. Packwood *v.* Kittitas County, 15 Wash. 88, 45 Pac. 640, 55 Am. St. Rep. 875, 33 L. R. A. 673. See, however, Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541, in which it was held, Snodgrass, C. J., and Beard, J., dissenting, that under Tenn. Laws (1895), c. 80, authorizing the county court of Knox county to issue the bonds of the county for the building of a bridge, and to levy a tax sufficient for the payment of the interest and principal as they mature, which act contains no specifications in regard to the bonds except as to the amount to be issued and the rate of interest, the court has no power to make such bonds, either principal or interest, payable in United States gold coin of the present standard of weight and fineness.

75. Chestnutwood *v.* Hood, 68 Ill. 132; Franklin *v.* Baird, 9 Ohio S. & C. Pl. Dec. 715, 7 Ohio N. P. 571; Snyder *v.* Kantner, 190 Pa. St. 440, 42 Atl. 884; Kyes *v.* St. Croix County, 108 Wis. 136, 83 N. W. 637.

Jurisdiction of federal court.— A United States circuit court cannot take jurisdiction on the ground of diverse citizenship of a suit by a non-resident taxpayer to enjoin county officers from issuing county bonds and from levying a tax to pay the coupons thereof, unless the bill shows that the tax to be paid by complainant or his liability determined by the ratio of his taxable property in the county exceeds five hundred dollars.

Adams *v.* Douglas County, 1 Fed. Cas. No. 52, McCahon (Kan.) 235.

76. Act authorizing payment of individual creditors of company unconstitutional.— In Baltimore, etc., R. Co. *v.* Spring, 80 Md. 510, 31 Atl. 208, 27 L. R. A. 72, it was held that Md. Acts (1892), c. 295, authorizing county commissioners to issue bonds to pay the county's subscription to the capital stock of a railroad company, and providing that before any of the money is paid over to the company all *bona fide* claims held by residents of the county against the company shall be first paid, is unconstitutional where, before the passage of the act, the railroad, after having been completed, had become insolvent, and there had been in fact no subscription by the county, and it was merely an act to pay the individual claims of certain creditors of the company at the expense of the taxpayers of the county.

77. *Alabama.*— *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 6 Am. Rep. 722.

Arkansas.— Hancock *v.* Chicot County, 32 Ark. 575.

Florida.— Cotten *v.* Leon County Com'rs, 6 Fla. 610.

Kansas.— Leavenworth, etc., R. Co. *v.* Douglas County, 18 Kan. 169; Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.—Richmond Cemetery Co. *v.* Sullivan, 104 Ky. 723, 47 S. W. 1079, 20 Ky. L. Rep. 1028; Sparks *v.* Bohannon, 61 S. W. 260, 22 Ky. L. Rep. 1710; Shortell *v.* Green County, 59 S. W. 522, 22 Ky. L. Rep. 1010.

Massachusetts.— Portage County *v.* Wisconsin Cent. R. Co., 121 Mass. 460.

Nebraska.— Hamlin *v.* Meadville, 6 Nebr. 227; Hallenbeck *v.* Hahn, 2 Nebr. 377.

Nevada.— Gibson *v.* Mason, 5 Nev. 283.

Pennsylvania.— Com. *v.* Allegheny County Com'rs, 37 Pa. St. 237.

Tennessee.—Clay *v.* Hawkins County, 5 Lea 137; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

West Virginia.— Goshorn *v.* Ohio County, 1 W. Va. 308.

United States.— Kankakee County *v.* Ætna L. Ins. Co., 106 U. S. 668, 2 S. Ct. 80, 27 L. ed. 309; Wilson County *v.* Nashville Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488;

counties are not authorized to make appropriations for the purpose of extending aid to a railroad or to subscribe for or hold stock therein, bonds of the county issued for such purpose are void.[78] It is also held that counties may be authorized to issue bonds for the purpose of funding or refunding county indebtedness,[79]

Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. 667, 21 L. ed. 375; Woods *v.* Lawrence County, 1 Black 386, 17 L. ed. 122; Curtis *v.* Butler County, 24 How. 435, 16 L. ed. 745; Kingman County Com'rs *v.* Cornell University, 57 Fed. 149, 6 C. C. A. 296; Adams *v.* Lawrence County, 1 Fed. Cas. No. 59.

See 13 Cent. Dig. tit. "Counties," § 262.

To what corporations applicable.— A statute authorizing counties to issue bonds to aid a corporation to complete a railroad begun prior to the adoption of the constitution of 1868 does not include a corporation which was first organized under a charter of reincorporation conferred after such adoption, although its original charter was conferred prior to such adoption. Buncombe County *v.* Payne, 123 N. C. 432, 31 S. E. 711. And see Wilkes County *v.* Call, 123 N. C. 308, 31 S. E. 481.

78. Delaware County *v.* McClintock, 51 Ind. 325; McClure *v.* Owen, 26 Iowa 243; Chamberlain *v.* Burlington, 19 Iowa 395; Ten Eyck *v.* Keokuk, 15 Iowa 486; Smith *v.* Henry County, 15 Iowa 385; Rock *v.* Wallace, 14 Iowa 593; McMillan *v.* Boyles, 14 Iowa 107; Myers *v.* Johnson County, 14 Iowa 47.

Bonds subscribed after new constitution adopted.— A railroad charter authorized the commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the voters consented. After the election at which a majority voted to subscribe, but before the subscription was made, a new constitution was adopted, which prohibited counties from loaning their credit, or borrowing money, to pay such subscriptions. It was held that bonds subsequently issued by the county in payment of stock subscribed for in said railroad were void. Aspinwall v. Daviess County, 22 How. (U. S.) 364, 16 L. ed. 296.

79. *Arizona.*— Schuerman *v.* Territory, (1900) 60 Pac. 895; Yavapai County *v.* McCord, (1899) 59 Pac. 99.

Arkansas.— Pulaski County *v.* Reeve, 42 Ark. 54.

California.— Chapman *v.* Morris, 28 Cal. 393.

Colorado.— Lake County *v.* Standley, 24 Colo. 1, 49 Pac. 23; *In re* Funding of County Indebtedness, 15 Colo. 421, 24 Pac. 877.

Idaho.—Bannock County *v.* Bunting, 4 Ida. 156, 37 Pac. 277.

Kansas.— Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560; Carpenter *v.* Hindman, 32 Kan. 601, 5 Pac. 165.

Kentucky.—Richmond Cemetery Co. *v.* Sullivan, 104 Ky. 723, 47 S. W. 1079, 20 Ky. L. Rep. 1028; Smith *v.* Mercer County, 104 Ky. 596, 47 S. W. 596, 20 Ky. L. Rep. 812; Sparks *v.* Bohannon, 61 S. W. 260, 22 Ky. L. Rep. 1710; Muhlenburg County *v.* Morehead, 46 S. W. 216, 20 Ky. L. Rep. 377.

Missouri.— Butler County *v.* Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047; Bradley *v.* Franklin County, 65 Mo. 638; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87.

Montana.— Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821.

Nebraska.—State *v.* Benton, 33 Nebr. 823, 51 N. W. 140, 33 Nebr. 834, 51 N. W. 144; Jefferson County Com'rs *v.* People, 5 Nebr. 127.

North Carolina.— McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99.

Oklahoma.— Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976.

Pennsylvania.— Snyder *v.* Kantner, 190 Pa. St. 440, 42 Atl. 884; Com. *v.* Allegheny County Com'rs, 37 Pa. St. 237.

South Dakota.— Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

Texas.— Clarke *v.* San Jacinto County, 18 Tex. Civ. App. 204, 45 S. W. 315.

Utah.— Darke *v.* Salt Lake County, 15 Utah 467, 49 Pac. 257.

Washington.—Richards *v.* Klickitat County, 13 Wash. 509, 43 Pac. 647.

Wyoming.— Carbon County *v.* Rollins, 9 Wyo. 281, 62 Pac. 351.

United States.— Meath *v.* Phillips County, 108 U. S. 553, 2 S. Ct. 869, 27 L. ed. 819; Pratt County *v.* Savings Soc., 90 Fed. 233, 32 C. C. A. 596; Haskell County *v.* National L. Ins. Co., 90 Fed. 228, 32 C. C. A. 591; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585; Rathbone *v.* Kiowa County, 83 Fed. 125, 27 C. C. A. 477; Howard *v.* Kiowa County, 73 Fed. 406; Sinton *v.* Carter County, 23 Fed. 535.

See 13 Cent. Dig. tit. "Counties," § 263.

Advertisement for bids.— Wash. Laws (1895), p. 465, § 3, requiring the publication of a notice calling for bids before the issuance of county bonds, should be complied with, although it is desired to issue the bonds in order to take up warrants, all in the hands of one person willing to exchange them for the bonds, and although by reason of its debt limitations the county could not obtain the money on the bonds by a sale while the warrants were outstanding; for the bonds might be sold to one not holding the warrants and the proceeds deposited with an agent to be used in taking up the warrants. Duryee *v.* Friars, 18 Wash. 55, 50 Pac. 583.

Inclusion of indebtedness evidenced by county warrants.— A statute authorizing the funding by a county of "matured and maturing indebtedness of every kind and description" (Kan. Act, March 8, 1879) includes indebtedness evidenced by county warrants. Howard *v.* Kiowa County, 73 Fed. 406. See also as holding that indebtedness evidenced by warrants may be funded Bannock County *v.* Bunting, 4 Ida. 156, 37 Pac. 277; Hotch-

provided the debt is a valid and binding one;[80] for erecting or repairing county buildings;[81] and for aid to works of internal and public improvement,[82] as for instance a water grist-mill,[83] the improvement of navigation,[84] the construction and improvement of roads,[85] the building of bridges, etc.[86] And it has been held that a bond of a county for money borrowed for the support of soldiers' families during the Civil war is valid.[87]

kiss *v.* Marion, 12 Mont. 218, 29 Pac. 821; Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173; Richards *v.* Klickitat County, 13 Wash. 509, 43 Pac. 647. In Whitwell *v.* Pulaski County, 29 Fed. Cas. No. 17,605, 2 Dill. 249, it was held that where the statute of the state provided that the county court (the body having the management of county affairs) shall issue ordinary county warrants of a prescribed form for all sums of money found due from the county, the county court had no implied authority to fund outstanding warrants by the issue of negotiable bonds payable at a fixed future time, and which if valid would change and enlarge the liability of the county. Such bonds under the legislation of the state are *ultra vires*, and impose no liability upon the county even when in the hands of a holder for value.

Presumption of issue to fund valid debt.— Where the facts and conditions might have been such under the law that any part of the excessive debt funded might have been valid, the legal presumption is, in an action on the bond, that these facts and conditions existed, and that the bond in action was issued to fund a valid portion of the debt, because the presumption is that the county officers faithfully discharged their duties, and issued the bond only after ascertaining the validity of the debt for which it was exchanged. Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

Prohibition of issuance by new county.— Kan. Laws (1876), c. 63, § 1, concerning the organization of new counties, contained a proviso that "no bonds of any kind shall be issued by any county . . . within one year after the organization" thereof. This act was afterward amended (1 Kan. Gen. Stat. pp. 535, 536, § 120), and the proviso was changed to the following: "That no bonds . . . shall be voted for and issued . . . within one year after the organization." It was held that the words "voted for" were a further restriction, and not an enlargement, of the power of counties, and that funding bonds were within the prohibition of the act. Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288.

80. Dunbar *v.* Canyon County 5 Ida. 407, 49 Pac. 409; McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99; Kiowa County *v.* Howard, 83 Fed. 296, 27 C. C. A. 531.

81. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Russell *v.* Cage, 66 Tex. 428, 1 S. W. 270; Robertson *v.* Breedlove, 61 Tex. 316; Comanche County Com'rs *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604; Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6, 21 L. ed. 272; Montgomery *v.* Orr, 27 Fed. 675.

Implied in absence of restrictions.— Where power is given to a county board to erect or repair public buildings, court-houses, jails, etc., without any restrictions, they have the power to issue bonds to pay for the same. Cushman *v.* Carver County, 19 Minn. 295; Nininger *v.* Carver County, 10 Minn. 133; Chaska County *v.* Carver County, 6 Minn. 204.

Where, however, this power is restricted, as for instance by a limitation upon the power of the county to incur indebtedness, the board has no power to issue bonds for such purpose. Rogers *v.* Le Sueur County, 57 Minn. 434, 59 N. W. 488; State *v.* Lincoln County, 18 Nebr. 283, 25 N. W. 91.

82. **Must not violate constitutional prohibition as to loan of credit, etc., to any person or corporation.** Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838; Colburn *v.* Chattanooga Western R. Co., 94 Tenn. 43, 28 S. W. 298.

83. State *v.* Clay County, 20 Nebr. 452, 30 N. W. 528; State *v.* Keith County, 16 Nebr. 508, 20 N. W. 856; Traver *v.* Merrick County, 14 Nebr. 327, 15 N. W. 690, 45 Am. Rep. 111; De Clerq *v.* Hager, 12 Nebr. 185, 10 N. W. 697; Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450; Clapp *v.* Otoe County, 104 Fed. 473, 45 C. C. A. 579; Kimball *v.* Grant County, 21 Fed. 145; Shelley *v.* St. Charles County, 17 Fed. 909, 5 McCrary 474.

84. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

85. Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577; State *v.* Warren County, 17 Ohio St. 558; Kimball *v.* Board of Com'rs, 21 Fed. 145.

Where only part of county contributes to road fund.— The levying of a tax for county road purposes on property in a city in which work and improvements on the street are done by virtue of laws relating to street work and improvements therein, being prohibited by Cal. Stat. (1883), p. 20, so that the road fund is one to which only part of the county contributes, and which is to be expended for the benefit of such part only, the county's bonds cannot be issued for construction of a road. Devine *v.* Sacramento County, 121 Cal. 670, 54 Pac. 262.

86. State *v.* Keith County, 16 Nebr. 508, 20 N. W. 856; Fremont Bldg. Assoc. *v.* Sherwin, 6 Nebr. 48; Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450; Mitchell County *v.* City Nat. Bank, 91 Tex. 361, 43 S. W. 880 [*reversing* 15 Tex. Civ. App. 172, 39 S. W. 628]; Coler *v.* Wyandot County, 6 Fed. Cas. No. 2,987, 3 Dill. 391 note.

87. Conyers *v.* Bartow County, 108 Ga. 559, 34 S. E. 351.

4. Requisites and Form of Bonds — a. Compliance With Statutory Requirements. Bonds when issued by the proper county authorities should comply with the prescribed statutory requirements in regard to form.[88] It therefore follows that they should be dated,[89] signed,[90] countersigned,[91] attested,[92] sealed,[93]

88. Otherwise the party who has agreed to purchase them is not bound to accept them, even though they might be valid in the hands of a purchaser. Merced County *v.* State University, 66 Cal. 25, 4 Pac. 780.

Directory provisions as to form.— Where a statute under which bonds were issued and which prescribes that they shall be payable to a certain corporation and its successor and assigns is merely directory, a divergence from such formula by making the bonds payable to the corporation or bearer is one of form and not of substance, of which the company will be estopped to take advantage by the recital in the bonds of conformity to the statutes. Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410. See also Woodward *v.* Calhoun County, 30 Fed. Cas. No. 18,002.

89. Prettyman *v.* Tazewell County, 19 Ill. 406, 71 Am. Dec. 230.

Date where issuance delayed.— Bonds to be issued by a county in aid of a railroad should bear date and draw interest as of and from the time when they should have issued, whether the issuance has been delayed by the officers or not. Prettyman *v.* Tazewell, 19 Ill. 406, 71 Am. Dec. 230.

The antedating of bonds has been held not to affect their validity. State *v.* Moore, 46 Nebr. 590, 65 N. W. 193, 50 Am. St. Rep. 626; Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. 899.

90. Curtis *v.* Butler County, 65 U. S. 435, 16 L. ed. 745.

Delegation of power to sign.— The county board may delegate the power to sign bonds to the county judge. Clark *v.* Hancock County, 27 Ill. 305. So it has been held that the clerk may sign the bond upon the order of the county judge. Ring *v.* Johnson County, 6 Iowa 365.

Signature and sealing in adjoining county. — County commissioners, when about to issue bonds in aid of railroad construction in pursuance of a valid election held for that purpose, being apprehensive of an injunction to prevent the issue, went into an adjoining county before the issuing of the injunction, and without knowledge that one had been obtained, taking with them the county seal and a deputy clerk, and there signed and sealed the bonds. It was held that the bonds were validly executed, and that they must be delivered to the donee. Jones *v.* Hurlburt, 13 Nebr. 125, 13 N. W. 5.

Signature by judge when absent from county.— In Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6, 21 L. ed. 272, it was held that it was competent for the county judge to visit New York and there affix to the bonds a seal there procured and for that purpose, although a statute of the state provided that in case of the absence of that officer the county clerk shall fill his place.

Signature by majority of board.— The signature of two out of three county commissioners to county bonds is binding upon the county. Curtis *v.* Butler County, 24 How. (U. S.) 435, 16 L. ed. 745; Howard *v.* Crawford County, 12 Fed. Cas. No. 6,757, 1 Pittsb. (Pa.) 531. When a law directs that certain bonds of a parish shall be signed by a majority of the members of its police jury, it means a majority of the members designated by the jury. It does not mean any majority of its members not selected for the purpose by the jury. State *v.* Police Jury, 30 La. Ann. 287.

Signature of coupons by one county officer only.— If the bonds to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defense to an action on the coupons that they are signed by only one of the county officers. Thayer *v.* Montgomery County, 23 Fed. Cas. No. 13,870, 3 Dill. 389.

91. Douglass *v.* Lincoln County, 5 Fed. 775, 2 McCrary 449.

The omission of a treasurer to countersign bonds as required by statute is a mere defect in their execution, which a court of equity will supply in the absence of a remedy at law. Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141.

92. State *v.* Roggen, 22 Nebr. 118, 34 N. W. 108; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

Duty of auditor and secretary of state to register and certify.— In registering and certifying bonds issued under the Nebraska act, "To authorize the issue of county bonds in certain cases," approved Feb. 19, 1877, the auditor and secretary of state have no right to review the action of their predecessors upon the original bonds. State *v.* Alexander, 14 Nebr. 280, 15 N. W. 365.

The legislature has the power to direct by what agency claims against the county shall be ascertained and adjusted, and by what officials the bonds of a county authorized to be issued to provide means of payment therefor shall be attested and issued. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

93. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; Howard *v.* Crawford County, 12 Fed. Cas. No. 6,757.

Presumption as to sealing coupons.—Where interest coupons recognize the fact that they constitute part of and belong to certain county bonds, and recite that they are given for interest becoming due upon them, it is to be presumed that they are correctly executed by the county judge and are under the county seal. Ring *v.* Johnson County, 6 Iowa 265.

The seal of the judge of probate is suffi-

and registered, if the statute under which their issuance is authorized so prescribes.[94]

b. Effect of Erroneous Reference to Statute. Where county bonds reciting that they were issued in conformity to law refer to the wrong statute, this will not render them void, so long as ample authority is found elsewhere under statutes in force at the time of issuance which have been substantially complied with.[95] This rule does not, however, apply where the official records show proceedings not in conformity with the act authorizing the issue, and the recitals of the bonds themselves exclude the possibility that they were issued under such act.[96]

5. Rights of Corporation in Whose Favor Issued. Where a statute provides that county bonds shall issue for a certain purpose after certain conditions precedent, and such conditions have been performed, it is the duty of the county, upon the request of the payee, to issue such bonds to the payee, or to reissue them if wrongfully destroyed.[97] Bonds of a county issued in payment of its

cient in Florida, where counties have no seal. Jefferson County *v.* Lewis, 20 Fla. 980.

94. Melvin *v.* Lisenby, 72 Ill. 63, 22 Am. Rep. 141; Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976; Douglass *v.* Lincoln County, 5 Fed. 775, 2 McCrary 449.

Effect of erroneous description as to payee. — That bonds described in their registration as being payable to the "State of Texas" were "payable to bearer" was held in Hardeman County *v.* Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536, not to invalidate them, since the statute does not prescribe what the registration shall contain.

95. Dawson County *v.* McNamar, 10 Nebr. 276, 4 N. W. 991; Johnson County *v.* January, 94 U. S. 202, 24 L. ed. 110. See also Anderson County *v.* Beal, 113 U. S. 227, 5 S. Ct. 433, 28 L. ed. 966. In Dawson County *v.* McNamar, 10 Nebr. 276, 4 N. W. 991, county bonds issued to raise money to build a court-house recited that they were issued under the authority of the aforesaid "internal improvement" acts. It was held that this reference to a statute which gave no authority was no ground for declaring the bonds invalid, so long as ample authority was found elsewhere which had been substantially observed.

Right of bondholder to show issuance under another statute. — A recital on the face of county bonds that they are "issued under and pursuant to order of the county court . . for subscription to the stock of the Missouri & Mississippi Railroad Company as authorized by an act . . . entitled 'An act to Incorporate the Missouri & Mississippi Railroad Company,' approved February 20, 1865," although it may estop the county in favor of the bondholder, is not conclusive in favor of the county, and the bondholder may introduce evidence to prove that the bonds were issued under authority of another statute. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 94, 13 S. Ct. 267, 37 L. ed. 93 [*affirming* 37 Fed. 75]. See also Smith *v.* Clark County, 54 Mo. 58, where it was held that where certain railroad-aid bonds recited that they were issued under the general act passed in 1855, and the same act as amended by the acts of 1860 and 1861, which required a popular vote to authorize the issue of such bonds, such recitals would not estop an innocent holder from showing in point of fact that the bonds were issued under the special act of 1857, not requiring such vote.

Where there is a variance between the recitals of a bond and of the petition in a suit thereon as to the statute under which the bond was issued, the presumption is that the recitals in the bond were true, and these will control in the absence of evidence that such recitals were written by mistake and that the power to issue was in fact derived from another than the act named. U. S. *v.* Knox County, 15 Fed. 704, 5 McCrary 76.

96. Gilson *v.* Dayton, 123 U. S. 59, 8 S. Ct. 66, 31 L. ed. 74; Crow *v.* Oxford, 119 U. S. 215, 7 S. Ct. 180, 30 L. ed. 388.

97. Matthews *v.* Blount County, 3 Lea (Tenn.) 120; Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. 899.

Bill in equity by contractors on completion of contract. — The legislature of Alabama passed an act creating a harbor board, with authority to contract for the improvement of Mobile harbor, and requiring the authorities of the county of Mobile to issue to said harbor board the bonds of the county, to an amount not exceeding one million of dollars, to pay for said improvement. The harbor board made a contract for work on the harbor, to be paid for in county bonds. The work was performed by the contractors, and on settlement there was found due to them six county bonds of one thousand dollars each. The act creating the harbor board was repealed, and the board could not demand or receive from the county authorities the bonds to pay this obligation. It was held that the bill in equity of the contractors, against the county, to compel the delivery directly to them of the bonds, was well brought, and that a court of equity had jurisdiction of the case. The rights of the contractors could not be impaired by the repeal of the law creating the harbor board or any other legislation enacted after the date of their contract. Kimball *v.* Mobile County, 14 Fed. Cas. No. 7,774, 3 Woods 555.

Ultra vires of payee as defense. — In King-

subscription to a railroad company will not be invalidated merely for imperfections in the decree of court by which the corporation was organized.[98]

6. Rights of Purchasers — a. In General. As a general rule county bonds issued to the obligee or bearer possess all the elements of commercial paper, and are subject to all the rules pertaining thereto.[99] Their holders are entitled to all the rights, privileges, and immunities attaching to negotiable instruments,[1] and in the hands of innocent holders for value before maturity such bonds are neither subject to antecedent equities,[2] nor invalidated by mere irregularities, not going to the power to issue the same.[3] A purchaser or holder of such bonds who has

man County Com'rs *v.* Cornell University, 57 Fed. 149, 6 C. C. A. 296, a county with general powers to lend its credit in aid of railroads issued bonds in exchange for the stock of a railway company on condition that the company build a railway of standard gauge through the county, which condition was subsequently fulfilled. In making this issue all formalities required by law were complied with. It was held that the county could not set up the defense of *ultra vires*, in an action on the bonds, merely because the railway company was authorized to build only a narrow-gauge railroad.

98. Williams *v.* Duck River Valley Narrow Gauge R. Co., 9 Baxt. (Tenn.) 488.

99. *Arkansas.*— Hancock *v.* Chicot County, 32 Ark. 575.

Missouri.—Barrett *v.* Schuyler County Ct., 44 Mo. 197.

New York.— Lindsley *v.* Diefendorf, 43 How. Pr. 357.

Texas.— Board *v.* Texas, etc., R. Co., 46 Tex. 316.

United States.— Durant *v.* Iowa County, 8 Fed. Cas. No. 4,189, Woolw. 69; Kennicott *v.* Wayne County, 14 Fed. Cas. No. 7,710, 6 Biss. 138.

Contra.— Diamond *v.* Lawrence County, 37 Pa. St. 383, 78 Am. Dec. 429. And *compare* Madison County *v.* Brown, 28 Ind. 161.

See 13 Cent. Dig. tit. "Counties," § 289; and, generally, Commercial Paper.

Bonds payable from special fund.— Bonds issued by a county which acknowledge an indebtedness in a certain sum, and promise to pay the same to the payee or bearer from a special fund to be raised by the annual levy of a specified rate of tax on the taxable property of the county, such fund to be applied *pro rata* on such bonds, first to the payment of the interest, and then the principal, are not negotiable instruments within the law merchant, because there is no certainty as to the fact or time of payment, which depends entirely on the adequacy of the fund. Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621.

1. Barrett *v.* Schuyler County Ct., 44 Mo. 197; Lindsley *v.* Diefendorf, 43 How. Pr. (N. Y.) 357; Board *v.* Texas, etc., R. Co., 46 Tex. 316; Durant *v.* Iowa County, 8 Fed. Cas. No. 4,189, Woolw. 69; Kennicott *v.* Wayne County, 14 Fed. Cas. No. 7,710, 6 Biss. 138.

2. Barrett *v.* Schuyler County Ct., 44 Mo. 197; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261 [*affirming* 25 Fed. 395].

3. *Illinois.*— Maxcy *v.* Williamson County Ct., 72 Ill. 207.

Nebraska.— State *v.* Moore, 46 Nebr. 590, 65 N. W. 193, 50 Am. St. Rep. 626.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

North Carolina.— Street *v.* Craven County, 70 N. C. 644.

Tennessee.— State *v.* Anderson County, 8 Baxt. 249; Louisville, etc., R. Co. *v.* State, 8 Heisk. 663.

See 13 Cent. Dig. tit. "Counties," § 289.

As for instance: That the company was not organized within the time limited by charter. Ralls County *v.* Douglass, 105 U. S. 728, 26 L. ed. 957. That the road was consolidated with another after the election. Tipton County *v.* Rogers Locomotive, etc., Works, 103 U. S. 528, 26 L. ed. 340; Warrener *v.* Kankakee County, 29 Fed. Cas. No. 17,205. That the company sold bonds at a discount in violation of statute. Woods *v.* Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122; Adams *v.* Lawrence County, 1 Fed. Cas. No. 59, 2 Pittsb. (Pa.) 60. That the proceeds of bonds were used for another purpose than that for which they were issued. Francis *v.* Howard County, 50 Fed. 44. That there was a non-compliance with conditions imposed by the county before delivery. Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648. That the company was not created according to law, until after the favorable vote. Daviess County *v.* Huidekoper, 98 U. S. 98, 25 L. ed. 112. That officers of the railroad failed to fulfil their promises to citizens of the county, that the road would run through the county, to induce them to vote for the subscription. Carpenter *v.* Greene County, 130 Ala. 613, 29 So. 194. That the agent authorized to make the subscription purchased stock instead of subscribing. Street *v.* Craven County, 70 N. C. 644; Lewis *v.* Taylor, 18 Ohio Cir. Ct. 443, 10 Ohio Cir. Dec. 205. That there were irregularities in the election. Williams *v.* People, 132 Ill. 574, 24 N. E. 647; Mercer County *v.* Hubbard, 45 Ill. 139; Clarke *v.* Hancock County, 27 Ill. 305; State *v.* Kiowa County, 39 Kan. 657, 19 Pac. 925, 7 Am. St. Rep. 569; State *v.* Sanderson, 54 Mo. 203; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585; Knox

notice of irregularities or infirmities, or is in possession of facts sufficient to put him on inquiry, is not, however, entitled to such immunities, but takes subject to such irregularities or infirmities.[4]

b. In Case of Unauthorized Issue. Where the county officers in the exercise of their authority issue county bonds, the presumption is that they were issued conformably to authority,[5] and that all preliminaries, including the election, etc., have been complied with.[6] Where, however, bonds are issued by those having no authority so to do,[7] in violation of statutory provisions as to conditions precedent,[8] or registration,[9] or in excess of the amount allowed by law, etc., it has been held that such bonds are void even in the hands of a *bona fide* holder.[10]

7. Estoppel to Deny Validity of Bonds — a. By Recitals in Bonds — (1) *In General.* Where the statutes leave it to the officers issuing the bonds to determine whether the facts exist which constitute the statutory or constitutional conditions precedent to an issuance of the bonds, and does not require these facts to be made a matter of public record, the county is estopped by the recital of such facts in its bonds to deny their validity in the hands of *bona fide* purchasers.[11] The

County *v.* Wallace, 21 How. (U. S.) 546, 16 L. ed. 211; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208; Schenck *v.* Marshall County, 21 Fed. Cas. No. 12,449, 1 Biss. 533 [*affirmed* in 5 Wall. 772, 18 L. ed. 556].

Reversal of decision as to the validity.— Where bonds are bought upon the decision of the supreme court declaring them valid, the fact that they are subsequently declared invalid by such court does not invalidate those purchased in good faith and before maturity. U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77.

The determination of the supreme court as to the constitutionality of a statute authorizing an issue of bonds in payment of subscription is conclusive and cannot be questioned, or the validity of the bonds in the hands of a *bona fide* holder impeached. Columbia County Com'rs *v.* Davidson, 13 Fla. 482; Columbia County Com'rs *v.* King, 13 Fla. 451.

4. *Minnesota.*— St. Paul First Nat. Bank *v.* Scott County, 14 Minn. 77, 10 Am. Dec. 194.

Mississippi.— Madison County *v.* Paxton, 57 Miss. 701.

Missouri.— Cass County *v.* Green, 66 Mo. 498.

Texas.— Ball *v.* Presidio County, 88 Tex. 60, 29 S. W. 1042.

United States.—Chambers County *v.* Clews, 21 Wall. 317, 32 L. ed. 517; Francis *v.* Howard County, 54 Fed. 487, 4 C. C. A. 460 [*affirming* 50 Fed. 44]; Mobile Sav. Bank *v.* Oktibbeha County, 24 Fed. 110; Whitford *v.* Clark County, 13 Fed. 837.

See 13 Cent. Dig. tit. "Counties," § 289 *et seq.*

Burden of proof is on county to show knowledge of irregularities. Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

Negotiability dependent on delivery by treasurer of state.— Where a legislature has made the negotiability of county bonds depend upon their delivery by the treasurer of state, a purchaser of such bonds, which purport upon their face to have been issued under the provisions of a statute containing such condition, is not a *bona fide* purchaser without notice, where such bonds were fraudulently issued, without being delivered by the treasurer of state. Lewis *v.* Barbour County, 3 Fed. 191, 1 McCrary 458.

The mere fact that some of the interest coupons were overdue at the time of plaintiff's purchase of railroad-aid bonds issued by a county is not sufficient to put him upon inquiry or charge him with notice of any defenses to the bonds, especially where, during the time these coupons were running, the negotiation of the bonds had been restrained by an injunction which was finally dissolved. Preble *v.* Portage County, 19 Fed. Cas. No. 11,380, 8 Biss. 358.

5. Maxcy *v.* Williamson County Ct., 72 Ill. 207; Schenck *v.* Marshall County, 21 Fed. Cas. No. 12,449, 1 Biss. 533 [*affirmed* in 5 Wall. 772, 18 L. ed. 556].

Record sufficient for purchaser.— If the record of a county respecting the issue of its bonds shows enough upon the matter of authority to justify a purchaser in taking the bonds, he cannot be compelled to go behind it and show that the record is true. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

6. Burr *v.* Chariton County, 12 Fed. 848, 2 McCrary 603.

7. Marshall County *v.* Cook, 38 Ill. 44, 87 Am. Dec. 282; Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678; Whitwell *v.* Pulaski County, 29 Fed. Cas. No. 17,605, 2 Dill. 249.

8. Hancock *v.* Chicot County, 32 Ark. 575.

Without authorization of popular vote.— Hull *v.* Marshall County, 12 Iowa 142; Sherrard *v.* Lafayette County, 21 Fed. Cas. No. 12,771, 3 Dill. 236.

9. Anthony *v.* Jasper County, 1 Fed. Cas. No. 488, 4 Dill. 136.

10. Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026; Francis *v.* Howard County, 50 Fed. 44.

11. *Florida.*—Jefferson County *v.* Lewis, 20 Fla. 980.

holder is in such case bound to look for nothing except legislative authority given for the issuance of such bonds, and he is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled, but may rely upon the recital.[12] If, however, the statute expressly requires the

Mississippi.— Madison County *v.* Brown, 67 Miss. 684, 7 So. 516; Cutler *v.* Madison County, 56 Miss. 115.

Missouri.— Smith *v.* Clark County, 54 Mo. 58; State *v.* Saline County Ct., 48 Mo. 390, 8 Am. Rep. 108; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Barrett *v.* Schuyler County Ct., 44 Mo. 197.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

North Carolina.— Belo *v.* Forsythe County Com'rs, 76 N. C. 489.

Ohio.— State *v.* Fayette County, 37 Ohio St. 526.

Tennessee.— Shelby County *v.* Jarnagin, (Sup. 1875) 16 S. W. 1040; Nelson *v.* Haygood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648.

Texas.— Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Anderson County *v.* Houston, etc., R. Co., 52 Tex. 228; Mitchell County *v.* Paducah City Nat. Bank, 17 Tex. Civ. App. 172, 39 S. W. 628; Ball *v.* Presidio County, (Civ. App. 1894) 27 S. W. 702.

United States.— Sutliff *v.* Lake County, 147 U. S. 230, 13 S. Ct. 318, 37 L. ed. 145; Comanche County Com'rs *v.* Lewis, 133 U. S. 198, 10 S. Ct. 286, 33 L. ed. 604 [*affirming* 35 Fed. 343]; Anderson County Com'rs *v.* Beal, 113 U. S. 227, 5 S. Ct. 433, 28 L. ed. 966; Grenada County *v.* Brown, 112 U. S. 261, 5 S. Ct. 125, 28 L. ed. 704; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Dallas County *v.* McKenzie, 110 U. S. 686, 4 S. Ct. 184, 28 L. ed. 285; Northern Nat. Bank *v.* Porter Tp., 110 U. S. 608, 4 S. Ct. 254, 28 L. ed. 258; Sherman County *v.* Simond, 109 U. S. 735, 3 S. Ct. 502, 27 L. ed. 1093; Bourbon County *v.* Block, 99 U. S. 686, 25 L. ed. 491; Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394; Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46; Moultrie County *v.* Rockingham Sav. Bank, 92 U. S. 631, 23 L. ed. 631; Chambers County *v.* Clews, 21 Wall. 317, 22 L. ed. 517; Nugent *v.* Putnam County, 19 Wall. 241, 22 L. ed. 83 [*overruling* 18 Fed. Cas. No. 10,377, 3 Biss. 105]; Kenicott *v.* Wayne County, 16 Wall. 452, 21 L. ed. 319; Lynde *v.* Winnebago County, 16 Wall. 6, 21 L. ed. 272; Knox County *v.* Aspinwall, 21 How. 539, 16 L. ed. 208; Clapp *v.* Otoe County, 104 Fed. 473, 45 C. C. A. 579; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541; Cowley County *v.* Heed, 101 Fed. 768, 41 C. C. A. 668; Barber County *v.* Savings Soc., 101 Fed. 767, 41 C. C. A. 667; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167; Haskell County *v.* National L. Ins. Co., 90 Fed. 228, 32 C. C. A. 591; Ashley *v.* Presque Isle County, 60 Fed. 55, 8 C. C. A. 455; Potter *v.* Chaffee County, 33 Fed. 614; Mobile Sav. Bank *v.* Oktibbeha County, 24 Fed. 110; Lewis *v.* Sherman County, 5 Fed. 269, 2 McCrary 464; Darlington *v.* La Clede County, 6 Fed. Cas. No. 3,577, 4 Dill. 200; Smith *v.* Tallapoosa County, 22 Fed. Cas. No. 13,113, 2 Woods 574; Westermann *v.* Cape Girardeau County, 29 Fed. Cas. No. 17,432, 5 Dill. 112.

See 13 Cent. Dig. tit. "Counties," § 283.

Effect of recital of issue pursuant to order of court.— A recital in county bonds that they are issued "pursuant to an order of the county court" puts all persons dealing in the bonds upon inquiry as to the terms of the order. Post *v.* Pulaski County, 49 Fed. 628, 1 C. C. A. 405.

Estoppel to raise question of debt limit.— Where bonds recite that all the requirements of the act authorizing issuance have been complied with, that the issue was authorized by popular vote, and that the whole amount of the issue does not exceed the constitutional debt limit, the county is estopped from asserting that the contrary is the fact as against a *bona fide* holder. Gunnison County *v.* Rollins, 173 U. S. 255, 19 S. Ct. 390, 43 L. ed. 689; Chaffee County Com'rs *v.* Potter, 142 U. S. 355, 12 S. Ct. 216, 35 L. ed. 1040 [*affirming* 33 Fed. 614]; Dallas County *v.* McKenzie, 110 U. S. 686, 4 S. Ct. 184, 28 L. ed. 285; Meade County *v.* Ætna L. Ins. Co., 90 Fed. 237, 32 C. C. A. 600; Dudley *v.* Lake County, 80 Fed. 672, 26 C. C. A. 82.

Recital conclusive on county.— The recitals in a bond executed by the county judge and issued by the county to a railroad company in payment for the subscription to its stock are conclusive in an action thereon by a third person who acquired the same *bona fide*. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

The action and certificate of the auditor.— The action and certificate of the auditor are conclusive evidence, as between the county and a *bona fide* holder, that bonds unconditional upon their face were regularly and legally issued and therefore negotiable. Lewis *v.* Barbour County, 105 U. S. 739, 26 L. ed. 993.

12. Douglas County *v.* Bolles, 94 U. S. 104, 24 L. ed. 46. And see Dodge *v.* Platte County, 82 N. Y. 218.

Effect of misnomer of payee.— Where the voters approve the issuance of bonds, in aid of the construction of wagon roads in the name of the Del Norte and Summit Wagon Road Company, and the county thereupon issues and registers bonds, but in the name of the Del Norte and Summit-Wagon Toll-Road Company, if the companies are one, and the bonds recite that the voters have approved their issue in the latter name, and the county pays the interest regularly and assumes the management of the completed road, the bonds are valid in the hands of a *bona fide*

facts constituting the conditions precedent to the issuance of bonds to be made a matter of public record open to the inspection of everyone, there can be no implication that it was intended to leave the matter to be determined and concluded contrary to the facts so recorded, to the officers charged with the duty of issuing the bonds, and the purchaser is charged with notice and bound to ascertain from the record whether the county has power to issue the bonds.[13] The doctrine is well established that a purchaser of county bonds is bound to ascertain if the county has authority to issue them, and that no recital contained in a county bond can cure such a defect as an utter want of power in the county to execute it, and the county will not be estopped thereby, even as against a *bona fide* purchaser.[14]

(II) *No Recitals to Show Authority.* Where the bonds contain no recitals to show authority for their issuance, but are mere naked promises to pay, every purchaser and holder thereof is chargeable with notice of whatever appears upon the face of the county records, and if want of authority appears the bonds are void even in the hands of an otherwise *bona fide* holder.[15]

purchaser notwithstanding the misnomer. Haag *v.* Rio Grande County, 34 Fed. 778.

13. Madison County *v.* Brown, 67 Miss. 684, 7 So. 516; Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823; Sutliff *v.* Lake County, 147 U. S. 230, 13 S. Ct. 318, 37 L. ed. 145; Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; Quaker City Nat. Bank *v.* Nolan County, 59 Fed. 660; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288; Francis *v.* Howard County, 54 Fed. 487, 4 C. C. A. 460, 50 Fed. 44; Post *v.* Pulaski County, 47 Fed. 282. "If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by anyone; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument." Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360.

14. Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173; Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. 899; Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585; Lake County *v.* Graham, 130 U. S. 674, 9 S. Ct. 654, 32 L. ed. 1065; German Sav. Bank *v.* Franklin County, 128 U. S. 526, 9 S. Ct. 159, 32 L. ed. 519; Dixon *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360; Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005; Dallas County *v.* MacKenzie, 94 U. S. 660, 24 L. ed. 182; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040; Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288; Deland *v.* Platte County, 54 Fed. 823; Post *v.* Pulaski County, 47 Fed. 282; Sutliff *v.* Lake County, 47 Fed. 106; Sherrard *v.* Lafayette County, 21 Fed. Cas. No. 12,771, 3 Dill. 236.

Recital as to age of county.— Under Kan. Gen. Stat. pp. 535, 536, § 120, declaring that after certain steps have been taken a new county "shall be deemed duly organized, provided that no bonds shall be issued . . . within one year after the organization," a county, after taking such steps, is not "duly organized" for the purpose of issuing bonds, and is not estopped by any recitals in its bonds to show that they were issued within the forbidden time, and are therefore invalid in the hands of *bona fide* holders. Coffin *v.* Kearney County, 57 Fed. 137, 6 C. C. A. 288 [*approving* State *v.* Haskell County, 40 Kan. 65, 19 Pac. 362].

When act under which bonds are issued is unconstitutional and the bonds are therefore invalid a recital in them of authority to issue them does not make them valid in the hands of a *bona fide* purchaser. Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565.

Where the state constitution prohibits county subscriptions to railroad stock, and the issue of bonds to pay therefor, except in cases where a vote had already been taken, and bonds are issued in a case coming within the exception, the bonds will be invalid if the vote was irregular, and the county is not estopped to set up such invalidity because it did not give notice of such irregularity when the bonds were delivered, nor because the company performed labor and incurred liabilities on the faith of the subscription. People *v.* Jackson County, 92 Ill. 441.

15. Lewis *v.* Bourbon County Com'rs, 12 Kan. 149; Ball *v.* Presidio County, (Tex. Civ. App. 1894) 27 S. W. 702.

The fact that they were registered in accordance with the statutory requirement and a certificate to that effect indorsed thereon does not preclude the county from showing that the statute was not complied with in their issuance, even as against innocent holders. Bolles *v.* Perry County, 92 Fed. 479, 34 C. C. A. 478.

(iii) *Recitals Showing Want of Authority.* Where a bond shows on its face want of legislative authority for its issuance every taker thereof has notice of such want of power,[16] and if the recitals therein import a want of authority to issue them a *bona fide* holder cannot maintain an action thereon.[17]

b. By County Records. Innocent holders of county bonds will be protected where the county records themselves show that the conditions precedent to a valid issue of such bonds have been complied with, and the county will be estopped to deny such recitals in the record.[18]

8. Ratification of Bonds. A county may, unless restrained by constitutional or statutory provisions, so acquiesce in and confirm the acts of its agents or officers in issuing county bonds which, although irregular, are not *ultra vires* as to be estopped from questioning the validity of the bonds;[19] as by failure to protest or commence legal proceedings[20] or by laches in so doing;[21] by payment of interest on the bonds;[22] by retention of the proceeds, etc.;[23] by accepting stock in payment of bonds;[24] by voting to issue or issuing refunding bonds in place of those originally issued.[25] So where a county with power to fund its indebtedness

16. McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. ed. 129.

17. Dodge *v.* Platte County, 82 N. Y. 218 [*reversing* 16 Hun 285]. So where the recitals do not import either expressly or by necessary implication a compliance with the condition precedent imposed by the popular vote for their issue, the county may, in an action on the bonds, show that that condition was not performed when the bonds were issued by order of the county court, and had never been performed, and therefore that the bonds were invalid. Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585.

18. *Florida.*—Jefferson County *v.* Lewis, 20 Fla. 980.

Iowa.— Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Kansas.—Lewis *v.* Bourbon County Com'rs, 12 Kan. 186.

North Carolina.— Belo *v.* Forsythe County, Com'rs, 76 N. C. 489.

United States.— Valley County *v.* McLean, 79 Fed. 728, 25 C. C. A. 174.

See 13 Cent. Dig. tit. "Counties," § 292.

If the records show enough upon the matter of authority to justify a purchaser in taking the bond, he cannot be held bound to go behind it and show that the record is true. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678; State *v.* Fayette County, 37 Ohio St. 526.

19. Chicago, etc., R. Co. *v.* Chase County, 49 Kan. 399, 30 Pac. 456; Hutchinson, etc., R. Co. *v.* Kingman County, 48 Kan. 70, 28 Pac. 1078, 30 Am. St. Rep. 273, 15 L. R. A. 401; State *v.* Wilkinson, 20 Nebr. 610, 31 N. W. 376; Pendleton County *v.* Amy, 13 Wall. (U. S.) 297, 20 L. ed. 579; Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556.

20. Prettyman *v.* Tazewell County Sup'rs, 19 Ill. 406, 71 Am. Dec. 230; Hutchinson, etc., R. Co. *v.* Kingman County, 48 Kan. 70, 28 Pac. 1078, 30 Am. St. Rep. 273, 15 L. R. A. 401.

21. Prettyman *v.* Tazewell County Sup'rs, 19 Ill. 406, 71 Am. Dec. 230; Hutchinson, etc., R. Co. *v.* Kingman County, 48 Kan. 70, 28 Pac. 1078, 30 Am. St. Rep. 273, 15 L. R. A. 401.

Failure to object until maturity of bonds. — Johnson *v.* Stark County, 24 Ill. 75.

22. *Illinois.*— Clarke *v.* Hancock County, 27 Ill. 305.

Kansas.— State *v.* Scott County, 58 Kan. 491, 49 Pac. 663; Leavenworth, etc., R. Co. *v.* Douglas County, 18 Kan. 169.

South Dakota.— Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

Texas.— Noel Young Bond, etc., Co. *v.* Mitchell County, 21 Tex. Civ. App. 638, 54 S. W. 284.

United States.— Ray County *v.* Vansycle, 96 U. S. 675, 24 L. ed. 800; Marshall County *v.* Schenck, 5 Wall. 772, 18 L. ed. 556.

See 13 Cent. Dig. tit. "Counties," § 290 *et seq.*

As by levy and collection of tax to pay interest coupons attached to its bonds see Cook *v.* Lyon County, 6 Ky. L. Rep. 360. *Contra,* Buncombe County *v.* Payne, 123 N. C. 432, 31 S. E. 711.

Will not waive or ratify excess of power.— In Daviess County Ct. *v.* Howard, 13 Bush (Ky.) 101, it was held that payment by the taxpayers of a county, of a tax levied for several successive years to pay the interest on county bonds, does not operate to waive or ratify excess of power in issuing the bonds. See also Noel Young Bond, etc., Co. *v.* Mitchell County, 21 Tex. Civ. App. 638, 54 S. W. 284.

23. Mobile County *v.* Sands, 127 Ala. 493, 29 So. 26; Hutchinson, etc., R. Co. *v.* Kingman County, 48 Kan. 70, 28 Pac. 1078, 30 Am. St. Rep. 273, 15 L. R. A. 401; Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823.

24. Ray County *v.* Vansycle, 96 U. S. 675, 24 L. ed. 800; Leavenworth County *v.* Barnes, 94 U. S. 70, 24 L. ed. 63; Pendleton County *v.* Amy, 13 Wall. (U. S.) 297, 20 L. ed. 579.

25. State *v.* Dakota County, 22 Nebr. 448, 35 N. W 225; State *v.* Wilkinson, 20 Nebr. 610, 31 N. W. 376; Jasper County *v.* Ballou, 103 U. S. 745, 26 L. ed. 422 [*affirming* 3 Fed. 620].

issues bonds in payment of judgments standing against it, it cannot attack the validity of such bonds by showing that the judgments are invalid as being in excess of the constitutional debt limit.[26] And where a county files a bill to restrain the negotiation of bonds issued by it in aid of a railroad, and the case is decided against the county, the latter is estopped from setting up against subsequent purchasers of the bonds any ground of illegality which might have been set up in the bill.[27] The county will, however, in no case be estopped from setting up a total want of power to issue bonds.[28] And the usual rule that a ratification being in its effect upon the act of an agent equivalent to the possession by him of previous authority can only be made when the party ratifying possesses the power to perform the act ratified applies to the issuance of bonds by county officers without previous authorization by popular vote.[29]

9. Sale — a. Power to Sell. A state legislature may in connection with the grant of authority to a county to issue bonds also authorize it to sell such bonds in order to carry out the purpose of the issue,[30] and may further require such sale to be at the highest price obtainable.[31] But the power conferred by statute upon county authorities to subscribe for stock in a railroad company and issue bonds therefor does not by implication authorize the selling of such bonds and employing the money to pay for the subscription.[32]

b. Terms of Sale. According to some decisions a limitation imposed by statute that bonds issued by counties in payment of subscriptions to railroads shall not be sold by the company at less than par, after it has taken them in payment of the subscription, has no other meaning than that it shall not so sell them at the expense of the county,[33] and the fact that the company does sell or pay out the bonds for less than par will not affect the right of the holder of such bonds and coupons to recover the principal and interest at par.[34] According to others the county is entitled upon a sale of the bonds by the company at less than par to rescind the bonds on the ground of fraud,[35] and to a return of the bonds remaining in the hands of the company, and to be paid the par value of those disposed of,[36] or the county may by a proceeding in equity compel the holder to receive in satisfaction of such bonds the sum paid by the first purchaser with interest thereon.[37]

10. Payment[38] — a. In General. A valid county bond cannot be paid by a void one.[39] Where the law relating to the redemption and cancellation of the

26. Ætna L. Ins. Co. *v.* Lyon County, 44 Fed. 329.

27. Preble *v.* Portage County, 19 Fed. Cas. No. 11,380, 8 Biss. 358.

28. Marshall County *v.* Cook, 38 Ill. 44, 87 Am. Dec. 282.

29. Daviess County Ct. *v.* Howard, 13 Bush (Ky.) 101; Citizens' Sav., etc., Assoc. *v.* Perry County, 156 U. S. 692, 15 S. Ct. 547, 39 L. ed. 585; Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040; Aspinwall *v.* Daviess County, 22 How. (U. S.) 365, 16 L. ed. 296.

30. Alabama, etc., R. Co. *v.* Reed, 124 Ala. 253, 27 So. 19.

Change of terms of sale after the advertisement thereof does not render the sale void, unless it appear that it will work injury to the county, and the issue of such bonds cannot for that reason be enjoined. Franklin *v.* Baird, 9 Ohio S. & C. Pl. Dec. 715, 7 Ohio N. P. 571.

31. Williams *v.* Butler County, 123 Ala. 432, 26 So. 346.

32. Daviess County Ct. *v.* Howard, 13 Bush (Ky.) 101.

33. Woods *v.* Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122.

Payment of commission.— Where a statute prescribes that county bonds may not be sold by the county commissioners at less than their par value, such provision is violated by the payment of a commission to the purchaser of such bonds. Hunt *v.* Fawcett, 8 Wash. 396, 36 Pac. 318.

34. Richardson *v.* Lawrence County, 154 U. S. Appendix 536, 14 S. Ct. 1157, 17 L. ed. 558.

35. Lawrence County's Appeal, 67 Pa. St. 87; Lawrence County *v.* Northwestern R. Co., 32 Pa. St. 144.

36. Lawrence County *v.* Northwestern R. Co., 32 Pa. St. 144.

37. Armstrong County *v.* Brinton, 47 Pa. St. 367.

38. For payment generally see PAYMENT.

39. The debt created is not thereby extinguished but can be sued upon. Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362.

securities for the funded debts of counties makes it the duty of the county auditor to draw at the proper time his warrant upon the treasurer for the payment of such instalments of principal and interest as may then be due and to deliver the same to the treasurer, he should issue and deliver the same without request of the bondholders.[40]

b. Manner of Providing For Payment. Where no special mode of paying bonds is provided, it is implied that it is to be done in the ordinary way by the levy and collection of taxes.[41] Mandamus will lie to compel the levy of a tax for such purpose.[42]

c. From What Funds Payable. County bonds issued for a particular improvement are usually chargeable only against the fund collected for that improvement and are not a charge against the general fund of the county from which a general liability of the county will arise.[43] With regard to the payment of bonds issued by a county in payment of subscriptions to railroads, etc., pursuant to a statute which also authorizes the levy of a special tax to pay the same, the authorities differ as to whether or not the money raised by such special tax constitutes the only fund out of which the bonds or warrants issued to pay judgments rendered thereon are of right payable.[44]

40. Wilson *v.* Neal, 23 Fed. 129.

41. Com. *v.* Perkins, 43 Pa. St. 400.

42. Elliott County *v.* Kitchen, 14 Bush (Ky.) 289; Osenton *v.* Carter County, 5 Ky. L. Rep. 686; Johnston *v.* Cleaveland County, 67 N. C. 101; State *v* Clinton County, 6 Ohio St. 280; State *v.* Anderson County, 8 Baxt. (Tenn.) 249.

A judgment is not a prerequisite to the right to a writ of mandamus. State *v.* Anderson County, 8 Baxt. (Tenn.) 249.

Necessity for raising arrears in one year.— Where interest on bonds has not been paid for many years, the board should not be required to raise in one year by taxation the whole amount of interest in arrear, but in the case of mandamus ordering them to levy a tax and pay the interest, it was a prudent exercise of a discretion to raise part by taxation, and issue county bonds in order to raise the remainder. Johnston *v.* Cleaveland County, 67 N. C. 101.

43. Walker *v.* Monroe County, 11 Ind. App. 285, 38 N. E. 1095. Under a statute authorizing county commissioners to issue gravel-road bonds of the county, to be paid out of assessments on the land benefited, the county is not liable thereon; the holder simply having a right to receive from the treasurer the money collected from the assessments. Kirsch *v.* Braun, 153 Ind. 247, 53 N E. 1082.

Effect of diversion of funds.— In Morrill *v.* Smith County, 89 Tex. 529, 36 S. W. 56, a statute authorizing the issuance of bonds by counties to railroad companies provided for the levy of an annual tax sufficient to pay the interest and at least two per cent of the principal, when collected to be paid into the state treasury for the benefit of the holders of the bonds, to whom the interest and two per cent of the principal of their bonds should be paid annually by warrants drawn by the comptroller, and the excess, if any, to be used in the purchase of bonds for cancellation. In a particular case no payments were made by the controller on the principal of the bonds, but all above interest was treated as excess, and used in the purchase of bonds for cancellation. It was held that the bonds purchased with such two per cent would be treated as still in force, and were the property of the bondholders whose money was used in their purchase.

Payment before maturity only from surplus of certain fund.— In Davis *v.* Yuba County, 75 Cal. 452, 453, 13 Pac. 874, 17 Pac. 533, it was held that bonds issued in pursuance of Cal. Stat. (1871–1872), p. 662, authorizing "the county of Yuba to issue sixty thousand dollars of bonds for the purpose of constructing, repairing, and improving wagon-roads and bridges in said county," are not authorized to be paid prior to the expiration of twenty years from their issue, except out of a surplus remaining after payment of interest due, in the "Wagon-road and Bridge Interest and Sinking-fund" provided for in the act; and an attempt by the county to pay such bonds before maturity in any other manner than out of such surplus is void as against a non-assenting holder, and such holder, having presented his coupons to the county treasurer for payment, is entitled to interest thereon from that time.

The county treasurer will not be justified in paying interest coupons on county bonds out of any other than specific funds raised for that purpose and in his hands, until the board of county commissioners have issued an order upon him to do so. Bailey *v.* Lawrence County, 2 S. D. 533, 51 S. W. 331.

44. That this does constitute the only fund available is held in one jurisdiction. State *v.* Trammel, 106 Mo. 510, 17 S. W. 502; State *v.* Macon County Ct., 68 Mo. 29; State *v.* Shortridge, 56 Mo. 126. But the supreme court of the United States holds that such bonds are entitled to be paid out of the general funds of the county so far as the special tax may be insufficient to pay them. Knox County *v.* U. S., 109 U. S. 229, 3 S. Ct. 131, 27 L. ed. 915; Macon County *v.* Huidekoper, 99 U. S. 592, 25 L. ed. 333; U. S. *v.* Macon County Ct., 99 U. S. 582, 25 L. ed. 331; U. S.

d. Time and Place of Payment. County bonds, unlike county warrants, being obligations payable at a definite time running through a series of years, are payable at maturity, regardless of the order of their presentation.[45] In the absence of any designation county bonds are payable at the county treasury,[46] and according to some authorities counties, unless specially authorized by legislative enactment, have no power to make their bonds payable at any other place than at their treasuries.[47] According to other decisions, however, where no place of payment is designated by the statute, the power to issue bonds carries with it the power to make the same payable beyond the limits of the county.[48]

11. INTEREST.[49] Under a statute authorizing the issue of bonds and not limiting the rate of interest, the county court or board may fix any rate not prohibited by law.[50] In some jurisdictions the statute authorizing the issue of bonds in aid of a railroad provides that the interest to be paid on such bonds shall be specified in the proposition to be submitted to the electors, thus leaving the determination of the rate of interest to the people of the county, and the rate so fixed is valid.[51] Where the time of payment of interest is fixed by statute, the board must fix the time of payment in accordance with the statute;[52] if not fixed by statute, the board may fix the time.[53] Where county bonds or coupons payable at a certain place are silent as to the rate of interest after maturity, the rate of interest established by law in the state where they are payable is to be allowed after maturity.[54] In jurisdictions where the law provides for the payment of interest upon every debt due and unpaid, without any stipulation to that effect in the contract or obligation out of which the debt arose, holders of county bonds stipulating for the

v. Clark County Ct., 96 U. S. 211, 24 L. ed. 628; U. S. *v.* Knox County, 5 Fed. 556, 2 McCrary 625, 51 Fed. 880.

45. Shelley *v.* St. Charles County, 21 Fed. 699, 5 McCrary 474.

46. Johnson *v.* Stark County, 24 Ill. 75; Skinker *v.* Butler County, 112 Mo. 332, 20 S. W. 613.

47. Johnson *v.* Stark County, 24 Ill. 75; People *v.* Tazewell County Sup'rs, 22 Ill. 147.

The fact that a coupon is made payable elsewhere than at the treasury of the county issuing it will not invalidate it, but the objectionable words will be regarded as surplusage. Johnson *v.* Stark County, 24 Ill. 75.

48. Skinker *v.* Butler County, 112 Mo. 332, 20 S. W. 613; Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410; Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6, 21 L. ed. 272.

49. For interest generally see INTEREST.

Deposit precluding accruing interest.— A county by making an unconditional deposit of funds for the payment of its bonds at the time and place provided in such bonds may preclude the accruing of further interest; but this effect will not be attained where to the deposit is attached the condition that no bond shall be paid unless accompanied by all coupons for accrued interest. Bailey *v.* Buchanan County, 8 N. Y. St. 145.

Special agreement.— Although by agreement the corporation in whose aid county bonds stipulating for the payment of interest by the county are issued are to pay all interest accruing on the bonds, and are entitled to all the profits and dividends of the stock until the bonds are redeemed by the county, the holders of such bonds are entitled to their interest from the county. State *v.* Clinton County, 6 Ohio St. 280. See also McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

Where a county is authorized to issue interest-bearing bonds in subscription stock of a railroad company bearing certain interest, and to deliver such bonds to the company when the latter shall begin the construction of its road, and shall deposit a bond to secure the interest thereon until the completion of the road in the county, when stock to the amount of the bonds is to be received by the county, the company is not liable for interest on the bonds after the county has received and become entitled to interest on its stock, even though the latter was received before the road was completed. Lancaster County *v.* Cheraw, etc., R. Co., 28 S. C. 134, 5 S. E. 338.

50. Beattie *v.* Andrew County, 56 Mo. 42.

Necessity for registration.— County commissioners may provide for paying the interest on county bonds issued in payment of a county subscription, although such bonds may not have been registered with the state auditor. St. Louis County *v.* Nettleton, 22 Minn. 356.

51. Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

52. English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215.

53. Wilson *v.* Neal, 23 Fed. 129.

54. Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541. But *compare* Sober *v.* Calaveras County, 39 Cal. 134; Beals *v.* Amador County, 28 Cal. 449, holding that where no provision is made in a funding statute for the payment of interest, after the bonds issued under it have become due, no interest will accrue thereon after that date.

payment of interest semiannually, although part only of such bonds have coupons therefor attached, are entitled to recover interest upon all semiannual instalments of interest from the date on which they become due.[55]

12. Actions — a. Right to Maintain. An action at law will lie for judgment on county bonds or coupons thereon, notwithstanding the fact that mandamus will lie to compel the levy of a tax to satisfy the same.[56]

b. Jurisdiction.[57] The holder of a county bond if otherwise entitled to sue in the United States circuit court may sue there, although the bonds were issued to a railroad in the same state as the county is situated, and which therefore could not have been sued in the federal court.[58]

c. Conditions Precedent. It is not essential to the right to maintain an action on coupons that the bonds to which they had been attached shall be produced;[59] and the fact that coupons on county bonds are made payable at a particular place does not make a presentation of them for payment at that place necessary before an action can be maintained upon them.[60]

d. Statutes of Limitation.[61] The statute of limitations does not bar a right of action on interest coupons attached to a county bond until the right of action on the bond itself is barred;[62] and where coupons are payable only when money comes into the treasurer's hands applicable thereto and the same are presented to the treasurer and payment refused because there is no money to pay them with, the statute does not run against such coupon until money applicable to their payment has been received by the treasurer.[63] A county cannot plead the statute of limitations to an action against it on bonds or coupons payable from a particular fund without first showing that it had provided such fund.[64]

e. In Whose Name Brought. Where county bonds issued to a railroad company covenant to pay the holder thereof, the county is liable to the holder thereof, who may sue in his own name, notwithstanding an agreement between the company and the county that the former shall pay the bond.[65]

f. Pleadings[66] — (1) *Declaration, Petition, or Complaint.* In an action on county bonds or coupons issued under a special act, the power to issue such bonds must appear by distinct averment of the special authority conferring the right, unless such authority appears from the instrument annexed to the declaration or petition,[67] which will be sufficient.[68] It is not necessary to plead in detail

55. Wilson *v.* Neal, 23 Fed. 129.

56. Osenton *v.* Carter County, 5 Ky. L. Rep. 686; Peter *v.* Taylor County, 5 Ky. L. Rep. 315. And see Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. 899.

57. For jurisdiction generally see Courts.

58. McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

59. Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208; Kennard *v.* Cass County, 14 Fed. Cas. No. 7,697, 3 Dill. 147; McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

60. Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541.

61. For statutes of limitation generally see Limitations of Actions.

62. Cushman *v.* Carver County, 19 Minn. 295.

63. Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766.

64. State *v.* Lincoln County, 23 Nev. 262, 45 Pac. 982; Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; Robertson *v.* Blaine County, 90 Fed. 63, 32 C. C. A. 512, 47 L. R. A. 459.

65. McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

66. For pleading generally see Pleading.

67. Jefferson County *v.* Lewis, 20 Fla. 980; Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577; Donaldson *v.* Butler County, 98 Mo. 163, 11 S. W. 572; Carpenter *v.* Buena Vista County, 5 Fed. Cas. No. 2,429, 5 Dill. 556; Kennard *v.* Cass County, 14 Fed. Cas. No. 7,697, 3 Dill. 147; Thayer *v.* Montgomery County, 23 Fed. Cas. No. 13,870, 3 Dill. 389. *Compare* Ring *v.* Johnson County, 6 Iowa 265, in which it was held that as the power of a county to issue bonds in the payment of subscription to the capital stock of a railway exists by virtue of the general law of the land, such power need not be set forth in the declaration in an action upon the bonds.

For the want of such showing the pleading will be demurrable. Donaldson *v.* Butler County, 98 Mo. 163, 11 S. W. 572.

68. Carpenter *v.* Buena Vista County, 5 Fed. Cas. No. 2,429, 5 Dill. 556; Thayer *v.*

a compliance with the contract and statute under which the issue was made,[69] or that the holder shall allege in his petition the election or other facts showing a compliance with the preliminary steps required of the county officers before they are authorized to issue and deliver the bonds.[70] If the bonds are issued under an act limiting the total amount to be issued, the petition need not allege that there was not an overissue, where the sum sued for is less than the amount so limited.[71] So where the bonds in suit were issued by a county subscribing to railroad stock, it is not necessary to show an actual subscription in the manner prescribed by statute or that a certificate of railroad stock issued.[72] Nor is it necessary to allege a reservation made in such bonds by the county as to the time of their payment, where there was no such reservation in the act authorizing the subscription, as such reservation does not affect the power to issue but is a matter of defense to be set up by answer.[73] An allegation that the bonds were "executed in due form of law and issued" sufficiently alleges execution.[74] In declaring on coupons[75] the instruments in suit should be identified on the face of the declaration by the number of the bond, date, sum, and time of payment.[76]

(II) *Plea or Answer.*[77] The plea of the general issue puts in issue the authority to issue the bonds in suit and the question of *bona fides*, and notice is also put in issue thereby.[78] If fraud and misrepresentation are relied on as a defense the facts constituting the fraud or mispresentation must be stated.[79]

Montgomery County, 23 Fed. Cas. No. 13,870, 3 Dill. 389.

Sufficient showing of authority and purpose.—A declaration on a railroad bond guaranteed by a county set forth the indorsement on the bond which was in part as follows: "The credit of the county of Shelby . . . by virtue of an act . . . January 23, 1871, is hereby pledged for the payment of this bond . . . in accordance with an order of the court of said county passed October 5, 1871, and approved by the people at an election held in said county on the 11th of November, 1871. Witness my hand. . . . T. C. Bleckley, Chairman of County Court." It was held that this sufficiently sets forth the action of the court in ordering the indorsement, and also the vote of the people approving thereof. Shelby County *v.* Jarnagin, (Tenn. 1875) 16 S. W. 1040.

69. Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577.

70. Chicago, etc., R. Co. *v.* Otoe County, 5 Fed. Cas. No. 2,667, 1 Dill. 338. A complaint which sets out the bond, which contains a recital that it was issued in pursuance of a specified legislative act, and avers that the bond was issued in conformity with the enactment therein recited, and that the plaintiff is a *bona fide* purchaser thereof for value, is good, although it does not otherwise allege a compliance with the conditions precedent to its issue. Hughes County *v.* Livingston, 104 Fed. 306, 43 C. C. A. 541.

71. Catron *v.* La Fayette County, 106 Mo. 659, 17 S. W. 577, where it was further held that even if such overissue were not a matter of defense, an averment in the petition that the bonds were duly issued would be sufficient.

72. McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

73. Breckenridge County *v.* McCracken, 61 Fed. 191, 9 C. C. A. 442.

74. Nininger *v.* Carver County, 10 Minn. 133.

75. **It is not necessary to declare on the bonds** to which such coupons were attached, or to set them out in the petition. Chicago, etc., R. Co. *v.* Otoe County, 5 Fed. Cas. No. 2,667, 1 Dill. 338; McCoy *v.* Washington County, 15 Fed. Cas. No. 8,731, 3 Phila. (Pa.) 290, 15 Leg. Int. (Pa.) 388, 3 Wall. Jr. 381.

76. Kennard *v.* Cass County, 14 Fed. Cas. No. 7,697, 3 Dill. 147.

77. **Invalidity of issue.**— A plea alleging invalidity of the bonds, because the required number of qualified voters did not vote at the election held to determine the issuance of such bonds, and that plaintiff knew of such fact, but which does not allege how many votes were cast at the election, the number of the qualified voters in the county, nor how many votes were cast in favor of and how many against the proposition, is not sufficient to enable the court to decide whether or not the defense is valid, and is bad on demurrer. Mobile Sav. Bank *v.* Oktibbeha County, 22 Fed. 580.

Knowledge of holder.— A plea in an action on county bonds issued in payment for railroad stock, setting up the failure or refusal of the company to comply with the conditions upon which the bonds were issued, which does not aver that the plaintiff had had any knowledge or notice of such conditions or of the intention of the company not to comply with the same, is insufficient. Mobile Sav. Bank *v.* Oktibbeha County, 22 Fed. 580.

78. Chambers County *v.* Clews, 21 Wall. (U. S.) 317, 22 L. ed. 517.

79. Mobile Sav. Bank *v.* Oktibbeha County, 22 Fed. 580.

g. Evidence[80] — (I) *Burden of Proof.* Where bonds are issued within the apparent scope of a lawful power,[81] and their recitals import the performance of all conditions precedent, and irregularities in the exercise of such power are relied on as a defense to an action thereon, the burden of proof is on the county to show that the holder had knowledge of such irregularities,[82] but the burden of proof is upon the purchaser of bonds who had notice of facts sufficient to put him on inquiry as to their validity to show that he exercised reasonable diligence in making the inquiry.[83] So where the plaintiff by his own evidence establishes the fact that he is the holder of bonds issued without authority by law, he cannot recover without first showing that he was an innocent purchaser and without notice of illegality.[84]

(II) *Admissibility and Sufficiency.* Where the question is under which of two statutes bonds were issued, statements on the records of the county are competent evidence, and the whole conduct of the county both before, at the time, and after the issue of its bonds may be shown.[85] In an action on the common counts against a county, an interest coupon from a county bond is admissible as evidence of money loaned to the maker, if issued to the holder, and if he bought it it is evidence of money paid by him for the use of the maker on the debt of the latter.[86] Where the plaintiff produces the bonds and coupons sued on, the execution of them not being put in issue, this establishes the plaintiff's case, and presumptively that he is the holder for value before maturity and without notice.[87]

G. Taxation[88] — **1. Power to Tax.** Counties have no inherent power of taxation, nor are they usually invested by the constitution with such power, but this must be conferred by statute expressly or by necessary implication.[89] The legislatures of the states may and usually do delegate to counties the power to assess and levy taxes for certain local purposes.[90] And the power need not be expressly

80. For evidence generally see Evidence.

81. Where by a constitutional provision counties are prohibited from subscribing or making donations in aid of railroad or private corporations, but an exception is made in the case of subscriptions already authorized under the existing law, all bonds issued in payment for such subscriptions are *prima facie* invalid, and the burden is thrown upon the one affirming their validity of proving that they were authorized as provided under the then existing laws. Choisser *v.* People, 140 Ill. 21, 29 N. E. 546; Post *v.* Pulaski County, 47 Fed. 282.

82. Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619, knowledge of overissue. See also Lake County *v.* Linn, 29 Colo. 446, 68 Pac. 839.

83. Ball *v.* Presidio County, 88 Tex. 60, 29 S. W. 1042. To the same effect see Cass County *v.* Green, 66 Mo. 498.

84. Frick *v.* Mercer County, 138 Pa. St. 523, 21 Atl. 6.

85. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93.

86. Johnson *v.* Stark County, 24 Ill. 75.

Necessity for proof of execution.— In Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619, it was held that in a suit on interest coupons, where there was no plea denying under oath the execution of the coupons, they were admissible in evidence under the common money counts, without any further proof of their execution.

87. Chambers County *v.* Clews, 21 Wall. (U. S.) 317, 22 L. ed. 517.

88. For taxation generally see Taxation.

89. State *v.* Street, 117 Ala. 203, 23 So. 807; Albany Bottling Co. *v.* Watson, 103 Ga. 503, 30 S. E. 270; Hunter *v.* Campbell County Justices, 7 Coldw. (Tenn.) 49.

90. *Alabama.*— State *v.* Street, 117 Ala. 203, 23 So. 807; State *v.* Brewer, 64 Ala. 287.

Arkansas.— Bush *v.* Wolf, 55 Ark. 124, 17 S. W. 709.

Georgia.— Daniel *v.* Putnam County, 113 Ga. 570, 38 S. E. 980, 54 L. R. A. 292; Jones *v.* Sligh, 75 Ga. 7; Spann *v.* Webster County, 64 Ga. 498; Board of Public Education *v.* Barlow, 49 Ga. 232; Powers *v.* Dougherty County Inferior Ct., 23 Ga. 65.

Maryland.—Board of Public School Com'rs *v.* Allegany County Com'rs, 20 Md. 449.

Minnesota.— St. Louis County *v.* Nettleton, 22 Minn. 356.

Nebraska.— Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

North Carolina.— Caldwell *v.* Burke County Justices, 57 N. C. 323.

Ohio.— Wasson *v.* Wayne County, 11 Ohio Dec. (Reprint) 475, 27 Cinc. L. Bul. 134.

Tennessee.— Nashville *v.* Towns, 5 Sneed 186.

Texas.— Bagby *v.* Bateman, 50 Tex. 446.

Virginia.— Harrison County Justices *v.* Holland, 3 Gratt. 247.

Washington.— Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

conferred, but may be implied from the grant of other powers to the exercise of which the power of taxation is essential, as for instance, from the grant of power to borrow money and issue bonds, the power to levy a tax for the payment of the same may be implied in the absence of a contrary provision.[91]

2. Limitation of Power to Tax — a. As to Amount — (1) *In General.* The power of counties to levy taxes is usually, if not universally, limited by the constitutions or statutes of the various states to a certain rate or amount that may be levied during any one year.[92] Such restrictions upon the taxing power are mandatory and binding and must be enforced in all cases, save where they may contravene the prohibitions of the federal constitution,[93] and cannot be evaded by

See 13 Cent. Dig. tit. "Counties," § 300 *et seq.*

Regulation and restriction by legislature.— Miss. Const. art. 12, § 16, provides as follows: "No county shall be denied the right to raise, by special tax, money sufficient to pay for the building and repairing of court-houses, jails, bridges, and other necessary conveniences for the people of the county, and money thus collected shall never be appropriated for any other purpose; provided, the tax thus levied shall be a certain per cent on all taxes levied by the State." This provision does not confer upon the county boards of supervisors the right, exclusive of legislative control, to levy special taxes in whatever amount they may deem proper for the purposes therein specified, but it must be considered as a direction to the legislature not to withhold from the counties the right to levy sufficient taxes for the purposes mentioned. And this right, thus guarded, may be regulated and restricted by the legislature, provided the rate of taxation prescribed be sufficient for the purposes enumerated in the section above quoted; and of the sufficiency thereof the legislature must determine. Beck *v.* Allen, 58 Miss. 143.

To assess a tax is to adjudge and determine what proportion of his property the taxpayer shall contribute to the public. To levy a tax is to make a record of this determination, and to extend the assessment against the taxpayer's property. Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

Validity of curative statutes as to tax proceedings.— "Barring the matter of the right to a hearing, (For this cannot be dispensed with,) the legislature may legalize any step or declare immaterial any omission in a tax proceeding, provided, of course, there is something which may be called an assessment and levy. If the officer authorized to make the assessment fails to make it, but the property is assessed by another, the act of the latter may be declared an assessment, provided he could have been authorized originally to make such assessment." Wells County *v.* McHenry, 7 N. D. 246, 256, 74 N. W. 241.

91. Peoria, etc., R. Co. *v.* People, 116 Ill. 401, 6 N. E. 497; Board of Public School Com'rs *v.* Allegany County Com'rs, 20 Md. 449; Ralls County Ct. *v.* U. S., 105 U. S. 733, 26 L. ed. 1220.

92. *Alabama.*— Francis *v.* Southern R. Co., 124 Ala. 544, 27 So. 22; McDaniel *v.* State, 31 Ala. 390.

Illinois.— Pope County *v.* Sloan, 92 Ill. 177.

Iowa.— Tobin *v.* Hartshorn, 69 Iowa 648, 29 N. W. 764; Williams *v.* Poor, 65 Iowa 410, 21 N. W. 753.

Kansas.— Howard *v.* Hulbert, 63 Kan. 793, 66 Pac. 1041, 88 Am. St. Rep. 267; Osborne County *v.* Blake, 25 Kan. 356; Atchison, etc., R. Co. *v.* Woodcock, 18 Kan. 20.

Minnesota.— Johnston *v.* Becker County, 27 Minn. 64, 6 N. W. 411.

Missouri.— State *v.* Kansas City, etc., R. Co., 145 Mo. 596, 47 S. W. 500; State *v.* Macon County Ct., 68 Mo. 29; State *v.* Shortbridge, 56 Mo. 126.

Nebraska.— Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

North Carolina.— Williams *v.* Craven County, 119 N. C. 520, 26 S. E. 150; Clifton *v.* Wynne, 80 N. C. 145; Street *v.* Craven County, 70 N. C. 644; Uzzle *v.* Franklin County Com'rs, 70 N. C. 564; Haughton *v.* Jones County Com'rs, 70 N. C. 466; Simmons *v.* Wilson, 66 N. C. 336.

Ohio.—Dexter *v.* Hamilton County, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364.

Tennessee.— Byrd *v.* Ralston, 3 Head 477.

Texas.— Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451; Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

United States.—U. S. *v.* Macon County, 144 U. S. 568, 12 S. Ct. 921, 36 L. ed. 544 [*affirming* 35 Fed. 483]; U. S. *v.* Macon County, 51 Fed. 883; U. S. *v.* Knox County, 15 Fed. 704, 5 McCrary 76, 51 Fed. 880.

See 13 Cent. Dig. tit. "Counties," § 303.

Road taxes are county taxes within the meaning of the constitutional or statutory limitations on the amount that may be levied in one year. State *v.* Kansas City, etc., R. Co., 145 Mo. 596, 47 S. W. 500.

No restriction for building and repairing court-houses.— The legislature may limit the power of the board of supervisors as to expenditures and taxation except for purposes of "building and repairing bridges, jails and court-houses" for which its power to levy is not subject to restriction under the constitution. Warren County *v.* Klein, 51 Miss. 807.

Special tax to build a new jail is within the provisions limiting the amount of taxation. McDaniel *v.* State, 31 Ala. 390.

93. Witkowski *v.* Bradley, 35 La. Ann. 904.

making an unnecessary levy for another purpose and transferring the same when collected to a fund which has already reached its limit;[94] but they do not apply to taxes levied to pay debts against the county existing at or before the adoption of the constitution.[95]

(II) *EFFECT OF EXCESSIVE LEVY.* Where a county levies a tax in excess of the constitutional or statutory limit, the tax is void as to so much as is in excess thereof,[96] and where a county has already exhausted its power of taxation, by levying a tax to the full amount authorized by statute or constitutional provision, any subsequent taxation is illegal and void.[97] In some jurisdictions, however, where authority is granted by the legislature to a county to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligation to be incurred is held to be implied from the power to contract, and such power may be exercised, although the limit placed upon ordinary taxes be thereby exceeded, unless the law conferring the authority or some general law in force at the time clearly manifests a contrary

Unconstitutionality must clearly appear.— Ala. Acts (1890–1891), p. 440, permitting Jefferson county to levy a tax of five cents on the one hundred dollars of taxable property therein for the support of its schools, is not in violation of Ala. Const. art. 11, § 5, forbidding the general assembly to authorize any county to levy a larger rate of taxation in any year, on the value of taxable property therein, than one-half of one per cent, since the act must be construed as authorizing said county to levy the tax, if within the rate prescribed by the constitution. Francis *v.* Southern R. Co., 124 Ala. 544, 27 So. 22.

94. Jefferson Iron Co. *v.* Hart, 18 Tex. Civ. App. 525, 45 S. W. 321.

95. *Illinois.*— Pope County *v.* Sloan, 92 Ill. 177; Chiniquy *v.* People, 78 Ill. 570.

Kentucky.— Columbia Bank *v.* Taylor County, 65 S. W. 451, 23 Ky. L. Rep. 1483.

Nebraska.— Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069.

North Carolina.— Blanton *v.* McDowell County, 101 N. C. 532, 8 S. E. 162; Clifton *v.* Wynne, 80 N. C. 145; Trull *v.* Madison County, 72 N. C. 388; Mauney *v.* Montgomery County, 71 N. C. 486; Brothers *v.* Currituck County Com'rs, 70 N. C. 726; Street *v.* Craven County, 70 N. C. 644; Uzzle *v.* Franklin County Com'rs, 70 N. C. 564; Haughton *v.* Jones County Com'rs, 70 N. C. 466; Simmons *v.* Wilson, 66 N. C. 336.

Texas.— Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119.

See 13 Cent. Dig. tit. "Counties," § 303.

The auditing by the county commissioners of debts against a county, contracted prior to the adoption of the constitution restricting the amount of taxation, does not so change their character as to subject them to such restrictions as to taxation. Mauney *v.* Montgomery County, 71 N. C. 486.

96. **Does not render whole tax void.**— A levy of taxes in excess of the rate fixed by the constitution or statute does not render the whole tax void, but only so much of it as is in excess of the limit, if the tax within the limit can be separated from the portion that is in excess thereof. Mix *v.* People, 72 Ill. 241; People *v.* Nichols, 49 Ill. 517; Briscoe *v.* Allison, 43 Ill. 291; Whaley *v.* Com., 61 S. W. 35, 23 Ky. L. Rep. 1292.

97. *Alabama.*— Frederick *v.* Northern Alabama R. Co., 130 Ala. 407, 30 So. 426.

Arkansas.— Graham *v.* Parham, 32 Ark. 676; Greedup *v.* Franklin County, 30 Ark. 101.

Illinois.— Mix *v.* People, 72 Ill. 241.

Iowa.— Iowa R. Land Co. *v.* Sac County, 39 Iowa 124; Polk *v.* Winett, 37 Iowa 34.

Kansas.— Atchison, etc., R. Co. *v.* Atchison County, 47 Kan. 722, 28 Pac. 999; Osborne County *v.* Blake, 25 Kan. 356; Atchison, etc., R. Co. *v.* Woodcock, 18 Kan. 20.

Louisiana.— Byrne *v.* East Carroll Parish, 45 La. Ann. 392, 12 So. 52; Reynolds, etc., Co. *v.* Police Jury, 44 La. Ann. 863, 11 So. 236; Witkowski *v.* Bradley, 35 La. Ann. 904; State *v.* Police Jury 34 La. Ann. 673.

Nebraska.— Union Pac. R. Co. *v.* Cheyenne County, (1902) 90 N. W. 917; Union Pac. R. Co. *v.* Buffalo County, 9 Nebr. 449, 4 N. W. 53.

Texas.— Dean *v.* Lufkin, 54 Tex. 265.

Wyoming.— Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

United States.— Louisiana *v.* Police Jury, 116 U. S. 135, 6 S. Ct. 332, 29 L. ed. 588; U. S. *v.* Clark County Ct., 95 U. S. 769, 24 L. ed. 545; U. S. *v.* Macon County Ct., 51 Fed. 883; U. S. *v.* Knox County, 51 Fed. 880; U. S. *v.* Miller County, 26 Fed. Cas. No. 15,776, 4 Dill. 233.

See 13 Cent. Dig. tit. "Counties," § 303.

Liability for penalty where levy partly legal and partly excessive.— Where part of the tax assessed on personal property is illegal by reason of excessive levies, and the taxpayer has had no opportunity to pay that which is legal without also paying that which is illegal, and the treasurer proceeds under Ohio Rev. Stat. § 2859, to enforce the collection, by a civil action against such person, who interposes and maintains a defense to the illegal part, the ten per cent penalty previously added under Ohio Rev. Stat. § 2855, was wholly unwarranted and invalid, and no part of it should be included in the judgment.

legislative intention.[98] And in other jurisdictions the legislature is empowered by the constitution to authorize by special act counties to exceed the usual limit imposed by constitutions in order to procure funds for special purposes.[99]

b. As to Purpose — (i) *In General.* Where the constitution provides the objects for which the power to levy taxes may be delegated to counties, such power cannot be exercised for other purposes.[1] So also acts authorizing the levy of taxes for certain purposes must be strictly followed and will not authorize the levy of taxes for other purposes, and the levy of taxes for purposes not authorized by the legislature will be void.[2] And in some jurisdictions it is expressly provided that the order of the county court for the levy of a tax for a special purpose shall specify the purpose thereof.[3]

(ii) *Specific Purposes For Which Taxes May Be Levied.* Generally speaking taxation by counties is authorized for corporate purposes,[4] and among the purposes which have been held to come under this definition, and for which a county may properly levy a tax, are the payment of the principal and interest on county bonds as they become due,[5] and the creation of a sinking fund for their

Western, etc., R. Co. *v.* Stewart, 7 Ohio Cir. Dec. 193.

Penalty not a part of tax.—The penalty for the non-payment of a tax pertains to the remedy, and is no part of the tax when it is levied; and where the tax itself is within the statutory limit it is immaterial that the tax with the penalty added is in excess of the limit. Tobin *v.* Hartshorn, 69 Iowa 648, 29 N. W. 764.

98. Scotland County *v.* U. S., 140 U. S. 41, 11 S. Ct. 197, 35 L. ed. 351 [*affirming* 32 Fed. 774]; Ralls County *v.* U. S., 105 U. S. 733, 26 L. ed. 1220. See also Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541; Lauderdale County *v.* Fargason, 7 Lea (Tenn.) 153.

99. Smathers *v.* Madison County, 125 N. C. 480, 34 S. E. 554; Herring *v.* Dixon, 122 N. C. 420, 29 S. E. 368; Williams *v.* Craven County, 119 N. C. 520, 26 S. E. 150; Simmons *v.* Wilson, 66 N. C. 336.

1. Daniel *v.* Putnam County, 113 Ga. 570, 38 S. E. 980, 54 L. R. A. 292; Jones *v.* Sligh, 75 Ga. 7; Livingston County *v.* Weider, 64 Ill. 427, for corporate purposes.

2. *Georgia.*—Daniel *v.* Putnam County, 113 Ga. 570, 38 S. E. 980, 54 L. R. A. 292; Vanover *v.* Davis, 27 Ga. 354.

Illinois.— Allen *v.* Peoria, etc., R. Co., 44 Ill. 85.

Michigan.— Atty.-Gen. *v.* Bay County, 34 Mich. 46.

Tennessee.— Hunter *v.* Campbell County Justices, 7 Coldw. 49.

United States.— Carroll County *v.* U. S., 18 Wall. 71, 21 L. ed. 771.

Legal not invalidated by connection with unauthorized, if separable.— The board of supervisors having authority to levy a tax to pay existing indebtedness, the levying of a tax in connection therewith to pay a non-existing indebtedness does not render the entire levy void, if the authorized can be separated from the unauthorized. Allen *v.* Peoria, etc., R. Co., 44 Ill. 85.

3. Louisville, etc., R. Co. *v.* Com., 89 Ky. 531, 12 S. W. 1064, 11 Ky. L. Rep. 734; Dean *v.* Lufkin, 54 Tex. 265. See also Labadie *v.* Dean, 47 Tex. 90, where it was held that where the order of the court imposing the tax states the amount and character of the tax and of the property upon which it is levied such order is sufficient.

4. *Illinois.*— Livingston County *v.* Weider, 64 Ill. 427.

Maryland.— Board of Public School Com'rs *v.* Allegany County Com'rs, 20 Md. 449.

New York.— Bush *v.* Orange County, 159 N. Y. 212, 53 N. E. 1121, 70 Am. St. Rep. 538, 45 L. R. A. 556 [*affirming* 10 N. Y. App. Div. 542, 42 N. Y. Suppl. 417].

Ohio.— Wasson *v.* Wayne County, 11 Ohio Dec. (Reprint) 475, 27 Cinc. L. Bul. 134.

Tennessee.— Nashville *v.* Towns, 5 Sneed 186.

Washington.— Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; Mason *v.* Purdy, 11 Wash. 591, 40 Pac. 130.

United States.— U. S. *v.* Macon County Ct., 51 Fed. 883; U. S. *v.* Knox County, 51 Fed. 880.

See 13 Cent. Dig. tit. "Counties," § 300 *et seq.*

The term "corporate purposes" has been held to mean only such as are germane to the objects of the creation of the municipality. These do not include that of securing the location of a state reform school. Livingston County *v.* Weider, 64 Ill. 427.

5. *Georgia.*— Powers *v.* Dougherty County Inferior Ct., 23 Ga. 65.

Illinois.— Peoria, etc., R. Co. *v.* People, 116 Ill. 401, 6 N. E. 497.

Missouri.— State *v.* Chicago, etc., R. Co., 165 Mo. 597, 65 S. W. 989; State *v.* Hannibal, etc., R. Co., (1889) 11 S. W. 746.

South Dakota.— Chicago, etc., R. Co. *v.* Faulk County, 15 S. D. 501, 90 N. W. 149.

Texas.— Mitchell County *v.* Paducah City Nat. Bank, 91 Tex. 361, 43 S. W. 880; Baghy *v.* Bateman, 50 Tex. 446.

Washington.— Seymour *v.* Frost, 25 Wash. 644, 66 Pac. 90.

United States.— Ralls County Ct. *v.* U. S., 105 U. S. 733, 26 L. ed. 1220; Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621.

redemption;[6] the payment of outstanding indebtedness evidenced by its warrants legally issued in former years;[7] the payment of appropriations in aid of railroads;[8] public improvements;[9] county buildings;[10] bridges;[11] poor farms;[12] the payment of appropriations in aid of a system of general education within the limits of the county;[13] and the payment of appropriations to secure the location of a state agricultural experiment station, etc.[14] On the other hand a levy of taxes by a county court for the payment of county indebtedness when there is no such indebtedness is illegal,[15] and where the indebtedness for which a tax has been

See 13 Cent. Dig. tit. "Counties," § 301.

For the purchase of the cancellation bonds of the county, a tax having been levied to pay the interest and provide for a sinking fund. Dean *v.* Lufkin, 54 Tex. 265.

Effect of existence of illegal bonds.— Where there were illegal county bonds outstanding, and also valid outstanding bonds, a county-tax levy for the purpose of paying bonds could not be held invalid by reason of the existence of the illegal bonds, since it would be presumed that the levy was made for the purpose of paying lawful obligations. Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682.

Effect on taxpayers' liability of payment of bonds.— The fact that a county which has levied a special tax to pay bonds has paid the bonds out of the proceeds of such tax paid by other taxpayers before the institution of suit against a delinquent taxpayer to recover the amount assessed against him will not preclude it from maintaining such suit. State *v.* Gibson, 27 Tex. Civ. App. 355, 65 S. W. 690; State *v.* Parker, (Tex. Civ. App. 1901) 65 S. W. 495.

6. Mitchell County *v.* Paducah City Nat. Bank, 91 Tex. 361, 43 S. W. 880; Presidio County *v.* Paducah City Nat. Bank, 20 Tex. Civ. App. 511, 44 S. W. 1069.

7. State *v.* Harvey, 12 Nebr. 31, 10 N. W. 406.

Judgment must be actually satisfied from proceeds of levy.— The obligation of a county to pay a judgment recovered for unpaid warrants is a continuing obligation, and is not satisfied by a tax levy which if all paid would be sufficient to discharge the judgment, unless said judgment is actually paid in full from the proceeds of such levy. Garden City First Nat. Bank *v.* Morton County, 7 Kan. App. 739, 52 Pac. 580.

8. Huntington County *v.* State, 109 Ind. 596, 10 N. E. 625; State *v.* Wheadon, 39 Ind. 520; Merrill *v.* Marshall County, 74 Iowa 24, 36 N. W. 778; Burges *v.* Mabin, 70 Iowa 633, 27 N. W. 464.

Limitation to property of district subscribing.— Levies made by the county court to pay subscriptions of a magisterial district to internal improvements must be limited to property within such district. Neale *v.* Wood County, 43 W. Va. 90, 27 S. E. 370.

9. Albany Bottling Co. *v.* Watson, 103 Ga. 503, 30 S. E. 270; Deitrick *v.* Parke County, 28 Ind. App. 83, 62 N. E. 97; Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, ship canal connecting two lakes in same county.

10. *Arkansas.*— Durrett *v.* Buxton, 63 Ark. 397, 39 S. W. 56.

California.— Babcock *v.* Goodrich, 47 Cal. 488, county jail.

Georgia.—Habersham County *v.* Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547; Barlow *v.* Sumter County, 47 Ga. 639, repair of public buildings.

Kansas.— State *v.* Pratt County, 42 Kan. 641, 22 Pac. 722, purchase of county poor-house.

Missouri.— Mississippi County *v.* Jackson, 51 Mo. 23, erection of jail.

North Carolina.—Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818; McKenzie *v.* Buchanan, 51 N. C. 31, such taxes demandable and receivable from the sheriff by the treasurer of public buildings and not by the county trustee.

Texas.— Brown *v.* Graham, 58 Tex. 254 (additions to buildings already built may be paid for under laws conferring power to levy taxes for the "erection of public buildings"); Creswell Ranch, etc., Co. *v.* Roberts County, (Civ. App. 1894) 27 S. W. 737.

See 13 Cent. Dig. tit. "Counties," § 302.

Levy by instalments.— As in the matter of building a court-house and jail it is not to be expected that the whole sum necessary can be covered by the tax levy of one year, since the levy for erecting such buildings must not exceed in any one year the rate of five mills, the amount and number of instalments necessary to cover the whole cost is in the discretion of the levying court. Hilliard *v.* Bunker, 68 Ark. 340, 58 S. W. 362.

Levy without issuance of bonds.— Under statutes authorizing the issuance of bonds for the purpose of erecting public buildings a tax may be levied for such purpose without the issuance of bonds. Mississippi County *v.* Jackson, 51 Mo. 23; Creswell Ranch, etc., Co. *v.* Roberts County, (Tex. Civ. App. 1894) 27 S. W. 737.

11. Ada Tp. *v.* Grove, 114 Mich. 77, 72 N. W. 35.

12. Armour Bros. Banking Co. *v.* Finney, County, 41 Fed. 321.

13. Board of Public Education *v.* Barlow, 49 Ga. 232.

14. Wasson *v.* Wayne County, 11 Ohio Dec. (Reprint) 475, 27 Cinc. L. Bul. 134.

15. Greedup *v.* Franklin County, 30 Ark. 101.

A levy of a tax by a county board for the payment of judgments is unauthorized if there are no judgments against the county when the levy is made. Custer County *v.*

ordered is found to have been satisfied, it is competent for the court to rescind the order and arrest the collection of the tax.[16]

c. Necessity For Submission to Public Vote. It is a very usual provision that where it is desired to levy a tax to meet an unusual outlay for certain purposes in excess of the rate fixed by law, the proposition shall be submitted to the voters to be affected thereby,[17] taxes for necessary expenses constituting an exception in some jurisdictions.[18]

d. Necessity For Estimate of Expenses. It is sometimes expressly required that the authorities of a county before fixing the amount of taxation for the current year shall make an estimate of the county expenses for the current year upon which the tax may be based.[19]

e. Necessity For Order of Court Authorizing Levy. In Missouri county courts are authorized by statute[20] to levy certain taxes without an order of the circuit court directing the levy, and are prohibited from levying any other tax without such order,[21] and a tax not of the former class levied without the required order is void.[22]

3. Duty to Levy Taxes. It is the duty of the proper county officers to levy taxes for purposes authorized by statute, where required by the public interests or individual rights;[23] and under such circumstances the statute authorizing such

Chicago, etc., R. Co., 62 Nebr. 657, 87 N. W. 341.

Levy in anticipation of deficiency.— A county has no authority to make a special levy in anticipation of a deficiency in the levy for its quota of state taxes. State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

Necessity for existence of debt eo nomine. — A tax levied by a county to pay a turnpike debt was held not to be void, although there was not in existence any turnpike debt *eo nomine*. It was also held sufficient that there existed an indebtedness created on account of a turnpike debt. Marion County *v.* Louisville, etc., R. Co., 91 Ky. 388, 15 S. W. 1061, 12 Ky. L. Rep. 961.

16. People *v.* Macoupin County Ct., 54 Ill. 217.

17. *Iowa.*— Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

Kansas.— Osborne County *v.* Blake, 25 Kan. 356.

Michigan.—Ada Tp. *v.* Grove, 114 Mich. 77, 72 N. W. 35.

Nebraska.— Grand Island, etc., R. Co. *v.* Dawes County, 62 Nebr. 44, 86 N. W. 934.

North Carolina. — Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818.

And see *supra*, V, B, 2; IX, A, 2, b; IX, F, l, f, (v).

Vote ineffective without levy by board.— Where the question of levying for the year 1871, and from year to year thereafter, in addition to the tax allowed by law, a special tax for four mills on the dollar, "for the purpose of redeeming outstanding county warrants and for ordinary county revenue," was submitted by the board of supervisors to the electors of a county and carried in the affirmative, but the tax was never in fact levied by the board under the authority thus delegated, it was held that the tax was invalid, and the auditor was not authorized to place it upon the tax books. Iowa R. Land Co. *v.* Woodbury County, 39 Iowa 172.

18. Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818; State *v.* Haywood County, 122 N. C. 812, 30 S. E. 352.

19. Police Jury *v.* Bouanchaud, 51 La. Ann. 860, 25 So. 653; Lorie *v.* Hitchcock, 26 La. Ann. 154; Seymour *v.* Frost, 25 Wash. 644, 66 Pac. 90. See also Constant *v.* East Carroll Parish, 105 La. Ann. 286, 29 So. 728.

20. Mo. Rev. Stat. (1879), § 6799; Mo. Rev. Stat. (1889), § 7654.

21. State *v.* Chicago, etc., R. Co., 165 Mo. 597, 65 S. W. 989; State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505; State *v.* Wabash, etc., R. Co., 97 Mo. 296, 10 S. W. 434; State *v.* Hager, 91 Mo. 452, 3 S. W. 844; State *v.* Hannibal, etc., R. Co., 87 Mo. 236.

22. State *v.* Wabash, etc., R. Co., 97 Mo. 296, 10 S. W. 434.

The presumption that the necessary preliminary order has been made arises from the levy of a tax in the absence of evidence to the contrary. State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505.

23. *California.*— English *v.* Sacramento, 19 Cal. 172.

Florida.— State *v.* Rose, 26 Fla. 117, 7 So. 370.

Nebraska.— Jackson *v.* Washington County, 34 Nebr. 680, 52 N. W. 169.

New York.— People *v.* Niagara County, 49 Hun 32, 1 N. Y. Suppl. 460; People *v.* New York County, 3 Abb. Dec. 566, 2 Keyes 288, 34 How. Pr. 379.

Tennessee. — Newman *v.* Scott County, 5 Sneed 695.

United States.— Meriwether *v.* Muhlenburg County Ct., 120 U. S. 354, 7 S. Ct. 563, 30 L ed. 653; Rock Island County *v.* U. S., 4 Wall. 435, 18 L. ed. 419.

See 13 Cent. Dig. tit. "Counties," § 304.

Levy of new tax for sum retained by treasurer.— Until a loss has actually been sustained by the default of a county treasurer to pay over the proceeds of a state tax, the

levy will be deemed mandatory and as leaving no discretion to be exercised by such officers,[24] even though in terms they are merely permissive.[25]

4. By Whom Power to Levy Taxes Exercised. When the power of taxation is delegated to a county the exercise of such power devolves usually upon the county commissioners,[26] county court,[27] or police jury.[28]

5. Procedure to Compel Levy. A writ of mandamus lies to compel the proper county officers to levy a county tax,[29] and a court of equity has no jurisdiction to

board of supervisors is not required by the statute (N. Y. Laws (1850), c. 298, § 25) to levy a new tax for the sums retained by him. People *v.* Livingston County, 17 N. Y. 486.

Right of subsequent holder of bond.— When a funding act provides that a certain tax shall be levied to pay bonds, a person who takes the bonds in place of his claim is entitled as part of his contract to have the tax so levied; and any subsequent holder is entitled to such levy. English *v.* Sacramento, 19 Cal. 172.

The mere order of county commissioners that a levy be made for future years, based on the assessment of a previous year, amounts to nothing as an actual levy of a tax. Hodges *v.* Crowley, 186 Ill. 305, 57 N. E. 889.

Upon request by board of health a tax may be levied to defray their expenses under the Florida act of June 7, 1889. State *v.* Rose, 26 Fla. 117, 7 So. 370.

24. People *v.* Niagara County, 49 Hun (N. Y.) 32, 1 N. Y. Suppl. 460; Meriwether *v.* Muhlenburg County Ct., 120 U. S. 354, 7 S. Ct. 563, 30 L. ed. 653. And see People *v.* Livingston County, 6 Hun (N. Y.) 572.

25. State *v.* Hamilton County, 5 Ohio Dec. (Reprint) 471, 6 Am. L. Rec. 106; Rock Island County *v.* U. S., 4 Wall. (U. S.) 435, 18 L. ed. 419.

26. *Alabama.* — State *v.* Street, 117 Ala. 203, 23 So. 807.

Kansas.—Connelly *v.* Trego County, 64 Kan. 168, 67 Pac. 453.

Mississippi.— Beck *v.* Allen, 58 Miss. 143.

Nebraska.— Chicago, etc., R. Co. *v.* Klein, 52 Nebr. 258, 71 N. W. 1069; Union Pac. R. Co. *v.* Buffalo County, 9 Nebr. 449, 4 N. W. 53.

Ohio.— Wasson *v.* Wayne County, 11 Ohio Dec. (Reprint) 475, 27 Cinc. L. Bul. 134.

Washington.— Mason *v.* Purdy, 11 Wash. 591, 40 Pac. 130.

See 13 Cent. Dig. tit. "Counties," § 300 *et seq.*

Amount fixed by board.—A state legislature may, instead of itself fixing the amount of a special county tax, authorize the board of county supervisors to raise so much not in excess of a certain limit as shall be by them found fully due for services rendered. People *v.* Haws, 34 Barb. (N. Y.) 69.

Power to reduce levy.—County commissioners have authority, after concluding that a tax levy theretofore made by them is in excess of the financial necessities of the county for the fiscal year for which such tax was levied, to amend their action in that respect and reduce the levy. State *v.* Headlee, 22 Wash. 126, 60 Pac. 126.

27. Palmer *v.* Craddock, Ky. Dec. 182; Harrison County Justices *v.* Holland, 3 Gratt. (Va.) 247.

County judge and justices.—Under the Kentucky act of Feb. 24, 1868, amending the charter of the Elizabethtown and Paducah Railroad Company, the "county court" which is authorized to levy a tax to pay bonds in aid of the railway is the county judge and the justices of the peace for the county, and not the county judge alone. Meriwether *v.* Muhlenburg County Ct., 120 U. S. 354, 7 S. Ct. 563, 30 L. ed. 653 [*affirming* 8 Fed. 737]. *Compare* Feland *v.* Morton, 10 Ky. L. Rep. 217, 8 S. W. 852.

Necessity for signature to proceedings.— The proceedings of a levying court were not invalid because the proceedings were not signed by the members of the court participating, where the authorized officer had written up the minutes of the record, and their verity had not been called in question, since, the county court having general jurisdiction of the subject-matter, and being a superior court, the truth of the minutes could be established by parol. Hilliard *v.* Bunker, 68 Ark. 340, 58 S. W. 362.

28. Lorie *v.* Hitchcock, 26 La. Ann. 154; New Orleans *v.* Lockett, 3 La. Ann. 99.

29. Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; Davis *v.* Simpson, 25 Nev. 123, 58 Pac. 146, 83 Am. St. Rep. 570; State *v.* Anderson County, 8 Baxt. (Tenn.) 249; Thompson *v.* Allen County, 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472; Ceredo First Nat. Bank *v.* Savings Soc., 80 Fed. 581, 25 C. C. A. 466. See *supra*, IX, D, 10, a; and, generally, MANDAMUS.

In Indiana the remedy by mandamus in the first instance is not exclusive. A petition to procure a levy may be first presented to the board and an adverse decision appealed from. Knox County *v.* Montgomery, 106 Ind. 518, 6 N. E. 915; White County *v.* Karp, 90 Ind. 236; Gavin *v.* Decatur County, 81 Ind. 480. And in case the board refuses to act mandamus will lie. Knox County *v.* Barnett, 106 Ind. 599, 7 N. E. 205; Knox County *v.* Montgomery, 106 Ind. 518, 6 N. E. 915.

Appointment of commissioner improper.— In Rusch *v.* Des Moines County, 21 Fed. Cas. No. 12,142, Woolw. 313, it was held that where the county supervisors, in disobedience to the command of a mandamus from the federal circuit court, have neglected to levy a tax to raise money to pay a judgment, the court will not appoint a special commissioner to levy the tax, where the county treasurer whose sole duty it is to collect the tax has never refused to perform his duty.

compel the levy of a tax, even though the remedy at law by mandamus is insufficient.[30] If the tax is to procure funds to pay bonds owing by the county, a judgment thereon is not a prerequisite to the right to a writ of mandamus;[31] nor is a judgment a prerequisite under a statute requiring supervisors to raise such sum as may be found due to certain claimants, and the controller to pay said amount when the same shall be judicially determined.[32] Where, however, a statute only authorizes a tax for the purpose of paying outstanding warrants and other floating indebtedness a board of county commissioners cannot be compelled to levy a tax for the payment of a particular claim unless it has been reduced to judgment.[33]

6. COLLECTION AND PAYMENT. A court of equity has no jurisdiction to enforce collection of taxes to pay the debts of municipal corporations.[34] A county court has no power to extend the time for the collection of taxes.[35] A statute imposing a penalty for wrongfully enjoining the collection of taxes does not apply to assessments made under an order of court to pay a judgment against the parish.[36] An officer who has collected money by illegal taxation on a void subscription to public improvements holds the same as a trust fund for the benefit of the taxpayers contributing the same.[37] County warrants may be received in payment of a special tax, even though the priority in which such warrants are required by law to be paid is thereby defeated.[38]

7. DISPOSITION OF TAXES — a. Legislative Control. The legislature has full power to direct what shall be done with the taxes levied and collected by any county.[39] Statutes designating the objects for which county funds can be appropriated are at all times subject to repeal or alteration, so as to appropriate the funds in a manner, or to objects different from those provided;[40] and the taxes may be intercepted while in process of collection or withdrawn from the county.[41] The legislature may require that all taxes levied within unorganized territory attached to organized counties shall be expended within the limits of such territory.[42] It may order the division and apportionment of taxes collected and paid

Neglect of officers charged with the duty of levying taxes to raise money which they are required to raise for the benefit of public creditors may amount under peculiar circumstances to a refusal to do so. People *v.* New York County, 3 Abb. Dec. (N. Y.) 566, 2 Keyes (N. Y.) 288, 34 How. Pr. (N. Y.) 379.

Mandamus to compel relevy upon misappropriation by treasurer.— In People *v.* Delaware County, 75 N. Y. App. Div. 184, 77 N. Y. Suppl. 676, it was held that where in an action against a county, a town recovered judgment, with directions, under N. Y. Laws (1869), c. 907, that a tax be levied therefor, and that the money when collected be deposited with the county treasurer, and by him invested for the benefit of the town, and such tax was levied and collected, the judgment is met and satisfied so far as the board is concerned, and the fact that the treasurer misappropriated the money by paying it out on other obligations of the county does not entitle the town to a mandamus to compel the board to levy another tax to satisfy such judgment.

30. Thompson *v.* Allen County, 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472.

31. See *supra*, IX, D, 10, a.

32. People *v.* New York County, 3 Abb. Dec. (N. Y.) 566, 2 Keyes (N. Y.) 288, 34 How. Pr. (N. Y.) 379.

33. Vincent *v.* Hinsdale County, 12 Colo. App. 40, 54 Pac. 393.

34. Thompson *v.* Allen County, 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472. To the same effect see McLean County *v.* Owensboro Deposit Bank, 81 Ky. 254. *Contra*, Post *v.* Taylor County, 19 Fed. Cas. No. 11,302, 2 Flipp. 518.

35. Lane *v.* Howell, 1 Lea (Tenn.) 275.

A county court may sue the sheriff for a surplus in his hands collected on a levy that has turned out to be larger than was needed for its special purpose, and this right is not affected by the rule that when such court has levied a tax to pay claims against the county, the sheriff failing to pay over the tax collected is suable only by the creditors and not by the court. Hardy *v.* Logan County Ct., 23 S. W. 661, 15 Ky. L. Rep. 405.

36. Wilson *v.* Anderson, 28 La. Ann. 261.

37. Blair *v.* Carlisle, etc., Turnpike Co., 4 Bush (Ky.) 157. See also Clay *v.* Nicholas County Ct., 4 Bush (Ky.) 154.

38. U. S. *v.* Macon County Ct., 45 Fed. 400.

39. Hannibal *v.* Marion County, 69 Mo. 571; State *v.* St. Louis County Ct., 34 Mo. 546; Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

40. State *v.* St. Louis County Ct., 34 Mo. 546.

41. State *v.* Brewer, 64 Ala. 287.

42. Midland Tp. *v.* Roscommon Tp., 39 Mich. 424.

into the county treasury between counties and cities,[43] direct the county to appropriate part of its funds to pay certain expenses of a city within its limits,[44] or direct that the county in which a city is situated shall on a certain contingency pay to the city a certain portion of the taxes collected for county purposes,[45] in the absence of constitutional prohibition.[46] So it may direct the payment of a certain proportion of specified taxes to the municipality in which they were collected.[47]

b. Appropriation of Surplus. Notwithstanding a constitutional provision that "no tax levied for one purpose shall ever be devoted to another purpose," where a surplus remains after the purpose for which a particular levy was made has been accomplished it may be appropriated by the county for general purposes.[48]

c. Recall of Money in Hands of Agent. Where a county court has levied a tax for the amount of its subscription to a railroad company, and appointed an agent to receive the money collected and pay it over upon the order of the court, the railroad has no lien on such money collected and in the agent's hands, but not ordered to be paid over, and such money can be recalled from the agent at any time before payment to the company.[49]

8. Rights and Remedies of Taxpayers — a. In General. In many jurisdictions resident taxpayers of a county may invoke the interposition of a court of equity to prevent an illegal disposition of the moneys or other funds of the county, or the illegal creation of a debt by the county which they in common with other property holders of the county may otherwise be compelled to pay,[50] provided

43. Logan County *v.* Lincoln, 81 Ill. 156.

Omission of officers to perform duty.— Where such a statute makes it the duty of the county judge and the mayor of a city to divide and apportion the county revenue in a certain way, the duty is merely ministerial, and upon the neglect of such officers to perform the duty the amount due the city may be ascertained in any mode by which the fact may be satisfactorily established. Logan County *v.* Lincoln, 81 Ill. 156.

44. State *v.* St. Louis County Ct., 34 Mo. 546, to pay portion of police expenses.

45. Hannibal *v.* Marion County, 69 Mo. 571.

46. State *v.* Police Jury, 47 La. Ann. 1244, 17 So. 792; State *v.* Pohling, 1 Ohio Cir. Ct. 486; Nasnville *v.* Towns, 5 Sneed (Tenn.) 186.

47. Ratterman *v.* State, 44 Ohio St. 641, 10 N. E. 678; Com. *v.* Martin, 170 Pa. St. 118, 32 Atl. 624.

Application of taxation on railroad property to payment of town bonds.— In New York it is provided that taxes collected from any railroad upon its property in a town which has issued bonds in aid of such railroad shall be applied to the payment of such bonds. People *v.* Cayuga County, 136 N. Y. 281, 32 N. E. 854; Clark *v.* Sheldon, 106 N. Y. 104, 12 N. E. 341; Bridges *v.* Sullivan County, 92 N. Y. 570; Ackerson *v.* Niagara County, 72 Hun (N. Y.) 616, 25 N. Y. Suppl. 196 [*affirming* 18 N. Y. Suppl. 219]; Kilbourne *v.* Sullivan County, 62 Hun (N. Y.) 210, 16 N. Y. Suppl. 507 [*affirmed* in 137 N. Y. 170, 33 N. E. 159]; Vinton *v.* Cattaraugus County, 50 Hun (N. Y.) 600, 2 N. Y. Suppl. 367; Wood *v.* Monroe County, 50 Hun (N. Y.) 1, 2 N. Y. Suppl. 369.

48. Whaley *v.* Com., 110 Ky. 154, 61 S. W. 35, 23 Ky. L. Rep. 1292.

49. Henry County *v.* Allen, 50 Mo. 231, where it was further held that for refusal to restore the money on call the agent becomes liable to his principal.

50. Newmeyer *v.* Missouri, etc., R. Co., 52 Mo. 81, 14 Am. Rep. 394; Normand *v.* Otoe County, 8 Nebr. 18; Carman *v.* Woodruff, 10 Oreg. 133; Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. ed. 1070.

To compel taxes to be applied to proper object.— A taxpayer may petition a county board praying that money collected by taxation in his township to aid a railroad by taking stock therein be applied accordingly, and upon refusal he may appeal to the circuit court. White County *v.* Karp, 90 Ind. 236.

To enjoin county judge from doing an act detrimental to the interests of themselves and other citizens of the county, as for instance to enjoin him from building a court-house at a place not the county-seat in default of any particular officer whose duty it is to restrain him. Rice *v.* Smith, 9 Iowa 570.

Illustrations.— Upon a proper case being made, at the instance of a taxpayer, a court of equity may enjoin the collection of a tax or assessment which is void, illegal, or vitiated by fraud (State *v.* Baxter, 38 Ark. 462; Worthen *v.* Badgett, 32 Ark. 496; Du Page County *v.* Jenks, 65 Ill. 275; Brandirff *v.* Harrison County, 50 Iowa 164; Kentucky, etc., R. Co. *v.* Bourbon County, 85 Ky. 98, 2 S. W. 687, 8 Ky. L. Rep. 881; Lee *v.* Mehew, 8 Okla. 136, 56 Pac. 1046; may prevent the unlawful appropriation or disposition of the funds belonging to the county or compel the restoration of the same (see *supra*, IX, B, 2, e); may prevent the creation of debts in ex-

there be no adequate remedy at law for the protection and enforcement of their rights as such taxpayers.[51]

b. Special Interest Distinct From That of Public. In some jurisdictions, however, it is held that taxpayers of a county cannot maintain, in the absence of statute, such a suit unless they have some special interest distinct from that of the public.[52] Nevertheless it has been held that although a party, simply because he is a taxpayer, has not such an interest in a litigation to which a county is defendant as will entitle him to intervene and defend,[53] yet when in an action against a county the county board conspire with the plaintiff to aid him in procuring a judgment, a taxpayer has such an interest in the litigation as entitles him to intervene.[54]

c. Estoppel. The general rule that one who receives a benefit under an unconstitutional law may be estopped from denying its constitutionality applies to suits by a taxpayer to enjoin the levying of taxes issued in accordance with a statute.[55] So also the right to enjoin the collection of a tax on the ground that the county board exceeded their authority in making the contract, in payment of which such tax was levied, may be held to be waived where such contract is let, the work done, and the settlement made in good faith and without objection at the time.[56]

9. Suits Arising Out of Taxation. A county is not a trustee for its taxpayers

cess of the legal limit (see *supra*, IX, A, 3); may restrain the allowance by a county board of a claim, the payment of which will be in violation of law and the rights of the plaintiff and other taxpayers (see *infra*, X, B, 3, c, (II)); may restrain the issue or payment of orders or warrants illegally drawn (see *supra*, IX, D, 2, i); may restrain the making by the county of fraudulent and collusive sales of tax certificates at less than their value (Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657); or may prevent the making of an unlawful contract by a county board (see *supra*, VI, A, 7). So it may restrain the corporate authorities of the county from issuing its bonds without the sanction of the law. See *supra*, IX, F, 2.

51. Burr *v.* Sacramento County, 96 Cal. 210, 31 Pac. 38; Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586; Tackett *v.* Stevenson, 155 Ind. 407, 58 N. E. 534.

52. *Alabama.*— Perry County *v.* Perry County Medical Soc., 128 Ala. 257, 29 So. 586.

California.— Merriam *v.* Yuba County, 72 Cal. 517, 14 Pac. 137.

Dakota.— Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586.

Kansas.— Wyandotte, etc., Bridge Co. *v.* Wyandotte County, 10 Kan. 326; Craft *v.* Jackson County Com'rs, 5 Kan. 518.

New York.— People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Roosevelt *v.* Draper, 23 N. Y. 318; Doolittle *v.* Broome County, 18 N. Y. 155.

See 13 Cent. Dig. tit. "Counties," § 300 *et seq.*

No right in advance of actual levy.— In Michigan an individual has no right, as a taxpayer, either in his own name or on behalf of himself and the other taxpayers, to file a bill to enjoin proceedings in advance of the actual levy of a tax. He cannot seek redress until his own tax can be ascertained, and he cannot then proceed in equity except to protect his individual interests from injuries not remediable otherwise. Miller *v.* Grandy, 13 Mich. 540 [*followed* in Steffes *v.* Moran, 68 Mich. 291, 36 N. W. 76].

53. Greeley *v.* Lyon County, 40 Iowa 72; Cornell College *v.* Iowa County, 32 Iowa 520; Orleans County *v.* Bowen, 4 Lans. (N. Y.) 24.

54. Greeley *v.* Lyon County, 40 Iowa 72.

Intervention of ten taxpayers after judgment.— After judgment has been obtained against a county, ten taxpayers may intervene under the Pennsylvania act of June 12, 1878, and take the case to the supreme court. Under this act the court has no discretion to grant or withhold the permission to intervene. The petition is merely in the nature of a suggestion for the purpose of getting the taxpayers upon the record. Bell *v.* Allegheny County, 149 Pa. St. 381, 24 Atl. 209.

55. Vickey *v.* Hendricks County, 134 Ind. 554, 32 N. E. 880.

Estoppel to object to illegal election.— A property taxpayer is estopped from contesting the legality of a tax voted in aid of a railroad corporation at a special election ordered by a police jury under La. Const. (1879), art. 242, and La. Acts (1886), No. 35, making provision for such election, on the ground that the police jury was without power to order the election, since the petition presented to them was not signed by a proper number of property taxpayers, where the exercise of the right is unreasonably delayed until after the railroad is constructed, and the corporation has expended large amounts of money on the faith of the official promulgation of the result of the election. Vicksburg, etc., R. Co. *v.* Scott, 52 La. Ann. 512, 27 So. 137.

56. Hull *v.* Kearney County, 13 Nebr. 539, 14 N. W. 529.

as a body so as to maintain a suit in their behalf to prevent action under a tax law on the ground that the law discriminates against the individual taxpayers of the county in favor of those living in other counties,[57] nor can a new county maintain a suit in equity to enjoin the sale for taxes of lands within its limits by officers of the county from which it was formed, since it has no interest in the subject-matter.[58]

X. CLAIMS AGAINST COUNTIES.

A. Presentation For Audit and Allowance — 1. Necessity For — a. In General. It is usually expressly provided by statute in the several jurisdictions that unliquidated claims or demands against a county shall be presented to the proper county officer or tribunal for audit and allowance or rejection,[59] or

57. Arapahoe County *v.* McIntire, 23 Colo. 137, 46 Pac. 638.

58. Nassau County *v.* Phipps, 43 N. Y. App. Div. 595, 60 N. Y. Suppl. 249.

59. *Alabama.*— Mobile County *v.* Sands, 127 Ala. 493, 29 So. 26; Roberts *v.* Cleburne County, 116 Ala. 378, 22 So. 545; Crenshaw County *v.* Fleming, 109 Ala. 554, 19 So. 906; Boothe *v.* King, 71 Ala. 497; Schroeder *v.* Colbert County, 66 Ala. 137; Briggs *v.* Coleman, 51 Ala. 561; Palmer *v.* Fitts, 51 Ala. 489; Vincent *v.* Gilmer, 51 Ala. 387; Dale County *v.* Gunter, 46 Ala. 118; Jackson *v.* Dinkins, 46 Ala. 69; Barbour County *v.* Horn, 41 Ala. 114; Falkner *v.* Randolph County, 19 Ala. 177.

Arizona.—Yavapai County *v.* O'Neil, (1892) 29 Pac. 430.

California.— San Diego County *v.* Riverside County, (1899) 58 Pac. 81 [*reversing* (1898) 55 Pac. 7]; Nelson *v.* Merced County, 122 Cal. 644, 55 Pac. 421; San Diego County *v.* Riverside County, (1898) 55 Pac. 7; Ames *v.* San Francisco, 76 Cal. 325, 18 Pac. 397; Clear Lake Waterworks Co. *v.* Lake County, 45 Cal. 90; Alden *v.* Alameda County, 43 Cal. 270; McCann *v.* Sierra County, 7 Cal. 121.

Colorado.— Rio Grande County *v.* Phye, (Sup. 1899) 59 Pac. 55; Rio Grande County *v.* Bloom, 14 Colo. App. 187, 59 Pac. 417.

Florida.— Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690.

Idaho.— Jolly *v.* Woodward, 4 Ida. 496, 42 Pac. 512; Rankin *v.* Jauman, 4 Ida. 394, 39 Pac. 1111.

Illinois.— Clinton County *v.* Pace, 59 Ill. App. 576; Kern *v.* People, 44 Ill. App. 181.

Indiana.— Gibson County *v.* Tichenor, 129 Ind. 562, 29 N. E. 32; Montgomery County *v.* Courtney, 105 Ind. 311, 4 N. E. 896; Morris *v.* State, 96 Ind. 597; Pfaff *v.* State, 94 Ind. 529; Morgan County *v.* Pritchett, 85 Ind. 68; Bartholomew County *v.* Ford, 27 Ind. 17; Randolph County *v.* Henry County, 27 Ind. App. 378, 61 N. E. 612; Wright *v.* Caskey, 26 Ind. App. 520, 60 N. E. 320; Barnhill *v.* Woodard, 26 Ind. App. 482, 59 N. E. 1085; Hamilton County *v.* Tipton County, 23 Ind. App. 330, 55 N. E. 453; Carroll County *v.* Pollard, 17 Ind. App. 470, 46 N. E. 1012; Cole *v.* Harrison County, 3 Ind. App. 13, 28 N. E. 1031.

Iowa.— Des Moines *v.* Polk County, 107 Iowa 525, 78 N. W. 249; Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559; Marsh *v.* Benton County, 75 Iowa 469, 39 N. W. 713; Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906; Cerro Gordo County *v.* Wright County, 50 Iowa 439; Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678; State *v.* Floyd County Judge, 5 Iowa 380; Bradford *v.* Jackson County, Morr. 219.

Kansas.— Skinner *v.* Cowley County, 63 Kan. 557, 66 Pac. 635; Atchison, etc., R. Co. *v.* Kearney County, 58 Kan. 19, 48 Pac. 583; Saline County Com'rs *v.* Bondi, 23 Kan. 117; Saline County Com'rs *v.* Young, 18 Kan. 440; State *v.* Bonebrake, 4 Kan. 247; Finney County *v.* Gray County, 8 Kan. App. 745, 54 Pac. 1100; Herdman *v.* Woodson County, 6 Kan. App. 513, 50 Pac. 946.

Kentucky.— Weis *v.* Lawrence County Ct., 13 Ky. L. Rep. 975.

Maine.— Huse *v.* Cumberland County, 29 Me. 467; Weymouth *v.* Gorham, 22 Me. 385.

Michigan.— Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657; Auditor Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570.

Minnesota.— Washington County *v.* Clapp, 83 Minn. 512, 86 N. W. 775; Bailey *v.* Strachan, 77 Minn. 526, 80 N. W. 694.

Mississippi.— Marion County *v.* Woulard, 77 Miss. 343, 27 So. 619; Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975; Lawrence County *v.* Brookhaven, 51 Miss. 68.

Montana.—Powder River Cattle Co. *v.* Custer County, 9 Mont. 145, 22 Pac. 383.

Nebraska.— Greeley County *v.* Gebhardt, (1902) 89 N. W. 753; Ayres *v.* Thurston County, 63 Nebr. 96, 88 N. W. 178; Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941; Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399; State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733; Perkins County *v.* Keith County, 58 Nebr. 323, 78 N. W. 630; Douglas County *v.* Taylor, 50 Nebr. 535, 70 N. W. 27; State *v.* Baushausen, 49 Nebr. 558, 68 N. W. 950; Hollingsworth *v.* Saunders County, 36 Nebr. 141, 54 N. W. 79; Fuller *v.* Colfax County, 33 Nebr. 716, 50 N. W. 1044; Richardson County *v.* Hull, 28 Nebr. 810, 45 N. W. 53, 24 Nebr. 536, 39 N. W. 608; Dixon County *v.* Barnes, 13 Nebr. 294, 13 N. W. 623.

demand of payment made[60] within the time prescribed by statute,[61] before

Nevada.— Thornburg *v.* Hermann, 1 Nev. 473.

New Hampshire.—Brown *v.* Grafton County, 69 N. H. 130, 36 Atl. 874.

New Jersey.— Irving *v.* Applegate, 49 N. J. L. 376, 8 Atl. 505.

New York.— Foy *v.* Westchester County, 168 N. Y. 180, 61 N. E. 172 [*affirming* 60 N. Y. App. Div. 412, 69 N. Y. Suppl. 887]; People *v.* Delaware County, 45 N. Y. 196; Staten Island Bank *v.* New York, 68 N. Y. App. Div. 231, 74 N. Y. Suppl. 284; People *v.* Westchester County, 57 N. Y. App. Div. 135, 67 N. Y. Suppl. 981; People *v.* Cayuga County, 9 Hun 440; Brady *v.* New York, 2 Sandf. 460; People *v.* Schuyler County, 2 Abb. Pr. N. S. 78.

North Carolina.— Jones *v.* Bladen County, 73 N. C. 182; McLendon *v.* Anson County Com'rs, 71 N. C. 38; Alexander *v.* McDowell County Com'rs, 67 N. C. 330.

North Dakota.— Barrett *v.* Stutsman County, 4 N. D. 175, 59 N. W. 964.

Ohio.— State *v.* McConnell, 28 Ohio St. 589; State *v.* Dreihs, 11 Ohio Cir. Ct. 226, 1 Ohio Cir. Dec. 215; *In re* Holiday, 6 Ohio Cir. Dec. 751; State *v.* Grigsey, 8 Ohio S. & C. Pl. Dec. 616, 6 Ohio N. P. 202; Ottawa County *v.* County Auditor, 5 Ohio S. & C. Pl. Dec. 597, 7 Ohio N. P. 400.

Pennsylvania.— Luzerne County *v.* Day, 23 Pa. St. 141; *In re* Boyle, 20 Pa. Super. Ct. 1; Com. *v.* Lloyd, 9 Kulp 296.

South Carolina.—Colleton County *v.* Hampton County. 52 S. C. 589, 30 S. E. 484; State *v.* Baldwin, 14 S. C. 135.

South Dakota.— Lyman County *v.* Lyman County Com'rs, 14 S. D. 341, 85 N. W. 597; Thomas *v.* Douglas County, 13 S. D. 520, 83 N. W. 580; State *v.* Pennington County, 13 S. D. 430, 83 N. W. 563.

Texas.—Mills County *v.* Lampasas County, 90 Tex. 603, 40 S. W. 403; Trinity County *v.* Vickery, 65 Tex. 554; Colorado County *v.* Beethe, 44 Tex. 447; Bowie County *v.* Powell, (Civ. App. 1901) 66 S. W. 237; Herring-Hall-Marvin Co. *v.* Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980; Luckie *v.* Schneider, (Civ. App. 1900) 57 S. W. 690; Mills County *v.* Lampasas County, (Civ. App. 1897) 40 S. W. 552; Herring-Hall-Marvin Co. *v.* Bexar County, 16 Tex. Civ. App. 673, 40 S. W. 145.

Utah.— Auerbach *v.* Salt Lake County, 23 Utah 103, 63 Pac. 907, 90 Am. St. Rep. 685; Fenton *v.* Salt Lake County, 3 Utah 423, 4 Pac. 241.

Virginia.— Prince George County *v.* Atlantic, etc., R. Co., 87 Va. 283, 12 S. E. 667.

Washington.— Nickeus *v.* Lewis County, 23 Wash. 125, 62 Pac. 763; Hoexter *v.* Judson, 21 Wash. 646, 59 Pac. 498; State *v.* Snohomish County, 18 Wash. 160, 51 Pac. 368.

West Virginia.— Chancey *v.* Roane County Ct., 51 W. Va. 252, 41 S. E. 156; Yates *v.* Taylor County Ct., 47 W. Va. 376, 35 S. E. 24.

Wisconsin.— Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867; Jones *v.* Washburn County, 106 Wis. 391, 82 N. W. 286; Miller *v.* Crawford County, 106 Wis. 210, 82 N. W. 175; Pier *v.* Oneida County, 93 Wis. 463, 67 N. W. 702; Lincoln County *v.* Oneida County, 80 Wis. 267, 50 N. W. 344; Hyde *v.* Kenosha County Sup'rs, 43 Wis. 129; Kellogg *v.* Winnebago County Sup'rs, 42 Wis. 97; Stringham *v.* Winnebago County, 24 Wis. 594; Jackson County *v.* La Crosse County, 13 Wis. 490.

Wyoming.— Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015; *In re* Fremont, etc., County, 8 Wyo. 1, 54 Pac. 1073.

United States.— Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; Greene County *v.* Daniel, 102 U. S. 187, 26 L. ed. 99; Lorsbach *v.* Lincoln County, 94 Fed. 963; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101; Vincent *v.* Lincoln County, 62 Fed. 705; May *v.* Jackson County, 35 Fed. 710; May *v.* Cass County, 30 Fed. 762; May *v.* Buchanan County, 29 Fed. 469.

See 13 Cent. Dig. tit. "Counties," § 309 *et seq.*

In Georgia the bringing of suit within the time limited is a sufficient presentation of the claim. Demard *v.* De Kalb County, 97 Ga. 733, 25 S. E. 382.

60. Jones *v.* Bladen County, 73 N. C. 182; McLendon *v.* Anson County Com'rs, 71 N. C. 38; Alexander *v.* McDowell County Com'rs, 67 N. C. 330; Luzerne County *v.* Day, 23 Pa. St. 141; *In re* Boyle, 20 Pa. Super. Ct. 1; Fenton *v.* Salt Lake County, 3 Utah 423, 4 Pac. 241.

When a claim is delivered to the county clerk it will be considered filed, although he fails to indorse thereon the fact and time of filing. State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733.

61. People *v.* Monroe, 23 How. Pr. (N. Y.) 395.

Thus some statutes require claims to be filed within twelve months after their accrual. Marengo County *v.* Coleman, 55 Ala. 605; Michael *v.* Marengo County, 52 Ala. 159; Carroll *v.* Siebenthaler, 37 Cal. 193; Powell *v.* Muscogee County, 71 Ga. 587; Carroll *v.* Board of Police, 28 Miss. 38. Others require that claims shall be presented during the fiscal year. Colleton County *v.* Hampton County, 52 S. C. 589, 30 S. E. 484. And others require that claims shall be presented within two years after accrual. Herdman *v.* Woodson County, 6 Kan. App. 513, 50 Pac. 946; Royster *v.* Granville County, 98 N. C. 148, 3 S. E. 739.

Claim barred after six years.— A claim against a county for witness' fees is barred after six years, although no demand be made in that time. Lineberger *v.* Mercer County, 19 Pa. Co. Ct. 532, 28 Pittsb. Leg. J. N. S. 154.

Failure to act on claim within statutory period.— If a claim is presented within the statutory period it is not barred, although the

the payment of such claims can be enforced.[62] And to authorize the bringing of an action, it must be shown that the claim thus presented was rejected or that a reasonable time for action had elapsed before bringing the suit.[63] The object of these requirements is to prevent the revenue of a county from being consumed in litigation by providing that an opportunity for amicable adjustment shall be first afforded to the county before it can be charged with the costs of a suit.[64]

b. What Claims Must Be Presented. In some jurisdictions the obligation to present claims before suit thereon applies to claims for damages arising from torts as well as to those arising upon contracts.[65] In other states, however, it has been held that the word "claim" refers only to "claims" arising upon contract and not upon tort.[66] In any event only unauthenticated and unliquidated claims against a county need be presented for audit and allowance.[67] Presentation for allowance is unnecessary in the case of county orders or warrants, or claims which have already been presented, audited, and allowed;[68] or in the case of county bonds or coupons belonging thereto issued for a purpose authorized by law,[69] or judgments thereon;[70] claims which constitute a primary charge on the fine-and-forfeiture fund, and which do not constitute a charge against the county;[71] charges imposed by a state upon a county upon allowance by the proper state officer;[72] and claims in respect

board fails to act on it, until after the expiration of the time within which the claim must be presented. Dinwiddie County *v.* Stuart, 28 Gratt. (Va.) 526.

Waiver of limitations.— The county board may waive the defense of the statute of limitations as to a claim already barred, and its action in this regard binds its successor. Woods *v.* Madison County, 136 N. Y. 403, 32 N. E. 1011.

62. Falkner *v.* Randolph County, 19 Ala. 177.

63. Rio Grande County *v.* Bloom, 14 Colo. App. 187, 59 Pac. 417.

64. McCann *v.* Sierra County, 7 Cal. 121; McLendon *v.* Anson County Com'rs, 71 N. C. 38.

65. Schroeder *v.* Colbert County, 66 Ala. 137; Barbour County *v.* Horn, 41 Ala. 114; McCann *v.* Sierra County, 7 Cal. 121.

66. Douglas County *v.* Taylor, 50 Nebr. 535, 70 N. W. 27; Hollingsworth *v.* Saunders County, 36 Nebr. 141, 54 N. W. 79; Henderson *v.* Newberry County, 27 S. C. 419, 3 S. E. 787; Chancey *v.* Roane County Ct., 51 W. Va. 252, 41 S. E. 156.

67. Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678; Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; May *v.* Jackson County, 35 Fed. 710.

68. *Florida.*— Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690.

Iowa.— Campbell *v.* Polk County, 3 Iowa 467.

Nebraska.— Ayres *v.* Thurston County, 63 Nebr. 96, 88 N. W. 178; Perkins County *v.* Keith County, 58 Nebr. 323, 78 N. W. 630.

New York.— Chemung Canal Bank *v.* Chemung County, 5 Den. 517.

Wisconsin.— Savage *v.* Crawford County Sup'rs, 10 Wis. 49.

United States.— Lyell *v.* Lapeer County, 15 Fed. Cas. No. 8,618, 6 McLean 446.

See 13 Cent. Dig. tit. "Counties," § 311.

Bills fixed by judges as fees for lawyers assisting in criminal prosecutions are not reviewable by the county commissioners. State *v.* Franklin County, 5 Ohio S. & C. Pl. Dec. 579, 7 Ohio N. P. 563. See also Worcester County *v.* Melvin, 89 Md. 37, 42 Atl. 910.

Effect of allowance and attempt to pay.— Where a person received a grant of school lands from a county under a voidable conveyance, in consideration of services rendered, an objection in an action by the county to recover the land that defendant was not entitled to recover for the services of his remote grantor, the county's grantee, because the latter's claim against the county had not been presented to the commissioners' court for allowance, is without merit, since the commissioners' court had allowed and sought to pay it by the conveyance to its grantee. Club Land, etc., Co. *v.* Dallas County, 26 Tex. Civ. App. 449, 64 S. W. 872.

69. *Alabama.*—Limestone County *v.* Rather, 48 Ala. 433.

Iowa.— Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Nebraska.— Ayres *v.* Thurston County, 63 Nebr. 96, 88 N. W. 178.

New York.— Parker *v.* Saratoga County, 106 N. Y. 392, 13 N. E. 308.

United States.— Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; Greene County *v.* Daniel, 102 U. S. 187, 26 L. ed. 99; Lorsbach *v.* Lincoln County, 94 Fed. 963.

See 13 Cent. Dig. tit. "Counties," § 311.

70. Lorsbach *v.* Lincoln County, 94 Fed. 963; Vincent *v.* Lincoln County, 62 Fed. 705.

71. Briggs *v.* Coleman, 51 Ala. 561.

72. Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570. And see Morris *v.* State, 96 Ind. 597.

Certificate of commanding officer as to compensation of armorer.— Under section 125 of the military code of New York, the certificate of the commanding officer as to the

to which the statute prescribes the method of collection and the manner by which the means for payment are to be obtained.[73] So it has been held that presentation is unnecessary where difficult questions of law are involved and the examination of witnesses are necessary.[74]

2. Who Has Cognizance of Claims. Where it is necessary to present claims for audit and allowance, they should be presented to and acted upon by the proper county authorities, ordinarily the board of county commissioners or supervisors,[75] the county court,[76] or the board of police.[77] Nevertheless power is often given to other officers to audit and allow or reject demands and expense accounts without the submission of the same to the county board or court,[78] and a right of appeal

amount due to an armorer is conclusive upon the board of supervisors, and nothing remains for them to do but to levy, collect, and pay such amount. People *v.* Cayuga County, 9 Hun (N. Y.) 440.

73. In such case the claim must be enforced and paid in the mode provided and in no other way. Dale County *v.* Gunter, 46 Ala. 118; Clear Lake Waterworks Co. *v.* Lake County, 45 Cal. 90.

74. Kellogg *v.* Winnebago County Sup'rs, 42 Wis. 97.

75. *Alabama.*— Speed *v.* Cocke, 57 Ala. 209; Curbbert *v.* Lewis, 6 Ala. 262.

California.— McBride *v.* Newlin, 129 Cal. 36, 61 Pac. 577; Hunt *v.* Broderick, 104 Cal. 313, 37 Pac. 1040; McFarland *v.* Cowen, 98 Cal. 329, 33 Pac. 113 (except salaries of officers); *Ex p.* Widber, 91 Cal. 967, 27 Pac. 733; Babcock *v.* Goodrich, 47 Cal. 488.

Colorado.— Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583.

Indiana.— Waller *v.* Wood, 101 Ind. 138; Orange County *v.* Ritter, 90 Ind. 362; Marion County *v.* Reissner, 58 Ind. 260; Carroll County *v.* Pollard, 17 Ind. App. 470, 46 N. E. 1012.

Iowa.— Dalt *v.* Webster County, 76 Iowa 370, 41 N. W. 1; Bean *v.* Carroll County, 57 Iowa 53, 49 N. W. 1049.

Kansas.— State *v.* Bonebrake, 4 Kan. 247.

Michigan.— People *v.* Manistee County, 33 Mich. 497.

Nebraska.— State *v.* Merrell, 43 Nebr. 575, 61 N. W. 754; Boone County *v.* Armstrong, 23 Nebr. 764, 37 N. W. 626.

New Hampshire.—Brown *v.* Grafton County, 69 N. H. 130, 36 Atl. 874.

New York.— People *v.* Haws, 34 Barb. 69, 21 How. Pr. 117; People *v.* Green, 2 Thomps. & C. 18; Brown *v.* Earle, 16 Abb. Pr. N. S. 64, 46 How. Pr. 308; People *v.* Monroe County, 23 How. Pr. 395; People *v.* Dutchess County, 9 Wend. 508; People *v.* Washington County, 1 Wend. 75.

Virginia.— Dinwiddie County *v.* Stuart, 28 Gratt. 526.

Wisconsin.— Marsh *v.* St. Croix County Sup'rs, 42 Wis. 355.

United States.— Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

See 13 Cent. Dig. tit. "Counties," § 312.

Audit of expenses upon transfer of cause.— Where the expenses of a criminal trial have been properly audited in the county where the trial was had. it is unnecessary to have the same claims verified, and presented as unaudited accounts to the commissioners of the county from which the cause was transferred. Washoe County *v.* Humboldt County, 14 Nev. 123.

Power not implied from management of county business.— The general care and management of the county funds and business confided to the county court, while it authorizes the county court, as representative of the county, to pay the fees of officers for services rendered for the county, and perhaps all just and lawful claims against the county, does not necessarily imply the authority to audit and allow claims in the judicial sense "to hear and to determine," and its refusal to pay such fees, in whole or in part, is not the exercise of judicial functions, or a "decision" which can only be reviewed by the writ of review provided by the code. Crossen *v.* Wasco County, 10 Oreg. 111.

Power of temporary board.— Under a statute providing for the organization of new counties, and authorizing the governor to appoint temporary officers, on whose qualification "the county shall be deemed to be duly organized," a temporary board of commissioners so appointed has power to audit claims for legitimate county expenses and to issue warrants therefor. Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

76. Worthen *v.* Roots, 34 Ark. 356; Chicot County *v.* Tilghman, 26 Ark. 461; Jefferson County *v.* Hudson, 22 Ark. 595.

Justices of county court.—In Tennessee the power to audit claims against a county, and to issue county warrants therefor, belongs to the justices of the county court, and in the absence of an express order made by a competent member of them the county judge has no authority to allow such claims. Connell *v.* Davidson County Judge, 2 Head (Tenn.) 189.

Must act as a court.— Members of a county court can bind their county in the matter of claims only when acting as a court, and its records are the only admissible evidence of their judicial acts. McHaney *v.* Marion County, 77 Ill. 488.

The court must be held by the county judge alone, in Arkansas, and not with the justices of the peace, when contracts and allowances for county expenses are to be made by the county court. Lawrence County *v.* Coffman, 36 Ark. 641.

77. Cotton *v.* Board of Police, 27 Miss. 367.

78. Hunt *v.* Broderick, 104 Cal. 313, 37 Pac. 1040.

from their action to the county board given the claimant.[79] So in one jurisdiction it has been held that the county board may delegate to its chairman and clerk the power to audit claims against the county.[80]

3. REQUISITES OF STATEMENT OF CLAIM — a. In General. In presenting a claim for allowance no formal pleadings are required;[81] and the statement need not possess all the essentials of a complaint in an action;[82] nor need it allege all the steps which the law requires to be taken to render the county liable;[83] but enough must be alleged to show that the county is liable for the demand.[84] It should be in writing,[85] and should set forth the nature of the claim,[86] its amount,[87] and the facts on which it is based,[88] with sufficient clearness to enable the board whose

Allowance by circuit court for services, stationery, etc.— State *v.* St. Louis County Ct., 42 Mo. 496.

Allowance to clerks for books, furniture, etc.— Under a statute providing that the circuit and chancery courts shall make allowance to the clerks thereof for needful books, furniture, etc., for their offices and court-rooms, "and certify such allowance to the board of supervisors," where a bill for such supplies is presented by the clerk, the court should allow or disallow the bill, rather than certify the same to the board of supervisors to be passed on. Jones *v.* Lee County, (Miss. 1892) 12 So. 341.

Contingent expenses of the court.— Where the statute requires county treasurers to pay contingent expenses of the courts, the court, and not the treasurer or the county supervisors, is the proper judge of the necessity of the expenditure. People *v.* Greene County, 15 Abb. N. Cas. (N. Y.) 447.

Costs of investigation of county finances must be taxed by chief justice. State *v.* Middlesex County, 58 N. J. L. 285, 33 Atl. 197.

Expenses incurred in providing suitable court-room for holding the superior courts where such are not provided by the supervisor, may be audited by the judge. *Ex p.* Widber, 91 Cal. 367, 27 Pac. 733.

79. Hunt *v.* Broderick, 104 Cal. 313, 37 Pac. 1040.

80. Wilson *v.* State, 53 Nebr. 113, 73 N. W. 456.

81. Wiegel *v.* Pulaski County, 61 Ark. 74, 32 S. W. 116; Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222; Howard County *v.* Jennings, 104 Ind. 108, 3 N. E. 619; Duncan *v.* Lawrence County, 101 Ind. 403; Gibson County *v.* Emmerson, 95 Ind. 579; Orange County *v.* Ritter, 90 Ind. 362; Fountain County *v.* Wood, 35 Ind. 70.

A demurrer does not lie to a claim presented to a county court for allowance. Wiegel *v.* Pulaski County, 61 Ark. 74, 32 S. W. 116.

Rules of pleading not applicable to a claim filed for allowance. La Grange County *v.* Kromer, 8 Ind. 446.

82. Tippecanoe County *v.* Everett, 51 Ind. 543; Hart *v.* Vigo County, Smith (Ind.) 133.

Petition by several persons.— In Hart *v.* Vigo County, Smith (Ind.) 133, it was held that it is no objection to a petition by several persons to the county commissioners for the payment of expenses arising in the same case that the claims of the petitioners are several, such petition not being in the nature of an action.

83. Orange County *v.* Ritter, 90 Ind. 362; Blackford County *v.* Shrader, 36 Ind. 87.

84. Orange County *v.* Hon, 87 Ind. 356.

85. Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941; French *v.* Dunn County, 58 Wis. 402, 17 N. W. 1.

86. Carroll County *v.* Graham, 98 Ind. 279; French *v.* Dunn County, 58 Wis. 402, 17 N. W. 1.

A detailed and succinct statement of claim is sufficient in any case commenced before a county board. Gibson County *v.* Emmerson, 95 Ind. 579; Fountain County *v.* Loeb, 68 Ind. 29.

A claim in the form of an itemized account is sufficient. Jay County *v.* Gillum, 92 Ind. 511; Newson *v.* Bartholomew County, 92 Ind. 229; Orange County *v.* Ritter, 90 Ind. 362 [*overruling* on this point Orange County *v.* Hon, 87 Ind. 356]; Taylor *v.* Bosworth, 1 Ind. App. 54, 27 N. E. 115. And see *infra*, X, A, 3, b.

Presentation of account and proof of services is sufficient in the case of an application by a physician to the county court for services rendered in examination, on the order of a justice, of a person exposed to smallpox. Marion County *v.* Averitt, 1 Ky. L. Rep. 267.

87. Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1.

88. Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1; Miller *v.* Crawford County, 106 Wis. 210, 82 N. W. 175; French *v.* Dunn County, 58 Wis. 402, 17 N. W. 1; Eaton *v.* Manitowoc County, 40 Wis. 668.

Claimant need not produce his evidence, although in many cases it may be desirable for him to do so. Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1.

Effect of claim of lien not authorized by statute.— Where a contractor furnishing labor and material for a county building filed with the proper officer an itemized and sworn statement of his demand therefor, within thirty days of the time the last material and labor were furnished, the validity of his claim is not affected by the fact that he also included in such statement a claim for

duty it is to pass upon it to investigate the facts involved and reach an intelligent decision.[89]

b. Itemized Account and Dates of Items. It is a very usual requirement that an account presented to a county tribunal for allowance shall be itemized,[90] and that the dates shall be given when necessary to their identification.[91]

c. Verification. So the statutes in a number of jurisdictions require that the claim shall be verified before presentation for allowance[92] by the claimant or someone having personal knowledge of the facts.[93] If made by the claimant it is

a lien on the building, and on the funds set apart for its erection. Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93.

89. Dale *v.* Webster County, 76 Iowa 370, 41 N. W. 1; Thomas *v.* Douglas County, 13 S. D. 520, 83 N. W. 580.

Claim held too indefinite for allowance.— A claim by a district attorney for "Car fares and other incidental expenses necessarily incurred by Mr. Jas. Seaton, stenographer," and for "traveling and other expenses necessarily incurred" in a certain case, is not sufficiently definite to justify its allowance by the board of supervisors. *In re* Pinney, 17 Misc. (N. Y.) 24, 40 N. Y. Suppl. 716.

Effect to designate county as debtor.— In State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733, a claim in favor of a party for property sold to a county under a contract with the county, wherein it is recited that the property was sold to the county commissioners of such county as per agreement, was held to be a claim against the county, and the failure to designate the county by name as debtor was only an irregularity, which did not affect the validity of the claim.

90. *Alabama.*— Washington County *v.* Porter, 128 Ala. 278, 29 So. 185; Schroeder *v.* Colbert County, 66 Ala. 137.

Colorado.— Roberts *v.* People, 9 Colo. 458, 13 Pac 630; Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583.

Idaho.— Clyne *v.* Bingham County, (1900) 60 Pac. 76.

Indiana.— Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Orange County *v.* Ritter, 90 Ind. 362.

Kansas.— Atchison County Com'rs *v.* Tomlinson, 9 Kan 167.

Nebraska.— Wilson *v.* State, 53 Nebr. 113, 73 N. W. 456.

New York.— Matter of White, 51 N. Y. App. Div. 175, 64 N. Y. Suppl. 726; People *v.* Wayne County, 45 Hun 62; People *v.* Monroe County, 18 Barb. 567; People *v.* Delaware County, 9 Abb Pr. N. S. 416.

Oregon.— Brownfield *v.* Houser, 30 Oreg. 534, 49 Pac. 843.

South Carolina.— Maxwell *v.* Saluda County, 55 S. C. 382, 33 S. E. 457; State *v.* Appleby, 25 S. C. 100.

South Dakota.—Thomas *v.* Douglas County, 13 S. D 520, 83 N. W. 580.

Wisconsin.—Miller *v.* Crawford County, 106 Wis. 210, 82 N. W. 175; Outagamie County *v.* Greenville, 77 Wis. 165, 45 N. W. 1090.

See 13 Cent. Dig. tit. "Counties," § 313.

Notice to itemize necessary.— A claim against a county for a specific sum due on a contract cannot be repudiated because not itemized as required by statute, where no notice to itemize it was given to claimant pursuant to such statute. Colusa County *v.* Welch, 122 Cal. 428, 55 Pac. 243.

Where the account is for services or labor, but not for specific fees, such as are allowed by law, the time actually and necessarily devoted to the performance of such service or labor should be specified. Atchison County Com'rs *v.* Tomlinson, 9 Kan. 167.

91. Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Orange County *v.* Ritter, 90 Ind. 362.

92. *Alabama.*— Washington County *v.* Porter, 128 Ala. 278, 29 So. 185; Schroeder *v.* Colbert County, 66 Ala. 137.

Arkansas.—Perry County *v.* Conway County, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665.

California.—McCormick *v.* Tuolumne County, 37 Cal. 257.

Iowa.— Hegele *v.* Polk County, 92 Iowa 701, 61 N. W. 393.

Nebraska.—Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941.

New Jersey.— Curley *v.* Hudson County, 66 N. J. L. 401, 49 Atl. 471.

New York.— People *v.* Monroe County, 18 Barb. 567; People *v.* Delaware County, 9 Abb. Pr. N. S. 416; People *v.* Schuyler County, 2 Abb. Pr. N. S. 78; People *v.* O'Reilly, 61 How. Pr. 3.

South Carolina.— Maxwell *v.* Saluda County, 55 S. C. 382, 33 S. E. 457; Green *v.* Richland County, 27 S. C. 9, 28 S. E. 618.

See 13 Cent. Dig. tit. "Counties," § 314.

Affidavit may be made before a commissioner of deeds in and for the county. People *v.* O'Reilly, 61 How. Pr. (N. Y.) 3.

Essential to allowance to clerk for services. — Nave *v.* Ritter, 41 Ind. 301.

No application to claims under special statutes.—Under a special statute providing that a county which has received territory detached by a previous act from another county shall be liable to the latter for a just proportion of its debt, existing at the date of the segregating act, to be allowed on a claim presented to the county court, it is not necessary to authenticate such claim in the manner required by the general statute, in case of ordinary demands against counties, if the special statute does not require it. Perry County *v.* Conway County, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665.

93. Schroeder *v.* Colbert County, 66 Ala. 137.

If the verification is by an agent he need

not necessary for him to state that he has personal knowledge of its correctness.[94] If a claim is not verified as required by statute the refusal of the board to audit the same will not be reviewed or a mandamus issued to the board in aid of the claimant;[95] but it has been held that the board may waive the benefit of the statute.[96]

4. Amendment and Correction. The board may permit an amendment of a claim which is not sufficiently full in details or is insufficiently verified,[97] and it has been held that mandamus will lie to compel the board to permit such amendment.[98]

B. Hearing and Determination — 1. Time and Place. It is for the county tribunals to whom claims against a county are required to be presented to fix the time and place when they will consider a claim and hear the proofs,[99] and to give notice thereof.[1]

2. Proceedings — a. The Hearing — (i) *In General.* The tribunal which passes on the validity of the claim should permit the claimant to furnish such proof as he desires to establish its validity,[2] and mandamus will lie to compel it to do so.[3] Such boards also have the power to examine witnesses and gather such proofs in regard to a claim presented to them as they may desire before taking final action thereon,[4] and need not accept statements supported only by claimant's

not state therein that he is acting as agent. Gillette-Herzog Mfg. Co. *v.* Aitkin County, 69 Minn. 297, 72 N. W. 123.

94. Mobile County *v.* Sands, 127 Ala. 493, 29 So. 26.

95. People *v.* Delaware County, 9 Abb. Pr. N. S. (N. Y.) 416; People *v.* Schuyler County, 2 Abb. Pr. N. S. (N. Y.) 78.

96. People *v.* St. Lawrence County, 30 How. Pr. (N. Y.) 173; Parker *v.* Grant County, 1 Wis. 414.

97. People *v.* Herkimer County, 3 How. Pr. N. S. (N. Y.) 241.

98. People *v.* Wayne County, 45 Hun (N. Y.) 62.

99. Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771.

Deliberations in private.— A statute providing that no claim shall be passed on except when the board and their clerk are in private does not violate a constitutional provision that all courts shall be open. State *v.* Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520.

Effect of postponement upon right to plead subsequent repeal of statute.— The fact that the county board postponed without prejudice the consideration of a town's claim against the county did not preclude it from subsequently pleading in bar of the claim that since the postponement the statute was repealed. Wirt *v.* Allegany County, 90 Hun (N. Y.) 205, 35 N. Y. Suppl. 887.

1. Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771.

Need not notify claimant of day of trial.— In passing upon county claims, the board of county commissioners acts as a board of audit, and is not required to notify the claimant of the day of trial, so that he may appear with his witnesses as in courts of trial. Tinsley *v.* Union County, 40 S. C. 276, 18 S. E. 794.

2. Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771; People *v.* Manistee County, 26 Mich. 422; Pickens County *v.* Day, 45 S. C. 161, 22 S. E. 772.

Affidavit that account is just insufficient. — In Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771, a constable presented an account for allowance by the board of supervisors, made up of charges for official services claimed to have been rendered in criminal cases, verified by his affidavit, in which he swore that the account "was just and true, and that the same, or any part thereof, had not been paid." It was held that such affidavit was insufficient to establish the justness or correctness of the account, or to prove that it was a proper charge to be allowed and paid from the treasury of the county.

It may be shown by parol that allowances made by the board of commissioners on account of special contracts for work in the court-house and jail did not include a claim for repairs in the jail under a subsequent parol contract. De Kalb County *v.* Auburn Foundry, etc., Works, 14 Ind. App. 214, 42 N. E. 689.

Showing as to services included in prior account.— When an account has been presented against a county and allowed and paid, and thereafter the claimant presents a claim for fees for services apparently included in the first account, the claimant is not concluded thereby; but may show as a matter of fact what services were covered by the charges in the first account. Jefferson County Com'rs *v.* Patrick, 12 Kan. 605.

Waiver of hearing.— Where a claimant is asked to explain certain items and makes no request for a hearing thereon, he cannot afterward complain of not having been heard. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

3. People *v.* Cortland County, 15 N. Y. Suppl. 748.

4. People *v.* Herkimer County, 3 How. Pr. N. S. (N. Y.) 241.

affidavit,[5] unless they see fit so to do.[6] They are bound to give its proper effect to all testimony laid before them in the same manner in which courts and judicial bodies are expected to give effect to proofs in the course of justice.[7] Where claimant's counsel is permitted to examine witnesses and discuss the claim before a committee appointed by the board for audit it is discretionary with the board whether the counsel shall be permitted to make an argument before it.[8]

(II) *Opposition and Defenses to Claim.* Any resident taxpayer has the right to oppose in a proper manner the allowance of a claim against a county before the board of commissioners.[9] A county board cannot offset against a meritorious claim[10] the amount of a claim allowed claimant by a former board and paid, on the ground of the erroneous allowance of the first claim.[11]

(III) *Reference For Trial.* As the filing of a claim does not constitute an action, there can be no reference thereof for trial.[12]

(IV) *Reconsideration.* A county board has not the power after it has passed on a claim presented to it, and after the term at which its decision was rendered has closed, to reconsider and set it aside;[13] but it has during its meeting full control over its actions upon claims presented to it during its session,[14] and may set aside or reconsider the same when found to have been erroneous.[15]

3. Decision — a. Necessity For. A county tribunal to whom claims have been properly presented are bound to come to a decision upon the merits of each claim, or distinctly record the fact that they reject it as not properly admissible, so as to enable the party to obtain a judicial decision whether they are bound to consider it,[16] and mandamus will lie to compel such action on their part in case of

5. *In re* Lanehart, 32 N. Y. App. Div. 4, 52 N. Y. Suppl. 671.

Requirement of further testimony.—The law of South Carolina does not require the board of county commissioners to demand further proof of a claim presented against the county, where the proof submitted does not satisfy them of the correctness of the claim. The proviso to S. C. Gen. Stat. § 623, is permissive only. Tinsley *v.* Union County, 40 S. C. 276, 18 S. E. 794; Green *v.* Richland County, 27 S. C. 9, 2 S. E. 618. A committee of a board of supervisors, to which has been referred a sheriff's bills, in passing upon the same may rely on the knowledge of its individual members, and on information received from persons having knowledge of the subject, and are not bound to swear witnesses, if they can acquire information without so doing. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

6. People *v.* Ingham County, 38 Mich. 658.

7. Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771; People *v.* Manistee County, 26 Mich. 422.

8. People *v.* Fulton County, 74 Hun (N. Y.) 251, 26 N. Y. Suppl. 610.

9. State *v.* White Pine County, 22 Nev. 80, 35 Pac. 485.

10. A county court cannot, it has been held, pay off or take assignments of claims against a creditor of the county and set off the same against his demand, in the absence of statute authorizing such procedure. Idaho Bank *v.* Malheur County, 30 Oreg. 420, 45 Pac. 781, 35 L. R. A. 141.

11. Cuming County *v.* Thiele, 48 Nebr. 888, 67 N. W. 883.

12. Gilmore *v.* Putnam County, 35 Ind. 344.

13. *Alabama.*—Commissioners' Ct. *v.* Moore, 53 Ala. 25.

Arkansas.— Kersh *v.* Lincoln County, 36 Ark. 589.

Illinois.— Cook County *v.* Ryan, 51 Ill. App. 190.

Indiana.— Lyons *v.* Miller, 17 Ind. 250.

Mississippi.— Arthur *v.* Adam, 49 Miss. 404.

Missouri.— State *v.* Cooper County Ct., 17 Mo. 507.

See 13 Cent. Dig. tit. "Counties," § 325.

In Arkansas county courts are empowered to review all allowances made at previous terms. Desha County *v.* Newman, 33 Ark. 788.

14. People *v.* Stocking, 50 Barb. (N. Y.) 573, 32 How. Pr. (N. Y.) 48, 6 Park. Crim. (N. Y.) 263.

15. Dean *v.* Saunders County, 55 Nebr. 759, 76 N. W. 450; People *v.* Broome County, 65 N. Y. 222; People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122; Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015. And see People *v.* Manistee County, 33 Mich. 497.

Effect of order of disallowance after reconsideration.— Where an order disallowing a claim against a county has been reconsidered, such order of disallowance will not operate as an adjudication of the claim. Dean *v.* Saunders County, 55 Nebr. 759, 76 N. W. 450.

Notice of reconsideration is waived by the appearance of counsel for the claimant and the obtaining of a postponement by him. State *v.* Bausbausen, 49 Nebr. 558, 68 N. W. 950.

16. Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771; People *v.* Manistee County, 26 Mich. 422.

refusal.[17] They cannot make it a condition precedent to such action that the claimant release all errors in a case in which the county has obtained judgment against him,[18] or refuse to act on a claim properly presented, because it had been formerly rejected because not properly presented.[19]

b. Requisites. It is not essential, or according to some decisions even proper, for the board to enter a formal judgment as in courts of law; but it will be sufficient if it appear that the claim was duly presented and was allowed or rejected.[20] In order, however, to render counties liable on claims against them, such claims must be audited and allowed at an authorized term of the commissioners' court,[21] each item must be passed on separately,[22] the bill or claim must receive the assent of a majority of the members of the board,[23] the precise amount allowed must be stated,[24] and the allowance of the claim should be spread upon the record.[25] Where the extent of the power of a board is to determine on the

17. *Ex p.* Taylor, 5 Ark. 49; People *v.* San Francisco, 11 Cal. 42; People *v.* Cortland County, 15 N. Y. Suppl. 748; People *v.* Delaware County, 9 Abb. Pr. N. S. (N. Y.) 408; Weldy *v.* Hocking County, 8 Ohio Dec. (Reprint) 767, 9 Cinc. L. Bul. 313.

Such a writ does not, however, control or prescribe the mode or determine the result of their action. People *v.* San Francisco, 11 Cal. 42; People *v.* Oneida County, 24 Hun (N. Y.) 413; People *v.* Delaware County, 9 Abb. Pr. N. S. (N. Y.) 408.

18. *Ex p.* Taylor, 5 Ark. 49.

19. Smith *v.* San Bernardino County, 99 Cal. 262, 33 Pac. 1094.

Effect of mandamus compelling inclusion of claim in tax estimate.— The allowance of a writ of mandamus to compel a county board to include relator's claim in its estimate of the taxes to be levied for the ensuing year is not necessarily an adjudication that a definite sum is due from the county to relator, in view of the fact that the statute contemplates that the estimate shall be made before the allowance of claims against the county, and the drawing of warrants in payment of the same. State *v.* Baushausen, 49 Nebr. 558, 68 N. W. 950.

20. Black *v.* Saunders County Com'rs, 8 Nebr. 440, 1 N. W. 144.

What amounts to rejection.— A statement by the board that they would not allow the claim nor make any record of its rejection or allowance amounts to a rejection. Nickeus *v.* Lewis County, 23 Wash. 125, 62 Pac. 763.

Adoption of report advising rejection amounts to a disallowance. Warner *v.* Outagamie County, 19 Wis. 611. See also Adams *v.* Wheatfield, 46 N. Y. App. Div. 466, 61 N. Y. Suppl. 738.

Allowance of physician's claim for services at inquest.— The making and filing with the county auditor of a fee bill, by a justice of the peace acting as coroner, for the expenses of an inquest held by him, which included an item in favor of a physician, is a sufficient allowance of the physician's claim. Bradley *v.* Delaware County, 54 Iowa 137, 6 N. W. 175.

Allowance of several claims at one vote.— Under a statute providing that every ordinance or resolution, etc., providing for the expenditure of public moneys in sums exceeding five hundred dollars shall be published before final action upon the same, the board of supervisors may at one vote allow several claims against the city and county without passing an ordinance, even if the aggregate of the demands exceeds five hundred dollars, provided each claim is for less than five hundred dollars. Sweeny *v.* Maynard, 52 Cal. 468.

Disallowance of single item.— In People *v.* Orleans County, 16 Misc. (N. Y.) 213, 38 N. Y. Suppl. 890, it was held that an examination of the various items of an account and the disallowance of a single item is an audit of the account.

Inclusion of claim in assessment roll.—Under a statute requiring the board of supervisors to include in the assessment roll such claims as are allowed by them, the inclusion of a claim in such roll constitutes an audit thereof, although it was included without investigation, and while an appeal was pending from its allowance by a town board. Adams *v.* Wheatfield, 46 N. Y. App. Div. 466, 61 N. Y. Suppl. 738.

21. Wightman *v.* Karsner, 20 Ala. 446.

22. People *v.* Westchester County, 57 N. Y. App. Div. 135, 67 N. Y. Suppl. 981; People *v.* Fulton County, 74 Hun (N. Y.) 251, 26 N. Y. Suppl. 610; Taylor *v.* Salt Lake County, 2 Utah 405.

Disallowance of similar claims as a whole. — Items of a sheriff's account which are of the same character may be grouped together and disallowed as a whole by the board of supervisors. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

23. State *v.* Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520; Rice *v.* Plymouth County, 43 Iowa 136.

Claim marked "allowed" by one with consent of all.— In Griggs *v.* Kimball, 42 Iowa 512, where a claim against the county was examined by the board of supervisors and marked "allowed" by one of them, with the knowledge and consent of all, in accordance with the usual course of business of the board, it was held that the allowance was legal and bound the county, although no formal vote was taken or appeared of record.

24. Spring Valley Water Works *v.* Ashbury, 52 Cal. 126.

25. Speed *v.* Cocke, 57 Ala. 209.

Registry of claims allowed.— By Ala. Rev.

validity of claims presented, they have no authority to determine out of what fund such claims are to be paid, and any such judgment is a nullity.[26]

c. Discretionary Powers of Tribunals — (i) *In General.* The power of county boards or courts to audit and allow accounts, claims, and demands against the county, being conferred by statute, must be exercised according to law;[27] but they are ordinarily empowered to exercise a reasonable legal discretion in allowing or rejecting claims which are legitimate charges against the county, but the compensation for which is not fixed by statute, nor even expressly provided for;[28] and a court of equity will not interfere with their action in the allowance or rejection of claims, unless fraud or corruption be shown, or they have undertaken to allow a claim not of a character to be paid by the county.[29] They cannot, however, refuse to allow legal claims at the amount fixed by law;[30] and where county boards are required by statute to audit and allow accounts of public officers, they have no discretion to exercise, but must allow the salary as fixed by law.[31] So also where a statute authorizes a county board to audit and pay certain claims against the county, such provision has been held to be mandatory in its operation and as leaving no discretion with the board as to its action;[32] nor can the board

Code, § 907, "every claim, or such part thereof as is allowed must be registered in a book kept for that purpose," etc. Commissioners' Ct. *v.* Moore, 53 Ala. 25, 27.

26. Cuthbert *v.* Lewis, 6 Ala. 262. And See White *v.* Hayden, 126 Cal. 621, 59 Pac. 118.

27. Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583; Warren County *v.* Klein, 51 Miss. 807.

28. *Colorado.*— Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583.

Indiana.— Rothrock *v.* Carr, 55 Ind. 334; Carroll County *v.* Richardson, 54 Ind. 153. See also Marion County *v.* Reissner, 58 Ind. 260.

Iowa.— Whicher *v.* Cedar County, 1 Greene 217.

Maine.—Bangor *v.* Penobscot County Com'rs, 87 Me. 294, 32 Atl. 903.

Michigan.— People *v.* Ingham County, 38 Mich. 658.

Minnesota.— Gerken *v.* Sibley County, 39 Minn. 433, 40 N. W. 508; Fuller *v.* Morrison County, 36 Minn. 309, 30 N. W. 824.

New York.— People *v.* Oneida County, 24 Hun 413; People *v.* Haws, 34 Barb. 69, 21 How. Pr. 117; Chase *v.* Saratoga County, 33 Barb. 603; People *v.* Webb, 21 N. Y. Suppl. 298; People *v.* St. Lawrence County, 30 How. Pr. 173; People *v.* Dutchess County, 9 Wend. 508.

Ohio.—Handy *v.* Hamilton County, 1 Disn. 263, 12 Ohio Dec. (Reprint) 611.

Pennsylvania.—Butz *v.* Fayette County, 168 Pa. St. 464, 32 Atl. 28; Parker *v.* Lancaster County, 1 Watts & S. 460.

Texas.— Parker County *v.* Courts, 2 Tex. Unrep. Cas. 398.

See 13 Cent. Dig. tit. "Counties," § 318.

Audit of services of de facto officer.—When a coroner is given a certificate of election by the supervisors, and performs the duties of the office, but is afterward ousted by another candidate, the board may properly allow his account for services and disbursements while holding the office. Deane *v.* Greene County, 66 How. Pr. (N. Y.) 461.

Disallowance of claim for gratuitous services.— As no compensation is provided for services rendered in aiding the prosecuting attorney to examine the reports of county commissioners, said services must be regarded as gratuitous, and no claim for compensation can be enforced; hence the county board may properly disallow a claim therefor. Anderson *v.* Jefferson County, 25 Ohio St. 13. See also to same effect McClave *v.* Miller, 25 Ohio St. 14.

29. Fitzgerald *v.* Harms, 92 Ill. 372; People *v.* Oneida County, 24 Hun (N. Y.) 413.

30. People *v.* Manistee County, 26 Mich. 422; People *v.* Delaware County, 9 Abb. Pr. N. S. (N. Y.) 408; People *v.* St. Lawrence County, 30 How. Pr. (N. Y.) 173.

Fees for summoning witnesses for the grand jury are part of the public expense of carrying on the circuit court, and are payable out of the county treasury, upon the certificate of the circuit court in which the expenses occur, and the county court has no authority to reject or reduce a claim for such expenses so authenticated. Jefferson County *v.* Hudson, 22 Ark. 595.

31. People *v.* Stout, 23 Barb. (N. Y.) 338; Morris *v.* People, 3 Den. (N. Y.) 381.

32. People *v.* Livingston County, 68 N. Y. 114; People *v.* Erie County, Sheld. (N. Y.) 517; People *v.* St. Lawrence County, 30 How. Pr. (N. Y.) 173, 181, where it is said: "In settling the amount, if it is for any matter the price of which is fixed by law, by custom, by authority, or by contract, with one having authority to contract on behalf of the county, the board have no discretion. It must settle or declare the amount according to such law, custom, authority or contract; but if the amount is for any matter which does not come within either of said classes, the board in settling or fixing amounts is vested with a discretion, and acts in the light

in passing upon claims against the county attach conditions precedent to their allowance and payment.[33]

(II) *Claim Not Legally Chargeable to County.* A county board or court has no power to audit and allow accounts not legally chargeable to the county,[34] or which grow out of contracts which the county is not authorized to make.[35] The discretion given to such bodies to make allowances means that they may exercise a legal (and not a personal) discretion in making such allowances as are authorized by law,[36] and the allowance of a claim which is not legally enforceable imports no acknowledgment of liability of the county thereon,[37] and will neither bind nor estop the county.[38] Furthermore a court of equity will restrain the allowance by a county board of a claim, the payment of which will be in violation of law and the rights of the plaintiff and other taxpayers.[39]

(III) *Effect of Lack of Funds.* The fact that there is no appropriation to pay a claim or that there are no funds in the treasury to meet necessary expenses does not justify a refusal to audit, approve, and allow a claim;[40] this merely justifies non-payment.[41]

C. Effect of Decision — 1. On County — a. In General. In some jurisdictions it is held that a county board in passing upon claims against the county does not necessarily act in a judicial capacity, but merely in an executive or ministerial capacity as agents of the county, and their allowance of claims, while *prima facie* evidence of their correctness, will not constitute an adjudication binding on the county.[42] In others, however, it is held that a county board or court, in passing

of such information as it may possess or seek, or as may be furnished to it by claimants."

33. Henderson *v.* Pueblo County, 4 Colo. App. 301, 35 Pac. 880; People *v.* Livingston County, 68 N. Y. 114.

34. *Alabama.*— Jack *v.* Moore, 66 Ala. 184.

California.— Linden *v.* Case, 46 Cal. 171.

Colorado.— Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583.

Indiana.— Gross *v.* Whitley County, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394; State *v.* Monroe County, 158 Ind. 102, 62 N. E. 1000; Rothrock *v.* Carr, 55 Ind. 334; Huntington County *v.* Buchanan, 21 Ind. App. 178, 51 N. E. 939.

Iowa.— Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207.

Louisiana.— Beauregard *v.* East Baton Rouge Parish, 28 La. Ann. 306.

Michigan.— People *v.* Manistee County, 26 Mich. 422.

Mississippi.— Bridges *v.* Clay County, 57 Miss. 252; Warren County *v.* Klein, 51 Miss. 807.

Missouri.— Hooper *v.* Ely, 46 Mo. 505.

New York.— Richmond County *v.* Ellis, 59 N. Y. 620; People *v.* Lawrence, 6 Hill 244.

Ohio.— Jones *v.* Lucas County, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710; State *v.* Griggsy, 8 Ohio S. & C. Pl. Dec. 616, 6 Ohio N. P. 202.

See 13 Cent. Dig. tit. "Counties," § 319.

35. English *v.* Chicot County, 26 Ark. 454; Gemmill *v.* Arthur, 124 Ind. 258, 25 N. E. 283; Waymire *v.* Powell, 105 Ind. 328, 4 N. E. 886; Miller *v.* Embree, 88 Ind. 133; People *v.* Stout, 13 How. Pr. (N. Y.) 314.

36. Rothrock *v.* Carr, 55 Ind. 334.

37. Peoria County *v.* Rocke, 65 Ill. 77; People *v.* Green, 2 Thomps. & C. (N. Y.) 23.

38. *Alabama.*—Commissioners' Ct. *v.* Moore, 53 Ala. 25.

Arkansas.— Desha County *v.* Newman, 33 Ark. 788.

Colorado.— Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583.

Indiana.— Gross *v.* Whitley County, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394.

Ohio.—Richardson *v.* State, 66 Ohio St. 108, 63 N. E. 593.

United States.—Sbirk *v.* Pulaski County, 21 Fed. Cas. No. 12,794, 4 Dill. 202.

Amount of fees limited by statute.—Where the fees of county officers are definitely fixed by law their audit by the county board is a ministerial and not a judicial duty, and the board cannot allow more than the statute provides for. State *v.* Roderick, 25 Nebr. 629, 41 N. W. 404.

39. Peter *v.* Prettyman, 62 Md. 566; Wilson *v.* Wallace, 64 Miss. 13, 8 So. 128; White *v.* Multnomah County, 13 Oreg. 317, 10 Pac. 484, 57 Am. Rep. 20.

40. People *v.* Earle, 47 How. Pr. (N. Y.) 370; People *v.* New York County, 21 How. Pr. (N. Y.) 322 [*affirmed* in 22 How. Pr. 71]. But see Clark *v.* Greer County, 8 Okla. 425, 58 Pac. 639, holding that county commissioners have no authority to allow warrants as a claim against the county, there being no fund from which they can be paid, as the existence of such a fund is a necessary prerequisite to the allowance of a claim.

41. People *v.* Earle, 47 How. Pr. (N. Y.) 370.

42. *Alabama.*—Commissioners' Ct. *v.* Moore, 53 Ala. 25.

Indiana.— Huntington County *v.* Heaston, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; De Kalb County *v.* Auburn

upon claims or demands which they have jurisdiction to hear and determine, act judicially, or at least in a quasi-judicial capacity, and their allowance and settlement in such cases have the force of judgments and are conclusive upon the county,[43] in the absence of fraud or mistake,[44] and unless reversed or vacated in the manner provided by law.[45] Such allowance is conclusive upon the board[46] and their successors;[47] and the officer whose duty it is to pay the claim or draw a

Foundry, etc., Works, 14 Ind. App. 214, 42 N. E. 689; Jackson County *v.* Nichols, 12 Ind. App. 315, 40 N. E. 277, 54 Am. St. Rep. 528.

Kansas.— Leavenworth County Com'rs *v.* Keller, 6 Kan. 510.

North Carolina.— Abernathy *v.* Phifer, 84 N. C. 711.

Virginia.— Board of Sup'rs *v.* Calett, 86 Va. 158, 9 S. E. 999.

United States.— Gurnee *v.* Brunswick County, 11 Fed. Cas. No. 5,872, 1 Hughes 270; Shirk *v.* Pulaski County, 21 Fed. Cas. No. 12,794, 4 Dill. 209.

See 13 Cent. Dig. tit. "Counties," § 322 *et seq.*

43. *California.*— Alameda County *v.* Evers, 136 Cal. 132, 68 Pac. 475; McBride *v.* Newlin, 129 Cal. 36, 61 Pac. 577; McFarland *v.* McCowen, 98 Cal. 329, 33 Pac. 113; Placer County *v.* Campbell, (1886) 11 Pac. 602; Colusa County *v.* De Jarnett, 55 Cal. 373; El Dorado County *v.* Elstner, 18 Cal. 144; Knox *v.* Woods, 8 Cal. 545.

Illinois.— Cook County *v.* Ryan, 51 Ill. 190.

Kentucky.— Boone County *v.* Dills, 5 Ky. L. Rep. 135.

Mississippi.— Carroll *v.* Board of Police, 28 Miss. 38.

Nebraska.— Taylor *v.* Davey, 55 Nebr. 153, 75 N. W. 553; Trites *v.* Hitchcock County, 53 Nebr. 79, 73 N. W. 215; State *v.* Vincent, 46 Nebr. 408, 65 N. W. 50; Heald *v.* Polk County, 46 Nebr. 28, 64 N. W. 376; Sioux County *v.* Jameson, 43 Nebr. 265, 61 N. W. 596; State *v.* Churchill, 37 Nebr. 703, 56 N. W. 484; Ragoss *v.* Cuming County, 36 Nebr. 375, 54 N. W. 683; State *v.* Buffalo County, 6 Nebr. 454; Brown *v.* Otoe County Com'rs, 6 Nebr. 111.

New York.— People *v.* Stout, 23 Barb. 349, 4 Abb. Pr. 22, 13 How. Pr. 314; Onondaga County *v.* Briggs, 2 Den. 26.

South Carolina.— State *v.* Appleby, 25 S. C. 100; State *v.* Kirby, 17 S. C. 563; Richland County *v.* Miller, 16 S. C. 236.

Washington.— State *v.* Headlee, 19 Wash. 477, 53 Pac. 948; State *v.* Headlee, 17 Wash. 637, 50 Pac. 493; Dillon *v.* Whatcom County, 12 Wash. 391, 41 Pac. 174. *Compare* Ferry *v.* King County, 2 Wash. 337, 26 Pac. 537.

See 13 Cent. Dig. tit. "Counties," § 322 *et seq.*

By auditing a portion of bills for expenses incurred by a county officer, the board thereby concedes their necessity, and gives the act of the officer incurring the same the effect of being made with the board's prior authority. People *v.* Cayuga County, 22 Misc. (N. Y.) 816, 50 N. Y. Suppl. 16.

Presumpton as to compliance with conditions.— Where a claim has been allowed by county commissioners, it is presumed that the commissioners have investigated as to whether claimant has complied with all statutory requirements. State *v.* Headlee, 18 Wash. 220, 51 Pac. 369.

Although a claim is of doubtful validity the county court may allow it. State *v.* Ferriss, (Tenn. Ch. App. 1899) 56 S. W. 1039.

44. *California.*— El Dorado County *v.* Elstner, 18 Cal. 144.

Missouri.— Phelps County *v.* Bishop, 68 Mo. 250, may be collaterally attacked for fraud.

New York.— Staten Island Bank *v.* New York, 68 N. Y. App. Div. 231, 74 N. Y. Suppl. 284.

Ohio.— Ridenour *v.* State, 14 Ohio Cir. Ct. 393, 7 Ohio Cir. Dec. 481; Weldy *v.* Hocking County, 8 Ohio Dec. (Reprint) 767, 9 Cinc. L. Bul. 313; State *v.* Griggsy, 8 Ohio S. & C. Pl. Dec. 616, 6 Ohio N. P. 202.

Pennsylvania.— Bradford County *v.* Horton, 6 Lack. Leg. N. 306.

See 13 Cent. Dig. tit. "Counties," § 322.

45. Carroll *v.* Board of Police, 28 Miss. 38; Gage County *v.* Hill, 52 Nebr. 444, 72 N. W. 581; Sioux County *v.* Jameson, 43 Nebr. 265, 61 N. W. 596.

46. Prebels *v.* Chism, 5 T. B. Mon. (Ky.) 158; People *v.* Green, 64 Barb. (N. Y.) 162.

Effect of act authorizing disallowance.— In State *v.* Cathers, 25 Nebr. 250, 41 N. W. 182, it was held that whatever effect the Nebraska statute of 1879, which authorizes the disallowance of claims after they are allowed, may have, it can only apply to claims allowed since the act took effect, and cannot destroy vested rights in claims allowed before the act took effect.

No review after roll signed and warrant delivered.— In People *v.* Rensselaer County, 34 Hun (N. Y.) 266, it was held that a county board cannot review an audit after the roll has been signed and the warrants delivered.

47. People *v.* Green, 64 Barb. (N. Y.) 162; Chenango County *v.* Birdsall, 4 Wend. (N. Y.) 453; Northampton County *v.* Yohe, 24 Pa. St. 305; State *v.* Kirby, 17 S. C. 563. In State *v.* Richland County, 28 S. C. 258, 5 S. E. 622, a claim was presented to a board of county commissioners and disallowed, and no appeal was taken. The same claim was then presented to a succeeding board who refused to consider it because already passed upon. It was held that claimant was not entitled to a writ of mandamus to compel this latter board to consider this claim, it having been already passed upon.

warrant therefor cannot lawfully refuse so to do,[48] unless the board allows a claim in excess of its jurisdiction.[49] In order that the allowance shall have a binding effect the claim must be of a nature which the board may lawfully allow. The audit and allowance of illegal claims is not binding on the county.[50]

b. Recovery Back of Money Paid.[51] A county may recover back money paid on claims audited and allowed by the board, if the allowance was made through fraud or mistake of fact;[52] and where claims are not legally chargeable against a county, and in allowing and auditing the same county boards or courts exceed their jurisdiction, their action is not conclusive and the money paid may be recovered back by action.[53] The payment of such a claim so audited is not a voluntary payment by the county, but an unauthorized act of its agents.[54] Where, however, money is voluntarily paid, with a knowledge of all the facts, and is not procured by fraud or false representation, it cannot be recovered back, although the money was not due or owing.[55] Money allowed and paid by the county under a mistake of law cannot be recovered back;[56] nor can money be recovered back by the

48. *California.*— McFarland *v.* McCowan, 98 Cal. 329, 33 Pac. 113.

Colorado.— Beeney *v.* Irwin, 6 Colo. App. 66, 39 Pac. 900.

Georgia.— State *v.* Bell, 9 Ga. 334; Coleman *v.* Neal, 8 Ga. 560.

New York.— People *v.* Edmonds, 15 Barb. 529; People *v.* Gallup, 12 Abb. N. Cas. 64, 65 How. Pr. 108; People *v.* Fitzgerald, 54 How. Pr. 1.

Texas.— Callaghan *v.* Salliway, 5 Tex. Civ. App. 239, 23 S. W. 837.

Washington.— State *v.* Headlee, 19 Wash. 477, 53 Pac. 948.

Wisconsin.— State *v.* Richter, 37 Wis. 275.

See 13 Cent. Dig. tit. "Counties," § 323.

Conclusive on auditors as to value of services.— The allowance of a claim for services is conclusive on the auditor of the rendition and value of the services. Lamberson *v.* Jefferds, 118 Cal. 363, 50 Pac. 403.

49. Walton *v.* McPhetridge, 120 Cal. 440, 52 Pac. 731; Merriam *v.* Yuba County, 72 Cal. 517, 14 Pac. 137; Linden *v.* Case, 46 Cal. 171.

50. Richmond County *v.* Ellis, 59 N. Y. 620.

Compromise ineffectual.— A county board cannot bind the county by allowing and ordering an illegal claim to be paid, and a compromise of such claim is of no effect. Endion Imp. Co. *v.* Evening Telegram Co., 104 Wis. 432, 80 N. W. 732.

Part payment of an illegal demand will not estop the county from denying its liability for the balance of such claim. Gill *v.* Appanoose County, 68 Iowa 20, 25 N. W. 908.

51. See, generally, PAYMENT.

52. Marion County *v.* Phillips, 45 Mo. 75; New York County *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 152.

53. *Kansas.*— Jefferson County *v.* Patrick, 12 Kan. 605.

Nevada.— State *v.* Washoe County Com'rs, 14 Nev. 66.

New York.— Richmond County *v.* Ellis, 59 N. Y. 620; Richmond County *v.* Van Clief, 1 Hun 454, 3 Thomps. & C. 458; Chemung Canal Bank *v.* Chemung County, 5 Den. 517; People *v.* Lawrence, 6 Hill 244.

Ohio.— Richardson *v.* State, 66 Ohio St. 108, 63 N. E. 593; Higgins *v.* Logan County, 62 Ohio St. 621, 57 N. E. 504; Jones *v.* Lucas County, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710; Logan County *v.* Easton, 6 Ohio S. & C. Pl. Dec. 333.

Oregon.— Union County *v.* Hyde, 26 Oreg. 24, 37 Pac. 76; Grant County *v.* Sels, 5 Oreg. 243.

South Carolina.— Richland County *v.* Miller, 16 S. C. 236.

See 13 Cent. Dig. tit. "Counties," § 324.

54. Richmond County *v.* Ellis, 59 N. Y. 620.

Not a payment under mistake of law.— In some jurisdictions it is held that payment under an allowance of claims made by the board of county commissioners in defiance of a positive statute is not a payment by the county within the rule that a payment under mistake of law cannot be recovered. Huntington County *v.* Heaston, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192. And see Jones *v.* Lucas County, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710.

55. Randall *v.* Lyon County, 20 Nev. 35, 14 Pac. 583; Onondaga County *v.* Briggs, 2 Den. (N. Y.) 26; Macon County *v.* Jackson County, 75 N. C. 240 (even though there was in fact no debt); Ottawa County *v.* Auditor, 5 Ohio S. & C. Pl. Dec. 597, 7 Ohio N. P. 400.

Excessive allowances and overcharges for fees of officers.— Where one board of commissioners allows and pays duly itemized and verified accounts of a county officer for services in the line of official duty, for which no specified fees are allowed by law, a subsequent board cannot recover back from such officer the whole sum so paid him, on the ground that it was for overcharges and paid by mistake, in the absence of fraud on his part in obtaining payment. Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583. See also Scioto County *v.* Gherky, Wright (Ohio) 493, holding that a county cannot recover overcharges for fees of officers in the absence of fraud.

56. Boone County *v.* Dils, 5 Ky. L. Rep. 686; Scioto County *v.* Gherky, Wright (Ohio)

county merely because there has been an abuse of discretionary power by the board in auditing and allowing the claim.[57]

2. On Claimant — a. Rejection of Claim. In some jurisdictions it is held that where the allowance of a claim or the fixing of compensation is a matter left to the exclusive discretion of a county board or court, the decision of such tribunal is conclusive upon the claimant.[58] So also where it is the duty of county boards to audit and allow such fees of officers as are legal, and order them paid from the county treasury their decision is final. The law gives no appeal therefrom and the officer cannot create one by suit to recover his claim.[59] Where, however, the nature of a claim is not such as to give a county board or court absolute discretion in passing upon it, their action in rejecting the same in whole or in part is not final and conclusive so as to prevent the claimant from obtaining relief thereupon by appeal from the decision or by action on the claim against the county.[60] In the case of a partial allowance, however, the claimant should notify the board of his unwillingness to accept the amount allowed.[61]

b. Allowance of Claim. Suit cannot be maintained against a county on a claim which has been audited and allowed,[62] but the proper remedy of the holder in such case is by mandamus to compel the levy of a tax or against the treasurer

493; Ottawa County *v.* Auditor, 5 Ohio S. & C. Pl. Dec. 597, 7 Ohio N. P. 400. And see *supra*, note 55.

57. Garfield County *v.* Leonard, 3 Colo. App. 576, 34 Pac. 583.

58. *Colorado.*— Arapahoe County *v.* Graham, 4 Colo. 201.

Illinois.— See Tazewell County *v.* McEnrow, 5 Ill. App. 496.

Kansas.— Linton *v.* Linn County Com'rs, 7 Kan. 79.

Michigan.— Stamp *v.* Cass County, 47 Mich. 330, 11 N. W. 183.

New York.— Martin *v.* Greene County, 29 N. Y. 645; Adams *v.* Oswego County, 66 Barb. 368; Chase *v.* Saratoga County, 33 Barb. 603; Boyce *v.* Cayuga County, 20 Barb. 294; Brady *v.* New York, 2 Sandf. 460 [*affirmed* in 10 N. Y. Suppl. 260]; Erhard *v.* Kings County, 36 N. Y. Suppl. 656; People *v.* Herkimer County, 3 How. Pr. N. S. 241.

Ohio.— Geauga County Com'rs *v.* Ranney, 13 Ohio St. 388.

See 13 Cent. Dig. tit. "Counties," § 326 *et seq.*

59. Sterling *v.* Cumberland County, 91 Me. 316, 39 Atl. 1003.

60. *Arizona.*— Smith *v.* Mojave County, (1885) 5 Pac. 160.

California.— Arbios *v.* San Bernardino County, 110 Cal. 553, 42 Pac. 1080; Price *v.* Sacramento County, 6 Cal. 254.

Colorado.— Gunnison County *v.* McCormick, 1 Colo. App. 319, 29 Pac. 25.

Illinois.— Tazewell County *v.* McEnrow, 5 Ill. App. 496.

Iowa.— Garber *v.* Clayton County, 19 Iowa 29; Marvin *v.* Fremont County, 11 Iowa 463.

Missouri.— Boggs *v.* Caldwell County, 28 Mo. 586.

Montana.— Davis *v.* Lewis, etc., County, 4 Mont. 292, 1 Pac. 750.

Nebraska.— Jarvis *v.* Chase County, (1902) 89 N. W. 624.

Ohio.— Clermont County Com'rs *v.* Robb, Wright 48, 5 Ohio 490.

South Carolina.— Wheeler *v.* Newberry County, 18 S. C. 132.

Virginia.— Dinwiddie County *v.* Stuart, 28 Gratt. 526.

Wisconsin.— Conover *v.* Washington County, 5 Wis. 438.

See 13 Cent. Dig. tit. "Counties," § 326.

Refusal to audit unitemized claim.— The refusal of a county board of supervisors to entertain a claim against the county, the statement of which is not properly itemized as required by Wis. Rev. Stat. § 677, until such statement is amended, is not such a disallowance of the claim as may be appealed from to the circuit court. Miller *v.* Crawford County, 106 Wis. 210, 82 N. W. 175.

Sufficient evidence of refusal.— Where the record of the county board as kept by the clerk shows the proper presentation of a claim and that the board refused to grant it, this will be enough to authorize an appeal by the claimant. Black *v.* Saunders County Com'rs, 8 Nebr. 440, 1 N. W. 144.

Where a resolution to disallow is tabled this is not such an order of disallowance as can be appealed from. Tazewell County *v.* McEnrow, 5 Ill. App. 496.

61. Arbios *v.* San Bernardino County, 110 Cal. 553, 42 Pac. 1080.

62. Commissioners' Ct. *v.* Moore, 53 Ala. 25; Elmore County *v.* Long, 52 Ala. 277; Covington County *v.* Dunklin, 52 Ala. 28 [*overruling* Randolph County *v.* Hutchins, 46 Ala. 397]; Marshall County *v.* Jackson County, 36 Ala. 613.

For remedies of holders of county warrants or orders issued on audit and allowance of claims see *supra*, IX, D, 10.

Insufficient allowance to bar action.—Where the statute authorizing the issuance of bonds provides for their payment by levying a special tax and creating a special fund, the allowance by the county board and audit of a claim on a judgment on such bonds, as payable out of the general fund, is not an allowance in the manner and to the extent to

if he fails without sufficient excuse to make payment.[63] The allowance of a claim which had formerly been disallowed and on which a suit is pending bars further proceedings in the suit.[64]

c. Effect of Acceptance of Partial Allowance. An acceptance by a claimant of the amount allowed by a county board with notice of the rejection of the residue is a bar to a suit to recover all that may have been due, and a waiver of the right to appeal from the action of the board.[65] A further recovery will not be precluded, however, where the claimant accepts part payment of his claim with no notice of the rejection of the residue,[66] or where he accepts part payment and there is no dispute as to the facts and no agreement that it shall be in full.[67]

D. Proceedings to Obtain Relief From Action of Board — 1. By Claimant — a. In Case of Total or Partial Rejection of Claim — (I) *Jurisdictions in Which Remedy by Action Is Exclusive.* In some jurisdictions it is held that a board of county commissioners is not such a judicial tribunal that its decision in passing upon claims against the county can be reviewed on appeal, but the proper remedy to test the validity of a rejected claim is by civil action.[68]

(II) *Jurisdictions in Which Appeal*[69] *and Action Are Concurrent Remedies.* In many of the states the right of appeal from the decision of a county tribunal, rejecting a claim in whole or in part, expressly provided for by statute is not an exclusive but a concurrent remedy, and does not operate as a bar to the right to maintain an independent action against the county at law or in equity.[70]

which the holder is entitled, and he is not precluded from maintaining an action on the judgment because another remedy is prescribed by statute to enforce payment of claims allowed and audited. Vincent *v.* Lincoln County, 62 Fed. 705.

63. Commissioners' Ct. *v.* Moore, 53 Ala. 25; Elmore County *v.* Long, 52 Ala. 277.

64. Jeffersonian Pub. Co. *v.* Hilliard, 105 Ala. 576, 17 So. 112.

Matters not included in claim.— The allowance or rejection by a county board of a claim against the county will not, however, bar a recovery for matters not included in the claim. De Kalb County *v.* Auburn Foundry, etc., Works, 14 Ind. App. 214, 42 N. E. 689.

65. *Alabama.*— Looney *v.* Jackson County, 105 Ala. 597, 17 So. 105.

Arizona.—Yavapai County *v.* O'Neill, (1892) 29 Pac. 430.

Colorado.— La Plata County *v.* Morgan, 28 Colo. 322, 65 Pac. 41.

Idaho.— Clyne *v.* Bingham County, (1900) 60 Pac. 76; Eakin *v.* Nez Perces County, 4 Ida. 131, 36 Pac. 702.

Iowa.— Brick *v.* Plymouth County, 63 Iowa 462, 19 N. W. 304 [*distinguishing* Fulton *v.* Monona County, 47 Iowa 622]; Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396; Wapello County *v.* Sinnaman, 1 Greene 413.

Michigan.— Browne *v.* Livingston County, 126 Mich. 276, 85 N. W. 745.

New York.—People *v.* Hamilton County, 56 Hun 459, 10 N. Y. Suppl. 88; People *v.* Queens County, 33 Hun 305; Chase *v.* Saratoga County, 33 Barb. 603.

Oklahoma.— Cleveland County *v.* Seawell, 3 Okla. 281, 41 Pac. 592.

Contra.—Belle *v.* Waupaca County, 62 Wis. 214, 22 N. W. 398. For rule under previous statute see Pulling *v.* Columbia County, 3 Wis. 337.

See 13 Cent. Dig. tit. "Counties," § 327.

An agreement between the claimant and the board that his acceptance of an allowance of his claim in part shall not affect his right to sue for the amount disallowed is void. Yavapai County *v.* O'Neill, (Ariz. 1892) 29 Pac. 430.

66. Fulton *v.* Monona County, 47 Iowa 622.

67. People *v.* Hamilton County, 56 Hun (N. Y.) 459, 10 N. Y. Suppl. 88.

68. McMillan *v.* Robeson County, 90 N. C. 28; Jones *v.* Franklin County, 88 N. C. 56.

In Alabama, by the code, suit against a county is prohibited until the claim has been disallowed in whole or in part, but if a statute creating a claim against the county provides no remedy for its enforcement, a suit against the county is the proper remedy. Lowndes County *v.* Hunter, 49 Ala. 507; Montgomery County *v.* Barber, 45 Ala. 237; Antauga County *v.* Davis, 32 Ala. 703.

69. For appeal generally see Appeal and Error.

70. *Colorado.*—Wasson *v.* Hoffman, 4 Colo. App. 491, 36 Pac. 445; Park County *v.* Locke, 2 Colo. App. 508, 31 Pac. 351; Pitkin County *v.* Brown, 2 Colo. App. 473, 31 Pac. 525.

Dakota.— Spencer *v.* Sully County, 4 Dak. 474, 33 N. W. 97.

Idaho.— Ada County *v.* Gess, 4 Ida. 611, 43 Pac. 71.

Illinois.— Grundy County *v.* Hughes, 8 Ill. App. 34.

Iowa.—Curtis *v.* Cass County, 49 Iowa 421; Armstrong *v.* Tama County, 34 Iowa 309; State *v.* Floyd County Judge, 5 Iowa 380; Wapello County *v.* Sinnaman, 1 Greene 413.

(III) *Jurisdictions in Which Appeal*[71] *or Certiorari*[72] *Are Exclusive Remedies.* In other jurisdictions where a county board or court has rejected a claim properly before them, in whole or in part, the only remedy is by appeal[73] or by certiorari.[74]

(IV) *Appellate Procedure*[75] — (A) *Parties.* The right of appeal from a decision auditing, settling, and directing the payment of demands against the county only extends to such persons as may have an interest in the claim and who feel aggrieved by the allowance or rejection of their demand. It has no reference to the citizens of a county who are not interested in the allowance of the claim.[76] It has been held in one jurisdiction that the county cannot be made

Kansas.— Leavenworth County Com'rs *v.* Brewer, 9 Kan. 307.

Kentucky.— Washington County Ct. *v.* Thompson, 13 Bush 239; Boone County *v.* Dils, 5 Ky. L. Rep. 135.

Minnesota.— Gutches *v.* Todd County, 44 Minn. 383, 46 N. W. 678; Murpby *v.* Steele County Com'rs, 14 Minn. 67.

Mississippi.— Taylor *v.* Marion County, 51 Miss. 731; Yalabusha County *v.* Carbry, 3 Sm. & M. 529.

Missouri.— Reppy *v.* Jefferson County, 47 Mo. 66.

Montana.— Greeley *v.* Cascade County, 22 Mont. 580, 57 Pac. 274.

Nevada.— Waitz *v.* Ormsby County, 1 Nev. 370.

Wyoming.— Boswell *v.* Albany County, 1 Wyo. 235.

See 13 Cent. Dig. tit. "Counties," § 328.

In Indiana under the act of 1852 if a claim was disallowed by the county board the claimant might appeal, or at his option bring suit against the county. Fulton County *v.* Maxwell, 101 Ind. 268; Jameson *v.* Bartholomew County, 64 Ind. 524; Blackford County *v.* Shrader, 36 Ind. 87; Bartholomew County *v.* Wright, 22 Ind. 187; Decatur County *v.* Wheeldon, 15 Ind. 147. This act was, however, repealed by the law of 1879 providing that no court should have jurisdiction except on appeal from the decision of the board. Fulton County *v.* Maxwell, 101 Ind. 268; State *v.* Washington County, 101 Ind. 69; Jackson County *v.* Applewhite, 62 Ind. 464. Since the later statute of 1885, however, a party aggrieved by the decision of the board may appeal or bring an action against the county. Myers *v.* Gibson, 152 Ind. 500, 53 N. E. 646; Myers *v.* Gibson, 147 Ind. 452, 46 N. E. 914; Bass Foundry, etc., Works *v.* Parke County, 141 Ind. 68, 32 N. E. 1125; Allen County *v.* Creviston, 133 Ind. 39, 32 N. E. 735 (applies to actions in tort as well as in contract); Maxwell *v.* Fulton County, 119 Ind. 20, 23, 19 N. E. 617, 21 N. E. 453; Posey County *v.* Stock, 11 Ind. App. 167, 33 N. E. 928.

In Ohio if the claim is based on statute the remedy by appeal is exclusive; if founded on contract, the party has a concurrent remedy either by appeal or action. Belmont County Com'rs *v.* Ziegelhofer, 38 Ohio St. 523; State *v.* Hamilton County, 26 Ohio St. 364; Shepard *v.* Darke County, 8 Ohio St. 354; Stewart *v.* Logan County, 2 Ohio Cir. Ct. 134.

In Virginia when the claim duly presented to the board of supervisors has been rejected in whole or in part by the board, such disallowance shall be final, and a perpetual bar to any such claim, unless an appeal be taken, or the board consent to the institution of an action against the county, provided, however, that when the board of supervisors shall refuse or neglect to act upon any claim duly presented to them, the statute shall not be so construed as to prevent the institution of an action by such claimant. Prince George County *v.* Atlantic, etc., R. Co., 87 Va. 283, 12 S. E. 667.

71. For certiorari generally see CERTIORARI.

72. For appeal generally see APPEAL AND ERROR.

73. Fuller *v.* Colfax County, 33 Nebr. 716, 50 N. W. 1044; Richardson County *v.* Hull, 24 Nebr. 536, 39 N. W. 608; Dixon County *v.* Barnes, 13 Nebr. 294, 13 N. W. 623; State *v.* Furnas County, 10 Nebr. 361, 6 N. W. 434; Black *v.* Saunders County Com'rs, 8 Nebr. 440, 1 N. W. 144; State *v.* Buffalo County, 6 Nebr. 454; Brown *v.* Otoe County Com'rs, 6 Nebr. 111; Jennings *v.* Abbeville County, 24 S. C. 543; Civic Federation *v.* Salt Lake County, 22 Utah 6, 61 Pac. 222.

As to appeal from decisions of county board see *supra*, IV, C, 9, h, (v).

74. Foy *v.* Westchester County, 168 N. Y. 180, 61 N. E. 172 [*affirming* 60 N. Y. App. Div. 412, 69 N. Y. Suppl. 887]; Adams *v.* Wheatfield, 46 N. Y. App. Div. 466, 61 N. Y. Suppl. 738.

75. For appeal generally see APPEAL AND ERROR.

76. Hudson *v.* Jefferson County Ct., 28 Ark. 359 [*following* Chicot County *v.* Tilghman, 26 Ark. 461].

Appeal by district attorney on demand of taxpayer.— Since S. D. Comp. Laws, § 610, authorizing the district attorney to appeal to the circuit court from the action of the county commissioners on claims against the county when seven taxpayers of the county demand it, does not require that such demand shall recite that those who sign it are taxpayers, it will be presumed in the absence of proof to the contrary that persons signing such demand are taxpayers of the county. Lyman County *v.* Lyman County Com'rs, 14 S. D. 341, 85 N. W. 597.

Manner of docketing appeal from order of allowance.— On an appeal by one to the circuit court from an order of a county board allowing a claim filed by another before said

a party, and that it is improper to join it with the board, as it can only be proceeded against by an action under the provisions of statutes authorizing suits against counties.[77]

(B) *Transcript.* On failure to file a transcript as required by statute, containing notice of appeal, the order or decision appealed from, and the accounts, bills, contracts, or papers connected therewith and necessary to a proper hearing, an appeal should be dismissed.[78]

(C) *Pleadings.* The proceedings on appeal must be substantially for the claim presented to the commissioner.[79] And in some jurisdictions it is held that the statement ought to contain the substantial requisites of a complaint.[80] In one jurisdiction on appeal from the disallowance of a claim it is held that the appeal must be heard upon the original papers without pleading.[81] In another the verified claim or account is to be treated as the complaint, and the order or vote of the board disallowing the same as the answer.[82] And in another no judgment can be rendered on appeal from an order disallowing a claim, unless formal pleadings are filed.[83] A formal complaint when required need not allege a demand upon the county.[84] If no formal pleadings are required, the county in the absence of such pleadings may make the same defense as an individual could, and avail itself of any counter-claim or set-off it may have against the claimant.[85]

(D) *Hearing and Determination.* On appeal from a decision of a county board in respect to a claim presented for allowance there is a hearing *de novo* on the merits.[86] A court may dismiss an appeal from the allowance by a county board of a claim against the county, if it be shown that the appeal was not taken in good faith.[87] So where the parties have acted upon the theory that issues should be made, if the appellant after a demurrer has been sustained to all the paragraphs of his answer except one, withdraws his remaining answer and declines to plead further, the court may dismiss the appeal and give judgment for the appellee without hearing evidence.[88] In jurisdictions where appeal is the only remedy, where an appeal from an adverse decision of a claim is dismissed in the

board, the cause should be docketed in the circuit court in the names of the claimant and appellant, the former as plaintiff and the latter as defendant. Ralston *v.* Radcliff, 34 Ind. 513. Where an appeal is taken by a district attorney under S. D. Comp. Laws, § 610, the cause should be docketed in the circuit court in the name of the claimant against the county, and not in the name of the county against the commissioners. Lyman County *v.* Lyman County Com'rs, 14 S. D. 341, 85 N. W. 597.

77. Gorman *v.* Boise County, 1 Ida. 627.

78. Clyne *v.* Bingham County, 7 Ida. 75, 60 Pac. 76.

79. Orange County *v.* Hon, 87 Ind. 356; Thomas *v.* Scott County Com'rs, 15 Minn. 324.

80. Orange County *v.* Hon, 87 Ind. 356.

Very little formality in pleading is required, however, and a succinct and detailed statement of the claim will be sufficient. Gibson County *v.* Emmerson, 95 Ind. 579; Jay County *v.* Gillum, 92 Ind. 511; Taylor *v.* Bosworth, 1 Ind. App. 54, 27 N. E. 115.

A defective statement on appeal may be amended. Orange County *v.* Hon, 87 Ind. 356.

81. Stewart *v.* Logan County, 2 Ohio Cir. Ct. 134.

82. Tarbox *v.* Adams County Sup'rs, 34 Wis. 558.

The court may, however, at its discretion permit or require more formal pleadings to be filed (Baker *v.* Columbia County Sup'rs, 39 Wis. 444; Tarbox *v.* Adams County Sup'rs, 34 Wis. 558. See also Eaton *v.* Manitowoc County Sup'rs, 49 Wis. 668); and where this is done a formal complaint filed by the plaintiff must be treated on demurrer as in other cases and nothing considered except that which appears or is referred to within it (Smith *v.* Barron County, 44 Wis. 686).

83. Box Butte County *v.* Noleman, 54 Nebr. 239, 74 N. W. 582.

84. Smith *v.* Barron County, 44 Wis. 686.

85. Jefferson County Com'rs *v.* Patrick, 12 Kan. 605.

86. See *supra*, IV, C, 9, h, (V), (G), (I).

87. Gage County *v.* George E. King Bridge Co., 58 Nebr. 827, 80 N. W. 56.

The motion to dismiss, if based on occurrences subsequent to the appeal, or on the ground that the appeal is for corrupt purposes, will be entertained at any time during the proceedings before the trial on the merits, and after, if the reasons for the motion were not discovered before, and any delay in the presentment of the motion before trial will not constitute its waiver, unless it appears that the delay was without excuse. Gage County *v.* George E. King Bridge Co., 58 Nebr. 827, 80 N. W. 56.

88. Taylor *v.* Bosworth, 1 Ind. App. 54, 27 N. E. 115.

district court, such judgment is a final disposition of the suit unless reversed on error in the supreme court.[89]

(E) *Effect of Judgment on the Merits.* Where a court decides against allowance of a claim on appeal from the decision of the board in respect thereto, this puts an end to the claim.[90]

(V) *Procedure by Action*— (A) *Statutes of Limitation.*[91] Where a claimant may waive an appeal from the decision of a county board upon his claim and sue direct in the circuit court such action need not be brought within the time prescribed for taking the appeal.[92] In some jurisdictions, where it is a condition precedent to an action against the county on an unliquidated claim that the same shall be first presented to the county board or court for allowance, the statute commences to run against the claim from the time it accrued and not from the date of presentation.[93] In other jurisdictions a claim will be barred unless an action be brought thereon within a certain time after it has been rejected by the county commissioners.[94] An acknowledgment of a claim or waiver of prescription by a county or parish officer will not operate as an interruption of prescription unless it be shown that he was duly authorized to make such waiver.[95]

(B) *Pleadings*— (1) Petition, Declaration, or Complaint.[96] According to the weight of authority, where it is necessary to present a claim against a county for allowance before suit can be brought thereon, the complaint, declaration, or petition in such suit must allege such presentation,[97] within the time prescribed,[98]

89. Richardson County *v.* Hull, 24 Nebr. 536, 39 N. W. 608.

90. State *v.* Benson, 70 Ind. 481.

91. For statutes of limitation generally see Limitations of Actions.

92. Posey County *v.* Stock, 11 Ind. App. 167, 36 N. E. 928.

93. Noel Young Bond, etc., Co. *v.* Mitchell County, 21 Tex. Civ. App. 638 54 S. W. 284. In Baker *v.* Johnson County, 43 Iowa 645, the board of supervisors employed an agent to procure and furnish proof of the character of its swamp lands and secure compensation therefor from the general government. It was held that his cause of action against the county for services accrued, not at the time when the county received its scrip, but at the time of the completion of his work under the contract, and that his right of action was barred in five years from that time.

94. Apache County *v.* Barth, (Ariz. 1898) 53 Pac. 187 (applies to open unliquidated accounts and not to warrants); Honea *v.* Monroe County, (Miss. 1894) 15 So. 789.

Rejection of claim before passage of statute of limitations.— Under a statute requiring actions on rejected claims to be commenced within six months after the first rejection, a claim rejected before the passage of the act is barred if no action is commenced thereon within six months after its passage. Greeley *v.* Cascade County, 22 Mont. 580, 57 Pac. 274.

95. Hynes *v.* Police Jury, 22 La. Ann. 71.

96. For form of complaint held sufficient in respect to allegations of presentment see Rhoda *v.* Alameda County, 69 Cal. 523, 11 Pac. 57.

97. *Alabama.*—Schroeder *v.* Colbert County, 66 Ala. 137; Autauga County *v.* Davis, 32 Ala. 703.

California.—Rhoda *v.* Alameda County, 52 Cal. 350, 69 Cal. 523, 11 Pac. 57.

Georgia.— Maddox *v.* Randolph County, 65 Ga. 216.

Iowa.— Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278.

Mississippi.— Lawrence County *v.* Brookhaven, 51 Miss. 68.

North Carolina.— Jones *v.* Bladen County, 73 N. C. 182; Love *v.* Chatham County Com'rs, 64 N. C. 706.

Texas.— Hohman *v.* Comal County, 34 Tex. 36.

Utah.—Fenton *v.* Salt Lake County, 4 Utah 466, 11 Pac. 611.

West Virginia.—Chapman *v.* Wayne County Ct., 27 W. Va. 496.

Contra.— Gibson County *v.* Tichenor, 129 Ind. 562, 29 N. E. 32; Hancock County *v.* Leggett, 115 Ind. 544, 18 N. E. 53; Mullen *v.* Decatur County, 9 Ind. 502; Gillett *v.* Lyon County Com'rs, 18 Kan. 410.

See 13 Cent. Dig. tit. "Counties," § 356.

Effect of allegation of presentation and part payment.— An allegation in a complaint in an action against a county that the claim sued on was presented to the county court for payment, and that subsequently a part of the amount claimed was paid thereon, does not render the complaint demurrable, by raising a presumption that such payment was made or accepted in full of the claim. Flagg *v.* Marion County, 31 Oreg. 18, 48 Pac. 693.

Limitations of rule.— When, however, a claim against the county is not allowed for the reason that it is not a charge against the county, and its form and proper presentation is not questioned, it has been held that it is not necessary for the complaint to allege that the requirements of the statute as to form of claim and proper presentation thereof has been complied with. Taylor *v.* Canyon County, 7 Ida. 171, 61 Pac. 521.

98. Maddox *v.* Randolph County, 65 Ga. 216.

and must show that the claim was itemized and verified as required.[99] It will not be sufficient to allege generally that the claim was duly presented and rejected.[1]

(2) ANSWER.[2] In a suit against a county board for services an answer alleging that the plaintiff has presented his claim to the board and has appealed from their rejection of the same, and that the appeal is still pending, must show the perfecting of such appeal according to the statute.[3] In an action against a police jury, where the jury are only nominal defendants and the taxpayers are the real parties in interest, they will not be held to allegations made erroneously in the answer by the police jury.[4]

(c) *Evidence*.[5] As a usual rule the records of a county court or board where such were made are the only admissible evidence of their judicial acts in passing upon claims against a county, and parol evidence is inadmissible to vary the same. In order to show that the legal requirements as to the presentation of an itemized and verified statement of a claim before bringing suit against a county have been complied with, such statement may be read in evidence in such a suit.[7] In an action against a county to recover the amount of a claim which has been presented to the county board but, it is alleged, has neither been allowed nor disallowed, the original bill filed with the county board is not of itself evidence of any fact tending to support the cause of action.[8]

(D) *Judgment*.[9] Where a suit is brought for work and labor done for the county, a judgment by default against the county should show that the amount was to be collected only from the property of the county.[10] Where the complaint alleges that the claim has been presented to the court of county commissioners as required by statute, and disallowed, and judgment is entered on default, it is not necessary that the judgment recite that proof was made of such presentation and refusal, as by default the county admitted the truth of the allegations.[11] The rule that a party cannot split up his cause of action applies to a claim against a county, and if upon an allowance by a county board of a part of his claim a claimant sues and recovers judgment upon a portion of the original claim, the judgment in the first suit is when properly pleaded a bar to further proceedings to enforce the

99. Washington County *v.* Porter, 128 Ala. 278, 29 So. 185; Schroeder *v.* Colbert County, 66 Ala. 137; Billings First Nat. Bank *v.* Custer County, 7 Mont. 464, 17 Pac. 551; Rice *v.* Schuylkill County, 14 Pa. Co. Ct. 541.

1. Rhoda *v.* Alameda County, 52 Cal. 350.

2. For pleadings generally see PLEADING.

3. Morgan County *v.* Holman, 34 Ind. 256.

Necessity for verification.— Such an answer, and also an answer that said claim has been presented by the plaintiff to said board for allowance and is still pending before the board, are answers in abatement, and must be verified by affidavit. Morgan County *v.* Holman, 34 Ind. 256.

4. Brown *v.* Police Jury, 4 La. Ann. 180.

5. For evidence generally see EVIDENCE.

6. McHaney *v.* Marion County, 77 Ill. 488.

An agreement of accord and satisfaction which has been performed between a county board representing the county and those having claims against the county may be proven by parol evidence, in the absence of any written record of minutes of the county board of such agreement. Green *v.* Lancaster County, 61 Nebr. 473, 85 N. W. 439.

Promises of county attorney that county would pay a certain debt are not admissible in a suit upon such claim against the county. Holten *v.* Lake County, 55 Ind. 194.

Orders issued by township trustees for supplies to poor persons, while not conclusive upon them or the county, are admissible in evidence in support of claims against counties by persons furnishing such supplies in connection with proof *aliunde* that the supplies had actually been furnished to the persons named in such orders and that they were entitled thereto. Posey County *v.* Harlem, 108 Ind. 164, 8 N. E. 913.

Where a county warrant declared on and introduced in evidence shows on its face that it was issued on account of a claim bearing a certain number, a certified copy of such claim from the county records is admissible on behalf of the county as evidence of the date of the rendition of the services for which the claim was filed. Rollins *v.* Rio Grande County, 90 Fed. 575, 33 C. C. A. 181.

7. Winnebago County *v.* Rockford, 61 Ill. App. 656.

8. Jones *v.* Washburn County, 106 Wis. 391, 82 N. W. 286.

9. For judgments generally see JUDGMENTS.

10. Sybert *v.* Ellis, 3 Blackf. (Ind.) 229.

11. Washington County *v.* Porter, 128 Ala. 278, 29 So. 185.

claim as allowed by the board.[12] The validity of the judgment cannot be attacked in a collateral proceeding.[13] It has been held that the allowance of interest in a judgment on a claim due by a county is not a contract by the county to pay interest and does not violate a constitutional prohibition of the issuance by counties of any interest-bearing evidences of indebtedness.[14]

b. In Case of Failure to Act. In some jurisdictions where the auditing tribunal has failed or neglected to act upon a claim properly presented to it an action will lie against the county, where such action would have been proper in the case of the rejection of the claim in whole or in part;[15] and it will not be necessary for the claimant to apply for mandamus to compel the board to act.[16]

2. By County. A right of appeal is usually given to a county or a taxpayer thereof, from the allowance in whole or in part, of claims by its board, except where allowances are made for services voluntarily rendered or things voluntarily furnished to the county;[17] but this right of appeal does not prevent the mainte-

12. Zirker *v.* Hughes, 77 Cal. 235, 19 Pac. 423.

13. Lambeth *v.* De Bellevue, 24 La. Ann. 394.

14. Nevada County *v.* Hicks, 50 Ark. 416, 8 S. W 180, where it was held that under Mansf. Dig. §§ 4740, 4741, a decree against a county for a sum of money bears interest at the rate of six per cent per annum, although no interest is therein provided for.

15. *Iowa.*— Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906; White *v.* Polk County, 17 Iowa 413.

Kansas.— Gillett *v.* Lyon County Com'rs, 18 Kan. 410.

North Dakota.— Barrett *v.* Stutsman County, 4 N. D. 175, 59 N. W. 964.

Virginia.— Prince George County *v.* Atlantic, etc., R. Co., 87 Va. 283, 12 S. E. 667.

Wisconsin.— Hyde *v.* Kenosha County, 43 Wis. 129.

See 13 Cent. Dig. tit. "Counties," § 328 *et seq.*

Although no hearing had on merits.— That a claim for damages against a county is refused payment by the ordinary, after having been presented to him within twelve months, is sufficient to allow suit in the superior court, although no hearing upon the merits of the claim was had before the ordinary. The ordinary has not exclusive jurisdiction of such cases. Cobb County *v.* Adams, 68 Ga. 51.

Necessity for proof of rejection or lapse of reasonable time.— Where the plaintiff failed to introduce evidence that his claim against the county had been rejected by its board of county commissioners, or that a reasonable time had elapsed for their action thereon, the court should have compelled such proof, and where the case went to the jury without it a new trial should have been granted. Rio Grande County *v.* Bloom, 14 Colo. App. 187, 59 Pac. 417.

Reference to attorney of board.— In Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975, after a claim against a county was presented by the claimant's attorney, it was referred by the board of supervisors to its attorney, who thereafter informed the claimant's attorney that he did not think the county was liable, and that claimant would have to bring suit, but no order of refusal to allow the claim was entered on the minutes of the board. It was held that it was sufficient evidence of a refusal, the statute only requiring an order of allowance to be entered on the minutes.

16. Barrett *v.* Stutsman County, 4 N. D. 175, 59 N. W. 964.

17. *Arkansas.*—St. Francis County *v.* Roleson, 66 Ark. 139, 49 S. W. 351.

Idaho.— Ada County *v.* Gess, 4 Ida. 611, 43 Pac. 71.

Indiana.— Myers *v.* Gibson, 147 Ind. 452, 46 N. E. 914; Gemmill *v.* Arthur, 125 Ind. 258, 25 N. E. 283; Vermillion County *v.* Potts, 10 Ind. 286; Wright *v.* Caskie, 26 Ind. App. 520, 60 N. E. 320; Barnhill *v.* Woodard, 26 Ind. App. 482, 59 N. E. 1085; Robbins *v.* Marshall County, 24 Ind. App. 341, 56 N. E. 729.

Iowa.— Garber *v.* Clayton County, 19 Iowa 29.

Kentucky.— Ohio County Ct. *v.* Newton, 79 Ky. 267.

Minnesota.— Ryan *v.* Dakota County, 32 Minn. 138, 19 N. W. 653.

Montana.— Twohy *v.* Granite County, 17 Mont. 461, 43 Pac. 494; State *v.* Minar, 13 Mont. 1, 31 Pac. 723.

Nebraska.— Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941; Gage County *v.* George E. King Bridge Co., 58 Nebr. 827, 80 N. W. 56; State *v.* Slocum, 34 Nebr. 368, 51 N. W. 969.

South Dakota.— Lyman County *v.* Lyman County Com'rs, 14 S. D. 341, 85 N. W. 597.

See 13 Cent. Dig. tit. "Counties," § 329 *et seq.*

Appeal from separate items.— An appeal may be taken by a taxpayer from separate items of the allowance of a claim against a county without appealing from the whole allowance. Twohy *v.* Granite County, 17 Mont. 461, 43 Pac. 494.

Determination as to nature of decision and right of appeal.— Where an appeal is taken from an allowance made upon a claim for a certain sum of money presented to the board of county commissioners by the claimants, it is a question of law for the court to deter-

nance of a suit by a county to recover back money illegally paid by the fiscal agents of the county.[18]

E. Payment[19]**— 1. In General.** Where a claim against a county has been properly adjusted and allowed, and there is a balance in the treasury to be appropriated for such expenses, the proper county officer will be required to pay the same by mandamus.[20] Claims can as a rule only be paid out of the fund raised or appropriated for such purpose,[21] and no duty is imposed upon a county treasurer to pay claims before he has received moneys applicable to their payment.[22]

2. Necessity For Warrant or Order. The auditing and allowance of a claim against a county gives the holder thereof no lien upon or right to any money in the treasury or which may come into it, but it is the order or warrant which gives such right.[23] The legislature may, however, provide for the payment of claims upon the certificate of a county board without an order authorizing the treasurer to pay the same.[24]

3. Registration. In a number of the states claims against a county must be registered and numbered,[25] and where a statute providing for the registration and

mine, after hearing all the facts, or after the facts are found, whether the decision appealed from was one which made an allowance for voluntary services within the discretion of the board, and from which no appeal would lie. Gemmill *v.* Arthur, 125 Ind. 258, 25 N. E. 283.

18. Ada County *v.* Gess, 4 Ida. 611, 43 Pac. 71; Meller *v.* Logan County, 4 Ida. 44, 35 Pac. 712; Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399.

19. **Issue of bonds to pay claim.**— Under the New York act relative to the indexing of deeds, etc., in the county of Kings, the expenses of the register are payable as a county charge, and if the county treasurer is without funds to pay a claim of this nature, he may raise the money necessary by the issue of county bonds, provided the total amount thereof does not exceed the amount appropriated or required to carry out the provisions of the act. Matter of Kenna, 91 Hun (N. Y.) 178, 36 N. Y. Suppl. 280.

20. People *v.* Earle, 46 How. Pr. (N. Y.) 267.

In Kentucky a creditor whose claim against the county is payable out of the county levy is not entitled to ten per cent damages against the sheriff for his failure to pay. Combs *v.* Crawford, 44 S. W. 358, 19 Ky. L. Rep. 1704.

Effect of delay in collection.— Where officers in charge of a county's finances delayed the collection of a claim against it, payable out of its funds for a certain year, they cannot take advantage thereof to oppose payment of the judgment based on such claim from funds on hand in a succeeding year intended for other purposes. Maxwell *v.* Bodie, 56 S. C. 402, 34 S. E. 692.

Where a deputy sheriff has bought with his own money a county claim which it was the duty of the sheriff to pay out of the county levy, it must be regarded as a payment of the claim by the deputy for his principal, and he is entitled to a credit therefor in his settlement with his principal. Moore *v.* Lawson, 102 Ky. 126, 42 S. W. 1136, 43 S. W. 409, 19 Ky. L. Rep. 1104.

21. Sherwood *v.* Connolly, 35 How. Pr. (N. Y.) 124.

As to payment from special funds see *supra*, IX, B, 1, b; IX, D, 6, b.

22. People *v.* Robinson, 76 N. Y. 422.

23. Humboldt County *v.* Churchill County Com'rs, 6 Nev. 30; Com. *v.* Buckwalter, 1 Chest. Co. Rep. (Pa.) 342.

As to county warrants and orders, their issuance, payment, etc., see *supra*, IX, D, 2 *et seq.*

24. Beally *v.* State, 9 Ga. 367.

Order or warrant as essential to refund of tax rebate.— Where the board of supervisors rebates a tax for any of the reasons named in Iowa Code, § 800, and the tax has been paid when such rebate is made, the county treasurer has no authority to refund such tax without an order to that effect from the board of supervisors. Whether a warrant from the auditor would not also be necessary *quære.* Crosby *v.* Flocte, 65 Iowa 370, 21 N. W. 682.

25. State *v.* Fisher, 30 La. Ann. 514; San Patricio County *v.* McClane, 44 Tex. 392; Clarke *v.* San Jacinto County, 18 Tex. Civ. App. 204, 45 S. W. 315.

Purpose and effect of registry.— Neither the registry by the treasurer of an account against the parish, nor its indorsement by him under the statute, amounts to the issuance of scrip or negotiable obligations of the parish. State *v.* Fisher, 30 La. Ann. 514, 518, where the court said: "The object of the registry and the manner of evidencing it is not that, but to enable the parish authorities to know the extent and character of its indebtedness, that they may make provision accordingly, as well as also to identify the claim with a view, as is evident from the latter clause of the statute, to its possible use in the payment of taxes, or its ready collection otherwise. But were it the issuance of such evidence of indebtedness as argued by the defendant, it is specifically authorized and required by the statute."

The officer to whom the claim is presented cannot refuse to register it on the ground that there is no money in the treasury (State *v.* Fisher, 30 La. Ann. 514), or on the ground that it has been paid in part by the state as

payment of claims prohibits payment except in the number and date of presentation for registration, the holder of a claim cannot lawfully demand payment without complying with the law, and in a suit on a claim not so presented for registration that fact may be pleaded.[26]

4. PREFERRED CLAIMS. The payment of all ordinary claims against a county is subject to any specific appropriation and setting apart of the county revenues for any designated purpose, unless such appropriation interfere with some prior vested right to the revenue, and a legislature has the power to direct that certain claims against a county shall have a preference over all others which are not so situated as to give the holder a vested right to money in or to come into the treasury.[27]

5. PAYMENT IN DEPRECIATED WARRANTS. In paying claims against a county in county warrants, such warrants must in the absence of statute be considered as at par, and no allowance made because they are at a discount,[28] and it is sometimes expressly provided by statute that they cannot allow in warrants any greater sum for a claim against the county than the amount actually due thereon, dollar for dollar.[29]

6. INTEREST. A claim audited and allowed by a county tribunal does not bear interest from the day of its allowance nor from the day of its registration.[30] But where the county court under legislative authority assumes the liability of taxpayers for attorney's fees incurred in a suit by the taxpayers to defeat the collection of a tax on a subscription to railroad stock, and levies a tax for the payment of such fee, it cannot refuse to pay interest on the debt so assumed, on the ground that it is an ordinary appropriation not arising from contract.[31]

F. Compromise and Arbitration. As a general rule counties through their proper officers, usually the county board of supervisors or county court, have the power to compromise and settle disputed claims, etc.,[32] and judgments recovered in favor of the county,[33] and to submit to arbitration matters in controversy which might be the subject of a suit.[34]

provided by statute (Gray *v.* Abbott, 130 Ala. 322, 30 So. 346).

26. San Patricio County *v.* McClane, 44 Tex. 392.

27. Humboldt County *v.* Churchill County Com'rs, 6 Nev. 30.

Allowance of diminished compensation raises no presumption of preference.— Where an act of the legislature required the recorder of a county to transcribe certain records, and allowed him less compensation therefor than was usually allowed, it raised no presumption that his claim for such compensation was to have preference over other claims against the county. People *v.* Williams, 8 Cal. 97.

28. Bauer *v.* Franklin County, 51 Mo. 205; Cleveland County *v.* Seawell, 3 Okla. 281, 41 Pac. 592. See also Foster *v.* Coleman, 10 Cal. 278.

The loss sustained by a creditor of a county by his discounting a valid claim against such county is not a county charge and he cannot by mandamus compel its allowance. People *v.* Ulster County, 43 Hun (N. Y.) 385.

29. Dorsey County *v.* Whitehead, 47 Ark. 205, 1 S. W. 97; Barton *v.* Swepston, 44 Ark. 437; Union County *v.* Smith, 34 Ark. 684; Goyne *v.* Ashley County, 31 Ark. 552; Crump *v.* Colfax County, 52 Miss. 107.

30. Vincent *v.* Gilmer, 51 Ala. 387; State *v.* Evans, 18 S. C. 137; Holmes *v.* Charleston County, 14 S. C. 146.

As to interest on warrants see *supra*, IX, D, 7.

A county treasurer is not required to pay interest on claims allowed by the fiscal court, where no provision has been made therefor. Cooper *v.* Wait, 51 S. W. 161, 21 Ky. L. Rep. 229.

31. Washington County Ct. *v.* McKee, 13 S. W. 909, 12 Ky. L. Rep. 102.

32. Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66; Labette County *v.* Elliott, 27 Kan. 606; St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431.

For compromises generally see COMPROMISE AND SETTLEMENT.

Compromise of claim pending appeal.— A board of county commissioners has power, in the absence of fraud or collusion, to compromise a disputed claim of the county after judgment and pending appeal, by the acceptance of less than the amount of the judgment. State *v.* Davis, 11 S. D. 111, 75 N. W. 897, 74 Am. St. Rep. 780.

Pending litigation involving title to swamp lands may be compromised by a county, and it cannot afterward set up the fact in order to defeat the compromise that the lands in controversy were swamp lands, and that it therefore had no power to convey them as provided by the terms of the compromise. Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66.

33. Collins *v.* Welch, 58 Iowa 72, 12 N. W. 121, 43 Am. Rep. 111; Orleans County *v.* Bowen, 4 Lans. (N. Y.) 24.

34. Remington *v.* Harrison County Ct., 12 Bush (Ky.) 148; Chapline *v.* Overseers of Poor, 7 Leigh (Va.) 231, 30 Am. Dec. 504.

XI. ACTIONS.[35]

A. Capacity of County to Sue and Be Sued. At common law a county could neither sue nor be sued, and it is only by virtue of statutory authority that any action can be maintained either in its behalf or against it.[36] In most of the states at the present time counties are authorized to sue and be sued, either by express statute or by virtue of their character as political corporations or quasi-corporations.[37] The right to sue may be given without imposing the liability to

For arbitration generally see ARBITRATION AND AWARD.

35. For actions against counties: For torts see *supra*, VIII. On contract by contractor see *supra*, VI, L, 3. On contract by employee for dismissal see *supra*, VI, L, 2. On contract for services rendered see *supra*, VI, L, 1. On contract by subcontractor see *supra*, VI, L, 4.

For actions between counties to settle and determine boundaries see *supra*, III, B, 5, d.

For actions by counties on contracts see *supra*, VI, M.

For actions on the bonds of contractors see *supra*, VI, F, b.

For actions to enforce: Civil liabilities of members of county boards see *supra*, IV, C, 12, f. Claims against counties see *supra*, X, D, 1, a, (v). Liability of county officers on their official bonds see *supra*, IV, D, 8, d. (I). Payment of bonds issued by county see *supra*, IX, F, 12. Payment of county warrants see *supra*, IX, D, 10, b.

For adjustment of liabilities between new counties and counties from which territory was taken to create them see *supra*, III, C, 4, e. (I), (B).

For indictments of members of county boards see *supra*, IV, C, 13, b.

For proceedings for removal: Of county-seat see *supra*, IV, B, 5, c. Of members of county boards see *supra*, IV, C, 3, f.

36. *Alabama.*—Lowndes County *v.* Hunter, 49 Ala. 507.

California. — Whittaker *v.* Tuolumne County, 96 Cal. 100, 30 Pac. 1016; Hastings *v.* San Francisco, 18 Cal. 49; Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130.

Colorado.— Phillips County *v.* Churning, 4 Colo. App. 321, 35 Pac. 918.

Connecticut.— Ward *v.* Hartford County, 12 Conn. 404; Lyon *v.* Fairfield County, 2 Root 30; Sheldon *v.* Litchfield County, 1 Root 158.

Georgia.— Talbot County *v.* Mansfield, 115 Ga. 766, 42 S. E. 72; Monroe County *v.* Flint, 80 Ga. 489, 6 S. E. 173.

Illinois.— Rock Island County *v.* Steele, 31 Ill. 543.

Louisiana.— McGuire *v.* Bry, 3 Rob. 196; St. Helena *v.* Fluker, 1 Rob. 389; Police Jury *v.* McDonough, 7 Mart. 8.

Massachusetts. — Hampshire County *v.* Franklin County, 16 Mass. 76; Hawkes *v.* Kennebeck County, 7 Mass. 461; Lincoln County *v.* Prince, 2 Mass. 544.

Mississippi.—Anderson *v.* State, 23 Miss. 459.

New Hampshire. — Plymouth *v.* Grafton County, 68 N. H. 361, 44 Atl. 523.

North Carolina.— Bell *v.* Johnston County, 127 N. C. 85, 37 S. E. 136.

Ohio.— Summers *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 553, 7 Ohio N. P. 542.

South Carolina. — Wheeler *v.* Newberry County, 18 S. C. 132.

Washington.—Hoexter *v.* Judson, 21 Wash. 646, 59 Pac. 498.

United States.— Chicot County *v.* Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. ed. 546; Marion County *v.* McIntyre, 10 Fed. 543, 2 McCrary 143; Lyell *v.* St. Clair County, 15 Fed. Cas. No. 8,621, 3 McLean 580.

See 13 Cent. Dig. tit. "Counties," § 338.

An unorganized county cannot be sued, although attached to an organized county for judicial purposes, intended for the administration of the laws and the protection of its citizens. Brewster County *v.* Presidio County, 19 Tex. Civ. App. 638, 48 S. W. 213.

37. *Alabama.*— Lowndes County *v.* Hunter, 49 Ala. 507; Randolph County *v.* Hutchins, 46 Ala. 397.

California.— Price *v.* Sacramento County, 6 Cal. 254.

Georgia.— Harris County *v.* Brady, 115 Ga. 767, 42 S. E. 71; Justices Clark County Inferior Ct. *v.* Haygood, 15 Ga. 309.

Illinois. — Schuyler County *v.* Mercer County, 9 Ill. 20.

Indiana.— Blackwell *v.* Lawrence County, 2 Blackf. 143; Gibson County *v.* Harrington, 1 Blackf. 260.

Kentucky.— Lawrence County *v.* Chattaroi R. Co., 81 Ky. 225.

Missouri.— Lincoln County *v.* Magruder, 3 Mo. App. 314.

Nebraska.—Ayres *v.* Thurston County, 63 Nebr. 96, 88 N. W. 178.

North Carolina.—Winslow *v.* Perquimano County Com'rs, 64 N. C. 218.

Ohio.— State *v.* Piatt, 15 Ohio 15.

Oregon.— State *v.* Baker County, 24 Oreg. 141, 33 Pac. 530.

Pennsylvania.—Vankirk *v.* Clark, 16 Serg. & R. 286.

United States.—Vincent *v.* Lincoln County, 30 Fed. 749; May *v.* Mercer County, 30 Fed. 246; Hall *v.* El Dorado County, 24 Fed. 257; Nash *v.* El Dorado County, 24 Fed. 252; Lyell *v.* St. Clair County, 15 Fed. Cas. No. 8,621, 3 McLean 580.

See 13 Cent. Dig. tit. "Counties," § 338.

In Ohio the power to sue or the liability to be sued, with the single exception of the

be sued,[38] and in some jurisdictions it has been held that, although not liable to suit,[39] a county may bring suit, although not expressly authorized so to do by statute on the ground that the right to sue is a power incident to such corporations and without which it could not carry out the powers given it.[40] Where there is no statutory authority for suits against counties, mandamus to the county board or court is the proper remedy to compel the payment of debts due from such county.[41]

B. In What Name Actions in Behalf of County Brought — 1. In Name of County Board or Designated Officers. In many jurisdictions counties as corporations are expressly authorized by constitutional or statutory provisions to bring suit in their corporate names.[42] In other jurisdictions suits in favor of the county must as a general rule be brought in the name of the county board,[43]

power to sue for injury done to county property, extends only to actions arising upon contract and not upon tort. Hamilton County *v.* Noyes, 5 Ohio Dec. (Reprint) 281, 4 Am. L. Rec. 216.

The levy court of Washington county, in the District of Columbia, if not a corporation in the full sense of the term, is a quasi-corporation, and can sue and be sued in regard to any matter in which by law it has rights to be enforced, or is under obligations which it refuses to fulfil. Washington County Levy Court *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851.

38. Ward *v.* Hartford County, 12 Conn. 404.

39. Taylor *v.* Salt Lake County Ct., 2 Utah 405.

40. Salt Lake County *v.* Golding, 2 Utah 319.

41. Lowndes County *v.* Hunter, 49 Ala. 507; Tarver *v.* Tallapoosa County, 17 Ala. 527; Taylor *v.* Salt Lake County Ct., 2 Utah 405.

42. *California.*— Solano County *v.* Neville, 27 Cal. 465; Smith *v.* Myers, 15 Cal. 33. And see Hedges *v.* Dam, 72 Cal. 520, 14 Pac. 133.

Georgia.— Bennett *v.* Walker, 64 Ga. 326. See also Jackson *v.* Dougherty County, 99 Ga. 185, 25 S. E. 625; Lumpkin County *v.* Williams, 89 Ga. 388, 15 S. E. 487.

Idaho.— U. S. *v.* Shoup, 2 Ida. (Hasb.) 493, 21 Pac. 656.

Iowa.— Cedar County *v.* Sager, 90 Iowa 11, 57 N. W. 634.

Kentucky.— Com. *v.* Tilton, 49 S. W. 2, 20 Ky. L. Rep. 1216.

Missouri.— Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687; State *v.* Rubey, 77 Mo. 610; Barry County *v.* McGlothlin, 19 Mo. 307.

North Carolina.— Tyrrel *v.* Simmons, 48 N. C. 187.

Oregon.— Weiss *v.* Jackson County, 9 Oreg. 470.

Pennsylvania.— Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547 [*affirming* 10 Pa. Co. Ct. 347].

South Carolina.— Richland County *v.* Miller, 16 S. C. 236, 244; Greenville County *v.* Runion, 9 S. C. 1.

Texas.— McConnell *v.* Wall, 67 Tex. 323, 3 S. W. 287; De la Garza *v.* Bexar County, 31 Tex. 484.

Wyoming.— Sweetwater County *v.* Young, 3 Wyo. 684, 29 Pac. 1002.

See 13 Cent. Dig. tit. "Counties," § 348.

Bills of interpleader if maintainable at all must be brought in the name of the county and not in the name of the judge of probate. Patrick *v.* Robinson, 83 Ala. 575, 2 So. 694.

Suits in the name of the chief justice for the benefit of the county are not authorized under a statute providing that suits by or against counties shall be in the name of or against the county. De la Garza *v.* Bexar County, 31 Tex. 484.

The fact that a prosecuting attorney instituted a suit for the benefit of the county in his own name instead of that of the county will not render the judgment void, where the county appeared at the trial by its commissioner. State *v.* Headlee, 18 Wash. 220, 51 Pac. 369.

Under direction of treasurer.— Under Tex. Rev. Stat. art. 995, it is made the duty of a county treasurer "to direct prosecutions according to law for the recovery of all debts that may be due his county and superintend the collection thereof," but under Tex. Rev. Stat. art. 1200, such suits should be brought in the name of the county. McConnell *v.* Wall, 67 Tex. 323, 325, 3 S. W. 287.

43. *Illinois.* — Rock Island County *v.* Steele, 31 Ill. 543.

Indiana.—Tipton County *v.* Kimberlin. 108 Ind. 449, 9 N. E. 407; Caldwell *v.* Fayette County, 80 Ind. 99; Franklin County *v.* McIlvain, 24 Ind. 382; Peirce *v.* Ruley, 5 Ind. 69; State *v.* Clark, 4 Ind. 315; Harper *v.* Ragan, 2 Blackf. 39; Gibson County *v.* Harrington, 1 Blackf. 260.

New York.— New York County *v.* Tweed, 13 Abb. Pr. N. S. 152; Weld *v.* Columbia County, 9 How. Pr. 315.

Ohio.— Perry County *v.* Newark, etc., R. Co., 43 Ohio St. 451, 2 N. E. 854; Hamilton County *v.* Noyes, 35 Ohio St. 201; State *v.* Pratt, 15 Ohio 15; Gallia County Com'rs *v.* Holcomb, 7 Ohio 232; State *v.* Zumstein, 4 Ohio Cir. Ct. 268; State *v.* Cappeller, 8 Ohio Dec. (Reprint) 547, 8 Cinc. L. Bul. 311.

Wisconsin.— Oconto County *v.* Hall, 42 Wis. 59.

county court,[44] or other county officers who are the financial representatives of the county, where the cause of action arises out of a subject-matter within their control, as for instance a county ordinary,[45] or presidents of police boards.[46]

2. IN NAME OF STATE. Actions may sometimes, and in certain cases, be brought in the name of the state upon the relation of county officers or agents.[47]

C. In What Name Counties Sued. In some jurisdictions actions are expressly authorized against counties as corporate bodies and in their corporate names;[48] and where this is the case, an action cannot properly be brought against a county in the name of the commissioners,[49] and when so brought should be dismissed on motion.[50] In other jurisdictions the county board is the corporation, and actions against the county should be brought against the board[51] as a board

See 13 Cent. Dig. tit. "Counties," § 348 *et seq.*

Continuance of action in name of consolidated corporation.— New York County *v.* Tweed, 3 Hun (N. Y.) 682, 6 Thomps. & C. (N. Y.) 223.

44. Maury County *v.* Lewis County, 1 Swan (Tenn.) 236.

45. In Georgia suits in behalf of a county may be brought by the ordinary, and if during their pendency a board of commissioners are by law appointed for the county, the commissioners may by amendment be substituted in lieu of the ordinary. Cook *v.* Houston County, 54 Ga. 163.

46. Police Jury *v.* Mansura Corp., 107 La. 201, 31 So. 650.

Misnomer.— Where in an action which should have been brought against a county by its corporate name, the complaint names instead three of the commissioners of the county, the error has been held simply one of misdescription of parties defendant; it is a misnomer amenable at the trial if objected to, and to be disregarded both at the trial and on appeal when such objection is not taken (Anthony *v.* Bank of Commerce, 97 U. S. 374, 24 L. ed. 1060); but where, however, a county which has adopted township organization is sued by any other name than that of the board of supervisors contrary to express statutory provision, it has been held that it is error and that there is no necessity for a plea of misnomer as in ordinary cases (Rock Island County *v.* Steele, 31 Ill. 543).

47. Thus actions to recover moneys loaned from county funds, or money fraudulently obtained from the county treasury, may be upon the relation of the county board (State *v.* Clark, 4 Ind. 315; Hamilton County *v.* Noyes, 5 Ohio Dec. (Reprint) 238, 3 Am. L. Rec. 745), or of the agent in charge of the funds (State *v.* Rush, 7 Ind. 221); and suits against a county treasurer individually for trust funds and state and other taxes may be on the relation of the county auditor, when ordered by the board of county commissioners (Tipton County *v.* Kimberlin, 108 Ind. 449, 9 N. E. 407; Caldwell *v.* Fayette County, 80 Ind. 99; Vanarsdall *v.* State, 65 Ind. 176; Franklin County *v.* McIlvain, 24 Ind. 382).

The county trustee, where there is one, is the proper relator in an action in the name of the state to recover moneys due to the county, except when he is a defaulter or when he refuses to proceed against defaulters. State *v.* Woodside, 31 N. C. 496.

48. Solano County *v.* Neville, 27 Cal. 465; Arnett *v.* Decatur County, 75 Ga. 782; Bennett *v.* Walker, 64 Ga. 326.

49. Weiss *v.* Jackson County, 9 Oreg. 470; Slegel *v.* Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547 [*affirming* 10 Pa. Co. Ct. 347]; Wilson *v.* Huntingdon County Com'rs, 7 Watts & S. (Pa.) 197; De la Garza *v.* Bexar County, 31 Tex. 484.

The power given to a county board to defend on behalf of the county will not render the board liable to be sued directly for a claim against the county. Hastings *v.* San Francisco, 18 Cal. 49.

50. Arnett *v.* Decatur County, 75 Ga. 782.

51. *Colorado.*—Phillips County *v.* Churning, 4 Colo. App. 321, 35 Pac. 918.

Illinois.— Rock Island County *v.* Steele, 31 Ill. 543.

Indiana.— Gibson County *v.* Harrington, 1 Blackf. 260.

New York.— Doolittle *v.* Broome County, 18 N. Y. 155; Hill *v.* Livingston County, 12 N. Y. 52; Magee *v.* Cutler, 43 Barb. 239; Chase *v.* Saratoga County, 33 Barb. 603; Wild *v.* Columbia County, 9 How. Pr. 315.

Ohio.— State *v.* Piatt, 15 Ohio 15.

United States.— Lyell *v.* St. Clair County, 15 Fed. Cas. No. 8,621, 3 McLean 580.

See 13 Cent. Dig. tit. "Counties, § 351.

In Georgia and Pennsylvania such actions were formerly required to be brought against the county board as the managers of the fiscal affairs of the county. Collins *v.* Hudson, 54 Ga. 25; Vankirk *v.* Clark, 16 Serg. & R. (Pa.) 286; Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443.

In North Carolina there is no direction either in the constitution or statutes as to the name by which a county shall be sued. Anthony *v.* Bank of Commerce, 97 U. S. 374, 24 L. ed. 1060.

The board of justices in their corporate capacity may be sued under Ind. Rev. Code (1842), p. 86, for any legal demand against the county. Blackwell *v.* Lawrence County, 2 Blackf. (Ind.) 143.

Revivor against board of action against county court.—In Carson *v.* Cleaveland County Com'rs, 64 N. C. 566, it was held that the

and not against the individual members thereof.[52] Where it is thus provided that the name in which a county shall be sued shall be that of the board of county commissioners, a judgment for the plaintiff in a suit against the county is a nullity, and since the board is not a party to such suit it cannot be affected by the judgment, and a writ of error by such board will be dismissed.[53]

D. Statutes of Limitations.[54] Municipal corporations are not within the operation of the statute of limitations as respects public rights,[55] except under special circumstances which would make it highly inequitable or oppressive to enforce such public rights, in which case the court will interpose by holding the municipality estopped from so doing;[56] but in regard to contracts or mere private rights the statute is operative both in behalf of and against them;[57] and the exemption of the state as a sovereign power from the operation of statutes of limitations has been held not to extend to civil actions brought by a county or in the name of any officer or person for the benefit of a county.[58] Where the statute of limitations is expressly made applicable to the state it is applicable to the counties of the state and runs against the county.[59]

E. Jurisdiction[60] and Venue — 1. Actions by Counties. A county author-

board of county commissioners is the successor, not the representative of the former county court, as regards matters of administration. Therefore a suit pending against the latter at the time of its dissolution cannot be revived against the former.

52. Hill *v.* Livingston County, 12 N. Y. 52; Magee *v.* Cutler, 43 Barb. (N. Y.) 239.

Designation of defendant.— In an action against a county the suit should be brought against "the board of supervisors" of the county; but when the action is against the supervisors, the suit should be brought against them individually, specifying their name of office. Wild *v.* Columbia County, 9 How. Pr. (N. Y.) 315. A complaint against the board of commissioners of D county is not bad for designating such board as "the commissioners of D county." De Kalb County *v.* Auburn Foundry, etc., Works, 14 Ind. App. 214, 42 N. E. 689. See also Fountain County *v.* Loeb, 68 Ind. 29. A suit against G, F, and W, described as commissioners of Portage county, is against them in their corporate capacity, not as individuals. Paine *v.* Portage County, Wright (Ohio) 417.

53. Phillips County *v.* Churning, 4 Colo. App. 321, 35 Pac. 918.

Corporate name of board as that of county. — Where a statute provides that a county must be known in suits as "The board of county commissioners of the county of ——," this must be regarded as the corporate name for the purpose of bringing suits, no other name being expressly designated by statute. Sweetwater County *v.* Young, 3 Wyo. 684, 29 Pac. 1002. And see Phillips County *v.* Churning, 4 Colo. App. 321, 35 Pac. 918.

54. For statutes of limitations generally see Limitations of Actions.

55. Catlett *v.* People, 151 Ill. 16, 37 N. E. 855; Logan County *v.* Lincoln, 81 Ill. 156; Pike County *v.* Cadwell, 78 Ill. App. 201.

Exemption only as to recovery of roads, streets, sidewalks, grounds, etc.— In Johnston *v.* Llano County, 15 Tex. Civ. App. 421, 39 S. W. 995, it was held that the right of a county to recover lands not acquired or used for public purposes may be barred by limitations, although the state is exempt from the operation of the statute, and the constitution recognizes counties as subdivisions of the state, since it also classifies them as municipal corporations, and such corporations are subject to limitations in such cases; and since Tex. Rev. Stat. (1895), art. 3351, exempting the state generally from the operation of the statute in suits to recover land, exempts counties from its operation only as to the right to recover any "road, street, sidewalk, or grounds."

Where funds involved in a controversy are in the nature of trust funds held by a county to be disposed of by it according to law, the statute of limitations is not available as a defense. Pike County *v.* Cadwell, 78 Ill. App. 201.

56. Piatt County *v.* Goodell, 97 Ill. 84.

57. Catlett *v.* People, 151 Ill. 16, 37 N. E. 855; Piatt County *v.* Goodell, 97 Ill. 84; Logan County *v.* Lincoln, 81 Ill. 156; Pike County *v.* Cadwell, 78 Ill. App. 201; Cross *v.* Grant County, 9 N. M. 410, 54 Pac. 880; Municipal Security Co. *v.* Baker County, 39 Oreg. 396, 65 Pac. 369; Shelby County *v.* Bickford, 102 Tenn. 395, 52 S. W. 772.

Statute applies to mandamus by county to compel clerk to perform the duties of reporting all the fees of his office and to pay into the treasury any excess over the amount he is entitled to retain. State *v.* Boyd, 49 Nebr. 303, 68 N. W. 510.

58. Armstrong *v.* Dalton, 15 N. C. 568.

59. Bannock County *v.* Bell, (Ida. 1901) 65 Pac. 710 [*overruling* Fremont County *v.* Brandon, 6 Ida. 482, 56 Pac. 264], holding that the statute of limitations runs against the county in a civil action brought by the county against an ex-clerk of the district court, who was *ex officio* auditor and recorder of such county for alleged fees and compensation collected by him from the county during his term of office.

60. For jurisdiction generally see Courts.

ized to bring suit may resort to any court having jurisdiction of the subject-matter in the county where the defendant resides.[61]

2. Actions Against Counties — a. In General. As a general rule all suits against a county must be brought in the courts of the defendant county.[62] Courts of other counties have no jurisdiction in the absence of a statute conferring it,[63] and it does not follow that because counties may bring a suit in another county that the same rule may be applied to them when defendant.[64]

b. Federal Jurisdiction. Where a state law declares a county to be a corporation with power to sue or be sued in any court within the state, a county is subject to suit in the United States courts.[65] A state statute requiring all persons having claims against a county to present the same to the county court for allowance does not deprive non-resident creditors of their right to sue the county in a federal court, when the amount is sufficient to invoke the jurisdiction of such court.[66]

3. Change of Venue.[67] When an action against a county has been brought in the proper court of such county it may like all civil actions be removed by a change of venue to the court of another county, where the statutory causes authorizing it are alleged to exist.[68]

61. Dandurand *v.* Kankakee County, 196 Ill. 537, 63 N. E. 1011 [*affirming* 96 Ill. App. 464].

62. *Illinois.*— McBane *v.* People, 50 Ill. 503; Kane County *v.* Young, 31 Ill. 194; Randolph County *v.* Ralls, 18 Ill. 29; Schuyler County *v.* Mercer County, 9 Ill. 20.

Missouri.— Givens *v.* Daviess County, 107 Mo. 603, 17 S. W. 998.

North Carolina. — Henderson County *v.* Rutherford County, 70 N. C. 657; Steele *v.* Rutherford County Com'rs, 70 N. C. 137; Jones *v.* Bladen County, 69 N. C. 412; Alexander *v.* McDowell County Com'rs, 67 N. C. 330; Johnston *v.* Cleaveland County, 67 N. C. 101.

Pennsylvania. — Lehigh County *v.* Kleckner, 5 Watts & S. 181.

Texas.—Austin City Nat. Bank *v.* Presidio County, (Civ. App. 1894) 26 S. W. 775.

See 13 Cent. Dig. tit. "Counties," § 345.

A proceeding by mandamus is a suit within the meaning of a statute requiring all suits against a county to be brought in the circuit court of the county being sued. McBane *v.* People, 50 Ill. 503. See also Woodman *v.* Somerset County Com'rs, 24 Me. 151.

By the Arkansas act of Feb. 27, 1879, the Arkansas legislature expressly repealed all laws declaring counties to be corporations and forbade suits against them except in the county court. Shaver *v.* Lawrence County, 44 Ark. 225. In Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886, it was held that this act does not apply to a cause of action in equity which had already accrued; and as the county court has no equity jurisdiction such a suit may be brought in the circuit court of the county sued.

Minn. Laws (1860), p. 132, § 8, confers jurisdiction upon the district court of all actions against a county. Bingham *v.* Winona County, 6 Minn. 136.

Under Nebr. Comp. Stat. (1899) c. 18, art. 1, § 37, the jurisdiction of the district court to hear and determine actions for the enforcement of claims against counties arising *ex contractu* is derivative, and not original. Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941.

The superior court of the city of Buffalo had jurisdiction of an action against the board of supervisors of Erie county, where the summons was served upon the chairman or clerk of the board in that city. Buffalo, etc., R. Co. *v.* Erie County, 48 N. Y. 93.

Jurisdiction of justices of the peace.—Gammon *v.* Lafayette County, 79 Mo. 223; Floral Springs Water Co. *v.* Rives, 14 Nev. 431; Paine *v.* Portage County, Wright (Ohio) 417.

63. Lehigh County *v.* Kleckner, 5 Watts & S. (Pa.) 181; Austin City Nat. Bank *v.* Presidio County, (Tex. Civ. App. 1894) 26 S. W. 775.

In Nevada it has been held that a statute providing that actions against counties may be commenced in the district court of the judicial district embracing said county does not preclude the bringing of such an action in another judicial district subject to defendant's right to a change of venue, which right may be waived by appearance and answer without objection to the jurisdiction. Clarke *v.* Lyon County, 8 Nev. 181.

In New York it has been held that an attachment will be granted in a proper case against a county of another state which is made capable by statute of suing and being sued. Van Horn *v.* Kittitas County, 46 N. Y. App. Div. 623, 61 N. Y. Suppl. 1150 [*affirming* 28 Misc. 333, 59 N. Y. Suppl. 883].

64. Lehigh County *v.* Kleckner, 5 Watts & S. (Pa.) 181.

65. Floyd County *v.* Hurd, 49 Ga. 462, 15 Am. Rep. 682; McLean *v.* Hamilton County, 16 Fed. Cas. No. 8,881.

66. Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674 [*following* Chicot County *v.* Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. ed. 546].

67. For change of venue generally see Venue.

68. McBane *v.* People, 50 Ill. 503.

F. Process.[69] The officers of a county upon whom process shall be served is a matter of statutory regulation and varies in the different states;[70] thus there are provisions which make it necessary to serve process on the clerk of the county board;[71] on the clerk of the county court;[72] on the county judge;[73] on a majority of the county commissioners;[74] on the president of the county board;[75] or on the parish police jury.[76] The fact that a county officer who, as a ministerial officer, was merely a nominal party in an injunction suit, was not served with process, and did not appear in the suit, will not render the judgment void, where the real party in interest appeared and litigated the issues.[77]

G. Payment and Enforcement of Judgment Against Counties[78] — **1. In General.** Where a judgment is rendered against a county, it is the duty of the board to apply such funds in the treasury of the county as are not otherwise appropriated to its payment,[79] and to order a warrant to be drawn upon the treasurer for the amount of the judgment.[80] But if there are no funds and the board possesses the power to levy a tax for that purpose, it should do so, and in case it refuses to apply funds on which the judgment may be paid to the payment thereof or to resort to taxation to create a fund in case there are no funds applicable to the payment of the judgment, resort may be had to mandamus to compel it so to do.[81] If, however, there are no funds and the power to levy a tax has

Change of venue in suits where a county is a party.— In a suit where a county is a party, a change of venue may be awarded to another county, as in all civil actions, when application therefor is properly made. Jackson County *v.* Hall, 53 Ill. 440.

69. For process generally see Process.

70. Exclusive manner of service.— Where the statutes thus specify the manner and upon whom service shall be made, they must be regarded as providing an exclusive manner of service (Weil *v.* Greene County, 69 Mo. 281), and no jurisdiction is conferred by service upon another than the specified officer (Gross *v.* Sioux County, 11 Fed. Cas. No. 5,842, 2 Dill. 509).

71. Kane County *v.* Young, 31 Ill. 194; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333.

72. Weil *v.* Greene County, 69 Mo. 281; Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. ed. 586.

By leaving copy of original summons with clerk at least fifteen days before the return-day thereof. Weil *v.* Greene County, 69 Mo. 281.

The clerk's failure to communicate fact of service to the court will not affect the validity of the service or the judgment obtained therein by default as he is the agent of the court. Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. ed. 586.

73. Gross *v.* Sioux County, 11 Fed. Cas. No. 5,842, 2 Dill. 509.

74. Early County *v.* Powell, 94 Ga. 680, 20 S. E. 10 (constitutes personal service on county); Collins *v.* Hudson, 54 Ga. 25.

Effect of summons naming members of board.—Although a writ which commands the summoning of a board of county commissioners names the members thereof, it is process against the board as such and not against the individual members. Jones *v.* Rowan County, 85 N. C. 278.

Service upon two commissioners, of a writ of summons against a county is good. Klechner *v.* Lehigh County, 6 Whart. (Pa.) 66, according to which case it would seem that service upon one would have been sufficient.

75. Clarke County *v.* State, 61 Ind. 75.

76. Lucky *v.* Police Jury, 46 La. Ann. 679, 15 So. 89.

77. State *v.* Headlee, 18 Wash. 220, 51 Pac. 369.

78. For enforcement of judgments generally see Judgments.

79. Emric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742; King *v.* McDrew, 31 Ill. 418.

80. King *v.* McDrew, 31 Ill. 418; Knox County *v.* Arms, 22 Ill. 175.

81. *California.*— Emeric *v.* Gilman, 10 Cal. 404, 78 Am. Dec. 742.

Colorado.— See People *v.* Rio Grande County, 11 Colo. App. 124, 52 Pac. 748.

Kansas.— Lockard *v.* Decatur County, 10 Kan. App. 316, 62 Pac. 547.

North Carolina. — Hughes *v.* Craven County, 107 N. C. 598, 12 S. E. 465.

United States.— Ceredo First Nat. Bank *v.* Savings Soc., 80 Fed. 581, 25 C. C. A. 466; U. S. *v.* King, 74 Fed. 493.

By mandamus against commissioners or motion against treasurer.— On a judgment against a county, neither an execution nor a garnishment can be sued out; but the judgment must be filed as a claim against the county, and if not paid the creditor has his remedy by motion against the county treasurer and the sureties on his official bond, or by mandamus against the commissioners' court in a proper case. Edmondson *v.* De Kalb County, 51 Ala. 103.

Sufficiency of demand.— Under the Kentucky county funding act of March 18, 1878, a demand made by a bondholder pursuant to section 20 for the levy of a tax to pay his claim is not insufficient merely because made at the same time, and by the same instrument, both upon the county judge when presiding alone and on the court when composed

not been delegated to the board, the legislature must be invoked for additional authority.[82]

2. Execution.[83] An execution cannot be awarded on a judgment against a county to satisfy the same,[84] nor on a decree in equity.[85]

H. Costs[86] **— 1. In General.** At common law counties are liable for no costs.[87] And it is well settled that a county is liable for the costs of judicial proceedings only when made so by constitutional or statutory provisions.[88] Every claimant

of the county judge and the justices. Fleming *v.* Trowsdale, 85 Fed. 189, 29 C. C. A. 106.

Questions considered on application for mandamus.—On an application for mandamus to compel the levy of a tax to pay a judgment, no questions affecting the validity of the bonds on which the judgment is founded, or the validity or correctness of the judgment itself, are open to consideration. Fleming *v.* Trowsdale, 85 Fed. 189, 29 C. C. A. 106.

82. Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742.

83. For executions generally see Executions.

84. *Alabama.* — Edmondson *v.* De Kalb County, 51 Ala. 103.

California.— Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742.

Illinois.— King *v.* McDrew, 31 Ill. 418; Knox County *v.* Arms, 22 Ill. 175; Randolph County *v.* Ralls, 18 Ill. 29.

Missouri.— State *v.* New Madrid County Ct., 51 Mo. 82.

North Carolina.— Lutterloh *v.* Cumberland County, 65 N. C. 403; Gooch *v.* Gregory, 65 N. C. 142.

Contra.— *Dictum* in Lyell *v.* St. Clair County, 15 Fed. Cas. No. 8,621, 3 McLean 580.

See 13 Cent. Dig. tit. "Counties," § 365.

Liability of private property to execution. — The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742. This is the general rule, although in some of the New England states the doctrine of individual liability of the inhabitants of towns and parishes prevails and is founded upon immemorial usage. See Beardsley *v.* Smith, 16 Conn. 368, 41 Am. Dec. 148; Gaskill *v.* Dudley, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163.

Seizure of public buildings.— Where execution is issued against a police jury buildings provided by it in accordance with its duty, for courts and jurors, and a jail for prisoners, where they are used for public purposes, are not liable to seizure. Police Jury *v.* Michel, 4 La. Ann. 84.

Under the Georgia constitution there seems to be no way to enforce a judgment against a county for damages. Gwinnett County *v.* Dunn, 74 Ga. 358.

Provisional allowance of execution.— In Montana a statute provides that execution shall not issue on a judgment against a board of county commissioners, but that "the same shall be levied and paid by tax or other county charges," "provided, that execution may issue on said judgment if payment be not made within 60 days after the time required for the payment of county taxes to the county treasurer." It was held that a judgment recovered against a board of county commissioners after the annual tax levy is not entitled to payment until after the next levy. State *v.* Cascade County, 16 Mont. 271, 273, 40 Pac. 595.

85. King *v.* McDrew, 31 Ill. 418.

Mandamus executions.— By the Pennsylvania act of April 16, 1834, it is provided that: "It shall be lawful for the court in which such judgment may be obtained to issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interest and costs, to be paid to the party entitled to such judgment, out of any moneys unappropriated of such county, or, if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment." The duty of the commissioners, on whom process under this act is served, is plainly set forth: (1) If there be any money in the treasurer's hands unappropriated by previous orders, the exigencies of this writ require that the commissioners cause it to be paid to the party. (2) If there be not money enough in the treasury to satisfy the whole judgment, it is their duty to pay it out of the first money received. (3) If the taxes of the current year are insufficient to pay the judgments and other expenses of the county, it is their duty to assess and collect on the next year a sufficient sum for this purpose. (4) The judgment of the court is an appropriation of all the money in the treasury not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the controller; and also of the first money thereafter received for the use of the county. Loute *v.* Allegheny County, 15 Fed. Cas. No. 8,544. See also Pollock *v.* Lawrence County, 19 Fed. Cas. No. 11,255.

86. For costs generally see Costs.

87. Sipler *v.* Clarion County, 8 Pa. Dist. 253; Hinkle *v.* York County, 12 Lanc. Bar (Pa.) 175.

88. Miner *v.* Shiawassee County, 49 Mich. 602, 14 N. W. 562; Sipler *v.* Clarion County, 8 Pa. Dist. 253. See also Franklin County *v.* Conrad, 36 Pa. St. 317; Berks County *v.* Pile, 18 Pa. St. 493.

Allowance for costs advanced.— Where a

must be able to point to the statute which obliges the county to pay what he claims, and this liability cannot be extended beyond the limits fixed by the legislature.[89] It has been held that where counties are made capable of suing and being sued by statute, the same as a natural person, they are within the operation of statutes authorizing the taxation of costs against unsuccessful parties,[90] or statutes providing that when a plaintiff in an action shall recover judgment he shall have judgment for costs against the defendant.[91] On certiorari to county commissioners costs cannot be allowed against the county, as it is not a party, but they must be awarded against the commissioners if they oppose the proceedings, and the latter can reimburse themselves from the county treasury.[92]

2. PERSONAL LIABILITY OF COUNTY OFFICERS. County officers are not liable individually for the costs of a judgment rendered against them in suits commenced by them.[93]

3. DEFENSES TO CLAIM FOR COSTS. A county may plead the statute of limitations to a claim for costs, where no demand has been made for their payment for nine years.[94]

I. Fees. Fees are not a proper county charge in the absence of some statute[95] authorizing their payment from the funds of the county.[96] Among the fees often made county charges by statute are the following: Witness' fees in state cases;[97] fees in proceedings to determine the sanity or insanity of a person where

county was engaged in litigation, and necessity for the present payment of a small amount of costs arose, and a member of the board of commissioners advanced the required sum, an allowance by the board of the sum so advanced will not be reversed. Osborn *v.* Ravenscraft, 5 Ida. 612, 51 Pac. 618.

In civil cases to which a county is not a party it is not chargeable for costs and expenses which the sheriff has failed to collect. Bransom *v.* Larimer County, 5 Colo. App. 231, 37 Pac. 957.

Liability not imputed.— The courts will not impute to the legislature an intent to make the county liable for costs where it is not so expressed in the act. Conley *v.* York County, 5 Pa. Dist. 748.

In Illinois it has been provided by statute that in all suits and actions commenced for or on behalf of any county, or in the name of any person for the use of any county, if the plaintiff recovers any debt or damages the plaintiff shall recover costs as any other person in like cases, but if such plaintiff suffer a discontinuance, be nonsuited or non-prossed or verdict pass against such plaintiff the defendant shall not recover any costs whatever; but it is also provided that nothing in such statute shall extend to any popular action, nor to any action to be prosecuted by any person on behalf of himself and the people or a county upon any penal statute. Ward *v.* Alton, 23 Ill. App. 475, in which it was held that a county when acting as a public agency of the state in proceedings for the collection of the general and local taxes assessed in the name of the people is within Ill. Rev. Stat. c. 33, § 17, and is not liable for costs. See also People *v.* Coultas, 9 Ill. App. 39.

89. Sipler *v.* Clarion County, 8 Pa. Dist. 253. See also Brinker *v.* Northampton County, 5 Pa. Dist. 686.

90. State *v.* Parker, 83 Ala. 269, 3 So. 552; Dover *v.* State, 45 Ala. 244; Hurd *v.* Hamill, 10 Colo. 174, 14 Pac. 126.

Interpleader by county.—Thus where pending an action against a county for a fund to which there are several claimants, whose rights can be adjudicated in that action, the county brings an independent action in the nature of interpleader against the claimants, it is liable for costs of the latter action. Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

91. Jefferson County *v.* Philpot, 66 Ark. 243, 50 S. W. 453; Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

92. Stetson *v.* Penobscot County Com'rs, 72 Me. 17. To the same effect see Pike County *v.* Goldthwaite, 35 Ala. 704.

93. Avery *v.* Slack, 19 Wend. (N. Y.) 50, holding this to be true, although their individual names appear on the record, provided it also appear that they sued in their representative character for the benefit of their constituents and not for their own benefit.

94. Com. *v.* Crawford County Com'rs, 20 Pa. Co. Ct. 593.

95. **When fees are claimed to be a county charge by virtue of statutory provision** allowing them in certain proceedings, the case must be clearly within the purview of the statute, and the latter will not be so construed as to allow fees in any other proceeding. Des Moines *v.* Polk County, 107 Iowa 525, 78 N. W. 249; Christ *v.* Polk County, 48 Iowa 302.

96. Polk County *v.* Crocker, 112 Ga. 152, 37 S. E. 178; Price *v.* Lancaster County, 24 Pa. Co. Ct. 225; Whittle *v.* Saluda County, 59 S. C. 554, 38 S. E. 168; *Ex p.* Henderson, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 426.

97. *Ex p.* Henderson, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 426.

the estate of such person is insufficient to pay the costs and expenses;[98] fees of coroners, jurors, and witnesses in cases of inquests;[99] the fees of a physician at such inquest;[1] fees of physicians called in by a justice of the peace to make an autopsy where impracticable to secure the county physician;[2] fees of expert witnesses;[3] fees for the arrest of vagrants;[4] the compensation awarded to court auditors;[5] fees of justices and constables in criminal cases;[6] referee's fees in certain cases;[7] the daily rate of pay of criers and tipstaves when fixed by the judges of the courts;[8] the pay of stenographers when employed by certain courts, and in certain cases;[9] fees to a sheriff for summoning witnesses to appear before the grand jury;[10] fees of witnesses required to attend before the grand jury, or in criminal cases in any of the courts.[11] It has been held that a county is not liable for officers' fees in proceedings under the fraudulent debtors' act,[12] and that a county is not liable for the fees of a United States commissioner for his services as a committing magistrate, although the offense was committed in such county.[13]

COUNTIES PALATINE. Three English counties, Chester, Durham, and Lancaster.[1]

98. Saline County Com'rs *v.* Bondi, 23 Kan. 117.

99. Washington County Levy Court *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851.

1. The reasonable value of the services of a physician, but not his fees as an expert, in making the necessary examination to ascertain the cause of death, are a charge against the county. Fairchild *v.* Ada County, 6 Ida. 340, 55 Pac. 654. See also Northampton County *v.* Innes, 26 Pa. St. 156; Brinker *v.* Northampton County, 5 Pa. Dist. 686.

2. Polk County *v.* Phillips, 92 Tex. 630, 51 S. W. 328.

3. Tompkins *v.* New York, 14 N. Y. App. Div. 536, 43 N. Y. Suppl. 878; People *v.* Cayuga County, 22 Misc. (N. Y.) 616, 50 N. Y. Suppl. 16.

Fee of analyzing chemist.— Where a medical man has, by order of the district attorney, rendered services in making a chemical analysis in an inquiry into a case of alleged poisoning, such services are properly chargeable against the county. People *v.* St. Lawrence County, 30 How. Pr. (N. Y.) 173.

What compensation shall be paid to an expert witness necessarily employed by a district attorney in a criminal case must be determined by the board of supervisors. People *v.* Jefferson County, 35 N. Y. App. Div. 239, 54 N. Y. Suppl. 782.

4. Hays *v.* Cumberland County, 186 Pa. St. 109, 40 Atl. 282.

5. Fessenden *v.* Nickerson, 125 Mass. 316.

6. Cal. Stat. (1895) p. 267, providing that the boards of supervisors may reject all bills for fees of justices and constables in criminal cases in which the district attorney has not approved the issue of the warrant of arrest, is in conflict with Cal. Const. art. 11, § 5, providing that the legislature shall regulate the compensation of county and township officers in proportion to the duties they perform, and also with article 1, section 11, requiring all laws of a general nature to have a uniform operation. Westerfield *v.* Riverside County, (Cal. 1897) 50 Pac. 929; Dwyer *v.* Parker, 115 Cal. 544, 47 Pac. 372.

7. Under the New Hampshire statutes the fees of referees as allowed by the court must be paid by the county in cases wherein the parties are entitled to a trial by jury, in cases referred without the consent of the parties, by order of the court in term-time, and in cases referred with or without their consent by a justice in vacation. In all other cases the court may order that the whole, a part, or none of the fees be paid by the county. Davis *v.* Richardson, 62 N. H. 272; Dodge *v.* Stickney, 61 N. H. 607.

8. Com. *v.* Pattison, 12 Phila. (Pa.) 242, 35 Leg. Int. (Pa.) 120.

9. In Munson *v.* New York, 57 How. Pr. (N. Y.) 497, it was held that a stenographer to the surrogate's court is not limited under the act of 1865 in the collection of his salary, to the fees paid by that court into the county treasury, and that any excess over such fees is a county charge.

Contra.— State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764, holding that a court has no power to charge a county with the expense of a stenographer's notes upon the trial of a civil action, although the case may involve many parties and conflicting rights.

10. Jefferson County *v.* Hudson, 22 Ark. 595, as part of the expense of carrying on the court.

Contra.— Polk County *v.* Crocker, 112 Ga. 152, 37 S. E. 178.

11. People *v.* Hull, 23 Misc. (N. Y.) 63, 50 N. Y. Suppl. 463.

Contra.— Greer County *v.* Watson, 7 Okla. 174, 54 Pac. 441.

12. Wayne County *v.* Randall, 43 Mich. 137, 5 N. W. 75.

13. Wilkins *v.* Iron County, 2 Utah 532.

1. 1 Bl. Comm. 116.

COUNTING-HOUSE. A part of a house devoted to purposes of commerce;[2] a part of a house which is devoted to the purposes of commercial business.[3]

COUNTOR. In old English practice, an ADVOCATE (*q. v.*) or professional pleader; one who counted for his client, that is, related his case, recited his count, or orally pleaded his cause.[4] Also, a debtor's prison; a bench on which goods are exposed for sale; one who counts or calculates.[5] (See ATTORNEY AND CLIENT; COUNT.)

COUNTRY.[6] In its primary meaning, signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word "country" is employed to denote the population, the nation, the state, the government, having possession and dominion over the country.[7] The term has also been held to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme and legislative control.[8] In extradition proceedings, under an international convention, the term has been defined as the special political jurisdiction that has cognizance of the crime.[9] In pleading and practice, the inhabitants of a district from which a jury is summoned in a cause;[10] a jury summoned, or to be summoned.[11] (Country: Exclusion From, see ALIENS. Indian, see INDIANS. Trial by Jury, see JURIES. See, generally, INTERNATIONAL LAW; STATES; UNITED STATES.)

COUNTRY DAMAGE. As applied to cotton, a result due to the bad condition of the commodity when it is baled, or from its exposure to bad weather, or from ill usage in its interior transportation.[12]

2. Per Bovill, C. J., in Piercy *v.* Maclean, L. R. 5 C. P. 252, 258, 1 Hopw. & C. 371, 39 L. J. C. P. 115, 22 L. T. Rep. N. S. 213, 18 Wkly. Rep. 732. And see Wright *v.* Stockport, B. & Arn. 39, 7 Jur. 1112, 1115, 13 L. J. C. P. 50, 1 Lutw. 32, 5 M. & G. 33, 7 Scott N. R. 561, 44 E. C. L. 28; *Re* Creek, 3 B. & S. 459, 9 Jur. N. S. 646, 32 L. J. Q. B. 89, 7 L. T. Rep. N. S. 596, 11 Wkly. Rep. 234, 113 E. C. L. 459.

3. Per Willes, J., in Piercy *v.* Maclean, L. R. 5 C. P. 252, 261, 1 Hopw. & C. 371, 39 L. J. C. P. 115, 22 L. T. Rep. N. S. 213, 18 Wkly. Rep. 732. And see Toms *v.* Luckett, 5 C. B. 23, 34, 11 Jur. 993, 17 L. J. C. P. 27, 2 Lutw. 19, 57 E. C. L. 23; Reg. *v.* Potter, 3 C. & K. 179, 5 Cox C. C. 187, 188, 2 Den. C. C. 235, 15 Jur. 498, 20 L. J. M. C. 170, T. & M. 561, 4 Eng. L. & Eq. 575.

4. Burrill L. Dict. [*citing* 1 Bl. Comm. 24, note t; 9 Coke ix].

5. English L. Dict.

6. "The term country seems to be well understood by everybody. However, as it is taken in different senses, it may not be unuseful to give it here an exact definition. It commonly signifies the state of which one is a member." "In a more confined sense, this term signifies the state, or even more particularly the town or place of our birth." Vattel Law Nat. bk. 1, c. 9, § 122 [*quoted* in U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,129, 1 Blatchf. 218].

7. U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,129, 1 Blatchf. 218.

In the preamble to the convention of 1815, "countries," "territories," and "people," are used by the two governments [United States and Great Britain] as having one import; and, in the first article, "territories" is employed as the correlative of "inhabitants." U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,129, 1 Blatchf. 218.

8. So defined by the secretary of the treasury in instructions to customs officers relative to the enforcement of the revenue laws. Stairs *v.* Peaslee, 18 How. (U. S.) 521, 530, 15 L. ed. 474 [*quoted* in Campbell *v.* Barney, 4 Fed. Cas. No. 2,354, 5 Blatchf. 221]; U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,129, 1 Blatchf. 218.

9. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345.

10. Burrill L. Dict.

A "conclusion to the country" is an offer of trial by jury. Burrill L. Dict. [*citing* 3 Bl. Comm. 315].

"To make a certain jury of the country," were words of the old writ of venire facias. Burrill L. Dict.

Under the old system of pleading prior to that provided by the code, the phrase, used by a pleader, "and of this he puts himself upon the country," etc., meant that the truth of the fact so stated he desired to have tried by a jury. Bell *v.* Yates, 33 Barh. (N. Y.) 627, 629 [*citing* 2 Chitty Pl. 450]. If the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers: but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of the peers against the defendant in another form; thus "and this he prays may be inquired of by the country." 3 Bl. Comm. 313.

11. Burrill L. Dict.

12. Bradstreet *v.* Heran, 3 Fed. Cas. No. 1,792*a*, 2 Blatchf. 116.

COUNTRY ROCK. The character and description of the general body of the mountain, whether it is granite, or gneiss, or syenite, or porphyry, or any other of the many different kinds of rock;[13] "neighboring rock."[14]

COUNTY. See Counties.

COUNTY AFFAIRS. Those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers.[15] (See, generally, Counties.)

COUNTY AFORESAID. The county named in the margin of the declaration.[16] (See Aforesaid; and, generally, Pleading.)

COUNTY ATTORNEY. See Prosecuting Attorneys.

COUNTY AUTHORITY. The justices of a county in general or quarter sessions assembled.[17]

COUNTY BOARD. See Counties.

COUNTY BRIDGE.[18] A bridge built by the county authorities in the exercise of their statutory power;[19] a public bridge which the county is liable to repair.[20] (See, generally, Bridges; Counties.)

COUNTY CHARGES. Moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law.[21] (See, generally, Counties.)

COUNTY CLERK. See Clerks of Courts; Counties.

COUNTY COMMISSIONER. See Counties.

COUNTY CORPORATE. A City (*q. v.*) or town, with more or less territory annexed, having the privilege to be a county of itself, and not to be comprised in any other county.[22] (See, generally, Counties; Municipal Corporations.)

COUNTY COURT.[23] In old English law, a court incident to the jurisdiction of the sheriff.[24] In modern English law the name is appropriated to a system of tribunals established by 9 & 10 Vict. c. 95, having a limited jurisdiction, principally for the recovery of small debts.[25] In American law the name is used in

"Country damaged," used in reference to a cargo of wheat, means damaged by being wet, or from some other cause before shipment. Alexander *v.* McNear, 28 Fed. 403.

13. Stevens *v.* Williams, 23 Fed. Cas. No. 13,414, where it is said: "They [miners] use that word to describe the general mass of rock of which the mountain is composed, as distinguished from that which is found in the vein or lode."

The cleft between the inclosing rocks.—Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 29 L. ed. 712.

14. King *v.* Amy, etc., Consol. Min. Co., 9 Mont. 543, 565, 24 Pac. 200, where it is said: "The 'neighboring rock' being called in the miner's language the 'country' or the 'country rock.'"

15. Hankins *v.* New York, 64 N. Y. 18, 22 [*quoted* in Fragley *v.* Phelan, 126 Cal. 383, 388, 58 Pac. 923].

16. Sutton *v.* Fenn, 2 W. Bl. 847, 848, where the declaration referred to more than one county.

17. Reg. *v.* Dover, 49 J. P. 86, 32 Wkly. Rep. 876, 877, construing the highways act of 1878 (41 & 42 Vict. c. 77).

18. "County bridge" is said to be an expression not known to the law. Reg. *v.* Chart, L. R. 1 C. C. 237, 239.

May be included in the term "highway." See Mass. Pub. Stat. (1882), c. 3, § 8.

The term includes hundred bridges. Queen *v.* Chart, L. R. 1 C. C. 237, 240.

19. Soper *v.* Henry County, 26 Iowa 264, 269. See also Taylor *v.* Davis County, 40 Iowa 295, 297, where it is said that bridges which are properly designated county bridges are bridges of a larger class which the county is required to erect and maintain at an extraordinary expenditure of money.

20. Queen *v.* Chart, L. R. 1 C. C. 237, 239.

21. N. Y. Laws (1892), c. 686, § 230 [*quoted* in Worth *v.* Brooklyn, 34 N. Y. App. Div. 223, 224, 54 N. Y. Suppl. 484].

22. Such as London, York, Bristol, Norwich, and other cities in England. Black L. Dict. [*citing* 1 Bl. Comm. 120]. And see State *v.* Finn, 4 Mo. App. 347, 355.

23. A court of high antiquity in England. Black L. Dict.

"County court" and "court of the county," are convertible terms. Palmer *v.* Craddock, Ky. Dec. 182.

24. 3 Bl. Comm. 35.

It was not a court of record. 3 Bl. Comm. 35.

The freeholders of the county were the real judges in this court, and the sheriff was the ministerial officer. 3 Bl. Comm. 36.

25. Black L. Dict.

"Court commonly called the county court."—Where a statute prescribed a punishment for a contempt of court, and referred to "the court commonly called the county court," the reference was construed to mean the ancient county court. Reg. *v.* Judge Brompton County Ct., [1893] 2 Q. B. 195, 198, 57 J. P. 648, 62 L. J. Q. B. 604, 5 Reports 462, 41 Wkly. Rep. 648.

many of the states to designate the ordinary courts of record having jurisdiction for trials at *nisi prius*.[26] Again, as defined with reference to its jurisdiction the terms may mean a court presided over by the county judge alone.[27] (County Court: As Administrative Body, see COUNTIES. As Judicial Body, see COURTS.)

COUNTY JAIL. See PRISONS.

COUNTY OFFICER. See COUNTIES.

COUNTY PURPOSE.[28] A purpose in accordance with the object of its organization.[29] (See CITY PURPOSE; and, generally, COUNTIES.)

COUNTY RATE. An imposition levied on the occupiers of lands, and applied to many miscellaneous purposes.[30]

COUNTY ROAD. See STREETS AND HIGHWAYS.

COUNTY-SEAT. A COUNTY TOWN,[31] *q. v.* (See, generally, COUNTIES.)

COUNTY SESSIONS. In England, the court of general quarter sessions of the peace held in every county once in every quarter of a year.[32] (See, generally, COURTS.)

COUNTY TOWN. The town of a county where the county business is transacted — a shire town;[33] the chief town of a county, the seat of justice.[34] (See, generally, COUNTIES.)

COUNTY WARRANT. See COUNTIES.

COUPLED WITH AN INTEREST.[35] A power which accompanies, or is connected with, an interest.[36] As applied to a license, the term means that where a party obtains a license to do a thing, he also acquires a right to do it.[37] (See, generally, PRINCIPAL AND AGENT; POWERS.)

COUPLING CARS. See MASTER AND SERVANT.

It is also the name of certain tribunals of limited jurisdiction in the county of Middlesex, established under 22 Geo. II, c. 33. Black L. Dict.

26. Black L. Dict.

The appellation was probably taken from the constitution of 1777. People *v.* Albany C. Pl., 19 Wend. (N. Y.) 27, 30.

The term will embrace the court of common pleas. Arnold *v.* Allen, 8 Mass. 147, 149. In People *v.* New York, 25 Wend. (N. Y.) 9, 19, it is said: "We have long had courts, 'which, from their jurisdiction, business, local organization and character,' are sufficiently designated by the name of 'county courts.' Such are the two courts in each county, of common pleas and general sessions of the peace. People *v.* Albany C. Pl., 19 Wend. (N. Y.) 27."

The term "county court," as used in the act of Feb. 12, 1849, was designed only to apply to the sittings of the county court for the transaction of county business. St. Clair County *v.* Irwin, 15 Ill. 54, 56.

27. Bowling Green, etc., R. Co. *v.* Warren County Ct., 10 Bush (Ky.) 711, 717.

28. County and town purposes.— The designation of a square laid off upon the map as "court square" does not have the effect to limit the dedication thereof to the use of the public for "county" as distinguished from "town" purposes. San Leandro *v.* Le Breton, 72 Cal. 170, 177, 13 Pac. 405.

29. English L. Dict.

The term includes maintenance of public roads. State *v.* Hannibal, etc., R. Co., 101 Mo. 120, 135, 13 S. W. 406. But will not include labor upon a local drain. State *v.* Seaman, 23 Ohio St. 389, 394. And see McCormick *v.* Fitch, 14 Minn. 252.

30. Wharton L. Lex [*citing* 15 & 16 Vict. c. 81].

31. Webster Dict. [*quoted* in *In re* County Seat, 4 Pa. Dist. 319].

32. Black L. Dict.

33. Webster Dict. [*quoted* in *In re* County Seat, 4 Pa. Dist. 319].

34. Zell Encycl. [*quoted* in *In re* County Seat, 4 Pa. Dist. 319].

Synonymous with "county-seat," which has been defined to be "the seat of government of a county; the town in which the county and other courts are held, and where the county officers perform their functions." Zell Encycl. [*quoted* in *In re* County Seat, 4 Pa. Dist. 319].

35. Attorney's authority coupled with an interest see 4 Cyc. 953, n. 33.

36. Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 202, 5 L. ed. 589 [*quoted* in Missouri *v.* Walker, 125 U. S. 339, 8 S. Ct. 929, 31 L. ed. 769].

"The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it." Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 204, 5 L. ed. 589 [*quoted* in Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636; Daugherty *v.* Moon, 59 Tex. 397, 399].

37. 2 Bouvier Inst. 568 [*citing* Warren *v.* Arthur, 2 Mod. 317, 318; Bringloe *v.* Morrice, 1 Mod. 210].

COUPON BONDS. Instruments payable to bearer, and provided with interest warrants called "coupons," for each installment of interest.[38] (See CONVERTIBLE COUPON BONDS; COUPONS; and, generally, BONDS; COMMERCIAL PAPER; INTEREST.)

COUPON NOTE. A promissory note with coupons attached.[39] (See CONVERTIBLE COUPON BONDS; COUPONS; and, generally, BONDS; COMMERCIAL PAPER; INTEREST.)

COUPONS.[40] Written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds;[41] promises to pay money;[42] interest and dividend certificates;[43] also those parts of a commercial instrument which are to be cut,[44] and which are evidence of something connected with the contract mentioned in the instrument;[45] a term employed in England[46] and elsewhere to denote the warrants for the payment of the periodical dividends on the

38. Benwell *v.* Newark, 55 N. J. Eq. 260, 263, 36 Atl. 668.

39. The coupons being notes for the interest, written at the bottom of the principal note and designed to be cut off when the notes are presented for payment or paid. Anderson L. Dict.; Webster Int. Dict. [*quoted* in Williams *v.* Moody, 95 Ga. 8, 11, 22 S. E. 30].

40. **Derived from the French,—"** *couper,*" to cut. Howard *v.* Bates County, 43 Fed. 276, 277. See also Myers *v.* York, etc., R. Co., 43 Me. 232, 239.

Distinguished from bills of credit in Poindexter *v.* Greenhow, 114 U. S. 270, 9 S. Ct. 903, 29 L. ed. 185.

Distinguished from promissory note.—" The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature." Kenosha *v.* Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725 [*quoted* in State *v.* Spartanburg, etc., R. Co., 8 S. C. 129, 163; Howard *v.* Bates County, 43 Fed. 276, 278]. And see Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62, 64; Enthoven *v.* Hoyle, 13 C. B. 373, 394, 16 Jur. 272, 21 L. J. C. P. 100, 76 E. C. L. 373.

41. Aurora *v.* West, 74 U. S. 82, 19 L. ed. 50 [*quoted* in Holland Trust Co. *v.* Thomson-Houston Electric Co., 62 N. Y. App. Div. 299, 309, 71 N. Y. Suppl. 51; Edwards *v.* Bates County, 163 U. S. 269, 271, 18 S. Ct. 967, 41 L. ed. 155].

"Coupons are annexed to bonds in order that they may be severed and transferred by delivery, and thereby carry to the purchaser the interest which they represent." Miller *v.* Berlin, 17 Fed. Cas. No. 9,562, 13 Blatchf. 245 [*quoted* in Holland Trust Co. *v.* Thomson-Houston Electric Co., 62 N. Y. App. Div. 299, 309, 71 N. Y. Suppl. 51].

Coupons are commercial paper in the strictest sense. Holland Trust Co. *v.* Thomson-Houston Electric Co., 62 N. Y. App. Div. 299, 309, 71 N. Y. Suppl. 51 [*quoting* Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170]. And see Spooner *v.* Holmes, 102 Mass. 503, 507, 3 Am. Rep. 491.

Coupons are negotiable, and a suit may be maintained on them without the necessity of producing the bonds to which they were attached. Edwards *v.* Bates County, 163 U. S. 269, 271, 16 S. Ct. 967, 41 L. ed. 155; Aurora *v.* West, 74 U. S. 82, 107, 19 L. ed. 50.

Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Nesbitt *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562.

Functions of coupons.—" Coupons are, substantially, but copies from the body of the bond in respect to the interest and, as is well known, are given to the holder of the bond for the purpose: first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and, second, to enable the holder to realize the interest due, or to become due, by negotiating the coupons to the bearer in business transactions, on whom the duty of collecting them devolves." Kenosha *v.* Lamson, 9 Wall. (U. S.) 477, 483, 19 L. ed. 725 [*quoted* in Lexington *v.* Butler, 14 Wall. (U. S.) 282, 296, 20 L. ed. 809]. And see Evertsen *v.* Newport Nat. Bank, 4 Hun (N. Y.) 692, 695 [*quoted* in Howard *v.* Bates County, 43 Fed. 276, 278].

42. Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185.

43. Wharton L. Lex. [*quoted* in McKenzie *v.* Montreal, etc., R. Co., 27 U. C. C. P. 224, 227].

There are as many of these certificates as there are payments of interest to be made. At each time of payment one is cut off and presented for payment. Myers *v.* York, etc., R. Co., 43 Me. 232, 239; Howard *v.* Bates County, 43 Fed. 276, 277 [*citing* Worcester Dict.].

44. Wharton L. Lex. [*quoted* in McKenzie *v.* Montreal, etc., R. Co., 27 U. C. C. P. 224, 227].

Something intended to be cut off from another thing. Williams *v.* Moody, 95 Ga. 8, 11, 22 S. E. 30.

45. Wharton L. Lex. [*quoted* in McKenzie *v.* Montreal, etc., R. Co., 27 U. C. C. P. 224, 227].

46. **In England,** they are known as "warrants" or "dividend warrants," and the securities to which they belong, debentures. Bouvier L. Dict. [*citing* Enthoven *v.* Hoyle, 13 C. B. 373, 16 Jur. 272, 21 L. J. C. P. 100, 76 E. C. L. 373.

public stocks, a number of which being appended to the bonds are severally cut off for presentation as the dividends fall due.[47] (Coupons: Action on, see BONDS. Drawing Interest, see INTEREST; USURY. Negotiability of, see BONDS. Payment of, see PAYMENT. Secured by Mortgage, see MORTGAGES. See also CONVERTIBLE COUPON BONDS: COUPON BONDS; and, generally BONDS; COMMERCIAL PAPER.)

COUPON STAMP. A government revenue stamp with a coupon attached, used on intoxicating liquors.[48] (See, generally, INTERNAL REVENUE.)

COUPON TICKETS. Complete tickets fastened together, issued by carriers of passengers to be detached and given up in payment of fare.[49] (See, generally, CARRIERS.)

COURAGE. That quality of mind which enables one to encounter dangers and difficulties with firmness, or without fear or depression of spirits; valor, boldness, bravery, etc.[50]

COURSE.[51] A running or moving forward — a continuous progression or advance;[52] motion considered with reference to its direction; line of progress, direction;[53] progress from point to point without change of direction; any part of the progress from one place to another, which is in a straight line or in one direction; the track or line of motion; direction in which motion takes place; the direction or motion; the line in which a body moves; as what "course" shall the pilot steer; the course of a projectile through the air;[54] the direction of a line with reference to a meridian;[55] order; sequence; rotation; succession of one to another in office, property, dignity, duty, etc.[56] As used in higher institutions of learning the word means curriculum.[57] In practice, the word signifies pro-

47. Webster Dict. [*quoted* in Myers *v.* York, etc., R. Co., 43 Me. 232, 239].

Synonymous with "certificate."— Where the secretary of a company gave two "certifications" of transfer, one "coupon for 1100*l* preference shares in the company's office," etc., the court said: "'Coupon' is identical in its meaning in the above documents with 'certificate.'" Whitechurch *v.* Cavanagh, [1902] A. C. 117, 133, 71 L. J. K. B. 400, 85 L. T. Rep. N. S. 349, 9 Manson 351, 50 Wkly. Rep. 218.

48. English L. Dict.

49. English L. Dict.

50. Gardner *v.* State, 40 Tex. Crim. 19, 22, 48 S. W. 170 [*citing* Tex. Pen. Code, § 700], distinguishing the term "courage" from the term "temper."

51. "Course of the vein on the surface" as used in mining laws see Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 6 S. Ct. 1177, 30 L. ed. 98.

52. Britannia *v.* Cleugh, 153 U. S. 130, 142, 14 S. Ct. 795, 38 L. ed. 660.

53. Webster Dict. [*quoted* in Bayha *v.* Taylor, 36 Mo. App. 427, 442].

54. Webster Dict. [*quoted* in Britannia *v.* Cleugh, 153 U. S. 129, 148, 14 S. Ct. 795, 38 L. ed. 660, dissenting opinion]. And see Wharton *v.* Brick, 49 N. J. L. 289, 291, 6 Atl. 442, 8 Atl. 529.

Applied to navigation.—Where the rules of navigation provided that "one of two vessels shall keep out of the way, the other shall keep her course," etc., the court said: "Now, unless we are to give to the word 'course' a meaning quite different from that given by the grammarians, we must hold that the steamer discharged her obligation to 'keep her course' by keeping steadily in the direction in which she had been previously going." Britannia *v.* Cleugh, 153 U. S. 129, 148, 14 S. Ct. 795, 38 L. ed. 660, dissenting opinion. And see The Beryl, 5 Aspin. 321, 53 L. J. Adm. 75, 51 L. T. Rep. N. S. 554, 556, 9 P. D. 137, 33 Wkly. Rep. 191 [*quoted* in The Oporto, [1897] P. 249, 66 L. J. Adm. 49; Britannia *v.* Cleugh, 153 U. S. 130, 149, 14 S. Ct. 795, 38 L. ed. 660, dissenting opinion], where the court, in construing a similar rule, said: "Now 'keeping her course' means that she is to keep in the same direction as before, it does not relate to the question of speed." See also General Steam Nav. Co. *v.* Hedley, L. R. 3 P. C. 44, 51, 39 L. J. Adm. 20, 21 L. T. Rep. N. S. 686, 6 Moore P. C. N. S. 263, 18 Wkly. Rep. 264, 17 Eng. Reprint 725, where a provision in the rules of navigation relative to a vessel, that she "shall keep her course," was construed. See also COLLISION, 7 Cyc. 357.

55. Bouvier L. Dict.

56. Century Dict.

"Course of entail."— Where the intention of a testatrix was expressed in the recital in the codicil to be, "to settle the estates devised by her will in a course of settlement to correspond, as far as may be practicable, with the limitations of the Barony of Buckhurst," and she directed her trustees "to convey, settle, and assure her estates in a course of entail to correspond as nearly as may be with the limitations of the barony," Lord Chelmsford said: "There can be no doubt that the words 'course of settlement,' and 'course of entail,' and 'as far as may be practicable,' and 'as nearly as may be,' were used as equivalent expressions." Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543, 563, 39 L. J. Ch. 505.

57. Iron City Commercial College *v.* Kerr, 3 Brewst. (Pa.) 196, 200.

gressive action in a suit or proceeding not yet determined.[58] (See, generally, BOUNDARIES.)

COURSE OF BUSINESS. The usual custom in business or a particular line of business.[59] (See COURSE OF TRADE.)

COURSE OF EMPLOYMENT. Whatever may be incident to the employment.[60] (See, generally, MASTER AND SERVANT; PRINCIPAL AND AGENT.)

COURSE OF LAW. See DUE COURSE OF LAW.

COURSE OF RIVER. A line parallel with its banks.[61]

COURSE OF TRADE. What is customarily or ordinarily done in the management of trade or business.[62] (See COURSE OF BUSINESS.)

COURSE OF VOYAGE. The regular and customary track, if such there be, which long usage has proved to be the safest and the best;[63] the route pursued from port to port.[64] (See, generally, SHIPPING.)

COURT-BARON. An inferior court of civil jurisdiction in England, attached to a manor, being an inseparable incident thereto, and holden by the steward within the manor.[65] (See, generally, COURTS.)

58. Williams *v.* Ely, 14 Wis. 236, 257. See also People *v.* Turner, 39 Cal. 370, 371 (step or proceeding "arising during the course of the trial"); Langford *v.* State, 9 Tex. App. 283, 285 (perjury or false swearing "in course of a judicial proceeding").

59. English L. Dict. And see Clough *v.* Patrick, 37 Vt. 421, 429 [*quoted* in Chelsea Nat. Bank *v.* Isham, 48 Vt. 590, 593].

60. Redding *v.* South Carolina R. Co., 3 S. C. 1, 7, 16 Am. Rep. 681.

61. Atty.-Gen. *v.* Paterson, etc., R. Co., 9 N. J. Eq. 526, 550, where it is said: "The 'current of the stream,' will vary from the general 'course of the river,' depending upon a variety of circumstances." And see Jackson *v.* Camp, 1 Cow. (N. Y.) 605, 612.

62. Black L. Dict.

"Conveyance of any goods or burden in the course of trade" does not include a traveling circus, and carriages belonging thereto, used in a parade, so as to be exempt from duty under a statute. Speak *v.* Powell, L. R. 9 Exch. 25, 28, 43 L. J. M. C. 19, 29 L. T. Rep. N. S. 434.

"Course of trade and dealing" as used in a statute see Harwood *v.* Lomas, 11 East 127, 131.

63. 1 Bouvier Inst. 482.

64. English L. Dict.

65. This court, however, is now fallen into almost entire disuse in England. Burrill L. Dict.

Customary court-baron is one appertaining entirely to copyholders. Freeholder's court-baron is one held before the freeholders who owe suit and service to the manor. It is the court-baron proper. Black L. Dict. See also Burrill L. Dict. [*citing* 3 Bl. Comm. 33].

The old manors in the province of New York had their courts-baron and courts-leet. Burrill L. Dict.

COURT COMMISSIONERS

By Ernest H. Wells

CROSS-REFERENCES

For Matters Relating to:
Auditors, see REFERENCES.
Commissioners:
As Additional Members of Court, see COURTS; JUDGES.
In Admiralty, see ADMIRALTY.
In Chancery, see EQUITY.
Of Federal Court, see UNITED STATES COMMISSIONERS.
Of Insolvent Estate, see EXECUTORS AND ADMINISTRATORS.
To Make:
Partition, see PARTITION.
Sale, see JUDICIAL SALES.
To Set Off Dower, see DOWER.
To Take Deposition, see DEPOSITIONS.
Masters in Chancery, see EQUITY.
Referees, see REFERENCES.
United States Commissioners, see UNITED STATES COMMISSIONERS.

I. DEFINITION.

A court commissioner is an officer possessing certain minor judicial or quasi-judicial powers.[1] He is a subordinate officer of the court of which he is commissioner.[2]

1. See *In re* Burger, 39 Mich. 203.
Ministerial powers.—Sometimes he is given some purely ministerial functions such as the power "to take acknowledgments and proof of deeds, mortgages," etc. A statute giving him such power is not affected by the amendment of another statute which omits commissioners from the officers named who can take acknowledgments, etc., for there is no necessary inconsistency in the two provisions. Malone *v.* Bosch, 104 Cal. 680, 38 Pac. 516.

2. *In re* Burger, 39 Mich. 203, 205 (where it is said: "The circuit court commissioner is a subordinate and assistant to the circuit court rather than an independent judicial officer"); Boinay *v.* Coats, 17 Mich. 411. See also *infra*, III, C, D.

II. CREATION OF OFFICE.

By virtue of permissive constitutional provisions,[3] statutes in a number of the states have created the office.[4]

III. POWERS.

A. In General. Since the office of court commissioner is one created by statute, he has no powers but what are conferred by statute.[5] His powers as prescribed by statute cannot be enlarged by consent of the parties,[6] nor can the court confer upon a commissioner powers not given him by law.[7]

B. Chamber Powers of Judge. In states where this officer exists the several constitutions generally limit his powers to those of a judge in chambers.[8] These powers are those which are exercised in preliminary, intermediate, or *ex*

3. Fenelon *v.* Butts, 49 Wis. 342, 5 N. W. 784.

Conferring office on recorder of city.— Where the constitution provides for the office, the legislature cannot, in the absence of express constitutional authority, confer such office on the recorders of cities. McClintock *v.* Laing, 19 Mich. 300. But in New York other officers have been given the powers of court commissioners. See for example Tallmadge *v.* Teller, 22 Wend. (N. Y.) 646.

The power to act as a probate judge under a statutory provision is not in conflict with a constitutional provision that vacancies in the office of probate judge are to be filled by the appointment of the governor. And such a statute authorizes a court commissioner to act as a probate judge when the probate judge is temporarily disqualified or is ill or absent. Kelley *v.* Edwards, 38 Mich. 210.

4. Fenelon *v.* Butts, 49 Wis. 342, 5 N. W. 784.

In New York the office once existed under authority of the courts. As early as 1819 it was decided that commissioners appointed under the authority of a statute did not supersede the commissioners already appointed by the supreme court. Jones *v.* Smith, 16 Johns. (N. Y.) 232. The constitution of 1821 recognized the office as already existing. The office was abolished by the constitution of 1846. It has been held, however, that this did not prevent the legislature from conferring powers formerly held by the commissioners. Cushman *v.* Johnson, 4 Abb. Pr. (N. Y.) 256, 13 How. Pr. (N. Y.) 495.

5. See Bicknell *v.* Tallman, 3 Pinn. (Wis.) 388, 4 Chandl. (Wis.) 95. See also Loder *v.* Littlefield, 39 Mich. 374, where the court said that a commissioner's powers to allow certiorari were those defined by statute.

Appointment of receiver.— Since Cal. Code Civ. Proc. § 259, does not give a court commissioner any jurisdiction to appoint a receiver, and since section 564 of the code provides that a receiver may be appointed by the court, or a judge thereof, the power to appoint a receiver is confined to the court or judge thereof. Therefore a court commissioner has no jurisdiction to appoint a receiver, and a bond given by a receiver so appointed is void. Quiggle *v.* Trumbo, 56 Cal. 626 [*citing* Stone *v.* Bunker Hill Copper, etc., Min. Co., 28 Cal. 497].

Approval of appeal-bond.— Where the power to approve appeal-bonds is not among the powers of the commissioner enumerated in the statute, and where the statute further provides that the commissioner may do "such other things as are required by the court, or as are necessary and proper for the full exercise of the powers hereby granted" the commissioner cannot approve an appeal-bond. Anonymous, 8 Wis. 308. But see Emerson *v.* Atwater, 5 Mich. 34.

Dissolution of injunction.— Where by statute a court commissioner may hear a motion or make any order in reference to the dissolution of an injunction, when the question is referred to him by the court, he has no jurisdiction to hear such a motion or make such order unless the matter has been referred to him by the court. Stone *v.* Bunker Hill Copper, etc., Min. Co., 28 Cal. 497.

Grant of injunction.— Where a court commissioner has the power in the absence of the judge of the circuit court to grant writs of injunction, he has the power to grant a writ of injunction in any cause in which a circuit judge if present could have granted such a writ, but he cannot incorporate into his order restraining the sheriff from making a sale of goods in execution of a judgment, a further order that the sheriff shall make an appraisement and a schedule of that portion of the judgment debtor's property which he claims to be exempt from execution under the constitution. The only power a commissioner has in the premises is to grant an injunctional order restraining the sale of so much of the property levied upon and advertised to be sold as was exempt to complainant from a forced sale. McMichael *v.* Grady, 34 Fla. 219, 15 So. 765.

6. Jackson *v.* Puget Sound Lumber Co., (Cal. 1898) 52 Pac. 838 [*reversed* in 123 Cal. 97, 55 Pac. 788].

7. The fact that the court had, under the terms of a previous order, authorized and afterward affirmed the action of the commissioner does not affect the question of his jurisdiction. Haight *v.* Lucia, 36 Wis. 355.

8. As to powers of judge in chambers see JUDGES.

parte matters, not involving the merits of a cause — powers which may be exercised by a judge out of term, acting as a judge merely, not as a court.[9] If a commissioner has the powers of a judge at chambers, a power granted by statute to a judge at chambers is impliedly conferred on the commissioner.[10]

C. Power to Review Judicial Decision. A court commissioner cannot review or investigate the proceedings of a judicial tribunal, for such a power involves the exercise of a judicial power in the strict legal sense.[11] Nor can he transfer a case from one court of record to another on the ground of prejudice of the judge of the former court.[12]

D. Power to Try Title to Land. A court commissioner cannot try the title to land either under a statute conferring on him directly the power of adjudicating tax-titles,[13] or in the exercise of his rightful power to entertain summary proceedings to recover the possession of land wrongfully detained by tenants;[14] and when the question of title arises by the proofs offered it is his duty to dismiss.[15]

9. Prignitz *v.* Fischer, 4 Minn. 366; Pulver *v.* Grooves, 3 Minn. 359; Gere *v.* Weed, 3 Minn. 352; Cushman *v.* Johnson, 13 How. Pr. (N. Y.) 495.

Illustrations.—A court commissioner may take bail in criminal cases (Daniels *v.* People, 6 Mich. 381; Hoskins *v.* Baxter, 64 Minn. 226, 66 N. W. 969; Gere *v.* Weed, 3 Minn. 352), may grant exoneration of bail (De Meyer *v.* McGonegal, 32 Mich. 120), may entertain summary proceedings to recover lands unlawfully detained by tenants (Streeter *v.* Paton, 7 Mich. 341), may dissolve attachments (Edgarton *v.* Hinchman, 7 Mich. 352. See also ATTACHMENT, 4 Cyc. 781, note 42), may enter judgment by default (Peterson *v.* Dillon, 27 Wash. 78, 67 Pac. 397), may forbid a transfer or disposition of the property of a judgment debtor not exempt from execution (*In re* Perry, 30 Wis. 268), may issue an execution for the collection of costs in proceedings held before him (Watson *v.* Randall, 44 Mich. 514, 7 N. W. 84), may make an order for security of costs and may modify or revoke it (Harris *v.* Mason, 10 Wend. (N. Y.) 568; Moore *v.* Merritt, 9 Wend. (N. Y.) 482), may extend the time for settling a bill of exceptions where the delay is satisfactorily excused (Pellage *v.* Pellage, 32 Wis. 136), and may order the arrest and take the examination of offenders (Hoskins *v.* Baxter, 64 Minn. 226, 66 N. W. 969; Faust *v.* State, 45 Wis. 273). But an order allowing alimony (Thorp *v.* Thorp, 2 Mich. N. P. 209), an order striking out irrelevant and redundant matter from a pleading (Balkins *v.* Baldwin, 84 Wis. 212, 54 N. W. 403), an order determining the right of contesting parties to the control, custody, education, and nurture of a child (Rowe *v.* Rowe, 28 Mich. 353), or an order regulating the admission of attorneys (Anonymous, 2 Wend. (N. Y.) 280) is not within the power of a commissioner to make. So his order overruling a demurrer to a complaint (Gere *v.* Weed, 3 Minn. 352), or denying a motion to set aside a summons in an action (Pulver *v.* Grooves, 3 Minn. 359) is void. Nor can a court commissioner entertain supplementary proceedings or punish for contempt and disobedience of his orders. He is limited to the power of granting a preliminary order for an examination before the judge. *In re* Remington, 7 Wis. 643.

10. Hempsted *v.* Cargill, 46 Minn. 141, 48 N. W. 686.

A court commissioner may make an order for the service of summons without the state, under a statute which declares that such an order may be made by a court or a judge thereof, even though it is otherwise provided by statute that when a statute authorizes an order to be made "by the presiding judge, or by the circuit judge, using such words of designation," the commissioner has no power to make such order. Pfister *v.* Smith, 95 Wis. 51, 69 N. W. 984.

Vacating a default judgment.— Where a statute provides that the circuit court "or a judge thereof" may at any time within a year relieve a party from a judgment obtained against him through his surprise, mistake, or excusable neglect, a court commissioner may vacate a default judgment of the circuit court within the prescribed time, even though by statute a court commissioner is precluded from acting where any statute authorizes an order or proceeding by the court, or by a court or a presiding judge thereof. Freiberg *v.* La Clair, 78 Wis. 164, 47 N. W. 178.

11. *In re* Burger, 39 Mich. 203; *In re* Buddington, 29 Mich. 472.

A court commissioner cannot issue a certiorari to review an order of the circuit court. Church *v.* Anti-Kalsomine Co., 119 Mich. 437, 78 N. W. 478.

12. Bicknell *v.* Tallman, 3 Pinn. (Wis.) 388, 4 Chandl. (Wis.) 95.

In Michigan a court commissioner is prohibited by rule of court from granting injunctions to stay proceedings in law without notice previously given to the adverse party. This rule was made to prevent "the unseemly spectacle of a subordinate officer overruling the action of a circuit judge or court." Bonay *v.* Coats, 17 Mich. 411, 416.

13. Case *v.* Dean, 16 Mich. 12; Waldby *v.* Callendar, 8 Mich. 430.

14. Mulder *v.* Corlett, 54 Mich. 80, 19 N. W. 756. Nor in an action of forcible entry and detainer. Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

15. Jenkinson *v.* Winans, 109 Mich. 524, 67 N. W. 549.

E. Powers of Court in Vacation. The powers of a court in vacation[16] cannot be exercised by a court commissioner, for such powers are greater than those possessed by a judge in chambers.[17]

IV. TERRITORIAL JURISDICTION.

A commissioner with the powers of a judge at chambers may grant a writ of habeas corpus in another county when it appears in the application for the writ that there is no officer in the county in which a prisoner was detained authorized to grant the writ.[18] A circuit court commissioner may grant a certiorari to review proceedings which took place outside of his county.[19]

V. TERM OF OFFICE.

Where a statute provides for the appointment of a court commissioner for a definite term of years, his office expires at the end of the term, and he cannot continue to hold office until his successor is appointed.[20]

VI. DISQUALIFICATION TO ACT.

A commissioner is disqualified from performing the duties of his office in an action wherein he is plaintiff's attorney,[21] or where his law partner is interested in the case.[22]

VII. BOND.

The failure of the court to require a court commissioner to renew his bond as required by statute does not release the sureties on the existing bond.[23]

VIII. PROCEEDINGS BEFORE COMMISSIONER.[24]

In the absence of a statutory requirement a circuit court commissioner is not obliged to wait an hour for the appearance of defendant beyond the time at which the summons is made returnable before proceeding to trial.[25]

But the jurisdiction of the commissioner is not ousted by a plea of title in defendant, or by the mere fact that defendant asserts that the instrument under which plaintiff claims is void as a matter of law. It is only where the question of title is necessarily involved that the jurisdiction is ousted. Barrett *v.* Cox, 112 Mich. 446, 70 N. W. 220; Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342.

16. As to powers of judge in vacation see JUDGES.

17. Gere *v.* Weed, 3 Minn. 352. See also JUDGES.

18. State *v.* Hill, 10 Minn. 63.

But where the constitution limits the jurisdiction of a court commissioner to his own county, a statute appointing a commissioner resident in a village situated in two counties is unconstitutional. Fenelon *v.* Butts, 49 Wis. 342, 5 N. W. 784.

19. Loder *v.* Littlefield, 39 Mich. 374. See also Heyn *v.* Farrar, 36 Mich. 258, holding that under a general statute which provides that a court commissioner may perform the duties of a court commissioner of an adjoining county when the latter is disqualified, an application to dissolve an attachment may be heard before the court commissioner of an adjoining county when such disqualification exists.

20. Court commissioners appointed under such a statute cannot properly be said to have successors in office any more than notaries public, and therefore cannot hold over until the appointment of a successor as public policy requires county officers to do. Johnson *v.* Eldred, 15 Wis. 481.

21. Crouch *v.* Crouch, 30 Wis. 667. See also Brown *v.* Byrne, Walk. (Mich.) 453.

As to disqualification of judge generally see JUDGES.

22. Heyn *v.* Farrar, 36 Mich. 258.

23. Ison *v.* Com., 60 S. W. 1125, 22 Ky. L. Rep. 1588.

24. Entitlement of proceedings to dissolve attachment.— The proceedings before a court commissioner to dissolve an attachment need not be entitled in the original cause. Heyn *v.* Farrar, 36 Mich. 258.

Order of taking proof.—A court commissioner has no power to control the order of taking proofs before him in chancery cases. Either party has the right to take his testimony in any order he may choose. Brown *v.* Brown, 22 Mich. 242.

25. Fowler *v.* Bredin, 98 Mich. 133, 56 N. W. 1110.

IX. COMPENSATION AND FEES.

Since a court commissioner is not a county officer, a statute relating to the salaries and fees of county officers does not affect his fees already specifically fixed by statute.[26]

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. A court established by 11 & 12 Vict. c. 78, composed of such of the judges of the superior courts of Westminster as were able to attend, for the consideration of questions of law reserved by any judge in a court of oyer and terminer, gaol delivery, or quarter sessions, before which a prisoner had been found guilty by verdict.[1] (See, generally, COURTS.)

COURT FOR CORRECTION OF ERRORS. The style of a court having jurisdiction for review, by appeal or writ of error.[2] (See, generally, COURTS.)

COURT FOR CORRECTION OF ERRORS AT LAW. At common law, a court that has such jurisdiction as a writ of error can confer upon it.[3] (See, generally, COURTS.)

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. The name of a new court established in England by 20 & 21 Vict. c. 85, and to which has been transferred all the jurisdiction of the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, and in all causes and matters matrimonial.[4] (See, generally, COURTS.)

COURT FOR RELIEF OF INSOLVENT DEBTORS. A local court which has its sittings in London only, which receives the petitions of insolvent debtors, and decides upon the question of granting a discharge.[5] (See, generally, BANKRUPTCY; COURTS; INSOLVENCY.)

COURT FOR TRIAL OF IMPEACHMENTS. A tribunal empowered to try any officer of government or other person brought to its bar by the process of impeachment.[6] (See COURT OF IMPEACHMENT; and, generally, OFFICERS.)

COURT HAND. In old English practice, the peculiar hand in which the records of the courts were written from the earliest period down to the reign of George II.[7]

COURT-HOUSE.[8] A house where courts are held.[9]

26. Cochise County *v.* Johnston, (Ariz. 1898) 52 Pac. 356.

Services of stenographer.— Where a statute prescribing the fees of court commissioners on criminal examinations refers only to cases where the evidence is taken by the officer in person, the amount to be paid for the services of a stenographer to take such testimony is such an amount as would be a reasonable recompense for the services performed. Pistorius *v.* Saginaw County Sup'rs, 51 Mich. 125, 16 N. W. 262.

1. Such a question is stated in the form of a special case. Black L. Dict. [*citing* 4 Stephen Comm. 442].

2. The name was formerly used in New York and South Carolina. Black L. Dict.

3. State *v.* Bailey, 1 S. C. 1, 5.

4. Burrill L. Dict.

5. Black L. Dict.

6. In England, the house of lords constitutes such a court; in the United States, the senate; and in the several states, usually, the upper house of the legislative assembly. Black L. Dict.

7. Burrill L. Dict.

Blackstone speaks of "The ancient immutable court hand in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian." 3 Bl. Comm. 323.

8. "The court house, as the term implies, is chiefly for the use of the court; the remaining uses being subordinate, and to a great extent incidental." Vigo County *v.* Stout, 136 Ind. 53, 58, 35 N. E. 683.

"Court-house" and "jail" operating as a dedication see Travis County *v.* Christian, (Tex. Civ. App. 1892) 21 S. W. 119.

"Court-house" and "door of the court-house" as places for making judicial sales see, generally, EXECUTIONS; JUDICIAL SALES.

9. Harris *v.* State, 72 Miss. 960, 965, 18 So. 387, 33 L. R. A. 85. See also Schanewerk *v.* Hoberecht, 117 Mo. 22, 27, 28 S. W. 949, 38 Am. St. Rep. 631 (where the words "court house in Benton County" were interpreted to mean "the house provided by the county for the purpose, and in which are held the sessions of the various courts of the county, . . . and in which are generally the offices of the county officials"); Hambright *v.* Brock-

COURT LANDS. Demains, or lands kept in demesne, i. e. in the lord's own hands, to serve his family.[10]

COURT-LEET. A court of record in England.[11] (See, generally, COURTS.)

COURT MARTIAL. See ARMY AND NAVY.

COURT NOT OF RECORD. See COURTS.

COURT OF ADMIRALTY. See ADMIRALTY.

COURT OF ANCIENT DEMESNE. A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded.[12] (See, generally, COURTS.)

COURT OF APPEALS. An appellate tribunal which is often the court of last resort.[13] (See, generally, COURTS.)

COURT OF APPEALS IN CASES OF CAPTURE. A court created by congress under the articles of confederation, before the adoption of the United States constitution, having appellate jurisdiction in prize cases.[14] (See, generally, COURTS.)

COURT OF APPELLATE JURISDICTION. See COURTS.

COURT OF ARBITRATION OF THE CHAMBER OF COMMERCE. A court of arbitrators, created for the convenience of merchants in the city of New York, by act of the legislature of New York.[15]

COURT OF ARCHES. A court of appeal belonging to the archbishop of Canterbury.[16] (See ARCHDEACON'S COURT.)

COURT OF ASSISTANTS. A New England colonial supreme court.[17]

man, 59 Mo. 52, 57 (where the court in construing the words "at the court house door," etc., said: "When a court house is mentioned, it is obviously designed to designate the building where courts are held, and where the people attending such courts are supposed to congregate").

"'At the courthouse' has, in the legislation and decisions of this state, a crystallized and settled meaning in this connection, and means at the 'building occupied and appropriated according to law for the holding of the courts.'" Harris *v.* State, 72 Miss. 960, 965, 18 So. 387, 33 L. R. A. 85.

"Court-house purposes."—"What is meant by the phrase 'court-house purposes,' within the intention of these parties, we need not attempt to define. The customs and usages of a particular State or locality might contribute largely in shaping such a definition. Some of these customs might also be matters so general, and of such common knowledge, as to be the subjects of judicial cognizance, without proof. However this may be, one point is very clear to our mind. No mere incidental and collateral use, to which the lot in question may be temporarily devoted, which does not conflict or interfere with its use by the county for court-house purposes, can be construed to be a breach of the conditions of the deed." Henry *v.* Etowah County, 77 Ala. 538, 540.

"By the 'court house door' of a county is meant either of the principal entrances to the house provided by proper authority for the holding of the District Court; and where from any cause there is no such house, the door of the house where the District Court was last held in that county shall be deemed to be the court house door. Where the court house or house used by the court has been destroyed by fire or other cause, and another has not been designated by the proper authority, the place where such house stood shall be deemed to be the court house door." Tex. Rev. Stat. art. 2310 [*quoted* in Boone *v.* Miller, 86 Tex. 74, 79, 23 S. W. 574]. See also as to the meaning of the words "court-house door," where the court-house had been destroyed by fire, Longworthy *v.* Featherston, 65 Ga. 165, 167 [*quoted* in Harris *v.* State, 72 Miss. 960, 965, 18 So. 387, 33 L. R. A. 85]; Chandler *v.* White, 84 Ill. 435, 440; Alden *v.* Goldie, 82 Ill. 581; Waller *v.* Arnold, 71 Ill. 350, 353.

10. Burrill L. Dict.

11. Held once or twice in every year within a particular hundred, lordship, or manor, before the steward of the leet, for the preservation of the peace, and the punishment of all trivial misdemeanors. Burrill L. Dict.

A grant for years, in reversion, of a court-leet, and court-baron, is good as to the court-baron only; and assumpsit lies for the fees of that office, to which the defendant claimed title. Howard *v.* Wood, 2 Show. 361, 364.

12. Black L. Dict. [*citing* 2 Bl. Comm. 99].

Ancient demesne may be pleaded in ejectment by leave of the court, and upon a proper affidavit. Doe *v.* Roe, 2 Burr. 1046, 1048.

13. Black L. Dict.

14. Rapalje & L. L. Dict. See also Talbot *v.* Three Brigs, 1 Dall. (Pa.) 95, 107, 1 L. ed. 52. And see U. S. *v.* Peters, 5 Cranch 115, 140, 3 L. ed. 53; Ross *v.* Rittenhouse, 2 Dall. (Pa.) 160, 169, 3 L. ed 321.

This was not a common-law court. Talbot *v.* Three Brigs, 1 Dall. (Pa.) 95, 105, 1 L. ed. 52.

15. It decides disputes between members of the chamber of commerce, and between members and outside merchants who voluntarily submit themselves to the jurisdiction of the court. Black L. Dict.

16. 3 Bl. Comm. 65.

17. English L. Dict.

COURT OF ATTACHMENTS. The lowest of the forest courts.[18]

COURT OF AUDIENCE. See AUDIENCE COURT.

COURT OF AUGMENTATION. An English court created in the time of Henry VIII.[19]

COURT OF BANKRUPTCY. An English court of record, having original and appellate jurisdiction in matters of bankruptcy, and invested with both legal and equitable powers for that purpose.[20] (See, generally, BANKRUPTCY; COURTS; INSOLVENCY.)

COURT OF BERGHMOTE. A court not of record which administered justice among the miners of the Peak, in Derbyshire, England.[21]

COURT OF CASSATION. The highest court in France; so termed from possessing the power to quash (*casser*) the decrees of inferior courts.[22] (See CASSATION; and, generally, COURTS.)

COURT OF CHANCERY. See COURTS; EQUITY.

COURT OF CHIVALRY. A court formerly held before the lord high constable and earl marshal of England jointly, and afterwards before the latter only.[23]

COURT OF CLAIMS. See COURTS.

COURT OF CLERK OF THE MARKET. An English court of inferior jurisdiction held in every fair or market for the punishment of misdemeanors committed therein, and the recognizance of weights and measures.[24]

COURT OF COMMISSIONERS OF SEWERS. The name of certain English courts created by commission under the great seal pursuant to the statute of sewers, (23 Hen. VIII, c. 5.)[25]

COURT OF COMMON BENCH. See COMMON BENCH.

COURT OF COMMON PLEAS. See COMMON PLEAS.

COURT OF COMMON PLEAS FOR CITY AND COUNTY OF NEW YORK. The oldest court in the state of New York.[26]

COURT OF CONSISTORY. An ecclesiastical court held by each bishop with appeal to the archbishop.[27]

COURT OF CONSTRUCTION. See CONSTRUCTION, COURT OF.

COURT OF CONVOCATION. See CONVOCATION.

COURT OF CORONER. See CORONERS.

COURT OF COUNTY COMMISSIONERS. In Alabama a court of record, composed of the judge of probate, as principal judge, and four commissioners, who are elected at the times prescribed by law, and hold office for four years.[28] (See, generally, COUNTIES; COURTS.)

COURT OF DELEGATES. Formerly, the great court of appeal in England in all ecclesiastical causes.[29]

COURT OF DUCHY OF LANCASTER. A court of special jurisdiction, held before the chancellor of the duchy or his deputy, concerning all matters of equity relating to lands holden of the king in right of the duchy of Lancaster.[30]

COURT OF EQUITY. See COURTS; EQUITY

COURT OF ERROR. An expression applied especially to the court of exchequer chamber and the house of lords, as taking cognizance of error brought.[31] (See, generally, COURTS.)

18. Burrill L. Dict. [*citing* 3 Bl. Comm. 71, 72; Termes de la Ley].

19. It had jurisdiction over the property and revenue of certain religious foundations, which had been made over to the king by act of parliament, and over suits relating to the same. Black L. Dict.

20. Black L. Dict.

21. English L. Dict.

22. Burrill L. Dict.

23. It had cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. Burrill L. Dict. [*citing* 3 Bl. Comm. 68, 103, 105].

24. Black L. Dict.

25. Black L. Dict.

26. Rapalje & L. L. Dict. Abolished by N. Y. Const. (1895), art. 6, § 5.

27. English L. Dict.

28. Black L. Dict. And see Ala. Civ. Code (1896), § 951.

29. The judicial committee of the privy council is now substituted for this court. Burrill L. Dict.

30. Burrill L. Dict. [*citing* 3 Bl. Comm. 78].

31. Black L. Dict.

In some of the United States the name applied to the court of last resort in the state;

COURT OF ERRORS AND APPEALS. The court of last resort in the state of New Jersey.[32] (See, generally, COURTS.)

COURT OF EXCHEQUER. A very ancient court of record, set up by William the Conqueror as part of the *aula regis*, and afterwards one of the four superior courts at Westminster.[33] (See, generally, COURTS.)

COURT OF EXCHEQUER CHAMBER. The name of a former English court of appeal, intermediate between the superior courts of common law and the house of lords.[34]

COURT OF FACULTIES. An archbishop's court.[35]

COURT OF FIRST INSTANCE. Court of primary jurisdiction.[36]

COURT OF GENERAL JURISDICTION. See COURTS.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. A court of criminal jurisdiction in New Jersey and in England.[37] (See, generally, COURTS; CRIMINAL LAW.)

COURT OF GENERAL SESSIONS. A court of general original jurisdiction in criminal cases in some states.[38] (See, generally, COURTS.)

COURT OF GREAT SESSIONS IN WALES. A court formerly held in Wales.[39]

COURT OF GREEN CLOTH. A court within the King's household having charge of the King's Court and keeping the peace therein.[40]

COURT OF HIGH COMMISSION. An ecclesiastical and admiralty court of appellate jurisdiction established under Henry VIII.[41]

COURT OF HUSTINGS. The county court of London, held before the mayor, recorder and sheriff, but of which the recorder is, in effect, the sole judge;[42] a local court in some parts of Virginia.[43] (See, generally, COURTS.)

COURT OF IMPEACHMENT. A court for the trial of government officials.[44] (See COURT FOR TRIAL OF IMPEACHMENTS; and, generally, OFFICERS.)

COURT OF INQUIRY. See ARMY AND NAVY.

COURT OF JUSTICE SEAT. The principal of the forest courts.[45]

COURT OF JUSTICIARY. A Scotch court of general criminal jurisdiction of all offenses committed in any part of Scotland, both to try causes and to review decisions of inferior criminal courts.[46]

COURT OF KING'S BENCH. The supreme court of common law in the kingdom.[47] (See, generally, COURTS.)

COURT OF LAND REGISTRATION. In Massachusetts, a court of record having exclusive original jurisdiction of all applications for the registration of title to land within the commonwealth, with power to hear and determine all questions arising upon such applications, and of such other questions as may come before it, subject to the right of appeal.[48] (See, generally, COURTS.)

COURT OF LAST RESORT. One from which there is no appeal.[49]

and in its most general sense denotes any court having power to review the decisions of lower courts on appeal, error, certiorari, or other process. Black L. Dict.

32. Formerly, the same title was given to the highest court of appeal in New York. Black L. Dict.

33. The judicature act of 1873 transferred the business and jurisdiction of this court to the "exchequer division" of the "high court of justice." Black L. Dict.

In Scotch law, it was a court which had jurisdiction of matters of revenue, and a limited jurisdiction over cases between the crown and its vassals where no questions of title were involved. Black L. Dict.

34. By the judicature act of 1873 the jurisdiction of this court is transferred to the court of appeal. Black L. Dict.

35. English L. Dict.

36. English L. Dict.

37. Black L. Dict. [*citing* 4 Stephen Comm. 317–320].

38. Black L. Dict.

39. Black L. Dict. [*citing* 3 Stephen Comm. 317 note].

40. It was held in the counting house, at a board covered with green cloth, from which it takes its name. English L. Dict.

41. English L. Dict.

42. Burrill L. Dict.

43. Black L. Dict. [*citing* Smith *v.* Com., 6 Gratt. (Va.) 696].

44. English L. Dict.

45. Black L. Dict.

46. Black L. Dict.

47. It is now merged in the high court of justice under the judicature act of 1873. Black L. Dict.

48. 2 Mass. Rev. Laws (1902), c. 128, § 1.

49. English L. Dict.

COURT OF LAW. See Courts.

COURT OF LIMITED JURISDICTION. See Courts.

COURT OF LORD HIGH STEWARD. A court instituted for the trial, during the recess of parliament, of peers indicted for treason or felony, or for misprision of either.[50]

COURT OF LORD HIGH STEWARD OF THE UNIVERSITIES. A court constituted for the trial of scholars or privileged persons connected with the university at Oxford or Cambridge who are indicted for treason, felony, or mayhem.[51]

COURT OF MAGISTRATES AND FREEHOLDERS. A court formerly established in South Carolina for the trial of slaves and free persons of color for criminal offenses.[52]

COURT OF MARCHES. A court on the marches of Wales having limited jurisdiction.[53]

COURT OF MARSHALSEA. A court which had jurisdiction of all trespasses committed within the verge of the king's court, where one of the parties was of the royal household; and of all debts and contracts, when both parties were of that establishment.[54]

COURT OF MEDIATION AND ARBITRATION. In Michigan a court established by statute for the hearing and settlement of any grievance or dispute of any nature which shall arise between any employer and his employees.[55]

COURT OF NISI PRIUS. A term frequently used as a general designation of any court exercising general, original jurisdiction in civil cases, (being used interchangeably with "trial-court").[56] (See, generally, Courts.)

COURT OF ORDINARY. The name sometimes given to the probate or surrogate's court.[57] (See Court of Probate.)

COURT OF ORIGINAL JURISDICTION. See Courts.

COURT OF OYER AND TERMINER. In English law, a court for the trial of cases of treason and felony. In American law, the name is generally used (sometimes, with additions) as the title, or part of the title, of a state court of criminal jurisdiction, or of the criminal branch of a court of general jurisdiction, being commonly applied to such courts as may try felonies, or the higher grades of crime.[58] (See, generally, Courts.)

COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY. A court of criminal jurisdiction in the state of Pennsylvania.[59]

COURT OF OYER AND TERMINER, GENERAL JAIL DELIVERY, AND COURT OF QUARTER SESSIONS OF THE PEACE, IN AND FOR THE CITY AND COUNTY OF PHILADELPHIA. A court of record of general criminal jurisdiction in and for the city and county of Philadelphia, in the state of Pennsylvania.[60] (See, generally, Courts.)

COURT OF PALACE AT WESTMINSTER. A court which had jurisdiction of personal actions arising within twelve miles of the palace at Whitehall.[61]

COURT OF PASSAGE. An inferior court, possessing a very ancient jurisdiction over causes of action arising within the borough of Liverpool.[62]

COURT OF PECULIARS. A spiritual court in England, being a branch of, and annexed to the Court of Arches,[63] *q. v.*

COURT OF PIEPOUDRE, PIEPOWDERS, or PYPOWDERS.[64] A court held in

50. Black L. Dict.
51. Black L. Dict.
52. Black L. Dict.
53. English L. Dict.
54. It was abolished by 12 & 13 Vict. c. 101, § 13. Black L. Dict.
55. 1 Mich. Comp. Laws (1897), c. 30, § 1.
56. Black L. Dict.
57. Black L. Dict.
58. Black L. Dict. See 5 Cyc. 78, note 81.
59. Black L. Dict. [*citing* Brightly Purd. Dig. Pa. pp. 26, 382, 1201].
60. Black L. Dict.
61. Abolished by 12 & 13 Vict. c. 101. Black L. Dict. [*citing* 3 Stephen Comm. 317 note].
62. It appears to have been also called the "Borough Court of Liverpool." It has the same jurisdiction in admiralty matters as the Lancashire county court. Black L. Dict. [*citing* Roscoe Adm. 75].
63. Burrill L. Dict.
64. Derived from *pied pouldreaux*, a pedlar. Jacob L. Dict.

fairs, to do justice to buyers and sellers, and for redress of disorders committed in them.[65]

COURT OF PLEAS. A court of the county palatine of Durham, having a local common-law jurisdiction.[66]

COURT OF POLICIES OF ASSURANCE. A court established by 43 Eliz. c. 12, to determine in a summary way all causes between merchants, concerning policies of insurance.[67]

COURT OF PRIVATE LAND CLAIMS. A court created by congress, with jurisdiction over claims for lands in the territory acquired from Mexico, based on Mexican title.[68]

COURT OF PROBATE. In England, a court to which the testamentary jurisdiction of ecclesiastical and other courts has been transferred.[69] In America, a court having jurisdiction over the probate of wills, the grant of administration, and the supervision of the management and settlement of the estates of decedents, including the collection of assets, the allowance of claims, and the distribution of the estate.[70] (See, generally, COURTS; EXECUTORS AND ADMINISTRATORS; ORPHANS' COURT; SURROGATE'S COURT; WILLS.)

COURT OF QUARTER SESSIONS OF THE PEACE. A court of criminal jurisdiction in the state of Pennsylvania, having power to try misdemeanors, and exercising certain functions of an administrative nature.[71] (See, generally, COURTS.)

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. See COURTS.

COURT OF REGARDS. One of the forest courts, held every third year for the lawing or expeditation of dogs.[72]

COURT OF REQUESTS. A court, not of record, constituted by act of parliament in the city of London, and other towns, for the recovery of small debts.[73]

COURT OF REVIEW. A court whose principal function is passing upon final decisions of other courts.[74] (See, generally, COURTS.)

COURT OF SESSION. The name of the highest court of civil jurisdiction in Scotland.[75]

COURT OF SESSIONS. Courts of criminal jurisdiction existing in some of the states.[76] (See, generally, COURTS.)

COURT OF SHEPWAY. A court of which the lord warden of the cinque port was judge.[77]

COURT OF SPECIAL JURISDICTION. See COURTS.

COURT OF STANNARIES. A court established in Devonshire and Cornwall, for the administration of justice among the miners and tinners, and that they may not be drawn away from their business to attend suits in distant courts.[78]

COURT OF STAR CHAMBER. An English court of very ancient origin, but newly-modeled by 3 Hen. VII, c. 1, and 21 Hen. VIII, c. 20, consisting of divers

65. So-called because they are most usual in summer, when the suitors to the court have dusty feet; and from the expedition in hearing causes proper thereunto, before the dust goes off the feet of the plaintiffs and defendants. Jacob L. Dict.

66. It was abolished by the judicature act of 1873, which transferred its jurisdiction to the high court. Black L. Dict [*citing* 3 Bl. Comm. 79].

67. Burrill L. Dict.

68. English L. Dict.; 26 U. S. Stat. at L. p. 854, c. 539 [U. S. Comp. Stat. (1901) p. 764].

69. Burrill L. Dict. Established by 20 & 21 Vict. c. 77, §§ 3, 4.

70. In some states the probate courts also have jurisdiction of the estates of minors, including the appointment of guardians and the settlement of their accounts, and of the estates of lunatics, habitual drunkards, and spendthrifts. And in some states these courts possess a limited jurisdiction in civil and criminal cases. They are also called "orphans' courts" and "surrogate's courts." Black L. Dict.

71. Black L. Dict. [*citing* Brightly Purd. Dig. Pa. pp. 26, 383, § 35; p. 1198, § 1].

72. Burrill L. Dict. [*citing* 3 Bl. Comm. 72].

73. Burrill L. Dict.

74. English L. Dict.

75. 37 Alb. L. J. 4; Black L. Dict.

76. Black L. Dict. See 5 Cyc. 82, note 6.

77. English L. Dict.

78. The stannary court is a court of record, with a special jurisdiction. Black L. Dict. [*citing* 3 Bl. Comm. 79].

lords, spiritual and temporal, being privy councillors, together with two judges of the courts of common law, without the intervention of any jury.[79]

COURT OF STEWARD AND MARSHAL. A high court, formerly held in England by the steward and marshal of the king's household.[80]

COURT OF STEWARD OF KING'S HOUSEHOLD. A court which had jurisdiction of all cases of treason, misprision of treason, murder, manslaughter, bloodshed, and other malicious strikings whereby blood is shed, occurring in or within the limits of any of the palaces or houses of the king, or any other house where the royal person is abiding.[81]

COURT OF ST. MARTIN LE GRAND. An ancient, but local, London court so called from the church of that name.[82]

COURT OF SUMMARY JURISDICTION. As defined by statute, any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them or under any other act, or by virtue of his commission, or under the common law.[83]

COURT OF SURVEY. A court for the hearing of appeals by owners or masters of ships, from orders for the detention of unsafe ships, made by the English board of trade, under the merchant shipping act of 1876.[84]

COURT OF SWEINMOTE. One of the forest courts, having a somewhat similar jurisdiction to that of the COURT OF ATTACHMENTS,[85] *q. v.*

COURT OF TEIND. In Scotch law, a court having jurisdiction of tithes, stipends and parish boundaries.[86]

COURT OF TRAILBASTON. A court established by Edward I, with jurisdiction over certain criminal offences, and presided over by justices of Trailbaston.[87]

COURT OF UNIVERSITIES. Courts organized by statute at the universities of Oxford and Cambridge, and having jurisdiction in all personal actions to which any member or servant of the respective university is a party, provided that the cause of action arose within the liberties of the university, and that the member or servant was resident in the university when it arose, and when the action was brought.[88] (See, generally, COURTS.)

COURT OF WARDS AND LIVERIES. A court of record, established in England in the reign of Henry VIII.[89]

COURT RULES. See COURTS.

79. Brown L. Dict.

The jurisdiction extended legally over riots, perjury, misbehavior of sheriffs, and other misdemeanors contrary to the laws of the land; yet it was afterwards stretched to the asserting of all proclamations and orders of state, to the vindicating of illegal commissions and grants of monopolies; holding for honorable that which it pleased, and for just that which it profited, and becoming both a court of law to determine civil rights and a court of revenue to enrich the treasury. It was finally abolished by 16 Car. I, c. 10. Brown L. Dict.

80. Burrill L. Dict. [*citing* 2 Reeve Hist. 235, 247, 249, 415, 420].

81. It was created by 33 Hen. VIII, c. 12, but long since fell into disuse. Black L. Dict. [*citing* 4 Bl. Comm. 276, 277 and notes].

82. English L. Dict.

83. Boulter *v.* Kent, [1897] A. C. 556, 563, 61 J. P. 532, 66 L. J. Q. B. 787, 77 L. T. Rep. N. S. 288, 46 Wkly. Rep. 114. And see Reg. *v.* Glamorganshire, [1892] 1 Q. B. 621, 629 [*citing* 9 Geo. IV, c. 61], where Fry, L. J., said: "The effect seems to be that a 'court of summary jurisdiction' means a justice or justices of the peace acting as such."

84. Black L. Dict.

85. Black L. Dict.

86. English L. Dict.

87. English L. Dict.

88. Black L. Dict. [*citing* 3 Stephen Comm. 299; 19 & 20 Vict. c. 17; 25 & 26 Vict. c. 26, § 12].

Each university court also has a criminal jurisdiction in all offenses committed by its members. Black L. Dict. [*citing* 4 Stephen Comm. 325].

89. Burrill L. Dict. [*citing* Crabb Eng. L. 468; 4 Reeve Eng. L. 258].

COURTS

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CROSS-REFERENCES

For Matters Relating to:
Amicus Curiæ, see AMICUS CURIÆ.
Appearance in Court, see APPEARANCES.
Clerks of Courts, see CLERKS OF COURTS.
Contempt of Court, see CONTEMPT.
Court Commissioners, see COURT COMMISSIONERS.
Deposits in Court, see DEPOSITS IN COURT.
Distribution of Governmental Powers, see CONSTITUTIONAL LAW.
Embracery, see EMBRACERY.
Judges, see JUDGES.
Judicial Notice of Jurisdiction of Courts, see EVIDENCE.
Obstructing Justice, see OBSTRUCTING JUSTICE.
Particular Classes of Courts:
Admiralty Courts, see ADMIRALTY.
Bankruptcy Courts, see BANKRUPTCY.
Consular Courts, see AMBASSADORS AND CONSULS.
Courts For Trial of Impeachments, see OFFICERS.
Courts-Martial, see ARMY AND NAVY; MILITIA; WAR.
Courts of Equity, see EQUITY.
Courts of Inquiry, see ARMY AND NAVY.
Courts of Insolvency, see INSOLVENCY.
Justices of the Peace, see JUSTICES OF THE PEACE.
Naturalization Courts, see ALIENS.
Prize-Courts, see ADMIRALTY.
Power to Determine Constitutional Questions, see CONSTITUTIONAL LAW.
Removal of Cause to Federal Court, see REMOVAL OF CAUSES.
Reports of Judicial Decisions, see REPORTS.
Submission of Controversy, see SUBMISSION OF CONTROVERSY.
Venue, see VENUE.

I. DEFINITIONS.

A. Court Generally. A court[1] has been defined as: A place where justice

1. **Derivation.**— *Curia*, court, is derived *à cura, quia in curiis publicis curas gerebant.* Coke Litt. 58*a*.

The word "court" may be construed to mean "courts." Shaw *v.* McHenry, 52 Iowa 182, 186, 2 N. W. 1076, construing Iowa Code, § 45, subs. 3.

The term "court" has a well understood and accepted meaning. Popular as well as legal parlance impart to it a sense generally recognized and received. *Ex p.* Carson, 5 S. C. 117, 119. The word is used in its technical sense in the provision of the constitution which vests the judicial power in certain courts. State *v.* Woodson, 161 Mo. 444, 61 S. W. 252, 255, construing Mo. Const. art. 6, § 1.

Constituent parts.— As understood in its full modern signification, a court consists of at least three constituent parts; the *actus, reus*, and *judex*. The *actus*, or plaintiff, who complains of any injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial

is judicially administered;[2] the presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place, at an appointed time,

power, which is to examine the truth of the fact, to determine the law arising upon the fact and, if any injury appears to have been done, to ascertain and, by its officers, to apply the remedy. 3 Bl. Comm. 25 [*quoted* in Clayton *v.* Berry, 27 Ark. 129, 134; Union Colony *v.* Elliott, 5 Colo. 371, 381; People *v.* Van Allen, 55 N. Y. 31, 35; Reg. *v.* Bunting, 7 Ont. 118, 125].

Our system of courts and the principles governing them are derived from the common law. But in England the tribunal was called the "*curia*" or "court," because it was held by the king himself originally. The judgments of the court read as the judgments of the king, and when he ceased to hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. Manifestly, there the subject was not responsible for damages for the act of the king. In this country the power vested in the king vests in the body of the people, and the courts sit as their representative. Bridges *v.* McAlister, 106 Ky. 791, 796, 51 S. W. 603, 45 L. R. A. 800.

A judge sitting at chambers is a court, in the proper and usual sense of the term. Foote *v.* Silsby, 9 Fed. Cas. No. 4,917, 1 Blatchf. 542.

A board to try election contests may be a court. Pratt *v.* Breckinridge, 65 S. W. 136, 23 Ky. L. Rep. 1356, 1366, 53 L. R. A. 245.

A master commissioner is not a court, and judicial duties which courts can exercise cannot be conferred upon him. Shoultz *v.* McPheeters, 79 Ind. 373, 376.

Justices of the peace are embraced in the term "courts" within the meaning of the Illinois constitution relative to the administration of justice. Tissier *v.* Rhein, 130 Ill. 110, 144, 22 N. E. 848. But see Waldo *v.* Wallace, 12 Ind. 569, 583, where it is said: "The judicial power is vested in Courts, not in officers. An officer may not necessarily be a Court. A justice of the peace is not necessarily a Court. He is not a Court when elected, simply by virtue of his election, and is not vested, by his election simply, with judicial power. But if the legislature, after or before his election, vest judicial power in that officer, as such, the exercise of which is made the chief and permanent duty of his office, he thus becomes a Court." See also JUSTICES OF THE PEACE.

2. *Alabama.*— *Ex p.* Branch, 63 Ala. 383, 384.

Arkansas.— Dunn *v.* State, 2 Ark. 229, 252, 35 Am. Dec. 54.

California.— Von Schmidt *v.* Widber, 99 Cal. 511, 512, 34 Pac. 109.

Colorado.— Union Colony *v.* Elliott, 5 Colo. 371, 381.

Indiana.— White County *v.* Gwin, 136 Ind. 562, 576, 36 N. E. 237, 22 L. R. A. 402; Shoultz *v.* McPheeters, 79 Ind. 373, 375; Levey *v.* Bigelow, 6 Ind. App. 677, 34 N. E. 128.

Iowa.— Hobart *v.* Hobart, 45 Iowa 501, 503.

Kansas.— Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500, 506, 7 Am. St. Rep. 575.

Kentucky.— Com. *v.* Rodes, 5 T. B. Mon. 318, 334 (dissenting opinion); Venhoff *v.* Morgan, 11 Ky. L. Rep. 276, 278.

Minnesota.— See Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 149, 90 N. W. 378.

Missouri.— State *v.* Woodson, 161 Mo. 444, 453, 61 S. W. 252; Mason *v.* Woerner, 18 Mo. 566, 570.

New Jersey.—Lewis *v.* Hoboken, 42 N. J. L. 377, 379.

New York.—Losee *v.* Dolan, 74 N. Y. Suppl. 685, 688; People *v.* Barrett, 9 N. Y. Suppl. 321, 322, 18 N. Y. Civ. Proc. 230.

Pennsylvania.— Murdy *v.* McCutcheon, 95 Pa. St. 435, 437; King *v.* King, 1 Penr. & W. 15, 19; Com. *v.* Brower, 7 Pa. Dist. 254, 9 Kulp 317, 318.

Tennessee.— Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 505, 19 S. W. 618, where it is said: "The meaning of 'court' depends upon the connectior in which it is used. It may refer to the place where justice is judicially administered."

Texas.— Henderson *v.* Beaton, 52 Tex. 29, 42, dissenting opinion.

West Virginia.— Johnston *v.* Hunter, 50 W. Va. 52, 55, 40 S. E. 448.

United States.— Fuller *v.* Colfax County, 14 Fed. 177, 178, 4 McCrary 535.

England.— 3 Bl. Comm. 23; Coke Litt. 58*a*.

Criticism of definition.— In Hobart *v.* Hobart, 45 Iowa 501, 503 [*quoted* in Shoultz *v.* McPheeters, 79 Ind. 373, 375; *In re* Terrill, 52 Kan. 29, 32, 34 Pac. 457, 39 Am. St. Rep. 327], it is said: "This definition obviously wants fullness; it is limited to the place of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law." In White County *v.* Gwin, 136 Ind. 562, 577, 36 N. E. 237, 22 L. R. A. 402, it is said: "The prominence of the word 'place,' in this definition, no doubt arises from the ancient idea that the king was the fountain and dispenser of justice, and wherever he was domiciled was a court or place where justice was dispensed. In modern times, and under our form of government, the judicial power is exercised by means of courts. . . . A time when, a place where, and the persons by whom judicial functions are to be exercised, are essential to complete the idea of a court. It is

engaged in the full and regular performance of its duties;[3] a body in the government to which the public administration of justice is delegated;[4] an organized

in its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptation of the term. But a court may exist in legal contemplation, without any officers charged with the duty of administering justice." In People *v.* Barrett, 9 N. Y. Suppl. 321, 322, 18 N. Y. Civ. Proc. 230, it is said: "The term 'place' must be understood figuratively, for a court is properly composed of persons consisting of the judge or judges, and other proper officers, united together in a civil organization, and invested by law with the requisite functions for the administration of justice."

"To administer justice judicially, there must be a judge, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court, so that jurisdiction may be acquired over the person or property which forms the subject-matter of the controversy. To administer justice judicially, two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the 'justice to be judicially administered' results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed." Fuller *v.* Colfax County, 14 Fed. 177, 178, 4 McCrary 535.

3. Bouvier L. Dict. [*quoted* in State *v.* Woodson, 161 Mo. 444, 453, 61 S. W. 252; Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 505, 19 S. W. 618; Henderson *v.* Beaton, 52 Tex. 29, 42 (dissenting opinion); Erwin *v.* U. S., 37 Fed. 470, 476, 2 L. R. A. 229].

Open court.— In Hobart *v.* Hobart, 45 Iowa 501, 504, it is said: "The word open, used in the section before us as an adjective qualifying the noun court, is to be understood as conveying the idea in this connection that the court must be in session, organized for the transaction of judicial business. This is its meaning when used elsewhere in the Code. It may, possibly, in this connection, mean public, free to all. If so, such signification would not materially change the force of the expression, and certainly would not require us to understand the term court to imply anything other than a tribunal organized for the administration of justice at the time and place prescribed by law."

Session of court.— Where a statute granted payment to a clerk "for his attendance on the court while actually in session," the court said: "'Court' is here used clearly in the sense of 'term' or 'session' of the court, . . . because it is the term or session of the court which is 'required by law to be held' at a particular time and place." Erwin *v.* U. S., 37 Fed. 470, 476, 2 L. R. A. 229.

4. *Connecticut.*— See Miles *v.* Strong, 68 Conn. 273, 286, 36 Atl. 55.

Idaho.— Rupert *v.* Alturas County, 2 Ida. (Hasb.) 19, 21, 2 Pac. 718.

Illinois.— Tissier *v.* Rhein, 130 Ill. 110, 114, 22 N. E. 848.

Indiana.— See Vigo County *v.* Stout, 136 Ind. 53, 58, 35 N. E. 683, 22 L. R. A. 398.

Kentucky.—Pratt *v.* Breckenridge, 66 S. W. 405, 23 Ky. L. Rep. 1858, 1861.

Michigan.— See Shurbun *v.* Hooper, 40 Mich. 503, 505; Streeter *v.* Paton, 7 Mich. 341.

Missouri.— State *v.* Woodson, 161 Mo. 444, 453, 61 S. W. 252.

Texas.— Henderson *v.* Beaton, 52 Tex. 29, 42, dissenting opinion.

Other similar definitions are: "A body in the government organized for the public administration of justice at the time and place prescribed by law." Steberg *v.* State, 48 Nebr. 299, 312, 67 N. W. 190.

"A tribunal charged, as a substantive duty, with the exercise of judicial power." Waldo *v.* Wallace, 12 Ind. 569, 583.

"A tribunal organized for the purpose of administering justice, and presided over by a judge or judges." Shoultz *v.* McPheeters, 79 Ind. 373, 375.

"A tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law." Von Schmidt *v.* Widber, 99 Cal. 511, 512, 34 Pac. 109 [*quoted* in State *v.* Woodson, 161 Mo. 444, 454, 61 S. W. 252].

"A tribunal whose office and purpose is to administer exact justice as nearly as may be to all parties before it." Hinson *v.* Adrien, 92 N. C. 121, 127.

"A tribunal established for the administration of justice (Pratt *v.* Breckenridge, 66 S. W. 405, 23 Ky. L. Rep. 1858, 1861; People *v.* Van Allen, 55 N. Y. 31, 35; *In re* Huntingdon County Line, 8 Pa. Super. Ct. 380, 391) and composed of one or more persons, assembled under authority of law for the hearing and trial of causes, and the transaction of judicial business (State *v.* Atherton, 19 Nev. 332, 341, 10 Pac. 901), or of one or more judges, who sit for that purpose at fixed times and places, attended by proper officers" (Mason *v.* Woerner, 18 Mo. 566, 570; Butts *v.* Armor, 164 Pa. St. 73, 83, 30 Atl. 357, 26 L. R. A. 213).

"An organization invested by law with certain functions for the administration of justice." People *v.* Barrett, 9 N. Y. Suppl. 321, 322, 18 N. Y. Civ. Proc. 230.

"Persons officially assembled, under authority of law, at the appropriate time and place, for the administration of justice." *In re* Allison, 13 Colo. 525, 528, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790 [*quoted* in White County *v.* Gwin, 136 Ind. 562, 569, 36 N. E. 237, 22 L. R. A. 402].

Courts or tribunals in the nature of courts are the only agencies of the law by which a cause can be heard and determined, they are the only depositaries of judicial power. Without them it lies dormant and inactive in the

body, with defined powers, meeting at certain times and places, for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers, viz., attorneys and counsel, to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure order in its proceedings;[5] a tribunal empowered to hear and determine issues between parties, upon pleadings, either oral or written, and upon evidence to be adduced under well-defined and established rules, according to settled principles of law;[6] an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which, and at a place where it is, by law, authorized to be held, and the performance of some public act indicative of the design to perform the functions of a court;[7] a judicial assembly;[8] an official assembly, legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes.[9] In a broad

sovereignty of the state. Its active and potent existence is inseparable from that of a court. Johnston *v.* Hunter, 50 W. Va. 52, 55, 40 S. E. 448.

Includes police judge.— It is not unconstitutional to apply the word "court" to a tribunal presided over by a police judge. It is an inferior court which the legislature may establish in any corporation, city, or town, or city and county. Boys, etc., Aid Soc. *v.* Reis, 71 Cal. 627, 633, 12 Pac. 796.

5. *Ex p.* Gardner, 22 Nev. 280, 284, 39 Pac. 570 [*quoting* Burrill L. Dict.]; State *v.* Atherton, 19 Nev. 332, 341, 10 Pac. 901 [*quoting* Abbott L. Dict.]; Walsh *v.* Matchett, 6 Misc. (N. Y.) 114, 117, 26 N. Y. Suppl. 43 (dissenting opinion); People *v.* Barrett, 9 N. Y. Suppl. 321, 322, 18 N. Y. Civ. Proc. 230.

"Any court of law."— Where a statute required conveyances of lands made by persons non-residents of the state to be acknowledged "before any court of law," it was said: "'Any court of law' . . . means any person or persons who at the time constituted a court of law in the state where the grantor resided." Loree *v.* Abner, 57 Fed. 159, 164, 6 C. C. A. 302.

6. State *v.* Columbia, 17 S. C. 80, 82.

7. Bacon Abr. tit. Court [*quoted* in *In re* Terrill, 52 Kan. 29, 31, 34 Pac. 457, 39 Am. St. Rep. 327; State *v.* Judge Cir. Dist. Ct., 32 La. Ann. 1256, 1261; Gray *v.* Bostedo, 46 N. J. L. 453, 455; Lewis *v.* Hoboken, 42 N. J. L. 377, 379; Davis *v.* Delaware Tp., 41 N. J. L. 55, 56]; *In re* Lawyer's Tax Cases, 8 Heisk. (Tenn.) 565, 650 [*citing* Bouvier L. Dict.].

Essential elements of time, place, and officers.— In Dunn *v.* State, 2 Ark. 229, 252, 35 Am. Dec. 54, it is said: "And therefore to constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place, must be there for that purpose. Then, but not otherwise, there is a court, and the judicial power of the State may be there exercised by the judge or person authorized by law to hold it." And see State *v.* Woodson, 161 Mo. 444, 453, 61 S. W. 252; Johnston *v.* Hunter, 50 W. Va. 52, 55, 40 S. E. 448. In Williams *v.* Reutzel, 60 Ark. 155, 158, 29 S. W. 374 [*citing* Dunn *v.* State, 2 Ark. 229, 252, 35 Am. Dec. 54], it is said: "The meeting together of the judge and officers of a court at the place, but not at the time, fixed by law for holding the court, was not a court under our constitution and law, but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void." And see Brumley *v.* State, 20 Ark. 77, 84; Walsh *v.* Matchett, 6 Misc. (N. Y.) 114, 117, 26 N. Y. Suppl. 43. In Venhoff *v.* Morgan, 11 Ky. L. Rep. 276, 278, it is said: "Certainty, both as to time and place, is essential to the conception of a court of justice; it would be eminently Caligulan could it act when and where it pleases the judge. Without recourse to the notion of a court as a sort of incorporate entity it is obvious that a judge does not at all times and places constitute a court, and that he can not, when he pleases, assert and enforce his judicial power. He becomes a judge when he is appointed or elected, but he becomes a court only when at the time and place designated by law he performs judicial duties. As said in Dunn *v.* State, 2 Ark. 229, 252, 35 Am. Dec. 54, the time and place designated by law and the presence of the judge there acting judicially are the 'union and combination of circumstances' which constitute a court. Jurisdiction is not predicated of the judge but of the court." And see King *v.* King, 1 Penr. & W. (Pa.) 15, 19, where it is said: "It is difficult to conceive of the office of a judge, without at the same time associating with it the idea of a place for the performance of its duties." But if the law should not, however, appoint a place for sitting of a court, it would doubtless rest in the power of the judge to appoint the time and place of sitting; and the only limitation of the power would be, that the place should be within the territory of his jurisdiction. But when the law prescribes the time and place time and place are as essential elements of jurisdiction, as subject-matter and parties. *Ex p.* Branch, 63 Ala. 383, 384 [*citing* Wightman *v.* Karsner, 20 Ala. 446].

8. State *v.* Woodson, 161 Mo. 444, 453, 61 S. W. 252.

9. Webster Dict. [*quoted* in Shoultz *v.* McPheeters, 79 Ind. 373, 376].

sense the term may include a judge,[10] and a jury,[11] as well as a judge and a clerk.[12]

B. Courts of General and Courts of Limited or Special Jurisdiction. Courts of general jurisdiction are courts which take cognizance of all causes, civil or criminal, of a particular nature.[13] Courts of limited or special jurisdiction are those which can take cognizance of a few specified matters only.[14]

C. Courts of Original and Courts of Appellate Jurisdiction. Courts of original jurisdiction are those in which an action has its first source or existence,

10. *California.*— Von Schmidt *v.* Widber, 99 Cal. 511, 513, 34 Pac. 109. See also Brewster *v.* Ludekins, 19 Cal. 162.

Colorado.— *Compare* Gruner *v.* Moore, 6 Colo. 526, 529, where it is said: "It was contended by counsel for petitioner, in argument, that the term 'court,' as here used, admits of a meaning synonymous with that of 'judge.' We cannot think that the statute was intended to admit of such a construction. The words court and judge seem to be here employed with the peculiar significance which ordinarily attaches to each term distinctively."

Georgia.— See Rodgers *v.* Price, 105 Ga. 67, 68, 31 S. E. 126.

Indiana.— Pressley *v.* Lamb, 105 Ind. 171, 185, 4 N. E. 682 (where it is said: "In a legal sense, the judge of a court is the court; certainly, there can be no court, under our laws, constitutional or statutory, without a judge. So nearly akin are the two words 'court' and 'judge,' in legal parlance, that, as they are used in the sections of the code now under consideration, they may well be regarded as synonyms, each of the other"); Michigan Cent. R. Co. *v.* Northern Indiana R. Co., 3 Ind. 239, 245 [*quoted* in Shoultz *v.* McPheeters, 79 Ind. 373, 375; Levey *v.* Bigelow, 6 Ind. App. 677, 34 N. E. 128].

Mississippi.— Louisville, etc., R. Co. *v.* McDonald, 79 Miss. 641, 643, 31 So. 417 [*citing* Brewster *v.* Ludekins, 19 Cal. 162, 170], where it is said: "The word 'court' is often used interchangeably with the word 'judge.'"

Missouri.— State *v.* Woodson, 161 Mo. 444, 453, 61 S. W. 252 (where it is said: "The judge of the court is its presiding officer. While the judge is often called the 'court' yet he is only so rightly called when the tribunal over which he presides is in session"); McClure *v.* McClurg, 53 Mo. 173, 175.

Nebraska.— Porter *v.* Flick, 60 Nebr. 773, 84 N. W. 262 [*citing In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730].

New York.— People *v.* Molineux, 168 N. Y. 264, 329, 61 N. E. 286 (where it is said: "The word 'court' in the statutes is used in its generic sense, and includes both judge and jury in a case where a jury is present"); Matter of Brenner, 35 Misc. 212, 217, 70 N. Y. Suppl. 744 [*citing* Goddard *v.* State, 2 Yerg. (Tenn.) 96, 104].

Tennessee.—See Lawyer's Tax Cases, 8 Heisk. 565, 650, where it is said: "In another sense, the judges, clerk or prothonotary, counsellors and ministerial officers are said to constitute the court."

West Virginia.— See Carper *v.* Cook, 39 W. Va. 346, 348, 19 S. E. 379.

England.— Wilson *v.* Hood, 3 H. & C. 148, 152, where it is said that the word "'Judge' must mean one who in himself constitutes the Court, and not a Judge sitting at Nisi prius."

The judge and officers of the court are, of course, constituents of its organization, but they are not the court except when regularly convened at the time and place prescribed by law for the exercise of their several functions. People *v.* Barrett, 9 N. Y. Suppl. 321, 18 N. Y. Civ. Proc. 230 [*quoted* in Walsh *v.* Matchett, 6 Misc. (N. Y.) 114, 117, 26 N. Y. Suppl. 43].

11. People *v.* Molineux, 168 N. Y. 264, 329, 61 N. E. 286; Matter of Brenner, 35 Misc. (N. Y.) 212, 217, 70 N. Y. Suppl. 744 [*citing* Goddard *v.* State, 2 Yerg. (Tenn.) 96, 104]; Gold *v.* Vermont Cent. R. Co., 19 Vt. 478, 482.

"The court trying the cause" as used in a statute, would be the judge and jury. Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 506, 19 S. W. 618. See also State *v.* Schlitz Brewing Co., 104 Tenn. 715, 739, 59 S. W. 1033, 78 Am. St. Rep. 941.

12. Gold *v.* Vermont Cent. R. Co., 19 Vt. 478, 482.

13. Kinney L. Dict.

A court of general jurisdiction, whether named in the constitution or established in pursuance of the provisions of the constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government. Vigo County *v.* Stout, 136 Ind. 53, 59, 35 N. E. 683, 22 L. R. A. 398.

The division of courts, recognized at common law, was superior or courts of general jurisdiction, and inferior, or courts of limited jurisdiction. Superior courts derived much of their jurisdiction from the common law. Inferior courts derived their whole existence and jurisdistion from the statutes constituting them. *Ex p.* Roundtree, 51 Ala. 42, 44. See also Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

14. Bouvier L. Dict.

Another definition is: "One the jurisdiction of which is limited to special cases." English L. Dict.

The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 185, 3 L. ed. 70 [*quoted* in *Ex p.* Watkins, 3 Pet. 193, 205, 7 L. ed. 650]. And see *infra*, XII, A, 3.

and which do not take jurisdiction of it by appeal.[15] Courts of appellate jurisdiction are those which review causes removed by appeal or error from another court.[16]

D. Courts of Equity and Courts of Law. Courts of equity are those which have jurisdiction in cases where the parties have only equitable rights.[17] Courts of law are courts having jurisdiction of actions and suits at law as distinguished from courts of equity.[18]

E. Courts of Record and Courts Not of Record. A court of record[19] has been defined as a court where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony,[20] and which has power to fine and imprison for contempt of its authority;[21] a court that is bound to keep a

15. Abbott *v.* Knowlton, 31 Me. 77, 79.

The phrase "original jurisdiction" does not mean exclusive jurisdiction; two or more courts may have original jurisdiction of the same actions. Abbott *v.* Knowlton, 31 Me. 77, 79.

16. Kinney L. Dict.

17. 4 Bouvier Inst. 73, No. 2535 [*citing* 1 Story Eq. c. 2].

18. English L. Dict.

Another definition is: "Any court which administers justice according to the principles and forms of the common law." Anderson L. Dict.

"Courts having common law jurisdiction are such as exercise their powers according to the course of the common law." People *v.* McGowan, 77 Ill. 644, 648, 20 Am. Rep. 254 [*quoted* in Dean, Petitioner, 83 Me. 489, 496, 22 Atl. 385, 13 L. R. A. 229]. See also Matter of Conner, 39 Cal. 98, 2 Am. Rep. 427.

19. Called in law French, court *que porte* record; a court which bears record. Burrill L. Dict.

"Recordum, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or dammage amounts to fortie shillings or above, which wee call Courts of Record and are created by parliament, letters patent, or prescription. . . . But legally records are restrained to the rolles of such only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legemet consuetudinem Angliæ*." Coke Litt. 260*a* [*quoted* in Planters', etc., Bank *v.* Chiply, 1 Ga. Dec. 50, 51].

All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine and imprison; so that the very erection of a new jurisdiction, with the power of fine and imprisonment, makes it a court of record. 3 Bl. Comm. [*quoted* in Planters', etc., Bank *v.* Chipley, 1 Ga. Dec. 50, 51; Young *v.* Woodcock, 5 N. Brunsw. 554, 558].

20. *California.*— Hahn *v.* Kelly, 34 Cal. 391, 422, 94 Am. Dec. 742.

Georgia.— Planters', etc., Bank *v.* Chipley, 1 Ga. Dec. 50, 51.

New Mexico.— Bucher *v.* Thompson, 7 N. M. 115, 118, 32 Pac. 498.

New York.— Hutkoff *v.* Demorest, 103 N. Y. 377, 386, 8 N. E. 899, 10 N. E. 535; Wheaton *v.* Fellows, 23 Wend. 372, 377.

Ohio.— Adair *v.* Rogers, Wright 428, 429, where it is said: "We have no parchment or roll, but a book of records of paper, in which alone our judicial proceedings are preserved."

United States.— The Thomas Fletcher, 24 Fed. 481, 482.

Canada.— Young *v.* Woodcock, 5 N. Brunsw. 554, 558.

The privilege of having these enrolled memorials constitutes the great leading distinction in English and American law between courts of record, and courts not of record, or, as they are frequently designated, superior and inferior courts. In the United States paper has universally supplied the place of parchment as the material of the record, and the roll form has, on that account, fallen into disuse; but in other respects the forms of the English records have, with some modifications, been generally adopted. But whether in parchment or paper, in the roll form or otherwise, this judgment-roll is what is known in law as the record — the technical record — and is what is meant by courts and law writers when they speak of records of superior courts, or courts of record. This technical record is the only strict and proper proof of the proceedings of the courts in which they are preserved and are regarded in law as proof of so absolute a nature as to admit of no contradiction. In the language of Lord Coke, "they import in themselves such incontrollable credit and verity, as they admit no averment, plea or proof to the contrary." Hahn *v.* Kelly, 34 Cal. 391, 423, 94 Am. Dec. 742 [*citing* 3 Bl. Comm. 24; Burrill L. Dict.; Coke Litt. 260*a*; 3 Stephen Comm. 583].

21. Bucher *v.* Thompson, 7 N. M. 115, 118, 32 Pac. 498. In Groenvelt *v.* Burwell, 1 Salk. 200, Holt, C. J., said: "Wherever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges: And wherever there is a jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record."

Other similar definitions are:. "Any juris-

record of its proceedings, and that may fine or imprison;[22] a judicial, organized tribunal, having attributes, and exercising functions, independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law;[23] a court having a seal.[24] Courts not of record are those of inferior dignity, which have no power to fine or imprison, and in which the proceedings are not enrolled or recorded.[25]

F. Civil and Criminal Courts. Civil courts are those which are authorized by the common law, or by the constitution or statute, to decide upon all civil actions, and disputes between persons, in their private capacity; whether such matters relate to the persons of the parties, or to their personal or real property.[26] Criminal courts are those established for the repression of crimes and for their punishment.[27]

G. Superior and Inferior Courts. A superior court is a court with controlling authority over some other court or courts, and with certain original jurisdiction of its own.[28] Inferior courts are those which are subordinate to other courts or those of a very limited jurisdiction.[29] According to the technical mean-

diction which has power to fine and imprison." Wahrenberger *v.* Horan, 18 Tex. 57, 59.

"A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the common law." Woodman *v.* Somerset, 37 Me. 29, 38; Bucher *v.* Thompson, 7 N. M. 115, 118, 32 Pac. 498.

A power to fine and imprison is sometimes stated as the distinguishing characteristic; but as such power may be given by special statute, or otherwise, it is no certain test. Thayer *v.* Com., 12 Metc. (Mass.) 9, 11.

22. Hooker *v.* State, 7 Blackf. (Ind.) 272, 273.

"A court of record necessarily requires some duly authorized person to record the proceedings." *Ex p.* Cregg, 6 Fed. Cas. No. 3,380, 2 Curt. 98.

23. *Ex p.* Thistleton, 52 Cal. 220. 224; Dean, Petitioner, 83 Me. 489, 494, 22 Atl. 385, 13 L. R. A. 229; Thayer *v.* Com., 12 Metc. (Mass.) 9, 11; *Ex p.* Gladhill, 8 Metc. (Mass.) 168, 170; U. S. *v.* Hall, 5 N. M. 178, 182, 21 Pac. 85.

24. Ingoldsby *v.* Juan, 12 Cal. 564, 580. But see Hutkoff *v.* Demorest, 103 N. Y. 377, 386, 8 N. E. 899, 10 N. E. 535.

Designation by statute.— Courts may be designated by statute as courts of record. Thus a probate court (Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; Sheldon *v.* Newton, 3 Ohio St. 494; State *v.* Burnside, 33 S. C. 276, 11 S. E. 787), a municipal court (Shaffel *v.* State, 97 Wis. 377, 78 N. W. 888), a justice's court (Hooker *v.* State, 7 Blackf. (Ind.) 272; Hinchman *v.* Cook, 20 N. J. L. 271; State *v.* Daily, 14 Ohio 91; Adair *v.* Rogers, Wright (Ohio) 428. But see Thomas *v.* Robinson, 3 Wend. (N. Y.) 267), or a board of county commissioners (State *v.* Conner, 5 Blackf. (Ind.) 325. But see Brumfield *v.* Douglas County, 2 Nev. 65) may be a court of record.

25. Burrill L. Dict. [*citing* 3 Stephen Comm. 384].

A court, not of record, is where it cannot hold plea of debt or damages amounting to forty shillings, but of pleas under that sum; or where the proceedings are not according to the course of the common law, nor enrolled; as the county court, and the court baron, etc. Jacob L. Dict. [*citing* 1 Inst. 117, 260; 4 Rep. 52]. All courts which do not come within the definition of a court of record, are courts not of record. 4 Bouvier Inst. 68, No. 2524.

26. 4 Bouvier Inst. 71, No. 2530.

Another definition is: "A court instituted for the enforcement of private rights and the redress of private wrongs." Anderson L. Dict.

27. 4 Bouvier Inst. 71, No. 2531.

Another definition is: "One with jurisdiction to hear and determine criminal charges." English L. Dict.

28. Anderson L. Dict.

A court in some of the United States between the inferior and supreme courts, the jurisdiction of which is fixed by statute. English L. Dict.

To constitute a court, a superior court, as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential, to enable the court to take cognizance of them, is the acquisition of jurisdiction of the persons of the parties. Simons *v.* De Bare, 4 Bosw. (N. Y.) 547, 553.

29. Bailey *v.* Winn, 113 Mo. 155, 159, 20 S. W. 21 [*citing* Bouvier L. Dict.].

All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 185, 3 L. ed. 70 [*quoted* in *Ex p.* Watkins, 3 Pet. (U. S.) 193, 205, 7 L. ed. 650; McCormick *v.* Sullivant, 10 Wheat. (U. S.) 192, 199, 6 L. ed. 300]. See also Sanders *v.* State, 55 Ala. 42;

ing of the term, inferior courts are those the judgments of which, standing alone, are mere nullities, and in order to give them validity their proceedings must show their jurisdiction.[30]

H. Local Courts. Local courts are those which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony.[31]

II. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

A. Definitions — 1. JURISDICTION GENERALLY. Jurisdiction[32] has been defined as: The power to hear and determine a cause;[33] the power to hear and determine

Ex p. Roundtree, 51 Ala. 42; Nugent *v.* State, 18 Ala. 521.

A circuit court, although an inferior court, in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules, which the caution, or jealousy, of the courts at Westminster, long applied to courts of that denomination; but are entitled to as liberal intendments, or presumptions, in favor of their regularity, as those of any supreme court. Turner *v.* Enrille, 4 Dall. (U. S.) 7, 11, 1 L. ed. 717.

The test of inferiority may be solved by showing that the court is either placed under the supervisory or appellate control of other courts, or that the jurisdiction as to the subsequent matter is limited and confined. Bailey *v.* Winn, 113 Mo. 155, 159, 20 S. W. 21 [*citing* State *v.* Daniels, 66 Mo. 192, 201].

In England an inferior court is a court which is not one of the four great courts of the realm; that is, the court of chancery and the three great common-law courts sitting at Westminster. Tomlin L. Dict. [*quoted* in Swift *v.* Wayne Cir. Judges, 64 Mich. 479, 480, 31 N. W. 434].

30. Nugent *v.* State, 18 Ala. 521, 524 [*quoted* in Sanders *v.* State, 55 Ala. 42, 44], where it is said: "But all courts, from which an appeal or writ of error lies, are inferior courts in relation to the court before which their judgments may be carried, and by which they may be reviewed, annulled, or affirmed. *Ex p.* Watkins, 3 Pet. (U. S.) 193, 205, 7 L. ed. 650. It is in this latter sense that the framers of our constitution used the words 'inferior courts.' They meant thereby courts, whose judgment could be reviewed, and their errors corrected by another and a higher tribunal." See also *infra*, II, H, 3.

31. Bouvier L. Dict.

32 The word "jurisdiction" (*jus dicere*) is a term of large and comprehensive import. Hopkins *v.* Com., 3 Metc. (Mass.) 460, 462. The very word in its origin imports much; it is derived from *juris* and *dico*; I speak by the law. And that sentence ought to be inscribed in living light on every tribunal of criminal power. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. Mills *v.* Com., 13 Pa. St. 627, 629 [*quoted* in Johnston *v.* Hunter, 50 W. Va. 52, 54, 40 S. E. 448].

Distinguished from judgment.— Between judgment and jurisdiction there is, however, a clear distinction. The one is, the decision of the law, given by the court as a result of proceedings therein instituted; the other has reference to the power conferred to take cognizance of, and determine causes according to law, and to carry the same into execution. Lampson *v.* Platt, 1 Iowa 556, 558.

A plain distinction must be observed between jurisdiction and the exercise of jurisdiction. A court may have the right and power to determine the status of a thing, and yet may exercise its authority erroneously. After jurisdiction attaches in any case, all that follows is exercise of jurisdiction. Wells *v.* Clarkson, 5 Mont. 336, 343, 5 Pac. 894.

33. *Alabama.*— Goodman *v.* Winter, 64 Ala. 410, 431, 38 Am. Rep. 13; Woodruff *v.* Stewart, 63 Ala. 206, 211 (where it is said: "And it exists whenever an officer or tribunal is by law clothed with the capacity 'to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power'"); Lamar *v.* Gunter, 39 Ala. 324, 328.

California.—*Ex p.* Bennett, 44 Cal. 84, 88; Central Pac. R. Co. *v.* Board of Equalization, 43 Cal. 365, 368; Hickman *v.* O'Neal, 10 Cal. 292, 295.

Illinois.— Bush *v.* Hanson, 70 Ill. 480, 482.

Indiana.— Worthington *v.* Dunkin, 41 Ind. 515, 520.

Ohio.— Sheldon *v.* Newton, 3 Ohio St. 494, 499.

Vermont.— Perry *v.* Morse, 57 Vt. 509, 513; Vaughn *v.* Congdon, 56 Vt. 111, 127, 48 Am. Rep. 758, dissenting opinion.

West Virginia.— Johnston *v.* Hunter, 50 W. Va. 52, 54, 40 S. E. 448 [*citing* Quarl *v.* Abbett, 102 Ind. 233, 239, 1 N. E. 476, 52 Am. Rep. 662; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547].

United States. — Nash *v.* Williams, 20 Wall. 226, 22 L. ed. 254; Grignon *v.* Astor, 2 How. 319, 338, 11 L. ed. 283; U. S. *v.* Arredondo, 6 Pet. 691, 709, 8 L. ed. 547; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396.

See 13 Cent. Dig. tit. "Courts," § 1.

It is the power to do both or either — to hear without determining, or to determine

a cause — the authority by which judicial officers take cognizance of and decide them;[34] the power to hear and determine the particular case involved;[35] the power of a court or a judge to entertain an action, petition, or other proceeding;[36] the legal power of hearing and determining controversies;[37] the power conferred by law to determine causes concerning certain subjects, and between parties legally before the court, by process and notice, actual or constructive;[38] a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law, and to carry his sentence into execution;[39] the power and authority to declare the law;[40] the right of administering justice through the laws;[41] authority to judge or declare the law between parties brought into court;[42] the power to hear and determine the subject-matter in controversy between parties to the suit; to adjudicate or exercise any judicial power over them.[43] As applied to a particular claim or controversy, jurisdiction is the power to hear and determine that controversy.[44] The term imports authority to expound or apply the laws, and excludes the idea of power to make the laws.[45] The term also means the district or geographical limits within which the judgments or orders of a court can be enforced or executed.[46]

2. GENERAL AND LIMITED OR SPECIAL JURISDICTION. General jurisdiction extends to all cases comprised within a class or classes of causes.[47] Limited or special

without hearing. *Ex p.* Bennett, 44 Cal. 84, 88 [*quoted* in Brownsville *v.* Basse, 43 Tex. 440, 449].

Any movement of the court is the cause of an exercise of jurisdiction. Grignon *v.* Astor, 2 How. (U. S.) 319, 338, 11 L. ed. 283; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 718, 9 L. ed. 1233 [*quoted* in Vaughn *v.* Congdon, 56 Vt. 111, 127, 48 Am. Rep. 758, dissenting opinion].

It is coram judice whenever a case is presented which brings the power to hear and determine a cause into action. Goodman *v.* Winter, 64 Ala. 410, 431, 38 Am. Rep. 13; Lamar *v.* Gunter, 39 Ala. 324; Bush *v.* Hanson, 70 Ill. 480; Gray *v.* Bowles, 74 Mo. 419, 423; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 718, 9 L. ed. 1233; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 709, 8 L. ed. 547; Grignon *v.* Astor, 2 How. (U. S.) 319, 338, 11 L. ed. 283; *In re* Bogart, 3 Fed. Cas. No. 1,596, 2 Sawy. 396.

34. Brownsville *v.* Basse, 43 Tex. 440, 449 [*citing* Sheldon *v.* Newton, 3 Ohio St. 494; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547].

35. Bassick Min. Co. *v.* Schoolfield, 10 Colo. 46, 50, 14 Pac. 65; Gray *v.* Bowles, 74 Mo. 419, 423; Babb *v.* Bruere, 23 Mo. App. 604. 606. See also Munday *v.* Vail, 34 N. J. L. 418.

The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. Quarl *v.* Abbett, 102 Ind. 233, 239, 1 N. E. 476, 52 Am. Rep. 662 [*cited* in Johnston *v.* Hunter, 50 W. Va. 52, 54, 40 S. E. 448].

36. Perry *v.* Morse, 57 Vt. 509, 513 [*quoting* Rapalje & L. L. Dict.].

37. Huber *v.* Beck, 6 Ind. App. 47, 32 N. E. 1025, where it is said: "As the derivatives of the word import, it is the law declaring or speaking. Jurisdiction of the subject-matter always comes from the law, it cannot be waived nor conferred by consent of the parties or their counsel."

38. House *v.* Williams, 40 Tex. 346, 358.

39. Johnson *v.* Jones, 2 Nebr. 126, 135 [*citing In re* Ferguson, 9 Johns. (N. Y.) 239].

40. Mills *v.* Com., 13 Pa. St. 627, 629 [*quoted* in Johnston *v.* Hunter, 50 W. Va. 52, 54, 40 S. E. 448].

41. Mills *v.* Com., 13 Pa. St. 627, 629 [*quoted* in Johnston *v.* Hunter, 50 W. Va. 52, 54, 40 S. E. 448].

42. *In re* Pierce, 44 Wis. 411, 454 [*quoting* Bracton 5, c. 1, f. 400].

43. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 718, 9 L. ed. 1233.

44. Central Pac. R. Co. *v.* Board of Equalization, 43 Cal. 365, 368.

45. Glenn *v.* York County Com'rs, 6 S. C. 412, 441, where it is said: "This word is often used in a broader sense, but when employed for the purpose of indicating a partition of powers among the different departments of the government must be used in a strict sense."

The test of jurisdiction is, whether the tribunal had power to enter upon the inquiry, not whether its methods were regular, its findings right, or its conclusions in accordance with the law. Johnson *v.* Miller, 50 Ill. App. 60, 70.

46. Sweet L. Dict. [*citing In re* Smith, L. R. 1 P. D. 300, 301].

The space or extent of country over which the judge is entitled to exercise the power of judging. Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42, 43.

Within the jurisdiction of the court is meant within the state. Stevens *v.* Irwin, 12 Cal. 306, 308.

47. Anderson L. Dict.

General jurisdiction in law and equity is jurisdiction of every kind that a court can possess, of the person, subject-matter, territorial, and generally the power of the court

jurisdiction on the other hand is jurisdiction which is confined to particular causes.[48]

3. ORIGINAL AND APPELLATE JURISDICTION. Original jurisdiction is jurisdiction conferred upon, or inherent in, a court in the first instance.[49] Appellate jurisdiction is the power and authority conferred upon a superior court to rehear and determine causes which have been tried in inferior courts.[50]

4. EXCLUSIVE AND CONCURRENT OR COORDINATE JURISDICTION. Exclusive jurisdiction is jurisdiction confined to a particular tribunal or grade of courts.[51] Concurrent or coördinate jurisdiction is that jurisdiction exercised by different courts at the same time over the same subject-matter and within the same territory, and wherein litigants may, in the first instance, resort to either court indifferently.[52]

5. CRIMINAL AND CIVIL JURISDICTION. Criminal jurisdiction is that which exists for the punishment of crimes.[53] Civil jurisdiction is that which exists when the subject-matter is not of a criminal nature.[54]

6. TERRITORIAL JURISDICTION. Territorial jurisdiction is the power of the tribunal considered with reference to the territory within which it is to be exercised.[55]

B. Source of Jurisdiction and Right to Assume Jurisdiction — 1. IN GENERAL. Jurisdiction in the general sense as applied to the subject-matter of a suit at law or equity is always conferred by law, and it is error to suppose that the power to decide in any case rests solely upon the averments in a pleading.[56] State courts as a general rule derive their jurisdiction from the constitution of the state.[57] And although they may possess implied and resulting powers from

in the discharge of its judicial duties. Bouvier L. Dict. [*citing* Mussen *v.* Ausable Granite Works, 63 Hun (N. Y.) 367, 18 N. Y. Suppl. 267].

48. Anderson L. Dict.

Limited jurisdiction (called also special and inferior) is that which extends only to certain specified causes. Bouvier L. Dict. [*cited* in State *v.* Daniels, 66 Mo. 192, 201].

49. Anderson L. Dict.

Another definition is: "That bestowed upon a tribunal in the first instance." Bouvier L. Dict.

50. Brownsville *v.* Basse, 43 Tex. 440, 449 [*quoting* Bouvier L. Dict.]. See also APPELLATE JURISDICTION, 3 Cyc. 536.

51. Anderson L. Dict.

Another definition is: "That which gives to one tribunal sole power to try the cause." Bouvier L. Dict.

Exclusive jurisdiction as given by statute to a police court, taken by itself alone, is a grant only of exclusive authority to try, or to examine and bold for trial, those who are charged with the offenses of which such court has cognizance. Com. *v.* O'Connell, 8 Gray (Mass.) 464, 468.

52. Hercules Iron Works *v.* Elgin, etc., R. Co., 141 Ill. 491, 498, 30 N. E. 1050.

Another definition is: "That which is possessed over the same parties or subject-matter at the same time by two or more separate tribunals." Bouvier L. Dict.

Concurrent jurisdiction on the river as conferred by an act of congress is jurisdiction which "pertains only to acts or causes of action on the water or in some way connected with the navigation thereof, or floatable purposes of some kind, or to the service of process upon persons while on the water in some sense." Roberts *v.* Fullerton, (Wis. 1903) 93 N. W. 1111, 1114. See also Com. *v.* Garner, 3 Gratt. (Va.) 624.

53. Bouvier L. Dict. See, generally, CRIMINAL LAW.

54. Bouvier L. Dict.

55. Bouvier L. Dict.

The tract of land or district within which a court, judge, or magistrate has jurisdiction is called his "territory," and his power in relation to his territory is called his "territorial jurisdiction." 4 Bouv. Inst. 72, No. 2,532.

56. Thomas *v.* People, 107 Ill. 517, 47 Am. Rep. 458.

Mere assumption of jurisdiction by an inferior court where there is no compliance with statutory prerequisites will not establish jurisdiction. Van Loon *v.* Lyons, 61 N. Y. 22.

In courts created by statute jurisdiction of the subject-matter can be conferred only by statute. Thorp *v.* Porter, 70 Vt. 570, 41 Atl. 657.

A rule of court cannot confer jurisdiction on another court. Bell *v.* O'Rourke, 11 La. 124. So a ratification of an invalid judgment of one court by another will be inoperative, as one court cannot enlarge the powers of another. Hously *v.* Lindsay, 10 Heisk. (Tenn.) 651; Allen *v.* Van Rosenberg, (Tex. Sup. 1891) 16 S. W. 1096.

57. McNealy *v.* Gregory, 13 Fla. 417; Rencher *v.* Anderson, 93 N. C. 105; Messner *v.* Giddings, 65 Tex. 301; Teel *v.* Yancey, 23 Gratt. (Va.) 691; Griffin *v.* Cunningham, 20 Gratt. (Va.) 31.

The jurisdiction of a court is determined by the rights of the complainant and not those of defendant. Jersey City *v.* Gardner, 33 N. J. Eq. 622. And the power of the court to entertain jurisdiction of an action

a general grant of jurisdiction they possess no inherent powers.[58] Again they cannot decline jurisdiction conferred upon them nor assume that which is not conferred.[59]

2. Of Cause of Action — a. In General. Where a cause of action is necessarily local the territorial jurisdiction will be exclusive,[60] and if there is no right to recover for an injury to a person or property in the state or territory where the injury is alleged to have been inflicted, no courts in any other state will assume jurisdiction of an action to recover therefor.[61] Again if different causes of action are alleged in a complaint, of some of which the court has jurisdiction and of others not, the case may be tried as to those of which the court has jurisdiction.[62] But by the waiver of the tort and suing in assumpsit jurisdiction will not be conferred upon a court which did not originally possess it.[63]

b. Place Where Cause of Action Accrues. Jurisdiction may be determined by the place where the injury is received,[64] as in the case of injury to the person,[65] to personal property,[66] or to real property.[67] In the case of contracts made in one state to be performed in another, a cause of action thereon will accrue in the latter state.[68]

or proceeding does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not. Fischer *v.* Langbein, 103 N. Y. 84, 8 N. E. 251. Again where certain facts should exist as a necessary prerequisite to give a court jurisdiction they should exist at or before the time such jurisdiction is assumed. Carney *v.* Taylor, 4 Kan. 178. The proper test of jurisdiction is whether the court had power to enter on the inquiry. Johnson *v.* Miller, 50 Ill. App. 60. Jurisdiction may depend on the existence of one of two or more alternative facts or conditions. Clason *v.* Corley, 5 Sandf. (N. Y.) 454. See also Peck *v.* Dickey, 5 Misc. (N. Y.) 95, 24 N. Y. Suppl. 834, 23 N. Y. Civ. Proc. 210 [*construing* N. Y. Code Civ. Proc. § 340].

58. McNealy *v.* Gregory, 13 Fla. 417; Messner *v.* Giddings, 65 Tex. 301.

59. McNealy *v.* Gregory, 13 Fla. 417. See also O'Fallon *v.* Elliott, 1 Mo. 364; Cowan *v.* Nixon, 28 Tex. 230.

And where jurisdiction and judicial powers are so conferred they are not subject to legislative control unless such power is expressly conferred upon the legislature. Rencher *v.* Anderson, 93 N. C. 105. See Cullen *v.* Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047. Nor is the jurisdiction of courts a part of the obligations of a contract. McNealy *v.* Gregory, 13 Fla. 417.

60. Cragin *v.* Quitman, 22 Hun (N. Y.) 101. *Compare* Holmes *v.* Barclay, 4 La. Ann. 63.

61. Holderman *v.* Pond, 45 Kan. 410, 25 Pac. 872, 23 Am. St. Rep. 734, 11 L. R. A. 542.

62. Diblee *v.* Davison, 25 Ill. 486; Taylor *v.* Hollander, 4 Mart. N. S. (La.) 535.

63. Mann *v.* Kendall, 47 N. C. 192. See also Holderman *v.* Pond, 45 Kan. 410, 25 Pac. 872, 23 Am. St. Rep. 734, 11 L. R. A. 542.

64. *Alabama.*— Smith *v.* State, 103 Ala. 57, 15 So. 866.

Connecticut.— Lewis *v.* Hull, 39 Conn. 116; Clark *v.* Smith, 9 Conn. 379; Maples *v.* Wightman, 4 Conn. 376. 10 Am. Dec. 149; Wooster *v.* Parsons, Kirby 27.

Kansas.— Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Kentucky.— Com. *v.* Calhoun, 11 B. Mon. 292; Gano *v.* Hart, Hard. 297.

Michigan.— Cofrode *v.* Wayne County Cir. Judge, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

New York.— Boyd *v.* Howden, 3 Daly 455; Hilleary *v.* Skookum Root Hair Grower Co., 4 Misc. 127, 23 N. Y. Suppl. 1016.

See 13 Cent. Dig. tit. "Courts," § 13.

A police court of a city may have jurisdiction conferred upon it by the legislature to try a person for an offense against the state committed outside the city. Fletcher *v.* State, 7 Ohio Cir. Dec. 316.

65. Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092, where it was held that a cause of action accrued in Arkansas for an injury received in that state from a blast fired in the Indian Territory.

Where a continuous tort by a railroad company is commenced in one county and completed in another, the principal damage being done in the latter county, the courts of that county have jurisdiction of the cause of action. Georgia Cent. R. Co. *v.* Dorsey, 116 Ga. 719, 42 S. E. 1024.

66. Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

67. Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 538, where it was held that for injury to mills in one state by the act in another of drawing water from a stream in which both parties were tenants in common, the action might be prosecuted personally for the direct act in the latter state or in the former state for the consequential injury to the mills.

68. Brinley *v.* Avery, Kirby (Conn.) 25; U. S. Graphite Co. *v.* Pacific Graphite Co., 68 Fed. 442. See also Burckle *v.* Eckhart, 3

c. Transitory Actions. Where a cause of action is transitory in its nature, the courts of a state may assume jurisdiction thereof, although it may be based on an act done in another state.[69]

d. Of Actions Under Laws of Another State or Country — (i) *In General.* Courts of justice in one state will out of comity assume jurisdiction of causes of action which are transitory in their nature, given by and arising under the statutes of a foreign state, where by so doing they will not violate their own laws or inflict injury upon their own citizens.[70] So also laws of a foreign country may in some cases be enforced,[71] and courts of a state may likewise assume jurisdiction of an action arising under the common law of another state, although there be a variance of view as to the law which controls, provided it does not amount to a fundamental difference of policy.[72] This principle applies in the case of a right of action for a tort given by the statute of another state and committed therein,[73]

N. Y. 132; Phillio *v.* Blythe, 12 Tex. 124; and CONTRACTS, XI, A, 2 [9 Cyc. 665].

For breach of contract of carriage a cause of action accrues where the contract is broken and not where made. Maxwell *v.* Atchison, etc., R. Co., 34 Fed. 286.

In action against a surety the court of the place where the indorsement was made has jurisdiction. Phelps *v.* Garrow, 3 Edw. (N. Y.) 139.

That courts of the place where the contract is made may have jurisdiction see Richmond, etc., R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69; Ord *v.* The Uncle Sam, 13 Cal. 369; Jones *v.* Norwich, etc., Transp. Co., 50 Barb. (N. Y.) 193; Mayer *v.* Brown, (Tex. App. 1890) 16 S. W. 788.

69. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

This principle has been applied in an action for failure of a railroad company to fence its road (Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675), to recover for personal property (Southern Pac. Co. *v.* Graham, 12 Tex. Civ. App. 565, 34 S. W. 135), on a bail-bond (Otis *v.* Wakeman, 1 Hill (N. Y.) 604), on a covenant of quiet enjoyment (Jackson *v.* Hanna, 53 N. C. 188), and in an action by a creditor of a corporation of another state against a stock-holder to enforce the remedy given by the statute of that state (Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122).

70. *Arkansas.*— St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

Illinois.— O'Donnell *v.* Lewis, 104 Ill. App. 198.

Nebraska. — Delahaye *v.* Heitkemper, 16 Nebr. 475, 20 N. W. 385.

New York.— Roblin *v.* Long, 60 How. Pr. 200.

Rhode Island.— O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503. *Compare* Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323; Anderson *v.* Milwaukee, etc., R. Co., 37 Wis. 321.

United States.—Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122; Delilah *v.* Jacobs, 7 Fed. Cas. No. 3,773, 4 Cranch C. C. 238.

See 13 Cent. Dig. tit. "Courts," § 18.

The courts of one state will not enforce laws of another state where they are repugnant to its own. Petit's Succession, 49 La. Ann. 625, 21 So. 717, 62 Am. St. Rep. 659. So where a citizen would be deprived of property obtained by a *bona fide* purchase for value, the courts will not enforce a law of another state. Woodward *v.* Roane, 23 Ark. 523.

Under a statute of Georgia regulating compensation of inspectors a recovery cannot be had in South Carolina for services performed in the latter state. Fitzsimons *v.* Guanahani Co., 16 S. C. 192.

71. Evey *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387, where it is decided that the right of an employee of a railroad company injured in the republic of Mexico by the negligence of such company to recover in a civil action damages for such injury under the law of that republic may be enforced in a federal court which has jurisdiction of the parties and of the subject-matter, where there is not such a dissimilarity between such laws and those of the state in which they are sought to be enforced as to conflict with the settled public policy of that state.

That an extraordinary indemnity in such sum as may be determined, considering the "social position" of the person injured which is against the policy of our laws, is provided for by the law of a foreign country, does not prevent the enforcement in a court of this country of the right to recover under such law, where there is no prayer for such indemnity. Evey *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

72. Walsh *v.* New York, etc., R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; St. Joseph F. & M. Ins. Co. *v.* Leland, 90 Mo. 177, 2 S. W. 431, 59 Am. Rep. 9.

73. *Indiana.*— Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230.

Iowa.— Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39.

to the enforcement of a valid obligation of a legatee, executed in another state, to carry out the provisions of a will,[74] and to an action for damages against a railroad for unjust discrimination in violation of the laws of another state;[75] and a contract implied by official relations in a foreign state, by the law of that state, will be recognized and enforced at the suit of the sovereign who is the creditor by force of such relations.[76]

(II) *PENAL STATUTES.* Penal laws of a state are local in their character and effect, and do not extend and will not be enforced beyond the territorial jurisdiction wherein they are established.[77] But where a private right is conferred by such a statute it has been decided that the mere fact that the statute was passed as a penal one or as a police regulation is no reason why such right should not be enforced in another state, unless it be contrary to the public policy of such state.[78]

e. Fictitious or Unnecessary Controversies and Questions. The purpose for which courts are constituted is to administer justice and where a controversy is fictitious it will be dismissed.[79] Some individual right affecting the parties litigant should be involved and a suit which is brought merely to obtain a decision upon some abstract question of law, or to establish a precedent for subsequent cases, will not be entertained.[80]

Massachusetts.—Walsh *v.* New York, etc., R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514.

Minnesota.— Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

Mississippi. — Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977.

Nebraska.— Missouri Pac. R. Co. *v.* Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67.

New York.— Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

Pennsylvania.— Knight *v.* West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200.

See 13 Cent. Dig. tit. "Courts," § 18.

74. Groves *v.* Nutt, 13 La. Ann. 117.

75. McDuffee *v.* Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72.

76. King of Prussia *v.* Kuepper, 22 Mo. 550, 66 Am. Dec. 639.

77. Com. *v.* Green, 17 Mass. 515; Peterson *v.* Walsh, 1 Daly (N. Y.) 182; U. S. *v.* Campbell, Tapp. (Ohio) 29.

Federal judiciary will not enforce penal laws of a foreign country.—*Ex p.* Dos Santos, 7 Fed. Cas. No. 4,016, 2 Brock. 403.

78. Boyce *v.* Wabash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730. See also Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449. But see Bird *v.* Hayden, 2 Abb. Pr. N. S. (N. Y.) 61.

Whether such a statute may or may not be enforced depends upon the question whether the object of the statute is to furnish a private remedy to the person injured by the wrongful act or to punish an offense against the public justice of the state. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123.

79. *California.*— People *v.* Pratt, 30 Cal. 223.

Illinois.—People *v.* Leland, 40 Ill. 118.

Louisiana.— Kohn *v.* Louisiana Ins. Co., 15 La. 86.

Mississippi.— Port Gibson Bank *v.* Dickson, 4 Sm. & M. 689.

New York.— Judson *v.* Flushing Jockey Club, 14 Misc. 562, 36 N. Y. Suppl. 128.

United States.— Livingston *v.* D'Orgenoy, 108 Fed. 469, 1 Mart. (La.) 86.

See 13 Cent. Dig. tit. "Courts," § 11; and DISMISSAL AND NONSUIT.

As to necessity of actual controversy to give appellate court jurisdiction see APPEAL AND ERROR, II, A [2 Cyc. 533]; XIV, B [3 Cyc. 182].

Where parties who really claim adverse titles to land bring a suit by agreement in reference thereto, such suit will not on this account be considered fictitious. Dubuque, etc., R. Co. *v.* Litchfield, 23 How. (U. S.) 66, 16 L. ed. 500. So a petition by a stock-holder to restrain the expenditure of money in the operation of a road already constructed, and the construction of other lines in violation of franchises presents no fictitious issue. Teachout *v.* Des Moines Broad-Gauge St. R. Co., 75 Iowa 722, 38 N. W. 145. And in a suit to try the validity of a statute and to restrain officers from acting thereunder, the court acquires jurisdiction, although the parties are agreed as to its validity. Parker *v.* State, 132 Ind. 419, 31 N. E. 1114.

80. *Illinois.*— Washburne *v.* People, 50 Ill. App. 93.

Indiana.— Brewington *v.* Lowe, 1 Ind. 21, 48 Am. Dec. 349.

Iowa.— Cutcomp *v.* Utt, 60 Iowa 156, 14 N. W. 214.

Missouri.— Blair *v.* Illinois State Bank, 8 Mo. 313.

North Carolina.— Little *v.* Thorne, 93 N. C. 69.

Pennsylvania.— Potter's Estate, 4 Pa. Dist. 329.

Texas.— Moore *v.* Blagge, (Civ. App. 1896) 34 S. W. 311; Blagge *v.* Moore, 6 Tex. Civ. App. 359, 23 S. W. 466.

Virginia.— Flanagan *v.* Central Lunatic

f. Contentions Originating in Unlawful Transactions. Courts of justice will not assume jurisdiction of contentions originating in unlawful purposes or transactions.[81] But on the other hand jurisdiction of an action will not be affected by the fact that the wrong-doer was acting without authority of law.[82]

g. Prize Questions. Questions as to property captured upon the high seas and condemned as prize are exclusively of admiralty jurisdiction.[83]

h. Torts Causing Injuries in Another State. Courts of one state will in many cases assume jurisdiction of an action for a tort or wrongful act committed or causing injury in another state or country, where they have the means and can obtain jurisdiction over the wrong-doer.[84] Under such circumstances they may so act in cases of personal injury,[85] as where an action is brought against a railway company by an employee or passenger for injuries so sustained,[86] and in

Asylum, 79 Va. 554; Randolph *v.* Randolph, 2 Leigh 540.

Wisconsin.—Zentner *v.* Schinz, 90 Wis. 236, 63 N. W. 162.

See 13 Cent. Dig. tit. "Courts," § 11.

81. Fabacher *v.* Bryant, 46 La. Ann. 820, 15 So. 181.

82. Baltimore, etc., R. Co. *v.* Meyers, 62 Fed. 367, 10 C. C. A. 485.

83. Novion *v.* Hallett, 16 Johns. (N. Y.) 327; Cheriot *v.* Foussat, 3 Binn. (Pa.) 220; Bingham *v.* Cabbot, 3 Dall. (U. S.) 19, 1 L. ed. 491. See also ADMIRALTY, IV, E, 5 [1 Cyc. 838].

That action to recover prize-money for seamen where question of prize or no prize is not involved may be in common-law court see Henderson *v.* Clarkson, 1 Yeates (Pa.) 148.

That action to recover the value of a vessel where sentence of condemnation is reversed may be in common-law court see Taxier *v.* Sweet, 2 Dall. (Pa.) 81, 1 L. ed. 298.

84. Alabama Great Southern R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Burdick *v.* Freeman, 46 Hun (N. Y.) 138, 10 N. Y. St. 756, 27 N. Y. Wkly. Dig. 313; Ducktown Sulphur, etc., Co. *v.* Barnes, (Tenn. Sup. 1900) 60 S. W. 593.

Thus jurisdiction may be assumed of an action to recover damages for fraud committed in another state (McQueen *v.* New, 87 Hun (N. Y.) 206, 33 N. Y. Suppl. 802), of an action against the lessee of a railroad for a tort committed in another state (Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646), of an action for a nuisance in one state injuring property in another (Ruckman *v.* Green, 9 Hun (N. Y.) 225), of an action for the diversion of water in one state injuring property in another (Thayer *v.* Brooks, 17 Ohio 489, 49 Am. Dec. 474; Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 539), and of an action for a failure to deliver a telegram sent to another state (Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638, 30 S. W. 494. See also Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225).

Essentials to maintenance of action.—It has been held in the United States that for a tort committed within the exclusive jurisdiction of a foreign country, no action can be maintained in the United States unless it would be maintainable by the laws of both countries. Petersen *v.* The Lamington, 87 Fed. 752. But in England it has been determined that while the act must be actionable in that country, it is not necessary that it be the subject of civil proceedings in the country in which committed. Machado *v.* Fontes, [1897] 2 Q. B. 231, 66 L. J. Q. B. 542, 76 L. T. Rep. N. S. 588, 45 Wkly. Rep. 565. And in New Brunswick it has been decided that an action may be maintained there for a wrong committed abroad, provided that at the time it was brought the wrong was actionable under the laws of the country where committed. Campbell *v.* McGregor, 29 N. Brunsw. 644.

85. Newman *v.* Goddard, 3 Hun (N. Y.) 70, 48 How. Pr. (N. Y.) 363; Beach *v.* Bay State Steamboat Co., 16 How. Pr. (N. Y.) 1; Smith *v.* Bull, 17 Wend. (N. Y.) 323; Shmit *v.* Day, 27 Oreg. 110, 39 Pac. 870; Curtis *v.* Bradford, 33 Wis. 190.

Action for double damages for injury to a person from bite of a dog is local and a court will not take jurisdiction of an action thereunder for injury to a person from being bitten in another state. Le Forest *v.* Tolman, 117 Mass. 109, 19 Am. Dec. 400.

Where the parties reside in the state where the injury was inflicted, the courts of another state will not assume jurisdiction unless special reasons are shown. Ferguson *v.* Neilson, 11 N. Y. Suppl. 524.

86. *Alabama.*—Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

Georgia.—Watson *v.* Richmond, etc., R. Co., 91 Ga. 222, 18 S. E. 306.

New Jersey.—Ackerson *v.* Erie R. Co., 31 N. J. L. 309.

New York.—Flynn *v.* New Jersey Cent. R. Co., 142 N. Y. 439, 37 N. E. 514.

Wisconsin.—McCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707.

United States.—Hills *v.* Richmond, etc., R. Co., 37 Fed. 660.

See 13 Cent. Dig. tit. "Courts," § 24.

One injured in another country by the negligence of a railroad company may sue in a United States court, especially where the company owns and operates part of the same line of railroad in the state in which the suit is brought, and the court has jurisdiction of the parties and the subject-matter. Mexican Cent. R. Co. *v.* Marshall, 91 Fed. 933, 34

actions for assault and battery,[87] wrongful arrest and imprisonment,[88] and for slander.[89] Again jurisdiction may be assumed of actions to recover for injuries to personal property in another state.[90] Actions for injury or trespass to real estate, however, are local in their character and must be brought in the state where the land is located,[91] subject to this exception, that where the action is in the nature of trover, although the facts alleged might be sufficient to constitute a cause of action for injury to real estate, the courts of one state may take jurisdiction of such an action where the wrongful act was done in another state.[92]

3. Of the Person — a. Generally. No jurisdiction will be acquired in a state court of an action against a person, where neither he nor any property of his can be found within the state.[93] But civil and criminal jurisdiction will attach to all persons found within the state whether their residence be permanent or temporary;[94] and by personal service of process on a defendant in the prescribed legal manner a court having authority to issue such process acquires *prima facie* a jurisdiction of his person,[95] which may continue, although defendant goes beyond the court's jurisdiction.[96] Again to give the court jurisdiction of the person of

C. C. A. 133 [*following* Evey *v.* Mexican Cent. R. Co., 87 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387]. But see Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276 [*reversing* (Civ. App. 1895) 32 S. W. 230].

87. Watts *v.* Thomas, 2 Bibb (Ky.) 458; Armstrong *v.* Foote, 11 Abb. Pr. (N. Y.) 384. See also Assault and Battery, 3 Cyc. 1079.

88. Tupper *v.* Morin, 12 N. Y. Suppl. 310, 25 Abb. N. Cas. (N. Y.) 398. See also Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146.

89. Hull *v.* Vreeland, 42 Barb. (N. Y.) 543, 18 Abb. Pr. (N. Y.) 182; Lister *v.* Wright, 2 Hill (N. Y.) 320. *Compare* Hatfield *v.* Sisson, 28 Misc. (N. Y.) 255, 59 N. Y. Suppl. 73.

90. Boyce *v.* Wahash R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730; Mason *v.* Warner, 31 Mo. 508; Gregg *v.* Union Pac. R. Co., 48 Mo. App. 494; St. Louis, etc., R. Co. *v.* Holden, 3 Tex. App. Civ. Cas. § 323.

A personal action against a sheriff for wrongful levy on plaintiff's property may be maintained in any state in which the sheriff is found and served with process. Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

Where buildings are erected on land with right of removal courts may so act in suits for damages for injuries thereto. Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, 13 Am. St. Rep. 564. So where damages are both to personalty and realty jurisdiction may be taken. Barney *v.* Burstenbinder, 7 Lans. (N. Y.) 210.

Civil damage act is local and has no extra-territorial effect, and therefore cannot be invoked where a person becomes drunk and injures property in another state. Goodwin *v.* Young, 34 Hun (N. Y.) 252.

91. *Alabama.*— Howard *v.* Ingersoll, 23 Ala. 673.

Illinois.— Eachus *v.* Illinois, etc., Canal, 17 Ill. 534.

Massachusetts.— Sumner *v.* Finegan, 15 Mass. 280.

Minnesota.— *Compare* Little *v.* Chicago, etc., R. Co., 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423.

New York.— American Union Tel. Co. *v.* Middleton, 80 N. Y. 408; Day *v.* Sun Ins. Office, 40 N. Y. App. Div. 305, 57 N. Y. Suppl. 1033; Genet *v.* Delaware, etc., Canal Co., 56 Hun 640, 8 N. Y. Suppl. 822; Dodge *v.* Colby, 37 Hun 515; De Courcy *v.* Stewart, 20 Hun 561.

Texas.— Morris *v.* Missouri Pac. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

Vermont.— Niles *v.* Howe, 57 Vt. 388.

Wisconsin.— Bettys *v.* Milwaukee, etc., R. Co., 37 Wis. 323.

See 13 Cent. Dig. tit. "Courts," § 23.

92. So held in an action for the value of sand removed from one's land and converted to use of defendant (McGonigle *v.* Atchison, 33 Kan. 726, 7 Pac. 550) and for timber cut and carried away (Greeley *v.* Stilson, 27 Mich. 153; Tyson *v.* McGuineas, 25 Wis. 656).

93. Skinner *v.* McDaniel, 4 Vt. 418.

Where property is taken from the custody of the federal circuit court such court has power by summary process to compel the restoration of the same, whether the party taking it be or be not a party to the suit concerning such property. Erie R. Co. *v.* Heath, 8 Fed. Cas. No. 4,514, 8 Blatchf. 536.

94. Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662; Parker *v.* Lynch, 7 Okla. 631, 56 Pac. 1082.

Jurisdiction of probate court in insolvency proceedings exists over a person who leaves the state until he acquires a domicile elsewhere. Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1108, 23 Am. St. Rep. 37, 6 L. R. A. 716. See, generally, Insolvency.

A railroad corporation partly in two states and operating under legislative acts of each will be subject to the jurisdiction of the courts of either state. Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613.

A recital in a writ that defendant is an "absent and absconding debtor" does not show want of jurisdiction, being a form prescribed by law. Bissell *v.* Wheelock, 11 Cush. (Mass.) 277.

95. Barnes *v.* Harris, 4 N. Y. 374.

96. People's Bldg., etc., Assoc. *v.* Mayfield, 42 S. C. 424, 20 S. E. 290.

a defendant it should affirmatively appear that he was served with process or appeared.[97]

b. Non-Residents — (I) *GENERALLY.* It is not of itself sufficient to defeat the jurisdiction of a state court that a party to an action is a resident of another state.[98] Likewise inferior courts in a state may have jurisdiction of a cause of action, although both parties may not reside within the territorial limits of such court's particular jurisdiction.[99]

(II) *ACTIONS BY.* Courts will assume jurisdiction of actions by non-residents to enable them to assert their rights, unless there exists some legal restraint to prevent them from so acting.[1]

(III) *ACTIONS AGAINST.* State courts cannot as a general rule take jurisdiction of actions against non-residents who own no property within the state and upon whom no personal service of process has been had within such state.[2] Nor does the ownership of property by a non-resident give state courts jurisdiction

97. State *v.* Ennis, 74 Ind. 17. See, generally, PROCESS.

Service by publication is not sufficient. Sowders *v.* Edmunds, 76 Ind. 123; Bartlett *v.* Holmes, 12 Hun (N. Y.) 398.

98. Swan *v.* Smith, 26 Iowa 87. See also Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638.

As to who are non-residents see Glover *v.* Glover, 18 Ala. 367; Charter Oak Bank *v.* Reed, 45 Conn. 391; Clarkson *v.* Mittnacht, 6 Daly (N. Y.) 398; Gundlin *v.* Hamburg American Packet Co., 6 Misc. (N. Y.) 620, 26 N. Y. Suppl. 73; Bartlett *v.* Brisbane, 2 Rich. (S. C.) 489.

Averments in pleadings as to residence see Ormsby *v.* Lynch, Litt. Sel. Cas. (Ky.) 303; Banks *v.* Fowler, 3 Litt. (Ky.) 332; Hager *v.* Coup, 50 Mich. 4, 14 N. W. 698; Bagley *v.* Pridgeon, 42 Mich. 550, 4 N. W. 289; Cleaveland *v.* Hatch, 25 Hun (N. Y.) 308; Allison *v.* Pearce, (Tenn. Ch. App. 1900) 59 S. W. 192.

99. Louden Irrigating Canal Co. *v.* Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Richards *v.* Stewart, 2 Day (Conn.) 328; Hogar *v.* Coup, 50 Mich. 54, 14 N. W. 698; Bagley *v.* Pridgeon, 42 Mich. 550, 4 N. W. 289; Heenan *v.* New York, etc., R. Co., 34 Hun (N. Y.) 602, 6 N. Y. Civ. Proc. 348, 1 How. Pr. N. S. (N. Y.) 53; Evans *v.* Wood, 15 Abb. Pr. (N. Y.) 416.

1. *Indiana.*— Burke *v.* Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304.

Kentucky.— Lexington Mfg. Co. *v.* Door, 2 Litt. 256.

Louisiana.— Amato *v.* Ermann, 47 La. Ann. 967, 17 So. 505.

Missouri.— King of Prussia *v.* Kuepper, 22 Mo. 550, 66 Am. Dec. 639.

New York.— Wertheim *v.* Clergue, 53 N. Y. App. Div. 122, 65 N. Y. Suppl. 750; Jackson *v.* Wheedon, 3 Code Rep. 186. See also Gibson *v.* American L. & T. Co., 58 Hun 443, 12 N. Y. Suppl. 444.

Tennessee.— Lisenbee *v.* Holt, 1 Sneed 42.

Texas.— Western Union Tel. Co. *v.* Phillips, (Civ. App. 1893) 30 S. W. 494. See also Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225.

See 13 Cent. Dig. tit. "Courts," § 35.

That a non-resident plaintiff shall be held to answer a cross-action is provided for in some states. Aldrich *v.* Blatchford, 175 Mass. 369, 56 N. E. 700; Rice *v.* Sharpleigh Hardware Co., 85 Fed. 559.

2. *Alabama.*— Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758; Glover *v.* Glover, 16 Ala. 440.

Georgia.— Howell *v.* Gordon, 40 Ga. 302; Adams *v.* Lamar, 8 Ga. 83; Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300. See also Reynolds, etc., Estate Mortg. Co. *v.* Martin, 116 Ga. 495, 42 S. E. 796.

Illinois.— Waverly *v.* Auditor of Public Accounts, 100 Ill. 354.

Indiana.— Beard *v.* Beard, 21 Ind. 321.

Kentucky.— Meres *v.* Chrisman, 7 B. Mon. 422.

Louisiana.— Lenmann *v.* Truxillo, 32 La. Ann. 65; Dejona *v.* The Osceola, 17 La. Ann. 277; Fell *v.* Darden, 17 La. Ann. 236.

Maine.— Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746; Lovejoy *v.* Albee, 33 Me. 414, 54 Am. Dec. 630.

Massachusetts.— Ewer *v.* Coffin, 1 Cush. 23, 48 Am. Dec. 587.

Mississippi.— Cocke *v.* Brewer, 68 Miss. 775, 9 So. 823.

Missouri.— Hiles *v.* Rule, 121 Mo. 248, 25 S. W. 959.

New York.—Mahr *v.* Norwich Union F. Ins. Soc., 127 N. Y. 452, 28 N. E. 391; Schwinger *v.* Hickok, 53 N. Y. 280. *Compare* Reed *v.* Chilson, 16 N. Y. Suppl. 744; Ward *v.* Arredondo, Hopk. 213, 14 Am. Dec. 543.

Ohio.— Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340.

South Carolina.— McKinne *v.* Augusta, 5 Rich. Eq. 55.

Texas.—*Compare* Butterworth *v.* Kinsey, 14 Tex. 495.

Virginia.— Miller *v.* Sharp, 3 Rand. 41; Hopkirk *v.* Bridges, 4 Hen. & M. 413.

United States.— Wilson *v.* Graham, 30 Fed. Cas. No. 17,804, 4 Wash. 53.

See 13 Cent. Dig. tit. "Courts," § 36.

By joining a nominal party, who is a resident of the county, as co-defendant, jurisdiction of the real party defendant who is a

of the owner's person,[3] although they may have jurisdiction in some cases of actions against a non-resident to the extent of such property.[4] But if a defendant who is a non-resident is found within the state and service of process is there made upon him, jurisdiction will thereby be acquired.[5]

(IV) *ACTIONS BETWEEN.* Courts of one state will in many cases assume jurisdiction of actions between non-residents, where either the subject-matter of the controversy is in reference to rights in or to property situated within such state, or where the cause of action, although it accrues in another state, is transitory in its nature and the parties are personally within the jurisdiction of the court.[6] And of actions between foreigners state courts will in many instances assume jurisdiction where defendant can be found within the state and process there personally served upon him.[7]

c. Political Corporations. The political corporation known as the parish or county exists everywhere throughout its territorial limits and may therefore be

non-resident cannot be obtained. Robinson *v.* Harrison, 9 Ohio S. & C. Pl. Dec. 701, 7 Ohio N. P. 273; Weekes *v.* Sunset Brick, etc., Co., 22 Tex. Civ. App. 556, 56 S. W. 243.

A federal district court in one state has no jurisdiction *in personam* against a citizen of another state who has not been served with process in the former state. Wilson *v.* Graham, 30 Fed. Cas. No. 17,804, 4 Wash. 53.

A fraudulent conveyance of land may be set aside, although defendant is a non-resident, where constructive service by publication of a warning order is had on him. McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56 (service under Mansf. Ark. Dig. §§ 4989, 4990).

3. McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666.

4. Adams *v.* Lamar, 8 Ga. 83; Penn *v.* Evans, 28 La. Ann. 576; White *v.* White, 7 Gill & J. (Md.) 208; Johnson *v.* Herbert, 45 Tex. 304.

Stocks and bonds accompany person of the owner, being personal property, and although within the state, the court acquires no jurisdiction of action against non-resident in reference thereto. Huntzinger *v.* Philadelphia Coal Co., 11 Phila. (Pa.) 609, 33 Leg. Int. (Pa.) 178.

5. *Illinois.*— Brewster *v.* Scarborough, 3 Ill. 280.

Iowa.— Darrah *v.* Watson, 36 Iowa 116.

Maine.— Alley *v.* Caspari, 80 Me. 234, 14 Atl. 12, 6 Am. St. Rep. 178; Badger *v.* Towle, 48 Me. 20.

Massachusetts.— Barrell *v.* Benjamin, 15 Mass. 354.

New York.— Johnson *v.* Ackerson, 40 How. Pr. 222.

See 13 Cent. Dig. tit. "Courts," § 36.

Persons having a place of business in New York city are to be deemed residents for the purpose of suing. Routenberg *v.* Schweitzer, 165 N. Y. 175, 58 N. E. 880; Clarkson *v.* Millnacht, 56 How. Pr. (N. Y.) 323; N. Y. Laws (1862), c. 484; Greater N. Y. Charter, § 1370, subs. 3.

6. *California.*—Roberts *v.* Dunsmuir, 75 Cal. 203, 16 Pac. 782.

Florida.— La Trobe *v.* Hayward, 13 Fla. 190.

Indiana.— Levi *v.* Kaufman, 12 Ind. App. 347, 39 N. E. 1045.

New Jersey.— Tomson *v.* Tomson, 31 N. J. Eq. 464.

New York.—Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949; Latourette *v.* Clarke, 45 Barb. 327, 30 How. Pr. 242; Walter *v.* F. E. McAlister Co., 21 Misc. 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33. But in an action by one foreign corporation against another the courts have no jurisdiction in the absence of statutory authority. Anglo-American Provision Co. *v.* Davis Provision Co., 50 N. Y. App. Div. 273, 63 N. Y. Suppl. 987. And see Smith *v.* Crocker, 162 N. Y. 600, 57 N. E. 1124 [*affirming* 14 N. Y. App. Div. 245, 43 N. Y. Suppl. 427], as to actions in tort where the cause of action arises outside the state. See also Hatfield *v.* Sisson, 28 Misc. 255, 59 N. Y. Suppl. 73.

North Carolina.— Walters *v.* Breeder, 48 N. C. 64; Miller *v.* Black, 47 N. C. 341.

Texas.— Ward *v.* Lathrop, 11 Tex. 287.

Vermont.— Whitmore *v.* Orcutt, Brayt. 22.

See 13 Cent. Dig. tit. "Courts," § 40.

In actions upon a contract jurisdiction may be taken. Johnston *v.* Trade Ins. Co., 132 Mass. 432; Roberts *v.* Knights, 7 Allen (Mass.) 449; Furbush *v.* Nye, 17 N. Y. App. Div. 325, 45 N. Y. Suppl. 214; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Pullman Palace Car Co. *v.* Arents, 28 Tex. Civ. App. 71, 66 S. W. 329; American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. 350.

An act conferring jurisdiction in actions "between non-residents and citizens" confers jurisdiction where plaintiffs are all non-residents and only one of defendants a citizen. Turner *v.* O'Bannon, 2 J. J. Marsh. (Ky.) 186.

Where defendant has no property in the state the court has no jurisdiction. Ward *v.* Lathrop, 4 Tex. 180. So in an action on book-account where both parties are non-residents and neither person nor property are attached or held within the state, the court has no jurisdiction. Osborn *v.* Lloyd, 1 Root (Conn.) 301.

7. Peabody *v.* Hamilton, 106 Mass. 217; Caignett *v.* Rouge, 1 Yeates (Pa.) 546.

sued in any court of proper or competent jurisdiction within such territorial limits.[8]

4. Of Subject-Matter or Property — a. Essentials of. If the remedy is purely statutory it is applicable only to cases where the circumstances that warrant it have occurred within the jurisdiction of the state,[9] and if neither the person nor the subject-matter are within the jurisdiction of the court it has no power over them.[10] But these rules are not exclusive in a general sense, for if there is something to which the jurisdiction can attach the court will take cognizance of the action even though other matters are involved which of themselves are without the limitation of the court's power, between which and the question of jurisdiction of defendant or of the property or subject-matter there may be and frequently is a distinction.[11] In connection with the preceding statement it is proper to notice here another analogous underlying principle, and that is that the presence of the subject-matter, the *rem*, within the territorial dominion of the sovereign power under authority of which the court acts, confers jurisdiction on such court.[12]

b. What Constitutes Jurisdiction of the Subject-Matter. Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings in question belong.[13]

8. State *v.* Dupre, 46 La. Ann. 117, 14 So. 907; State *v.* Judge First Justice's Ct., 41 La. Ann. 403, 6 So. 653.

Police jury must be sued in Louisiana in a court having jurisdiction over the whole parish. Berthaud *v.* Police Jury, 7 Rob. (La.) 550.

The phrase "in any court of this state," in an act providing for action by the state on the relation of the state auditor against the board of commissioners of a county, means any court having competent jurisdiction and does not permit the action to be brought in any county. State *v.* Vanderburgh County, 49 Ind. 457.

9. Nations *v.* Alvis, 5 Sm. & M. (Miss.) 338.

Form of procedure not essential.—Although an actual seizure is required in proceedings *in rem* against the personal property of an absconding debtor, yet the court may obtain jurisdiction by virtue of a vendor's lien retained by the creditor upon real estate which constitutes the property in question and which is sought to be purchased. Oswald *v.* Kampmann, 28 Fed. 36.

10. Waverly *v.* Auditor of Public Accounts, 100 Ill. 354. Nor will the court assume jurisdiction to examine into a fraudulent perversion of the proceedings of the court of another state and set aside transfers based thereon when the actions, the transactions, and the property are all within said state. Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522.

Where no fund is actually in court it should not frame an issue to determine its distribution, although such fund is in some other court of coördinate jurisdiction. Walker *v.* Erie Mar. Nat. Bank, 98 Pa. St. 574.

A contract violating the public policy of a state, although resulting from the transaction of business within the state, will not be enforced as an exercise of comity. Henni *v.* Fidelity Bldg., etc., Assoc., 61 Nebr. 744, 86 N. W. 475, 87 Am. St. Rep. 519.

11. Thus where land is attached within the court's jurisdiction for the payment of a debt, such court may take cognizance, notwithstanding the alleged indebtedness did not arise from any dealing in relation to the land (Philips *v.* Hines, 33 Miss. 163), and although money is obtained possession of without the parish, yet if it is deposited in a bank within the parish the court thereof obtains jurisdiction (Coit *v.* Jennings, 8 Mart. (La.) 166). So a court of limited jurisdiction may take cognizance of an action for the recovery of personal property taken on the high seas and brought in the custody of a United States marshal within the territory over which said court may exercise its powers. Cashmere *v.* Crowell, 1 Code Rep. (N. Y.) 95. Again the question may become specifically one of limitation of power of the court and not one of jurisdiction over defendant, as where defendant corporation has its principal place of business without the limits of the court's jurisdiction and service is there made. Heenan *v.* New York, etc., R. Co., 34 Hun (N. Y.) 602, 6 N. Y. Civ. Proc. 348, 1 How. Pr. N. S. (N. Y.) 53.

12. New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 28 N. Y. App. Div. 411, 50 N. Y. Suppl. 1093; Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 332, 336. See also Delaware Tp. *v.* Ripley County, 26 Ind. App. 97, 59 N. E. 189.

A cause of action arising out of commercial transactions affecting property rights, some of which at least arose within the state, will confer jurisdiction, as in case of an action of deceit for false representations inducing a sale, and so even though both parties are non-residents. Wertheim *v.* Clergue, 53 N. Y. App. Div. 122, 65 N. Y. Suppl. 750.

13. State *v.* Neville, 110 Mo. 345, 19 S. W. 491.

c. Property of Non-Resident Within State. The proper tribunals of a state may inquire into the nature and extent of the obligations of a non-resident where he has property within such state and may control its disposition or appropriate it to satisfy the claims of her citizens; but there is nothing upon which the state courts can adjudicate in the absence of such property within the limits of their jurisdiction.[14] And jurisdiction will attach to the thing even though all the parties in interest are foreigners, and although such thing has been brought within the territory by a violation of the sovereign rights of another nation.[15]

C. Mode of Acquiring Jurisdiction — 1. In General. It is a general rule that every state may within its constitutional authority prescribe the manner in which its courts shall exercise jurisdiction;[16] and if a new jurisdiction is created by statute without its form of proceeding being prescribed, such jurisdiction may pursue its own forms and regulations if not inconsistent with the laws of the land.[17] But where the mode of acquiring jurisdiction is prescribed by statute compliance therewith is essential or the proceedings will be a nullity.[18] Again where there is an absence of power conferred by law a court will not act in the premises.[19]

2. Court Cannot Act Sua Sponte. The court cannot of its own motion assume jurisdiction. Some person must in some legal way invoke its action.[20]

3. Of Plaintiff — Commencement of Suit. A court acquires jurisdiction of plaintiff when he applies for its power and assistance to render him his rights, but this aid must be sought according to the prescribed forms. The court must in some manner acquire jurisdiction of something relating to the controversy. When, however, plaintiff lawfully submits himself and the subject-matter to the court's jurisdiction, and the court or law commences acting under his claim for investigation, he has commenced his suit. But jurisdiction of the person of

It includes the authority to adjudge concerning the general questions involved therein, and is not dependent upon the state of facts which may appear in a particular case or the ultimate existence of a good cause of action in plaintiff. Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129. Again it seems that in all cases where the averments are such that the tribunal has power to proceed and try them and to render judgment according to its finding, it has then jurisdiction of the subject-matter. Wanzer *v.* Howland, 10 Wis. 8.

14. Southwestern R. Co. *v.* Wright, 68 Ga. 311; Todd *v.* Lancaster, 104 Ky. 427, 47 S. W. 336, 20 Ky. L. Rep. 623; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295. See also Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80, holding that the district court has jurisdiction of an action against non-resident heirs brought by one who seeks to recover land, situate in the county, by virtue of an ancestral title.

Appointment in Montreal of tutor ad hoc aux biens is illegal where minor is domiciled in the United States, although he has property in Montreal. Donohue *v.* La Banque Jacques Cartier, 11 Quebec Super. Ct. 90.

An action lies to collect the value of improvements from property in a court within the territorial limits of which land belonging to an infant is situate and the contract relative to improvements thereon was made. Shumate *v.* Harbin, 35 S. C. 521, 15 S. E. 270 (Code Civ. Proc. § 156, subs. 4).

15. The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336.

16. Campbell *v.* Wilson, 6 Tex. 379.

17. Pilotage Com'rs *v.* Low, R. M. Charlt. (Ga.) 298.

18. Paul *v.* Armstrong, 1 Nev. 82; People *v.* Board of Police, 6 Abb. Pr. (N. Y.) 162. See also Wortman *v.* Wortman, 17 Abb. Pr. (N. Y.) 66 (holding that where the jurisdiction is strictly statutory the specific mode of acquiring jurisdiction is exclusive); Odell *v.* Campbell, 9 Oreg. 298; Campbell *v.* Wilson, 6 Tex. 379 (holding that jurisdiction if acquired in the manner prescribed by statute cannot be questioned within the state); Ratcliff *v.* Polly, 12 Gratt. (Va.) 528 (where although the suit was for freedom of a slave, nevertheless the principle asserted is applicable, viz., that the acts relied upon to confer jurisdiction must be done in conformity with the statute, otherwise jurisdiction fails, especially if a writ is resorted to merely to evade the statute).

Mere error of judgment as to pleadings by state court does not affect jurisdiction. Griswold *v.* Hazard, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. ed. 678 [*affirming* 28 Fed. 578].

19. *In re* Bickley, 3 Fed. Cas. No. 1,387, where the court refused in time of war to transcend or revoke or vary the commands of the commander-in-chief to an officer of the army in respect to military services.

20. Johnson *v.* Miller, 50 Ill. App. 60; Townsend's Succession, 37 La. Ann. 114; Dowd *v.* Morgan, 1 Miss. 587.

defendant is not essential to the commencement of the suit nor is his appearance or service upon him necessary therefor, where by the practice of the state and under the law the taking of certain legal steps precedes the service of process.[21]

4. Service of Process and Notice — a. In General. In a suit in a common-law court there must be some service upon the adverse party in some mode authorized by law or the court cannot proceed, and a judgment rendered without such service would be a nullity.[22] So the rule prevails that service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or property,[23] and this statutory mode of service or of giving notice must be followed,[24] including requirements as to time,[25] or the return.[26] Nor does a person's knowledge of the existence of an action, no matter how clearly brought home to him, supply the want of compliance with the statutory or legal requirements,[27] and so even though the party is in the court's presence unless he is brought there by legal means.[28] Again an attachment of property cannot give jurisdiction so as to affect the interest of a person therein who is not legally notified.[29] It is not necessary, however, in order to acquire jurisdiction of the subject-matter *in rem* that the court shall bring the parties within reach of its process.[30]

b. Sending Process Out of Jurisdiction. Service of process out of the territorial jurisdiction of the court from which it issues, at common law, is a nullity,[31] for process of court has no force outside of its jurisdiction.[32] This rule applies to

21. *Ex p.* Cohen, 6 Cal. 318; Schroeder *v.* Merchants', etc., Ins. Co., 104 Ill. 71.

As to when action is deemed commenced see Actions, 1 Cyc. 747.

Existence or filing of written pleadings is not essential to rendition of judgment when proceedings are according to the course of the common law. Johnson *v.* Miller, 50 Ill. App. 60.

Mere filing of bill and notice thereof of a motion for appointment of receiver does not confer jurisdiction. Wheeler *v.* Walton, etc., Co., 65 Fed. 720.

22. *Ex p.* Davis, 41 Me. 38, holding that a memorial filed alleging the invalidity of the removal of a justice of the supreme court is not a process known to the common law.

23. Wheeler *v.* Walton, etc., Co., 65 Fed. 720 [*citing* Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 8; Platt *v.* Archer, 19 Fed. Cas. No. 11,213, 9 Blatchf. 559; Union Trust Co. *v.* Rockford, etc., R. Co., 24 Fed. Cas. No. 14,401, 6 Biss. 197, and *quoting* Bradley, J., in Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409, as follows: "Service of process gives jurisdiction over the person, seizure gives jurisdiction over the property"].

Rule is supported by the following cases:

Georgia.— Pilotage Com'rs *v.* Low, R. M. Charlt. 298.

Kansas.—Cohen *v.* Trowbridge, 6 Kan. 385.

Kentucky.— Jones *v.* Kenny, Hard. 96.

Louisiana.— Caldwell *v.* Glenn, 6 Rob. 9; McNairy *v.* Bell, 5 Rob. 418; Slocomb *v.* Bowie, 13 La. 10; Zacharie *v.* Blandin, 4 La. 154; Wall *v.* Wilson, 2 La. 169.

Mississippi.— Hunt *v.* Johnson, Freem. 282.

New Jersey.— Karr *v.* Karr, 19 N. J. Eq. 427.

Oregon.— Woodward *v.* Baker, 10 Oreg. 491.

See 13 Cent. Dig. tit. "Courts," § 69.

Action wrongly begun before clerk, process may be amended where it gets into superior court by appeal or otherwise, that court having jurisdiction of the whole cause. Elliott *v.* Tyson, 117 N. C. 114, 23 S. E. 102.

24. Cohen *v.* Trowbridge, 6 Kan. 385; Karr *v.* Karr, 19 N. J. Eq. 427; Odell *v.* Campbell, 9 Oreg. 298.

25. Matlock *v.* Layman, 3 N. J. L. 993; Karr *v.* Karr, 19 N. J. Eq. 427.

26. Matlock *v.* Layman, 3 N. J. L. 993; Stone *v.* Miller, 62 Barb. (N. Y.) 430.

27. Caldwell *v.* Glenn, 6 Rob. (La.) 9; Wall *v.* Wilson, 2 La. 169.

28. Jones *v.* Kenny, Hard. (Ky.) 96.

29. Wells *v.* Sequin, 14 Iowa 143.

Resident assignee may attach, although nonresident assignor could not. McBride *v.* Farmers' Bank, 26 N. Y. 450.

30. Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126. See The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 332, holding that suits *in rem* are local and that the court within whose jurisdiction the thing is situate is the proper forum, although all the parties in interest are foreigners. See also Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

31. Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341, Code Rep. N. S. (N. Y.) 42.

32. Isett *v.* Stuart, 80 Ill. 404, 22 Am. Rep. 194.

Order for service of writ out of jurisdiction discharged in a suit to establish widow's right to estate and to enjoin defendants from obtaining it, they having been appointed in *ex parte* proceedings in Scotland executrixes. *In re* De Penny, [1891] 2 Ch. 63, 60 L. J. Ch. 518, 64 L. T. Rep. N. S. 521, 39 Wkly. Rep. 571.

state,[33] county,[34] district,[35] and inferior courts of municipalities,[36] except where otherwise specifically and lawfully provided,[37] or there is a waiver.[38] If, however, from the nature of the action the court has no jurisdiction it cannot obtain it either over the person of a non-resident or over the subject-matter by publication of an order of appearance nor by issuing a subpœna;[39] nor will jurisdiction be conferred contrary to state laws by the joinder of defendants over whom the court has jurisdiction.[40] But jurisdiction is conferred over several or joint defend-

Decree to set aside foreclosure is not a mere continuation of original foreclosure so as to authorize service of subpœna without the territorial jurisdiction. Pacific R. Co. *v.* Missouri Pac. R. Co., 3 Fed. 772, 2 McCrary 347.

33. *Indiana.*— Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440, notice.

Iowa.— Bates *v.* Chicago, etc., R. Co., 19 Iowa 260, notice.

Louisiana.— *In re* Dumas, 32 La. Ann. 679, process in personal action.

Michigan.— Pratt *v.* Windsor Bank, Harr. 254, service of subpœna irregular.

New York.— Appleton *v.* Appleton, 50 Barb. 486. But see Fetes *v.* Volmer, 5 Silv. Supreme 408, 8 N. Y. Suppl. 294.

Pennsylvania.— Ralston's Appeal, 93 Pa. St. 133 (sheriff cannot depute sheriff of another state to execute a writ); Scott *v.* Noble, 72 Pa. St. 115, 13 Am. Rep. 663 (notice and indorsement "I accept service of this writ"); Briggs *v.* Briggs, 6 Kulp 490 (subpœna).

South Carolina.— Toms *v.* Richmond, etc., R. Co., 40 S. C. 520, 19 S. E. 142 (service of summons gives no jurisdiction in absence of an attachment); Tillinghast *v.* Boston, etc., R. Lumber Co., 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49 (personal service on foreign corporation in another state).

Texas.— Maddox *v.* Craig, 80 Tex. 600, 16 S. W. 328 (notice); Kimmarle *v.* Houston, etc., R. Co., 76 Tex. 686, 12 S. W. 698 (service); Masterton *v.* Little, 75 Tex. 682, 13 S. W. 154.

Vermont.— Davis *v.* Richmond, 35 Vt. 419, service by sheriff in another state.

Virginia.— Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. See Pacific R. Co. *v.* Missouri Pac. R. Co., 3 Fed. 772, 1 McCrary 647.

See 13 Cent. Dig. tit. "Courts," § 70.

34. *Florida.*— Sanchez *v.* Haynes, 35 Fla. 619, 18 So. 27.

Illinois.— Maxwell *v.* Vansant, 46 Ill. 58 (promissory note was indorsed to resident of S. county but was executed in M. county. It did not appear where transfer was made. Summons from M. county into S. county invalid); Aird *v.* Haynie, 36 Ill. 174 (service on assignor of note).

Kentucky.— Cowan *v.* Montgomery, 7 J. J. Marsh. 299 (service of process in transitory action); Rogers *v.* Hagan, 6 J. J. Marsh. 578 (action of trespass; judgment void against defendant served within the county); Dicken *v.* King, 3 J. J. Marsh. 591; Cave *v.* Trabue, 2 Bibb 444 (subpœna in transitory action).

Massachusetts.— Pitman *v.* Tremont Nail Co., 2 Allen 531.

Michigan.— Turrill *v.* Walker, 4 Mich. 177.

Minnesota.— Shatto *v.* Latham, 33 Minn. 36, 21 N. W. 838, service of summons.

Oregon.— Brown *v.* Deschuttes Bridge Co., 23 Oreg. 7, 35 Pac. 177.

See 13 Cent. Dig. tit. "Courts," § 70.

35. Gibson *v.* Huie, 14 La. 129; Nesbit *v.* McDaniel, Cheves (S. C.) 12; Romaine *v.* Union Ins. Co., 28 Fed. 625 (subpœna as compulsory process). See also Burns *v.* Yost, 47 N. J. L. 222, summons.

36. Dixon *v.* Dixon, 61 Ill. 324 (process generally); Holmes *v.* Fihlenburg, 54 Ill. 203 (summons); Burns *v.* Yost, 47 N. J. L. 222 (summons); Wellman *v.* Bergmann, 44 N. J. L. 613 (construction of statute as to jurisdiction and process); Hoag *v.* Lamont, 60 N. Y. 96 (strictly local court). See also Porter *v.* Lord, 4 Duer (N. Y.) 682, 4 Abb. Pr. (N. Y.) 43, 13 How. Pr. (N. Y.) 254.

37. *Colorado.*— Phelps *v.* Spruance, 1 Colo. 414.

Florida.— Sanchez *v.* Haynes, 35 Fla. 619, 18 So. 27.

Illinois.— Linton *v.* Anglin, 12 Ill. 284.

Minnesota.— Gould *v.* Johnston, 24 Minn. 188.

New York.— Porter *v.* Lord, 4 Duer 682, 13 How. Pr. 254, 4 Abb. Pr. 43; Gemp *v.* Pratt, 53 How. Pr. 83 (common pleas of city of New York [abolished by Const. (1895), art. 6, § 5, and jurisdiction vested in supreme court] may issue process in any county of state); Code Civ. Proc. § 426.

Wisconsin.— American L. & T. Co. *v.* Bond, 91 Wis. 204, 64 N. W. 854, circuit court process runs throughout state, applied to superior courts. See also Chase *v.* Ostrom, 50 Wis. 640, 7 N. W. 667.

See 13 Cent. Dig. tit. "Courts," § 70.

The legislature may authorize service of process beyond territorial limits (Hickman *v.* O'Neal, 10 Cal. 292), but has no power to authorize extraterritorial service of process contrary to the constitution (Holmes *v.* Fihlenburg, 54 Ill. 203; Rockwell *v.* Raymond, 5 N. Y. Suppl. 642; Landers *v.* Staten Island R. Co., 14 Abb. Pr. N. S. (N. Y.) 346).

38. Cowan *v.* Montgomery, 7 J. J. Marsh. (Ky.) 299.

39. Gifford *v.* Thorn, 7 N. J. Eq. 90.

40. Goldstein *v.* New Orleans, 38 Fed. 626, warrants against a city. See also Herkimer *v.* Sharp, 5 Ill. App. 620.

ants, part of whom are non-residents, by the proper service upon resident defendants where the statute so provides.[41] The statute must, however, be complied with, and acts of service or joinder or other acts calculated to evade the statute or which are otherwise not within its purport and intent will be non-effective to confer jurisdiction.[42]

c. Fraud and Improper Means to Obtain Jurisdiction. A defendant is not amenable to process unless he is in or comes voluntarily within the territorial jurisdiction of the court, and if he is wrongfully, fraudulently, or by deceit induced by abuse of process or otherwise to come within the process of the court, service is not effective either as to his person or property and should be set aside, dismissed, vacated, or quashed.[43]

5. JURISDICTION BY CONSENT — a. Statement of Rule. Parties cannot by consent or by stipulation invest a court with jurisdiction or power not authorized by law or conferred upon it by the constitution.[44] This rule applies to jurisdiction

41. *Indiana.*—McCammock *v.* Clark, 16 Ind. 320.

Kentucky.— Turner *v.* O'Bannon, 2 J. J. Marsh. 186.

Louisiana.— Adams *v.* Scott, 25 La. Ann. 528; Toby *v.* Hart, 8 La. 523; Flower *v.* Hagan, 2 La. 223.

Michigan.— Allison *v.* Kinne, 104 Mich. 141, 62 N. W. 152.

Mississippi.— Comstock *v.* Rayford, 1 Sm. & M. 423, 40 Am. Dec. 102.

New York.— Clason *v.* Corley, 5 Sandf. 454.

Virginia.— Porter *v.* Young, 85 Va. 49, 6 S. E. 803.

See 13 Cent. Dig. tit. "Courts," § 71.

Although rights of non-residents are wholly distinct from parties before court it is sufficient if one material defendant is served. Jackson *v.* Tiernan, 10 Yerg. (Tenn.) 172, under Stat. (1787), c. 22.

Co-executors living in different counties, action will not abate because served on one living in jurisdiction and not on others. Park *v.* Morrison, 4 N. C. 155.

42. *Illinois.*— Aird *v.* Haynie, 36 Ill. 174.

Kentucky.— Bayse *v.* Brown, 78 Ky. 553 (party improperly joined); Fernold *v.* Speer, 3 Metc. 459 (*pro forma* joinder only without proceedings or disposition of suit); Pottinger *v.* Mayfield, 14 B. Mon. 647 (must appear that one party is a resident); Lewis *v.* Davis, 2 Bibb 570.

Nebraska.— Dunn *v.* Haines, 17 Nebr. 560, 23 N. W. 501.

New York.— Hoag *v.* Lamont, 60 N. Y. 96 (jurisdiction of local court cannot be extended to bring it within the law); Delafield *v.* Wright, 3 Sandf. 746.

Ohio.—Allen *v.* Miller, 11 Ohio St. 374 (real parties in interest does not mean nominal parties only); Fisher *v.* Murdock, 1 Handy 544, 12 Ohio Dec. (Reprint) 280.

Tennessee.— Yancey *v.* Marriott, 1 Sneed 28 (*nolle prosequi* entered as to resident defendant, jurisdiction over non-resident co-defendants fails); Jackson *v.* Tiernan, 10 Yerg. 172.

Texas.— Pool *v.* Pickett, 8 Tex. 122 (joinder must be *bona fide*); Henderson *v.* Kissam, 8 Tex. 46.

See 13 Cent. Dig. tit. "Courts," § 71.

Jurisdiction is not dependent upon successful prosecution of suit against resident defendants. Rich *v.* Rayle, 2 Humphr. (Tenn.) 404.

43. *Illinois.*— Wanzer *v.* Bright, 52 Ill. 35.

Kentucky.— Wood *v.* Wood, 78 Ky. 624.

Michigan.— Stilson *v.* Greeley, 2 Mich. N. P. 222.

Minnesota.— Chubbuck *v.* Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864.

Missouri.— Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96 [*overruling* Byler *v.* Jones, 22 Mo. App. 623].

New Jersey.—Reed *v.* Williams, 29 N. J. L. 385; Heston *v.* Heston, 52 N. J. Eq. 91, 28 Atl. 8.

New York.— Dunham *v.* Cressy, 51 Hun 641, 4 N. Y. Suppl. 13; Metcalf *v.* Clark, 41 Barb. 45; Wyckoff *v.* Packard, 20 Abb. N. Cas. 420; Baker *v.* Wales, 14 Abb. Pr. N. S. 331, 45 How. Pr. 137; Steiger *v.* Bonn, 59 How. Pr. 496.

Ohio.— *Ex p.* Everts, 2 Disn. 33.

Oregon.— *Compare* Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517.

Pennsylvania.— Hevener *v.* Heist, 9 Phila. 274, 30 Leg. Int. 46. *Compare* Fearl *v.* Hanna, 129 Pa. St. 588, 18 Atl. 556.

Tennessee.— Battelle *v.* Youngstown Rolling Mill Co., 16 Lea 355.

Wisconsin.— Townsend *v.* Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793.

United States.— Blair *v.* Turtle, 5 Fed. 394, 1 McCrary 372; Steiger *v.* Bonn, 4 Fed. 17.

See 13 Cent. Dig. tit. "Courts," § 73.

44. *Alabama.*—Dunham *v.* Hatcher, 31 Ala. 483; Fields *v.* Walker, 23 Ala. 155; State *v.* Caroline, 20 Ala. 19; Winn *v.* Freele, 19 Ala. 171; Humphrey *v.* State, Minor 64.

California.— Boggs *v.* Merced Min. Co., 14 Cal. 279.

Colorado.— Haverly Invincible Min. Co. *v.* Howcutt, 6 Colo. 574.

Connecticut.— Andrews *v.* Wheaton, 23 Conn. 112.

Florida.— Post *v.* Carpenter, 2 Fla. 441; Bluett *v.* Nicholson, 1 Fla. 384.

Georgia.— Georgia Mut. Loan Assoc. *v.*

of the cause of action or subject-matter,[45] to causes wherein the necessary juris-

McGowan, 59 Ga. 811; Central Bank *v.* Gibson, 11 Ga. 453; Pilotage Com'rs *v.* Low, R. M. Charlt. 298.

Illinois.— Shissler *v.* People, 93 Ill. 472; Fleischman *v.* Walker, 91 Ill. 318; Beesman *v.* Peoria, 16 Ill. 484; Ginn *v.* Rogers, 9 Ill. 131; Leigh *v.* Mason, 2 Ill. 249; Foley *v.* People, 1 Ill. 57; Mathias *v.* Mathias, 104 Ill. App. 344; Leman *v.* Sherman, 18 Ill. App. 368.

Indiana.— Herbster *v.* State, 80 Ind. 484.

Iowa.— Dicks *v.* Hatch, 10 Iowa 380; Michales *v.* Hine, 3 Greene 470.

Kansas.— Van Bentham *v.* Osage County, 49 Kan. 30, 30 Pac. 111.

Kentucky.— Davis *v.* Davis, 10 Bush 274; Stark *v.* Thompson, 3 J. J. Marsh. 299; Ormsby *v.* Lynch, Litt. Sel. Cas. 303; Lindsey *v.* McClelland, 1 Bibb 262; Brown *v.* Crow, Hard. 443.

Louisiana.— Riggs *v.* Bell, 39 La. Ann. 1030, 3 So. 183; State *v.* Judge Eleventh Dist. Ct., 21 La. Ann. 258; State *v.* Judge Judicial Dist. Ct., 13 La. Ann. 89; Marsoudet *v.* Bienvenu, 11 La. 122.

Maine.— Hobbs *v.* Gould, (1887) 10 Atl. 457; Powers *v.* Mitchell, 75 Me. 364; State *v.* Bonney, 34 Me. 223.

Massachusetts.— Osgood *v.* Thurston, 23 Pick. 110; Carlisle *v.* Western, 21 Pick. 535.

Michigan.— Hagar *v.* Coup, 50 Mich. 54, 14 N. W. 698.

Mississippi.— Lester *v.* Harris, 41 Miss. 668; Bell *v.* Tombigbee R. Co., 4 Sm. & M. 549; Hurd *v.* Tombes, 7 How. 229.

Missouri.— Cones *v.* Ward, 47 Mo. 289; Dodson *v.* Scroggs, 47 Mo. 285; *In re* Williams, 62 Mo. App. 339.

Montana.— Sanders *v.* Farwell, 1 Mont. 599; Wilson *v.* Davis, 1 Mont. 98.

Nevada.— Phillips *v.* Welch, 11 Nev. 187; Paul *v.* Armstrong, 1 Nev. 82.

New Jersey.— Collins *v.* Keller, 58 N. J. L. 429, 34 Atl. 753; Cottrell *v.* Thompson, 15 N. J. L. 344; Parker *v.* Munday, 1 N. J. L. 70; Falkenburg *v.* Cramer, 1 N. J. L. 31.

New York.—Davidsburgh *v.* Knickerbocker L. Ins. Co., 90 N. Y. 526; Perry *v.* Erie Transfer Co., 4 Misc. 598, 23 N. Y. Suppl. 878; Tucker *v.* Tucker, 4 Abb. Dec. 428, 4 Keyes 136; Parkhurst *v.* Rochester Lasting Mach. Co., 65 Hun 489, 20 N. Y. Suppl. 395; Ansonia Brass, etc., Co. *v.* New York Lamp Chimney Co., 64 Barb. 435; Clyde, etc., Plank Road Co. *v.* Parker, 22 Barb. 323; Coffin *v.* Tracy, 3 Cai. 129.

North Carolina.— Green *v.* Collins, 28 N. C. 139.

Ohio.— Evans *v.* Iles, 7 Ohio St. 233; Gilliland *v.* Sellers, 2 Ohio St. 223; Mygatt *v.* Ingham, Wright 176.

Pennsylvania.— Oil City *v.* McAboy, 74 Pa. St. 249; Gettysburg R. Co. *v.* Kohler, 3 Lanc. Bar 10.

Rhode Island.— Weeden *v.* Richmond, 9 R. I. 128, 98 Am. Dec. 373.

South Carolina.— Chalmers *v.* Turnipseed, 21 S. C. 126; Bent *v.* Graves, 3 McCord 280, 15 Am. Dec. 632.

Tennessee.— Rice *v.* Alley, 1 Sneed 51; *Ex p.* Williams, 4 Yerg. 579.

Texas.— Wynns *v.* Underwood, 1 Tex. 48.

Virginia.— Tyson *v.* Glaize, 23 Gratt. 799; Randolph *v.* Kinney, 3 Rand. 394; Clarke *v.* Conn, 1 Munf. 160; Brickhouse *v.* Hunter, 4 Hen. & M. 363, 4 Am. Dec. 528; Bogle *v.* Fitzhugh, 2 Wash. 213.

Washington.— Steiner *v.* Nerton, 6 Wash. 23, 32 Pac. 1063; Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 75.

Wisconsin.— Hager *v.* Falk, 82 Wis. 644, 52 N. W. 432; Hills *v.* Miles, 13 Wis. 625; Wanzer *v.* Howland, 10 Wis. 8.

United States.— Fourniquet *v.* Perkins, 7 How. 160, 12 L. ed. 650; Olds Wagon Works *v.* Benedict, 67 Fed. 1, 14 C. C. A. 285; Central Trust Co. *v.* Virginia, etc., Co., 55 Fed. 769; Daly *v.* Doe, 3 Fed. 903. See also St. Louis R. Co. *v.* Pacific R. Co., 52 Fed. 770; Ketchum *v.* Farmers' L. & T. Co., 14 Fed. Cas. No. 7,736, 4 McLean 1.

See 13 Cent. Dig. tit. "Courts," § 75.

As to conferring jurisdiction on appellate court by consent see APPEAL AND ERROR, II, B, 1 [2 Cyc. 536].

Total want of jurisdiction cannot be cured by consent of parties. *In re* Aylmer, 20 Q. B. D. 258, 57 L. J. Q. B. 168, 36 Wkly. Rep. 231; Jones *v.* Owen, 5 D. & L. 669, 13 Jur. 261, 18 L. J. Q. B. 8; Bacon Abr. tit. Courts (A).

45. *Alabama.*— Walker *v.* Ivey, 74 Ala. 475; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Jeffries *v.* Harbin, 20 Ala. 387; Wyatt *v.* Judge, 7 Port. 37.

Arkansas.— Jacks *v.* Moore, 33 Ark. 31.

California.— Ball *v.* Putnam, 123 Cal. 134, 55 Pac. 773.

Colorado.— Whipple *v.* Stevenson, 25 Colo. 447, 55 Pac. 188; McKinnon *v.* Hall, 10 Colo. App. 291, 50 Pac. 1052.

District of Columbia.— Palmer *v.* Fleming, 1 App. Cas. 528.

Georgia.— Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660.

Illinois.— Parsons *v.* Millar, 189 Ill. 107, 59 N. E. 606; Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; Peak *v.* People, 71 Ill. 278; Bureau County *v.* Thompson, 39 Ill. 566.

Indian Territory.— *In re* Frazee, (1901) 64 S. W. 545.

Iowa.— Chapman *v.* Morgan, 2 Greene 374.

Kentucky.— Brown *v.* McKee, 1 J. J. Marsh. 471.

Maryland.— Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806; Danner *v.* State, 89 Md. 220, 42 Atl. 965.

Michigan.— Kirkwood *v.* Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549.

Minnesota.— State *v.* Dike, 20 Minn. 363.

dictional amount is involved,[46] to a supreme court concerning questions brought up from below pending trial,[47] to long acquiescence as a basis of jurisdiction of a court of appeals,[48] to an action of trespass and a stipulation to try title,[49] to a case where jurisdiction is conferred upon another court,[50] or to extending jurisdiction so as to have certain matters settled in a proceeding before the court,[51] and it precludes bringing a local action in another county than that in which the property lies.[52]

b. Qualification of Rule. Where jurisdiction has attached and the cause of action or subject-matter is legally and properly within the power and cognizance of the court, it may proceed upon consent or stipulation with reference to the matters before it;[53] and this rule applies where the court has general jurisdiction

Mississippi.— Holloman *v.* Holloman, 5 Sm. & M. 559.

Missouri.—Abernathy *v.* Moore, 83 Mo. 65; Brown *v.* Woody, 64 Mo. 547; Tippack *v.* Briant, 63 Mo. 580.

Nebraska.— Crawford *v.* Hathaway, 61 Nebr. 317, 85 N. W. 303; Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; Johnson *v.* Bouton, 56 Nebr. 626, 77 N. W. 57.

New Hampshire.—Batchelder *v.* Currier, 45 N. H. 460.

New Jersey.— Warren County School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115; Newkirk *v.* Morris, 12 N. J. Eq. 62.

New York.— *In re* Walker, 136 N. Y. 20, 32 N. E. 633 [*reversing* 17 N. Y. Suppl. 666]; Dudley *v.* Mayhew, 3 N. Y. 9; Matter of Campbell, 88 Hun 374, 34 N. Y. Suppl. 831; Shakespeare *v.* Markham, 10 Hun 311; Bumstead *v.* Read, 31 Barb. 661; Harriott *v.* New Jersey R., etc., Co., 2 Hilt. 262; Matter of Krakauer, 33 Misc. 674, 68 N. Y. Suppl. 935; Perry *v.* Erie Transfer Co., 4 Misc. 598, 23 N. Y. Suppl. 878; Albany Brewing Co. *v.* Smith, 74 N. Y. Suppl. 901; Chambers *v.* Feron, 56 N. Y. Suppl. 338; Dakin *v.* Demming, 6 Paige 95; Shaw's Estate, Tuck. Surr. 352.

North Carolina.— Leach *v.* Western North Carolina R. Co., 65 N. C. 486.

Ohio.— Rohn *v.* Dunbar, 13 Ohio St. 572; Gilliland *v.* Sellers, 2 Ohio St. 223; Ballou *v.* Farnsworth, 4 Ohio Dec. (Reprint) 88, Clev. L. Rep. 17; Wilson *v.* Swigart, 1 Ohio S. & C. Pl. Dec. 418.

Pennsylvania.— Small's Appeal, (1888) 15 Atl. 767; Hoch's Appeal, 72 Pa. St. 53.

Rhode Island.— Fitts *v.* Shaw, 22 R. I. 17, 46 Atl. 42.

South Carolina.— Gallman *v.* Gallman, 5 Strobh. 207.

Tennessee.— Baker *v.* Mitchell, 105 Tenn. 610, 59 S. W. 137; Anderson *v.* Cannon, Cooke 27.

Texas.— Haney *v.* Millikin, 2 Tex. App. Civ. Cas. § 221.

West Virginia.— Yates *v.* Taylor County Ct., 47 W. Va. 376, 35 S. E. 24.

See 13 Cent. Dig. tit. "Courts," § 76.

46. *California.*— Feillett *v.* Engler, 8 Cal. 76.

Indiana.— Horton *v.* Sawyer, 59 Ind. 587.

Louisiana.— Gee *v.* Thompson, 39 La. Ann. 310, 1 So. 537; Tague *v.* Royal Ins. Co., 38 La. Ann. 456.

Michigan.— Gamber *v.* Holben, 5 Mich. 331.

Missouri.— Tippack *v.* Briant, 63 Mo. 580.

Texas.— Southern Pac. R. Co. *v.* Burns, (Civ. App. 1893) 23 S. W. 288; McMahan *v.* Dennis, 1 Tex. App. Civ. Cas. § 1209.

Virginia.— Wynn *v.* Scott, 7 Leigh 63.

United States.— Merrill *v.* Petty, 16 Wall. 338, 21 L. ed. 499.

See 13 Cent. Dig. tit. "Courts," § 78.

47. Long *v.* Long, Morr. (Iowa) 381.

48. Clarke *v.* Conn, 1 Munf. (Va.) 160. See also Warren County School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115.

49. Union Coal Co. *v.* La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326.

50. Yates *v.* Taylor County Ct., 47 W. Va. 376, 35 S. E. 24.

51. Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806.

52. McHenry *v.* Wallen, 2 Yerg. (Tenn.) 441.

Land without state — When consent gives jurisdiction.— But a village police justice has jurisdiction by consent over land in another town in the county (Brandon *v.* Avery, 22 N. Y. 469), and a promise in writing to submit to service within the state coupled with service, confers jurisdiction over a contract for the sale of land situate without the state (Shattuck *v.* Cassidy, 3 Edw. (N. Y.) 152).

53. Thus parties may consent to try a cause at chambers instead of at the regular term (Lindsay *v.* People, 1 Ida. 438), and the court may try an action transferred by agreement from another county (Milner *v.* Chicago, etc., R. Co., 77 Iowa 755, 42 N. W. 567. See Fourniquet *v.* Perkins, 7 How. (U. S.) 160, 12 L. ed. 650). So consent can dispense with recitals or statements in pleadings setting forth the jurisdiction (Clyde, etc., Plank Road Co. *v.* Parker, 22 Barb. (N. Y.) 323), and jurisdiction over a particular action can be conferred by agreement (Greer *v.* Cagle, 84 N. C. 385). So the whole controversy may be by consent submitted on a rehearing (Badgely *v.* Badgely, 5 Ohio Dec. (Reprint) 495, 6 Am. L. Rec. 286), and consent may restore jurisdiction which has once attached, but which has been exercised so that the court's power is gone and said suit may be redetermined (Brown

of the cause in controversy.[54] Again the principle as to consent has been held to be applicable only to the question of general jurisdiction to adjudicate as to the subject-matter and not to the question whether the particular facts of the case bring it within that conceded jurisdiction.[55] It has also been asserted that the rule that jurisdiction cannot be conferred by consent does not cover cases where the agreement of the parties is in effect only waiving the ordinary process by which the power of the court is invoked,[56] especially so where the court has general jurisdiction over the subject-matter and has proceeded to final judgment without objection taken.[57] So parties who consent that an order of court be made have been held to be obligated thereby, even though the court had no power to make such order.[58]

c. As to the Person. Although the rule that parties cannot by consent confer jurisdiction where the law gives none has been applied to an appearance by defendant and answering to the merits[59] or confessing the bill by omitting to make answer;[60] yet where the court has jurisdiction over the subject-matter, or the exemption of the party is a personal privilege, it may, the parties being legally competent, be waived by express consent or stipulation, or by some act equivalent thereto,[61] or where a foreign corporation designates in compliance with the law a person upon whom process may be served.[62] So the rule applies where the jurisdiction is exclusive over the subject-matter;[63] but third persons cannot be prejudiced by such consent of the parties.[64] It has also been held that jurisdiction of the person, although not of the subject-matter, may be conferred by consent.[65]

v. Crow, Hard. (Ky.) 443; Bogle *v.* Fitzhugh, 2 Wash. (Va.) 213). So parties may "agree to come to trial" (Vanderveer *v.* Ingleton, 7 N. J. L. 140), or that an action may be brought (Bowers *v.* Durant, 43 Hun (N. Y.) 348), and after injunction improperly granted, parties may stipulate to refer all matters in dispute to arbitrators (Brickhouse *v.* Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528). Again irregular proof of facts showing that a cause is properly before a court may be admitted by consent (Hills *v.* Miles, 13 Wis. 625), and consent of creditors suing on separate attachments that the property be surrendered to the assignee appointed by another court gives the latter exclusive jurisdiction (Plume, etc., Mfg. Co. *v.* Caldwell, 35 Ill. App. 492 [*affirmed* in 136 Ill. 163, 26 N. E. 599, 29 Am. St. Rep. 305]). But a stipulation does not confer jurisdiction to try a cause after an adjournment in one county and the commencement of a term in another county. Bates *v.* Gage, 40 Cal. 183.

54. Foreman *v.* Hough, 98 N. C. 386, 3 S. E. 912. See also Hawkins *v.* Hughes, 87 N. C. 115.

55. Wanzer *v.* Howland, 10 Wis. 8.

56. Groves *v.* Richmond, 56 Iowa 69, 8 N. W. 752 [*distinguishing* McMeans *v.* Cameron, 51 Iowa 691, 49 N. W. 856].

"Consent of parties cannot confer jurisdiction on the court in a matter excluded by law. But when the court has jurisdiction of the subject-matter, and the party is privileged from the jurisdiction, he may waive such privilege." Bacon Abr. tit. Courts (A).

57. *In re* Spring St., 112 Pa. St. 258, 3 Atl. 581.

58. Chalmers *v.* Turnipseed, 21 S. C. 126.

59. Parkhurst *v.* Rochester Lasting Mach. Co., 65 Hun (N. Y.) 489, 20 N. Y. Suppl. 395.

60. Burckle *v.* Eckhart, 3 N. Y. 132.

61. *California.*— Gray *v.* Hawes, 8 Cal. 562.

Georgia.— Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660; Central Bank *v.* Gibson, 11 Ga. 453; Bostwick *v.* Perkins, 4 Ga. 47.

Illinois.— Allen *v.* Belcher, 8 Ill. 594.

Indiana.— Gage *v.* Clark, 22 Ind. 163.

Nebraska.— Bedford *v.* Ruby, 17 Nebr. 97, 22 N. W. 76.

Ohio.— Campbell *v.* Cowden, Wright 484.

South Carolina.— Brown *v.* Overstreet, 4 McCord 79.

See 13 Cent. Dig. tit. "Courts," § 79.

Consent prior to institution of proceeding. — The execution of a consent and waiver prior to the institution of a proceeding does not confer upon a surrogate jurisdiction over the party executing such consent and waiver. Matter of Graham, 39 Misc. (N. Y.) 226, 79 N. Y. Suppl. 573, 12 N. Y. Annot. Cas. 157.

Upon the substitution of a wife as administratrix in place of a deceased husband, in a proceeding against the husband and wife to foreclose a tax lien, the court may continue the action to a decree. State *v.* Jordan, 25 Tex. Civ. App. 17, 59 S. W. 826, 60 S. W. 1008.

62. Gray *v.* Quicksilver Min. Co., 21 Fed. 288.

63. Randolph County *v.* Ralls, 18 Ill. 29.

64. Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660; Georgia R., etc., Co. *v.* Harris, 5 Ga. 527.

65. Gage *v.* Clark, 22 Ind. 163.

That jurisdiction over the person may be conferred by consent see Fowler *v.* Halbert, 3 Bibb (Ky.) 384; Brown *v.* Woody, 64 Mo.

D. Scope and Extent of Jurisdiction — 1. In General. Courts established by law cannot transcend the powers granted, nor can such jurisdiction be enlarged by intendment.[66] Nor can authority over a cause of an equitable nature include matters preliminary to the exercise of such jurisdiction which are purely of equitable cognizance over which as such the court has no power,[67] nor are the consequences and incidents of a matter included where the matter itself is excluded,[68] nor will an express statutory exclusion of certain cases be controlled by a subsequent enactment which merely indicates an inclusion thereof,[69] nor can a limitation of jurisdiction be inferred when not expressed in the act conferring the same, although it may arise from a necessary implication.[70] But where the statute gives jurisdiction over certain proceedings in a specified matter, it may be exercised, although the enforcement of the entire remedy is not necessary for the protection of plaintiff's legal rights.[71] Again the court will not modify an order where such act would be a delegation of its authority to a tribunal of another state,[72] nor will a court take cognizance of the acts of its predecessors to correct their judgments or decrees.[73] Again the jurisdiction of a court is generally confined to its territorial limits.[74]

2. Over Entire Controversy. The authority to hear and determine a cause is jurisdiction to try and decide all the questions involved in the controversy,[75] and if a court legally obtains jurisdiction of the parties and subject-matter, it may decide all questions arising in the cause, and its decisions are binding until reversed by a competent court.[76]

3. Ancillary and Incidental Jurisdiction — a. In General. Although the legislature may by virtue of constitutional authority give to a court cognizance over all incidental and dependent matters, so that the litigants shall have the full benefit of their rights and the court be enabled to pronounce finally,[77] still a grant of jurisdiction implies the necessary and usual incidental powers essential to effectuate it;[78] and a court's power to apply a remedy is coextensive with its jurisdiction over the subject-matter.[79] So that demands, matters, or questions ancillary or incidental to or growing out of the main action, and which also come within the above principles, may be taken cognizance of by the court and determined,

547; Burnley *v.* Cook, 13 Tex. 586, 65 Am. Dec. 79; Walker *v.* Rogan, 1 Wis. 597.

Rule applies to justices' courts.— Grimm *v.* Dundee Land, etc., Co., 55 Mo. App. 457.

66. Baker *v.* Chisholm, 3 Tex. 157.

67. Mally *v.* Mally, 31 Iowa 60.

68. Matter of Ferguson, 9 Johns. (N. Y.) 239.

69. Ludington *v.* U. S., 15 Ct. Cl. 453.

70. U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.

71. Kenny *v.* Geohegan, 9 N. Y. Civ. Proc. 378.

72. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 9.

73. Reed *v.* Allison, 54 Cal. 489; Saunders *v.* Smith, 3 Ga. 121; Long *v.* Pellett, 1 Harr. & M. (Md.) 531. But see Davis *v.* Watson, 54 Miss. 679.

74. Gardner *v.* Witbord, 59 Ill. 145; Sherry *v.* Winton, 1 Ind. 96; Winet *v.* Berryhill, 55 Iowa 411, 7 N. W. 681.

75. Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

76. *Arkansas.*— Evans *v.* Percifull, 5 Ark. 424.

Connecticut.— Sherwood *v.* Stevenson, 25 Conn. 431.

Georgia.— Leyden *v.* Hickman, 75 Ga. 684.

Iowa.— Smith *v.* Engle, 44 Iowa 265.

Louisiana.— Wheeless *v.* Fisk, 28 La. Ann. 731; McDowell *v.* Read, 3 La. Ann. 391.

New York.— Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Hall *v.* Hall, 30 How. Pr. 51.

Ohio.— Borntraeger *v.* Borntraeger, 7 Ohio Dec. (Reprint) 551, 3 Cinc. L. Bul. 891.

Texas.— Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46; Peticolas *v.* Carpenter, 53 Tex. 23; Kenedy *v.* Jarvis, (Sup. 1886) 1 S. W. 191.

See 13 Cent. Dig. tit. "Courts," § 83.

A court of equity will not retain bill against resident parties in respect to property or claims thereto held by them as agents of foreign governments where by international law courts can exercise no jurisdiction over them. Leavitt *v.* Dabney, 3 Abb. Pr. N. S. (N. Y.) 469.

77. State Bank *v.* Duncan, 52 Miss. 740.

78. State *v.* Rombauer, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502. See also Jenkins *v.* Simms, 45 Md. 532.

79. Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

If court has no jurisdiction over a suit it will not construe a contract involved. Tay-

for such jurisdiction is in aid of its authority over the principal matter.[80] Again a court may entertain proceedings ancillary to the judgment, for jurisdiction once acquired is not exhausted by the rendition of judgment, but continues until such judgment is satisfied and includes the power to issue all proper process and to take all proper proceedings for its enforcement.[81] A court may also entertain a

lor *v.* Mutual Reserve Fund L. Assoc., 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621.

80. Thus the power to render judgment involves the power to take the preliminary steps (Com. *v.* Simpson, 2 Grant (Pa.) 438), and jurisdiction of a cause vested in a district court includes incidental demands, growing out of or connected with the main suit (State *v.* Thompson, 34 La. Ann. 758). The rule also includes jurisdiction over a warrantor of defendant subsequently brought in (Meade *v.* Warring, (Tex. Civ. App. 1896) 35 S. W. 308), and an orphans' court has power to discharge a party attached in contempt (Kuntz's Estate, 2 Lehigh Val. L. Rep. (Pa.) 241). So the supreme court has inherent power to protect parties in interest from injustice and fraud (Baldwin *v.* New York, 42 Barb. (N. Y.) 549), and although a supreme court may not have original jurisdiction in equity to relieve against fraud as a direct object of a bill, yet where the question of fraud arises incidentally to a suit the court may consider it (Goodrich *v.* Staples, 2 Cush. (Mass.) 258). The rule also applies to the power of a superior court to order the taking of an account (Rountree *v.* Britt, 94 N. C. 104), to the right of a chancellor to grant an injunction incidental merely to a decree (Mason *v.* Chambers, 4 J. J. Marsh. (Ky.) 401), to the right of a parish court to enforce the sale of property on execution (McGinty *v.* Richmond, 27 La. Ann. 606), to the right of the court of a county or city to restrain the sale of real estate in another county or city (Winston *v.* Midlothian Coal Min. Co., 20 Gratt. (Va.) 686), to the right of a county court to pass upon title to land in an action of trespass (Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241), to the right of a court of common pleas to determine title in an action for partition between heirs (Thompson *v.* Mills, 39 Ind. 528), to the trial of land titles as an incidental matter in counties other than that where the land lies (Royston *v.* Royston, 21 Ga. 161), and to the cancellation of a deed by a county court in an action of partition (Bell *v.* Gittere, 9 N. Y. Suppl. 400 [*affirmed* in 134 N. Y. 616, 32 N. E. 640]). But circuit courts cannot set aside conveyances in foreign countries in aid of executions issued by the circuit court of one county to the sheriff of another. Richards *v.* Hyde, 21 Ill. 640. A city court may within the rule grant a writ of assistance to put a purchaser in possession of land sold on foreclosure of a mechanic's lien (O'Connor *v.* Schaeffel, 11 N. Y. Suppl. 737, 19 N. Y. Civ. Proc. 378, 25 Abb. N. Cas. (N. Y.) 344), and the title to premises concerning which a foreclosure is sought may be settled (Ewing *v.* Patterson, 35 Ind. 326. See also Denny *v.* Graeter, 20 Ind. 20; Toner *v.* Mitchell, 13 Ind. 530). So a circuit court may regulate all proceedings necessary to foreclose a mortgage (Tooley *v.* Gridley, 3 Sm. & M. (Miss.) 493, 41 Am. Dec. 628), and a county court may reform a condition of a bond secured by mortgage as incidental to an action to foreclose (Mead *v.* Langford, 56 Hun (N. Y.) 279, 9 N. Y. Suppl. 586, 18 N. Y. Civ. Proc. 293; N. Y. Code Civ. Proc. §§ 340, 348). Such court may also in such an action dispose of issues arising upon a counter-claim, although it has no original jurisdiction over such claim. Hall *v.* Hall, 30 How. Pr. (N. Y.) 51. But a power to reform a mortgage is not vested in said courts as incidental to the power to foreclose. Thomas *v.* Harmon, 122 N. Y. 84, 25 N. E. 257 [*affirming* 46 Hun 75, 11 N. Y. St. 79, 27 N. Y. Wkly. Dig. 316]. The power, however, to make distribution of the mortgage fund involves the power to determine all incidental questions including an attorney's compensation (Ihmsen's Estate, 29 Pittsb. Leg. J. (Pa.) 218), and a power to declare trusts of a devisee or executor and to determine liabilities in payment of legacies of lands devised authorizes granting incidentally the application of the personalty or to apply the land to satisfy the legacies (Devereux v. Devereux, 81 N. C. 12; N. C. Acts (1876–1877), c. 241, § 6). So a petition for a sale of real property for the payment of debts gives a circuit court power to make all incidental orders and decrees required by the circumstances and equities of the case. Moore *v.* Moore, 11 Humphr. (Tenn.) 512. Again in a suit by a vendee, in so far as its object is the recovery from a third person of the land in controversy, the district court has power to hear and determine in the alternative the branch of action against the vendor on the warranty, regardless of the amount sued for. Chesnutt *v.* Chism, (Tex. Civ. App. 1898) 48 S. W. 549.

81. Phelps *v.* Mutual Reserve Fund L. Assoc., 112 Fed. 453, 50 C. C. A. 339 [*reversing* 103 Fed. 515].

The power to arrest judgment after verdict is necessarily inherent in the common-law courts and belongs therefore to the district court. Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97. So the power to compel the return of an execution issued is incidental to the authority to issue the same (Shindler *v.* Blunt, 1 Sandf. (N. Y.) 683), and the power to issue executions is a necessary incident of a court of record (Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045). So a

petition to restrain a foreign corporation over which it has jurisdiction from doing anything to prevent a receiver from acting in matters which pertain to the subject-matter of the suit before it, such as taking possession of property.[82]

b. Of Probate and Like Courts — (I) *In General.* Probate and like courts have a special jurisdiction only, and their powers as to ancillary or incidental questions must of necessity be exercised within certain limitations.[83] Beyond this point the difficulty in formulating any general rule of value in a specific case is obvious;[84] especially so in view of the fact that in rendering their decisions the expressions of the courts have differed upon essential points, principally as to the degree of strictness with which the grant of jurisdiction should be construed.[85]

circuit court in Mississippi has power to correct any oppressive or unjust abuse of its process and to quash an execution and set aside a sale thereunder. Hopton *v.* Swan, 50 Miss. 545.

82. Chesapeake, etc., R. Co. *v.* Swayze, 60 N. J. Eq. 417, 47 Atl. 28.

Order appointing receiver will not be modified so as to make the action in one state collateral or ancillary to that pending in another state, especially where such modification would be a delegation of the court's authority to the tribunal of another state. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 9.

83. See Clarke *v.* Ratcliffe, 7 How. (Miss.) 162; Matter of Hawley, 104 N. Y. 250, 10 N. E. 352; Carman *v.* Cowles, 2 Redf. Surr. (N. Y.) 414; Ainey's Appeal, 2 Pennyp. (Pa.) 192.

84. In New York the difficulty may be illustrated by the fact that the legislature attempted at an early date to specifically restrict the exercise of "incidental powers" by surrogates, and it being found that compliance with precise statutory restrictions was incompatible with the business necessities of that court the statute was repealed and the surrogate's "incidental powers" were restored. Laws (1837), c. 460, § 71, repealing 2 Rev. Stat. 221. See Sipperly *v.* Baucus, 24 N. Y. 46. See also Campbell *v.* Thatcher, 54 Barb. 382; Dobke *v.* McClaran, 41 Barb. 491. The present code after enumerating the "incidental powers" of that court provides in conclusion for the exercise by it of "such incidental powers, as are necessary to carry into effect the powers expressly conferred." Code Civ. Proc. § 2481. Under this provision such court may on a judicial settlement, in order to determine the rights of the parties, pass upon the validity of an alleged assignment of a legacy. Matter of Havens, 8 Misc. 574, 29 N. Y. Suppl. 1085, 24 N. Y. Civ. Proc. 68. Again the imposition and collection of the succession tax imposed upon legacies are simply incidents in the final settlement of estates and therefore are not foreign to the jurisdiction (*In re* McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502), and a surrogate may issue a supplemental citation where the necessary parties are not before it (Matter of Phalen, 51 Hun 208, 4 N. Y. Suppl. 409, 16 N. Y. Civ. Proc. 292), may relieve a purchaser at an executor's sale of lands of a deceased person from his purchase, where the proceedings in which the order of sale was made were defective, so as to cloud the title (*In re* Lynch, 33 Hun 309, 67 How. Pr. 436 [*reversing* 2 Dem. Surr. 611]), may determine the validity of alleged gifts by deceased (Fowler *v.* Lockwood, 3 Redf. Surr. 465), may bring all the parties in court to accomplish the objects of the statute (Danser *v.* Jeremiah, 3 Redf. Surr. 130), may try any question on which for the settlement of an executor's accounts a decision may be required and may determine whether assets were a gift to the executor (Merchant *v.* Merchant, 2 Bradf. Surr. 432), and may direct that securities be deposited in a safe place (O'Connor's Estate, 1 N. Y. Suppl. 110).

85. Thus it has been decided that the code contemplated an expansion rather than a contraction of the surrogate's jurisdiction, and that where the legislature has neglected to point out the precise way in which that court may exercise its powers it is at liberty to adopt such modes of procedure as the exigencies of the case may demand, which would include the "incidental powers" vested in it by the code. Delaplaine's Estate, 12 N. Y. Civ. Proc. 35. It has also been determined that a surrogate takes no incidental powers or constructive authority by implication which is not expressly given by statute. *In re* Hawley, 104 N. Y. 250, 10 N. E. 352 [*citing* Wood *v.* Brown, 34 N. Y. 337; Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76; *In re* Woodworth, 2 Barb. Ch. (N. Y.) 351; Bulkley *v.* Van Wyck, 5 Paige (N. Y.) 536; *In re* Andrews, 1 Johns Ch. (N. Y.) 99]), and that the "incidental powers" of that court are only such as are reasonably necessary to carry out the provisions of the statute, and such as may be inferred from its language to be necessary to accomplish its objects (Carman *v.* Cowles, 2 Redf. Surr. (N. Y.) 414). Again a constitutional provision giving to probate courts "jurisdiction in all matters testamentary and of administration" is decided to impliedly draw to its aid every incidental power and authority necessary to the proper discharge of its important functions and to the full and successful accomplishment thereof. Powell *v.* Burrus, 35 Miss. 605. See also West *v.* Gibbs, 42 Miss. 168; Killcrease *v.* Kill-

There seems, however, to be a general tendency, in the absence of express and specific restrictions to the contrary, to uphold the exercise by these courts of such incidental powers as are, within the purview of their grant of authority, reasonably necessary to enable them to accomplish the objects for which they were invested with jurisdiction and to perfect the same.[86]

(II) *Over Title to Property and Validity of Contracts.* The consensus of opinion is that probate and like courts have no jurisdiction to try title to land or other property in direct proceedings therefor and decide directly upon the validity thereof. If, however, the question of title arises collaterally or incidentally and its examination is necessary in order to reach a correct determination in matters over which such courts have jurisdiction, or to enforce their rightful or admitted jurisdiction then they may and should take cognizance thereof and make the requisite inquiry into the same.[87] The same rule has also been applied to the question of the validity of contracts.[88]

(III) *Over Construction of Wills.* The power to construe wills or to inquire into their validity and legal effect and to determine the rights of the parties thereunder is conceded to probate and like courts where the exercise of such power is necessarily incidental to the carrying into effect the powers expressly granted over the administration, settlement, and distribution of estates.[89]

crease, 7 How. (Miss.) 311. So in an early Louisiana decision a court of probate was decided to possess under the code all the powers necessary to the exercise of its jurisdiction. Babin *v.* Nolan, 4 Rob. (La.) 278. It is also determined that the power of the orphans' court once invoked in matters of distribution of decedents' estates is commensurate with its duties. Ainey's Appeal, 2 Pennyp. (Pa.) 192, 196 [*citing* Shollenberger's Appeal, 21 Pa. St. 337; Whiteside *v.* Whiteside, 20 Pa. St. 473].

86. See in this connection cases *supra*, note 85.

Incidental powers include the ademption of legacies (May *v.* May, 28 Ala. 141), the production of books of account in the hearing of claims against the estate (Miller *v.* People, 52 Ill. App. 236), questions of warranty, eviction, and damages (Durnford's Succession, 8 Rob. (La.) 488), the right to inquire collaterally into a sale to ascertain if the property is to be included in the partition (McCaleb *v.* McCaleb, 8 La. 459), jurisdiction to partition real estate (Phillips *v.* Perry, 49 N. H. 264), jurisdiction to determine the parties in interest or any other question necessarily involved in the exercise of its legal authority (Dunham *v.* Marsh, 52 N. J. Eq. 256, 30 Atl. 473), jurisdiction to compel an administrator or executor to return a full inventory (Killcrease *v.* Killcrease, 7 How. (Miss.) 311. See also Compton *v.* Compton, 6 Sm. & M. (Miss.) 194), jurisdiction to compel property to be added to the inventory and to inquire if it be assets (Compton *v.* Compton, 6 Sm. & M. (Miss.) 194), jurisdiction to enter a widow's dissent on transfer of case (Ramsour *v.* Ramsour, 63 N. C. 231), jurisdiction to settle all questions of advancement or of debts that stand therefor (Springer's Appeal, 29 Pa. St. 208), and jurisdiction to enforce necessary orders against distributees after distribution and upon final settlement (Powell *v.* Burrus, 35 Miss. 605).

Power not of necessity incidental to the exercise of any of the granted powers cannot be exercised, and this applies to the enforcement of an attorney's lien on money recovered. Clarke *v.* Ratcliffe, 7 How. (Miss.) 162.

87. *California.*— Kimberly's Estate, 97 Cal. 281, 32 Pac. 234; Haas' Estate, 97 Cal. 232, 31 Pac. 893; Burton's Estate, 64 Cal. 428, 1 Pac. 702; *In re* Dunn, Myr. Prob. 122.

Louisiana.— Hemken *v.* Ludewig, 12 Rob. 188; Durnford's Succession, 8 Rob. 488; *In re* Hackett, 4 Rob. 290; Babin *v.* Nolan, 4 Rob. 278; Goodrich's Succession, 3 Rob. 100; Badon *v.* Foucher, 15 La. 455.

Maine.— Shaw, Appellant, 81 Me. 207, 16 Atl. 662.

Mississippi.— McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127; Gaskins *v.* Hammett, 32 Miss. 103.

New Hampshire.— Phillips *v.* Perry, 49 N. H. 264; Bellows *v.* Grant, Smith 115.

New Jersey.— Robison *v.* Furman, 47 N. J. Eq. 307, 20 Atl. 898; Swackhamer *v.* Kline, 25 N. J. Eq. 503.

Pennsylvania.—Corson's Estate, 137 Pa. St. 160, 20 Atl. 588.

South Carolina.— Gregory *v.* Rhoden, 24 S. C. 90.

Tennessee.—Walsh *v.* Crook, 91 Tenn. 388, 19 S. W. 19.

See 13 Cent. Dig. tit. "Courts," § 86.

88. McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127.

89. *Alabama.*—Harrison *v.* Harrison, 9 Ala. 470.

Michigan.— Glover *v.* Reid, 80 Mich. 228, 45 N. W. 91.

Missouri.— Brown *v.* Stark, 47 Mo. App. 370.

New Jersey.— Hill *v.* Bloom, 41 N. J. Eq. 276, 7 Atl. 438.

4. Property Without Territorial Limits of Jurisdiction. Jurisdiction may rest upon proceedings *in rem* over property or be based upon properly bringing the person within the court's control. This is a principle running through all the cases. The first question therefore to be determined is the extent of the tribunal's authority and the limitation upon its powers. The nature of the action or character of the remedy sought is also important. Thus in cases of fraud, trust, or contract the jurisdiction of equity is sustainable wherever the person can be found, although lands without the limits of the court's authority may be affected by the decree. If, however, the suit relates to a mere question of title it must be tried in the district where the land lies,[90] for if the subject-matter of the controversy lies without the limits of the court's control and where its process cannot reach the *locus in quo* it has no jurisdiction.[91] This rule also applies to a

New York.— *In re* Verplanck, 91 N. Y. 439; Matter of Perkins, 75 Hun 129, 26 N. Y. Suppl. 958; Matter of Havens, 8 Misc. 574, 29 N. Y. Suppl. 1085, 24 N. Y. Civ. Proc. 68; *In re* Owens, 33 N. Y. Suppl. 422, 24 N. Y. Civ. Proc. 256; Matter of Kick, 11 N. Y. St. 688.

Washington.— Webster *v.* Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1082.

Wisconsin.— Schæffner's Appeal, 41 Wis. 260.

See 13 Cent. Dig. tit. "Courts," § 87.

90. Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181.

91. Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 15 How. (U. S.) 233, 14 L. ed. 674.

Application of rule.— If the nature of the suit is that of a proceeding *in rem* it must be prosecuted within the jurisdiction where the property is situate, as where it is sought to subject assets descended to the heir to the payment of an ancestor's debt. Williams *v.* Ewing, 31 Ark. 229. So where a court's jurisdiction does not extend beyond the limits of a city it has no control of lands without said city. Watts *v.* White, 13 Cal. 321. A claim to lands must be determined in the state where the lands lie, whether based on contract express or implied, direct or in secret trust. Clopton *v.* Booker, 27 Ark. 482. Although the legislature may authorize proceedings to subject equitable interests in real estate this does not include land beyond the territorial limits of the state. Butterfield *v.* Ogborn, 1 Disn. (Ohio) 550, 12 Ohio Dec. (Reprint) 789. So a petition to confirm a claim to land in another state will be dismissed on objection to the jurisdiction. Callender *v.* U. S., 4 Fed. Cas. No. 2,321, Hempst. 34. On a bill to rescind a contract relating to land outside its jurisdiction a court cannot decree that defendant remove his machinery from the land and deliver possession of said land to plaintiff. Genet *v.* Delaware, etc., Canal Co., 13 Misc. (N. Y.) 409, 35 N. Y. Suppl. 147. The location of the property will operate as a limitation upon the power of a district court, even though the constitution of the state grants such court jurisdiction of all cases in law or equity. Louden Irrigating Canal Co. *v.* Handy Ditch Co., 22 Colo. 102, 43 Pac. 535; Colo. Const. art. 6, § 11. So the court's authority is limited by the fact that the land is located in another county. Bunch *v.* Bunch, 26 Ind. 40. So also where the object to be seized under executory process of a city court is beyond the city's limits. Elwyn *v.* Jackson, 14 La. 411. No real action lies in Louisiana for lands situate in Mississippi. Edwards *v.* Ballard, 14 La. Ann. 362. So where the statute expressly limits the jurisdiction to premises within the judicial district, its decree cannot affect property without said district. People *v.* Third Dist. Ct., 57 How. Pr. (N. Y.) 443. See also People *v.* Campbell, 22 Hun (N. Y.) 574, 60 How. Pr. (N. Y.) 102. Again the superior court of Cincinnati cannot restrain the assessment or collection of an illegal tax on lands without the city's limits. Jones *v.* Gerke, 2 Cinc. Super. Ct. 500. Like principles have also been applied to other courts of special or limited jurisdiction. Morris *v.* Remington, 1 Pars. Eq. Cas. (Pa.) 387 (a court of common pleas); Atkins *v.* Fraker, 32 Wis. 510 (a municipal court); Brockway *v.* Carter, 25 Wis. 510 (a municipal court).

Person within jurisdiction — Property, etc., not.— Equity may prevent persons over whom it has jurisdiction from prosecution of actions without the state. Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538. And where a husband is within the control of chancery it may exercise its powers as to him, even though his wife's equitable estate out of which he seeks a settlement is within a foreign state. Guild *v.* Guild, 16 Ala. 121. But see Bunch *v.* Bunch, 26 Ind. 400. So a court which has jurisdiction over a creditor may prevent his defeating the operation of an assignment and thereby obtaining a preference over domestic creditors, although his proceedings were directed against real property in another state. Hayden *v.* Yale, 45 La. Ann. 362, 12 So. 633, 40 Am. St. Rep. 232. Again, even though defendant's property is beyond reach of process of the court, yet it may compel a defendant who is personally within its jurisdiction to bring said property within the court's control, or to execute such a trans-

case of a boundary line between states, where the jurisdiction does not extend beyond the middle of a stream dividing them,[92] or where the exclusive jurisdiction of a state in respect to navigable and tide-waters is limited by certain lines of demarcation or qualified as to commerce on such waters or as to designated property within ascertainable lines.[93]

E. Exercise of Jurisdiction — 1. Mode of Exercise in General — a. Regulation and Limitation of. The legislature has the power, even though the constitution gives the court exclusive jurisdiction in certain cases, to regulate the manner or fix the conditions under which the jurisdiction shall be exercised.[94] And if authority is given by a legislative act in a particular case the court will not deviate from the letter thereof. It cannot confound its original jurisdiction and its jurisdiction conferred by the special act, even though it is to be enforced by the same mode of procedure; nor will it deviate from the exercise of its powers under the private statute and make orders founded partly upon such express specific authority and partly upon its original jurisdiction.[95]

b. Relative Powers as Court or Judge. If a judge is vested with exclusive power he must act as judge,[96] and a judge may exercise the power conferred by statute upon him as judge in the name of the court and as the act of the court.[97] But the authority may be given to the court and not to the judge thereof in his individual capacity.[98]

fer and conveyance thereof as will vest the legal title as well as the possession of the property according to the *lex loci rei sitæ*. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669. But service upon a party within the limits of the court's jurisdiction does not give it control where its jurisdiction is limited. Fisher *v.* Murdock, 1 Handy (Ohio) 544, 12 Ohio Dec. (Reprint) 280.

Decree in personam — Land in another state. — The jurisdiction acquired over parties to an action incidentally affecting lands in another state is purely *in personam* and the judgment has no extraterritorial force *in rem*. Bullock *v.* Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213. The power of equity to enforce such decrees does not extend to a case where a simple contract debtor attempts to make the voluntary grantors of his deceased debtor account to him. Lide *v.* Parker, 60 Ala. 165. Nor has chancery jurisdiction, where the decree sought would not be *in personam*, but would direct the sale of land without the jurisdiction, through the medium of a trustee. White *v.* White, 7 Gill & J. (Md.) 208.

92. Gilbert *v.* Moline Water Power, etc., Co., 19 Iowa 319, holding that courts cannot abate a nuisance existing beyond the dividing line of a river, even though both states have concurrent jurisdiction over commerce on said stream. See also Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311. *Contra*, where there was held to be concurrent jurisdiction over a stream in an action for injuries resulting in death. Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575. See also Sanders *v.* St. Louis, etc., Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390, so holding although in this case the parties were citizens of the domestic state.

93. State *v.* Babcock, 30 N. J. L. 29; People *v.* New Jersey Cent. R. Co., 42 N. Y. 283.

94. *In re* North Chester Election Dist., 3 Pa. Co. Ct. 247.

95. Williamson *v.* Berry, 8 How. (U. S.) 495, 12 L. ed. 1170. See also Williamson *v.* Ball, 8 How. (U. S.) 566, 12 L. ed. 1200; Williamson *v.* New York Irish Presb. Congregation, 8 How. (U. S.) 565, 12 L. ed. 1200.

96. Regan *v.* Traube, 16 Daly (N. Y.) 152, 9 N. Y. Suppl. 495, 18 N. Y. Civ. Proc. 332, holding that where the statute provides that an order for service of summons by publication shall be made, not by the court but by a judge, and such an order bears a special term caption and a direction to enter by the judge, such direction may be disregarded and the order treated as a chambers order. See also Crosby *v.* Thedford, 13 Daly (N. Y.) 150, 7 N. Y. Civ. Proc. 245. And see People *v.* Donovan, 63 Hun (N. Y.) 512, 18 N. Y. Suppl. 501 [*reversed* in 135 N. Y. 76, 31 N. E. 1009, 29 Abb. N. Cas. (N. Y.) 172, 23 N. Y. Civ. Proc. 1].

Where the power to act is exclusively conferred on the judge and not on the court to partition lands, the court has no jurisdiction in the premises. Smith *v.* Craig, 10 Sm. & M. (Miss.) 447.

Although a statute contemplates that an act is to be done by the judge out of court unless by a court **in the county** where the bill is pending, yet it may be done by a judge sitting in court in another county, but if so done it can have only the effect of an act of a judge at chambers. Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

97. King *v.* McClurg, 7 S. D. 67, 63 N. W. 219.

98. Porter *v.* U. S., 19 Fed. Cas. No. 11,290, 2 Paine 313.

c. Orders Made by Court or Judge. Orders made by the court should not be entered as orders of the judge thereof,[99] and the presumption that a clerk's action was done by order of the judge does not exist where the act is a judicial one of the judge necessary to be evidenced by an order.[1]

2. Discretion of Court — a. Obligation or Duty to Assume Jurisdiction. Courts are bound to solve doubtful questions of law and not to refer them to the legislature.[2] And if no discretion is reposed or the jurisdiction is a positive one the court must proceed in a cause or matter properly before it.[3]

b. Right to Retain or Assume Jurisdiction. Where discretion may be exercised jurisdiction may be retained, no valid reason being shown to the contrary,[4] especially so where there are also good reasons therefor.[5] And equity[6] may assume jurisdiction against a foreign corporation,[7] or grant relief in case of doubtful jurisdiction,[8] or where a less circuitous and better remedy can be given than is afforded by the courts of another state.[9]

c. Right to Refuse Jurisdiction. A court which is not in a condition to do complete justice in the case should decline to entertain jurisdiction.[10] So jurisdiction, where a matter of discretion, may be refused in the absence of sufficient reasons for assuming it.[11] Jurisdiction may also be refused where it would be advisable,[12] where the action is between non-residents or arose without the state and so, even though the action is transitory,[13] where the suit is against a foreign corporation or its stock-holders[14] or in favor of such stock-holders,[15] where there is an objection to the jurisdiction in a cause before a supreme court by stipulation, although the court might otherwise proceed,[16] or where the court whose aid

A motion to set aside an order appointing a receiver is properly made to the court and not to a judge. Lippincott *v.* Westray, 6 N. Y. Civ. Proc. 74.

Where superior court judge transacts judicial business at the place designated his acts are, under the constitution, the acts of the "court." Von Schmidt *v.* Widber, 99 Cal. 511, 34 Pac. 109.

99. Lippincott *v.* Westray, 6 N. Y. Civ. Proc. 74, holding that an order purporting to be made by a judge of the court should not be substituted for one made by the court.

1. Baltimore *v.* Baltimore County Com'rs, 19 Md. 554.

In special proceedings originally instituted before the clerk of court an order of the judge before issues are made up and the case has been certified to the court is extrajudicial. Wharton *v.* Wilkerson, 92 N. C. 407.

2. Breedlove *v.* Turner, 9 Mart. (La.) 353.

3. Dunphy *v.* Belden, 57 Cal. 427; Wolff *v.* Matthews, 39 Mo. App. 376; Petersen *v.* Brockelmann, 1 N. Y. City Ct. 193.

Court has no discretion to refuse jurisdiction, although demand is stale. Hutsonpiller *v.* Stover, 12 Gratt. (Va.) 579.

4. Cofrode *v.* Wayne County Cir. Judge, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

Court cannot refuse jurisdiction because rights might be more conveniently and completely determined in another forum. Kimball *v.* Neal, 44 Vt. 567.

5. Winchester *v.* Browne, 13 N. Y. Suppl. 655.

Where a statute is so clearly valid as to admit of no reasonable discretion the court will not, upon a mere suggestion of its invalidity, surrender its jurisdiction of a cause. Schaffer *v.* Coorsen, 10 Ky. L. Rep. 634.

6. As to equity discretion to foreclose mortgage see Corbett *v.* Rice, 2 Nev. 330.

7. Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. See also Wilson *v.* Martin-Wilson Automatic Fire-Alarm Co., 149 Mass. 24, 20 N. E. 318.

8. Adriance *v.* New York, 1 Barb. (N. Y.) 19.

9. Richardson *v.* Williams, 56 N. C. 116.

10. Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416; National Telephone Mfg. Co. *v.* Du Bois, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503, 30 L. R. A. 628.

11. People *v.* Kern County, 47 Cal. 205; State *v.* Branch, 28 Mo. App. 131; Burdick *v.* Freeman, 46 Hun (N. Y.) 138, 10 N. Y. St. 756, 27 N. Y. Wkly. Dig. 313 [*affirmed* in 120 N. Y. 420, 24 N. E. 949].

12. *In re* Health Com'rs, 6 Ohio Dec. (Reprint) 1174, 11 Am. L. Rec. 651.

Where there are reasons of policy against entertaining an action, jurisdiction should not be exercised except for special reasons shown, even though the court has the right to take cognizance. Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31.

13. Morris *v.* Missouri Pac. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349. See also Reynolds, etc., Estate Mortg. Co. *v.* Martin, 116 Ga. 495, 42 S. E. 796.

14. Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86. See also Bank of North America *v.* Rindge, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240, 13 L. R. A. 56.

15. Kimball *v.* St. Louis, etc., R. Co., 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250.

16. Rathbun *v.* Moody, 4 Minn. 364.

is invoked has not the equitable jurisdiction in the premises possessed by another court.[17]

3. BEYOND TERRITORIAL LIMITS — a. Generally. A judge of one court may be authorized to perform such acts in relation to law cases as are necessary to be performed in vacation in another court.[18] But a judge cannot, contrary to the statute, summon a judgment debtor residing in another county to appear and be examined.[19]

b. Issuing Injunctions. Generally the right of a court to issue injunctions is only coextensive with the limits of its territorial jurisdiction,[20] and the same principles and the exceptions to the rule which govern the scope and extent of jurisdiction over extraterritorial property control and prevent the issuance of injunctions relating to property in another state.[21] Again the courts of a state have no jurisdiction to enjoin the doing of threatened acts or to compel the undoing of the same in another state, even though such acts constitute an interference with contract rights.[22] A judge may, however, be authorized by statute to award injunctions to judgments rendered or proceedings apprehended out of his own circuit with a limitation excluding the right of such judge to hear and determine the cause.[23] So discrimination by a railroad company where its road runs through different states may be enjoined,[24] and a corporation owing its existence in part to and exercising its functions in a state may be there restrained from expending its funds anywhere for any other than corporate purposes.[25] Again where jurisdiction has been obtained over a foreign defendant he may be restrained from performing or exhibiting a drama in a foreign state in violation of plaintiff's rights.[26]

c. Title to, Conveyance, Reconveyance, and Sale of Lands — (i) *IN GENERAL.* A court of a state other than that in which the land is situate cannot make a decree affecting the legal or equitable title to such land, and within this rule are conveyances and reconveyances, sale and resale, and assignments.[27] There are,

17. People *v.* Blackman, 1 Den. (N. Y.) 632.

18. State *v.* Hocker, 35 Fla. 19, 16 So. 614.

19. Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39.

20. Western Union Tel. Co. *v.* Pacific, etc., Tel. Co., 49 Ill. 90; Montgomery *v.* Commercial Bank, Sm. & M. Ch. (Miss.) 632. See, generally, INJUNCTIONS.

21. Western Union Tel. Co. *v.* Western, etc., R. Co., 8 Baxt. (Tenn.) 54.

Injunction to restrain entry on land cannot be maintained in county other than that in which the land is situate. Norfolk, etc., R. Co. *v.* Postal Tel. Cable Co., 88 Va. 932, 14 S. E. 689, 88 Va. 936, 14 S. E. 690.

Construction of dam may be restrained even though one end thereof extends into another state. *In re* Binney, 2 Bland (Md.) 99.

Exception exists where jurisdiction over person exists.— Alexander *v.* Tolleston Club, 110 Ill. 65; Frank *v.* Peyton, 82 Ky. 150; Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948.

22. Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377, 11 N. Y. Wkly. Dig. 122 [*modified* in 87 N. Y. 355, 14 N. Y. Wkly. Dig. 365]. See also American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Western Union Tel. Co. *v.* Pacific, etc., Tel. Co., 49 Ill. 90.

A court will decline on ground of comity to restrain breach of contract in another state made by a foreign railroad company for transportation in such foreign state. Delaware, etc., R. Co. *v.* New York, etc., R. Co., 12 Misc. (N. Y.) 230, 33 N. Y. Suppl. 1081.

23. Randolph *v.* Tucker, 10 Leigh (Va.) 655.

A court having jurisdiction in personam may require defendant to do or refrain from doing, beyond its territorial jurisdiction, anything which it has power to require him to do or omit within the limits of its territory. State *v.* Fredlock, 52 W. Va. 232, 43 S. E. 153.

24. Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

25. State *v.* Northern Cent. R. Co., 18 Md. 193.

26. French *v.* Maguire, 55 How. Pr. (N. Y.) 471.

27. *Arkansas.*—Williams *v.* Nichol, 47 Ark. 254, 1 S. W. 243.

District of Columbia.—Contee *v.* Lyons, 19 D. C. 207.

Kentucky.— McLawrin *v.* Salmons, 11 B. Mon. 96, 52 Am. Dec. 563.

Louisiana.— Mussina *v.* Alling, 11 La. Ann. 568.

Maryland.— White *v.* White, 7 Gill & J. 208.

New Jersey.— Davis *v.* Headley, 22 N. J. Eq. 115.

however, certain exceptions which qualify the rule and which come within the principles hereinbefore stated, as where the court has jurisdiction of the parties and power to pass upon the subject-matter, or where there is the factor of fraud and the like.[28]

(II) *Power to Cancel, Reform, or Establish Deeds to Land.* A court of one state cannot decree that a conveyance of land in another state is fraudulent and void, nor annul the deed,[29] nor will it assume jurisdiction in such case,[30] although if it acquires jurisdiction of the parties it may declare that a deed to such lands is void,[31] cancel it when obtained by fraud,[32] take cognizance of a suit

New York.— Glen *v.* Gibson, 9 Barb. 634; Smith *v.* Tozer, 11 N. Y. Civ. Proc. 349; Hawley *v.* James, 7 Paige 213, 32 Am. Dec. 623.

Ohio.— Daniels *v.* Stevens, 19 Ohio 222; Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640.

Pennsylvania.— Thomas *v.* Hukill, 131 Pa. St. 298, 18 Atl. 875.

Tennessee.— Miller *v.* Birdsong, 7 Baxt. 531.

Texas.— Moseby *v.* Burrow, 52 Tex. 396; Paschal *v.* Acklin, 27 Tex. 173.

Virginia.— Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Gibson *v.* Burgess, 82 Va. 650; Poindexter *v.* Burwell, 82 Va. 507.

United States.— Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11; Tardy *v.* Morgan, 23 Fed. Cas. No. 13,752, 3 McLean 358.

See 13 Cent. Dig. tit. "Courts," § 54.

Cannot decree sale of land in another county or district.— State *v.* Jacksonville, etc., R. Co., 16 Fla. 708; Montgomery *v.* Montgomery, 2 Bush (Ky.) 49; Wilmot *v.* Cole, 10 Ohio Dec. (Reprint) 777, 23 Cinc. L. Bul. 339; Ludlow *v.* McBride, 3 Ohio 240. *Contra*, where the statute confers jurisdiction so to do upon a probate court. Van Horn *v.* Ford, 16 Iowa 578.

28. Thus a court can decree as to title in case of fraudulent conspiracy by defendants in another state to divest plaintiff of his title to lands therein, when the relief sought is damages for the wrong and an accounting and payment of the rents and profits, the title to the property being only incidentally involved. Mussina *v.* Belden, 6 Abb. Pr. (N. Y.) 165. And chancery may compel a judgment debtor to convey lands in another state for the benefit of his creditors so as to vest in the grantee the legal title. Bailey *v.* Ryder, 10 N. Y. 363. So a defendant personally within the court's jurisdiction may be compelled to make such a transfer or conveyance of property without the state, as will vest the legal title and possession. Mitchell *v.* Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Lyman *v.* Lyman, 15 Fed. Cas. No. 8,628, 2 Paine 11; Tardy *v.* Morgan, 23 Fed. Cas. No. 13,752, 3 McLean 358. And a court can compel conveyance or reconveyance when it has acquired jurisdiction of the parties (McGee *v.* Sweeney, 84 Cal. 100, 23 Pac. 1117; Cooley *v.* Scarlett, 38 Ill. 316, 87 Am. Dec. 298; Seixas *v.* King, 39 La. Ann. 510, 2 So. 416; Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Roblin *v.* Long, 60 How. Pr. (N. Y.) 200; Guerrant *v.* Fowler, 1 Hen. & M. (Va.) 5), or where it has jurisdiction in a suit to cancel a deed fraudulently recorded (Vreeland *v.* Vreeland, 49 N. J. Eq. 322, 24 Atl. 551), and where partition has been decreed in Indiana of lands there and in Kentucky a court of the latter state may compel a conveyance of lands in said state from minor heirs, who were parties to the Indiana suit and had removed to Kentucky, to person entitled under the foreign judgment (Page *v.* McKee, 3 Bush (Ky.) 135, 96 Am. Dec. 201).

Conveyance of equity of redemption may be decreed, although the mortgaged land be out of the state where the mortgagor and mortgagee reside in the state. Eaton *v.* McCall, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561.

Court can decree sale of lands of a partnership by a receiver, where the court has general equity powers and has jurisdiction of the parties in a suit for the dissolution of the partnership. Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067. And it can act on a person within its jurisdiction and compel compliance with its decree affecting the sale of lands. Poindexter *v.* Burwell, 82 Va. 507. So where a widow has used assets of her deceased husband's estate in the purchase of lands, some of which are in another state, her sureties may be coerced within the jurisdiction to convey said lands to an administrator to be sold for the benefit of creditors and distributees. Miller *v.* Birdsong, 7 Baxt. (Tenn.) 531.

29. Carpenter *v.* Strange, 141 U. S. 87, 11 S. Ct. 960, 35 L. ed. 640. See also Gray *v.* Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

30. Cooley *v.* Scarlett, 38 Ill. 316, 87 Am. Dec. 298; Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159; Bennett *v.* Erving, 4 Rob. (N. Y.) 671, 32 How. Pr. (N. Y.) 384.

31. McGee *v.* Sweeney, 84 Cal. 100, 23 Pac. 1117.

Establishment of lost deed.— A court of equity in another state, having acquired jurisdiction over the persons of the parties to the suit, may compel the restoration of a deed for the conveyance of land in the state which had been fraudulently destroyed. Pillow *v.* King, 55 Ark. 633, 18 S. W. 764.

32. Guerrant *v.* Fowler, 1 Hen. & M. (Va.) 5.

alleging it to be fraudulent,[33] or set it aside on that ground, especially where part of the land is in both states.[34] Again a covenant of seizin being a personal one a deed may be reformed as to that, even though the land be without the jurisdiction.[35]

(III) *Rescinding Contracts to Convey and Recovery Back of Consideration.* In an action to rescind a contract of sale of property in another state, if the real object is to obtain a recovery back of the consideration which the vendees were fraudulently induced to give therefor, the court will assume jurisdiction, and it constitutes no valid objection that title is involved by reason of an offer to restore such title to the vendors, this being an equitable obligation on the part of the vendees. The right of the court to take cognizance in such case will be further justified where there are other factors by reason of which the jurisdiction attaches.[36] But where the entire object of the action is to determine the personal rights and obligations of defendant, the suit being merely *in personam*, process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond in proceedings against them. The property must be brought within the court's control by some legally sufficient act.[37]

(IV) *Enforcing Contracts.* A decree for the specific performance of a contract to convey land in another state to be executed by one acting in a fiduciary capacity is ineffectual in the latter state;[38] nor can chancery compel a domestic corporation to go into another state and specifically execute a contract to make improvements on lands, and on its default enforce the decree by attachment and sequestration of the property in the home state.[39] So the courts of one state will not assume jurisdiction at the instance of a foreign resident against a foreign corporation over a contract entered into in another state and relating to land there situate,[40] although the right to decree specific performance of contracts for the sale and purchase of land without the territory has been asserted,[41] even though the contract was made and to be performed there,[42] and so where a part of the tract of land, the sale of which is decreed, lies within the court's jurisdiction,[43] or

33. Reed *v.* Reed, 75 Me. 264.

34. De Klyn *v.* Watkins, 3 Sandf. Ch. (N. Y.) 185.

Where fraudulent transfer of foreign land constitutes the consideration of a sale of domestic land the court may rescind the sale. Paul *v.* Chenault, (Tex. Civ. App. 1900) 59 S. W. 579.

35. Bethell *v.* Bethell, 92 Ind. 318.

36. Loaiza *v.* San Francisco Super. Ct., 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376. It appeared in this case that the contract of sale was entered into in the state where the remedy was sought; that even though the parties were non-residents plaintiffs had voluntarily submitted to the jurisdiction and the consideration was in the hands of the vendor's agent within said state, he being a resident thereof.

Contract for sale of goods may be rescinded. Bradberry *v.* Keas, 5 J. J. Marsh. (Ky.) 446.

37. Dull *v.* Blackman, 169 U. S. 243, 247, 18 S. Ct. 333, 42 L. ed. 733 [*citing* Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565]. See also Dewey *v.* Des Moines, 173 U. S. 193, 19 S. Ct. 379, 43 L. ed. 665; Goldey *v.* Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517; Wilson *v.* Seligman, 144 U. S. 41, 12 S. Ct. 541, 36 L. ed. 338. But see Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. ed. 964; Hart *v.* Sansom, 110 U. S. 151, 3 S. Ct. 586, 28 L. ed. 101.

38. Morris *v.* Hand, 70 Tex. 481, 8 S. W. 210. See Baldwin *v.* Talmadge, 39 N. Y. Super. Ct. 400, as to compelling specific performance where the parties have been brought by service of process or otherwise within the jurisdiction. See, generally, Specific Performance.

The place of execution and performance of a contract for the sale of personal property may preclude the right of the court to determine its validity (D'Invernois *v.* Leavitt, 23 Barb. (N. Y.) 63) or may support its jurisdiction (Wilson Mfg. Co. *v.* Schwind, 5 Misc. (N. Y.) 205, 25 N. Y. Suppl. 808).

39. Port Royal R. Co. *v.* Hammond, 58 Ga. 523.

40. Day *v.* Sun Ins. Office, 167 N. Y. 543, 60 N. E. 1110 [*affirming* 40 N. Y. App. Div. 305, 57 N. Y. Suppl. 1033].

41. Potter *v.* Hollister, 45 N. J. Eq. 508, 18 Atl. 204; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Macon Episcopal Church *v.* Wiley, 2 Hill Eq. (S. C.) 584, 30 Am. Dec. 386. See also Muller *v.* Stemmler, 1 N. Y. City Ct. 4.

42. Cleveland *v.* Burrill, 25 Barb. (N. Y.) 532.

43. Barger *v.* Buckland, 28 Gratt. (Va.) 850.

where the parties reside there,[44] and the consideration is an act to be there performed,[45] or where jurisdiction has attached, even though the land has, pending suit, been set off as a part of another state.[46] Again where a foreign resident submits to the jurisdiction to enforce a contract for the exchange of land situate in the foreign and domestic jurisdiction, such jurisdiction will be entertained.[47]

(v) *Proceeds of Land.* A person whose domicile is within the court's jurisdiction may bring suit to recover the proceeds of foreign land.[48]

(vi) *Mortgage of Land.* A court may in the exercise of its equitable powers foreclose a mortgage upon corporate property of a railway, although embracing lands in another state, and may direct a sale thereof, and the execution of a proper conveyance to the purchaser where the parties, and the cause of action or the property as an entire indivisible thing is properly within the jurisdiction of the court.[49] The same rule applies generally to a foreclosure of a mortgage covering lands partly within two states.[50] Again a court of equity will decree relief in an action for the strict foreclosure of a mortgage on foreign land where defendants have been served with process within the court's jurisdiction and appear and contest plaintiff's demand;[51] and a proceeding to foreclose a mortgage executed by a foreign corporation on lands without the state is not precluded by the rule that an action for damages to land cannot be maintained in the courts of the state, where such suit is brought, especially so where the mortgage provides that the trustee may take possession of the property and sell without legal proceedings.[52] A court will not, however, decree redemption of a mortgage on lands without the jurisdiction at the instance of a judgment creditor whose judgment is by statute of the jurisdiction wherein the land is situate a lien thereupon, and so, even though the parties reside in the jurisdiction sought.[53] But although a decree of foreclosure is granted and a sale thereunder is made in one state of property situate therein, and in another state the deed of the referee does not, it has been decided, convey title to the property in the foreign state nor does the sale constitute a defense to a suit of foreclosure in the latter state;[54] and a sale under a foreclosure has been determined to be restricted to lands within the

44. Cloud *v.* Greasley, 125 Ill. 313, 17 N. E. 826; Johnson *v.* Kimbro, 3 Head (Tenn.) 557, 75 Am. Dec. 781.

45. Cloud *v.* Greasley, 125 Ill. 313, 17 N. E. 826.

46. Brown *v.* Desmond, 100 Mass. 267.

47. Montgomery *v.* Ruppensburg, 31 Ont. 433.

48. Edwards *v.* Ballard, 14 La. Ann. 362; Kessler *v.* Kessler, 3 Pa. Co. Ct. 522. *Contra,* as to the proceeds of land of a lunatic, even though such proceeds are brought into the state after his death. Allison *v.* Campbell, 21 N. C. 152.

Where assignee having assets of lands both within and without the state is within the power of the court, it may direct a distribution of the foreign fund. Moss' Estate, 138 Pa. St. 646, 21 Atl. 206, 27 Wkly. Notes Cas. (Pa.) 300.

49. *Connecticut.*— Mead *v.* New York, etc., R. Co., 45 Conn. 199.

Georgia.— McTighe *v.* Macon Constr. Co., 94 Ga. 306, 21 S. E. 701, 47 Am. St. Rep. 153, 32 L. R. A. 208.

Maine.— Eaton *v.* McCall, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561.

New York.— Union Trust Co. *v.* Olmsted, 102 N. Y. 729, 7 N. E. 822, 1 Silv. Supreme 153.

United States.— Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207.

See 13 Cent. Dig. tit. "Courts," § 64.

Courts of Manitoba cannot decree sale of entire railroad on foreclosure, where part thereof is situate without the province; nor can it decree sale of the part within the province unable to be cut off and separately operated by purchaser. Gray *v.* Manitoba, etc., R. Co., 11 Manitoba 42.

Where the mortgage is to a trustee in the state and the railroad property is in a foreign state, the court of the state where the trustee resides may restrain such trustee from a diversion of the company's income contrary to the terms of the mortgage and compel an accounting. Buel *v.* Baltimore, etc., R. Co., 24 Misc. (N. Y.) 646, 53 N. Y. Suppl. 749. See Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067.

50. Union Trust Co. *v.* Olmsted, 102 N. Y. 729, 7 N. E. 822, 1 Silv. Supreme (N. Y.) 153.

51. House *v.* Lockwood, 40 Hun (N. Y.) 532.

52. People *v.* American L. & T. Co., 17 N. Y. Suppl. 76.

53. Henderson *v.* Hamilton Bank, 23 Can. Supreme Ct. 716.

54. Farmers' L. & T. Co. *v.* Postal Tel. Co.,

state wherein the decree is rendered; but a deficiency judgment is not dependent upon the result of a foreclosure in the foreign jurisdiction.[55] It has also been denied that a court of a foreign state has jurisdiction to foreclose a mortgage on domestic railroad property or transfer any title thereto.[56] Again the court may entertain a suit to declare that a mortgage with the usual covenants of payment was taken in the name of the mortgagee instead of a debtor, where all the parties reside within the jurisdiction, even though the mortgage covers foreign land.[57]

d. Liens. A court with limited powers cannot enforce a lien upon property not within the territorial limits of its jurisdiction,[58] and a lien or privilege founded upon a debt cannot be established where the court has no jurisdiction of the question whether such a debt exists.[59]

e. Trusts and Trustees — (i) *In General.* An action by a landlord against tenants to establish a trust in lands in another state, purchased at a judicial sale, will not be entertained, where such purchase if fraudulent at all was only constructive or legal and not an actual fraud;[60] nor has a court of equity jurisdiction to enforce a trust created in another state.[61] It has been determined, however, that a trustee residing in a state may be compelled by its courts to convey the legal title to lands held by him in trust and lying without the jurisdiction.[62] And where the only fund remaining undisposed of is a judgment of the courts of the state where the suit is brought, the court will assume jurisdiction, at the instance of the maker of the trust deed, to protect the residue of the fund from misap-

55 Conn. 334, 11 Atl. 184, 3 Am. St. Rep. 53.

55. Clark *v.* Simmons, 55 Hun (N. Y.) 175, 8 N. Y. Suppl. 74.

56. Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457. See Pittsburgh, etc., R. Co.'s Appeal, (Pa. 1886) 4 Atl. 385.

Foreclosure suit will be entertained where a mortgage covers telegraph property in several states and provides that in case of default the mortgagee's rights shall be obtained only by a public sale of the whole property to be made as specified. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 44 Hun (N. Y.) 400.

57. Pavey *v.* Davidson, 23 Ont. App. 9.

58. Fisher *v.* Murdock, 1 Handy (Ohio) 544, 12 Ohio Dec. (Reprint) 280.

Accounting and sale of land. — Where the parties agreed to conduct a business on an island without the court's jurisdiction and to divide profits and losses, and complainants were to have a lien on the island for advances made, the court, upon a bill for an accounting and sale of the land, will decree an accounting and settlement of the rights of the parties. Wood *v.* Warner, 15 N. J. Eq. 81.

In Florida a circuit court may fix the rights and define the liens of the several parties before it in respect to lands in another circuit. State *v.* Jacksonville, etc., R. Co., 16 Fla. 708.

59. Gay *v.* Eaton, 27 La. Ann. 166.

60. Pickett *v.* Ferguson, 86 Tenn. 642, 8 S. W. 386 [*citing* Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181].

61. Campbell *v.* Sheldon, 13 Pick. (Mass.) 8, holding that equity could not compel an executor to perform his trust where the property had been conveyed in trust to a person living in another state where he died, it appearing that his will was there proved and an executor appointed who lived in the state in the courts of which relief was sought, and who having received the testator's effects, including the trust property, brought it into the state. The will, however, was not there proved nor a copy thereof there filed. See, generally, TRUSTS.

The refusal of the courts to take cognizance of such cases is not, however, always put upon the broad ground of want of jurisdiction; but often on the ground of comity. This principle requires the courts of one state to leave courts of other states untrammeled in matters which are strictly within their control. Again there might be circumstances which would deprive a plaintiff of any remedy in the courts of the foreign state, and which from necessity might require the domestic court to take cognizance. And it cannot be absolutely asserted that where an express trust is created by act of the donor, a trustee might not be called to an accounting by a *cestui que trust* in a state other than that where the deed was executed. Alger *v.* Alger, 31 Hun (N. Y.) 471, holding that the court will not take jurisdiction of a suit requiring an account from a trustee, the trust having been created in another state where the property was, and the courts of that state being competent to deal with the case.

The courts of one state cannot appoint a trustee of lands in another state in place of one appointed in the latter by a court thereof. Williams *v.* Maus, 6 Watts (Pa.) 278, 31 Am. Dec. 465.

62. Vaughan *v.* Barclay, 6 Whart. (Pa.) 392.

Although title to foreign land is incidentally affected, courts may enforce trusts. Manley *v.* Carter, 7 Kan. App. 86, 52 Pac. 915 [*citing* Phelps *v.* McDonald, 99 U. S. 298, 25 L. ed. 473; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181].

plication, and have the trustees to account, even though the trust was created in another state.[63]

(II) *Trusts Created by Will.* If a trust is created by will in the state where relief is sought, the courts thereof may compel persons within the jurisdiction to execute the trust over lands in another state, even though the will is not probated therein. The action in such case is not *in rem*, nor one to establish title; but is a suit *in personam* to enforce a personal obligation.[64] And chancery will take cognizance of a suit by creditors and heirs residing without the territory against the executor or administrator of a trustee who died within the domestic state to subject his estate to the payment of the unaccounted-for fund, even though the trustee was appointed under a will in the foreign jurisdiction. This is a matter not of comity, but of right.[65]

f. Decedent's Property — (I) *In General.* An executor cannot change the forum in which he will litigate questions by the removal of personal property from the state of the testator's domicile at the time of his death, and the court of the state to which the property is removed has no jurisdiction thereof.[66] Nor can a probate court confer authority on an administrator or guardian to lease or collect rents from land without the state.[67] Nor will a court of chancery exercise any jurisdiction or control over foreign courts or their proceedings as to the probate of wills and settlement of estates nor decide the rights of parties to foreign assets. The *lex loci rei sitæ* is of paramount force in all questions relative to the nature and amount of said assets, and the *lex domicilii* governs in the final distribution.[68] A qualification may exist, however, as to the proceeds of part of the assets which can be traced into land within the court's jurisdiction to the extent that such fund may be administered according to the law of the state where the intestate died.[69] Again under a statute making directors of a corporation liable to the full amount of debts contracted in excess of the subscribed capital stock in case of the corporation's dissolution, such statute is contractual and not penal, and a deceased director's estate is liable in any state.[70]

(II) *Enforcing Legacy.* If legacies are charged upon lands, the courts of equity in the state where the land lies have exclusive jurisdiction to enforce their payment.[71]

63. Wilcox *v.* Morrison, 9 Lea (Tenn.) 699.

Court of chancery may compel a defendant within the state to account as trustee for the proceeds of lands situate in another state, although their management was confined to that state. Reading *v.* Haggin, 58 Hun (N. Y.) 450, 12 N. Y. Suppl. 368.

64. Gilliland *v.* Inabnit, 92 Iowa 46, 60 N. W. 211.

Where trustees of will resided in England, and service of summons could be had upon them, the court assumed jurisdiction, at the instance of a resident of another state, to recover the price of land in another state purchased by their testator in his lifetime. Belden *v.* Wilkinson, 44 N. Y. App. Div. 420, 60 N. Y. Suppl. 1083, 7 N. Y. Annot. Cas. 48.

65. Bird *v.* Key, 8 Baxt. (Tenn.) 366. But see Blount *v.* Blount, 8 N. C. 365, holding that chancery cannot decree an acting executor residing within the state to sell land, lying without the territory, according to the directions of a will executed within the territory.

66. Varner *v.* Bevil, 17 Ala. 286. See, generally, Executors and Administrators.

67. Smith *v.* Wiley, 22 Ala. 396, 58 Am. Dec. 262.

68. Beach *v.* Norton, 9 Conn. 182. See also Parsons *v.* Millar, 189 Ill. 107, 59 N. E. 606.

The rule applies even though the probate court has control of part of the assets. Parker's Estate, 7 Phila. (Pa.) 514.

The law of the situs governs as to the capacity or incapacity of the testator, the extent of his power to dispose of immovable property, the descent and heirship thereof, and the manner in which it shall be disposed of for the payment of debts. Per Battle, J., in Williams *v.* Nichol, 47 Ark. 254, 1 S. W. 243.

69. McNamara *v.* McNamara, 62 Ga. 200.

70. Farr *v.* Briggs, 72 Vt. 225, 47 Atl. 793, 82 Am. St. Rep. 930.

71. Williams *v.* Nichol, 47 Ark. 254, 1 S. W. 243.

Residence within the state of the surviving executors of the executor of a will, and the control by them of a part of the estate, does not of itself justify the court in granting relief as to said fund, under a claim that one is a residuary legatee thereof, where the testator was a non-resident, and his will had never been proved in the state where the bill was brought. Van Gieson *v.* Banta, 40 N. J. Eq. 14. But where the sole question is whether a legacy draws interest, and the ex-

g. Final Process. Local courts may have authority vested in them to issue final process beyond the limits of their original jurisdiction to aid in enforcing their judgments.[72]

F. Loss or Divestiture of Jurisdiction — 1. In General. The general principles and exceptions are applicable here which are elsewhere stated as underlying the effect of the exercise of legislative power in organizing or reorganizing courts, abolishing the same, or otherwise changing, transferring, or superseding their jurisdiction.[73]

2. When Ousted. Jurisdiction over pending causes will be ousted by the repeal of the statute upon which it wholly depends,[74] unless there be a saving clause in the enactment.[75] But necessarily this rule does not apply to exclusively constitutional courts.[76] Again jurisdiction may be lost or divested by the withdrawal of plaintiff,[77] by his transfer of all his claims to another court,[78] by a final judgment, dismissal of the parties, and closing of the term of the court,[79] and by the existence of facts being shown which in themselves prove the lack of jurisdiction.[80] But where the jurisdiction of a court is exclusive and has once lawfully attached it cannot be ousted by subsequent events or facts arising in the cause, but the court may proceed to final judgment unless some constitutional statute operates to divest that particular court of its jurisdiction.[81] Nor will the

ecutor and plaintiff are residents of the state whose jurisdiction is invoked, the former having personally the title to the real and personal property of the testator as executor and residuary legatee, the court will determine the suit; but it will consider the law of the foreign state. Brown *v.* Knapp, 17 Hun (N. Y.) 160.

72. Covill *v.* Phy, 26 Ill. 432; People *v.* Barr, 22 Ill. 241.

73. See *infra*, III, A, 1 *et seq.*

74. Remington *v.* Smith, 1 Colo. 53; Langdon *v.* Applegate, 5 Ind. 327; Hunt *v.* Jennings, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; Todd *v.* Landry, 5 Mart. (La.) 459, 12 Am. Dec. 479; Gates *v.* Osborne, 9 Wall. (U. S.) 567, 19 L. ed. 748.

75. Pennypacker *v.* Switzer, 75 Va. 671. See also Langdon *v.* Applegate, 5 Ind. 327; Hunt *v.* Jennings, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465.

76. Knight *v.* Knight, 12 La. Ann. 59.

77. Ryan *v.* Tomlinson, 31 Cal. 11, holding that the suit will not be continued in such case to try conflicting claims of defendants.

78. Thoms *v.* Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467, which was a suit to subject a vessel to sale. She was libeled in a foreign port by others and plaintiff brought all his claims there.

79. Clay *v.* Edwards, 84 Ky. 548, 2 S. W. 147, 8 Ky. L. Rep. 559.

80. Pickering *v.* Pickering, 21 N. H. 537.

81. Estes *v.* Martin, 34 Ark. 410; Tindall *v.* Meeker, 2 Ill. 137; Burch *v.* Davenport, etc., R. Co., 46 Iowa 449, 26 Am. Rep. 150. See also State *v.* St. Louis County Ct., 38 Mo. 402.

Illustrations.— If an orphans' court rightfully assumes jurisdiction it cannot be divested of it, except in the statutory cases (Dorman *v.* Ogbourne, 16 Ala. 759); nor is jurisdiction divested by a discontinuance of the case (Sanford *v.* Sanford, 28 Conn. 6); nor by a continuance (Wilson *v.* Piper, 77 Ind. 437); nor by an adjournment to a day certain and failure to sit on said day, where the court sits on a subsequent day within the statutory time (Langhorne *v.* Waller, 76 Va. 213); nor by the failure to regularly adjourn (Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441]); nor by the expiration of the term for hearing and determining the cause (Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 1); nor by a mistake of the law controlling the decision (People *v.* Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105); nor by an error of the court in determining the nature of the proceeding or remedy (Fisher *v.* Hepburn, 48 N. Y. 41); nor by a subsequent error or irregularity (Hard *v.* Shipman, 6 Barb. (N. Y.) 621); nor by the clerk's omitting the cause from the docket for several years (Farmers' College *v.* Cary, 35 Ohio St. 648); nor by the sole judge becoming personally incapacitated (Humphreys *v.* King, 2 La. 49); nor, in the absence of an express statute, by a subsequent change in the condition or residence of the parties (Anderson *v.* Wilson, 100 Ind. 402; Dustin *v.* Dickinson, 2 Mich. N. P. 6; Upton *v.* New Jersey Southern R. Co., 25 N. J. Eq. 372; Koppel *v.* Heinrichs, 1 Barb. (N. Y.) 449); nor by the voluntary removal of the trustee of a will to a foreign state (McGehee *v.* Polk, 24 Ga. 406); nor by a recantation (*In re* Quakertown, 3 Grant (Pa.) 203); nor by the withdrawal of some of the petitioners (State *v.* Wilkins, 67 N. H. 164, 29 Atl. 693); nor, as to non-resident co-defendants, by a dismissal of the suit as to resident defendants (Read *v.* Renaud, 6 Sm. & M. (Miss.) 79); nor by a claim of reconvention or intervention of which the court has not original jurisdiction (Hoover *v.* York, 30 La. Ann. 752); nor by plaintiff's appropriation of the property in trover to his own use (Montpelier, etc., R. Co. *v.* Coffrin, 52 Vt. 17); nor by the sale of the claim to a third party (Blake *v.* State Bank, 22 La. Ann. 572); nor by defendants trans-

court be deprived of jurisdiction where the proceeding which would have so operated under the statute has been instituted and withdrawn before jurisdiction attached.[82] Nor is jurisdiction ousted by the fraud or misconduct of the judge unless the facts clearly supporting the charge are shown.[83]

3. Effect of Death of Party. Whether jurisdiction is divested or not by the death of a party depends primarily upon the nature of the action and the governing statute and also upon the nature of the jurisdiction with which the court is invested.[84] But the court does not lose its jurisdiction by the death of some of the petitioners;[85] and the statute may provide for continuance,[86] as by the substitution of a representative.[87] But in such case the court cannot proceed, except to discontinue the action, until the administrator appears, or, being served, suffers default.[88]

G. Presumptions as to Jurisdiction — 1. Courts of General Jurisdiction — a. Statement of Rule. Jurisdiction will be presumed as to courts of general jurisdiction, unless the contrary appears of record.[89] This presumption has

ferring the note attached and so taking advantage of his own wrong (Gibson *v.* Huie, 14 La. 129); nor by the accidental destruction of the instrument sued on (Bliss *v.* Covington, etc., Turnpike Co., 9 Dana (Ky.) 265); nor will the satisfaction of the claim in the original action after cross writ filed defeat the cross-action (Aldrich *v.* Blatchford, 175 Mass. 369, 56 N. E. 700); nor is attached jurisdiction ousted by incidentally putting in issue the title to real estate (Bourgette *v.* Hubinger, 30 Ind. 296); nor by an amendment averring additional matter which the court is not competent to consider and which is surplusage (Finch *v.* Baskerville, 85 N. C. 205); nor by sustaining a demurrer to an answer voluntarily filed and whereby jurisdiction was acquired (Brooks *v.* Chatham, 57 Tex. 31); nor by the appearance of facts which would have authorized a proceeding in another court (Paul *v.* Fulton, 25 Mo. 156).

A judge who begins to hear a cause before appointment to superseding court may continue hearing without resubmission. Seale *v.* Ford, 29 Cal. 104.

Order for transfer does not oust jurisdiction where the conditions are not complied with. Hill *v.* Henderson, 13 Sm. & M. (Miss.) 688.

82. Thurston *v.* Gough, 42 N. J. Eq. 346, 7 Atl. 573.

83. Liddicoat *v.* Treglown, 6 Colo. 47.

84. See Abatement and Revival, III [1 Cyc. 47].

Court may have power to decide case after death.— Branham *v.* Johnson, 62 Ind. 259.

Court's power continues until after appointment of commissioners by probate court. Miller *v.* Williams, 30 Vt. 386.

85. State *v.* Wilkins, 67 N. H. 164, 29 Atl. 693.

86. Ashley *v.* Harrington, 1 D. Chipm. (Vt.) 348.

87. *Indiana.*— Lawson *v.* Newcomb, 12 Ind. 439.

Louisiana.— Prall *v.* Peet, 3 La. 274.

New Hampshire.— Parker *v.* Badger, 26 N. H. 466.

Texas.— State *v.* Jordan, 25 Tex. Civ. App. 17, 59 S. W. 826, 60 S. W. 1008.

Vermont.— Ashley *v.* Harrington, 1 D. Chipm. 348.

See 13 Cent. Dig. tit. "Courts," § 128.

88. Parker *v.* Badger, 26 N. H. 466.

89. *Alabama.*— Foster *v.* Glazener, 27 Ala. 391.

California.— Mahoney *v.* Middleton, 41 Cal. 41; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Sharp *v.* Daugney, 33 Cal. 505; Carpentier *v.* Oakland, 30 Cal. 439.

Connecticut.— Sullivan *v.* Vail, 42 Conn. 90.

Illinois.— Matthews *v.* Hoff, 113 Ill. 90; Wenner *v.* Thornton, 98 Ill. 156; Dodge *v.* Cole, 97 Ill. 338, 37 Am. Rep. 111; Harris *v.* Lester, 80 Ill. 307; Wallace *v.* Cox, 71 Ill. 548; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689; Wells *v.* Mason, 5 Ill. 84; Seavey *v.* Seavey, 30 Ill. App. 625.

Indiana.—Cosby *v.* Powers, 137 Ind. 694, 37 N. E. 321; McCormick *v.* Webster, 89 Ind. 105; Houk *v.* Barthold, 73 Ind. 21; Kinnaman *v.* Kinnaman, 71 Ind. 417; Carlisle *v.* Gaar, 18 Ind. 177; Hanes *v.* Worthington, 14 Ind. 320.

Iowa.— Suiter *v.* Turner, 10 Iowa 517; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Rowan *v.* Lamb, 4 Greene 468.

Kansas.— English *v.* Woodman, 40 Kan. 752, 21 Pac. 283; Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191; Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

Kentucky.—Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222; Clarey *v.* Marshall, 4 Dana 95.

Louisiana.— House *v.* Croft, 8 Mart. N. S. 704.

Maine.— Stetson *v.* Corinna, 44 Me. 29.

Massachusetts.— Rogers *v.* Woodbury, 15 Pick. 156.

Minnesota.—Holmes *v.* Campbell, 12 Minn. 221.

Mississippi.— Ratcliff *v.* Ratcliff, 12 Sm. & M. 134.

Missouri.— Huxley *v.* Harrold, 62 Mo. 516; Gibson *v.* Vaughan, 61 Mo. 418. *Compare* Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1.

greater force after lapse of time,[90] and embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment was rendered, but of the parties also.[91] So it will be presumed that every step necessary to give jurisdiction has been taken,[92] although this presumption may be rebutted by extrinsic evidence,[93] as want of jurisdiction may be inquired into.[94] Any acts or omissions affecting the validity of the proceedings must be affirmatively shown.[95]

b. Limitations of Rule — (i) *In General.* The presumptions that the law implies in support of judgments of superior courts of general jurisdiction arise only with respect to jurisdictional facts concerning which the record is silent, and if the record states the evidence or makes an averment with reference to a jurisdictional fact it is understood to speak the truth on that point, and it will not be presumed that the record was false. Such presumptions are also limited to persons within the court's territorial limits, and also to proceedings that are in accordance with the course of the common law or which are brought into action by the usual form of common law or chancery.[96] And generally where want of

Montana.— Beach *v.* Spokane Ranch, etc., R. Co., 25 Mont. 379, 65 Pac. 111.

Nebraska.— Parsons *v.* State, 61 Nebr. 244, 85 N. W. 65.

New Hampshire.— Wingate *v.* Haywood, 40 N. H. 437; Flanders *v.* Atkinson, 18 N. H. 167.

New Jersey.— State *v.* Lewis, 22 N. J. L. 564.

New York.— U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 8 Abb. Pr. 192; Ray *v.* Rowley, 1 Hun 614; Chemung Canal Bank *v.* Judson, 8 N. Y. 254, Seld. Notes 49; Wright *v.* Douglass, 10 Barb. 97 [*reversed* in 7 N. Y. 564]; Hutchinson *v.* Brand, 6 How. Pr. 73 [*affirmed* in 9 N. Y. 208].

Ohio.— Beebe *v.* Scheidt, 13 Ohio St. 406; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459.

Oregon.— Rutenic *v.* Hanakar, 40 Oreg. 444, 67 Pac. 196; Heatherly *v.* Hadley, 4 Oreg. 1.

Pennsylvania.— Lacaze *v.* State, Add. 59.

Rhode Island.— Slocum *v.* Providence Steam, etc., Co., 10 R. I. 112.

Tennessee.— Wilcox *v.* Cannon, 1 Coldw. 369; Hopper *v.* Fisher, 2 Head 253; McCarroll *v.* Weeks, 5 Hayw. 246.

Texas.— Largen *v.* State, 76 Tex. 323, 13 S. W. 161; Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Black *v.* Epperson, 40 Tex. 162.

Vermont.— Arel *v.* Centebar, 73 Vt. 238, 50 Atl. 1064; Huntington *v.* Charlotte, 15 Vt. 46.

Virginia.— Devaughn *v.* Devaughn, 19 Gratt. 556; Cox *v.* Thomas, 9 Gratt. 323.

West Virginia.— Mayer *v.* Adams, 27 W. Va. 244.

Wisconsin.— Falkner *v.* Guild, 10 Wis. 563.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Harvey *v.* Tyler, 2 Wall. 328, 17 L. ed. 871; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 636.

England.— Howard *v.* Gosset, 10 Q. B. 359, 11 Jur. 750, 16 L. J. Q. B. 345, 59 E. C. L. 359.

See 13 Cent. Dig. tit. "Courts," § 140.

90. Wilcox *v.* Cannon, 1 Coldw. (Tenn.) 369.

91. Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

92. Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 6 S. Ct. 742, 29 L. ed. 892.

Rule applies to the various stages of the proceedings from institution to completion as well as to judgments or decrees. Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490.

93. Heatherly *v.* Hadley, 4 Oreg. 1.

94. Harrington *v.* People, 6 Barb. (N. Y.) 607. See Wright *v.* Douglass, 10 Barb. (N. Y.) 97 [*reversed* in 7 N. Y. 564].

95. People *v.* Robinson, 17 Cal. 363.

No presumption against jurisdiction can be indulged in. Rowan *v.* Lamb, 4 Greene (Iowa) 468.

96. Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

In order to give jurisdiction court will not presume that the assignment of a mortgage was merely nominal. Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202.

Presumption of jurisdiction at variance with recitals of record.— A finding in favor of jurisdiction is not conclusive over record evidence. Senichka *v.* Lowe, 74 Ill. 274. And the presumption is rebutted in a collateral proceeding where the record shows an insufficient service, and there is no finding showing any other service or appearance. Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457. So the presumption of jurisdiction is overcome, and the judgment is void where the facts appearing of record are insufficient, for such presumption must be consistent with the record. But although the record is insufficient to support a finding of jurisdiction, the presumption is not destroyed as to jurisdiction of the person, for it will be presumed that the court heard other evidence not necessary to be preserved therein, or that it acquired jurisdiction in some other manner than that stated. Bannon *v.* People, 1 Ill. App. 496. Again if the record shows that the cause of action was beyond the jurisdiction, or that the court proceeded without notice, no presumption arises. Heatherly *v.* Hadley, 4 Oreg. 1. And where a specific mode of acquiring jurisdiction is disclosed by the record, and that is insufficient to confer it, something further in the

jurisdiction appears affirmatively on the face of the proceedings, no presumption exists favoring the validity of judgments even of courts of general jurisdiction.[97] But unless the want of jurisdiction, either as to the subject-matter or the parties, appears in some proper form, jurisdiction in case of collateral attack upon a judgment will be supported by every intendment.[98] Again a qualification of the general rule may exist where the statute requires evidence thereof to be in the record.[99]

(II) *Exercise of Specially Conferred Powers.* Where courts of general jurisdiction do not act within the scope thereof, but exercise other and special statutory powers in derogation of, or not according to, the course of the common law, or where such special powers are purely ministerial, no presumption of jurisdiction favors the judgments of said courts;[1] since by the exercise of such special powers a court stands in this respect on the same footing with courts of limited and inferior jurisdiction.[2] But the rule has been held not applicable to a statute merely regulating the mode of procedure in receiving the confession of a judgment.[3]

2. Courts of Inferior, Limited, or Special Jurisdiction. The mere exercise of jurisdiction by courts of inferior, limited, or special jurisdiction does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within the jurisdiction of such courts, except that which expressly appears to be so.[4] The rule applies to jurisdiction over the subject-matter of the

record is necessary to justify the presumption that another mode was adopted, or that jurisdiction was acquired in another way. Northcut *v.* Lemery, 8 Oreg. 316; Ely *v.* Tallman, 14 Wis. 28. So no presumption exists from part of record produced that remainder contains facts necessary to give jurisdiction, unless it appears that a portion of the record is gone, and there is no secondary proof of its contents. Hargis *v.* Morse, 7 Kan. 415.

97. Dillard *v.* Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124; Wade *v.* Hancock, 76 Va. 620.

98. *Ex p.* Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. ed. 154. See also Cooper *v.* Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808; Manson *v.* Duncanson, 166 U. S. 533, 17 S. Ct. 647, 41 L. ed. 1105; *In re* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198; *Ex p.* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415; White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113; Gunn *v.* Plant, 94 U. S. 664, 669, 24 L. ed. 304; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

"If the court had jurisdiction of the subject matter, and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous, its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain, in point of form, its record may appear; its judgment is void to every intent, and for every purpose." Per Ranney, J., in Sheldon *v.* Newton, 3 Ohio St. 494, 498.

When collaterally questioned everything done within the power of a jurisdiction which has once attached "is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error." Laing *v.* Rigney, 160 U. S. 531, 542, 16 S. Ct. 366, 40 L. ed. 525.

99. Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 6 S. Ct. 742, 29 L. ed. 892.

1. *Alabama.*— Foster *v.* Glazener, 27 Ala. 391, summary proceedings.

Illinois.— Firebaugh *v.* Hall, 63 Ill. 81.

Iowa.— Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Tiffany *v.* Glover, 3 Greene 387, attachment proceedings.

Maine.— Prentiss *v.* Parks, 65 Me. 559.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620; Northcut *v.* Lemery, 8 Oreg. 316.

Texas.— Bruhn *v.* Jefferson Nat. Bank, 54 Tex. 152.

Virginia.— Chesterfield County *v.* Hall, 80 Va. 321.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Tolmne *v.* Thompson, 24 Fed. Cas. No. 14,080, 3 Cranch C. C. 123 [*reversed* in 2 Pet. 157, 7 L. ed. 381].

See 13 Cent. Dig. tit. "Courts," § 143.

2. Foster *v.* Glazener, 27 Ala. 391; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

3. Bush *v.* Hanson, 70 Ill. 480.

4. *Alabama.*— Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630; Pettus *v.* McClannahan, 52 Ala. 55; Talladega Com'rs Ct. *v.* Thompson, 18 Ala. 694.

Arkansas.— McClure *v.* Hill, 36 Ark. 268.

Connecticut.— Raymond *v.* Bell, 18 Conn. 81.

Illinois.— Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Beaubien *v.* Brickerhoff, 3 Ill. 269; Spooner *v.* Warner, 2 Ill. App. 240.

Maryland.— Clark *v.* Bryan, 16 Md. 171.

judgment, and the parties.[5] But where these courts have not transcended their powers, and jurisdiction is once established, or has once actually attached, the validity of subsequent proceedings will be presumed until the contrary be shown, nor will such jurisdiction be lost in such case by an irregularity in the mode of exercising it.[6] Again if the jurisdiction of the special or inferior tribunal over the subject-matter be made to appear upon the face of the proceedings, the maxim *omnia præsumuntur rite esse acta* applies.[7] And where the record declares the ascertainment of the jurisdictional fact it is conclusive.[8] A party, however, who relies upon a decision or order of such special, limited, or inferior courts, or who claims any right or benefit under their proceedings, must affirmatively show their jurisdiction in the premises by alleging and proving the same,[9] and this covers jurisdiction over both subject-matter and parties.[10]

3. Courts of Probate and County Courts. The rules as to the presumptions in favor of the jurisdiction of courts of general jurisdiction[11] apply to courts of probate and those with like powers, where they are courts of general jurisdiction or possess the attributes thereof,[12] even though they have not exclusive jurisdic-

Michigan.— Truesdale *v.* Hazard, 2 Mich. 344.

Mississippi.— Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

Missouri.— Rohland *v.* St. Louis, etc., R. Co., 89 Mo. 180, 1 S. W. 147; Gibson *v.* Vaughan, 61 Mo. 418; McCloon *v.* Beattie, 46 Mo. 391.

Nebraska.— Kuker *v.* Beindorff, 63 Nebr. 91, 88 N. W. 190.

New Hampshire.— Tebbetts *v.* Tilton, 31 N. H. 273.

New York.— Matter of Baker, 173 N. Y. 249, 65 N. E. 1100; Chemung Canal Bank *v.* Judson, 8 N. Y. 254, Seld. Notes 49; Stone *v.* Miller, 62 Barb. 430; Ford *v.* Babcock, 1 Den. 158; People *v.* Koeber, 7 Hill 39.

Oregon.— Farley *v.* Parker, 6 Oreg. 105, 25 Am. Rep. 504; Johns *v.* Marion County, 4 Oreg. 46.

Tennessee.— Hopper *v.* Fisher, 2 Head 253. *Compare* Mankin *v.* State, 2 Swan 206.

Texas.— Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730.

Vermont.— The same presumptions exist in favor of justices as apply to superior courts. Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758.

West Virginia.— Mayer *v.* Adams, 27 W. Va. 244.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959.

England.— Howard *v.* Gosset, 10 Q. B. 359, 11 Jur. 750, 16 L. J. Q. B. 345, 59 E. C. L. 359; Reg. *v.* Silkstone, 2 Q. B. 520, 42 E. C. L. 788; London *v.* Cox, L. R. 2 H. L. 239, 36 L. J. Exch. 225, 16 Wkly. Rep. 44; Rex *v.* All Saints Parish, 7 B. & C. 785, 6 L. J. M. C. O. S. 53, 1 M. & R. 663, 31 Rev. Rep. 296, 14 E. C. L. 351; Taylor *v.* Clemson, 11 Cl. & F. 610, 8 Jur. 833, 8 Eng. Reprint 1233 [*affirming* 2 Q. B. 978, 2 G. & D. 346, 11 L. J. Exch. 447, 3 R. & Can. Cas. 65, 42 E. C. L. 1005]; Dempster *v.* Purnell, 1 Dowl. P. C. N. S. 168, 11 L. J. C. P. 33, 3 M. & G. 375, 4 Scott N. R. 30; Stanton *v.* Styles, 5 Exch. 578, 19 L. J. Exch. 336, 1 L. M. & P. 575; Rex *v.* Hulcott, 6 T. R. 583.

See 13 Cent. Dig. tit. "Courts," § 142.

The old rule was that nothing is intended to be within the jurisdiction of an inferior court, except that which is specially alleged. Howard *v.* Gosset, 10 Q. B. 359, 11 Jur. 750, 16 L. J. Q. B. 345, 59 E. C. L. 359; Peacock *v.* Bell, 1 Wm. Saund. 73.

5. Tebbetts *v.* Tilton, 31 N. H. 273.

6. Smith *v.* Engle, 44 Iowa 265; Little *v.* Sinnett, 7 Iowa 324; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Kuker *v.* Beindorff, 63 Nebr. 91, 88 N. W. 190. And where a court has jurisdiction over the person and subject-matter, and no objection is raised below as to the jurisdiction of the parties, it will be presumed. Erwin *v.* Lowry, 7 How. (U. S. 172, 12 L. ed. 655 [*reversing* 6 Rob. (La.) 192, 39 Am. Dec. 556]. And see Wooster *v.* Parsons, Kirby (Conn.) 110.

7. Fowler *v.* Jenkins, 28 Pa. St. 176. See also Barnes *v.* Keane, 15 Q. B. 75, 14 Jur. 786, 19 L. J. Q. B. 309, 69 E. C. L. 75; Taylor *v.* Clemson, 11 Cl. & F. 610, 8 Jur. 833, 8 Eng. Reprint 1233; Dempster *v.* Purnell, 1 Dowl. P. C. N. S. 168, 11 L. J. C. P. 33, 3 M. & G. 375, 4 Scott N. R. 30.

8. Pettus *v.* McClannahan, 52 Ala. 55; Raymond *v.* Bell, 18 Conn. 81.

9. Von Kettler *v.* Johnson, 57 Ill. 109; Stone *v.* Miller, 62 Barb. (N. Y.) 430; People *v.* Koeber, 7 Hill (N. Y.) 39; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638; Stanton *v.* Styles, 5 Exch. 578, 19 L. J. Exch. 336, 1 L. M. & P. 575.

10. Ford *v.* Babcock, 1 Den. (N. Y.) 158.

11. See *supra*, II, G, 1.

12. *Alabama.*—Acklen *v.* Goodman, 77 Ala. 521; Steele *v.* Tutwiler, 68 Ala. 107.

California.— Irwin *v.* Scriber, 18 Cal. 499.

Georgia.— Bush *v.* Lindsey, 24 Ga. 245, 71 Am. Dec. 117; Wood *v.* Crawford, 18 Ga. 526.

Illinois.—Salomon *v.* Wincox, 104 Ill. App. 277.

tion[13] or have a limited, but not a special, jurisdiction,[14] or their powers are limited to certain specified subjects.[15] These rules and their limitations[16] also apply to county courts of general jurisdiction,[17] or where such courts are courts of limited but not of inferior jurisdiction,[18] or where jurisdiction of the subject-matter has been acquired.[19] Under some decisions, however, probate courts are brought within the rules[20] applicable to courts of special and limited jurisdiction,[21] particularly when they exercise powers in special matters constituting exceptions to their general authority.[22]

4. Courts of Another State. The presumption exists, in the absence of evidence to the contrary, that courts of record or of general jurisdiction of other states have the authority which they assume to exercise, and that their modes of procedure were authorized.[23]

H. Necessity of Jurisdiction Appearing of Record — 1. In General. If the court is one of competent general jurisdiction, and the want of jurisdiction is not availed of by plea, and the record is not contradictory thereof, the presumption is that every act is rightly done without its appearing of record, unless the contrary be shown.[24]

Louisiana.— Gary *v.* Sandoz, 16 La. 11.

Minnesota.—Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

Mississippi.— Pollock *v.* Buie, 43 Miss. 140.

Missouri.— State *v.* Nolan, 99 Mo. 569, 12 S. W. 1047.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116.

United States.— Adams *v.* Lewis, 1 Fed. Cas. No. 60, 5 Sawy. 229.

See 13 Cent. Dig. tit. "Courts," § 144.

13. Acklen *v.* Goodman, 77 Ala. 521.

14. Hess *v.* Cole, 23 N. J. L. 116.

15. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

16. See *supra*, II, G, 1.

17. Matthews *v.* Hoff, 113 Ill. 90; People *v.* Cole, 84 Ill. 327; People *v.* Gray, 72 Ill. 343; Housh *v.* People, 66 Ill. 178.

18. People *v.* Cole, 84 Ill. 327.

19. Davenport Mut. Sav. Fund, etc., Assoc. *v.* Schmidt, 15 Iowa 213. But see Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

20. See *supra*, II, G, 2.

21. Potwine's Appeal, 31 Conn. 381; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; People *v.* Hartman, 2 Sweeny (N. Y.) 576; People *v.* Corlies, 1 Sandf. (N. Y.) 228; Easley *v.* McClinton, 33 Tex. 288.

22. Vogelsang *v.* Dougherty, 46 Tex. 466; Bowser *v.* Williams, 6 Tex. Civ. App. 197, 25 S. W. 453.

23. Ward *v.* Baker, 16 Kan. 31; Haynes *v.* Cowen, 15 Kan. 637; Dodge *v.* Coffin, 15 Kan. 277; Buffum *v.* Stimpson, 5 Allen (Mass.) 591, 81 Am. Dec. 767; Council Bluffs Sav. Bank *v.* Griswold, 50 Nebr. 753, 70 N. W. 376.

Full faith and credit is to be given in each state to the judicial proceedings of every other state. U. S. Const. art. 4; Laing *v.* Rigney, 160 U. S. 531, 16 S. Ct. 366, 40 L. ed. 525. But the fact that necessary jurisdictional facts did not exist, notwithstanding the record of a judgment of another state, may be shown irrespective of the constitutional requirement that full faith and credit be given to the public acts, records, and judicial proceedings of sister states, and of the acts of congress in pursuance thereof. Thompson *v.* Whitman, 18 Wall. (U. S.) 457, 21 L. ed. 897. See also Cooper *v.* Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808; Scott *v.* McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. ed. 896; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Reynolds *v.* Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464; Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054; Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629.

Nothing will be presumed in favor of foreign military tribunal erected by hostile force. Snell *v.* Faussatt, 22 Fed. Cas. No. 13,138, 1 Wash. 271.

24. *Illinois.*— Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; Osgood *v.* Blackmore, 59 Ill. 261.

Indiana.— Godfrey *v.* Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Brownfield *v.* Weicht, 9 Ind. 394; Delaware Tp. *v.* Ripley County, 26 Ind. App. 97, 59 N. E. 189.

New Jersey.— State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

New York.— Gervais *v.* Chicago, etc., R. Co., 13 N. Y. Suppl. 589, 18 N. Y. Civ. Proc. 404 [*affirmed* in 12 N. Y. Suppl. 312, 20 N. Y. Civ. Proc. 95].

Tennessee.—Campbell *v.* McIrwin, 4 Hayw. 60.

Virginia.—Shelton *v.* Jones, 26 Gratt. 891; Ballard *v.* Thomas, 19 Gratt. 14.

United States.— Harvey *v.* Tyler, 2 Wall. 328, 17 L. ed. 871; Voorhees *v.* Jackson, 10 Pet. 449, 9 L. ed. 490 [*affirming* 2 Fed. Cas. No. 939, 1 McLean 221].

See 13 Cent. Dig. tit. "Courts," § 134.

Ground for the exercise of authority must appear where a chancellor of another circuit than that at which a suit is brought presides at a hearing for injunction at cham-

2. Courts With Specially Conferred Powers — a. In General. Where the statute confers special authority not within the general jurisdiction of the court, to be exercised not according to the course of the common law, sufficient matter must appear of record or on the face of the proceedings to show the case to be within such special jurisdiction.[25]

b. Summary Proceedings. As a rule everything necessary to give the court jurisdiction in summary proceedings should appear upon the face of the record.[26]

3. Courts of Inferior, Limited, or Special Jurisdiction. A court of special, limited, or inferior jurisdiction must by its record show all essential or vital jurisdictional facts of its authority to act in the particular case, and in what respect it has jurisdiction.[27] This rule also applies to jurisdiction over special statutory pro-

bers. Sharman *v.* Thomaston, 67 Ga. 246. So the record must show jurisdiction over defendant, or there must be a finding or recital of jurisdiction over him or that he appeared. Jackson *v.* Rickard, 19 Ill. App. 507. And the judgment of a state court does not raise a presumption of the existence of jurisdictional facts against the exclusive jurisdiction of a federal court, but such facts must appear from the record. The Montauk *v.* Walker, 47 Ill. 335. So jurisdiction over a non-resident must appear of record. Semple *v.* Anderson, 9 Ill. 546. And this is true as to a non-resident plaintiff, although the fact need not necessarily appear in the bill. Lexington Mfg. Co. *v.* Dorr, 2 Litt. (Ky.) 256. So the record must affirmatively show that all the parties are capable of suing. Anderson *v.* Jackson, 1 Fed. Cas. No. 357, 2 Paine 426.

If jurisdiction is necessary to be shown, and it is not, consent does not give it. Boybshall *v.* Oppenheimer, 3 Fed. Cas. No. 1,592, 4 Wash. 482. See also *supra*, II, C, 5.

25. *Iowa.*— Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Maryland.— Boarman *v.* Patterson, 1 Gill 372.

Minnesota.— Ullman *v.* Lion, 8 Minn. 381, 83 Am. Dec. 783.

Missouri.— Eaton *v.* St. Charles County, 76 Mo. 492; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585.

New Jersey.— Bergen Turnpike Co. *v.* State, 25 N. J. L. 554.

New York.— Smith *v.* Fowle, 12 Wend. 9; Denning *v.* Corwin, 11 Wend. 647. See Burckle *v.* Eckart, 3 Den. 279 [*affirmed* in 3 N. Y. 132].

Ohio.— Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477.

Oregon.—Northcut *v.* Lemery, 8 Oreg. 316.

Virginia.— Chesterfield County *v.* Hall, 80 Va. 321; Pulaski County *v.* Stuart, 28 Gratt. 872; Dinwiddie County *v.* Stuart, 28 Gratt. 526.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Cowdrey *v.* Caneadea, 16 Fed. 532, 21 Blatchf. 351. *Compare* Harvey *v.* Tyler, 2 Wall. 328, 17 L. ed. 871.

See 13 Cent. Dig. tit. "Courts," § 137.

26. Levert *v.* Planters', etc., Bank, 8 Port. (Ala.) 104; Bates *v.* Planters', etc., Bank, 8 Port. (Ala.) 99; Chicago *v.* Rock Island R. Co., 20 Ill. 286; Crockett *v.* Parkison, 3 Coldw. (Tenn.) 219; Hamilton *v.* Burum, 3 Yerg. (Tenn.) 355; Mayer *v.* Adams, 27 W. Va. 244.

27. *Alabama.*— Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630; Joiner *v.* Winston, 68 Ala. 129; Lowndes County Com'rs Ct. *v.* Hearne, 59 Ala. 371; Trammell *v.* Pennington, 45 Ala. 673; State *v.* Falconer, 44 Ala. 696; State *v.* Ely, 43 Ala. 568; Owen *v.* Jordan, 27 Ala. 608; Russell Com'rs Ct. *v.* Tarver, 25 Ala. 480; Molett *v.* Keenan, 22 Ala. 484; Lamar *v.* Marshall County Com'rs Ct., 21 Ala. 772; Barnett *v.* State, 15 Ala. 829; Talladega County Road, etc., Com'rs *v.* Thompson, 15 Ala. 134; McCartney *v.* Calhoun, 11 Ala. 110; Caskey *v.* State, 6 Ala. 193; Lister *v.* Vivian, 8 Port. 375.

Arkansas.— Trice *v.* Crittenden County, 7 Ark. 159.

Georgia.— Tift *v.* Griffin, 5 Ga. 185.

Illinois.—Osgood *v.* Blackmore, 59 Ill. 261.

Indiana.— Ohio, etc., R. Co. *v.* Shultz, 31 Ind. 150; State *v.* Gachenheimer, 30 Ind. 63; Rosenthal *v.* Madison, etc., Plank-Road Co., 10 Ind. 358; Rhode *v.* Davis, 2 Ind. 53.

Iowa.— Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Rowan *v.* Lamb, 4 Greene 468.

Kentucky.— Triplett *v.* Waring, 5 Dana 448; Grant *v.* Tams, 7 T. B. Mon. 218; Ormsby *v.* Lynch, Litt. Sel. Cas. 303; Taylor *v.* Moore, 65 S. W. 612, 23 Ky. L. Rep. 1572.

Maine.— State *v.* Pownal, 10 Me. 24.

Maryland.—Wickes *v.* Caulk, 5 Harr. & J. 36.

Michigan.— Denison *v.* Smith, 33 Mich. 155.

Mississippi.— Linn *v.* Kyle, Walk. 315; Blanchard *v.* Buckholts, Walk. 64.

Missouri.— State *v.* Metzger, 26 Mo. 65.

Nebraska.— Kuker *v.* Beindorff, 63 Nebr. 91, 88 N. W. 190.

New Hampshire.— Tebbetts *v.* Tilton, 31 N. H. 273.

New Jersey.— Nixon *v.* Ruple, 30 N. J. L. 58; Perrine *v.* Farr, 22 N. J. L. 356.

New York.— Frees *v.* Ford, 6 N. Y. 176; Simons *v.* De Bare, 4 Bosw. 547, 8 Abb. Pr. 269; Sophian *v.* Henig, 31 Misc 759, 64 N. Y. Suppl. 8; Parker *v.* Dennett Surpassing Coffee Co., 30 Misc. 768, 61 N. Y. Suppl. 785; Wilson *v.* Hogan, 30 Misc. 763, 61 N. Y. Suppl. 854; Gilbert *v.* York, 12 N. Y. Civ.

ceedings exercised in derogation of, or not according to, the course of the common law.[28] So the necessary jurisdictional facts must affirmatively appear by averment and proof to bring the case within the jurisdiction of such courts.[29] The evidence, however, on which the court bases its decision or judgment need not be set forth in the record.[30] Again the legislature which creates the court may change or qualify the rule or principle as to the record.[31]

4. Courts of Probate. In so far as probate courts have general jurisdiction their records need not affirmatively show the existence of facts upon which the exercise of their jurisdiction depends.[32] And the rule applies even though the court is one of limited jurisdiction where it is invested with full authority over probate and testamentary matters and is a court of record.[33] This general rule has, however, not only been limited[34] but the contrary has been asserted.[35]

I. Waiver of Objections — 1. In General. Three distinct factors are to be considered in determining whether or not there is a waiver: (1) Jurisdiction itself; (2) the pleadings as affecting the same; and (3) the proceedings in the action. As to the first, if there is an absolute want of jurisdiction[36] in the prem-

Proc. 345; People *v.* Mallon, 39 How. Pr. 454.

Oregon.— Tompkins *v.* Clackamas County, 11 Oreg. 364, 4 Pac. 1210; State *v.* Officer, 4 Oreg. 180.

Texas.— Guilford *v.* Love, 49 Tex. 715; Bohl *v.* Brown, 2 Tex. App. Civ. Cas. § 538; Lacroix *v.* Evans, 1 Tex. App. Civ. Cas. § 673.

West Virginia.— Mayer *v.* Adams, 27 W. Va. 244.

United States.— Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283; Voorhees *v.* Jackson, 10 Pet. 449, 9 L. ed. 490 [*affirming* 2 Fed. Cas. No. 939, 1 McLean 221]; Kemp *v.* Kennedy, 14 Fed. Cas. No. 7,686, Pet. C. C. 30 [*affirmed* in 5 Cranch 173, 3 L. ed. 70]; Mayhew *v.* Davis, 16 Fed. Cas. No. 9,347, 4 McLean 213.

England.— Taylor *v.* Clemson, 11 Cl. & F. 610, 8 Jur. 833, 8 Eng. Reprint 1233.

See 13 Cent. Dig. tit. "Courts," § 135.

Jurisdictional facts may be shown aliunde. — Van Deusen *v.* Sweet, 51 N. Y. 378.

That requisite number of magistrates were present need not be recited in record; it is sufficient if it is shown that the magistrates were present. McCullough *v.* Moore, 9 Yerg. (Tenn.) 305.

28. Chandler *v.* Nash, 5 Mich. 409; State *v.* Lewis, 22 N. J. L. 564; Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620; Northcut *v.* Lemery, 8 Oreg. 316; Chesterfield County *v.* Hall, 80 Va. 321. See also Mayhew *v.* Davis, 16 Fed. Cas. No. 9,347, 4 McLean 213.

29. *Colorado.*— Learned *v.* Fritch, 6 Colo. 432.

Connecticut.— Buel *v.* Fabrick, 1 Root 150; Wooster *v.* Parsons, Kirby 27.

Illinois.— Shute *v.* Chicago, etc., R. Co., 26 Ill. 436; Trader *v.* McKee, 2 Ill. 558.

Kentucky.— Ormsby *v.* Lynch, Litt. Sel. Cas. 303.

Michigan.— Denison *v.* Smith, 33 Mich. 155.

Minnesota.— Clark *v.* Norton, 6 Minn. 412.

New York.— Giallorenzi *v.* Caggiano, 31 Misc. 785, 65 N. Y. Suppl. 194; Consolidated Copalquin Mines Co. *v.* Broadway Realty Co., 31 Misc. 783, 65 N. Y. Suppl. 227.

Texas.— Bohl *v.* Brown, 2 Tex. App. Civ. Cas. § 538.

See 13 Cent. Dig. tit. "Courts," § 135.

That process must show case within jurisdiction see City Council *v.* Truchelut, 1 Nott & M. (S. C.) 227.

30. Trice *v.* Crittenden County, 7 Ark. 159.

31. Rutter *v.* Sullivan, 25 W. Va. 427; Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 3 L. ed. 70.

32. *Alabama.*— Sims *v.* Waters, 65 Ala. 442.

Georgia.— Barnes *v.* Underwood, 54 Ga. 87; Perkins *v.* Attaway, 14 Ga. 27.

Iowa.— Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

New Jersey.— Obert *v.* Hammel, 18 N. J. L. 73.

Ohio.— Shroyer *v.* Richmond, 16 Ohio St. 455.

See 13 Cent. Dig. tit. "Courts," § 138.

33. Shroyer *v.* Richmond, 16 Ohio St. 455.

34. Sims *v.* Waters, 65 Ala. 442.

In pleading appointment of guardian facts conferring jurisdiction should be alleged. Holden *v.* Scanlin, 30 Vt. 177.

Where the facts essential to jurisdiction are required to be set forth there must be a sufficient showing that jurisdiction has been acquired as claimed. Hershberger *v.* Blewett, 55 Fed. 170.

35. *Alabama.*— Taliferro *v.* Bassett, 3 Ala. 670.

Mississippi.— Sullivan *v.* Blackwell, 28 Miss. 737.

New York.— Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299; Dakin *v.* Hudson, 6 Cow. 221.

Pennsylvania.— Forster's Estate, 2 Lanc. L. Rev. 206.

Texas.— Easley *v.* McClinton, 33 Tex. 288.

See 13 Cent. Dig. tit. "Courts," § 138.

36. Want of jurisdiction over the subject-matter cannot be waived.

ises, that which is without existence cannot be brought into being by a waiver, for a nullity cannot be waived. Consent, as has been elsewhere stated,[37] cannot, in the absence of an express statutory provision, give jurisdiction. As to the second factor, whatever distinctions exist between the common law and such code systems as prevail will in some measure account for the varying decisions as to waiver, and here the question of defects in matters of substance and of mere form should be noted, since as to the former one might formerly often avail himself of such defects after pleading over, the sufficiency of law and of fact not being thereby necessarily admitted, while as to the latter the maxim *consensus tollit errorem* applied. And finally, as to proceedings in the action, such maxim applies to irregularities where the party has knowledge thereof and subsequently does the alleged act of waiver, but here again proceedings which are absolutely defective and void cannot by any subsequent waiver be given validity.[38] These

Illinois.— Demilly *v.* Grosvenaud, 201 Ill. 272, 66 N. E. 234; Hammond *v.* Leavitt, 181 Ill. 416, 54 N. E. 982.

Iowa.— Smith *v.* Dubuque County, 1 Iowa 492.

Louisiana.— Debuys *v.* Yerby, 1 Mart. N. S. 380.

Missouri.— Klingelhoefer *v.* Smith, 171 Mo. 455, 71 S. W. 1008.

New Jersey.— School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115.

New York.— De Bussiene *v.* Holladay, 4 Abb. N. Cas. 111; Bennett *v.* American Art Union, 5 Sandf. 614.

Ohio.—The General Buell *v.* Long, 18 Ohio St. 521; Wilson *v.* Swigart, 1 Ohio S. & C. Pl. Dec. 418.

Tennessee.— Baker *v.* Mitchell, 105 Tenn. 610, 59 S. W. 137; Agee *v.* Dement, 1 Humphr. 332.

Texas.—Newman *v.* McCallum, 1 Tex. App. Civ. Cas. § 273.

West Virginia.— Freer *v.* Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556.

United States.— Earl *v.* Raymond, 8 Fed. Cas. No. 4,243, 4 McLean 233.

See 13 Cent. Dig. tit. "Courts," § 147; and cases cited *infra*, note 40.

As to effect of appearance as waiver of objections to jurisdiction over subject-matter see APPEARANCES, V, A, 1, b, (I) [3 Cyc. 515].

37. See *supra*, II, C, 5.

38. Want of jurisdiction over the person may be waived where jurisdiction over the subject-matter exists. Pease *v.* Delaware, etc., R. Co., 10 Daly (N. Y.) 459; Agee *v.* Dement, 1 Humphr. (Tenn.) 332. So mere irregularity in bringing parties before the court may be waived (Mayo *v.* Murchie, 3 Munf. (Va.) 358), as may be mere defects in service, teste, or place of return, where the court has jurisdiction in other respects (Simonds *v.* Parker, 1 Metc. (Mass.) 508; Carlisle *v.* Weston, 21 Pick. (Mass.) 535); and that a justice is "near of kin" may be waived (Rector *v.* Drury, 3 Pinn. (Wis.) 298, 4 Chandl. (Wis.) 24). So an exception should be taken *in limine* where the court has jurisdiction of the subject and the lack of it in some particular case depends upon some exceptional matter. Hawkins *v.* Hughes, 87 N. C. 115. See also English *v.* Randle, 29 Ind. App. 681, 65 N. E. 22; Illinois Cent. R. Co. *v.* Glover, 71 S. W. 630, 24 Ky. L. Rep. 1447.

Jurisdiction is waived or an estoppel is raised by filing a cross bill asking affirmative relief (Tygh *v.* Dolan, 95 Ala. 269, 10 So. 837. See also Burgess *v.* Wheate, 1 Eden 177, 1 W. Bl. 123), by coming into court by consent (Gager *v.* Doe, 29 Ala. 341), by the voluntary submission by a guardian of the settlement of his guardianship (Norton *v.* Miller, 25 Ark. 108), by voluntarily submitting and going to a hearing upon the merits (Adamski *v.* Wieczorek, 93 Ill. App. 357), by answering at a law term, the writ being returnable at a probate instead of a law term, there being jurisdiction of the subject-matter (Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349), by accepting and exercising a trust as administrator (Williamson *v.* Hill, 6 Port. (Ala.) 184), by permitting trial to proceed until near the close, without objection (Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949 [*affirming* 46 Hun 138, 10 N. Y. St. 756, 27 N. Y. Wkly. Dig. 313]), by participating, without objection, at an extra term of the court, in the trial of a cause not docketed properly (Rivers *v.* Priester, 58 S. C. 194, 36 S. E. 543), by a failure to plead in abatement (Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621), by plaintiff bringing an action and by defendant pleading generally and going to trial without objection (Sentenis *v.* Ladew, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569 [*affirming* 24 N. Y. Suppl. 1141]), or by giving an undertaking to appear, both plaintiff and defendant residing wholly without the county (Oulton *v.* Radcliffe, L. R. 9 C. P. 189, 43 L. J. C. P. 87, 30 L. T. Rep. N. S. 22, 22 Wkly. Rep. 372). So where the state appears and submits to process in her legislative capacity and pleads in bar, all doubts as to jurisdiction are at rest, and a motion to dismiss is not analogous to a plea to the jurisdiction of a court of common law or equity in England. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

principles, in the absence of statutory or code provisions or a prevailing practice to the contrary, govern largely if not exclusively in determining what constitutes a waiver, and were early stated.[39]

2. TIME OF OBJECTING. Want of jurisdiction over the subject-matter may be taken advantage of at any stage of the proceedings.[40] An objection to the jurisdiction must be made, however, in apt time or it will be waived, where there is not a want of jurisdiction, where there is a mere irregularity in the proceeding, or where the objection is to the form and not the substance.[41]

Jurisdiction is not waived nor is an estoppel raised by calling for a bill of particulars (Watkins *v.* Brown, 5 Ark. 197), by the appearance of a non-resident and pleading to the jurisdiction (Bryant *v.* Ela, Smith (N. H.) 396), by answering "ready" on call of the calendar (Feist *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 240, 34 N. Y. Suppl. 57, 25 N. Y. Civ. Proc. 257), by pleading to the jurisdiction alleging facts showing a want thereof (Van Antwerp *v.* Hulburd, 28 Fed. Cas. No. 16,826, 7 Blatchf. 426), by pleading in abatement and consenting to a continuance (Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735), by asking for and obtaining an adjournment when brought before the court by illegal process, and pleading to the action under force of such process (Robinson *v.* West, 11 Barb. (N. Y.) 309 [*reversing* 1 Sandf. (N. Y.) 19]), by moving for instructions or reserving a point (Grant *v.* Tams, 7 T. B. Mon. (Ky.) 218), by executing a delivery bond for attached property (Egan *v.* Lumsden, 2 Disn. (Ohio) 168), by filing a stipulation on dissolution of injunction to abide decree, defendant, a non-resident, having first appeared specially to object to jurisdiction (Walling *v.* Beers, 120 Mass. 548), by failing to except when there is no jurisdiction (Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248), and objection to the jurisdiction may be made at the hearing (Clark *v.* Manufacturers' Nat. Bank, 74 Conn. 263, 50 Atl. 727).

As to effect of appearance as waiver of objections to jurisdiction over the person see APPEARANCES, V, A, 1, b, (II) [3 Cyc. 515].

39. Lawrence *v.* Wilcock, 11 A. & E. 941, 39 E. C. L. 495; Furnival *v.* Stringer, 1 Bing. N. Cas. 68, 5 L. J. C. P. 344, 4 M. & S. 578, 27 E. C. L. 547; Tyerman *v.* Smith, 6 E. & B. 719, 2 Jur. N. S. 860, 25 L. J. Q. B. 359, 88 E. C. L. 719; Andrewes *v.* Elliott, 6 E. & B. 338, 2 Jur. N. S. 663, 25 L. J. Q. B. 336, 4 Wkly. Rep. 527, 88 E. C. L. 338; St. Victor *v.* Devereux, 14 L. J. Ch. 244; Anonymous, 2 Salk. 519; Lucking *v.* Denning, 1 Salk. 201; Cowne *v.* Bowles, 1 Salk. 93; Bacon Abr. tit. Courts (A); Brown Leg. Max. 136.

40. *Alabama.* — Talladega Com'rs Ct. *v.* Thompson, 18 Ala. 694.

Connecticut. — Davison *v.* Champlin, 7 Conn. 244. See also Olmstead's Appeal, 43 Conn. 110.

Delaware. — Beeson *v.* Elliott, 1 Del. Ch. 368.

Illinois. — Vogel *v.* People, 37 Ill. App. 388.

Indiana. — Harris *v.* Harris, 61 Ind. 117; Brownfield *v.* Weicht, 9 Ind. 394.

Iowa. — Orcutt *v.* Hanson, 71 Iowa 514, 32 N. W. 482; Smiths *v.* Dubuque County, 1 Iowa 492.

Massachusetts. — Osgood *v.* Thurston, 23 Pick. 110; Carlisle *v.* Weston, 21 Pick. 535.

Michigan. — Farrand *v.* Bentley, 6 Mich. 281.

Mississippi. — Green *v.* Creighton, 10 Sm. & M. 159, 48 Am. Dec. 742.

New Hampshire. — State *v.* Richmond, 26 N. H. 232.

New York. — Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 16 N. Y. Civ. Proc. 225, 2 L. R. A. 636 [*affirming* 56 N. Y. Super. Ct. 108, 1 N. Y. Suppl. 418, 15 N. Y. Civ. Proc. 88, 28 N. Y. Wkly. Dig. 518]; Baer *v.* Kempner, 15 Daly 110, 3 N. Y. Suppl. 529; Perry *v.* Erie Transfer Co., 23 N. Y. Suppl. 878 [*affirming* 1 Misc. 208, 20 N. Y. Suppl. 891]; Wilkins *v.* Williams, 3 N. Y. Suppl. 897, 15 N. Y. Civ. Proc. 168; Brooks *v.* Mexican Nat. Constr. Co., 3 N. Y. Civ. Proc. 36, 64 How. Pr. 364; Titus *v.* Relyea, 8 Abb. Pr. 177, 16 How. Pr. 371; Delafield *v.* Wright, 3 Sandf. 746, Code Rep. N. S. 123.

North Carolina. — Hannah *v.* Richmond, etc., R. Co., 87 N. C. 351; Branch *v.* Houston, 44 N. C. 85.

Pennsylvania. — Rankin's Appeal, 95 Pa. St. 358; Collins *v.* Collins, 37 Pa. St. 387; *In re* Little Meadows, 28 Pa. St. 256; Stearly's Appeal, 3 Grant 270.

South Carolina. — Gibbes *v.* Morrison, 39 S. C. 369, 17 S. E. 803.

South Dakota. — Wayne *v.* Caldwell, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750.

Vermont. — Lamson *v.* Worcester, 58 Vt. 381, 4 Atl. 145; Stoughton *v.* Mott, 13 Vt. 175.

Wisconsin. — State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Damp *v.* Dane, 29 Wis. 419.

United States. — Dailey *v.* Doe, 3 Fed. 903; Donaldson *v.* Hazen, 7 Fed. Cas. No. 3,984, Hempst. 423; Kelly *v.* Harding, 14 Fed. Cas. No. 7,670, 5 Blatchf. 502; Maisonnaire *v.* Keating, 16 Fed. Cas. No. 8,978, 2 Gall. 325.

See 13 Cent. Dig. tit. "Courts," § 148.

41. Gilmanton *v.* Ham, 38 N. H. 108; Rankin's Appeal, 95 Pa. St. 358; Gilman *v.* Perkins, 7 Fed. 887, 10 Biss. 430.

Application of rule. — Objection comes too late: After answering to the merits where want of jurisdiction relates to the person and not to the subject-matter (Pease *v.* Delaware, etc., R. Co., 10 Daly (N. Y.) 459), where not made before entering a general appearance

J. Determination of Jurisdictional Questions — 1. In General. The question of jurisdiction is always open for determination, even though there may be in the same case prior rulings of the same or another judge sustaining the jurisdiction,[42] and is to be decided as regards the nature of the thing in controversy, by the character of the suit, without reference to what defenses exist.[43] These questions also rest in the sound judicial discretion of the court itself,[44] to be decided in the first instance by the court whose judicial action is first invoked,[45] except where dependent upon questions of fact, when the jury may, subject to the direction of the court as to matter of law, affirm jurisdiction or not by a general verdict.[46] So defendant has the right to challenge the jurisdiction in the first instance, and he may also have the cause set down for a hearing upon that issue and have it determined.[47] In addition there is an implied ruling in favor of jurisdiction arising from the issuance of process.[48] So the allegations of the pleadings determine whether a cause of action arose within the state, and such

and answering to the merits, the objection being founded on a personal privilege (The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 332), after filing a claim and plea to the merits (The Abby, 1 Fed. Cas. No. 14, 1 Mason 360), after going to trial on the merits after voluntarily withdrawing a motion to dismiss for want of jurisdiction in a personal action (Luco *v.* Tuolumne Supreme Ct., 71 Cal. 555, 12 Pac. 677; Cal. Code Civ. Proc. § 848), after trial in justice's court stipulating for submission to district court which has jurisdiction of the subject-matter and proceeding to trial (Edwards *v.* Smith, 16 Colo. 529, 27 Pac. 809), after trial and verdict (Smith *v.* Bauer, 9 Colo. 380, 12 Pac. 397), after verdict (Ohio, etc., R. Co. *v.* Heaton, 137 Ind. 1, 35 N. E. 687), after trial without objection and on second trial the court having jurisdiction of the subject-matter (Schrader *v.* Hoover, 87 Iowa 654, 54 N. W. 463), after defendant goes into the evidence and the testimony is closed (Head *v.* Gervais, Walk. (Miss.) 431, 12 Am. Dec. 577), after designedly failing to object until after various proceedings are had and the court has jurisdiction over the cause (Warren *v.* Glynn, 37 N. H. 340), where the trial is nearly closed (Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949 [*affirming* 46 Hun 138, 10 N. Y. St. 756, 27 N. Y. Wkly. Dig. 313]), after reference, trial, and decision in one court, an appeal to another and reference and trial there (Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 435), after trial and decree (McDonald *v.* Crockett, 2 McCord Eq. (S. C.) 130), after appearing and defending suit and want of jurisdiction does not appear on the bill (Whyte *v.* Gibbes, 20 How. (U. S.) 541, 15 L. ed. 1016), after judgment by default (Tegarden *v.* Powell, 15 La. Ann. 184), when not made before judgment (Corsicana *v.* Kerr, 75 Tex. 207, 12 S. W. 982), after judgment and neglect to plead in abatement at the proper time (Covington *v.* Neilson, 6 Yerg. (Tenn.) 475), after judgment if not objected to when action was pending (Collamer *v.* Page, 35 Vt. 387), when raised for the first time after appeal (Olmstead's Appeal, 43 Conn. 110; Wroe *v.* Greer, 2 Swan (Tenn.) 172), and after sixteen years (Brown's Appeal, 89 Pa. St. 139).

42. Sheldon *v.* Wabash R. Co., 105 Fed. 785.

When it is ascertained that the lien sought to be enforced has no existence the suit will be dismissed. Storrie *v.* Woessner, (Tex. Civ. App. 1898) 47 S. W. 837.

If disclosed on appeal that a case embraces a cause of action legal in its nature and a simulated equitable action not arising from the same transaction nor transactions connected with the same subject of action, and the appellate court has no jurisdiction over the legal action, the entire petition will be dismissed. Wellston *v.* Morgan, 59 Ohio St. 147, 52 N. E. 127.

43. Boone *v.* Poindexter, 12 Sm. & M. (Miss.) 640.

44. People *v.* Chicago, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833; U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483.

Court may inquire if statutory remedy exists in determining whether it has jurisdiction at common law. Fisher *v.* Kreebel, 1 Leg. Chron. (Pa.) 113.

45. Manier *v.* Trumbo, 30 Fed. Cas. No. 18,309.

46. U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483. See also Hamilton *v.* Gorman, 24 N. Y. App. Div. 85, 48 N. Y. Suppl. 1002.

47. Robinson *v.* Harrison, 9 Ohio S. & C. Pl. Dec. 701, 7 Ohio N. P. 273.

Defendant only can raise question of jurisdiction to enforce a decree against a foreign tribunal. Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116.

Defendant cannot object that judge is not legally commissioned by way of plea to the jurisdiction. Beard *v.* Cameron, 7 N. C. 181.

48. Manier *v.* Trumbo, 30 Fed. Cas. No. 18,309, holding that whether or not there is any jurisdiction arises immediately upon application for the original or first process in the action, and is then decided as of necessity in favor of the jurisdiction, and is also by necessary implication thereafter decided as preliminary to every order, sentence, or mandate of the writ, and every order or process exhibits on its face a decision of the court that it is made and awarded by competent authority.

averments are exclusive of affidavits upon the point.[49] Again jurisdiction will not be defeated by a rigid construction.[50]

2. COURT'S POWER. A court has judicial power to hear and determine the question of its own jurisdiction,[51] and is not bound to dismiss the suit on a mere allegation, but may inquire into the correctness of the averment.[52] So it may receive testimony on a preliminary question to determine its jurisdiction.[53] Courts of law will also incidentally inquire into the validity of judgments of special jurisdictions whenever necessary to the exercise of their ordinary powers.[54]

3. RIGHT AND DUTY OF COURT TO ACT OF ITS OWN MOTION. The court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect,[55] unless the petition be reformed where it can be done.[56]

4. EFFECT OF DECISION. Where a court has power to determine its own jurisdiction its decision will have relatively the same effect as to conclusiveness as will the judgments or records of such courts upon matters confessedly within their jurisdiction. Within this rule are courts of last resort,[57] a superior court or court of record,[58] a court of general jurisdiction,[59] inferior courts[60] having general jurisdiction,[61] appellate courts,[62] and generally courts of whatever rank.[63]

49. Delaware, etc., R. Co. *v.* New York, etc., R. Co., 12 Misc. (N. Y.) 230, 33 N. Y. Suppl. 1081. But see *infra*, II, J, 2.

On an averment of domicile it is error to exclude evidence of defendant to contradict evidence of plaintiff offered in support of such allegation. Stephenson *v.* Broadwell, 26 La. Ann. 387.

That a remedy existed in another state cannot be shown to defeat jurisdiction in an action by a citizen of that state to enforce a liability of a transitory nature against a corporation of the state where suit is brought, and so even though the cause of action arose wholly in such foreign state. Sorkin *v.* Houston, etc., R. Co., (Tex. Civ. App. 1899) 53 S. W. 608.

50. Stanley *v.* Barker, 25 Vt. 507.

51. King *v.* Poole, 36 Barb. (N. Y.) 242; Gormley *v.* McIntosh, 22 Barb. (N. Y.) 271; Silver *v.* Schuylkill County, 32 Pa. St. 356; Lindsey *v.* Luckett, 20 Tex. 516; Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 6 Sawy. 276. See State *v.* Judge Second City Ct., 35 La. Ann. 1110.

Court cannot consider questions under constitution of United States for purpose of determining its own jurisdiction. Bennett *v.* Missouri Pac. R. Co., 105 Mo. 642, 16 S. W. 947 [*remanding* 44 Mo. App. 372]. But see Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684.

52. State *v.* Voorhies, 34 La. Ann. 1142.

53. Caton *v.* Carter, 9 Gill & J. (Md.) 476.

54. Savage Mfg. Co. *v.* Owings, 3 Gill (Md.) 497.

55. *Arkansas.* — Crawford *v.* Carson, 35 Ark. 565.

Connecticut. — Pettibone *v.* Phelps, 2 Root 137.

District of Columbia. — Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. 356.

Louisiana. — Fabacher *v.* Bryant, 46 La. Ann. 820, 15 So. 181; Fleming *v.* Hiligsberg, 11 Rob. 77; Greiner *v.* Thielen, 6 Rob. 365; Dupey *v.* Greffin, 1 Mart. N. S. 198.

Maine. — Chalmers *v.* Hack, 19 Me. 124.

Maryland. — Berrett *v.* Oliver, 7 Gill & J. 191.

Massachusetts. — Lawrence *v.* Smith, 5 Mass. 362.

Mississippi. — Stamps *v.* Newton, 3 How. 34.

New York. — Griffin *v.* Dominguez, 2 Duer 656, 11 Leg. Obs. 285.

North Carolina. — Hannah *v.* Richmond, etc., R. Co., 87 N. C. 351.

South Carolina. — Hammarskold *v.* Bull, 9 Rich. 474.

Texas. — Burks *v.* Bennett, 55 Tex. 237.

Vermont. — Glidden *v.* Elkins, 2 Tyler 218.

United States. — Heriot *v.* Davis, 12 Fed. Cas. No. 6,404, 2 Woodb. & M. 229.

See 13 Cent. Dig. tit. "Courts," § 156.

Upon suggestion of amicus curiæ the court may stay proceedings for want of jurisdiction. Chalmers *v.* Hack, 19 Me. 124; Hammarskold *v.* Bull, 9 Rich. (S. C.) 474. See also AMICUS CURIÆ, III, B [2 Cyc. 282].

Court will not of its own motion raise objection to jurisdiction where it has jurisdiction of the subject-matter and parties and the issues are tried without objection. Courtney *v.* Neimeyer, 33 Nebr. 796, 51 N. W. 234.

56. Crawford *v.* Carson, 35 Ark. 565.

57. People *v.* Clark, 1 Park. Crim. (N. Y.) 360 [*reversed* in 7 N. Y. 385, 11 N. Y. Leg. Obs. 4].

58. McCauley *v.* Fulton, 44 Cal. 355; Bannon *v.* People, 1 Ill. App. 496.

59. Cannon *v.* Cooper, 39 Miss. 784, 40 Am. Dec. 101.

60. *In re* Grove, 61 Cal. 438; Mullikin *v.* Bloomington, 72 Ind. 161; Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Stohmier *v.* Stumph, Wils. (Ind.) 304; State *v.* Scott, 1 Bailey (S. C.) 294.

61. Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937.

62. Fahs *v.* Darling, 82 Ill. 142.

63. Dowdy *v.* Wamble, 110 Mo. 289, 19 S. W. 489.

K. Proceedings and Acts Without Jurisdiction — 1. In General. Where a court is without jurisdiction in the premises its acts and proceedings can be of no force or validity, nor can it by its decisions or otherwise acquire jurisdiction.[64] This rule applies, even though the court's powers are thereafter enlarged by an amendment of the law.[65] It is especially applicable when jurisdiction is denied by the constitution.[66] Again if a court of special or limited jurisdiction exceeds its powers its proceedings are void[67] and not merely voidable.[68]

2. Jurisdiction as to Part of Demand. Although jurisdiction is lacking as to part of the demand, nevertheless the court may proceed as to the part within its jurisdiction,[69] and an award will be void only as to the excess.[70]

3. Proceedings Subsequent to Decision That No Jurisdiction Exists. Upon determining that it has no jurisdiction the court may not only refuse to proceed further and determine other objections or the rights of the parties,[71] but it is improper to decide upon the sufficiency of other matters of defense.[72] Nor has the court authority to proceed after the cause is dismissed.[73]

III. Creation, Constitution, and Officers of Court.

A. Power to Create, Organize, Abolish, Reorganize, Consolidate, and Transfer Courts — 1. Source of Power. The authority to establish a court must emanate from the supreme power of the state, otherwise the court itself is an absolute nullity, and all its proceedings are utterly void.[74] No person can in

64. *California.*— Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.
Illinois.— Clark *v.* Carr, 45 Ill. App. 469.
Indiana.— Marsh *v.* Sherman, 12 Ind. 358.
Louisiana.— Bradley *v.* Woodruff, 26 La. Ann. 299; Mora *v.* Kuzac, 21 La. Ann. 754.
Maryland.— Wickes *v.* Caulk, 5 Harr. & J. 36.
Massachusetts.— Sigourney *v.* Sibley, 21 Pick. 101, 32 Am. Dec. 248.
Michigan.— Richards *v.* Morton, 18 Mich. 255.
Missouri.— Latimer *v.* Union Pac. R. Co., 43 Mo. 105, 97 Am. Dec. 378.
New York.— Harrington *v.* People, 6 Barb. 607; Bigelow *v.* Stearns, 19 Johns. 39, 10 Am. Dec. 189.
Pennsylvania.— Thompson *v.* Lyle, 3 Watts & S. 166; Taylor *v.* Knipe, 2 Pears. 151.
See 13 Cent. Dig. tit. "Courts," § 157.
Court cannot reverse a case from below and place it on its own docket for trial where it has no jurisdiction of the subject-matter. Banks *v.* Porter, 39 Conn. 307.

65. Mora *v.* Kuzac, 21 La. Ann. 754.

66. Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.
Where a statute which confers jurisdiction on a certain court is held unconstitutional, such decision will have no retroactive effect on the principle, *communis error facit jus*, and where proceedings have been regularly had under the law as it existed before such decision they will not be disturbed. Thomas *v.* Poole, 19 S. C. 323; Herndon *v.* Moore, 18 S. C. 339.

67. Barrett *v.* Crane, 16 Vt. 246; Walbridge *v.* Hall, 3 Vt. 114.

68. Hendrick *v.* Cleaveland, 2 Vt. 329.

69. Levi *v.* Hare, 8 Ind. App. 571, 36 N. E. 369; State *v.* Ogden, 35 La. Ann. 738; Taylor *v.* Hollander, 4 Mart. N. S. (La.) 535.

70. American Ins. Co. *v.* Fisk, 1 Paige (N. Y.) 90.

71. Stough *v.* Chicago, etc., R. Co., 71 Iowa 641, 33 N. W. 149.

72. Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. (Ky.) 282.

73. Gray *v.* Dean, 136 Mass. 128; Wheeler, etc., Mfg. Co. *v.* Whitcomb, 62 N. H. 411.
Court may enter judgment on a replevy bond for the property or its value, even though it has no jurisdiction to hear and determine the cause. Close *v.* Hannig, (Tex. App. 1890) 17 S. W. 350.

74. State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415; 3 Bl. Comm. 24.
Courts created by the constitution proceed directly from the sovereign will; they constitute a coördinate and independent department of the government. Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.
As a sovereign the United States is bound by the limitations of the federal constitution, and it cannot create a state court and appoint a judge to administer it. Mechanics', etc., Bank *v.* Union Bank, 25 La. Ann. 387.
Power to hear appeals must be expressly granted. Rhoads *v.* Philadelphia, 2 Phila. (Pa.) 149, 13 Leg. Int. (Pa.) 238.
The establishment of separate ecclesiastical courts was not a part of the common law, and the English statutes relating thereto were in derogation of the common law, and were never in force in Indiana. Short *v.* State, 58 Ind. 29.
In England all jurisdiction is derived from the crown. Rex *v.* Knollys, 2 Salk. 509; Bacon Abr. tit. Courts (A). See also Matter of Colenso, 3 Moore P. C. N. S. 115, 12 Jur. N. S. 353, 12 L. T. Rep. N. S. 188, 13 Wkly. Rep. 549, 16 Eng. Reprint 43.

the absence of law create a court and preside over the same as judge,[75] and judges cannot hold a court which is unconstitutional in its organization.[76] In the United States the constitutions of the several states generally vest the judicial power in designated courts, and delegate certain powers in respect thereto; and as to other courts, to the legislature, although courts are created by the constitution in numerous instances conferring power directly upon them independently of legislative enactment or interference.[77]

75. State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415, holding, however, that where a court has a legal existence, a person may without any authority assume the office of judge and preside as such and the acts of the court will be valid.

The president of the United States cannot create a court to decide any civil controversy. Mechanics', etc., Bank *v.* Union Bank, 25 La. Ann. 387.

76. Com. *v.* Swank, 79 Pa. St. 154. See also APPEAL AND ERROR, 3 Cyc. 213, note 12.

77. *Alabama.*— Perkins *v.* Corbin, 45 Ala. 103, 118, 6 Am. Rep. 698; Nugent *v.* State, 18 Ala. 521.

Arkansas.— State *v.* Martin, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153; State *v.* Fairchild, 15 Ark. 619.

California.— People *v.* Sands, (1894) 35 Pac. 330; People *v.* Toal, (1890) 23 Pac. 203; Vassault *v.* Austin, 36 Cal. 691; People *v.* Provines, 34 Cal. 520; Hicks *v.* Bell, 3 Cal. 219.

Colorado.— People *v.* Richmond, 16 Colo. 274, 26 Pac. 929.

Connecticut.— Smith *v.* Hall, 71 Conn. 427, 42 Atl. 86.

Delaware.— Morrow *v.* State, 2 Marv. 4, 37 Atl. 43.

Florida.— *Ex p.* Pitts, 35 Fla. 149, 17 So. 76.

Illinois.— People *v.* Opel, 188 Ill. 194, 58 N. E. 996; People *v.* Rose, 166 Ill. 422, 47 N. E. 64; Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; Klokke *v.* Dodge, 103 Ill. 125; People *v.* Rumsey, 64 Ill. 44; People *v.* Evans, 18 Ill. 361; *In re* Welsh, 17 Ill. 161.

Indiana.— Woods *v.* McCay, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97; State *v.* Bear, 135 Ind. 701, 34 N. E. 877; State *v.* Friedley, 135 Ind. 119, 34 N. E. 872, 21 L. R. A. 634; Branson *v.* Studabaker, 133 Ind. 147, 33 N. E. 98.

Iowa.— Page *v.* Millerton, 114 Iowa 378, 86 N. W. 440; Milner *v.* Chicago, etc., R. Co., 77 Iowa 755, 42 N. W. 567.

Kansas.— Morris *v.* Bunyan, 58 Kan. 210, 48 Pac. 864; State *v.* Young, 3 Kan. 445.

Kentucky.— Hildreth *v.* McIntire, 1 J. J. Marsh. 206, 19 Am. Dec. 61; Dotson *v.* Fitzpatrick, 66 S. W. 403, 23 Ky. L. Rep. 2042; Pratt *v.* Breckinridge, 65 S. W. 136, 23 Ky. L. Rep. 1356; Addams' Petition, 26 S. W. 182, 16 Ky. L. Rep. 45.

Louisiana.— State *v.* Walsh, 32 La. Ann. 1234; La Chambre *v.* Cole, 30 La. Ann. 961; State *v.* Judge Seventh Dist. Ct., 22 La. Ann. 565; State *v.* Jones, 8 Rob. 573.

Michigan.— Renand *v.* State Ct., 124 Mich. 648, 83 N. W. 620, 83 Am. St. Rep. 346, 51 L. R. A. 458; Chicago, etc., R. Co. *v.* Nester, 63 Mich. 657, 30 N. W. 315; People *v.* Kent County Cir. Judge, 37 Mich. 472.

Minnesota.— Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384.

Mississippi.— Hughes *v.* State, 79 Miss. 77, 29 So. 786; Houston *v.* Royston, 7 How. 543.

Missouri.— State *v.* Vallino, 140 Mo. 523, 41 S. W. 887; State *v.* Laughlin, 75 Mo. 147; State *v.* Mann, 41 Mo. 395.

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

New Jersey.— State *v.* Gruff, 68 N. J. L. 287, 53 Atl. 88; Johnson *v.* State, 59 N. J. L. 271, 35 Atl. 787 [*affirmed* in 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373]; Schalk *v.* Wrightson, 58 N. J. L. 50, 32 Atl. 820.

New York.— Worthington *v.* London Guarantee, etc., Co., 164 N. Y. 81, 58 N. E. 102, 31 N. Y. Civ. Proc. 274; Alexander *v.* Bennett, 60 N. Y. 204; Sill *v.* Corning, 15 N. Y. 297; People *v.* Howland, 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347; Beaudrias *v.* Hogan, 16 N. Y. App. Div. 38, 44 N. Y. Suppl. 785; Fifth Ave. Bank *v.* Forty-Second Street, etc., R. Co., 6 N. Y. App. Div. 567, 40 N. Y. Suppl. 219; De Hart *v.* Hatch, 3 Hun 375.

North Carolina.— State *v.* Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334; Rhyne *v.* Lipscombe, 122 N. C. 650, 29 S. E. 57; Washington *v.* Hammond, 76 N. C. 33.

North Dakota.— McDermont *v.* Dinnie, 6 N. D. 278, 69 N. W. 294.

Ohio.— State *v.* Archibald, 52 Ohio St. 1, 38 N. E. 314.

Pennsylvania.— *In re* Cahill, 110 Pa. St. 167, 20 Atl. 414; Com. *v.* Dumbauld, 97 Pa. St. 293; Com. *v.* Green, 58 Pa. St. 226.

South Carolina.— Middleton *v.* Taber, 46 S. C. 337, 24 S. E. 282; Land Mortg. Invest., etc., Co. *v.* Faulkner, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288; State *v.* Fillebrown, 2 S. C. 404.

Tennessee.—State *v.* Lindsay, 103 Tenn. 625, 53 S. W. 950; McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; McElwee *v.* McElwee, 97 Tenn. 649, 37 S. W. 560.

Texas.— Lytle *v.* Halff, 75 Tex. 128, 12 S. W. 610; *Ex p.* Hart, 41 Tex. Crim. 581, 56 S. W. 341; *Ex p.* Wilbarger, 41 Tex. Crim. 514, 55 S. W. 968; Corey *v.* State, 28 Tex. App. 490, 13 S. W. 778; Daniel *v.* Hutcheson, 4 Tex. Civ. App. 239, 22 S. W. 278.

Virginia.—*In re* Richmond Mayoralty Case, 19 Gratt. 673.

Washington.— State *v.* Rusk, 15 Wash. 403, 46 Pac. 387.

Wisconsin.— American L. & T. Co. *v.* Bond, 91 Wis. 204, 64 N. W. 854; Lannon *v.* Hackett, 49 Wis. 261, 5 N. W. 474; Smith *v.* Odell, 1 Pinn. 449.

2. CONSTITUTIONAL AND LEGISLATIVE POWER — a. General and Specific Rules. There are certain rules which may be denominated as fundamental and controlling as to the power of courts. These rules are as follows: (1) Where the intent of a constitutional provision is to abrogate special legislation, and establish uniformity in the powers, proceedings, and practice of all courts of the same class or grade it will so operate, and a constitution designed to remove an existing mischief will never be construed as dependent for its efficacy and operation upon legislative will.[78] (2) If it is claimed that a court is abolished by the constitution, the burden is upon the party asserting the point to satisfy the court either from the express language of the constitution or by necessary implication from such language that the court in question was abolished. There should be left no doubt, and where there is nothing in the constitution or from a reasonable intendment showing such fact the claim will not be sustained.[79] (3) If several statutes relate to the creation, organization, and reorganization of courts the rule will be applied that statutes *in pari materia* should be read together as one law.[80] (4) If in a statute organizing a court the unconstitutional part can be separated from the valid parts the latter will stand.[81] (5) The repeal of statutes by implication is not favored. If there is no essential repugnancy in statutes they should be construed so as to stand consistently together. Other kindred rules of statutory construction[82] also apply to legislative enactments creating, abolishing, or reorganizing courts, establishing new judicial districts, attaching or detaching counties, etc., and to statutes generally relating to the powers of courts and their facilities for transacting business.[83] (6) As opposed to the statutory intent a general statute organizing certain courts throughout the state will not apply to a particular locality excepted in the statute, where a special provision continues the existence of similar courts in the excepted locality.[84] (7) It is not necesssary to clothe a court with appellate jurisdiction over its decisions in order to create a judicial tribunal.[85] (8) Literal compliance with the constitution, in the enacting clause of an act of the legislature, is not essential where the substance of the required enacting words remains, there being a distinction between mandatory and directory provisions as applied to organic law. This applies where courts are created by the constitution and the election of its judges provided for, and the act in question is merely one of reorganization or rearrangement.[86] So where the legislature is empowered to establish as many courts of a certain class within specified limits as the public interest may require, an act establishing a court of the same class as provided is constitutional, even though it omits its specific name or denomination.[87] (9) A statute cannot operate retroactively so as to lawfully create and establish a court from a date anterior to the adoption of the enact-

Wyoming.— *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

See 13 Cent. Dig. tit. "Courts," § 164 *et seq.*

78. People *v.* Rumsey, 64 Ill. 44.

79. Forbes *v.* State, (Del. 1898) 41 Atl. 1102; State *v.* Walsh, 32 La. Ann. 1234.

80. Hall's Petition, 38 Kan. 670, 17 Pac. 649.

81. *Ex p.* Pitts, 35 Fla. 149, 17 So. 76.

82. As to construction of statutes generally see STATUTES.

83. *In re* Mitchell, 120 Cal. 384, 52 Pac. 799 [*followed* in People *v.* Burns, 121 Cal. 529, 53 Pac. 1096]; People *v.* Wall, 88 Ill. 75; People *v.* Barr, 44 Ill. 198; Middleton *v.* White, 35 Ill. 114; Baker *v.* The Milwaukee, 14 Iowa 214 (declaring that it will reasonably be believed that if the legislature designed to repeal an act establishing a court it would have indicated its intention by some express language, especially where the court is one of importance, with its powers, duties, terms, judges, and other officers provided for and a mode for correcting its abuses not inconsistent with the terms of the constitution); *Ex p.* Cannon, (Tex. Crim. 1897) 43 S. W. 87.

The rule that a repeal by implication is not favored applies to an unconstitutional provision of a statute relating to ministerial officers of a court. McAllister *v.* Hamlin, 83 Cal. 361, 23 Pac. 357.

84. People *v.* New York Gen. Sess., 15 Abb. Pr. (N. Y.) 59.

85. Rhoads *v.* Philadelphia, 2 Phila. (Pa.) 149, 13 Leg. Int. (Pa.) 238.

86. State *v.* Harris, 47 La. Ann. 386, 17 So. 129.

87. State *v.* Anderson, 29 La. Ann. 774.

ment.[88] (10) Where the establishment or disestablishment of courts of inferior jurisdiction by special legislation rests in the legislature's discretion, such legislation will not be reviewed by the courts.[89]

b. General and Specific Constitutional Provisions. In addition to vesting judicial power in certain courts, delegating authority, and directly creating judicial tribunals,[90] constitutions divide a state into judicial circuits, districts, etc.,[91] or provide that it shall be done;[92] divide counties;[93] abolish the entire judiciary system created and established under a prior constitution;[94] abolish courts, divest and transfer their jurisdiction, or substitute other courts in their place;[95] create one court as the successor of another, giving it jurisdiction over all causes and proceedings pending in the abolished court;[96] provide that causes shall be transferred or that jurisdiction over the same be vested in other courts or tribunals;[97] continue courts and their jurisdiction[98] until the legislature shall act;[99] reorganize the judiciary and divest them of jurisdiction[1] except over specified causes;[2] limit or specify the number of judges in counties or other judicial divisions;[3] provide for uniformity in organization, proceedings, and practice in certain courts;[4] expressly specify the limitation of jurisdiction in designated courts;[5] make specific provision covering the organization of courts, the extent and number of judicial districts, the election of judges, terms of courts, and place of holding the same until otherwise provided by law, and provide for officers thereof;[6] and restrict legislative power by designating the manner, mode, and time of its exercise, or by otherwise placing limitations thereon as to population, elections, extent of territory or districts, etc.[7]

88. Murray *v.* State, 112 Ga. 7, 37 S. E. 111.

89. State *v.* Pinger, 50 Mo. 486.

90. See *supra*, III, A, 1.

91. State *v.* Martin, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153; Lytle *v.* Halff, 75 Tex. 128, 12 S. W. 610.

92. Stocking *v.* State, 7 Ind. 326.

93. Goforth *v.* Adams, 11 Ill. 52.

94. State *v.* Duffel, 32 La. Ann. 649. See also Fowler *v.* Thompson, 22 W. Va. 106.

95. *California.*— Gillis *v.* Barnett, 38 Cal. 393.

Georgia.—Strickland *v.* Griffin, 70 Ga. 541.

Louisiana.— Scherrer *v.* Caneza, 33 La. Ann. 314.

Maryland.— Orrick *v.* Boehm, 49 Md. 72.

Montana.— *In re* Davis, 11 Mont. 1, 27 Pac. 342.

New Jersey.— State *v.* Taylor, 68 N. J. L. 276, 53 Atl. 392.

North Carolina.—Forsyth County *v.* Blackburn, 68 N. C. 406; Green *v.* Moore, 66 N. C. 425.

Pennsylvania.—Taylor *v.* Com., 103 Pa. St. 96.

United States.— Mitchell, etc., Furniture Co. *v.* Sampson, 40 Fed. 805.

See 13 Cent. Dig. tit. "Courts," § 180 *et seq.*

96. Learned *v.* Castle, 67 Cal. 41, 7 Pac. 34; Gurnee *v.* San Francisco Super. Ct., 58 Cal. 88; People *v.* Colby, 54 Cal. 184; Glendenning *v.* Ansley, 52 Ga. 347.

97. Foster *v.* Daniels, 39 Ga. 39; State *v.* Mathews, 33 La. Ann. 103; Wegman *v.* Childs, 41 N. Y. 159; O'Maley *v.* Reese, 1 Barb. (N. Y.) 643; Butler *v.* Benson, 1 Barb. (N. Y.) 526; Johnson *v.* Sedberry, 65 N. C. 1.

98. Marble *v.* Whaley, 35 Miss. 527; State *v.* Laughlin, 75 Mo. 147; Kilpatrick *v.* Com., 31 Pa. St. 198.

99. Edwards *v.* Newton County, 73 Mo. 636.

1. Orrick *v.* Boehm, 49 Md. 72; Fowler *v.* Thompson, 22 W. Va. 106.

2. Fowler *v.* Thompson, 22 W. Va. 106.

3. State *v.* Martin, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153; State *v.* Shuford, 128 N. C. 588, 38 S. E. 808; *Ex p.* Wilbarger, 41 Tex. Crim. 514, 55 S. W. 968.

4. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; Frantz *v.* Fleitz, 85 Ill. 362; People *v.* Rumsey, 64 Ill. 44.

5. Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179.

6. Lytle *v.* Halff, 75 Tex. 128, 12 S. W. 610.

7. *Arkansas.*—Patterson *v.* Temple, 27 Ark. 202.

California.— People *v.* Sassovich, 29 Cal. 480.

Illinois.— People *v.* Opel, 188 Ill. 194, 58 N. E. 996; People *v.* Rose, 166 Ill. 422, 47 N. E. 64; Klokke *v.* Dodge, 103 Ill. 125; Knickerbocker *v.* People, 102 Ill. 218; People *v.* Wall, 88 Ill. 75.

Kentucky.— Clerk Whitley County Ct. *v.* Lester, 46 S. W. 694, 20 Ky. L. Rep. 481.

Mississippi.—Lindsley *v.* Coahoma County, 69 Miss. 815, 11 So. 336.

New Jersey.— Kenny *v.* Hudspeth, 59 N. J. L. 320, 36 Atl. 662.

New York.—Lanning *v.* Carpenter, 20 N. Y. 447, time for altering districts.

Ohio.—State *v.* Kinninger, 46 Ohio St. 570, 22 N. E. 637.

Pennsylvania.— Com. *v.* Handley, 106 Pa. St. 245; Com. *v.* Dumbauld, 97 Pa. St. 293.

Tennessee.— McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

c. Exclusive Constitutional Provisions — (I) *Statement of Rule.* The provisions of the constitution may be such as to operate as an express restriction or limitation upon legislative authority in respect to matters of the character under consideration,[8] and it is a general rule that the legislature is powerless to interfere with the jurisdiction, functions, or judicial powers conferred by the constitution upon a court, nor can it diminish, enlarge, transfer, or otherwise infringe upon the same, nor abolish, reorganize, divide, or consolidate such constitutional courts or judicial districts,[9] especially so where the court has long been acquiesced in as permanent.[10] And the rule applies to a court whose existing powers and jurisdiction has been continued by the constitution. Nor may such court itself transfer or relinquish its jurisdiction or be authorized so to do by statute.[11] A constitutional restriction, however, as to the creation of new and enlarged circuits will not be implied from a limitation as to changing boundaries of circuits, the general rule which is applicable being that if no technical words are employed in a constitution it admits of no interpretation other than that which the common understanding places upon it.[12] Again the constitutional specification of courts which may exercise judicial power operates as a limitation.[13] Otherwise, however, where other sections provide for other courts.[14] So if a court is distinctly designated by name in the constitution, another court, not within that constitutional name and intent, cannot be held to be included.[15]

(II) *Appellate and Intermediate Appellate Courts.* Where a court is by the constitution placed at the head of the judicial system of a state, there being no appeal from its judgments to any other state tribunal, the legislature cannot interfere with its existence or supremacy, nor can that body alter the nature of its jurisdiction and duties, nor create a court of coördinate final jurisdiction, for no statute can in such case deprive the court of last resort of its rank

Texas.— *Ex p.* Hart, 41 Tex. Crim. 581, 56 S. W. 341.

Virginia.— Foster *v.* Jones, 79 Va. 642, 52 Am. Rep. 637.

Washington.—State *v.* Rusk, 15 Wash. 403, 46 Pac. 387; *In re* Cloherty, 2 Wash. 137, 27 Pac. 1064.

See 13 Cent. Dig. tit. "Courts," § 180 *et seq.*

8. People *v.* Porter, 90 N. Y. 68; Lanning *v.* Carpenter, 20 N. Y. 447.

9. *Alabama.*— Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.

Arkansas.— Patterson *v.* Temple, 27 Ark. 202; *Ex p.* Jones, 2 Ark. 93.

California.—People *v.* Burns, 121 Cal. 529, 53 Pac. 1096; *In re* Mitchell, 120 Cal. 384, 52 Pac. 799 (justices of the peace are part of the constitutional judiciary of the state); Zander *v.* Coe, 5 Cal. 230; Hicks *v.* Bell, 3 Cal. 219.

Colorado.— *In re* Senate Bill No. 76, 9 Colo. 623, 21 Pac. 471.

Illinois.— Berkowitz *v.* Lester, 121 Ill. 99, 11 N. E. 860; *In re* Welsh, 17 Ill. 161.

Indiana.— State *v.* Friedley, 135 Ind. 119, 34 N. E. 872, 21 L. R. A. 634.

Michigan.— People *v.* Kent County Cir. Judge, 37 Mich. 472.

New Jersey.— Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Johnson *v.* State, 59 N. J. L. 271, 35 Atl. 787 [*affirmed* in 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373]; Schalk *v.* Wrightson, 58 N. J. L. 50, 32 Atl. 820.

New York.—Alexander *v.* Bennett, 60 N. Y. 204; People *v.* Howland, 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347; De Hart *v.* Hatch, 3 Hun 375.

North Carolina.— State *v.* Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334.

North Dakota.— McDermont *v.* Dinnie, 6 N. D. 278, 69 N. W. 294.

Ohio.— *In re* Judges Assignment, 34 Ohio St. 431.

Pennsylvania.—*In re* Bern Tp., 115 Pa. St. 615, 9 Atl. 62; Com. *v.* Green, 58 Pa. St. 226.

Wisconsin.— Smith *v.* Odell, 1 Pinn. 449.

See 13 Cent. Dig. tit. "Courts," § 180.

10. Schalk *v.* Wrightson, 58 N. J. L. 50, 32 Atl. 820.

11. Alexander *v.* Bennett, 60 N. Y. 204.

12. It should not be hampered by judicial construction so as to make it impracticable or inoperative; that which is plainly expressed admits of no construction. People *v.* Wall, 88 Ill. 75.

13. Knickerbocker *v.* People, 102 Ill. 218; State *v.* Police Jury, 30 La. Ann. 287; Smith *v.* Odell, 1 Pinn. (Wis.) 449.

14. State *v.* Police Jury, 30 La. Ann. 287.

15. People *v.* Rucker, 5 Colo. 455, declaring also that the fact that the power to establish a particular court is vested by the constitution in the legislature does not support the contention that such court is not "provided for," that is, created and established by the constitution. See also *Ex p.* White, 5 Colo. 521.

as the highest and ultimate judicial power; but where the constitution expressly or impliedly so permits, or where its judgment is subject to review by the court of *dernier ressort*, or where its jurisdiction is so limited that it cannot equal that of the highest court, an intermediate appellate court may be created having even final jurisdiction, where the constitution is not exclusive in respect to supreme courts as courts of last resort.[16]

d. Power of Congress Over State Courts. Congress cannot confer judicial power upon state courts[17] nor enlarge their jurisdiction.[18]

3. Delegation to Legislature of Power and Its Exercise — a. Governing Principles. If the organic law evidences an intent to delegate to the legislature the power to create, establish, organize, or reorganize courts, to regulate their jurisdiction, or to otherwise legislate concerning them, that body may so do, subject to whatever restrictions or limitations are imposed. A statute, however, which is wholly unconstitutional cannot be upheld and confers no authority or jurisdiction whatsoever upon any court or judicial body as to any matters upon which it is attempted therein to legislate. The terms in which the constitutions so doing have delegated to the people or legislative body the above-mentioned power are various, being both general and specific, and these include by necessary implication the exercise of such authority as is essential to effectuate the purposes intended.[19] But whether the constitutional delegation of power be general or specific, restrictive or otherwise, inclusive or exclusive, or discretionary and not exclusive, or whatever be the nature thereof, its exercise must be governed by the organic law granting or conferring the right. These principles are fundamental; they run through all the decisions and govern statutes relating to inferior courts in general,[20] county and probate courts,[21] municipal and police courts,[22] charter

16. *Colorado.* — People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; *In re* Court of Appeal, 15 Colo. 578, 26 Pac. 214.

Illinois.— Berkenfield *v.* People, 191 Ill. 272, 61 N. E. 96.

Indiana.— Branson *v.* Studabaker, 133 Ind. 147, 33 N. E. 98.

Louisiana.— State *v.* Jones, 8 Rob. 573.

Missouri.— State *v.* Vallins, 140 Mo. 523, 41 S. W. 887.

See 13 Cent. Dig. tit. "Courts," § 180.

17. *Ex p.* Knowles, 5 Cal. 300.

Rule applies to suits arising on penal laws of the United States. Davison *v.* Champlin, 7 Conn. 244; Ely *v.* Peck, 7 Conn. 239.

As to revenue stamps see Lewis *v.* Randall, 30 How. Pr. (N. Y.) 378; German Liederkranz *v.* Schiemann, 25 How. Pr. (N. Y.) 388.

18. U. S. *v.* Campbell, Tapp. (Ohio) 61.

19. Powers essential to functions granted may be expressly granted by the statute. Barrett *v.* Jackson, 38 Ga. 181. But the legislative authority to grant such essential powers may arise by implication under the constitutional authorization to create courts. People *v.* Wall, 88 Ill. 75.

20. *Alabama.*— Sanders *v.* State, 55 Ala. 42.

California.— People *v.* Toal, (1890) 23 Pac. 203.

Delaware.— Morrow *v.* State, 2 Marv. 4, 37 Atl. 43.

Florida.— *Ex p.* Cox, (1902) 33 So. 509.

Indiana.— Woods *v.* McCay, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97; Smith *v.* Smith, 77 Ind. 80.

Iowa.— Page *v.* Millerton, 114 Iowa 378, 86 N. W. 440.

Kansas.— Morris *v.* Bunyan, 58 Kan. 210, 48 Pac. 864.

Louisiana.— State *v.* Anderson, 29 La. Ann. 774; State *v.* Judge Seventh Dist. Ct., 22 La. Ann. 565; State *v.* Jones, 8 Rob. 573.

Mississippi.—Hughes *v.* State, 79 Miss. 77, 29 So. 786.

Missouri.— Bailey *v.* Winn, 113 Mo. 155, 20 So. 21.

See 13 Cent. Dig. tit. "Courts," § 166.

21. *Alabama.*— Craft *v.* Simon, 118 Ala. 625, 24 So. 380; Balkum *v.* State, 40 Ala. 671.

Arkansas.— Patterson *v.* Temple, 27 Ark. 202.

Florida.— *Ex p.* Pitts, 35 Fla. 149, 17 So. 76.

Illinois.— People *v.* Opel, 188 Ill. 194, 58 N. E. 996.

Kansas.— Atchison, etc., R. Co. *v.* Rice, 36 Kan. 593, 14 Pac. 229.

Pennsylvania.— Com. *v.* Green, 58 Pa. St. 226.

Wisconsin.— American L. & T. Co. *v.* Bond, 91 Wis. 204, 64 N. W. 854; Lannon *v.* Hackett, 49 Wis. 261, 5 N. W. 474; State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

See 13 Cent. Dig. tit. "Courts," § 167.

22. *Alabama.*— Nugent *v.* State, 18 Ala. 521.

California.— *Ex p.* Mauch, 134 Cal. 500, 66 Pac. 734; *In re* Lloyd, 78 Cal. 421, 20 Pac. 872; Uridias *v.* Morrill, 22 Cal. 473; Meyer *v.* Kalkmann, 6 Cal. 582.

Colorado.— Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155; Darrow *v.* People, 8 Colo. 417, 8 Pac. 661.

provisions relating to such courts,[23] courts of equity or chancery in general,[24] special courts[25] or tribunals,[26] commissions,[27] the creation of courts of either exclusive[28] or concurrent jurisdiction[29] or both,[30] changing the status of courts,[31] acts in derogation of constitutional provisions as to appeals,[32] appellate jurisdiction of particular courts,[33] and statutes providing or failing to provide for judges[34] or prescribing or regulating the mode of procedure.[35]

b. Extent of Authority Conferred — (i) *In General.* Where the constitution expressly or by necessary and lawful implication so permits the legislature may divide the state into judicial districts; alter the same and their boundaries;[36] increase or diminish the number thereof;[37] detach and attach counties or districts;[38] create courts and invest them with such jurisdiction as seems necessary and proper, and separate the judicial powers of the state, so as to adapt them to

Georgia.— Heard *v.* State, 113 Ga. 444, 39 S. E. 118, city court.

Illinois.— Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; People *v.* Evans, 18 Ill. 361; People *v.* Wilson, 15 Ill. 388.

Iowa.— Davis *v.* Woolnough, 9 Iowa 104.

Kansas.— Chesney *v.* McClintock, 61 Kan. 94, 58 Pac. 993; State *v.* Young, 3 Kan. 445; Malone *v.* Murphy, 2 Kan. 250.

Kentucky.— Tesh *v.* Com., 4 Dana 522; Louisville, etc., R. Co. *v.* Adams, 10 S. W. 425, 10 Ky. L. Rep. 713; Digby *v.* Newport City Ct., 8 Ky. L. Rep. 144.

Michigan.— Chicago, etc., R. Co. *v.* Nester, 63 Mich. 657, 30 N. W. 315; People *v.* Treasurer, 36 Mich. 332.

Mississippi. — Thomas *v.* State, 5 How. 20.

New York.— International Bank *v.* Bradley, 19 N. Y. 245; Sill *v.* Corning, 15 N. Y. 297; Beaudrias *v.* Hogan, 16 N. Y. App. Div. 38, 44 N. Y. Suppl. 785; Pierson *v.* Fries, 3 N. Y. App. Div. 418, 38 N. Y. Suppl. 765; People *v.* Dutcher, 4 Thomps. & C. 391.

North Carolina.— Washington *v.* Hammond, 76 N. C. 33.

Pennsylvania.— *In re* Cahill, 110 Pa. St. 167, 20 Atl. 414; Com. *v.* Conyngham, 65 Pa. St. 76, 3 Brewst. 214.

South Carolina.— State *v.* Fillebrown, 2 S. C. 404.

Texas.— Corey *v.* State, 28 Tex. App. 490, 13 S. W. 778.

Virginia.— *In re* Richmond Mayoralty Case, 19 Gratt. 673.

Washington.— *In re* Cloherty, 2 Wash. 137, 27 Pac. 1064.

See 13 Cent. Dig. tit. "Courts," § 168.

23. People *v.* Sands, (Cal. 1894) 35 Pac. 330; *Ex p.* Reilly, 85 Cal. 632, 24 Pac. 807; People *v.* Toal, 85 Cal. 333, 24 Pac. 603, 23 Pac. 203; *In re* Ah You, 82 Cal. 339, 22 Pac. 929; Malone *v.* Murphy, 2 Kan. 250; Worthington *v.* London Guarantee, etc., Co., 164 N. Y. 81, 58 N. E. 102, 31 N. Y. Civ. Proc. 274.

24. State *v.* Fairchild, 15 Ark. 619; Houston *v.* Royston, 7 How. (Miss.) 543.

25. Rabe *v.* Fyler, 10 Sm. & M. (Miss.) 440, 48 Am. Dec. 763; State *v.* Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

26. *Ex p.* Wells, 21 Fla. 280; Meagher *v.* Storey County, 5 Nev. 244.

Board to try election contests.— Pratt *v.* Breckinridge, 65 S. W. 136, 23 Ky. L. Rep. 1356.

Court of mediation and arbitration.— Renand *v.* State Ct., 124 Mich. 648, 83 N. W. 620, 83 Am. St. Rep. 346, 51 L. R. A. 458.

27. Case *v.* Dean, 16 Mich. 12; Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384; Henderson *v.* Beaton, 52 Tex. 29; Forest County *v.* Langlade County, 76 Wis. 605, 45 N. W. 598.

28. State *v.* Archibald, 52 Ohio St. 1, 38 N. E. 314; *Ex p.* Wilbarger, 41 Tex. Crim. 514, 55 S. W. 968; Lannon *v.* Hackett, 49 Wis. 261, 5 N. W. 474.

29. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; Chicago, etc., R. Co. *v.* Nester, 63 Mich. 657, 30 N. W. 315; Rhyne *v.* Lipscombe, 122 N. C. 650, 29 S. E. 57; *Ex p.* Hart, 41 Tex. Crim. 581, 56 S. W. 341; *Ex p.* Welbarger, 41 Tex. Crim. 514, 55 S. W. 968.

30. Coombs *v.* State, (Tex. Crim. 1898) 44 S. W. 854.

31. State *v.* Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334.

32. State *v.* Ray, 122 N. C. 1097, 29 S. E. 61.

33. Morrow *v.* State, 2 Marv. (Del.) 4, 37 Atl. 43.

34. People *v.* Wall, 88 Ill. 75; Com. *v.* Swank, 79 Pa. St. 154.

35. Purcell *v.* Riverside, 1 Ohio Cir. Dec. 648.

36. *California.* — People *v.* Sassovich, 29 Cal. 480.

Illinois.— Davison *v.* People, 90 Ill. 221; People *v.* Wall, 88 Ill. 75.

Louisiana.— State *v.* Williams, 29 La. Ann. 779; State *v.* Anderson, 29 La. Ann. 774.

Mississippi.—Alfred *v.* State, 37 Miss. 296.

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

Ohio.— State *v.* Jacobi, 52 Ohio St. 66, 39 N. E. 317.

Washington.— State *v.* Rusk, 15 Wash. 403, 46 Pac. 387.

See 13 Cent. Dig. tit. "Courts," § 180.

37. State *v.* Atherton, 19 Nev. 332, 10 Pac. 901; State *v.* Kinkead, 14 Nev. 117.

38. *Kansas.*—*In re* Schurman, 40 Kan. 533, 20 Pac. 277; *In re* Wells, 36 Kan. 341, 13 Pac. 548; Pelham *v.* Finney County, 36 Kan. 101, 12 Pac. 557; State *v.* Ruth, 21 Kan. 583.

Minnesota.— State *v.* Wilcox, 24 Minn. 143.

Missouri.— State *v.* Laughlin, 75 Mo. 147.

its growth and change of circumstances;[39] create separate judicial districts;[40] create and limit the duration of judicial circuits;[41] establish new, additional, other, or independent courts,[42] even though additional courts are not specified in the constitution;[43] abolish and reorganize existing courts;[44] transfer undetermined causes;[45] abolish courts and designate other places than county-seats for holding the same;[46] abolish inferior courts and confer their jurisdiction upon a higher court;[47] determine whether the necessity exists for certain judicial circuits;[48] and limit the jurisdiction of the supreme court on appeal to the review of questions of law.[49]

(II) *Over Particular Courts and Their Jurisdiction*—(A) *Governing Rules.* The legislature may, when acting within the constitutional limitations over its power, confer or impose additional authority on courts,[50] limit jurisdic-

Nebraska.— Behr *v.* Willard, 11 Nebr. 601, 10 N. W. 525.

New York.—Rumsey *v.* People, 19 N. Y. 41.

Tennessee.— McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

Virginia.— Foster *v.* Jones, 79 Va. 642, 52 Am. Rep. 637.

Wyoming.— White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

See 13 Cent. Dig. tit. "Courts," § 178.

After the exercise of the power to redistrict the state, the legislature cannot thereafter make any changes before the expiration of the time limit specified in the constitution. Clerk Whitley County Ct. *v.* Lester, 46 S. W. 694, 20 Ky. L. Rep. 481.

39. Com. *v.* Hipple, 69 Pa. St. 9.

40. Com. *v.* Judges, 6 L. T. N. S. (Pa.) 223.

The specific inclusion of a particular county in creating a judicial district excludes any other county. State *v.* Blasdel, 6 Nev. 40.

41. Carpenter *v.* State, 72 Ind. 331.

42. *Ex p.* Jordan, 62 Cal. 464; *Ex p.* Lee, 1 Minn. 60; Hughes *v.* State, 79 Miss. 77, 29 So. 786; *In re* Cahill, 110 Pa. St. 167, 29 Atl. 414.

A statute is equivalent to a repeal which creates a new court with new duties and powers, but at the same time embraces all the duties and powers theretofore exercised by an inferior tribunal. *Ex p.* Lee, 1 Minn. 60.

43. Com. *v.* Hipple, 69 Pa. St. 9.

The constitution sanctions and validates the practice, where it is adopted after a decision of the supreme court that a county might lawfully be divided into districts, and it fails to prohibit or restrict said practice. Lindsley *v.* Coahoma County, 69 Miss. 815, 11 So. 336.

44. Kilpatrick *v.* Com., 31 Pa. St. 198; State *v.* Lindsay, 103 Tenn. 625, 53 S. W. 950. See also State *v.* Wright, 7 Ohio St. 333.

45. *Indiana.*— Davidson *v.* Koehler, 76 Ind. 398.

Kansas.— Hentig *v.* Redden, 1 Kan. App. 163, 41 Pac. 1054, transfer from supreme court to court of appeals.

Maryland.— Brown *v.* Gilmor, 8 Md. 322.

Mississippi.— Marble *v.* Whaley, 35 Miss. 527.

Missouri.— **Graham *v.* O'Fallon** 3 Mo. 507, **to county from probate court.**

North Carolina.— Patton *v.* Shipman, 81 N. C. 347.

Ohio.— Purcell *v.* Riverside, 1 Ohio Cir. Dec. 648.

South Carolina.— Norris *v.* Clinkscales, 59 S. C. 232, 37 S. E. 821, transfer to a new county.

Virginia.— Cowan *v.* Fulton, 23 Gratt. 579.

See 13 Cent. Dig. tit. "Courts," § 186.

Cases pending in one court of appeals may be transferred to another court to be there heard as by an appellate court. Cowan *v.* Fulton, 23 Gratt. (Va.) 579.

46. Milner *v.* Chicago, etc., R. Co., 77 Iowa 755, 42 N. W. 567.

Courts may be abolished by the same power which creates them, and this rule applies to courts which derive their existence from legislative enactment under constitutional permission. Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.

47. Kavanaugh *v.* State Bank, 21 Ala. 564; Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373; Kenny *v.* Hudspeth, 59 N. J. L. 320, 36 Atl. 662; McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

48. State *v.* Daniels, 66 Mo. 192.

49. McElwee *v.* McElwee, 97 Tenn. 649, 37 S. W. 560.

50. *Alabama.*— Richardson *v.* Cleaveland, 5 Port. 251.

Arkansas.— Oliver *v.* Martin, 36 Ark. 134; Price *v.* State, 22 Ark. 335.

Georgia.— Davis *v.* Harper, 54 Ga. 180.

Illinois.— Broadwell *v.* People, 76 Ill. 554; Lansing *v.* Hunter, 25 Ill. 247.

Kentucky.— Tudder *v.* Warren, 6 J. J. Marsh. 93.

Louisiana.— Ledoux *v.* Ducote, 24 La. Ann. 181; State *v.* Judge Sixth Judicial Dist., 12 La. Ann. 405.

Mississippi.— Hunt *v.* Potter, 58 Miss. 96.

Missouri.— State *v.* Brown, 71 Mo. 454.

New York.— Sale *v.* Lawson, 4 Sandf. 718; Sweet *v.* Flannagan, 61 How. Pr. 327.

South Carolina.— Pringle *v.* Carter, 1 Hill 53.

Tennessee.— Duggan *v.* McKinney, 7 Yerg. 21.

Texas.— Franks *v.* Chapman, 61 Tex. 576; Mora *v.* State, 9 Tex. App. 406; Kaufman County *v.* McGaughey, 11 Tex. Civ. App. 551, 33 S. W. 1020; Gulf, etc., R. Co. *v.* Tacquard, 3 Tex. App. Civ. Cas. § 141.

tion or provide that it shall be exclusive,[51] confer extraterritorial jurisdiction,[52] authorize suits against non-residents,[53] and provide for the revival of actions where a party dies during the pendency thereof.[54] The legislative exercise of power must not, however, encroach upon the constitutional authority of courts. This rule applies to the power to take jurisdiction from one court and vest it in another,[55] to divesting courts of jurisdiction,[56] and to the power to convert local courts into courts of general jurisdiction.[57]

(B) *Courts of Appellate Jurisdiction.* The legislative power with respect to an appellate court depends upon the exclusive character of the revising power with which the court is vested by the constitution, and upon the factor whether such court is placed at the head of the judiciary system of the state as a court of last resort, or is an intermediate appellate court with or without final jurisdiction,[58] or a court with both original and appellate jurisdiction. The nature of the court, the character of the jurisdiction conferred, and the terms of the constitution of each state must therefore determine the extent of the legislative power in reference to such courts. It also becomes a question of construction in most cases whether or not a statute which attempts to confer jurisdiction upon other courts infringes upon the constitutional powers of courts of appellate jurisdiction, and the test is the constitutional and statutory intent.[59]

(C) *County and Probate Courts.* Where the constitution does not so permit, county courts cannot be created with a jurisdiction coextensive within the county

Wisconsin.— State *v.* McArthur, 13 Wis. 383; Second Ward Bank *v.* Upmann, 12 Wis. 499.

United States.— U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

Additional power is not conferred where the statute is unconstitutional or legislative power is exceeded.— *Alabama.*— Foster *v.* Glazener, 27 Ala. 391.

Arkansas.— *Ex p.* Batesville, etc., R. Co., 39 Ark. 82.

Illinois.— Weatherford *v.* People, 67 Ill. 520.

Maryland.— State *v.* Mace, 5 Md. 337.

Michigan.— Quinlon *v.* Rogers, 12 Mich. 168; Waldby *v.* Callendar, 8 Mich. 430.

New Jersey.— Flanagan *v.* Plainfield, 44 N. J. L. 118.

New York.— Rall *v.* Buckhout, 2 N. Y. Civ. Proc. 442; Lenhard *v.* Lynch, 62 How. Pr. 56; Griffin *v.* Griffith, 6 How. Pr. 428.

North Carolina.— Wilmington *v.* Davis, 63 N. C. 582.

Texas.— Sun Vapor Electric Light Co. *v.* Keenan, 88 Tex. 197, 30 S. W. 868; Leach *v.* State, 36 Tex. Crim. 248, 36 S. W. 471.

51. Comstock *v.* Matthews, 55 Minn. 111, 56 N. W. 583; Higgins *v.* Beveridge, 35 Minn. 285, 28 N. W. 506; Burke *v.* St. Paul, etc., R. Co., 35 Minn. 172, 28 N. W. 190; Agin *v.* Heyward, 6 Minn. 110; State *v.* Brown, 71 Mo. 454; *In re* Beavins, 33 N. H. 89.

The legislature cannot withdraw and vest in the jury a part of the judicial power of circuit courts to determine actions, although it may perhaps withdraw from such courts a particular class of equitable actions, such as foreclosure suits. Callanan *v.* Judd, 23 Wis. 343.

52. State *v.* McArthur, 13 Wis. 383, holding that legislative power to "vest such jurisdiction as may be deemed necessary" does not prohibit vesting extraterritorial jurisdiction on the inferior local court contemplated by such constitutional provision.

When legislative power is restricted as to vesting extraterritorial jurisdiction see People *v.* Evans, 18 Ill. 361; *In re* Buffalo, 139 N. Y. 422, 34 N. E. 1103 [*affirming* 18 N. Y. Suppl. 771]; Connors *v.* Gorey, 32 Wis. 518.

53. Elliott *v.* Farwell, 44 Mich. 186, 6 N. W. 234, where service is made within the jurisdiction. *Contra*, where jurisdiction depends upon residence, and the constitution limits the jurisdiction. Grand Rapids, etc., R. Co. *v.* Gray, 38 Mich. 461.

54. Wade *v.* Bridges, 24 Ark. 569.

55. *Ex p.* Kennedy, 11 Ark. 598; Zander *v.* Coe, 5 Cal. 230; Broadwell *v.* People, 76 Ill. 554; Pittsburg, etc., R. Co. *v.* Hurd, 17 Ohio St. 144.

56. State *v.* Moore, 19 Ala. 514.

When statute held not to operate to divest jurisdiction within this rule see Deere *v.* Council Bluffs, 86 Iowa 591, 53 N. W. 344; Sterritt *v.* Robinson, 17 Iowa 61; Jordan *v.* Moses, 10 S. C. 431; Murfree *v.* Leeper, 1 Overt. (Tenn.) 1. See also Reeves *v.* Brown, 2 Pa. L. J. Rep. 196, 3 Pa. L. J. 464.

57. Landers *v.* Staten Island R. Co., 53 N. Y. 450, 13 Abb. Pr. N. S. (N. Y.) 338.

58. See *supra*, III, A, 2, c, (II).

59. Although the exclusive revising power cannot be divested (Byrd *v.* Brown, 5 Ark. 709; Haight *v.* Gay, 8 Cal. 297, 68 Am. Dec. 323; Hazen *v.* Com., 23 Pa. St. 355), jurisdiction be limited (Com. *v.* Allegheny County Com'rs, 37 Pa. St. 237; Hazen *v.* Com., 23 Pa. St. 355), the general jurisdiction conferred under the former constitution upon the supreme court of New York be abridged or limited by statute with or without the consent of such court (De Hart *v.* Hatch, 3 Hun (N. Y.) 375, 6 Thomps. & C. (N. Y.) 186), nor a supreme court, whose powers are defined and limited by the constitution, be deprived

with that of a constitutional circuit court.[60] A court may, however, be established with exclnsive jurisdictiou in specified matters, and as to such matters it will supersede another court, where it is evident that it was intended that there should not be concurrent jurisdiction between the two courts in the same county.[61] And the legislature may relieve the probate court of matters not interfering with its general jurisdiction, and invest the power as to such matters in another court, and so even though the first mentioned court is created by the constitution, but not with exclusive jurisdiction.[62] So more than one judicial district in a county may be created, and two district courts may be authorized to sit at one place, the county-seat, where the constitution does not show an intention to forbid the same.[63] Again the legislature may diminish or change the jurisdiction of county courts,[64] or of courts created by statute when proper provision is made for pending causes;[65] confer additional power on probate courts;[66] authorize such courts to

of appellate jurisdiction, nor invested with original jurisdiction (Vail *v.* Dinning, 44 Mo. 210), still the power to restrict is limited only by the constitution (Stewart *v.* Stewart, 2 T. B. Mon. (Ky.) 85), and the legislature may restrict the appellate jurisdiction of the supreme court within this rule (Lampson *v.* Platt, 1 Iowa 556). So the right to appeal may be limited as to the amount involved, as this simply limits the exercise of appellate jurisdiction and does not oust the appellate court of power to review by certiorari (Tierney *v.* Dodge, 9 Minn. 166), the right to certiorari may be limited as to the amount involved, and this does not limit supervisory jurisdiction (Wilson *v.* West Virginia Cent., etc., R. Co., 38 W. Va. 212, 18 S. E. 577), the right to hear appeals in special cases may be conferred where the powers of the revising court are left untrammeled (State *v.* Northern Cent. R. Co., 18 Md. 193), and other concurrent jurisdiction may be conferred on other courts (Burns *v.* Henderson, 20 Ill. 264). So the mode of taking appeals may be prescribed (Haight *v.* Gay, 8 Cal. 297, 68 Am. Dec. 323), and the power to review its own decrees may be conferred (Longworth *v.* Sturges, 4 Ohio St. 690). So the statute may provide that the supreme court shall reëxamine cases upon questions of law only (Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406), and the fact that another court's decision is final under a statute does not make the act unconstitutional (State *v.* Le Burgeois, 45 La. Ann. 249, 12 So. 360), nor is a statute invalid which makes the decision of a circuit court of appellate jurisdiction final on appeal (Dismukes *v.* Stokes, 41 Miss. 430), and the right of appeal may be conferred on another court where it does not violate a constitutional provision by increasing the jurisdiction of such other court (Harris *v.* Vanderveer, 21 N. J. Eq. 424. See Jones *v.* Jones, 1 Tex. App. Civ. Cas. § 200), nor deprive the supreme court of the right of review (Overseers of Poor *v.* Smith, 2 Serg. & R. (Pa.) 363). Again it has been held that the jurisdiction of an appellate court conferred by the constitution cannot be enlarged, although it may be regulated and restricted by legislative enactment. State *v.* Jones, 22 Ark. 331. But a reference which can only be granted by consent does not interfere with nor diminish the jurisdiction of the supreme court. Newark Pass. R. Co. *v.* Kelly, 57 N. J. L. 655, 32 Atl. 223. So a statute providing for maintaining actions against foreign corporations does not restrict the constitutional jurisdiction of the supreme court. Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821 [*reversing* 32 N. Y. Suppl. 873]. And the supreme court may be given exclusive cognizance of all actions against the mayor, aldermen, etc. Bretz *v.* New York, 6 Rob. (N. Y.) 325, 4 Abb. Pr. N. S. (N. Y.) 258, 35 How. Pr. (N. Y.) 130 [*reversing* 3 Abb. Pr. N. S. 478]. Again merely declaring the decision of an inferior tribunal final and conclusive is not sufficiently express language to deprive the supreme court of jurisdiction. State *v.* Falkinburge, 15 N. J. L. 320.

A statute does not transfer jurisdiction in quo warranto from a supreme to a circuit court so as to be unconstitutional, where it provides that county courts "shall pronounce judgment whenever the incumbent or any contestant was duly elected, and the person so declared elected will be entitled to his certificate on qualification." Conger *v.* Convery, 52 N. J. L. 417, 442, 20 Atl. 166 [*affirmed* in 53 N. J. L. 658, 24 Atl. 1002]. See also O'Brien *v.* Benny, 58 N. J. L. 189, 33 Atl. 380.

60. State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

61. Klokke *v.* Dodge, 103 Ill. 125. See also Gassenheimer *v.* District of Columbia, 6 App. Cas. (D. C.) 108.

62. State *v.* Archibald, 52 Ohio St. 1, 38 N. E. 314.

63. Lytle *v.* Halff, 75 Tex. 128, 12 S. W. 610.

64. Blair *v.* Blanton, (Tex. Civ. App. 1899) 54 S. W. 321.

65. Citizens St. R. Co. *v.* Haugh, 142 Ind. 254, 41 N. E. 533.

66. New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211; *In re* Johnson, 12 Kan. 102; Kirkpatrick *v.* State, 5 Kan. 673; State *v.* Wilcox, 24 Minn. 143; Servis *v.* Beatty, 32 Miss. 52; McCullom *v.* Box, 8 Sm. & M. (Miss.) 619.

When grant of appellate jurisdiction void

grant divorces;[67] and vest them with jurisdiction of proceedings in aid of execution,[68] although these courts cannot, contrary to the organic law, be invested with jurisdiction in chancery and at common law.[69]

(D) *Municipal and Police Courts.* No power may exist to repeal a city charter establishing a city court;[70] but city courts may be created by carving out of other courts the necessary power therefor.[71] So courts may be established under one section of a constitution which are independent of those erected under another section thereof;[72] and a court within municipal limits may be given jurisdiction over offenses arising therein, even though a general court has jurisdiction in common over the same offenses.[73] It has also been held that the legislature cannot, when it has no authority, invest municipal courts with jurisdiction, exclusive of or concurrent with the state courts, to try violations of penal laws.[74] And where it is the plain intent of a constitution that the powers and jurisdiction of city courts shall be uniform, they will not be continued in existence contrary to such requirement; and it is the duty of the legislature where it has the necessary authority to bring about such uniformity as soon as possible.[75] So where the constitution so provides inferior courts may be established in one city; nor need all such courts have the same organization and jurisdiction, but the several courts in cities having more than one must all be like those of their own class.[76] Again, where the power of the legislature under the constitution to create additional inferior courts is not an original, inherent one but is delegated within certain limitations, it cannot be redelegated, and inferior courts can be created only in accordance with express statutory provisions, and this rule applies to municipal or police courts.[77]

(E) *Special and Temporary Courts and Commissions.* In determining to what extent the power may be exercised to create, abolish, or otherwise affect special and temporary courts and commissions, recourse must be had to the constitution and the legislative enactment to which such bodies, or as in some cases the appointing or creating power, directly or indirectly owe their existence. The question is largely one of construction, dependent upon particular wordings of constitutions or statutes applying to such bodies or to the immediate appointing or creative power, and therefore each case must rest upon its own especial governing factors.[78] But generally it may be said that the legislature may abolish

as to probate court see Moore *v.* Koubly, 1 Ida. 55.

When statute authorizing proceedings on guardian's bond void as to probate court see Handy *v.* Woodhouse, (Tex. Civ. App. 1894) 25 S. W. 40.

67. Kenyon *v.* Kenyon, 3 Utah 431, 24 Pac. 829; Whitmore *v.* Hardin, 3 Utah 121, 1 Pac. 465; Cast *v.* Cast, 1 Utah 112.

68. Young *v.* Ledrick, 14 Kan. 92.

69. Dewey *v.* Dyer, McCahon (Kan.) 77; Locknane *v.* Martin, McCahon (Kan.) 60; McCray *v.* Baker, 3 Wyo. 192, 18 Pac. 749; Perris *v.* Higley, 20 Wall. (U. S.) 375, 22 L. ed. 383.

70. Hetherington *v.* Bissell, 10 Iowa 145.

71. People *v.* Treasurer, 36 Mich. 332.

Jurisdiction taken from justices and conferred on police court as to offenses in a city. Perrott *v.* Pierce, 75 Mich. 578, 42 N. W. 1002.

72. Hughes *v.* State, 79 Miss. 77, 29 So. 786.

73. *In re* Pennsylvania Hall, 5 Pa. St. 204. See also State *v.* Foster, 105 La. 315, 29 So. 806; *Ex p.* Hart, 41 Tex. Crim. 581, 56 S. W. 341.

74. Coombs *v.* State, (Tex. Crim. 1898) 44 S. W. 854.

75. Frantz *v.* Fleitz, 85 Ill. 362.

76. Stow *v.* People, 25 Ill. 81.

77. *In re* Cloherty, 2 Wash. 137, 27 Pac. 1064.

78. Board of commissioners superseding court of claims.— Dotson *v.* Fitzpatrick, 66 S. W. 403, 23 Ky. L. Rep. 2042.

Commission of arbitration and award acts only by consent, and cannot render judgment, and its award should be entered as the judgment of the court to which it is returned, subject to examination for proper entry. Henderson *v.* Beaton, 52 Tex. 29.

Commissioners to assess damages in condemnation proceedings may be appointed by judge of county court, which court was substituted in place of abolished county commissioners' court. Shute *v.* Chicago, etc., R. Co., 26 Ill. 436.

City recorder may be given powers like those of former supreme court commissioners and also powers of a justice of supreme court at chambers. Hayner *v.* James, 17 N. Y. 316. See further as to recorders Carrol *v.* Langan, 63 Hun (N. Y.) 380, 18 N. Y. Suppl.

special courts,[79] and transfer their jurisdiction[80] and the powers appertaining to them to commissioners.[81]

4. Effect of Exercise of Power — a. In General. A proper and lawful exercise of delegated legislative authority, or the direct exercise of constitutional power, will operate to abolish a court or not, according to the intent expressed or lawfully to be implied within the principles heretofore stated. This intent governs in determining the effect of the adoption of a new constitution, of the creation, alteration, and reorganization of new districts, circuits, or other judicial subdivisions, of the detaching, attaching, annexation, and consolidation of districts and the transfer of jurisdiction in general. Specifically, however, each law must be interpreted and applied in each individual case.[82]

b. With Relation to Time. The effect generally of specifying a time certain in the law creating, continuing, or abolishing a court is to fix a period governing the jurisdiction of the new, continued, or old court.[83] Where a constitution abolishes a court "from" a day certain, that day is excluded and a judgment of such court rendered on such day is valid.[84] A court is not, however, divested of all jurisdiction immediately after the date of an amendment of a constitution, where it is the evident intent thereof that such tribunal should remain in existence with jurisdiction over specified subjects until a certain subsequent date.[85] Again the provisions of the law may be such that the jurisdiction of the old court will continue until such time as is specified for the judge of the new court to

290; People *v.* Freund, 33 N. Y. Suppl. 612, 9 N. Y. Crim. 516; People *v.* Hulett, 15 N. Y. Suppl. 630.

"Court of claims" is not a "court" but a tribunal in the nature of a board of audit constitutionally created to inquire as to unfunded state debts. *Ex p.* Childs, 12 S. C. 111.

Jurisdiction ends and special court is dissolved when each separate case is ended which it is constituted to try. Warren *v.* African Baptist Church, 50 Miss. 223.

Special and inferior courts cannot set aside verdict and award another trial except where right is expressly given. Warren *v.* African Baptist Church, 50 Miss. 223.

79. State *v.* Smith, 65 N. C. 369; *In re* Pennsylvania Hall, 5 Pa. St. 204. See also Dotson *v.* Fitzpatrick, 66 S. W. 403, 23 Ky. L. Rep. 2042.

80. Opinion of Justices, 8 Gray (Mass.) 20; Dearborn *v.* Ames, 8 Gray (Mass.) 1.

81. Dotson *v.* Fitzpatrick, 66 S. W. 403, 23 Ky. L. Rep. 2042.

82. *California.*— Matter of Guerrero, 69 Cal. 88, 10 Pac. 261; People *v.* Provines, 34 Cal. 520.

Illinois.— People *v.* Aurora, 84 Ill. 157.

Kansas.— State *v.* Ruth, 21 Kan. 583.

Kentucky.— Drake *v.* Vaughan, 6 J. J. Marsh. 143.

Louisiana.— State *v.* Walsh, 32 La. Ann. 1234; Lafayette F. Ins. Co. *v.* Remmers, 29 La. Ann. 419. See also Harrison *v.* Hernsheim, 28 La. Ann. 881.

Minnesota.— State *v.* Wilcox, 24 Minn. 143.

New Hampshire.— Jenkins *v.* Sherburne, 56 N. H. 17.

New Jersey.— Rutgers *v.* New Brunswick, 42 N. J. L. 51.

New York.— People *v.* Wilcox, 22 Barb. 178 [*affirmed* in 14 N. Y. 575].

Ohio.— Talliaferro *v.* Porter, Wright 610.

Pennsylvania.— Com. *v.* Harding, 87 Pa. St. 343; Kilpatrick *v.* Com., 31 Pa. St. 198.

Tennessee.— State *v.* Cole, 13 Lea 367.

Texas.— Galbraith *v.* State, 33 Tex. Crim. 331, 26 S. W. 502; Long *v.* State, 1 Tex. App. 709; Daniel *v.* Hutcheson, 4 Tex. Civ. App. 239, 22 S. W. 278.

Wisconsin.— State *v.* Messmore, 14 Wis. 163.

United States.— Page *v.* Chillicothe, 6 Fed. 599.

See 13 Cent. Dig. tit. "Courts," § 181.

83. McAllister *v.* Ball, 24 Ill. 149; Richards *v.* Morton, 18 Mich. 255; Lash *v.* Thomas, 86 N. C. 313.

Where the statute is silent as to the time of expiration a court remains in existence to superintend the execution of a judgment in a habeas corpus case, and there is still a tribunal to be reached by certiorari. Livingston *v.* Livingston, 24 Ga. 379.

84. Strickland *v.* Griffin, 70 Ga. 541.

Proceedings in the new court prior to the date of the statute taking effect are illegal. *Ex p.* Snyder, 64 Mo. 58. See also Downer *v.* Smith, 24 Cal. 114.

85. Fowler *v.* Thompson, 22 W. Va. 106.

Where the jurisdiction of a court is continued to a day certain, a cause standing in said court on the date of the amendment of the constitution is within its jurisdiction, even though a decree has been granted, it being unexecuted. Brandon *v.* Bingaman, 39 Miss. 505.

Where the time of the adoption of a statute is that evidently intended to govern as to certain courts then existing it will be so construed, even though the enactment was not to take effect until a stated future time. Milner *v.* Chicago, etc., R. Co., 77 Iowa 755, 42 N. W. 567.

enter upon his duties,[86] or until the time specified for the organization of the new court, such tribunal being the successor of the old court, and so, even though the terms of its judges, so far as provided by law, may expire.[87]

c. As to Transfer of Causes of Action and Jurisdiction — (I) *IN GENERAL.* As a general rule causes of action may and will be transferred where they come within the terms of a constitution or constitutional statute providing therefor; otherwise not.[88] And it has been held that in the absence of a constitutional or statutory provision to the contrary causes pending in the abolished courts are transferred by operation of law to the new courts,[89] no certificate[90] or order transferring them being necessary.[91]

(II) *AUTHORITY OF NEW OR SUPERSEDING COURT.* If such is the intent of the law, the new court will obtain and may proceed to exercise jurisdiction over causes lawfully transferred, reference being necessarily had to the nature and status of the cause, to the character of the jurisdiction with which the new court

86. Edwards *v.* Newton County, 73 Mo. 636. See also Gillis *v.* Barnett, 38 Cal. 393; State *v.* Pratt, 23 La. Ann. 730; Opinion of Justices, 3 Gray (Mass.) 601; Mason *v.* Woerner, 18 Mo. 566.

87. Addams' Petition, 26 S. W. 182, 16 Ky. L. Rep. 45.

The expiration of existing terms of office of judges may govern the time when an annexed parish will become part of a judicial district. Lafayette F. Ins. Co. *v.* Remmers, 29 La. Ann. 419.

88. Causes transferable. — An action in which a verdict is recovered but no judgment entered (Foster *v.* Daniels, 39 Ga. 39), a suit to revive a contract of marriage (Starns *v.* Goodwyn, 43 La. Ann. 302, 8 So. 931), a suit commenced in the old court prior to the adoption of the constitution (Knox *v.* Gurnett, 28 La. Ann. 601), a suit brought in the old court (Moore *v.* Dunn, 50 Miss. 32), a suit not finally disposed of, and which comes within the final appellate jurisdiction of the new court under the statute (State *v.* Slevin, 16 Mo. App. 541), a cause in which judgment was vacated and new trial granted (Aldrich *v.* Wright, 57 N. H. 104), and an action is "pending" as long as judgment is unsatisfied (Wegman *v.* Childs, 41 N. Y. 159. See also Hyland *v.* Loomis, 3 How. Pr. (N. Y.) 223). So all suits are "pending" in which any judicial act remains to be had (O'Maley *v.* Reese, 1 Barb. (N. Y.) 643), and judgments previously rendered are included in "questions of law and suits in equity pending" (Johnson *v.* Sedberry, 65 N. C. 1). So a cause is pending where it rests upon exceptions to a master's report when the constitution was adopted (Kersey Oil Co. *v.* Oil Creek, etc., R. Co., 3 Wkly. Notes Cas. (Pa.) 288), and an award made upon a cause upon which judgment had not been entered is a case "remaining untried" (Preston *v.* Englert, 5 Binn. (Pa.) 390). So the court whose jurisdiction is superseded may order the transfer of causes pending at the time of the passage of the transferring statute. Sharpleigh *v.* Cooper, 1 Tex. App. Civ. Cas. § 55.

Causes not transferable.— Suits in which judgments had been rendered are not within the clause "all causes now pending and on file" (La Chambre *v.* Cole, 30 La. Ann. 961), nor does "all suits and causes" depending apply to judgments then rendered (McMurray *v.* Hopper, 43 Pa. St. 468), nor is a suit "pending" so as to be transferable where final judgment is entered (Wegman *v.* Childs, 44 Barb. (N. Y.) 403 [*reversed* in 41 N. Y. 159]), and a statute making a district court exclusively a probate court does not operate to transfer successive cases pending in another court (State *v.* Judge New Orleans Second Dist. Ct., 20 La. Ann. 466), nor is the jurisdiction which a probate court has at the time of decedent's death divested by a transfer of jurisdiction, even though proceedings had not been instituted in the first court (Forstall *v.* Forstall, 4 La. 214). Again a case dismissed from the docket merely to relieve the same is "pending" within an exception that cases "pending" shall not be transferred (Darrow *v.* Darrow, 159 Mass. 262, 34 N. E. 270, 21 L. R. A. 100), nor does the conferring of concurrent jurisdiction on two courts operate to transfer a pending case from one to the other (Langmaid *v.* Reed, 159 Mass. 409, 34 N. E. 593. See also Baldwin *v.* Wilbraham, 140 Mass. 459, 4 N. E. 829), nor can the constitutional right of a party to have his action tried in a certain court be taken away by the legislature or the court without his consent (De Hart *v.* Hatch, 3 Hun (N. Y.) 375, 6 Thomps. & C. (N. Y.) 186). Again an act directing the transfer of pending causes does not authorize the transfer of an administration, on the application of the widow, as against the administrator (Wilson *v.* Catchings, 41 Tex. 587), nor of actions pending on cases stated and agreed upon by the parties transferred (Walbridge *v.* Hall, 3 Vt. 114), and courts will not be included which are not within the purview of the statute as to transfer of "pending and undetermined" suits (Knowlton *v.* Culver, 2 Pinn. (Wis.) 93, 1 Chandl. (Wis.) 25.

89. State *v.* Duffel, 32 La. Ann. 649.

Rule is also applied where a new county is created. Perkins *v.* Patten, 10 Ga. 241.

90. Easterlin *v.* State, (Fla. 1901) 31 So. 350.

91. Davis *v.* San Francisco Super. Ct., 63 Cal. 581; Millard *v.* Yee Teen, 63 Cal. 584.

is invested and of which the old court is divested, and to such other matters as are material and relevant.[92] This rule includes authority to hold the remainder of a term which was in session when the statute took effect;[93] the right to amend records relating to the judicial action of the superseded court;[94] and to try *de novo* a transferred cause.[95]

(III) *Authority of Old or Superseded Court.* An abolished court cannot sign a bill of exceptions,[96] try actions,[97] nor overrule exceptions so as to bind the new court.[98] If, however, the statute is not imperative in requiring the transfer of all causes the original court may continue to exercise jurisdiction over an action commenced therein.[99] So the circumstances of the case may justify the chancellor of the abolished court in appointing a receiver to hold and preserve property,[1] and a judge who has tried a cause may make and file a decision after

But see Stone *v.* Martin, 1 Tex. App. Civ. Cas. § 87.

An enabling act is unnecessary to confer jurisdiction upon a constitutional court, where the state is reorganized. State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

92. Thus original jurisdiction may be conferred to reopen the final settlement of an estate. Heaton *v.* Knowlton, 65 Ind. 255. So an orphans' court of the new county has jurisdiction over all subsequent accounts of new trustees. Brown's Appeal, 12 Pa. St. 333. So jurisdiction of a minor's estate may be acquired and also power to appoint a guardian, accept his resignation, appoint his successor, and decree a sale of the minor's lands. McGale *v.* McGale, 18 R. I. 675, 29 Atl. 967. And a circuit court of a city may become vested with power to construe a will and direct the distribution of an estate. Orrick *v.* Boehm, 49 Md. 72. So proceedings may be continued and completed before the new court which were commenced in the abolished court. Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449. And a court of a new county obtains jurisdiction of a properly transferred cause, where the law so permits, although only one of defendants was a resident. Norris *v.* Clinkscales, 59 S. C. 232, 37 S. E. 821. So the new court may render judgment (Clark *v.* Sawyer, 48 Cal. 133; Kruse *v.* Wilson, 79 Ill. 233; Moore *v.* Dunn, 50 Miss. 32), enter decrees (U. S. *v.* Garcia, 25 Fed. Cas. No. 15,186, 1 Sawy. 383), revive a judgment (Scherrer *v.* Caneza, 33 La. Ann. 314) which is unsatisfied (Mitchell, etc., Furniture Co. *v.* Sampson, 40 Fed. 805), reëxamine the case on proper showing therefor (U. S. *v.* Garcia, 25 Fed. Cas. No. 15,186, 1 Sawy. 383), set aside a decree (Sherman *v.* Felt, 2 N. Y. 186, 3 How. Pr. (N. Y.) 425), and issue an execution on a legal judgment in the old court (Rutherford *v.* Crawford, 53 Ga. 138; Wegman *v.* Childs, 41 N. Y. 159 [*reversing* 44 Barb. 403]).

Where new court has no jurisdiction.— Where by abolishing a court and transferring its business an appeal is lost the new court cannot set aside a verdict and grant a new trial. Cummings *v.* White Mountains R. Co., 43 N. H. 114. And where an action was not pending in the circuit court when the constitution of New York of 1895 took effect, said court having been thereby abolished and the jurisdiction of all actions and proceedings pending having been vested in the supreme court, the special term has no power to order exceptions taken in the circuit court to be heard in the first instance in the general term, and the fact that the special term judge was the trial judge also is immaterial. Fifth Ave. Bank *v.* Forty-Second St., etc., R. Co., 6 N. Y. App. Div. 567, 40 N. Y. Suppl. 219.

93. Com. *v.* Skiffington, 14 Gray (Mass.) 381.

94. Forsyth County *v.* Blackburn, 68 N. C. 406.

95. State *v.* Mathews, 33 La. Ann. 103.

96. Reed *v.* Worland, 64 Ind. 216.

97. Brown *v.* Kimball, 4 Kan. 422.

98. Parker *v.* Shropshire, 26 La. Ann. 37.

99. Hosie *v.* McCann, 2 Pennyp. (Pa.) 133.

If the new court is vested with exclusive jurisdiction, there being no saving clause as to pending suits, the old court is without jurisdiction thereafter. State *v.* Lackey, 2 Ind. 285.

An inferior court may act in matters before it after the adoption of the constitution and until the appointment of the official to whom jurisdiction is transferred. Aycock *v.* Aven, 25 Ga. 694. So an original bill in chancery may be proceeded with as if the suit had not been abolished. Marble *v.* Whaley, 33 Miss. 157. And where no final decree has been rendered in equity it must be proceeded with in accordance with the practice of courts of equity existing when the constitution was adopted. Green *v.* Moore, 66 N. C. 425. So scire facias will lie after jurisdiction is transferred. *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326. But *contra*, as to fieri facias. Strickland *v.* Griffin, 70 Ga. 541. The old court may render judgment on the day "from" which a constitution takes effect, but an execution thereafter issued is not valid. Strickland *v.* Griffin, 70 Ga. 541. It cannot, however, render judgment in a case pending when the constitution was adopted (Randall *v.* Kline, 44 Miss. 313), nor sign a judgment in an injunction suit after passage of the act transferring such suits (Hoyle *v.* New Orleans City R. Co., 23 La. Ann. 502), nor revive a judgment (Calhoun *v.* Levy, 33 La. Ann. 1296. But see McMurray *v.* Hopper, 43 Pa. St. 468).

1. *In re* Colvin, 3 Md. Ch. 278.

the county is attached to another district, even though he is not a judge thereof.[2]

(iv) *Practice, Procedure, Process, and Defenses.* If a court under a new constitution is a continuation of an established one, and no change is made in the practice or procedure therein, the former laws regulating the practice of the old courts will be in force;[3] and where the constitution provides for a transfer of causes to the superseding court to be proceeded with as though the old courts had not been abolished the legislature has the right to provide for and regulate the modes of procedure therein, and to prescribe what proceedings in regard thereto should be taken by the court and the parties in the specified cases.[4] But a statute relating to appeals from an order granting or refusing a new trial, and applicable to the new court to which probate matters are transferred by the constitution, governs instead of the statute which related to probate appeals in the old court.[5] Again a motion in the case is included when jurisdiction is legally transferred;[6] but a writ cannot be issued from a court not in existence, as where the statute appointing the court has not taken effect.[7] As to defenses it is a general rule that such as were available in the old court may be relied upon in the new where a cause of action has been lawfully transferred.[8]

d. Whether Court New or Continuation of Established Court. A new court is not created within a constitutional prohibition by a charter provision wherein certain courts are "continued, consolidated, and reorganized under one name, as 'The Municipal Court,'" etc., but such charter merely continues and reorganizes existing courts.[9] Nor is a new court created by merely dividing the territorial jurisdiction of an established court, where no provision of the constitution

2. Darelius *v.* Davis, 74 Minn. 345, 77 N. W. 214.

A division of a county, etc., will not oust attached jurisdiction (Lindsay *v.* McCormack, 2 A. K. Marsh. (Ky.) 229, 12 Am. Dec. 387; Champlin *v.* Bakewell, 21 La. Ann. 353; Patouillet *v.* Patouillet, 2 La. 270; Drury *v.* Midland R. Co., 127 Mass. 571) unless express prohibitory words are used in the statute (State *v.* St. Louis County Ct., 38 Mo. 402), nor where there is a saving clause (Drury *v.* Midland R. Co., 127 Mass. 571).

3. Ross *v.* Lafayette, etc., R. Co., 6 Ind. 297.

The law of the court to which a suit is transferred under an act of congress providing for such removal regulates the practice. Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83, 12 L. ed. 60.

4. Purcell *v.* Riverside, 1 Ohio Cir. Dec. 648.

Number of petit jurors may properly be provided for. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

Procedure for obtaining new official bonds may be prescribed and be made applicable to the new court. Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490. See also Purcell *v.* Riverside, 1 Ohio Cir. Dec. 648.

Supplementary proceedings may be instituted and a receiver appointed by the superseding court. Wegman *v.* Childs, 41 N. Y. 159 [*reversing* 44 Barb. 403].

A constitutional provision requiring the proceedings, practice, jurisdiction, powers, etc., **of all courts of the same grade so far as regulated by law, and the course and effect** of process, judgments, and decrees of such courts severally to be uniform, will so operate even to the abrogation of special legislation to the contrary. People *v.* Rumsey, 64 Ill. 44.

5. *In re* Davis, 11 Mont. 1, 27 Pac. 342.

No appeal lies from the "county and probate courts" when such courts are amalgamated. *Ex p.* Sellers, Walk. (Miss.) 414.

A writ of error should be sued out in the division in which judgment was recovered. Goforth *v.* Adams, 11 Ill. 52.

6. Kavanaugh *v.* State Bank, 21 Ala. 564; Chipman *v.* Bowman, 14 Cal. 157.

7. Coleen *v.* Figgins, 1 Ill. 19.

The old court may issue process until an order of transfer is made. Stone *v.* Martin, 1 Tex. App. Civ. Cas. 87. But see *supra*, III, A, 4, c, (III).

Process may be regular, although on the day of issuance no judges were in commission. Evans *v.* Webb, 4 Pa. L. J. 318.

8. Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83, 12 L. ed. 60.

Legal and equitable remedies remain distinct, although transferred to one tribunal. Onderdonk *v.* Mott, 34 Barb. (N. Y.) 106. See also Westlake *v.* Farrow, 34 S. C. 270, 13 S. E. 469. But equitable defenses in an action at law and same relief may be availed of and had where chancery powers of old court are vested in a law court. Gates *v.* Smith, 2 Minn. 30. See also Campbell *v.* Montgomery, 1 Rob. (Va.) 392.

9. Worthington *v.* London Guarantee, etc., Co., 164 N. Y. 81, 58 N. E. 102, 31 N. Y. Civ. Proc. 274 [*reversing* 47 N. Y. App. Div. 609, 62 N. Y. Suppl. 591]. But see Matter of Schultes, 33 N. Y. App. Div. 524, 54 N. Y. Suppl. 34, holding such court a new court.

Courts may be continued under another name by the joint operation of a new consti-

imposes any limitation upon the legislative power in respect to making such division or appointing a place in each division for holding the court.[10] Again, even though the jurisdiction is somewhat different under a new constitution, a court may nevertheless be a continuation of an established court.[11] But where it is evident from the language of a new constitution that a new tribunal was not created, even though an additional judge was added, and that such court was not to be continued as before until the general assembly should elect an additional associate justice, it will be so construed.[12] And a new judge may be added by statute to an existing court without thereby creating a new court or constituting a legislative attempt to make the judges of an existing court judges of a new court.[13]

e. Divisions and Parts of Courts. The legislature in the absence of a constitutional limitation may divide the territorial jurisdiction of a county court, and appoint a place in each division for holding the same.[14] A constitutional provision, however, for "a superior court" means that there shall be one and only one tribunal of that name, even though it has by statute distinct sessions in several counties at stated times, separate county clerks, and separate records.[15] And where the constitution vests the power in the court and not in departments which are merely for convenience, the judges hold but one and the same court whether sitting separately or together, and causes may be assigned to one department, and transferred to another, even though irregularly done, so as to validate the latter's jurisdiction and subject its orders to review by certiorari.[16] So actions brought in such departments are in effect in the same court, and the judgments are rendered by the same tribunal. The rule therefore that the judgment of the court first acquiring jurisdiction will prevail over that of another court subsequently acquiring jurisdiction does not apply in such a case, nor does the reason for its exercise have any existence.[17] Although the various branches of a court constitute but one tribunal, still the proceedings in such branches must be separate and independent in so far as the trial of causes is concerned.[18] Again a grant is exclusive in accordance with its terms where it confers authority to sit in banc for a specified purpose, and for no other purpose whatever.[19] Beyond these general rules, however, the law in relation to divisions and parts of courts and of jurisdiction in connection therewith is peculiar to the particular constitution and statutes under which they exist.[20]

tution and statute. People *v.* Aurora, 78 Ill. 218, common pleas continued as city courts.

10. Lowery *v.* State, 103 Ala. 50, 15 So. 641.

11. Ross *v.* Lafayette, etc., R. Co., 6 Ind. 297.

12. Middleton *v.* Taber, 46 S. C. 337, 24 S. E. 282; Land Mortg. Invest., etc., Co. *v.* Faulkner, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288.

13. *Ex p.* Lloyd, 78 Cal. 421, 20 Pac. 872.

Spanish tribunals were not continued after the United States took possession of the territory and all suits had to be begun *de novo* in American courts. Dennis *v.* Durnford, 4 Mart. N. S. (La.) 32.

14. Lowery *v.* State, 103 Ala. 50, 15 So. 641.

15. Smith *v.* Hall, 71 Conn. 427, 42 Atl. 86. See Jackson *v.* State, 87 Md. 191, 39 Atl. 504; O'Keefe *v.* Moore, 60 N. J. L. 138, 37 Atl. 453.

As to division of superior court into a "criminal," a "civil," and an "equity department" and transfer and retransfer of case see State *v.* Lichtenberg, 4 Wash. 553, 30 Pac. 659.

16. White *v.* San Francisco Super. Ct., 110 Cal. 60, 42 Pac. 480. See also Wood *v.* Fithian, 24 N. J. L. 838.

But where courts have no authority or control over the clerks, dockets, or records of other courts, they are separate and distinct bodies. Goldsmith *v.* Kilbourn, 46 Md. 289.

17. Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12.

18. People *v.* Matson, 129 Ill. 591, 22 N. E. 456.

19. People *v.* Arapahoe County Dist. Ct., 14 Colo. 396, 24 Pac. 260.

20. The intent of the constitution will determine the power of judges to sit together or separately to hold court in each branch. Jones *v.* Albee, 70 Ill. 34. And a court has no power to peremptorily order the clerk to determine by lot to which of the two branches of a court a case on the docket should be transferred. Hindman *v.* Toney, 97 Ky. 413, 30 S. W. 1006, 17 Ky. L. Rep. 286. If the constitution does not prohibit, and the statute so provides, a judge of one branch of a court may upon request of a judge of another branch, hear and determine a cause pending in the latter, although one is a criminal and

B. Judges[21] and Constitutional and Legislative Powers Relating Thereto — 1. IN GENERAL. A court cannot be established until it has a judge, and unless the things required by the constitution for the existence of a court concur the court cannot exist.[22] The right to try the constitutional qualifications of one elected by the two houses of the legislature to a judgeship is a judicial and not a political question.[23] The establishment of a court is not the creation of a contract. Such establishment, however, originates the office, and the judicial power is lodged in the court and not in the magistrate.[24] If there is a constitutional delegation of power to the legislature to create inferior courts it may authorize any judicial officer to preside over them *ex officio*, even though judges of inferior courts are required to be elected by the people.[25] Again the legislature may provide for the appointment of a judge of a new judicial district,[26] and by limiting the extent of a circuit thereby limit the jurisdiction of its judges.[27] But the right of a county expressly given by the constitution not to have associate judges cannot be taken away by the attachment of one county to another;[28] nor can the legislature confer authority on judges to sit in matters contrary to those authorized by the constitution.[29] And where justices of the peace are part of the constitutional judiciary of the state, the determination by the legislature of their number in an incorporated city is not subject to the distinction between general and special laws.[30]

2. ABOLISHING OFFICE — a. Constitutional Power. If the constitution abolishes a court, the office of judge thereof does not exist either *de facto* or *de jure* after the day "from" which the constitution takes effect[31] or on the adoption of the constitution.[32] But in order that a constitutional provision shall operate to abolish the office of judge, such intent must appear from express language or by necessary implication.[33]

b. Legislative Acts and Authority — (i) *IN GENERAL.* Under a general constitutional delegation of power to the legislature, and in the absence of an express or implied limitation, it may abolish a court. If a court is abolished the office of judge thereof is abolished in the absence of such constitutional protection thereof, and within the same rule the law providing for salary may be repealed, and one

the other a civil branch. Mengel *v.* Jackson, 94 Ky. 472, 22 S. W. 854, 15 Ky. L. Rep. 289. Again an assignment of the first of several identical suits will carry all the others to the same division of the court. State *v.* Judges Civil Dist. Ct., 47 La. Ann. 1601, 18 So. 632. And a case may be transferred to a division of a court other than that to which it was allotted, and it cannot be dismissed because improperly allotted, and such action is not necessarily divisible, its purpose being the payment of a legacy out of the assets of a solvent succession, although the proceedings attacked show it to be insolvent. Pironi *v.* Riley, 39 La. Ann. 302, 1 So. 675.

21. See, generally, JUDGES.

22. People *v.* Opel, 188 Ill. 194, 58 N. E. 996. See also Com. *v.* Swank, 79 Pa. St. 154.

23. State *v.* Porter, 1 Ala. 688.

24. Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.

The official acts of a "county judge" are the acts of the "county court," the terms being identical. Lee County *v.* Nelson, 4 Greene (Iowa) 348.

25. Balkum *v.* State, 40 Ala. 671. See also Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676.

Effect of constitutional requirement for election of judges upon power of legislature see State *v.* Stingley, 10 Iowa 488; Com. *v.* Conyngham, 65 Pa. St. 76, 3 Brewst. (Pa.) 214; McCully *v.* State, 102 Tenn. 509, 53 S. W. 534, 46 L. R. A. 567; State *v.* Rusk, 15 Wash. 403, 46 Pac. 387.

Legislative acts as to population and judges see *In re* Mitchell, 120 Cal. 384, 54 Pac. 799 [*followed* in People *v.* Burns, 121 Cal. 529, 53 Pac. 1096]; People *v.* Opel, 188 Ill. 194, 58 N. E. 996; Field *v.* Silo, 44 N. J. L. 355; Com. *v.* Dumbauld, 97 Pa. St. 293.

Time of election of judges see People *v.* Opel, 188 Ill. 194, 58 N. E. 996; People *v.* Rose, 166 Ill. 422, 47 N. E. 64; Com. *v.* Handley, 106 Pa. St. 245.

26. *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

27. State *v.* Laughlin, 75 Mo. 147.

28. Com. *v.* Dumbauld, 97 Pa. St. 293.

29. Worthen *v.* Badgett, 32 Ark. 496.

30. *In re* Mitchell, 120 Cal. 384, 52 Pac. 799.

31. Strickland *v.* Griffin, 70 Ga. 541.

32. *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

33. Forbes *v.* State, (Del. 1898) 41 Atl. 1102.

who accepts a statutory office accepts it with such a condition.[34] So where the legislature under a legitimate exercise of its power abolishes courts, reorganizes them, detaches and attaches districts, circuits, or other judicial divisions, or transfers the jurisdiction of courts or the duties of judges, such enactment operates to vacate the judicial office, or the statute may expressly declare such office vacant and provide for a new judge or for the election thereof.[35] Again where the judge's office is abolished, and the appointment of new judges is provided for, there becomes attached to them the jurisdiction of the old ones.[36] But the legislature cannot interfere with a judicial office established by the constitution by changing the boundaries of circuits so as to nominally create one new one with a new judge, and so leave one of the old judges without a circuit.[37]

(II) *During Term of Office.* If the legislature has a constitutional delegation of power to alter or divide judicial districts, circuits, or counties, or to transfer their jurisdiction, or otherwise to abolish courts, such power is not restricted by the duration of the term of office of a judge being fixed by the constitution for a period extending beyond the time of such legislative action.[38] When a court is abolished there is no office to fill.[39] On the other hand it has been held that the legislature cannot abridge the constitutional term of the office of a judge by abolishing the court, nor add to, take from, or create new circuits before such constitutional term of office expires, since a judge cannot be removed except in the manner provided by the constitution.[40]

(III) *Increasing or Limiting Number of Judges.* The legislature may by a lawful and constitutional exercise of its power increase[41] or diminish the number of judges.[42]

C. Ministerial Officers — 1. In General. The legislature may create ministerial officers with power to perform ministerial duties necessary in the administration of the law.[43] Again if the constitution repeals the law under which the

34. Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698; Rutgers *v.* New Brunswick, 42 N. J. L. 51; State *v.* Wright, 7 Ohio St. 333. See also State *v.* Porter, 1 Ala. 688; Van Buren County *v.* Maddox, 30 Ark. 566.

35. *Kansas.*— Aikman *v.* Edwards, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149.

Massachusetts.—Brien *v.* Com., 5 Metc. 508.

Mississippi.— Miazza *v.* State, 36 Miss. 613.

Missouri.— State *v.* Mann, 41 Mo. 395.

Tennessee.— State *v.* Lindsay, 103 Tenn. 625, 53 S. W. 950; McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

36. Russell *v.* Howe, 12 Gray (Mass.) 147. See also Baker *v.* Fernald, 12 Gray (Mass.) 154.

Where the duration of a judicial circuit ceases by lapse of time subsequent acts of a judge therein are void. Carpenter *v.* State, 72 Ind. 331.

37. People *v.* Bangs, 24 Ill. 184.

The legislature cannot abolish the office of judge created by the constitution. State *v.* Floyd, 9 Ark. 302.

38. *Alabama.*— Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.

Arkansas.— Van Buren County *v.* Maddox, 30 Ark. 566.

Indiana.— Stocking *v.* State, 7 Ind. 326.

Kansas.— Aikman *v.* Edwards, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149.

New Jersey.— Kenny *v.* Hudspeth, 59 N. J. L. 320, 36 Atl. 662.

Tennessee.— McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

39. Van Buren County *v.* Maddox, 30 Ark. 566.

40. State *v.* Friedley, 135 Ind. 119, 34 N. E. 872, 21 L. R. A. 634. See also State *v.* Bear, 135 Ind. 701, 34 N. E. 877; Clerk Whitley County Ct. *v.* Lester, 46 S. W. 694, 20 Ky. L. Rep. 481; Lafayette F. Ins. Co. *v.* Remmers, 29 La. Ann. 419.

As to a constitutional provision that during a term of office no judicial circuit shall be altered, etc., see Opinion of Judges, 55 Mo. 215; State *v.* Blasdel, 6 Nev. 40.

41. State *v.* Martin, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153; *In re* Cahill, 110 Pa. St. 167, 20 Atl. 414; Kilpatrick *v.* Com., 31 Pa. St. 198. See also State *v.* Atherton, 19 Nev. 332, 10 Pac. 901; Field *v.* Silo, 44 N. J. L. 355.

A legislative act does not increase the number of justices of the peace contrary to a constitutional limitation thereof, where such statute creates a corporation court in each municipality and confers upon it the same criminal jurisdiction as possessed by said justices. *Ex p.* Wilbarger, 41 Tex. Crim. 514, 55 S. W. 968.

42. State *v.* Atherton, 19 Nev. 332, 10 Pac. 901; State *v.* Kinkead, 14 Nev. 117; State *v.* Holle, 64 N. J. L. 363, 48 Atl. 1118 [*affirming* 62 N. J. L. 533, 41 Atl. 832].

43. Smith *v.* Odell, 1 Pinn. (Wis.) 449.

Appointment of standing master need not be recorded to be valid. Seaman *v.* Northwestern Mut. L. Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

appointment was made the appointment ceases.[44] And where the legislative power to establish, alter, or abolish courts exists, if such courts are abolished the terms of their officers are thereby terminated.[45] So there may be a substitution of officers,[46] and the court may call upon its officers to make correct and proper return of process.[47]

2. INTERPRETERS. The law may expressly provide for the appointment of an interpreter for designated courts or purposes,[48] although the right and duty of courts to employ and swear interpreters of foreign languages when necessary is conceded.[49] But the court is not bound to appoint a sworn interpreter, for if there be none any qualified person may act in that capacity.[50] Such officer cannot be removed without cause, under a law authorizing his appointment with a salary "during good behavior."[51]

3. STENOGRAPHERS — a. Appointment and Duties. Generally the appointment, duties, and qualifications of stenographers rest upon the law providing therefor, and the construction of the terms thereof, and this also governs the effect of their acts in relation to matters or proceedings in courts.[52] Such stenographer is an official of the court, and must act under its directions, and is subject to its control.[53]

"Public office" construed and distinguished, in a constitution prohibiting the judges from exercising "any power of appointment to public office" in connection with legislative power to invest courts with jurisdiction to appoint officers of a certain class. *In re* Hathaway, 71 N. Y. 238 [*affirming* 9 Hun 79].

44. People *v.* Rumsey, 64 Ill. 44.

45. Rutgers *v.* New Brunswick, 42 N. J. L. 51.

The resignation of a judge does not arrest ministerial proceedings of subordinate court officers, who may continue to exercise their legal duties until his successor is appointed. Maskell *v.* Horner, 10 La. Ann. 641.

46. State *v.* Griffith, 63 Mo. 545.

47. Com. *v.* Green, 1 Ashm. (Pa.) 289.

48. People *v.* Young, 108 Cal. 8, 41 Pac. 281; People *v.* Adams, 89 Hun (N. Y.) 284, 35 N. Y. Suppl. 648 [*reversed* in 148 N. Y. 724, 42 N. E. 725]; Com. *v.* Sanson, 67 Pa. St. 322.

49. As where a witness is not sufficiently acquainted with the English language to be understood (Horn *v.* State, 98 Ala. 23, 13 So. 329; Amory *v.* Fellowes, 5 Mass. 219; *In re* Norberg, 4 Mass. 81), or where the court and jury are ignorant of the language in which records are written (Davis *v.* Police Jury, 19 La. 533).

The determination of the necessity when a matter of discretion is not abused by the court's refusing an interpreter to an accused foreigner who appears to sufficiently understand English. People *v.* Young, 108 Cal. 8, 41 Pac. 281.

50. Farar *v.* Warfield, 8 Mart. N. S. (La.) 695.

Next friend of infant may act. Swift *v.* Applebone, 23 Mich. 252.

Witness on criminal charge is not incompetent before grand jury at examination of other witnesses. People *v.* Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

51. People *v.* Adams, 89 Hun (N. Y.) 284, 35 N. Y. Suppl. 648 [*reversed* in 148 N. Y. 724, 42 N. E. 725].

Compensation.— Resolution fixing salary is not applicable to successor (Rosenthal *v.* New York, 6 Daly (N. Y.) 167), and the nature of the jurisdiction of a court may determine the right to appoint an interpreter at the county's expense (Crawford County Sup'rs *v.* Le Clerc, 3 Finn. (Wis.) 325, 4 Chandl. (Wis.) 56). Again a later statute fixing the salary of an Indian interpreter repeals a former one. U. S. *v.* Mitchell, 109 U. S. 146, 3 S. Ct. 151, 27 L. ed. 887. And an unqualified interpreter cannot recover salary when so far unqualified as to be chargeable with fraud in accepting office. Conroy *v.* New York, 6 Daly (N. Y.) 490 [*affirmed* in 67 N. Y. 610].

52. People *v.* McIntyre, 127 Cal. 423, 59 Pac. 779 (holding that the legislature did not intend that civil sections should be read into the penal code in relation to stenographers' qualifications); People *v.* Lon Me, 49 Cal. 353 (holding that if a law allowing shorthand reporters at a grand jury hearing be repealed, an indictment will be set aside where a stenographer was present at such hearing); State *v.* Murphy, 125 Mo. 464, 28 S. W. 767 (appointment may be limited to courts having jurisdiction over felonies in cities exceeding a certain population). See also State *v.* Martin, 121 Mo. 61, 25 S. W. 851.

Employment of stenographers before commissioners in executing orders or decrees of reference is unauthorized. Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

Official recognition.— A court reporter may become by official recognition a *de facto* officer, even though not regularly appointed by the court. Etter *v.* O'Neil, 83 Iowa 655, 49 N. W. 1013.

53. Varnum *v.* Wheeler, 9 N. Y. Civ. Proc. 421.

He may be required by a circuit judge to attend a court regularly held by him in a circuit other than his own, whenever in his

b. Compensation — (I) *In General.* A statute by providing for compensation to official shorthand reporters is not unconstitutional.[54] And the statutory compensation will rule, whether it be a *per diem* allowance[55] to be fixed by the court,[56] or an annual salary,[57] unless by the operation of concurrent statutes the judge can fix a different fee.[58] And the compensation will be limited to the term specified for a temporary appointment beyond which the judge could not have continued the employment.[59] So the manner of payment prescribed by statute governs.[60] Again neither the state nor the county can be charged with liability for a stenographer's fees, unless authorized by law.[61] A stenographer is, however, entitled to reasonable compensation for his services, even though his fees are not fixed by statute, where the law authorizes the court to appoint such official.[62] Again a superseding constitutional court invested with like powers as the old court may fix and order the compensation of its stenographer under statutes providing therefor, as to the superseded court.[63] And where the statute requires that the compensation of such official shall be fixed by the court at a sum not exceeding a certain amount, the magistrate's action thereon is judicial and not legislative.[64] So where the court's discretion in fixing fees has not been abused such action will not be interfered with.[65]

(II) *Attendance Before Examiners, Referees, Auditors, Etc.* A stenographer's compensation for performance of his duties before examiners, referees, auditors, etc., depends upon the statute where it provides therefor,[66] and

judgment public interests so demand. Underwood *v.* Lawrence County, 6 S. D. 5, 60 N. W. 147.

54. Smith *v.* Strother, (Cal. 1885) 7 Pac. 801.

A statute providing that fees be taxed as costs does not require a party to employ a stenographer. Chosen Friends Home, etc., League *v.* Otterson, 7 Wyo. 89, 50 Pac. 194.

55. Knight *v.* Ocean County, 48 N. J. L. 70, 3 Atl. 344, holding that if the statute fixes a *per diem* allowance for attendance, taking testimony and proceedings and furnishing a copy to the judge such statute is exclusive.

56. Andreson *v.* Ogden Union R., etc., Co., 7 Utah 396, 26 Pac. 1119.

57. Stockwell *v.* Genesee County Sup'rs, 56 Mich. 221, 23 N. W. 25, holding that if an annual salary is fixed by law no *per diem* allowance while in attendance can be made. So where the statute specifies certain duties as those required they must be performed without other compensation than the salary allowed. State *v.* Supple, 22 Mont. 184, 56 Pac. 20.

Where salary must be apportioned among counties no more than the salary can be recovered, nor can a county be compelled to pay any specific sum as salary in the absence of a showing that it was the amount apportioned. Goodale *v.* Marquette County, 45 Mich. 47, 7 N. W. 207.

58. Knight *v.* Ocean County, 49 N. J. L. 485, 12 Atl. 625.

59. *In re* O'Sullivan, 166 N. Y. 596, 59 N. E. 1128 [*affirming* 54 N. Y. App. Div. 374, 66 N. Y. Suppl. 611].

60. McAllister *v.* Hamlin, 83 Cal. 361, 23 Pac. 357.

But a county treasurer is not obligated to pay upon the certificate of a magistrate that services were rendered, nor is such certificate a demand, there being no law prescribing the fees or authorizing the magistrate to fix them. Fox *v.* Lindley, 57 Cal. 650.

61. Mattingly *v.* Nichols, 133 Cal. 332, 65 Pac. 748.

A city and county cannot avoid an obligation to pay fees on the ground of no appropriation by councils. Wilson *v.* Philadelphia, 14 Wkly. Notes Cas. (Pa.) 74.

Mandamus will not lie to compel a county treasurer to pay a certificate of a city judge issued to a shorthand reporter, where the law providing for such officials has no application to city courts. Bartling *v.* People, 92 Ill. App. 410.

62. Washoe County *v.* Humboldt County, 14 Nev. 123. But he is not entitled to compensation for the time between preferring charges against him and the entry of an order for his removal, where during such time he did not attend court as required by law nor offer to do so except by deputy. State *v.* Slover, 113 Mo. 211, 20 S. W. 790.

Mileage is recoverable under the statute, where a stenographer by direction of the judges who appointed him attends court outside of the circuit for which he is appointed. Underwood *v.* Lawrence County, 6 S. D. 5, 60 N. W. 147.

63. *Ex p.* Reis, 64 Cal. 233, 30 Pac. 806. See also People *v.* Becker, (Cal. 1884) 4 Pac. 942.

64. McAllister *v.* Hamlin, 83 Cal. 361, 23 Pac. 357.

65. Andreson *v.* Ogden Union R., etc., Co., 7 Utah 396, 26 Pac. 1119.

66. Taylor's Estate, 3 Pa. Super. Ct. 275 (such as shall be directed by the court, and fixed by the auditor, examiner, master, referee, or commissioner, including extra services, within the limitation prescribed by the

where the statute does provide for such compensation the fees are not a subject of contract.[67]

(III) *Transcript of Shorthand Notes.* The right of a stenographer to compensation for services for a transcript of his shorthand notes must be determined by the law creating the office and specifying the duties, etc., of such officials.[68] There may, however, be an express or implied contract to pay for such services.[69]

c. Removal. If a constitutional court is a different tribunal from the superseded one the reporter of the former will not succeed to the office of reporter of the latter.[70] And where the legislature and not the constitution creates the office of court stenographer it may abolish, modify, or control it, and the appointee takes it subject to that risk. Hence he cannot complain when a new court is carved out of his circuit, or his court divided and a separate stenographer appointed therefor.[71] Again where the statute provides that a court may employ a stenographer it has authority to discharge one who is incompetent and delays the trial on account of his slowness, even though no other stenographer can be obtained.[72]

statute); Drinkhouse's Estate, 1 Pa. Dist. 92. See Underwood *v.* Lawrence County, 6 S. D. 5, 60 N. W. 147.

A federal court will allow rate in state courts to a state court stenographer appointed by a federal court as a special examiner in chancery. Indianapolis Water Co. *v.* American Straw Board Co., 65 Fed. 534.

67. Taylor's Estate, 3 Pa. Super. Ct. 275.

If a reporter holds no official position his compensation depends on contract which may be implied. Coale *v.* Suckert, 18 Misc. (N. Y.) 76, 41 N. Y. Suppl. 583.

68. *California.*— Mattingly *v.* Nichols, 133 Cal. 332, 65 Pac. 748.

Georgia.— Henderson *v.* Parry, 93 Ga. 255, 20 S. E. 107, holding that the stenographer is not entitled in addition to the statutory *per diem* allowance to compensation per folio for transcribing. See also Ragland *v.* Palmer, 93 Ga. 777, 21 S. E. 145, holding that the court may allow for time spent in writing out the stenographic notes in case of conviction, but not in case of a mistrial, under Code, § 4696*b*, and the act of Oct. 12, 1885. And see Henderson *v.* Parry, 93 Ga. 775, 21 S. E. 144.

Montana.— It is a stenographer's ministerial duty under Code Civ. Proc. § 1874, to deliver, without demanding his fees in advance, the transcript of notes taken in a proceeding conducted by the attorney-general on behalf of the state. State *v.* Ledwidge, 27 Mont. 197, 70 Pac. 511.

Nebraska.— State *v.* Moore, 8 Nebr. 22.

New York.—McCarthy *v.* Bonynge, 12 Daly 356, holding that compensation fixed by statute for copies precludes agreement for greater rate. And see Baker *v.* New York, 56 N. Y. App. Div. 350, 67 N. Y. Suppl. 814.

Pennsylvania.— Lehigh County *v.* Meyer, 102 Pa. St. 479 (statute fixing annual compensation does not provide for additional duty such as writing out notes in longhand); Briggs *v.* Erie County, 98 Pa. St. 570 (county is not liable for transcript of notes, unless made by order of court or filed in performance of general duty, nor for transcript furnished at request of counsel, although filed as part of record); Reed *v.* Sieman, 24 Pittsb. Leg. J. N. S. 129 (rate per folio fixed by statute).

See 13 Cent. Dig. tit. "Courts," § 200.

Compensation is based on actual count and not on estimated folios. Wright *v.* Nostrand, 58 How. Pr. (N. Y.) 184.

Mandamus to compel furnishing transcript without cost does not lie where statute does not authorize appointment of stenographer. Sattley *v.* Wofford, 126 Mo. 435, 29 S. W. 152.

Prepayment of fees may be required. State *v.* Supple, 22 Mont. 184, 56 Pac. 20; State *v.* Moore, 8 Nebr. 22; Guth *v.* Dalton, 58 How. Pr. (N. Y.) 289. But see Wright *v.* Nostrand, 58 How. Pr. (N. Y.) 184.

69. Miller *v.* Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107; Arcana Gas Co. *v.* Moore, 8 Ind. App. 482, 36 N. E. 46; Query *v.* Cooney, 34 Misc. (N. Y.) 161, 68 N. Y. Suppl. 800 [*affirming* 33 Misc. 795, 67 N. Y. Suppl. 592].

Fees for copies made for private persons under special contract may be recovered. Langley *v.* Hill, 63 Mich. 271, 29 N. W. 709.

When attorney is not liable in absence of express agreement to pay see Sheridan *v.* Genet, 12 Hun (N. Y.) 660; Bonynge *v.* Waterbury, 12 Hun (N. Y.) 534.

70. *Ex p.* Lawrence, 1 Ohio St. 431.

71. State *v.* Ford, 41 Mo. App. 122, holding that an original appointee of a court thereafter divided has no title over a reporter appointed to a certain division, under a law providing for a stenographer for each division. In such case relator cannot preform the duties of both courts, sitting separately at the same time, either in person or by deputy, the latter being merely an assistant not authorized to take charge of a separate division.

72. Hines *v.* Holland, 3 Tex. App. Civ. Cas. § 99.

The failure of such official to devote his personal attention to the duties of his office, leaving them to be wholly performed by his

4. Court Attendants and Assistants — a. Appointment and Duties. A court[73] may be authorized by statute[74] or possess as a court of general jurisdiction, as a court of record, or of last resort, the inherent power to provide the necessary attendants and assistants as a means of conducting its business with reasonable despatch, or to provide for assistants charged with the care of its rooms or other like functions, and the court itself may determine the necessity.[75] In those cases, however, where the statute vests the right to appoint in other than the judge, such enactment operates as a limitation or exclusively;[76] but this rule is subject to such exception as arises from the necessity created by the neglect or refusal of the appointing power to act, although such right to appoint is only coextensive with the necessity and ceases with it.[77] So if the power of appointment has been lawfully exercised the court cannot be compelled by mandamus to appoint another to the same office.[78] Again the duties of an attendant may be founded on ancient practice sanctioned by laws impliedly recognizing the same.[79] But the duties generally of these appointees are those which appertain to the character of the office itself, and the necessity upon which rests their appointment, and such as are also specifically provided by law.[80]

b. Compensation. The right to compensation may rest upon the statute[81] or

deputies, constitutes a cause for his removal, where the constitution and statute both provide for such action. Tilley *v.* Slover, 113 Mo. 202, 20 S. W. 788.

73. In the early history of English jurisprudence when the sheriff himself held court he appointed the clerks, criers, tipstaffs, constables, and other officers. Thereafter, however, his authority was divested until he became a ministerial and executive officer, but still as a matter of form he appointed court officers, although subject to the approval of the court. *In re* Court Officers, 3 Pa. Dist. 196.

74. Cox *v.* Passaic County C. Pl. Ct., 45 N. J. L. 328 (holding that judges have statutory power to require the sheriff to summon additional constables, whenever necessary for the proper transaction of public business); *In re* Court Officers, 3 Pa. Dist. 196 (holding that the statute gives power to courts and not to county commissioners to control court criers, and tipstaffs).

An appointment contrary to statutory intent cannot be made by an inferior court. Bannister *v.* Middlesex County, 125 Mass. 523.

75. People *v.* Wendell, 57 Hun (N. Y.) 362, 10 N. Y. Suppl. 587; White *v.* Hughes County, 9 S. D. 12, 67 S. W. 855; *In re* Janitor Supreme Ct., 35 Wis. 410. But see Huff *v.* Knapp, 3 Sandf. (N. Y.) 299, declaring that a court with none of the incidental powers of a court of record could appoint no officers except such as were named in and authorized by the act creating it or subsequent acts.

76. State *v.* Smith, 82 Mo. 51, holding that the court cannot appoint a janitor where it derives all its jurisdiction and power from the statute creating it, and can have no authority which is expressly withheld from it and conferred upon another, and where a statute gives all the control of court buildings to the city, and an ordinance provides that the commissioner of public buildings shall appoint janitors subject to approval of the board of public improvements, it excludes the exercise of such power by another.

Court cannot interfere with sheriff's discretion in appointing bailiffs nor reduce the number provided by statute. But the sheriff is liable for contempt in appointing persons offensive to the court's order and decorum, under pretense of exercising his statutory discretion, and the court may enforce the exclusion of such appointees from his presence. *Ex p.* Strobach, 49 Ala. 443.

77. Mayhew *v.* Hamilton County, 1 Disn. (Ohio) 186, 12 Ohio Dec. (Reprint) 565, holding that on the neglect or refusal of commissioners to appoint the judge may appoint.

78. People *v.* Wendell, 57 Hun (N. Y.) 362, 10 N. Y. Suppl. 587, holding that an honorably discharged soldier cannot by mandamus compel a county judge to appoint him after the office is filled.

79. Cox *v.* Passaic County C. Pl. Ct., 45 N. J. L. 328, where it is said that the practice that all constables of the county attend all sessions of the court is very ancient and is probably coeval with the establishment of courts in the colony. It does not seem that the practice was adopted over the united colonies. This practice is sanctioned by the fact that when new courts were created to sit in colonies, constables were made ministerial officers, which necessitated their presence at the sessions, and such practice is necessary to the transaction of business.

80. See *In re* Court Officers, 3 Pa. Dist. 196 (criers and tipstaffs); U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209 (criers); N. Y. Civ. Proc. § 96; U. S. Rev. Stat. § 715 [U. S. Comp. Stat. (1901) p. 579]; Bacon Abr. tit. Constables (A).

81. Bannister *v.* Middlesex County, 125 Mass. 523, holding that the statute may merely operate to fix the compensation for

upon the inherent power of a court of record to appoint.[82] Where the statute specifies the fees it thereby limits the recovery.[83] A sheriff is not entitled to pay for services not required by the court, and outside of his duty under the statute.[84] But commissioners may be liable for services of court attendants appointed by the court from the necessity occasioned by their neglect or refusal to appoint, such services having been accepted by the commissioners.[85]

c. **Removal.** Where the requisite authority exists the appointee may be removed, but not otherwise.[86] And the power of removal, there being no other provision, follows and abides with the power of appointment, and if the court or the justices possess the latter it follows that they alone can exercise the former.[87] But the power to terminate the appointment must be actually exercised and cannot be implied from a transfer of the appointing power even though the statute providing therefor takes effect immediately.[88]

D. De Facto and Unauthorized or Illegal Courts and Tribunals — 1. **In General.** A *de facto*[89] officer implies a *de jure* office.[90] There cannot be a *de facto* officer of an office which has no existence, nor can there be an officer either *de jure* or *de facto* if there be no office to fill, and while there may be *de facto* officers there can be no *de facto* office in a constitutional government.[91] Within this rule the general assembly cannot create the office of judge to begin to take effect before the district exists, and one attempting to perform the duties of an alleged judicial office before its existence is neither a *de jure* nor a *de facto*

attendance on a court of record, and not as a requirement that such service may or shall be rendered in all courts of record.

Fees are not allowable after the repeal of the statute providing therefor. Hart *v.* New Orleans, 24 La. Ann. 290.

If the selection is required from the existing class of attendants it must be so made to entitle appointee to compensation. Day *v.* New York, 66 N. Y. 592 [*reversing* 6 Hun 92].

82. White *v.* Hughes County, 9 S. D. 12, 67 N. W. 855.

Compensation of appointee of court not of record not recoverable. Huff *v.* Knapp, 3 Sandf. (N. Y.) 299 [*affirmed* in 5 N. Y. 65].

83. Lewis *v.* Hoboken, 42 N. J. L. 377.

A bailiff is not entitled to extra compensation when, being in attendance at court, he is required to attend a jury at night pending a verdict. Randolph County *v.* Henry County, 27 Ind. App. 378, 61 N. E. 612, 621.

A criminal court attendant allowed and paid per diem fee cannot recover fees allowed sheriffs for summoning special juries. Brantly *v.* State, 4 Baxt. (Tenn.) 307.

Officers take their offices cum onere, and services required of them for which they are not specifically paid must be considered compensated by the fees allowed for other services. Noble *v.* Wayne County, 101 Ind. 127; Atchison County Com'rs *v.* Tomlinson, 9 Kan. 167; Morris County *v.* Freeman, 44 N. J. L. 631; Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

84. St. Clair County *v.* Irwin, 15 Ill. 54.

85. Mayhew *v.* Hamilton County, 1 Disn. (Ohio) 186, 12 Ohio Dec. (Reprint) 565.

86. Mayhew *v.* Hamilton County, 1 Disn. (Ohio) 186, 12 Ohio Dec. (Reprint) 565; *In re* Janitor Supreme Ct., 35 Wis. 410, holding that the superintendent of public property without authority over the rooms of state officers cannot remove a janitor previously appointed by the supreme court.

A court has no power to vacate, contrary to statutory provisions, the office of constable and no general power to do such acts as shall cause his office to become vacant; and where the only power in the premises is to require the constable to show cause why a new bond should not be given the law must be strictly pursued, and an order peremptorily requiring a new bond and thereafter declaring the office vacant, no order to show cause being made, is absolutely void. Sheeley *v.* Wiggs, 32 Mo. 398.

Mandamus against judge does not oust an incumbent unless he is a party to the proceeding. People *v.* Wendell, 57 Hun (N. Y.) 362, 10 N. Y. Suppl. 587.

87. *In re* Janitor Supreme Ct., 35 Wis. 410.

88. Blunt *v.* New York, 60 How. Pr. (N. Y.) 482.

A direct proceeding is necessary and the incumbent must be a party, to determine a constable's right to office or to vacation of office, where he has the commission, has given bond, and has taken the oath of office. *Ex p.* Strobach, 49 Ala. 443.

89. As to reasons for de facto doctrine see State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409 [*quoted* in Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 476, 18 N. W. 285].

90. Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289.

91. State *v.* Shuford, 128 N. C. 588, 38 S. E. 808 [*citing* Carleton *v.* People, 10 Mich. 250; Norton *v.* Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178].

When the constitution or form of government remains unaltered there can be no *de facto* department or *de facto* office. While the legislative and executive departments re-

officer, and his acts are null and void.[92] And a *de facto* court of appeals cannot exist under a constitution which authorizes only one supreme court, defines the qualification of its judges, and prescribes the mode of appointing them.[93] But where a court has been established by an act of the legislature apparently valid, and has gone into operation under such act it is to be regarded as a court *de facto*.[94] If, however, there is no law authorizing a certain court to be held, and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings will be void.[95] Again although a court is established, yet if it was never legally authorized a person convicted therein will be discharged.[96]

2. Courts of De Facto Government. A state county government, organized in disputed territory, and in which the inhabitants have exercised all governmental functions, is a *de facto* government, and the courts held therein under and by virtue of the laws of the state are *de facto* courts, and their judgments valid during the period prior to a determination of the supreme court of the United States that such territory belongs to the national government, it appearing that up to the time of such decision the United States had acquiesced in such acts in the disputed territory.[97] So acts of a government in actual possession in the ordinary administration of its laws so far as they affect private rights are valid, and can be set up to support an action or defend a right. Those affecting public rights are, however, void and cannot be enforced, but the proceedings must have been final and the decree conclusive.[98] Again the judgments of courts of a state exercising

main there can be no *de facto* judicial department or head of that department, unless it also be *de jure*. Hildreth *v.* McIntire, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

92. State *v.* Shuford, 128 N. C. 588, 38 S. E. 808.

93. Hildreth *v.* McIntyre, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

94. Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289.

A court adjourned by a special judge with authority so to do is a *de facto* court, and its proceedings are valid. Brewer *v.* State, 6 Lea (Tenn.) 198.

95. State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

96. *In re* Davis, 62 Kan. 231, 61 Pac. 809.

A court which is not established under any lawful legislature nor under any constitution entitled to be enforced, or which is established by no valid enactment, or which is not created by any lawful sovereignty has no lawful existence. The establishment of a court and the election of a judge are two separate and distinct things, and each must be accomplished in the manner that the constitution prescribes. Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.

Confederate courts have been held illegal (Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698; Hickman *v.* Jones, 9 Wall. (U. S.) 197, 19 L. ed. 551), their acts not binding (Snider *v.* Snider, 3 W. Va. 200), their judgments stand upon no higher ground than acts and judgments of a foreign court, and can be impeached in the same manner (Troy *v.* Ellerbe, 48 Ala. 624; Bibb *v.* Avery, 45 Ala. 691; Griffin *v.* Ryland, 45 Ala. 688; Mosely *v.* Tuthill, 45 Ala. 621, 6 Am. Rep. 710; Martin *v.* Hewitt, 44 Ala. 418), and their judgments null and void (Timms *v.* Grace, 26 Ark. 598; Thompson *v.* Mankin, 26 Ark. 586, 7 Am. Rep. 628). On the other hand it has been held that the state courts of Alabama during the Civil war were legal courts and their judgments valid (McQueen *v.* McQueen, 55 Ala. 433; Hill *v.* Huckabee, 52 Ala. 155; Parks *v.* Coffey, 52 Ala. 32), that the jurisdiction of the civil courts of Louisiana between citizens of the state was not affected (Pepin *v.* Lachenmeyer, 45 N. Y. 27), and that the judgments and decrees of judges of the court of appeals holding over until restoration of the Union were valid and binding (Griffin *v.* Cunningham, 20 Gratt. (Va.) 31. See also Johnson *v.* Atlantic Transit Co., 156 U. S. 618, 15 S. Ct. 520, 39 L. ed. 556; Ketchum *v.* Buckley, 99 U. S. 188, 25 L. ed. 473; Ford *v.* Surget, 97 U. S. 594, 24 L. ed. 1018; Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071; Taylor *v.* Thomas, 22 Wall. (U. S.) 479, 22 L. ed. 789; U. S. *v.* Home Ins. Co., 22 Wall. (U. S.) 99, 22 L. ed. 816).

97. Cullins *v.* Overton, 7 Okla. 470, 54 Pac. 702.

98. Trevino *v.* Fernandez, 13 Tex. 630, where the rule was applied to a decree of a Mexican tribunal as to the ownership of lands in disputed territory made subsequent to the declaration of ownership by Texas, but while such territory was claimed and controlled by Mexico.

Courts acting under rulers de facto of a country for the time being have the jurisdiction of legitimate courts. Bank of North America *v.* McCall, 4 Binn. (Pa.) 371.

A judgment of a foreign tribunal sitting in ceded territory, but the actual possession of which is not surrendered to the United States, the ceding power being *de facto* in possession, is valid as to rights of private persons affected by such judgment. Keene

civil jurisdiction in territory between its acquisition by the United States and the adoption of a state code of laws are valid where such courts exercised unlimited jurisdiction in civil cases and over deceased persons' estates and were the only courts then in existence exercising these functions, and their authority was universally acquiesced in.[99]

3. Collateral Impeachment. The legality of a *de facto* court or judicial officer cannot be questioned collaterally.[1]

IV. Terms and Places of Holding Court.

A. Term of Court — 1. Definition. Terms of a court are the time prescribed for holding it for the administration of judicial duties[2] and not the time the court sits transacting business.[3]

2. Time For Holding. The designation and regulation of the terms for holding court is ordinarily controlled either by legislative acts or by the courts themselves, where such power is conferred upon them.[4] Again the establishment of the time and place of holding the court when controlled by the legislature is a matter of general legislation, respecting which the acts of one session of the gen-

v. McDonough, 8 Pet. (U. S.) 308, 8 L. ed. 955. But see Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 20 S. Ct. 28, 44 L. ed. 78; Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691; Pollard *v.* Kibbe, 14 Pet. (U. S.) 353, 10 L. ed. 490; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137.

99. Ryder *v.* Cohn, 37 Cal. 69.

1. Jenkins *v.* State, 93 Ga. 1, 18 S. E. 992; State *v.* Harris, 47 La. Ann. 386, 17 So. 129; Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289.

That there were not enough inhabitants to constitutionally make a separate court can be the ground of a plea to the jurisdiction to impeach the constitutionality of an act creating a separate court. Coyle *v.* Com., 104 Pa. St. 117.

Direct attack by sovereign power necessary. — A judge *de facto* assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is open to the attack of the sovereign power alone, and the rightful authority of a judge in the full exercise of his judicial functions cannot be questioned by any merely private individual nor by any other except in the form provided by law. The attorney-general representing the sovereignty of the state by a writ of quo warranto might properly raise this constitutional question, but it cannot be raised by any other source or in any other form. Coyle *v.* Com., 104 Pa. St. 117.

2. Bush *v.* Doy, 1 Kan. 86; Horton *v.* Miller, 38 Pa. St. 270; Lipari *v.* State, 19 Tex. App. 431.

Other definitions are: The times fixed by law for the transaction of judicial business. Von Schmidt *v.* Widber, 99 Cal. 511, 512, 34 Pac. 109.

"A definite and fixed period prescribed by law for the administration of judicial duties." Anderson L. Dict. [*quoted* in Walsh *v.* Matchett, 6 Misc. (N. Y.) 114, 117, 26 N. Y. Suppl. 43, dissenting opinion].

"Those times or seasons of the year, which are set apart for the despatch of business in the superior courts of common law." Tidd Pr. 105 [*quoted* in State *v.* McHatton, 10 Mont. 370, 378, 25 Pac. 1046; Horton *v.* Miller, 38 Pa. St. 270, 271].

Appearance term is ordinarily the first term after legal service has been made, but as referred to in Iowa Code, § 2742, as to trials *de novo* in the supreme court, means the term when it first becomes apparent that an issue of fact is to be determined. Vinsant *v.* Vinsant, 47 Iowa 594.

Session of a court has been construed as the time of its actual sitting. Lipari *v.* State, 19 Tex. App. 431.

"Sitting" of a court may mean session for the day (Costigin *v.* Bond, 65 Md. 122, 3 Atl. 285); or the phrase may be used in such a way that it will be regarded as signifying term (Gird *v.* State, 1 Oreg. 308 [Oreg. Act, Dec. 10, 1856]); and the words "before the sitting of the court" have been construed as equivalent to "before the first day of the term" (Anonymous, 5 Mass. 197 [Mass. Act (1785), c. 69, § 8]).

3. Bush *v.* Doy, 1 Kan. 86.

Where it is provided that the term shall commence and terminate on certain days it comprises the whole of the intermediate period. Hatton *v.* Weems, 12 Gill & J. (Md.) 83.

4. *Colorado.*—Wilson *v.* People, 3 Colo. 325.

Idaho.— U. S. *v.* Kuntze, 2 Ida. (Hasb.) 480, 21 Pac. 407.

Illinois.— Petty *v.* People, 118 Ill. 148, 8 N. E. 304.

Louisiana.— State *v.* De Baillon, 51 La. Ann. 788, 25 So. 648.

Massachusetts.— *In re* Sawtell, 6 Pick. 110.

Texas.— Doss *v.* Waggoner, 3 Tex. 515; Wilson *v.* State, 15 Tex. App. 150.

See 13 Cent. Dig. tit. "Courts," § 206.

As to the construction of particular constitutional and statutory provisions as to terms of courts see the following cases:

Alabama.— Johnson *v.* State, 94 Ala. 35, 10 So. 667; *Ex p.* State Bank, 6 Ala. 498.

Arizona.— Campbell *v.* Shivers, 1 Ariz. 161, 25 Pac. 540.

eral assembly cannot be binding on another.[5] And where the terms of a court are once fixed they cannot be changed except in the manner directed.[6] Nor where the authority to regulate the terms is conferred by statute upon the judges can they exceed the authority so conferred.[7] And where the statute provides that the designation of the time shall be done in a certain manner by the judges, they must comply therewith.[8] The power, however, given to judges to fix the time of holding court "until otherwise provided by law" is a continuing power to be exercised whenever proper occasion arises and is not exhausted by user.[9] And although in a general sense a legislature cannot delegate its general powers as to legislation, it may, where the regulation of the terms of a court is conferred upon it, designate one regular term and authorize the judges to name such other terms as the business may require.[10] And a provision of the constitution that all laws relating to courts shall be of general and uniform application does not apply to the time when the several courts shall meet nor to the length of their terms.[11] Again the terms of a court being fixed by law all persons are bound to know and observe the same.[12]

3. FIRST DAY OF TERM. The first day of the term is the day designated for the commencement thereof, and it is immaterial whether the judge attends or not,[13] or that the court is adjourned to another day.[14] And in determining whether the lien of a judgment has priority over that of a mortgage filed on the first day of the term it will be presumed that the term began at the statutory hour in the absence of evidence to the contrary.[15] If the day fixed is a legal holiday the court may be opened on the succeeding day.[16]

4. ORDER FIXING TERM. An order by a judge fixing the term of a court should appear affirmatively in the record.[17] And where certain essentials are prescribed

Arkansas.— Hellems *v.* State, 22 Ark. 207; Jones *v.* Austin, 16 Ark. 336; *Ex p.* Trapnall, 6 Ark. 9, 42 Am. Dec. 676.

Colorado.— Wilson *v.* People, 3 Colo. 325; Marlow *v.* Kuhlenbeck, 2 Colo. 602.

Illinois.— Goodall *v.* People, 123 Ill. 389, 15 N. E. 171; Parks *v.* Miller, 48 Ill. 360.

Indiana.— Augustine *v.* Rigdon, 48 Ind. 255; Church *v.* Stadler, 16 Ind. 463.

Iowa.— Pilkey *v.* Gleason, 1 Iowa 522.

Kansas.— State *v.* Countryman, 57 Kan. 815, 48 Pac. 137.

Louisiana.— Hoyle's Succession, 109 La. 623, 33 So. 625; Borgstede *v.* Clarke, 5 La. Ann. 291.

Mississippi.— Mobile, etc., R. Co. *v.* Mattan, 41 Miss. 692; *In re* Opinion of Ct., 41 Miss. 54; Sagory *v.* Bayless, 13 Sm. & M. 153.

Missouri.— State *v.* Stratton, 136 Mo. 423, 38 S. W. 83.

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

North Carolina.— State *v.* Brown, 127 N. C. 562, 37 S. E. 330.

Ohio.— *Ex p.* Shean, 25 Ohio St. 440.

South Carolina.— Burwell *v.* Chapman, 59 S. C. 581, 38 S. E. 222; Goodlett *v.* Charles, 14 Rich. 46.

South Dakota.— Benedict *v.* Ralya, 1 S. D. 167, 46 N. W. 188.

Texas.— Whitener *v.* Belknap, 89 Tex. 273, 34 S. W. 594; Stebbins *v.* State, 22 Tex. App. 32, 2 S. W. 617.

Washington.— Skagit R., etc., Co. *v.* Cole, 1 Wash. 330, 26 Pac. 535.

See 13 Cent. Dig. tit. "Courts," § 207.

5. Elwell *v.* Tucker, 1 Blackf. (Ind.) 285.

6. State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

7. Flanagan *v.* Borg, 64 Minn. 394, 67 N. W. 216.

8. People *v.* Moneghan, 1 Park. Crim. (N. Y.) 570.

9. Candy *v.* State, 8 Nebr. 482, 1 N. W. 454.

10. Moore *v.* Packwood, 5 Oreg. 325. See also Merchant *v.* North, 10 Ohio St. 251.

11. Karnes *v.* People, 73 Ill. 274.

12. Gauldin *v.* Shehee, 20 Ga. 531.

13. Downey *v.* Smith, 13 Ill. 671; Bush *v.* Doy, 1 Kan. 86.

Where there are several statutes relating to the same subject-matter it is a general principle that their provisions should be so construed, if this can reasonably be done, as to produce consistency and harmony and effectuate their apparent intent, and this general rule applies where several statutes have been passed referring to the commencement of the terms of courts. Wortham *v.* Basket, 99 N. C. 70, 5 S. E. 401. See also Smithson *v.* Dillon, 16 Ind. 169. And see *In re* House Bill No. 218, 12 Colo. 359, 21 Pac. 485; Richie *v.* Peiper, 99 Ky. 194, 35 S. W. 279, 18 Ky. L. Rep. 87.

14. McKellar *v.* Parker, 29 S. C. 237, 7 S. E. 295.

15. Hemminway *v.* Davis, 24 Ohio St. 150.

16. Maskell *v.* Horner, 10 La. Ann. 641.

17. Clelland *v.* People, 4 Colo. 244.

An order, although written and signed at chambers, is substantially an order rendered in open court if spread the same day it is rendered on the minutes. State *v.* West, 45 La. Ann. 14, 12 So. 7.

by statute in connection with the making or publication of the order they should be complied with.[18] Again it has been decided that an order fixing terms cannot be revoked.[19] Judges are in some cases also authorized to alter the terms fixed by law,[20] and where the judge has such power notice that he has ordered a changed term must precede the term, although it need not precede the order.[21]

5. Interval Between Terms. A statutory provision that a certain period should intervene between the terms of a court should be complied with.[22]

6. Change of Terms by Statute — a. Power to Change. In the absence of some provision in the constitution which forbids, the legislature may change the terms of a court.[23]

b. Effect of Change. An act which merely changes the time of holding a certain court does not abolish such court[24] nor effect a discontinuance of business therein pending.[25] And a court which has convened prior to the passage of such an act is not prevented from concluding its session.[26] But where a law has gone into effect which changes the term of a court, and in ignorance thereof the term is held as provided by the former law, all judgments and proceedings are without warrant of law and void.[27]

7. Court Held at Unauthorized Time. All proceedings in a court at a time when the holding of such court is unauthorized by law and its jurisdiction is not exercised within the time prescribed will be void.[28] But although a court may convene before the time designated it has been decided that a judgment rendered

If it is objected that the order of notification to persons interested was made when no term existed by law and required appearance at a time when no term could by law exist, these defects should be shown affirmatively. Overton *v.* Johnson, 17 Mo. 442.

18. People *v.* Nugent, 57 N. Y. App. Div. 542, 67 N. Y. Suppl. 1035, 15 N. Y. Crim. 312; People *v.* Wilcox, 23 How. Pr. (N. Y.) 297.

Substantial compliance may be sufficient. People *v.* Nugent, 57 N. Y. App. Div. 542, 67 N. Y. Suppl. 1035, 15 N. Y. Crim. 312.

A provision that the court shall not change the number of terms for one year does not prevent the court making an order to that effect within a year after the previous order, where the new terms are to commence after the expiration of the year. Frickie *v.* State, 40 Tex. Crim. 626, 51 S. W. 394.

19. State *v.* Bristol, 21 Mont. 578, 55 Pac. 107.

20. Overton *v.* Johnson, 17 Mo. 442; Jackson *v.* Com., 13 Gratt. (Va.) 795.

21. State *v.* Dillard, 35 La. Ann. 1049.

22. Manning *v.* Kohn, 44 Ala. 343.

An admission that the designated period has not elapsed from the date of adjournment of a prior term does not prove non-compliance with a provision that such a period shall intervene between the beginning of terms. State *v.* Brodden, 47 La. Ann. 375, 16 So. 874. And where it is provided that in a district composed of three or more parishes the terms shall commence on days a certain period apart, it is not an irregularity of which defendant can complain that in other parishes than that in which he was indicted the opening days were less than three weeks apart. State *v.* Powell, 45 La. Ann. 694, 12 So. 757; State *v.* Stuart, 45 La. Ann. 659, 12 So. 736.

23. Parker *v.* Sanders, 46 Ark. 229; Reid *v.* Hawkins, 46 Ind. 222; Carson *v.* Walker, 16 Mo. 68; Prescott *v.* Linney, 75 Tex. 615, 12 S. W. 1128; *Ex p.* Murphy, 27 Tex. App. 492, 11 S. W. 487; Goosby *v.* State, 17 Tex. App. 167; Graves *v.* State, 6 Tex. App. 228.

If the constitution confers such power upon certain legislatures no other legislature has authority to so act. Kepley *v.* People, 123 Ill. 367, 13 N. E. 512.

24. Com. *v.* Holbrook, 140 Mass. 440, 5 N. E. 168; Com. *v.* Parker, 140 Mass. 439, 5 N. E. 167.

25. Boswell *v.* Newton, 3 Fed. Cas. No. 1,683*a*, Hempst. 264; Compton *v.* Palmer, 6 Fed. Cas. No. 3,070*a*, Hempst. 282.

Writs are returnable to the substituted term. Freeman *v.* Thompson, 53 Mo. 183.

Where defendant is notified to appear at the next term which is changed to a later month, he should appear without further notice. Peoria M. & F. Ins. Co. *v.* Dickerson, 28 Iowa 274.

26. Shelton *v.* Maybin, 4 S. C. 541; Womack *v.* Womack, 17 Tex. 1.

Where convened before law goes into effect a judgment subsequently rendered is valid. Clare *v.* Clare, 4 Greene (Iowa) 411; Venable *v.* Curd, 2 Head (Tenn.) 582.

27. Robinson *v.* Ferguson, 78 Ill. 538.

28. *Alabama.*— Garlick *v.* Dunn, 42 Ala. 404.

Arkansas.— Brumley *v.* State, 20 Ark. 77.

Illinois.—Galusha *v.* Butterfield, 3 Ill. 227.

Indiana.— Cain *v.* Goda, 84 Ind. 209; McCool *v.* State, 7 Ind. 378.

Maine.— White *v.* Riggs, 27 Me. 114.

Oklahoma.—American F. Ins. Co. *v.* Pappe, 4 Okla. 110, 43 Pac. 1085.

South Carolina.— *Ex p.* De Hay, 3 S. C. 564.

Texas.— Hodges *v.* Ward, 1 Tex. 244; Wil-

or order made on a day subsequent to that fixed for the rightful convening of the court will be valid.[29]

8. Sessions of Court — a. Time For. The sitting or session of a court should be held at a time prescribed or authorized by law,[30] and where it is held at a time and place designated by law the fact that during the session an act is passed which fixes a different time for holding the court does not affect the jurisdiction of the court to continue its session, there being no provision in that regard.[31]

b. Adjournment. The sessions or sittings of a court during the term are as a general rule within the control of the court, and it may adjour n its session from day to day or for a longer period.[32] And an adjournment for a longer period than that specified in a statute which provides that if the judge of the court is absent for more than a designated time his court shall be adjourned until the next regular term is not prohibited by such statute, which is applicable only to those cases where the judge is absent without a regular adjournment.[33] Again it has been decided that after the court has adjourned for the day the judge may cause it to reconvene for the transaction of business.[34]

B. Special or Extraordinary Terms — 1. Appointment. In most states the legislature has power to authorize judges of the courts to hold special terms.[35] And an act to this effect conferring such authority upon judges of certain courts

son *v.* State, 37 Tex. Crim. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373.

Virginia.— Withers *v.* Fuller, 30 Gratt. 547.

West Virginia.— Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448.

See 13 Cent. Dig. tit. "Courts," § 217.

A plaintiff notified to bring suit at first term to which suit may be brought is excused from bringing it at an unauthorized term. Simpson *v.* McDaniel, 42 Ala. 458.

Probate courts.— In New Hampshire it has been held that the constitutional provision that probate courts shall be held at times and places fixed by law does not deprive them of jurisdiction over proceedings at other times. Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

29. Garlick *v.* Dunn, 42 Ala. 404; Shumard *v.* Phillips, 53 Ark. 37, 13 S. W. 510.

30. Norwood *v.* Kenfield, 34 Cal. 329; McAfee *v.* State, 31 Ga. 411.

Sufficient notice of a night session is given by an announcement thereof in open court. Boon *v.* Moline Plow Co., 81 Ill. 293.

A provision that the district courts shall be in session at all times and open at any place where the judge may be is within the powers conferred by the organic acts. U. S. *v.* Gwyn, 4 N. M. 635, 42 Pac. 167.

Under organic acts relating to district courts providing that "the first six days of every term of said courts, or so much thereof as may be necessary, shall be appropriated to the trial of causes arising under said constitution and law," the court is convened for federal and territorial business and is in session for both purposes from the beginning of its term until it finally adjourns. Peters *v.* U. S., 2 Okla. 138, 143, 37 Pac. 1081.

31. Shelton *v.* Maybin, 4 S. C. 541.

32. *Georgia.*—Wharton *v.* Sims, 88 Ga. 617, 15 S. E. 771; Revel *v.* State, 26 Ga. 275; Mealing *v.* Pace, 14 Ga. 596.

Illinois.— Cook *v.* Skelton, 20 Ill. 107, 71 Am. Dec. 250.

Kansas.— Steele *v.* Martin, 6 Kan. 430.

Kentucky.— Richie *v.* Peiper, 99 Ky. 194, 35 S. W. 279, 18 Ky. L. Rep. 87.

New Hampshire.— Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

North Carolina.— State *v.* Martin, 24 N. C. 101.

Pennsylvania.— Briceland *v.* Com., 74 Pa. St. 463.

Texas.— Labadie *v.* Dean, 47 Tex. 90; Robinson *v.* State, 22 Tex. App. 690, 2 S. W. 539.

See 13 Cent. Dig. tit. "Courts," § 250.

Adjournment "from day to day" in code provision refers to judicial days and not to Sunday. State *v.* Howard, 82 N. C. 623.

Adjournment of a court for refreshment does not suspend its functions as a court and its authority over its officers, the parties, counsel, and juries. Barrett *v.* State, 1 Wis. 175.

Judge may adjourn his court more than once in same term. Willis *v.* Elam, 28 La. Ann. 857.

Notice of adjournment need not be posted, as required by statute, where the judge is not present, if adjournment is ordered by the court on the first day of the term. Bressler *v.* People, 117 Ill. 422, 8 N. E. 62.

An order cannot be antedated so as to create a legal session where there was no adjournment to a day certain. Stovall *v.* Emerson, 20 Mo. App. 322.

33. Redwine *v.* State, 15 Ind. 293; Seymour *v.* State, 15 Ind. 288.

34. Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

35. *Iowa.*— Harriman *v.* State, 2 Greene 270.

Oregon.— O'Kelly *v.* Territory, 1 Oreg. 51.

South Carolina.— State *v.* Williams, 2 McCord 301.

Texas.— Hardin *v.* State, 38 Tex. 597.

is not invalid as infringing the constitutional requirement of uniformity in the jurisdiction, powers, proceedings, and practice of courts,[36] nor is it repugnant to a constitutional provision that the legislature shall fix the terms of such courts,[37] nor to such a provision regulating only the regular terms of the courts, and prohibitive of subsequent legislation.[38] This power or authority to call special terms is usually conferred upon the judges of the courts to be exercised whenever the occasion or necessity may require,[39] and in some states the governor has been given such authority.[40] But where a special term is unauthorized all proceedings therein are void,[41] as is likewise the case where the facts essential to authorize the holding of a special term do not exist.[42] Again a judge of a circuit court who is required by law to hold court in a certain county has no authority to appoint a special term to commence in another county at the same time.[43]

2. PRESUMPTION AS TO NOTICE. Where a special term of the court is authorized by statute parties are bound to take notice thereof.[44]

3. ORDER APPOINTING — a. Sufficiency. If certain provisions are imposed by statute as essential to the validity of an order there should be a compliance therewith. This rule applies where the statute requires the order to be entered on the records of the court,[45] or specifies what it shall contain.[46] But where the statute prescribes no set form to be used by a judge in appointing a special term any

Wisconsin.— Messenger *v.* Broom, 1 Pinn. 630.

See 13 Cent. Dig. tit. "Courts," § 221.

As to the construction of particular constitutional or statutory provisions see the following cases:

Alabama.— Stickney *v.* Huggins, 10 Ala. 106.

California.— People *v.* Tyler, 36 Cal. 522.

Colorado.— Klopfer *v.* Keller, 1 Colo. 410.

Iowa.— State *v.* Nash, 7 Iowa 347.

Louisiana.— State *v.* Judge Seventh Judicial Dist., 11 La. Ann. 66.

Minnesota.— Flanagan *v.* Borg, 64 Minn. 394, 67 N. W. 216.

New York.— Matter of Rupp, 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1147 [*affirming* 28 Misc. 703, 59 N. Y. Suppl. 997].

North Carolina.— State *v.* Monroe, 80 N. C. 373.

South Dakota.— Myers *v.* Mitchell, 1 S. D. 249, 46 N. W. 245.

Utah.— Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759.

Wisconsin.—State *v.* Bardon, 103 Wis. 297, 79 N. W. 226.

See 13 Cent. Dig. tit. "Courts," § 220.

36. Branch *v.* Augusta Glass Works, 95 Ga. 573, 23 S. E. 128.

37. Spann *v.* State, 47 Ga. 553; Grinad *v.* State, 34 Ga. 270.

38. State *v.* Claude, 35 La. Ann. 71.

39. *Alabama.*— Knight *v.* State, 116 Ala. 486, 22 So. 902; Wilson *v.* State, 52 Ala. 299; Taylor *v.* State, 48 Ala. 180; Levy *v.* State, 48 Ala. 171.

Arkansas.— Galbreath *v.* Mitchell, 32 Ark. 278.

Illinois.— Burnham *v.* Chicago, 24 Ill. 496.

Kansas.— *In re* Wells, 36 Kan. 341, 13 Pac. 548.

Kentucky.— Com. *v.* Graves, 18 B. Mon. 33.

Louisiana.— State *v.* Scott, 48 La. Ann. 293, 19 So. 141; State *v.* Judge Seventh Judicial Dist., 11 La. Ann. 66.

Mississippi.—Mastronada *v.* State, 60 Miss. 86.

New Mexico.— Territory *v.* Hicks, 6 N. M. 596, 30 Pac. 872.

Oregon.— Kamer *v.* Clatsop County, 6 Oreg. 238.

See 13 Cent. Dig. tit. "Courts," § 219.

A provision requiring the appointment of special terms on or before a certain date is directory merely. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460.

An irregularity in designation by the appellate division justices arising from the fact that such division had no legal existence at the date of making the designation may be cured by a redesignation on the day such court legally convenes. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460.

40. People *v.* Young, 18 N. Y. App. Div. 162, 45 N. Y. Suppl. 772; State *v.* Ketchey, 70 N. C. 621. See also People *v.* Shea, 147 N. Y. 78, 41 N. E. 505; People *v.* McKane, 80 Hun (N. Y.) 322, 30 N. Y. Suppl. 95.

41. Wightman *v.* Karsner, 20 Ala. 446; Stewart *v.* Kemp, 54 Tex. 248.

42. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

43. Archer *v.* Ross, 3 Ill. 303.

44. Sharp *v.* Pike, 5 B. Mon. (Ky.) 155.

45. Toler *v.* Com., 94 Ky. 529, 23 S. W. 347, 15 Ky. L. Rep. 292; Huber *v.* Armstrong, 7 Bush (Ky.) 590.

Order need not be entered on minutes until court convenes.— Grant *v.* State, 62 Ala. 233. So an order is properly entered on the minutes of the special term and need not be entered on the minutes of the term when made. Daughdrill *v.* State, 113 Ala. 7, 21 So. 378.

For sufficiency of recital on records see Grant *v.* State, 62 Ala. 233.

46. Toler *v.* Com., 94 Ky. 529, 23 S. W. 347,

form will be sufficient which clearly indicates the purpose.[47] It need not recite that a special term is necessary, as the order is of itself an affirmation of this fact.[48] Nor is an order nugatory because it recites that the authority therefor is derived from the constitution instead of from a statute.[49] Again where the records have been destroyed, if it appears that the judge had authority to call a special term it will be presumed to have been regularly called.[50]

b. Publication and Notice. Where the statute provides that there shall be a publication and notice of an order for a special term, a compliance with these provisions is essential to the validity of the proceedings at such term.[51] It has, however, been held that a provision that the notice be posted by the clerk at the court-house door for a specified time is directory merely and failure to so post it will not invalidate the term.[52] A similar ruling has been made as to a provision that the clerk shall notify the commonwealth's attorney and sheriff.[53]

c. Revocation. An order for the calling of a special term may be revoked by the court making the same, and a different time appointed for the holding of such term.[54]

4. Jurisdiction and Authority — a. In General. The jurisdiction and authority of a court at special term is ordinarily prescribed by statute, and as a general rule a court at such term has the same jurisdiction and authority as it possesses at a regular term.[55] So it has been decided that suits may be commenced and determined at special term,[56] that a cause may be removed to another county at special term,[57] that a grand jury may be organized at special term,[58] and that an act

15 Ky. L. Rep. 292. See Knight *v.* State, 116 Ala. 486, 22 So. 902.

47. Mattingly *v.* Darwin, 23 Ill. 618.

48. Grant *v.* State, 62 Ala. 233.

49. Brown *v.* State, 9 Nebr. 157, 2 N. W. 378.

50. Spring *v.* Kane, 86 Ill. 580. See also Merchant *v.* North, 10 Ohio St. 251.

The burden of overcoming the presumption of the validity of a special term is upon the party contesting its validity. Black *v.* Bent, 20 Colo. 342, 38 Pac. 387.

51. People *v.* Riley, 16 Cal. 186; Toler *v.* Com., 94 Ky. 529, 23 S. W. 347, 15 Ky. L. Rep. 292; Flanagan *v.* Borg, 64 Minn. 394, 67 N. W. 216; Reams *v.* Kearns, 5 Coldw. (Tenn.) 217. But see Friar *v.* State, 3 How. (Miss.) 422.

The affidavit of the manager of the paper in which the notice is published is sufficient proof of publication, under a statute requiring evidence of publication to be in the form of a certificate of the printer or publisher. Black *v.* Bent, 20 Colo. 342, 38 Pac. 387.

That required notice was given may in some cases be presumed. Harriman *v.* State, 2 Greene (Iowa) 270; Harman *v.* Copenhaver, 89 Va. 836, 17 S. E. 482; Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

52. Blimm *v.* Com., 7 Bush (Ky.) 320; State *v.* Claude, 35 La. Ann. 71; Northwestern Fuel Co. *v.* Kofod, 74 Minn. 448, 77 N. W. 206; State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734.

53. Harman *v.* Copenhaver, 89 Va. 836, 17 S. E. 482.

54. Brown *v.* People, 9 Ill. 439.

55. *Alabama.*— Bales *v.* State, 63 Ala. 30; Wilson *v.* State, 52 Ala. 299; Roach *v.* Gunter, 42 Ala. 239; Arrington *v.* Roach, 42 Ala. 155.

Illinois.— Buck *v.* Beekly, 45 Ill. 100.

Mississippi.— Dees *v.* State, 78 Miss. 250, 28 So. 849.

New York.— *In re* Seventh Ave., 29 How. Pr. 180.

North Dakota.— *In re* Baker, 8 N. D. 277, 78 N. W. 988; Smith *v.* Northern Pac. R. Co., 3 N. D. 17, 53 N. W. 173.

Oregon.—Kamer *v.* Clatsop County, 6 Oreg. 238.

Tennessee.— Hall *v.* State, 3 Lea 552.

Virginia.— Harman *v.* Copenhaver, 89 Va. 836, 17 S. E. 482; Hitchcox *v.* Rawson, 14 Gratt. 526. *Compare* Fowler *v.* Mosher, 85 Va. 421, 7 S. E. 542.

See 13 Cent. Dig. tit. "Courts," § 228.

An order reciting that important business is pending, that it is to the interest of the county that a special term be held for the trial of the same, and ordering the drawing of a grand jury, contemplates the trial of any indictment which may be returned. Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

At special term for disposal of unfinished business of regular term only such causes are triable as could have been tried at the preceding regular term. Hatto *v.* Brooks, 33 Miss. 575; Commercial Bank *v.* Galloway, 6 How. (Miss.) 515; McKinley *v.* Beasley, 5 Sneed (Tenn.) 170.

Where an inquiry of damages is ordered to be executed at the next term, without specifying whether at a regular or special term, damages may be assessed at a special term held before the next regular term. Hall *v.* Mount, 3 Coldw. (Tenn.) 73.

56. Darby *v.* McConnel, 13 Ill. 352; Knight *v.* Bamberger, 19 Ind. 91.

57. Sparkman *v.* Daughtry, 35 N. C. 168.

58. Floyd *v.* State, 55 Ala. 61; Harrington *v.* State, 36 Ala. 236.

authorized to be done by a judge at chambers may be performed at special term.[59]

b. As Affected by Matters Specified in Order. The power of a court at special term is not necessarily limited by the fact that the order therefor specifies a particular business for which the court will convene, but it may transact other business where there is no surprise to parties or their counsel.[60] The trial of criminal cases, however, will be excluded by an order for a special term "for the trial of causes upon the civil docket."[61]

C. Duration of Term — 1. **In General.** A term continues until it is adjourned or until it expires according to the time established by law.[62] Where the judge leaves the court before the expiration of the term he should formally adjourn it and not leave it to expire by its own limitation.[63] Again the whole term of a court is regarded by law as if but one day,[64] and all acts done within it

59. Whallon *v.* Bancroft, 4 Minn. 109.

60. Wharton *v.* Sims, 88 Ga. 617, 15 S. E. 771; People *v.* Nichols, 58 How. Pr. (N. Y.) 200.

61. Brown *v.* Newby, 6 Yerg. (Tenn.) 395.

62. *Georgia.*—King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Illinois.—Jasper *v.* Schlesinger, 22 Ill. App. 637.

Kansas.— Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

Maine.— Parsons *v.* Hathaway, 40 Me. 132.

Maryland.— Townshend *v.* Chew, 31 Md. 247.

New York.— People *v.* Central City Bank, 53 Barb. 412, 35 How. Pr. 428.

North Carolina.— State *v.* Penley, 107 N. C. 808, 12 S. E. 455.

Ohio.— Paris *v.* Coppock, 7 Ohio Cir. Ct. 402; Waters *v.* Hamilton County, 9 Ohio Dec. (Reprint) 5, 10 Cinc. L. Bul. 4.

Pennsylvania.— Com. *v.* Thompson, 18 Pa. Co. Ct. 487.

South Carolina.— De Leon *v.* Barrett, 22 S. C. 412.

Texas.— Labadie *v.* Dean, 47 Tex. 90; Clegg *v.* Galveston County, 1 Tex. App. Civ. Cas. § 58.

See 13 Cent. Dig. tit. "Courts," § 230.

A continuance by consent of all parties of all causes not otherwise disposed of would be a completion of business justifying adjournment. *Ex p.* Croom, 19 Ala. 561.

The court may continue in session to the latest hour which permits the judge to attend the next regular term. Hill *v.* Com., 2 Gratt. (Va.) 594. So the term may be extended so as to include Sunday. Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137. Again a term is not ended by adjournment to a subsequent day of the term. Green *v.* Morse, 57 Nebr. 391, 77 N. W. 925, 73 Am. St. Rep. 518. So the death of the regular judge does not end the term, his successor qualifying on the same day. Franklin *v.* Vandervoort, 50 W. Va. 412, 40 S. E. 374. But an adjournment to the day fixed for the beginning of the next regular term puts an end to the current term. State *v.* Todd, 72 Mo. 288.

A term commencing on Monday to continue for a week does not include the following Sunday. Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387; Harper *v.* State, 43 Tex. 431; Michie *v.* Michie, 17 Gratt. (Va.) 109. See also Richter *v.* Koopman, 131 Ala. 399, 31 So. 32. But see Taylor *v.* Ervin, 119 N. C. 274, 25 S. E. 875. So the word "until," in a statute providing that the term shall continue "until" a specific day, does not include such day. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276. And a rule to declare before the end of the next term means before actual adjournment. Pike *v.* Power, 1 How. Pr. (N. Y.) 103.

63. Foley *v.* Blank, 92 N. C. 476.

The court's convening in another place in the same district does not necessarily end a term of the United States circuit court. East Tennessee Iron, etc., Co. *v.* Wiggin, 68 Fed. 446, 15 C. C. A. 510.

The judge's going home before the jury agreed on a verdict does not dissolve the court, where with the consent of the parties a justice of the appellate court was present to receive the verdict. French *v.* Seamans, 21 Misc. (N. Y.) 722, 48 N. Y. Suppl. 9. *Compare In re* Patzwald, 5 Okla. 789, 50 Pac. 139.

Where a recess merely is taken the term continues, although other courts of the circuit are held in the meantime. King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

64. *Arkansas.*— Cunningham *v.* Ashley, 13 Ark. 653.

Kentucky.— Dye *v.* Knox, 1 Bibb 573.

New York.— Manchester *v.* Herrington, 10 N. Y. 164.

South Carolina.— Saunders *v.* Bobo, 2 Bailey 492.

United States.— The Canary No. 2, 22 Fed. 536.

See 13 Cent. Dig. tit. "Courts," § 230.

Principle applied where a statute requires that before every adjournment of a court the minutes of the proceedings shall be publicly read by the clerk and then signed by the judge, it being held that the statute does not require each day's proceedings to be read from day to day, but that the whole session may be treated as one day and a single ad-

as contemporaneous.[65] This fiction of the law, however, does not prevent the court from inquiring as to the day or the hour if it becomes important.[66]

2. SPECIAL TERMS. Judges who call special terms have the authority to designate the time to which such special terms may be adjourned.[67] And a special term not being limited by law to any specified number of days, proceedings thereat will not be invalid because it continues in session for a longer period than the regular term of such court is limited to.[68] Nor are proceedings at a special term invalidated by a continuance of the term beyond the time fixed for a regular term.[69]

3. ADJOURNMENT — a. Extension of Term by. The terms of a court may in some cases be extended by adjournment.[70] And it has been decided that an adjourned term may remain in session so long as it may be necessary to transact its business,[71] and that new actions may be brought.[72] Again, where adjourned terms are authorized by statute if nothing to the contrary appears, it will be presumed that the court was regularly held and the cause regularly brought to trial.[73] But a court having regular terms and in which all cases are continued from one term to another in regular succession has no power to adjourn to a time beyond the commencement of another regular term of the same court in the same county, where both terms are of the same character.[74]

journing order made at the end of that time. Com. *v.* Howard, 99 Ky. 542, 36 S. W. 556, 18 Ky. L. Rep. 412.

65. Saunders *v.* Bobo, 2 Bailey (S. C.) 492.

66. People *v.* Beatty, 14 Cal. 566.

67. Jernigan *v.* State, 17 Fla. 690; Bass *v.* State, 17 Fla. 685; State *v.* Ballenger, 10 Iowa 368.

A statute providing "if any court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day" applies to special terms as well as to regular. State *v.* Harkins, 100 Mo. 666, 670, 13 S. W. 830.

Where the day named for a special term conflicts with that for a regular term and adjournment of the special term is taken to a succeeding day, an indictment found at such term is legal. State *v.* Clark, 30 Iowa 168.

68. Dees *v.* State, 78 Miss. 250, 28 So. 849.

69. Lewin *v.* Dille, 17 Mo. 64; Samuels *v.* State, 3 Mo. 68; Cheek *v.* Merchants' Nat. Bank, 9 Heisk. (Tenn.) 489; Munzesheimer *v.* Fairbanks, 82 Tex. 351, 18 S. W. 697; Borrego *v.* Cunningham, 164 U. S. 612, 17 S. Ct. 182, 41 L. ed. 572 (construing N. M. Comp. Laws, §§ 543, 552). But see Blake *v.* Harlan, 75 Ala. 205.

Continuance to receive the verdict of the jury does not prejudice the rights of the parties. Greensboro Nat. Bank *v.* Gilmer, 116 N. C. 684, 22 S. E. 2.

70. Cochran *v.* State, 113 Ga. 726, 39 S. E. 332; Cordell *v.* State, 22 Ind. 1; State *v.* Palmer, 40 Kan. 474, 20 Pac. 270.

A term of the United States circuit court may be adjourned to a distant day, although another term intervenes. Florida *v.* Charlotte Harbor Phosphate Co., 70 Fed. 883, 17 C. C. A. 472.

A judgment entered at an hour earlier than that named in the adjournment but on the same day is not invalid. Richardson *v.* Beldam, 18 Ill. App. 527.

Where court adjourns with no time fixed to reconvene it cannot convene until the next regular session. Irwin *v.* Irwin, 2 Okla. 180, 37 Pac. 548. But see State *v.* McBain, 102 Wis. 431, 78 N. W. 602.

A district court may adjourn a term in one county over an intervening term in another county.

Indian Territory.— White *v.* Brown, 1 Indian Terr. 98, 38 S. W. 335.

Iowa.— State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454; *In re* Hunter, 84 Iowa 388, 51 N. W. 20.

Kansas.— State *v.* Rogers, 56 Kan. 362, 43 Pac. 256; Kingsley *v.* Bagby, 2 Kan. App. 23, 41 Pac. 991.

Louisiana.— State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784.

Montana.— Mayne *v.* Creighton, 3 Mont. 108; Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

Nebraska.— Tippy *v.* State, 35 Nebr. 368, 53 N. W. 208. *Compare* Smith *v.* State, 4 Nebr. 277.

Oklahoma.— *In re* Dossett, 2 Okla. 360, 37 Pac. 1066.

Wyoming.— *In re* McDonald, 4 Wyo. 150, 33 Pac. 18; Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

See 13 Cent. Dig. tit. "Courts," § 241.

71. Murray *v.* State, 91 Ga. 136, 17 S. E. 99.

72. Hawley *v.* Parrott, 10 Conn. 486.

Where a term is adjourned for the purpose of completing business and before the time set for the adjourned term papers in a divorce suit are filed on a change of venue and the parties subsequently appear and waive all irregularities and consent to go to trial, the court may try the action. Hyatt *v.* Hyatt, 33 Ind. 309.

73. Shirts *v.* Irons, 28 Ind. 458.

Substantial compliance with statute as to adjournment is sufficient. Washer *v.* Allensville, etc., Turnpike Co., 81 Ind. 78.

74. Jaques *v.* Bridgeport Horse R. Co., 43 Conn. 32, where it is decided that a civil

b. Postponement or Commencement of Term by. Where the power to adjourn a court exists, the power to put off the holding of the court to another time or place is implied, subject to such legal restrictions thereon as may be imposed.[75] And the authority is conferred upon a judge in some states when the completion of a trial would proceed beyond the day fixed for the next term, to adjourn the latter term so that there may be sufficient time to complete such trial.[76] And where a court is so adjourned or postponed the return-day thereof is also adjourned.[77]

c. On Non-Attendance of Judge. In order to prevent the loss of a term it is frequently provided by statute that in case of the absence of the judge on the day appointed for commencing such term all cases therein shall be continued and the court adjourned from day to day for a specified time until the judge shall appear.[78] But where the court is not held until after the expiration of the time designated all proceedings thereat will be void.[79]

d. Order. Requirements are frequently imposed by statute as essential to the validity of an order for adjournment. Thus it may be necessary that the order shall be a "written order,"[80] that there be notice by publication in some newspaper,[81] or that it be entered upon the records.[82] But an order of the court continuing to the next term all cases which are undisposed of does not, it has been determined, remove such cases from the control of the court, but the order may be set aside and the cases tried.[83] The power of final adjournment, however, which is conferred upon a court cannot be delegated by it to its clerk.[84]

term may, however, be adjourned beyond a criminal term and *vice versa*.

The adjourned session fails, if the judge does not appear to hold it on the day to which the adjournment is taken. Streett *v.* Reynolds, 63 Ark. 1, 38 S. W. 150.

75. People *v.* Northrup, 50 Barb. (N. Y.) 147.

76. State *v.* Stevens, 67 Iowa 557, 25 N. W. 777 (Iowa Code (1873), § 169); Cluverius *v.* Com., 81 Va. 787 (Va. Code, c. 154, §§ 26, 36).

77. Wilson *v.* Lott, 5 Fla. 302.

First day of actual session is first day of actual jury term. State *v.* Pate, 40 La. Ann. 748, 5 So. 21.

78. *Alabama.*—Cullum *v.* Casey, 1 Ala. 351.

California.— Thomas *v.* Fogarty, 19 Cal. 644.

Georgia.— Osgood *v.* State, 63 Ga. 791.

Missouri.— Holman *v.* Hogg, 83 Mo. App. 370.

Nevada.— State *v.* Roberts, 8 Nev. 239.

See 13 Cent. Dig. tit "Courts," § 235.

Tornado furnishes unavoidable cause of absence. Allen *v.* State, 74 Ga. 769.

The clerk (Denver Circle R. Co. *v.* Martin, 10 Colo. 428, 15 Pac. 726; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Cogswell *v.* Schley, 50 Ga. 481), **sheriff** (Flagg *v.* Roberts, McGloin (La.) 238. But see Thomas *v.* Fogarty, 19 Cal. 644), or a special judge appointed by the proper officers (Jones *v.* State, 11 Ind. 357) may on the non-appearance of the regular judge on the first day adjourn court.

When the first day is Monday and court is to adjourn for a week a final adjournment on Saturday is premature. Thomas *v.* Fogarty, 19 Cal. 644.

When judgment lien may attach from first day see Wight *v.* Wallbaum, 39 Ill. 554.

79. Holman *v.* Hogg, 83 Mo. App. 370; Garza *v.* State, 12 Tex. App. 261.

80. State *v.* Holmes, 56 Iowa 588, 9 N. W. 894, 41 Am. Rep. 121, holding that a telegram from the judge to the clerk is a written order within Iowa Code (1873), § 169.

81. Clarke *v.* State, 61 Ind. 75, holding that where the statute does not fix the time of notice nor prescribe the number of insertions, publication in a paper of general circulation before the holding of the term is sufficient.

Affidavit of publisher of the newspaper is sufficient proof of publication within Ind. Acts (1877), Reg. Sess. p. 28. Clarke *v.* State, 61 Ind. 75.

Notice by publication is unnecessary as to parties having actual and seasonable notice within N. H. Pub. Stat. c. 207, §§ 3, 4, as amended by Laws (1895), c. 56. State *v.* Moore, 69 N. H. 102, 40 Atl. 702.

That the clerk shall advertise the order is merely directory. Wise *v.* State, 34 Ga. 348.

82. Slaughter *v.* Gregory, 16 Ind. 250. But see Cass *v.* Krimbill, 39 Ind. 357.

Order may be entered nunc pro tunc (Green *v.* White, 18 Ind. 317), and it need not specify the manner in which public notice of such term is to be given (Conrad *v.* Johnson, 20 Ind. 421).

As to sufficiency of record see Shiel *v.* Maffett, 17 Ind. 316; Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687.

83. Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592; Green *v.* Morse, 57 Nebr. 391, 77 N. W. 925, 73 Am. St. Rep. 518.

An order as to the registration of voters made in the interval between the date of adjournment and the time set for court to reconvene is not *coram non judice*. State *v.* Nash, 83 Mo. App. 509.

84. State *v.* McBain, 102 Wis. 431, 78 N. W. 602.

e. Nature of Adjourned Term. A legally adjourned term of court is not, it has generally been determined, a distinct, independent term, but is rather regarded as a continuance or part of the same term.[85]

4. Continuance of Proceedings Beyond Term. Where the time at which a term of court shall terminate is designated by law and no authority is conferred to continue it beyond such time, all proceedings at a continuance thereof beyond that time will be void.[86] But in some states power is conferred upon a court to continue in session beyond the term for the purpose of disposing of unfinished business.[87]

5. Simultaneous and Conflicting Terms. A court cannot be held at a time when no authority therefor is conferred by law, and where the terms of a district or circuit court are fixed by statute and there is but one judge, if a court hold a term in one county during the time fixed by law for the term in another county or part of the same circuit or district its proceedings will not be sustained.[88] But where a judge is required by law to hold court in two counties at the same time it has been decided that he may in his discretion hold court in either county.[89]

That the sheriff may adjourn court on an order given by the judge see State *v.* Reed, 49 La. Ann. 704, 21 So. 732.

85. *Arizona.*— *Compare* Bryan *v.* Pinney, (1888) 17 Pac. 97.

California.— People *v.* Ah Ying, 42 Cal. 18.

Georgia.— Hodnett *v.* Stone, 93 Ga. 645, 20 S. E. 43.

Indiana.— Smith *v.* Smith, 17 Ind. 75.

Kansas.— Sawyer *v.* Bryson, 10 Kan. 199.

Kentucky.— *Compare* McManama *v.* Garnett, 3 Metc. 517.

Massachusetts.— Com. *v.* Justices Norfolk County Ct. Sess., 5 Mass. 435.

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; Higgins *v.* Ransdall, 13 Mo. 205; Fannon *v.* Plummer, 30 Mo. App. 25.

New Hampshire.— Eastman *v.* Concord, 64 N. H. 263, 8 Atl. 822.

Pennsylvania.— *In re* Springbrook Road, 64 Pa. St. 451.

Vermont.— Hoar *v.* Franklin County Jail Delivery Com'rs, 2 Vt. 402.

United States.— Florida *v.* Charlotte Harbor Phosphate Co., 70 Fed. 883, 17 C. C. A. 472; Memorandum, 16 Fed. Cas. No. 9,409, 1 Cranch C. C. 159.

See 13 Cent. Dig. tit. "Courts," § 237.

The "additional term" provided for by the Ohio act of January, 1854, § 5 [52 Ohio Laws, p. 10] is a distinct term. Harris *v.* Gest, 4 Ohio St. 469.

86. Lawson *v.* Pulaski County, 3 Ark. 1; *Ex p.* Lilly, 7 S. C. 372.

An order allowing a fee cannot be made at a term subsequent to final disposition of a case. Hill *v.* Faison, 27 Tex. 428.

Judgment rendered after time set for term to expire is void. Wright *v.* Northwestern Union R. Co., 37 Wis. 391.

87. Napper *v.* Noland, 9 Port. (Ala.) 218; Sutherlin *v.* State, 150 Ind. 154, 49 N. E. 947; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487; Walker *v.* State, 102 Ind. 502, 1 N. E. 856; Dorsch *v.* Rosenthall, 39 Ind. 209; Addington *v.* Wilson, 5 Ind. 137, 61 Am. Dec. 81; Mapstrick *v.* Ramge, 9 Nebr. 390, 2 N. W. 739, 31 Am. Rep. 415; U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267.

The phrase "whenever any criminal case shall be on trial at the end of any term," must be taken literally. Com. *v.* MacLellan, 121 Mass. 31.

The power of the legislature to authorize a continuance is not restricted by express words or by implication by a constitutional provision that a court shall be held "in each county, at least twice in each year, to continue for two weeks." State *v.* Taylor, 76 N. C. 64; State *v.* Adair, 66 N. C. 298.

When no judgment is entered on a verdict during the term at which the verdict is rendered, the cause passes over to the next term for entry of judgment, disposition of a motion for a new trial, and any other action that might be taken in the case. Walker *v.* Moser, 117 Fed. 230, 54 C. C. A. 262. See also Jones *v.* Miller, (Nebr. 1902) 92 N. W. 201.

88. *Arkansas.*— *Ex p.* Williams, 69 Ark. 457, 65 S. W. 711.

Colorado.— Cooper *v.* American Cent. Ins. Co., 3 Colo. 318.

Indiana.— Batten *v.* State, 80 Ind. 394.

Iowa.— Grable *v.* State, 2 Greene 559.

Kansas.— *In re* Millington, 24 Kan. 214.

Nebraska.— Tippy *v.* State, 35 Nebr. 368, 53 N. W. 208.

North Carolina.— See McNeill *v.* McDuffie, 119 N. C. 336, 25 S. E. 871, where it is decided that acts providing for the holding of a superior court at the same time in two counties in the same judicial district are not irreconcilably in conflict, but that the judge after opening court in one county may subsequently hold court in the other county, the term not having been previously adjourned by the sheriff.

Tennessee.— Gregg *v.* Cooke, Peck 82.

Texas.— Wilson *v.* State, 37 Tex. Crim. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373.

See 13 Cent. Dig. tit. "Courts," § 243.

89. Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356; Carland *v.* Custer County, 5 Mont. 579,

Again the holding of different branches of the same court by different judges at the same time may be authorized.[90] And likewise simultaneous terms of different courts may be held in the same county.[91]

6. Lapse or Discontinuance of Term. Where the judge fails to appear on the day fixed by law for the opening of a term, his non-appearance will result in the lapse and loss thereof in the absence of some constitutional or statutory provision preserving the term in such case.[92] It has been decided, however, that after a court is regularly convened the failure of the judge to appear on a distant day to which the court is adjourned does not cause a discontinuance of the term.[93] But although there is a failure to hold a term owing to the absence of the judge or other cause it is still the appearance term as to the suing out and returning of process and filing of declarations,[94] and causes both civil and criminal stand continued by operation of law.[95]

7. Proceedings in Vacation — a. In General. Although there may be no express direction to that effect, it is a general rule that all judicial business should be transacted by a court in term-time. For the transaction of such business in vacation there must be some warrant therefor, either in a constitutional or statutory provision.[96]

6 Pac. 24. But see *Ex p.* Jones, 49 Ark. 110, 4 S. W. 639, where such an act is declared void.

90. Cahill *v.* People, 106 Ill. 621; Harris *v.* Gest, 4 Ohio St. 469 (as to common pleas courts); Cumberland First Nat. Bank *v.* Parsons, 45 W. Va. 688, 32 S. E. 271 (as to circuit court). But see State *v.* Leahy, 1 Wis. 258.

That an adjourned term conflicts with the regular term in the same county does not render proceedings void where a special judge presides at the latter. Smurr *v.* State, 105 Ind. 125, 4 N. E. 445.

If a party acquiesces in setting a case for trial at an adjourned term he cannot object, when the case is called, that such term conflicts with the regular term of the court in another county, where the court has at least color of authority under the law to hold the former. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751.

91. Wadhams *v.* Hotchkiss, 80 Ill. 437; Swails *v.* Coverdill, 21 Ind. 271.

92. *In re* McClasky, 52 Kan. 34, 34 Pac. 459; *In re* Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327; *In re* McClaskey, 2 Okla. 568, 37 Pac. 854.

The appearance of parties does not render proceedings legal which are held on a subsequent day. Cullum *v.* Casey, 1 Ala. 351.

The setting aside a first venire and ordering the drawing of a second does not cause a term to lapse where the court remains in session. State *v.* Vance, 31 La. Ann. 398.

Irregularity from the failure of the clerk to perform his duty as to the daily adjournments provided for by statute upon the non-appearance of the judge does not cause the term to lapse. May *v.* People, 8 Colo. 210, 6 Pac. 816. *Compare* State *v.* Roberts, 8 Nev. 239.

A judge may hold court where he appears on the morning of the fourth day at eleven thirty, where a statute provides that if he does not appear on the first day the sheriff may adjourn court from day to day for three days, and on the morning of the fourth day, in the absence of the judge, he shall adjourn it until the first day of the next term. Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77.

That a statute subsequently passed may validate proceedings where the judge fails to appear on the first day and court is held on a later day see Neal *v.* Shinn, 49 Ark. 227, 4 S. W. 771.

93. Palmer *v.* State, 73 Miss. 780, 20 So. 156; People *v.* Sullivan, 115 N. Y. 185, 21 N. E. 1039; *In re* Dossett, 2 Okla. 369, 37 Pac. 1066; Schofield *v.* Horse Springs Cattle Co., 65 Fed. 433.

94. Downey *v.* Smith, 13 Ill. 671; Thornton *v.* Fitzhugh, 10 Sm. & M. (Miss.) 438.

95. *Ex p.* Driver, 51 Ala. 41; Singleton *v.* Pidgeon, 21 Ind. 118; State *v.* Wells, 54 Kan. 161, 37 Pac. 1005; Thornton *v.* Fitzhugh, 10 Sm. & M. (Miss.) 438.

96. *California.*—Wicks *v.* Ludwig, 9 Cal. 173.

Colorado.— Thomas *v.* Guirand, 6 Colo. 530.

Illinois.— People *v.* Mobley, 2 Ill. 215.

Indiana.— Newman *v.* Hammond, 46 Ind. 119; *Ex p.* Skeen, 41 Ind. 418; Lunger *v.* State, 12 Ind. 483.

Louisiana.— Baltimore, etc., Tel. Co. *v.* Louisiana Western R. Co., 39 La. Ann. 659, 2 So. 67; State *v.* Judge Orleans Parish Sixth Dist. Ct., 21 La. Ann. 733. But see Berfuse's Succession, 34 La. Ann. 599.

Mississippi.— Wingate *v.* Wallis, 5 Sm. & M. 249.

Oklahoma.—American F. Ins. Co. *v.* Pappe, 4 Okla. 110, 43 Pac. 1085.

Texas.— International, etc., R. Co. *v.* Smith, 62 Tex. 185.

Vermont.— Yatter *v.* Miller, 61 Vt. 147, 17 Atl. 850.

Virginia.— Tyson *v.* Glaize, 23 Gratt. 799.

b. Decisions and Judgments. Decisions and judgments may in some cases be rendered in vacation where the cause has been heard and submitted during term-time.[97] But only such judgments can be rendered as are authorized by the constitution or by a statute.[98] And where a court has no jurisdiction to so act it cannot be conferred by agreement of the parties unless it is so provided by law.[99]

D. Places For Holding Terms — 1. In General. The places for holding courts are generally designated by statute which, however, should not conflict with any constitutional provision.[1] And where the place at which a court shall be held is fixed by law the judge has no power to hold such court at any other place.[2] In some cases, however, the power to designate the place for holding court has been conferred upon the judge.[3]

2. At Seat of Government or County-Seat. Ordinarily the supreme or other highest court in a state is held at the seat of government,[4] and such courts as

See 13 Cent. Dig. tit. "Courts," § 265.

Authorized by statute in some cases.— *Ex p.* State, 7 Ind. 347 (preliminary examination in criminal cases); Williams *v.* Judge Eighteenth Judicial Dist. Ct., 45 La. Ann. 1295, 14 So. 57 (expropriation suits may be tried); Kelly *v.* State, 79 Miss. 168, 30 So. 49 (quo warranto to try right to office).

Where case is continued nisi court has jurisdiction during vacation. Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100.

Where by agreement of the parties a case is heard and decided before one judge of the circuit court of the United States, it will be considered as if heard and decided before and by the court. Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

"Vacation" at common law means "all the time between the end of one term and the beginning of another," but it has been construed as covering a recess caused by an adjournment over of court for several days or weeks (Conkling *v.* Ridgely, 112 Ill. 36, 40, 1 N. E. 261, 54 Am. Rep. 204), and also where the court is kept open for the purpose of hearing matters *ex parte*, where no order of final adjournment is made, although the court ceases to meet in the court-room from day to day and no parties can be compelled to appear (Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 2 Ind. 670). Again when the court finally adjourns it is "vacation." *In re* Murphy, 73 Vt. 115, 50 Atl. 817.

97. *Arizona.*— Woffenden *v.* Charouleau, (1886) 11 Pac. 61.

Idaho.—Schenk *v.* Birdseye, 2 Ida. (Hasb.) 130, 6 Pac. 128.

New Hampshire.— State *v.* Rye, 35 N. H. 368.

Vermont.— Yatter *v.* Miller, 61 Vt. 147, 17 Atl. 850.

Virginia.— Tyson *v.* Glaize, 23 Gratt. 799.

United States.—Harrison *v.* German-American Ins. Co., 90 Fed. 758.

See 13 Cent. Dig. tit. "Courts," § 268.

98. Smith *v.* Chichester, 1 Cal. 409; Tyson *v.* Glaize, 23 Gratt. (Va.) 799.

99. Francis *v.* Wells, 4 Colo. 274. See also *supra*, II, C. 5.

1. *Arkansas.*— *Ex p.* Jones, 27 Ark. 349.

Colorado.— Beery *v.* U. S., 2 Colo. 186.

Georgia.— Bone *v.* State, 86 Ga. 108, 12 S. E. 205; Johnson *v.* Heitman, 67 Ga. 482.

Illinois.— Waller *v.* Tully, 75 Ill. 576; Rutan *v.* Lagonda Nat. Bank, 72 Ill. App. 35.

Indiana.— Shull *v.* Kennon, 12 Ind. 34.

Missouri.— Rose *v.* Kansas City, etc., R. Co., 128 Mo. 135, 30 S. W. 518.

New Hampshire.— Willie *v.* Parkhurst, 31 N. H. 415.

Virginia.— Com. *v.* Scott, 10 Gratt. 749.

See 13 Cent. Dig. tit. "Courts," § 255.

The transfer of a cause from one place of session to another may be authorized by statute. Lillienfeld *v.* Com., 92 Va. 818, 23 S. E. 882.

A term of the district court cannot be held in a district which is not an organized county. State *v.* Osborn, 36 Kan. 530, 13 Pac. 850.

The failure of the records to state the place to which a case is adjourned may not cause loss of jurisdiction. State *v.* Wright, 80 Wis. 648, 50 N. W. 894.

The argument of a motion for a new trial at a place outside of the county in which the case was tried, but in the same judicial district, will not invalidate an order for a new trial duly made and entered in the county in which the action was tried. Mathias *v.* Cook, 57 Kan. 16, 45 Pac. 56.

2. White *v.* Riggs, 27 Me. 114; Hershoff *v.* Beverly, 43 N. J. L. 139; Gould *v.* Bennett, 59 N. Y. 124; Eaton, etc., R. Co. *v.* Varnum, 10 Ohio St. 622.

Proceedings are void if held at an unauthorized place. Williams *v.* Reutzel, 60 Ark. 155, 29 S. W. 374. But see State *v.* Peyton, 32 Mo. App. 522.

3. Campbell *v.* Shivers, 1 Ariz. 161, 25 Pac. 540; U. S. *v.* Kuntze, 2 Ida. (Hasb.) 480, 21 Pac. 407.

4. State *v.* Tally, 102 Ala. 25, 15 So. 722, where it is held, however, that it may adjourn to a different place in proceedings to impeach a circuit judge where such action subserves the convenience of witnesses, and in pursuance of an agreement between the state and respondent to take evidence and hear the arguments at a place other than the seat of government.

county, district, and circuit courts are generally held at the county-seat,[5] although there be no express statutory provision in reference thereto.[6] Again if a statute provides that a court shall be held at the county-seat it cannot be held elsewhere.[7]

3. Temporary Quarters. It is not in all cases essential to the validity of a court's proceedings that the court be held in the room where its sessions are usually held.[8] And in case of the destruction of the court-house by fire temporary quarters may be obtained and used,[9] as may also be done where the county-seat has been changed and there is no court-house at the new place.[10]

4. Court-Houses. A United States court which derives its right to the use and occupancy of rooms in a federal building directly from an act of congress providing for "permanent accommodations" cannot be dispossessed by the treasury department of the United States from the occupancy of such rooms as have been permanently appropriated for its use.[11] And where the control of the location of court-houses is vested in the county commissioners a circuit court of a state has no power to change the location of a court-house.[12]

5. Expenditures of Court. In the absence of some statutory provision in reference thereto it is for the court alone to determine as to what expenditures are necessary to carry on the business of the court.[13] But if there is a statute in reference thereto, the power of the court is controlled thereby.[14]

5. Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; White County *v.* Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

Such courts may be held at other than county-seat where authorized by statute. Woods *v.* McCay, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97; Whallon *v.* Gridley, 51 Mich. 503, 16 N. W. 876. But see Coulter *v.* Routt County Com'rs, 9 Colo. 258, 11 Pac. 199.

That a place is county site *de facto* is sufficient. Watts *v.* State, 22 Tex. App. 572, 3 S. W. 769.

6. White County *v.* Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

7. Whitener *v.* Belknap, 89 Tex. 273, 34 S. W. 594.

It is not necessary to hold court in the court-house, although it must be held at the county-seat. Jordan *v.* People, 19 Colo. 417, 36 Pac. 218.

Incursion of enemies will excuse compliance. Sevier *v.* Teal, 16 Tex. 371.

8. Smith *v.* Jones, 23 La. Ann. 43.

The regular judge may hold court in another room in the court-house where another judge has been substituted for the trial of a particular case which is in progress in the regular court-room. Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335. See also Reed *v.* State, 147 Ind. 41, 46 N. E. 135. And a judge may be authorized by statute to hold court at a place other than the court-house when it cannot be conveniently held at the latter place. Cody *v.* Cody, 98 Wis. 445, 74 N. W. 217. Attending and taking part in a trial is a waiver of any objection to the adjournment of a court from a court-room to another building. Mohon *v.* Harkreader, 18 Kan. 383. So the court may adjourn to the house of a judge who is ill. Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013. And an adjournment to the house of a sick juror has been held proper. Litchfield Bank *v.* Church, 29 Conn. 137. But the court cannot adjourn to the home of a sick witness and proceed with the trial there. Funk *v.* Carroll County, 96 Iowa 158, 64 N. W. 768. See also Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563, as to an adjournment to the home of a sick litigant.

9. Lee *v.* State, 56 Ark. 4, 19 S. W. 16; Wheeler *v.* Wheeler, 76 Tex. 489, 13 S. W. 305; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198.

10. Hudspeth *v.* State, 55 Ark. 323, 18 S. W. 183.

Where a county-seat is changed provided a convenient place for holding such court shall be furnished at another place, until such accommodations have been furnished court will be held at the former county-seat. Edwards *v.* Ide, 49 Conn. 507.

11. *In re* Lyman, 55 Fed. 29.

12. Benton County *v.* Thompson, 7 Ind. 265.

A county board which has care of a court-house as real estate simply, the court-house, as such, being in the custody of the sheriff and subject to the court's direction, has no power to dictate to the courts what court-rooms they shall severally occupy. Dahnke *v.* People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197 [*affirming* 57 Ill. App. 619]. *Compare* Hardin *v.* Sangamon County, 71 Ill. App. 103, as to the authority and the duty of a sheriff.

Use of elevators.—Where the county commissioners refuse to permit the use of an elevator in a court-house, which is the principal means of reaching the circuit court rooms, the court may on refusal of the one in charge of the elevator to run it direct the sheriff to take charge of and run the same. Vigo County *v.* Stout, 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398.

13. State *v.* Smith, 5 Mo. App. 427.

14. Nienaber *v.* Tarvin, 104 Ky. 149, 46

V. JUDGES AND OFFICERS.

A. Designation, Assignment, and Attendance of Judges — 1. In General. The designation, assignment, and attendance of judges is generally controlled by statute either by direct provisions or by a delegation of power to the courts themselves.[15]

2. Holding Court in Another Circuit. In those states where circuit courts are in existence it has been held that a judge of one circuit may preside in and hold a court for a term or for a single trial where the presiding judge of the latter circuit is absent.[16]

3. Power to Enforce Attendance. The supreme court of a state has the power to enforce the attendance of its members, such power being indispensable to its very existence.[17]

B. Attendance of Officers. It is frequently provided by statute that the sheriff of a county shall attend certain courts. Where this provision is construed as a directory one his presence is not necessary to the organization or continuance of the court.[18] And where such attendance is required the presence of a duly qualified deputy sheriff is in contemplation of law attendance by the sheriff.[19]

VI. RULES OF COURT.

A. Regulation of Procedure — 1. Constitutional and Statutory Provisions. It is within the power of the legislature, subject to such provisions as may be incorporated in the constitution, to establish the procedure by which courts shall exercise their jurisdiction.[20]

S. W. 513, 20 Ky. L. Rep. 451; State *v.* Wear, 140 Mo. 487, 41 S. W. 967.

Ice has been held not one of the things "necessary for the proper furnishing of the offices of the register of wills and of orphans' court." Commercial Ice Co. *v.* Philadelphia, 6 Pa. Super. Ct. 299, 42 Wkly. Notes Cas. (Pa.) 255.

15. Brunswick First Nat. Bank *v.* Lime Rock F. & M. Ins. Co., 56 Me. 424, holding that the presence of the presiding judge is essential to constitute "a session of the supreme judicial court," under Me. Rev. Stat. c. 82, § 1.

A limitation by the assignment of the powers and duties of the justice assigned by the general term has been held not to invalidate the assignment even if improper. McLane *v.* Cropper, 6 App. Cas. (D. C.) 422.

Statutes must not violate the constitutional provisions in reference to courts. Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; Hall *v.* Hamilton, 74 Ill. 437; Beauchamp *v.* State, 6 Blackf. (Ind.) 299.

As to qualification, appointment, and tenure of judges see Judges.

16. Grant *v.* State, 62 Ala. 233; Flemming *v.* Lyon, 3 McCord (S. C.) 183.

A statute to this effect is not unconstitutional. Bradley *v.* Barbour, 74 Ill. 475; Hall *v.* Hamilton, 74 Ill. 437; Beauchamp *v.* State, 6 Blackf. (Ind.) 299.

As to power of military governor of a state to order the holding of courts by judges of other courts see Lanfear *v.* Mestier, 18 La. Ann. 497, 89 Am. Dec. 658.

In New York a justice of the supreme court may accept an assignment outside of his own department, although it has been declared that he is not obliged to accept. People *v.* Herrmann, 149 N. Y. 190, 43 N. E. 546.

17. Opinion of Chief Justice, 8 Fla. 496.

18. McGuffie *v.* State, 17 Ga. 497.

A provision that a constable attend the sittings of a district court refers to attendance on the court when sitting for the performance of its judicial functions. Lewis *v.* Hoboken, 42 N. J. L. 377.

19. McGuffie *v.* State, 17 Ga. 497.

20. *California.*— *Ex p.* Harker, 49 Cal. 465.

Illinois.— O'Connor *v.* Leddy, 64 Ill. 299.

New York.— *In re* Bowery Extension, 19 Barb. 588.

North Carolina.— McAdoo *v.* Benbow, 63 N. C. 461.

Pennsylvania.— Com. *v.* Dieffenbach, 3 Grant 368.

Texas.— Texas Land Co. *v.* Williams, 48 Tex. 602.

See 13 Cent. Dig. tit. "Courts," § 275.

A constitutional provision for uniformity of practice and proceedings in courts operates to abrogate all special laws in relation to practice in force at the time of the adoption of the constitution. O'Connor *v.* Leddy, 64 Ill. 299.

Courts of equity. — A statute prescribing regulations for the practice of courts has been held not to embrace courts of equity without express words to that effect or plain implication. Sandridge *v.* Spurgen, 37 N. C. 269.

Where a positive rule of practice is given by statute, courts have no discretion in the matter. Stevens *v.* Ross, 1 Cal. 94; Piggott *v.* Ramey, 2 Ill. 145.

2. Power of Court to Make Rules — a. In General. Courts are in some cases authorized by statute to make their own rules for the regulation of their practice and the conduct of their business, and in the absence of any statutory provision or regulation in reference thereto a court has the inherent power to make such rules,[21] subject, however, to this limitation, that a court can make no rule which is unreasonable, which deprives a party of his legal rights, or which is in contravention of a statute or of the law of the land.[22]

b. As Affecting Practice in Another Court. In the absence of some authority either under the constitution or a statute, an appellate court has no power to make rules which are binding on an inferior court as to practice and proceedings in the latter.[23] Nor similarly are the rules of a court in one county binding on the corresponding court in another county.[24]

B. Matters Subject to Regulation — 1. In General. Only such matters as are not regulated by general or special laws in reference to practice and procedure may be regulated by a rule of court,[25] and there must be a compliance

21. *Alabama.*—*Ex p.* Birmingham, 134 Ala. 609, 33 So. 13, 59 L. R. A. 572.

Connecticut.— Sanford *v.* Sanford, 28 Conn. 6.

District of Columbia.— Reynolds *v.* Smith, 18 D. C. 27, 17 Wash. L. Rep. 117; National Metropolitan Bank *v.* Hitz, MacArthur & M. 198.

Illinois.— Prindeville *v.* People, 42 Ill. 217; Holloway *v.* Freeman, 22 Ill. 197; Hopper *v.* Mather, 104 Ill. App. 309; Beveridge *v.* Hewitt, 8 Ill. App. 467. See also Hinckley *v.* Dean, 104 Ill. 630.

Indiana.— State *v.* Van Cleave, 157 Ind. 608, 62 N. E. 446; Fletcher *v.* Holmes, 25 Ind. 458.

Missouri.— Brooks *v.* Boswell, 34 Mo. 474; Nutter *v.* Houston, 42 Mo. App. 363; Maloney *v.* Hunt, 29 Mo. App. 379.

Nebraska.— Hunter *v.* Union L. Ins. Co., 58 Nebr. 198, 78 N. W. 516.

New York.— Francis *v.* Watkins, 171 N. Y. 682, 64 N. E. 1120; Vanderheyden *v.* Reid, Hopk. Ch. 408.

Oregon.— Coyote, etc., Co. *v.* Ruble, 9 Oreg. 121; Carney *v.* Barrett, 4 Oreg. 171.

Pennsylvania.—*In re* McCandless Tp. Road, 110 Pa. St. 605, 1 Atl. 594; Gannon *v.* Fritz, 79 Pa. St. 303; Snyder *v.* Bauchman, 8 Serg. & R. 336; Dubois *v.* Turner, 4 Yeates 361.

South Dakota.— Smith *v.* Hawley, 11 S. D. 399, 78 N. W. 355.

Tennessee.— Boring *v.* Griffith, 1 Heisk. 456.

Vermont.— Jones *v.* Spear, 21 Vt. 426.

United States.— Lawrence *v.* Bowman, 15 Fed. Cas. No. 8,134, 1 McAll. 419.

See 13 Cent. Dig. tit. "Courts," § 274.

Rules altering the practice previously settled by decision may be made. Havemeyer *v.* Ingersoll, 12 Abb. Pr. N. S. (N. Y.) 301. *Compare* Bachman *v.* Sulzbacher, 5 S. C. 58.

A commission to hear and determine claims has been held to have power to make rules. Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796.

22. *California.*— People *v.* McClellan, 31 Cal. 101; Stevens *v.* Ross, 1 Cal. 94.

Illinois.— Fisher *v.* National Bank of Commerce, 73 Ill. 34; Prindeville *v.* People, 42 Ill. 217; Beveridge *v.* Hewitt, 8 Ill. App. 467; Crotty *v.* Wyatt, 3 Ill. App. 388.

Kentucky.— Kennedy *v.* Cunningham, 2 Metc. 538.

Louisiana.— State *v.* Judges Fifth Cir., 37 La. Ann. 596; State *v.* Posey, 17 La. Ann. 252, 87 Am. Dec. 525.

Maryland.— Main *v.* Lynch, 54 Md. 658.

Missouri.— Purcell *v.* Hannibal, etc., R. Co., 50 Mo. 504; Nutter *v.* Houston, 42 Mo. App. 363; Maloney *v.* Hunt, 29 Mo. App. 379.

New Jersey.— Hinchly *v.* Machine, 15 N. J. L. 476.

New York.— Gormerly *v.* McGlynn, 84 N. Y. 284.

Oregon.— Coyote, etc., Co. *v.* Ruble, 9 Oreg. 121; Carney *v.* Barrett, 4 Oreg. 171.

Pennsylvania.— *In re* McCandless Tp. Road, 110 Pa. St. 605, 1 Atl. 594; Gannon *v.* Fritz, 79 Pa. St. 303; Barry *v.* Randolph, 3 Binn. 277; Dubois *v.* Turner, 4 Yeates 361.

Virginia.— Suckley *v.* Rotchford, 12 Gratt. 60, 65 Am. Dec. 240.

United States.— Saylor *v.* Taylor, 77 Fed. 476, 23 C. C. A. 343.

See 13 Cent. Dig. tit. "Courts," § 276.

The legality of a rule of court cannot be questioned by proceedings brought in the name of a private citizen. Holcomb *v.* Reporter-Journal Pub. Co., (Pa. 1886) 3 Atl. 243.

Where the discretion of the court is unlimited at common law in certain matters judges cannot make a rule restricting such discretion. De Lorme *v.* Pease, 19 Ga. 220.

A court on an appeal from a surrogate is not restricted as to the method of its procedure by a statute providing that the court in such case shall proceed as the court of probate might have proceeded. Vanderheyden *v.* Reid, Hopk. (N. Y.) 408.

23. Smith *v.* Valentine, 19 Minn. 452; *Ex p.* Larkin, 11 Nev. 90. See also State *v.* Fenly, 18 Mo. 445; Trotter *v.* Heckscher, 41 N. J. Eq. 478, 4 Atl. 784.

24. Clayton's Estate, 1 Chest. Co. Rep. (Pa.) 21.

25. Palmer *v.* Phenix Ins. Co., 22 Hun (N. Y.) 224; Stedman *v.* Poterie, 139 Pa. St. 100, 103, 21 Atl. 219, 27 Wkly. Notes Cas. (Pa.) 270.

Affidavit of defense may be required independent of any special legislation on the subject. Hogg *v.* Charlton, 25 Pa. St. 200.

with such rules where they are lawfully prescribed.[26] These general principles have been applied in construing rules of court as to the time of trial,[27] calendars,[28] procedure and practice in general,[29] a motion to require security for costs,[30] time of application for change of venue,[31] presenting or filing complaints, pleadings, and other papers,[32] process,[33] defaults,[34] trial by jury,[35] admissibility and reception of evidence,[36] exceptions to auditor's report,[37] time for presenting special instructions and interrogatories to the jury,[38] entry of judgment,[39] applications for a rehearing,[40] appeals,[41] submission of civil causes on abstracts of record,[42] and fees and costs.[43]

A rule authorizing summary trial of actions defended for delay is void where inconsistent with the general law. Angel *v.* Plume, etc., Mfg. Co., 73 Ill. 412; Fisher *v.* National Bank of Commerce, 73 Ill. 34.

26. Jones *v.* Menefee, 28 Kan. 436 (holding that district courts may prescribe by rule that cases shall be noticed for settlement within a certain time); Maberry *v.* Morse, 43 Me. 176 (holding that there must be compliance with the rule that all objections should be in writing); Peck's Appeal, 11 Wkly. Notes Cas. (Pa.) 31 (holding that a court may by rule require that exceptions to an auditor's account be accompanied by affidavit that they were not filed for purposes of delay).

27. Angel *v.* Plume, etc., Mfg. Co., 73 Ill. 412.

A rule that on affidavit that a defense is for delay only plaintiff may on giving five days' notice bring the cause to trial has been held within the power of the court. Wallbaum *v.* Haskin, 49 Ill. 313. But a rule allowing cases, where there is no defense, to be taken out of their docket order is unconstitutional. Sea *v.* Glover, 1 Ill. App. 335.

28. Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

29. Gibbes *v.* Mitchell, 2 Bay (S. C.) 467; Jones *v.* Spear, 21 Vt. 426.

Where parties desire the court to state in writing its findings of fact separately from its conclusions of law, the court may require by rule that the request shall be made at the commencement of the trial. Schuler *v.* Collins, 63 Kan. 372, 65 Pac. 662.

30. Pancoast *v.* Travelers Ins. Co., 79 Ind. 172.

31. Hoke *v.* Applegate, 92 Ind. 570; Jones *v.* Rittenhouse, 87 Ind. 348; Thompson *v.* Pershing, 86 Ind. 303; Truitt *v.* Truitt, 38 Ind. 16; Vail *v.* McKernan, 21 Ind. 421; Anglemyer *v.* Blackburn, 16 Ind. App. 352, 45 N. E. 483.

32. *Minnesota.*— Fagebank *v.* Fagebank, 9 Minn. 72.

New Hampshire.— Carr *v.* Adams, 70 N. H. 622, 45 Atl. 1084.

Pennsylvania.— *In re* McCandless Tp. Road, 110 Pa. St. 605, 1 Atl. 524; Lehman *v.* Howley, 95 Pa. St. 295; *In re* Little Britain Road, 27 Pa. St. 69.

Texas.— New York Fidelity, etc., Co. *v.* Carter, 23 Tex. Civ. App. 359, 57 S. W. 315.

Washington.— Washington Bank *v.* Horn, 24 Wash. 299, 64 Pac. 534.

See 13 Cent. Dig. tit. "Courts," § 287.

33. The Planet Venus, 113 Fed. 387.

Alias attachment writ may be allowed by rule, such writ not being prohibited by statute. Van Benschoten *v.* Fales, 126 Mich. 176, 85 N. W. 476.

34. Hurst *v.* Hawkins, 40 Mich. 575; Wyandotte Rolling Mills Co. *v.* Robinson, 34 Mich. 428; Howard *v.* Tomlinson, 27 Mich. 168.

35. Gambrill *v.* Parker, 31 Md. 1.

Court may deny defendant a trial by jury where he refuses to furnish an affidavit of his own belief that the claim is disputable. Jones *v.* Spear, 21 Vt. 426.

Where trial by jury, unless expressly waived, is provided for by statute, a court cannot make a rule that a jury shall be considered as waived, unless demanded at a certain term. Ten Eyck *v.* Farlee, 16 N. J. L. 348.

36. Thus rules have been sustained in reference to the admission of office copies of deeds (Sellars *v.* Carpenter, 27 Me. 497), which provide that the whole testimony on both sides shall be offered before any question of law is raised (Gist *v.* Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426), which provide that parties shall be confined on the trial of an action to the grounds of defense stated in the specification filed by them with the clerk (Fox *v.* Conway F. Ins. Co., 53 Me. 107), and which provide that a defendant deny by affidavit the execution of an instrument on which suit is brought (Odenheimer *v.* Stokes, 5 Watts & S. (Pa.) 175). But a court cannot enforce a rule which has the effect of admitting illegal evidence (Kennedy *v.* Meredith, 3 Bibb (Ky.) 465), nor can it control the rights of parties in matters of evidence admissible by general principles of law (Patterson *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108).

Appointment of examiners by court of quarter sessions in Pennsylvania to take testimony in contested election cases has been held proper. *In re* Election Cases, 65 Pa. St. 20.

37. *In re* Mylin, 7 Watts (Pa.) 64.

38. Ollam *v.* Shaw, 27 Ind. 388; Bell *v.* North, 4 Litt. (Ky.) 133.

39. Harres *v.* Com., 35 Pa. St. 416.

40. Brooks *v.* Dolard, McGloin (La.) 279; Burch *v.* Newberry, 3 How. Pr. (N. Y.) 271, 1 Code Rep. (N. Y.) 41.

41. Pinders *v.* Yager, 29 Iowa 468; Ismond *v.* Scougale, 119 Mich. 501, 78 N. W. 546; Sayer *v.* Kirchhof, 3 Misc. (N. Y.) 245, 22 N. Y. Suppl. 773; Frost *v.* Roatch, 6 Whart. (Pa.) 359; Kuhn *v.* Kisterhock, 6 Whart. (Pa.) 166.

42. Smith *v.* Guckenheimer, 42 Fla. 1, 27 So. 900.

43. Meffert *v.* Dubuque, etc., R. Co., 34

2. Jurisdiction. The jurisdiction of a court as conferred by the constitution or a statute cannot be enlarged or diminished by a rule of court.[44]

C. Operation and Force — 1. In General. A rule of court cannot operate so as to render valid anything which is void in law,[45] nor can it supersede a statute.[46] But where a court is authorized to establish its own rules, such rules, when not repugnant to or in conflict with the organic laws, have all the force of law,[47] and likewise as to an inferior court whose rules are prescribed by an appellate court.[48]

2. Construction of Rules. A reasonable interpretation should be given to the rules of a court so as to effectuate the purposes for which they were adopted.[49] And while a court may have authority to make its own rules it is not in all cases the final and conclusive judge of the construction and legal effect thereof.[50] An appellate court, however, will generally adopt the construction which an inferior court has placed on its rules of practice,[51] unless it clearly appears that there has been manifest and material error in their construction and application.[52]

3. Time of Taking Effect. Rules of court should only operate prospectively;[53]

Iowa 430; McGreevy *v.* Kulp, 126 Pa. St. 97, 17 Atl. 541; Salt Lake City *v.* Redwine, 6 Utah 335, 23 Pac. 756.

A court has no power to adopt a rule allowing a fee to complainant's solicitor where a decree or order of sale is passed. McCullough *v.* Pierce, 55 Md. 540.

A board of justices of the municipal court in New York city have no power to create and, exact fees. Matter of Hale, 32 Misc. (N. Y.) 104, 65 N. Y. Suppl. 449.

44. Rozier *v.* Williams, 92 Ill. 187; Brown *v.* Snell, 46 Me. 490; The St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; The Brig Hiram, 23 Ct. Cl. 431.

45. Pickett *v.* Pickett, 1 How. (Miss.) 267.

46. Cates *v.* Mack, 6 Colo. 401.

47. *District of Columbia.*— District of Columbia *v.* Roth, 18 App. Cas. 547.

Illinois.— Gage *v.* Eddy, 166 Ill. 102, 47 N. E. 200; Kluesmith *v.* Van Bramer, 104 Ill. App. 384; Hopper *v.* Mather, 104 Ill. App. 309.

Iowa.— David *v.* Ætna Ins. Co., 9 Iowa 45.

Louisiana.— Walker *v.* Ducros, 18 La. Ann. 703.

Maine.— Maberry *v.* Morse, 43 Me. 176.

Maryland.— Dunbar *v.* Conway, 11 Gill & J. 92.

Massachusetts.— Pratt *v.* Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97.

Nevada.— Lightle *v.* Ivancovich, 10 Nev. 41.

New Jersey.— Ogden *v.* Robertson, 15 N. J. L. 124.

North Carolina.— State *v.* Edwards, 110 N. C. 511, 14 S. E. 741.

Ohio.— Wood *v.* Ward, 1 Ohio Dec. (Reprint) 589, 10 West. L. J. 505.

Pennsylvania.— Strouse *v.* Miller, 3 Dauph. Co. Rep. 90.

Wyoming.— Johns *v.* Adams, 2 Wyo. 194.

United States.— Rio Grande Irr., etc., Co. *v.* Gildersleeve, 174 U. S. 603, 19 S. Ct. 761, 43 L. ed. 1103.

See 13 Cent. Dig. tit. "Courts," § 294.

It is not negligence for parties or their attorneys to assume that the rules of a court regulating practice will be observed and enforced. Consolidated Rapid Transit, etc., R. Co. *v.* O'Neill, 25 Ill. App. 313.

Where by a long-established usage returns to writs of error are made without the signature of the judge, which is also not required by any statute, a court of appeals will not in view thereof hold a return defective regardless of whether such signature is required. State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

48. Chester Traction Co *v.* Philadelphia, etc., R. Co., 180 Pa. St. 432, 36 Atl. 916, 40 Wkly. Notes Cas. (Pa.) 49.

49. Ferguson *v.* Kays, 21 N. J. L. 431.

Construction of particular rules.— An adjourned term is not included in a rule of court which requires that appearance shall be entered at the term next succeeding the term at which the case is entered. Larman *v.* Tisdale, 11 How. (U. S.) 586, 13 L. ed. 823. And issues out of chancery are not subject to a rule which requires that a report of the evidence be filed before moving for judgment on a special verdict. Purcell *v.* McKune, 14 Cal. 230. Again where a rule of court provides that a defendant in default for want of a plea shall if required by plaintiff show that he has a meritorious defense, plead issuably, and proceed to trial, a defendant who comes within the application of this rule cannot plead the statute of limitations. Wood *v.* Ward, 1 Ohio Dec. (Reprint) 589, 10 West. L. J. 505.

50. Rathbone *v.* Rathbone, 4 Pick. (Mass.) 89. But see Hunter *v.* Union L. Ins. Co., 58 Nebr. 198, 78 N. W. 516.

51. Simmons *v.* Morrison, 13 App. Cas. (D. C.) 161; Mix *v.* Chandler, 44 Ill. 174.

52. Bair *v.* Hubartt, 139 Pa. St. 96, 21 Atl. 210, 27 Wkly. Notes Cas. (Pa.) 272; Morrison *v.* Nevin, 130 Pa. St. 344, 18 Atl. 636.

53. Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649; Owens *v.* Ranstead, 22 Ill. 161; Smith *v.* Lee, 10 Nev. 208; Reist *v.* Heilbrenner, 11 Serg. & R. (Pa.) 131.

An amendment of a rule as to the record does not apply to a case tried before such amendment was made. Rawlings *v.* Neal, 122 N. C. 173, 29 S. E. 93.

and rules of court should not be in force until after reasonable publicity and notice thereof.[54]

4. Non-Compliance With Rules. Non-compliance with a rule requiring applications for a change of venue to be made at least one day before the cause is set for trial is excused where prejudice on the part of the judge which was not known in time to comply with the rule is alleged in the affidavit.[55] And a person is not subject to such a rule who has entered into a voluntary appearance to an action after the date set for the trial of the case.[56] Again where a rule is made merely for the convenience of the clerk a non-compliance therewith cannot be taken advantage of by the opposite party whose rights have not been affected thereby.[57]

5. Modification, Suspension, or Rescission — a. Power of Court. There are numerous cases which declare that rules of court should be adhered to both by parties litigant and the court, in all cases which fall within them so long as they remain in force, and that the court has no power in a particular case, where no discretion is reserved, to suspend or modify any rule which it has made.[58] It has generally been decided, however, that rules of court are but a means to accomplish the ends of justice, and that the court always has the power to modify, suspend, or rescind its own rules whenever justice requires it.[59] But if the rules of a court are prescribed by a higher court, under a statute, the court for which such rules are prescribed has no authority to modify or suspend the same.[60] And rules adopted by a whole body of judges or a majority of them should be observed

54. Owens *v.* Ranstead, 22 Ill. 161; Risher *v.* Thomas, 2 Mo. 98; Smith *v.* Lee, 10 Nev. 208.

Admission of attorneys.— A provision that after the adoption of rules as to admission to the bar copies are to be filed in the office of the secretary of state, who must transmit a printed copy thereof to the clerk of each county, and also cause the same to be published in the next ensuing volume of the session laws, has been held directory merely. *In re* Maxwell, 14 N. Y. Suppl. 658.

55. Galloway *v.* State, 29 Ind. 442.

56. Truitt *v.* Truitt, 38 Ind. 16.

57. Kennedy *v.* Kennedy, 18 N. J. L. 51.

58. *California.*— Hanson *v.* McCue, 43 Cal. 178.

Illinois.— Beveridge *v.* Hewitt, 8 Ill. App. 467.

Indiana.— Magnuson *v.* Billings, 152 Ind. 177, 52 N. E. 803.

Iowa.—Burlington, etc., R. Co. *v.* Marchand, 5 Iowa 468.

Louisiana.— Walker *v.* Ducros, 18 La. Ann. 703.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Maryland.— Quynn *v.* Brooke, 22 Md. 288; Hughes *v.* Jackson, 12 Md. 450; Dunbar *v.* Conway, 11 Gill. & J. 92; Wall *v.* Wall, 2 Harr. & G. 79.

Massachusetts.— Pratt *v.* Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97; Thompson *v.* Hatch, 3 Pick. 512.

New Jersey.— Ogden *v.* Robertson, 15 N. J. L. 124.

Oregon.— Coyote, etc., Co. *v.* Ruble, 9 Oreg. 121.

See 13 Cent. Dig. tit. "Courts," § 295.

A rule which has become permanently engrafted in a system of law and sanctioned by a long series of repeated adjudications cannot be revoked in a particular case. Powell *v.* Waters, 8 Cow. (N. Y.) 669.

59. *California.*— Symons *v.* Bunnell, (1889) 20 Pac. 859; Sullivan *v.* Wallace, 73 Cal. 307, 14 Pac. 789; Chielovich *v.* Krauss, (1886) 9 Pac. 945; People *v.* Williams, 32 Cal. 280.

Georgia.— Snipes *v.* Parker, 98 Ga. 522, 25 S. E. 580.

Kansas.— Dolan *v.* Stone, 63 Kan. 450, 65 Pac. 641.

Minnesota.— Gillette-Herzog Mfg. Co. *v.* Ashton, 55 Minn. 75, 56 N. W. 576; Sheldon *v.* Risedorph, 23 Minn. 518.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Deming *v.* Foster, 42 N. H. 165.

New York.— Apel *v.* O'Connor, 39 Hun 482; Burch *v.* Newberry, 3 How. Pr. 271, 1 Code Rep. 41.

Pennsylvania.— Lance *v.* Bonnell, 105 Pa. St. 46; McBeth *v.* Newlin, 15 Wkly. Notes Cas. 129; Lewis *v.* Jones, 10 Kulp 32.

South Carolina.— *Ex p.* Clyde, 14 S. C. 385.

Texas.— De Leon *v.* Owen, 3 Tex. 153.

Vermont.— Plattsburg First Nat. Bank *v.* Post, 65 Vt. 222, 25 Atl. 1093; McNeish *v.* U. S. Hullness Oat Co., 57 Vt. 316.

United States.—U. S. *v.* Breitling, 20 How. 252, 15 L. ed. 900; Southern Pac. Co. *v.* Johnson, 69 Fed. 559, 16 C. C. A. 317; Southern Pac. Co. *v.* Hamilton, 54 Fed. 468, 4 C. C. A. 441; Mutual Bldg. Fund Soc., etc., Bank *v.* Bossieux, 17 Fed. Cas. No. 9,977, 1 Hughes 386; Russell *v.* McLellan, 21 Fed. Cas. No. 12,158, 3 Woodb. & M. 157; Wallace *v.* Clark, 29 Fed. Cas. No. 17,098, 3 Woodb. & M. 359.

See 13 Cent. Dig. tit. "Courts," § 295.

60. State *v.* Call, 39 Fla. 504, 22 So. 748; Baker *v.* Blood, 128 Mass. 543; Detroit, etc., R. Co. *v.* Eaton Cir. Judge, 128 Mich. 495, 87

and enforced by single judges.[61] Again where a lower court has the power to make its own rules they cannot be suspended by a higher court in a particular case.[62]

b. By Statute. Where the authority exists in the legislature to regulate the practice and procedure in courts, the rules of a court may be amended, rescinded, or repealed by statute.[63]

c. By Parties. Where rules are prescribed by a court no unqualified right exists in parties to stipulate for the abrogation of the same.[64]

6. Record and Evidence of Rules. Rules of court cannot rest in parol, but must be placed upon the records of the court.[65] Such records are the only competent evidence of the existence of a rule of court.[66]

VII. Rules of Adjudication, Decisions, Opinions, and Records.

A. Mode and Principles of Adjudication — 1. In General. The business of a court is confined to giving decisions to causes properly before it.[67] And where a decision of the United States circuit court is being reviewed collaterally by the supreme court of a state, the latter will not give a judgment at variance with its own view of the law, where such view accords with that of the circuit court, in order that the question may be reviewed by the United States supreme court.[68] Nor will a court of last resort in a state in deciding a cause between those who are parties to another cause in a circuit court give a decision upon a question in that action, where the decision of such question is not necessary to the disposition of the cause by it.[69] But if two cases in a court of last resort appear to be in irreconcilable conflict as to the right of a complainant to maintain a bill, a demurrer to such bill will be sustained so that a speedy determination of the right may be obtained.[70]

2. When Court May Decline to Act. Where the same questions are before a court of last resort and a lower court in the same case, and the latter's decision will in any event be nugatory, it will not pass upon the question.[71]

N. W. 641; Shamokin, etc., Light, etc., Co. *v.* John, 18 Pa. Super. Ct. 498.

Rules of United States supreme court prescribed by authority of congress are binding on the circuit courts, except where they remit power to such courts in certain cases. Poultney *v.* La Fayette, 13 Pet. (U. S.) 472, 9 L. ed. 1161.

61. Tripp *v.* Brownell, 2 Gray (Mass.) 402; *In re* Livingston, 34 N. Y. 555; People *v.* Nichols, 18 Hun (N. Y.) 530.

62. Baker *v.* State, 84 Wis. 584, 54 N. W. 1003.

63. Jordan *v.* White, 20 Minn. 91. See Shane *v.* McNeill, 76 Iowa 459, 41 N. W. 166.

64. Reynolds *v.* Lawrence, 15 Cal. 359.

65. Owens *v.* Ranstead, 22 Ill. 161. But that adoption of written rules is not essential in establishing or changing a court's practice see Duncan *v.* U. S., 7 Pet. (U. S.) 435, 8 L. ed. 739.

Rules must be adopted of record by the court, although they need not be spread in full on the record. State *v.* Ensley, 10 Iowa 149.

A single record showing assent of the several judges of a circuit to rules jointly adopted by them is sufficient, although there is no authority for such judges to jointly hold a term. Gage *v.* Eddy, 167 Ill. 102, 47 N. E. 200.

Where rules are made known by publication they may be enforced before actual filing in clerk's office. State *v.* Ensley, 10 Iowa 149.

66. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058; Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

The affidavit of counsel to the effect that there was no general rule or order of court for the opening of depositions does not establish the non-existence of such rule or order, as rules of court must be proved by the record, and their non-existence by the testimony of the clerk of court. Hughes *v.* Humphreys, 102 Ill. App. 194.

In Louisiana it has been decided that the court of appeals cannot take *ex officio* notice of the rules of a lower court, nor receive evidence to show their existence or character. Dours *v.* Cazentre, McGloin (La.) 251.

67. Mississippi *v.* Durham, 4 Mackey (D. C.) 235.

68. Lord *v.* Cannon, 75 Ga. 300.

69. Maghee *v.* Robinson, 98 Ill. 458.

70. Graver *v.* Faurot, 64 Fed. 241.

71. New York, etc., R. Co. *v.* Woodruff, 42 Fed. 468.

In an election contest a court will not assume jurisdiction for any purpose where a trial by it would be a fruitless proceeding and another trial by the state senate would be necessary to determine the rights of the parties. Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899.

3. AGREEMENT OF PARTIES AS TO MODE. A court will not be bound by an agreement of the parties that an action at law may be decided on the same principles as though it were pending in a court of equity.[72]

4. PERSONAL KNOWLEDGE SHOULD NOT AFFECT. In all judicial investigations the decision of the court should be given according to the proofs, unaffected by any personal knowledge of the facts of the case under advisement.[73]

5. STATUTORY PROVISIONS. A statutory provision that a court may in certain cases render such judgment as substantial justice shall require is to be construed as meaning substantial legal justice ascertained and determined by fixed rules and positive statutes, and not the abstract, varying notions of equity entertained by each individual.[74]

6. WHERE INTEREST OF PARTIES IN DECISION HAS CEASED. Whether a decision of a case involving a question which has ceased to be of practical interest to the parties will be given by the court depends on whether the question is one of great public importance.[75]

B. Previous Decisions as Controlling or as Precedents — 1. IN GENERAL. As a general rule where a principle of law has become settled by a series of decisions it is binding on the courts and should be followed.[76] But it has been determined that a single decision is not necessarily binding.[77] Again the maxim *stare decisis* is not imperative;[78] and an opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court from which the opinion emanates.[79]

72. Fagan *v.* Jacocks, 15 N. C. 263.

73. Mills *v.* Paynter, 1 Nebr. 440.

74. Stevens *v.* Ross, 1 Cal. 94.

75. Matter of Cuddeback, 3 N. Y. App. Div. 103, 39 N. Y. Suppl. 388.

76. Martin *v.* Martin, 25 Ala. 201; Ferris *v.* Coover, 11 Cal. 175; Morgan *v.* Parker, 1 Dana (Ky.) 444.

The doctrine of stare decisis has no application to findings of fact. Stern *v.* Fountain, 112 Iowa 96, 83 N. W. 826. See McWilliams *v.* Bonner, 69 Ark. 99, 61 S. W. 378.

Where the constitution and laws of the federal government are to be expounded it is important that there be uniformity of decision. Ferris *v.* Coover, 11 Cal. 175.

As to extending scope of decision.— The power and duty to maintain the fundamental law of the constitution being intrusted to the United States supreme court it is not required under the rule of *stare decisis* to extend the scope of any decision upon a constitutional question, where it is convinced that error in principle might supervene. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 30 L. ed. 759.

Failure to give grounds of decision.— The authority of a decision of the supreme court of the United States upholding a rule of a court is not lessened by the former court's failure to give the grounds for its decision, as this omission does not give rise to an inference that it had doubts as to the validity of the rule, but rather that it regarded the grounds of challenge to such validity as without foundation. Fidelity, etc., Co. *v.* U. S., 187 U. S. 315, 23 S. Ct. 120, 47 L. ed. 194.

77. *California.*—Duff *v.* Fisher, 15 Cal. 375.

Indiana.— Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037.

Kentucky.—Montgomery County Fiscal Ct. *v.* Trimble, 104 Ky. 629, 47 S. W. 773, 20 Ky. L. Rep. 827, 42 L. R. A. 738.

Louisiana.— Smith *v.* Smith, 13 La. 441.

South Carolina.— State *v.* Williams, 13 S. C. 546.

Utah.— Kimball *v.* Grantsville, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628.

Washington.—McDonald *v.* Davey, 22 Wash. 366, 60 Pac. 1116.

Wisconsin.— Pratt *v.* Brown, 3 Wis. 603.

See 13 Cent. Dig. tit. "Courts," § 314.

A decision in conflict with prior decisions and not supported by reason or authority will not be adhered to where it is not probable that property rights will be seriously affected. Young *v.* Downey, 150 Mo. 317, 51 S. W. 751. See Truxton *v.* Fait, etc., Co., 1 Pennew. (Del.) 483, 42 Atl. 431, 73 Am. St. Rep. 81.

78. Colorado Seminary *v.* Arapahoe County, 30 Colo. 507, 71 Pac. 410; Kneeland *v.* Milwaukee, 15 Wis. 454.

Positive authority of a decision is coextensive only with the facts upon which it is founded. Grimes *v.* Bryne, 2 Minn. 89. See Southern Pac. R. Co. *v.* Robinson, 132 Cal. 408, 64 Pac. 572; Reed *v.* Reed, 114 Mass. 372.

"Precedents are to be regarded as the great storehouse of experience; not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although, at times, they be liable to conduct us to the paths of error, yet, may be important aids in lighting our footsteps in the road to truth." Per Bartley, C. J., in Leavitt *v.* Morrow, 6 Ohio St. 71, 78, 67 Am. Dec. 334.

English privy council is not concluded by former decisions in other ecclesiastical cases. Read *v.* Lincoln, [1892] A. C. 644, 56 J. P. 725, 62 L. J. P. C. 1, 67 L. T. Rep. N. S. 128, 46 Alb. L. J. 365.

79. Gage *v.* Parker, 178 Ill. 455, 53 N. E.

2. Decisions of Courts of Same State — a. Of Same Court — (I) *In General.* Upon the principle of *stare decisis* the decisions which have been rendered by a court will be adhered to by such court in subsequent cases, unless there is something manifestly erroneous therein,[80] or the rule or principle of law established by such decisions has been changed by legislative enactment.[81]

(II) *By Divided Court.* A decision rendered by a divided court is not generally considered obligatory as a precedent.[82]

(III) *Statute That Unanimous Decision Shall Not Be Overruled.* A statute providing that unanimous decisions shall never be overruled but shall be followed as law cannot operate retrospectively, and so far as it may tend to so operate it will to this extent be unconstitutional.[83]

b. Of Coördinate Courts. A decision by a state court unless clearly erroneous should be followed by other courts of coördinate jurisdiction until the question is settled in the court of last resort.[84]

317; Larson *v.* First Nat. Bank, (Nebr. 1902) 92 N. W. 729.

An exception taken to the form of a declaration in a court does not constitute an approval thereof, where such question is not called to the attention of the court. Knight *v.* St. Louis, etc., R. Co., 40 Ill. App. 471.

80. *Colorado.*— *In re* House Resolutions, 15 Colo. 598, 26 Pac. 323. *Compare* Colorado Seminary *v.* Arapahoe County, 30 Colo. 507, 71 Pac. 410; Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209.

Georgia.— Adams *v.* Franklin, 82 Ga. 168, 8 S. E. 44; Gray *v.* Gray, 34 Ga. 499.

Illinois.— McCormick *v.* Bauer, 122 Ill. 573, 13 N. E. 852.

Indiana.— Grubbs *v.* State, 24 Ind. 295.

Iowa.— State *v.* Silvers, 82 Iowa 714, 47 N. W. 772; Davidson *v.* Biggs, 61 Iowa 309, 16 N. W. 135; Lemp *v.* Hastings, 4 Greene 448.

Maryland.— Dugan *v.* Hollins, 13 Md. 149.

Minnesota.— Knox *v.* Randall, 24 Minn. 479; Nininger *v.* Carver County, 10 Minn. 133.

Missouri.— St. Louis R. Co. *v.* Southern R. Co., 138 Mo. 591, 39 S. W. 471; Shoenberg *v.* Heyer, 91 Mo. App. 389; Wells *v.* Adams, 88 Mo. App. 215.

Nebraska.— Richardson Drug Co. *v.* Raymond, 59 Nebr. 157, 80 N. W. 490.

New Jersey.— State *v.* Taylor, 68 N. J. L. 276, 53 Atl. 392.

New York.— Reynolds *v.* Davis, 5 Sandf. 267; Greenbaum *v.* Stein, 2 Daly 223; Gibbons *v.* Ogden, 17 Johns. 488.

North Carolina.— Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

Pennsylvania.— McDowell *v.* Oyer, 21 Pa. St. 417.

Tennessee.— State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031; Cox *v.* Crumley, 5 Lea 529.

Utah.— Whittemore *v.* Cope, 11 Utah 344, 40 Pac. 256.

United States.— Wright *v.* Columbus, etc., R. Co., 176 U. S. 481, 20 S. Ct. 398, 44 L. ed. 554; Wright *v.* Sill, 2 Black 544, 17 L. ed. 333; Hadden *v.* Natchaug Silk Co., 84 Fed. 80; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 18 C. C. A. 122.

See 13 Cent. Dig. tit. "Courts," § 314.

Mere errors or irregularities will not prevent a former decision from controlling. McCormick *v.* Bauer, 122 Ill. 573, 13 N. E. 852.

A departure from the rule has been held proper in a case involving the question whether a state has alienated its right to tax a private corporation. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. So a former judgment in obedience to a ruling of the United States supreme court as understood is not conclusive, where such court subsequently places a contrary construction on its former holding. Union, etc., Bank *v.* Memphis, (Tenn. 1898) 46 S. W. 557.

81. Lemp *v.* Hastings, 4 Greene (Iowa) 448.

82. *Georgia.* — Gilbert *v.* State, 116 Ga. 819, 43 S. E. 47; Hill *v.* State, 112 Ga. 32, 400, 37 S. E. 441.

Illinois.— Hopkins *v.* McCann, 19 Ill. 113.

New York.— Morse *v.* Goold, 11 N. Y. 281, 62 Am. Dec. 103.

Pennsylvania.— *In re* Griel, 171 Pa. St. 412, 33 Atl. 375, 37 Wkly. Notes Cas. 85.

Virginia.— Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468; Whiting *v.* West Point, 88 Va. 905, 14 S. E. 698, 29 Am. St. Rep. 750, 15 L. R. A. 860.

United States.— Hanifen *v.* Armitage, 117 Fed. 845.

See 13 Cent. Dig. tit. "Courts," § 316.

Where judges in the minority on the general question concur in an opinion of one of the majority in relation to another question, the principle as established therein may be considered as the settled law of the court. Boyle *v.* Zacharie, 6 Pet. (U. S.) 348, 8 L. ed. 423.

83. Bond *v.* Munro, 28 Ga. 597.

84. Bentley *v.* Goodwin, 38 Barb. (N. Y.) 633, 15 Abb. Pr. (N. Y.) 82; Loring *v.* U. S. Vulcanized Gutta Percha Belting, etc., Co., 30 Barb. (N. Y.) 644; Andrews *v.* Wallege, 29 Barb. (N. Y.) 350, 8 Abb. Pr. (N. Y.) 425, 17 How. Pr. (N. Y.) 263; Malam *v.* Simpson, 12 Abb. Pr. (N. Y.) 225, 20 How. Pr. (N. Y.) 488; State *v.* Frosdick, 1 Ohio Cir. Ct. 265, 1 Ohio Cir. Dec. 145; Miller *v.* Hulbert, 8 Ohio Dec. (Reprint) 240, 6 Cinc. L. Bul. 412.

A wrong construction by a circuit court upon a decision of the supreme court, no reason therefor being given, cannot be consid-

c. Of Higher Court or Court of Last Resort. Decisions of a court of last resort in a state are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled.[85] And likewise an inferior court should follow the decisions of a superior or appellate court, although the latter is not a court of last resort.[86]

d. Change in Organization of Court. Where a court is abolished or reorganized and succeeded by a new court which is in fact a continuation of the former court the decisions of such former court are generally followed in the application

ered as authority in other courts of the state. *In re* McDonald, 4 Ohio S. & C. Pl. Dec. 396.

85. *California.*—People *v.* McGuire, 45 Cal. 56.

Delaware.— State *v.* Green, 1 Pennew. 63, 39 Atl. 590.

Illinois.— Field *v.* People, 3 Ill. 79.

Indiana.— Julian *v.* Beal, 34 Ind. 371; Kelley *v.* Crawfordsville, 14 Ind. App. 81, 42 N. E. 491.

Iowa.— Telford *v.* Barney, 1 Greene 575.

Missouri.— Harburg *v.* Arnold, 87 Mo. App. 326; Becker *v.* Schutte, 85 Mo. App. 57; Schafer *v.* St. Louis, etc., R. Co., 76 Mo. App. 131; Hamilton *v.* Aurora F. & M. Ins. Co., 35 Mo. App. 263; White *v.* Wabash Western R. Co., 34 Mo. App. 57.

New Jersey.— Hodge *v.* U. S. Steel Corp., 64 N. J. Eq. 90, 53 Atl. 601.

New York.— Palmer *v.* Lawrence, 5 N. Y. 389; Ryan *v.* New York, 78 N. Y. App. Div. 134, 79 N. Y. Suppl. 599; Smith *v.* Lehigh Valley R. Co., 77 N. Y. App. Div. 43, 79 N. Y. Suppl. 106; Devitt *v.* Providence Washington Ins. Co., 61 N. Y. App. Div. 390, 70 N. Y. Suppl. 654; Bigelow *v.* Tilden, 52 N. Y. App. Div. 390, 65 N. Y. Suppl. 140; Scott *v.* King, 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 626; Jersey City Mechanics', etc., Bank *v.* Dakin, 8 Hun 431; Costello *v.* Syracuse, etc., R. Co., 65 Barb. 92; Rochester, etc., R. Co. *v.* Clarke Nat. Bank, 60 Barb. 234; Hanford *v.* Artcher, 4 Hill 271; Hawley *v.* James, 7 Paige 213, 32 Am. Dec. 623.

Ohio.— Vattier *v.* Cheseldine, 1 Ohio Dec. (Reprint) 127, 2 West. L. J. 375.

Pennsylvania.— Com. *v.* Geesey, 1 Pa. Super. Ct. 502, 38 Wkly. Notes Cas. 274; Wheeler *v.* Rice, 4 Brewst. 129, 3 Wkly. Notes Cas. 333, 8 Phila. 115.

Tennessee.— Rush *v.* Moore, (Ch. App. 1897) 48 S. W. 90.

Texas.— Jones *v.* Gulf, etc., R. Co., (Civ. App. 1893) 23 S. W. 186.

Wisconsin.— Eau Claire Nat. Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604; Cawley *v.* La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197; Atty.-Gen. *v.* Lum, 2 Wis. 507.

United States.— Gooding *v.* Oliver, 17 How. 274, 15 L. ed. 148; Williams *v.* Gibbs, 17 How. 239, 15 L. ed. 135.

See 13 Cent. Dig. tit. "Courts," § 325.

A decision of commissioners of appeal when adopted by the court of last resort is to be followed the same as a decision of that court. Wooters *v.* Hollingsworth, 58 Tex. 371.

The last decision of a court of last resort should be followed by a lower court without inquiring as to whether it is in harmony with earlier decisions. Becker *v.* Schutte, 85 Mo. App. 57; Thompson *v.* Irwin, 76 Mo. App. 418; Seaboard Nat. Bank *v.* Woesten, 76 Mo. App. 155. See also Costello *v.* Syracuse, etc., R. Co., 65 Barb. (N. Y.) 92.

A decision of the United States supreme court contrary to that of the court of last resort in a state will not be followed by an inferior court in such state, although the principles of law in such case are reviewable in the supreme court. Poole *v.* Kermit, 37 N. Y. Super. Ct. 114. See also Ascherson *v.* Pennsylvania Steel Co., 2 Pa. Dist. 599; Ascherson *v.* Bethlehem Iron Co., 2 Pa. Dist. 597. But where the supreme court of the United States reverses the decision of a state court effect must be given to that decision in the suit in which it is made. Venice *v.* Breed, 65 Barb. (N. Y.) 597.

86. *Indiana.*— Leard *v.* Leard, 30 Ind. 171.

Louisiana.— Martin *v.* Hoggatt, 37 La. Ann. 340.

New Jersey.— Flaucher *v.* Camden, 56 N. J. L. 244, 28 Atl. 82.

New York.— People *v.* American L. & T. Co., 39 Misc. 647, 80 N. Y. Suppl. 627; Western Nat. Bank *v.* Faber, 29 Misc. 467, 62 N. Y. Suppl. 82; *In re* Ransier, 26 Misc. 582, 57 N. Y. Suppl. 650; U. S. Trust Co. *v.* Black, 9 Misc. 653, 30 N. Y. Suppl. 453; Adams *v.* Bush, 2 Abb. Pr. N. S. 112; Burt *v.* Powis, 16 How. Pr. 289.

Ohio.— Cincinnati Gaslight, etc., Co. *v.* Bowman, 1 Handy 289, 12 Ohio Dec. (Reprint) 147.

See 13 Cent. Dig. tit. "Courts," § 326.

A decision in a proceeding outside of its jurisdiction will not be binding on a lower court. Lockwood *v.* Carr, 4 Dem. Surr. (N. Y.) 515. So a decision on a question relating to a statute which is involved in a maze of legislation will not be given the same weight where it appears that statutory provisions have been overlooked. Overheiser *v.* Morehouse, 8 N. Y. Civ. Proc. 11, 16 Abb. N. Cas. (N. Y.) 208, 2 How. Pr. N. S. (N. Y.) 257. Again a county court has been held not bound by a decision of the supreme court in another department. Nichols *v.* Fanning, 20 Misc. (N. Y.) 73, 45 N. Y. Suppl. 409. And a decision entered *pro forma* without argument or consideration and solely to hasten determination of the question by the court of appeals will not be regarded as binding. Matter of McGinness, 13 Misc. (N. Y.) 714, 35 N. Y. Suppl. 820.

of the principle of *stare decisis*, except where such decisions are manifestly erroneous.[87]

e. Matters of Form and Practice. Decisions on mere matters of form and practice will generally be followed,[88] although were it not for such prior decisions a contrary conclusion might be reached.[89]

f. Construction of Constitutions and Statutes. A court will not as a general rule inquire into the constitutionality of a statute where this question has been passed upon in previous decisions,[90] nor will it under like circumstances again consider the question as to the construction and operation of a statute,[91] or of a pro-

87. *California.* — Davis *v.* San Francisco Super. Ct., 63 Cal. 581.

Delaware.—The supreme court will not depart from the decisions of the court of oyer and terminer and the court of general sessions unless clearly erroneous. Daniels *v.* State, 2 Pennew. 586, 48 Atl. 196, 54 L. R. A. 286.

Iowa.— Doolittle *v.* Shelton, 1 Greene 272, holding that the state supreme court will follow decisions of the territorial supreme court.

Maryland.— Hammond *v.* Ridgely, 5 Harr. & J. 245, 9 Am. Dec. 522, as to court of appeals.

New York.— Olcott *v.* Tioga R. Co., 26 Barb. 147; Spicer *v.* Norton, 13 Barb. 542; Lovett *v.* German Reformed Church, 12 Barb. 67. But the appellate division of the supreme court is not bound by the decisions of the former general terms of the supreme court. Sias *v.* Rochester R. Co., 18 N. Y. App. Div. 506, 46 N. Y. Suppl. 582.

South Carolina.— Lewis *v.* Wilson, 1 McCord Eq. 210.

Wisconsin.— Parker *v.* Pomeroy, 2 Wis. 112.

See 13 Cent. Dig. tit. "Courts," § 315.

88. Louve's Succession, 6 La. Ann. 529; Wells *v.* Northern Pac. R. Co., 2 Wash. Terr. 303, 5 Pac. 215; Sauer *v.* Steinbauer, 10 Wis. 370; Smith *v.* Ely, 15 How. (U. S.) 137, 14 L. ed. 634.

What is said in an advisory way by a court of last resort as to matters of procedure should be followed. Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816. See also Strauss *v.* Jacobs, 10 Ohio S. & C. Pl. Dec. 132, 7 Ohio N. P. 258.

89. Wells *v.* Northern Pac. R. Co., 2 Wash. Terr. 303, 5 Pac. 215.

In a case of glaring or dangerous error a prior decision will not be followed. Weaver *v.* Gardner, 14 Kan. 347. So if no substantial injury will be suffered by litigants a court may, as to a matter of practice, correct an error in a former opinion by it. Wetzstein *v.* Boston, etc., Consol. Copper, etc., Min. Co., 25 Mont. 135, 63 Pac. 1043.

90. *Colorado.*— Campbell *v.* Los Angeles Gold Mine Co., 28 Colo. 256, 64 Pac. 194.

Indiana.— Bothwell *v.* Millikan, 104 Ind. 162, 2 N. E. 959, 3 N. E. 816; Ricketts *v.* Spraker, 77 Ind. 371; State *v.* Stout, 61 Ind. 143.

Kansas.— Missouri, etc., R. Co. *v.* Steinberger, 60 Kan. 856, 55 Pac. 1101 [*affirming* 6 Kan. App. 585, 51 Pac. 623].

Kentucky.— Hughes *v.* Hughes, 4 T. B. Mon. 42.

New Hampshire.— Amoskeag Mfg. Co. *v.* Goodale, 62 N. H. 66.

New York.— Scott *v.* King, 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 626.

Pennsylvania.— Com. *v.* Mill Creek Coal Co., 157 Pa. St. 524, 27 Atl. 375; Com. *v.* National Oil Co., 157 Pa. St. 516, 27 Atl. 374, 33 Wkly. Notes Cas. 137.

Tennessee.—State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031; McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

Texas.— May *v.* Finley, 91 Tex. 352, 43 S. W. 257; Bogard *v.* State, (Crim. 1900) 55 S. W. 494.

Vermont.— Gill *v.* Parker, 31 Vt. 610.

See 13 Cent. Dig. tit. "Courts," § 317.

The rule of stare decisis does not require that, in deciding on the constitutionality of a statute in an action which concerns public interests, the court should be bound by a decision by a circuit court in an action between private citizens. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726. So decisions on former statutes which were similar to that in question but not identical with it are not binding within the rule of *stare decisis*. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. Again a decision that a special act to relocate a county-seat is constitutional is subject to review in a new and independent action, it not being a rule of property. Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037.

91. *California.*— Seale *v.* Mitchell, 5 Cal. 401.

Indiana.— Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222.

Louisiana.— New Orleans *v.* Hermann. 31 La. Ann. 529; Wolf *v.* Lowry, 10 La. Ann. 272; State *v.* Thompson, 10 La. Ann. 122; Beck *v.* Brady, 7 La. Ann. 1.

Mississippi.— Davis *v.* Holberg, 59 Miss. 362.

Missouri.—Sedalia *v.* Gold, 91 Mo. App. 32.

New York.— Wood *v.* New York, 73 N. Y. 556; Von Loon *v.* Lyon, 4 Daly 149.

See 13 Cent. Dig. tit. "Courts," § 318.

To have the force of stare decisis the construction of the statute should be directly involved in the case decided. St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771. See Remey *v.* Iowa Cent. R. Co., 116 Iowa 133, 89 N. W. 218. A decision by a divided court construing a statute has been held

vision of the constitution.[92] And where the interpretation of a statute in a prior case is relied upon by a party to an action it is not necessary for him to show that the same facts existed in and governed the determination of that case, but the opposite party should prove, before he can ask for a reversal of that decision, that such facts do not exist in the case at bar.[93]

g. Erroneous Decisions. Although the rule of *stare decisis* is entitled to great weight, and is adhered to in most courts, yet it is not followed to the exclusion in all cases of a departure therefrom, and it is a doctrine generally recognized that the rule will not be invoked to sustain and perpetuate a principle of law which is established by a series of decisions, clearly erroneous, unless property complications have resulted therefrom, and a reversal would result in greater injury and injustice than would ensue by following the rule.[94] But the rule should not be departed from except on the fullest conviction that such an error has been committed.[95]

3. Decisions of Courts of Other States — a. In General. The courts of one state in construing constitutional or statutory provisions of such state, or in determining a question of common law, are not bound by decisions of other states upon a similar question.[96]

not binding where the construction given is erroneous and contrary to public policy. Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468.

92. Angus *v.* Plum, 121 Cal. 608, 54 Pac. 97.

93. Wood *v.* New York, 73 N. Y. 556.

94. *California.*—Aud *v.* Magruder, 10 Cal. 282; McFarland *v.* Pico, 8 Cal. 626.

Colorado.— Calhoun Gold Min. Co. *v.* Ajax Gold-Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209.

Georgia.— Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809.

Indiana.— Jasper County *v.* Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; Paul *v.* Davis, 100 Ind. 422.

Kentucky.—Pratt *v.* Breckinridge, 65 S. W. 136, 23 Ky. L. Rep. 1356. *Compare* Tribble *v.* Taul, 7 T. B. Mon. 455; South *v.* Thomas, 7 T. B. Mon. 59.

Louisiana.— Lagrange *v.* Barré, 11 Rob. 302; Griffin *v.* His Creditors, 6 Rob. 225.

Missouri.— *Compare* Long *v.* Long, 79 Mo. 644.

Nebraska.— State *v.* Hill, 47 Nebr. 456, 66 N. W. 541.

New York.— Judson *v.* Gray, 11 N. Y. 408; Romaine *v.* Kinshimer, 2 Hilt. 519.

Oregon.— State *v.* Clark, 9 Oreg. 466.

Pennsylvania.—Callender *v.* Keystone Mut. L. Ins. Co., 23 Pa. St. 471.

South Carolina.— State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345 [*overruling* McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410].

Texas.— Groesbeck *v.* Golden, (Sup. 1887) 7 S. W. 362.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

See 13 Cent. Dig. tit. "Courts," § 320.

Where rights and obligations of individuals have become conformed to such construction, only the strongest possible reasons can justify a departure therefrom; but such is not the case where a rule of evidence has been misconstrued so as to impair a fundamental rule on which rights of persons and property rest. Roof *v.* Charlotte, etc., R. Co., 4 S. C. 61.

95. Sydnor *v.* Gascoigne, 11 Tex. 449.

A rule of law apparently salutary in its operation and recognized by decisions of other states should rarely be abandoned merely because the reasons given for its original adoption are not altogether satisfactory. Jansen *v.* Atchison City, 16 Kan. 358.

Simply because of a doubt as to its correctness a prior decision will not be overruled. State *v.* Silvers, 82 Iowa 714, 47 N. W. 772; St. Louis R. Co. *v.* Southern R. Co., 138 Mo. 591, 39 S. W. 471; Wells *v.* Adams, 88 Mo. App. 215.

96. *Georgia.*— Krogg *v.* Atlanta, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 85.

Indiana.— Nathan *v.* Lee, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140; Franklin *v.* Twogood, 25 Iowa 520, 96 Am. Dec. 73.

New York.— St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241 [*reversing* 59 Hun 383, 12 N. Y. Suppl. 864]; Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Boyce *v.* St. Louis, 29 Barb. 650.

Texas.— Alexander *v.* Lebanon Bank, (Civ. App. 1898) 47 S. W. 840.

Wisconsin.— Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

See 13 Cent. Dig. tit. "Courts," § 322.

In questions arising under the federal constitution and laws a state court is not bound by adjudications in other states. Caldwell *v.* Gale, 11 Mich. 77.

In construing a will devising lands situate in two states a construction given to the will in one of such states does not bind the courts

b. As to Statutes of Other States. The construction of the constitution or statutes of a state which has been given thereto by its supreme judicial tribunal should be followed by the courts of other states, and of the United States in those cases where similar questions arise.[97]

4. Decisions of United States Courts — a. Of Coördinate Courts. A court will not reverse or review a judgment of another court of coördinate jurisdiction.[98] So the rule prevails in the various circuit courts of the United States, which are coördinate tribunals constituting but a single system, that where a question has been fully considered and decided in such a court it will be followed in the other circuit courts until it has been reversed by the appellate court.[99] And in order

in the other state in construing it. McCartney *v.* Osburn, 118 Ill. 403, 9 N. E. 210.

Constitutions should be construed from their own terms rather than by authorities from other states, although a definite construction of like provisions is entitled to the same weight as in other cases. People *v.* Burbank, 12 Cal. 378.

97. *Alabama.*—See Nelson *v.* Goree, 34 Ala. 565.

California.— McGrew *v.* New York Mut. L. Ins. Co., (1901) 64 Pac. 103.

Connecticut.— Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711.

Georgia.— Clark *v.* Turner, 73 Ga. 1.

Illinois.— Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804; Fowler *v.* Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163.

Iowa.— Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Franklin *v.* Twogood, 25 Iowa 520, 96 Am. Dec. 73; Brown *v.* Phillipps, 16 Iowa 210.

Louisiana.— Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. 464, 16 Am. Dec. 199. *Compare* Cotton *v.* Brien, 6 Rob. 115.

Massachusetts.— Broadway Nat. Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603.

Mississippi.— McIntyre *v.* Ingraham, 35 Miss. 25.

Missouri.— McMerty *v.* Morrison, 62 Mo. 140.

New Jersey.— Rosenbaum *v.* U. S. Credit System Co., 64 N. J. L. 34, 44 Atl. 966; Watson *v.* Lane, 52 N. J. L. 550. 20 Atl. 894, 10 L. R. A. 784 [*affirming* 51 N. J. L. 186, 17 Atl. 117]; Hale *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420.

New York.— Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Jessup *v.* Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; Howe *v.* Welch, 17 Abb. N. Cas. 397; Viele *v.* Wells, 9 Abb. N. Cas. 277.

North Carolina.— Watson *v.* Orr, 14 N. C. 161.

Ohio.— Ott *v.* Lake Shore, etc., R. Co., 18 Ohio Cir. Ct. 395, 10 Ohio Cir. Dec. 85.

Pennsylvania.— Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907; Ball *v.* Anderson, 196 Pa. St. 86, 46 Atl. 366, 79 Am. St. Rep. 693; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208; Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697; Kean *v.* Rice, 12 Serg. & R. 203.

South Carolina.—Carlton *v.* Felder, 6 Rich. Eq. 58; Johnston *v.* South Western Railroad Bank, 3 Strobh. Eq. 263.

Washington.— Whitman *v.* Mast, etc., Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874.

Wisconsin.— Eau Claire Nat. Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604.

United States.—Wiggins Ferry Co. *v.* Chicago, etc., Co., 11 Fed. 381, 3 McCrary 609; Humphreyville Copper Co. *v.* Sterling, 12 Fed. Cas. No. 6,872, Brunn. Col. Cas. 3; Prentice *v.* Zane, 19 Fed. Cas. No. 11,383.

See 13 Cent. Dig. tit. "Courts," § 323.

The duty rests upon comity, and is not imposed by the federal constitution. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 11 Fed. 381, 3 McCrary 609.

The decision of an inferior court of one state is not binding as against the court of highest appellate jurisdiction in another. Matter of Robertson, 23 Misc. (N. Y.) 450, 51 N. Y. Suppl. 502.

A court will not declare unconstitutional the statute of another state, although apparently repugnant to the federal constitution where it has not been so adjudged in the state in which it was enacted, if the question can be decided without passing on the validity of such law. Shelden *v.* Miller, 9 La. Ann. 187.

If the decision of the United States supreme court relative to the subject-matter to which the statute relates conflicts with the decisions of the state court in construing the statute, the court of another state may follow the supreme court of the United States. Davis *v.* Robertson, 11 La. Ann. 752.

98. Hayes *v.* Dayton, 20 Fed. 690.

99. McMurray *v.* Gosney, 106 Fed. 11; Reed *v.* Atlantic, etc., R. Co., 85 Fed. 692; Grand Trunk R. Co. *v.* Central Vermont R. Co., 84 Fed. 66; Norton *v.* Brownsville Taxing Dist., 36 Fed. 99; Celluloid Mfg. Co. *v.* Zylonite Brush, etc., Co., 27 Fed. 291; Reed *v.* Atlantic, etc., R. Co., 21 Fed. 283; Wells *v.* Oregon, etc., R. Co., 15 Fed. 561, 8 Sawy. 600; Edgarton *v.* Furst, etc., Mfg. Co., 9 Fed. 450, 10 Biss. 402; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351, 2 Fish. Pat. Cas. 499. But see Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604, where it

to secure uniformity a district court will follow the decisions of other district courts in similar cases.[1]

b. Of Higher or Supreme Court. The decisions of the supreme court are binding on all of the federal courts on matters of general jurisprudence not involving any state law,[2] and in the absence of any such decisions which are controlling a circuit court should follow the decisions of the circuit court of appeals.[3]

c. As Authority in State Courts. In cases not arising upon the construction of the constitution and laws of the federal government, but in which the state courts have full jurisdiction and their judgments are final, such courts will adhere to and follow their own decisions and are not bound by those of the federal courts.[4] As to questions, however, which are federal in their nature, decisions of the supreme court of a state should yield to those of the United States supreme court.[5]

is held such a decision is not necessarily binding.

Motions for injunctions have been held to be exceptions to the rule, where error may be followed by irremediable mischief. Many *v.* Sizer, 16 Fed. Cas. No. 9,057, 1 Fish. Pat. Cas. 31.

A circuit court of appeals should follow the decision of a circuit court of appeals of another circuit. Beach *v.* Hobbs, 92 Fed. 146, 34 C. C. A. 248.

1. The Chelmsford, 34 Fed. 399. *Compare* Louis Snyders' Sons Co. *v.* Armstrong, 37 Fed. 18.

2. Angle *v.* Chicago, etc., R. Co., 95 Fed. 214; Crooks *v.* Stuart, 7 Fed. 800, 2 McCrary 13.

A circuit court of appeals will not certify to the supreme court for instructions a case under a federal statute, like one already decided. Lau Ow Bew *v.* U. S., 47 Fed. 641, 1 C. C. A. 1.

A decision by the supreme court of the United States affirming a decision of a state court as to the validity of a state statute is binding on the lower federal courts, and where the constitutionality of such statute was dependent upon the existence of a certain remedy the lower court cannot disregard the decision on the ground that its existence was assumed by the supreme court, because it was bound in that case to follow the decision of the state court, and is not so bound in a case arising in a federal court. In cases on writ of error to the supreme court it must exercise an independent judgment, and not follow the state court. Saranac Land, etc, Co. *v.* Roberts, 177 U. S. 318, 20 S. Ct. 642, 44 L. ed. 786. So where after an interlocutory decree and before a final decree the supreme court renders a decision affecting the case, the final decree of the circuit court will be made in accordance with such decision. Wooster *v.* Handy, 21 Fed. 51.

3. Fayerweather Will Cases, 118 Fed. 943; Hale *v.* Hilliker, 109 Fed. 273; Duff Mfg. Co. *v.* Norton, 96 Fed. 986; National Folding-Box, etc., Co. *v.* Dayton Paper-Novelty Co., 95 Fed. 991; Fairfield Floral Co. *v.* Bradbury, 87 Fed. 415; Beach *v.* Hobbs, 82 Fed. 916; Edison Electric Light Co. *v.* Bloomingdale, 65 Fed. 212; Norton *v.* Wheaton, 57 Fed. 927.

4. *California.*— Ferris *v.* Coover, 11 Cal. 175.

Connecticut.— Slocum *v.* Wheeler, 1 Conn. 429.

Georgia.— Baldy *v.* Hunter, 98 Ga. 170, 25 S. E. 416.

Illinois.— Fuller *v.* Shedd, 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146.

Louisiana.— State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709; Murphy *v.* Factors, etc., Ins. Co., 36 La. Ann. 953.

Maryland.— Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 531.

Mississippi.—Shelton *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149.

New York.—Towle *v.* Forney, 14 N. Y. 423; Mynard *v.* Syracuse, etc., R. Co., 7 Hun 399.

Ohio.— Skelly *v.* Jefferson Branch Bank, 9 Ohio St. 606.

Pennsylvania.— Lebanon Bank *v.* Mangan, 28 Pa. St. 452.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

Texas.— El Paso *v.* Ft. Dearborn Nat. Bank, (Civ. App. 1903) 71 S. W. 799 [*reversed* in (Sup. 1903) 74 S. W. 21].

See 13 Cent. Dig. tit. "Courts," § 329.

Territorial courts are not obliged to follow a decision of the federal supreme court on a question of practice determined on appeal from another state. People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

The supreme court of the District of Columbia is bound by a decision by the federal supreme court holding a patent valid. Goodyear Dental Vulcanite Co. *v.* Brightwell, MacArthur & M. (D. C.) 74.

Where bonds have been declared void by state courts, and similar bonds in the hands of non-residents have been held valid by a United States circuit court, the state court will not compel a resident holder to deliver up his bond to be canceled. Dallas County *v.* Merrill, 77 Mo. 573.

5. *California.*— Belcher *v.* Chambers, 53 Cal. 635.

d. As to Patents. A former decision of a circuit court in which the question of the validity of a patent is determined will be followed by other circuit courts in a case involving the same question where there is no new evidence, such action being based not merely on the ground of comity, but for the purpose of avoiding repeated litigation and conflicting decrees.[6] And the existence of a grave doubt as to the soundness thereof is not sufficient ground for a refusal to follow such a decision.[7]

e. As to Construction of Federal Constitution, Statutes, and Treaties. Decisions of the United States supreme court on all questions involving the construc-

Illinois.— Breitung *v.* Chicago, 92 Ill. App. 118.

Louisiana.— State *v.* Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Laughlin *v.* Louisiana, etc., Ice Co., 35 La. Ann. 1184.

Missouri.— See Barber Asphalt Paving Co. *v.* French, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492.

Tennessee.— Bell *v.* Perkins, Peck 261, 14 Am. Dec. 745.

Texas.—Kipper *v.* State, 42 Tex. Crim. 613, 62 S. W. 420.

Utah.— State *v.* Bates, 22 Utah 65, 61 Pac. 905, 83 Am. St. Rep. 768.

See 13 Cent. Dig. tit. "Courts," § 329.

The rule has been applied to a decision that a federal court is not deprived of jurisdiction by prior proceedings in a state court (Clark *v.* Wolf, 29 Iowa 197), to decisions as to who must pay the stamp required by the war revenue act of June 13, 1898 (U. S. Express Co. *v.* People, 195 Ill. 155, 62 N. E. 825; Biddle Hardware Co. *v.* Adams Express Co., 8 Pa. Dist. 43, 22 Pa. Co. Ct. 1), to a decision in an action to determine the liability of a United States marshal, and the sureties on his official bond (McKee *v.* Brooks, 64 Tex. 255), and in determining to what extent a judgment of the United States circuit court operates as a lien (Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137 [*affirming* 74 Ill. App. 54]).

As to questions in commercial law it has been held that paramount authority should be attributed to the decisions of the United States supreme court, this being a subject of national character. Stoddard *v.* Long Island R. Co., 5 Sandf. 180.

6. Cutter Electrical, etc., Co. *v.* Anchor Electric Co., 97 Fed. 804 [*affirmed* in 101 Fed. 120, 41 C. C. A. 246]; Office Specialty Mfg. Co. *v.* Winternight, etc., Mfg. Co., 67 Fed. 928; Edison Electric Light Co. *v.* Packard Electric Co., 61 Fed. 1002; Edison Electric Light Co. *v.* Spreckels Sugar-Refining Co., 60 Fed. 397; National Folding-Box, etc., Co. *v.* Phœnix Paper Co., 57 Fed. 223; Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 793; National Cash-Register Co. *v.* American Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559; Overman Wheel Co. *v.* Curtis, 53 Fed. 247; American Paper Pail, etc., Co. *v.* National Folding Box, etc., Co., 51 Fed. 229, 2 C. C. A. 165; Zinsser *v.* Krueger, 45 Fed. 572; American Bell Tel. Co. *v.* Wallace Electric Tel. Co., 37 Fed. 672; Kidd *v.* Ransom, 35 Fed. 588; Hancock Inspirator Co. *v.* Regester, 35 Fed. 61; Meyer *v.* Goodyear India-Rubber Glove Mfg. Co., 11 Fed. 891, 20 Blatchf. 91; Spring *v.* Domestic Sewing Mach. Co., 9 Fed. 505; Blake *v.* Robertson, 3 Fed. Cas. No. 1,501 [*affirmed* in 94 U. S. 728, 24 L. ed. 245]. But see Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648.

The obligation to follow in patent cases increases according to the number of courts that have passed on the question. Mast *v.* Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 708, 44 L. ed. 856.

The rule does not apply to the circuit court of appeals which may examine and dispose of a question according to its own convictions, independent of a circuit court decision of another circuit. Curtis *v.* Overman Wheel Co., 58 Fed. 784, 7 C. C. A. 493; Wanamaker *v.* Enterprise Mfg. Co., 53 Fed. 791, 3 C. C. A. 672; National Cash-Register Co. *v.* American Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559. But a circuit court of appeals should follow a decision of another circuit court of appeals. Hatch Storage-Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975, 41 C. C. A. 133; Beach *v.* Hobbs, 92 Fed. 146, 34 C. C. A. 248. But this is not obligatory, and where such a decision is not so followed in another court the latter decision will not be reversed, although sufficient weight is not given to the doctrine of comity. Mast *v.* Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 708, 44 L. ed. 856.

A decision in another circuit overruling a prior one should be followed. Brown Mfg. Co. *v.* Mast, 53 Fed. 578.

After a decree is entered in ignorance of a decision in another circuit court it is too late to call upon the court to follow such decision. Consolidated Roller-Mill Co. *v.* George T. Smith Middlings Purifier Co., 40 Fed. 305.

7. Macbeth *v.* Gillinder, 54 Fed. 169.

There must be a clear case of mistake of law or fact, some newly discovered evidence, or some question not considered by the court to justify another court in a reëxamination of the question. Heaton-Peninsular Button-Fastener Co. *v.* Elliott Button-Fastener Co., 58 Fed. 220; Zinsser *v.* Krueger, 45 Fed. 572; Green *v.* French, 11 Fed. 591; Searls *v.* Worden, 11 Fed. 501.

tion of the constitution of the United States should be followed by the state courts in determining legal questions dependent upon such constitution.[8] A similar rule prevails as to decisions of the supreme court construing treaties of the United States[9] and acts of congress,[10] and state courts will be bound by whatever the supreme court may determine as to the constitutionality of such acts.[11]

f. As to Construction of State Constitutions and Statutes. A decision of the federal courts as to the construction and interpretation of the statutes of a state will not be followed by the state court where at variance with its own judgment.[12]

8. *Connecticut.* — Hempstead *v.* Reed, 6 Conn. 480.

Georgia.— *Compare* Padelford *v.* Savannah, 14 Ga. 438.

Illinois.— McInhill *v.* Odell, 62 Ill. 169.

Indiana.— Churchman *v.* Martin, 54 Ind. 380.

Kentucky. — Eubanks *v.* Poston, 5 T. B. Mon. 285; Bodley *v.* Gaither, 3 T. B. Mon. 57; U. S. Bank *v.* Norton, 3 A. K. Marsh. 422.

Louisiana.— Saloy *v.* New Orleans, 33 La. Ann. 79.

Maryland. — Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 531.

Massachusetts. — Mooney *v.* Hinds, 160 Mass. 469, 36 N. E. 484; Braynard *v.* Marshall, 8 Pick. 194.

Nebraska.— State *v.* Sioux City, etc., R. Co., 46 Nebr. 682, 65 N. W. 766, 31 L. R. A. 47.

New Hampshire.—Newmarket Bank *v.* Butler, 45 N. H. 236.

New York.— Hicks *v.* Hotchkiss, 7 Johns. Ch. 297, 11 Am. Dec. 472.

Ohio.— Lee *v.* Citizens' Bank, 5 Ohio Dec. (Reprint) 21, 1 Am. L. Rec. 385.

Pennsylvania.— Com. *v.* Lewis, 6 Binn. 266.

Texas.— Osborne *v.* Barnett, 1 Tex. App. Civ. Cas. § 125.

See 13 Cent. Dig. tit. "Courts," § 332.

The construction is binding on a jury as well as on the court. U. S. *v.* Shive, 27 Fed. Cas. No. 16,278, Baldw. 510.

Although similar provisions in state constitution may be differently construed the supreme court decision will be followed. Lee *v.* Citizens' Bank, 5 Ohio Dec. (Reprint) 21, 1 Am. L. Rec. 385.

9. Purvis *v.* Harmonson, 4 La. Ann. 421; Pontalba *v.* Copeland, 3 La. Ann. 86; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531.

10. *Alabama.*—Rugely *v.* Robinson, 19 Ala. 404.

Colorado.— Calhoun Gold-Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209.

Georgia.— Clews *v.* Mumford, 78 Ga. 476, 3 S. E. 267.

Illinois.— Gilmore *v.* Sapp, 100 Ill. 297; McGoon *v.* Shirk, 54 Ill. 408, 5 Am. Rep. 122; Lender *v.* Kidder, 23 Ill. 49.

Indiana. — Richmond First Nat. Bank *v.* Turner, 154 Ind 456, 57 N. E. 110.

Kentucky.— Moore *v.* Allen, 3 J. J. Marsh. 612.

Missouri.— Haseltine *v.* Central Nat. Bank, 155 Mo. 66, 56 S. W. 895.

Nebraska.— Bressler *v.* Wayne County, 25 Nebr. 468, 41 N. W. 356.

Nevada.— Feusier *v.* Lammon, 6 Nev. 209.

New Jersey.— Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56.

New York.— York *v.* Conde, 147 N. Y. 486, 42 N. E. 193; Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190; Harris *v.* Jex, 55 N. Y. 421, 14 Am. Rep. 285; Buffalo German Ins. Co. *v.* Buffalo Third Nat. Bank, 29 N. Y. App. Div. 137, 51 N. Y. Suppl. 667; American Ins. Co. *v.* Fisk, 1 Paige 90.

Ohio.— Board of Trustees *v.* Cuppett, 52 Ohio St. 567, 40 N. E. 792; Wellington First Nat. Bank *v.* Chapman, 9 Ohio Cir. Ct. 79; *In re* Brophy, 4 Ohio S. & C. Pl. Dec. 391.

Washington.—Aberdeen First Nat. Bank *v.* Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

See 13 Cent. Dig. tit. "Courts," § 332.

This rule has been applied to decisions construing the National Banking Act (Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190), the Bankruptcy Act (Rugely *v.* Robinson, 19 Ala. 404), as to the jurisdiction of the federal judiciary (Feusier *v.* Lammon, 6 Nev. 290), and as to the effect of a patent (Gilmore *v.* Sapp, 100 Ill. 297).

11. *Kentucky.*— Com. *v.* Morrison, 2 A. K. Marsh. 75.

Massachusetts.— *In re* Sims, 7 Cush. 285.

Michigan.— Baldwin *v.* Baker, 121 Mich. 259, 80 N. W. 36.

New Jersey.— Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56.

Ohio. — *Ex p.* Bushnell, 9 Ohio St. 77; Keene *v.* Mould, 16 Ohio 12.

Virginia.— Burwell *v.* Burgess, 32 Gratt. 472.

See 13 Cent. Dig. tit. "Courts," § 332.

The rule has been applied to decisions upon legal tender acts. Black *v.* Lusk, 69 Ill. 70; Barringer *v.* Fisher, 45 Miss. 200; Cochran *v.* Darcy, 5 S. C. 125; Kellogg *v.* Page, 44 Vt. 356, 8 Am. Rep. 383; Townsend *v.* Jennison, 44 Vt. 315.

In case of a gross violation of the constitution the opinion has been expressed that a state court would not be bound, but it was also declared that nothing but an overwhelming necessity can justify such a semirevolutionary act. *Ex p.* Bushnell, 9 Ohio St. 77.

12. *California.*— People *v.* Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86.

But where a state statute is by the supreme court of the United States declared to be in violation of the federal constitution, such decision will be binding on the state courts.[13] And it has been decided that a decision by the federal district court of another state as to the construction of a statute of such state will be followed by the federal circuit court.[14]

5. English Decisions. English decisions made subsequent to the period of our separation from the British empire, while they are not received as absolute authority in our courts, may nevertheless be referred to and are entitled to great respect.[15] And where the common law has been adopted as a rule of decision in a state, the common-law rule of a case for the first time in such state will not be disregarded merely because the English judges have frequently regretted its adoption.[16]

Illinois.— Penn *v.* Bornman, 102 Ill. 523.

Indiana.— Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

Iowa.— Goodnow *v.* Wells, 67 Iowa 654, 25 N. W. 864; McClure *v.* Owen, 26 Iowa 243.

Kentucky.—Perry *v.* Wheeler, 12 Bush 541.

Louisiana.— Levy *v.* Mentz, 23 La. Ann. 261.

Maryland.—As to state insolvent laws the court of appeals is bound by the decisions of the United States supreme court. State *v.* Krebs, 6 Harr. & J. 31.

Mississippi.— Bailey *v.* Fitz-Gerald, 56 Miss. 578; McIntyre *v.* Ingraham, 35 Miss. 25; Deans *v.* McLendon, 30 Miss. 343.

Missouri.— State *v.* Trammel, 106 Mo. 510, 17 S. W. 502.

Nebraska.— Franklin *v.* Kelley, 2 Nebr. 79.

Ohio.— Sandusky City Bank *v.* Wilbor, 7 Ohio St. 481; Wilkins *v.* Philips, 3 Ohio 49, 17 Am. Dec. 579.

United States.— Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 12 S. Ct. 530, 36 L. ed. 191.

See 13 Cent. Dig. tit. "Courts," § 333.

A federal decision prior to any decision in the state court will be held binding by the latter as between the parties. Hoyle *v.* Southern Athletic Club, 48 La. Ann. 900, 19 So. 924; Billgery *v.* Indianapolis Land Trust, 48 La. Ann. 890, 19 So. 920.

Where the obligation of a prior contract is involved the United States supreme court will assume jurisdiction. Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 12 S. Ct. 530, 36 L. ed. 191.

Where a state was a territory at the time a decision was rendered by the supreme court construing a statute such decision will be controlling on the state court in construing a statute which is in effect the same. Choate *v.* Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424.

13. *Illinois.*— Smoot *v.* Lafferty, 7 Ill. 383.

Indiana.— Ballard *v.* Wiltshire, 28 Ind. 341.

Louisiana.— State *v.* Fullarton, 7 Rob. 219.

Missouri.— Barber Asphalt Paving Co. *v.* French, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492; Paddock *v.* Missouri Pac. R. Co., 155 Mo. 524, 56 S. W. 453.

Ohio.— Railway Pass. Assur. Co. *v.* Pierce, 27 Ohio St. 155; Skelly *v.* Jefferson Branch Bank, 9 Ohio St. 606.

Tennessee.— State *v.* Hernando Ins. Co., 97 Tenn. 85, 36 S. W. 721.

See 13 Cent. Dig. tit. "Courts," § 331.

Statute regulating service of process on non-residents.— The decisions of the United States supreme court are binding upon the state courts as to the constitutionality of such a statute. Caldwell *v.* Armour, 1 Pennew. (Del.) 545, 43 Atl. 517.

A state court will decide according to its judgment as to whether a state statute violates the federal constitution, where there is no federal decision in reference thereto. State *v.* Intoxicating Liquors, 95 Me. 140, 49 Atl. 670.

14. White *v.* The Cynthia, 29 Fed. Cas. No. 17,546*a*.

15. *Kentucky.*— Leigh *v.* Everheart, 4 T. B. Mon. 379, 16 Am. Dec. 160; Hickman *v.* Boffman, Hard. 348. But see Acts (1807), p. 28, c. 7.

Louisiana.— Miller *v.* Holstein, 16 La. 389.

Maryland.— Koontz *v.* Nabb, 16 Md. 549.

Virginia.— Marks *v.* Morris, 4 Hen. & M. 463.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120.

See 13 Cent. Dig. tit. "Courts," § 324.

Decisions under the English statute of wills are not authority. Miller *v.* McNeill, 35 Pa. St. 217, 78 Am. Dec. 333.

The principle and practice of the ecclesiastical courts of England should be considered as a precedent and guide to state courts in exercising any part of such jurisdiction under a statute. Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460. But the decisions of the courts of common law and chancery in England should be followed in preference to those of the ecclesiastical courts. Chapman *v.* Gray, 8 Ga. 341.

On principles of comity a mortgage on a vessel has been held void in a federal court where it is void under English law. The Acme, 1 Fed. Cas. No. 27, 2 Ben. 386.

16. Johnson *v.* Fall, 6 Cal. 359, 65 Am. Dec. 518.

If a statute is merely affirmative of the common law, decisions of the common law are applicable as precedents. Wren *v.* Dooley, 97 Ill. App. 88.

6. DICTA. A judicial opinion is an authority as a precedent only as to the point or points decided, and views upon any point or principle which the court is not required to decide or statements by way of argument or illustration beyond the case, not necessarily leading to the opinion on the point intended to be decided and not uttered upon such point or question but as if turning aside from the main topic of the case to collateral subjects, are mere *dicta*, and although entitled to respect are not binding as authority.[17]

7. RULES OF PROPERTY. Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property it is the duty of the court, on the principle of *stare decisis*, to adhere to such decisions without regard to how it might be inclined to decide if the question were new.[18] And this rule obtains, although the

Where a resort to legislation is regarded as warranted by the English bench and bar to eliminate a rule established by a decision, such decision will not be followed. North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

17. *California.*— Mulford *v.* Estudillo, 32 Cal. 131; Trinity County *v.* McCammon, 25 Cal. 117.

Florida.— Hart *v.* Stribling, 25 Fla. 433, 6 So. 455.

Illinois.— Bratsch *v.* People, 195 Ill. 165, 62 N. E. 895; Mayer *v.* Erhardt, 88 Ill. 452; Brown *v.* Coon, 36 Ill. 243, 85 Am. Dec. 402; Stow *v.* People, 25 Ill. 81.

Indiana.— Lucas *v.* Tippecanoe County Com'rs, 44 Ind. 524.

Louisiana.— Davis *v.* Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517; State *v.* Rohfrischt, 12 La. Ann. 382; Miller *v.* Marigny, 10 La. Ann. 338.

Maryland.— Alexander *v.* Worthington, 5 Md. 471.

Michigan.—Holcomb *v.* Bonnell, 32 Mich. 6.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; Lanier *v.* State, 57 Miss. 102.

New York.— Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Matter of Klock, 30 N. Y. App. Div. 24, 51 N. Y. Suppl. 897; People *v.* Leubischer, 23 Misc. 495, 51 N. Y. Suppl. 735.

Rhode Island.— Hancock Nat. Bank *v.* Farnum, 20 R. I. 466, 40 Atl. 341.

Tennessee.— Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

Virginia.— Lewis *v.* Thornton, 6 Munf. 87.

United States.— Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759; Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896; Carroll *v.* Carroll, 16 How. 275, 14 L. ed. 936.

See 13 Cent. Dig. tit. "Courts," § 335.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Per Marshall, C. J., in Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 399, 5 L. ed. 257.

That a decision might have been put upon a different ground does not place it in the category of a *dictum*. Clark *v.* Thomas, 4 Heisk. (Tenn.) 419. So the fact that the questions determined were not properly raised by the record and were not necessary to the determination of the case will not release an inferior tribunal from following such decision. Gibson *v.* Chouteau, 7 Mo. App. 1. Again, although a point is not fully argued, the decision of the court cannot be considered a *dictum*. Michael *v.* Morey, 26 Md. 239, 90 Am. Dec. 106. But where no argument or authorities are presented upon a point which the appellant failed to notice and the decision is based thereon the court will not consider itself concluded by what was stated in its opinion from considering the same question in a subsequent case. Lyman *v.* Malcolm Brewing Co., 161 N. Y. 119, 55 N. E. 408. In a decision that a recovery cannot be had at law but is in equity the latter conclusion is not a *dictum*. Menken *v.* Frank, 58 Miss. 283. And where the record presents two or more points, on either of which the decision might turn, and both are fully considered and determined neither can be considered as a *dictum*. State *v.* Brookhart, 113 Iowa 250, 84 N. W. 1064; Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 578; Hawes *v.* Contra Costa Water Co., 11 Fed. Cas. No. 6,235, 5 Sawy. 287 [*affirmed* in 104 U. S. 450, 26 L. ed. 827]. But see Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327.

18. *Alabama.*— Bibb *v.* Bibb, 79 Ala. 437; Bennett *v.* Bennett, 34 Ala. 53; Matheson *v.* Hearin, 29 Ala. 210; Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341; McVay *v.* Ijams, 27 Ala. 238.

Arkansas.— Townsend *v.* Martin, 55 Ark. 192, 17 S. W. 875.

California.— Sacramento Bank *v.* Alcorn, 121 Cal. 379, 53 Pac. 813; Smith *v.* Ferries, etc., R. Co., (1897) 51 Pac. 710; Smith *v.* McDonald, 42 Cal. 484; Hihn *v.* Courtis, 31 Cal. 398; Clark *v.* Troy, 20 Cal. 219.

Georgia.— Scott *v.* Stewart, 84 Ga. 772, 11 S. E. 897.

Illinois.— Braxon *v.* Bressler, 64 Ill. 488; Hopkins *v.* McCann, 19 Ill. 113.

Indiana.— Pond *v.* Irwin, 113 Ind. 243, 15 N. E. 272; Frank *v.* Evansville, etc., R. Co., 111 Ind. 132, 12 N. E. 105; Schori *v.* Ste-

court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable.[19] So such a rule controls as to decisions involving questions of constitutional law[20] and the construction and operation of statutes.[21]

phens, 62 Ind. 441; Carver *v.* Louthain, 38 Ind. 530; Harrow *v.* Myers, 29 Ind. 469.

Kentucky.— Uhl *v.* Reynolds, 64 S. W. 498, 23 Ky. L. Rep. 759; Nickels *v.* Com., 64 S. W. 448, 23 Ky. L. Rep. 778; Flannery *v.* Givens, 52 S. W. 962, 21 Ky. L. Rep. 705.

Michigan.— Reid *v.* Donovan, (1903) 93 N. W. 914; Rothschild *v.* Grix, 31 Mich. 150, 18 Am. Rep. 171.

Missouri.— Wilson *v.* Beckwith, 140 Mo. 359, 41 S. W. 985; Dunklin County *v.* Chouteau, 120 Mo. 577, 25 S. W. 553.

New Jersey.— Ocean Beach Assoc. *v.* Brinley, 34 N. J. L. 438.

New York.— Mott *v.* Clayton, 9 N. Y. App. Div. 181, 41 N. Y. Suppl. 87.

North Carolina.— Kirby *v.* Boyette, 118 N. C. 244, 24 S. E. 18.

Ohio.— Shumaker *v.* Pearson, 67 Ohio St. 330, 65 N. E. 1005; Cincinnati *v.* Taft, 63 Ohio St. 141, 58 N. E. 63; June *v.* Purcell, 36 Ohio St. 396; Sheldon *v.* Newton, 3 Ohio St. 494.

Oregon.— Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673.

Pennsylvania.— Bright *v.* Esterley, 199 Pa. St. 88, 48 Atl. 810; White *v.* Kyle, 1 Serg. & R. 515.

South Carolina.— Gage *v.* Charleston, 3 S. C. 491.

Texas.— Mayman *v.* Reviere, 47 Tex. 357; Dean *v.* Gibson, (Civ. App. 1898) 48 S. W. 57. But where a decision is in contravention of the constitution it need not be followed. Higgins *v.* Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770. See also Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

West Virginia.— Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909; Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

Wisconsin.— Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681; Pittelkow *v.* Milwaukee, 94 Wis. 651, 69 N. W. 803.

United States.— McCullough *v.* Com., 172 U. S. 102, 19 S. Ct. 134, 43 L. ed. 382 [*reversing* 90 Va. 597, 19 S. E. 114]; Minnesota Min. Co. *v.* National Min. Co., 3 Wall. 332, 18 L. ed. 42.

See 13 Cent. Dig. tit. "Courts," § 336.

A decision which has become a rule of property should be overruled only for most cogent reasons (Reichert *v.* McClure, 23 Ill. 516; Pond *v.* Irwin, 113 Ind. 243, 15 N. E. 272) or most palpable error (Lindsay *v.* Lindsay, 47 Ind. 283; Lombard *v.* Lombard, 57 Miss. 71; Boon *v.* Bowers, 30 Miss. 246, 64 Am. Dec. 159; Reed *v.* Ownby, 44 Mo. 204; Kearny *v.* Buttles, 1 Ohio St. 362).

The rule applies only to decisions of courts of last resort. Board of Directors *v.* People, 189 Ill. 439, 59 N. E. 977. So decisions in circuit courts cannot be held to establish a rule of property, where no appeals have been taken therefrom, so as to bind the circuit court of appeals. American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293. See also The Madrid, 40 Fed. 677.

Where a state is divided into two states and prior to such division a rule of property is established by a series of decisions of the highest court, the courts of the new state formed by such division will be bound thereby. Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909; Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

19. *Alabama.*— Bennett *v.* Bennett, 34 Ala. 53.

California.— Smith *v.* McDonald, 42 Cal. 484.

Georgia.— Scott *v.* Stewart, 84 Ga. 772, 11 S. E. 897.

Indiana.— Hines *v.* Driver, 89 Ind. 339; Ewing *v.* Ewing, 24 Ind. 468; Rockhill *v.* Nelson, 24 Ind. 422.

Michigan.— Emerson *v.* Atwater, 7 Mich. 12.

Nevada.— Linn *v.* Minor, 4 Nev. 462.

New York.— Van Winkle *v.* Constantine, 10 N. Y. 422.

Ohio.— Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

Tennessee.— State *v.* Whitworth, 8 Lea 594.

See 13 Cent. Dig. tit. "Courts," § 339.

Decisions should be those of supreme judicial tribunal in order to raise an erroneous decision to the dignity of law so as to be within the rule. Ocean Beach Assoc. *v.* Brinley, 34 N. J. L. 438. So if a decision is clearly incorrect it may be reversed where no injurious results are likely to flow therefrom. Linn *v.* Minor, 4 Nev. 462.

20. *Alabama.*— Hart *v.* Floyd, 54 Ala. 34.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56.

Texas.— Willis *v.* Owen, 43 Tex. 41.

Wisconsin.— Fisher *v.* Horicon Iron, etc., Co., 10 Wis. 351.

United States.— Mitchell *v.* Burlington, 4 Wall. 270, 18 L. ed. 350.

See 13 Cent. Dig. tit. "Courts," § 337.

Construction of a provision as to mode of amending laws is not a rule of property. Greencastle Southern Turnpike Co. *v.* State, 28 Ind. 382.

If municipal bonds are valid by the judicial interpretation of the constitution and laws of a state they cannot be made invalid by a subsequent decision. Mitchell *v.* Burlington, 4 Wall. (U. S.) 270, 18 L. ed. 350.

21. *Indiana.*— Haskett *v.* Maxey, 134 Ind.

8. PREVIOUS DECISIONS IN SAME CASE AS LAW OF CASE. As a general rule where a court has considered and determined a point in a case, its conclusion becomes the law of that case until reversed by an appellate court.[22]

9. RULINGS OF LEGISLATIVE AND EXECUTIVE DEPARTMENTS AND SPECIAL TRIBUNALS. If a doubtful constitutional question has been construed by the legislature, the courts will adhere to the construction so given, unless it be clearly wrong.[23] And upon the question as to when a war was terminated, an act of congress designating a certain day as the one upon which it was closed may be accepted by the courts.[24] But decisions or rulings of any of the departments of government are not generally considered as binding on the courts.[25] And it has been determined

182, 3 N. E. 358, 19 L. R. A. 379 [*modifying* Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52].

Louisiana.— Levy *v.* Hitsche, 40 La. Ann. 500, 4 So. 472.

Ohio.— Day *v.* Munson, 14 Ohio St. 488; Brown *v.* Farran, 3 Ohio 140.

Oregon.— Ross *v.* Ross, 21 Oreg. 9, 26 Pac. 1007 [*overruling* Weiss *v.* Bethel, 8 Oreg. 522].

Texas.— Hall *v.* White, (Sup. 1901) 61 S. W. 385 [*affirming* (Civ. App. 1900) 59 S. W. 810]; Thouvenin *v.* Rodrigues, 24 Tex. 468.

See 13 Cent. Dig. tit. "Courts," § 338.

22. *Illinois.*— Hallissy *v.* West Chicago Park Com'rs, 177 Ill. 598, 52 N. E. 843.

Louisiana.—Henderson *v.* Rost, 11 La. Ann. 541.

Massachusetts.— Luchterhand *v.* Sears, 108 Mass. 552.

Michigan.—Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576.

Missouri.— Paddock *v.* Missouri Pac. R. Co., 155 Mo. 524, 56 S. W. 453; Harburg *v.* Arnold, 87 Mo. App. 326.

Nebraska.—Smith *v.* Neufeld, 61 Nebr. 699, 85 N. W. 898.

New Hampshire.—Hedding *v.* Gallagher, 70 N. H. 631, 47 Atl. 614.

New York.— Brennan *v.* New York, 1 Hun 315; Guidet *v.* New York, 37 N. Y. Super. Ct. 124; Matter of Post, 30 Misc. 551, 64 N. Y. Suppl. 369; Cullen *v.* Cullen 23 Misc. 80, 50 N. Y. Suppl. 433; People *v.* Rourke, 11 Abb. N. Cas. 89; Peel *v.* Elliott, 16 How. Pr. 484; Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320. See also McGill *v.* Holmes, 168 N. Y. 647, 61 N. E. 1131 [*affirming* 54 N. Y. App. Div. 630, 66 N. Y. Suppl. 359].

Ohio.— Bane *v.* Wick, 6 Ohio St. 13; Walbridge *v.* Union Mfg. Co., 5 Ohio S. & C. Pl. Dec. 203, 7 Ohio N. P. 430.

Pennsylvania.— *In re* Devine, 199 Pa. St. 250, 48 Atl. 1072.

South Carolina.— Hunter *v.* Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

Tennessee.— Maloney *v.* Jones, (Ch. App. 1900) 59 S. W. 700.

Texas.— Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309. See also O'Rourke *v.* Clopper, 22 Tex. Civ. App. 377, 54 S. W. 930.

Vermont.— Enright *v.* Arnsden, 70 Vt. 183, 40 Atl. 37.

United States.—Montgomery *v.* McDermott, 99 Fed. 502; Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113; Wakelee *v.* Davis, 44 Fed. 532; Simonds Counter Machinery Co. *v.* Knox, 39 Fed. 702.

See 13 Cent. Dig. tit. "Courts," § 340.

Another element entering into the consideration of a case may justify a reversal. Knight *v.* Finney, 59 Nebr. 274, 80 N. W. 912.

The court will be governed by the record of the previous trial in determining whether an issue has been adjudicated. Hart *v.* Chemical Nat. Bank, (Miss. 1900) 27 So. 926.

A judge of a circuit court will not review a decision in a case rendered by another circuit judge. Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449; Oglesby *v.* Attrill, 14 Fed. 214, 4 Woods 114; Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,990, 1 Sawy. 685; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

A decision on a demurrer in a federal court has been held binding as the law of the case until a different rule is laid down by the supreme court. Wakelee *v.* Davis, 44 Fed. 532. But an order sustaining defendant's demurrer and giving plaintiff leave to amend does not preclude the court from entertaining the same question of law upon the subsequent trial on an amended complaint. Post *v.* Pearson, 108 U. S. 418, 2 S. Ct. 799, 27 L. ed. 774. *Compare* Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445.

A suggestion by a trial judge as to the validity of a stipulation of facts between the parties is not binding on the judge, before whom the case comes up. Brown *v.* Pechman, 55 S. C. 555, 33 S. E. 732. See Seery *v.* Murray, 107 Iowa 384, 77 N. W. 1058.

23. Hedgecock *v.* Davis, 64 N. C. 650.

24. So held as to the termination of the Civil war, although in a foreign war the treaty of peace is generally evidence of this. U. S. *v.* Anderson, 9 Wall. (U. S.) 56, 19 L. ed. 615; Grossmayer's Case, 4 Ct. Cl. 1.

25. Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,579, 1 Oreg. 381, where it is so held as to the determination of what laws of the United States were applicable to the territory of Oregon under the act organizing the territory.

This rule has been followed as to rulings of the navy department (Goldsborough *v.* U. S., 10 Fed. Cas. No. 5,519, Taney 80), of the treasury department (U. S. *v.* Bashaw, 50 Fed. 749, 1 C. C. A. 653), and of the war department (Wilson *v.* Wall, 34 Ala. 288).

that decisions of military tribunals are of no binding authority except as to the particular cases decided by them.[26] And a similar conclusion has been reached as to the opinion of a commission of arbitration and award, where such tribunal can only act with the consent of the parties, and cannot render or enforce a judgment.[27] Where, however, a trust is created for the benefit of those adhering to a particular denomination it has been decided that the determination of the proper ecclesiastical tribunals as to who are in subordination to that denomination will be accepted and followed by the courts.[28]

10. Effect of Reversal of Prior Decision. A decision overruling an earlier one is said to relate back to the date of the latter,[29] except so far as the construction last given would impair the obligations of contracts and injuriously affect vested rights.[30]

C. Number of Judges Necessary to Adjudication — 1. In General. The question as to how many judges should be present to authorize the legal transaction of business by a court is generally a matter to be determined in each case from the constitutional or statutory provisions creating or regulating the courts, and although the number varies in the different jurisdictions, as a general rule a

26. Taylor *v.* Murphy, 50 Tex. 291.

27. Henderson *v.* Beaton, 52 Tex. 29, Moore, C. J., dissenting.

28. First Constitutional Presb. Church *v.* Congregational Soc., 23 Iowa 567.

29. Boyd *v.* State, 53 Ala. 601; Taliaferro *v.* Barnett, 47 Ark. 359, 1 S. W. 702; Center School Tp. *v.* State, 150 Ind. 168, 49 N. E. 961; Lewis *v.* Symmes, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428.

A change in the construction of a statute relates back to the time of its enactment except where by so doing it would impair the obligation of contracts. Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94. See also Pierce *v.* Pierce, 46 Ind. 86. So held as to a decision overruling a prior decision in reference to the distribution of the surplus dog fund, it being declared that the township trustees acquired no vested rights under the earlier decision, and that a town might under the later one recover its share of such fund. Addison School Tp. *v.* Shelbyville School, 21 Ind. App. 707, 52 N. E. 105; Center School Tp. *v.* State, (Ind. App. 1898) 51 N. E. 103.

Persons agreeing to be bound by a decision in a case pending in the United States supreme court are bound thereby, although in a subsequent case the decision is overruled. Woodruff *v.* Woodruff, 52 N. Y. 53.

The right to public office is not contractual, and where fees are paid to an officer to which he is entitled under decisions construing a statute it has been decided that there may be a recovery back of such fees where a decision is subsequently rendered which holds to the contrary. Sudbury *v.* Monroe County, 157 Ind. 446, 62 N. E. 45.

30. *Indiana.*—Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Center School Tp. *v.* State, 150 Ind. 168, 49 N. E. 961; Hardinsburg *v.* Cravens, (Sup. 1897) 47 N. E. 153; Hibbits *v.* Jack, 97 Ind. 570, 49 Am. Rep. 478.

Minnesota.— Hollinshead *v.* Von Glahn, 4 Minn. 190.

New York.— See Miller *v.* Tyler, 58 N. Y. 477.

Ohio.— Lewis *v.* Symmes, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428.

Pennsylvania.— Geddes *v.* Brown, 5 Phila. 180, 22 Leg. Int. 324.

United States.— *In re* Dunham, 8 Fed. Cas. No. 4,146.

See 13 Cent. Dig. tit. "Courts," § 341.

Compare Allen *v.* Allen, (Cal. 1891) 27 Pac. 30; Bool *v.* Kenner, 105 Ky. 517, 49 S. W. 330, 20 Ky. L. Rep. 1343; Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066; McMaster *v.* Dyer, 44 W. Va. 644, 29 S. E. 1016.

Bonds valid according to the judicial decisions at the time of their issuance cannot be rendered invalid by a subsequent reversal of such decisions. State *v.* Bristol, 109 Tenn. 315, 70 S. W. 1031; Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440; Kenosha *v.* Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725.

A decision as to the taxation of stock-holders in national banks, which reverses prior decisions holding that such stock-holders were entitled to deduct from the value of their shares for purposes of taxation the amount of their indebtedness, and under which such deductions were made, is not retroactive so as to permit a recovery by the state of taxes on the amount of the deductions. Mercantile Nat. Bank *v.* Lander, 109 Fed. 21. In another case, however, where an opinion that banks were not subject to county taxation was subsequently overruled, it was decided that back taxes could be collected, as the payment had merely been suspended by the earlier decisions. Bohannon *v.* Shelbyville Bank, 63 S. W. 474, 23 Ky. L. Rep. 508.

Where, pending an appeal to the court of appeals of the District of Columbia from a judgment based on a decision of this court in another and analogous case, the decision of this court in the latter case is reversed by the supreme court of the United States, the judgment appealed from will be reversed. Macfarland *v.* Byrnes, 19 App. Cas. (D. C.) 531.

majority is a quorum sufficient for this purpose.[31] And in the absence of the quorum or number required by law to hold court a judgment rendered by the remaining judges will be regarded as a nullity, as in such a case there is no authority conferred to render a judgment.[32]

2. DEATH, DISQUALIFICATION, OR ABSENCE OF A JUDGE. The effect which the death, disqualification, or absence of a judge may have upon the right of the other judges to hold court and transact business must ordinarily depend upon the provisions of the constitution or statutes in reference to courts. As a general rule, however, the death, disqualification, or absence of a judge will not deprive the surviving judges of power and authority to hold court and exercise all its functions, provided the existence of any of the above factors does not reduce the number of judges below that legally required for the transaction of business.[33]

31. *Arkansas.*—Trice *v.* Crittenden County, 7 Ark. 159; Ferguson *v.* Crittenden County, 6 Ark. 479.

California.— All the judges should be present. People *v.* Barbour, 9 Cal. 230; People *v.* Ah Chung, 5 Cal. 103.

Florida.— Opinion of Chief Justice, 8 Fla. 478; Griffin *v.* Orman, 5 Fla. 332.

Indiana.— A single judge may hold court alone and transact business. Miller *v.* Burger, 2 Ind. 337.

Massachusetts.— Coffin *v.* Hussey, 12 Pick. 289.

New Jersey.— Engle *v.* State, 50 N. J. L. 272, 13 Atl. 604. See also Gray *v.* Bastedo, 46 N. J. L. 453.

New York.— Matter of Divine, 11 Abb. Pr. 90, 21 How. Pr. 80, 5 Park. Crim. 62; McFarland *v.* Crary, 6 Wend. 297 [*affirming* 8 Cow. 253]. See also Lawrence *v.* Republic Bank, 6 Rob. 497.

North Carolina.— State *v.* King, 27 N. C. 203, holding that the record should show that the requisite number of judges were present.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198; *In re* Northern Liberty Hose Co., 13 Pa. St. 193; Zeppon *v.* Com., 4 Pa. L. J. 362. See also Com. *v.* Martin, 2 Pa. St. 244; Com. *v.* Nathans, 2 Pa. St. 138.

Tennessee.— Steele *v.* Blanton, 1 Lea 514.

Texas.— Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960; West *v.* Burke, 60 Tex. 51.

Vermont.— State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

See 13 Cent. Dig. tit. "Courts," § 344.

The legislature may provide that a less number of judges shall constitute a quorum than the number which the constitution requires the court shall be composed of. Oakley *v.* Aspinwall, 3 N. Y. 547.

Where two constitute a quorum if that number are duly qualified in their office the court is duly organized. Snider *v.* Rinehart, 18 Colo. 18, 31 Pac. 716. But if they are divided in opinion a valid final judgment cannot be rendered. Deglow *v.* Kruse, 57 Ohio St. 434, 49 N. E. 477.

32. Trice *v.* Crittenden County, 7 Ark. 159; Ferguson *v.* Crittenden County, 6 Ark. 479; Jagger *v.* Coon, 5 Mich. 31.

33. Thus the death of one of three judges does not deprive the surviving two of power to hold court. Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567; State *v.* Lane, 26 N. C. 434; Aultman *v.* Utsey, 35 S. C. 596, 14 S. E. 351. So where a judge is disqualified for any reason from sitting the remaining judge or judges may hold court. Oakley *v.* Aspinwall, 3 N. Y. 547; People *v.* Davis, 61 Barb. (N. Y.) 456; McLughan *v.* Bovard, 4 Watts (Pa.) 308; Nalle *v.* Austin, 85 Tex. 520, 22 S. W. 668, 960; Western Union Tel. Co. *v.* McLeod, (Tex. Civ. App. 1894) 24 S. W. 815. And a judge who is disqualified is in some cases allowed to sit for the purpose of making a quorum, although he is not permitted to act or participate in the proceedings. Nephi Irr. Co. *v.* Jenkins, 8 Utah 452, 32 Pac. 699; Walker *v.* Rogan, 1 Wis. 597. Again the absence of a judge may not deprive the court from acting. Pedrieau *v.* Hunt, Riley Eq. (S. C.) 88. So the absence of a judge of a special court commissioned by the governor has been held not to invalidate proceedings held by the other two. Goodman *v.* Walker, 29 Ala. 444. So the temporary absence of one of the members necessary to make a duly organized court does not impair the validity of the court's proceedings. People *v.* Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Tuttle *v.* People, 36 N. Y. 431. But where a judge was absent for a day it has been decided that he was disqualified from further participation in the trial, and that where another judge subsequently absented himself, and did not return, a verdict by the remaining members was one by a court not legally constituted, there not being present the necessary members required by law. People *v.* Shaw, 63 N. Y. 36. *Compare* Furman *v.* Applegate, 23 N. J. L. 28. In case of a vacancy in office the remaining judges may act. Sullivan *v.* Speights, 14 S. C. 358.

The calling in of another judge to constitute a quorum is in some cases authorized by statute. People *v.* Barbour, 9 Cal. 230; Pedrieau *v.* Hunt, Riley Eq. (S. C.) 88. Or one "learned in the law" may be commissioned by the governor to act where such power is conferred upon him. Williams *v.* Benet, 35 S. C. 150, 14 S. E. 311, 14 L. R. A. 825; Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960; Western Union Tel. Co. *v.* McLeod, (Tex. Civ. App. 1894) 24 S. W. 815.

A single judge may hold a special court alone, where the two associate judges are interested in the event of the suit, and where such action is taken to prevent a failure of

D. Number of Judges Concurring in Opinion — **1. In General.** The question as to the number of judges who must concur in an opinion is one which must generally be determined from the constitutional or statutory provisions in reference to courts in general or to the particular court. Therefore no definite rule applicable in all cases can be stated except that where by such provisions a certain number of judges of a court must concur in an opinion by it there must be a compliance with such provision to render the opinion valid and binding.[34]

2. Where Court Is Divided. Where, upon the question whether relief should be granted or refused, the judges constituting the court are equally divided in opinion, such relief cannot be granted.[35] So under such circumstances an objection to evidence will not prevail,[36] nor will a demurrer be sustained;[37] and a motion for a new trial and in arrest of judgment will be considered as overruled,[38] and likewise a motion for a writ of habeas corpus will be dismissed.[39] But where in an action at law submitted by agreement to the president of a court and one of the associate judges they were divided in opinion it was decided that under such circumstances the cause should have been continued for a new trial.[40]

justice. McLughan *v.* Bovard, 4 Watts (Pa.) 308.

34. *Alabama.* — Goodman *v.* Walker, 38 Ala. 142.

California. — Luco *v.* De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543.

Georgia. — Hardin *v.* Lovelace, 79 Ga. 209, 5 S. E. 493; Johnson *v.* State, 1 Ga. 271.

Louisiana. — State *v.* Judges Civ. Dist. Ct., 35 La. Ann. 1075.

New Jersey. — Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

New York. — Corning *v.* Slosson, 16 N. Y. 294; Oakley *v.* Aspinwall, 3 N. Y. 547.

Pennsylvania. — *In re* Branch, 164 Pa. St. 427, 30 Atl. 296, 35 Wkly. Notes Cas. 310; Hamlin *v.* Peck, 135 Pa. St. 493, 19 Atl. 1053; *In re* Huntington County Line, 8 Pa. Super. Ct. 380.

Rhode Island. — State *v.* Congdon, 14 R. I. 458.

South Carolina. — Johnson *v.* Lewis, 1 Rich. Eq. 390.

Tennessee. — Austin *v.* Harbin, 95 Tenn. 598, 32 S. W. 628; Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126, 21 S. W. 329; Love *v.* Smith, 4 Yerg. 117.

Texas. — Lewis *v.* Riggs, 9 Tex. 164.

West Virginia. — Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352.

See 13 Cent. Dig. tit. "Courts," § 351; and Appeal and Error, 3 Cyc. 405.

A judge writing an opinion on a different ground than that appearing in the opinion by the other judges will be presumed to have concurred therein, where his opinion is not inconsistent with the same and where he has made no reference thereto. State *v.* Greene, 1 Pennew. (Del.) 63, 39 Atl. 590.

A majority of those sitting, provided the number required to hold court is present, may be sufficient, although not a majority of all the judges of such court, unless the law provides otherwise. Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449; Oakley *v.* Aspinwall, 3 N. Y. 547; Love *v.* Smith, 4 Yerg. (Tenn.) 117. But where constitutional questions are involved a majority of all of the judges of the supreme court of the United States should concur, according to the practice of that court in such cases. Briscoe *v.* Kentucky Bank, 8 Pet. (U. S.) 118, 8 L. ed. 887.

Where no dissent or absence of a judge is noted a decision will be regarded as one by the whole court. Vincennes Nat. Bank *v.* Cockrum, 64 Ind. 229. See also State *v.* Green, 1 Pennew. (Del.) 63, 39 Atl. 590; Warn *v.* New York Cent., etc., R. Co., 163 N. Y. 525, 57 N. E. 742; Anderson *v.* Fowler, 48 S. C. 8, 25 S. E. 900.

35. Madlem's Appeal, 103 Pa. St. 584. See also Hatton *v.* Weems, 12 Gill & J. (Md.) 83, holding that where the court is divided in opinion on a motion to dismiss an appeal, the motion cannot be granted.

As to equal division of appellate court see Appeal and Error, 3 Cyc. 219, 405.

An absent judge's opinion will not be considered for the purpose of showing a division of the court. Johnson *v.* Lewis, 1 Rich. Eq. (S. C.) 390.

The court may appoint another judge under the constitution in some cases. Colvin *v.* Johnston, 104 La. 655, 29 So. 274; Florence *v.* Brown, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273.

In Louisiana it has been held that in a suit involving the principal and a reconventional demand, if three justices of the supreme court concur in rejecting the principal demand, and three concur in rejecting the reconventional demand, there is a concurrence of the majority of the court. Losecco *v.* Gregory, 108 La. 648, 32 So. 985.

In Minnesota it has been held that the opinion of the senior judge of the district court is the opinion of the court, where he and his associate fail to agree. Darelius *v.* Davis, 74 Minn. 345, 77 N. W. 214; *In re* State Bank, 57 Minn. 361, 59 N. W. 315.

36. Henry *v.* Ricketts, 11 Fed. Cas. No. 6,385, 1 Cranch C. C. 545.

37. Putnam *v.* Rees, 12 Ohio 21.

38. State *v.* Brown, 2 Marv. (Del.) 380, 36 Atl. 458.

39. Stockman's Case, 56 Mich. 218, 22 N. W. 321.

40. Irons *v.* Hussey, 3 Ind. 158. *Compare*

E. Opinions — **1. Necessity, Requirements, and Sufficiency.** It has been held that it is not necessary in all cases that an opinion be written,[41] or that the reasons therefor be given.[42] But it is frequently provided by the constitution or statutes of a state that opinions, particularly those of an appellate court or a court of last resort, shall be in writing, and where there is such a provision of law it should as a general rule be complied with;[43] although where the statute so provides the supreme court need not prepare and file an opinion in a cause when it deems it unnecessary.[44] And the judge of an appellate circuit court need not file an opinion on reversing or affirming the judgment appealed from.[45] A court need not, however, give an opinion upon a point of law which is not raised by the evidence,[46] nor will it give an advisory opinion to another court after the latter has rendered judgment.[47] But where jurisdiction in error is conferred on a court all errors assigned should be passed upon by it.[48] Again an expression of an opinion *ore tenus* by one of the judges of a court after judgment is pronounced does not affect the law of the case.[49] And the head-notes to a case are an expression of the law thereof only so far as they are warranted by the judgment of the court upon the facts.[50] Again it may be stated that the absence of a judge from the

Northern R. Co. *v.* Concord R. Co., 50 N. H. 166, as to a hearing in equity.

41. Randolph County *v.* Ralls, 18 Ill. 29; Brady *v.* Edwards, 35 Misc. (N. Y.) 435, 71 N. Y. Suppl. 972; Letzkus *v.* Butler, 69 Pa. St. 277; *In re* Spring Garden St., 4 Rawle (Pa.) 192; Needham *v.* Hickey, (Tex. Civ. App. 1901) 61 S. W. 433.

That the legislature has no authority to require the supreme court of a state to give in writing the reasons for its decisions see Vaughn *v.* Harp, 49 Ark. 160, 4 S. W. 751; Houston *v.* Williams, 13 Cal. 24, 73 Am. Dec. 565.

An act requiring judges to write a syllabus is unconstitutional, as the legislature cannot impose ministerial duties upon a court or add duties to those devolved by the constitution. *Ex p.* Griffiths, 118 Ind. 83, 20 N. E. 513, 10 Am. St. Rep. 107, 3 L. R. A. 398; Matter of Head-Notes to Opinions, 43 Mich. 641, 8 N. W. 552.

42. Respublica *v.* Doan, 1 Dall. (Pa.) 86, 1 L. ed. 47. But see Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51 [rehearing *denied* in 37 S. E. 225].

The reason why defenses were not sustained need not be set up in a decision. Brady *v.* Edwards, 35 Misc. (N. Y.) 435, 71 N. Y. Suppl. 972. So reasons for rulings on motions and interlocutory proceedings need not be written out and filed. Farwell *v.* Laird, 58 Kan. 817, 51 Pac. 284. And on a finding by a court of review that the verdict is supported by the testimony the opinion need not recite and discuss the facts on which it is based. Sweet *v.* West Chicago Park Com'rs, 177 Ill. 492, 53 N. E. 74. See also Harrell *v.* Beall, 17 Wall. (U. S.) 590, 21 L. ed. 692. Again what the supreme court may deem a fallacy need not be answered at length. Speight *v.* People, 87 Ill. 595. So the court will not write out reasons at length on a second appeal, but will simply announce its decision on "an inspection of the whole record." Bradsher *v.* Cheek, 112 N. C. 838, 17 S. E. 533.

A judgment with an opinion per curiam is held to imply that elucidation and argument are not required in the particular case. Letzkus *v.* Butler, 69 Pa. St. 277.

43. *Arizona.*—Arhelger *v.* New York Mut. L. Ins. Co., (1899) 56 Pac. 720.

Arkansas.—Vaughn *v.* Harp, 49 Ark. 160, 4 S. W. 751

California.— McQuillan *v.* Donahue, 49 Cal. 157.

Illinois.— Speight *v.* People, 87 Ill. 595.

Indiana.— Craig *v.* Bennett, 158 Ind. 9, 62 N. E. 273; Trayser *v.* Indiana Asbury University, 39 Ind. 556; Willetts *v.* Ridgway, 9 Ind. 367; Hand *v.* Taylor, 4 Ind. 409.

Iowa.— Baker *v.* Kerr, 13 Iowa 384. See also Clay *v.* Maynard Sav. Bank, 104 Iowa 748, 73 N. W. 884.

Minnesota.—Brackett *v.* Rich, 23 Minn. 485, 23 Am. Rep. 703.

Nebraska.— See Stevens *v.* State, 56 Nebr. 556, 76 N. W. 1055.

See 13 Cent. Dig. tit. "Courts," § 354.

On the affirmance of a judgment by a divided court a written opinion need not be delivered. Louisville, etc., R. Co. *v.* Sharp, 91 Ky. 411, 16 S. W. 86.

A judge who did not hear the oral argument may write the opinion where it is concurred in by the other judges who heard such argument. Wollman *v.* New York Fidelity, etc., Co., 87 Mo. App. 677.

44. Anderson *v.* Connecticut Mut. L. Ins. Co., 55 Kan. 81, 39 Pac. 1038. See also Metzler *v.* Wenzel, 6 Kan. App. 921, 49 Pac. 750.

45. U. S. Express Co. *v.* Meints, 72 Ill. 293.

46. Gardner *v.* Collins, 9 Fed. Cas. No. 5,223, 3 Mason 398.

47. *Ex p.* Barker, 7 Cow. (N. Y.) 143.

48. Kramer *v.* Toledo, etc., R. Co., 53 Ohio St. 436, 42 N. E. 252.

49. Steele *v.* Charlotte, etc., R. Co., 14 S. C. 324.

50. Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198.

The title of a cause and the court at the head of an opinion when erroneous may be

county will not deprive him of the power to prepare and sign the finding and decision in another county, and the clerk on receiving them may file the same and enter judgment.[51] The court cannot, however, be compelled by mandamus to certify a paper which is not a decree, but one merely prepared for the convenience of counsel to enable them to see what decree he was prepared to make.[52]

2. SUPPLEMENTAL AND MODIFIED OPINIONS. A supplemental opinion may be filed as of the date of the first opinion setting forth the facts on which the court acted;[53] and the original opinion may be modified on the denial of a motion for a reargument.[54]

3. OF COMMISSIONERS OF SUPREME COURT. The opinions prepared by a commissioner of the supreme court and submitted to the judges thereof for examination and criticism and adopted by them are opinions of the court.[55]

4. OPERATION AND EFFECT. The law and the opinion of the judge are not always convertible terms or one and the same thing, since it may sometimes happen that the judge may mistake the law.[56] The decision of a supreme court is, however, in general, evidence of what is the law. *Legis interpretatio legis vim obtinet.*[57] But an opinion is not authority that the assumption of a certain principle by counsel is correct law where the court does not discuss the correctness thereof, and so, even though the court decides the case upon such assumption.[58] So the decision of the highest court of another state on a particular question will be presumed to govern the matter to which it applies in the absence of any other decision or statute to the contrary.[59] The presumption exists, however, that all facts in a record bearing upon the points decided have received due consideration by the supreme court, whether all, a part, or none of these facts are mentioned in the opinion.[60] If a decision of a court is reversed by an appellate court and its decision is reversed by the court of last resort on such terms as to leave the question of jurisdiction in the first court doubtful such question will not be thereby decided.[61] Again the rule is declared to be well settled that the language of an opinion must be held as referring to the particular case,[62] and an opinion is not a judgment and becomes no part of the record.[63]

F. Records — 1. WHAT CONSTITUTES, AND NECESSITY FOR. The record constitutes a history of the cause, and is required in England to be enrolled.[64] Records

disregarded. Lovelace *v.* Taylor, 6 Rob. (La.) 92.

51. Comstock Quicksilver Min. Co. *v.* Santa Cruz County Super. Ct., 57 Cal. 625.

52. Fairbanks *v.* Amoskeag Nat. Bank, 32 Fed. 572.

53. Lester's Appeal, (Pa. 1887) 11 Atl. 387.

Additional reasons for reversing and remanding a cause may be given in an opinion filed after trial of the remanded cause. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

54. Philadelphia *v.* Jewell, 2 Mona. (Pa.) 734.

55. Randall *v.* Minneapolis Nat. Bldg. L., etc., Union, 43 Nebr. 876, 62 N. W. 252.

56. 1 Bl. Comm. 71.

57. Breedlove *v.* Turner, 9 Mart. (La.) 353.

58. Donner *v.* Palmer, 31 Cal. 500.

An opinion is no authority for what is not mentioned in it and what does not appear to have been suggested to the court rendering it. Knight *v.* St. Louis, etc., R. Co., 40 Ill. App. 471 [*affirmed* in 141 Ill. 110, 30 N. E. 543].

59. Meuer *v.* Chicago, etc., R. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774.

Obiter dicta of the highest court of another state is some evidence of the law of such state, and in the absence of conflicting evidence warrants a finding that the law is as stated. Meuer *v.* Chicago, etc., R. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774.

60. Mulford *v.* Estudillo, 32 Cal. 131.

A statement of facts in an opinion is not binding on third parties, even though it may be regarded as an adjudication of matters of fact. Gage *v.* Busse, 7 Ill. App. 433.

The opinion of a judge on issues of fact in trial which did not result in a judgment is not admissible in evidence on a second trial before another court. Eckerson *v.* Archer, 10 N. Y. App. Div. 344, 41 N. Y. Suppl. 802.

61. *In re* Henderson, 33 N. Y. App. Div. 545, 53 N. Y. Suppl. 957.

62. People *v.* Winkler, 9 Cal. 234.

63. Gage *v.* Busse, 7 Ill. App. 433.

64. "The record is a history of the most material proceedings in the cause entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or oyer prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered verbatim on the roll; and also the issue or demurrer, and joinder

were formerly all written in Norman or law French.[65] Again all orders of a court not entered of record are extrajudicial and void.[66] And where a court consists of several judges, a transcript of the record should show that there were justices enough to constitute a court, and therefore having authority to make or cause to be made a record of the court.[67]

2. Making, Authentication, Certification, and Custody. In determining questions as to the making, authentication, certification, and custody of records resort must be had not only to statutes relating to records,[68] their authentication, etc.,[69] but also to the law of the creation of courts, the nature of such courts, and the character of their jurisdiction.[70]

therein." 3 Bl. Comm. 317. See also Wilkins *v.* Anderson, 1 Phila. (Pa.) 134, 8 Leg. Int. (Pa.) 6.

"Record" means a copy of the record in expressions referring to proceedings before courts of review such as "defect in the record," etc. Anderson L. Dict.

The original entry of each matter in the course of a suit is essentially the record of that matter. Wilkins *v.* Anderson, 1 Phila. (Pa.) 134, 8 Leg. Int. (Pa.) 6. But the trial list of causes (Moore *v.* Kline, 1 Penr. & W. (Pa.) 129), or minutes or memoranda only (Hoehne *v.* Trugillo, 1 Colo. 161, 91 Am. Dec. 703. See also Harvey *v.* Brown, 1 Ohio 268) are not parts of the record. And unless made so by agreed statement, etc., affidavits, depositions, and matters of parol evidence are no part of the record or transcript of the proceedings of a common-law court. Baltimore, etc., R. Co. *v.* Sixth Presby. Church, 91 U. S. 127, 23 L. ed. 260.

The word "record" technically applied to courts which proceeded according to the course of the common law, which courts were denominated courts of record, and did not apply to inferior courts. See *supra*, I, E. But these latter, when courts of record, even those not technically such, are required in this country to keep records of their proceedings. Chase *v.* Hathaway, 14 Mass. 222.

65. 3 Bl. Comm. 317.

66. Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135.

67. State *v.* King, 27 N. C. 203.

68. A statute may require separate dockets to be kept by county and circuit courts and that entry of judgments shall state when docketed. Western Sav. Co. *v.* Currey, 39 Oreg. 467, 65 Pac. 360, 87 Am. St. Rep. 660.

A statute relating to records should not conflict with a constitutional provision that the jurisdiction and powers of all courts of the same class shall be uniform. *In re* Beaver County Indexes, 6 Pa. Co. Ct. 525.

69. Thus where a statute requires the minutes of the proceedings to be signed by the presiding judge at the end of the term the failure of such judge so to sign does not invalidate orders entered on the minutes in regard to local option. Lillard *v.* State, (Tex. Civ. App. 1899) 53 S. W. 125. So a statute relating to the custody of records is not unconstitutional where it provides for a certified copy of a decree to be annexed to a tax record and such record to be delivered to the county treasurer in whose office it shall remain, "except as needed in the office of the county clerk," since the court may at any time repossess itself of the tax record. Mersereau *v.* Miller, 112 Mich. 103, 70 N. W. 341. And a statute does not authorize judges to order new indexes to their records, where it requires them to superintend said records and to require that the dockets "and all indexes to the records be correctly made out at the proper time." Ward *v.* Cole County Ct., 50 Mo. 401. Again a statute confirming all acts of surrogates in certifying the records covers the record of a will existing and undetermined in the courts at the passage thereof. Fetes *v.* Volmer, 58 Hun (N. Y.) 1, 11 N. Y. Suppl. 552.

Records unless copied cannot be removed from files where the statute requires the surrogate "to file and preserve in his office every deposition, etc." Matter of Smith, 15 N. Y. St. 743.

70. Thus it is not irregular to keep the minutes of civil cases in one book and those of criminal cases in another. Wilson *v.* State, 69 Ga. 224. If a court is subdivided into different rooms it gives each room its minutes under the control of the presiding judge therein, and an entry in any one of the minute books of any room reciting that all matters pending in that court are continued is an entry continuing everything pending in that court. Hazzard *v.* State, 6 Ohio Dec. (Reprint) 1081, 10 Am. L. Rec. 307. Again a judge's signature made by his clerk, in his presence and at his direction, to the record of one day's business is binding, and the failure of the judge to sign one day's record does not invalidate the proceedings, the beginning of one day's orders being sufficient to give validity to the orders of preceding days of the same month. Middleton *v.* Hensley, 52 S. W. 974, 21 Ky. L. Rep. 703. So if a book containing the entry of the minutes is signed by the presiding judge at the end of the term it need not be paragraphed "*ne varietur*" (State *v.* Hardaway, 50 La. Ann. 1345, 24 So. 320), although the minutes of a term of a court not signed by the judge have no force (Johnson *v.* Johnson, 2 Heisk. (Tenn.) 521); but in the absence of a law so requiring records need not be made out at length and signed by the judges before the close of the term (Chouteau *v.* Hooe, 1 Pinn. (Wis.) 663). Again if the records of one tribunal are required to be kept with another and are made records of such other, they may be authenticated by the seal and signatures of the chief

3. Entries Nunc Pro Tunc. It is competent for the court to make an entry *nunc pro tunc*,[71] even though the rights of third persons may be affected.[72] But record entries *nunc pro tunc* can only be properly made when based on some writing in a cause which directly or by fair inference indicates the purpose of the entry so sought to be made.[73]

4. Amendment and Correction — a. In General. In case of an omission or error in the record the power exists in the court to amend such record so that it may conform to the actual facts and truth of the case.[74] But where the rights of third persons will be affected by the allowance of an amendment for the purpose of putting into a process, pleading, or return something which was not originally

judge and clerk of the court in which they are deposited. Taylor *v.* Barron, 35 N. H. 484. And if the minutes of a certain day of a special term chambers, offered in evidence, do not show that certain orders were made at any particular time in the day or that the entries were made consecutively in relation to time, such questions may be determined by the jury. Hamilton *v.* Gorman, 24 N. Y. App. Div. 85, 48 N. Y. Suppl. 1002. Where the clerk of a circuit court is the legal custodian of the records and files the supreme court has no power to compel him to surrender them to any other person (Anonymous, 40 Ill. 77; Cameron *v.* Savage, 40 Ill. 76), nor will a legal custodian of the records of former county courts be compelled to surrender them to the board of county commissioners to be altered by them (Forsyth County *v.* Blackburn, 68 N. C. 406).

On application to the surrogate to sign the records of a predecessor left incomplete it is proper to require proof by affidavit or otherwise of the fact and to recite in the record the mode in which completed. Matter of Espie, 2 Redf. Surr. (N. Y.) 445.

71. Buckwalter *v.* Craig, 24 Iowa 215; Foster *v.* Woodfin, 65 N. C. 29; Miller *v.* Richardson, 38 Tex. 500; Burnett *v.* State, 14 Tex. 455, 65 Am. Dec. 131; Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496.

When order nunc pro tunc cannot be made see People *v.* New York City Super. Ct., 18 Wend. (N. Y.) 675; Kelly *v.* Belcher, 1 Tex. App. Civ. Cas. § 1126; The Bayonne, 159 U. S. 687, 16 S. Ct. 185, 40 L. ed. 305.

The clerk has no authority after adjournment of court to write out in full his minutes of the preceding day, for he thereby becomes a judicial officer as to matters not contained in the minutes. Johnson *v.* Com., 80 Ky. 377.

72. Foster *v.* Woodfin, 65 N. C. 29.

73. St. Francis Mill Co. *v.* Sugg, 142 Mo. 358, 44 S. W. 247. See also Gilmore *v.* Harp, 92 Mo. App. 386; Miller *v.* Richardson, 38 Tex. 500.

The amendment by the court of the record *nunc pro tunc* to speak the truth, on conflicting evidence as to the facts, is conclusive. Kerr *v.* Hicks, 131 N. C. 90, 42 S. E. 532.

74. *California.*—Allison *v.* Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89.

Colorado.— Pleyte *v.* Pleyte, 15 Colo. 44, 24 Pac. 579.

Georgia.— Baker *v.* Parrott, 105 Ga. 479, 30 S. E. 420.

Indiana.— Beach *v.* Woolford, 7 Ind. 351.

Iowa.— Goodrich *v.* Conrad, 28 Iowa 298; Stockdale *v.* Johnson, 14 Iowa 178.

Maine.— Morrell *v.* Cook, 31 Me. 120; *In re* Limerick, 18 Me. 183.

Missouri.— Gilmore *v.* Harp, 92 Mo. App. 386.

Nevada.— Sparrow *v.* Strong, 2 Nev. 362.

New Hampshire.— Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

New York.— Dart *v.* McAdam, 27 Barb. 187; *In re* Munro, 15 Abb. Pr. 363.

North Carolina.— Ricaud *v.* Alderman, 132 N. C. 62, 43 S. E. 543; Peoples Nat. Bank *v.* McArthur, 82 N. C. 107; Ashe *v.* Streator, 53 N. C. 256.

Pennsylvania.— Sweeny *v.* Delany, 1 Pa. St. 320, 44 Am. Dec. 136; Cumberland County *v.* Renninger, 9 Pa. Dist. 628.

South Carolina.— Gibson *v.* Gibson, 7 S. C. 356.

Texas.— Johnston *v.* Arrendale, (Civ. App. 1902) 71 S. W. 44.

Vermont.— Mosseaux *v.* Brigham, 19 Vt. 457.

Wisconsin.— Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

United States.— Gilman *v.* Libbey, 10 Fed. Cas. No. 5,445, 4 Cliff. 447.

See 13 Cent. Dig. tit. "Courts," § 369.

A refusal to amend by the trial judge will not be disturbed by the supreme court where the facts concerning which the evidence is contradictory occurred before him. Stockdale *v.* Johnson, 14 Iowa 178.

That the judge, by whose omission the record is erroneous, is no longer in office does not prevent the aggrieved party from having the correction made. Goodrich *v.* Conrad, 28 Iowa 298.

Records of a court can be altered only by the court itself. Otey *v.* Rogers, 26 N. C. 534. And a court is the exclusive judge of the necessity and propriety of an amendment to its record and of the sufficiency of the proof offered. Gilman *v.* Libbey, 10 Fed. Cas. No. 5,445, 4 Cliff. 447. A clerk has no authority to substitute his recollection for the written memorandum of the court. Crowell *v.* Deen, 21 Ill. App. 363. Any competent evidence may be received and acted upon by the court in its discretion. Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172. And an amendment to a record cannot be collaterally inquired into or impeached. Hamilton *v.* Seitz, 25 Pa. St. 226, 64 Am. Dec. 694. See also *In re* Limerick, 18 Me. 183.

in such process, pleading, or return, it has been decided that such an amendment will not as a general rule be allowed.[75]

b. Procedure. Upon motion with due notice to the opposite party the record may be amended.[76]

c. Time. The minutes or records of a trial court may be amended by such court at any time during the term.[77] And although after the final adjournment of a term a court ceases to have any power over its records, yet it is a general rule that clerical errors in a record may be corrected at any time, although subsequent to the term in which they are made, where the record affords matters, or where there is some written memorandum upon which to base such correction.[78] It has also been decided that a record may be corrected by the court in chambers as well as in term.[79]

5. Operation and Effect. The records of a court of record, where made pursuant to law, import absolute verity and cannot be contradicted within the jurisdiction of such court.[80] But where the approval of the judge is required by statute, a record is not conclusive which has not been so approved.[81]

6. Supplying Lost Records. Where any part of the records of a court have been lost or destroyed the power exists in such court of supplying a new record.[82]

VIII. Courts of General Original Jurisdiction.[83]

A. Nature and Grounds of Jurisdiction — 1. In General. The nature and character of the jurisdiction which a court possesses may be determined in

75. Foster *v.* Woodfin, 65 N. C. 29.

76. Eno *v.* Hunt, 8 Iowa 436; Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70. But see Gilman *v.* Libbey, 10 Fed. Cas. No. 5,445, 4 Cliff. 447, where it is held that mistakes or omissions of clerks or recording officers may be supplied at any time without notice.

Collateral attack.—An error in the record cannot be attacked collaterally. Willson *v.* Broder, 24 Cal. 190.

On a motion to amend the question will not be considered collaterally as to what effect the amendment may have or whether the court had the right to do what it is alleged to have done. Foster *v.* Woodfin, 65 N. C. 29.

Correction of a record after the expiration of a term should be made only upon formal petition, in which the error is set forth and the respect in which it is sought to be corrected, and also after notice has been given to the adverse party. Weed *v.* Weed, 25 Conn. 337.

77. State *v.* Griffin, 4 Ida. 459, 40 Pac. 60; Burnside *v.* Ennis, 43 Ind. 411; Robbins *v.* Neal, 10 Iowa 560; Howell *v.* State, 1 Oreg. 241.

78. *Alabama.*—Van Dyke *v.* State, 22 Ala. 57.

Arkansas.— King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739.

Connecticut.— Waldo *v.* Spencer, 4 Conn. 71.

Illinois.— Chicago *v.* Wolf, 86 Ill. App. 286; Schmelzer *v.* Chicago Ave. Sash, etc., Mfg. Co., 85 Ill. App. 596.

Iowa.— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146. But see Perry *v.* Kaspar, 113 Iowa 268, 85 N. W. 22.

Louisiana.— State *v.* Howard, 34 La. Ann. 369.

Maine.— Lewis *v.* Ross, 37 Me. 230, 59 Am. Dec. 49; Woodcock *v.* Parker, 35 Me. 138.

Nebraska.— Wachsmuth *v.* Orient Ins. Co., 49 Nebr. 590, 68 N. W. 935.

New Mexico.—Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

North Carolina.— Galloway *v.* McKeithen, 27 N. C. 12, 42 Am. Dec. 153.

Pennsylvania.— Nimick's Estate, 179 Pa. St. 591, 36 Atl. 350.

Texas.— Johnston *v.* Arrendale, (Civ. App. 1902) 71 S. W. 44.

West Virginia.— Miller *v* Zeigler, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777.

Wisconsin.— Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

See 13 Cent. Dig. tit. "Courts," § 372.

Record cannot be amended at a subsequent term from recollection merely (Hotaling *v.* Huntington, 64 Ill. App. 655) or upon information obtained from an affidavit of the attorney for one of the parties interested (Scott *v.* Schnadt, 67 Ill. App. 545).

79. Picard *v.* Prival, 35 La. Ann. 370; Falkner *v.* Hunt, 68 N. C. 475.

80. Shroyer *v.* Richmond, 16 Ohio St. 455; Selin *v.* Snyder, 7 Serg. & R. (Pa.) 166; Adickes *v.* Allison, 21 S. C. 245. See also Walker *v.* Moser, 117 Fed. 230, 54 C. C. A. 262.

Courts must be trusted as to the fidelity of their records and their decision thereon is final. People *v.* Judge Tenth Judicial Dist., 9 Cal. 19.

The record of the proceedings of the district court, kept in its journal entries, is the legal evidence of judgments and orders of the court. Morrill *v.* McNeill, (Nebr. 1901) 91 N. W. 601.

81. Shepherd *v.* Brenton, 15 Iowa 84.

82. Taylor *v.* McElrath, 35 Ala. 330; Loomis *v.* McKenzie, 48 Iowa 416; Gammon *v.* Knudson, 46 Iowa 455; Dubois *v.* Thomas, 14 S. C. 30.

83. Definition of a court of general juris-

many cases from the constitutional provisions in reference to such court;[84] although it may also be stated that the jurisdiction which is now exercised by the common-law courts or courts of general jurisdiction in this country is in a large measure dependent upon the special statutes conferring it.[85] Courts are not necessarily limited in all cases to those powers conferred by statute, for courts of superior general jurisdiction may possess other inherent powers.[86] If, however, the jurisdiction of a court is expressly limited it cannot be extended except by express grant or necessary implication.[87] Nor on the other hand should the jurisdiction of a court of general jurisdiction be restricted except by the unequivocal will of the legislature.[88] Again the question whether a court is of inferior or general jurisdiction is to be determined by the nature of the jurisdiction conferred, and not by the territorial limits within which it is to be exercised.[89]

2. **Conferred For a Limited Period.** Jurisdiction conferred for a limited period of time will not continue in force after the expiration of such period, nor will any power exist thereafter to review or modify a judgment pronounced prior thereto.[90]

3. **Amount in Controversy.** The jurisdiction of a court of original or exclusive jurisdiction may depend in some cases upon the amount or value in controversy.[91]

diction see *supra*, I, B. Of a court of original jurisdiction see *supra*, I, C.

84. Wright *v.* Johnson, 5 Ark. 687; Agin *v.* Heyward, 6 Minn. 110.

Where the constitution vests sole jurisdiction or certain actions in a particular court the legislature has no power to vest any part of such jurisdiction in another tribunal. Goldstein *v.* Ewing, 62 N. J. Eq. 69, 49 Atl. 517.

85. *California.*—Wright *v.* Central California Colony Water Co., 67 Cal. 532, 8 Pac. 70.

Iowa.— Laird *v.* Dickerson, 40 Iowa 665.

Kansas.— McGregor *v.* Morrow, 40 Kan. 730, 21 Pac. 157; English *v.* Woodman, 40 Kan. 412, 20 Pac. 262.

Maryland.— O'Brian *v.* Baltimore County Com'rs, 51 Md. 15.

Oregon.— Wright *v.* Young, 6 Oreg. 87.

Pennsylvania.— Ainey's Appeal, 2 Pennyp. 192.

United States.— Harvey *v.* Tyler, 2 Wall. 328, 17 L. ed. 871.

See 13 Cent. Dig. tit. "Courts," § 375.

Power to set aside a verdict is a power usually belonging to courts exercising a common-law jurisdiction, and a court of the class to which such power is granted by a statute possesses it, although not created until after the passage of such statute. Brown *v.* Moore, 79 Me. 216, 9 Atl. 355.

The jurisdiction of a tribunal is exclusive unless otherwise provided, where a statute confers a right, provides a specific remedy, and designates the tribunal for the enforcement thereof. Armstrong *v.* Mayer, 61 Nebr. 355, 83 N. W. 401.

To constitute a court a superior court as to any class of actions within the common-law meaning of the term it has been declared that its jurisdiction of such actions must be unconditional, so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties. Simons *v.* De Bare, 4 Bosw. (N. Y.) 547, 8 Abb. Pr. (N. Y.) 269.

Where a certain jurisdiction is expressly conferred by statute upon a court all power necessary to carry such jurisdiction into effect is likewise conferred thereby. *Ex p.* State, 71 Ala. 371.

Where statute enacted or repealed after suit commenced.—An act which is a beneficial or remedial law may in some cases have a retrospective operation so as to confer jurisdiction upon a court of an action commenced before the passage of the act. Simmons *v.* Hanover, 23 Pick. (Mass.) 188. And again where a court has jurisdiction of an action when commenced such jurisdiction may continue as to that action, although the court be deprived of its jurisdiction by an act subsequently passed. Braman *v.* Johnson, 26 How. Pr. (N. Y.) 27. See *In re* Innes, 4 Whart. (Pa.) 179.

86. Cook *v.* Walker, 15 Ga. 457; Curtis *v.* Gooding, 99 Ind. 45; Sanders *v.* State, 85 Ind. 318, 44 Am. Rep. 29; Nealis *v.* Dicks, 72 Ind. 374. See Wright *v.* Central California Colony Water Co., 67 Cal. 532, 8 Pac. 70.

87. Anderson *v.* Fowler, 1 Hill (S. C.) 226. See also Dangberg *v.* Ruhenstroth, 26 Nev. 455, 70 Pac. 320.

A judge will not be deputed to hold a special election court, that election officers may have a tribunal to advise them as to their legal rights or duties. *In re* Election Ct., 204 Pa. St. 92, 53 Atl. 784.

88. Henry *v.* Keays, 12 La. 214.

It is incumbent upon those who deny the jurisdiction of such a court to point out the constitutional or statutory provision which abridges its powers. Barrett *v.* Watts, 13 S. C. 441.

89. State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

90. Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089.

91. *California.*— Christian *v.* San Diego County Super. Ct., 122 Cal. 117, 54 Pac. 518.

4. Construction and Application of Provisions Conferring Jurisdiction — a. Of Civil Causes. In determining whether a case is a "civil case" within the meaning of a constitutional or statutory provision conferring jurisdiction in this class of cases not only should the general meaning of the term be considered, but resort should also be had to the provision creating the court or conferring the jurisdiction upon it.[92]

b. Of "Special Cases." As to what are "special cases" within the meaning of a constitutional provision permitting the legislature to confer jurisdiction on a certain court in "special cases" it has been decided that the ordinary interpretation of this provision is that it means a case unknown to the framework of the courts of law or equity.[93]

Connecticut.— Starr Cash, etc., Car Co. *v.* Starr, 69 Conn. 440, 37 Atl. 1057. *Compare* Brennan *v.* Berlin Iron Bridge Co., 75 Conn. 393, 53 Atl. 779.

District of Columbia.—Mansfield *v.* Winter, 10 App. Cas. 549.

Kentucky.— Com. *v.* Scott, 65 S. W. 596, 23 Ky. L. Rep. 1488, 55 L. R. A. 597.

Michigan.— Dodge *v.* Van Buren Cir. Judge, 118 Mich. 189, 76 N. W. 315.

Missouri.— Force *v.* Van Patton, 149 Mo. 446, 50 S. W. 906.

New Jersey.— Margarum *v.* Moon, 63 N. J. Eq. 586, 53 Atl. 179.

North Carolina.— Sloan *v.* Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21.

Ohio.— Burnap *v.* Sylvania Butter Co., 1 Ohio S. & C. Pl. Dec. 110, 7 Ohio N. P. 217.

Texas.—Williams *v.* Harrison, 27 Tex. Civ. App. 179, 65 S. W. 884; Delling *v.* Waddell, (Civ. App. 1901) 64 S. W. 945; Calhoun *v.* Wren, (Civ. App. 1901) 64 S. W. 786; French *v.* McCready, (Civ. App. 1900) 57 S. W. 894; Lazarus *v.* Swafford, 15 Tex. Civ. App. 367, 39 S. W. 389. *Compare* Jackson *v.* Corley, (Civ. App. 1902) 70 S. W. 570.

See 13 Cent. Dig. tit. "Courts," § 413 *et seq.*; and *infra*, IX, C.

The amount claimed in the complaint determines the jurisdiction in such cases.

Alabama.— Sharpe *v.* Barney, 114 Ala. 361, 21 So. 490.

California.— Rodley *v.* Curry, 120 Cal. 541, 52 Pac. 999.

Colorado.— Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642.

Florida.— Florida Cent., etc., R. Co. *v.* Seymour, (1902) 33 So. 424, addition of attorney's fee.

Missouri.— Bay *v.* Trusdell, 92 Mo. App. 377, addition of attorney's fee.

New Jersey.— Quairoli *v.* Vineland Italian Beneficial Soc., 64 N. J. Eq. 205, 53 Atl. 622.

North Carolina.— McCall *v.* Zachary, 131 N. C. 466, 42 S. E. 903.

Texas.— Smith *v.* Horton, 92 Tex. 21, 46 S. W. 627; Allison *v.* Haney, (Civ. App. 1901) 62 S. W. 933; Lillard *v.* Freestone County, 23 Tex. Civ. App. 363, 57 S. W. 338. See also *infra*, IX, C.

92. Gilbert *v.* Thomas, 3 Ga. 575.

What are civil actions.— A suit against a surety on an administration bond (State *v.* Turner, 10 Ind. 411), an action under the insolvent law, charging fraud against an insolvent (Mayewski *v.* Creditors, 40 La. Ann. 94, 4 So. 9), and a proceeding for the recovery of a penalty (Huggins *v.* Ball, 19 Ala. 587; Cahill *v.* Pennsylvania R. Co., 56 N. J. L. 445, 29 Atl. 156; Donahue *v.* Dougherty, 5 Rawle (Pa.) 124. *Contra*, Deer Lodge County *v.* Kohrs, 2 Mont. 66; Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771) have been held to be civil actions. But it has been decided in Massachusetts that a proceeding for the enforcement of a mechanic's lien is not a "civil proceeding" of which the municipal court of Boston has jurisdiction, when the claim does not exceed three hundred dollars. Cooper *v.* Skinner, 124 Mass. 183. And see Actions; Civil Action; Civil Case; Civil Cause.

93. Parsons *v.* Tuolumne County Water Co., 5 Cal. 43, 63 Am. Dec. 76; Hall *v.* Nelson, 23 Barb. (N. Y.) 88; Beecher *v.* Allen, 5 Barb. (N. Y.) 169.

What are "special cases."— It has been decided that cases of insolvency (Harper *v.* Freelon, 6 Cal. 76), proceedings to enforce mechanics' liens (McNiel *v.* Borland, 23 Cal. 144), proceedings to decide contested elections (Saunders *v.* Haynes, 13 Cal. 145), proceedings to condemn lands (Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70), proceedings for the partition of real estate (Doubleday *v.* Heath, 16 N. Y. 80), and proceedings under an act regulating the mode of settling claims to lots in joint town sites on public land in a certain county (Ricks *v.* Reed, 19 Cal. 551) are special cases. But actions for assault and battery (Kundolf *v.* Thalheimer, 12 N. Y. 593), actions to prevent or abate a nuisance (Parsons *v.* Tuolumne County Water Co., 5 Cal. 43, 63 Am. Dec. 76), or writs of mandamus (People *v.* Kern County, 45 Cal. 679. *Compare* People *v.* Day, 15 Cal. 91) are not special cases. And see, generally, Actions.

In a later case, however, in New York it was decided that under such a provision all remedies which were pursued by actions at common law were not excluded, and that jurisdiction might be conferred where the remedy was by a bill in equity. Arnold *v.* Rees, 18 N. Y. 57, 17 How. Pr. (N. Y.) 35, 7 Abb. Pr. (N. Y.) 328. *Compare* Hall *v.* Nelson, 14 How. Pr. (N. Y.) 32.

c. Of Actions Ex Contractu.[94] Actions on judgments are actions on contract, a judgment being declared to be a contract of the highest nature known to law.[95] And a tax properly assessed likewise is a debt on contract implied.[96]

d. Of Actions Ex Delicto.[97] Where a court has jurisdiction of actions in tort, within certain amounts, it has jurisdiction of an action for damages for conversion, the amount claimed being within the prescribed limits, such action being one sounding in tort, although based on a breach of contract.[98] And similarly where a court has such jurisdiction it has been decided that a penalty for violation of a statute, requiring every telegraph company to transmit and deliver messages with impartiality, may be recovered in an action before it.[99]

B. Courts of Particular States. In Arkansas the jurisdiction of the circuit courts is only limited as to the subject-matter by the constitution; and their jurisdiction of the person and powers to issue writs to other counties is to be determined by statute.[1]

In California the superior courts, which superseded the district courts under the constitution of 1879, were vested with the jurisdiction of the latter courts to inquire into any election held by any corporate body.[2] And they may administer relief in equity and also in accordance with the laws relating to probate matters.[3]

In Colorado county courts are courts of superior or general jurisdiction.[4]

In Connecticut the court of common pleas is inferior to the superior court, and it is the duty of the former to obey a writ of mandamus issued by the latter.[5]

In Florida the circuit court is a superior court of general jurisdiction,[6] and has jurisdiction of all actions which relate to the possession of real estate subject to exercise in such form as the legislature may prescribe.[7]

94. See, generally, ACTIONS; CONTRACTS.

95. Decree of a court of another state directing the payment of alimony is a contract. Crane *v.* Crane, 19 N. Y. Suppl. 691. And see EQUITY; JUDGMENTS.

96. Bowe *v.* Jenkins, 69 Hun (N. Y.) 458, 23 N. Y. Suppl. 548. And see TAXATION.

97. See, generally, TORTS.

98. McDonald *v.* Cannon, 82 N. C. 245. And see TROVER AND CONVERSION.

99. Western Union Tel. Co. *v.* Brightwell, 94 Ga. 434, 21 S. E. 518; Dicken *v.* Western Union Tel. Co., 94 Ga. 433, 21 S. E. 228; Solomon *v.* Western Union Tel. Co., 92 Ga. 360, 17 S. E. 265. And see TELEGRAPHS AND TELEPHONES.

1. Tucker *v.* Real Estate Bank, 4 Ark. 431.

They have jurisdiction of all civil causes not cognizable before a justice of the peace and in cases involving title to lands they have jurisdiction. Evans *v.* Percifull, 5 Ark. 424.

2. Wickersham *v.* Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106.

3. Pennie *v.* Roach, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106.

As affected by amount in controversy see California Cured Fruit Assoc. *v.* Ainsworth, 134 Cal. 461, 66 Pac. 586; Gallagher *v.* McGraw, 132 Cal. 601, 64 Pac. 1080.

Jurisdiction of an action to have an absolute conveyance of real estate declared a mortgage, to redeem therefrom, and to obtain an accounting of profits see Peninsular Trading, etc., Co. *v.* Pacific Steam Whaling Co., 123 Cal. 689, 56 Pac. 604.

Such courts are not prevented from exercising any jurisdiction conferred on them by the constitution because an act which was passed subsequent to the adoption of the constitution for the purpose of adapting the phraseology of the several codes to the nomenclature of the courts omitted such change in any particular section of the code. Wickersham *v.* Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106.

4. Terry *v.* Wright, 9 Colo. App. 11, 47 Pac. 905.

5. Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030. See Conn. Const. art. 5, § 1.

6. Nothing is out of its jurisdiction except that which specially appears to be so intended. Chapman *v.* Reddick, 41 Fla. 120, 25 So. 673.

As to issuance of summons ad respondendum see Chapman *v.* Raddick, 41 Fla. 120, 25 So. 673.

As to writs of attachment see Chapman *v.* Reddick, 41 Fla. 120, 25 So. 673.

In matters of costs.— Fla. Const. art. 5, § 11, relating to the jurisdiction of circuit courts, does not deny the legislature the right to confer jurisdiction in matters of costs, as provided by Fla. Rev. Stat. § 1305, where any officer shall have wilfully overcharged, although the amount involved be less than one hundred dollars. State *v.* Reeves, (Fla. 1902) 32 So. 814.

7. Stark *v.* Billings, 15 Fla. 318.

County courts are not courts of general jurisdiction proceeding according to the course of the common law. Epping *v.* Robinson, 21 Fla. 36.

In Georgia the superior court has power, where proceedings to change militia district lines are for any reason void, to so declare.[8]

In Illinois circuit courts are courts of superior general jurisdiction.[9] County courts are courts of general jurisdiction of unlimited extent as to a particular class of subjects, and when acting within that sphere they have the same general jurisdiction as the circuit court.[10] City courts have concurrent jurisdiction with the circuit court in all civil cases.[11]

In Indiana circuit courts are courts of superior general jurisdiction,[12] possessing both common-law and equity powers, although they act as distinct tribunals in exercising the different jurisdictions.[13]

In Iowa all civil and criminal business which arises in their respective districts is within the jurisdiction of the district courts.[14]

In Kentucky the circuit court of Franklin county is the fiscal court of the commonwealth and its jurisdiction for this purpose is coextensive with the whole state.[15]

In Louisiana by the constitution[16] the distinction between the jurisdiction of probate courts and civil courts of ordinary general jurisdiction is abolished, and the civil district court of the parish of Orleans[17] has a blended probate and general ordinary jurisdiction.[18]

In Maryland the circuit court of Anne Arundel county has jurisdiction over the space lying between the limits of that county, as described in the act of 1726,[19] and the channel of the Patapsco river.[20]

In Massachusetts the supreme judicial court when held by one judge in one

3. Howell *v.* Kinney, 99 Ga. 544, 27 S. E. 204.

9. Haywood *v.* Collins, 60 Ill. 328; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Beaubien *v.* Brinckerhoff, 3 Ill. 269; Kincaid *v.* Storz, 52 Mo. App. 564.

The constitution recognizes two courts of general jurisdiction in Cook county, the circuit and superior courts. Each court has its own clerk, who is responsible to it, and not to any other court of coördinate jurisdiction. Each has its files, records, and proceedings, which are before that court, and which cannot be controlled, altered, or reversed by any other court of coördinate jurisdiction. Mathias *v.* Mathias, 104 Ill. App. 344 [*affirmed* in 202 Ill. 125, 66 N. E. 1042].

When acting within the scope of their general powers such jurisdiction extends to all matters and suits at common law and in chancery. Haywood *v.* Collins, 60 Ill. 328.

10. People *v.* Gray, 72 Ill. 343.

All questions of conflicting or controverted titles are within its jurisdiction. Sutton *v.* Reed, 176 Ill. 69, 51 N. E. 801.

The superior court of Cook county is one of superior general jurisdiction. Ross *v.* Knapp, etc., Co., 77 Ill. App. 424.

11. Ill. Rev. Stat. c. 37, § 240.

City court of Mattoon has jurisdiction of an action to reform a written instrument on the ground of mistake. McKinstry *v.* Elliott, 89 Ill. App. 599.

12. Barkley *v.* Tapp, 87 Ind. 25.

13. Bequette *v.* Lasselle, 5 Blackf. (Ind.) 443.

Such court has power to set aside a fraudulent conveyance.—Barkley *v.* Tapp, 87 Ind. 25.

14. Chapman *v.* Morgan, 2 Greene (Iowa) 374.

15. Mershon *v.* Com., 2 Metc. (Ky.) 371. See also Com. *v.* Lyddane, 108 Ky. 503, 55 S. W. 704, 56 S. W. 807, 21 Ky. L. Rep. 1514.

16. La. Const. art. 130.

17. The terms and vacations of the civil district court for the parish of Orleans, and the character of litigation which may be conducted otherwise than by consent in vacation, are regulated by La. Acts (1896), No. 4, and the rules of court not in conflict therewith. State *v.* St. Paul, 109 La. 8, 33 So. 49.

18. Bellande's Succession, 41 La. Ann. 491, 6 So. 505, holding that questions of ownership of real estate may be passed upon by it. But see Union Wood Preserving Co. *v.* Bell, 29 La. Ann. 13.

In a suit between the state and a recorder to test the title of the latter to his office the civil district court has jurisdiction. State *v.* Grandjean, 51 La. Ann. 1099, 25 So. 940.

May decree a judgment a nullity where pronounced by a court without jurisdiction. Hibernia Nat. Bank *v.* Standard Guano Chemical, etc., Co., 51 La. Ann. 1321, 26 So. 274.

Fourth district court of the parish of Orleans is one of general civil jurisdiction. State *v.* Judge Fourth Dist. Ct., 27 La. Ann. 704.

Where a judge of one district court upon a legal system of interchange acts in another upon matters lodged in that other, the acts done by him must in their legal effect be held as if performed by the actual judge of the latter district acting within his jurisdiction, and by that court. Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641.

19. Md. Acts (1726), c. 1.

20. Acton *v.* State, 80 Md. 547, 31 Atl. 419; Md. Acts (1704), c. 92.

place has been declared to have jurisdiction of all matters of which it may take cognizance when so held in any other county.[21]

In Michigan a suit by a receiver of an insolvent fire insurance company to declare a lien on insured property cannot be entertained by the circuit court, where the amount inclusive of costs is less than one hundred dollars.[22]

In Nebraska the district court is a court of general jurisdiction,[23] possessing ample powers in cases of fraud by persons holding a fiduciary relation, to compel the proper application of trust funds committed to their care.[24]

In New Hampshire the supreme court has no original jurisdiction of claims against the estate of an insolvent debtor.[25]

In New Jersey it has been decided that general common-law powers and jurisdiction are vested in a court of common pleas.[26]

In North Carolina the superior court is one of general common-law jurisdiction.[27]

In Ohio the general equity jurisdiction of the court of common pleas was not taken away by the jurisdiction conferred on the probate court.[28]

In Pennsylvania it was decided in an early case that jurisdiction of the proof and execution of all contracts for the sale of land, made on a valuable consideration, whether for money or otherwise, exists in the court of common pleas.[29] A court of common pleas is, however, generally confined in its jurisdiction to the limits of the county in which it is located.[30]

21. Coffin *v.* Hussey, 12 Pick. (Mass.) 289.

22. Peake *v.* Bradley, 121 Mich. 182, 79 N. W. 1108, construing Howell Anno. Stat. Mich. §§ 4258, 6613.

23. May give legal or equitable relief. State *v.* Dickinson, 63 Nebr. 869, 89 N. W. 431.

In cases of forcible detainer the court has no original jurisdiction. Armstrong *v.* Mayer, 61 Nebr. 355, 83 N. W. 401.

24. Blake *v.* Chambers, 4 Nebr. 90.

25. In all cases of insolvency the courts of probate have original jurisdiction. Hunt *v.* O'Shea, 69 N. H. 600, 45 Atl. 480.

26. Den *v.* Gaston, 24 N. J. L. 818.

The jurisdiction is not extended by N. J. Pub. Laws (1892), p. 224, which authorizes the transfer of suits from circuit courts to courts of common pleas. Coles *v.* Collingswood First Baptist Church, 59 N. J. L. 311, 35 Atl. 907.

Appeal to the court of common pleas has been declared to be the only method of reviewing a case brought in the district court, where the amount did not exceed two hundred dollars. Lochanowski *v.* McKeone, 60 N. J. L. 118, 36 Atl. 882.

27. May try actions founded on contract where the principal sum is above the amount necessary to confer jurisdiction, and such other actions as the general assembly may constitutionally designate. Walton *v.* Walton, 80 N. C. 26.

Of an action for mandamus this court has sole jurisdiction. State *v.* Haywood County, 122 N. C. 661, 29 S. E. 60.

As to a civil action begun before a clerk of a superior court under N. C. Acts (1887), c. 27, see Baker *v.* Carter, 127 N. C. 92, 37 S. E. 81.

Original jurisdiction does not exist where the amount sought to be recovered in an action to recover over payment of interest on a loan is less than two hundred dollars. Gillam *v.* Virginia L. Ins. Co., 121 N. C. 369, 28 S. E. 470.

28. Deering Harvester Co. *v.* Keifer, 20 Ohio Cir. Ct. 311, 11 Ohio Cir. Dec. 270.

The jurisdiction of the common pleas court in an action against several subscribers to a contract to purchase, who were only liable to the extent of their subscription, so far as it is dependent upon the amount involved, should be determined by the amount recoverable against each subscriber. Hoosier Canning, etc., Co. *v.* Donovan, 9 Ohio S. & C. Pl. Dec. 59, 6 Ohio N. P. 431.

29. Meanor *v.* McKowan, 4 Watts & S. (Pa.) 302, construing the act of March 31, 1792.

This court also has jurisdiction of a petition to prevent grade crossings (*In re* Upper Darby Tp. Road, 8 Del. Co. 158), to foreclose a mortgage executed by a street railway company (Old Colony Trust Co. *v.* Allentown, etc., Rapid-Transit Co., 192 Pa. St. 596, 44 Atl. 319, under the acts of May 5, 1876, and March 23, 1877).

The court of common pleas of Dauphin county has power to issue a writ of quo warranto against a corporation, in which the commonwealth is the real plaintiff. Com. *v.* Pennsylvania, etc., R. Co., 2 Dauph. Co. Rep. (Pa.) 283.

30. Ollendike's Petition, 9 Pa. Dist. 95, 5 Lack. Leg. N. (Pa.) 356. *Compare* Com. *v.* Philadelphia County, 2 Dauph. Co. Rep. (Pa.) 8, where it is held that under the Pennsylvania act of April 7, 1870, in reference to the court of Dauphin county, such court has jurisdiction of an action by the state against Philadelphia county to recover charges for keeping its insane.

In Rhode Island the jurisdiction conferred by the Judiciary Act[31] on district courts over actions for the possession of tenements or estates left or held at will or by sufferance applies to all tenements or estates so held whether they are let or not.[32]

In South Carolina a circuit court has jurisdiction of an action to recover past-due taxes from a railroad.[33] A court of common pleas is one of general jurisdiction.[34]

In Tennessee the chancery court has concurrent jurisdiction with the circuit court of all actions triable at law "except for injuries to persons, property or character, involving unliquidated damages."[35]

In Texas the district court is under the constitution[36] given general jurisdiction over all cases for which jurisdiction is not otherwise provided.[37]

In Virginia a county court was a court of general jurisdiction.[38]

IX. COURTS OF LIMITED OR INFERIOR JURISDICTION.

A. Nature and Scope of Limitations — 1. In General. The powers conferred upon courts of limited jurisdiction must be exercised by them in the mode prescribed and cannot be enlarged by implication.[39]

31. R. I. Judiciary Act, c. 8, § 23.

32. O'Conner *v.* O'Brien, 18 R. I. 529, 28 Atl. 765.

33. State *v.* Cheraw, etc., R. Co., 54 S. C. 564, 32 S. E. 691.

34. Its records are absolute verities. Adickes *v.* Allison, 21 S. C. 245.

But under the constitutional provisions conferring exclusive original jurisdiction upon the court of common pleas in all actions *ex delicto* which are not cognizable before justices of the peace, and conferring upon the latter jurisdiction of such actions where the damages claimed do not exceed one hundred dollars (S. C. Const. art. 4, §§ 5, 22) it is determined that the exclusive jurisdiction vested in the court of common pleas extends only to those cases where the claim for damages exceeds such amount. Rhodes *v.* Wilmington, etc., R. Co., 6 S. C. 385.

35. Dorris *v.* King, (Tenn. Ch. App. 1899) 54 S. W. 683, where it is decided that an action for damages growing out of the violation of a contract is not within the exception to the act conferring such jurisdiction.

No jurisdiction, however, is conferred upon the court of chancery of a claim for less than fifty dollars. McNew *v.* Toby, 6 Humphr. (Tenn.) 27.

The common-law and chancery court of Memphis is one possessing general jurisdiction of all causes at law of a civil nature, and its judge may issue a writ of mandamus. Saffrons *v.* Ericson, 3 Coldw. (Tenn.) 1.

36. Tex. Const. art. 5, § 8.

37. Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703.

Such court has jurisdiction of an action to enjoin the taking of land by a county under proceedings alleged to be void where no damages are claimed (Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703); of an action against an officer for damages caused by a wrongful levy, if the amount sued for is beyond that over which the justice's court has jurisdiction (Ostrom *v.* McCloskey, (Tex. Civ. App. 1898) 44 S. W. 307); of an action on a note on which less than five hundred dollars was due where a lien on real estate was asked and granted (Green *v.* Scottish-American Mortg. Co., 18 Tex. Civ. App. 286, 44 S. W. 319); of actions to foreclose a lien on land (Grace *v.* Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158); of an action to restrain the use of a trade-name and to recover five hundred dollars damages, the jurisdiction being determined by the equitable relief prayed for (Cleaver *v.* Duke, (Tex. Civ. App. 1900) 58 S. W. 145); and of an action in which the petition alleges the execution of deeds in fraud of the law, prays that they be declared null and void, and also charges the executors with fraud and collusion in the procurement of the will, the county court in such case having no power to grant full and adequate relief (Becton *v.* Alexander, 27 Tex. 659).

38. Shelton *v.* Jones, 26 Gratt. (Va.) 891; Ballard *v.* Thomas, 19 Gratt. (Va.) 14.

39. No controversy not clearly within the comprehension of the law conferring the jurisdiction can be entertained by such courts.

California.— Umbarger *v.* Chaboya, 49 Cal. 525.

Connecticut.— Sears *v.* Terry, 26 Conn. 273.

Georgia.— Butler *v.* Mutual Aid, etc., Co., 94 Ga. 562, 20 S. E. 101.

Illinois.— Hardin County *v.* McFarlan, 82 Ill. 138; Board of School Inspectors *v.* People, 20 Ill. 525; Bowers *v.* Green, 2 Ill. 42.

Indiana.— English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215; Rhode *v.* Davis, 2 Ind. 53; White *v.* Conover, 5 Blackf. 462.

Kentucky.— Tull *v.* Geohagen, 3 J. J. Marsh. 377.

Louisiana.— Samory *v.* Hebrard, 17 La. 555.

Michigan.— Clark *v.* Holmes, 1 Dougl. 390; Wight *v.* Warner, 1 Dougl. 384.

2. What Are Courts of Limited Jurisdiction.[40] Where an act confers upon a court exclusive jurisdiction in certain cases, but abstains from conferring general jurisdiction, such court is one of limited jurisdiction.[41] But it has been decided that, although courts may be limited in their jurisdiction as to the division of judicial powers between them, they are not thereby made courts of inferior jurisdiction whose judgments are void, unless the record shows the facts necessary to bring all their powers into exercise.[42]

3. Powers as to Procedure. Although a court may possess inherent powers as to procedure, yet it is a general rule that the extent of its powers, whether inherent or otherwise, must depend upon the character of the jurisdiction conferred upon it.[43]

New Jersey.— See *v.* Zabriskie, 28 N. J. Eq. 422.

New York.— *In re* Jay, 5 Sandf. 674; Ahern *v.* National Steamship Co., 3 Daly 399; Richards *v.* Littell, 11 Misc. 637, 32 N. Y. Suppl. 919.

North Carolina.—Thompson *v.* Cox, 53 N. C. 311.

Ohio.— McCleary *v.* McLain, 2 Ohio St. 368.

South Carolina.— Pringle *v.* Carter, 1 Hill 53; McKenzie *v.* Ramsay, 1 Bailey 457.

South Dakota.— Benedict *v.* Johnson, 4 S. D. 387, 57 N. W. 66.

Vermont.— U. S. *v.* Davy, Brayt. 146.

Virginia.— Jackson *v.* Maxwell, 5 Rand. 636.

United States.— Hart *v.* Gray, 11 Fed. Cas. No. 6,152, 3 Sumn. 339.

See 13 Cent. Dig. tit. "Courts," § 404.

40. Definition of court of limited jurisdiction see *supra*, I, B.

41. Howard *v.* Lacroix, McGloin (La.) 16. Whenever the enforcement of a new statutory right is committed to a court, even of general original jurisdiction, such court is as to this an inferior court and should pursue the statute strictly. Cohen *v.* Barrett, 5 Cal. 195. *Compare* Diehl *v.* Page, 3 N. J. Eq. 143.

42. Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Guilford *v.* Love, 49 Tex. 715.

43. Inferior courts have power to allow the plaintiff to amend his summons on the return-day where the defendant appears. Cooper *v.* Kinney, 2 Hilt. (N. Y.) 12, 6 Abb. Pr. (N. Y.) 380. A rehearing cannot be granted by a state board of mediation and arbitration, where no such power is conferred upon the court by law. Renaud *v.* State Ct. Mediation, etc., 124 Mich. 648, 83 N. W. 620, 83 Am. St. Rep. 346, 51 L. R. A. 458.

A county court has power to review its proceedings in an action after judgment and to grant a new trial (Hall *v.* Hall, 30 How. Pr. (N. Y.) 51. See also Yenawine *v.* Richter, 43 Cal. 312; Dickinson *v.* Van Horn, 9 Cal. 207); to revive a judgment rendered by it which has become dormant (Dennis *v.* Omaha Nat. Bank, 19 Nebr. 675, 28 N. W. 512); to permit by order a return of property, in mitigation of damages, in an action of trover (Rutland, etc., R. Co. *v.* Middlebury Bank, 32 Vt. 639); to hear and determine, in allowing demands, in a summary way, without the form of pleading (Sublett *v.* Nelson, 38 Mo. 487); and to grant an injunction (People *v.* Dwyer, 90 N. Y. 402). See also Hathaway *v.* Warren, 44 How. Pr. (N. Y.) 161; Middletown *v.* Rondont, etc., R. Co., 43 How. Pr. (N. Y.) 144.

A court of common pleas in Ohio may make all such orders and issue all such processes as are authorized by well-established chancery practice as it existed before the adoption of the code (Tetterbach *v.* Meyer, 10 Ohio Dec. (Reprint) 212, 19 Cinc. L. Bul. 221), but cannot, it is decided in an early case, try the facts of a case without the consent of both parties (Mills *v.* Noles, 1 Ohio 534).

As to the district court in New York city it has been held that supplemental matter may be inserted in an answer by amendment (Myers *v.* Rosenback, 9 Misc. (N. Y.) 89, 29 N. Y. Suppl. 34 [*affirming* 7 Misc. 560, 28 N. Y. Suppl. 9, 23 N. Y. Civ. Proc. 363]); that a non-resident can only sue by short summons after furnishing evidence of non-residence and giving security for costs (Haulenbeck *v.* Gillies, 2 Hilt. (N. Y.) 238); that a cause may be adjourned upon the default of a defendant to answer a complaint for the purpose of hearing a motion to vacate an order of arrest (Adler *v.* Kerner, 13 Daly (N. Y.) 60); but that a reply not being necessary, judgment for defendant on a counter-claim will not be entered on the pleadings for want of a reply (Kuhn *v.* American Automatic Knife, etc., Co., 9 Misc. (N. Y.) 54, 29 N. Y. Suppl. 73), and that the code provision as to arrests in civil actions and requiring that fraud in contracting a debt must be proved on the trial does not apply to proceedings in this court (Stern *v.* Moss, 12 Daly (N. Y.) 516).

Particular municipal courts.— See Rossiter *v.* Minnesota Bradner-Smith Paper Co., 37 Minn. 296, 33 N. W. 855 (as to municipal court of the village of Duluth having power to vacate an attachment); Gould *v.* Johnston, 24 Minn. 188 (as to the municipal court of St. Paul having discretion as to the form of the summons); Schmidt *v.* Eiseman, 6 Misc. (N. Y.) 264, 26 N. Y. Suppl. 766 (as to city court of Albany, holding that statute of limitations need not be pleaded to a counter-claim); Jackson *v.* Hovey, 2 Misc. (N. Y.) 208, 21 N. Y. Suppl. 256 (as to municipal court of Buffalo); Schork *v.* Moritz, 6 N. Y. Suppl. 554 (as to municipal court of Buffalo, holding that under Code Civ. Proc. § 2944, a complaint may be amended during trial); Heath *v.* Kyles, 1 N. Y. Suppl. 770 (as to municipal court of Buffalo, holding that it

4. Civil Jurisdiction of Criminal Courts. The civil jurisdiction of a criminal court must in each case be determined from the constitutional or statutory provision creating or conferring jurisdiction upon it, and where civil jurisdiction is conferred it can only be exercised in the mode and to the extent designated.[44]

B. Limitations as to Subject-Matter. The jurisdiction of a court may be limited as to the subject-matter of the controversy, as in the case of attachment proceedings,[45] or in the case of actions which involve title to or interest in land.[46]

has power to charge the jury under Code Civ. Proc. § 2868, and Acts (1880), c. 344, § 6); Gunsolus *v.* Lormer, 54 Wis. 630, 12 N. W. 62 (as to municipal court of Dane county and appeal from judgment of such court). See also Williams *v.* State, 116 Ga. 525, 42 S. E. 745, as to making up panels of jurors by the city court of Cartersville in Georgia.

44. *Alabama.*— Lassiter *v.* State, 106 Ala. 292, 17 So. 725.

California.— Santa Barbara *v.* Stearns, 51 Cal. 499, holding that a police court cannot try an action to recover a license-tax for the transaction of business, where the legality of the tax is denied.

Kentucky.— Cessna *v.* Stedman, 1 Duv. 188; Smither *v.* Blanton, 1 Metc. 44.

Missouri.— St. Louis *v.* Tiefel, 42 Mo. 578; State *v.* Woerner, 33 Mo. 216.

New York.— Sill *v.* Corning, 15 N. Y. 297.

Tennessee.— State *v.* Alder, 1 Heisk. 543.

45. No general rule can be laid as controlling in this class of cases. Recourse must be had in each case to the constitutional or legislative provisions by virtue of which the court acquires jurisdiction as well as to such acts as may exist in reference to these particular actions, the court in some cases being specifically limited to jurisdiction of such actions in particular instances, or being controlled as to the amount involved or both. So it is decided in some cases that the circuit court has jurisdiction of such actions (Sturman *v.* Stone, 31 Iowa 115; Monks *v.* Strange, 25 Mo. App. 12; Brown *v.* Bissett, 21 N. J. L. 46), also the court of common pleas (McHugh *v.* Meyer, 61 Mo. 334; Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490); the county court (Wragg *v.* Kelley, 42 Miss. 231; McRimmon *v.* Moody, 87 Tex. 260, 28 S. W. 279; Barnett *v.* Rayburn, (Tex. App. 1890) 16 S. W. 537; Grizzard *v.* Brown, 2 Tex. Civ. App. 584, 22 S. W. 252. *Contra*, as to an attachment on land, Newton *v.* Heidenheimer, 2 Tex. App. Civ. Cas. § 126. See also Wright *v.* Cullers, 2 Tex. App. Civ. Cas. § 750); the district court (Malkemesius *v.* Pauly, 17 Misc. (N. Y.) 371, 39 N. Y. Suppl. 1095; Reeves *v.* Brown, 2 Pa. L. J. Rep. 196, 3 Pa. L. J. 464; Wright *v.* Cullers, 2 Tex. App. Civ. Cas. § 750; Rowan *v.* Shapard, 2 Tex. App. Civ. Cas. § 302); a city court (Lowenstein *v.* Martin, 105 Ala. 668, 17 So. 97; Bledsoe *v.* Gary, 95 Ala. 70, 10 So. 502; Sherwood *v.* Stevenson, 25 Conn. 431. *Contra*, Rome First Nat. Bank *v.* Ragan, 92 Ga. 333, 18 S. E. 295; Simpson *v.* Holt, 89 Ga. 834, 16 S. E. 87); a mayor's court (Welles *v.* Detroit, 2 Dougl. (Mich.) 77); and a justice of the peace (Hawkins *v.* Com., 1 T. B. Mon. (Ky.) 144).

46. If the title to real estate is the principal thing to be determined it may be then said that the title is in issue, but if such question only arises incidentally it is not in issue so as to affect the jurisdiction of a court, although in some cases a decision on this point may be material to the determination of the cause.

Alabama.— Stein *v.* Ashby, 24 Ala. 521.

California.— Randolph *v.* Kraemer, 106 Cal. 199, 39 Pac. 533.

Florida.— Collier *v.* Anderson, 36 Fla. 635, 18 So. 850.

Indiana.— Sipe *v.* Holliday, 62 Ind. 4; Carpenter *v.* Vanscoten, 20 Ind. 50; Macy *v.* Allee, 18 Ind. 126; Wolcott *v.* Wigton, 7 Ind. 44.

Louisiana.— State *v.* Lochte, 45 La. Ann. 1405, 14 So. 215; Samory *v.* Hebrard, 17 La. 555.

Maine.— Knight *v.* Dunbar, 83 Me. 359, 22 Atl. 216.

Minnesota.— Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151; Bassett *v.* Fortin, 30 Minn. 27, 14 N. W. 56; Steele *v.* Bond, 28 Minn. 267, 9 N. W. 772.

Nebraska.— Hesser *v.* Johnson, 57 Nebr. 155, 77 N. W. 406; Republican Valley R. Co. *v.* Fink, 28 Nebr. 397, 44 N. W. 434.

New Jersey.— Buttoro *v.* Whalen, 64 N. J. L. 461, 45 Atl. 981.

New York.— Cannavan *v.* Conklin, 1 Daly 509, 1 Abb. Pr. N. S. 271.

North Carolina.— Henderson *v.* Davis, 106 N. C. 88, 11 S. E. 573.

Texas.— Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423; Meyers *v.* Jones, 4 Tex. Civ. App. 330, 23 S. W. 562; Hatch *v.* Allan, 3 Tex. App. Civ. Cas. § 229; C. B. Carter Lumber Co. *v.* De Grazier, 3 Tex. App. Civ. Cas. § 176; Porter *v.* Porter, 2 Tex. App. Civ. Cas. § 433.

Vermont.— Long *v.* Ober, 51 Vt. 73.

See 14 Cent. Dig. tit. "Courts," § 410.

In the application of these principles it has been decided that a title to or interest in land is involved, so as to oust a court of jurisdiction where the action is one to enjoin the opening of a street (Lamasco *v.* Brinkmeyer, 12 Ind. 349); where a right of way is claimed by a railroad (Cincinnati, etc., R. Co. *v.* Sipe, 11 Ind. 67. See also Vaughn *v.* Dayton, 12 Ind. 561); in case of an action to set aside a sale of a debtor's real estate on execution in favor of a third person (Clark *v.* Trovinger, 8 Ind. 334); of a prosecution for obstructing a public alley, where the question of title to the alley is necessarily involved (People *v.* Stott, 90 Mich. 343, 51 N. W. 509; Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; State *v.* Cotton, 29 Minn. 187, 12 N. W. 529); of a

C. Amount or Value in Controversy[47] — **1. As Affecting Jurisdiction Generally.** The jurisdiction of courts of limited or inferior jurisdiction is generally dependent upon and must be determined by the amount in controversy.[48] And

suit to enforce an attachment lien on land (Rowan *v.* Shapard, 2 Tex. App. Civ. Cas. § 295); to enjoin the opening of a street (Coleman *v.* Thurmond, 56 Tex. 514); to enjoin the sale of land under execution, claimed as a homestead (Cross *v.* Peterson, 1 Tex. App. Civ. Cas. § 1061); to enjoin the obstruction of an alleged right of way (Scripture *v.* Kent, 1 Tex. App. Civ. Cas. § 1056); to enjoin the removal of a house on lands (Bean *v.* Toland, 1 Tex. App. Civ. Cas. § 1022); to foreclose a lien on a grade or rail bed of a railroad (Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160); to remove a cloud from title to land (Greenwood *v.* Watts, 1 Tex. App. Civ. Cas. § 114); or to recover for the removal of permanent fixtures (Beckham *v.* Burney, (Tex. Civ. App. 1895) 31 S. W. 718). But it has been decided that a title to land is not involved where the suit is one to subject realty held in trust to the payment of a claim for services rendered (Beckwith *v.* McBride, 70 Ga. 642); where it is one in equity to annul a deed to land (Smith *v.* Bryan, 34 Ga. 53. *Compare* Moise *v.* Franklin, 79 Mo. 518); a proceeding to revoke the will of a person (Morse *v.* Morse, 42 Ind. 365); an action in trespass claiming damages by adverse possession (Carter *v.* Augusta Gravel Road Co., Wils. (Ind.) 14); an action to recover for the use or expense of building a party wall (Blondean *v.* Sheridan, 103 Mo. 134, 15 S. W. 530; Garmire *v.* Willy, 36 Nebr. 340, 54 N. W. 562; Mahoney *v.* Lapowski, 3 Tex. App. Civ. Cas. § 307. But see Holman *v.* Taylor, 31 Cal. 338); an action to recover for gravel taken from plaintiff's land (Victoria *v.* Schott, 9 Tex. Civ. App. 332, 29 S. W. 681); an action for a growing crop taken and sold under execution (Phillips *v.* Warner, (Tex. App. 1890) 16 S. W. 423); an action for the cutting of timber (Brown *v.* Brown, 3 Tex. App. Civ. Cas. § 82); or of an action to foreclose a mortgage of personalty such as a boiler or engine with the shafting and pulleys (Ames Iron Works *v.* Davenport, (Tex. Civ. App. 1893) 24 S. W. 369).

Contracts relating to sale or mortgage of land.— An action upon a promissory note for the price of land is not one respecting titles to land, although a failure of consideration is alleged (Black *v.* Fritz, 98 Ga. 32, 25 S. E. 188; Spears *v.* Featheringill, 14 Ind. 402; De Armond *v.* Bohn, 12 Ind. 640; Harvey *v.* Dakin, 12 Ind. 481. But see Kelly *v.* Kelly, 2 Duv. (Ky.) 363; Lindsay *v.* Lindsay, 1 McCord (S. C.) 490); nor is a suit for damages for breach of warranty of title (McGregor *v.* Tabor, (Tex. Civ. App. 1894) 26 S. W. 443; Williams *v.* Truitt, 1 Tex. App. Civ. Cas. § 518), to enforce a vendor's lien on real estate for unpaid purchase-money (Jemison *v.* Walsh, 30 Ind. 167; Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045, 113 Mo. 155, 20 S. W. 21), to enforce a mechanic's lien (Wheatley *v.* Blalock, 82 Ga. 406, 9 S. E. 168); or an action on a contract for purchase-money and damages (Messer *v.* Bassett, (Tex. App. 1892) 18 S. W. 650); a suit to recover back money paid on an agreement to purchase (Mushrush *v.* Devereaux, 20 Nebr. 49, 28 N. W. 847. See also Lewis *v.* Reed, 11 Ind. 239. *Compare* Copertini *v.* Oppermann, 76 Cal. 181, 18 Pac. 256); or an action for specific performance of a contract to convey land (Snideman *v.* Rinker, 42 Ind. 223). But a contract, however, to give a lease has been held to be a contract relating to land for the breach of which an action should be brought before the "land court" (Brockman *v.* Dessaint, 21 Mo. 585); and it has been decided that title to land is the gist of an action on a bond conditioned for the payment of a specified sum to plaintiffs if their title to land should be held superior to that of defendants (Edwards *v.* Hefley, 3 Tex. Civ. App. 465, 22 S. W. 659).

What are easements on real estate.— See Knowles *v.* Eastham, 11 Cush. (Mass.) 429; Ashley *v.* Ashley, 6 Cush. (Mass.) 70; Salem Turnpike, etc., Bridge Corp. *v.* Hayes, 5 Cush. (Mass.) 458; Crittenton *v.* Alger, 11 Metc. (Mass.) 281; Hunt *v.* Hanover, 8 Metc. (Mass.) 343; Turner *v.* Blodgett, 5 Metc. (Mass.) 240 note; Cary *v.* Daniels, 5 Metc. (Mass.) 236.

47. See *supra*, VIII, A, 3.

48. *Arkansas.*— Dillard *v.* Noel, 2 Ark. 449.

California.— Napa State Hospital *v.* Flaherty, 134 Cal. 315, 66 Pac. 322.

Connecticut.— Fowler *v.* Fowler, 50 Conn. 256; Stone *v.* Platt, 41 Conn. 285.

Dakota.— St. Paul F. & M. Ins. Co. *v.* Hanson, 4 Dak. 162, 28 N. W. 193.

Georgia.— Baxley Banking Co. *v.* Carter, 112 Ga. 529, 37 S. E. 728; Lathrop *v.* Clewis, 63 Ga. 282.

Illinois.— Haines *v.* O'Conner, 5 Ill. App. 213.

Indiana.—Brown *v.* McQueen, 6 Blackf. 208.

Louisiana.— Conery *v.* New Orleans Water-Works Co., 39 La. Ann. 770, 2 So. 555; *In re* Brown, 28 La. Ann. 716; Bynum *v.* Bynum, 24 La. Ann. 127; Swan *v.* Gayle, 21 La. Ann. 478; Taenzer *v.* Judge Third Dist. Ct., 15 La. Ann. 120.

Massachusetts.— Bossidy *v.* Branniff, 135 Mass. 290.

Missouri.— Frazer *v.* Shitle, 1 Mo. 575.

New Jersey.— Hood *v.* Spaeth, 51 N. J. L. 129, 16 Atl. 163.

New York.— Ferguson *v.* Kimball, 3 Barb. Ch. 616; Spear *v.* Given, 9 Paige 362; Smith *v.* Adams, 6 Paige 435; Vredenberg *v.* Johnson, Hopk. 112; Church *v.* Ide, Clarke 494.

North Carolina.— Cooper *v.* Chambers, 15 N. C. 261, 25 Am. Dec. 710; Griffin *v.* Ing, 14 N. C. 358; Williams *v.* Holcombe, 4 N. C. 33.

Pennsylvania.— Kline *v.* Wood, 9 Serg. & R. 294; Byrne *v.* Gordon, 2 Browne 271.

South Carolina.— Trowell *v.* Youmans, 5 Strobh. 67.

Texas.— Johnson *v.* Happell, 4 Tex. 96; Cleveland *v.* People's Nat. Bank, (Civ. App.

although proof of plaintiff's title may be requisite, in an action to recover rent the amount of which is within the jurisdiction of the court, since the question of title is a collateral matter, the court's jurisdiction will not be thereby affected.[49]

2. AMOUNT CLAIMED DETERMINES — a. In General. The jurisdiction of a court is as a general rule to be determined by the amount claimed by the plaintiff without regard to the amount found due by the court or jury.[50] And if the plaintiff

1899) 49 S. W. 523; Cross *v.* Peterson, 1 Tex. App. Civ. Cas. § 1028.

Vermont.— Field *v.* Randall, 51 Vt. 33; Washburn *v.* Washburn, 23 Vt. 576; Hobart *v.* Wardner, 15 Vt. 564; Kittridge *v.* Rollins, 12 Vt. 541.

See 13 Cent. Dig. tit. "Courts," § 413 *et seq.*

Ad damnum may be increased before trial to give jurisdiction in some cases. Merrill *v.* Curtis, 57 Me. 152.

Amount due at the time of hearing may determine jurisdiction where not sufficient at the time of filing the bill, although alleged to be sufficient. Smalley *v.* Martin, Clarke (N. Y.) 293.

Amount involved in divorce decree.— See Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365.

A premium note, to be paid at such times and in such amounts as the directors may require, is one for the whole amount so far as jurisdiction is affected, although the assessments amount to only part thereof. Farmers' Mut. F. Ins. Co. *v.* Marshall, 29 Vt. 23.

In all actions of covenant and all actions upon liquidated demands, it is decided in an early case that if the law prescribes the precise sum which may be legally claimed and can be recovered, and no discretion is left to the court and jury, that sum must be treated as the sum in controversy, for the purpose of determining the jurisdiction of the court. Heilman *v.* Martin, 2 Ark. 158.

In an interpleader suit for a particular fund the amount should be ascertained with sufficient certainty to enable it to be brought into court, unless the parties can agree to fix it. Finlay *v.* American Exch. Bank, 11 How. Pr. (N. Y.) 468.

It is proper to hear and consider evidence upon the question whether a court has jurisdiction as to the amount. State *v.* Judge Third Judicial Dist., 47 La. Ann. 1022, 17 So. 479.

Although the verdict of a jury is in excess of the court's jurisdiction it does not deprive such court of power to grant a new trial. Kirk *v.* Grant, 67 Ind. 418, 10 Atl. 230.

Where a garnishee is summoned in, in an attachment suit, the amount in controversy between the defendant and him is the test. Haines *v.* O'Conner, 5 Ill. App. 213.

49. Kalteyer *v.* Wipff, (Tex. Civ. App. 1901) 65 S. W. 207.

50. *Alabama.*— Crossthwaite *v.* Caldwell, 106 Ala. 295, 18 So. 47; Bell *v.* Montgomery Light Co., 103 Ala. 275, 15 So. 569; Haws *v.* Morgan, 59 Ala. 508; Howard *v.* Wear, Minor 84.

Arkansas.— Heilman *v.* Martin, 2 Ark. 158.

California.— Derby *v.* Stevens, 64 Cal. 287, 30 Pac. 820; Solomon *v.* Reese, 34 Cal. 28; Wratten *v.* Wilson, 22 Cal. 465.

Connecticut.— Stone *v.* Hawkins, 56 Conn. 111, 14 Atl. 297; Nichols *v.* Hastings, 35 Conn. 546; Skinner *v.* Bailey, 7 Conn. 496; Pitkin *v.* Flowers, 2 Root 42.

Florida.— Livingston *v.* L'Engle, 27 Fla. 502, 8 So. 728.

Georgia.— Velvin *v.* Hall, 78 Ga. 136; Giles *v.* Spinks, 64 Ga. 205.

Illinois.— Wilson *v.* McKenna, 52 Ill. 43.

Indiana.— Pate *v.* Shafer, 19 Ind. 173; Guard *v.* Circle, 16 Ind. 401. But see Louisville, etc., R. Co. *v.* Johnson, 67 Ind. 546.

Iowa.— Bush *v.* Elson, Morr. 316.

Kentucky.— Hambell *v.* Hamilton, 3 Dana 501; Mills *v.* Couchman, 4 J. J. Marsh. 242; Whitecotton *v.* Simpson, 4 J. J. Marsh. 11; Singleton *v.* Madison, 1 Bibb 342.

Louisiana.—Abney *v.* Whitted, 28 La. Ann. 818; Daigle *v.* Lirette, 23 La. Ann. 34; Oakey *v.* Aiken, 12 La. Ann. 11.

Maryland.— Baltimore Cannel Coal, etc., Co. *v.* Steuart, 28 Md. 365; Reidel *v.* Turner, 28 Md. 362; Beall *v.* Black, 1 Gill 203. But see Rohr *v.* Anderson, 51 Md. 205; Carter *v.* Tuck, 3 Gill 248.

Massachusetts.— Wright *v.* Potomska Mills Corp., 138 Mass. 328.

Michigan.— Raymond *v.* Hinkson, 15 Mich. 113; Strong *v.* Daniels, 3 Mich. 466.

Minnesota.— Barber *v.* Kennedy, 18 Minn. 216; Turner *v.* Holleran, 8 Minn. 451.

Mississippi.— Fenn *v.* Harrington, 54 Miss. 733.

Missouri.— Funk *v.* Funk, 35 Mo. App. 246; Henks *v.* Debertshauser, 1 Mo. App. 402.

Nevada.— Klein *v.* Allenbach, 6 Nev. 159.

New Hampshire.— Adams *v.* Spaulding, 64 N. H. 384, 10 Atl. 688; Hoit *v.* Molony, 2 N. H. 322.

New York.— Foley *v.* Gough, 4 E. D. Smith 724; *In re* Barbour, 52 How. Pr. 94; Shotwell *v.* Daniels, 8 Johns. 341; Fitzburgh *v.* Everingham, 6 Paige 29.

North Carolina.— Newman *v.* Tabor, 27 N. C. 231; Clark *v.* Cameron, 26 N. C. 161; McGehee *v.* Draughon, 4 N. C. 240.

Ohio.— Linduff *v.* Steubenville, etc., Plank-Road Co., 14 Ohio St. 336; Brunaugh *v.* Worley, 6 Ohio St. 597; Jenney *v.* Gray, 5 Ohio St. 45.

Pennsylvania.— Fenton *v.* Harred, 17 Pa. St. 158; McKinney *v.* Allen, 1 Walk. 289; Matlock *v.* Brown, 2 Miles 15.

Rhode Island.— Edwards *v.* Hopkins, 5 R. I. 138.

has brought his action for an amount within the jurisdictional limits in respect thereto the cause will not be dismissed because he fails to establish the amount claimed, but the court may adjudicate the subject-matter and a judgment for a less sum than that required to give jurisdiction may be given, unless it appear that the plaintiff in stating his demand improperly sought to give jurisdiction where it did not rightfully belong.[51]

b. Fictitious or Fraudulent Demand. While the sum demanded ordinarily determines the jurisdiction, where it is dependent on the amount in controversy, yet if it manifestly appears that part of the demand is fictitious, being claimed merely to give the court jurisdiction, and that a less sum is really due, which is below the required amount, the suit will be dismissed.[52]

Tennessee.— Spurlock *v.* Fulks, 1 Swan 289.

Texas.— Little *v.* State, 75 Tex. 616, 12 S. W. 965; Jecker *v.* Phytides, 27 Tex. Civ. App. 410, 65 S. W. 1129; Euless *v.* Russell, (Civ. App. 1895) 34 S. W. 176; Sanger *v.* Ker, 1 Tex. App. Civ. Cas. § 1081; Lay *v.* Blankenship, 2 Tex. Unrep. Cas. 272.

Vermont.— Scott *v.* Moore, 41 Vt. 205, 98 Am. Dec. 581; Joyal *v.* Barney, 20 Vt. 154; McGray *v.* Wheeler, 18 Vt. 502; Brainard *v.* Austin, 17 Vt. 650; Manwell *v.* Briggs, 17 Vt. 176; Stevens *v.* Pearson, 5 Vt. 503; Ladd *v.* Hill, 4 Vt. 164.

Virginia.— Newsum *v.* Pendred, 2 Va. Cas. 93.

West Virginia.— Marion Mach. Works *v.* Craig, 18 W. Va. 559.

Compare Lee *v.* Foot, 2 Bailey (S. C.) 112.

See 13 Cent. Dig. tit. "Courts," § 413 *et seq.*

This rule has been applied in actions under the Mechanics' Lien Law (Foley *v.* Gough, 4 E. D. Smith (N. Y.) 724. See Jecker *v.* Phytides, 27 Tex. Civ. App. 410, 65 S. W. 1129); for damages for breach of contract (Newsum *v.* Pendred, 2 Va. Cas. 93); by a landlord against his tenant to recover rent due under a lease (Bailey *v.* Sloan, 65 Cal. 387, 4 Pac. 349); in replevin (Adams *v.* Spaulding, 64 N. H. 384, 10 Atl. 688; Stevens *v.* Chase, 61 N. H. 340; Fenton *v.* Harred, 17 Pa. St. 158; Matlock *v.* Brown, 2 Miles (Pa.) 15. *Compare* Powell *v.* Hyndman, 29 Ill. App. 179); for conversion (Haws *v.* Morgan, 59 Ala. 508; Euless *v.* Russell, (Tex. Civ. App. 1895) 34 S. W. 176); and generally in actions of tort (Aulick *v.* Adams, 12 B. Mon. (Ky.) 104; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Hancock *v.* Barton, 1 Serg. & R. (Pa.) 269; Ancora *v.* Burns, 5 Binn. (Pa.) 522; Edwards *v.* Hopkins, 5 R. I. 138).

Dismissal by the court of an action sounding in damages merely when the *ad damnum* brings the case within the jurisdiction of the trial court should not be done after reference and report. Learned *v.* Bellows, 8 Vt. 79.

If no value is alleged in the complaint, where the value of the property involved is essential to jurisdiction, the question may be raised by the pleadings. Fowler *v.* Fowler, 50 Conn. 256.

Sufficiency of oath as to value or amount of matter in controversy. Lincoln *v.* Taunton Copper Mfg. Co., 11 Cush. (Mass.) 440; Ives *v.* Hamlin, 5 Cush. (Mass.) 534; Farrar *v.* Parker, 7 Metc. (Mass.) 43.

51. *Arkansas.*— Heilman *v.* Martin, 2 Ark. 158.

California.— Jackson *v.* Whartenby, 5 Cal. 94.

Mississippi.—Griffin *v.* Lower, 37 Miss. 458.

North Carolina.— Martin *v.* Goode, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799; Usry *v.* Suit, 91 N. C. 406.

Texas.— Dwyer *v.* Brenham, 70 Tex. 30, 7 S. W. 598; Tidball *v.* Eichoff, 66 Tex. 58, 17 S. W. 263; Dwyer *v.* Bassett, 63 Tex. 274; Sherwood *v.* Douthit, 6 Tex. 224; Tarbox *v.* Kennon, 3 Tex. 7; Sozaya *v.* Patterson, (Civ. App. 1893) 23 S. W. 745; Bates *v.* Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949.

Vermont.— Drown *v.* Forrest, 63 Vt. 557, 22 Atl. 612, 14 L. R. A. 80; Clark *v.* Crosby, 37 Vt. 188; Mason *v.* Potter, 26 Vt. 722; Henry *v.* Tilson, 17 Vt. 479; Spafford *v.* Richardson, 13 Vt. 224.

52. *Arkansas.*— Heilman *v.* Martin, 2 Ark. 158.

Connecticut.— Hunt *v.* Rockwell, 41 Conn. 51.

Louisiana.— Bayon *v.* Rivet, 2 Mart. 149; Taylor *v.* Frederick, McGloin 380.

Michigan.— Fix *v.* Sissung, 83 Mich. 561, 47 N. W. 340, 21 Am. St. Rep. 616.

Mississippi.— Potts *v.* Hines, 57 Miss. 735.

North Carolina.—Wiseman *v.* Witherow, 90 N. C. 140; Froelich *v.* Southern Express Co., 67 N. C. 1; Johnston *v.* Francis, 35 N. C. 465.

Texas.— Bridge *v.* Ballew, 11 Tex. 269; Gulf, etc., R. Co. *v.* Wilm, 9 Tex. Civ. App. 161, 28 S. W. 925.

Vermont.— Scott *v.* McDonough, 39 Vt. 203; Miller *v.* Livingston, 37 Vt. 467.

See 13 Cent. Dig. tit. "Courts," § 423.

A claim for court costs is to be considered as a fictitious demand. Taylor *v.* Frederick, McGloin (La.) 380.

An intent to evade the limitations on jurisdiction is not sufficiently shown by the mere fact that the plaintiff testified that an account for a sum under the jurisdictional limit was correct. Potts *v.* Hines, 57 Miss. 735; Johnson *v.* Borden, (Tex. Civ. App. 1894) 25 S. W. 1131.

c. Amount of Damages Claimed. The amount of damages claimed is in many cases to be considered in determining the question of a court's jurisdiction, where such jurisdiction is dependent upon the amount in controversy.[53]

3. Value of Property as Affecting. It has been decided that in actions to foreclose a mortgage the jurisdiction of the court is determined by the amount of the mortgage debt or liability;[54] that in case of a bill to quiet title to land of an actual value less than the jurisdictional amount, equity may have jurisdiction, where by reason of valuable riparian rights the value of such land is greater than the required sum;[55] that in replevin the real value of the property regulates the jurisdiction of the court;[56] that where a judgment creditor seeks to have a purchase declared simulated the test of jurisdiction is the value of the property and not the amount of the judgment;[57] and that in a joint action against parties for a tract of land of a value sufficient to confer jurisdiction, although the interest of

Presumption is that plaintiff acted in good faith. Bickford *v.* Travelers' Ins. Co., 67 Vt. 418, 32 Atl. 230; Worcester *v.* Lampson, 55 Vt. 350; Joyal *v.* Barney, 20 Vt. 154.

53. Covey *v.* Noggle, 13 Barb. (N. Y.) 330; Seay *v.* Diller, (Tex. Sup. 1891) 16 S. W. 642; Dahoney *v.* Allison, 1 Tex. Unrep. Cas. 112.

This rule has been followed in actions in replevin (Payne *v.* Weems, 36 Mo. App. 54; Dempsey *v.* Hill, 3 Ohio Dec. (Reprint) 260, 5 Wkly. L. Gaz. 181) and for assault (Covey *v.* Noggle, 13 Barb. (N. Y.) 330).

Allegations as to damages are, it has been decided, not to be considered in determining whether the amount in controversy is sufficient to give jurisdiction, where the damages could not under any evidence be recovered. Harmon *v.* Callahan, (Tex. Civ. App. 1896) 35 S. W. 705; Texas, etc., R. Co. *v.* Crawford, 2 Tex. App. Civ. Cas. § 757; Lay *v.* Blankenship, 2 Tex. Unrep. Cas. 272. So there being no uncertainty as to the amount to be recovered, increasing the *ad damnum* will not confer jurisdiction. Griffin *v.* McDaniel, 63 Miss. 121. Thus it has been so held in an action in debt (Grant *v.* Tams, 7 T. B. Mon. (Ky.) 218) and in conversion (Hannon *v.* Bramley, 65 Conn. 193, 32 Atl. 336).

A sum claimed as exemplary damages may be considered (Connellee *v.* Drake, (Tex. App. 1890) 16 S. W. 175; Waugh *v.* Dabney, 12 Tex. Civ. App. 290, 33 S. W. 753) unless the facts pleaded do not sustain such claim (Paterson *v.* Thomas, (Tex. Civ. App. 1893) 24 S. W. 1124); and the dismissal of this claim because of the subsequent death of plaintiff does not cause a loss of jurisdiction, already acquired, because the amount is reduced below that necessary to give jurisdiction (Dwyer *v.* Bassett, (Tex. Civ. App. 1895) 29 S. W. 815).

In a petition for an injunction, where it is averred that unless it is issued the petitioner will sustain injury to a certain amount, such amount may determine the jurisdiction. State *v.* Judge, 39 La. Ann. 619, 2 So. 385; Gay *v.* New Orleans Pac. R. Co., 31 La. Ann. 274.

54. Cantoni *v.* Betts, 70 Conn. 386, 39 Atl. 604; Conn. Gen. Stat. § 809; Page *v.* Harrison, 20 Wis. 323. *Compare* Griswold *v.* Mather, 5 Conn. 435; Scripture *v.* Johnson, 3 Conn. 211; Peters *v.* Goodrich, 3 Conn. 146; Wheat *v.* Griffin, 4 Day (Conn.) 419; Marshall *v.* Taylor, 7 Tex. 235; Munroe *v.* Schwartz, (Tex. App. 1890) 16 S. W. 539.

Where the mortgage covers other property than that in controversy it is error to charge that the value of the property in the mortgage is the test. Baker *v.* Guinn, 4 Tex. Civ. App. 539, 23 S. W. 604.

55. Blodgett *v.* Dwight, 38 Mich. 596.

56. Sanford *v.* Scott, 38 Conn. 244; Small *v.* Swain, 1 Me. 133; Annis *v.* Bigney, 28 Mo. 247; Barnard *v.* Devine, 34 Misc. (N. Y.) 182, 68 N. Y. Suppl. 859.

In proceedings to recover goods wrongfully seized for rent the amount of plaintiff's damages rather than the amount of rent is said to control. Hirst *v.* Moss, 3 Phila. (Pa.) 457, 16 Leg. Int. (Pa.) 316. See Dazey *v.* Pennington, 10 Tex. Civ. App. 326, 31 S. W. 312.

Where a sum is specified in excess of which jurisdiction only exists and a verdict is given for such sum the court will be considered as having no jurisdiction in the absence of all showing in the declaration or otherwise that the plaintiff had reason to believe and did believe the property involved to be of greater value. Stephen *v.* Eiseman, 54 Miss. 535.

Assessed value.— In Texas the rule prevails by statute that the jurisdiction of justice, county, and district courts in trials of right to property is, in the absence of fraud, to be determined by the value assessed thereon by the officer serving the writ. Betterton *v.* Echols, 85 Tex. 212, 20 S. W. 63; Cleveland *v.* Tufts, 69 Tex. 580, 7 S. W. 72; Erwin *v.* Blanks, 60 Tex. 583; Chrisman *v.* Grayham, 49 Tex. 491; Harris *v.* Hood, 1 Tex. App. Civ. Cas. § 573; Tex. Rev. Stat. arts. 4823, 4826, 4831. But in Michigan it has been decided that where property has been recently purchased at a sum in excess of that necessary to give jurisdiction the fact that it is appraised at a less sum will not deprive the court of jurisdiction. Eldred *v.* Woolaver, 46 Mich. 241, 9 N. W. 266.

57. Godshaw *v.* Judges Second Cir. Ct. App., 38 La. Ann. 643.

each of the defendants does not appear equal to that amount, the court may have jurisdiction.[58] In proceedings, however, to enforce a lien it has been declared that jurisdiction is to be determined by the amount demanded;[59] and likewise that in attachment the jurisdiction is so determined.[60] Again in quo warranto involving the right to impose taxes the amount of such taxes controls.[61]

4. Uniting Separate Demands or Causes of Action — a. In General. The law, to prevent vexatious litigation, encourages a consolidation of actions in all cases where they can be joined according to the rules of pleading,[62] and in accordance with this principle it has been decided that the aggregate amount of several notes, or where the demand consists of several items or debts, the aggregate amount of the same, will determine the jurisdiction of the court.[63] There are numerous other decisions, however, in which it is declared that jurisdiction cannot be conferred by an aggregation of the amounts claimed in several substantive causes of action, each of which is for sums under the jurisdictional amount.[64]

58. Clarey *v.* Marshall, 4 Dana (Ky.) 95.

59. May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80; Vaughn *v.* Ely, 4 Barb. (N. Y.) 159. And see Lake Nav. Co. *v.* Austin Electrical Supply Co., (Tex. Civ. App. 1895) 30 S. W. 832; Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 568.

60. Barnett *v.* Rayburn, (Tex. App. 1890) 16 S. W. 537; Wheeler, etc., Mfg. Co. *v.* Whitener, 2 Tex. App. Civ. Cas. § 15. But see Kelley *v.* Stein, 3 Tex. App. Civ. Cas. § 451.

The amount named in a receipt given by the officer attaching property which he promises to pay upon failure to deliver the same on demand is not the test in a suit on such receipt. Fowler *v.* Bishop, 32 Conn. 199.

In case of doubt, where property sold on instalments has been levied on, whether the entire value of such property is recoverable or only the amount unpaid, the court will not dismiss for want of jurisdiction. Hefflin *v.* Bell, 30 Vt. 134.

61. East Dallas *v.* State, 73 Tex. 371, 11 S. W. 1030.

62. See, generally, Consolidation and Severance of Actions, 8 Cyc. 589.

63. *Alabama.*— Ledbetter *v.* Castles, 11 Ala. 149.

California.— Galloway *v.* Jones, (1887) 13 Pac. 712; Bailey *v.* Sloan, 65 Cal. 387, 4 Pac. 349.

Connecticut.— New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542.

Georgia.— Green *v.* Lester, 78 Ga. 86.

Indiana.— Culley *v.* Laybrook, 8 Ind. 285; State Bank *v.* Brooks, 4 Blackf. 485.

Kentucky.— Bakewell *v.* Howell, 2 Metc. 268; Sayre *v.* Lewis, 5 B. Mon. 90.

Michigan.— Picard *v.* McCormick, 11 Mich. 68.

Mississippi.— Cocke *v.* Board of Police, 38 Miss. 340.

Missouri.— Vineyard *v.* Lynch, 86 Mo. 684; Langham *v.* Boggs, 1 Mo. 476.

North Carolina.— Burrell *v.* Hughes, 116 N. C. 430, 21 S. E. 971; Martin *v.* Goode, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799; Moore *v.* Nowell, 94 N. C. 265; McCasten *v.* Quinn, 26 N. C. 43.

Pennsylvania.— Curry *v.* Spink, 23 Pa. St. 58.

Tennessee.— Nashville Bank *v.* Henderson, 5 Yerg. 104, 26 Am. Dec. 257.

Texas.— Cotter *v.* Parks, 80 Tex. 539, 16 S. W. 307; Nichols *v.* Snow, 42 Tex. 72; Lott *v.* Adams, 4 Tex. 426; Mays *v.* Lewis, 4 Tex. 38.

Vermont.— Cook *v.* Porter, 1 Tyler 450; McFarland *v.* McLaughlin, 2 D. Chipm. 90; Keyes *v.* Weed, 1 D. Chipm. 379.

See 13 Cent. Dig. tit. "Courts," § 417.

In actions ex delicto the aggregate amount of damages prayed for will determine and not the amount prayed for in a single count. Vineyard *v.* Lynch, 86 Mo. 684.

All animals killed on the track of a railroad company at any one time constitute a single cause of action. Lafayette, etc., R. Co. *v.* Ehman, 30 Ind. 83; Indianapolis, etc., R. Co. *v.* Elliott, 20 Ind. 430.

In actions for penalties the rule has been applied. Com. *v.* Mills, 6 Bush (Ky.) 296; Cocke *v.* Board of Police, 38 Miss. 340; Burrell *v.* Hughes, 116 N. C. 430, 21 S. E. 971. But *compare* Gibson *v.* Gault, 33 Pa. St. 44; Putney *v.* Bellows, 8 Vt. 272.

Where a claim under the mechanic's lien act was filed for a sum in excess of the amount necessary to confer jurisdiction, but was apportioned among several buildings so that the lien against each was for less than the amount necessary, it was held that the claim was to be considered as an entirety. Curry *v.* Spink, 23 Pa. St. 58. But see Keystone Min. Co. *v.* Gallagher, 5 Colo. 23.

Where a sum of money payable in instalments is due the whole amount determines. Brown *v.* Brown, 10 B. Mon. (Ky.) 247.

Where defendant has asserted his right to be sued on one of the notes in the county in which he resides, it cannot be added to those sued for the purpose of making the aggregate amount sufficient to give jurisdiction. Middlebrook *v.* David Bradley Mfg. Co., (Tex. Civ. App. 1894) 26 S. W. 113.

64. *Arkansas.*— Friend *v.* Smith Sons' Gin, etc., Co., 59 Ark. 86, 26 S. W. 374; Mannington *v.* Young, 35 Ark. 287; Berry *v.* Linton, 1 Ark. 252.

b. Claims By or Against Two or More Parties. In some cases jurisdiction may be determined by the amount of the claims of two or more plaintiffs against a defendant or of the amount claimed against two or more defendants.[65] But it is a general rule that one or more plaintiffs cannot, by improperly joining in one bill two or more claims against one or more defendants, where such claims are in their nature several and distinct as to each, both in law and in equity, compel the court to take jurisdiction thereof.[66]

c. Aggregate of Principal and Interest or Costs. Where the principal sum sued for is less than is necessary to confer jurisdiction upon the court, it is the general rule, supported by the weight of authority, that if the accrued interest, together with the principal, amount to the sum required for this purpose, the court will have jurisdiction of such suit.[67] Again it has been decided that the

Colorado.—Keystone Min. Co. *v.* Gallagher, 5 Colo. 23.

Connecticut.— Camp *v.* Stevens, 45 Conn. 92; Hoey *v.* Hoey, 36 Conn. 386; Denison *v.* Denison, 16 Conn. 34. *Compare* Main *v.* Preston First School Dist., 18 Conn. 214.

Indiana.— Jones *v.* Buntin, 1 Blackf. 322.

Kentucky.— Harris *v.* Smith, 7 T. B. Mon. 310; Lightfoot *v.* Payton, Hard. 3; Blackwood *v.* Tanner, 66 S. W. 500, 23 Ky. L. Rep. 1919.

New York.— People *v.* Crosby, 1 How. Pr. 243.

Pennsylvania.— Gibson *v.* Gault, 33 Pa. St. 44.

Vermont.— Putney *v.* Bellows, 8 Vt. 272.

See 13 Cent. Dig. tit. "Courts," § 417.

In case of an attachment on an account consisting of several items as to one only of which there is ground for attachment, and this is less than the amount necessary to confer jurisdiction, the attachment will be dissolved for want of jurisdiction. Delmas *v.* Morrison, 61 Miss. 314.

Where sheep are killed by dogs in an action against a town for damages jurisdiction cannot be conferred by combining in several counts of a complaint damages sustained on different days. Davis *v.* Seymour, 59 Conn. 531, 21 Atl. 1004, 13 L. R. A. 210.

Where two summary processes are brought on two distinct notes against the same defendant they will not be consolidated if the amount of both notes exceeds the summary jurisdiction. Parrot *v.* Green, 1 McCord (S. C.) 531.

65. Where a several contract is treated as a joint one for the purpose of a joint action jurisdiction may be determined by the whole amount claimed. Wilde *v.* Haycraft, 2 Duv. (Ky.) 309.

In an action against sureties the fact that the demand against each is below the jurisdictional limit is held not to deprive the court of jurisdiction. State *v.* Cousin, 31 La. Ann. 297. *Compare* Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593. And where a suit is brought against a principal and surety, although the plaintiff may permit a discharge of the principal and take judgment against the surety for contribution, which reduces the amount below the jurisdictional limit, this does not deprive the court of jurisdiction. Powers *v.* Thayer, 30 Vt. 361.

In an action to enforce a lien against two persons, the amount of the lien has been held to determine (Rickets *v.* Hamilton, 29 S. W. 736, 16 Ky. L. Rep. 762), and also where several lien-holders join in a petition to enforce such claims (Amato *v.* Ermann, 47 La. Ann. 967, 17 So. 505).

In a suit by several taxpayers to enjoin the collection of taxes the jurisdiction is determined by the aggregate of the taxes of all the petitioners. Girardin *v.* Dean, 49 Tex. 243; Carlile *v.* Eldridge, 1 Tex. App. Civ. Cas. § 986; Hamilton *v.* Wilkerson, 1 Tex. App. Civ. Cas. § 556.

In case of a creditor's bill the aggregate amount of their judgments will control. Sizer *v.* Smith, 9 Paige (N. Y.) 605; Dix *v.* Briggs, 9 Paige (N. Y.) 595; Van Cleef *v.* Sickles, 5 Paige (N. Y.) 505.

Where an action to enforce the execution of an express trust is brought by a creditor in behalf of himself and other creditors the aggregate amount of all the creditors' claims is the amount in controversy. Goncelier *v.* Foret, 4 Minn. 13.

Where a question of title is involved in an action against two defendants to recover land the value of such land determines. Derbes *v.* Romero, 28 La. Ann. 644.

66. Chapman *v.* Banker, etc., Pub. Co., 128 Mass. 478. See also Stevenson *v.* Weber, 29 La. Ann. 105.

Debts due to persons severally cannot be joined in one bill in equity. Chapman *v.* Banker, etc., Pub. Co., 128 Mass. 478.

In actions against stock-holders for a corporate debt, although the aggregate amount sought to be recovered from all exceeds the sum required to give jurisdiction, it has, however, been decided that the court cannot take jurisdiction as to those against whom the claims do not amount to a sum sufficient for that purpose. Derby *v.* Stevens, 64 Cal. 287, 30 Pac. 820; Evans *v.* Bailey, (Cal. 1885) 6 Pac. 424.

In an action to recover a reward offered by one instrument the court cannot take jurisdiction where each is bound in a sum below the amount required. Thomas *v.* Anderson, 58 Cal. 99.

67. *Alabama.*—Hogan *v.* Odam, 3 Stew. 58.

costs cannot be considered in determining whether the amount in controversy is sufficient to confer jurisdiction upon the particular court.[68]

d. Addition of Attorney's Fees. Where it is provided in a note that a certain amount shall be added for attorney's fees in case the note is not paid at maturity, such fees are to be included in determining the jurisdiction of the court with reference to the amount involved.[69]

5. Where Original Amount Has Been Reduced — a. In General. In an action to recover money due on a contract, although the original debt or amount due was one in the jurisdiction of the court, yet if it appears that such amount has been reduced by credits before the suit was commenced to an amount within the jurisdiction of another court, the suit should be brought in the latter court;[70]

Connecticut.— Stone *v.* Hawkins, 56 Conn. 111, 14 Atl. 297; Boyle *v.* Rice, 41 Conn. 418.

Florida.—Wilson *v.* Sparkman, 17 Fla. 871, 35 Am. Rep. 110.

Kentucky.— Bakewell *v.* Howell, 2 Metc. 268.

Maryland.— Barger *v.* Collins, 7 Harr. & J. 213.

Minnesota.—Crawford *v.* Hurd Refrigerator Co., 57 Minn. 187, 58 N. W. 985; Cooper *v.* Reaney, 4 Minn. 528.

New Jersey.— Van Giesen *v.* Van Houten, 5 N. J. L. 822.

North Carolina.— Ausley *v.* Alderman, 61 N. C. 215. *Compare* Birch *v.* Howell, 30 N. C. 468.

South Dakota.— Nelson *v.* Ladd, 4 S. D. 1, 54 N. W. 809.

Tennessee.— Brimingham *v.* Tapscott, 4 Heisk. 382.

Texas.—Dwyer *v.* Bassett, (Civ. App. 1895) 29 S. W. 815. See San Antonio, etc., R. Co. *v.* Barnett, (Civ. App. 1901) 66 S. W. 474.

Vermont.— Ormsby *v.* Morris, 28 Vt. 711; Hall *v.* Wadsworth, 28 Vt. 410; Blin *v.* Pierce, 20 Vt. 25; Nichols *v.* Packard, 16 Vt. 91.

Virginia.— Stone *v.* Ware, 6 Munf. 541.

See 13 Cent. Dig. tit. "Courts," § 419.

A court may enjoin the collection of a judgment which it had power to render, although with accrued interest and costs it exceeds the limit of original jurisdiction. Davis *v.* Davis, 10 Bush (Ky.) 274.

Interest from time of finding until judgment is not to be considered. Conger *v.* Nesbitt, 30 Minn. 436, 15 N. W. 875.

Jurisdiction once acquired will not be ousted by the accumulation of interest *pendente lite.* Denver Brick Mfg. Co. *v.* McAllister, 6 Colo. 326.

Where interest was neither claimed in the petition nor stipulated for by the contract it was held that the court had jurisdiction, the principal sum being within the required amounts. Evans *v.* Holliman, 2 Brev. (S. C.) 150.

In a few cases, however, it is declared that the question of jurisdiction must be determined by the principal sum in controversy exclusive of interest, this rule in part of the decisions being dependent upon particular constitutional or statutory provisions which so require.

Arkansas.— Fisher *v.* Hall, 1 Ark. 275.

California.—Arnold *v.* Van Brunt, 4 Cal. 89.

Louisiana.— State *v.* Fernandez, 49 La. Ann. 249, 21 So. 260; Johnson *v.* Mayer, 30 La. Ann. 1203; Decklar *v.* Frankenberger, 30 La. Ann. 410; Kahn *v.* Gay, 28 La. Ann. 240; Badeaux *v.* Blake, 24 La. Ann. 184; La. Const. §§ 85, 87. *Compare* Bloom *v.* Kern, 30 La. Ann. 1263.

Mississippi.— Martin *v.* Harden, 52 Miss. 694.

Missouri.— Bradley *v.* Asher, 65 Mo. App. 589; Monks *v.* Strange, 25 Mo. App. 12.

New York.— Knickerbacker *v.* Boutwell, 2 Sandf. Ch. 319.

See 13 Cent. Dig. tit. "Courts," § 419.

"Exclusive of interest," as used in a constitutional provision conferring jurisdiction, where the matter in controversy does not exceed a certain sum exclusive of interest, refers to the interest which in certain cases is expressly given by statute and not to interest which is allowed, without special statutory provision, as part of the damages to be recovered. Baker *v.* Smelser, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163.

68. Payne *v.* Davis, 2 Mont. 381; Shirley *v.* Shirley, 9 Paige (N. Y.) 362; Van Tyne *v.* Bunce, 1 Edw. (N. Y.) 583.

69. Simmons *v.* Terrell, 75 Tex. 275, 12 S. W. 854; Altgelt *v.* Harris, (Tex. 1889) 11 S. W. 857; Blakenship *v.* Watelsky, (Tex. 1887) 6 S. W. 140; Rainey *v.* Laudaudale, (Tex. Civ. App. 1895) 30 S. W. 1084; Moore *v.* Foy, (Tex. Civ. App. 1891) 15 S. W. 199.

In case of a mortgage this rule applies. McAffrey *v.* Richards, (Tenn. Ch. App. 1900) 59 S. W. 1064.

Under a statute, however, providing that a reasonable attorney's fee may be recovered by plaintiff, the amount alleged as a reasonable attorney's fee is not to be considered in determining whether the amount involved exceeds the jurisdiction of the court. Eagle Gold Min. Co. *v.* Bryarly, 28 Colo. 262, 65 Pac. 52.

70. *Illinois.*— Seymour *v.* Seymour, 31 Ill. App. 227.

Indiana.— Collins *v.* Shaw, 8 Ind. 516.

New York.— Bundick *v.* Hale, 4 N. Y. Civ. Proc. 311, 13 Abb. N. Cas. 60.

North Carolina.— Ausley *v.* Alderman, 61 N. C. 215; Parham *v.* Hardin, 33 N. C. 219.

South Carolina.— Leek *v.* Goodman, 2 Rich. 564; Vaughan *v.* Cade, 2 Rich. 49.

and similarly, where the amount has been so reduced by reason of part of the demand being barred by the statute of limitations.[71]

b. Remission of Sum in Excess. Where the amount in controversy exceeds that over which the court has jurisdiction it has been decided that a party may remit that part of his claim which is in excess and bring the amount within the jurisdiction of the court, and a judgment rendered for the latter amount will be regular.[72]

c. Reduction by Set-Off or Counter-Claim. The reduction of a claim by set-off or counter-claim does not affect the jurisdiction of the court.[73]

6. Actions on Bonds. In actions upon bonds the rule, supported by the major-

Texas.— Swigley *v.* Dickson, 2 Tex. 192; Wilkins *v.* Weller, 1 Tex. App. Civ. Cas. § 876. But see Middlebrook *v.* David Bradley Mfg. Co., 86 Tex. 706, 26 S. W. 935; Blankenship *v.* Adkins, 12 Tex. 536.

Vermont.— Abbott *v.* Chase, 55 Vt. 466; Hodges *v.* Fox, 36 Vt. 74; Southwick *v.* Merrill, 3 Vt. 320. But see Willard *v.* Collamer, 34 Vt. 594; Sanborn *v.* Chittenden, 27 Vt. 171; Shepherd *v.* Beede, 24 Vt. 40; Reed *v.* Talford, 10 Vt. 568; Middlebury Bank *v.* Tucker, 7 Vt. 144.

Virginia.— Larowe *v.* Binns, 2 Va. Cas. 203. See 13 Cent. Dig. tit. "Courts," § 421.

An amendment to a bill of particulars is held proper to make it conform to the declaration in respect to the amount demanded. Grether *v.* Klock, 39 Conn. 133.

In a suit by the assignee of a note a payment to the assignor which was unknown to the former and not entered on the note will not cause plaintiff to be nonsuited. Bean *v.* Baxter, 47 N. C. 356.

No ouster of jurisdiction by payments after suit is commenced. Picard *v.* Wade, 30 La. Ann. 623.

That want of jurisdiction should be specially pleaded where the amount is reduced by direct payment see Hayes *v.* Robb, 1 Pa. L. J. Rep. 394, 3 Pa. L. J. 29; Meredith *v.* Pierie, 1 Pa. L. J. Rep. 195, 2 Pa. L. J. 58.

71. Baltimore, etc., Turnpike Co. *v.* Barnes, 6 Harr. & J. (Md.) 57; Kelly *v.* Western Union Tel. Co., 17 Tex. Civ. App. 344, 43 S. W. 532; Keller *v.* Huffman, (Tex. Civ. App. 1894) 26 S. W. 863. *Compare* Burton *v.* Archinard, (Tex. Civ. App. 1899) 49 S. W. 684; Harrell *v.* Storrie, (Tex. Civ. App. 1898) 47 S. W. 838.

72. *Alabama.*— Wharton *v.* King, 69 Ala. 365.

Georgia.— Dowdle *v.* Stein, 103 Ga. 94, 29 S. E. 595; Stewart *v.* Thompson, 85 Ga. 829, 11 S. E. 1030; Ga. Civ. Code, § 4195.

Illinois.— Wright *v.* Smith, 76 Ill. 216; Reading *v.* Mead, 16 Ill. App. 360.

Minnesota.— Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308; Barber *v.* Kennedy, 18 Minn. 216.

Missouri.— Matlack *v.* Lare, 32 Mo. 262; Hempler *v.* Schneider, 17 Mo. 258.

New Jersey.— Lochanowski *v.* McKeone, 61 N. J. L. 288, 41 Atl. 1117. But see Sonders *v.* Stratton, 3 N. J. L. 528.

New York.— Van Clief *v.* Van Vechten, 130 N Y. 571, 29 N. E. 1017; Putnam *v.* Shelop, 12 Johns. 435.

Virginia.— Tennant *v.* Gray, 5 Munf. 494.

But see Bents *v.* Graves, 3 McCord (S. C.) 280, 15 Am. Dec. 632; St. Amand *v.* Gerry, 2 Nott & M. (S. C.) 487; Simpson *v.* McMillion, 1 Nott & M. (S. C.) 192; Burke *v.* Adoue, 3 Tex. Civ. App. 494, 22 S. W. 824, 23 S. W. 91. See 13 Cent. Dig. tit. "Courts," § 421.

An indorsement on a bond by the payee for the purpose of bringing the amount within the jurisdictional limits, where done without the consent of the obligor, has been declared to be a fraud on the law. Moore *v.* Thomson, 44 N. C. 221, 59 Am. Dec. 550.

A verdict or judgment may be reduced, where in excess of jurisdictional amount. Velvin *v.* Hall, 78 Ga. 136; Giles *v.* Spinks, 64 Ga. 205; Globe *v.* Rauch, 21 Misc. (N. Y.) 48, 46 N. Y. Suppl. 889; Roof *v.* Meyer, 8 N. Y. Civ. Proc. 60.

Judgment to extent of jurisdiction is held proper in early decisions in South Carolina. Huff *v.* Huff, 1 Bailey (S. C.) 456; Gracy *v.* Wright, 2 McCord (S. C.) 278.

Time when excess should be remitted.—See Reading *v.* Mead, 16 Ill. App. 360; McIntyre *v.* Carriere, 17 Hun (N. Y.) 64.

73. The St. Matthews *v.* Mordecai, 1 McMull. (S. C.) 294; Jordan *v.* Barry, 4 Hayw. (Tenn.) 102; Ratigan *v.* Holloway, 69 Tex. 468, 6 S. W. 785; Ferguson *v.* Highley, 2 Va. Cas. 255. See Walcott *v.* McNew, (Tex. Civ. App. 1901) 62 S. W. 815.

Matter in defense not a counter-claim, although setting up an amount in excess of the court's jurisdiction, does not oust it of jurisdiction. Lynch *v.* Frec, 64 Minn. 277, 66 N. W. 973.

Where a contract is pleaded in counter-claim for a sum less than is necessary to confer jurisdiction and shows plaintiff's claim to be wholly unfounded, defendant will not be entitled to judgment. Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820.

Plea in reconvention, however, being in effect a suit against the plaintiff, it has been decided that a court may acquire jurisdiction under such a plea where the amount is sufficient, although the plaintiff's claim is below the required amount. Phelps, etc., Windmill Co. *v.* Parker, (Tex. Civ. App. 1895) 30 S. W. 365. And likewise a court has no jurisdiction over such a claim so pleaded when in excess. Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470; Pennybacker *v.* Hazlewood, 26 Tex. Civ. App. 183, 61 S. W. 153; Newman *v.* McCallum, 1 Tex. App. Civ. Cas. § 273.

ity of the cases, is that it is not the penalty of the bond which determines the jurisdiction of the court but the amount due thereon.[74]

7. ALLEGATIONS IN PLEADINGS. The declaration, complaint, or petition of the plaintiff should show that the amount in controversy is one over which the court has jurisdiction,[75] and it is decided that in determining whether jurisdiction exists the court will ascertain the amount from the statements of plaintiff's cause of action and not by the *ad damnum* or amount for which judgment is prayed.[76] But, although the complaint may state a cause of action for an amount in excess of the jurisdictional one, if the amount claimed is not in excess thereof the court will have jurisdiction, the claim in such case being considered as a remittance of the excess.[77] Again a complaint or petition may be in some cases amended so as to bring the amount within the jurisdiction of the court.[78]

74. *Arkansas.*—Huddleston *v.* Spear, 8 Ark. 406.

California.— Page *v.* Ellis, 9 Cal. 248.

Colorado.— Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941. *Compare* Davis *v.* Wannamaker, 2 Colo. 637.

Illinois.— People *v.* Summers, 16 Ill. 173.

Indiana.— Paul *v.* Arnold, 12 Ind. 197.

Kansas.— Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004.

Pennsylvania.— Coates *v.* Cork, 1 Miles 270; Freedenberg *v.* Meeteer, 4 Pa. L. J. Rep. 182, 7 Pa. L. J. 244.

South Carolina.— Lynch *v.* Crocker, 2 Bailey 313.

Vermont.— Edgerton *v.* Smith, 35 Vt. 573; Maxfield *v.* Scott, 17 Vt. 634; Barker *v.* Willard, Brayt. 148.

See 13 Cent. Dig. tit. "Courts," § 425.

In some cases, however, it has been decided that the question of jurisdiction is to be determined by the amount of the penalty and not the damages laid or the amount to be recovered. Sims *v.* Harris, 8 B. Mon. (Ky.) 55; Com. *v.* Bohon, 1 Litt. (Ky.) 22; St. Louis *v.* Fox, 15 Mo. 71; Joyner *v.* Roberts, 112 N. C. 111, 16 S. E. 917; Brickell *v.* Bell, 84 N. C. 82. See Heath *v.* Blaker, 2 Va. Cas. 215.

75. *California.*—Greenbaum *v.* Martinez, 86 Cal. 459, 25 Pac. 12.

Colorado.— Home *v.* Duff, 5 Colo. 574.

Connecticut.— Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691; Watson *v.* Wells, 5 Conn. 468; Griswold *v.* Mather, 5 Conn. 435.

Michigan.— Huyck *v.* Bailey, 100 Mich. 223, 58 N. W. 1002; Glidden *v.* Norvell, 44 Mich. 202, 6 N. W. 195; Abbott *v.* Gregory, 39 Mich. 68.

Mississippi.— Thomas *v.* Miller, Walk. 324.

New York.— Bradt *v.* Kirkpatrick, 7 Paige 62; Smets *v.* Williams, 4 Paige 364. See Dwyer *v.* Rathbone, 49 Hun 609, 2 N. Y. Suppl. 170.

Pennsylvania.— Warfel *v.* Beam, 3 Penr. & W. 397.

Tennessee.— Albright *v.* Rader, 13 Lea 574.

Texas.— Morris *v.* State, 62 Tex. 728; Bohl *v.* Brown, 2 Tex. App. Civ. Cas. § 538.

Vermont.— Paul *v.* Burton, 32 Vt. 148. But see Widber *v.* Benjamin, (1903) 53 Atl. 1071, replevin, as in the case of beasts distrained.

See 13 Cent. Dig. tit. "Courts," § 427.

76. *Connecticut.*— Grether *v.* Klock, 39 Conn. 133.

Indiana.— Williamson *v.* Brandenburg, 133 Ind. 594, 32 N. E. 834; Collins *v.* Shaw, 8 Ind. 516.

Pennsylvania.— Gordon *v.* Correy, 5 Binn. 552.

Rhode Island.— Edwards *v.* Hopkins, 5 R. I. 138.

Texas.— Rose *v.* Riddle, 3 Tex. App. Civ. Cas. § 298.

Vermont.— Thompson *v.* Colony, 6 Vt. 91.

Compare Smith *v.* Hunt, 91 Me. 572, 40 Atl. 698; Ashuelot Bank *v.* Pearson, 14 Gray (Mass.) 521; Richardson *v.* Denison, 1 Aik. (Vt.) 210.

See 13 Cent. Dig. tit. "Courts," § 427.

An answer alleging a sum in excess of the court's jurisdiction as to the amount in controversy does not oust the court of jurisdiction where the action is for a sum not in excess. Corbell *v.* Childers, 17 Oreg. 528, 21 Pac. 670.

If the amount actually claimed is within the jurisdictional limits, that the suit is upon a demand for a larger sum in excess thereof does not affect. Wilhelms *v.* Noble, 36 Ga. 599. See also McVey *v.* Johnson, 75 Iowa 165, 39 N. W. 249; Goldthwaite *v.* Dent, 3 McCord (S. C.) 296.

77. Litchfield *v.* Daniels, 1 Colo. 268; Hapgood *v.* Doherty, 8 Gray (Mass.) 373; Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308.

78. Miller *v.* Newbauer, (Tex. Civ. App. 1901) 61 S. W. 974; Watson *v.* Mirike, 25 Tex. Civ. App. 527, 61 S. W. 538. *Compare* Sanders *v.* Pierce, 68 Vt. 468, 35 Atl. 377.

An amendment to bring a demand within the court's jurisdiction by striking out an item improperly charged in an action on an account is permissible. Temple *v.* Bradley, 14 Vt. 254. See also San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474. *Compare* Heffron *v.* Jennings, 66 N. Y. App. Div. 443, 73 N. Y. Suppl. 410. And where items are stricken out of a complaint and others added by amendment the jurisdiction will be determined by the amount of those not stricken out and of those so added. Missouri, etc., R. Co. *v.* Kolbe, 95 Tex. 76, 65 S. W. 34.

If the pleadings are such that the amount in controversy is not settled or presented thereby amendments or additional pleadings are held permissible. McNab *v.* Noonan, 28 Wis. 434.

8. Persons and Proceedings Affected — a. Construction of Constitutional and Statutory Provisions — (I) *In General.* Jurisdiction is conferred by the constitution or statutes[79] of a state and courts can only exercise such as is derived therefrom. Where it is limited as to the amount, if the amount in controversy is not within such limits, no jurisdiction is conferred and none can be exercised.[80] And where jurisdiction is expressly conferred by the constitution a statute merely declaratory thereof confers of itself no jurisdiction.[81]

(II) *As Enlarging or Restricting Jurisdiction.* Where the jurisdiction of a court is expressly prescribed and limited by the constitution in respect to the amount in controversy, the legislature cannot confer jurisdiction of an amount in excess thereof;[82] nor can it enact any law restricting the same.[83]

(III) *Application to State and Municipal Body.* It has been determined that general statutes as to courts of record, restricting the jurisdiction as to the amount in controversy, do not bind the state unless expressly mentioned therein, and that a suit may be brought by the state for a sum less than the statute specifies as necessary to confer jurisdiction.[84]

b. Proceedings in Which Jurisdictional Amount Applies. No general rule for the determination of the question as to what proceedings the jurisdictional amount applies to can be given. Each particular case must stand by itself[85] to be determined in the particular instance from the constitutional or statutory provisions conferring jurisdiction. So upon the construction of such provisions

79. **Doubtful provisions** of constitutions or statutes should be interpreted so as to maintain the jurisdiction of legal tribunals. Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635. See also Reese *v.* Hawks, 63 Md. 130.

Repugnant provisions of a constitution should be so construed that the more general provisions yield to the more specific (Carroll *v.* Silk, 70 Tex. 23, 11 S. W. 116; Gulf, etc., R. Co. *v.* Rambolt, 67 Tex. 654, 44 S. W. 356; Erwin *v.* Blanks, 60 Tex. 583; St. Louis Type Foundry *v.* Taylor, 6 Tex. Civ. App. 732, 26 S. W. 226), and the latter in position is said to control, although it has been declared that this rule should be appealed to, if at all, only as a last resort (Gulf, etc., R. Co. *v.* Rambolt, 67 Tex. 654, 4 S. W. 356).

New provisions in a revised or amended constitution take effect from the time that those they take the place of cease to be of force, and where former provisions are enacted in the same words their operation and force is considered as uninterrupted. Muench *v.* Oppenheimer, 86 Tex. 568, 26 S. W. 496; Gossett *v.* Munro, (Tex. Civ. App. 1894) 26 S. W. 780.

80. *Georgia.*— Forbes *v.* Owens, 45 Ga. 132.

Indiana.— Brown *v.* McQueen, 6 Blackf. 208.

Kentucky.— Griswold *v.* Peckenpaugh, 1 Bush 220.

Massachusetts.— Octo *v.* Teahan, 133 Mass. 430; Sumner *v.* Finegan, 15 Mass. 280.

North Carolina.— Harrell *v.* Warren, 100 N. C. 259, 6 S. E. 777.

Tennessee.— Fleming *v.* Talliafer, 4 Heisk. 352.

Wisconsin.— State *v.* Smith, 14 Wis. 564.

See 13 Cent. Dig. tit. "Courts," § 429.

Exclusive jurisdiction does not exist unless expressly conferred. Sams *v.* Stockton, 14 B. Mon. (Ky.) 232.

81. Rich *v.* Calhoun, (Miss. 1893) 12 So. 707.

82. Buckhout *v.* Rall, 28 Hun (N. Y.) 484.

83. Dillard *v.* Noel, 2 Ark. 449. See also Fort *v.* Hundley, 5 Ark. 179.

Where a court is one of general jurisdiction, merely conferring jurisdiction upon another court of a certain class of actions does not divest the former of its powers, but operates as giving concurrent jurisdiction. Koons *v.* Dyer, Morr. (Iowa) 93.

84. State *v.* Garland, 29 N. C. 48.

That a county is restricted in like manner as an individual see Camp *v.* Marion County, 91 Ala. 240, 8 So. 786.

85. *Georgia.*— Georgia State Bldg., etc., Assoc. *v.* Owens, 88 Ga. 224, 14 S. E. 210 (jurisdiction of city court as to distress warrants); Graves *v.* Tift, 50 Ga. 122 (jurisdiction of county courts as to distress warrants).

Illinois.— People *v.* Woodside, 72 Ill. 407.

Louisiana.— Cross *v.* Parent, 26 La. Ann. 591 (petition in intervention in district court); Hagan *v.* Hart, 6 Rob. 427.

Mississippi.— Martin *v.* Harvey, 54 Miss. 685.

New Jersey.— Baldwin *v.* Hertzman, 47 N. J. L. 225.

North Carolina.— Latham *v.* Rollins, 72 N. C. 454.

Ohio.— Ford *v.* Parker, 4 Ohio St. 576.

Texas.— Aulanier *v.* Governor, 1 Tex. 653 (action in district court to recover sum due for license-tax); Morrow *v.* Short, 3 Tex. App. Civ. Cas. § 31 (sequestration suit in county court).

Vermont.— Carlton *v.* Young, 1 Aik. 332.

Wisconsin.— State *v.* Smith, 19 Wis. 531.

See 13 Cent. Dig. tit. "Courts," § 429 *et seq.*

must depend the jurisdiction of actions upon contracts,[86] the jurisdiction of suits concerning real property,[87] the jurisdiction of proceedings in reference to estates of deceased and incompetent persons and probate matters generally,[88] the jurisdiction of proceedings for the enforcement of liens and mortgages,[89] the jurisdiction of suits for statutory penalties,[90] the jurisdiction of actions in replevin,[91] the jurisdiction of proceedings to try title to office,[92] the jurisdiction of tax proceedings,[93] and the jurisdiction of equitable proceedings in general.[94] Again a court

86. *Alabama.*— Cavender *v.* Funderburg, 9 Port. 460, in circuit court.

Arkansas.— Blackwell *v.* State, 3 Ark. 320.

Connecticut.— Andrew *v.* Babcock, 63 Conn. 109, 26 Atl. 715.

Indiana.— Proctor *v.* Bailey, 5 Blackf. 495.

Maryland.— Bruner *v.* Hedges, 1 Harr. & J. 207.

Ohio.— Crafts *v.* Prior, 51 Ohio St. 21, 36 N. E. 1070 (in common pleas for purchase-price of land); Baker *v.* Weaver, 1 Ohio Cir. Ct. 397 (action on note in justice's court).

Texas.— Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259, action in county court on a bond.

Vermont.— Hobart *v.* Wardner, 15 Vt. 564 (action on note in county court); Harris *v.* Bullock, Brayt. 141 (action of debt in county court).

See 13 Cent. Dig. tit. "Courts," § 429 *et seq.*

87. *Colorado.*— Denver, etc., R. Co. *v.* Otis, 7 Colo. 198, 2 Pac. 925.

Illinois.— Lachman *v.* Deisch, 71 Ill. 59.

Louisiana.— Fellers *v.* Brown, 24 La. Ann. 300, suit in parish court to annul title.

North Carolina.— Ballentine *v.* Poyner, 3 N. C. 110, action in county court for waste.

Rhode Island.— Clarke *v.* Rice, 15 R. I. 132, 23 Atl. 301, court of common pleas.

Texas.— Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310.

Vermont.— Doubleday *v.* Marstin, 27 Vt. 488, county court — trespass to freehold.

See 13 Cent. Dig. tit. "Courts," § 429 *et seq.*

88. *Colorado.*— Wyman *v.* Felker, 18 Colo. 382, 33 Pac. 157.

Florida.— Simpson *v.* Gonzales, 15 Fla. 9.

Indiana.— Wheeler *v.* Calvert, 25 Ind. 365 (court of common pleas); Wiggins *v.* Holman, 5 Ind. 502.

Louisiana.—Lay *v.* O'Neil, 25 La. Ann. 608; Nugent *v.* Randolph, 23 La. Ann. 693; Montgomery *v.* All the World, 23 La. Ann. 239; Hebert *v.* Winn, 22 La. Ann. 109.

Maryland.— Hale *v.* Howe, 4 Harr. & J. 448.

New York.— Matter of Smith, 16 How. Pr. 567.

Tennessee.— Fleming *v.* Talliafer, 4 Heisk. 352.

Texas.— Robertson *v.* McAfee, 1 Tex. App. Civ. Cas. § 546.

See 13 Cent. Dig. tit. "Courts," § 429 *et seq.*

89. *California.*— Van Winkle *v.* Stow, 23 Cal. 457, jurisdiction of county court as to mechanics' liens held not dependent upon amount of the lien. But see Brock *v.* Bruce, 5 Cal. 279.

Connecticut.— Griswold *v.* Mather, 5 Conn. 435.

Georgia.— Aycock *v.* Subers, 73 Ga. 807.

Kentucky.— Bush *v.* Williams, 6 Bush 405.

Louisiana.— Truxillo's Succession, 24 La. Ann. 453.

Michigan.— Dewey *v.* Duyer, 39 Mich. 509.

Minnesota.— Agin *v.* Heyward, 6 Minn. 110.

Mississippi.— Bibb *v.* Martin, 14 Sm. & M. 87.

Missouri.— Cranston *v.* Union Trust Co., 75 Mo. 29, circuit court may enforce mechanics' liens for less than fifty dollars. See Albers *v.* Eilers, 18 Mo. 279.

New York.— Hawley *v.* Whalen, 64 Hun 550, 19 N. Y. Suppl. 521.

North Carolina.— Murphy *v.* McNeill, 82 N. C. 221.

Pennsylvania.— Woodruff *v.* Chambers, 13 Pa. St. 132.

Tennessee.— Malone *v.* Dean, 9 Lea 336.

Texas.— Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227.

See 13 Cent. Dig. tit. "Courts," § 434.

Suit by a creditor in a common pleas court to compel a mortgagee to permit the redemption of property see Bridgeport *v.* Blinn, 43 Conn. 274.

90. Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771; Denoon *v.* Binns, 2 Pa. L. J. Rep. 397, 4 Pa. L. J. 183; State *v.* Eggerman, 81 Tex. 569, 16 S. W. 1067; Lockridge *v.* Baldwin, 20 Tex. 303, 70 Am. Dec. 385.

91. Blimline *v.* Cohen, 8 Md. 147 (court of common pleas); Walker *v.* Cooke, 163 Mass. 401, 40 N. E. 185 (municipal court).

92. Amount of salary determines jurisdiction. State *v.* De Vargas, 28 La. Ann. 342; State *v.* De Gress, 72 Tex. 242, 11 S. W. 1029; State *v.* Owens, 63 Tex. 261; Krakauer *v.* Caples, 5 Tex. Civ. App. 264, 23 S. W. 1036. *Compare* Dean *v.* State, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185, as to extraordinary writs in such cases.

93. *Alabama.*— State *v.* McAllister, 60 Ala. 105, justice of the peace.

California.— Bell *v.* Crippen, 28 Cal. 327; People *v.* Mier, 24 Cal. 61.

Louisiana.— Sentell *v.* Police Jury, 48 La. Ann. 96, 18 So. 910 (judicial district court); Roberts *v.* Zansler, 34 La. Ann. 205 (district court of parish of Orleans).

Missouri.— Williams *v.* Paynes, 80 Mo. 409.

Texas.— Moody *v.* Cox, 54 Tex. 492.

See 13 Cent. Dig. tit. "Courts," § 435.

94. *Alabama.*—Campbell *v.* Conner, 78 Ala. 211. See also Wood *v.* Wood, 3 Ala. 756.

Arkansas.—Uptmoor *v.* Young, 57 Ark. 528, 22 S. W. 169.

has no power to issue a mandamus to enforce its jurisdiction where the amount involved is less than that necessary to be in controvery to confer jurisdiction.[95]

D. Courts of Particular States — 1. New Jersey — a. Court of Common Pleas. The court of common pleas cannot try a question of title to lands.[96]

b. Court For Trial of Small Causes. Judgments of a court for the trial of small causes cannot be called in question in a collateral proceeding, and in this sense it is not an inferior court.[97]

c. District Court. The district court of Newark has jurisdiction of an action by a landlord against his tenant to recover double damages and for wilfully holding over if the amount involved does not exceed three hundred dollars.[98]

d. Courts of Police Justices. Courts of police justices have jurisdiction of complaints for violation of the Oleomargarine Act.[99]

2. **New York — a. County Courts.** County courts are courts of limited jurisdiction.[1] And it has been decided that they have no power to determine the right to possession of realty,[2] although they may have jurisdiction of an action for the invasion of the right of possession.[3] It has also been decided that this court has jurisdiction to try an issue between a creditor and receiver as to the title to a liquor-tax certificate,[4] and also of an action on a judgment of a justice of the peace of the county against a resident thereof.[5] Again the constitutional provision[6] restricting the jurisdiction of the county courts over non-residents, and within a certain amount applies, it has been decided, only to actions for the recovery of money and not to proceedings to assess damages to landowners by the laying out of a street.[7]

California.— Deuprez *v.* Deuprez, 5 Cal. 387.

Kentucky.— Burnes *v.* Cade, 10 Bush 251; Noland *v.* Johnson, 1 J. J. Marsh. 9; Cummins *v.* Canter, 5 T. B. Mon. 493.

Louisiana.— State *v.* Judge Second City Ct., 37 La. Ann. 583; Walker *v.* Kimbrough, 23 La. Ann. 637.

Michigan.— Mastenbrook *v.* Alger, 110 Mich. 414, 68 N. W. 213; Sanford *v.* Haines, 71 Mich. 116, 38 N. W. 777; Fuller *v.* Grand Rapids, 40 Mich. 395.

Mississippi.— Henderson *v.* Herrod, 23 Miss. 434.

New Jersey.— Allen *v.* Demarest, 41 N. J. Eq. 162, 2 Atl. 655.

New York.— It has been decided that the equitable jurisdiction of the supreme court is not limited as to amount. Marsh *v.* Benson, 34 N. Y. 358; Sarsfield *v.* Van Vaughner, 38 Barb. 444; Durham *v.* Willard, 19 How. Pr. 425. For earlier decisions as to chancery courts see Marsh *v.* Benson, 11 Abb. Pr. 241, 19 How. Pr. 415; Shepard *v.* Walker, 7 How. Pr. 46; Winsor *v.* Orcutt, 11 Paige 578; Sizer *v.* Miller, 9 Paige 605; Church *v.* Ide, Clarke 494.

North Carolina.— Charlotte Planing Mills *v.* McNinch, 99 N. C. 517, 6 S. E. 386; Smaw *v.* Cohen, 95 N. C. 85; Barnett *v.* Woods, 55 N. C. 198; Chunn *v.* McCarson, 17 N. C. 73.

Ohio.— Devou *v.* Simpson, 1 Handy 557, 12 Ohio Dec. (Reprint) 287.

Tennessee.— Rentfroe *v.* Dickinson, 1 Overt. 196.

Texas.— Harrison Mach. Works *v.* Templeton, 82 Tex. 443, 18 S. W. 601; Jenkins *v.* Cain, (Sup. 1889) 12 S. W. 1114; Mixan *v.* Grove, 59 Tex. 573; Anderson County *v.* Kennedy, 58 Tex. 616; Graves *v.* Fry, 1 Tex. App. Civ. Cas. § 134.

See 13 Cent. Dig. tit. "Courts," § 433.

"Matter in demand" as used with reference to suits in equity means the pecuniary value of the matter in controversy, and not necessarily a money demand. Blakeslee *v.* Murphy, 44 Conn. 188.

95. Goree *v.* Dupree, 1 Tex. App. Civ. Cas. § 825.

96. Collins *v.* Keller, 58 N. J. L. 429, 34 Atl. 753.

97. Russell *v.* Work, 35 N. J. L. 316.

98. Tims *v.* Spragg, 58 N. J. L. 273, 33 Atl. 213.

As to actions for statutory penalties see Koch *v.* Vanderhoof, 49 N. J. L. 619, 9 Atl. 771.

Such court is, however, confined in its jurisdiction to the limits of that city. Yost *v.* Burns, 48 N. J. L. 356, 4 Atl. 858, construing N. J. Pub. Laws (1873), p. 245; N. J. Pub. Laws (1884), p. 169.

99. McGuire *v.* Doscher, 65 N. J. L. 139, 46 Atl. 576, construing N. J. Pub. Laws (1898), p. 556, and 1 N. J. Gen. Stat. p. 1164, § 10.

1. Frees *v.* Ford, 6 N. Y. 176.

2. Wilkins *v.* Williams, 3 N. Y. Suppl. 897, 15 N. Y. Civ. Proc. 168.

3. Delamater *v.* Folz, 50 Hun (N. Y.) 528, 3 N. Y. Suppl. 711.

4. Albany Brewing Co. *v.* Smith, 74 N. Y. Suppl. 901.

5. Fink *v.* Shoemaker, 33 Misc. (N. Y.) 687, 68 N. Y. Suppl. 1112.

6. N. Y. Const. art. 6, § 14.

7. Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43.

In an action ex delicto, where some of the defendants are non-residents, the court may have jurisdiction as to those who reside in the county, although all the defendants were

b. Municipal Courts[8]—(I) *In General.* The municipal court of the city of New York is an inferior court.[9] Its jurisdiction will not be presumed, but all the facts essential thereto must appear in the record.[10] Under the constitution it can have no greater jurisdiction than county courts have.[11] And it has no jurisdiction where equitable issues are created.[12]

(II) *Jurisdiction Over Non-Residents.* By the Greater New York Charter provision is made as to actions by or against non-residents.[13] In this connection it has been decided that the municipal court has jurisdiction of an action by a non-resident corporation[14] and also against non-residents,[15] but not of an action by a non-resident against a foreign corporation, unless it appears that the cause of action arose in the state or that the contract sued on was made therein.[16]

sued as partners. Weidman *v.* Sibley, 16 N. Y. App. Div. 616, 44 N. Y. Suppl. 1057.

8. Municipal court: Of Buffalo see Revere Rubber Co. *v.* Genesee Valley Blue Stone Co., 20 N. Y. App. Div. 166, 46 N. Y. Suppl. 989, as to non-residents. Of Rochester see Ziegler *v.* Corwin, 12 N. Y. App. Div. 60, 42 N. Y. Suppl. 855 (as to extension of jurisdiction beyond limits of city); Baird *v.* Helfer, 12 N. Y. App. Div. 23, 42 N. Y. Suppl. 484 (as to service of summons out of the city).

9. Smith *v.* Silsbe, 53 N. Y. App. Div. 462, 65 N. Y. Suppl. 1083.

It is not a new court, but a continuation of the district court of such city. Routenberg *v.* Schwertzer, 165 N. Y. 175, 58 N. E. 880 [*reversing* 50 N. Y. App. Div. 218, 63 N. Y. Suppl. 746]; Worthington *v.* London Guarantee, etc., Co., 164 N. Y. 81, 58 N. E. 102, 31 N. Y. Civ. Proc. 274 [*reversing* 47 N. Y. App. Div. 609, 62 N. Y. Suppl. 591]; Meuthen *v.* Eyelis, 33 Misc. (N. Y.) 98, 67 N. Y. Suppl. 246, 8 N. Y. Annot. Cas. 372. *Contra,* McConologue *v.* McCaffrey, 29 Misc. (N. Y.) 139, 60 N. Y. Suppl. 279.

10. Tannenbaum *v.* Natchtigall, 29 Misc. (N. Y.) 759, 60 N. Y. Suppl. 474.

11. N. Y. Const. art. 6, § 18.

This provision has been construed as having reference to subject-matter and persons and not to territory. Kantro *v.* Armstrong, 44 N. Y. App. Div. 506, 60 N. Y. Suppl. 970; Irwin *v.* Metropolitan St. R. Co., 38 N. Y. App. Div. 253, 57 N. Y. Suppl. 21 [*affirming* 25 Misc. 187, 54 N. Y. Suppl. 195]. But see Tyroler *v.* Germmersbach, 28 Misc. (N. Y.) 151, 59 N. Y. Suppl. 266, 319.

12. Jacobs *v.* Lieberman, 51 N. Y. App. Div. 542, 64 N. Y. Suppl. 953 [*affirming* 29 Misc. 354, 60 N. Y. Suppl. 493].

13. See Greater New York Charter, §§ 1364, 1370.

Greater New York Charter, § 1370, subd. 1, provides that one of the parties to a suit in a municipal court must reside in the district, unless all reside outside the city. Subdivision 4 provides, if the district in which the action is brought is not the proper one, the action may be tried there, unless it is transferred to the proper one before trial on demand of defendant. It was held that the right to transfer will be deemed to have been waived; the record showing only that defendant made an affidavit for transfer, and it not appearing that the application was acted on, or that the point was raised when the case came on for trial. Brinn *v.* Rinderman, 38 Misc. (N. Y.) 792, 78 N. Y. Suppl. 921.

Who are residents or non-residents.— See Routenberg *v.* Schwertzer, 165 N. Y. 175, 58 N. E. 880; Langman *v.* Milbury, 31 Misc. (N. Y.) 459, 64 N. Y. Suppl. 465; New York *v.* Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483; Titus Sheard Co. *v.* Morissey, 23 Misc. (N. Y.) 122, 50 N. Y. Suppl. 634.

14. Lake Geneva Ice Co. *v.* Selvage, 28 Misc. (N. Y.) 581, 59 N. Y. Suppl. 544.

15. Schillinger *v.* Herrmann, 35 Misc. (N. Y.) 280, 71 N. Y. Suppl. 778; Meuthen *v.* Eyelis, 33 Misc. (N. Y.) 98, 67 N. Y. Suppl. 246; Masu *v.* Blumenstein, 32 Misc. (N. Y.) 691, 66 N. Y. Suppl. 449.

May have jurisdiction coextensive with the limits of the city and therefore has jurisdiction where defendant is a resident of the city, although in another county, and a provision conferring such jurisdiction does not contravene N. Y. Const. art. 6, § 18. Luban *v.* Simonds, 46 N. Y. App. Div. 192, 61 N. Y. Suppl. 697; Phillip Semmer Glass Co. *v.* Nassau Show Case Co., 46 N. Y. App. Div. 98, 62 N. Y. Suppl. 703 [*reversing* 28 Misc. 577, 59 N. Y. Suppl. 530]; Kantro *v.* Armstrong, 44 N. Y. App. Div. 506, 60 N. Y. Suppl. 970; Irwin *v.* Metropolitan St. R. Co., 38 N. Y. App. Div. 253, 57 N. Y. Suppl. 21 [*affirming* 25 Misc. 187, 54 N. Y. Suppl. 195]. *Contra,* Chavin *v.* Smith, 28 Misc. (N. Y.) 531, 59 N. Y. Suppl. 593; Tyroler *v.* Gummersbach, 28 Misc. (N. Y.) 151, 59 N. Y. Suppl. 266, 319.

Against non-resident of state this court has no jurisdiction. Pierson *v.* Ward, 27 Misc. (N. Y.) 793, 58 N. Y. Suppl. 362.

In an action for the recovery of money only it has been held that such court has jurisdiction where defendant is a non-resident. McKenna *v.* Fireman's Ins. Co., 28 Misc. (N. Y.) 173, 59 N. Y. Suppl. 41.

Actions against foreign corporations see Routenberg *v.* Schweitzer, 165 N. Y. 175, 58 N. E. 880; Worthington *v.* London Guarantee, etc., Co., 164 N. Y. 81, 58 N. E. 102, 31 N. Y. Civ. Proc. 274; Riesor *v.* Parker, 27 Misc. (N. Y.) 205, 57 N. Y. Suppl. 745.

16. Allison *v.* T. A. Snider Preserve Co., 20 Misc. (N. Y.) 367, 45 N. Y. Suppl. 923.

(III) *JURISDICTION IN WHAT ACTIONS.* The class of actions over which the municipal court has jurisdiction has been specifically designated by the Greater New York Charter.[17] In the construction and application of these provisions it has been decided that the municipal court has jurisdiction of an action to replevin chattels, although they were unlawfully taken and detained by defendant in the city of New York in a county other than that of the plaintiff,[18] of an action to recover five hundred dollars for conversion of personalty,[19] of an action for damages for fraud and deceit,[20] of an action for damages for breach of a contract by a vendor to convey good title,[21] of an action for damages by a passenger,[22] of a summary proceeding by a landlord to recover possession for the non-payment of rent where defendant denies plaintiff's title and claims title in himself,[23] and of an action by a creditor, whose debtor has wrongfully paid the debt to a third person, to recover the money from such person;[24] but it has been determined that this court has no jurisdiction of an action under the Mechanics' Lien Law,[25] of actions on attachment bonds taken in the supreme court, conditioned to pay costs and damages sustained by wrongful attachment,[26] or of an action against an officer for consequential damages for loss of property.[27]

(IV) *PROCEDURE.* The powers of such court as to procedure are in general the same as were possessed by the district court of that city.[28]

17. See Greater New York Charter, §§ 1364, 1365.

N. Y. Laws (1902), c. 580, § 1, subd. 14, confers on the municipal court of the city of New York jurisdiction over actions for damages for an injury to personal property. Section 139 provides that no action shall be maintained in the municipal court which arises on a written contract of conditional sale of personal property, except an action to foreclose the lien. It was held that the general provision in section 1, subd. 14, is restricted by the excluding provision of section 139, and an action of the class specified in the latter section cannot be maintained, notwithstanding that it involves an injury to personal property. Samodwitz *v.* Karpf, 80 N. Y. App. Div. 496, 80 N. Y. Suppl. 704.

18. Luban *v.* Simonds, 46 N. Y. App. Div. 192, 61 N. Y. Suppl. 697.

19. Vogel *v.* Banks, 60 N. Y. App. Div. 459, 70 N. Y. Suppl. 1010.

20. Chase *v.* Herr, 34 Misc. (N. Y.) 526, 69 N. Y. Suppl. 908. See also Agresta *v.* Hart, 34 Misc. (N. Y.) 784, 69 N. Y. Suppl. 1031.

21. Katz *v.* Henig, 32 Misc. (N. Y.) 672, 66 N. Y. Suppl. 530.

22. Hart *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 493, 72 N. Y. Suppl. 797.

23. Quinn *v.* Quinn, 46 N. Y. App. Div. 241, 61 N. Y. Suppl. 684. See Sage *v.* Crosby, 33 Misc. (N. Y.) 117, 67 N. Y. Suppl. 139.

24. Dechen *v.* Dechen, 59 N. Y. App. Div. 166, 68 N. Y. Suppl. 1043.

25. Smith *v.* Silsbe, 53 N. Y. App. Div. 462, 65 N. Y. Suppl. 1083; McConologue *v.* McCaffrey, 29 Misc. (N. Y.) 139, 60 N. Y. Suppl. 279. But see Kotzen *v.* Nathanson, 33 Misc. (N. Y.) 299, 68 N. Y. Suppl. 497.

26. Ward *v.* American Surety Co., 25 Misc. (N. Y.) 198, 54 N. Y. Suppl. 177.

27. Kneustler *v.* Doyle, 30 Misc. (N. Y.) 442, 62 N. Y. Suppl. 593.

28. Greater New York Charter, § 1369.

Adjournment.— Hertz *v.* Schmidt, 31 Misc. (N. Y.) 725, 65 N. Y. Suppl. 225.

Appeals.— Walker *v.* Baermann, 44 N. Y. App. Div. 587, 61 N. Y. Suppl. 91; People *v.* Ash, 44 N. Y. App. Div. 6, 60 N. Y. Suppl. 436, 14 N. Y. Crim. 167; Wallot *v.* Weber, 30 Misc. (N. Y.) 632, 62 N. Y. Suppl. 756.

Directing a verdict.— Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 41 N. Y. Suppl. 289.

Discontinuance of action.—Weidler *v.* Weidler, 36 Misc. (N. Y.) 219, 73 N. Y. Suppl. 200.

Granting new trial.— Prager *v.* Borden's Condensed-Milk Co., 34 Misc. (N. Y.) 193, 68 N. Y. Suppl. 833.

Opening of defaults.— Koerkle *v.* Pangborn, 33 Misc. (N. Y.) 476, 67 N. Y. Suppl. 898; Cahill *v.* Lilienthal, 30 Misc. (N. Y.) 429, 62 N. Y. Suppl. 524; Salvino *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 746, 60 N. Y. Suppl. 476; Stivers *v.* Ritt, 29 Misc. (N. Y.) 341, 60 N. Y. Suppl. 507.

Pleadings and amendments.— Shirtcliffe *v.* Wall, 68 N. Y. App. Div. 375, 74 N. Y. Suppl. 189; Rothfeld *v.* Lintz, 36 Misc. (N. Y.) 220, 73 N. Y. Suppl. 191; Hawkes *v.* Burke, 34 Misc. (N. Y.) 189, 68 N. Y. Suppl. 798; Equitable Providing Co. *v.* Eisentrager, 31 Misc. (N. Y.) 707, 65 N. Y. Suppl. 296; Lambert *v.* Hoffman, 20 Misc. (N. Y.) 331, 45 N. Y. Suppl. 806.

Removal of case.— Vogel *v.* Banks, 60 N. Y. App. Div. 459, 70 N. Y. Suppl. 1010; Lewis *v.* Metropolitan St. R. Co., 35 Misc. (N. Y.) 304, 71 N. Y. Suppl. 948. A justice of the municipal court of the city of New York has no authority to render judgment in a cause which he should have transferred on the ground that none of the parties resided in the district. Goldman *v.* Jacobs, 38 Misc. (N. Y.) 781, 78 N. Y. Suppl. 833.

Service of process.— Newton *v.* Stachelberg, 36 Misc. (N. Y.) 184, 73 N. Y. Suppl. 147; Tausend *v.* Handlear, 33 Misc. (N. Y.) 587, 68 N. Y. Suppl. 77, 31 N. Y. Civ. Proc. 170.

c. City Court of New York.[29] The city court of New York, having no equitable jurisdiction, cannot grant relief on equitable grounds;[30] and it has no jurisdiction of an action involving an accounting.[31] Nor has it any jurisdiction over the person of a defendant served without the city in an action to foreclose a mechanic's lien;[32] but it has been decided that it may entertain an action by a resident of the state, but not of the city, against a foreign corporation on a cause of action which arose outside the city.[33]

3. PENNSYLVANIA — a. Court of Quarter Sessions. This court has no jurisdiction of a petition to restrain the opening and grading of a duly authorized public highway across the tracks of a steam railroad at grade.[34] It may, however, adjust boundaries of boroughs, townships, etc.[35]

b. Magistrates' Courts. The act providing that a magistrate in Philadelphia should exercise the same jurisdiction as was exercised by two aldermen did not violate the constitutional provision as to the establishment of magistrates' courts in this city.[36]

4. TEXAS — a. County Courts. In those counties where the jurisdiction of the county court has not been transferred to the district court,[37] the former has general jurisdiction in all cases which relate to the administration of decedents' estates, and judgments rendered by it within the scope of its powers are entitled to the same presumption in support of their validity as the judgments of any court of general jurisdiction.[38] Such a court may also issue a writ of garnishment and determine a case against a non-resident having creditors in the state.[39] And an action for breach of warranty of title to land is within its jurisdiction,[40] as is also an appeal from the award of the county commissioners' court for damages sustained in establishing a third-class road[41] and an action in which a county judge is a defendant.[42] Its jurisdiction, however, is limited by the amount in contro-

Setting aside verdict.— Bale *v.* Pass, 64 N. Y. App. Div. 302, 72 N. Y. Suppl. 93.

Staying proceedings.— Farber *v.* Flauman, 30 Misc. (N. Y.) 627, 62 N. Y. Suppl. 784.

Time of rendering judgment.— Mayer *v.* Friedman, 44 N. Y. App. Div. 518, 60 N. Y. Suppl. 969.

Vacating a judgment.— Horowitz *v.* Fuchs, 39 Misc. (N. Y.) 344, 79 N. Y. Suppl. 864; Wolchock *v.* Tombarelli, 32 Misc. (N. Y.) 694, 66 N. Y. Suppl. 504; Porter *v.* Cregan, 26 Misc. (N. Y.) 417, 56 N. Y. Suppl. 200.

Vacating satisfaction pieces.— People *v.* Fitzpatrick, 35 Misc. (N. Y.) 456, 71 N. Y. Suppl. 191.

29. As to appeals from this court to the supreme court it has been determined that the rules control which govern the court of appeals on appeal from the supreme court. Wright *v.* May, 29 Misc. (N. Y.) 300, 60 N. Y. Suppl. 534 [*affirming* 57 N. Y. Suppl. 1151]. Weight of evidence is not to be considered on an appeal from the general term of the city court. Mahoney *v.* O'Neill, 29 Misc. (N. Y.) 619, 61 N. Y. Suppl. 69 [*reversing* 28 Misc. 437, 59 N. Y. Suppl. 378].

30. Lawrence *v.* Lawrence, 32 Misc. (N. Y.) 503, 66 N. Y. Suppl. 393 [*reversing* 31 Misc. 646, 64 N. Y. Suppl. 1113].

31. Gorse *v.* Lynch, 36 Misc. (N. Y.) 150, 72 N. Y. Suppl. 1054 [*reversing* 35 Misc. 848, 72 N. Y. Suppl. 1105]; Frost *v.* Weehawken Wharf Co., 33 Misc. (N. Y.) 736, 68 N. Y. Suppl. 399; Meyer *v.* Chamberlyn, 62 N. Y. Suppl. 431.

32. McCann *v.* Gerding, 29 Misc. (N. Y.) 283, 60 N. Y. Suppl. 467 [*reversing* 27 Misc. 845, 59 N. Y. Suppl. 381].

33. Maas *v.* Cunard Steamship Co., 19 Misc. (N. Y.) 100, 43 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 155.

34. *In re* Upper Darby Tp. Road, 8 Del. Co. 158.

35. *In re* Boundary Line, 10 Kulp (Pa.) 64.

36. Gallagher *v.* Maclean, 193 Pa. St. 583, 45 Atl. 76.

Such courts have jurisdiction of an action for removal of tenants at the expiration of a lease, although the damages claimed may exceed the limitation imposed by the constitution. Gallagher *v.* Maclean, 193 Pa. St. 583, 45 Atl. 76. See Pa. Const. art. 5, § 12, as to amount.

37. And such jurisdiction as was taken from county courts and vested in the district courts was not restored by the substitution by constitutional amendment in 1891 of a new section defining the jurisdiction of such courts and providing for appeals therefrom. Muench *v.* Oppenheimer, 86 Tex. 568, 26 S. W. 496.

38. Guilford *v.* Love, 49 Tex. 715.

39. Weems *v.* Miles, 1 Tex. App. Civ. Cas. § 1207.

40. Patrick *v.* Laprelle, (Tex. Civ. App. 1897) 40 S. W. 552.

41. Karnes County *v.* Nichols, (Tex. Civ. App. 1899) 54 S. W. 656.

42. State *v.* Hanscom, (Tex. Sup. 1896) 37 S. W. 601.

versy,[43] and it has no power to determine the validity of a lien upon land created by the levy of an execution.[44] Again the power conferred upon such court to approve a surveyor's report as to county boundary lines was only a veto power and not an original jurisdiction.[45]

b. Municipal Courts. It has been decided that municipal courts constitute no part of the judicial power of the state within the meaning of the constitution.[46]

5. OTHER STATES. Similarly the courts of other states, applying the principles hitherto stated and construing the respective constitutional and statutory provisions of such states, have determined the jurisdiction of courts of inferior or limited jurisdiction in particular cases; for example, in Alabama the jurisdiction of the circuit court,[47] and the jurisdiction of the city court;[48] in Arkansas the jurisdiction of the circuit court;[49] in California the jurisdiction of the superior court;[50] in Connecticut the jurisdiction of the superior court;[51] in Florida the jurisdiction of the county court;[52] in Georgia the jurisdiction of the county court[53] and of city courts;[54] in Illinois the jurisdiction of the county court;[55]

43. Must exceed two hundred dollars. Bonner *v.* Moores, 3 Tex. App. Civ. Cas. § 12.

The equitable relief prayed for determines the jurisdiction of an action to restrain the use of a trade-name and for five hundred dollars damages, the damages being stated incidentally and to show the result of defendant's acts. Cleaver *v.* Duke, (Tex. Civ. App. 1900) 58 S. W. 145.

44. Frichott *v.* Nowlin, (Tex. Civ. App. 1899) 50 S. W. 164.

45. Wise County *v.* Montague County, 21 Tex. Civ. App. 444, 52 S. W. 615.

46. *Ex p.* Coombs, 38 Tex. Crim. 648, 44 S. W. 854, construing Tex. Const. (1876), art. 5.

47. Circuit court.— In an action on a contract commenced in the circuit court there is not sufficient to sustain the jurisdiction of the court, if a valid cause of action for only a nominal sum is stated in the complaint. Cahuzac *v.* Samini, 29 Ala. 288.

48. City courts have jurisdiction of bastardy proceedings arising within its territorial jurisdiction. Williams *v.* State, 113 Ala. 58, 21 So. 463.

49. Circuit court.— To confer jurisdiction upon the circuit court the amount involved should be over one hundred dollars. Martin *v.* Foreman, 18 Ark. 249.

50. The superior court has original jurisdiction of actions, in which in order to determine the case the issue of title or possession is so involved, although only incidentally, that it must be decided (Hart *v.* Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196), and it also has jurisdiction of an action to recover the penalty of a bond given by a liquor-seller to the city in the sum of one thousand dollars (Tulare *v.* Hevren, 126 Cal. 226, 58 Pac. 530).

51. Superior court.— Jurisdiction of an action *qui tam* for burglary has been declared to exist in the superior court. Parks *v.* Morgan, Kirby (Conn.) 159.

52. County court.— In the matter of granting letters of administration on the estates of deceased persons a general and exclusive jurisdiction is conferred upon the county court (Epping *v.* Robinson, 21 Fla. 36), and such a court has jurisdiction of an action to recover on a written obligation for the payment of money, where the demand involved does not exceed five hundred dollars, although the cause of action sued on accrued prior to the organization of that court (Varn *v.* Alderman, 42 Fla. 378, 29 So. 323).

53. County court.— Under a code provision that the practice and procedure in the county court shall be the same as in the superior court, except as otherwise provided by the code (Ga. Civ. Code, §§ 4198, 4204), a code provision "to regulate the practice in the superior court" is applicable to pleadings in the county court (Newman *v.* Scofield, 102 Ga. 810, 30 S. E. 427).

No authority to administer the oath necessary for a warrant to issue against a tenant at sufferance, nor to issue such warrant, is conferred on a county judge. Griswold *v.* Rutherford, 109 Ga. 398, 34 S. E. 602, holding that under the statute the oath may be administered only by a judge of the superior court or a justice of the peace.

54. City courts.— Equitable defenses, which if proven will prevent a recovery or reduce the amount of plaintiff's verdict, may be set up by a party sued in the city court, although such a court has no power to grant affirmative equitable relief. Gentle *v.* Atlas Sav., etc., Assoc., 105 Ga. 406, 31 S. E. 544.

City courts, established on the recommendation of grand juries, were declared not to be "city courts" witnin the constitutional provision by which the power to grant new trials was confined to the superior court, and such city courts as were recognized by the constitution. Stewart *v.* State, 98 Ga. 202, 25 S. E. 424. See Ga. Const. art. 6, § 4, par. 5.

Particular municipal courts.— See Williams *v.* Augusta, 111 Ga. 849, 36 S. E. 607 (as to recorder's court of the city of Augusta); Cooper *v.* Jackson, 107 Ga. 255, 33 S. E. 60 (as to city court of Gwinett county); Johnson *v.* Hilton, etc., Lumber Co., 103 Ga. 212, 29 S. E. 819 (as to city court of Brunswick); Williams *v.* State, 116 Ga. 525, 42 S. E. 745 (as to the city court of Cartersville).

55. The county court is a court of record having a general jurisdiction over a particular class of cases, and its jurisdiction is not

in Indiana the jurisdiction of the superior court,[56] the jurisdiction of the criminal court in Marion county,[57] and the jurisdiction of the county commissioners' court;[58] in Kentucky the jurisdiction of the county court;[59] in Maine the jurisdiction of the municipal court of Portland;[60] in Maryland the jurisdiction of the circuit court;[61] in Massachusetts the jurisdiction of the supreme court[62] and the jurisdiction of the superior court;[63] in Michigan the jurisdiction of the superior court of Grand Rapids;[64] in Minnesota the jurisdiction of the municipal court of Duluth;[65] in Missouri the jurisdiction of the county court,[66]

inferior, although limited. Propst *v.* Meadows, 13 Ill. 157. Has no general chancery jurisdiction or powers. Friedman *v.* Podolski, 185 Ill. 587, 57 N. E. 818 [*affirming* 85 Ill. App. 284]. When adjudicating on the administration of estates it is not an inferior court. Moffitt *v.* Moffitt, 69 Ill. 641. The county court has jurisdiction of an action to recover five hundred dollars damages, where the subject-matter was one of which a justice of the peace has jurisdiction. Offield *v.* Siler, 15 Ill. App. 308. The claim of an attorney against the assets of an insolvent in the custody of an assignee for services may be heard and determined. Jones *v.* Spencer, 79 Ill. App. 349. When an action for damages for personal injuries is not within the jurisdiction of a county court. Robinson *v.* Hilderbrand, 71 Ill. App. 53. Again the jurisdiction of such courts should be uniform. Ill. Const. (1870), art. 6, § 29. Under this constitutional provision an act to increase the jurisdiction of county courts, but providing that it shall not apply to counties having a certain population, has been declared invalid as in contravention thereof (Myers *v.* People, 67 Ill. 503), as has also an act extending the jurisdiction of county courts in counties in which probate courts are or may be established (Klokke *v.* Dodge, 103 Ill. 125).

The county court of De Kalb county was not invested with chancery jurisdiction by the act of 1863. Boynton *v.* Holcomb, 49 Ill. App. 503.

The county court of Lasalle county was by the constitution of 1870 deprived of the extended jurisdiction conferred by the act of 1865. People *v.* Mead, 66 Ill. 135; Blake *v.* Peckham, 64 Ill. 362.

56. The superior court of Tippecanoe county has jurisdiction of a suit for a mandatory injunction to compel the removal of an obstruction to a highway. Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249.

57. The criminal court in Marion county having exclusive criminal jurisdiction in such county is an inferior court under a constitutional provision that all courts other than the supreme or circuit courts shall be inferior to them. Cropsey *v.* Henderson, 63 Ind. 268; Ind. Const. art. 7, § 1.

58. County commissioners' court is an inferior court of special and limited jurisdiction possessing only such jurisdiction and authority as are conferred by statute. Doctor *v.* Hartman, 74 Ind. 221; Rosenthal *v.* Madison, etc., Plank-Road Co., 10 Ind. 358.

59. In an early case it is decided that jurisdiction and authority of the county courts are derived wholly from the statute law of the state. Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164. Statute as to time of holding court is not unconstitutional. Mullins *v.* Andrews, 45 S. W. 231, 20 Ky. L. Rep. 20, construing Ky. Stat. § 1508; Ky. Const. § 51.

60. The municipal court of Portland, upon which the same jurisdiction was conferred as justices of the peace might exercise irrespective of the residence of the parties, was not affected by an act subsequently passed which provided that all actions between parties residing in the same county, returnable before any trial justice, should be commenced before a justice holding court in the town where one of the parties resided. Allen *v.* Somers, 68 Me. 247, construing Me. Laws (1856), c. 204, § 2; Rev. Stat. c. 83, § 7.

61. The special jurisdiction conferred upon the circuit courts as to the sale of mortgaged premises under a power in the mortgage has been decided to be confined to the parties to the instrument constituting the mortgage and conferring such power, and no others can be permitted to intervene. Warfield *v.* Ross, 38 Md. 85.

62. Supreme court.— In an action of replevin in which the parties have agreed that the property has a value less than twenty dollars, the supreme court has no jurisdiction. Leonard *v.* Hannon, 105 Mass. 113.

63. The superior court may grant a motion to vacate an order dismissing an appeal from a police court, although such motion is made during the adjournment of a session of the court. Dalton-Ingersoll Co. *v.* Fiske, 175 Mass. 15, 55 N. E. 468, so held under Mass. Stat. (1885), c. 384, § 2.

64. The superior court of Grand Rapids is one of special and limited jurisdiction. Denison *v.* Smith, 33 Mich. 155.

65. Municipal court of Duluth.— An action to recover damages for fraudulent covenants of warranty is within the jurisdiction of the municipal court of Duluth (Carlson *v.* Segog, 60 Minn. 498, 62 N. W. 1132); but it has been decided that such court has no jurisdiction in an action of forcible entry and detainer to determine a defense which seeks to set aside a foreclosure sale for fraud and to obtain leave to redeem (Lundberg *v.* Davidson, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71). See Tilleny *v.* Knoblauch, (Minn. 1898) 75 N. W. 1039, as to municipal court of Minneapolis.

66. The act conferring power upon the county court, whenever any part of a mortgage containing a power of sale became payable, to make an order to the sheriff

and of the St. Louis court of criminal correction;[67] in Nebraska the jurisdiction of the county court;[68] in North Carolina the jurisdiction of the superior court;[69] in Ohio the jurisdiction of the court of common pleas,[70] and the jurisdiction of the superior court of Cincinnati;[71] in Oregon the jurisdiction of the county court;[72] in Tennessee the jurisdiction of the county court;[73] and in West Virginia the jurisdiction of the county court.[74]

X. COURTS OF PROBATE JURISDICTION.

A. Nature, Scope, and Exercise of Jurisdiction — 1. In General. While probate courts, surrogates' courts, and courts of like character have only a special and limited jurisdiction,[75] yet the nature, extent,[76] and exercise of probate jurisdic-

commanding him to levy on the property described in the mortgage and providing that a copy of such order duly certified being delivered to the sheriff should have the effect of a fieri facias on a judgment of foreclosure by the circuit court, has been construed as valid. Benton County *v.* Morgan, 163 Mo. 661, 64 S. W. 119, construing Mo. Const. art. 6, § 1; Mo. Rev. Stat. (1899), § 9835.

67. **The court of criminal correction of St. Louis** has no jurisdiction to enter a final judgment upon a recognizance taken before it in a felony case. State *v.* Hoeffner, 63 Mo. App. 409.

68. **County court.**— An action to recover one hundred dollars damages for assault and battery is, it has been determined, within the jurisdiction of the county court (Brauer *v.* Luntzer, 12 Nebr. 473, 11 N. W. 730), as are also funds of an insolvent debtor which come into the hands of the assignee, the court having power in such cases to determine the rights of the creditors and to grant relief (Wilson *v.* Coburn, 35 Nebr. 530, 53 N. W. 466). A suit in equity, however, to vacate proceedings for the condemnation of the right of way for a railroad is not within the jurisdiction of such court. Mattheis *v.* Fremont, etc., R. Co., 53 Nebr. 681, 74 N. W. 30.

69. **Superior courts** have no jurisdiction of actions on implied contracts for money had and received, where the amount sued for is less than two hundred dollars. Powell *v.* Allen, 103 N. C. 46, 9 S. E. 138; Winslow *v.* Weith, 66 N. C. 432. But in actions for tort, although the amount claimed is fifty dollars or less, they may have jurisdiction. Crinkley *v.* Egerton, 113 N. C. 142, 18 S. E. 341. See Bowers *v.* Richmond, etc., R. Co., 107 N. C. 721, 12 S. E. 452.

70. Stevens *v.* State, 3 Ohio St. 453.

71. **Superior court of Cincinnati.**— It has been decided that the special term of the superior court of the city of Cincinnati is a court of original jurisdiction. Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 674.

72. **A county court** is one of special or limited jurisdiction. State *v.* Officer, 4 Oreg. 180. When exercising the powers and authority pertaining to county commissioners it is such. Crossen *v.* Wasco County, 10 Oreg. 111. It has no jurisdiction over questions of title or rights arising out of the exercise of eminent domain. Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280.

73. **The county court** has jurisdiction to appoint and remove trustees (Brien *v.* Robinson, 102 Tenn. 157, 52 S. W. 802); but has none of a suit to sell land for the enforcement of a judgment lien (Turner *v.* Turner, (Tenn. Ch. App. 1901) 64 S. W. 392).

74. Mayer *v.* Adams, 27 W. Va. 244. See W. Va. Const. art. 8, § 24.

75. Mathewson *v.* Sprague, 16 Fed. Cas. No. 9,278, 1 Curt. 457.

76. *Alabama.*— Probate courts are of limited jurisdiction (Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630), although it is also decided that such courts have original, general, and unlimited jurisdiction of the administration and probate of wills (Acklen *v.* Goodman, 77 Ala. 521; Steele *v.* Tutwiler, 68 Ala. 107; Hall *v.* Hall, 47 Ala. 290; Ikelheimer *v.* Chapman, 32 Ala. 676); but it is declared that as to the settlement of executors' accounts such courts are of limited and statutory jurisdiction (Whorton *v.* Moragne, 62 Ala. 201), and that the county court's jurisdiction in the adjustment of a decedent's estate is limited (Leavens *v.* Butler, 8 Port. 380).

Arkansas.— Probate courts have plenary and original jurisdiction in all matters within their cognizance. Borden *v.* State, 11 Ark. 519, 44 Am. Dec. 217.

California.— Under Const. art. 6, the probate court had not jurisdiction in all matters relating to the estates of deceased persons, its powers being limited by statute (Bush *v.* Lindsey, 44 Cal. 121); and prior to the statute of 1858 probate courts were of limited and inferior jurisdiction (Townsend *v.* Gordon, 19 Cal. 188; Irwin *v.* Scriber, 18 Cal. 499; Grimes *v.* Norris, 6 Cal. 621, 65 Am. Dec. 545; Clarke *v.* Perry, 5 Cal. 58, 63 Am. Dec. 82).

Colorado.— The probate court in 1871 was of limited but not of inferior jurisdiction. Cody *v.* Raynaud, 1 Colo. 272.

Connecticut.— Probate courts are of limited jurisdiction. Potwine's Appeal, 31 Conn. 381.

District of Columbia.— The supreme court succeeded to all the powers and jurisdiction of the orphans' court. Keyser *v.* Breitbarth, 2 Mackey 332.

Georgia.— The court of ordinary is a court of general jurisdiction in matters relating to decedents' estates. Stuckey *v.* Watkins, 112

tion depend upon the source thereof with reference to constitutional and statutory

Ga. 268, 37 S. E. 401, 81 Am. St. Rep. 47. They are also declared to have the same jurisdiction as the English ecclesiastical courts (Finch *v.* Finch, 14 Ga. 362), although they may exercise jurisdiction in matters testamentary and of administration, and are courts of general jurisdiction (Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488).

Illinois.— The act of April 27, 1877, created probate courts in all counties having a certain population and thus divested county courts in these counties of all probate jurisdiction (Meserve *v.* Delaney, 105 Ill. 53); and the courts are evidently of limited and inferior jurisdiction (Matthews *v.* Hoff, 113 Ill. 90; People *v.* Cole, 84 Ill. 327; People *v.* Gray, 72 Ill. 343; Housh *v.* People, 66 Ill. 178).

Indiana.— The jurisdiction of the circuit court in probate matters is held to be entirely independent of its jurisdiction in civil actions (Noble *v.* McGinnis, 55 Ind. 528); and it was decided in 1849 that the probate court had general jurisdiction (Doe *v.* Smith, Smith 381).

Iowa.— In 1849 the then probate court, although of limited jurisdiction, had plenary and original jurisdiction over the administration of decedents' estates. Barney *v.* Chittenden, 2 Greene 165.

Louisiana.— Prior to the constitution of 1845, courts of probate were of limited jurisdiction (Erwin *v.* Lowry, 1 La. Ann. 276; Le Page *v.* New Orleans Gas Light, etc., Co., 7 Rob. 183; Soulie *v.* Soulie, 5 La. 26), and had no jurisdiction of petitory actions, or actions of revendication (Barnes *v.* Gaines, 5 Rob. 314) or actions on appeal-bonds against sureties (Elkins *v.* Berry, 15 La. 358); nor could their jurisdiction be extended to cases not expressly included (Zander *v.* Pile, 8 La. 211. See also Erwin *v.* Lowry, 1 La. Ann. 276).

Maryland.— Orphans' courts are of limited jurisdiction under a decision in 1858. Michael *v.* Baker, 12 Md. 158, 71 Am. Dec. 593. See also Townshend *v.* Brooke, 9 Gill 90; Brodess *v.* Thompson, 2 Harr. & G. 120.

Mississippi.— Chancery courts succeeded to all the probate cognizance of the probate courts as they existed under the constitution of 1832 (Saxon *v.* Ames, 47 Miss. 565), and are courts of original and general jurisdiction (Hanks *v.* Neal, 44 Miss. 212; Pollock *v.* Buie, 43 Miss. 140; McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127), and it has been decided that the powers of such courts are coextensive with those of a court of equity (Carmichael *v.* Browder, 3 How. 252; Blanton *v.* King, 2 How. 856; Simmons *v.* Henderson, Freem. 493. But see Saxon *v.* Ames, 47 Miss. 565).

Missouri.— Probate courts are on the same footing as courts of general jurisdiction (Cooper *v.* Duncan, 20 Mo. App. 355), and, being courts of record, their jurisdiction as to wills and the administration of estates is general, exclusive, and original (Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276. See also State *v.* Millsaps, 69 Mo. 359; Pattee *v.* Thomas, 58 Mo. 163, as to particular counties).

New Hampshire.— Probate courts are of special and limited jurisdiction and their proceedings are not according to the course of the common law. Wood *v.* Stone, 39 N. H. 572.

New Jersey.— Orphans' courts have been held to be not of special but of limited jurisdiction (Hess *v.* Cole, 23 N. J. L. 116); and it is also decided that such courts are not of special jurisdiction for a particular purpose, nor a court of limited jurisdiction in the common acceptation of the term, which applies to courts having special powers only for performing special duties (Obert *v.* Hammel, 18 N. J. L. 73).

New York.— The powers of the surrogate and of surrogates' courts include, in addition to the powers conferred upon them by special provisions of the law, jurisdiction in certain enumerated cases under the code embracing also exclusive, concurrent, and incidental powers in specified cases (Stover Anno. Code Civ. Proc. §§ 2472, 2482, 2484, 2486; and as to jurisdiction under §§ 2486, 3347, see *In re* Gilman, 17 N. Y. Suppl. 494), and these courts are of special and limited jurisdiction (Dubois *v.* Sands, 43 Barb. 412; Seaman *v.* Duryea, 10 Barb. 523 [*affirmed* in 11 N. Y. 324]).

Ohio.— Under the act of April 30, 1852, the probate court is of special and limited jurisdiction in the matter of providing compensation to the owners of property taken for the use of corporations. Dayton, etc., R. Co. *v.* Marshall, 11 Ohio St. 497.

Oregon.—County courts under Const. art. 7, §§ 1, 2, and by statute are, in matters of probate, of general and superior jurisdiction, and are courts of record (Monastes *v.* Catlin, 6 Oreg. 119; Tustin *v.* Gaunt, 4 Oreg. 305; Russell *v.* Lewis, 3 Oreg. 380); but under the territorial organization they had only a limited and inferior jurisdiction (Farley *v.* Parker, 6 Oreg. 105, 25 Am. Rep. 504).

Pennsylvania.— The jurisdiction of a register of wills was, under a decision in 1889, decided to be limited by statute (Wall *v.* Wall, 123 Pa. St. 545, 16 Atl. 598, 10 Am. St. Rep. 549); and the same is true as to the orphans' court (Shollenberger's Appeal, 21 Pa. St. 337; Ainey's Appeal, 2 Pennyp. 192; Holt's Estate, 11 Phila. 13, 32 Leg. Int. 29); but as to those matters over which it has authority its jurisdiction is as exclusive and extensive as the demands of justice (Shollenberger's Appeal, 21 Pa. St. 337).

South Carolina.—Probate courts are of limited jurisdiction, but are not inferior courts, being courts of record (Turner *v.* Malone, 24 S. C. 398; Gallman *v.* Gallman, 5 Strobh. 207), and such courts are purely civil in their institution and jurisdiction, irrespective of their origin (Lide *v.* Lide, 2 Brev. 403).

South Dakota.— Under a decision in 1894

provisions[77] and also with reference to the common law;[78] and their incidental powers, which have elsewhere been discussed,[79] include the right to try questions which arise incidentally in a cause over which such courts have jurisdiction and the determination of which are necessary to a lawful exercise of the powers expressly conferred in arriving at a decision.[80] Accordingly the jurisdiction of these courts in matters of administration and over ordinary civil actions must be determined by a consideration of the factors just mentioned,[81] since each particu-

a probate court is one of general jurisdiction, with the same presumptions in favor of its proceedings as in case of ordinary courts of general jurisdiction. Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570.

Tennessee.— The county court in probate matters is not an inferior court and its jurisdiction is general, original, and exclusive. Townsend *v.* Townsend, 4 Coldw. 70, 94 Am. Dec. 185.

Texas.— Const. (1895), art. 5, § 16, gives the county court general jurisdiction of the administration of decedents' estates. Dodson *v.* Wortham, 18 Tex. Civ. App. 666, 45 S. W. 858. Probate courts, or the county courts as courts of probate, are courts of record and of general jurisdiction over decedent's estates. Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325; Murchison *v.* White, 54 Tex. 78; Easley *v.* McClinton, 33 Tex. 288. And see Bowser *v.* Williams, 6 Tex. Civ. App. 197, 25 S. W. 453.

Utah.— Probate courts have general jurisdiction as to matters of divorce. Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

See 13 Cent. Dig. tit. "Courts," § 469 *et seq.*

77. *Alabama.*— Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630.

Arkansas.— Reinhardt *v.* Gartrell, 33 Ark. 727. See also West *v.* Waddill, 33 Ark. 575.

California.— Bush *v.* Lindsey, 44 Cal. 121; *In re* Bowen, 34 Cal. 682; Grimes *v.* Norris, 6 Cal. 621, 65 Am. Dec. 545.

Connecticut.— State *v.* Blake, 69 Conn. 64, 36 Atl. 1019.

Louisiana.— Erwin *v.* Lowry, 1 La. Ann. 276. See also Le Page *v.* New Orleans Gas Light, etc., Co., 7 Rob. 183; Elkins *v.* Berry, 15 La. 358; Soulie *v.* Soulie, 5 La. 26.

Maryland.— Conner *v.* Ogle, 4 Md. Ch. 425. See also Brodess *v.* Thompson, 2 Harr. & G. 120.

Mississippi.— Hanks *v.* Neal, 44 Miss. 212; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; McWillie *v.* Vacter, 35 Miss. 428, 72 Am. Dec. 127.

Missouri.— Burke *v.* Walroud, 28 Mo. 591.

New Jersey.— Wood *v.* Tallman, 1 N. J. L. 153. And see Steele *v.* Queen, 67 N. J. L. 99, 50 Atl. 668.

New York.— *In re* Bolton, 159 N. Y. 129, 53 N. E. 756 [*affirming* 37 N. Y. App. Div. 625, 56 N. Y. Suppl. 1105 (*affirming* 20 Misc. 532, 46 N. Y. Suppl. 908)]; Riggs *v.* Cragg, 89 N. Y. 479, 11 Abb. N. Cas. 401 [*reversing* 26 Hun 89 (*affirming* 5 Redf. 82)]. See also Seaman *v.* Duryea, 10 Barb. 523 [*affirmed* in 11 N. Y. 324]; Dakin *v.* Hudson, 6 Cow. 221; Harris *v.* Meyer, 3 Redf. Surr. 450; Furniss *v.* Furniss, 2 Redf. Surr. 497.

Ohio.— Foresman *v.* Haag, 36 Ohio St. 102.

Oregon.— Wright *v.* Edwards, 10 Oreg. 298.

Pennsylvania.— Wall *v.* Wall, 123 Pa. St. 545, 16 Atl. 598, 10 Am. St. Rep. 549; Mann *v.* Mullin, 84 Pa. St. 297; Ainey's Appeal, 2 Pennyp. 192; Patterson's Estate, 3 Pa. Co. Ct. 236; Holt's Estate, 11 Phila. 13, 32 Leg. Int. 29; Fisher *v.* Kreebel, 1 Leg. Chron. 113.

Rhode Island.—See Mitchell *v.* People's Sav. Bank, 20 R. I. 500, 40 Atl. 502.

South Carolina.—Davenport *v.* Caldwell, 10 S. C. 317.

Texas.— Marks *v.* Hill, 46 Tex. 345; Daniel *v.* Hutcheson, 4 Tex. Civ. App. 239, 22 S. W. 278.

United States.— Mathewson *v.* Sprague, 16 Fed. Cas. No. 9,278, 1 Curt. 457. And see Fitzwilliam *v.* Campbell, 99 Fed. 30, 39 C. C. A. 399.

See 13 Cent. Dig. tit. "Courts," § 470.

78. East St. Louis *v.* Wittich, 108 Ill. 449 (county court at probate term has no jurisdiction in cases of law); Fisher *v.* Kreebel, 1 Leg. Chron. (Pa.) 113 (orphans' court system not indebted to common law for its existence or development); Brunson *v.* Burnett, 2 Pinn. (Wis.) 185, 1 Chandl. (Wis.) 136 (probate courts are offspring of common law, and statutes do not divest them of powers and functions of common-law courts, except to abridge or regulate); *Ex p.* Tweedy, 22 Fed. 84 (common-law jurisdiction of probate court in Tennessee cannot be supported). See further Wood *v.* Tallman, 1 N. J. L. 153.

79. See *supra*, II, D, 3, b. See also Riggs *v.* Cragg, 89 N. Y. 479 [*reversing* 26 Hun 89]; Sipperly *v.* Baucus, 24 N. Y. 46; Campbell *v.* Thatcher, 54 Barb. (N. Y.) 382; Davenport *v.* Caldwell, 10 S. C. 317.

80. *District of Columbia.*— McIntire *v.* McIntire, 14 App. Cas. 337.

Louisiana.—Schick *v.* Corbett, 52 La. Ann. 180, 26 So. 862.

Massachusetts.— Wade *v.* Lobdell, 4 Cush. 510.

New York.— Matter of Friedell, 20 N. Y. App. Div. 382, 46 N. Y. Suppl. 787; *In re* Davenport, 37 Misc. 179, 74 N. Y. Suppl. 940.

North Carolina.— Murrill *v.* Sandlin, 86 N. C. 54; Lovinier *v.* Pearce, 70 N. C. 167.

Ohio.— Cleveland, etc., R. Co. *v.* Johnson, 4 Ohio Dec. (Reprint) 67, 1 Clev. L. Rec. 89.

See 13 Cent. Dig. tit. "Courts," §§ 474, 475.

81. *Iowa.*— Steiner *v.* Lenz, 110 Iowa 49, 81 N. W. 190 [*distinguishing* Gillespie *v.* See, 72 Iowa 345, 33 N. W. 676]. See also Capper *v.* Sibley, 65 Iowa 754, 23 N. W. 153.

Nebraska.— Boales *v.* Ferguson, 55 Nebr. 565, 76 N. W. 18.

lar decision rests substantially upon some or all of these factors and the law and the facts peculiar thereto.

New York.— Matter of McKeon, 26 Misc. 464, 58 N. Y. Suppl. 589.

Ohio.— Gill *v.* Sealbridge, 17 Ohio Cir. Ct. 390, 9 Ohio Cir. Dec. 554; Graham Lumber Co. *v.* Julien, 5 Ohio S. & C. Pl. Dec. 167, 7 Ohio N. P. 391.

Oklahoma.— Walters *v.* Ratliff, 10 Okla. 262, 61 Pac. 1070.

Wisconsin.— Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571, 87 Am. St. Rep. 897, 56 L. R. A. 261; Burnham *v.* Norton, 100 Wis. 8, 75 N. W. 304.

See 13 Cent. Dig. tit. "Courts," § 469 *et seq.*

A court of probate has been held to have jurisdiction: To administer property consisting of stock in a domestic corporation owned by a non-resident decedent. Matter of Fitch, 26 Misc. (N. Y.) 353, 57 N. Y. Suppl. 212, 29 N. Y. Civ. Proc. 63. To authorize a mortgage to pay decedent's debts. Wilhelm's Estate, 20 Pa. Co. Ct. 413. To construe a will to the extent of determining whether a claim that a gift over is void is made in good faith and is based upon any foundation in law or in fact. Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204. To decide the validity of a bequest if put in issue. Matter of Lampson, 22 Misc. (N. Y.) 198, 49 N. Y. Suppl. 576. To decree property to plaintiff under a contract disposing of decedent's estate, the consideration being performed. Kleeberg *v.* Schrader, 69 Minn. 136, 72 N. W. 59. To determine all questions preventing distribution among legatees, etc. (*In re* Watson, 30 Pittsb. Leg. J. N. S. 206), the existence of an alleged assignment, under which authority for payment of a legacy to an assignee is claimed (Matter of Geis, 27 Misc. (N. Y.) 490, 59 N. Y. Suppl. 175), questions relating to a tax on collateral legacies, etc. (Callahan *v.* Woodbridge, 171 Mass. 595, 51 N. E. 176), the right of a trustee under the will to deduct from the income accruing to a beneficiary an overpayment, where the matter is merely one of accounting, and not dependent upon any doctrine of set-off or other principles of exclusive equity jurisdiction (Rutherford *v.* Myers, 50 N. Y. App. Div. 298, 63 N. Y. Suppl. 939), the validity of mortgages held by decedent against legatees (Prouty *v.* Matheson, 107 Iowa 259, 77 N. W. 1039), and whether the proceeds of a life-insurance policy shall be distributed to creditors or to the widow and child (Dulaney *v.* Walsh, (Tex. Civ. App. 1896) 37 S. W. 615). To direct an executrix to pay over personal property to the next of kin. Sinnott *v.* Kenaday, 12 App. Cas. (D. C.) 115. To enforce an attorney's lien on its decree where the value thereof has been fixed by judgment. Matter of Regan, 61 N. Y. Suppl. 1074, 7 N. Y. Annot. Cas. 165. To hear and determine a petition for the distribution of an estate, although there is a petition pending to determine heirship. *In re* Sheid, 129 Cal. 172, 61 Pac. 920, under Cal. Code Civ. Proc. § 1664. Over the abrogation of the adoption of a child. Matter of Trimm, 30 Misc. (N. Y.) 493, 63 N. Y. Suppl. 952, 7 N. Y. Annot. Cas. 293.

A court of probate has been held not to have jurisdiction: To adjudge that a ward is indebted to his guardian, for advances made by the latter after the former had attained his majority, and after expending estate for his benefit. *In re* Kincaid, 120 Cal. 203, 52 Pac. 492. To adjudicate a contest between an assignee of a legatee, and the latter's attaching creditor. Dunn *v.* Arkenburgh, 165 N. Y. 669, 59 N. E. 1122 [*affirming* 48 N. Y. App. Div. 518, 62 N. Y. Suppl. 861]. To authorize an executor to lend money or direct the clerk to execute and deliver the mortgage. Wilhelm's Estate, 20 Pa. Co. Ct. 413. To compel payment of disputed claims against decedent's estate. Matter of Whitehead, 38 N. Y. App. Div. 319, 56 N. Y. Suppl. 989. To conclude by decree the rights of mortgagees in mortgaged land devised to plaintiffs. Hershey *v.* Meeker County Bank, 71 Minn. 255, 73 N. W. 967. To construe wills. Dudley *v.* Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959. To decree that executors pay back money obtained by them on a judgment. *In re* Truslow, 37 Misc. (N. Y.) 189, 74 N. Y. Suppl. 944. To determine divorce suits (*In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504), the existence of an alleged partnership which is denied (Wright *v.* Wright, 11 Colo. App. 470, 53 Pac. 684), the validity in law, as against the legatee, of an assignment of a legacy (*In re* Grant, 37 Misc. (N. Y.) 151, 74 N. Y. Suppl. 958; *In re* Boyce, 37 Misc. (N. Y.) 146, 74 N. Y. Suppl. 946), whether an indorser of decedent's note is liable to the estate, upon an issue whether decedent was an accommodation indorser or maker (*In re* Schmidt, 58 N. Y. Suppl. 595), or whether a will contest settlement was fraudulent, collusive, etc. (Matter of Evans, 58 N. Y. App. Div. 502, 69 N. Y. Suppl. 482). To direct distribution of an estate charged with a lien in favor of the administrator for his expenses (Huston *v.* Becker, 15 Wash. 586, 47 Pac. 10), or the payment into court for distribution of a sum in lieu of dower where a dower interest is charged on lands by deed (Farrer *v.* Denning, 11 Pa. Super. Ct. 62). To empower a guardian to invest the ward's funds in real property to be used by the ward as a residence. *In re* Bolton, 159 N. Y. 129, 53 N. E. 756 [*affirming* 37 N. Y. App. Div. 625, 56 N. Y. Suppl. 1105 (*affirming* 20 Misc. 532, 46 N. Y. Suppl. 908)]. To enforce a right of action growing out of contract or the conduct of living persons. Wood's Estate, 7 Pa. Dist. 655. To order a special administrator to pay claims in advance of general administration. State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259. To pass finally upon the validity of an applicant's claim that a certain gift over was void. Chamberlin's Appeal, 70

2. EQUITABLE POWERS. In determining this, as in other questions of jurisdiction, the constitutional and legislative grant of authority must be considered, and also whether the jurisdiction invoked is over purely a matter of equity, or one merely involving equitable principles. So the question is pertinent whether such aid of the court is sought in a direct proceeding or in one which is in effect collateral or incidental to the exercise of such jurisdiction as is conceded. It may therefore be stated that, assuming that these courts may not take cognizance of a purely equitable matter,[82] nevertheless such a rule would not be exclusive, for in some states it is expressly decided that they have jurisdiction in equity, and in other jurisdictions which do not so decide, or which even hold against the exercise of equitable authority as such, certain matters of equity may be passed upon; especially where they are merely of an equitable nature, or arise collaterally or incidentally in the exercise of a conceded jurisdiction.[83]

Conn. 363, 39 Atl. 734, 41 L. R. A. 204. To pass on the validity of releases given executors by legatees. Potts *v.* Potts, 88 Md. 640, 42 Atl. 214. See also Shafer *v.* Shafer, 85 Md. 554, 37 Atl. 167. To render judgment against the sureties on the bond of a removed guardian for the amount due his ward's estate. Richardson *v.* Knox, 14 Tex. Civ. App. 402, 37 S. W. 189. To separate complicated, unsettled accounts and pass upon those items within its jurisdiction, leaving other items to the cognizance of another tribunal. Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133. To subject an heir's interest to the payment of his creditors' judgment in a suit therefor. Attridge *v.* Maxey, 15 Tex. Civ. App. 134, 39 S. W. 322. To try an issue whether a bequest is void as an evasion of the statute relating to bequests to charitable institutions. Matter of Mullen, 25 Misc. (N. Y.) 253, 55 N. Y. Suppl. 432. And in general if a court clearly ought not to exercise jurisdiction as to the settlement of an estate it is error so to do, even though there is a waiver. Burnham *v.* Norton, 100 Wis. 8, 75 N. W. 304.

82. *Alabama.*— Moore *v.* Winston, 66 Ala. 296.

California.— Meyers *v.* Farquharson, 46 Cal. 190.

Colorado.— Marshall *v.* Marshall, 11 Colo. App. 505, 53 Pac. 617.

Delaware.— McCaulley *v.* McCaulley, 7 Houst. 102, 30 Atl. 735.

District of Columbia.— McLane *v.* Cropper, 5 App. Cas. 276.

Illinois.— Van Schaack *v.* Leonard, 164 Ill. 602, 45 N. E. 982.

Iowa.— Prouty *v.* Matheson, 107 Iowa 259, 77 N. W. 1039.

Massachusetts.— Green *v.* Gaskill, 175 Mass. 265, 56 N. E. 560.

Michigan.— Murdoch *v.* Walls, 121 Mich. 164, 79 N. W. 1096; Shurte *v.* Fletcher, 111 Mich. 84, 69 N. W. 233.

Minnesota.— Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427.

Mississippi.— Barlow *v.* Esterling, Walk. 302.

Missouri.— Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; *In re* Glover, 127 Mo. 153, 29 S. W. 982; Burckhartt *v.* Helfrich, 77 Mo. 376; Butler *v.* Lawson, 72 Mo. 227.

New Jersey.— Sherman *v.* Lanier, 39 N. J. Eq. 249. And see O'Callaghan's Appeal, (Prerog. 1902) 51 Atl. 64.

New York.— *In re* Randall, 152 N. Y. 508, 46 N. E. 945 [*reversing* 80 Hun 229, 29 N. Y. Suppl. 1019]; Rutherford *v.* Myers, 50 N. Y. App. Div. 298, 63 N. Y. Suppl. 939; Matter of Widmayer, 28 Misc. 362, 59 N. Y. Suppl. 980.

North Carolina.— Sprinkle *v.* Hutchinson, 66 N. C. 450.

Ohio.— Gilliland *v.* Sellers, 2 Ohio St. 223; Jones *v.* Standard Home, etc., Assoc. Co., 18 Ohio Cir. Ct. 189, 10 Ohio Cir. Dec. 41.

Pennsylvania.— Ake's Appeal, 74 Pa. St. 116; Weyand *v.* Weller, 39 Pa. St. 443; Dundas' Estate, 8 Phila. 598.

Texas.— Hanrick *v.* Gurley, (Civ. App. 1899) 48 S. W. 994.

Vermont.— Mann *v.* Mann, 53 Vt. 48.

83. *California.*— Clary's Estate, 112 Cal. 292, 44 Pac. 569. And see Toland *v.* Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100.

Connecticut.— Donovan's Appeal, 41 Conn. 551.

Delaware.— Green *v.* Saulsbury, 6 Del. Ch. 371, 33 Atl. 623.

Georgia.— Welhorn *v.* Rogers, 24 Ga. 558.

Illinois.—Spencer *v.* Boardman, 118 Ill. 553, 9 N. E. 330; Brandon *v.* Brown, 106 Ill. 519. See also Doggett *v.* Dill, 108 Ill. 560, 48 Am. Rep. 565; *In re* Steele, 65 Ill. 322; Hurd *v.* Slatem, 43 Ill. 348; Adams *v.* Adams, 81 Ill. App. 637.

Indiana.— Powell *v.* North, 3 Ind. 392, 56 Am. Dec. 513.

Massachusetts.—Green *v.* Gaskill, 175 Mass. 265, 56 N. E. 560.

Michigan.—Sullivan *v.* Ross, 113 Mich. 311, 315, 71 N. W. 634, 76 N. W. 309.

Missouri.— Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374.

New York.—Wood *v.* Brown, 34 N. Y. 337; Rutherford *v.* Myers, 50 N. Y. App. Div. 298, 63 N. Y. Suppl. 939. And see Matter of Richmond, 63 N. Y. App. Div. 488, 71 N. Y. Suppl. 795.

Ohio.— Matter of Carter, 2 Ohio Dec. (Reprint) 655, 4 Cinc. L. Bul. 428.

Oklahoma.— State Capital Printing Co. *v.* Grant County, 8 Okla. 229, 56 Pac. 957.

3. Over Real and Personal Estate and Title Thereto. Technically the jurisdiction of courts of probate covers the personal and not the real estate,[84] although they have a certain power in regard to real estate.[85] Thus they may order the sale of land to pay debts,[86] and may partition land according to the will, where no question of title is to be tried.[87] But after the homestead has been set apart, the court has no jurisdiction over it for the purpose of distribution,[88] since the purpose and effect of such an order is to relieve the property from administration; nor does the court by such act change, transfer, or adjudicate the question of title.[89] Such courts may also determine questions which affect rights of devisees where the title to the real estate so affected is not put in issue.[90] And, it is decided, they may determine claims of property as between those interested in the estate; this authority, however, only goes to the extent of determining their relative interests as derived from the estate, and not to an interest derived adversely thereto.[91] Probate courts cannot, however, determine questions of title

Pennsylvania.— Tyson *v.* Rittenhouse, 186 Pa. St. 137, 40 Atl. 476; Ake's Appeal, 74 Pa. St. 116; Fidelity Ins., etc., Co. *v.* Gazzam, 2 Pa. Dist. 569; Neill's Estate, 3 Pa. Co. Ct. 197, 19 Wkly. Notes Cas. 380; *In re* Albright, 6 Lack. Leg. N. 108. See also Snyder's Appeal, 36 Pa. St. 166, 78 Am. Dec. 372; Dundas' Estate, 8 Phila. 598, 26 Wkly. Notes Cas. 481.

Vermont.— Mann *v.* Mann, 53 Vt. 48.

Wisconsin.—Brook *v.* Chappell, 34 Wis. 405. See also Tryon *v.* Farnsworth, 30 Wis. 577.

United States.— Farmers' Nat. Bank *v.* Green, 4 Fed. 609.

Equity jurisdiction qualified.— Such courts cannot exercise any chancery powers, unless such powers are of such a nature that they may be called as well a probate or surrogate power as a chancery power. Ritch *v.* Bellamy, 14 Fla. 537. And in New Jersey under a decision in 1793 it was determined that the orphans' court partook of the powers of chancery, and prerogative jurisdiction. Wood *v.* Tallman, 1 N. J. L. 177.

84. *Illinois.*— Ferguson *v.* Hunter, 7 Ill. 657.

Louisiana.—O'Donogan *v.* Knox, 11 La. 384.

Maryland.— Hayden *v.* Burch, 9 Gill 79; Stewart *v.* Pattison, 8 Gill 46.

Mississippi.— Hollman *v.* Bennett, 44 Miss. 322.

Pennsylvania.— Shields' Appeal, 20 Pa. St. 291; Fell's Estate, 14 Phila. 248, 38 Leg. Int. 6.

Texas.— Bradley *v.* Love, 60 Tex. 472.

See 13 Cent. Dig. tit. "Courts," § 478.

85. Matter of Leonhard, 86 Hun (N. Y.) 289, 33 N. Y. Suppl. 302 [*modified* in 152 N. Y. 645, 46 N. E. 1145] (holding that an executor might be compelled to account for lands in which he has invested the funds of the estate, where under the facts the investment in realty might be treated as personalty); Porter *v.* Woodard, 4 Coldw. (Tenn.) 86 (holding that where land is sold under its order judgment might be given upon the notes and obligations taken in the case, and also that the court could relieve a purchaser or interested party by opening biddings, setting aside sales, and the like).

Circuit courts may transfer title to real estate when necessary to the settlement of the estate and to end the entire controversy. Burnham *v.* Norton, 100 Wis. 8, 75, N. W. 304.

The circumstances may justify assuming jurisdiction over realty as well as personalty. *In re* Tyson, 191 Pa. St. 218, 43 Atl. 131. So the orphans' court may determine on a trustee's petition whether he or a purchaser is liable for an assessment on the land sold, of which neither party had knowledge at the time of the sale. Kayser's Estate, 9 Pa. Dist. 360. So a will may be construed which disposes of personal and real estate by directing its conversion into money. Matter of Bogart, 43 N. Y. App. Div. 582, 60 N. Y. Suppl. 496. And where the court has once acquired jurisdiction of a cause it may determine the existence of a tax lien, and such defenses as can properly be interposed against it, and a homestead claim can be properly so interposed. George *v.* Ryon, 94 Tex. 317, 60 S. W. 427 [*followed* substantially in State *v.* Jordan, 25 Tex. Civ. App. 17, 60 S. W. 1008, 59 S. W. 826].

86. Hamm *v.* Hutchins, 19 Tex. Civ. App. 209, 46 S. W. 873.

Orphans' court may order sale of land. *In re* Goddard, 198 Pa. St. 454, 48 Atl. 404.

Probate court may sell both real and personal estate where required in administration of estate. Fitzwilliam *v.* Campbell, 99 Fed. 30, 39 C. C. A. 399, construing Texas statute.

87. Blackwell *v.* Blackwell, 86 Tex. 207, 24 S. W. 389.

May partition real property and sell real or personal property under a mortgage lien or other encumbrance. Gill *v.* Sealbridge, 17 Ohio Cir. Ct. 390, 9 Ohio Cir. Dec. 554. See also *In re* McCorkle, 184 Pa. St. 626, 39 Atl. 545; *In re* Nixon, 28 Pittsb. Leg. J. N. S. 112.

88. Gilmore's Estate, 81 Cal. 240, 22 Pac. 655.

89. Rich *v.* Tubbs, 41 Cal. 34.

Cannot divide homestead between widow and heirs, upon latter's petition. *In re* James, 23 Cal. 415.

90. Morse *v.* Morse, 42 Ind. 365.

91. Stewart *v.* Lohr, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

to property,[92] unless such question arises collaterally as a necessary incident to the determination of other matters which are within the court's jurisdiction.[93] Nor can such courts determine adverse claims to property in the administrator's charge,[94] adjudicate disputed rights against an estate,[95] compel on summary application, an administrator in possession of property to deliver it over to the owner,[96] order an executor to reconvey real estate, conveyed to the testator by deed absolute, but intended only as security,[97] award partition between a surviving tenant in common and the heirs of his deceased tenant in common,[98] order a seizure, from one claiming to hold under a good title, of goods said to belong to the intestate,[99] issue a writ of possession, after confirmation, of lands sold under its order,[1] set aside a decree transferring a mortgage, on the ground of title thereto in the petitioner,[2] or determine the rights of remainder, merely adjudging the interest of a legatee in the land subject to such remainder.[3]

B. Practice and Procedure — 1. In General. Under certain decisions, the practice of courts of chancery may be adopted by courts exercising probate jurisdiction.[4] The statutes may also affect or control the manner of exercise of jurisdiction;[5] again the court may proceed according to the course of the common law, except as modified by statute, and if general power is given by the statute, without prescribing the mode of its exercise, the court in its sound discretion must regulate the same.[6] Outside of these general principles the practice and

92. *Arkansas.*—Mobley *v.* Andrews, 55 Ark. 222, 17 S. W. 805.

Connecticut.—Mack's Appeal, 71 Conn. 122, 41 Atl. 242; Homer's Appeal, 35 Conn. 113.

Louisiana.— Schick *v.* Corbett, 52 La. Ann. 180, 26 So. 862; Breau *v.* Landry, 16 La. 88; Kemp *v.* Kemp, 15 La. 517; Kerr *v.* Kerr, 14 La. 177; Lavigne *v.* Chalambert, 11 La. 17; Overton *v.* Overton, 10 La. 466; Curtis *v.* Curtis, 3 La. 513; Sharp *v.* Knox, 2 La. 23; Reels *v.* Knight, 5 Mart. N. S. 9; Donaldson *v.* Dorsey, 4 Mart. N. S. 509; Harris *v.* McKee, 4 Mart. N. S. 485.

Maryland.— Daugherty *v.* Daugherty, 82 Md. 229, 33 Atl. 541; Gibson *v.* Cook, 62 Md. 256.

Missouri.— Smith *v.* Gilmore, 13 Mo. App. 155.

New York.— *In re* Walker, 136 N. Y. 20, 32 N. E. 633 [*reversing* 17 N. Y. Suppl. 666]; Doyle *v.* Doyle, 15 N. Y. St. 318, 28 N. Y. Wkly. Dig. 325.

Pennsylvania.— Rankin's Estate, 2 Pa. Co. Ct. 264; Ryan's Estate, 12 Phila. 153, 35 Leg. Int. 431.

Texas.— Edwards *v.* Mounts, 61 Tex. 398; Wise *v.* O'Malley, 60 Tex. 588; Hamm *v.* Hutchins, 19 Tex. Civ. App. 209, 46 S. W. 873; White *v.* White, 11 Tex. Civ. App. 113, 32 S. W. 48.

Washington.— Stewart *v.* Lohr, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

See 13 Cent. Dig. tit. "Courts," § 478 *et seq.*

93. Schick *v.* Corbett, 52 La. Ann. 180, 26 So. 862.

94. Garver *v.* Richardson, 77 Mo. App. 459.

95. *In re* Singleton, 26 Nev. 106, 64 Pac. 513.

96. Marston *v.* Paulding, 10 Paige (N. Y.) 40.

97. Anderson *v.* Fisk, 41 Cal. 308.

98. Wilhelm's Estate, 6 Pa. Dist. 236, 18 Pa. Co. Ct. 637.

99. State *v.* Mitchell, 2 Bailey (S. C.) 225.

1. Porter *v.* Woodard, 5 Coldw. (Tenn.) 86.

2. Curran's Estate, 9 Pa. Co. Ct. 514.

3. Bramell *v.* Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619.

4. Adams *v.* Adams, 81 Ill. App. 637; Guier *v.* Kelly, 2 Binn. (Pa.) 294; *Ex p.* Richards, 2 Brev. (S. C.) 375; Walsh *v.* Walsh, 29 Fed. Cas. No. 17,117, 3 Cranch C. C. 651.

5. Murzynowski *v.* Delaware, etc., R. Co., 15 N. Y. Suppl. 841. And see Woodruff *v.* Cox, 2 Bradf. Surr. (N. Y.) 223. But see, however, Kohler *v.* Knapp, 1 Bradf. Surr. (N. Y.) 241.

But even though the statute may govern, yet in casus omissus the court should not decline jurisdiction because the law is silent as to the mode of exercise thereof, when it is apparent that a proper occasion to invoke the court's authority is shown. Kohler *v.* Knapp, 1 Bradf. Surr. (N. Y.) 241.

Surrogate's court may, by order to show cause, shorten time of notice of motion, regardless of whether the code is applicable to such court. *In re* Filley, 20 N. Y. Suppl. 427, 1 Pow. Surr. (N. Y.) 234.

There being no statutory provision, final disposition upon case stated cannot be made by the orphans' court. Holt's Estate, 11 Phila. (Pa.) 13, 32 Leg. Int. (Pa.) 29.

6. Campbell *v.* Logan, 2 Bradf. Surr. (N. Y.) 90. See Stover N. Y. Anno. Code Civ. Proc. § 2481, subs. 11, as to proceeding according to course and practice of a court of common-law jurisdiction.

In the absence of statutory directions it has been decided that the modes of procedure adopted by the English ecclesiastical courts were in force. Cowden *v.* Dobyns, 5 Sm. & M. (Miss.) 82.

Orphans' court is untrammeled by strict forms of common-law courts. *In re* Albright, 6 Lack. Leg. N. (Pa.) 108.

procedure of courts of probate jurisdiction is necessarily peculiar to the particular court, the jurisdiction of which is invoked, and no governing rule of value can be stated.[7]

2. Process, Parties, and Pleading. The statute may regulate the service of citations,[8] and authorize such courts to issue writs necessary in the exercise of their respective jurisdictions; and they may, in view of such statute or by virtue of their inherent powers, enforce their judgments by execution or other appropriate process.[9] Again it is decided that the technicalities of common-law pleadings do not obtain in orphans' courts,[10] and also that no formal pleadings are required in probate and like courts.[11]

3. Trial, Judgments, Orders, and Records. Courts of probate may under certain decisions summon a jury,[12] direct or award an issue,[13] judge the facts as a

7. The practice and procedure of probate courts need not be the same as district courts, in matters of concurrent jurisdiction. Nix *v.* Gilmer, 5 Okla. 740, 50 Pac. 131. See American F. Ins. Co. *v.* Pappe, 4 Okla. 110, 43 Pac. 1085.

Defects in procedure may be waived. Mack's Appeal, 71 Conn. 122, 41 Atl. 242.

District courts are governed by rules of practice applicable to former probate courts. *In re* Foley, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649.

Surrogate's practice should conform with that of courts of record. Goulburn *v.* Sayre, 2 Redf. Surr. (N. Y.) 310. Nor can such courts relax or extend supreme court rules of practice. De Lamater *v.* Havens, 5 Dem. Surr. (N. Y.) 53. And as to conformity by surrogate with practice of courts of general jurisdiction see Cluff *v.* Tower, 3 Dem. Surr. (N. Y.) 253.

The court will of its own motion consider and dispose of the question of the superiority of the allowance to the widow, in lieu of a homestead, over the state's lien for taxes against the real estate set apart to her, and the probate court alone has jurisdiction to determine that question. George *v.* Ryon, 94 Tex. 317, 60 S. W. 427.

8. Koch's Estate, 12 N. Y. Suppl. 94, 19 N. Y. Civ. Proc. 165.

9. Yeoman *v.* Younger, 83 Mo. 424.

So a court of probate jurisdiction with equity powers can by its power summon before it all parties concerned, and is not bound by the forms of the common-law courts. *In re* Albright, 6 Lack. Leg. N. (Pa.) 108.

New parties.—It is determined that the New York code provisions, as to the introduction of new parties to a pending suit and regulating proceedings upon the transfer of the interest of a party thereto, do not apply to surrogate's courts. Tilden *v.* Dows, 2 Dem. Surr. (N. Y.) 489. Orphans' court cannot permit any one to intervene in issue granted Whitaker's Estate, 14 Phila. (Pa.) 289, 38 Leg. Int. (Pa.) 214.

10. Strashaugh *v.* Dallam, 63 Md. 712, 50 Atl. 417.

11. Bellows *v.* Cheek, 20 Ark. 424; Charles *v.* Eshleman, 5 Colo. 107; Williams *v.* Gerber, 75 Mo. App. 18; Brown *v.* Hobbs, 19 Tex. 167.

Applications for relief on the probate side of a county court, in matters within the exclusive jurisdiction of that court, are suits in equity, and are governed by the general rules of pleading applicable to such suits. Genau *v.* Abbott, (Nebr. 1903) 93 N. W. 942.

Facts on which order is founded need not be set forth in petition, verified by affidavit. Grier's Appeal, 25 Pa. St. 352.

If party elects to file written plea, it must be signed as required by rules of special pleading. Bellows *v.* Cheek, 20 Ark. 424.

May grant relief consistent with case made, without prayer for relief, different from that asked for; not limited to granting or refusing precise relief asked. Brook *v.* Chappell, 34 Wis. 405.

No pleadings on claims presented to auditors are required, and objection may be taken on terms. Matter of Linn, 2 Pearson (Pa.) 487. See Charles *v.* Eshleman, 5 Colo. 107.

On mere motion or petition for rehearing, a final decree may be corrected as to clerical errors, etc. Bishop's Appeal, 26 Pa. St. 470.

Statutes contemplate that complaint or exceptions be filed by person wishing to contest. Brown *v.* Hobbs, 19 Tex. 167.

Statutory provision that all applications shall be in writing is directory merely. Robbins *v.* Tafft, 12 R. I. 67.

Verbal statement that title is in issue will oust the court of jurisdiction. Pickering *v.* Pickering, 21 N. H. 537.

When declaration must be filed see Wallace *v.* Elder, 5 Serg. & R. (Pa.) 143.

Written pleadings are unnecessary when a claim is presented for allowance in the probate court. Thomson *v.* Barker, 102 Ill. App. 304 [*affirmed* in (Ill. 1902) 65 N. E. 1092].

12. As to the right to summon a jury see Driver *v.* Hudspeth, 16 Ala. 348; Savage *v.* Dickson, 16 Ala. 256; Colorado Springs Co. *v.* Hewitt, 3 Colo. 275.

13. Price's Appeal, 116 Pa. St. 410, 9 Atl. 856; *In re* Krug, 13 York Leg. Rec. (Pa.) 163; *In re* Yohu, 17 Lanc. L. Rev. 52; *In re* Millar, 18 Lanc. Bar (Pa.) 206. See further as to granting or directing an issue Wallace *v.* Elder, 5 Serg. & R. (Pa.) 143; Clendaniel's Estate, 13 Phila. (Pa.) 248, 36 Leg. Int. (Pa.) 278; Evans' Estate, 11 Phila. (Pa.) 113, 33 Leg. Int. (Pa.) 45; South's Estate, 11 Phila. (Pa.) 107, 32 Leg. Int. (Pa.) 456; Clendaniel's Estate, 11 Phila. (Pa.) 50, 32

court,[14] dismiss actions,[15] pass upon requests to find questions of law or fact,[16] and pass upon evidence, either under the general rules of common law or of those prescribed by statute,[17] although it is decided that equitable defenses cannot be considered.[18] But if the court has equity powers it can make such orders as justice demands.[19] Again probate and like courts may under the statute or by virtue of their inherent powers make the necessary orders to effectuate their jurisdiction,[20] and their valid decrees are as lawful and binding as those of any other court and cannot be attacked except on appeal,[21] although the record should be made up in compliance with the requirements of the law.[22]

4. Revisory Power Over Orders and Decrees; Appeals, Bills of Review, Etc. Courts of probate jurisdiction have the power, at least in a certain degree, to open, review, modify, correct, vacate, and set aside their orders and decrees, or a revisory power exists over such orders or decrees by way of new trial, appeal, or bill of review;[23] the extent to which this power may be exercised varying accord-

Leg. Int. (Pa.) 117; Hill's Estate, 9 Phila. (Pa.) 355, 31 Leg. Int. (Pa.) 204.

14. Okeson's Appeal, 2 Grant (Pa.) 303. See also Keller *v.* Franklin, 5 Cal. 432, as to the right of the judge of former probate to try issues of fact.

15. Banks *v.* Uhl, 6 Nebr. 145.

16. Matter of Hoyt, 5 Dem. Surr. (N. Y.) 284; Hartwell *v.* McMaster, 4 Redf. Surr. (N. Y.) 389.

Decision in writing stating separately facts found and conclusion of law must be filed by surrogate in his office. Matter of Kaufman, 14 N. Y. Suppl. 901; Matter of Peck, 14 N. Y. Suppl. 899; Falls *v.* Falls, 10 N. Y. Suppl. 41.

17. Eveleth *v.* Crouch, 15 Mass. 307. See People *v.* Coffin, 7 Hun (N. Y.) 608; Hoyt *v.* Jackson, 2 Dem. Surr. (N. Y.) 443.

Surrogate may continue proceedings and consider testimony taken before his predecessor as well as that before himself. Reeve *v.* Crosby, 3 Redf. Surr. (N. Y.) 74.

18. Young *v.* Purdy, 4 Dem. Surr. (N. Y.) 455; Gardner *v.* Gardner, 10 R. I. 211. See as to equitable jurisdiction *supra*, X, A, 2.

19. *In re* Albright, 6 Lack. Leg. N. (Pa.) 108.

20. Yeoman *v.* Younger, 83 Mo. 424.

Mere verbal order is of no effect, allowing administratrix to take property returned in the inventory at the appraisement. Scott *v.* Fox, 14 Md. 388.

No power to inflict fine and then commit under statute giving power to enforce all lawful orders, processes, etc., by attachment of person. *In re* Watson, 5 Lans. (N. Y.) 466.

21. Gates *v.* Treat, 17 Conn. 388.

22. Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497 (use of seal not essential); McNaughton *v.* Chave, 5 Abb. N. Cas. (N. Y.) 225 (holding that surrogate must sign his decrees, that successor cannot sign for him, and that his clerk cannot file unsigned decree or otherwise make it valid); Espie's Estate, 2 Redf. Surr. (N. Y.) 445 (decree void for defect of surrogate; holding also that on application to surrogate to sign record of incompleted business of predecessor, consent or an opportunity to be heard should be given); Hartman's Appeal, 21 Pa. St. 488 (decrees and orders need not be drawn up at length during session). See also Roderigas *v.* East River Sav. Inst., 76 N. Y. 316, 32 Am. Rep. 290 [*affirming* 43 N. Y. Super. Ct. 217].

Nunc pro tunc entry.— Where orders and proceedings of a probate court were omitted from the minutes, the court has power to order that they be entered *nunc pro tunc* with the same effect as though entered in the first place. Alexander *v.* Barton, (Tex. Civ. App. 1902) 71 S. W. 71.

23. Thus if a void decree is rendered the court should be petitioned to set it aside and vacate the same (Vaughan *v.* Suggs, 82 Ala. 357, 2 So. 32); and although the power to vacate judgments after the term may not exist, yet the statute may change the rule in certain matters (Desha County *v.* Newman, 33 Ark. 788); so an application may properly be made for an order vacating and annulling a grant of administration on the estate of a living person, supposed to be dead (Stevenson *v.* San Francisco Super. Ct., 62 Cal. 60); and where equitable powers are possessed in probate matters orders for allowances may be set aside, after the term, for fraud or mistake (Schlink *v.* Maxton, 48 Ill. App. 471). So the court may pass upon the nullity or rescission of its own decrees or judgments (Darse *v.* Leaumont, 5 Rob. (La.) 284; Harty *v.* Harty, 8 Mart. N. S. (La.) 518) and may within a reasonable time revoke or correct an order of ratification of a sale procured by honest mistake or by deceit (Montgomery *v.* Williamson, 37 Md. 421). So the power exists independent of the statute to revoke letters testamentary or of administration when issued without jurisdiction, or irregularly, illegally, or for a special cause which has ceased to exist. Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213. And the surrogate, in court or out of court, has power to open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. But such power must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same

ing to the nature and scope of the jurisdiction possessed or conferred, as well also as upon specific statutory regulations expressly governing such matters. But in certain decisions such authority is denied, while in other cases it is declared to be limited, and in still others it does not include questions of law but merely those of fact, mistake, errors, fraud, and the like.[24]

powers. *In re* Flynn, 136 N. Y. 287, 32 N. E. 767 [*affirming* 20 N. Y. Suppl. 919]; Campbell *v.* Thatcher, 54 Barb. (N. Y.) 382; Matter of Gilman, 7 N. Y. St. 321; Matter of Olmsted, 17 Abb. N. Cas. (N. Y.) 320, 4 Dem. Surr. (N. Y.) 44; Brick's Estate, 15 Abb. Pr. (N. Y.) 12; Gay *v.* Monroe Gen. Sess., 12 Wend. (N. Y.) 272; Pew *v.* Hastings, 1 Barb. Ch. (N. Y.) 452; Janssen *v.* Wemple, 3 Redf. Surr. (N. Y.) 229; *In re* Espie, 2 Redf. Surr. (N. Y.) 445; 1 E. D. Smith (N. Y.) xvii; Campbell *v.* Logan, 2 Bradf. Surr. (N. Y.) 90). So a verdict on an issue directed by the orphans' court is no more binding than an auditor's report, for the court is bound to revise it (*In re* Krug, 13 York Leg. Rec. (Pa.) 163), and error in its original decree may be corrected either under or independent of statute (*In re* Burbaker, 4 Lanc. L. Rev. 90). So its adjudications may be revised for manifest error either of its own fault or of that of the parties (Milne's Appeal, 99 Pa. St. 483); nor is the power to correct its own decree in case of fraud, accident, or mistake restricted or taken away by the statutory protection of accountants (Hattrick's Estate, 13 Phila. (Pa.) 275, 36 Leg. Int. (Pa.) 436), and a question may be reopened to determine whether a judgment in a tax-lien suit is not entitled to priority over the widow's homestead claim (State *v.* Jordan, 25 Tex. Civ. App. 17, 59 S. W. 826, 60 S. W. 1008), and as long as the cause is pending the power exists to reopen and reëxamine former decrees and to correct all errors, irregularities, and mistakes (French *v.* Winsor, 24 Vt. 402). So apparent errors in former decrees or errors conceded by the parties or proved beyond all doubt may on petition be corrected at any time short of twenty years. Smith *v.* Rix, 9 Vt. 240. So where their orders and process conflict with statutory requirements courts review, correct, and annul the same. Brunson *v.* Burnett, 2 Pinn. (Wis.) 185, 1 Chandl. (Wis.) 136.

24. Thus where the court acts judicially it cannot set aside judgment after term. Brandenburg *v.* State, 24 Ark. 50. So a final decree distributing an entire estate vests the title in the distributees until modified or reversed on appeal, and pending the same the court can make no further order or different disposition of the estate. *In re* Garraud, 36 Cal. 277. Nor when the court has directed a certain payment can it thereafter direct nonpayment without notice to relator to appear and resist such order (Johnson *v.* State, 1 Ga. 271); nor has the surrogate any general revisory power on the ground that it erred as to the law or decided erroneously upon the facts, such revisory power being vested in the appellate court (Campbell *v.* Thatcher, 54 Barb. (N. Y.) 382; Brick's Estate, 15 Abb. Pr. (N. Y.) 12; Farmers' L. & T. Co. *v.* Hill, 4 Dem. Surr. (N. Y.) 41); nor can the surrogate grant a reargument of questions finally determined and disposed of by his predecessor (Melcher *v.* Stevens, 1 Dem. Surr. (N. Y.) 123); nor revoke his decision in a matter not included within the statute (Munro's Estate, 15 Abb. Pr. (N. Y.) 363), since the right of such courts to revoke their acts exists only to a limited extent as indispensable to the administration of justice (Campbell *v.* Thatcher, 54 Barb. (N. Y.) 382), and the power to vacate a judgment after the term for fraud, erroneous proceedings, etc., is restricted (Johnson *v.* Johnson, 26 Ohio St. 357). Again the probate court having entered a final decree cannot enter a second final decree in the same matter so as to revive a lapsed right of appeal (Harvey *v.* Wait, 10 Oreg. 117); nor can a confirmed sale be declared void (Young *v.* Shumate, 3 Sneed (Tenn.) 369).

Appeal, new trial, or writ of error.— It is decided in Colorado that the statute of 1885 as to notice, etc., in appeals does not apply to probate cases (Pennsylvania Mortg. Trust Co. *v.* Elliott, 19 Colo. 394, 35 Pac. 914; Lusk *v.* Kershow, 17 Colo. 481, 30 Pac. 62), although an appeal from a justice of the supreme court in the District of Columbia is to be taken in the same manner as an appeal from his action in holding any other than a special orphans' court (Keyser *v.* Breitbarth, 2 Mackey (D. C.) 332), and an appeal-bond properly executed may be sufficiently delivered from a distant county by mail (Harvey *v.* Allen, 94 Ga. 454, 19 S. E. 246). Where a statute provides for appeals to the circuit courts from orders of the county court in probate matters an appeal will not lie to the appellate court from such an order. Stull *v.* Stull, 68 Ill. App. 389. See Boyce *v.* Stull, 68 Ill. App. 392. See also as to procedure for review by appeal or writ of error of decrees of probate court Lynn *v.* Lynn, 160 Ill. 307, 43 N. E. 482. Again a palpable abuse of the surrogate's discretion in admitting evidence is reviewable on appeal. People *v.* Coffin, 7 Hun (N. Y.) 608. So an appeal lies in Utah to the district court from a judgment of the probate court refusing to remove, upon the heirs' petition, an administrator for alleged misconduct. Matter of Reese, 9 Utah 171, 33 Pac. 698.

Bill of review.— See Martin's Estate, 7 Pa. Dist. 408. See further as to bill of review Austin *v.* Lamar, 23 Miss. 189; Cowden *v.* Dobyns, 5 Sm. & M. (Miss.) 82; Harris *v.* Fisher, 5 Sm. & M. (Miss.) 74; Fortson *v.* Alford, 62 Tex. 576, correction by bill of review of judgment procured by fraud.

XI. COURTS OF APPELLATE JURISDICTION.

A. Grounds and Exercise of Jurisdiction — 1. In General. Although appellate jurisdiction may depend upon the nature of the cause of action,[25] and while it may be generally stated that where an appellate court is one of last resort it is the exclusive judge of its own jurisdiction,[26] still jurisdiction over an appeal cannot be taken under an unconstitutional statute,[27] nor can the legislature confer on the supreme court jurisdiction not given by the constitution.[28]

2. Manner of Exercise. The supreme court must exercise directly conferred power in a constitutional manner,[29] even though no rule of procedure applicable to the particular case is prescribed by statute.[30]

B. Appellate Courts of Particular States — 1. Alabama — a. Supreme Court. Except in the cases otherwise directed in the constitution the supreme court has appellate jurisdiction only, which is coextensive with the state, under such restrictions and regulations, not repugnant to the constitution, as may from time to time be prescribed by law; provided that such court shall have power to issue writs of injunction, habeas corpus, quo warranto, and other such remedial and original writs as may be necessary to give it general superintendence and control of inferior jurisdictions.[31]

b. Other Courts. The circuit court has appellate jurisdiction of all civil actions cognizable before a justice of the peace, and in such other cases as may be provided by law, and may exercise a general superintendence over all inferior jurisdictions,[32] and courts of chancery with appellate jurisdiction may be established by the legislature.[33]

25. Kinnear *v.* Jones, 24 Mo. 83; Norris *v.* Nesbit, 123 N. Y. 650, 25 N. E. 377, 3 Silv. App. (N. Y.) 183.

26. Hailey First Nat. Bank *v.* Lewis, 13 Utah 507, 45 Pac. 890. See Kramer *v.* Toledo, etc., R. Co., 53 Ohio St. 436, 42 N. E. 252; State *v.* King County Super. Ct., 24 Wash. 605, 64 Pac. 778; Milwaukee *v.* Simons, 93 Wis. 576, 67 N. W. 922.

27. Hauser *v.* Farrell, (N. J. Sup. 1900) 46 Atl. 784.

28. Winsor *v.* Bridges, 24 Wash. 540, 64 Pac. 780.

29. State *v.* Moores, 56 Nebr. 1, 76 N. W. 530 [*reversed* in 58 Nebr. 285, 78 N. W. 529].

30. State *v.* Moores, 56 Nebr. 1, 76 N. W. 530 [*reversed* in 58 Nebr. 285, 78 N. W. 529].

But a distinction seems to exist between power conferred by the constitution and that conferred by statute over the subject-matter, since in the former instance an appellate court may prescribe the mode and rules and regulations for bringing a case before it on error but not on appeal to be tried *de novo*, while in the latter instance where such statute prescribes no method for bringing a cause before it on appeal or error it acquires no jurisdiction and can provide no method. State *v.* Hanousek, 19 Ohio Cir. Ct. 303, 10 Ohio Cir. Dec. 516.

31. Ala. Const. (1875), art. 6, § 2; State *v.* Savage, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426; *Ex p.* Pearson, 76 Ala. 521; *Ex p.* Floyd, 40 Ala. 116; Lewis *v.* Lewis, Minor (Ala.) 35; State *v.* Flinn, Minor (Ala.) 8.

Such jurisdiction includes chancery causes (Lewis *v.* Lewis, Minor (Ala.) 35), and an appeal may be directly taken to such court from any inferior tribunal which has original, general, and unlimited jurisdiction of the cause of action (*Ex p.* Boynton, 44 Ala. 261). But its jurisdiction as to writs (*Ex p.* Pearson, 76 Ala. 521; *Ex p.* Peterson, 33 Ala. 74; *Ex p.* Pickett, 24 Ala. 91; *Ex p.* Simonton, 9 Port. (Ala.) 383; Davis *v.* Tuscumbia, etc., R. Co., 4 Stew. & P. (Ala.) 421) is revisory and can only be exercised when justice requires it for the purpose of such control, and the necessity does not exist where another court or judge has the power to issue such writs. It is necessary therefore to apply in the first instance to the lower court in certain cases (*Ex p.* Henderson, 43 Ala. 392; *Ex p.* Floyd, 40 Ala. 116; *Ex p.* Croon, 19 Ala. 561; *Ex p.* Tarlton, 2 Ala. 35; State *v.* Williams, 1 Ala. 342; *Ex p.* Mansony, 1 Ala. 98), especially so where the lower court is an appellate tribunal (State *v.* Hewlett, 124 Ala. 471, 27 So. 18; *Ex p.* Russell, 29 Ala. 717. But see *Ex p.* Burnett, 30 Ala. 461).

It is not an assumption of original jurisdiction to give summary judgment on motion against the securities in writ-of-error bonds. Johnston *v.* Atwood, 2 Stew. (Ala.) 225.

The legislature cannot prescribe the manner of exercising supervisory jurisdiction as to writs, etc. *Ex p.* Candee, 48 Ala. 386.

Proceedings before the register must first be acted on by the chancellor, and from his rulings only can an appeal be taken to the supreme court. Rogers *v.* Prattville Mfg. Co., 81 Ala. 483, 1 So. 643, 60 Am. Rep. 171.

32. Ala. Civ. Code (1896), § 918, subds. 2, 3.

33. Ala. Const. (1875), art. 6, § 7.

Injunctions returnable into courts of chancery may be issued. Ala. Code (1896), § 784.

2. Arkansas — a. Supreme Court. The supreme court, except in cases otherwise provided by the constitution, has appellate jurisdiction only, which is coextensive with the state, under such restrictions as may from time to time be prescribed by law. It also has a general superintending control over all inferior courts of law and equity; and in aid of its appellate and supervisory jurisdiction it has power to issue writs of errors and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs and to hear and determine the same, and its judges have likewise power to issue said writs. In the exercise of its original jurisdiction it may also issue writs of quo warranto to the circuit judges and chancellors when created, and to officers of political corporations when the question involved is the legal existence of such corporations.[34]

b. Circuit Courts. The circuit courts exercise superintending control and appellate jurisdiction over county, probate, court of common pleas, and corporation courts and justices of the peace, and have power to issue, hear, and determine all the necessary writs to carry into effect their general and specific powers, and any of said writs may be issued upon order of the judge of the appropriate court in vacation.[35]

3. California — a. Supreme Court. The supreme court has appellate jurisdiction in all cases in equity except such as arise in justices' courts;[36] also in all cases at law which involve the title or possession[37] of real estate, or the legality

Settlement of decedent's estate.— Chancery may correct errors of law or of fact occurring in the settlement of a decedent's estate. Ala. Code (1896), §§ 805, 807.

Although a circuit court may have a general supervisory jurisdiction over inferior courts it cannot mandamus a probate judge of a county in another judicial district (Dunbar *v.* Frazer, 78 Ala. 529), nor can it issue a supersedeas to an execution of the probate court, although it has to issue a mandamus to it (*Ex p.* Peterson, 33 Ala. 74).

34. Ark. Const. (1874), art. 7, §§ 4, 5; Massey-Herndon Shoe Co. *v.* Powell, 64 Ark. 514, 43 S. W. 506 (constitution confers no jurisdiction to hear and determine a motion for a summary judgment against a sheriff for failure to return an execution directed to and received by such sheriff); *Ex p.* Snoddy, 44 Ark. 221 (constitution confers original jurisdiction to issue writs of quo warranto and in all other cases the jurisdiction is appellate and such court cannot by mandamus compel a clerk of a circuit court to perform a legal duty which the judge is by reason of interest disqualified to perform); *Ex p.* Batesville, etc., R. Co., 39 Ark. 82; Price *v.* Page, 25 Ark. 527; Jones *v.* Little Rock, 25 Ark. 284 (power is limited to writs enumerated and such other remedial writs as are proper or necessary to the exercise of the court's supervisory jurisdiction, but the court cannot issue an injunction upon an original bill); *Ex p.* Crise, 16 Ark. 193; *Ex p.* Allis, 12 Ark. 101 (no jurisdiction to compel by mandamus inspectors of penitentiary to certify to auditor quarterly compensation of contractor); *Ex p.* Jones, 2 Ark. 93 (can issue only enumerated writs and cannot enjoin proceedings at law in inferior court); State *v.* Ashley, 1 Ark. 279 (no jurisdiction of an information in the nature of a quo warranto).

A removal directly into the supreme court by writ of error from a city court is not permitted. Hall *v.* State, 1 Ark. 201.

The original jurisdiction has been decided to be only such as is necessary to exercise a general control over all the courts and does not extend to cases where other courts have implied jurisdiction over the writ sought to be issued. *Ex p.* Allis, 12 Ark. 101.

35. Ark. Const. (1874), art. 7, § 14.

Statutes are constitutional providing for such appellate jurisdiction. Miller *v.* Heard, 6 Ark. 73.

Circuit courts have appellate jurisdiction from judgments of county courts (Dodson *v.* Ft. Smith, 33 Ark. 508), and have superintending control over county courts and justices of the peace (Carnall *v.* Crawford County, 11 Ark. 604; Levy *v.* Lychinski, 8 Ark. 113). Such control is of the same character as exercised by the court of king's bench of England over inferior courts, but not to the same extent. Carnall *v.* Crawford County, 11 Ark. 604. But in exercising such control they cannot adjudicate any cause determined in such county courts, etc. Levy *v.* Lychinski, 8 Ark. 113.

36. Edsall *v.* Short, 122 Cal. 533, 55 Pac. 327. See Raisch *v.* Sausalito Land, etc., Co., 131 Cal. 215, 63 Pac. 346.

37. Possession.—Title to land involved cannot be based upon the statement of counsel as a substitute for matter of record. Raisch *v.* Sausalito Land, etc., Co., 131 Cal. 215, 63 Pac. 346. But complaint may aver ownership of land and it is sufficient. Boyd *v.* Southern California R. Co., 126 Cal. 571, 58 Pac. 1046. And where the nature of the action is such that plaintiff must show ownership or at least possession, and issue thereon is raised by the pleadings, defendant's appeal need not raise the question of ownership or

of any tax, impost, assessment, toll, or municipal fine,[38] or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars;[39] also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate[40] matters as may be provided by law. The court also has power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction.[41] Each of the justices may likewise issue writs of habeas corpus to any part of the state.[42]

b. Superior Courts. The superior courts have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be provided by law,[43] and they are limited in the exercise of their jurisdiction to the extent and mode which the legislature prescribes.[44]

4. Colorado — a. Supreme Court. The supreme court, except as otherwise provided by the constitution, has appellate jurisdiction only,[45] which is coextensive with the state, and has general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law. It also has

possession, and the supreme court has appellate jurisdiction. Baker *v.* Southern California R. Co., 110 Cal. 455, 42 Pac. 975.

38. People *v.* Horsley, 65 Cal. 381, 4 Pac. 384. But a fine for wrongfully collecting toll is not within the appellate jurisdiction of the supreme court. People *v.* Johnson, 30 Cal. 98.

39. Amount.— The supreme court has appellate jurisdiction over superior court judgments only in those cases in which that court is entitled to exercise original jurisdiction and cannot review its action where it exercises only an appellate jurisdiction. So that where plaintiff's demand is less than three hundred dollars the superior court has no original jurisdiction to try the cause unless a question apparent of record exists of which the constitution gives such superior court jurisdiction, and where no such question is involved and the amount is less than three hundred dollars and has come before the superior court on appeal from a justice of the peace, the superior court's judgment is final and not subject to review by the supreme court. Raisch *v.* Sausalito Land, etc., Co., 131 Cal. 215, 63 Pac. 346. See also Edsall *v.* Short, 122 Cal. 533, 55 Pac. 327; Ertle *v.* Placer County, (Cal. 1896) 44 Pac. 229; Wheeler *v.* Donnell, 110 Cal. 655, 43 Pac. 1; Maxfield *v.* Johnson, 30 Cal. 545. But where title to real property is involved the fact that the amount is less than three hundred dollars, and that the suit was commenced in a justice's court, has been decided not to deprive the supreme court of appellate jurisdiction. Doherty *v.* Thayer, 31 Cal. 140.

40. Keller *v.* Franklin, 5 Cal. 432.

41. Issuance of writs and original jurisdiction.— A statute which organizes the supreme court and confers upon it original jurisdiction as to writs not within the constitutional grant of power is invalid (*Ex p.* People, 1 Cal. 85); and the enumeration of writs does not change as to original jurisdiction the provision of the old constitution which uses the words "and also all the writs necessary" (Hyatt *v.* Allen, 54 Cal. 353). So the supreme court cannot grant a petition for an original injunction upon appeal from a judgment to restrain threatened acts under such judgment, which acts amount only to a threatened trespass. Rose *v.* Mesmer, 131 Cal. 631, 63 Pac. 1010. Appellate jurisdiction in cases of mandamus also existed even though the constitution contained no provision therefor (Palache *v.* Hunt, 64 Cal. 473, 2 Pac. 245), and original jurisdiction also existed therefor (Tyler *v.* Houghton, 25 Cal. 26) as necessary to carry such appellate powers into effect and an inferior tribunal may be compelled to determine a proper cause (Purcell *v.* McKune, 14 Cal. 230).

Special causes.— The supreme court may entertain an appeal in special causes, such as a proceeding to condemn land. Stockton, etc., R. Co. *v.* Galgiani, 49 Cal. 139. It has also appellate jurisdiction over election contest in county court. Knowles *v.* Yates, 31 Cal. 82.

42. Cal. Const. art. 6, § 4.

The constitution establishes one supreme court, although it exercises jurisdiction coördinately either in department or in banc; but the court in banc exercises supervisory jurisdiction over the action of the court in department, the exercise of which by the justices of the court may be without a distinct order that the cause be heard in banc. So the department which rendered a judgment, the court in banc, or the justices, may reconsider the cause, modify, correct, or vacate the judgment, even of their own motion, although there is a constitutional provision as to hearing in banc of causes determined in department. Niles *v.* Edwards, 95 Cal. 41, 30 Pac. 134.

43. Cal. Const. art. 6, § 5. See Cal. Code Civ. Proc. §§ 75, 77.

On an appeal from a court without jurisdiction to the superior court which has original jurisdiction the irregular manner of obtaining jurisdiction does not affect the cause. Santa Barbara *v.* Eldred, 95 Cal. 378, 30 Pac. 562.

44. Sherer *v.* Lassen County Super. Ct., 94 Cal. 354, 29 Pac. 716.

45. The constitution confers no original jurisdiction to hear and determine a controversy

power to issue writs of habeas corpus, mandamus, quo warranto,[46] certiorari,[47] injunction, and other original and remedial writs, with authority to hear and determine the same; and each judge has like power and authority as to writs of habeas corpus. The court is further required to give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives,[48] and such opinions must be published with the reported decisions.[49] Again writs of error from, or appeals to, the supreme court lie to review every final judgment of the court of appeals in cases which might have been taken to the supreme court in the first instance.[50] And such court

between rival political factions as to the party name and emblem. Whipple *v.* Stevenson, 25 Colo. 447, 55 Pac. 188. Nor will original jurisdiction be taken as to mandamus, except in causes involving questions *publici juris*. People *v.* Arapahoe County Dist. Ct., 22 Colo. 280, 44 Pac. 506. See Wheeler *v.* Northern Colorado Irr. Co., 9 Colo. 248, 11 Pac. 103. Nor can injunction issue from such court to restrain the secretary of state from delivering certificates of election to public officers where trial of title thereto is required. People *v.* McClees, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646. Nor does a petition at the instance of owners of irrigated land and praying an injunction against polluting waters present a cause *publici juris*. People *v.* Rogers, 12 Colo. 278, 20 Pac. 702. Nor where the writs of the supreme court are invoked primarily for the enforcement of a private right, although questions *publici juris* may be indirectly or remotely involved, will the supreme court entertain jurisdiction, except in causes presenting some special or peculiar exigency, or where the interest of the state at large is directly involved, or its sovereignty violated, or the liberty of its citizens menaced, or where the usurpation of the alleged use of its prerogatives or franchises is the principal and not the collateral question. Wheeler *v.* Northern Colorado Irr. Co., 9 Colo. 248, 11 Pac. 103. Nor has such court original jurisdiction of condemnation proceedings. Denver, etc., R. Co. *v.* Lamborn, 9 Colo. 119, 10 Pac. 797. But original jurisdiction in quo warranto proceedings exists, notwithstanding the repeal of Rev. Stat. c. 73, and the enactment of a code remedy. People *v.* Boughton, 5 Colo. 487.

If original jurisdiction is invoked causes should be brought in the name of the people and the person instituting the same should appear as relator. Wheeler *v.* Northern Colorado Irr. Co., 9 Colo. 248, 11 Pac. 103.

The supreme court may of its own motion notice its jurisdiction to entertain appeals. McCarthy *v.* Crump, 28 Colo. 398, 65 Pac. 49.

46. People *v.* American Smelting, etc., Co., 30 Colo. 275, 70 Pac. 413.

47. Certiorari will not lie to review a judgment of the court of appeals where it has jurisdiction to review the judgment of the trial court, even though its judgment is erroneous, unless the court of appeals has clearly refused to be guided by the law set forth in prior decisions of the supreme court; nor will the supreme court review the determination of the court of appeals where the latter has never passed upon a question raised in the trial court; nor will such review be had where the decision of the court of appeals is not contrary to any decision of the supreme court (People *v.* Court of Appeals, 28 Colo. 442, 65 Pac. 42; People *v.* Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105); nor where certain insufficiencies in the record to the court of appeals is alleged, where the opinion of the latter court shows that the cause was submitted on an amended abstract, which contained facts sufficient to entitle the court to determine the cause; nor where the court of appeals considered the former decisions of the supreme court, but based its decision on peculiar facts not existing in such prior decisions (People *v.* Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105).

48. The supreme court will not generally give its opinion as to the constitutionality of a pending bill or of a provision thereof, where the conditions do not warrant such exercise of power, or where the opinion does not concern matters *publici juris* but solely private rights of persons (*In re* Senate Bill No. 27, 28 Colo. 359, 65 Pac. 50; *In re* House Bill No. 495, 26 Colo. 182, 56 Pac. 900; *In re* House Bill No. 99, 26 Colo. 140, 56 Pac. 181); nor review its previous decision as to the constitutionality of a provision in a bill (*In re* Senate Bill No. 142, 26 Colo. 167, 56 Pac. 564); nor decide questions of liability under existing statutes by an opinion as to constitutionality of a pending bill (*In re* Senate Bill No. 196, 23 Colo. 508, 48 Pac. 540); nor answer *ex parte* interrogatories of the governor affecting certain private rights of persons (*In re* State Lands, 27 Colo. 99, 60 Pac. 345; *In re* State Bd. of Equalization, 25 Colo. 296, 53 Pac. 1056). See further as to what submission must show or as to form of inquiry *In re* House Bill No. 107, 21 Colo. 32, 39 Pac. 431; *In re* Eight-Hour Bill, 21 Colo. 29, 39 Pac. 328; *In re* Loan of School Fund, 18 Colo. 195, 32 Pac. 273; *In re* House Bill No. 165, 15 Colo. 593, 595, 26 Pac. 141.

49. Colo. Const. art. 6, §§ 1, 2; Mills Anno. Stat. Colo. § 1091.

50. Colo. Laws (1891), p. 121, § 15; Mills Anno. Stat. Colo. pp. 319, 320, § 1002.

A decree declaring one lien subordinate to another and overruling a demurrer is not appealable from a district to a supreme court. Fisher *v.* Hanna, 21 Colo. 9, 39 Pac. 420.

Divorce and alimony.—The supreme court has no jurisdiction to review on its merits an appeal from a dismissal of an appeal in divorce proceedings by the court of appeals.

does not lose jurisdiction to review a final judgment of a county court because of a review had in the court of appeals.[51] The supreme court may also review a decree of the county court affirmed by the court of appeals where the jurisdiction does not depend upon the nature of the controversy, but attaches by reason of the rendition of the judgment by the county court.[52] Again the supreme court has appellate jurisdiction where the judgment exceeds two thousand five hundred dollars[53] or the matter relates to a franchise or a freehold or requires or involves the construction of a federal or state constitutional question, otherwise not.[54] In order, however, to bring a case within the exception, the construction of the constitutional question must appear to be necessary to a decision of the case, and that it was construed adversely to appellant.[55] But all questions necessary to a complete determination of the matters involved may be considered by the supreme court where a constitutional question exists or has been found necessary to be decided by the inferior court.[56]

b. Court of Appeals. The court of appeals has jurisdiction to review the final judgments of inferior courts of record in all civil cases where the judgment, or in replevin the value found is two thousand five hundred dollars or less exclusive of costs. It has jurisdiction not final in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the constitution of the state or of the United States is necessary to a decision of the case. Writs of error from, or appeals to, the court of appeals lie to review final judgments within the same time and in the same manner as is or may be provided by law for such reviews by the supreme court.[57]

Mercer *v.* Mercer, 27 Colo. 216, 60 Pac. 349. See also Smith *v.* Smith, 24 Colo. 113, 48 Pac. 811.

51. Crawford *v.* Brown, 21 Colo. 272, 40 Pac. 692. But see Altman *v.* Huffman, 30 Colo. 278, 70 Pac. 420.

52. Bitter *v.* Mouat Lumber, etc., Co., 27 Colo. 120, 59 Pac. 403 [*affirming* 10 Colo. App. 307, 51 Pac. 519].

In actions relating to real property the judgment of the court from which the appeal is taken and not the relief sought determines the jurisdiction of the supreme court. Weiss *v.* Gullett, 29 Colo. 121, 67 Pac. 155.

53. People *v.* Carver, 19 Colo. 86, 34 Pac. 576, holding that error does not lie to a judgment of the district court for usurpation of public office.

The primary object of a suit has been held material in so far as the necessary amount requisite to confer jurisdiction is concerned. St. Joe, etc., Min. Co. *v.* Aspen First Nat. Bank, 24 Colo. 537, 52 Pac. 678. But if a suit is substantially one in replevin, uncontroverted allegations of value do not confer jurisdiction on the supreme court where the judgment finds no value. Denver First Nat. Bank *v.* Follett, 27 Colo. 512, 62 Pac. 361. So although a cause is transferred by stipulation, this does not confer jurisdiction upon the supreme court unless requirements as to jurisdictional amount exist. Denver *v.* Marselis, 29 Colo. 79, 66 Pac. 887.

54. Weiss *v.* Gullett, 29 Colo. 121, 67 Pac. 155; Denver First Nat. Bank *v.* Montrose County, 29 Colo. 114, 66 Pac. 890; Park *v.* Park, 28 Colo. 447, 65 Pac. 38; Board of Public Works *v.* Denver Tel. Co., 28 Colo. 401, 65 Pac. 35; McCarthy *v.* Crump, 28 Colo. 398, 65 Pac. 49; Murto *v.* King, 28 Colo. 357, 64 Pac. 184; Jossey *v.* Atchison, etc., R. Co., 28 Colo. 248, 64 Pac. 188; Campbell *v.* West, 28 Colo. 160, 63 Pac. 300; Hahn's Peak, etc., Min. Co. *v.* Lees, 28 Colo. 5, 62 Pac. 841; Knowles *v.* Lower Clear Creek Ditch Co., 27 Colo. 469, 63 Pac. 317; Kyle *v.* Shore, 27 Colo. 300, 60 Pac. 568; Anthony *v.* Slayden, 27 Colo. 144, 60 Pac. 826; Daum *v.* Conley, 27 Colo. 56, 59 Pac. 753; Denver *v.* Denver Union Water Co., 26 Colo. 413, 58 Pac. 594; La Junta, etc., Canal Co. *v.* Hess, 25 Colo. 515, 55 Pac. 728; Madden *v.* Day, 24 Colo. 418, 51 Pac. 165; Kelly *v.* Atkins, 24 Colo. 267, 51 Pac. 164; Morris *v.* People, 23 Colo. 465, 48 Pac. 534; Persse *v.* Gaffney, 23 Colo. 245, 47 Pac. 293; Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259; Hurd *v.* Atkins, 21 Colo. 259, 40 Pac. 443; McClellan *v.* Hurd, 21 Colo. 197, 40 Pac. 445; McCandless *v.* Green, 20 Colo. 519, 39 Pac. 64; Baker *v.* Barton, 20 Colo. 506, 35 Pac. 65; Timerman *v.* South Denver Real Estate Co., 20 Colo. 147, 36 Pac. 901; Wyatt *v.* Larimer, etc., Irr. Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; Brandenburg *v.* Reithman, 7 Colo. 323, 3 Pac. 577.

Appeal does not lie unless right or title to freehold is the direct subject of the action, nor unless the judgment is conclusive of such right until reversed. Harvey *v.* Travelers' Ins. Co., 18 Colo. 354, 32 Pac. 935.

55. Hurd *v.* Carlile, 18 Colo. 461, 33 Pac. 164. See also Mackey *v.* Tabor, 22 Colo. 67, 43 Pac. 143.

56. Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236.

The amount involved may affect the right to raise a question as to the constitutionality of a law. McCandless *v.* Green, 20 Colo. 519, 39 Pac. 64.

57. Colo. Laws (1891), p. 119, § 4; Mills Anno. Stat. Colo. (1896), § 1002*a*.

c. Other Courts. District courts have such appellate jurisdiction as may be conferred by law, and appeals may be taken from the county to the district or supreme court in such cases and in such manner as may be prescribed by law, but no appeal lies to the district court from any judgment given upon an appeal from a justice of the peace.[58] County courts have appellate jurisdiction of appeals from justices of the peace in the same county and from judgments of police magistrates' courts.[59]

5. Connecticut — a. Supreme Court of Errors. Under the constitution the powers of the supreme court of errors and its jurisdiction are such as shall be defined by law;[60] and under the general statutes it has final and conclusive jurisdiction of all matters brought before it according to law, and it may carry into execution all its judgments and decrees. The chief justice or presiding judge may also by written order direct a judgment by agreement in a pending cause to be entered up.[61] Again writs of error, for errors of law from the judgments of a superior court, may be brought to the supreme court; and where errors of law cognizable in that court alone are involved, such court and not the superior court can review the same.[62] There exists, however, a right of appeal, and writs of error may be brought from the judgments of city courts to either the supreme or superior court, but appealing to one precludes an appeal to the other.[63] An appeal also lies to the supreme court of errors from a judgment of certain district courts.[64]

b. Other Courts. Superior courts' powers are such as are defined by law,[65] and they have appellate jurisdiction of judgments from justices of the peace and of other inferior courts, except as otherwise provided.[66] Again writs of error for errors in matters of fact, or errors in which matters of fact and of law are joined, may be brought from the judgment or decree of the superior court, court of

All final judgments in civil causes irrespective of the amount involved have been held appealable to the appellate court. Livermore *v.* Truesdell, 7 Colo. App. 470, 43 Pac. 663. Thus such court has jurisdiction to review a final judgment granting a writ of mandamus against the state board of canvassers. Orman *v.* People, (Colo. App. 1903) 71 Pac. 430. But such court has no jurisdiction of an appeal from an order of a county court appointing a conservator (Shapter *v.* Arapahoe County Ct., 13 Colo. App. 484, 59 Pac. 59), of an appeal from a decree of a county court in a special statutory proceeding providing for the disconnection of outlying territory from cities and towns (Fletcher *v.* Smith, (Colo. App. 1902) 70 Pac. 697), or of an appeal in divorce proceedings or those incidental thereto (Meiss *v.* Meiss, (Colo. App. 1901) 63 Pac. 952; Clark *v.* Clark, 15 Colo. App. 211, 61 Pac. 479; Eickhoff *v.* Eickhoff, 14 Colo. App. 127, 59 Pac. 411; Mercer *v.* Mercer, 13 Colo. App. 237, 57 Pac. 750). So such court has no jurisdiction of a transferred cause where the supreme court had no jurisdiction. Lowenbruck *v.* Denver, etc., R. Co., 2 Colo. App. 323, 30 Pac. 261; Pitkin County *v.* Aspen Min., etc., Co., 1 Colo. App. 125, 27 Pac. 875.

58. Colo. Const. art. 6, §§ 11, 23; Mills Anno. Stat. Colo. (1891), §§ 1085, 1090, 2678. See also Mills Anno. Stat. Colo. (1896), §§ 1087*a*, 1097; Lusk *v.* Kershow, 17 Colo. 481, 30 Pac. 62.

District courts have no appellate jurisdiction over probate courts. Cass *v.* Davis, 1 Colo. 43. See also Harrison *v.* Smith, 2 Colo. 625.

59. Mills Anno. Stat. Colo. (1891), §§ 2678, 2679, 3514; Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155.

Appellate jurisdiction may be conferred on county courts under Const. art. 6, § 23, for Const. art. 6, §§ 2, 11, does not by implication limit appellate jurisdiction to the supreme and district courts. Jeffries *v.* Harrington, 11 Colo. 191, 17 Pac. 505.

60. Conn. Const. art. 5, § 1.

61. Conn. Gen. Stat. (1888), §§ 815, 826. See also Pub. Acts (1897), c. 194, pp. 888–895.

Cause must have come regularly before the superior court by appeal, writ of error, or original process or the supreme court will not take cognizance thereof. Green *v.* Hobby, 8 Conn. 165.

62. Hubbard *v.* Hartford, 74 Conn. 452, 51 Atl. 133; Conn. Gen. Stat. § 1146; Conn. Pub. Acts (1897), p. 888, c. 194, § 1.

63. Bergkofski *v.* Ruzofski, 74 Conn. 204, 50 Atl. 565; Conn. Acts (1895), p. 370.

64. Fritts *v.* New York, etc., R. Co., 62 Conn. 503, 26 Atl. 347; Conn. Gen. Stat. § 1129; Conn. Pub. Acts (1889), c. 141.

65. Conn. Const. art. 5, § 1.

66. Conn. Pub. Acts (1897), p. 896, c. 196; Conn. Rev. Stat. (1888), § 774.

Appeal lies from probate court.— Edmond *v.* Canfield, 8 Conn. 87. See also Brewster *v.* Shelton, 24 Conn. 140; Leavenworth *v.* Marshall, 19 Conn. 1.

Appeal lies from final judgment of city court.— Conn. Special Acts (1895), p. 370; Bergkofski *v.* Ruzofski, 74 Conn. 204, 50 Atl. 565; White *v.* Washington School Dist., 45 Conn. 59; Kallahan *v.* Osborne, 37 Conn. 488.

common pleas, or city court to the superior court in which such judgment was rendered or decree passed; but such writs may be only of error on facts, not appearing on the face of the record, which render the judgment erroneous, and which can only be where the party had no legal capacity to appear, where he had no legal opportunity, or where the court had no power to render judgment. Where, however, the question is one of law the supreme and not the superior court has cognizance.[67] The court of common pleas in certain counties has jurisdiction of all civil causes brought to it, according to law, by appeal from judgments of justices of the peace or other inferior courts, and of writs of error from such judgments, and it seems in one county to have jurisdiction, with the superior court, of appeals from the acts of commissioners of insolvent estates subject to limitation as to amount.[68]

6. Delaware — a. Supreme Court. The supreme court has jurisdiction to issue writs of error to the superior court and to determine finally all matters in error in the judgments and proceedings of said superior court. It may issue writs of error to the court of oyer and terminer and the court of general sessions in certain criminal matters and in such other cases as may be provided by law. Said court may receive and determine finally appeals from the court of general sessions in cases of prosecutions for bribery at elections, appeals from the court of chancery, and all matters of appeals in the interlocutory or final decrees and proceedings in chancery. It may issue writs of prohibition, certiorari, and mandamus to the superior court, the court of oyer and terminer, the court of general sessions, the court of chancery, and the orphans' court, or any of the judges of said courts, and all orders, rules, and process proper to give effect to the same. The general assembly may provide by what judges of the supreme court the jurisdiction and power conferred under the constitution are to be exercised in vacation. Whenever the superior court, court of oyer and terminer, or court of general sessions shall consider that a question of law ought to be heard by the court in banc they have power upon application to direct it to be so heard. Such courts in exercising this power may direct a cause to be proceeded into verdict or judgment in that court, or to be otherwise proceeded in as shall be best for expediting justice. In matters of chancery jurisdiction where the chancellor is disqualified, the chief justice has jurisdiction, and there is an appeal to the supreme court. In the absence or disability of the chancellor the chief justice, or in his absence or disability the senior associate judge, has power to grant restraining orders and preliminary injunctions, pursuant to the rules of chancery; but general jurisdiction over the case is not conferred. Jurisdiction is also coextensive with the state.[69]

b. Other Courts. Where the opinions of the judges of the orphans' court are opposed, or when the decision is made by both of them in matters involving a right to real estate, or the appraised value or other value thereof, and in all matters affecting guardians' accounts, there shall be an appeal to the superior court for the county which has final jurisdiction in every such case.[70] Appeal lies to the

67. Hubbard *v.* Hartford, 74 Conn. 452, 51 Atl. 133; Conn. Gen. Stat. § 1146. See also Lockwood *v.* Knapp, 4 Conn. 257.

68. Conn. Pub. Acts (1899), c. 38, p. 1004, amending Conn. Gen. Stat. (1888), § 724. See also Conn. Pub. Acts (1887), c. 34; Conn. Pub. Acts (1889), cc. 114, 138.

69. Del. Const. (1897), art. 4, §§ 12, 15, 16, 17, 19.

Until the general assembly shall otherwise direct there shall be an appeal to the supreme court in all cases in which there is an appeal, according to any act of the general assembly, to the court of errors and appeals. Del. Const. (1897), art. 4, § 20.

"Before the adoption of the constitution in 1897, vesting this Court with the jurisdiction to issue writs of error to the Court of Oyer and Terminer, and to the Court of General Sessions, and to determine all matters in error, the last named courts were each, within their respective criminal jurisdictions, courts of last resort, possessing original and final jurisdiction." Per Boyce, J., in Daniels *v.* State, 2 Pennew. (Del.) 586, 591, 48 Atl. 196, 54 L. R. A. 286.

70. Del. Const. (1897), art. 4, § 11.

The jurisdiction of the courts in the several counties is not different under the new constitution from that under the old constitution,

court of general sessions in all cases in which the sentence is imprisonment exceeding one month or a fine exceeding one hundred dollars, although the general assembly may grant or deny the privilege of appeal to the court of general sessions.[71]

7. FLORIDA — a. Supreme Court. The supreme court has appellate jurisdiction[72] in all cases at law and in equity originating in circuit courts, and of appeals from the circuit courts in cases arising before judges of the county courts in matters pertaining to their probate jurisdiction, and in the management of the estates of infants, and in cases of conviction of felony in the criminal courts, and in all criminal cases originating in the circuit courts. The court has also power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs[73] necessary or proper to the complete exercise of its jurisdiction. Each of the justices has power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or any justice thereof, or before any circuit judge.[74]

b. Other Courts. Circuit courts have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before the county judge, of all misdemeanors tried in criminal courts, of judgments or sentences of any mayor's court, and of all cases arising before justices of the peace in counties in which there is no county court; and supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors and of such other matters as the legislature may provide. The circuit courts and judges have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, habeas corpus, and all writs necessary to the complete exercise of their jurisdiction.[75] County courts have final appellate jurisdiction in civil cases arising in the courts of justices of the peace. The trial of such appeals may be *de novo* at the option of appellant.[76]

8. GEORGIA — a. Supreme Court. The supreme court has no original jurisdiction, but is a court alone for the trial and correction of errors[77] from the superior

nor are the courts "more blended." Thomas *v.* Adams Express Co., 1 Pennew. (Del.) 142, 39 Atl. 1014.

If superior courts of one county attempted to exercise supervisory or appellate powers over the superior courts in other counties, the greatest inconvenience and confusion would ensue, and the superior court has no power to set aside or entertain jurisdiction of a judgment entered by the superior court in another county. Thomas *v.* Adams Express Co., 1 Pennew. (Del.) 142, 39 Atl. 1014.

71. Del. Const. (1897), art. 4, § 30.

72. Appellate jurisdiction exists either when regularly brought up or where forms are dispensed with by agreement in causes from circuit courts. Holbrook *v.* Allen, 4 Fla. 96.

73. State *v.* Gleason, 12 Fla. 190 (holding that information in nature of quo warranto is included); *Ex p.* White, 4 Fla. 165.

74. Fla. Const. (1887), art. 5, § 5.

The supreme court has general superintendence and supervisory control over all other courts. *Ex p.* White, 4 Fla. 165.

The governor may at any time require the opinion of the justices of the supreme court as to the interpretation of any portion of the constitution upon any question affecting his executive powers and duties, and the justices shall render such opinion in writing. Fla. Const. (1887), art. 4, § 13; *In re* Advisory Opinion to Governor, 39 Fla. 397, 22 So. 681; *In re* Executive Communication, 23 Fla. 297, 6 So. 925; Opinion of Justices, 14 Fla. 289.

75. Fla. Const. (1887), art. 5, § 11.

The purpose and effect of the constitutional provision is that an appeal shall be to the appellate and not to the original jurisdiction of the circuit court. State *v.* McClellan, 25 Fla. 88, 5 So. 600; State *v.* McClellan, 25 Fla. 111, 5 So. 603; State *v.* King, 20 Fla. 399.

76. Fla. Const. art. 5, § 18.

77. McRae *v.* Adams, 36 Ga. 442; Doe *v.* Lancaster, 5 Ga. 39.

Illustrations.— The decision of the superior court as to the sufficiency of a petition for the removal of an action to a federal court is subject to review in the supreme court. Carswell *v.* Schley, 59 Ga. 17. So jurisdiction exists in the supreme court of a bill against executors, and a receiver may be appointed and an injunction may be issued. Johns *v.* Johns, 23 Ga. 31. And an appeal lies to the supreme court from a decision refusing to grant letters of administration. Gresham *v.* Pyron, 17 Ga. 263. But such court cannot hear *ex parte* cases or entertain jurisdiction of an appeal from an order fixing an administrator's commissions on property turned over by a distributee. *Ex p.* Burney, 29 Ga. 33.

courts, and from specified city courts,[78] and such other like city courts[79] as may be established.[80]

b. Other Courts. Superior courts have appellate jurisdiction in all such cases as may be provided by law. They also have power to correct errors in inferior jurisdictions, by writ of certiorari, which can only issue on the sanction of the judge; and such courts and the judges thereof have power to issue writs of mandamus, prohibition, scire facias, and all other writs that may be necessary for carrying their powers fully into effect, and they have such other powers as may be conferred upon them by law.[81] There may also be an appeal (or, by consent of parties, without a decision) from the court ordinary to the superior court, under regulations prescribed by law.[82] A statute, however, cannot confer on a city court jurisdiction over appeals from justices' courts, contrary to the constitutional provision that in civil actions before justices of the peace there may be an appeal to a jury in said court, or to the superior court, under such regulations as may be prescribed by law.[83]

9. Idaho — a. Supreme Court. The supreme court shall have jurisdiction to review, upon appeal, any decision of the district courts or the judges thereof. The supreme court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction.[84]

b. District Courts. District courts have such appellate jurisdiction as may be conferred by law.[85]

10. Illinois — a. Supreme Court — (i) *Generally.* The supreme court of the state of Illinois has original jurisdiction[86] in cases relating to the revenue,[87] in

78. Hayden *v.* State, 69 Ga. 731.

79. Sellers *v.* Mann, 113 Ga. 643, 39 S. E. 11; Ivey *v.* State, 112 Ga. 175, 37 S. E. 398.

The words "like courts" refer to city courts, and a writ of error does not lie from a judgment of a county court. Bradford *v.* Preer, 51 Ga. 168. The legislature, however, cannot provide for writs of error from a city court unless such court is established in a city. Savannah, etc., R. Co. *v.* Jordan, 113 Ga. 687, 39 S. E. 511. Moreover a court is not "like" the specified city courts where it is established in a "city" which is not the county-seat of the county, and the jurisdiction of which extends only over the city and one militia district of the county. Collier *v.* Means, 113 Ga. 681, 39 S. E. 418. Again a town is not converted into a city so as to confer jurisdiction on the supreme court by an incidental reference in the title and body of a statute to the "city" of E which is a town. Atkinson *v.* State, 112 Ga. 402, 37 S. E. 746. See also Veiwig *v.* Polk, 112 Ga. 513, 37 S. E. 747; Wight, etc., Co. *v.* Wolff, 112 Ga. 169, 37 S. E. 395; Comer *v.* Rynehart, 99 Ga. 128, 24 S. E. 871.

80. Ga. Const. (1877), art. 6, § 2, par. 5; Ga. Code (1895), § 5836.

81. Ga. Const. (1877), art. 6, § 4, pars. 4, 5; Ga. Code (1895), §§ 5845, 5846.

A writ of error to the superior court lies from a city court. Ivey *v.* State, 112 Ga. 175, 37 S. E. 398.

82. Ga. Const. (1877), art. 5, § 6, par. 1; Ga. Code (1895), § 5852.

Appeal lies to the superior court from the justice's court under such regulations as may be prescribed by law. Ga. Const. (1877), art. 5, § 7, par. 2; 2 Ga. Code (1895), § 5856.

83. Kirkman *v.* Gillespie, 112 Ga. 507, 37 S. E. 714.

84. Ida. Const. art. 5, § 9.

Supreme court cannot review, by certiorari or appeal, a judgment of a justice's court. Nordyke, etc., Co. *v.* McConkey, 7 Ida. 562, 64 Pac. 893.

Place of hearing an appeal to the supreme court from a judgment in a proceeding to remove a county officer is determined the same as other causes, the word "causes" covering special proceedings. Mahoney *v.* Elliott, (Ida. 1902) 67 Pac. 317.

85. Ida. Const. art. 5, § 20.

86. The original jurisdiction of the supreme court cannot be enlarged by a statute giving such court the right to hear and determine election contests of judges of certain courts. Baird *v.* Hutchinson, 179 Ill. 435, 53 N. E. 567; Canby *v.* Hartzell, 167 Ill. 628, 48 N. E. 687. So the supreme court has no original jurisdiction to allow attorney's fees and expenses on appeal. Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

87. Cases relating to the revenue cover a suit to enjoin the collection of taxes, and an appeal lies directly to a supreme court and none to the appellate court. Lippincott *v.* Board of Education, 86 Ill. App. 522; Phœnix Grain, etc., Exch. *v.* Gleason, 22 Ill. App. 373. These words also include all taxes and assessments imposed by any public authority and cover a special assessment for street improvements (Herhold *v.* Chicago, 106 Ill. 547; People *v.* Springer, 106 Ill. 542; Potwin *v.* Johnson, 106 Ill. 532), and a petition under the drainage act to validate an assessment (Claypool Drainage, etc., Dist. *v.* Chicago,

mandamus[88] and habeas corpus, and appellate jurisdiction[89] in all other cases,[90] subject, however, to such exceptions as may exist by virtue of the establishment of inferior appellate courts.[91] The supreme court can also reëxamine cases brought to it by appeal or writ of error as to questions of law only, subject to certain exceptions.[92] And such court may issue writs of mandamus, habeas corpus, certiorari, error, and supersedeas, and all other writs, not prohibited by law, which may be necessary to enforce the due administration of justice in all matters within its jurisdiction.[93] The court has also certain powers in vacation over judgments,[94] and in condemnation proceedings.[95]

(II) *Over Appellate Courts.* Appeals and writs of error may be prosecuted from the final judgments,[96] orders, or decrees of the appellate courts; also in cases decided by said courts involving a less sum than one thousand dollars, exclusive of costs,[97] where a majority of the judges thereof are of opinion[98] that questions of law of such importance, either on account of principal or collateral interests, are involved that they should be passed upon by the supreme court; and also in all actions where there was no trial on an issue of fact[99] in the lower court where the amount claimed in the pleadings exceeds one thousand dollars.[1] Appeals may also be prosecuted to the supreme court from the final judgments of the appellate courts in all other cases[2] except actions *ex contractu* wherein the

etc., R. Co., 81 Ill. App. 433). The appellate court has no jurisdiction of an appeal from a decree on a bill to restrain the collection of taxes. Huling *v.* Ehrich, 81 Ill. App. 404. But an action in the name of the people on the official bond of a county collector does not relate to revenue. People *v.* Gillespie, 47 Ill. App. 522.

88. **Original jurisdiction in mandamus** is limited to protect the rights, interests, and franchises of the state and the people at large, and to enforce official duties affecting the general public, and does not include causes affecting local public interests or private rights unless there is no other adequate remedy at law, and the exercise of such jurisdiction is necessary to prevent a failure of justice. People *v.* Chicago, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833.

89. **The supreme court has only appellate jurisdiction** except where original jurisdiction is expressly given. Crull *v.* Keener, 17 Ill. 246; Beaubien *v.* Hamilton, 4 Ill. 213; Clark *v.* Ross, 1 Ill. 334.

90. Ill. Const. (1870), art. 6, § 2; Starr & C. Anno. Stat. Ill. (1896), p. 147.

91. Fleischman *v.* Walker, 91 Ill. 318; Ill. Const. (1870), art. 6, § 11; Starr & C. Anno. Stat. Ill. (1896), p. 149.

92. Starr & C. Anno. Stat. Ill. (1896), p. 3136, c. 110, § 90.

Restriction to questions of law of supreme court in appeals from appellate courts. Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, 32 N. E. 402; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406. See also Kerfoot *v.* Cromwell Mound Co., 115 Ill. 502, 25 N. E. 960.

93. People *v.* Cook County Cir. Ct., 173 Ill. 272, 50 N. E. 928, 169 Ill. 201, 48 N. E. 717 [*affirming* 59 Ill. App. 514]; Campbell *v.* Campbell, 22 Ill. 664; People *v.* Taylor, 2 Ill. 202.

The supreme court has no jurisdiction to consider a writ of error to the circuit court to review an order dismissing a petition for a writ of mandamus against the state's attorney to compel him to file informations in the nature of quo warranto against certain persons to try their title to the office of medical director and superintendent of nurses of county institutions. People *v.* Deneen, 201 Ill. 452, 66 N. E. 368.

94. Starr & C. Anno. Stat. Ill. (1896), p. 1149, c. 37, § 17.

95. Peoria, etc., Union R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110.

96. Harzfeld *v.* Converse, 105 Ill. 534, holding that the judgment must be final disposing of the cause on its merits.

Validity of tax-title.—An appeal lies from a judgment of the appellate court affirming a decree barring a wife of a mortgagor from asserting title on a bill to foreclose. Bozarth *v.* Landers, 113 Ill. 181.

97. Tucker *v.* Champaign County Agricultural Bd., 154 Ill. 593, 39 N. E. 563.

98. A certificate of importance is a condition precedent to an appeal where the amount involved is less than one thousand dollars. McNay *v.* Stratton, 109 Ill. 30; Klees *v.* Chicago, etc., R. Co., 82 Ill. App. 624. See also Preston *v.* Gahl, 94 Ill. 586.

99. Cummings *v.* Chicago, etc., R. Co., 189 Ill. 608, 60 N. E. 51 [*affirming* 89 Ill. App. 199]; Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653.

A finding of fact by the appellate court in an action at law precludes the supreme court finding otherwise, and it will not consider a question of law that might arise on other facts. Harzfeld *v.* Converse, 105 Ill. 534.

1. Starr & C. Anno. Stat. Ill. (1896), pp. 1153, 1154, c. 37, § 28; Ill. Rev. Stat. (1892), c. 37, § 25; Hurd Rev. Stat. Ill. (1889), p. 415.

2. "All other cases" includes a suit to restrain the obstruction of a right of way. Green *v.* Goff, 153 Ill. 534, 39 N. E. 975.

amount involved is less than one thousand dollars, and in all cases sounding in damages wherein the judgment is for less than one thousand dollars.[3]

(III) *Over Circuit, City, and County Courts.* Appeals and writs of error lie from the final orders, judgments, or decrees of the circuit and city courts, and from the superior court of Cook county, directly to the supreme court in all criminal cases and in cases involving a franchise or freehold, the validity of a statute,[4] or the construction of the constitution;[5] in all cases relating to revenue,[6] or in which the state is interested[7] as a party or otherwise.[8] Appeals and writs of error may also be taken and prosecuted to the supreme court from the final orders, judgments, and decrees of the county court in proceedings for the confirmation of special assessments, for the sale of lands for taxes and special assessments, and in all common-law and attachment cases and cases of forcible entry and detainer.[9]

b. Appellate Courts. Appellate courts exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal or writs of error from final judgments, orders, or decrees of any of the circuit courts, or the superior court of Cook county, or county courts, or from the city courts in any suit or proceeding at law,[10]

3. Ill. Rev. Stat. (1893), c. 37, § 25; Hurd Rev. Stat. Ill. (1897), p. 506. See also *In re* Landfield, 182 Ill. 264, 55 N. E. 371.

Amount involved.—An appeal lies regardless of the amount involved where the bill is not for the recovery of money, but is to set aside a sheriff's sale as a cloud on the title and to enjoin the making of a deed. Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273. So an appeal will not be dismissed where the amount claimed exceeds one thousand dollars, although the judgment is for much less. Guyer *v.* Caldwell, 189 Ill. 581, 60 N. E. 50 [*reversing* 89 Ill. App. 110]. But where the judgment of the appellate court is for less than one thousand dollars it is final and not appealable. Rimmer *v.* O'Brien-Green Co., 165 Ill. 31, 45 N. E. 979.

4. Morgan Park *v.* Knopf, 199 Ill. 444, 65 N. E. 322; Sauter *v.* Anderson, 199 Ill. 319, 65 N. E. 247; Union Drainage Dist. *v.* Cortland Highway Com'rs, 199 Ill. 80, 64 N. E. 1079; Foote *v.* Lake County, 198 Ill. 638, 64 N. E. 1015; Mechanics', etc., Sav., etc., Assoc. *v.* People, 184 Ill. 129, 56 N. E. 346; Haines *v.* Cearlock, 184 Ill. 96, 56 N. E. 336; Rowell *v.* Covenant Mut. L. Assoc., 176 Ill. 557, 52 N. E. 271; Clark *v.* Kern, 171 Ill. 538, 49 N. E. 488; Whittaker *v.* Venice, 150 Ill. 195, 37 N. E. 240; People *v.* Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; Pearson *v.* Zehr, 125 Ill. 573, 18 N. E. 204; Williams *v.* People, 118 Ill. 444, 8 N. E. 841; Virden *v.* Allan, 107 Ill. 505; Talcott *v.* Schuh, 95 Ill. 201; Hoffner *v.* Cass County, 94 Ill. App. 49.

Where the validity of a city charter is involved the supreme court has jurisdiction. Cairo *v.* Bross, 8 Ill. App. 296; East St. Louis *v.* School Trustees, 8 Ill. App. 295, because in such case the validity of a statute is involved.

The mere assertion of counsel that the validity of a statute is involved is not sufficient to confer jurisdiction on the supreme court of a direct appeal. Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Rowell *v.* Covenant Mut. L. Assoc., 176 Ill. 557, 52 N. E. 271; St. Louis Transfer Co. *v.* Canty, 103 Ill. 423. So the denial in a pleading of the validity of a statute is insufficient in itself to give the supreme court jurisdiction on direct appeal. Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679. But see Chaplin *v.* Highways Com'rs, 126 Ill. 264, 18 N. E. 765.

5. Chicago General R. Co. *v.* Sellers, 191 Ill. 524, 61 N. E. 495; Brueggemann *v.* Alton, 188 Ill. 320, 58 N. E. 951; Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Clark *v.* Kern, 171 Ill. 538, 49 N. E. 488; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; Corbin *v.* People, 142 Ill. 58, 31 N. E. 19; Cook County *v.* Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 8 Am. St. Rep. 386, 1 L. R. A. 437; McCoy *v.* Chicago, 33 Ill. App. 576.

6. Reed *v.* Chatsworth, 201 Ill. 480, 66 N. E. 217; People *v.* Hendee, 199 Ill. 55, 64 N. E. 1071; Kilgour *v.* Drainage Com'rs, 111 Ill. 342; Webster *v.* People, 98 Ill. 343; Ashford *v.* People, 82 Ill. 214; Fowler *v.* Perkins, 77 Ill. 271; Brown *v.* McCord, 9 Ill. App. 550; Johnson *v.* Eliel, 9 Ill. App. 520.

7. People *v.* Hendee, 199 Ill. 55, 64 N. E. 1071; Canal Com'rs *v.* Chicago Sanitary Dist., 191 Ill. 326, 61 N. E. 71; Evans *v.* Pierce, 163 Ill. 207, 45 N. E. 144.

8. Starr & C. Anno. Stat. Ill. (1896), p. 1153, c. 37, § 28, p. 3114, c. 110, § 89; Boddie *v.* Brewer, etc., Brewing Co., 193 Ill. 203, 61 N. E. 1047; Swift *v.* People, 160 Ill. 561, 43 N. E. 731; People *v.* St. Louis, etc., R. Co., 106 Ill. 412; Hodge *v.* People, 96 Ill. 423; Aiken *v.* Deal, 2 Ill. 327. See also Grand Tower Min., etc., Co. *v.* Hall, 94 Ill. 152; Williams *v.* Ayers, 92 Ill. 16; Meeks *v.* Leach, 91 Ill. 323; Young *v.* Stearns, 91 Ill. 221.

9. Starr & C. Anno. Stat. Ill. (1896), p. 1191, c. 37, § 241.

Bastardy cases are reviewable by the supreme court from a county-court judgment. Peak *v.* People, 76 Ill. 289. And see, generally, Bastards, 7 Cyc. 673.

10. Chicago *v.* Gosselin, 91 Ill. 48; People *v.* Church, 103 Ill. App. 132; Haines *v.* Cearlock, 95 Ill. App. 203; *In re* Busse, 80 Ill. App. 261; People *v.* Gillespie, 47 Ill. App. 522.

or in chancery,[11] other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute.[12] In all cases determined in said appellate courts, in actions *ex contractu* where the amount involved is less than one thousand dollars exclusive of costs, and in all cases sounding in damages where the judgment of the court below is less than one thousand dollars exclusive of costs, and the judgment is affirmed or otherwise finally disposed of in the appellate court, the judgment, order, or decree of the appellate court is final[13] and no appeal shall lie or writ of error be prosecuted therefrom, provided the term *ex contractu* shall not be construed to include actions involving a penalty.[14] Appeals also lie to the appellate courts from the final judgments, orders, or decrees of county courts in proceedings for the confirmation of special assessments, for the sale of lands for taxes and special assessments, and in all common-law and attachment cases and cases of forcible entry and detainer.[15] Appellate courts may also issue writs of mandamus to cause a proper record to be duly certified or made and certified, or to cause any other act to be done which may be necessary to enforce the due administration of justice in all matters, suits, or proceedings which could or might by appeal, writ of error, or in any other lawful manner be brought within their respective jurisdictions. They may also issue writs[16] of certiorari, error, supersedeas, and all other writs not prohibited by law which may be necessary to enforce the due administration of justice in all matters within their jurisdiction.[17] Appellate courts have in addition the same power as the supreme court to compel a party prosecuting an appeal for delay to pay the damages provided for in the statute.[18]

A suit or proceeding at law includes an appeal from an application to be released from imprisonment imposed by a writ of capias ad satisfaciendum. First Nat. Bank *v.* Sanford, 83 Ill. App. 58. But see Harmanek *v.* Guthman, 66 Ill. App. 593. It also includes an action under the statute providing for the trial of the right of property in personal property. Sellers *v.* Thomas, 185 Ill. 384, 57 N. E. 10 [*reversing* 85 Ill. App. 58]. But an order of the county court admitting a will to probate is not a proceeding at law or in chancery so as to be appealable to the appellate court. Schenk *v.* Schenk, 80 Ill. App. 614.

11. Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24; *In re* Busse, 80 Ill. App. 261.

12. People *v.* Kelly, 187 Ill. 333, 58 N. E. 373; Illinois State Bd. of Health *v.* People, 181 Ill. 512, 54 N. E. 1011; Chicago *v.* Duffy, 178 Ill. 258, 53 N. E. 439; Spring Valley *v.* Spring Valley Coal Co., 173 Ill. 497, 50 N. E. 1067 [*reversing* 71 Ill. App. 432]; Chaplin *v.* Highways Com'rs, 126 Ill. 264, 18 N. E. 765; Williams *v.* People, 118 Ill. 444, 8 N. E. 841; Gross *v.* People, 95 Ill. 366; Shakel *v.* People, 86 Ill. App. 686; Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 82 Ill. App. 407; Pennsylvania Co. *v.* Chicago, 73 Ill. App. 345; Brennan *v.* Kinsley, 70 Ill. App. 645; Bernstein *v.* People, 70 Ill. App. 175; Spring Valley Coal Co. *v.* Spring Valley, 65 Ill. App. 571; Gorr *v.* Dahmke, 46 Ill. App. 421; Cook County *v.* Sennott, 37 Ill. App. 268; Graham *v.* People, 35 Ill. App. 568; Stevens *v.* St. Mary's Training School, 33 Ill. App. 237; Pearson *v.* Zehr, 26 Ill. App. 286; Provident Sav. L. Assur. Co. *v.* English, 25 Ill. App. 134; Rosenstein *v.* Case, 9 Ill. App. 482; Falch *v.* People, 8 Ill. App. 351; Cairo *v.* Bross, 8 Ill. App. 296; East St. Louis *v.* School Trustees, 8 Ill. App. 295.

The appellate court may determine whether a statute is repealed. Morgan Park *v.* Gahan, 35 Ill. App. 646. See also Pearce *v.* Vittum, 193 Ill. 192, 61 N. E. 1116. And the appellate court must determine whether a statute exists where the claim or defense is under the statute. American Live Stock Commission Co. *v.* Chicago Live Stock Exch., 41 Ill. App. 149.

13. The statute authorizing the appellate court to make a finding of fact, and declaring such binding on the supreme court, is not unconstitutional. Earnshaw *v.* Western Stone Co., 200 Ill. 220, 65 N. E. 661.

14. Starr & C. Anno. Stat. Ill. (1896), pp. 1153, 1154, c. 37, § 28.

15. Starr & C. Anno. Stat. Ill. (1896), p. 1191, c. 37, § 241; Webster *v.* Gilmore, 91 Ill. 324; Hide, etc., Nat. Bank *v.* Rehm, 27 Ill. App. 172 [*affirmed* in 126 Ill. 461, 18 N. E. 788]; Smith *v.* Hood, 4 Ill. App. 360; West *v.* People, 3 Ill. App. 377.

16. Issuance of writs.— Original writ of prohibition by appellate court may issue as an ancillary writ to prevent encroachment on its appellate jurisdiction by inferior courts in a pending cause. People *v.* Cook County Cir. Ct., 169 Ill. 201, 48 N. E. 717. *Compare* People *v.* Cook County Cir. Ct., 59 Ill. App. 514. But the appellate court cannot by mandamus compel a judge of the superior court to sign a bill of exceptions in a cause not appealed to the former court nor pending there. Hawes *v.* People, 124 Ill. 560, 17 N. E. 13.

17. Starr & C. Anno. Stat. Ill. (1896), p. 1154, c. 37, § 29.

18. Town *v.* Alexander, 185 Ill. 254, 56 N. E. 1111 [*affirming* 85 Ill. App. 512]; Baker *v.* Prebis, 185 Ill. 191, 56 N. E. 1110 [*affirming* 86 Ill. App. 334]; Wallen *v.* Cummings, 88 Ill. App. 45; Hough *v.* Wells, 86 Ill. App. 186.

c. Other Courts. Circuit courts have such appellate jurisdiction as is or may be provided by law.[19] And in their respective counties, except where appeals lie to other courts, they have jurisdiction of appeals in all matters from the final orders, judgments, and decrees of the county courts, and upon such appeal the case may be tried *de novo*.[20] County courts have in addition to their original jurisdiction such other jurisdiction as may be provided by law.[21] City courts have jurisdiction of appeals from judgments of justices of the peace or police magistrates, and writs of certiorari may issue to remove causes from before such officers into the city court.[22]

d. Appeal When Franchise Is Involved. In the absence of statute conferring appellate jurisdiction on the appellate court in cases where a franchise is involved,[23] an appeal directly to, or a writ of error directly from, the supreme court only lies in such cases.[24] This rule is subject, however, to certain qualifications; as in case of waiver of objections by failing to question the decree on the point of a franchise being involved;[25] or in cases where the point arises whether the proceedings are such as legally involve a franchise.[26]

e. Appeal When Freehold Is Involved — (i) *Statement of Rule.* An appeal or a writ of error lies directly to the supreme court, where the whole

19. Ill. Const. (1870), art. 6, § 12.

On appeal from a justice's court in an action of forcible entry and detainer the circuit court has concurrent jurisdiction with the county court. People *v.* Huntoon, 71 Ill. 536.

20. Starr & C. Anno. Stat. Ill. (1896), p. 1190, c. 37, § 240; Heinzelman *v.* Schrader, 150 Ill. 227, 37 N. E. 235; Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24; *In re* Storey, 120 Ill. 244, 11 N. E. 209; Ennis *v.* Ennis, 103 Ill. 95; Johnson *v.* People, 84 Ill. 377; Haines *v.* Cearlock, 95 Ill. App. 203; Roheson *v.* Lagow, 73 Ill. App. 665; Grier *v.* Cable, 53 Ill. App. 350; Dailey *v.* Phillips, 52 Ill. App. 444; Columbian Light, etc., Co. *v.* Bunker, 51 Ill. App. 258; Traver *v.* Rogers, 16 Ill. App. 372; McFadon *v.* McEwen, 22 Ill. App. 563; Morris *v.* Morris, 12 Ill. App. 68.

Bastardy.— An appeal lies to the circuit court from a county court in bastardy proceedings. Stivers *v.* People, (Ill. 1894) 38 N. E. 574 [*overruling* Lee *v.* People, 140 Ill. 536, 30 N. E. 690]. See also Lewis *v.* People, 82 Ill. 104; Peak *v.* People, 76 Ill. 289; Rogers *v.* People, 34 Ill. App. 448.

Trial is de novo on appeal from a county to a circuit court in matters of assessment, and the latter court does not acquire any jurisdiction beyond that of the county court. Brown *v.* Joliet, 22 Ill. 123. And so on appeals from the county probate court. Lovell *v.* Divine, 12 Ill. App. 50. See also *In re* Storey, 120 Ill. 244, 11 N. E. 209.

21. Ill. Const. (1870), art. 6, § 18.

22. Starr & C. Anno. Stat. Ill. (1896), p. 1203, c. 37, § 285.

23. Perry *v.* Bozarth, 198 Ill. 328, 64 N. E. 1076, construing Starr & C. Anno. Stat. Ill. (1896), p. 3114, c. 110, § 88.

Ill. Const. (1870), art. 6, § 11, authorizing the creation of inferior appellate courts, to which such appeals as the legislature provide may be prosecuted, and from which appeals shall lie to the supreme court in cases involving a freehold, does not give the appellate court jurisdiction of an appeal involving a franchise, but merely authorizes the legislature so to do, with a condition that in such case there may be a further appeal to the supreme court. Perry *v.* Bozarth, 198 Ill. 328, 64 N. E. 1076.

The word "franchise," as used in the appellate court act in relation to appeals directly from the trial court to the supreme court, does not include a privilege merely, but is used in the restricted sense of a special privilege conferred by grant from the state. Hesing *v.* Atty.-Gen., 104 Ill. 292.

24. Bixler *v.* Summerfield, 195 Ill. 147, 62 N. E. 849; People *v.* Board of Trade, 193 Ill. 577, 62 N. E. 196; Chicago Steel Works *v.* Illinois Steel Co., 153 Ill. 9, 38 N. E. 1033; People *v.* Cooper, 139 Ill. 461, 29 N. E. 872; People *v.* O'Hair, 128 Ill. 20, 21 N. E. 211 [*reversing* 29 Ill. App. 239]; Mills *v.* Parlin, 106 Ill. 60; Talcott *v.* Schuh, 95 Ill. 201; Martens *v.* People, 85 Ill. App. 66 [*affirmed* in 186 Ill. 314, 57 N. E. 871]; Buda Foundry, etc., Co. *v.* Columbian Celebration Co., 55 Ill. App. 381; People *v.* Matthews, 53 Ill. App. 305; Parlin *v.* Mills, 11 Ill. App. 396; Springfield, etc., R. Co. *v.* Peters, 8 Ill. App. 300. See also People *v.* Marquiss, 192 Ill. 377, 61 N. E. 352; Winne *v.* People, 177 Ill. 268, 52 N. E. 377; People *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43; American L. & T. Co. *v.* Minnesota, etc., R. Co., 157 Ill. 641, 42 N. E. 153; People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843.

An office is not a franchise.— Whipple *v.* People, 180 Ill. 258, 54 N. E. 279; Graham *v.* People, 104 Ill. 321; McGrath *v.* People, 100 Ill. 464; People *v.* Holtz, 92 Ill. 426. But the right to hold a municipal office is a franchise when depending on the legality of the incorporation of a municipality. People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843.

25. O'Donnell *v.* Illinois Steel Co., 53 Ill. App. 314.

26. Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388.

merits of the cause cannot be adjudicated without determining the question of freehold, or where the necessary result of the judgment is that one party loses, and the other gains, a freehold estate, or where the title is so put in issue by the pleadings that a decision of such issue is necessarily required.[27] It is not essential, however, to the question that one party must lose, and another gain, the freehold;[28] and if a freehold is only incidentally or collaterally involved, the appeal is not to be taken directly to the supreme court.[29] The appellate court, however,

27. Helton *v.* Elledge, 199 Ill. 95, 64 N. E. 1091; Seidschlag *v.* Antioch, 198 Ill. 413, 64 N. E. 969; Harlem *v.* Suburban R. Co., 198 Ill. 337, 64 N. E. 1010; Perry *v.* Bozarth, 198 Ill. 328, 64 N. E. 1076; Dolton *v.* Malin, 102 Ill. App. 417; Smith *v.* Patton, 97 Ill. App. 180; Mills *v.* Wilson, 95 Ill. App. 88; Rice *v.* Adams, 91 Ill. App. 505; Vose *v.* Northwestern Loan, etc., Assoc., 83 Ill. App. 261; Gage *v.* McLaughlin, 7 Ill. App. 623; Neimeyer *v.* Knight, 7 Ill. App. 200; Randolph County *v.* Caldwell, 7 Ill. App. 135; McDowell *v.* Lucas, 7 Ill. App. 128.

The rule applies to a case where the title to lands is in controversy (Smith *v.* Patton, 97 Ill. App. 180), a claim in an equity suit to the fee of lands (Pratt *v.* Kendig, 30 Ill. App. 281), a case where the effect of the decree is to take a freehold out of one person and put it in another (Mills *v.* Wilson, 95 Ill. App. 88), all cases in law or equity involving a freehold (Chicago Theological Seminary *v.* Gage, 103 Ill. 175), a case where the question of freehold is only one of law, to be determined upon the pleadings (Ducker *v.* Wear, 45 Ill. App. 153), an action to set aside an order in proceedings under an assignment for creditors, part of the assigned estate being lands (Howe *v.* Warren, 154 Ill. 227, 40 N. E. 472), a bill by the holder of a sheriff's deed to have an alleged adverse title set aside as colorable (Shelton *v.* Blake, 115 Ill. 275, 6 N. E. 409), a claim for relief in equity for a cloud upon title, and a defense of title to part of the land (Bremer *v.* Calumet, etc., Canal, etc., Co., 123 Ill. 104, 13 N. E. 837), a suit to have a deed of lots, formed by accretion, set aside as a cloud upon title (Rutz *v.* Kehr, (Ill. 1890) 25 N. E. 957), an action by a husband, as tenant by the curtesy, to have a deed by him and his wife set aside (Agnew *v.* Fulton, 15 Ill. App. 668), an allegation and denial as to the amount of land intended to be conveyed in a bill to correct a deed (Baker *v.* Updike, 47 Ill. App. 516), an action where the existence of a passage for stock and wagons under the right of way of a railroad company is involved (Cleveland, etc., R. Co. *v.* Munsell, 94 Ill. App. 10), an action involving the right of one owning a drain to go upon the lands of another to repair it (Wessels *v.* Colebank, 174 Ill. 618, 51 N. E. 639), an action of trespass to real estate where the only issue was its dedication as a public alley (Galt *v.* Palmer, 89 Ill. App. 479), an action of trespass to real estate, where the defense was *liberum tenementum*, license and not guilty (Ragains *v.* Stout, 81 Ill. App. 209. See also Piper *v.* Connelly, 108 Ill. 646; Alton *v.* Fishback, 81 Ill. App. 86; Chicago, etc., R. Co. *v.* Robbins, 70 Ill. App. 195; West Chicago St. R. Co. *v.* Morrison, etc., Co., 54 Ill. App. 556), an action of forcible entry and detainer, by one claiming under a sheriff's sale, against one in possession claiming title from third persons (Kepley *v.* Luke, 10 Ill. App. 403), a suit by a ward for an accounting and to establish a resulting trust in land alleged to have been bought with the ward's money (Lehmann *v.* Rothbarth, 111 Ill. 185), a bill against executors for division and distribution of the estate, real and personal, and for the construction of the will as to the time of distribution (Newberry *v.* Blatchford, 106 Ill. 584), and an injunction suit against a municipal corporation, where ownership of the land on which defendant is about to construct a bridge is alleged and denied (Riverside *v.* Watson, 54 Ill. App. 432).

28. Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 54 Ill. App. 277.

The test as to whether or not a freehold is involved is to determine whether, as a result of the execution of the judgment or decree, one of the parties gains or loses a freehold estate. McDavid *v.* Sutton, 104 Ill. App. 626.

29. Pitts *v.* Looby, 142 Ill. 534, 32 N. E. 519; Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Payne *v.* Miller, 9 Ill. App. 403; McCarty *v.* Reeve, 8 Ill. App. 44.

The rule applies to an application for a writ of assistance which involves only the question of petitioner's right to the possession (Kerr *v.* Brawley, 193 Ill. 205, 61 N. E. 1057), a suit in equity to compel a railroad company to maintain a farm crossing (Cleveland, etc., R. Co. *v.* Hobbie, 61 Ill. App. 396), a bill to enjoin the interruption by a city of complainant's possession of land (Bryan *v.* East St. Louis, 105 Ill. 144), a question dependent only upon the location of the true boundary line between lots (Brownmark *v.* Livingston, 190 Ill. 412, 60 N. E. 618), an action for injury to real property, and a defense justifying acts under a claim of ownership, but not equivalent to a plea *liberum tenementum* (Cobine *v.* McKittrick, 186 Ill. 324, 57 N. E. 880), an appeal from a decree of specific performance of a contract for the sale of land, the only question raised being the amount due under the finding (Smith *v.* Gallentin, 171 Ill. 423, 49 N. E. 487), a suit to cancel an agreement to exchange lands and for liquidated damages and a cross bill praying specific performance or payment of liquidated damages (Hutchinson *v.* Howe, 100 Ill. 11), a case of dower and homestead rights which have been settled, only a controversy remaining as to the amount payable to lift

has jurisdiction to investigate the question whether a freehold is in fact involved, but if it decides in the affirmative, its jurisdiction determines with the dismissal.[30] Again, where no objection is made to the decree settling the freehold, an appeal from a part of the decree not involving such question must be taken to the appellate court.[31]

(II) *Applications of Rule.* The rule just stated[32] applies to suits which involve an easement,[33] suits which relate to highways,[34] suits which involve the title, or transfer of title to land,[35] partition suits,[36] actions of ejectment,[37] suits

encumbrances (Selb *v.* Mabee, 14 Ill. App. 574), a suit to set aside a fraudulent decree of divorce after defendant's death, the heirs being parties, no issue involving directly a freehold being raised (Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365), a suit, by a trustee in bankruptcy, to set aside a fraudulent conveyance, where the claims in bankruptcy have been paid without a sale or further conveyance of title other than that of the one general transfer to the trustee (Lamont *v.* Regan, 96 Ill. App. 359), a bill, by two trustees, to determine whether the resignation of a third trustee was effective, whether the trustees had power to sell the real estate, and whether they should carry out a contract with the bidder therefor, and for directions as to execution of the trust (Casey *v.* Canavan, 93 Ill. App. 538), and an action against a trustee, under a will to require him to account for certain securities belonging to the trust fund, and to restore thereto the amount of wasted securities, although the title to land is held, but not claimed, except as trustee (Nevitt *v.* Woodburn, 175 Ill. 376, 51 N. E. 593).

30. Smith *v.* Patton, 97 Ill. App. 180.

31. Rhodes *v.* Rhodes, 172 Ill. 187, 50 N. E. 170.

32. See *supra*, XI, B, 10, e, (I).

33. Waggeman *v.* North Peoria, 160 Ill. 277, 43 N. E. 347; Dierks *v.* Highway Com'rs, 142 Ill. 197, 31 N. E. 496; Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065; Chronic *v.* Pugh, 136 Ill. 539, 27 N. E. 415; Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503; Oswald *v.* Wolf, 126 Ill. 542, 19 N. E. 28 [*affirming* 25 Ill. App. 501]; Cottrell *v.* Cates, 67 Ill. App. 401; Brushy Mound *v.* McClintock, 46 Ill. App. 273. But see Keating *v.* Hayden, 132 Ill. 308, 23 N. E. 1023; Eckhart *v.* Irons, 114 Ill. 469, 6 N. E. 15; Lucan *v.* Cadwallader, 114 Ill. 285, 7 N. E. 286.

34. Taylor *v.* Pierce, 174 Ill. 9, 50 N. E. 1109 [*reversing* 71 Ill. App. 525]; Farrelly *v.* Kane, 172 Ill. 415, 50 N. E. 118; Crete *v.* Hewes, 168 Ill. 330, 48 N. E. 36 [*reversing* 68 Ill. App. 305]; Riverside *v.* Watson, 157 Ill. 669, 41 N. E. 1020 [*affirming* 54 Ill. App. 432]; Brushy Mound *v.* McClintock, 146 Ill. 643, 35 N. E. 159; Chaplin *v.* Highways Com'rs, 126 Ill. 264, 18 N. E. 765 [*overruling* Eckhart *v.* Irons, 114 Ill. 469, 6 N. E. 15; Lucan *v.* Cadwallader, 114 Ill. 285, 7 N. E. 286]; Cox *v.* Highway Com'rs, 97 Ill. App. 218; Highway Com'rs *v.* Elwood, 96 Ill. App. 239; Brewster *v.* Cahill, 81 Ill. App. 626; Alton *v.* Fishback, 81 Ill. App. 86; Roheson *v.* Hutton, 77 Ill. App. 464; Whitley Tp. *v.* Linville, 72 Ill. App. 426; Vermont *v.* Miller, 60 Ill. App. 166; Illinois Cent. R. Co. *v.* Mattoon Tp., 60 Ill. App. 165; Highways Com'rs *v.* Green, 55 Ill. App. 667; Madison Tp. *v.* Gallagher, 54 Ill. App. 91; Mt. Carmel *v.* McClintock, 53 Ill. App. 544; Wright *v.* Highway Com'rs, 46 Ill. App. 271; Highways Com'rs *v.* Chicago, etc., R. Co., 34 Ill. App. 32; Goudy *v.* Lake View, 31 Ill. App. 652. But see Rhoten *v.* Baker, 193 Ill. 271, 61 N. E. 1058; Shelby County *v.* People, 159 Ill. 242, 42 N. E. 777; Edwards County Road Dist. No. 3 *v.* Miller, 156 Ill. 221, 40 N. E. 447; Monroe *v.* Van Meter, 100 Ill. 347.

35. Hand *v.* Waddell, 167 Ill. 402, 47 N. E. 772; Eastman *v.* Littlefield, 164 Ill. 254, 45 N. E. 141; Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 576, 41 N. E. 918 [*affirming* 54 Ill. App. 277]; Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Rutz *v.* Kehn, 143 Ill. 558, 29 N. E. 553; Kankakee, etc., R. Co. *v.* Straut, 101 Ill. 653; Smith *v.* Patton, 97 Ill. App. 180; Mills *v.* Wilson, 95 Ill. App. 88; Rice *v.* Adams, 91 Ill. App. 505; Vose *v.* Northwestern Loan, etc., Assoc., 83 Ill. App. 261; Roberts *v.* Woods, 82 Ill. App. 630; Bethmann *v.* Bowman, 81 Ill. App. 85; Bauer Grocer Co. *v.* Zelle, 71 Ill. App. 73; McDole *v.* Kingsley, 62 Ill. App. 30; Humphreys *v.* Roth, 57 Ill. App. 40; Davis *v.* Chicago Dock Co., 27 Ill. App. 569; Patterson *v.* McKinney, 6 Ill. App. 394. But see Roodhouse *v.* Briggs, 194 Ill. 435, 62 N. E. 778; Brownmark *v.* Livingston, 190 Ill. 412, 60 N. E. 618; La Fleure *v.* Seivert, 188 Ill. 525, 59 N. E. 421; Prouty *v.* Moss, 188 Ill. 84, 58 N. E. 926; Hays City First Nat. Bank *v.* Vest, 187 Ill. 389, 58 N. E. 229; Goodkind *v.* Bartlett, 136 Ill. 18, 26 N. E. 387; Hunt *v.* Connor, 74 Ill. App. 298; Eppstein *v.* Nathan, 71 Ill. App. 192.

36. Schwartz *v.* Ritter, 186 Ill. 209, 57 N. E. 887; Wilson *v.* Dresser, 152 Ill. 387, 38 N. E. 888, 137 Ill. 474, 27 N. E. 536 [*affirming* 37 Ill. App. 607]; Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110 [*affirming* 44 Ill. App. 576]; Le Moyne *v.* Harding, 132 Ill. 78, 23 N. E. 416; Stunz *v.* Stunz, 131 Ill. 309, 23 N. E. 410; Bangs *v.* Brown, 110 Ill. 96; Carter *v.* Penn, 99 Ill. 390 [*reversing* 8 Ill. App. 299]; McFarland *v.* McFarland, 72 Ill. App. 425; Rohn *v.* Harris, 31 Ill. App. 26. But see Taylor *v.* Dawson, 65 Ill. App. 232. See also Malaer *v.* Hudgens, 130 Ill. 225, 22 N. E. 855.

37. Hartshorn *v.* Dawson, 2 Ill. App. 80. See also Bowar *v.* Chicago West Division R. Co., 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81.

which involve homestead rights,[38] suits relating to the assignment of dower,[39] suits involving tax sales of land or deeds thereunder,[40] and suits relating to the validity and construction of devises of land.[41] The question of freehold may be involved in the original suit, however, and not in the appeal, and so qualify the rule.[42] So a freehold is not involved in actions of forcible entry and detainer,[43] in bills to foreclose mortgages on real estate,[44] in bills to redeem or to have a deed declared a mortgage, and to redeem,[45] in suits to enforce liens on land,[46] and in suits involving the right to subject land to the payment of debts.[47]

11. INDIANA — a. Supreme Court. The supreme court has jurisdiction coextensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It also has such original jurisdiction as the general assembly may confer.[48] No appeal can be taken directly to the supreme court unless it be within one of the following classes: (1) Cases in which there is in question, and such question is duly presented,[49]

38. Pettyjohn *v.* Adams, 95 Ill. App. 243. See also Fizette *v.* Fizette, 37 Ill. App. 536; Board of Trustees *v.* Beale, 6 Ill. App. 536.

39. Marsh *v.* Irwin, 168 Ill. 50, 47 N. E. 768; Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006; Walker *v.* Rand, 31 Ill. App. 636; Hart *v.* Burch, 31 Ill. App. 22. But see Heuschkel *v.* Heuschkel, 86 Ill. App. 132.

40. Gage *v.* Scales, 100 Ill. 218; Angelo *v.* Angelo, 48 Ill. App. 580; Le Moyne *v.* Harding, 31 Ill. App. 624 [*affirmed* in 132 Ill. 23, 23 N. E. 414, 132 Ill. 78, 23 N. E. 416]. But see Westcott *v.* Kinney, 120 Ill. 564, 12 N. E. 81; Gage *v.* Pease, 107 Ill. 598; Gage *v.* Busse, 94 Ill. 590; Ragor *v.* Lomax, 22 Ill. App. 628.

41. More *v.* More, 191 Ill. 97, 60 N. E. 880 [*reversing* 92 Ill. App. 465]; Parsons *v.* Millar, 189 Ill. 107, 59 N. E. 606; Furnish *v.* Rogers, 47 Ill. App. 245; Craig *v.* Southard, 45 Ill. App. 529. See also Moyer *v.* Swygart, 21 Ill. App. 497; Bice *v.* Hall, 21 Ill. App. 298.

42. Fread *v.* Fread, 165 Ill. 228, 46 N. E. 268 [*affirming* 61 Ill. App. 586]; Franklin *v.* North America Loan, etc., Co., 152 Ill. 345, 38 N. E. 921; Moore *v.* Williams, 132 Ill. 591, 24 N. E. 617; Cheney *v.* Teese, 113 Ill. 444; Pritchard *v.* Walker, 22 Ill. App. 286.

43. McDole *v.* Shepardson, 156 Ill. 383, 40 N. E. 953; Spence *v.* Anderson, 108 Ill. 457; Yokem *v.* Lovell, 107 Ill. 209; Kepley *v.* Luke, 106 Ill. 395; Schofield *v.* Pope, 104 Ill. 130; Morris *v.* Preston, 93 Ill. 215; McGuirk *v.* Burry, 93 Ill. 118.

44. Kronenberger *v.* Heinemann, 190 Ill. 17, 60 N. E. 64; Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Tormohlen *v.* Walter, 175 Ill. 442, 51 N. E. 706; Van Meter *v.* Thomas, 153 Ill. 65, 38 N. E. 1036; Wilkinson *v.* Gage, 133 Ill. 137, 24 N. E. 562; Sanford *v.* Kane, 127 Ill. 591, 20 N. E. 810; Aikin *v.* Cassiday, 105 Ill. 22; McIntyre *v.* Yates, 100 Ill. 475; Pinneo *v.* Knox, 100 Ill. 471; Poole *v.* Kelsey, 95 Ill. App. 233; Wright *v.* Bruschke, 62 Ill. App. 358; Piper *v.* Headlee, 39 Ill. App. 93; Gage *v.* Chicago Theological Seminary, 8 Ill. App. 410. But see Smith *v.* Jackson, 153 Ill. 399, 39 N. E. 130; Kerfoot *v.* Cronin, 105 Ill. 609; Parlin, etc., Co. *v.* Galloway, 95 Ill. App. 60.

A hill to foreclose a chattel mortgage of building on leased ground does not involve the title to real estate. Wheeler *v.* Gage, 28 Ill. App. 427.

45. Schoendubee *v.* International Bldg., etc., Union, 183 Ill. 139, 55 N. E. 710; Adamski *v.* Wieczorek, 181 Ill. 361, 54 N. E. 1034; Ryan *v.* Sanford, 133 Ill. 291, 24 N. E. 428; Kirchoff *v.* Union Mut. L. Ins. Co., 128 Ill. 199, 20 N. E. 808; Lynch *v.* Jackson, 123 Ill. 360, 14 N. E. 697; Hollingsworth *v.* Koon, 113 Ill. 443; Hoover *v.* Ekdahl, 59 Ill. App. 312; Story *v.* Springer, 43 Ill. App. 495. But see Nichols *v.* Otto, 132 Ill. 91, 23 N. E. 411; Sanford *v.* Kane, 127 Ill. 591, 20 N. E. 810; Pease *v.* Hale, 37 Ill. App. 272.

46. Chicago, etc., R. Co. *v.* Peck, 112 Ill. 408. See also Poole *v.* Kelsey, 95 Ill. App. 233.

In a suit to foreclose a mechanic's lien a freehold is not involved. Pearson Lumber Co. *v.* Brady, 159 Ill. 378, 42 N. E. 875; Clement *v.* Reitz, 103 Ill. 315.

47. Pringle *v.* James, 185 Ill. 274, 56 N. E. 1055; Moshier *v.* Reynolds, 155 Ill. 72, 39 N. E. 621; Hupp *v.* Hupp, 153 Ill. 490, 39 N. E. 124; Adkins *v.* Beane, 135 Ill. 530, 26 N. E. 657; Herdman *v.* Cooper, 125 Ill. 359, 17 N. E. 826; Blackman *v.* Preston, 119 Ill. 240, 10 N. E. 669; Johns *v.* Boyd, 117 Ill. 339, 7 N. E. 588; Illinois Furnace Co. *v.* Vinnedge, 106 Ill. 650; Dobbins *v.* Cruger, 106 Ill. 383; Chicago, etc., R. Co. *v.* Watson, 105 Ill. 217; Sawyer *v.* Moyer, 105 Ill. 192; Conkey *v.* Knight, 104 Ill. 337; Galbraith *v.* Plasters, 101 Ill. 444; Magnusson *v.* Cronholm, 51 Ill. App. 473. But see Ducker *v.* Wear, etc., Dry Goods Co., 145 Ill. 653, 34 N. E. 562; Frank *v.* King, 121 Ill. 250, 12 N. E. 720; Dobbins *v.* Cruger, 11 Ill. App. 114; Patterson *v.* McKinney, 6 Ill. App. 394.

In suits by an administrator to sell lands to pay debts no freehold is involved. Richie *v.* Cox, 188 Ill. 276, 58 N. E. 952; Field *v.* Coker, 161 Ill. 186, 43 N. E. 916; Lynch *v.* Hickey, 13 Ill. App. 139.

48. Ind. Const. art. 7, § 164.

49. The constitutionality of a statute is involved and is "duly presented" where it is raised by a person as *amicus curiæ*. Boyd *v.* Brazil Block Coal Co., 152 Ind. 543, 49 N. E.

either the validity of a franchise,[50] the validity of an ordinance [51] of a municipal corporation, the constitutionality of a statute,[52] state or federal, or rights guaranteed by the state or federal constitution;[53] (2) all prosecutions for felonies; (3) actions to contest the election of public officers; (4) cases of mandate [54] and prohibition; (5) cases of habeas corpus; (6) actions to contest wills; (7) interlocutory orders appointing or refusing to appoint receivers, and interlocutory orders granting or dissolving, or overruling motions to dissolve, temporary injunctions;[55] (8) proceedings to establish public drains and proceedings to change or improve watercourses;[56] (9) proceedings to establish gravel roads.[57] Again if in any case two of the judges of either division of the appellate court are of the opinion that a ruling precedent of the supreme court is erroneous, the case, with a written statement of the reasons for such opinion, shall be transferred to the supreme court.[58] But in any case decided by either division of the appellate court any losing party has the right to appeal to the supreme court, only when the amount in controversy, exclusive of costs and interest on the judgment of the trial court, exceeds six thousand dollars, or where the court is equally divided.[59]

797. But where no provision of the constitution, state or federal, is cited or quoted, no question of constitutional law is "duly presented." *In re* Pittsburg, etc., R. Co., 147 Ind. 697, 47 N. E. 151. So the question of the validity of an ordinance is not "duly presented" merely because in the circuit court, on appeal from the city court, a demurrer to the answer alleging the invalidity of the ordinance was sustained. Berkey *v.* Elkhart, 141 Ind. 408, 40 N. E. 1081.

50. Shaul *v.* Citizens' State Bank, 157 Ind. 281, 61 N. E. 559.

51. People's Nat. Bank *v.* Ayer, 24 Ind. App. 212, 56 N. E. 267; Pittsburg, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Griffee *v.* Summitville, 10 Ind. App. 332, 37 N. E. 280, 1068.

52. See State *v.* Barnett, 159 Ind. 432, 65 N. E. 515; State *v.* Wright, 159 Ind. 422, 65 N. E. 289; Colliery Engineer Co. *v.* American Car, etc., Co., 157 Ind. 111, 60 N. E. 941; Whisnand *v.* Fee, (Ind. 1898) 49 N. E. 817; Dowell *v.* Talbot Paving Co., 138 Ind. 675, 38 N. E. 389; Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26; *Ex p.* Sweeney, 126 Ind. 583, 27 N. E. 127; State *v.* Bagby, 29 Ind. App. 554, 64 N. E. 895; Woods *v.* Indiana Mut. Bldg., etc., Assoc., 28 Ind. App. 359, 62 N. E. 454; Greensburg *v.* Cleveland, etc., R. Co., 23 Ind. App. 141, 55 N. E. 46; Pittsburg, etc., R. Co. *v.* Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; State *v.* Atkinson, (Ind. App. 1894) 38 N. E. 340; Durham *v.* State, (Ind. App. 1892) 30 N. E. 936.

Where the validity of a statute is involved the cause will be transferred from the appellate to the supreme court. Praigg *v.* Western Paving, etc., Co., (Ind. App. 1895) 42 N. E. 372; State *v.* Columbus, etc., R. Co., 9 Ind. App. 226, 36 N. E. 651; Indiana, etc., R. Co. *v.* Larrew, (Ind. App. 1892) 30 N. E. 152; Fuller *v.* Cox, (Ind. App. 1892) 30 N. E. 152. See also Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26. But where the supreme court has theretofore decided that a statute is constitutional, it is unnecessary to transfer the cause. Van Camp Hardware, etc., Co. *v.* O'Brien, (Ind. App. 1902) 62 N. E. 464.

53. Willard *v.* Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403.

54. See State *v.* Friedley, 151 Ind. 404, 51 N. E. 473.

55. Leatherman *v.* Orange County, (Ind. App. 1897) 47 N. E. 347; Wood *v.* Hughes, (Ind. App. 1892) 32 N. E. 594.

If the decree appointing a receiver is a final one an appeal is to be taken to the appellate and not to the supreme court. Hay *v.* McDaniel, 156 Ind. 390, 59 N. E. 1064.

56. Haefgen *v.* Harness, (Ind. App. 1897) 46 N. E. 1006; Denton *v.* Thompson, (Ind. App. 1893) 34 N. E. 128.

57. 2 Horner Anno. Stat. Ind. (1901), § 6565*e*.

58. 2 Horner Anno. Stat. Ind. (1901), § 6565*f*; Ind. Acts (1901), c. 247, § 10; Wagner *v.* Carskadon, 28 Ind. App. 573, 60 N. E. 731, 61 N. E. 976.

Where a petition for a rehearing in the appellate court has been overruled the aggrieved party may file an application in the supreme court for transfer thereto on the ground that the opinion of said division of said appellate court contravenes a ruling precedent of the supreme court, or that a new question of law is directly involved, and was decided erroneously and upon granting of the application, presented in compliance with the statute, the case shall be transferred to the supreme court. 2 Horner Anno. Stat. Ind. (1901), § 6565*f*; Ind. Acts (1901), c. 247, § 10.

The transfer of a cause by the supreme court is final and cannot be collaterally attacked. Wagner *v.* Carskadon, 28 Ind. App. 573, 60 N. E. 731, 61 N. E. 976. See also Newman *v.* Gates, 150 Ind. 59, 49 N. E. 826. But the supreme court cannot compel the court of appeals to transfer to it a record on appeal from review of a judgment in an action within the appellate court's jurisdiction. *Ex p.* Kiley, 135 Ind. 225, 34 N. E. 989. Again after an adverse decision in the supreme court the question cannot be presented again to the appellate court. Willard *v.* Albertson, 23 Ind. App. 166, 53 N. E. 1078, 54 N. E. 446.

59. 2 Horner Anno. Stat. Ind. (1901), § 6565*f*; Ind. Acts (1901), c. 247, § 10.

b. Appellate Court. All cases other than those above specified [60] as appealable to the supreme court are appealable to the appellate court, the jurisdiction of which is final except as above set forth.[61]

c. Other Courts. The circuit court has such appellate jurisdiction as may be conferred by law.[62] Appellate jurisdiction has also been conferred upon superior courts,[63] justices of the peace,[64] and generally upon courts of competent[66] or of general jurisdiction.[66]

12. Iowa — a. Supreme Court. The supreme court has appellate jurisdiction [67] only in cases in chancery, and constitutes a court for the correction of errors at law,[68] under such restrictions as the general assembly may by law prescribe,[69] and has power to issue all writs [70] and process necessary to secure justice to parties and exercise a supervisory control over all inferior judicial tribunals throughout the state.[71]

b. Other Courts. The district court possesses and exercises jurisdiction in all appeals and writs of error taken in civil and criminal actions and special proceedings authorized to be taken from all inferior courts, tribunals, boards, or officers, under any provisions of the laws of the state, and it has a general supervision thereof in all matters to prevent and correct abuses, where no other remedy is provided.[72] Writs of error and appeals may be taken to the superior court from justices' courts in the township in which the court is held, and by consent of parties from any other township in the county.[73]

13. Kansas — a. Supreme Court. The supreme court has original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus,[74] and such appellate jurisdiction as may be provided by law. Its jurisdiction is coextensive with

Division of court see Hudson *v.* Wood, (Ind. 1899) 54 N. E. 104.

Money demands and money judgments only are appealable, and not decrees or judgments involving ownership or possession of real estate merely. Smith *v.* American Crystal Monument Co., (Ind. 1902) 65 N. E. 524.

60. See *supra*, XI, B, 11, a.

61. 2 Horner Anno. Stat. Ind. (1901). §§ 6565*e*, 6565*f*, 6565*g*; Heady *v.* Brown, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85; Indiana Natural Gas, etc., Co. *v.* Wootens, 141 Ind. 315, 40 N. E. 669; Dallin *v.* McIvor, 140 Ind. 386, 39 N. E. 461; Midland R. Co. *v.* State, 138 Ind. 279, 37 N. E. 986; Terre Haute *v.* Blake, 136 Ind. 636, 36 N. E. 422; Chicago, etc., R. Co. *v.* Towle, (Ind. 1894) 36 N. E. 213; Rauh *v.* Weis, 133 Ind. 264, 32 N. E. 880; *Ex p.* Sweeney, 126 Ind. 583, 27 N. E. 127; Hammond *v.* New York, etc., R. Co., 126 Ind. 597, 27 N. E. 130; Baker *v.* Groves, 126 Ind. 593, 29 N. E. 1076; Leatherman *v.* Orange County, (Ind. App. 1897) 47 N. E. 347; North *v.* Barringer, (Ind. App. 1897) 46 N. E. 479; Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 587, 42 N. E. 1031; Howks *v.* Goshen, (Ind. App. 1895) 42 N. E. 242; Kiley *v.* Murphy, 7 Ind. App. 239, 34 N. E. 112, 650; Rissing *v.* Ft. Wayne, 7 Ind. App. 103, 34 N. E. 453; Shoemaker *v.* South Bend Spark Arrester Co., 7 Ind. App. 102, 34 N. E. 126; Evans *v.* West, 7 Ind. App. 70, 34 N. E. 244; Louisville, etc., R. Co. *v.* Malott, 6 Ind. App. 545, 33 N. E. 1009; Ft. Wayne Land, etc., Co. *v.* Maumee Ave. Gravel Road Co., (Ind. App. 1892) 30 N. E. 915.

62. Horner Anno. Stat. Ind. (1901), § 1314; Thornton Stat. Ind. (1897), § 1378; Hamilton *v.* Ft. Wayne, 73 Ind. 1; Hamlyn *v.* Nesbit, 37 Ind. 284; Henry *v.* Henry, 13 Ind. 250.

63. Thornton Stat. Ind. (1897), §§ 1416, 8224.

64. 2 Horner Anno. Stat. Ind. (1901), § 5079; Thornton Stat. Ind. (1897), § 7128.

65. Thornton Stat. Ind. (1897), § 3564.

66. 1 Horner Anno. Stat. Ind. 1901), §§ 3180, 3372, 3703; Thornton Stat. Ind. (1897), §§ 3711, 4516.

67. Simonson *v.* Chicago, etc., R. Co., 48 Iowa 19; Harvey *v.* Miller, 25 Iowa 219; Powell *v.* Spaulding, 3 Greene (Iowa) 417; Perkins *v.* Testerment, 3 Greene (Iowa) 207; Reed *v.* Murphy, 2 Greene (Iowa) 568; Preston *v.* Daniels, 2 Greene (Iowa) 536.

68. Harvey *v.* Miller, 25 Iowa 219.

69. Coffin *v.* Davenport, 26 Iowa 515.

70. Manning *v.* Poling, 114 Iowa 20, 83 N. W. 895, 86 N. W. 30; Westbrook *v.* Wicks, 36 Iowa 382.

71. Iowa Const. art. 5, § 4.

The supreme court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. Iowa Anno. Code (1897), § 4100.

Motion for new trial.— The supreme court has no jurisdiction to hear and determine motions for a new trial. Stewart *v.* Pierce, 116 Iowa 733, 89 N. W. 234.

72. Iowa Anno. Code (1897), § 225.

73. Iowa Anno. Code (1897), § 260.

74. State *v.* Allen, 5 Kan. 213. See also Chicago, etc., R. Co. *v.* Harris, 42 Kan. 223, 21 Pac. 1071.

The supreme court has no original jurisdiction of an action to enjoin one from exercising the duties and powers of county attorney. Foster *v.* Moore, 32 Kan. 483, 4 Pac. 850.

the state.[75] It may vacate or modify judgments and certain final and other orders of district or other courts of record, except a probate court,[76] but has no jurisdiction, unless the amount or value in controversy exclusive of costs in civil actions exceeds one hundred dollars.[77] It has jurisdiction in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution, or false imprisonment is declared upon, or the constitution of the state, or the constitution, laws, or treaties of the United States. It has also jurisdiction over certain motions for the rehearing of cases decided in the court of appeals prior to a specified date, and in certain other cases with relation to the court of appeals and cases therein.[78]

b. District Courts. District courts have such jurisdiction in their respective districts as may be provided by law,[79] and all appeals from probate courts and justices of the peace shall be to the district courts,[80] and also from certain police courts.[81] District courts have jurisdiction in cases of appeal and error from all inferior courts and tribunals, and have a general supervision and control of all inferior courts and tribunals to prevent and correct error and abuses.[82]

14. KENTUCKY — a. Court of Appeals. The court of appeals has appellate jurisdiction only,[83] which is coextensive with the state, under such restrictions and regulations not repugnant to the constitution as may from time to time be prescribed by law. Such court has power to issue such writs[84] as may be neces-

75. Kan. Const. art. 3, § 3; Dassler Gen. Stat. Kan. (1899), § 150.

76. Nash *v.* Campbell, 15 Kan. 226; Crane *v.* Giles, 3 Kan. 54.

Court of visitation.— The supreme court may review final decrees of the court of visitation. Dassler Gen. Stat. Kan. § 5812.

77. Barker *v.* Lanyon Zinc Co., 64 Kan. 884, 67 Pac. 629; Staley *v.* Chicago, etc., R. Co., 63 Kan. 885, 65 Pac. 643; Bailey *v.* Berry, 63 Kan. 880, 64 Pac. 981; Kansas City *v.* Frowerk, 61 Kan. 859, 64 Pac. 68; Davenport *v.* Franklin County School Dist. No. 4, 62 Kan. 869, 64 Pac. 596; Carlow *v.* Fowler, 62 Kan. 868, 63 Pac. 737; Conklin *v.* Hutchinson, 62 Kan. 867, 62 Pac. 1012; McClain *v.* Jones, 60 Kan. 639, 57 Pac. 500.

78. Kan. Laws (1901), c. 278, pp. 505–508.

During the existence of the court of appeals the supreme court had certain jurisdiction in relation thereto. See Holton *v.* Bimrod, 60 Kan. 860, 61 Kan. 13, 58 Pac. 558; McClain *v.* Jones, 60 Kan. 639, 57 Pac. 500; Erb *v.* Morasch, 60 Kan. 251, 56 Pac. 133; Standard Oil Co. *v.* Angevine, 60 Kan. 167, 55 Pac. 879; Stern *v.* Craig, (Kan. 1898) 51 Pac. 782; Hull *v.* Johnson, 10 Kan. App. 565, 63 Pac. 455; Landis *v.* Davidson, (Kan. App. 1898) 53 Pac. 488; Markley *v.* Kirby, 6 Kan. App. 494, 50 Pac. 953; McCalla *v.* Daugherty, 4 Kan. App. 410, 46 Pac. 30 [*affirmed* in 59 Kan. 719, 54 Pac. 1054]; Kansas City, etc., R. Co. *v.* Johnson County, 2 Kan. App. 742, 43 Pac. 1147. The effect of the act of Feb. 27, 1895, creating the court of appeals was to suspend the operation of the general provisions of the statute during the life of the court of appeals, and upon the expiration of that court [the second Monday of January, 1901] in the absence of any statute further staying the operation of such provisions, they became at once operative and effective; and the jurisdiction of the supreme court over all classes of litigation enumerated in the act of 1895 immediately thereafter attached and became reinstated as if no such act had been passed. A new act was not necessary to restore such jurisdiction, for the repealing part of said statute was not a general repeal, but only of such statutes as might interfere with the operation of the act of which said repealing clause was a part. Atchison, etc., R. Co. *v.* Morris, 65 Kan. 532, 70 Pac. 651.

Proceedings in error commenced while the court of appeals was in existence do not become cognizable by the supreme court in the first instance. Wood *v.* O'Hair, 64 Kan. 883, 67 Pac. 451.

79. Kan. Const. art. 3, § 153; Dassler Gen. Stat. Kan. (1899), § 153.

80. Kan. Const. art. 3, § 10; Dassler Gen. Stat. Kan. (1899), § 157.

81. Dassler Gen. Stat. Kan. (1899), §§ 784, 1006, 1117, 1135; Kan. Laws (1901), c. 114.

82. Dassler Gen. Stat. Kan. (1899), § 1879. See also Missouri Pac. R. Co. *v.* Atchison, 43 Kan. 529, 23 Pac. 610.

83. Marchand *v.* Russell, 78 Ky. 516; Beazley *v.* Mershon, 6 Bush (Ky.) 424; Daniel *v.* Warren County Ct., 1 Bibb (Ky.) 496; Morgan *v.* Register, Hard. (Ky.) 609.

Appellate jurisdiction implies, *ex vi termini*, a resort from an inferior to a superior tribunal for the purpose of reviewing the judgments of the former. Smith *v.* Carr, Hard. (Ky.) 305.

Jurisdiction as a revising tribunal is judicial only and extends only to those acts of inferior tribunals which are in their nature judicial or are done in the exercise of a judicial power. Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146.

84. Campbellville Tel. Co. *v.* Patteson, 69 S. W. 1070, 24 Ky. L. Rep. 832; Shackleford *v.* Patterson, 62 S. W. 1040, 23 Ky. L. Rep. 316.

sary to give it general control of inferior jurisdictions.[85] No appeal can be taken to such court for the recovery of money or personal property, if the value in controversy be less than two hundred dollars, exclusive of interest and costs,[86] nor to reverse a judgment granting a divorce or punishing contempt, nor from any order or judgment of a county court,[87] except in actions for the division of land or the allotment of dower, nor from any order or judgment of a quarterly, city,[88] police, fiscal, or justice's court, nor from a bond having the force of a judgment. In all other civil cases, the court of appeals has appellate jurisdiction over the final orders and judgments of all courts.[89]

b. Other Courts. Appeals may be taken to the circuit court from all orders and judgments of the fiscal court or quarterly court in civil cases, where the value in controversy, exclusive of interest and costs, is over twenty-five dollars, and from all judgments of the county court, where the amount in controversy is over fifty dollars, exclusive of interest and costs; and from all judgments and orders of said court in cases of bastardy, or in the settlement of accounts of personal representatives, assignees, guardians, trustees, curators, and other fiduciaries, and from orders granting, revoking, or refusing letters testamentary, or of administration, or appointing or refusing to appoint, or removing curators, guardians, trustees, or committees of estates, or granting or refusing to grant druggist, tavern, or liquor licenses,[90] and from judgments in proceedings to condemn land for any purpose, and in all other cases allowed by law.[91] Appeals may be taken to the quarterly court from all judgments and orders of justices, fiscal, city, or police courts, when the value in controversy is over ten dollars, exclusive of interest and costs.[92]

15. Louisiana — a. Supreme Court. Under the constitution[93] the supreme court, except as hereinafter stated, has appellate jurisdiction only,[94] which extends to all cases when the matter in dispute, or the fund to be distributed, whatever

Only judgments of inferior courts and not acts of ministerial officers of such courts are within jurisdiction as to writs. Smith *v.* Carr, Hard. (Ky.) 305.

85. Ky. Const. art. 4, § 1; Carroll Stat. Ky. (1899), §§ 110, 949.

86. Turner *v.* Pash, (Ky. 1891) 17 S. W. 809; Clarke *v.* Chiles, 2 T. B. Mon. (Ky.) 105; Hammond *v.* Lee, 62 S. W. 262, 23 Ky. L. Rep. 8; Gorman *v.* Glenn, 58 S. W. 776, 22 Ky. L. Rep. 839; Boune *v.* Beck, 58 S. W. 690, 22 Ky. L. Rep. 792; Brown *v.* Vancleave, 9 Ky. L. Rep. 150.

87. Hendrickson *v.* Bell County Ct., 7 Ky. L. Rep. 660. But see Boehler *v.* Com., 1 Duv. (Ky.) 3.

88. Smith *v.* Com., 1 S. W. 433, 8 Ky. L. Rep. 260.

89. Carroll Stat. Ky. (1899), § 950; Ky. Gen. Stat. c. 35, art. 1, subd. 2; Whitehead *v.* Brother's Lodge No. 132, I. O. O. F., 71 S. W. 933, 24 Ky. L. Rep. 1633.

Municipal ordinance.— An appeal to the court of appeals lies from a judgment of a judge of the Lexington city court, deciding against the validity of an ordinance or by-law of that city. Com. *v.* Ingraham, 7 Bush (Ky.) 106. But see Brannin *v.* Gleason, 14 Ky. L. Rep. 109.

Office or franchise.— An appeal lies to the court of appeals from an order, judgment, or decree relating to an office or franchise. Smith *v.* Cochran, 7 Bush (Ky.) 147; Justices Spencer County Ct. *v.* Harcourt, 4 B. Mon. (Ky.) 499.

Title to land.— Where the title to land is involved the court of appeals has jurisdiction. French *v.* Sewell, 93 Ky. 1, 29 S. W. 976; Stultz *v.* Farthing, 91 Ky. 372, 16 S. W. 80; Pittman *v.* Wakefield, 90 Ky. 171, 13 S. W. 525, 11 Ky. L. Rep. 972; Patterson *v.* T. J. Moss Tie Co., 71 S. W. 930, 24 Ky. L. Rep. 1571; Roach *v.* T. J. Moss Tie Co., 71 S. W. 2, 24 Ky. L. Rep. 1222; Hughes *v.* Merritt, 10 Ky. L. Rep. 543; Quiggins *v.* McCarty, 4 Ky. L. Rep. 444.

90. Hendrickson *v.* Bell County Ct., 7 Ky. L. Rep. 660. But see Boehler *v.* Com., 1 Duv. (Ky.) 3.

91. Carroll Stat. Ky. (1899), § 978; Ky. Gen. Stat. c. 35, art. 2, subd. 2.

The jurisdiction of the circuit courts remains as it existed when the present constitution became of full force, subject to the power of the general assembly to change the same, and this applies to the right to appeal or to sue out a writ of error. Ky. Const. art. 4, §§ 17, 18; Carroll Stat. Ky. (1899), §§ 126, 127.

92. Carroll Stat. Ky. (1899), § 1054; Ky. Gen. Stat. c. 35, art. 3. But see Monterfy, etc., Turnpike Co. *v.* Davis, 3 Ky. L. Rep. 465, holding that an appeal from a judgment of a police judge does not lie to the quarterly court but to the circuit court where the amount in controversy is sufficient.

93. La. Const. (1898), art. 85.

94. Brown *v.* Ragland, 35 La. Ann. 837; Walker *v.* Barelli, 32 La. Ann. 1159; State *v.* Cheevers, 32 La. Ann. 941; Tauzin's Suc-

may be the amount therein claimed, shall exceed two thousand dollars, exclusive of interest;[95] to suits for divorces and separation from bed and board, and to all matters arising therein; to suits involving alimony, for the nullity of marriage, or for interdiction; to all matters of adoption, emancipation, legitimacy, and custody of children; to suits involving homestead exemptions; to all cases in which the constitutionality or legality of any tax, toll, or impost whatever, or of any fine, forfeiture, or penalty imposed by a municipal corporation shall be in contestation, whatever may be the amount thereof;[96] to all cases wherein an ordinance of a municipal corporation or a law of the state has been declared unconstitutional;[97] and to criminal cases on questions of law alone, whenever the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars, or imprisonment exceeding six months is actually imposed.[98] The supreme court has also such original jurisdiction as may be necessary to enable it to determine questions of fact affecting its own jurisdiction in any case pending before it, or it may remand the case; and it has exclusive original jurisdiction in all matters touching professional misconduct of members of the bar, with power to disbar. The supreme court and each of the justices thereof have

cession, 21 La. Ann. 536; Elton *v.* Temple, 21 La. Ann. 502; Gove *v.* Breedlove, 5 Rob. (La.) 78; State *v.* Bermudez, 14 La. 478; Robouam *v.* Robouam, 12 La. 73; Bayon *v.* New Orleans, 9 La. 578.

95. Sugar *v.* Monroe, 108 La. 677, 32 So. 961, 59 L. R. A. 723; Hodge *v.* Monroe Mercantile Co., 105 La. 668, 30 So. 142; State *v.* Judges Ct. of App., 105 La. 333, 29 So. 892; Grangell *v.* Taylor, 105 La. 324, 29 So. 885; Immanuel Presb. Church *v.* Riedy, 52 La. Ann. 1353, 27 So. 888; Macedonia Baptist Church *v.* Dickinson, 52 La. Ann. 704, 27 So. 100; Germania Sav. Bank *v.* Muller, 52 La. Ann. 553, 27 So. 81; State *v.* Jastremski, 33 La. Ann. 110; Johnson *v.* Mayer, 30 La. Ann. 1203; Ellis *v.* Silverstein, 26 La. Ann. 47; Malone *v.* Casey, 25 La. Ann. 466; State *v.* Clinton, 25 La. Ann. 285; Cushing *v.* Hickle, 20 La. Ann. 567; Renneberg's Succession, 15 La. Ann. 661; Taenzer *v.* Judge Third Dist. Ct., 15 La. Ann. 120.

A statute providing that a party aggrieved "in any case" by the judgment rendered may bring the cause before the supreme court for review is unconstitutional. Brown Shoe Co. *v.* Hill, 51 La. Ann. 920, 25 So. 634.

96. Tebault *v.* New Orleans, 108 La. 686, 32 So. 983; State *v.* Delgado, 107 La. 72, 31 So. 389; State *v.* Putnam, 106 La. 88, 30 So. 285; Kelly *v.* Chadwick, 104 La. 719, 29 So. 295; State *v.* Pigot, 104 La. 683, 29 So. 335; State *v.* Rosenstram, 52 La. Ann. 2126, 28 So. 294; State *v.* Cox, 52 La. Ann. 2049, 28 So. 356; Kock *v.* Triche, 52 La. Ann. 825, 27 So. 354; Shreveport *v.* Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193; Ouachita Parish *v.* Monroe, 50 La. Ann. 301, 23 So. 832; Parker *v.* Strauss, 49 La. Ann. 1173, 22 So. 329; Chicago, etc., R. Co. *v.* Kentwood, 49 La. Ann. 931, 22 So. 192; Fayssoux *v.* Denis, 48 La. Ann. 850, 19 So. 760; State *v.* Judge Sixteenth Judicial Dist. Ct., 48 La. Ann. 506, 19 So. 454; Thibodaux *v.* Constatin, 48 La. Ann. 338, 19 So. 135; Sentell *v.* Police Jury, 48 La. Ann. 96, 18 So. 910; Vicksburg, etc., R. Co. *v.* Scott, 47 La. Ann. 706, 17 So. 249; Torian *v.* Shayot, 47 La. Ann. 589, 17 So. 203; Suthon *v.* Houma, 46 La. Ann. 1561, 16 So. 474; State *v.* Judges Ct. of App., 46 La. Ann. 1292, 16 So. 219; Parish *v.* Broussard, 42 La. Ann. 841, 8 So. 590; Meyer *v.* Pleasant, 41 La. Ann. 645, 6 So. 258; State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 6 So. 220; State *v.* Miller, 41 La. Ann. 53, 5 So. 258, 7 So. 672; Johnson *v.* Cavanac, 40 La. Ann. 773, 5 So. 61; Bush *v.* Police Jury, 39 La. Ann. 899, 2 So. 790; State *v.* New Orleans, 39 La. Ann. 342, 1 So. 668; Favrot *v.* Baton Rouge, 38 La. Ann. 230; Sweeney *v.* Seiler, 37 La. Ann. 585; Adler *v.* Board of Assessors, 37 La. Ann. 507; Carondelet Canal, etc., Co. *v.* The First Chevere Tedesco, 37 La. Ann. 100; Cobb *v.* McGuire, 36 La. Ann. 801; State *v.* Lazarus, 36 La. Ann. 286; New Orleans *v.* Arthurs, 36 La. Ann. 98; Tebbe *v.* Police Jury, 34 La. Ann. 137; State *v.* Police Jury, 34 La. Ann. 41; Board of Levee Com'rs *v.* Lorio, 33 La. Ann. 276; New Orleans *v.* Hill, 32 La. Ann. 1161; Lincoln Parish *v.* Huey, 30 La. Ann. 1244; Gonzales *v.* Lindsay, 30 La. Ann. 1085; State *v.* Sies, 30 La. Ann. 918; State *v.* Judge Third Dist. Ct., 30 La. Ann. 415; Hyatt *v.* Police Jury, 28 La. Ann. 233; Rooney *v.* Brown, 21 La. Ann. 51; State *v.* Third Justice of Peace, 12 La. Ann. 789; State *v.* Judge Sixth Judicial Dist., 9 La. Ann. 350; State *v.* Rebassa, 9 La. Ann. 305; Bayou Sara *v.* Tooraen, 9 La. Ann. 206; Albert *v.* Brewer, 9 La. Ann. 64; New Orleans *v.* The M. Hawes, 6 La. Ann. 389; Second Municipality *v.* Corning, 4 La. Ann. 407; Penn *v.* First Municipality, 4 La. Ann. 13.

97. Moss *v.* Newhouse, 52 La. Ann. 945, 27 So. 536; Central Mfg., etc., Co. *v.* Mutual Bldg., etc., Assoc., 51 La. Ann. 900, 25 So. 638; New Orleans *v.* Reems, 49 La. Ann. 792, 21 So. 599; State *v.* Dean, 45 La. Ann. 441, 12 So. 489; State *v.* Murphy, 41 La. Ann. 526, 6 So. 816; State *v.* Judge Fourth Judicial Dist. Ct., 24 La. Ann. 610; Louisiana Bd. of Health *v.* Pooley, 11 La. Ann. 743; Donaldsonville *v.* Richard, 4 La. Ann. 83.

98. State *v.* Hand, 50 La. Ann. 1076, 23 So. 871; Barry *v.* Garnier, 31 La. Ann. 831.

power to issue writs of habeas corpus at the instance of any person in actual custody in any case where it may have appellate jurisdiction.[99] Such court has also control and general supervision over all inferior courts.[1] The court or any judge thereof has power to issue writs of certiorari, prohibition, mandamus, quo warranto, and other remedial writs.[2]

b. Other Courts. The courts of appeal, except as otherwise provided in the constitution, have appellate jurisdiction only, which extends to all cases, civil or probate, when the matter in dispute or funds to be distributed exceed one hundred dollars, exclusive of interest, and does not exceed two thousand dollars, exclusive of interest.[3] The courts of appeal and each of the judges thereof have power to issue the writ of habeas corpus at the instance of any person in actual custody within their respective circuits. They also have authority to issue writs of mandamus, prohibition, and certiorari, in aid of their appellate jurisdiction.[4] District courts have jurisdiction of appeals from justices of the peace in all civil matters, regardless of the amount in dispute, and from all orders requiring a peace bond. Persons sentenced to a fine or imprisonment, by mayors or recorders, are entitled to an appeal to the district court of the parish upon security given, and in such cases the trial is *de novo*.[5] In all cases where there is an appeal from a judgment rendered on a reconventional demand, the appeal lies to the court having jurisdiction of the main demand.[6]

99. La. Const. (1898), art. 93; *In re* Ross, 38 La. Ann. 523; State *v.* Houston, 35 La. Ann. 1194; State *v.* Fagin, 28 La. Ann. 887; State *v.* Parish Prison, 15 La. Ann. 347. See also State *v.* Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115.

1. State *v.* King, 49 La. Ann. 1527, 22 So. 806; State *v.* Judges Ct. of App., 33 La. Ann. 1201.

To authorize review by certiorari the question must be one of law. *In re* Murff, 50 La. 998, 23 So. 965.

The power to review a judgment of the court of appeals will not be exercised where the amount involved is only a small sum and no application was made to correct the error by an application for a new trial. Schwan *v.* Forgey, 51 La. Ann. 752, 25 So. 465. And although on writ of review from the court of appeals the judgment may be declared void for want of jurisdiction, yet the merits of the case will not be passed upon under such writ when an adjudication could have been had upon the merits by a proper appeal from the court of first instance. State *v.* Rosenstream, 52 La. Ann. 2126, 28 So. 294. But see Murphy *v.* Royal Ins. Co., 52 La. Ann. 775, 27 So. 143.

2. La. Const. (1898), art. 94.

Remedial writs.— State *v.* Foster, 106 La. 425, 31 So. 57; State *v.* Hingle, 104 La. 775, 29 So. 349; State *v.* Judge Second City Ct., 37 La. Ann. 285; State *v.* Voorhies, 33 La. Ann. 832; State *v.* Judges Ct. of App., 33 La. Ann. 358; State *v.* Skinner, 33 La. Ann. 146; State *v.* Judge Sixth Judicial Dist., 9 La. Ann. 350; McCarty's Succession, 2 La. Ann. 979; State *v.* Parish Judge, 11 Rob. (La.) 285; Baron *v.* Kingsland, 5 La. 378. But writ of prohibition will not be issued. State *v.* Judge First Dist. Ct., 45 La. Ann. 1206, 14 So. 73; State *v.* Judge Civil Dist. Ct., 45 La Ann. 532, 12 So. 941; State *v.* Judge Super. Dist. Ct., 27 La. Ann. 676; State *v.* Judge Super. Dist. Ct., 26 La. Ann. 750.

3. La. Const. (1898), art. 98. See also State *v.* Circuit Ct. of App., 49 La. Ann. 1221, 22 So. 368; State *v.* Judges Ct. of App., 45 La. Ann. 1319, 14 So. 118; State *v.* Judges, 43 La. Ann. 1164, 10 So. 253.

Amount in controversy.—Reinerth *v.* Rhody, 52 La. Ann. 2029, 28 So. 277; State *v.* Judges Ct. of App., 52 La. Ann. 1503, 27 So. 965; Weil *v.* Richaud, 51 La. Ann. 1311, 26 So. 265; State *v.* Blackman, 50 La. Ann. 126, 23 So. 205; State *v.* Judges, 43 La. Ann. 198, 9 So. 16; State *v.* Judges, 42 La. Ann. 589, 7 So. 632; State *v.* Judge Ct. of App., 37 La. Ann. 372; State *v.* Judges Ct. of App., 33 La. Ann. 1096; Carroll *v.* Wallace, McGloin (La.) 316; Martel *v.* Smith, McGloin (La.) 167.

All cases on appeal to the court of appeal shall be tried on the original record, pleadings, and evidence. La. Const. (1898), art. 103. Such provision applies only to appeals from district courts and does not preclude jurisdiction of an appeal from a parish court. State *v.* Judges Circuit Ct. of App., 32 La. Ann. 774.

The court of appeal for the parish of Orleans has appellate jurisdiction from the city courts of New Orleans. La. Const. (1898), art. 131. See also State *v.* Judges Ct. of App., 41 La. Ann. 56, 5 So. 527; State *v.* Judges Ct. of App., 33 La. Ann. 1351; State *v.* Judges Ct. of App., 33 La. Ann. 358; Louisiana Ice Co. *v.* State Nat. Bank, 32 La. Ann. 597.

4. La. Const. (1898), art. 104.

Writs in aid of appellate jurisdiction.— State *v.* Judge First Dist. Ct., 45 La. Ann. 1206, 14 So. 73; Winn *v.* Scott, 2 La. 88.

5. La. Const. (1898), art. 111; State *v.* Judges Circuit Ct. of App., 32 La. Ann. 774.

6. La. Const. (1898), art. 95.

Reconventional demand on appeal goes to the court of appeals where it has jurisdiction of the main demand. Norwood *v.* Wimby, 104 La. 645, 29 So. 311.

16. MAINE — a. Supreme Judicial Court. The supreme court is obliged to give its opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate, or house of representatives.[7] The supreme court has jurisdiction of all offenses, misdemeanors, and civil actions legally brought before it; may render judgment and award execution thereon; may exercise its jurisdiction according to the common law not inconsistent with the constitution or statutes;[8] and may punish for contempts and administer oaths. It has general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy.[9] It may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all writs and processes necessary for the furtherance of justice, or the execution of the laws.[10] It has jurisdiction as a court of equity in specified cases,[11] and full equity jurisdiction according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate, and complete remedy at law.[12] Such court sits as a court of law only in cases in which there are motions for new trials upon evidence reported by the justice; questions of law arising on reports of cases; bills of exceptions; agreed statements of facts; cases, civil or criminal, presenting a question of law; all questions arising in equity cases; motions to dissolve injunctions issued after notice and hearing, or continued after a hearing; questions arising on writs of habeas corpus, mandamus, and certiorari, when the facts are agreed on, or are ascertained and reported by a justice.[13] The supreme court is also the supreme court of probate and has appellate jurisdiction in all matters determined by the several judges of probate except appointments of special administrators.[14]

b. Superior Courts. The superior court in each of the counties of Cumberland and Kennebec has exclusive jurisdiction of civil appeals from municipal and police courts and trial justices.[15]

17. MARYLAND — a. Court of Appeals. The jurisdiction of the court of appeals is coextensive with the state and such as is or may be prescribed by law.[16] Such court has jurisdiction of appeals from any judgment or determination of any court of law in any civil suit or action, or in any prosecution for the recovery of any penalty, fine, or damages; and from any final decree or order in the nature of a final decree passed by a court of equity.[17]

7. Me. Const. art. 6, § 3.

The question must be submitted on a solemn occasion, and if it appears to the judges that such an occasion does not exist it is their duty to decline to give such opinion. Opinion of Justices, 95 Me. 564, 51 Atl. 224; Opinion of Justices, 85 Me. 545, 27 Atl. 454. And only important questions of law and not questions of policy or expediency are within the requirement. Opinion of Justices, 95 Me. 564, 51 Atl. 224.

8. Badger *v.* Towle, 48 Me. 20, holding that the supreme court has general common-law jurisdiction in all cases unless restricted by the constitution or statutes.

9. Harriman *v.* Waldo County Com'rs, 53 Me. 83, holding that the supreme court has general superintendence over inferior courts and may issue writs.

10. Me. Rev. Stat. (1883), c. 77, §§ 1–5.

11. Me. Rev. Stat. (1883), c. 77, § 6, pp. 627, 628; Freeman's Suppl. (1885–1895), pp. 415, 416. See also Tappan *v.* Deblois, 45 Me. 122; Soutter *v.* Atwood, 34 Me. 153, 56 Am. Dec. 647; French *v.* Sturdivant, 8 Me. 246.

The supreme court in one county where an equity bill is filed has jurisdiction of all matters interlocutory or otherwise except such as by statute or by rules of court may be passed upon in another county or by a single judge at chambers in vacation. Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

12. Me. Rev. Stat. (1883), c. 77, p. 627 *et seq*; Freeman's Suppl. (1885–1895), p. 415 *et seq*.

13. Me. Rev. Stat. (1883), c. 77, § 42.

14. Me. Rev. Stat. (1883), c. 63, § 23. See also McKenney *v.* Alvord, 73 Me. 221; Carvill *v.* Carvill, 73 Me. 136.

An action is not a probate appeal, cognizable by a supreme court of probate, when brought by a creditor of an insolvent estate under administration. Merrill *v.* Crossman, 68 Me. 412.

15. Me. Rev. Stat. (1883), c. 77, §§ 63, 67; Freeman Suppl. (1885–1895), p. 419.

16. Md. Const. art. 4, § 14.

Habeas corpus.— The court of appeals has no original jurisdiction in habeas corpus cases. Sevinskey *v.* Wagus, 76 Md. 335, 25 Atl. 468; *Ex p.* O'Neill, 8 Md. 227. But see Roth *v.* House of Refuge, 31 Md. 329.

17. Md. Pub. Gen. Laws (1888), art. 5, §§ 2, 24.

b. Other Courts. The circuit courts were given by the constitution all the appellate power and jurisdiction exercised by the then circuit courts or which might thereafter be prescribed by law.[18] The Baltimore city court has exclusive jurisdiction of appeals from judgments of justices of the peace in such city.[19]

18. Massachusetts — a. Supreme Judicial Court. The opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions may be required by each branch of the legislature as well as by the governor and council.[20] Such court has general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein where no other remedy is expressly provided; and it may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws. It may remove clerks of courts, county commissioners, sheriffs, registers of probate and insolvency, or district attorneys. It has original and concurrent jurisdiction with the superior court of actions of contract or replevin in which the damages demanded or property claimed, if the actions are brought in the county of Suffolk, exceed in amount or value four thousand dollars or if brought in any other county exceed one thousand dollars, if the plaintiff, or a person in his behalf, before service of the writ makes the required oath, etc., as to value. The court may also upon petition hear and determine all matters and questions arising under wills. Questions of law are to be heard by the full court[21] — court in banc — arising upon exceptions or report, upon appeals from the superior court, except as otherwise provided. Causes may also be transferred to the full court.[22] Appeal also lies from a final decree of a justice of the supreme judicial court or a final decree of the superior court to the former court.[23] The supreme judicial court is also the supreme court of probate, and it has appellate jurisdiction of all matters which

As to mandamus appeals see Md. Pub. Gen. Laws (1888), art. 5, § 3.

As to appeals from orders as to injunctions, receivers, sale of property, or an order determining the right between parties see Md. Pub. Gen. Laws (1888), art. 5, § 25.

As to appeals from the commissioner of the land-office to the court of appeals see Md. Pub. Gen. Laws (1888), art. 5, § 79.

Order of orphans' court.— No appeal lies to the court of appeals from an order of the orphans' court made appealable elsewhere by statute. Abbott *v.* Golibart, 39 Md. 554. See also Worthington *v.* Herron, 39 Md. 145.

18. Md. Const. art. 4, § 20.

Appeals from justices of the peace are allowed in all cases to the circuit courts, except those cases appealable to the Baltimore city court, and such cases are to be heard *de novo* on appeal. Md. Pub. Gen. Laws (1888), art. 5, § 83.

19. Md. Const. art. 4, § 28.

20. Mass. Const. c. 3, art. 2.

Opinions of justices.—The justices will confine their answer to particular questions of law submitted to them, and there should not be submitted a law or a series of laws or rules more or less complicated to ascertain what questions can be raised as to the validity of every clause, and to obtain an opinion thereon in advance. Opinion of Justices, 145 Mass. 587, 13 N. E. 15. Nor will an opinion be given in relation to a matter where an officer *de facto* has a right to be heard before an opinion is given. Com. *v.* Smith, 9 Mass. 531. But a question whether a bill or resolve appropriating money from the state treasury is a money bill which must by the constitution originate in the lower house requires an opinion. Opinion of Justices, 126 Mass. 557.

21. Conto *v.* Silvia, 170 Mass. 152, 49 N. E. 86.

Hearing by single justice see Ripley *v.* Collins, 162 Mass. 450, 38 N. E. 1133; Tufts *v.* Newton, 119 Mass. 476; Granger *v.* Bassett, 98 Mass. 462.

22. Mass. Rev. Laws (1902), c. 156, §§ 1–27.

Original jurisdiction.—Such court has power to grant an injunction restraining a continuing trespass, such relief being an exercise of its general equity jurisdiction. Boston, etc., R. Co. *v.* Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275. But its chancery jurisdiction is limited to that conferred expressly or by implication. Pratt *v.* Bacon, 10 Pick. (Mass.) 123; Stone *v.* Hobart, 8 Pick. (Mass.) 464. Such court as one of chancery cannot settle an executor's account, the remedy being appellate. Jenison *v.* Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258. Statutes conferring equity jurisdiction are valid and not contrary to the declaration of rights securing a trial by jury. Charles River Bridge *v.* Warren Bridge, 6 Pick. (Mass.) 376. And the jurisdiction of the supreme court as one of common law is unlimited. Barrell *v.* Benjamin, 15 Mass. 354.

23. Mass. Rev. Laws (1902), c. 159, § 19.

Full court has exclusive jurisdiction of writ of error to the superior court. Tufts *v.* Newton, 119 Mass. 476. Appeal also lies to the

are determinable by the probate courts and by the judges thereof, except as otherwise expressly provided, and appeal lies to said court from orders, sentences, decrees, or denials of a probate court, or of a judge of such court except as otherwise provided.[24]

b. Superior Court. The superior court has jurisdiction of all civil actions and proceedings which are legally brought before it by appeal or removal, and appellate jurisdiction of crimes tried, etc., in specified courts.[25]

19. MICHIGAN — a. Supreme Court. The supreme court has a general superintending control over all inferior courts, and has power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs, and to hear and determine the same. In all other cases it has appellate jurisdiction only.[26]

b. Other Courts. The circuit court has appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same,[27] and the superior court of Grand Rapids has exclusive jurisdiction of appeals from the police court of such city.[28]

20. MINNESOTA — a. Supreme Court. The supreme court has original jurisdiction in such remedial cases as may be prescribed by law,[29] and appellate jurisdiction in all cases both in law and equity, but there shall be no trial by jury[30] in said court.[31]

b. District Courts. The district courts have such appellate jurisdiction as may be prescribed by law.[32]

full court from a judgment on demurrer in the superior court. Mass. Rev. Laws (1902), c. 173, § 96.

24. Mass. Rev. Laws (1902), c. 162, §§ 8, 9, 18, 27; Ripley *v.* Collins, 162 Mass. 450, 38 N. E. 1133.

Jurisdiction in insolvency matters see Harlow *v.* Tufts, 4 Cush. (Mass.) 448; Whiting *v.* Gray, 9 Metc. (Mass.) 291; Sabine *v.* Strong, 6 Metc. (Mass.) 270. But see Barnard *v.* Eaton, 2 Cush. (Mass.) 294.

25. Mass. Rev. Laws (1902), c. 157, §§ 6, 7.

Appeal lies to the superior court from the judgment of a police, district, or municipal court, or trial justice in a civil action, except where there is a written waiver of the right of appeal on trial before a standing and special justice. Mass. Rev. Laws (1902), c. 160, § 42, c. 173, § 97. Appeals also lie to the superior court from decisions and decrees of the land registration court. Mass. Rev. Laws (1902), c. 128, § 13.

26. Mich. Const. art. 6, § 3. See also 1 Mich. Comp. Laws (1887), §§ 191, 192.

A writ of error lies to the circuit court to remove adjudication on an appeal from probate as to a bequest in a will. American Baptist Missionary Union *v.* Peck, 9 Mich. 445. But it does not lie to any inferior court, the decisions of which are first reviewable by another than the supreme court. Hiney *v.* Cade, 1 Mich. 163.

The jurisdiction is exclusively appellate, except in special cases. Sanger *v.* Truesdail, 8 Mich. 543. See also Traverse City, etc., R. Co. *v.* Seymour, 81 Mich. 378, 45 N. W. 826; Ganoe *v.* The Jack Robinson, 18 Mich. 456; Jones *v.* Smith, 14 Mich. 334.

27. Mich. Const. art. 6, § 8. See also 1 Mich. Comp. Laws (1887), § 307.

Appealed cases.— Such court may hear and determine appealed cases. Newell *v.* Blair, 7 Mich. 103. See also *In re* Leonard, 95 Mich. 295, 54 N. W. 1082; Hoyt *v.* Mapes, 3 Mich. 552.

Supervisory control gives jurisdiction to issue common-law certiorari to an inferior court (Thompson *v.* Crockery School Dist. No. 6, 25 Mich. 483) or to review the action of a court commissioner (People *v.* Judge St. Clair Circuit, 32 Mich. 95), but a writ of mandamus can be issued only when necessary to carry orders, etc., into effect (McBride *v.* Grand Rapids, 32 Mich. 360). So such court cannot issue a writ of error. Teller *v.* Wetherell, 6 Mich. 46.

28. Mich. Comp. Laws (1897), § 630.

29. State *v.* Otis, 58 Minn. 275, 59 N. W. 1015; State *v.* Minneapolis Eastern R. Co., 40 Minn. 156, 41 N. W. 465; State *v.* Burr, 28 Minn. 40, 8 N. W. 899; Crowell *v.* Lambert, 10 Minn. 369; Prignitz *v.* Fischer, 4 Minn. 366; Harkins *v.* Scott County, 2 Minn. 342.

Original jurisdiction is limited to the exceptions enumerated in the statute. Ames *v.* Boland, 1 Minn. 365.

The legislature is authorized to confer and regulate original jurisdiction. State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245; State *v.* Lake, 28 Minn. 362, 10 N. W. 17; State *v.* Grant, 10 Minn. 39.

30. Crowell *v.* Lambert, 10 Minn. 369; Prignitz *v.* Fischer, 4 Minn. 366; Harknis *v.* Scott County, 2 Minn. 342.

31. Minn. Const. art. 6, § 2.

32. Minn. Const. art. 6, § 5.

District courts have appellate jurisdiction in civil and criminal cases from courts of probate and justices of the peace. Minn. Stat. (1894), § 4833.

21. MISSISSIPPI — a. Supreme Court. The supreme court has such jurisdiction as properly belongs to a court of appeals,[33] and shall hear and determine all manner of pleas, plaints, motions, causes, and controversies, civil and criminal, pending therein, or which may be brought before it, and which shall be cognizable in said court; but a cause shall not be removed into said court until after final judgment in the court below, except in the cases particularly provided by law; and said court may grant new trials and correct errors of the circuit court in granting or refusing the same. It may make all orders and cause to be issued and executed all necessary process to secure an appeal.[34]

b. Circuit Court. The circuit court has such jurisdiction as shall be prescribed by law.[35]

22. MISSOURI — a. Supreme Court. The supreme court has appellate jurisdiction[36] only which is coextensive with the state under the restrictions and limitations of the constitution. It has a general, superintending control over all inferior courts and has power to issue writs[37] of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs and to hear and determine the same.[38] Such court has also jurisdiction, under the constitution,[39] over cases certified from the courts of appeals, in decisions contrary to previous decisions,[40] and superintending control over the latter courts by writs of mandamus, prohibition,

The district court may reverse the judgment or award judgment absolute for appellant on appeal on questions of law alone from the judgment of the municipal court of Winona, under Laws (1885), c. 115, § 17, giving the same power on appeals from said court as is possessed by the district court in cases of appeals from justices' courts. Hardenburg *v.* Roesner, 83 Minn. 7, 85 N. W. 719.

33. Miss. Const. art. 6, § 146; Miss. Anno. Code (1892), § 4345.

The jurisdiction is exclusively revisory and appellate, with such incidental cognizance of a quasi-original character as is necessary to preserve its dignity and decorum, and to give complete operation to its appellate power. Brown *v.* Carraway, 47 Miss. 668. It has no original jurisdiction. Planters' Ins. Co. *v.* Cramer, 47 Miss. 200.

Amount in controversy.— Appellate jurisdiction may depend upon the amount in controversy, and where the verdict is reduced by remittitur below the required jurisdictional amount, by plaintiff, no review can be had. Wimbush *v.* Chinault, 58 Miss. 234.

34. Miss. Anno. Code (1892), §§ 4345, 4346.

Appeal may be taken to the supreme court from any final judgment of a circuit court in a civil case, not taken by confession, or from any final decree of a chancery court not being by consent. Appeal may also be taken on overruling a demurrer in chancery from certain interlocutory orders, from habeas corpus proceedings, in criminal cases, decrees in matters testamentary, etc. Miss. Anno. Code (1892), p. 29, § 31 *et seq.*

35. Miss. Const. art. 6, § 156.

The circuit court may review by certiorari cases from decisions of justices of the peace. Porter *v.* Deterly, 1 Sm. & M. (Miss.) 163. And an appeal lies to the circuit court in forcible entry and detainer cases. Robertson *v.* Williams, 6 How. (Miss.) 579.

36. State *v.* Flentge, 49 Mo. 488.

The supreme court has no original jurisdiction except in the specified cases, and a statute requiring it to take jurisdiction of an agreed case between the state and the public printer and examine all questions of law and fact therein is void. Foster *v.* State, 41 Mo. 61.

Where there is no jurisdiction it cannot be assumed by reason of some extraneous matter, such as the incompetency of the lower court by reason of one of its judges having been of counsel. Britton *v.* Steber, 62 Mo. 370.

37. State *v.* Eby, 170 Mo. 497, 71 S. W. 52; Kansas City *v.* Renick, 157 Mo. 292, 57 S. W. 713; State *v.* Towns, 153 Mo. 91, 54 S. W. 552; State *v.* Jones, 142 Mo. 354, 44 S. W. 224; State *v.* Tracy, 94 Mo. 217, 6 S. W. 709; State *v.* Cooper County Ct., 64 Mo. 170; State *v.* Vail, 53 Mo. 97; Thomas *v.* Mead, 36 Mo. 232; Lane *v.* Charless, 5 Mo. 285; State *v.* Merry, 3 Mo. 278.

38. Mo. Const. art. 6, §§ 2, 3.

39. Mo. Const. art. 6, Amendm. (1884), §§ 5–8 [Mo. Rev. Stat. (1899), pp. 93, 94].

40. Gipson *v.* Powell, 167 Mo. 192, 66 S. W. 969; State *v.* Bland, 148 Mo. 625, 50 S. W. 293, 43 L. R. A. 845; Smith *v.* Missouri Pac. R. Co., 143 Mo. 33, 44 S. W. 718; State *v.* Smith, 129 Mo. 585, 31 S. W. 917; State *v.* Smith, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901; State *v.* Philips, 96 Mo. 570, 10 S. W. 182; State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; Seaboard Nat. Bank *v.* Woesten, 76 Mo. App. 155; Robinson *v.* Smith, 50 Mo. App. 630; Elliott *v.* Wilson, 27 Mo. App. 218.

A cause may be transferred to the supreme court by either one of the courts of appeals where the former court has jurisdiction of the appeal. Langston *v.* Southern R. Co., 66 Mo. App. 73.

and certiorari.[41] It has exclusive appellate jurisdiction in all causes or proceedings reviewable by it to issue writs of error directly to the circuit courts and to courts having the jurisdiction pertaining to circuit courts, and appeals lie from such trial courts directly to the supreme court, and in all such cases the supreme court exercises superintending control over such trial courts.[42] Appeal lies to, and writs of error from, the supreme court, from and to the courts of appeals, subject to the jurisdictional limitation of the amount of four thousand five hundred dollars, exclusive of costs,[43] in cases involving the construction of the constitution of the United States,[44] or of the state;[45] in cases where the validity of a treaty or a statute, or of authority exercised under the United States is drawn in question;[46] in cases involving the construction of the revenue laws of the

41. See *supra*, note 38.

42. Mo. Const. art. 6, Amendm. (1884), § 5 [Mo. Rev. Stat. (1899), p. 93].

Appeal lies directly to the supreme from common pleas court. Schlueter *v.* Albert, 39 Mo. App. 154. But see Wilson *v.* Reed, 57 Mo. 238; Smith *v.* Guerant, 55 Mo. 584.

Writ of error does not lie to county courts. Town *v.* Supreme Ct. Clerk, 2 Mo. 26; Thompson *v.* Smith, 1 Mo. 404.

43. Mo. Laws (1901), p. 107; Crawford *v.* Dixon, 166 Mo. 501, 66 S. W. 159.

Amount in controversy.— Owens *v.* Fraser, 165 Mo. 242, 65 S. W. 569; Cardwell *v.* Stuart, 164 Mo. 166, 64 S. W. 158; Lile *v.* Gibson, 163 Mo. 182, 63 S. W. 371; Kansas City *v.* Metropolitan St. R. Co., 162 Mo. 236, 62 S. W. 689; Mankameyer *v.* Egelhoff, 161 Mo. 200, 61 S. W. 836; Kirkwood *v.* Meramec Highlands Co., 160 Mo. 111, 60 S. W. 1072; Culbertson *v.* Young, 156 Mo. 261, 56 S. W. 893; Worthington *v.* Roberta Min. Co., 152 Mo. 184, 53 S. W. 912; Ash *v.* Independence, 145 Mo. 120, 46 S. W. 749; Parlin, etc., Co. *v.* Hord, 145 Mo. 117, 46 S. W. 753; Hulett *v.* Missouri, etc., R. Co., 145 Mo. 35, 46 S. W. 951; Kelly *v.* Vandiver, 141 Mo. 480, 42 S. W. 1075; Hilton *v.* St. Louis, 129 Mo. 389, 31 S. W. 771; State *v.* Noonan, 122 Mo. 638, 27 S. W. 329; State *v.* Lewis, 96 Mo. 146, 8 S. W. 770; Overall *v.* St. Louis Traction Co., 88 Mo. App. 175; Cohn *v.* St. Louis, etc., R. Co., 87 Mo. App. 143; Rivers *v.* Blom, 78 Mo. App. 142; Missouri, etc., R. Co. *v.* Watson, 64 Mo. App. 465; Willi *v.* Lucas, 40 Mo. App. 70; Forster Vinegar Co. *v.* Guggemos, 24 Mo. App. 444; Priest *v.* Deaver, 21 Mo. App. 209.

44. Clark *v.* Porter, 162 Mo. 516, 63 S. W. 89; Hulett *v.* Missouri, etc., R. Co., 145 Mo. 35, 46 S. W. 951; St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878; State *v.* St. Louis Ct. of App., 97 Mo. 276, 10 S. W. 874; Canton *v.* McDaniel, 91 Mo. App. 626; Collins *v.* German-American Mut. L. Assoc., 84 Mo. App. 555; Sanders *v.* St. Louis, etc., Anchor Line, 21 Mo. App. 347.

45. Hardin *v.* Carthage, 171 Mo. 442, 71 S. W. 673; Hanlon *v.* Pulitzer Pub. Co., 167 Mo. 121, 66 S. W. 940; Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260, 63 S. W. 814; Kansas City *v.* Baird, 163 Mo. 196, 63 S. W. 495; Monroe *v.* Crawford, 163 Mo. 178, 63 S. W. 373; Kirkwood *v.* Meramec Highlands Co., 160 Mo. 111, 60 S. W. 1072; Coleman *v.* Cole, 158 Mo. 253, 59 S. W. 106; State *v.* Smith, 150 Mo. 75, 51 S. W. 713; Kirkwood *v.* Johnson, 148 Mo. 632, 50 S. W. 433; Ash *v.* Independence, 145 Mo. 120, 46 S. W. 749; Browning *v.* Powers, 142 Mo. 322, 44 S. W. 224; State *v.* Smith, 141 Mo. 1, 41 S. W. 906; Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385, 39 S. W. 791; St. Joseph *v.* Dye, 137 Mo. 177, 38 S. W. 942; Lang *v.* Callaway, 134 Mo. 491, 35 S. W. 1138; State *v.* Metcalf, 130 Mo. 505, 32 S. W. 993; State *v.* Dinnisse, 109 Mo. 434, 19 S. W. 92; Bennett *v.* Missouri Pac. R. Co., 105 Mo. 642, 16 S. W. 947; Baldwin *v.* Fries, 103 Mo. 286, 15 S. W. 760; Merchants' Ins. Co. *v.* Hill, 86 Mo. 466; Kreyling *v.* O'Reilly, 97 Mo. App. 384, 71 S. W. 372; Dawson *v.* Waldheim, 91 Mo. App. 117; Collins *v.* German-American Mut. L. Assoc., 85 Mo. App. 242; Tinsley *v.* Kemery, 83 Mo. App. 94; Tice *v.* Fleming, 84 Mo. App. 162; Dollar Sav. Bank *v.* Ridge, 79 Mo. App. 26; State *v.* Kramer, 78 Mo. App. 60; State *v.* Carr, 71 Mo. App. 661; Springfield *v.* Weaver, 66 Mo. App. 293; *In re* Opening of Essex Ave., 44 Mo. App. 288; State *v.* Dinnisse, 41 Mo. App. 22; *Ex p.* Olden, 37 Mo. App. 116; Carroll *v.* Campbell, 25 Mo. App. 630; State *v.* Farrell, 23 Mo. App. 176; Kamerick *v.* Castleman, 21 Mo. App. 587; State *v.* Elam, 21 Mo. App. 290; McCormick *v.* St. Louis, etc., R. Co., 20 Mo. App. 65; State *v.* Kaub, 19 Mo. App. 149.

An appeal does not lie from the court of appeals to the supreme court in an action wherein the court of appeals exercises original jurisdiction, notwithstanding that the determination of the cause involves a constitutional question. State *v.* Blakemore, 40 Mo. App. 406.

46. Clark *v.* Porter, 162 Mo. 516, 63 S. W. 89; Robert C. White Live-Stock Commission Co. *v.* Chicago, etc., R. Co., 157 Mo. 518, 57 S. W. 1070; Missouri, etc., R. Co. *v.* Smith, 154 Mo. 300, 55 S. W. 470; Shewalter *v.* Missouri Pac. R. Co., 152 Mo. 544, 54 S. W. 224; Vaughn *v.* Wabash R. Co., 145 Mo. 57, 46 S. W. 952; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; Wilson *v.* Kimmel, 109 Mo. 200, 19 S. W. 24; Nall *v.* Wabash, etc., R. Co., 97 Mo. 68, 10 S. W. 610; Lail *v.* Pacific Express Co., 81 Mo. App. 232; Central Nat. Bank *v.* Haseltine, 73 Mo. App. 60; Whirlwind *v.* Von der Ahe, 67 Mo. App. 628; Wabash Western R. Co. *v.* Siefert, 41 Mo. App. 35.

state,[47] or the title to any office under the state;[48] in cases involving the title to real estate;[49] in cases where a county or other political subdivision of the state, or any state officer, is a party;[50] and in all cases of felony.[51] Causes may also be transferred to the supreme court in banc from a division.[52]

b. Courts of Appeals. The constitution established the St. Louis court of appeals and the Kansas City court of appeals, specifying the counties over which their respective jurisdiction extends, subject to such changes as might be made by the legislature to create an additional court of appeals, to change the districts

47. Daudt *v.* Drainage Dist. No. 1, 149 Mo. 405, 50 S. W. 893; Stanberry *v.* Jordan, 145 Mo. 371, 46 S. W. 1093; Hilton *v.* Smith, 134 Mo. 499, 33 S. W. 464, 35 S. W. 1137; Moore *v.* Vaughn, 53 Mo. App. 632; State *v.* Angert, 53 Mo. App. 349; Cape Girardeau *v.* Burrough, 43 Mo. App. 298.

A conviction for keeping a dramshop without a license does not involve the construction of the revenue laws. State *v.* McNeary, 88 Mo. 143.

48. State *v.* Hill, 152 Mo. 234, 53 S. W. 1062; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653; State *v.* Meek, 55 Mo. App. 292. But see Vail *v.* Dinning, 44 Mo. 210.

Mayor of a city is not an officer "under this state." State *v.* Walker, 132 Mo. 210, 33 S. W. 813.

Policemen are not within the intent of the constitution, although the office is "an office under this state." State *v.* Kansas City Police Com'rs, 80 Mo. App. 206.

49. Balz *v.* Nelson, 171 Mo. 682, 72 S. W. 527; Klingelhoefer *v.* Smith, 171 Mo. 455, 71 S. W. 1008; F. M. Bruner Granitoid Co. *v.* Klein, 170 Mo. 225, 70 S. W. 687; Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; McGregor-Noe Hardware Co. *v.* Horn, 146 Mo. 129, 47 S. W. 957; Baker *v.* Squire, 143 Mo. 92, 44 S. W. 792; Baubie *v.* Ossman, 142 Mo. 499, 44 S. W. 338; Placke *v.* Union Depot R. Co., 140 Mo. 634, 41 S. W. 915; May *v.* Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 S. W. 782; Northcutt *v.* Eager, 132 Mo. 265, 33 S. W. 1125; Morris *v.* Clare, 132 Mo. 232, 33 S. W. 1123; Overton *v.* Overton, 131 Mo. 559, 33 S. W. 1; Bryant *v.* Russell, 127 Mo. 422, 30 S. W. 107; Hanna *v.* South St. Joseph Land Co., 126 Mo. 1, 28 S. W. 652; State *v.* Rombauer, 124 Mo. 598, 28 S. W. 75; Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309, 21 S. W. 491; Brown *v.* Turner, 113 Mo. 27, 20 S. W. 660 [*affirming* 43 Mo. App. 40]; Gardner *v.* Terry, 99 Mo. 523, 12 S. W. 888, 7 L. R. A. 67; Dunn *v.* Miller, 96 Mo. 324, 9 S. W. 640; Krepp *v.* St. Louis, etc., R. Co., (Mo. App. 1903) 72 S. W. 479; Lappin *v.* Crawford, 92 Mo. App. 453; Spence *v.* Renfro, 88 Mo. App. 59; Pelz *v.* Bollinger, 87 Mo. App. 540; Balz *v.* Nelson, 86 Mo. App. 374; Turner *v.* Overall, 83 Mo. App. 378; Yeamans *v.* Lepp, 80 Mo. App. 584; Longworth *v.* Sedivec, 77 Mo. App. 361; Schilb *v.* Pendleton, 76 Mo. App. 454; Moore *v.* McNulty, 76 Mo. App. 379; Vandergrif *v.* Brock, 73 Mo. App. 646; Bouner *v.* Lisenby, 73 Mo. App. 562; Rich *v.* Donovan, 72 Mo. App. 571; Truesdale *v.* Brennan, 72 Mo. App. 547; Hall *v.* Doughett, 71 Mo. App. 576; Beland *v.* Anheuser Brewing Assoc., 71 Mo. App. 567; Jones *v.* Gecry, 71 Mo. App. 566; St. Louis Brewing Assoc. *v.* Howard, 68 Mo. App. 198; Scheer *v.* Scheer, 67 Mo. App. 371; McGregor-Noe Hardware Co. *v.* Horn, 65 Mo. App. 200; Wells *v.* Leitmann, 60 Mo. App. 37; Kelly *v.* Staed, 59 Mo. App. 54; Chicago, etc., R. Co. *v.* Eubank, 55 Mo. App. 335; Joplin, etc., R. Co. *v.* McGregor, 53 Mo. App. 366; Hiles *v.* Rule, 49 Mo. App. 628; Karl *v.* Gabel, 48 Mo. App. 517; Lindell Glass Co. *v.* Hanneman, 46 Mo. App. 614; *In re* Opening of Essex Ave., 44 Mo. App. 288; St. Louis, etc., R. Co. *v.* Lewright, 44 Mo. App. 212; Nearen *v.* Bakewell, 40 Mo. App. 625; Pierce *v.* Georger, 30 Mo. App. 650; Isaacs *v.* Strainka, 18 Mo. App. 323.

50. Corbin *v.* Adair County, 171 Mo. 385, 71 S. W. 674; Howell County *v.* Wheeler, 108 Mo. 294, 18 S. W. 1080; Reynolds *v.* Clark County, 73 Mo. App. 278; Allen *v.* Cowan, 30 Mo. App. 1; Webster County *v.* Cunningham, 25 Mo. App. 358. See also State *v.* Dent, 121 Mo. 162, 25 S. W. 924.

City is included.— Steffen *v.* St. Louis, 135 Mo. 44, 36 S. W. 31; St. Louis *v.* Robinson, 55 Mo. App. 256; Riddle *v.* Brown, 37 Mo. App. 550. See also Harman *v.* St. Louis, 55 Mo. App. 175.

State superintendent of insurance is included.— State *v.* Smith, 131 Mo. 176, 33 S. W. 11; Reichenbach *v.* Ellerbe, 52 Mo. App. 72.

51. State *v.* Zinn, 141 Mo. 329, 42 S. W. 938 [*affirming* 61 Mo. App. 476], holding that an appeal from a judgment of conviction for malicious trespass on land is not within the jurisdiction of the supreme court under this provision of the constitution. But an appeal lies in an action for the penalty for the violation of an ordinance of the city of St. Louis to the supreme court and not to the appellate court. St. Louis *v.* Coffee, 76 Mo. App. 318.

52. Mo. Const. art. 6, Amendm. (1890), § 4 [Mo. Rev. Stat. (1899), p. 95] provides for a transfer to the supreme court in banc when the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved; or when a division in which a cause is pending shall so order the cause shall be transferred to the court for its decision.

Court in banc cannot entertain a motion to transfer a cause to it for review, decided by one of the divisions, where none of the grounds for transfer appear. McFadin *v.* Catron, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771.

and the names, etc. Such courts have power to issue writs[53] of habeas corpus, quo warranto, mandamus, certiorari, and other original remedial writs, and to hear and determine the same. They have superintending control over all inferior courts of record and their appellate jurisdiction is final, subject to certain exceptions.[54] But such courts have no jurisdiction over those cases which come within the constitutional or valid statutory specification of the jurisdiction of the supreme court.[55]

c. Circuit Courts. Circuit courts have such appellate jurisdiction over inferior tribunals and justices of the peace as is or may be provided by law.[56] Such courts also exercise a superintending control over all inferior courts.[57]

53. State *v.* Balcom, 71 Mo. App. 27; State *v.* Dillon, 65 Mo. App. 197; State *v.* Field, 37 Mo. App. 83; State *v.* Seay, 23 Mo. App. 623. But see State *v.* Green, 1 Mo. App. 226.

54. Mo. Const. art. 6, Amendm. (1884), §§ 1–11 [Mo. Rev. Stat. (1899), pp. 92–94].

Courts of appeals have appellate jurisdiction only and cannot allow claims against an estate except on appeal from the trial court. Wilson *v.* Ruthrauff, 87 Mo. App. 226. See also State *v.* Green, 1 Mo. App. 226. So the appellate jurisdiction of the court of appeals does not empower it to allow a female appellant in a divorce suit fees and expenses of appeal. State *v.* St. Louis Ct. of App., 88 Mo. 135. See also Lawlor *v.* Lawlor, 76 Mo. App. 293.

When a case comes neither by appeal nor writ of error to the court of appeals, but by transfer from the supreme court where the record was first filed, it will be stricken from the docket. Bristol *v.* Fischel, 81 Mo. App. 367.

55. See *supra*, XI, B, 22, a. See also Rowe *v.* Current River Land, etc., Co., 167 Mo. 305, 66 S. W. 928; Wilson *v.* Russler, 162 Mo. 565, 63 S. W. 370; Vandergrif *v.* Brock, 158 Mo. 681, 59 S. W. 979; Turney *v.* Sparks, 158 Mo. 365, 59 S. W. 73; Ozark Land, etc., Co. *v.* Robertson, 158 Mo. 322, 59 S. W. 69; Davis *v.* Watson, 158 Mo. 192, 59 S. W. 65; Bonner *v.* Lisenby, 157 Mo. 165, 57 S. W. 735; Bristol *v.* Fischel, 151 Mo. 34, 51 S. W. 678; Cox *v.* Barker, 150 Mo. 424, 51 S. W. 1051; Gay *v.* Missouri Guarantee Sav., etc., Assoc., 149 Mo. 606, 51 S. W. 403; Force *v.* Von Patton, 149 Mo. 446, 50 S. W. 906; Carlin *v.* Mullery, 149 Mo. 255, 50 S. W. 813; Edwards *v.* Missouri, etc., R. Co., 148 Mo. 513, 50 S. W. 89; Rothrock *v.* Cordz-Fisher Lumber Co., 146 Mo. 57, 47 S. W. 907; Bender *v.* Zimmerman, 145 Mo. 636, 47 S. W. 506; Security Sav. Trust Co. *v.* Donnell, 145 Mo. 431, 46 S. W. 959; State *v.* Higgins, 144 Mo. 410, 46 S. W. 423; Webb City, etc., Waterworks Co. *v.* Webb City, 143 Mo. 493, 45 S. W. 279; State *v.* School Dist., 143 Mo. 89, 44 S. W. 720; Heman *v.* Wade, 141 Mo. 598, 43 S. W. 162; Little *v.* Reid, 141 Mo. 242, 42 S. W. 674; Fischer *v.* Johnson, 139 Mo. 433, 41 S. W. 203; Parker *v.* Zeisler, 139 Mo. 298, 40 S. W. 881; Barber Asphalt Paving Co. *v.* Hezel, 138 Mo. 228, 39 S. W. 781; St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878; Luther *v.* Brown, 132 Mo. 70, 33 S. W. 442; Lemmon *v.* Lincoln, 130 Mo. 335, 32 S. W. 662; McGregor *v.* Pollard, 130 Mo. 332, 32 S. W. 640; Hilton *v.* St. Louis, 129 Mo. 389, 31 S. W. 771; Kansas City *v.* Neal, 122 Mo. 232, 26 S. W. 695; Reichenbach *v.* United Masonic Ben. Assoc., 112 Mo. 22, 20 S. W. 317 [*distinguishing* Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198]; Sage *v.* Tucker, 110 Mo. 407, 19 S. W. 831; State *v.* Henning, 110 Mo. 82, 19 S. W. 494; State *v.* Kansas City Ct. of App., 105 Mo. 299, 16 S. W. 853; State *v.* Rombauer, 105 Mo. 103, 16 S. W. 695; Bobb *v.* Wolff, 105 Mo. 52, 16 S. W. 835; State *v.* Rombauer, 101 Mo. 499, 14 S. W. 726; Wolff *v.* Matthews, 98 Mo. 246, 11 S. W. 563; Anchor Milling Co. *v.* Walsh, 97 Mo. 287, 11 S. W. 217; Corrigan *v.* Morris, 97 Mo. 174, 10 S. W. 880; Ford *v.* Fellows, (Mo. 1888) 8 S. W. 791; State *v.* Spencer, 91 Mo. 206, 3 S. W. 410; State *v.* Dillon, 90 Mo. 229, 2 S. W. 417; State *v.* Board of Health, 90 Mo. 169, 2 S. W. 291; State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; Schuermann *v.* Union Cent. L. Ins. Co., 77 Mo. App. 504; Clark *v.* Porter, 77 Mo. App. 103; Franta *v.* Bohemian Catholic Cent. Union, 77 Mo. App. 31; Schilb *v.* Pendleton, 76 Mo. App. 454; Mitchell *v.* Blatt, 76 Mo. App. 408; Herchenroeder *v.* Herchenroeder, 75 Mo. App. 283; Farmers' Exch. Bank *v.* Hageluken, 75 Mo. App. 62; St. Charles *v.* Elsner, 73 Mo. App. 517; Bell *v.* Winkleman, 73 Mo. App. 451; Clotilde *v.* Lutz, 73 Mo. App. 37; Riffel *v.* Ozark Land, etc., Co., 71 Mo. App. 617; State *v.* Gilmore, 71 Mo. App. 565; Joyce Surveying Co. *v.* St. Louis, 68 Mo. App. 182; Drummond Tobacco Co. *v.* Addison Tinsley Tobacco Co., 52 Mo. App. 10; Leahy *v.* Davis, 49 Mo. App. 519; Joplin Consol. Min. Co. *v.* Joplin, 48 Mo. App. 601; Cape Girardeau *v.* Borrough, 43 Mo. App. 298; Swan *v.* Thompson, 36 Mo. App. 155; State *v.* Armstrong, 35 Mo. App. 49; State *v.* Coleman, 33 Mo. App. 470; State *v.* Tittman, 31 Mo. App. 82; Freeman *v.* St. Louis Quarry Co., 30 Mo. App. 362; Owens *v.* Branson, 28 Mo. App. 584; Johnson County *v.* Bryson, 27 Mo. App. 341; State *v.* Jenkins, 25 Mo. App. 484; Myers *v.* Myers, 22 Mo. App. 94; McCormick *v.* St. Louis, etc., R. Co., 20 Mo. App. 65; Robertson *v.* Springfield, etc., R. Co., 18 Mo. App. 185.

56. Mo. Const. art. 6, § 22.

A writ of error will not lie in the absence of a statute. Matson *v.* Dickerson, 3 Mo. 339.

57. Mo. Const. art. 6, § 23. They exercise a superintending control over criminal courts, probate courts, county courts, municipal cor-

23. MONTANA — a. Supreme Court. The supreme court, except as otherwise provided by the constitution, has appellate jurisdiction only,[58] which is coextensive with the state, and has a general supervisory control[59] over all inferior courts under such regulations and limitations as may be prescribed by law.[60]

b. District Courts. District courts have appellate jurisdiction in such cases arising in justices and other inferior courts in their respective districts as may be provided by the constitution and the law.[61]

24. NEBRASKA — a. Supreme Court. The supreme court has original jurisdiction[62] in cases relating to the revenue,[63] civil cases in which the state shall be a party, mandamus,[64] quo warranto,[65] and habeas corpus, and has appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of the district courts,[66] in all matters of law, fact, or equity, where the rules of law or the principles of equity appear

poration courts, justices of the peace, and all inferior tribunals in each county in their respective circuits.

A statute is constitutional giving power to try appeals from probate, etc., courts. McCraw *v.* Hubble, 61 Mo. 107; Langshore *v.* Kelso, 56 Mo. 45; Ross *v.* Murphy, 55 Mo. 372. But appellate jurisdiction is derivative and cannot exceed that of the probate court from which appeal is taken. Garver *v.* Richardson, 77 Mo. 459.

58. The appellate jurisdiction of the supreme court extends to all cases in law and equity, subject to such limitations and regulations as may be prescribed by law. Such court has power in its discretion to issue and to hear and determine writs of habeas corpus, quo warranto, certiorari, prohibition, and injunction, and such other remedial writs as may be necessary and proper to the complete exercise of its appellate jurisdiction. Such court has power to summon a jury to determine an issue of fact. Each of the justices has power to issue writs of habeas corpus to any part of the state and to make such writs returnable before himself or the supreme court, or before any district court of the state, or any judge thereof, and such writs may be heard and determined by the particular court or judge before whom made returnable. Each of the justices may also issue, hear, and determine writs of certiorari in proceedings for contempt in the district court, and such other writs as he may be authorized by law to issue. Mont. Const. (1889), art. 8, § 3. See also Finlen *v.* Heinze, 27 Mont. 123, 69 Pac. 829, 70 Pac. 517; State *v.* Barret, 25 Mont. 112, 63 Pac. 1030; State *v.* Moran, 24 Mont. 433, 63 Pac. 390; State *v.* Hogan, 24 Mont. 379, 62 Pac. 493.

59. Supervisory control may be exercised where the inferior court makes an order not appealable nor subject to appellate jurisdiction by any of the specified writs. State *v.* Judicial Dist. Ct., 25 Mont. 504, 65 Pac. 1020. Nor is the supervisory control dormant for want of legislation prescribing the mode of exercise, where the code sufficiently overcomes any such objection. State *v.* First Judicial Dist. Ct., 24 Mont. 539, 63 Pac. 395.

60. Mont. Const. (1889), art. 8, § 2.

61. Mont. Const. (1889), art. 8, § 11.

The legislature may provide for appeals from the state board of medical examiners, for the constitution does not limit appellate jurisdiction to appeals from justices and inferior courts so as to exclude legislative power in this respect. State *v.* First Judicial Dist. Ct., 13 Mont. 370, 34 Pac. 298.

62. The constitutional specification of cases of original jurisdiction excludes others. Miller *v.* Wheeler, 33 Nebr. 765, 51 N. W. 137. Original jurisdiction when not expressly restricted is concurrent with that of the district courts of the proper counties and will be entertained in accordance with the terms, orders, and rules prescribed. *In re* Petition of Atty.-Gen., 40 Nebr. 402, 58 N. W. 945. But such jurisdiction does not exist in an action by a receiver of a state bank to recover assets of the bank. State *v.* Wahoo State Bank, 40 Nebr. 192, 58 N. W. 863. But see State *v.* Milligan Exch. Bank, 34 Nebr. 198, 51 N. W. 765; State *v.* Commercial State Bank, 28 Nebr. 677, 44 N. W. 998.

A writ of prohibition cannot be granted as an independent remedy. State *v.* Hall, 47 Nebr. 579, 66 N. W. 642.

63. *In re* Petition of Atty.-Gen., 40 Nebr. 402, 58 N. W. 945.

64. State *v.* Graves, (Nebr. 1902) 92 N. W. 144; Armstrong *v.* Mayer, 61 Nebr. 355, 86 N. W. 489; State *v.* Smith, 57 Nebr. 41, 77 N. W. 384.

65. State *v.* Frazier, 28 Nebr. 438, 44 N. W. 471.

66. Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; Smith *v.* State, 4 Nebr. 277.

Although a contested election decision of the district court is final under the provisions of the law, yet the supreme court may correct an error of the district court in administering said law. Miller *v.* Rolph, 8 Nebr. 438, 1 N. W. 123. But the supreme court has not original jurisdiction of contested election cases. Miller *v.* Wheeler, 33 Nebr. 765, 51 N. W. 137.

County court.— The supreme court cannot review directly the rulings of the county court, but on appeal or error therefrom to the district court its judgment thereon can be reviewed. Kingman *v.* Davis, 63 Nebr. 578, 88 N. W. 777. But see Fitzgerald *v.* Fitzgerald, etc., Co., 48 Nebr. 386, 67 N. W. 158.

from the files, exhibits, or records of such courts to have been erroneously determined.[67]

b. District Courts. District courts have appellate jurisdiction in all civil and criminal matters except where otherwise provided.[68]

25. NEVADA — a. Supreme Court. The supreme court has appellate jurisdiction in all cases in equity; also in all cases at law in which is involved the title or right of possession to, or the possession of, real estate or mining claims, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand (exclusive of interest), or the value of the property in controversy exceeds three hundred dollars; also, in all other civil cases not included in the general subdivisions of law and equity, and also on questions of law alone, in all criminal cases in which the offense charged amounts to a felony. The court also has power to issue writs[69] of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices has power to issue writs of habeas corpus to any part of the state upon petition by, or on behalf of, any person held in actual custody, and may make such writs returnable before himself or the supreme court, or before any district court in the state or judge of said courts.[70]

b. District Courts. District courts have final appellate jurisdiction in cases arising in justices' courts and such other inferior tribunals as may be established by law. They also have power to issue writs of mandamus, injunction, quo warranto, certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction and also writs of habeas corpus.[71]

26. NEW HAMPSHIRE. By the statute of 1901,[72] two courts were established instead of the supreme court then existing, to be known as the supreme court and as the superior court. The supreme court thereby established was given jurisdiction of all matters and things of which the court at law terms had jurisdiction.[73] The superior court was given original jurisdiction of all actions, appeals, processes, and matters and things which could be entered in, or were cognizable by the then court at the trial terms thereof.[74] The justices of the superior court in vacation were given all the powers possessed by the then court in vacation.

27. NEW JERSEY — a. Court of Errors and Appeals. The court of errors and appeals is one of last resort in all cases.[75] Writs and processes may issue out of the court of errors and appeals, and writs of error lie to remove final judgments in any circuit court directly into such court, and may be brought in the same manner and subject to the same rules as exist in case of a writ of error to the supreme court.[76]

67. Nebr. Const. art. 6, § 2; Nebr. Comp. Stat. (1901), §§ 204, 2399.

68. Nebr. Const. art. 6, § 9; Nebr. Comp. Stat. (1901), p. 508, § 2417.

Appeals lie to the district courts from the judgments of county courts (Nebr. Const. art. 6, § 17; Nebr. Comp. Stat. (1901), p. 37), from justices' courts (Nebr. Comp. Stat. (1901), pp. 1348, 1386), and from probate courts (Nebr. Comp. Stat. (1901), pp. 518, 520).

69. State *v.* McCullough, 3 Nev. 202, holding that the power to issue writs is an original jurisdiction and not merely auxiliary to appellate jurisdiction.

70. Nev. Const. art. 6, § 4; Cutting Comp. Laws Nev. (1900), § 115.

71. Nev. Const. art. 6, § 6; Cutting Comp. Laws Nev. (1900), § 117.

72. N. H. Laws (1901), c. 78.

73. N. H. Pub. Stat. (1901), c. 204, § 3.

74. N. H. Pub. Stat. (1901), c. 204, § 4.

75. N. J. Const. art. 6, § 1.

The court of errors and appeals is purely an appellate court and cannot admit new parties to the cause. New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507.

76. N. J. Laws (1900), c. 147, §§ 13, 14; N. J. Gen. Stat. (1895), p. 1022, § 12.

Only such writs as were customary to issue were authorized by the statute "to regulate the proceedings," etc. Anonymous, 20 N. J. L. 495.

Oyer and terminer.— A writ of error does not lie directly to the oyer and terminer from the court of errors. Eutries *v.* State, 47 N. J. L. 140.

Weighing evidence.— Such court cannot weigh evidence on a writ of error to a judgment of the supreme court and consider whether the verdict is excessive, since such review would deprive the judgment of the

b. Other Courts. In certain cases appellate jurisdiction is vested in the supreme[77] and other designated courts.[78]

28. New York — a. Court of Appeals. After Dec. 31, 1895,[79] the jurisdiction of the court of appeals, except where the judgment is of death, became limited to the review of questions of law.[80] Such court cannot review a unanimous decision of the appellate division of the supreme court that there is evidence, supporting or tending to sustain a finding of fact or a verdict not directed by the court.[81] Except where the judgment is of death appeals may be taken as of right to such court only from judgments or orders entered upon decisions of the appellate division of the supreme court, finally determining actions or special proceedings,[82] and from orders granting new trials or exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them.[83] The appellate division in any department may, however, allow an appeal upon any question of law which in its opinion ought to be reviewed by the court of appeals.[84] The legislature may further restrict the jurisdiction of the court of appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.[85]

attribute of finality as to fact. Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762. Nor does the statute as to deciding disputed questions of fact by the supreme court apply to the court of errors and appeals. Moran *v.* Jersey City, 58 N. J. L. 144, 35 Atl. 284.

77. Wilson *v.* Pennsylvania, etc., R. Co., 64 N. J. L. 44, 44 Atl. 850; Green *v.* Heritage, 63 N. J. L. 455, 43 Atl. 698; Central R. Co. *v.* Tunison, 55 N. J. L. 561, 27 Atl. 929; Diament *v.* Lore, 31 N. J. L. 220; Carron *v.* Martin, 26 N. J. L. 594, 69 Am. Dec. 584; Krumeick *v.* Krumeick, 14 N. J. L. 39.

Certiorari power of supreme court cannot be transferred to the district (Green *v.* Heritage, 64 N. J. L. 567, 46 Atl. 634) or circuit courts (McCullough *v.* Essex County Cir. Ct., 59 N. J. L. 103, 34 Atl. 1072).

78. Appeals to circuit court see Hauser *v.* Farrell, (N. J. Sup. 1900) 46 Atl. 784.

Appeals to common pleas see Lochanowski *v.* McKeone, 61 N. J. L. 288, 41 Atl. 1117 [*affirming* 60 N. J. L. 118, 36 Atl. 882].

Appeals to court of sessions see Brant *v.* Froehlich, 49 N. J. L. 336, 8 Atl. 283; Dunn *v.* Overseers of Poor, 32 N. J. L. 275; Hildreth *v.* Overseers of Poor, 13 N. J. L. 5.

Appeals to prerogative court see Diament *v.* Lore, 31 N. J. L. 220. But appeal will not lie directly to the prerogative court from an order of the surrogate granting administration. *In re* Grissom, 56 N. J. Eq. 373, 41 Atl. 676.

79. The former jurisdiction of the court of appeals depended upon whether the judgment was that of a general term of the supreme court (Martin *v.* Platt, 131 N. Y. 641, 30 N. E. 565 [*affirming* 16 N. Y. Suppl. 115]; White *v.* Delaware, etc., R. Co., 41 N. Y. 520, 39 How. Pr. (N. Y.) 479) or a decree or order of the special term (Potter *v.* Van Vranken, 36 N. Y. 619; Gracie *v.* Freeland, 1 N. Y. 228; Hubbard *v.* Copcutt, 9 Abb. Pr. N. S. (N. Y.) 289; New York *v.* Schermerhorn, 3 How. Pr. (N. Y.) 334). Such jurisdiction did not permit the review of the exercise of the discretion of a surrogate in refusing to discharge an administrator (*In re* Cornell, 137 N. Y. 600, 33 N. E. 384), and an appeal was prohibited from any judgment or order granting or refusing a new trial where the amount did not exceed a specified sum and this included a judgment of affirmance (Butterfield *v.* Rudde, 58 N. Y. 489). But where a judgment was reversed an order thereafter made, refusing defendant's motion for the appointment of commissioners in condemnation proceedings, was appealable to the court of appeals. *In re* Metropolitan El. R. Co., 136 N. Y. 500, 32 N. E. 1043.

80. *In re* Caruthers, 158 N. Y. 131, 52 N. E. 742, holding that original jurisdiction is not given by the constitution or codes, and therefore an attorney admitted to practice cannot be permitted to file an oath *nunc pro tunc*.

81. Israel *v.* Manhattan R. Co., 158 N. Y. 624, 53 N. E. 517 [*reversing* 10 Misc. 722, 31 N. Y. Suppl. 816]; Boyd *v.* Gorman, 157 N. Y. 365, 52 N. E. 113 [*affirming* 29 N. Y. App. Div. 428, 51 N. Y. Suppl. 1083].

82. *In re* Regan, 167 N. Y. 338, 60 N. E. 658 [*reversing* 58 N. Y. App. Div. 1, 68 N. Y. Suppl. 527].

83. Abbey *v.* Wheeler, 170 N. Y. 122, 62 N. E. 1074 [*reversing* 58 N. Y. App. Div. 451, 69 N. Y. Suppl. 432].

84. Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301 [*affirming* 24 N. Y. App. Div. 273, 48 N. Y. Suppl. 511].

No appeal shall be taken to the court of appeals in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the supreme court allows the appeal and shall certify that a question of law is involved. Stover Anno. Code Civ. Proc. N. Y. § 191; Sidwell *v.* Greig, 157 N. Y. 30, 51 N. E. 267; Halliburton *v.* Clapp, 149 N. Y. 183, 43 N. E. 558.

85. N. Y. Const. (1894), art. 6, § 9.

The provision that the legislature may further restrict the jurisdiction does not prohibit

b. Supreme Court and Appellate Division Thereof. After Dec. 31, 1895, the appellate division of the supreme court became vested with the jurisdiction theretofore exercised by the supreme court[86] at its general terms and by the general terms of the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo, and the city court of Brooklyn, and such additional jurisdiction as might be conferred by the legislature.[87] No justice of the appellate division shall exercise any of the powers of a justice of the supreme court other than those of a justice out of court and those pertaining to the appellate division or to the hearing and decisions of motions submitted by consent of counsel.[88]

29. North Carolina — a. Supreme Court. The supreme court has jurisdiction to review on appeal any decision of the courts below upon any matter of law or legal inference, and it may decide facts and issues of fact in equitable matters.[89] Such court has power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. It also has original jurisdiction to hear claims against the state,[90] but its decision is purely recommendatory;[91] no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action.[92]

b. Superior Courts. Superior courts have appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for errors assigned in matters of law.[93]

30. North Dakota — a. Supreme Court. The supreme court, except as otherwise provided in the constitution, has appellate jurisdiction only,[94] which is coextensive with the state, and has a general superintending control over all inferior courts

the enlarging of the jurisdiction and extending it to new cases from time to time subject to the special provisions of the constitution withdrawing certain cases from review, and a statute giving the right of appeal to said court from the court of special sessions of New York city is constitutional. People *v.* Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420 [*reversing* 7 N. Y. App. Div. 118, 40 N. Y. Suppl. 1, 17 N. Y. App. Div. 635, 45 N. Y. Suppl. 1146].

86. The powers of the supreme court as formerly organized were the same as those of the supreme court of the colony, and the latter were identical with those of the king's bench in England. Kanouse *v.* Martin, 3 Sandf. (N. Y.) 653, 3 Code Rep. (N. Y.) 124.

87. Judson *v.* Central Vermont, etc., R. Co., 158 N. Y. 597, 53 N. E. 514; Riverside Bank *v.* Jones, 75 N. Y. App. Div. 531, 78 N. Y. Suppl. 325; McTurck *v.* Foussadier, 51 N. Y. App. Div. 218, 64 N. Y. Suppl. 962; Barkley *v.* New York Cent., etc., R. Co., 42 N. Y. App. Div. 597, 59 N. Y. Suppl. 742; O'Rourke *v.* Feist, 42 N. Y. App. Div. 136, 59 N. Y. Suppl. 157 [*affirming* 24 Misc. 762, 53 N. Y. Suppl. 1110]; Manheim *v.* Seitz, 36 N. Y. App. Div. 352, 55 N. Y. Suppl. 321; Van Houten *v.* Pye, 23 N. Y. App. Div. 206, 48 N. Y. Suppl. 865; Boechat *v.* Brown, 9 N. Y. App. Div. 369, 41 N. Y. Suppl. 467; Fiske *v.* Smith, 9 N. Y. App. Div. 208, 41 N. Y. Suppl. 176; Ellensohn *v.* Keyes, 6 N. Y. App. Div. 601, 39 N. Y. Suppl. 774; Sanger *v.* French, 1 N. Y. App. Div. 323, 37 N. Y. Suppl. 148; King *v.* Norton, 36 Misc. (N. Y.) 53, 72 N. Y. Suppl. 591; Meyer *v.* Suburban Home Co., 25 Misc. (N. Y.) 686, 55 N. Y. Suppl. 566; Gilroy *v.* Loftus, 22 Misc. (N. Y.) 105, 48 N. Y. Suppl. 532; Eichhold *v.* Tiffany, 21 Misc. (N. Y.) 627, 48 N. Y. Suppl. 70 [*affirming* 20 Misc. 681, 46 N. Y. Suppl. 534]; Biel *v.* Randell, 20 Misc. (N. Y.) 335, 45 N. Y. Suppl. 892; Pollatschek *v.* Goodwin, 17 Misc. (N. Y.) 587, 40 N. Y. Suppl. 682.

88. N. Y. Const. (1894), art. 6, § 2; Stover Anno. Code Civ. Proc. N. Y. § 220.

89. State *v.* Hanna, 122 N. C. 1076, 29 S. E. 353; Munden *v.* Casey, 93 N. C. 97; Young *v.* Rollins, 90 N. C. 125; Greenshoro *v.* Scott, 84 N. C. 184; State *v.* Spurtin, 80 N. C. 362; Henry *v.* Smith, 78 N. C. 27; Keener *v.* Finger, 70 N. C. 35; Foushee *v.* Pottershall, 67 N. C. 453; Simonton *v.* Chipley, 64 N. C. 152; Heilig *v.* Stokes, 63 N. C. 612; American Bible Soc. *v.* Hollister, 54 N. C. 10; Littlejohn *v.* Williams, 17 N. C. 380: Binford *v.* Alston, 15 N. C. 351.

90. Reeves *v.* State, 93 N. C. 257; Martin *v.* Worth, 91 N. C. 45; Clodfelter *v.* State, 86 N. C. 51, 41 Am. Rep. 440; Bain *v.* State, 86 N. C. 49; Horne *v.* State, 84 N. C. 362; Sinclair *v.* State, 69 N. C. 47.

91. Bledsoe *v.* State, 64 N. C. 392.

92. N. C. Code (1883), §§ 945, 947.

93. N. C. Code (1883), § 923. See also Nash *v.* Sutton, 109 N. C. 550, 14 S. E. 77; Boing *v.* Raleigh, etc., R. Co., 87 N. C. 360; McArthur *v.* McEachin, 64 N. C. 454.

94. A statute does not violate the constitution as to appellate jurisdiction only being conferred, hy providing for trial anew of cases on appeal and that final judgment be rendered. Christianson *v.* Farmers' Ware-

under such regulations and limitations as may be prescribed by law.[95] It has power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and has authority to hear and determine the same; provided, however, that no jury trial shall be allowed in said court, but in proper cases questions of fact may be sent by said court to the district court for trial.[96]

b. District Courts. District courts have such appellate jurisdiction as may be conferred by law.[97]

31. Ohio — a. Supreme Court. The supreme court has original jurisdiction[98] in quo warranto, mandamus,[99] habeas corpus, and procedendo, and such appellate jurisdiction as may be provided by law.[1] A judgment rendered or a final order made by a circuit court, or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or a superior court or a judge thereof, may be reversed, vacated, or modified by the supreme court on petition in error, for errors appearing on the record; but no petition in error except as to the judgment or final order of the circuit court, or a judge thereof, or of the general term of any superior court or a judge thereof, shall be filed without leave of the supreme court or a judge thereof, and the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence.[2]

b. Other Courts. A judgment rendered or final order made by any court of common pleas, or a judge thereof may be reversed, vacated, or modified by the circuit court of the county wherein such court of common pleas is located, for errors appearing on the record;[3] and a judgment rendered or final order made by a probate court, justice of the peace, or any other tribunal, board, or officer, exercising judicial functions, and inferior in jurisdiction to the court of common pleas, may be reversed, vacated, or modified by the court of common pleas.[4]

house Assoc., 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.

95. N. D. Const. art. 4.

96. N. D. Const. art. 4.

Jurisdiction as to writs see State *v.* McLean County, 11 N. D. 356, 92 N. W. 385; State *v.* Wilcox, 11 N. D. 329, 91 N. W. 955; Anderson *v.* Gordon, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134; State *v.* Lavik, 9 N. D. 461, 83 N. W. 914; State *v.* Archibald, 5 N. D. 359, 66 N. W. 234; State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

97. N. D. Const. art. 4.

98. **Original jurisdiction.**— The supreme court has no original jurisdiction except that constitutionally conferred. Kent *v.* Mahaffy, 2 Ohio St. 498. See also Yoeman *v.* Lasley, 36 Ohio St. 416; Anonymous, 1 Ohio Dec. (Reprint) 315, 7 West. L. J. 221.

99. State *v.* Todd, 4 Ohio 351.

1. Ohio Const. art. 4, § 2.

Appellate jurisdiction extends only to judgments and decrees of courts created and organized in pursuance of the provisions of the constitution. *Ex p.* Logan Branch Bank, 1 Ohio St. 432. But the court exercises appellate and not original jurisdiction in deciding a cause reserved for its decision. Chase *v.* Washburn, 2 Ohio St. 98.

Correcting error in decision.— The supreme court may entertain a bill for the correction of an error in one of its own decisions. Longworth *v.* Sturges, 4 Ohio St. 690.

Jurisdiction conferred on other court.— The supreme court has no jurisdiction as to a petition in error where such jurisdiction is conferred upon another court. Kosminski *v.* Barrett, 34 Ohio St. 163; Benham *v.* Conklin, 3 Ohio St. 509. And this applies also to a review on certiorari (*In re* Gregory, 19 Ohio 357) or on appeal (McCurdy *v.* Legally, 14 Ohio 391).

2. Bates Anno. Stat. Ohio (1903), § 6710. See also Gompf *v.* Wolfinger, 67 Ohio St. 144, 65 N. E. 878.

3. Bates Anno. Stat. Ohio (1903), § 6709. See also Pierce *v.* Stewart, 61 Ohio St. 422, 56 N. E. 201; Dalton *v.* Davis, 18 Ohio Cir. Ct. 878, 6 Ohio Cir. Dec. 133; Toledo *v.* Andrews, 18 Ohio Cir. Ct. 861, 6 Ohio Cir. Dec. 606; Merchants' Nat. Bank *v.* Little, 2 Ohio Cir. Dec. 496; Kennedy *v.* Thompson, 2 Ohio Cir. Dec. 254.

The appellate jurisdiction of the circuit court is only that expressly conferred. Atwood *v.* Whipple, 48 Ohio St. 308, 28 N. E. 674.

4. Bates Anno. Stat. Ohio (1903), § 6708.

Appeal does not lie to common pleas from the probate court in matters not embraced in the statute. Barr *v.* Closterman, 1 Ohio Cir. Dec. 546.

As to appellate power of general term of superior court see Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 674.

Time of determination.— Bates Anno. Stat.

32. Oregon — a. Supreme Court. The supreme court has jurisdiction only to revise the final decisions of the circuit courts.[5]

b. Circuit Courts. Circuit courts have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals.[6]

33. Pennsylvania — a. Supreme Court. No duties can be imposed by law upon the supreme court or any of the judges thereof except such as are judicial.[7] The jurisdiction of the supreme court extends over the state. The judges thereof have original jurisdiction in cases of injunction,[8] where a corporation is a party defendant,[9] of habeas corpus, of mandamus to courts of inferior jurisdiction,[10] and of quo warranto as to all officers of the commonwealth whose jurisdiction extends over the state;[11] but they cannot exercise any other original jurisdiction.[12] They have appellate jurisdiction, by appeal, certiorari, or writ of error, in all cases, as is or may be provided by law.[13] The judges may also issue all remedial and other writs and process returnable to said court.[14] The supreme court also has appellate jurisdiction of pleas, plaints, and causes removed from any other court of the state, and may examine and correct all manner of errors of the justices, magistrates, and courts of the state in process, proceedings, judgments, and decrees, and may reverse, modify, or affirm the same.[15] Appeals also lie directly

Ohio (1903), §§ 557-1, 557-2, requiring that any case pending in the common pleas on error shall be determined within ninety days, and that the act shall apply to all motions affecting reports of referees, is directory merely, and on failure so to do the court does not lose jurisdiction. James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

5. Oreg. Const. art. 7, § 6.

An order not necessary or proper in aid of appellate jurisdiction will not be granted. O'Brien *v.* O'Brien, 36 Oreg. 92, 57 Pac. 374, 58 Pac. 892.

Original jurisdiction.— The supreme court is precluded from exercising original jurisdiction. Boon *v.* McClane, 2 Oreg. 331.

6. Oreg. Const. art. 7, § 9.

7. Pa. Const. art. 5, § 21.

8. Bruce *v.* Pittsburgh, 161 Pa. St. 517, 29 Atl. 584; De Walt *v.* Bartley, 146 Pa. St. 525, 23 Atl. 448; Clark *v.* Washington, 145 Pa. St. 566, 23 Atl. 333; Fargo *v.* Oil Creek, etc., R. Co., 81* Pa. St. 266; Wheeler *v.* Philadelphia, 77 Pa. St. 338; Philadelphia, etc., R. Co. *v.* Green, etc., St. Pass. R. Co., 33 Pa. St. 82; Cleveland, etc., R. Co. *v.* Erie, 1 Grant (Pa.) 212; Riley *v.* Ellmaker, 6 Whart. (Pa.) 545; Gilder *v.* Merwin, 6 Whart. (Pa.) 522; Buck Mountain Coal Co. *v.* Lehigh Coal, etc., Co., 2 Wkly. Notes Cas. (Pa.) 241.

9. Hottenstein *v.* Clement, 41 Pa. St. 502. See also Cassel *v.* Jones, 6 Watts & S. (Pa.) 552.

The clause as to a corporation being defendant applies to municipal as well as to private corporations. Wheeler *v.* Philadelphia, 77 Pa. St. 338.

10. Com. *v.* Hartranft, 77 Pa. St. 154; Com. *v.* Baroux, 36 Pa. St. 262; Com. *v.* Pittsburgh, 34 Pa. St. 496; Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9; Com. *v.* Lancaster County Com'rs, 6 Binn. (Pa.) 5.

11. Com. *v.* Dumbauld, 97 Pa. St. 293.

12. See *In re* Nichols, 180 Pa. St. 591, 37 Atl. 95; McCurdy's Appeal, 65 Pa. St. 290; Hottenstein *v.* Clement, 41 Pa. St. 502; Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278; Crawford County *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 141; Mauch Chunk Tp. *v.* Nescopeck Tp., 21 Pa. St. 46; Hays *v.* Pennsylvania R. Co., 17 Pa. St. 9; Williams *v.* Williams, 2 Yeates (Pa.) 167; Com. *v.* Skinner, 14 Pa. Co. Ct. 347; Lebanon Mut. Ins. Co. *v.* Erb, 2 Chest. Co. Rep. (Pa.) 573.

13. Pa. Const. art. 5, § 3.

14. 2 Brightly Purd. Dig. Pa. (12th ed.) p. 1957, § 25.

15. 2 Brightly Purd. Dig. Pa. (12th ed.) p. 1955, § 20. See also Hosack *v.* Crill, 197 Pa. St. 370, 47 Atl. 609; Matthews *v.* Rising, 194 Pa. St. 217, 44 Atl. 1067; Com. *v.* Dunham, 174 Pa. St. 436, 34 Atl. 329; Ruffner *v.* Hooks, 171 Pa. St. 531, 33 Atl. 108; Northampton County Com'rs' Appeal, 57 Pa. St. 452; Com. *v.* Nathans, 5 Pa. St. 124; Watson *v.* Mercer, 17 Serg. & R. (Pa.) 343; Wurtz *v.* McFaddon, 4 Serg. & R. (Pa.) 78; Patterson *v.* Schoyer, 10 Watts (Pa.) 333; Burginhofen *v.* Martin, 3 Yeates (Pa.) 479; Brower *v.* Kantner, 9 Pa. Super. Ct. 94.

Indictments may be removed into the supreme court by a writ of certiorari or a writ of error, as the case may require. 2 Brightly Purd. Dig. Pa. (12th ed.) p. 1957, par. 27.

Appeal lies to the supreme court from a judgment of the superior court: (1) If the jurisdiction of the superior court is in issue; (2) if the case involves the construction or application of the constitution or any statute or treaty of the United States; (3) or the construction or application of the constitution of the state; (4) if the appeal to the supreme court be specially allowed by the superior court itself or by any one justice of the supreme court except where by stipulation the decision of the court below or in the supreme court shall be final. Brightly Purd. Dig. Pa. (Suppl. 1895), p. 2685, § 29 *et seq.* See also *In re* Boyle, 190 Pa. St. 577, 42 Atl. 1025, 45 L. R. A. 399.

to the supreme court in all cases of disbarment, irrespective of the court in which the decree may have been pronounced.[16]

b. Superior Court. The superior court has power to grant writs and process necessary for the exercise of its jurisdiction, and for the enforcement of its orders and decrees.[17] Such court has no original jurisdiction except that it, or any judge thereof, has full power and authority when and as often as there may be occasion to issue writs of habeas corpus returnable in such court. Such court has exclusive and final appellate jurisdiction of all appeals in (1) all proceedings in the court of quarter sessions of the peace or before any judge thereof, except cases involving the right to a public office; (2) all proceedings in the court of oyer and terminer and general jail delivery, except cases of felonious homicide; (3) any action, claim, distribution, or dispute of any kind in the common pleas, at law or in equity, whether originating therein or reaching that court by appeal or certiorari from a justice of the peace or alderman, or magistrate, if the subject of the controversy be either money, chattels, real or personal, or the possession of or title to real property, and if also the amount or value thereof really in controversy be not greater than fifteen hundred dollars exclusive of costs, and if also the action be not brought, authorized, or defended by the attorney-general in his official capacity, and any single claim, any dispute, distribution, or other proceeding in the orphans' court, if the subject of the controversy be either money, chattels, real or personal, or the possession of or title to real property, and if also the amount or value thereof really in controversy in such single claim, dispute, or other proceeding be not greater than fifteen hundred dollars, exclusive of costs, and if also the claim, dispute, or other proceding be not brought, authorized, or defended by the attorney-general in his official capacity.[18]

34. Rhode Island. The supreme court has such jurisdiction as may from time to time be prescribed by law, and chancery powers may be conferred on such court. The judges thereof shall in all trials instruct the jury in the law. They shall also give their written opinion[19] upon any question of law whenever requested by the governor or by either house of the general assembly.[20]

35. South Carolina — a. Supreme Court. The supreme court has power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original remedial writs.[21] Such court has appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside. Such court is also constituted

16. Pa. Laws (1899), p. 250, § 6.

17. Brightly Purd. Dig. Pa. (Suppl. 1895), p. 2683, § 15.

18. Pa. Laws (1899), pp. 248, 249, §§ 1-4, amending Brightly Purd. Dig. Pa. (Suppl. 1895), p. 2684.

The jurisdictional amount on appeal from the orphans' court cannot be conferred by lumping the sums of persons whose shares were awarded in trust instead of to them directly. *In re* Samson, 200 Pa. St. 590, 51 Atl. 325.

19. **The opinions of the justices** need not be given on questions submitted by the house on resolutions passed after the assembly has been prorogued by the governor. *In re* Legislative Adjournment, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716.

20. R. I. Const. art. 10, §§ 2, 3; R. I. Gen. Laws (1896), tit. 25, cc. 221-223.

Certifying constitutional question.—A judgment is sufficient for certifying a constitutional question to the supreme court where the district court determines that it finds defendant probably guilty, whereupon it certifies, etc. State *v.* Brown, etc., Mfg. Co., 18 R. I. 1, 16, 25 Atl. 246, 17 L. R. A. 856.

Original jurisdiction.— An action of debt to recover a penalty is not within the original jurisdiction of the supreme court. Parker *v.* Barstow, 5 R. I. 232.

Overruling demurrer.— The appellate division and not the common pleas division is the one to which an appeal should be taken from the overruling a demurrer in the district court. Denison *v.* Foster, 18 R. I. 735, 31 Atl. 894.

Waiver of jury.— A case need only be certified to the appellate division for final determination from the common pleas division where a jury is expressly waived by agreement; but waiver by operation of law is contemplated where there is a reference to an auditor by agreement. Blanding *v.* Sayles, 21 R. I. 211, 42 Atl. 872.

21. Carolina Grocery Co. *v.* Burnet, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687; Gilmer *v.* Hunnicutt, 57 S. C. 166, 35 S. E. 521;

a court for the correction of errors at law under such regulations as the general assembly may by law prescribe.[22]

b. Other Courts. The circuit court has appellate jurisdiction of all matters originally within the jurisdiction of the probate court.[23] The court of common pleas has appellate jurisdiction in all cases within the jurisdiction of inferior courts, except from such inferior courts from which there is provided by the general assembly an appeal directly to the supreme court.[24] Again the court of general sessions has appellate jurisdiction in criminal cases.[25]

36. South Dakota — a. Supreme Court. The supreme court, except as otherwise provided by the constitution, has appellate jurisdiction only, which is coextensive with the state, and has general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law. Such court and the judges thereof have power to issue writs of habeas corpus. The supreme court also has power to issue writs of mandamus, quo warranto, certiorari, injunction, and other original and remedial writs,[26] with authority to hear and determine the same in such cases as may be prescribed by law, provided, however, that no jury trials shall be allowed in the supreme court, but in proper cases questions of fact may be sent by such court to a circuit court for trial before a jury.[27] Again the governor may require the opinion of the judges of the supreme court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.[28]

b. Circuit Courts. Circuit courts have such appellate jurisdiction as may be conferred by law and consistent with the constitution.[29]

37. Tennessee — a. Supreme Court. The jurisdiction of the supreme court is appellate only, under such restrictions and regulations as may from time to time be prescribed by law, although it possesses such other jurisdiction as was conferred by law upon it at the time of the adoption of the constitution.[30]

State *v.* Farris, 51 S. C. 176, 28 S. E. 308, 370; Salinas *v.* Aultman, 49 S. C. 325, 27 S. E. 385; State *v.* Columbia, 16 S. C. 412; State *v.* Hayne, 8 S. C. 367; Alexander *v.* McKenzie, 2 S. C. 81; State *v.* McIver, 2 S. C. 25; State *v.* Columbia, etc., R. Co., 1 S. C. 46; Mooney *v.* Welsh, 1 Mill (S. C.) 133.

Appeal does not lie direct to the supreme court from an order of two trial justices as to a writ of habeas corpus. State *v.* Duncan, 22 S. C. 87.

22. Const. S. C. (1895), art. 5, § 4.

Jurisdiction of appeals from city courts is not precluded by the absence of a constitutional provision, where the statute gives jurisdiction thereof. Charleston *v.* Weller, 34 S. C. 357, 13 S. E. 628.

Original jurisdiction.— The supreme court has no original jurisdiction of a proceeding to vacate a town charter (State *v.* Tritter, (S. C. 1898) 30 S. E. 273), nor of a controversy involving the construction of a will (Hayne *v.* Irvine, 24 S. C. 595).

23. S. C. Code Civ. Proc. §§ 55, 57.

Remanding case to probate court.—The circuit court has appellate jurisdiction only and cannot send a case back to the probate court to take testimony omitted at the original hearing. *Ex p.* White, 33 S. C. 442, 12 S. E. 5.

24. S. C. Const. (1895), art. 5, § 15.

25. S. C. Const. (1895), art. 5, § 18.

26. State *v.* McGee, (S. D. 1901) 88 N. W. 115; *In re* Ringrose, 9 S. D. 349, 69 N. W. 584; State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

Certiorari will not be granted at the instance of a private citizen to review the action of the board of county commissioners in establishing election precincts where there is no reason why the circuit court should not take jurisdiction, and the reason is insufficient that there is no term of the circuit court where said court has jurisdiction to issue said writ in vacation. Everitt *v.* Hughes County, 1 S. D. 365, 47 N. W. 276.

27. S. D. Const. art. 5, § 3.

Writs of error and appeals may be allowed from the county to the supreme court. S. D. Const. art. 5, § 20.

28. S. D. Const. art. 5, § 13.

A resolution is not within the constitution which involves the personal right of certain parties to hold commissioned offices and to be paid for services rendered. *In re* House Resolution No. 30, 10 S. D. 249, 72 N. W. 892 [*citing In re* Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478]. The right is confined exclusively to such questions as may raise a doubt in the executive department, never in the legislative, nor where the question involved is one purely of parliamentary procedure. *In re* Construction of Constitution, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575. See also *In re* Chapter 6, Session Laws, 8 S. D. 274.

29. S. D. Const. art. 5, § 14.

Writs of error and appeals may be allowed from the county to the circuit courts. S. D. Const. art. 5, § 20.

30. Tenn. Const. art. 6, § 2.

Jurisdiction of supreme court see State *v.*

b. Court of Chancery Appeals. The jurisdiction of the court of chancery appeals is appellate only and extends to all equity cases not involving state revenues, and the findings of facts in such court are conclusive[31] and the supreme court may transfer pending equity cases thereto, except those involving state revenues. On questions of law the decisions of such court are subject to appeal.[32]

38. Texas — a. Supreme Court. The supreme court has appellate jurisdiction,[33] coextensive with the limits of the state,[34] which extends to all questions of law arising in all civil cases of which the courts of civil appeals have appellate but not final jurisdiction.[35] All causes may be carried up to the supreme court by writs of error on final judgment and not on judgments reversing and remanding causes,[36] except in the following cases: (1) Where the state is a party or where the railroad commissioners are parties; (2) cases which involve the construction or application of the constitution of the United States or of the state of Texas,[37] or of an act of congress; (3) cases which involve the validity of a statute of the state;[38] (4) cases involving the title to a state office;[39] (5) cases in which a civil court of appeals overrules its own decisions,[40] the decision of another court of civil appeals,[41] or of the supreme court;[42] (6) cases in which the judges

Gannaway, 16 Lea (Tenn.) 124; Dodds *v.* Duncan, 12 Lea (Tenn.) 731; Chesnut *v.* McBride, 6 Baxt. (Tenn.) 95; State Bank *v.* Cannon, 2 Heisk. (Tenn.) 428; Newman *v.* Scott County, 1 Heisk. (Tenn.) 787; Phillips *v.* Hoffman, 5 Coldw. (Tenn.) 251; Young *v.* Thompson, 2 Coldw. (Tenn.) 596; Ward *v.* Thomas, 2 Coldw. (Tenn.) 565; Bone *v.* Rice, 1 Head (Tenn.) 149; State *v.* East Tennessee Bank, 5 Sneed (Tenn.) 573; Wilson *v.* Wilson, 10 Yerg. (Tenn.) 200; Cox *v.* Breedlove, 2 Yerg. (Tenn.) 499.

Power to issue writs see State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070; Memphis *v.* Halsey, 12 Heisk. (Tenn.) 210; State *v.* Elmore, 6 Coldw. (Tenn.) 528; Barry *v.* Green, 5 Hayw. (Tenn.) 67; King *v.* Hampton, 3 Hayw. (Tenn.) 59.

31. McElwee *v.* McElwee, 97 Tenn. 649, 37 S. W. 560, holding that a statute providing that the findings of fact of the court of chancery appeals shall be conclusive on appeal to the supreme court is valid.

32. Shannon Anno. Code Tenn. (1896), §§ 6321, 6323, 6326.

Two judges, one being absent, may decide, hear, etc., causes before them in the court of chancery appeals. Cowan *v.* Murch, 97 Tenn. 590, 37 S. W. 393, 34 L. R. A. 538.

The jurisdiction of a cause advanced by the supreme court and remanded, in order that it may be determined in advance of its regular order because of its public character, will not be refused by the court of chancery appeals. State *v.* Allen, (Tenn. Ch. App. 1900) 57 S. W. 182.

33. Trigg *v.* State, 49 Tex. 643; McKinney *v.* O'Connor, 26 Tex. 5.

The jurisdiction is essentially and exclusively appellate, and revisory power should be exercised, not over its own judgments, but over those of inferior courts. Chambers *v.* Hodges, 3 Tex. 517.

The legislature cannot confer appellate power on judges. Kleiber *v.* McManus, 66 Tex. 48, 17 S. W. 249.

34. See Pevito *v.* Rodgers, 52 Tex. 581.

35. Sayles Civ. Stat. Tex. (1897), art. 940. See also Security Co. *v.* Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22 [*reversing* (Civ. App. 1900) 54 S. W. 916]; Texas, etc., R. Co. *v.* Langsdale, 88 Tex. 513, 32 S. W. 523; Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942; McRimmon *v.* Moody, 87 Tex. 260, 28 S. W. 279; Burnett *v.* Powell, 86 Tex. 382, 24 S. W. 788, 25 S. W. 17.

The power to review carries as an incident the power to remand a case to the court of civil appeals with directions to reinstate. Frank *v.* Tatum, 87 Tex. 204, 25 S. W. 409.

The court of civil appeals may certify an issue to the supreme court for adjudication in a case of which it has final jurisdiction. Wallis *v.* Stuart, 92 Tex. 568, 50 S. W. 567.

36. Gallagher *v.* Rahm, 88 Tex. 514, 32 S. W. 523.

37. Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960.

Whether the judge is "interested," although a question within the constitution, will not be certified to the supreme court. Herf *v.* James, 86 Tex. 230, 24 S. W. 396.

38. Mathews Lumber Co. *v.* Hardin, 87 Tex. 639, 30 S. W. 898; Herf *v.* James, 86 Tex. 230, 24 S. W. 396. See also State *v.* Thompson, 88 Tex. 228, 30 S. W. 1046.

39. See State *v.* Thompson, 88 Tex. 228, 30 S. W. 1046.

40. See Tex. Laws (1899), p. 170.

A conflict of decisions must be well defined. McCurdy *v.* Conner, 95 Tex. 246, 66 S. W. 664; Bassett *v.* Sherrod, 90 Tex. 32, 36 S. W. 400.

Where an adjudicated case has been overruled the supreme court will not entertain jurisdiction. Sullivan *v.* Hartford F. Ins. Co., 89 Tex. 665, 36 S. W. 73.

41. McCurdy *v.* Conner, 95 Tex. 246, 66 S. W. 664; Gallagher *v.* Rahm, 88 Tex. 514, 32 S. W. 523; McDonald *v.* International, etc., R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803.

42. Molino *v.* Benavides, 94 Tex. 413, 60 S. W. 875; Adoue *v.* Wettermark, 94 Tex. 81,

of any court of civil appeals may disagree;[43] (7) cases in which any two of the courts of civil appeals may hold differently on the same questions of law;[44] and (8) when the judgment of the court of civil appeals reversing the judgment practically settles the case.[45] Again the supreme court or any justice thereof has power to issue certain writs subject to certain limitations.[46]

b. Courts of Civil and Criminal Appeals. The courts of civil appeals may issue writs of mandamus[47] to enforce their jurisdiction and have such other original and appellate jurisdiction as may be prescribed by law.[48] Cases may be transferred to equalize the dockets of the several courts of civil appeals.[49] The court of criminal appeals has no appellate jurisdiction save in criminal cases.[50]

c. Other Courts. Certain appellate jurisdiction is vested in the district courts and supervisory control in certain matters and over certain courts.[51] County courts have appellate jurisdiction in civil cases over which the justices' courts have original jurisdiction, when the judgment of the court appealed from or the amount in controversy exceeds a specified amount.[52]

58 S. W. 722; Douglass *v.* Blount, 93 Tex. 499, 56 S. W. 334; Assman *v.* Dittman, 93 Tex. 37, 53 S. W. 342; Gallagher *v.* Rahm, 88 Tex. 514, 32 S. W. 523.

43. Schintz *v.* Morris, 89 Tex. 648, 35 S. W. 1041; Texas, etc., R. Co. *v.* Langsdale, 88 Tex. 513, 32 S. W. 523; Mexia *v.* Lewis, 87 Tex. 208, 22 S. W. 397; Gulf, etc., R. Co. *v.* Ramey, 86 Tex. 455, 25 S. W. 406; Herf *v.* James, 86 Tex. 230, 24 S. W. 396.

44. Harn *v.* American Mut. Bldg., etc., Assoc., 95 Tex. 79, 65 S. W. 176; Hanway *v.* Galveston, etc., R. Co., 94 Tex. 76, 58 S. W. 724; Sturgis Nat. Bank *v.* Smyth, 87 Tex. 649, 30 S. W. 898.

45. Sayles Civ. Stat. Tex. (1897), art. 941. See also International, etc., R. Co. *v.* Coolidge, 95 Tex. 92, 65 S. W. 181; Molino *v.* Benavides, 94 Tex. 413, 60 S. W. 875; Douglass *v.* Blount, 93 Tex. 499, 56 S. W. 334; Powell *v.* Texas, etc., R. Co., 89 Tex. 663, 36 S. W. 72; Lee *v.* International, etc., R. Co., 89 Tex. 583, 36 S. W. 63.

The decision of a court of appeals on a question of fact is not reviewable by the supreme court. Warren *v.* Dennison, 89 Tex. 557, 36 S. W. 404; Word *v.* Ft. Worth, etc., R. Co., 88 Tex. 661, 32 S. W. 875; Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; Schley *v.* Blum, 85 Tex. 551, 22 S. W. 667. And a statute is constitutional which provides that the judgment of a court of civil appeals shall be conclusive in certain cases. Maddox *v.* Covington, 87 Tex. 454, 29 S. W. 465.

46. McCurdy *v.* Conner, 95 Tex. 246, 66 S. W. 664; Travis County *v.* Jourdan, 91 Tex. 217, 42 S. W. 543; McKenzie *v.* Baker, 88 Tex. 669, 32 S. W. 1038; Pickle *v.* McCall, 86 Tex. 212, 24 S. W. 265; Laredo *v.* Martin, 52 Tex. 548.

47. Wetz *v.* Thompson, 26 Tex. Civ. App. 396, 63 S. W. 1050; Rice *v.* Rice, 24 Tex. Civ. App. 506, 59 S. W. 941; Levy *v.* Gill, (Tex. Civ. App. 1898) 46 S. W. 84.

48. Tex. Const. art. 5, § 6. See also Tex. Rev. Stat. (1895), arts. 997, 1000; Whitener *v.* Belknap, 89 Tex. 273, 34 S. W. 594; Mexican Nat. R. Co. *v.* Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642; *Ex p.* Lynn, 19 Tex. App. 120; Kiel *v.* Campbell, (Tex. Civ. App. 1901) 63 S. W. 659; Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984; Green *v.* Warren, 18 Tex. Civ. App. 548, 45 S. W. 608; Emerson *v.* Emerson, (Tex. Civ. App. 1896) 35 S. W. 425; Missouri, etc., R. Co. *v.* Crane, (Tex. Civ. App. 1895) 32 S. W. 11; Cadwallader *v.* Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917; Schmidt *v.* Stern, 2 Tex. App. Civ. Cas. § 91.

49. Tex. Rev. Stat. (1895), § 994*a*.

A cause once transferred cannot be retransferred to the original court. Gulf, etc., Co. *v.* Smith, (Tex. Sup. 1897) 38 S. W. 750.

50. Tex. Const. art. 5, § 5. See also Jeter *v.* State, 86 Tex. 555, 26 S. W. 49; Samuels *v.* State, (Tex. Crim. 1899) 50 S. W. 715; Russell *v.* State, 37 Tex. Crim. 503, 36 S. W. 1070.

51. Tex. Const. art. 5, § 8; Sayles Civ. Stat. Tex. (1897), § 1099.

Power of the legislature to confer appellate jurisdiction on the district court see Bexar County *v.* Terrell, (Tex. Sup. 1890) 14 S. W. 62; *Ex p.* Whitlow, 59 Tex. 273; Thomerson *v.* State, 8 Tex. 172; Titus *v.* Latimer, 5 Tex. 433.

Jurisdiction of district courts see Harrison Mach. Works *v.* Templeton, 82 Tex. 443, 18 S. W. 601; Buchanan *v.* Bilger, 64 Tex. 589; Timmins *v.* Bonner, 58 Tex. 554; Wadsworth *v.* Chick, 55 Tex. 241; Blythe *v.* Deaton, 48 Tex. 198; Timmins *v.* Lacy, 30 Tex. 115; Aulanier *v.* Governor, 1 Tex. 653; Stephens *v.* Buie, 23 Tex. Civ. App. 491, 57 S. W. 312; Ballard *v.* Wheeler, 23 Tex. Civ. App. 422, 56 S. W. 946; Winstead *v.* Evans, (Tex. Civ. App. 1896) 33 S. W. 580.

52. Tex. Const. art. 5, § 16; Sayles Civ. Stat. Tex. (1897), art. 1158.

Power of the legislature to confer or increase the jurisdiction of the county court see Miman *v.* Eidman, 1 Tex. App. Civ. Cas. § 629.

County courts may issue an injunction to enforce their appellate jurisdiction (Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947) where the amount involved is within the required jurisdictional sum (Fendrick *v.* Shea, 1 Tex. App. Civ. Cas. § 912), otherwise

39. Utah — a. Supreme Court. The supreme court has original jurisdiction[53] to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus. Each of the justices has power to issue writs of habeas corpus to any part of the state, and may make such writs returnable before himself or the supreme court, or before any district court or judge thereof in the state. In other cases[54] the supreme court has appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction.[55]

b. District Courts. District courts have appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same, and may issue writs necessary to effect such control.[56]

40. Vermont — a. Supreme Court. The supreme court has exclusive jurisdiction of certain petitions and may try and determine questions of law, and has power to issue and determine certain writs.[57] An appeal also lies to such court from the court of chancery.[58] The governor may also require the opinion of the judges where the interests of the state demand it.[59]

b. County Courts. Appellate jurisdiction is vested in county courts in probate matters and over decisions of certain inferior courts and tribunals.[60]

41. Virginia — a. Supreme Court of Appeals. The supreme court of appeals has appellate jurisdiction only,[61] except in cases of habeas corpus,[62] mandamus,[63] and prohibition.[64] It has no jurisdiction in civil cases, where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land,[65] the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator; or concerning a mill, roadway, ferry, or landing; or the right of a corporation or of a county to levy tolls or taxes,[66] and except in cases

not (Lackie *v.* Bramlett, 1 Tex. App. Civ. Cas. § 1129). See also Carlisle *v.* Coffee, 59 Tex. 391; Fitzpatrick *v.* Small, 1 Tex. App. Civ. Cas. § 1140.

53. Original jurisdiction to issue writs does not authorize original jurisdiction of a quo warranto to contest the election to office of city councilman, although an information in the nature of a quo warranto is included. State *v.* Elliott, 13 Utah 200, 44 Pac. 248.

Habeas corpus see Godbe *v.* Salt Lake City, 1 Utah 68.

54. "In other cases" refers to appeals from final judgments. North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 14 Utah 155, 46 Pac. 824. So the supreme court has no jurisdiction of an appeal from an order of the district court vacating and setting aside a sale upon execution by said court issued on a judgment rendered on appeal from a judgment of a justice of the peace. Post *v.* Foot, 18 Utah 235, 54 Pac. 975. But see Ogden City *v.* Crossman, 17 Utah 66, 53 Pac. 985; Eureka City *v.* Wilson, 15 Utah 53, 48 Pac. 41.

55. Utah Const. art. 8, § 4.

The supreme court is the exclusive judge of its own jurisdiction. Hailey First Nat. Bank *v.* Lewis, 13 Utah 507, 45 Pac. 890.

56. Utah Const. art. 8, § 7.

57. Vt. Stat. (1894), § 993.

The supreme court has no power to set aside a default judgment of the lower court (Goddard *v.* Fullam, 38 Vt. 75; Scott *v.* Stewart, 5 Vt. 57), to review probate matters of discretion merely, or to rehear and determine them upon their merits (Holmes *v.* Holmes, 26 Vt. 536). It has power to issue writs. Shumway *v.* Sargeant, 27 Vt. 440; *In re* White River Bank, 23 Vt. 478. It also has original jurisdiction to vacate an order inadvertently made in a suit or a probate bond by a judge. Clerk *v.* Foster, 2 Tyler (Vt.) 467.

58. Vt. Stat. (1894), § 981.

The supreme court is an appellate court from final decrees only of the court of chancery and its powers are limited to the correction of errors in such decrees. Slason *v.* Cannon, 19 Vt. 219.

59. Vt. Stat. (1894), § 1006.

60. Vt. Stat. (1894), §§ 2582, 2584.

The county court is but a higher court of probate for determining appeals. Holmes *v.* Holmes, 26 Vt. 536. Upon appeal from the probate court the county court may allow a guardian reasonable expenses in accounting. Shaw *v.* Bates, 53 Vt. 360.

61. Mayo *v.* Clark, 2 Call (Va.) 389.

62. State Prison Assoc. *v.* Ashby, 93 Va. 667, 25 S. E. 893.

63. Barnett *v.* Meredith, 10 Gratt. (Va.) 650.

64. Com. *v.* Latham, 85 Va. 632, 8 S. E. 488; Gresham *v.* Ewell, 84 Va. 784, 6 S. E. 134.

65. Hutchinson *v.* Kellam, 3 Munf. (Va.) 202.

66. Com. *v.* Chaffin, 87 Va. 545, 12 S. E. 972; Prince George County *v.* Atlantic, etc., R. Co., 87 Va. 283, 12 S. E. 667; Bransford *v.* Karn, 87 Va. 242, 12 S. E. 404; Callan *v.* Bransford, 86 Va. 535, 10 S. E. 317; Staunton *v.* Stout, 86 Va. 321, 10 S. E. 5.

of habeas corpus, mandamus, and prohibition, or the constitutionality of a law;[67] provided that the assent of a majority of the judges elected to the court shall be required, in order to declare any law null and void by reason of its repugnance to the federal constitution, or to the constitution of the state.[68]

b. Other Courts. Certain appellate jurisdiction is vested in the circuit court[69] and also in the county or corporation court.[70]

42. WASHINGTON — a. Supreme Court. The supreme court has original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction does not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars,[71] unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.[72] Such court also has power to issue writs of mandamus,[73] review, prohibition,[74] habeas corpus,[75] certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges has power to issue writs of habeas corpus to any part of the state upon petition and may make such writs returnable before himself, before the supreme court, or before any superior court of the state or any judge thereof.[76]

b. Superior Courts. Superior courts have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.[77]

43. WEST VIRGINIA — a. Supreme Court of Appeals. The supreme court of appeals has original jurisdiction[78] in cases of habeas corpus, mandamus, and prohibition. It has appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in certain controversies enumerated in the constitution,[79] and also in cases

67. Com. *v.* McCullough, 90 Va. 597, 19 S. E. 114; Norfolk, etc., R. Co. *v.* Pendleton, 86 Va. 1004, 11 S. E. 1062. See also Western Union Tel. Co. *v.* Goddin, 94 Va. 513, 27 S. E. 429; Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

68. Va. Const. art. 6, § 2.

69. Va. Code (1887), §§ 161, 839, 840, 3469.

Appeal lies from a judgment of the county court in a case removed, on application of defendant before trial, into the county court where a warrant is brought before a justice on a claim exceeding twenty dollars. Carter *v.* Kelly, 28 Gratt. (Va.) 787.

A statute attempting to confer appellate jurisdiction on the circuit court by appeal to review an action of the corporation or hustings court is unconstitutional. Watson *v.* Blackstone, 98 Va. 618, 38 S. E. 939.

70. Va. Const. art. 6, § 14.

71. Trumbull *v.* Clallam County School Dist. No. 7, 22 Wash. 631, 61 Pac. 714; State *v.* Spokane County Super. Ct., 22 Wash. 496, 61 Pac. 158.

72. Hansen *v.* Nilsen, 17 Wash. 606, 50 Pac. 511; Doty *v.* Krutz, 13 Wash. 169, 43 Pac. 17; Jacobs *v.* Puyallup, 10 Wash. 384, 38 Pac. 994.

73. State *v.* Kings County Super. Ct., 24 Wash. 605, 64 Pac. 778.

74. Winsor *v.* Bridges, 24 Wash. 540, 64 Pac. 780; State *v.* Spokane County Super. Ct., 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111; State *v.* Pierce County Super. Ct., 12 Wash. 677, 42 Pac. 123.

75. *In re* Rafferty, 1 Wash. 382, 25 Pac. 465.

76. Wash. Const. art. 4, § 4.

77. Wash. Const. art. 4, § 6.

78. **Original jurisdiction is not given** of application authorizing one against whom a judgment was rendered while an infant to apply for opening thereof after majority. Ewing *v.* Winters, 39 W. Va. 489, 20 S. E. 572.

79. **Right of corporation or county to levy tolls for taxes.**— The supreme court has jurisdiction of a writ of error to a judgment of a circuit court affirming a judgment of a county court dismissing a petition by a bank to have an alleged erroneous assessment of its property for taxation corrected, under W. Va. Code, c. 29, § 94, allowing an appeal from the county to the circuit court if the former refuse to correct an assessment claimed to be erroneous, and W. Va. Const. art. 8, § 3, giving the supreme court appellate jurisdiction in civil cases "in controversies concerning the right of a corporation or county to levy tolls or taxes. Bramwell Bank *v.* Mercer County Ct., 36 W. Va. 341, 15 S. E. 78. In assumpsit by a private corporation authorized by its charter to levy tolls on persons using a river which had been improved by it, against defendant for tolls, the defendant pleaded *non assumpsit*, the ground of contention being that the condition of the river was such that plaintiff had

of quo warranto, habeas corpus, mandamus, certiorari, and prohibition, and in cases involving freedom or the constitutionality of a law. It has appellate jurisdiction in criminal cases and in cases relating to the public revenue the right of appeal belongs to the state as well as the defendant, and such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law.[80]

b. Circuit Courts. The circuit court has supervision and control of all proceedings before justices and other inferior tribunals by mandamus, prohibition, and certiorari. It has appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error, or supersedeas may be allowed to the judgment or proceedings of any inferior tribunal.[81] It shall also have such other supervisory or appellate jurisdiction as is or may be prescribed by law.[82]

44. Wisconsin — a. Supreme Court. The supreme court, except in cases otherwise provided in the constitution, has appellate jurisdiction only, coextensive with the state; but in no case removed to the supreme court may a trial by jury be allowed. Said court has general superintending control over all inferior courts;[83] it has power to issue writs of habeas corpus,[84] mandamus,[85] injunction,[86] quo warranto,[87]

no right to levy the tolls for which judgment was demanded. It was held that the right of the corporation to levy tolls was not directly called in question, within W. Va. Const. art. 8, § 3, giving the right of appeal in cases where the right of a corporation to levy tolls was concerned, irrespective of the amount involved. Miller *v.* Little Kanawha Nav. Co., 32 W. Va. 46, 9 S. E. 57.

80. W. Va. Const. art. 8, § 3. See Warth Code W. Va. (1899), p. 898 *et seq.*

Writs of error, supersedeas, or appeal shall be allowed only by the supreme court of appeals, or a judge thereof, subject to certain conditions. W. Va. Const. art. 8, § 6.

Has no jurisdiction of matters not expressly or by implication given by the constitution and the statutes. State *v.* Shumate, 48 W. Va. 359, 37 S. E. 618.

81. Appeals from justices see Warth Code W. Va. (1899), p. 516 *et seq.* See also Warth Code W. Va. (1899), pp. 316, 500, 514, 529, 533, 817.

Appeals from county courts see Warth Code W. Va. (1899), pp. 218, 315, 316; W. Va. Acts (1901), c. 80, pp. 166, 168. But see as to county courts Cobb *v.* Chesapeake, etc., R. Co., 35 W. Va. 65, 12 S. E. 1097.

82. W. Va. Const. art. 8, § 12. *Compare* Low *v.* Lincoln County Ct., 27 W. Va. 785.

83. Judgment cannot be taken directly to the supreme court for review on appeal or writ of error from a police court, the power of review being vested in the municipal court. Milwaukee *v.* Simons, 93 Wis. 576, 67 N. W. 922 [*distinguishing* Milwaukee *v.* Gross, 21 Wis. 241, 91 Am. Dec. 472].

84. Habeas corpus may be granted independently of the court's "superintending control of inferior courts" (*In re* Pierce, 44 Wis. 411), and such writ may issue, and all legitimate questions arising therefrom may be heard and determined, to release a citizen of the state or one entitled to its protection from illegal imprisonment (*In re* Booth, 3 Wis. 157).

85. Mandamus to enforce the statutory duty of the state treasurer to pay money may be sued out in the supreme court in the first instance (State *v.* Davidson, (Wis. 1902) 88 N. W. 596), although there must be a sufficient reason for taking jurisdiction of such writ where the right sought to be enforced is of a permanent character not greatly impaired by delay (State *v.* Juneau County Sup'rs, 38 Wis. 554). But where the legislature authorized the governor to enter into a certain contract mandamus will not lie to compel him to do acts mentioned in the contract but not provided for in the authorizing statute. State *v.* Farwell, 3 Pinn. (Wis.) 393, 4 Chandl. (Wis.) 100.

86. Injunction prohibiting a city from maintaining an aggravated public nuisance cannot be issued in the exercise of original jurisdiction. *In re* Hartung, 98 Wis. 140, 73 N. W. 988. Nor can said court enjoin an obstruction in a navigable river or remove the same. State *v.* St. Croix Boom Corp., 60 Wis. 565, 19 N. W. 396 [*distinguishing* Atty.-Gen. *v.* Eau Claire, 37 Wis. 400]. Nor can an injunction be issued in cases pending and undetermined in any of the other courts. Cooper *v.* Mineral Point, 34 Wis. 181. But an injunction may be issued on the relation of a private citizen in the name of the state, on the refusal of the attorney-general to act, to enjoin the state's secretary from publishing notices of an election of members of the legislature under an unconstitutional appointment act. State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145, Winslow, J., dissenting. But see *infra*, note 87.

87. Quo warranto.—Information in the nature of a quo warranto seeking forfeiture of a corporate charter is within the original jurisdiction of said court (State *v.* Milwaukee, etc., R. Co., 45 Wis. 579) as is also the writ of quo warranto (Atty.-Gen. *v.* Blossom, 1 Wis. 317). But such jurisdiction will not be exercised over a quasi-civil action for a local office in the name of the state on complaint of a private citizen. State *v.* Baker, 38 Wis. 71. But see *supra*, note 86. And facts of sufficient public importance must be stated to justify issuance of such writ. *In re* Holland, 107 Wis. 178, 83 N. W. 319.

certiorari,[88] and other original and remedial writs,[89] and to hear and determine the same.[90]

b. Other Courts. Circuit courts have appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They also have power to issue writs necessary to give them a general control over inferior courts and jurisdictions.[91] Appellate jurisdiction is also vested in other courts.[92]

45. Wyoming — a. Supreme Court. The supreme court has general appellate jurisdiction[93] coextensive with the state, in both civil and criminal causes, and has a general superintending control[94] over all inferior courts, under such rules and regulations as may be prescribed by law. It has original jurisdiction in quo warranto and mandamus[95] as to all state officers and in habeas corpus. It has power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges has power to issue writs of habeas corpus to any part of the state upon petition, and may make such writs returnable before himself or the supreme court, or before any district court of the state or judge thereof.[96]

b. District Courts. District courts have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.[97]

XII. FEDERAL COURTS.

A. Jurisdiction and Powers Generally — 1. General Principles. All the jurisdiction and powers of the federal courts are derived from the constitution and acts of congress,[98] and they do not possess as an incident to their constitution

88. **Certiorari** lies from a decision of one of the justices of said court on a writ of habeas corpus in vacation. *In re* Booth, 3 Wis. 1.

89. **All common-law writs necessary to superintending control** over inferior courts may be issued, including mandamus, prohibition, certiorari, and procedendo. State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33. See Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425; State *v.* Farwell, 3 Pinn. (Wis.) 393, 4 Chandl. (Wis.) 100.

90. Wis. Const. art. 7, § 3. See also Sanborn & B. Anno. Stat. Wis. (1898), § 2405 *et seq.*; Sanborn & B. Anno. Stat. Wis. (1898), § 3047; Wis. Laws (1899), c. 63; Wis. Laws (1901), c. 319.

Original jurisdiction will not be exercised, although the question is *publici juris* where the primary right is of a public nature and adequate relief can be obtained in the first instance in the circuit court. *In re* Illinois Ct. of Honor, 109 Wis. 625, 85 N. W. 497. Said jurisdiction is also confined to matters affecting the whole state. State *v.* Shaughnessey, 86 Wis. 646, 57 N. W. 1105. See State *v.* Juneau County Sup'rs, 38 Wis. 554. Although it will be exercised in matters *publici juris*. State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561. See State *v.* Cunningham, 82 Wis. 39, 51 N. W. 1133. Examine Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

Power of legislature to confer jurisdiction. Klein *v.* Valerius, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609; McNab *v.* Noonan, 28 Wis. 434; Harrison *v.* Doyle, 11 Wis. 283.

91. Wis. Const. art. 7, § 8. See also Sanborn & B. Anno. Stat. Wis. (1898), § 2420 *et seq.*; Sanborn & B. Anno. Stat. Wis. (1898), § 3047; Wis. Laws (1901), c. 269.

92. **Certain county courts** have also appellate jurisdiction from justices of the peace. Wis. Laws (1899), c. 1, § 1.

Municipal courts of certain counties have appellate jurisdiction of appeals from justices' courts. Taylor *v.* De Camp, 68 Wis. 162, 31 N. W. 728. See Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85; Bruins *v.* Bruins, 55 Wis. 548, 13 N. W. 542.

93. **Jurisdiction is appellate only** and the supreme court cannot allow a guardian's counsel fees incurred in defense of his accounts in proceedings in error. Nagle *v.* Robins, 9 Wyo. 211, 62 Pac. 154, 796.

94. **Superintending control.** — Jurisdiction exists over questions certified from the district court upon the point whether a person indicted for murder should be admitted to bail. State *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

95. State *v.* Clay, 3 Wyo. 393, 31 Pac. 409.

96. Wyo. Const. art. 5, §§ 2, 3.

97. Wyo. Const. art. 5, § 10.

98. Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147; *In re* Barry, 42 Fed. 113, 34 L. ed. 503 note. See also Fitch *v.* Creighton, 24 How. (U. S.) 159, 16 L. ed. 596; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Mulqueen *v.* Schlichter Jute Cordage Co., 108 Fed. 931; Price *v.* Abbott, 17 Fed. 506; U. S. Bank *v.* Northumberland Bank, 2 Fed. Cas. No. 931, 4 Wash. 108; Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203, 4 Hughes 606; Livingston *v.* Van Ingen, 15 Fed. Cas. No. 8,420, 1 Paine 45; Moffat *v.* Soley, 17 Fed.

any common-law jurisdiction, although in the construction of all laws they should be guided by the rules of the common law in the exercise of their special jurisdiction. And it is decided that the United States judiciary system is entirely disconnected with and independent of the judiciary of the several states.[99] Again it is no ground for affording a remedy in a federal court that there is a want of remedy in other courts.[1] And although original jurisdiction is not vested in the federal courts in cases where rights and benefits are claimed under the constitution of the United States a citizen does not thereby lose his rights, for the state courts are open to him.[2]

2. POWERS OF CONGRESS AS TO CREATING COURTS AND CONFERRING JURISDICTION. By the constitution[3] it is provided that the judicial power of the United States shall be vested in a supreme court and such inferior courts as congress may from time to time ordain and establish. This provision is a mandatory one, and congress cannot lawfully refuse to create a supreme court and to vest in it the whole

Cas. No. 9,688, 2 Paine 103; Scott *v.* Young America, 21 Fed. Cas. No. 12,549, Newb. Adm. 101; Smith *v.* Jackson, 22 Fed. Cas. No. 13,064, 1 Paine 453; Spanish Consul's Petition, 22 Fed. Cas. No. 13,202, 1 Ben. 225; U. S. *v.* Stevenson, 28 Fed. Cas. No. 16,395, 1 Abb. 495; Van Antwerp *v.* Hulburd, 28 Fed. Cas. No. 16,826, 7 Blatchf. 426.

Consent of the parties will not confer jurisdiction of an action where none exists by statute and the cases have not been removed from a state court in the statutory manner. Parkersburg First Nat. Bank *v.* Prager, 91 Fed. 689, 34 C. C. A. 51.

In an action against a consul of a foreign government the federal courts do not possess exclusive jurisdiction by Const. art. 3, § 2. Wilcox *v.* Luco, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 62 Am. St. Rep. 305, 45 L. R. A. 579. See also *infra*, XIII, B, 1, a.

No jurisdiction in probate matters.— Fuentes *v.* Gaines, 25 La. Ann. 85; Fouvergne *v.* New Orleans, 18 How. (U. S.) 470, 15 L. ed. 399; *In re* Frazer, 9 Fed. Cas. No. 5,068. See Everhart *v.* Everhart, 34 Fed. 82.

The criminal jurisdiction of the federal courts is only such as is expressly conferred upon them. Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105. But it is decided that in the administration of the criminal law such courts are governed by the rules of the common law. Howard *v.* U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

The constitution and statute law should concur to give jurisdiction to a federal court. U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331.

U. S. Const. art. 3, § 2, extending the judiciary power of the United States "to all Cases, in Law and Equity" arising under the United States constitution, laws, and treaties; "to all Cases affecting Ambassadors;" "to all Cases of admiralty and maritime Jurisdiction," and to various classes of controversies therein specified has been construed as extending to three classes of cases determined respectively: (1) By the subject-matter of the action wherein the power is exercised; (2) by the parties thereto; and (3) by the remedy to be enforced or course of proceedings adopted. Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 7 Am. Rep. 183.

What are suits "of a civil nature" within the meaning of the judiciary acts. See U. S. *v.* Block, 24 Fed. Cas. No. 14,610, 3 Biss. 208; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441.

99. Ferris *v.* Coover, 11 Cal. 175.

Empowering justices of the peace, by the Judiciary Act, to arrest and commit persons charged with a violation of the criminal law of the United States was declared not unconstitutional as conferring part of the United States judicial power on state tribunals. *Ex p.* Gist, 26 Ala. 156. See also *Ex p.* Pool, 2 Va. Cas. 276.

1. Lozano *v.* Wehmer, 22 Fed. 755.

2. Harrison *v.* Hadley, 11 Fed. Cas. No. 6,137, 2 Dill. 229.

3. U. S. Const. art. 3, § 1.

The judicial power extends to two classes of cases: (1) Where the supreme court has original jurisdiction; (2) where it has only appellate jurisdiction, and in the latter class the federal jurisdiction is dormant until congress has authorized its exercise. U. S. Bank *v.* Roberts, 2 Fed. Cas. No. 934, 4 Conn. 323.

Conferring on state courts jurisdiction of suits to recover penalties provided for by the act of March 3, 1825, relating to the post-office department was unconstitutional as in violation of U. S. Const. art. 3, § 1. Davison *v.* Champlin, 7 Conn. 244.

Congress alone has the power under the constitution to create a United States court. Mechanics', etc., Bank *v.* Union Bank, 25 La. Ann. 387.

Congress may direct the transfer of cases from one federal court to another. U. S. *v.* Haynes, 29 Fed. 691.

Dissolution of provisional courts established during the Civil war and the transfer of the pending cases to the proper United States court was within the power of congress. The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651.

Exclusive or concurrent jurisdiction may be given by congress of actions to enforce any liability incurred, although in obedience to orders of governmental officers, where if damages were recovered defendant could demand indemnity from the public treasury. Mitchell *v.* Clark, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. ed. 279.

constitutional jurisdiction.[4] And it is also bound to create some inferior courts in which to vest the jurisdiction which is not vested originally in the supreme court.[5] Again congress has power to authorize judicial officers of the several states to exercise such powers as are ordinarily given to officers of courts not of record.[6]

3. JURISDICTION IS LIMITED. Courts of the United States are of limited, but not inferior, jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them.[7]

4. STATE LAWS AS AFFECTING. No state legislature has any power to enlarge, diminish, or alter the jurisdiction of federal courts, nor can any citizen[8] be

Matters exclusively committed to the judicial department by the constitution cannot be withdrawn by congress, but it may designate such courts as it sees fit for the determination of matters of public right. Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372.

The bringing of all controversies between citizens of different states within the jurisdiction of the federal courts, at the option of either party, may be provided for by congress. Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524. See Kaufman *v.* McNutt, 7 Ohio Dec. (Reprint) 60, 1 Cinc. L. Bul. 94.

As to taking depositions on letters rogatory see *In re* Pacific Railway Commission, 32 Fed. 241, 12 Sawy. 559.

4. Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

Original jurisdiction of the supreme court cannot be enlarged or restricted by congress. U. S. *v.* Haynes, 29 Fed. 691; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97. But an extension of the appellate jurisdiction has been held within its power. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

5. Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

Congress may establish circuit and district courts in any and all the states (Livingston *v.* Story, 9 Pet. (U. S.) 632, 9 L. ed. 255), and a court to determine claims against the United States as to lands in the territories (U. S. *v.* Coe, 155 U. S. 76, 15 S. Ct. 16, 39 L. ed. 76). And such courts can only exercise such jurisdiction as has been expressly conferred upon them by act of congress. Belknap *v.* Northern R. Co., 25 Vt. 715; Manley *v.* Olney, 32 Fed. 708; U. S. Bank *v.* Roberts, 2 Fed. Cas. No. 934, 4 Conn. 323; Harrison *v.* Hadley, 11 Fed. Cas. No. 6,137, 2 Dill. 229; Livingston *v.* Van Ingen, 15 Fed. Cas. No. 8,420, 1 Paine 45; *In re* Metzger, 17 Fed. Cas. No. 9,511; U. S. *v.* Alberty, 24 Fed. Cas. No. 14,426, Hempst. 444; U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401; U. S. *v.* Railroad Bridge Co., 27 Fed. Cas. No. 16,114, 6 McLean 517. *Compare* Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237.

Jurisdiction of inferior courts is subject to the absolute control of congress. U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143; U. S. *v.* Haynes, 29 Fed. 691.

Where the supreme court has original jurisdiction by the constitution, congress may confer jurisdiction on inferior courts. Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482; Bors *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419. But see U. S. Bank *v.* Roberts, 2 Fed. Cas. No. 934, 4 Conn. 323.

6. Robertson *v.* Baldwin, 165 U. S. 275, 17 S. Ct. 326, 41 L. ed. 715, where it was, however, decided that congress had no authority to confer upon justices of the peace power to arrest deserting seamen and deliver them on board their vessel, such power not being a part of the judicial power.

7. Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 3 L. ed. 70; *Ex p.* Cabrera, 4 Fed. Cas. No. 2,278, 1 Wash. 232; U. S. *v.* Alberty, 24 Fed. Cas. No. 14,426, Hempst. 444; U. S. *v.* Tawan-ga-ca, 28 Fed. Cas. No. 16,435, Hempst. 304. See also Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Maxfield *v.* Levy, 16 Fed. Cas. No. 9,321, 2 Dall. (Pa.) 381, 4 Dall. (Pa.) 330; Spanish Consul's Petition, 22 Fed. Cas. No. 13,202, 1 Ben. 225. See also Van Antwerp *v.* Hulburd, 28 Fed. Cas. No. 16,826, 7 Blatchf. 426.

Regarded as courts of general jurisdiction although limited by intendment of law see Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

The limits of their jurisdiction must be determined by the courts themselves, and of this question the supreme court is the final arbiter. Starr *v.* Chicago, etc., R. Co., 110 Fed. 3.

8. A foreign corporation cannot be deprived by any state laws of its right to maintain an action in the federal courts. Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 11 Abb. N. Cas. (N. Y.) 183; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320; Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572; Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365; Orange Nat. Bank *v.* Traver, 7 Fed. 146, 7 Sawy. 210; Northwestern Mut. L. Ins. Co. *v.* Elliott, 5 Fed. 225, 7 Sawy. 17; Metropolitan L. Ins. Co. *v.* Harper, 17 Fed. Cas. No. 9,505, 3 Hughes 260. An act is void which provides that a permit to a foreign corporation shall be void if the corporation removes any case from the state to a federal court (Texas Land, etc., Co. *v.* Worsham, 76 Tex. 556, 13 S. W. 384; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942; Barrow *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 915. But see Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872; Morse *v.* Home Ins. Co.,

deprived of his rights in the federal courts, as conferred by the constitution or acts of congress, by any state laws or regulations.[9]

5. Equity Jurisdiction in General. Only such equity powers can be exercised by the United States courts as may be conferred by act of congress, and those judicial powers which were possessed and exercised by the high court of chancery in England[10] under its judicial capacity as a court of equity, at the time of the formation of the United States constitution.[11] And the equity powers of the federal

30 Wis. 496, 11 Am. Rep. 580 [*reversed* in 20 Wall. (U. S.) 445, 22 L. ed. 365]), or provides for certain penalties in case of the removal of a suit (Chicago, etc., R. Co. *v.* Becker, 32 Fed. 849). And it has been decided that where an act provides for a forfeiture in such a case a federal court may restrain a forfeiture thereunder (Hartford F. Ins. Co. *v.* Doyle, 11 Fed. Cas. No. 6,160, 6 Biss. 461), and that an act is void which provides that "in all suits and proceedings upon causes of action arising in this state in which it shall be a party" the corporation shall be deemed a domestic corporation (Moore *v.* Chicago, etc., R. Co., 21 Fed. 817 [*following* Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365, and *distinguishing* Stout *v.* Sioux City, etc., R. Co., 8 Fed. 794, 3 McCrary 1]. But see Home Ins. Co. *v.* Davis, 29 Mich. 238; New York L. Ins. Co. *v.* Best, 23 Ohio St. 105). And see Hobbs *v.* Manhattan Ins. Co., 56 Me. 417 96 Am. Dec. 472; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302. See also Foreign Corporations.

9. Greely *v.* Townsend, 25 Cal. 604; Collier *v.* Stanbrough, 6 Rob. (La.) 230; Chicot County *v.* Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. ed. 546; Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; Smith *v.* Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. ed. 437; *Ex p.* Schollenberger, 96 U. S. 369, 24 L. ed. 853; New Orleans Bd. of Liquidation *v.* U. S., 108 Fed. 689, 47 C. C. A. 587; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537; Bigelow *v.* Nickerson, 70 Fed. 113, 17 C. C. A. 1, 30 L. R. A. 336; Heaton *v.* Thatcher, 59 Fed. 731; Blydenstein *v.* New York Security, etc., Co., 59 Fed. 12; Hastings *v.* The Elexena, 53 Fed. 359; Semmes *v.* Whitney, 50 Fed. 666; Barling *v.* Bank of British North America, 50 Fed. 260, 1 C. C. A. 510; East Tennessee, etc., R. Co. *v.* Atlanta, etc., R. Co., 49 Fed. 608, 15 L. R. A. 109; Hoover *v.* Crawford County, 39 Fed. 7; Hall *v.* Devoe Mfg. Co., 14 Fed. 183; The Belfast *v.* Boon, 7 Wall. (U. S.) 624, 19 L. ed. 266; Hyde *v.* Stone, 20 How. (U. S.) 170, 15 L. ed. 874; Watson *v.* Tarpley, 18 How. (U. S.) 517, 15 L. ed. 509; Suydam *v.* Broadnax, 14 Pet. (U. S.) 67, 10 L. ed. 357; The Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; Beers *v.* Haughton, 9 Pet. (U. S.) 329, 9 L. ed. 145; Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253; U. S. *v.* Peters, 5 Cranch (U. S.) 115, 3 L. ed. 53; Davis *v.* James, 2 Fed. 618, 10 Biss. 51; Pomeroy *v.* New York, etc., R. Co., 19 Fed. Cas. No. 11,261, 4 Blatchf. 120.

10. Applies to remedy not to right.— They cannot, however, grant any remedy where no right exists either under the laws of the United States or of the state, even though the English court of chancery might grant one, for the rule that the powers of the federal courts are to be regulated by the law of the English chancery applies to the remedy and not to the right. Meade *v.* Beale, 16 Fed. Cas. No. 9,371, Taney 339. See Lewis *v.* Shainwald, 48 Fed. 492.

11. Loring *v.* Marsh, 15 Fed. Cas. No. 8,515, 2 Cliff. 469 [*affirmed* in 6 Wall. 337, 18 L. ed. 802]; Lorman *v.* Clarke, 15 Fed. Cas. No. 8,516, 2 McLean 568.

An adequate remedy at law will deprive a federal court of equity of jurisdiction, but to have this effect it must be one enforceable in the same court by an action which may be brought by complainant, as a remedy in a state court is not sufficient (U. S. Life Ins. Co. *v.* Cahle, 98 Fed. 761, 39 C. C. A. 264; Coler *v.* Stanly County, 89 Fed. 257), and one existing when the judiciary act of 1789 was adopted or subsequently provided by act of congress (Green *v.* Turner, 98 Fed. 756; Pokegama Sugar-Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 96 Fed. 34; Alger *v.* Anderson, 92 Fed. 696). It has, however, been decided that the object of this is to preserve to the parties the right to jury trial which may be waived by complainant bringing a suit in equity and defendant answering to the merits. Green *v.* Turner, 98 Fed. 756.

Federal courts have equitable jurisdiction of a suit against an administrator to recover assets fraudulently withheld by him (Van Bokkelen *v.* Cook, 28 Fed. Cas. No. 16,831, 5 Sawy. 587), for the partition of land (Daniels *v.* Benedict, 50 Fed. 347. See also Frey *v.* Willoughby, 63 Fed. 865, 11 C. C. A. 463. *Compare* Strettell *v.* Ballou, 9 Fed. 256, 3 McCrary 46), to require an executor to account (Pulliam *v.* Pulliam, 10 Fed. 23), to cancel an insurance policy claimed to have been procured by fraud (U. S. Life Ins. Co. *v.* Cable, 98 Fed. 761, 39 C. C. A. 264), and to protect riparian rights (Sullivan Timber Co. *v.* Mobile, 110 Fed. 186). They may enforce trusts in equity (Irvine *v.* Marshall, 20 How. (U. S.) 558, 15 L. ed. 994), and may also enforce judgments rendered in the state courts (Gilchrist *v.* Helena Hot Springs, etc., R. Co., 58 Fed. 708), and the circuit court may have equitable jurisdiction of a controversy, although it involve rights arising under judicial proceedings in another jurisdiction (Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630); but it has been decided that a federal court has no jurisdiction of a suit to cancel a tax-title to lands as a cloud on a title (Little Rock Junction R. Co. *v.* Burke, 66 Fed. 83, 13 C. C. A. 341. See also David-

courts are declared to be coequal and coextensive with those of such court as to rights and remedies within the limits of their constitutional jurisdiction.[12]

6. Jurisdiction to Afford Complete Relief. If jurisdiction of the parties has once been rightfully obtained by a federal court it may be retained until complete relief is afforded within the general scope of the equities to be enforced;[13] and jurisdiction will not be ousted by a subsequent change in the condition of the parties;[14] nor is it exhausted by the rendition of a judgment, but continues until the judgment shall be satisfied.[15]

7. Ancillary and Incidental Jurisdiction. Where a federal court has jurisdiction of the cause of action and of the parties it may also have jurisdiction of a suit which is a continuation of or incidental and ancillary to the former suit, although it might not have jurisdiction of the latter one, if it were an original action.[16]

son *v.* Calkins, 92 Fed. 230. *Compare* Green *v.* Turner, 98 Fed. 756), over the subject of divorce or for the allowance of alimony (Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226), or of a proceeding for an equitable attachment under a state statute (Hall *v.* Gambrill, 92 Fed. 32, 34 C. C. A. 190).

In a suit where the United States is a party and there is no adequate and complete remedy at law the circuit court may have equitable jurisdiction. U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, 1 McAll. 271.

May construe wills where the execution, validity, and probate are recognized (Wood *v.* Paine, 66 Fed. 807; Richardson *v.* Green, 61 Fed. 423, 9 C. C. A. 565; Toms *v.* Owen, 52 Fed. 417), and have jurisdiction of a suit to amend a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate (Everhart *v.* Everhart, 34 Fed. 82. *Compare* Oakley *v.* Taylor, 64 Fed. 245), but not of a suit instituted to determine the validity of a will as a preliminary step in determining whether it should be admitted to probate (Copeland *v.* Bruning, 72 Fed. 5). See also Wart *v.* Wart, 117 Fed. 766; and, generally, Wills.

May entertain creditors' bills.— Buckeye Engine Co. *v.* Donan Brewing Co., 47 Fed. 6; Gorrell *v.* Dickson, 26 Fed. 454; Frazer *v.* Colorado Dressing, etc., Co., 5 Fed. 163, 2 McCrary 11; Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16. *Compare* Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; England *v.* Russell, 71 Fed. 818. See, generally, Creditors' Suits.

Powers as to injunctions.— Krippendorf *v.* Hyde, 110 U. S. 276, 4 S. Ct. 27, 28 L. ed. 145; Sullivan Timber Co. *v.* Mobile, 110 Fed. 186; Haverhill Gaslight Co. *v.* Barker, 109 Fed. 694; Louisville Trust Co. *v.* Stone, 107 Fed. 305, 46 C. C. A. 299; Defiance Water Co. *v.* Defiance, 90 Fed. 753; Scholenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422; New York City Bank *v.* Skelton, 5 Fed. Cas. No. 2,740, 2 Blatchf. 26; Works *v.* Junction R. Co., 30 Fed. Cas. No. 18,046, 5 McLean 425. And see Injunctions.

12. Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381.

Powers not judicial exercised by the chancellor as the representative of the king's prerogative are not possessed by the circuit courts. Loring *v.* Marsh, 15 Fed. Cas. No. 8,515, 2 Cliff. 469 [*affirmed* in 6 Wall. 337, 18 L. ed. 802].

13. Ward *v.* Todd, 103 U. S. 327, 26 L. ed. 339; Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829; Jew Ho *v.* Williamson, 103 Fed. 10; Miles *v.* New South Bldg., etc., Assoc., 99 Fed. 4; Juando *v.* Taylor, 13 Fed. Cas. No. 7,558, 2 Paine 652; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139. See also Omaha Horse R. Co. *v.* Cable Tramway Co., 32 Fed. 727.

Cross bills.— See Park *v.* New York, etc., R. Co., 70 Fed. 641; Salem First Nat. Bank *v.* Salem Capital Flour-Mills Co., 31 Fed. 580, 12 Sawy. 485, 496; Vannerson *v.* Leverett, 31 Fed. 376; Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175. And see Equity.

Foreclosure proceedings.— See Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; White *v.* Ewing, 69 Fed. 451, 16 C. C. A. 296; New York Cent. Trust Co. *v.* East Tennessee, etc., R. Co., 30 Fed. 895; Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525; Randolph *v.* Wilmington, etc., R. Co., 20 Fed. Cas. No. 11,563. And see Mortgages.

14. A subsequent change rendering the parties citizens of the same state does not oust the jurisdiction. New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. 156; U. S. *v.* Myers, 27 Fed. Cas. No. 15,844, 2 Brock. 516.

15. Pollock *v.* Lawrence County, 19 Fed. Cas. No. 11,255.

16. Comstock *v.* Holbrook, 16 Gray (Mass.) 111; Kendall *v.* Winsor, 6 R. I. 453; New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485; Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 16 S. Ct. 537, 40 L. ed. 638; White *v.* Ewing, 159 U. S. 36, 15 S. Ct. 1018, 40 L. ed. 67; Covell *v.* Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390; Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 9 L. ed. 1041; Davis *v.* Martin, 113 Fed. 6, 51 C. C. A. 27; Louisville Trust Co. *v.* Stone, 107 Fed. 305, 46 C. C. A. 299; Everett *v.* Rock Rapids Independent School Dist., 102 Fed. 529; Rice *v.* Durham Water Co., 91 Fed. 433; McDonald *v.* Seligman, 81 Fed. 753; New York Cent. Trust Co. *v.* Benedict, 78 Fed. 198, 24 C. C. A. 56; People's Sav. Inst. *v.* Miles, 76 Fed. 252, 22 C. C. A. 152; Kuhn *v.* Morrison, 75 Fed. 81; Jones *v.* New York Cent. Trust Co., 73 Fed. 568, 19 C. C. A. 569; Chattanooga Terminal R. Co. *v.* Felton, 69 Fed. 273; Compton

8. Issuance of Prerogative and Other Writs.[17] Jurisdiction is conferred upon the supreme court and the circuit and district courts to issue writs of scire facias

v. Jesup, 68 Fed. 263, 15 C. C. A. 397; Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 724, 3 L. R. A. 189; Thompson *v.* McReynolds, 29 Fed. 657; De Vignier *v.* New Orleans, 16 Fed. 11, 4 Woods 206; Atwood *v.* Portland Co., 10 Fed. 283; Howards *v.* Selden, 5 Fed. 465, 4 Hughes 300; Deakin *v.* Lea, 7 Fed. Cas. No. 3,695, 11 Biss. 27; Seymour *v.* Phillips, etc., Constr. Co., 21 Fed. Cas. No. 12,689, 7 Biss. 460.

Amount involved in the ancillary suit does not affect this jurisdiction. Aldrich *v.* Campbell, 97 Fed. 663, 38 C. C. A. 347; Lanning *v.* Osborne, 79 Fed. 657; Washburn *v.* Pullman's Palace-Car Co., 76 Fed. 1005, 21 C. C. A. 598.

Irrespective of citizenship such jurisdiction exists. New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Krippendorf *v.* Hyde, 110 U. S. 276, 4 S. Ct. 27, 28 L. ed. 145; Reilly *v.* Golding, 10 Wall. (U. S.) 56, 19 L. ed. 858; Minnesota Co. *v.* St. Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886; Files *v.* Davis, 118 Fed. 465; Davis *v.* Martin, 113 Fed. 6, 51 C. C. A. 27; Virginia-Carolina Chemical Co. *v.* New York Home Ins. Co., 113 Fed. 1, 51 C. C. A. 21; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539; Lamb *v.* Ewing, 54 Fed. 269, 4 C. C. A. 320; Carey *v.* Houston, etc., R. Co., 52 Fed. 671; Foster *v.* Mansfield, etc., R. Co., 36 Fed. 627; Miller *v.* Rogers, 29 Fed. 401; Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206; Stone *v.* Bishop, 23 Fed. Cas. No. 13,482, 4 Cliff. 593. *Compare* Christmas *v.* Russell, 14 Wall. (U. S.) 69, 20 L. ed. 762; Winter *v.* Swinburne, 8 Fed. 49, 10 Biss. 454.

By compulsory process a party may be brought in, in such a suit, without regard to his citizenship. Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397.

Under such circumstances a federal court may have jurisdiction to enforce a judgment rendered by it over persons not parties to the judgment sought to be enforced (Labette County *v.* U. S., 112 U. S. 217, 5 S. Ct. 108, 28 L. ed. 698. See Jenks *v.* Brewster, 96 Fed. 625. See also Milwaukee, etc., R. Co. *v.* Chamberlain, 6 Wall. (U. S.) 748, 18 L. ed. 859; Babcock *v.* Millard, 2 Fed. Cas. No. 699. But *compare* Anglo-Florida Phosphate Co. *v.* McKibben, 65 Fed. 529, 13 C. C. A. 36); of a suit to have a decree set aside (Pacific R. Co. *v.* Missouri Pac. R. Co., 111 U. S. 505, 4 S. Ct. 583, 28 L. ed. 498); of a bill by defendant in an action to have a judgment set aside (O'Brien County *v.* Brown, 18 Fed. Cas. No. 10,399, 1 Dill. 588. See also Johnson *v.* Christian, 125 U. S. 642, 8 S. Ct. 1135, 31 L. ed. 820; Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349; Williams *v.* Byrne, 29 Fed. Cas. No. 17,718, Hempst. 472. *Compare* Ralston *v.* Sharon, 51 Fed. 702; Clarke *v.* Mathewson, 5 Fed. Cas. No. 2,857, 2 Sumn. 262); of a scire facias to revive a judgment (Wonderly *v.* Lafayette County, 77 Fed. 665; Penn. *v.* Klyne, 19 Fed. Cas. No. 10,936, Pet. C. C. 446); of a scire facias to enforce the liability for costs of the indorser of a writ (Washburn *v.* Pullman's Palace-Car Co., 76 Fed. 1005, 21 C. C. A. 598); of a bill for discovery (Kendall *v.* Winsor, 6 R. I. 453); of a suit to reach equitable assets of a non-resident debtor (Montgomery *v.* McDermott, 103 Fed. 801, 43 C. C. A. 348); of a bill of revivor (Hone *v.* Dillon, 29 Fed. 465); of a bill to obtain the benefit of a depending suit by a party who acquired plaintiff's title by transfer (Miller *v.* Rogers, 29 Fed. 401); of a bill by a receiver to protect his possession of lands (Connor *v.* Alligator Lumber Co., 98 Fed. 155); of an action against a receiver growing out of the transactions of the receiver or his employees (Carpenter *v.* Northern Pac. R. Co., 75 Fed. 850. See also Blake *v.* Pine Mountain Iron, etc., Co., 76 Fed. 624, 22 C. C. A. 430; Washington *v.* Northern Pac. R. Co., 75 Fed. 333); of a mortgage foreclosure suit, where the court has possession of the property through its receiver in another suit (Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642; Fish *v.* Ogdensburgh, etc., R. Co., 79 Fed. 131; Central Trust Co. *v.* Carter, 78 Fed. 225, 24 C. C. A. 73); of an action in aid of an execution at law (Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522); of a bill to enjoin the further prosecution of an action or suit (Widaman *v.* Hubbard, 88 Fed. 806. See also Hill *v.* Kuhlman, 87 Fed. 498, 31 C. C. A. 87; Bradshaw *v.* Joplin Miners' Bank, 81 Fed. 902, 26 C. C. A. 673; Cortes Co. *v.* Thannhauser, 9 Fed. 226, 20 Blatchf. 59; St. Luke's Hospital *v.* Barclay, 21 Fed. Cas. No. 12,241, 3 Blatchf. 259); and of a bill to enforce liens on part of a railroad as against the lien of a general mortgage (McBee *v.* Marietta, etc., R. Co., 48 Fed. 243).

After the determination of the original cause jurisdiction will not be extended to other questions and issues raised by supplemental bill filed after such determination. Omaha Horse R. Co. *v.* Cable Tramway Co., 33 Fed. 689. See also Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 112 Fed. 81.

Decrees for the sale of mortgaged property entered in ancillary suits for the foreclosure of the mortgage should conform so far as possible to that of the court of primary jurisdiction as to the method of the sale of the property. New York Cent. Trust Co. *v.* U. S. Flour Milling Co., 112 Fed. 371.

Suit to restrain private persons from selling the stock of a railroad company is not ancillary to one to foreclose a mortgage on property of such company, to which the stock-holders are not parties. Raphael *v.* Trask, 118 Fed. 777.

17. See, generally, Prohibition; Quo Warranto. And see Attachment, 4 Cyc. 460.

and "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."[18] Jurisdiction is also conferred upon such courts to issue writs of habeas corpus.[19] And the circuit courts may issue writs of mandamus, but their power in this respect is confined to those cases where it may be necessary to the exercise of their jurisdiction and the enforcement of their judgments.[20]

9. Territorial Limitations and Districts in Which Suits Must Be Brought — a. In General. The jurisdiction of the federal circuit and district courts is as a general

18. U. S. Rev. Stat. (1878) § 716 [U. S. Comp. Stat. (1901) p. 580].

Ne exeat.— See Lewis *v.* Shainwald, 48 Fed. 492. *Compare In re* Bininger, 3 Fed. Cas. No. 1,417, 7 Blatchf. 159; Gernon *v.* Boecaline, 10 Fed. Cas. No. 5,367, 2 Wash. 130. See also U. S. Rev. Stat. (1878) § 717 [U. S. Comp. Stat. (1901) p. 580]; and, generally, Ne Exeat.

Injunctions.— See Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Claybrook *v.* Owensboro, 16 Fed. 297. See also U. S. Rev. Stat. (1878) § 718 *et seq.* [U. S. Comp. Stat. (1901) p. 580 *et seq.*]; and, generally, Injunctions.

19. U. S. Rev. Stat. (1878) § 751 *et seq.* [U. S. Comp. Stat. (1901) p. 592 *et seq.*]. See also *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; *Re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345; Kelly *v.* Georgia, 68 Fed. 652; *In re* Fitton, 45 Fed. 471; U. S. *v.* Spink, 19 Fed. 631; *In re* Brosnahan, 18 Fed. 62, 4 McCrary 1; *Ex p.* Cabrera, 4 Fed. Cas. No. 2,278, 1 Wash. C. C. 232; *In re* Keeler, 14 Fed. Cas. No. 7,637, Hempst. 306; *Ex p.* McCann, 15 Fed. Cas. No. 8,679; Seavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 3 Cliff. 439; *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121; and, generally, Habeas Corpus.

Jurisdiction to issue habeas corpus exists in case of a debtor confined in jail under execution in a civil action (*In re* Mineau, 45 Fed. 188. See also *Ex p.* Randolph, 20 Fed. Cas. No. 11,558, 2 Brock. 447), where it is alleged that a person is restrained of his liberty, within the territorial jurisdiction of the court without due process of law (*Ex p.* Farley, 40 Fed. 66; *In re* Laundry License Case, 22 Fed. 701), in violation of the laws of the United States (U. S. *v.* Spink, 19 Fed. 631; Seavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 3 Cliff. 439), or under a statute in conflict with such laws (*In re* Brosnahan, 18 Fed. 62, 4 McCrary 1); where a person is in custody under a valid conviction and sentence but claims release under a pardon (*In re* Greathouse, 10 Fed. Cas. No. 5,741, 2 Abb. 382, 4 Sawy. 487); or where a person is wrongfully arrested by direction of a state executive for rendition to another state (*Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121). But no jurisdiction exists over a prisoner removed from the territorial limits of the court before the petition is filed (*In re* Bickley, 3 Fed. Cas. No. 1,387); or of an application by a father for such a writ for the purpose of enforcing his right to the custody of a child (*In re* Barry, 42 Fed. 113, 34 L. ed. 503 note; *Ex p.* Everts, 8 Fed. Cas. No. 4,581, 1 Bond 197).

Acts done in pursuance of a law of the United States.— See *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; Kelly *v.* Georgia, 68 Fed. 652.

Jurisdiction of a court to try an offender may be inquired into by habeas corpus. U. S. *v.* Rogers, 23 Fed. 658.

Power on petition of a Chinese immigrant held in custody on board a vessel under directions from the customs authorities is not taken away by the Chinese restriction act. U. S. *v.* Chung Shee, 71 Fed. 277.

Restriction as to prisoners in jail.— *In re* Mineau, 45 Fed. 188; Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299; *Ex p.* Cabrera, 4 Fed. Cas. No. 2,278, 1 Wash. 232; Seavey *v.* Seymour, 21 Fed. Cas. No. 12,596, 3 Cliff. 439.

The treaty with Great Britain of Aug. 9, 1842, as to the arrest and imprisonment of fugitives and the act of Aug. 12, 1848, supplemental thereto did not affect authority as to habeas corpus in cases of imprisonment thereunder. *In re* Kaine, 14 Fed. Cas. No. 7,598.

20. See U. S. Rev. Stat. (1878) §§ 688, 716 [U. S. Comp. Stat. (1901) pp. 565, 580]. See also Rosenbaum *v.* Bauer, 120 U. S. 450, 7 S. Ct. 633, 30 L. ed. 743; U. S. *v.* Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768; Knox County *v.* Aspinwall, 24 How. (U. S.) 376, 16 L. ed. 735; McIntire *v.* Wood, 7 Cranch (U. S.) 504, 3 L. ed. 420; U. S. *v.* New Orleans, 117 Fed. 610, 54 C. C. A. 106; Gares *v.* Northwest Nat. Bldg., etc., Assoc., 55 Fed. 209; Evans *v.* Pittsburgh, 8 Fed. Cas. No. 4,568, 2 Pittsb. (Pa.) 405; Smith *v.* Jackson, 22 Fed. Cas. No. 13,064, 1 Paine 453; U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,599, 2 Dill. 527.

Jurisdiction was not enlarged in this respect by the act of March 3, 1875. Rosenbaum *v.* Bauer, 120 U. S. 450, 7 S. Ct. 633, 30 L. ed. 743; Rosenbaum *v.* Board of Sup'rs, 28 Fed. 223; American Union Tel. Co. *v.* Bell Tel. Co., 1 Fed. 698, 1 McCrary 175.

Mandamus to compel the collection of a tax may be issued. Aylesworth *v.* Gratiot County, 43 Fed. 350; U. S. *v.* Scotland County Judges, 32 Fed. 714. But such power cannot be extended to compel the levy of a tax unauthorized by the constitution or laws of a state. Graham *v.* Parham, 32 Ark. 676; Vance *v.* Little Rock, 30 Ark. 435; U. S. *v.* Knox County Ct., 15 Fed. 704, 5 McCrary 76.

Mandamus may be issued to a state officer

rule, in the absence of express authority by act of congress, confined or restricted to the territorial limits within which they are placed.[21]

b. Actions Between Citizens of Different States. Where the jurisdiction is founded only on the fact that the parties are citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant.[22]

c. Local or Transitory Actions. Actions which are of a local nature by reason of the fact that the controversy involves property rights or interests should as a general rule be brought in the district where such property is located.[23] And the

(U. S. *v.* Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768), against county commissioners (Knox County *v.* Aspinwall, 24 How. (U. S.) 376, 16 L. ed. 735), and to enforce judgments against public corporations (Evans *v.* Pittsburg, 8 Fed. Cas. No. 4,567, 19 Leg. Int. (Pa.) 4).

But a circuit court has no power to issue such a writ, as an original proceeding, to compel a postmaster to enter and transmit through the mails a publication as second and not as third class matter (U. S. *v.* Pearson, 32 Fed. 309, 24 Blatchf. 453), to a federal district court to compel it to set aside its decree in admiralty, to grant a rehearing, or to allow an appeal after the time has elapsed in which it should have been taken (The Enterprise, 8 Fed. Cas. No. 4,500, 3 Wall. Jr. 58); or to require the clerk of the district court to pay to the receiver a fund in the registry of that court belonging to the execution debtor (*In re* Forsyth, 78 Fed. 296). Nor has it any power to issue a writ of this nature to compel the distribution of money raised from taxation for public schools under a state statute, there being nothing in such distribution and there being no contract with complainants which the court can enforce by affirmative relief. Claybrook *v.* Owensboro, 23 Fed. 634.

21. Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Mexican Ore Co. *v.* Mexican Guadalupe Min. Co., 47 Fed. 351; Colorado *v.* Colorado Cent. R. Co., 42 Fed. 638; *Ex p.* Graham, 10 Fed. Cas. No. 5,657, 3 Wash. 456, 4 Wash. 211; Hodge *v.* Hudson River R. Co., 12 Fed. Cas. No. 6,559, 6 Blatchf. 85; U. S. *v.* Town-Maker, 28 Fed. Cas. No. 16,533*a*, Hempst. 299; Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,498, 8 Blatchf. 267.

A navy-yard includes waters contiguous thereto, and necessary to the operation thereof, and both are in the exclusive jurisdiction of the United States. *Ex p.* Tatem, 23 Fed. Cas. No. 13,759, 1 Hughes 588.

An action to recover a penalty for violation of the embargo acts of 1807–1808 was held to be properly brought in the district where the offender was found. U. S. *v.* Woolsey, 28 Fed. Cas. No. 16,762.

A non-resident of the district may come in and submit to jurisdiction. McPike *v.* Wells, 54 Miss. 136; Denniston *v.* Potts, 11 Sm. & M. (Miss.) 36.

As to proceedings under the bankrupt act of March 2, 1867, see Lathrop *v.* Drake, 91 U. S. 516, 23 L. ed. 414. See also, generally, BANKRUPTCY.

As to service on non-residents in suits to enforce liens upon property within the district see Hay *v.* Alexandria, etc., R. Co., 11 Fed. Cas. No. 6,254*a*, 4 Hughes 331.

Jurisdiction over Indian reservations.— Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190; U. S. *v.* Rogers, 23 Fed. 658; U. S. *v.* Alberty, 24 Fed. Cas. No. 14,426, Hempst. 444. And see Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237.

Of a bill to abate a nuisance consisting of a bridge across the Mississippi from Iowa to Illinois it has been determined that the district court for the district of Iowa had no power to abate the nuisance on the Illinois side, the dividing line between the states being the middle of the river. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311.

The circuit court for South Carolina has been declared to have jurisdiction throughout the entire state. U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457.

Who is a resident of the district see King *v.* U. S., 59 Fed. 9.

22. *In re* Keasbey, etc., Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. ed. 402; Bostwick *v.* American Finance Co., 43 Fed. 897; Winona Bank *v.* Avery, 34 Fed. 81; Harold *v.* Iron Silver Min. Co., 33 Fed. 529; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 33 Fed. 385; Short *v.* Chicago, etc., R. Co., 33 Fed. 114; Bourke *v.* Amison, 32 Fed. 710.

Residence in the particular division of the district where the suit is brought is not required. Merchants' Nat. Bank *v.* Chattanooga Constr. Co., 53 Fed. 314.

Defendant may waive this privilege of exemption by a general appearance or by pleading to the merits of the action. Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282; Southern Express Co. *v.* Todd, 56 Fed. 104, 5 C. C. A. 432. See also Cooley *v.* McArthur, 35 Fed. 372. But the filing of a demurrer to the bill, although on other grounds, is not such a waiver. Chesapeake, etc., Coal Agency Co. *v.* Fire Creek Coal, etc., Co., 119 Fed. 942.

Of an action against an alien temporarily in the district the circuit court has no jurisdiction. Meyer *v.* Herrera, 41 Fed. 65. *Compare* Cooley *v.* McArthur, 35 Fed. 372.

23. This rule has been applied in an action by creditors for the appointment of a receiver for a railroad (Texas, etc., R. Co. *v.*

federal court of the district where land is situated has jurisdiction of a controversy in reference to such land, although neither plaintiff nor defendant is a resident of such district.[24]

d. District of Which Defendant Is an Inhabitant or in Which He Is Found. By the judiciary act of 1789 it was provided that no civil suit should be brought before the circuit or district courts against an inhabitant of the United States in any other district than that whereof he was an inhabitant or in which he shall be found at the time of serving the writ. This provision was in substance incorporated into various acts of congress subsequently passed.[25] This

Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; East Tennessee, etc., R. Co. *v.* Atlanta, etc., R. Co., 49 Fed. 608, 15 L. R. A. 109), an action *in rem* (U. S. *v.* One Thousand Seven Hundred and Fifty Six Shares of Capital Stock, 27 Fed. Cas. No. 15,961, 5 Blatchf. 231), a libel *in rem* (Nelson *v.* The Willamette, 53 Fed. 602), a petition to confirm a claim (Callender *v.* U. S., 4 Fed. Cas. No. 2,321, Hempst. 334), a suit to foreclose a mortgage (Merrihew *v.* Fort, 98 Fed. 899; Grove *v.* Grove, 93 Fed. 865; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161; Randolph *v.* Wilmington, etc., R. Co., 20 Fed. Cas. No. 11,563, 11 Phila. (Pa.) 502, 33 Leg. Int. (Pa.) 221) or to cancel a mortgage (Cowell *v.* City Water-Supply Co., 96 Fed. 769), and to an action for trespass upon land (Ellenwood *v.* Marietta Chair Co., 158 U. S. 105, 15 S. Ct. 771, 39 L. ed. 913; Livingston *v.* Jefferson, 15 Fed. Cas. No. 8,411, 1 Brock. 203, 4 Hughes 606). But it has been decided that a suit to enforce a contract to convey land should be brought in the district where one of the parties resides (Municipal Invest. Co. *v.* Gardiner, 62 Fed. 954), and that a suit by heirs against trustees under a will to recover a residue in the hands of defendants is not within the act of March 3, 1875 (Fayerweather *v.* Ritch, 89 Fed. 385).

Although land is situated within the district it does not give a federal court jurisdiction when it would not otherwise exist. Pooley *v.* Luco, 72 Fed. 561.

A non-resident of the district may be enjoined in such district from infringing the patent of another, although he is not subject to service of process therein or to be sued as a defendant. Kennedy *v.* Penn. Iron, etc., Co., 67 Fed. 339.

A penal statute is to be strictly construed, and where such an enactment makes penal only the act of falsely stamping an article patented, and provides for a penalty therefor, the suit to recover the penalty can only be brought in the district where such articles were actually stamped. Pentlarge *v.* Kirby, 19 Fed. 501. See also Winne *v.* Snow, 19 Fed. 507.

A sale of land located in one state cannot be decreed by the circuit court for another state, nor can it make its decree a lien on such land. Boyce *v.* Grundy, 9 Pet. (U. S.) 275, 9 L. ed. 127. See also Guarantee Trust, etc., Co. *v.* Delta, etc., Co., 104 Fed. 5, 43 C. C. A. 396.

Of a suit for the diversion of water the federal court of the district where the act was committed may have jurisdiction. Foot *v.* Edwards, 9 Fed. Cas. No. 4,908, 3 Blatchf. 310. See also Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 538.

Of a suit to remove a cloud on title to land, the circuit court, where such land is situated, has jurisdiction, although defendant is a citizen of another state (Dick *v.* Foraker, 155 U. S. 404, 15 S. Ct. 124, 39 L. ed. 201. See also U. S. *v.* Southern Pac. R. Co., 63 Fed. 481); but it is decided that such a suit need not be brought in the state where such land is situated (Remer *v.* McKay, 54 Fed. 432).

Shares of stock where deemed personal property by the laws of the state will be so considered within the meaning of the act of congress of March 3, 1875. Jellenik *v.* Huron Copper Min. Co., 177 U. S. 1, 20 S. Ct. 559, 44 L. ed. 647.

The place of actual seizure of property by customs authorities determines jurisdiction of the federal court. Seitz *v.* U. S., 97 U. S. 404, 24 L. ed. 1031.

Where a testator left real and personal property in one state in which administration was granted it has been decided that the fact that he died in another state, in which his will was proved, did not deprive the circuit court of the former state of jurisdiction of a bill for account of trust funds received by testator for complainant. Walker *v.* Beal, 29 Fed. Cas. No. 17,065, 3 Cliff. 155.

24. De Hierapolis *v.* Lawrence, 99 Fed. 321; Spencer *v.* Kansas City Stock Yards Co., 56 Fed. 741; Single *v.* Scott Paper Mfg. Co., 55 Fed. 553; Wheelwright *v.* St. Louis, etc., Co., 50 Fed. 709.

Although plaintiff and some of the defendants are non-residents, the rule prevails. Greeley *v.* Lowe, 155 U. S. 58, 15 S. Ct. 24, 39 L. ed. 69 [*distinguishing* Smith *v.* Lyon, 133 U. S. 315, 10 S. Ct. 303, 33 L. ed. 635]; Ames *v.* Holderbaum, 42 Fed. 341. *Compare* Detweiler *v.* Holderbaum, 42 Fed. 337.

25. Chaffee *v.* Hayward, 20 How. (U. S.) 208, 15 L. ed. 804; Huff *v.* Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; McMicken *v.* Webb, 11 Pet. (U. S.) 25, 9 L. ed. 618; Barton *v.* Petit, 7 Cranch (U. S.) 194, 3 L. ed. 313; Commercial Bank of Commerce *v.* Green, 6 Fed. Cas. No. 3,059, 2 Flipp. 181; Saddler *v.* Hudson, 21 Fed. Cas. No. 12,206, 2 Curt. 6; U. S. *v.* Ottman, 27 Fed. Cas. No. 15,977, 1 Hughes 313; Wilson *v.* Graham, 30 Fed. Cas. No. 17,804, 4 Wash. 53; Winter *v.*

judiciary act was, however, amended in 1887,[26] and again in 1888,[27] by acts of congress which provided that a civil suit must be brought in the district of which the defendant is an inhabitant, except when founded on the residence of the parties in different states, in which case it should be brought in a district of which either party is an inhabitant.[28]

e. Co-Plaintiffs or Co-Defendants Inhabitants of Different Districts. Where jurisdiction rests solely on the grounds of diverse citizenship and the action should be brought in the district of which either the plaintiff or defendant is a resident, and there are several co-plaintiffs or co-defendants, or both, if the jurisdiction depends on the citizenship of the plaintiffs it has generally been decided that each plaintiff must be competent to sue in that district, or, if on that of the defendants, each defendant must be capable of being sued in such district or jurisdiction cannot be entertained.[29]

Ludlow, 30 Fed. Cas. No. 17,891, 3 Phila. (Pa.) 464.

Attachment suit against property of non-resident not authorized by U. S. Rev. Stat. (1878), § 739. *Ex p.* Des Moines, etc., R. Co. 103 U. S. 794, 26 L. ed. 461; Maudlin *v.* Carll, 16 Fed. Cas. No. 9,307, 3 Hughes 249; Nazro *v.* Cragin, 17 Fed. Cas. No. 10,062, 3 Dill. 474; Richmond *v.* Dreyfous, 20 Fed. Cas. No. 11,799, 1 Sumn. 131. See also Seidenbach *v.* Hollowell, 21 Fed. Cas. No. 12,635, 5 Dill. 382.

Cross bill was held to be an original bill within such an act. Bates *v.* Delavan, 5 Paige (N. Y.) 299.

In patent cases the rule was not changed. Chaffee *v.* Hayward, 20 How. (U. S.) 208, 15 L. ed. 804; Saddler *v.* Hudson, 20 Fed. Cas. No. 12,206, 2 Curt. 6.

Defendant non-resident of district might waive service of process by entering appearance in the suit. Levy *v.* Fitzpatrick, 15 Pet. (U. S.) 167, 10 L. ed. 699. See also Taylor *v.* Cook, 23 Fed. Cas. No. 13,789, 2 McLean 516.

26. 24 U. S. Stat. at L. 552.

27. 25 U. S. Stat. at L. 434.

28. Campbell *v.* Duluth, etc., R. Co., 50 Fed. 241; U. S. *v.* Crawford, 47 Fed. 561; U. S. Express Co. *v.* Allen, 39 Fed. 712.

A defendant should be a real and not merely a nominal party to the suit to give jurisdiction on the ground of residence. Sacketts' Harbor Bank *v.* Barry, 21 Fed. Cas. No. 12,204, 1 Bond 154.

A resident of one state temporarily in another is an inhabitant of the power within the meaning of such acts. Bicycle Stepladder Co. *v.* Gordon, 57 Fed. 529 [*following* Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768 and *distinguishing* U. S. *v.* Southern Pac. R. Co., 49 Fed. 297].

In cases arising under the patent and copyright laws, it has been decided that a defendant may be sued in any district in which valid service can be made, the acts of 1887 and 1888 not applying to such cases. Spears *v.* Flynn, 102 Fed. 6; Lederer *v.* Rankin, 90 Fed. 449; National Button Works *v.* Wade, 72 Fed. 298; Smith *v.* Sargent Mfg. Co., 67 Fed. 801; Allen *v.* Blunt, 1 Fed. Cas. No. 215, 1 Blatchf. 480; Day *v.* Newark India-Rubber Mfg. Co., 7 Fed. Cas. No. 3,685, 1 Blatchf. 628. And see *In re* Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. ed. 1211. But *compare* Fraser *v.* Barrie, 105 Fed. 787; Union Switch, etc., Co. *v.* Hall Signal Co., 65 Fed. 625; Illingworth *v.* Atha, 42 Fed. 141; Reinstadler *v.* Reeves, 33 Fed. 308. Under a later act of congress, however, it has been decided that the jurisdiction of the federal court is restricted as to such cases. Bowers *v.* Atlantic, etc., Co., 104 Fed. 887. See also Fraser *v.* Barrie, 105 Fed. 787.

In suits by the federal government the only restriction is that they be brought in the district of which the defendant is an inhabitant. U. S. *v.* Southern Pac. R. Co., 49 Fed. 297.

Service on an agent of a manufacturer who resides in another district in a suit for infringement of a patent is not sufficient to bring the latter within the court's jurisdiction. Anderson *v.* Germain, 48 Fed. 295.

29. Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Smith *v.* Lyon, 133 U. S. 315, 10 S. Ct. 303, 33 L. ed. 635; Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. (U. S.) 172, 20 L. ed. 179; Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 15 How. (U. S.) 233, 14 L. ed. 674; Lengel *v.* American Smelting, etc., Co., 110 Fed. 19; Lancaster *v.* Asheville St. R. Co., 90 Fed. 129; Excelsior Pebble Phosphate Co. *v.* Brown, 74 Fed. 321, 20 C. C. A. 428; Duchesse d'Auxy *v.* Porter, 41 Fed. 68. *Compare* Smith *v.* Atchison, etc., R. Co., 64 Fed. 1; Bensinger Self-Adding Cash Register Co. *v.* National Cash Register Co., 42 Fed. 81; Rawitzer *v.* Wyatt, 40 Fed. 609; Wiggins *v.* European, etc., R. Co., 29 Fed. Cas. No. 17,626, 1 Hask. 122.

"Each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." Per Marshall, C. J., in Strawbridge *v.* Curtiss, 3 Cranch (U. S.) 267, 2 L. ed. 435.

An action to enforce a claim to property which is located in a state of which neither the plaintiff nor defendants are residents, and all the parties are residents of different

f. Actions by or Against Corporations. In construing the application of the federal statutes which provide that a civil suit shall be brought in the district of which defendant is an inhabitant or where the jurisdiction is founded on diverse citizenship, in the district of which either plaintiff or defendant is a resident, it has been determined that a corporation is not a resident, citizen, or inhabitant of a state in which it has not been incorporated, within the meaning of such statutes.[30] And it has also been declared that a corporation is not an inhabitant of a state

states, is properly brought in the district where such property is located. Carpenter *v.* Talbot, 33 Fed. 537.

Where defendants reside in different districts in the same state it has been decided that an injunction may be served on one of them out of the district in which the court sits. Babbitt *v.* Burgess, 2 Fed. Cas. No. 693, 2 Dill. 169.

30. *In re* Keasbey, etc., Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. ed. 402; Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16; National Typographic Co. *v.* New York Typographic Co., 44 Fed. 711; Myers *v.* Murray, 43 Fed. 695, 11 L. R. A. 216; Booth *v.* St. Louis Fire-Engine Mfg. Co., 40 Fed. 1; Filli *v.* Delaware, etc., R. Co., 37 Fed. 65; Jesup *v.* Illinois Cent. R. Co., 36 Fed. 735; Eaton *v.* St. Louis Shakspear Min., etc., Co., 7 Fed. 139, 2 McCrary 362; Myers *v.* Dorr, 17 Fed. Cas. No. 9,988, 13 Blatchf. 22; Pomeroy *v.* New York, etc., R. Co., 19 Fed. Cas. No. 11,261, 4 Blatchf. 120. *Compare In re* Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. ed. 1211; Hunter *v.* International R. Imp. Co., 26 Fed. 299; Thornburgh *v.* Savage Min. Co., 23 Fed. Cas. No. 13,986.

A corporation may be sued in a state in which incorporated by a citizen of another state, although it may also be incorporated in such other state. Page *v.* Fall River, etc., R. Co., 31 Fed. 257. See also Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Culbertson *v.* Wabash Nav. Co., 6 Fed. Cas. No. 3,464, 4 McLean 544; Minot *v.* Philadelphia, etc., R. Co., 17 Fed. Cas. No. 9,645, 2 Abb. 323, 7 Phila. (Pa.) 555, 27 Leg. Int. (Pa.) 396 [*affirmed* in 18 Wall. 206, 21 L. ed. 888].

"Or in which he is found" as used in earlier acts and applied to corporations. Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 11 Abb. N. Cas. (N. Y.) 183; Carpenter *v.* Westinghouse Air-Brake Co., 32 Fed. 434; Hat-Sweat Mfg. Co. *v.* Davis Sewing Mach. Co., 31 Fed. 294; Elgin Canning Co. *v.* Atchison, etc., R. Co., 24 Fed. 866; Good Hope Co. *v.* Railway Barb Fencing Co., 22 Fed. 635, 23 Blatchf. 43; Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 13 Fed. 358, 21 Blatchf. 109; McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3; Mohr *v.* Insurance Cos., 12 Fed. 474; Robinson *v.* National Stock-Yard Co., 12 Fed. 361, 20 Blatchf. 513; Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525; Knott *v.* Southern L. Ins. Co., 14 Fed. Cas. No. 7,894, 2 Woods 479; Schollenberger *v.* Forty Five Foreign Ins. Co.'s, 21 Fed. Cas. No. 12,475*a*; Southern, etc., Tel. Co. *v.* New Orleans, etc., R. Co., 22 Fed. Cas. No. 13,185; Williams *v.* Empire Transp. Co., 29 Fed. Cas. No. 17,720, 3 Ban. & A. 533.

Railroad corporations are under the laws of Georgia inhabitants of all the counties through which their roads run. East Tennessee, etc., R. Co. *v.* Atlanta, etc., R. Co., 49 Fed. 608, 15 L. R. A. 109 [*following* Davis *v.* Central R., etc., Co., 17 Ga. 323]. But although such a law may exist in a state, yet if it is also provided by statute that the public office which every railroad is required to maintain shall be considered its domicile it must be sued by an alien in the district where such office is located. Galveston, etc., R. Co. *v.* Gonzales, 151 U. S. 496, 14 S. Ct. 401, 38 L. ed. 248. *Compare* Zamhrino *v.* Galveston, etc., R. Co., 38 Fed. 449. And it has been decided that in the absence of any charter provision on the subject the principal office and domicile of such a corporation for the purposes of a suit in the federal courts are in the district where its stock-holders and directors' meetings are held, and the records thereof kept, together with the stock certificate book and where the principal officers have their offices. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940 [*affirming* 57 Fed. 948, 6 C. C. A. 653]. Again where a Canadian railroad corporation operated a railroad in one of the states under a lease ratified by the legislature it was decided that it must be considered as being within the state and subject to the jurisdiction of the federal court at the suit of a citizen of the district. Cummings *v.* Grand Trunk R. Co., 6 Fed. Cas. No. 3,475, 2 Hask. 101.

An order may be issued to a foreign railroad corporation to appear and plead in a suit by an alien bondholder against the trustee, in a mortgage securing such corporation's bonds, to restrain the payment of certain funds to the corporation, where the action was commenced in the district of which the trustee was an inhabitant. Pollitz *v.* Farmers' L. & T. Co., 39 Fed. 707.

Service of process on an officer or director of a corporation and in a state other than that of its incorporation was held not to confer jurisdiction. Ellsworth Trust Co. *v.* Parramore, 108 Fed. 906, 48 C. C. A. 132; Eldred *v.* American Palace-Car Co., 105 Fed. 455, 45 C. C. A. 1.

Where jurisdiction is founded only on the fact of diverse citizenship suit may be brought in the district where plaintiff resides against a non-resident corporation. McCormick Harvesting Mach. Co. *v.* Walthers, 134 U. S. 41, 10 S. Ct. 485, 33 L. ed. 833. See also Fairbank *v.* Cincinnati, etc., R. Co., 54 Fed. 420,

other than that in which it is incorporated from the fact that it does business in such state.[31] It has, however, been decided in numerous cases that if a foreign corporation engages in business in a state, and in pursuance of the laws thereof appoints an agent or attorney with power to receive service of process in any suit against it, it thereby becomes an inhabitant or resident of the state and consents in advance to be sued in the federal court located therein.[32]

10. Pleadings and Waiver of Objections. Where diverse citizenship is the only fact on which the jurisdiction of the court is founded it should appear from the complaint that either the plaintiff or the defendant resides in the district in which suit is brought.[33] The exemption, however, which a defendant may claim from suit in the federal court in any other district than that in which he is a resident is a personal privilege and may be waived,[34] and it will be considered

4 C. C. A. 403, 38 L. R. A. 271; Rawley *v.* Southern Pac. R. Co., 33 Fed. 305.

31. Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 377; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Central Trust Co. *v.* Virginia, etc., Steel, etc., Co., 55 Fed. 769; St. Louis R. Co. *v.* Pacific R. Co., 52 Fed. 770; Campbell *v.* Duluth, etc., R. Co., 50 Fed. 241; Bensinger Self-Adding Cash Register Co. *v.* National Cash Register Co., 42 Fed. 81; Booth *v.* St. Louis Fire-Engine Mfg. Co., 40 Fed. 1; Filli *v.* Delaware, etc., R. Co., 37 Fed. 65; Preston *v.* Fire-Extinguisher Mfg. Co., 36 Fed. 721; Connor *v.* Vicksburg, etc., R. Co., 36 Fed. 273, 1 L. R. A. 331; Gormully, etc., Mfg. Co. *v.* Pope Mfg. Co., 34 Fed. 818; Eaton *v.* St. Louis Shakspear Min., etc., Co., 7 Fed. 139, 2 McCrary 362. But see Palmer *v.* Chicago Herald Co., 70 Fed. 886; Gilbert *v.* New Zealand Ins. Co., 49 Fed. 884, 15 L. R. A. 125; East Tennessee, etc., R. Co. *v.* Atlanta, etc., R. Co., 49 Fed. 608, 15 L. R. A. 109; U. S. *v.* Central Pac. R. Co., 49 Fed. 304; U. S. *v.* Southern Pac. R. Co., 49 Fed. 297; Miller *v.* Eastern Oregon Gold Min. Co., 45 Fed. 345; U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,600, 3 Dill. 524; Wilson Packing Co. *v.* Hunter, 30 Fed. Cas. No. 17,852, 4 Ban. & A. 184, 8 Biss. 429.

A citizen of Mexico cannot, it has been declared, sue a Connecticut corporation in the circuit court for the southern district of California, although the corporation has an office and a managing agent in such district. Denton *v.* Mexico International Co., 36 Fed. 1, 13 Sawy. 355.

In an action for infringement of a patent against a foreign corporation the fact that it has a place of business in the state does not confer jurisdiction for the purposes of a suit. Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Gorham Mfg. Co. *v.* Watson, 74 Fed. 418; Donnelly *v.* U. S. Cordage Co., 66 Fed. 613; Cramer *v.* Singer Mfg. Co., 59 Fed. 74; National Typewriter Co. *v.* Pope Mfg. Co., 56 Fed. 849; Adriance *v.* McCormick Harvesting Mach. Co., 55 Fed. 287; Halstead *v.* Manning, 34 Fed. 565. But see Sayles *v.* Grand Trunk R. Co., 21 Fed. Cas. No. 12,419. But where a suit of this nature was brought against a New York corporation whose principal business office was declared by its certificate to be in New York city, and "such other places as the company may hereafter select," it was decided that suit was properly brought in the circuit court for the northern district of that state for an infringement there committed and in which it had a place of business. Consolidated Fastener Co. *v.* Columbian Fastener Co., 73 Fed. 828.

32. *Ex p.* Schollenberger, 96 U. S. 369, 24 L. ed. 853; Shainwald *v.* Davids, 69 Fed. 704; Dinzy *v.* Illinois Cent. R. Co., 61 Fed. 49; Spencer *v.* Kansas City Stock-Yards Co., 56 Fed. 741; Minford *v.* Old Dominion Steamship Co., 48 Fed. 1; Consolidated Store-Service Co. *v.* Lamson Consol. Store-Service Co., 41 Fed. 833; Riddle *v.* New York, etc., R. Co., 39 Fed. 290; Wotherspoon *v.* Massachusetts Ben. Assoc., 38 Fed. 625. And see U. S. *v.* Sheridan, 119 Fed. 236; Gale *v.* Alabama Southern Bldg., etc., Assoc., 117 Fed. 732. But see Platt *v.* Massachusetts Real-Estate Co., 103 Fed. 705; Rowhotham *v.* George P. Steele Iron Co., 71 Fed. 758; Southern, etc., Tel. Co. *v.* New Orleans, etc., R. Co., 22 Fed. Cas. No. 13,185.

Conditions declared essential to confer jurisdiction over a foreign corporation have been said to be: (1) That such corporation is as a matter of fact carrying on business in the state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) that there is some local law which makes such corporation amenable to suit as an express or implied condition of its doing business within the state. Mecke *v.* Valley Town Mineral Co., 89 Fed. 114; U. S. *v.* American Bell Telephone Co., 29 Fed. 17. See also Westinghouse Mach. Co. *v.* Press Pub. Co., 110 Fed. 254; Eldred *v.* American Palace-Car Co., 105 Fed. 455, 45 C. C. A. 1.

33. Laskey *v.* Newtown Min. Co., 50 Fed. 634. See also Harvey *v.* Richmond, etc., R. Co., 64 Fed. 19; U. S. *v.* Woolsey, 28 Fed. Cas. No. 16,762.

Averment on the record that defendant is an inhabitant of the district in which the suit is brought has been held not to be necessary. Gracie *v.* Palmer, 8 Wheat. (U. S.) 699, 5 L. ed. 719; Teese *v.* Phelps, 23 Fed. Cas. No. 13,818, McAll. 17.

34. Smith *v.* Atchison, etc., R. Co., 64 Fed. 1; Jewett *v.* Bradford Sav. Bank, etc., Co.,

as waived if not pleaded and the court may then have jurisdiction of the suit.[35]

11. Record Should Show Jurisdiction. The jurisdiction of a federal court should be affirmatively shown by the record, as where it depends alone on the diverse citizenship of the parties, and if it is not so shown a judgment given under such circumstances will be reversed by the appellate court.[36] And although the point is not made in the arguments by either party in the supreme court, such court will of its own motion deny both its own jurisdiction and that of the court from which the record comes.[37]

12. Presumption as to Jurisdiction. In an action in a federal court it is presumed that the court is without jurisdiction until the contrary affirmatively appears.[38]

45 Fed. 801; Purcell *v.* British Land, etc., Co., 42 Fed. 465; U. S. *v.* American Bell Telephone Co., 29 Fed. 17; Page *v.* Chillicothe, 6 Fed. 599.

35. Interior Constr., etc., Co. *v.* Gibney, 160 U. S. 217, 16 S. Ct. 272, 40 L. ed. 401; Central Trust Co. *v.* McGeorge, 151 U. S. 129, 14 S. Ct. 286, 38 L. ed. 98 [*reversing* 55 Fed. 769]; De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227; Von Auw *v.* Chicago Toy, etc., Co., 69 Fed. 448; Hoover, etc., Co. *v.* Columbia Straw-Paper Co., 68 Fed. 945; Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421; Vermont Farm Mach. Co. *v.* Gibson, 50 Fed. 423; McBride *v.* Grand de Tour Plow Co., 40 Fed. 162; Norris *v.* Atlas Steamship Co., 37 Fed. 279; Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525; Black *v.* Thorne, 3 Fed. Cas. No. 1,465, 10 Blatchf. 66.

The point may be raised by demurrer as well as by motion to dismiss, where it appears from the face of the bill that the defendants have been sued in the wrong district. Reinstadler *v.* Reeves, 33 Fed. 308; U. S. *v.* Woolsey, 28 Fed. Cas. No. 16,762.

36. Mattingly *v.* Northwestern Virginia R. Co., 158 U. S. 53, 15 S. Ct. 725, 39 L. ed. 894; Brock *v.* Northwestern Fuel Co., 130 U. S. 341, 9 S. Ct. 552, 32 L. ed. 905; Continental L. Ins. Co. *v.* Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380; Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057; Connolly *v.* Taylor, 2 Pet. (U. S.) 556, 7 L. ed. 518; McCormick *v.* Sullivant, 10 Wheat. (U. S.) 192, 6 L. ed. 300; Sullivan *v.* Fulton Steamboat Co., 6 Wheat. (U. S.) 450, 5 L. ed. 302; Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 3 L. ed. 70; Course *v.* Stead, 4 Dall. (U. S.) 22, 1 L. ed. 724; Turner *v.* Enrille, 4 Dall. (U. S.) 7, 1 L. ed. 717; Norton *v.* Brewster, 23 Fed. 840; Allen *v.* Blunt, 1 Fed. Cas. No. 215, 1 Blatchf. 480; Tunstall *v.* Worthington, 24 Fed. Cas. No. 14,239, Hempst. 662; U. S. *v.* Alberty, 24 Fed. Cas. No. 14,426, Hempst. 444; Wood *v.* Mann, 30 Fed. Cas. No. 17,952, 1 Sumn. 578; Johnson *v.* U. S., 29 Ct. Cl. 1. *Compare* Chemung Canal Bank *v.* Judson, 8 N. Y. 254, Seld. Notes (N. Y.) 49; Wood *v.* Mann, 30 Fed. Cas. No. 17,952, 1 Sumn. 578.

Allegation of citizenship in a remittitur of damages will not give jurisdiction. Denny *v.* Pironi, 141 U. S. 121, 11 S. Ct. 966, 35 L. ed. 657.

Diversity of "residence," where shown by the record, is not sufficient. Diversity of citizenship should be shown. Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057; Texas, etc., R. Co. *v.* Rogers, 57 Fed. 378, 6 C. C. A. 403; Southwestern Tel., etc., Co. *v.* Robinson, 48 Fed. 769, 1 C. C. A. 91.

In papers copied into the transcript and which do not make a part of the record citizenship of the parties should be shown. Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057.

Leave to amend the petition so as to give the circuit court jurisdiction will not be granted by the supreme court on appeal. Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132.

Where shown in summons which forms a part of the record it may be sufficient when the question is first raised in the supreme court. Gordon *v.* Chattanooga Third Nat. Bank, 144 U. S. 97, 12 S. Ct. 657, 36 L. ed. 360.

Where the fault alone rests on plaintiff reversal by the supreme court will be at his cost. Halsted *v.* Buster, 119 U. S. 341, 7 S. Ct. 276, 30 L. ed. 462.

Where, whether the land in controversy was in the northern or southern district of California was not shown by the record, the judgment was reversed and the case was remanded by the supreme court to the circuit court for the purpose of making jurisdiction apparent and for the correction of other matters of form or substance. Cervantes *v.* U. S., 16 How. (U. S.) 619, 14 L. ed. 1083.

37. King Iron Bridge, etc., Co. *v.* Otoe County, 120 U. S. 225, 7 S. Ct. 552, 30 L. ed. 623.

Although exception to jurisdiction was not taken in the trial court the appellate court will reverse. St. Louis, etc., R. Co. *v.* Newcom, 56 Fed. 951, 6 C. C. A. 172.

38. Robertson *v.* Cease, 97 U. S. 646, 24 L. ed. 1057; U. S. *v.* Central Pac. R. Co., 49 Fed. 304; U. S. *v.* Southern Pac. R. Co., 49 Fed. 297; Hampton *v.* Truckee Canal Co., 19 Fed. 1, 9 Sawy. 381.

Where an order in mandamus proceedings is made by a federal court, it will not be presumed that such court ordered the officer to perform an act in violation of a previous injunction decree of a state court. Mail *v.* Maxwell, 107 Ill. 554.

13. Determination of Question of Jurisdiction. It is the duty of the court to dismiss the action as soon as lack of jurisdiction over it satisfactorily appears.[39] Where jurisdiction depends upon the question of citizenship it is to be determined by the citizenship of the parties to the record and not of those beneficially interested.[40] And where jurisdiction is claimed by reason of a federal question being involved it should be determined by the issues raised in the plaintiff's petition, which are necessary to be decided in order to afford an adequate remedy.[41]

14. Loss or Divestiture of Jurisdiction.[42] It is a general rule that the jurisdiction of the federal court having attached the right of the plaintiff to prosecute his suit to a final determination cannot be arrested, defeated, or impaired by any proceeding in a court of another or concurrent jurisdiction;[43] nor can it be defeated by the fact that after the action is begun defendant does not continue to resist plaintiff's demands,[44] by reason of the parties becoming citizens of the same state,[45]

Where, however, a judgment has been rendered in a federal court it will be presumed, where such judgment is collaterally assailed in a state tribunal, that the court had jurisdiction of the cause unless the contrary appears on the face of the records.

Alabama.— Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

Michigan.—Arnold *v.* Nye, 23 Mich. 286.

Minnesota.—Turrell *v.* Warren, 25 Minn. 9.

Nevada.— *Ex p.* Hill, 5 Nev. 154.

New York.— Ruckman *v.* Cowell, 1 N. Y. 505; Griswold *v.* Sedgwick, 1 Wend. 126.

United States.— Erwin *v.* Lowry, 7 How. 172, 12 L. ed. 655.

Compare Morse *v.* Presby, 25 N. H. 299.

See 13 Cent. Dig. tit. "Courts," § 817.

39. Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; U. S. *v.* Crawford, 47 Fed. 561.

It is never too late to consider the question of jurisdiction, and the court may dismiss an action at any time after it has been commenced, where the want thereof satisfactorily appears. Robinson *v.* Anderson, 121 U. S. 522, 7 S. Ct. 1011, 30 L. ed. 1021; Williams *v.* Nottawa Tp., 104 U. S. 209, 26 L. ed. 719; Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. 163; Vannerson *v.* Leverett, 31 Fed. 376; Eaton *v.* Calhoun, 15 Fed. 155, 2 Flipp. 593; Spring *v.* Domestic Sewing Mach. Co., 13 Fed. 446. The case may be dismissed after verdict. Hartog *v.* Memory, 23 Fed. 835.

Although the complaint may bring the case within the jurisdiction of a federal court the action may be dismissed where it appears on the trial that no federal question is involved. Fergus Falls *v.* Fergus Falls Water Co., 72 Fed. 873, 19 C. C. A. 212.

Likewise where the ground of jurisdiction is diversity of citizenship, and it appears on the trial that the court has no jurisdiction on such ground, the action should be dismissed. Maxfield *v.* Levy, 16 Fed. Cas. No. 9,321, 2 Dall. (Pa.) 381, 4 Dall. (Pa.) 330. *Compare* Hartog *v.* Memory, 116 U. S. 588, 6 S. Ct. 521, 29 L. ed. 725.

Where as to part of the matters there is no jurisdiction and as to the others there is extreme doubt, and there is an adequate remedy in the state courts, a plea to the jurisdiction should be sustained. Freeney *v.* Plattsmouth First Nat. Bank, 16 Fed. 433, 3 McCrary 622.

Where averments are found to be immaterial in the determination of the matter really in dispute between the parties and were evidently made for the purpose of conferring jurisdiction where none in fact existed the case may be dismissed. Robinson *v.* Anderson, 121 U. S. 522, 7 S. Ct. 1011, 30 L. ed. 1021. See also Filhiol *v.* Torney, 119 Fed. 974.

40. Robb *v.* Parker, 3 S. C. 60. See Georgia *v.* Madrazo, 1 Pet. (U. S.) 110, 7 L. ed. 73.

A decree dismissing a bill will be affirmed in the supreme court where it did not appear from the record that the court below had jurisdiction, the parties not being citizens of different states. Sullivan *v.* Fulton Steamboat Co., 6 Wheat. (U. S.) 450, 5 L. ed. 302.

Jurisdiction depends not merely on the description of the parties as belonging to different states, but upon the fact that they do so belong. Killpatrick *v.* Frost, 2 Grant (Pa.) 168.

Where a bill contains the necessary averments to give the court jurisdiction on the ground of diversity of citizenship, and no plea to the jurisdiction is interposed, but the question is raised for the first time on a hearing, the burden of proof rests upon the defendants to disprove such averments; and affidavits of unknown witnesses, who have not been subjected to cross-examination, obtained by a person shown to have resorted to questionable methods, will not be accepted as sufficient against positive testimony in contradiction. Kilgore *v.* Norman, 119 Fed. 1006.

41. Sawyer *v.* Concordia Parish, 12 Fed. 754, 4 Woods 273, where it is also decided that jurisdiction will not be divested by the character of the defense made.

42. A clerical error in docketing an admiralty cause on a civil docket will not oust the jurisdiction of the court sitting in admiralty. Hatch *v.* The Boston, 3 Fed. 807.

43. Suit filed in state court will not oust. Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572; Gaylord *v.* Ft. Wayne, etc., R. Co., 10 Fed. Cas. No. 5,284, 6 Biss. 286. But see U. S. *v.* Wickersham, 10 Fed. 505.

44. Park *v.* New York, etc., R. Co., 70 Fed. 641.

45. Clarke *v.* Mathewson, 12 Pet. (U. S.) 164, 9 L. ed. 1041; Cross *v.* Evans, 86 Fed. 1, 29 C. C. A. 523.

or by an amendment to the pleading setting forth an entirely new cause of action.[46]

B. Jurisdiction Dependent on Nature of Subject-Matter — 1. In General. Where it appears that some right, title, privilege, or immunity will be defeated by one construction of the constitution or a law or treaty of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States;[47] and where a federal question is involved jurisdiction exists without regard to the citizenship of the parties;[48] but it is a rule that to confer jurisdiction on the ground that a federal question is involved there must be a real and substantial dispute[49] as to the effect or construction of a provision either of the constitution or of some law of the United States, upon the determination of which the right of recovery depends.[50] Again the federal courts have jurisdiction of actions where the question is involved whether by a state law the obligation of a contract has been impaired,[51] where persons are denied the

46. Green *v.* Custard, 23 How. (U. S.) 484, 16 L. ed. 471.

47. Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209; Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; Starin *v.* New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388; New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 26 L. ed. 96; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Richards *v.* Rock Rapids, 31 Fed. 505; Leonard *v.* Shreveport, 28 Fed. 257; Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 9 Sawy. 313; Ellis *v.* Norton, 16 Fed. 4, 4 Woods 399; Van Allen *v.* Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598.

Cases arising under the laws of the United States are such as grow out of the legislation of congress. New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 26 L. ed. 96; Ellis *v.* Norton, 16 Fed. 4, 4 Woods 399.

What does or what does not constitute a federal question see Avery *v.* Papper, 179 U. S. 305, 21 S. Ct. 94, 45 L. ed. 203; La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223 [*affirming* 32 Ct. Cl. 462]; *In re* Delafield, 109 Fed. 577; Anglo-American Provision Co. *v.* Davis Provision Co., 105 Fed. 536; Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 107 Fed. 762; Southern Bell Telephone, etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147 [*affirming* 98 Fed. 671]; Leslie *v.* Brown, 90 Fed. 171, 32 C. C. A. 556; Capital City Gas Co. *v.* Des Moines, 72 Fed. 818; Green *v.* Elbert, 63 Fed. 308, 11 C. C. A. 207. See Green *v.* Rogers, 56 Fed. 220; Sowles *v.* Witters, 46 Fed. 497; Murdock *v.* Cincinnati, 44 Fed. 726; Winter *v.* Swinburne, 8 Fed. 49, 10 Biss. 454; Johnson *v.* Jumel, 13 Fed. Cas. No. 7,392, 3 Woods 69. See also Jones *v.* Seward, 40 Barb. (N. Y.) 563; *Ex p.* Kinnebrew, 35 Fed. 52.

48. U. S. Express Co. *v.* Allen, 39 Fed. 712; Woodfin *v.* Phœbus, 30 Fed. 289; Sawyer *v.* Concordia Parish, 12 Fed. 754, 4 Woods 273; Fischer *v.* Neil, 6 Fed. 89. See also Files *v.* Davis, 118 Fed. 465.

49. A case which in fact depends upon questions of local or general law cannot be brought within the jurisdiction of a federal court, as one arising under the constitution or laws of the United States by a reference thereto. St. Paul, etc., R. Co. *v.* St. Paul, etc., R. Co., 68 Fed. 2, 15 C. C. A. 167. See Dowell *v.* Griswold, 7 Fed. Cas. No. 4,041, 5 Sawy. 39.

The mere fact that it may become necessary to construe the constitution or laws of the United States in the progress of the trial of the case does not give the federal courts jurisdiction, unless the decision must depend upon such construction. Wise *v.* Nixon, 78 Fed. 203.

50. McCain *v.* Des Moines, 174 U. S. 168, 19 S. Ct. 644, 43 L. ed. 936 [*affirming* 84 Fed. 726].

51. Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Citizens' St. R. Co. *v.* City R. Co., 56 Fed. 746; Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715; Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529; Leonard *v.* Shreveport, 28 Fed. 257; Levy *v.* Shreveport, 28 Fed. 209; Sawyer *v.* Concordia Parish, 12 Fed. 754, 4 Woods 273. And see U. S. Const. art. 1, § 10.

A bill alleging contract exemption from taxation, and that the state is attempting to impair or destroy the same, raises a question of which the federal courts have jurisdiction. Illinois Cent. R. Co. *v.* Adams, 180 U. S. 28, 21 S. Ct. 251, 45 L. ed. 410. See also Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455.

Existence of a valid contract, the impairment of which is complained of, is not necessary. Pacific Electric Co. *v.* Los Angeles, 118 Fed. 746; Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736, 55 C. C. A. 240. *Compare* New York City Underground R. Co. *v.* New York City, 116 Fed. 952.

That a municipal ordinance impairs the obligation of a contract involves a constitutional question which is within the jurisdiction of a federal court. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341 [*affirming* 60 Fed. 957]; Anoka Waterworks, etc., Co. *v.* Anoka, 109 Fed. 580; Los Angeles City Water Co. *v.* Los Angeles, 103 Fed. 711; Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 99 Fed. 812; Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11. The ordinance should, however, be authorized, or supposed to be authorized.

equal protection of the laws,[52] or where a proceeding is without due process of law;[53] of all cases arising under treaties made under the authority of the United States;[54] of cases arising under the Civil Rights Act;[55] of torts committed on the high seas without reference to the nationality of the vessel;[56] and of actions which arise under the federal bankruptcy laws.[57] So also such courts have

Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963.

A federal court is not ousted of jurisdiction of a suit, in which the question is raised whether the state was attempting to impair the obligation of a contract, by a decision that the question was *res judicata* as against the state. Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187 [*affirming* 88 Fed. 383].

Where a state constitutional provision does not indicate on its face that it was to be applied to antecedent contracts, and the state supreme court has held that it could not be so applied, a federal court has no jurisdiction. Shreveport *v.* Cole, 129 U. S. 36, 9 S. Ct. 210, 32 L. ed. 589.

Where such question not involved.— New Orleans *v.* Benjamin, 153 U. S. 411, 14 S. Ct. 905, 38 L. ed. 764; Carter *v.* Greenhow, 114 U. S. 317, 5 S. Ct. 928, 962, 29 L. ed. 202. See also Elkins *v.* Chicago, 119 Fed. 957.

52. Davenport *v.* Cloverport, 72 Fed. 689.

Denial of right to vote for non-compliance with state law see Swafford *v.* Templeton, 108 Fed. 309.

Of a suit to restrain collection of taxes on the ground that taxing authorities are proceeding illegally and not in conformity with the statutes of the state, a federal court has no jurisdiction. Manhattan R. Co. *v.* New York City, 18 Fed. 195.

53. U. S. Const. Amendm. 14, § 1. And see Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725; Hanford *v.* Davies, 163 U. S. 273, 16 S. Ct. 1051, 41 L. ed. 157; Crystal Springs Land, etc., Co. *v.* Los Angeles, 76 Fed. 148. *Compare* Huntington *v.* New York City, 118 Fed. 683.

A federal court has jurisdiction of a writ of habeas corpus alleging the arrest and imprisonment of the petitioner without authority under the state laws (*In re* Monroe, 46 Fed. 52); and of a bill for an injunction against owners of trespassing cattle, where it is alleged that the injury was committed by defendants under an unconstitutional state act by which the complainant was deprived of the use of his property without due process of law (Smith *v.* Bivens, 56 Fed. 352); but a federal question is not involved in a suit to enjoin the threatened taking of property, which it is alleged will be without any authority of law (Kiernan *v.* Multnomah County, 95 Fed. 849); nor is this constitutional provision involved where the question is under what statute a convict shall be executed, or whether he shall be executed at all (Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249); and a fine and imprisonment imposed by a state court for contempt in disobeying a writ of habeas corpus are not without due process of law (*Ex p.* Young, 50 Fed. 526).

An illegal levy of a tax or assessment may be a taking of property without due process of law. Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; White *v.* Tacoma, 109 Fed. 32; Southern R. Co. *v.* North Carolina Corp. Commission, 97 Fed. 513; Nashville, etc., R. Co. *v.* Taylor, 86 Fed. 168; Ceredo First Nat. Bank *v.* Savings Soc., 80 Fed. 581, 25 C. C. A. 466. *Compare* McCain *v.* Des Moines, 174 U. S. 168, 19 S. Ct. 644, 43 L. ed. 936 [*affirming* 84 Fed. 726]. But see Chicago Union Traction Co. *v.* State Bd. of Equalization, 112 Fed. 607; Corbus *v.* Alaska Treadwell Gold-Min. Co., 99 Fed. 334.

Of an action by a tribal Indian for false arrest on a charge of violating the laws of the United States or of a state a federal court has jurisdiction. Peters *v.* Malin, 111 Fed. 244; Ma-Ka-Ta-Wah-Qua-Twa *v.* Rebok, 111 Fed. 12; Y-ta-tah-wah *v.* Rebock, 105 Fed. 257; Peters *v.* Malin, 104 Fed. 849.

The fixing of rates to be charged by a railroad, water, or gas company, may amount to a taking of property without due process of law. Louisville, etc., R. Co. *v.* McChord, 103 Fed. 216; Kimball *v.* Cedar Rapids, 99 Fed. 130; Consolidated Water Co. *v.* San Diego, 93 Fed. 849, 35 C. C. A. 631; San Joaquin, etc., River Canal, etc., Co. *v.* Stanislaus County, 90 Fed. 516; Consolidated Water Co. *v.* San Diego, 84 Fed. 369; Indianapolis Gas Co. *v.* Indianapolis, 82 Fed. 245.

54. U. S. *v.* Weld, 127 U. S. 51, 8 S. Ct. 1000, 32 L. ed. 62; Verden *v.* Coleman, 1 Black (U. S.) 472, 17 L. ed. 161; New Orleans *v.* De Armas, 9 Pet. (U. S.) 224, 9 L. ed. 109; Smith *v.* Maryland, 6 Cranch (U. S.) 286, 3 L. ed. 225; Owings *v.* Norwood, 5 Cranch (U. S.) 344, 3 L. ed. 120; Bodemuller *v.* U. S., 39 Fed. 437. See also, generally, TREATIES.

When action is held not to arise under a treaty in particular cases so as to confer jurisdiction see Crystal Springs Land, etc., Co. *v.* Los Angeles, 177 U. S. 169, 29 S. Ct. 573, 44 L. ed. 720; Muse *v.* Arlington Hotel Co., 168 U. S. 430, 18 S. Ct. 109, 42 L. ed. 531.

55. See, generally, CIVIL RIGHTS. And see Smoot *v.* Kentucky Cent. R. Co., 13 Fed. 337. See also Harrison *v.* Hadley, 11 Fed. Cas. No. 6,137, 2 Dill. 229; U. S. *v.* Rhodes, 27 Fed. Cas. No. 16,151, 1 Abb. 28. But *compare* U. S. *v.* Cruikshank, 25 Fed. Cas. No. 14,897, 1 Woods 308 [*affirmed* in 92 U. S. 542, 23 L. ed. 588].

56. The Noddleburn, 28 Fed. 855, 30 Fed. 142.

57. See, generally, BANKRUPTCY. And see Lord *v.* Cannon, 75 Ga. 300; Burbank *v.* Bigelow, 92 U. S. 179, 23 L. ed. 542; Gindrat *v.* Dane, 10 Fed. Cas. No. 5,455, 4 Cliff.

jurisdiction of actions which relate to public lands of the United States;[58] of a controversy growing out of the exercise of rights by a railroad company in the construction and operation of its road in and through a territory of the United States where all such rights are derived from an act of congress;[59] of a suit in reference to mining property, where the interpretation of a federal statute is involved;[60] of questions relating to commerce[61] and navigable waters;[62] and of

260; Payson *v.* Stoever, 19 Fed. Cas. No. 10,863, 2 Dill. 427.

58. See, generally, PUBLIC LANDS. And see Eaton *v.* Calhoun, 47 Fed. 422; Jones *v.* Florida, etc., R. Co., 41 Fed. 70; Hills *v.* Homton, 12 Fed. Cas. No. 6,508, 4 Sawy. 195; Mezes *v.* Greer, 17 Fed. Cas. No. 9,520, 1 McAll. 401.

A federal court may have jurisdiction of an action for violation of an act forbidding the inclosure of public lands (U. S. *v.* Bisel, 8 Mont. 20, 19 Pac. 251); of an action for mesne profits of land during the time between plaintiff's preëmption entry and the issuance of the patent (Florida Cent., etc., R. Co. *v.* Bell, 87 Fed. 369, 31 C. C. A. 9); of an action in regard to the right to accretions along the river front by owners of land who acquired title through a patent issued under act of congress (King *v.* St. Louis, 98 Fed. 641); and of suits generally to determine conflicting claims to public lands, where each party claims under the United States (McHenry *v.* Nygaard, 72 Minn. 2, 74 N. W. 1106; Linkswiler *v.* Schneider, 95 Fed. 203; Florida Cent., etc., R. Co. *v.* Bell, 87 Fed. 369, 31 C. C. A. 9; Evans *v.* Durango Land, etc., Co., 80 Fed. 433, 25 C. C. A. 531; Pierce *v.* Molliken, 78 Fed. 196. *Compare* King *v.* Lawson, 84 Fed. 209). But the acts of congress of 1824, and of 1844, which provided for the enforcement of claims to land in the Louisiana purchase by petition to the district court referred not to perfect legal titles under grants of former governments, but only to equitable and inchoate titles. U. S. *v.* Ducros, 15 How. (U. S.) 38, 14 L. ed. 591; U. S. *v.* D'Auterieve, 15 How. (U. S.) 14, 14 L. ed. 580; U. S. *v.* Pillerin, 13 How. (U. S.) 9, 14 L. ed. 28; U. S. *v.* Castant, 12 How. (U. S.) 437, 13 L. ed. 1056; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74. And jurisdiction is not conferred by the mere fact that the title to lands in controversy was originally derived from the United States. St. Paul, etc., R. Co. *v.* St. Paul, etc., R. Co., 68 Fed. 2, 15 C. C. A. 167. So a question which merely involves the title to public land, and does not involve the construction of a United States law, is not within the jurisdiction of a federal court. Theurkauf *v.* Ireland, 27 Fed. 769. See also Butler *v.* Shafer, 67 Fed. 161; Stayton Min. Co. *v.* Woody, 50 Fed. 633; Southern Pac. R. Co. *v.* Whittaker, 47 Fed. 529. Nor has the circuit court any jurisdiction of a suit to cancel a United States patent to land on the ground of fraud in obtaining the same. Holland *v.* Hyde, 41 Fed. 897.

59. Southern Kansas R. Co. *v.* Briscoe, 144 U. S. 133, 12 S. Ct. 538, 36 L. ed. 377 [*affirming* 40 Fed. 273].

60. See, generally, MINES AND MINERALS.

May have jurisdiction of an action where the right to enter within the side-lines of the land of another and mine and take ore therefrom is claimed under the mining laws of the United States (Cheesman *v.* Shreeve, 37 Fed. 36. See also Montana Ore-Purchasing Co. *v.* Boston, etc., Copper, etc., Min. Co., 85 Fed. 867, 29 C. C. A. 462), of a suit to quiet title to a placer mining claim, where defendant claims title by reason of a location after issue of the patent on a quartz vein known to exist before the application for the placer patent (Haggin *v.* Lewis, 66 Fed. 199. See also Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286. *Compare* Wise *v.* Nixon, 76 Fed. 3), and of an action in which it is claimed that the defendant procured a patent for a mining claim from the land department by fraud, and without complying with the statute as to notice and proofs, and that it was issued without authority of law, and asking for a decree that the defendant hold the patent in trust for complainants (Cates *v.* Producers', etc., Oil Co., 96 Fed. 7); but not of the question whether a mining claim has been abandoned (Inez Min. Co. *v.* Kinney, 46 Fed. 832); or of a trespass upon such a claim (Peabody Gold-Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657).

Where a suit in support of an adverse mining claim is brought, it is not a suit arising under the laws of the United States, so as to confer jurisdiction, unless it involves the meaning and construction of federal statutes. Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 20 S. Ct. 726, 44 L. ed. 864 [*reversing* 87 Fed. 801, 31 C. C. A. 223]; Blackburn *v.* Portland Gold-Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276; Nevada Sierra Oil Co. *v.* Miller, 97 Fed. 681; Dewey Min. Co. *v.* Miller, 96 Fed. 1. *Compare* Larned *v.* Jenkins, 109 Fed. 100, 48 C. C. A. 252; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354; Burke *v.* Bunker Hill, etc., Min., etc., Co., 46 Fed. 644.

61. Elder *v.* Whitesides, 72 Fed. 724; Monteith *v.* Kirkpatrick, 17 Fed. Cas. No. 9,721, 3 Blatchf. 279. See also, generally, COMMERCE.

Interstate commerce.—*Ex p.* Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110; Donald *v.* Scott, 67 Fed. 854; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289. But see New York Cent. Trust Co. *v.* Grantham, 83 Fed. 540, 27 C. C. A. 570.

62. See, generally, NAVIGABLE WATERS. And see U. S. *v.* The Kodiak, 53 Fed. 126.

What constitutes an unlawful obstruction of navigable waters is a question of which

actions arising under the patent laws of the United States.[63] They likewise have jurisdiction of actions for the infringement of a copyright;[64] of suits to obtain relief for the infringement of trade-marks;[65] of actions by or against corporations

the federal courts have jurisdiction. Sunflower River Packet Co. *v.* Georgia Pac. R. Co., 39 Fed. 229; Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643; U. S. *v.* Milwaukee, etc., R. Co., 26 Fed. Cas. No. 15,778, 5 Biss. 410. So such jurisdiction exists in the case of a suit by the United States to enjoin the deposit in a river of a mining debris injurious to navigation (U. S. *v.* North Bloomfield Gravel-Min. Co., 53 Fed. 625), of a suit for an injunction against a log boom as an obstruction to navigation (U. S. *v.* Bellingham Bay Boom Co., 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437 [*reversing* 81 Fed. 658, 26 C. C. A. 547]), of a suit to enjoin the erection of a bridge over navigable waters (Chatfield Co. *v.* New Haven, 110 Fed. 788; Hatch *v.* Wallamet Iron Bridge Co., 6 Fed. 326, 7 Sawy. 127; U. S. *v.* Milwaukee, etc., R. Co., 26 Fed. Cas. No. 15,778, 5 Biss. 410), although authorized by the legislature of a state (Baird *v.* Shore Line R. Co., 2 Fed. Cas. No. 758, 6 Blatchf. 276); but in such a suit between citizens of the same state, the jurisdiction is declared to extend only so far as to inquire whether its construction is in violation of the constitution or laws of the United States (Miller *v.* New York City, 17 Fed. Cas. No. 9,585, 13 Blatchf. 469); and in the absence of a federal statute assuming police jurisdiction of navigable waters lying wholly within the limits of a particular state, it has been decided that the question whether certain erections are a public nuisance is not one of which the federal court has jurisdiction (Kenyon *v.* Knipe, 46 Fed. 309; Milnor *v.* New Jersey R. Co., 17 Fed. Cas. No. 9,620; Silliman *v.* Hudson River Bridge Co., 22 Fed. Cas. No. 12,852, 4 Blatchf. 395).

Question as to the rights of a state over marsh and tide lands on the borders of a sea or its estuaries is a local question. Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331; Chisolm *v.* Caines, 67 Fed. 285. See Kenyon *v.* Knipe, 46 Fed. 309.

Questions as to priority of possession of a water right and of conformity to local customs, laws, and decisions are not federal ones. Telluride Power Transmission Co. *v.* Rio Grande Western R. Co., 175 U. S. 639, 20 S. Ct. 245, 44 L. ed. 305 [*dismissing* appeal in 16 Utah 125, 51 Pac. 146].

Questions as to riparian rights of owners of real estate bounded by a navigable river, although generally subject to local laws, may involve a consideration of other matters bringing it within jurisdiction of federal courts. King *v.* St. Louis, 98 Fed. 641.

63. Puetz *v.* Bransford, 32 Fed. 318; Duke *v.* Graham, 19 Fed. 647; Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92; Hoffheins *v.* Brandt, 11 Fed. Cas. No. 6,575. See also Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; and *infra*, XIII, B, 1, b.

The object in placing the subject-matter of patents under the control of congress and the federal courts was to give patentees everywhere the same rights and remedies, without regard to local laws. Read *v.* Miller, 20 Fed. Cas. No. 11,610, 2 Biss. 12.

Act of March 3, 1887, did not repeal the act of March 3, 1875, or Rev. Stat. (1878), §§ 699, 711. Miller-Magee Co. *v.* Carpenter, 34 Fed. 433.

A general equity power was conferred by the act of 1836. Hoffheins *v.* Brandt, 11 Fed. Cas. No. 6,575; Potter *v.* Dixon, 19 Fed. Cas. No. 11,325, 5 Blatchf. 160. See also Sayles *v.* Richmond, etc., R. Co., 21 Fed. Cas. No. 12,424, 3 Hughes 172.

The interest of a patentee cannot be ordered sold by the circuit court to pay a judgment rendered in a state court. Ryan *v.* Lee, 10 Fed. 917.

A suit to enjoin the collection of state taxes on the ground that they are illegal because in effect levied on patents or patent rights is not within the jurisdiction of the circuit court under U. S. Rev. Stat. (1878) § 629, cl. 9 [U. S. Comp. Stat. (1901) p. 504]. Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 20 S. Ct. 272, 44 L. ed. 374 [*affirming* 80 Fed. 1, 25 C. C. A. 301].

64. Potter *v.* McPherson, 21 Hun (N. Y.) 559. See, generally, COPYRIGHT.

Residence or citizenship does not affect the jurisdiction of the circuit court to entertain a suit for infringement of a copyright or to grant an injunction. Lederer *v.* Rankin, 90 Fed. 449. *Compare* Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47. But where the parties are citizens of the same state and the federal court has in an action for infringement determined that the copyright is invalid it has been decided that it has no jurisdiction to grant relief on other grounds. Larrowe-Loisette *v.* O'Loughlin, 88 Fed. 896.

Where the question of copyright is merely incidental to another matter the court will not entertain jurisdiction. Haworth *v.* Nystrom, 11 Fed. Cas. No. 6,251, 8 Wkly. Notes Cas. (Pa.) 204.

No power to make decrees, under the act of Feb. 15, 1819, for penalties for violation of the act of Feb. 3, 1831. Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155.

A suit to enforce a contract between an author and a publisher is not within the jurisdiction of a federal court. Silver *v.* Holt, 84 Fed. 809.

Of a suit merely involving title to a copyright a state court has jurisdiction. Hoyt *v.* Bates, 81 Fed. 641.

65. Duwell *v.* Bohmer, 8 Fed. Cas. No. 4,213, 2 Flipp. 168. See, generally, TRADE-MARKS AND TRADE-NAMES and *infra*, XIII, B, 1, a.

Although federal statutes are declared unconstitutional equitable remedies may be administered in the federal courts. Battle *v.* Finlay, 50 Fed. 106.

which are created by act of congress,[66] or by or against government officers or agents;[67] and of actions by or against receivers who have been appointed by federal courts to administer the estate of an insolvent corporation and who have taken possession of all of its property.[68] And similarly the federal courts have

66. Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Supreme Lodge K. of P. *v.* England, 94 Fed. 369, 36 C. C. A. 298; U. S. Freehold Land, etc., Co. *v.* Gallegos, 89 Fed. 769, 32 C. C. A. 470; Union Pac. R. Co. *v.* McComb, 1 Fed. 799, 17 Blatchf. 510; Hay *v.* Alexandria, etc., R. Co., 11 Fed. Cas. No. 6,254*a*, 4 Hughes 331.

Although adequate remedies may exist in the state courts, such a corporation is not compelled to seek the jurisdiction of such courts. New Orleans First Nat. Bank *v.* Bohne, 8 Fed. 115, 4 Woods 74. *Compare* Adams Express Co. *v.* Denver, etc., R. Co., 16 Fed. 712, 4 McCrary 77.

Railway corporations so created may sue or be sued in federal courts. Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 9 Sawy. 313; Bauman *v.* Union Pac. R. Co., 2 Fed. Cas. No. 1,117, 3 Dill. 367; Smith *v.* Union Pac. R. Co., 22 Fed. Cas. No. 13,121, 2 Dill. 278. So it was decided that such a court had jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law (U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,599, 2 Dill. 527, 28 Fed. Cas. No. 16,600, 3 Dill. 524); and jurisdiction exists of a suit for personal injuries against a railroad corporation as created (Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829) and of a suit to restrain the collection of taxes on property claimed to be exempt under an act of congress (Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134).

National banks.— A federal court has jurisdiction of an action to enjoin the collection of a tax upon a national bank and the shares belonging to the stock-holders, where the tax is in violation of the constitution. Pittsburg Third Nat. Bank *v.* Mylin, 76 Fed. 385; Dakota Nat. Bank *v.* Swenson, 48 Fed. 626; Sioux Falls Nat. Bank *v.* Swenson, 48 Fed. 621. See also Stanley *v.* Albany County, 6 Fed. 561, 19 Blatchf. 147. And it has been decided that an action by a national bank against its former officers for a loss occasioned by a negligent loaning of the bank's funds is within the jurisdiction of the circuit court (Abbott *v.* National Bank of Commerce, 20 Wash. 552, 56 Pac. 376; National Bank of Commerce *v.* Wade, 84 Fed. 10), but not an action for damages against the directors of a bank for inducing plaintiff by false representations in their reports to loan money to the bank, which is lost through the bank's insolvency (Bailey *v.* Mosher, 74 Fed. 15) or an action against the assignees of bank-stock, by the assignors, to recover payments the latter were compelled to make toward the bank's liabilities, owing to the fact that the transfer was not properly registered on the bank's books (Lessassier *v.* Kennedy, 123 U. S. 521, 8 S. Ct. 244, 31 L. ed. 262). Again, under the act of congress of Aug. 13, 1888, national banks are to be deemed citizens of the state in which located for the purposes of all suits by or against them. *Ex p.* Jones, 164 U. S. 691, 17 S. Ct. 222, 41 L. ed. 601. See also Thomas *v.* D. O. Mills Nat. Bank, 106 Fed. 438, 45 C. C. A. 407.

67. U. S. *v.* McCrory, 119 Fed. 861, 56 C. C. A. 373.

Actions on official bonds of government officers are within the jurisdiction of the circuit court. Postmaster-Gen. *v.* Early, 12 Wheat. (U. S.) 136, 6 L. ed. 577; U. S. *v.* Belknap, 73 Fed. 19; Crawford *v.* Johnson, 6 Fed. Cas. No. 3,369, Deady 457. So also a federal court has jurisdiction of an action by a person injured by a breach of the marshal's bond (Adler *v.* Newcomb, 1 Fed. Cas. No. 83, 2 Dill. 45), irrespective of the citizenship of the parties (U. S. *v.* Davidson, 25 Fed. Cas. No. 14,921, 1 Biss. 433; Wetmore *v.* Rice, 29 Fed. Cas. No. 17,468, 1 Biss. 237).

United States marshals.— A federal court has jurisdiction of a suit against a marshal for wrongfully taking possession of real estate (Front St. Cable R. Co. *v.* Drake, 65 Fed. 539), of an action where the validity and effect of process issued by a United States court is to be determined (Ellis *v.* Norton, 16 Fed. 4, 4 Woods 399), and of an action by a marshal to protect money in his hands as such (Henry *v.* Sowles, 28 Fed. 481).

A telegraph company becomes an agent of the federal government by accepting the provisions of the act of July 24, 1866. Western Union Tel. Co. *v.* Charleston, 56 Fed. 419.

68. Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Brookfield *v.* Hecker, 118 Fed. 942; Bowman *v.* Harris, 95 Fed. 917; Bausman *v.* Denny, 73 Fed. 69; *In re* Barnard, 61 Fed. 531. *Compare* Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 19 S. Ct. 500, 43 L. ed. 814.

Receivers of national banks.— A federal court has jurisdiction of an action brought by or against such an officer in his official capacity (McDonald *v.* State, 101 Fed. 171, 41 C. C. A. 278; Gilbert *v.* McNulta, 96 Fed. 83; Brown *v.* Smith, 88 Fed. 565; Snohomish County *v.* Puget Sound Nat. Bank, 81 Fed. 518) without regard to the citizenship of the parties (Bowman *v.* Harris, 95 Fed. 917; Myers *v.* Hettinger, 94 Fed. 370, 37 C. C. A. 369 [*affirming* 81 Fed. 805]; Short *v.* Hepburn, 75 Fed. 113, 21 C. C. A. 252) or the amount in controversy (Bowman *v.* Harris, 95 Fed. 917; Myers *v.* Hettinger, 94 Fed. 370, 37 C. C. A. 369 [*affirming* 81 Fed. 805]. *Compare* Smithson *v.* Hubbell, 81 Fed. 593; Thompson *v.* German Ins. Co., 76 Fed. 892). But where in an action by such a receiver

jurisdiction of suits arising under the provisions of the United States revenue laws.[69]

2. SUFFICIENCY OF PLEADINGS. Where the jurisdiction of a circuit court is invoked on the ground that the suit is one "arising under the Constitution of the United States," it must appear from the declaration or bill that the question in dispute is one which really and substantially involves some right under such constitution or laws.[70] And jurisdiction cannot be conferred by setting forth in the bill or declaration the contention which will be made by defendant;[71] nor where the action is founded on an alleged breach of contract of license by defendant, by

the jurisdiction depends solely on the official character of the plaintiff, and there is a sale and transfer by him of all his interest in the subject-matter of the litigation, it is decided that jurisdiction is lost. Weaver *v.* Kelly, 92 Fed. 417, 34 C. C. A. 423. See also Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920.

A federal court which has possession of the property of a railroad company by its receiver in a foreclosure suit draws to itself as auxiliary all suits and proceedings with respect to the property. Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 93 Fed. 689. See also Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155.

Limited in bringing suit to the federal court of the state of his appointment see Brigham *v.* Luddington, 4 Fed. Cas. No. 1,874, 12 Blatchf. 237.

That an action may be maintained in a state court against a receiver of a railroad for negligence see Malott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

69. Ames *v.* Hager, 36 Fed. 129, 13 Sawy. 473, 1 L. R. A. 377.

Jurisdiction exists in the circuit court of a suit against an internal revenue collector to recover taxes alleged to have been illegally collected (Louisville Sinking Fund Com'rs *v.* Buckner, 48 Fed. 533); and of a similar proceeding against a collector of customs (Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Schmeider *v.* Barney, 22 Fed. Cas. No. 12,462, 13 Blatchf. 37). And the district court has jurisdiction of actions for penalties and forfeitures under the customs and revenue laws (U. S. *v.* Mooney, 11 Fed. 476; Hall *v.* Warren, 11 Fed. Cas. No. 5,952, 2 McLean 332); and may discharge upon bail property in its custody which is proceeded against as forfeited (U. S. *v.* Three Hundred Barrels of Whiskey, 28 Fed. Cas. No. 16,510, 1 Ben. 15). But it has been decided that a federal court has no jurisdiction of an action to restrain the collection of internal revenue taxes (Miles *v.* Johnson, 59 Fed. 38; Roback *v.* Taylor, 20 Fed. Cas. No. 11,877, 2 Bond 36. But see Georgia *v.* Atkins, 10 Fed. Cas. No. 5,350, 35 Ga. 315, 1 Abb. 22), and that no original jurisdiction is vested in a federal court of an action against a collector of internal revenue, except on the ground of diversity of citizenship, and where an amount sufficient to confer jurisdiction is involved, although the defendant may at his option remove any such action commenced in the state court to the federal court (Cincinnati Brewing Co. *v.* Bettman, 102 Fed. 16).

War-stamp tax.— Where the railroad commission of a state issued an order requiring an express company to pay the war-stamp tax, without any demand on the shipper for its payment, it was decided, in an action by the company to enjoin the enforcement of such order, that a construction of the act of congress imposing such tax was not necessarily involved, as the defendants had no legal interest in the matter which entitled them to demand such construction (Dinsmore *v.* Southern Express Co., 92 Fed. 714); it was, however, determined that a federal court had jurisdiction of a suit to determine the validity of the action of the state authorities, without regard to the citizenship of the parties (Dinsmore *v.* Southern Express Co., 92 Fed. 714); and it was decided in another case that the state courts had jurisdiction of a petition to compel an express company to receive and carry goods upon payment of the regular charges, where a controversy was involved as to whether the company or the shipper should pay the stamp tax (Atty.-Gen. *v.* American Express Co., 118 Mich. 682, 77 N. W. 317).

70. Bienville Water-Supply Co. *v.* Mobile, 175 U. S. 109, 20 S. Ct. 40, 44 L. ed. 92 [*affirming* 95 Fed. 539]; City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114; Tennessee *v.* Union, etc., Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511; Metcalf *v.* Watertown, 128 U. S. 586, 9 S. Ct. 173, 32 L. ed. 543; *Ex p.* Smith, 94 U. S. 455, 24 L. ed. 165; Henuy *v.* La Compagnie Generale Transatlantique, etc., 96 Fed. 497; California Oil, etc., Co. *v.* Miller, 96 Fed. 12; Dewey Min. Co. *v.* Miller, 96 Fed. 1; Montana Ore-Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 93 Fed. 274, 35 C. C. A. 1; Indiana *v.* Allegheny Oil Co., 85 Fed. 870; Fergus Falls *v.* Fergus Falls Water Co., 72 Fed. 873, 19 C. C. A. 212; Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421; Slayton Min. Co. *v.* Woody, 50 Fed. 633; Booth *v.* Lloyd, 33 Fed. 593; Levy *v.* Shreveport, 28 Fed. 209; Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 26 Fed. 477; Manhattan R. Co. *v.* New York City, 18 Fed. 195; Dowell *v.* Griswold, 7 Fed. Cas. No. 4,041, 5 Sawy. 39. And see New York City Underground R. Co. *v.* New York City, 116 Fed. 952.

71. Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486 [*revers-*

joining in the complaint a minor claim, imperfectly stated, for infringement of a patent.[72] And merely setting up a general right under a federal statute does not present a case within the first category of cases specified in the Revised Statutes[73] of "an authority exercised under the United States" where the validity of such statute is not involved.[74] But it has been decided that it is not necessary to show in the pleadings what particular clause of the constitution has been violated in order to confer jurisdiction of a suit as one arising under the constitution.[75] And diversity of citizenship need not appear in the pleadings where, from the allegations, it affirmatively appears that a federal question is directly involved.[76]

C. Jurisdiction Dependent on Citizenship, Residence, or Character of Parties — 1. In General — a. Cases Affecting Ambassadors, Public Ministers, or Consuls. The federal courts have jurisdiction of all suits against consuls and vice-consuls,[77] and exclusive jurisdiction was conferred by a federal statute upon the supreme court of suits against ambassadors and other public ministers.[78]

b. Controversies to Which the United States Is Party. Controversies to which the United States is a party are within the jurisdiction of the federal courts.[79] And the federal courts have jurisdiction of a civil action at law in

ing 87 Fed. 369, 31 C. C. A. 9]; Tennessee *v.* Union, etc., Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511; Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 111 Fed. 817, 49 C. C. A. 637; Montana Ore-Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 93 Fed. 274, 35 C. C. A. 1; Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421. See also Sawyer *v.* Concordia Parish, 12 Fed. 754, 4 Woods 273. *Compare* Cox *v.* Gilmer, 88 Fed. 343.

72. Reliable Incubator, etc., Co. *v.* Stahl, 105 Fed. 663, 44 C. C. A. 657.

73. U. S. Rev. Stat. (1878) § 709 [U. S. Comp. Stat. (1901) p. 575].

74. Telluride Power Transmission Co. *v.* Rio Grande Western R. Co., 175 U. S. 639, 20 S. Ct. 245, 44 L. ed. 305.

75. Crystal Springs Land, etc., Co. *v.* Los Angeles, 76 Fed. 148.

76. San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 90 Fed. 516.

77. U. S. Rev. Stat. (1878) § 563 [U. S. Comp. Stat. (1901) p. 459].

In case of consuls of United States in foreign countries, jurisdiction does not exist. Bors *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419; Froment *v.* Duclos, 30 Fed. 385; Lorway *v.* Lousada, 15 Fed. Cas. No. 8,517, 1 Lowell 77; Milward *v.* McSaul, 17 Fed. Cas. No. 9,624; St. Luke's Hospital *v.* Barclay, 22 Fed. Cas. No. 12,241, 3 Blatchf. 259. *Compare Ex p.* Hitz, 111 U. S. 766, 4 S. Ct. 698, 28 L. ed. 592; Pooley *v.* Luco, 72 Fed. 561; Bixby *v.* Janssen, 3 Fed. Cas. No. 1,452, 6 Blatchf. 315.

Consular character only exempts from jurisdiction of state courts. St. Luke's Hospital *v.* Barclay, 22 Fed. Cas. No. 12,241, 3 Blatchf. 259.

78. U. S. Rev. Stat. (1878) § 687 [U. S. Comp. Stat. (1901) p. 565].

That a consul general exercising the functions of the minister, during the latter's absence, by consent of the secretary of state, is not a public minister within the meaning of the statute, but is subject to the jurisdiction of the district court in case of a suit against him see *In re* Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222.

79. U. S. Const. art. 3, § 2 (relating to "controversies in which the United States shall be a party"); U. S. Rev. Stat. (1878) § 563 [U. S. Comp. Stat. (1901) p. 455] (relating to jurisdiction "in all suits at common law brought by the United States").

A federal court has jurisdiction of a proceeding by the United States to collect the amount which a collector of customs is in default (Murray *v.* Hoboken Land Co., 18 How. (U. S.) 272, 15 L. ed. 372. *Compare* Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204); of an action where the United States sues in the district court as indorsees of a promissory note (U. S. *v.* Greene, 26 Fed. Cas. No. 15,258, 4 Mason 427); of a suit against the United States to compel the issue of a patent to a purchaser of timber (Montgomery *v.* U. S., 36 Fed. 4, 13 Sawy. 383. *Compare* McDougall *v.* Hayes, 46 Fed. 817); of a set-off interposed by the United States to an action by a district attorney to recover fees (Tuthill *v.* U. S., 38 Fed. 538); and of a proceeding by the United States to take land for public use by condemnation (Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449. See U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61). Again where the United States has under the law of a state a right of action on the official bond of a sheriff, the district court has jurisdiction of the same. Tennessee *v.* Hill, 60 Fed. 1005, 9 C. C. A. 326, 24 L. R. A. 170. And where a bill of information is filed by the district attorney in the district court to foreclose a mortgage, the United States will be considered the real complainant for the purposes of jurisdiction. Benton *v.* Woolsey, 12 Pet. (U. S.) 27, 9 L. ed. 987. But it has been decided that an action on a contractor's bond in the name of the United States, for the use of the laborer or materialman, may be brought in any proper state court (U. S. *v.* Sheridan, 119 Fed. 236; U. S. *v.* Henderlong, 102 Fed. 2); as may also a suit by a riparian owner to prevent

which the United States is party plaintiff, without regard to the amount involved in the dispute.[80]

c. Controversies to Which a State Is Party.[81] No jurisdiction is conferred upon the circuit courts of an action by a state against a citizen of the same or another state.[82] And immunity exists in favor of a state from suits against it in a federal court.[83] But a suit to restrain an officer of a state from acting under a statute which is alleged to be in violation of the constitution of the United States is not a suit against the state and is one of which a federal court has jurisdiction.[84]

interference with his rights in a submerged water front by an officer of the United States in possession of a pier built by the government (Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126).

80. U. S. *v.* Reid, 90 Fed. 522.

81. See, generally, STATES.

82. State *v.* Corbin, 16 S. C. 533; Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353; Minnesota *v.* Guaranty Trust, etc., Co., 73 Fed. 914; Gale *v.* Babcock, 9 Fed. Cas. No. 5,188, 4 Wash. 199; North Carolina *v.* University Trustees, 18 Fed. Cas. No. 10,318, 65 N. C. 714, 1 Hughes 133; Wisconsin *v.* Duluth, 30 Fed. Cas. No. 17,902, 2 Dill. 406, 29 Leg. Int. (Pa.) 268. *Compare* State *v.* Atkins, 10 Fed. Cas. No. 5,350, 35 Ga. 315.

83. See U. S. Const. Amendm. art. 11; Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140; Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; Hollingsworth *v.* Virginia, 3 Dall. (U. S.) 378, 1 L. ed. 644; Union Trust Co. *v.* Stearns, 119 Fed. 790; Lowenstein *v.* Evans, 69 Fed. 908; Brown University *v.* Rhode Island Agriculture, etc., College, 56 Fed. 55; Hans *v.* Louisiana, 24 Fed. 55; Preston *v.* Walsh, 10 Fed. 315; Athon *v.* Morton, 2 Fed. Cas. No. 599. *Compare In re* Virginia Coupon Cases, 25 Fed. 654; Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440; Grayson *v.* Virginia, 3 Dall. (U. S.) 320, 1 L. ed. 619.

An action against a state by a corporation created by act of congress is not within the jurisdiction of the federal courts under U. S. Const. art. 3, § 2. Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140; Smith *v.* Rackliffe, 87 Fed. 964, 31 C. C. A. 328.

Jurisdiction of questions arising under the constitution of the United States in actions against a state by a citizen thereof is neither conferred by U. S. Const. art. 3, § 2, providing that "the judicial Power [of the United States] shall extend to all Cases in Law and Equity, arising under this Constitution," nor by the act of congress of March 3, 1875, providing that "circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States." North Carolina *v.* Temple, 134 U. S. 22, 10 S. Ct. 509, 33 L. ed. 849; Hans *v.* Louisiana, 134 U. S. 1, 10 S. Ct. 504, 33 L. ed. 842. *Compare* Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

Rule not applicable to suits involving questions of admiralty and maritime jurisdiction and which are brought in the district courts as courts of admiralty. U. S. *v.* Bright, 24 Fed. Cas. No. 14,647.

The counties of Nevada being made liable to suit as individuals by the constitution of the state, the circuit court has jurisdiction of an action against them by citizens of another state. Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766.

Immunity may be waived.— Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780.

84. Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 420, 14 S. Ct. 1047, 1062, 38 L. ed. 1014, 1031; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3; Haverhill Gaslight Co. *v.* Barker, 109 Fed. 694; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258; Western Union Tel. Co. *v.* Myatt, 98 Fed. 335; Dinsmore *v.* Southern Express Co., 92 Fed. 714; Howell *v.* Miller, 91 Fed. 129, 33 C. C. A. 407; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537; Virginia, etc., Steel, etc., Co. *v.* Bristol Land Co., 88 Fed. 134; Western Union Tel. Co. *v.* Henderson, 68 Fed. 588; Donald *v.* Scott, 67 Fed. 854; Mills *v.* Green, 67 Fed. 818; Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525; Yale College *v.* Sanger, 62 Fed. 177; Sanford *v.* Gregg, 58 Fed. 620; Clyde *v.* Richmond, etc., R. Co., 57 Fed. 436; *In re* Virginia Coupon Cases, 25 Fed. 654; Claybrook *v.* Owensboro, 16 Fed. 297; Chaffraix *v.* Board of Liquidation, 11 Fed. 638; Murdock *v.* Woodson, 17 Fed. Cas. No. 9,942, 2 Dill. 188 [*affirmed* in 22 Wall. 351, 22 L. ed. 716].

Actions against officers.— An action in ejectment against a state officer is one of which the federal courts may have jurisdiction (Saranac Land, etc., Co. *v.* Roberts, 68 Fed. 521; Tindall *v.* Wesley, 65 Fed. 731, 13 C. C. A. 160), as is also a proceeding for contempt against a state officer in disobeying an order of a federal court (*Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689). But if a suit is nominally against such an officer, who has no interest, and the only matter in controversy is a right of the state, the latter will be considered as the real defendant, and the suit as one within the jurisdiction of the federal courts. State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692; Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140; Farmers' Nat. Bank *v.* Jones, 105 Fed. 459; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711; Smith *v.* Rackliffe, 87 Fed. 964, 31 C. C. A. 328. And a suit by or against the governor of the state, as such, in his official

And it has been decided that such a court may also by a mandatory decree compel the performance of a duty by a state officer.[85] Again a federal court is not deprived of jurisdiction of an action between private citizens from the mere fact that a state claims an interest in the subject in dispute.[86]

d. Controversies to Which Indians Are Parties. An Indian tribe is not a "foreign state" within the meaning of the constitutional provision conferring jurisdiction upon the supreme court of controversies "between a state or citizen thereof and foreign states."[87]

e. Controversies Between Citizens of the Same State Claiming Lands Under Grants of Different States. Jurisdiction was by the constitution conferred upon the federal courts of controversies between citizens of the same state claiming lands under grants of different states.[88]

f. Where an Alien Is a Party. No jurisdiction is conferred upon the federal courts of a case in which both of the parties are aliens;[89] but of a suit between a citizen of a state and an alien a federal court has jurisdiction without reference to which of them is plaintiff or defendant.[90]

character, is one by or against the state. Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717; Athon *v.* Morton, 2 Fed. Cas. No. 599.

85. Parsons *v.* Marye, 23 Fed. 113. *Compare* Waite *v.* Santa Cruz, 89 Fed. 619.

86. Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Wheeler *v.* Chicago, 68 Fed. 526; U. S. *v.* Bright, 24 Fed. Cas. No. 14,647. *Compare* Chaffraix *v.* Board of Liquidation, 11 Fed. 638. See also Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17, 71 N. C. 571, where it was decided that a circuit court will take jurisdiction of causes affecting property of a state, in the hands of its agents, if the property or the agent is within the jurisdiction, without requiring the state to be a party.

87. Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25. See also Paul *v.* Chilsoquie, 70 Fed. 401.

It has been decided that an unnaturalized Indian is not a citizen of the United States or of the state of his residence within the constitutional or statutory provisions conferring jurisdiction upon the federal courts. Paul *v.* Chilsoquie, 70 Fed. 401. *Compare Ex p.* Reynolds, 20 Fed. Cas. No. 11,719, 5 Dill. 394.

88. U. S. Const. art. 3, § 1. And see Thompson *v.* Kendrick, 5 Hayw. (Tenn.) 113; Colson *v.* Lewis, 2 Wheat. (U. S.) 377, 4 L. ed. 266; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181; Wilson *v.* Mason, 1 Cranch (U. S.) 44, 2 L. ed. 29.

89. Orosco *v.* Gagliardo, 22 Cal. 83; Montalet *v.* Murray, 4 Cranch (U. S.) 46, 2 L. ed. 545; Mossman *v.* Higginson, 4 Dall. (U. S.) 12, 1 L. ed. 720; Pooley *v.* Luco, 72 Fed. 561; Hinckley *v.* Byrne, 12 Fed. Cas. No. 6,510, Deady 224; Petrocokino *v.* Stuart, 19 Fed. Cas. No. 11,041, 14 Phila. (Pa.) 412, 37 Leg. Int. (Pa.) 30, 9 N. Y. Wkly. Dig. 371; Prentiss *v.* Brennan, 19 Fed. Cas. No. 11,385, 2 Blatchf. 162; Rateau *v.* Bernard, 20 Fed. Cas. No. 11,579, 3 Blatchf. 244.

Of a suit by an alien against a partnership, one of whom is an alien, a federal court may take jurisdiction. Liverpool, etc., Nav. Co. *v.* Agar, 14 Fed. 615, 4 Woods 201.

90. Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556; Chappedelaine *v.* Dechenaux, 4 Cranch (U. S.) 306, 2 L. ed. 629; Reinach *v.* Atlantic, etc., R. Co., 58 Fed. 33; Bell *v.* Ohio L. Ins. Co., 3 Fed. Cas. No. 1,261; Hinckley *v.* Byrne, 12 Fed. Cas. No. 6,510, Deady 224; Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

Aliens need not reside abroad in order to sue. Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413, 8 L. ed. 731.

A citizen of Cuba is held to be a citizen of a foreign state. Betancourt *v.* Mutual Reserve Fund L. Assoc., 101 Fed. 305.

As to foreign corporations see Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 63 How. Pr. (N. Y.) 459; Barrowcliffe *v.* La Caisse Générale, etc., 58 How. Pr. (N. Y.) 131, 1 N. Y. City Ct. 151; Cummings *v.* Grand Trunk R. Co., 6 Fed. Cas. No. 3,475, 2 Hask. 101; Petrocokino *v.* Stuart, 19 Fed. Cas. No. 11,041, 14 Phila. (Pa.) 412, 37 Leg. Int. (Pa.) 30, 9 N. Y. Wkly. Dig. 371.

In a case between citizens where plaintiffs are only nominal plaintiffs for the use of an alien a federal court has jurisdiction. Browne *v.* Strode, 5 Cranch (U. S.) 303, 3 L. ed. 108.

In a suit by an alien against a corporation the fact that a shareholder is upon his own application made a co-plaintiff will not defeat jurisdiction of the federal court. Graham *v.* Boston, etc., R. Co., 14 Fed. 753.

Joining an alien with a citizen has been held not to affect the jurisdiction of a circuit court, especially where the alien is not a material party. Rateau *v.* Bernard, 20 Fed. Cas. No. 11,579, 3 Blatchf. 244.

Removing from the United States and residing in a foreign country does not render one an alien so as to enable him to sue in the federal courts. Bishop *v.* Averill, 76 Fed. 386. But a woman who marries a British subject domiciled in Canada and lives there with him becomes an alien as respects the United States. Jenns *v.* Landes, 85 Fed. 801.

g. Where a Foreign Sovereign or a Nation Is a Party. Where a foreign sovereign or a nation is a party to an action the federal courts have jurisdiction of the same.[91]

2. Controversies Between Citizens of Different States — a. Citizenship in General — (I) *Extent of Jurisdiction Generally.* As there is no constitutional limitation upon the classes of cases involving controversies between citizens of different states to which the jurisdiction of the United States may be extended, congress may provide for the bringing, at the option of either party, all such controversies within the jurisdiction of the federal judiciary.[92] But it has been determined that no power is conferred upon the federal circuit court to administer common-law relief in a suit between citizens of the same state.[93]

(II) *Diversity of Citizenship in General.* Although a citizen of one state may generally be considered as a citizen of every other state, yet so far as jurisdiction of the federal courts is concerned a person can be a citizen of but one state, which is that of his domicile.[94] And in actions between citizens of different states one of the parties must be a citizen of the state where the suit is brought in order to give the circuit court jurisdiction of the same.[95] Again the test of jurisdiction is the citizenship of the parties at the time the action is commenced.[96]

(III) *Necessary, Nominal, and Formal Parties.* Where a person is a necessary and indispensable party to a controversy and cannot be subjected to the jurisdiction of the court it has been determined that the action cannot be sus-

91. The Sapphire *v.* Napoleon III, 11 Wall. (U. S.) 164, 20 L. ed. 127; Republic of Colombia *v.* Cauca Co., 106 Fed. 337; King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,814, 2 Wash. 429.

92. Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524. See Girardey *v.* Moore, 10 Fed. Cas. No. 5,462, 3 Woods 397.

A federal court may have jurisdiction in such cases of habeas corpus (King *v.* McLean Asylum, 64 Fed. 331, 12 C. C. A. 145), of a creditor's bill (Chicago First Nat. Bank *v.* Steinway, 77 Fed. 661), of an action by an administrator to recover damages for the death of his intestate by wrongful act (Holmes *v.* Oregon, etc., R. Co., 5 Fed. 75, 6 Sawy. 262), of a bill for foreclosure (Connecticut Mut. L. Ins. Co. *v.* Crawford, 21 Fed. 281), of a suit by a divorced wife by her next friend for alimony decreed to her (Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226), and of condemnation proceedings where the issue is as to the amount of compensation (Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206); also to determine the validity of foreign claims against a decedent's estate (Del Valle *v.* Welsh, 28 Fed. 342), and of a proceeding where the right to the custody of a child is in controversy (Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299).

93. Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47.

94. Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240, 4 Wash. 101; Read *v.* Bertrand, 20 Fed. Cas. No. 11,601, 4 Wash. 514.

A wife after divorce may acquire a different domicile from that of her husband, although during the existence of the marriage relation it follows his. Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Nichols *v.* Nichols, 92 Fed. 1; Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299.

Domicile as test of citizenship see Poppenhauser *v.* India Rubber Comb Co., 14 Fed. 707. It is essential to the character of citizenship that will bring the case within the jurisdiction of such a court that there be a fixed or permanent residence or domicile in a state. Prentiss *v.* Brennan, 19 Fed. Cas. No. 11,385, 2 Blatchf. 162.

Domicile of child, unless he is emancipated, is that of his father. Woolridge *v.* McKenna, 8 Fed. 650.

Residence is not made the equivalent of citizenship by the first clause of the fourteenth amendment to the constitution. Nichols *v.* Nichols, 92 Fed. 1. See Haskell *v.* Bailey, 63 Fed. 873, 11 C. C. A. 476. See also Bissell *v.* Horton, 3 Fed. Cas. No. 1,448, 3 Day (Conn.) 281, Brunn. Col. Cas. 53; Bryne *v.* Holt, 4 Fed. Cas. No. 2,272, 2 Wash. 282.

95. Marks *v.* Marks, 75 Fed. 321; Goodyear *v.* Day, 10 Fed. Cas. No. 5,568, 1 Blatchf. 565; Kelly *v.* Harding, 14 Fed. Cas. No. 7,670, 5 Blatchf. 502; Kitchen *v.* Strawbridge, 14 Fed. Cas. No. 7,854, 4 Wash. 84; Shute *v.* Davis, 22 Fed. Cas. No. 12,828, 1 Pet. C. C. 431; White *v.* Fenner, 29 Fed. Cas. No. 17,547, 1 Mason 520. *Compare* Brooks *v.* Bailey, 9 Fed. 438, 20 Blatchf. 85.

Applicable only to those cases whereof the state and federal courts have concurrent jurisdiction. Van Patten *v.* Chicago, etc., R. Co., 74 Fed. 981.

Does not apply to a suit against an alien or a foreign corporation. Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. ed. 964.

May be waived.— Marks *v.* Marks, 75 Fed. 321.

96. Frank *v.* Chetwood, 9 Fed. Cas. No. 5,051.

Parties considered are those of record in determining jurisdiction. U. S. *v.* Myers, 27 Fed. Cas. No. 15,844, 2 Brock. 516.

tained;[97] but where the joinder of persons in a suit would by reason of their citizenship oust the court of jurisdiction, and the merits of the particular controversy as between the parties properly before the court can be decided without prejudice to the rights of such persons, jurisdiction will not be declined.[98] And the joinder or non-joinder of merely formal or nominal parties to the suit, having no real interest therein, can neither operate to confer upon or oust the federal courts of jurisdiction.[99]

(IV) *CHANGE OF CITIZENSHIP OR RESIDENCE.* Where a person removes from one state to another for the sole purpose of enabling him to sue or be sued in a federal court, he does not thereby acquire a domicile or residence which will confer jurisdiction.[1] Where, however, the jurisdiction of the federal courts has once attached by reason of diverse citizenship it will not be divested by a subsequent change of domicile by which the parties become citizens of the same state.[2]

97. Post *v.* Buckley, 119 Fed. 249; Baltimore Bldg., etc., Assoc. *v.* Alderson, 90 Fed. 142, 32 C. C. A. 542; Detweiler *v.* Holderbaum, 42 Fed. 337; Dormitzer *v.* Illinois, etc., Bridge Co., 6 Fed. 217; Hannibal First Nat. Bank *v.* Smith, 6 Fed. 215; Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, 1 McAll. 26.

Where such a party is a citizen of the same state as the opposite parties the rule prevails. Farni *v.* Tesson, 1 Black (U. S.) 309, 17 L. ed. 67; Pittsburgh, etc., R. Co. *v.* Baltimore, etc., R. Co., 61 Fed. 705, 10 C. C. A. 20; Mangels *v.* Donau Brewing Co., 53 Fed. 513; Watson *v.* Evers, 13 Fed. 194; Brigham *v.* Luddington, 4 Fed. Cas. No. 1,874, 12 Blatchf. 237. *Compare* National Union Bank *v.* Dodge, 18 Fed. Cas. No. 10,053.

Necessary and indispensable parties cannot be disregarded. Blackburn *v.* Portland Gold-Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276; Eldred *v.* American Palace-Car Co., 105 Fed. 457, 44 C. C. A. 554; Popp *v.* Cincinnati, etc., R. Co., 96 Fed. 465.

98. Omaha Hotel Co. *v.* Wade, 97 U. S. 13, 24 L. ed. 917; Simms *v.* Guthrie, 9 Cranch (U. S.) 19, 3 L. ed. 642; Illinois *v.* Illinois Cent. R. Co., 16 Fed. 881; Cole Silver-Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,989, 1 Sawy. 470; Harrison *v.* Urann, 11 Fed. Cas. No. 6,146, 1 Story 64.

One who purchases pendente lite the interest of a defendant in the subject-matter of a suit is held not a necessary party. Myers *v.* Dorr, 17 Fed. Cas. No. 9,988, 13 Blatchf. 22.

99. Vose *v.* Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; Wood *v.* Davis, 18 How. (U. S.) 467, 15 L. ed. 460; Shields *v.* Barrow, 17 How. (U. S.) 130, 15 L. ed. 158; Carneal *v.* Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Wormley *v.* Wormley, 8 Wheat. (U. S.) 421, 5 L. ed. 651; Shearson *v.* Littleton, 105 Fed. 533; Reese *v.* Zinn, 103 Fed. 97; Putnam *v.* Timothy Dry-Goods, etc., Co., 79 Fed. 454; New Chester Water Co. *v.* Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399 [*affirming* 48 Fed. 879]; Wade *v.* Wortsman, 29 Fed. 754; Marvin *v.* Ellis, 9 Fed. 367; Foss *v.* Denver First Nat. Bank, 3 Fed. 185, 1 McCrary 474; Girardey *v.* Moore, 10 Fed. Cas. No. 5,462, 3 Woods 397.

In a suit by nominal parties for the use of an alien against citzens of the same state it has been decided that a federal court has jurisdiction. Browne *v.* Strode, 5 Cranch (U. S.) 303, 3 L. ed. 108.

In a suit by the state on the relation of a person the relator will be considered as the sole party plaintiff in determining the question of jurisdiction on the ground of diverse citizenship. Indiana *v.* Glover, 155 U. S. 513, 15 S. Ct. 186, 39 L. ed. 243.

1. Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; Jones *v.* League, 18 How. (U. S.) 76, 15 L. ed. 263; Alabama Great Southern R. Co. *v.* Carroll, 84 Fed. 772, 28 C. C. A. 207; Kingman *v.* Holthaus, 59 Fed. 305; Case *v.* Clarke, 5 Fed. Cas. No. 2,490, 5 Mason 70; Catlin *v.* Gladding, 5 Fed. Cas. No. 2,520, 4 Mason 308; Gardner *v.* Sharp, 10 Fed. Cas. No. 5,236, 4 Wash. 609; *Ex p.* Kenyon, 14 Fed. Cas. No. 7,720, 5 Dill. 385. *Compare* Briggs *v.* French, 4 Fed. Cas. No. 1,871, 2 Sumn. 251; Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594.

If the removal is real, with a bona fide intention of becoming a citizen of another state, jurisdiction may then exist. Chamberlain *v.* Eckert, 5 Fed. Cas. No. 2,577, 2 Biss. 126; Cooper *v.* Galbraith, 6 Fed. Cas. No. 3,193, 3 Wash. 546; Knox *v.* Greenleaf, 14 Fed. Cas. No. 7,908, 4 Dall. (Pa.) 360.

2. *Ex p.* Jones, 66 Ala. 202; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081; Dunn *v.* Clarke, 8 Pet. (U. S.) 1, 8 L. ed. 845; Connolly *v.* Taylor, 2 Pet. (U. S.) 556, 7 L. ed. 518; Mollan *v.* Torrance, 9 Wheat. (U. S.) 537, 6 L. ed. 154; Morgan *v.* Morgan, 2 Wheat. (U. S.) 290, 4 L. ed. 242; Brigel *v.* Tug River Coal, etc., Co., 73 Fed. 13; Shakers Soc. *v.* Watson, 68 Fed. 730, 15 C. C. A. 632; Jarboe *v.* Templer, 38 Fed. 213; Glover *v.* Shepperd, 21 Fed. 481; Culver *v.* Woodruff County, 6 Fed. Cas. No. 3,469, 5 Dill. 392; Hatfield *v.* Bushnell, 11 Fed. Cas. No. 6,211, 22 Vt. 659, 1 Blatchf. 393.

Creditor's bill for discovery is a continuation of the suit at law and the court is not ousted of jurisdiction by a change of the residence of complainant. Hatch *v.* Dorr, 11 Fed. Cas. No. 6,206, 4 McLean 112.

Death of a party and the continuation of a suit by an administrator or executor resident of the same state as the opposite party

(v) *Collusion to Confer Jurisdiction.* Where diversity of citizenship is brought about by collusion for the purpose of creating a case cognizable in a federal court, such court will have no jurisdiction and the suit should be dismissed.[3]

(vi) *Co-Plaintiffs or Co-Defendants Citizens of Same or Different States*—(a) *In General.* All the persons on one side of an action in the federal courts should be citizens of different states from those on the other side in order that such courts may have jurisdiction of the controversy as one "between citizens of different states."[4] And in the application of this rule the question of

does not divest. Shakers Soc. *v.* Watson, 68 Fed. 730, 15 C. C. A. 632; Trigg *v.* Conway, 24 Fed. Cas. No. 14,173, Hempst. 711.

Jurisdiction must have actually vested by the commencement of the suit. Thaxter *v.* Hatch, 23 Fed. Cas. No. 13,866, 6 McLean 68.

3. Lehigh Min., etc., Co. *v.* Kelly, 160 U. S. 327, 16 S. Ct. 307, 40 L. ed. 444 [*affirming* 64 Fed. 401]; Cashman *v.* Amador, etc., Canal Co., 118 U. S. 58, 6 S. Ct. 926, 30 L. ed. 72; Detroit *v.* Dean, 106 U. S. 537, 1 S. Ct. 560, 27 L. ed. 300; Lake County *v.* Schradsky, 97 Fed. 1, 38 C. C. A. 17; Betzoldt *v.* American Ins. Co., 47 Fed. 705; Marvin *v.* Ellis, 9 Fed. 367.

Under the particular facts of each case there was held to be no collusion in Simpson *v.* Union Stock Yards Co., 110 Fed. 799; Irvine Co. *v.* Bond, 74 Fed. 849; Bowdoin College *v.* Merritt, 63 Fed. 213; Towle *v.* American Bldg., etc., Co., 60 Fed. 131; Pond *v.* Vermont Valley R. Co., 19 Fed. Cas. No. 11,265, 12 Blatchf. 280.

A previous understanding that relief would be more speedily and effectually obtained does not affect the right of parties to sue in the federal court. Mercantile Trust Co. *v.* Texas, etc., R. Co., 51 Fed. 529.

The statute is not intended to restrict those who contemplate bringing a suit from selecting as adversaries all against whom any substantial relief is sought. Garrett *v.* New York Transit, etc., Co., 29 Fed. 129.

4. Miller *v.* Lynde, 2 Root (Conn.) 444, 1 Am. Dec. 86; Dunn *v.* Waggoner, 3 Yerg. (Tenn.) 58; Nulton *v.* Isaacs, 30 Gratt. (Va.) 726; Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486 [*reversing* 87 Fed. 369, 31 C. C. A. 9]; Blacklock *v.* Small, 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70; Peninsular Iron Co. *v.* Stone, 121 U. S. 631, 7 S. Ct. 1010, 30 L. ed. 1020; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Connolly *v.* Taylor, 2 Pet. (U. S.) 556, 7 L. ed. 518; New Orleans *v.* Winter, 1 Wheat. (U. S.) 91, 4 L. ed. 44; Elkins *v.* Chicago, 119 Fed. 957; Consolidated Water Co. *v.* Babcock, 76 Fed. 243; Oxley Stave Co. *v.* Coopers' International Union of North America, 72 Fed. 695; Oberlin College *v.* Blair, 70 Fed. 414; Tug River Coal, etc., Co. *v.* Brigel, 67 Fed. 625, 14 C. C. A. 577; Wetherby *v.* Stinson, 62 Fed. 173, 10 C. C. A. 243; Beebe *v.* Louisville, etc., R. Co., 39 Fed. 481; Covert *v.* Waldron, 33 Fed. 311; Bland *v.* Fleeman, 29 Fed. 669; Jackson, etc., Co. *v.* Burlington, etc., R. Co., 29 Fed. 474; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. 529; Adams Express Co. *v.* Denver, etc., R. Co., 16 Fed. 712, 4 McCrary 77; Karns *v.* Atlantic, etc., R. Co., 10 Fed. 309.

Although a defendant files a disclaimer where the bill shows that he and the complainant are citizens of the same state, yet if such defendant is not dismissed the suit should be. Wetherby *v.* Stinson, 62 Fed. 173, 10 C. C. A. 243.

If any of the judgment creditors and persons interested who are made parties to the foreclosure of a mortgage are citizens of the same state as the complainants the federal court has no jurisdiction. Tug River Coal, etc., Co. *v.* Brigel, 67 Fed. 625, 14 C. C. A. 577.

In a suit to enjoin the institution of a boycott by certain trades-unions or assemblies and their members, no jurisdiction exists in the federal court as to individual defendants who are residents of the same state as the corporation bringing the suit. Oxley Stave Co. *v.* Coopers' International Union of North America, 72 Fed. 695.

In an action to foreclose a mortgage by citizens of one state against a corporation of another state, in which state there also reside other persons occupying similar positions to the plaintiffs but who cannot be made plaintiffs because of their citizenship, it has been decided that the court may, after ordering a sale, distribute the proceeds according to the rights of all. Jackson, etc., Co. *v.* Burlington, etc., R. Co., 29 Fed. 474.

One of several defendants cannot file a cross bill against the others, all being citizens of the same state, as to matters not set up in the original bill, in which the original complainants have no interest. Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

One of several defendants, who is not a citizen of either the state in which the suit is brought and of which the other defendants are citizens, or that in which the complainant is a citizen but who is a citizen of a third state, will not, although he is served in the district in which the suit is brought, be subject to the jurisdiction of the court. Jenkins *v.* York Cliffs Imp. Co., 110 Fed. 807.

Severable action.—It has been decided that where citizens of one state bring an action against citizens of another state and also join as defendants persons who are citizens of the same state as the plaintiffs, if the cause of action is severable and distinct as to those parties defendant properly before the court so that substantial justice can be done as to them without affecting the other defendants, jurisdiction may be exercised as to the former. Boon *v.* Chiles, 8 Pet. (U. S.) 532, 8

the diversity of citizenship is to be determined by arranging the parties on one side or the other as their interests require.[5]

(B) *No Service on or Appearance of One of Co-Defendants.* Where there are parties in interest who have not been made defendants, a voluntary appearance and answer by them has been permitted.[6]

(VII) *Persons Holding Legal or Equitable Interests or Occupying Fiduciary Relations.* Where the legal right to sue exists in the plaintiff in a suit where jurisdiction depends on diversity of citizenship, the residence of those who may have an equitable interest in the claim or subject-matter in dispute will not be inquired into.[7] So the question of jurisdiction may be determined by the personal citizenship of an administrator or executor in an action by or against him without regard to the state in which he was appointed or the residence of the beneficiary for whom he acts.[8] And likewise in actions by or against a trustee the citizenship of such person controls.[9] So also it has been decided that the citizenship of a receiver determines the jurisdiction of the court in actions by or

L. ed. 1034; Cameron *v.* McRoberts, 3 Wheat. (U. S.) 591, 4 L. ed. 467; Nesmith *v.* Calvert, 18 Fed. Cas. No. 10,123, 1 Woodb. & M. 34. See Clearwater *v.* Meredith, 21 How. (U. S.) 489, 16 L. ed. 201.

5. Missouri Pac. R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932; Old Colony Trust Co. *v.* Atlanta R. Co., 100 Fed. 798; Chattanooga First Nat. Bank *v.* Radford Trust Co., 80 Fed. 569, 26 C. C. A. 1; Consolidated Water Co. *v.* Babcock, 76 Fed. 243; Cilley *v.* Patten, 62 Fed. 498; Pittsburgh, etc., R. Co. *v.* Baltimore, etc., R. Co., 61 Fed. 705, 10 C. C. A. 20; Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443 [*affirming* 49 Fed. 183].

By making persons who are necessary party plaintiffs defendants, jurisdiction will not be conferred upon a federal court where if they had been made plaintiffs there would not have been the necessary diversity of citizenship. Bland *v.* Fleeman, 29 Fed. 669.

6. Pond *v.* Vermont Valley R. Co., 19 Fed. Cas. No. 11,265, 12 Blatchf. 280.

Not applicable where appearance would defeat jurisdiction see Drake *v.* Goodridge, 7 Fed. Cas. No. 4,062, 6 Blatchf. 151. *Compare* Lovejoy *v.* Washburne, 15 Fed. Cas. No. 8,550, 1 Biss. 416.

Where no service and refusal to appear.— Where a bill is filed against several defendants, who are all residents of a state other than that where suit is brought and are necessary defendants, it has been determined that if some of them refuse to appear and no service is made upon them, no jurisdiction is required and the bill should be dismissed as to those who appear and move for a dismissal. Herndon *v.* Ridgway, 17 How. (U. S.) 424, 15 L. ed. 100. *Compare* Craig *v.* Cummings, 6 Fed. Cas. No. 3,331, Pet. C. C. 431, 2 Wash. 505. The court may, however, proceed against those served and take judgment in some cases. Fallis *v.* McArthur, 8 Fed. Cas. No. 4,627, 1 Bond 100; Heriot *v.* Davis, 12 Fed. Cas. No. 6,404, 2 Woodb. & M. 229.

7. Bonnafee *v.* Williams, 3 How. (U. S.) 574, 11 L. ed. 732; Adams *v.* White, 1 Fed. Cas. No. 68, 16 Leg. Int. (Pa.) 293, 2 Pittsb. (Pa.) 21.

8. Miller *v.* Sunde, 1 N. D. 1, 44 N. W. 301; Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Bishop *v.* Boston, etc., R. Co., 117 Fed. 771; Wilson *v.* Hastings Lumber Co., 103 Fed. 801; Popp *v.* Cincinnati, etc., R. Co., 96 Fed. 465; Central Nat. Bank *v.* Fitzgerald, 94 Fed. 16; Bangs *v.* Loveridge, 60 Fed. 963; De Forest *v.* Thompson, 40 Fed. 375; Harper *v.* Norfolk, etc., R. Co., 36 Fed. 102; Carter *v.* Treadwell, 5 Fed. Cas. No. 2,480, 3 Story 25. *Compare* Brownson *v.* Wallace, 4 Fed. Cas. No. 2,042, 4 Blatchf. 465.

An administrator who removes to another state may sue in the federal court a citizen of the state from which he removed. Rice *v.* Houston, 13 Wall. (U. S.) 66, 20 L. ed. 484.

That executors, residents of same state as complainants, are joined as nominal parties with defendants, in order that such executors may perform the ministerial act of conveying title in case the power to do so is vested in them by the laws of the state, does not defeat jurisdiction. Walden *v.* Skinner, 101 U. S. 577, 25 L. ed. 963.

Where a representative of deceased is substituted in a suit commenced by the latter, the residence of the representative is immaterial and jurisdiction continues (Trigg *v.* Conway, 24 Fed. Cas. No. 14,173, Hempst. 711. See Hatfield *v.* Bushnell, 22 Vt. 659), but does not extend to any additional relief prayed for (Dunn *v.* Clarke, 8 Pet. (U. S.) 1, 8 L. ed. 845).

9. Massachusetts, etc., Constr. Co. *v.* Cane Creek Tp., 155 U. S. 283, 15 S. Ct. 91, 39 L. ed. 152; Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501; Peper *v.* Fordyce, 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435; Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. (U. S.) 172, 20 L. ed. 179; Pennington *v.* Smith, 78 Fed. 399, 24 C. C. A. 145; Griswold *v.* Bacheller, 75 Fed. 470; Shipp *v.* Williams, 62 Fed. 4, 10 C. C. A. 247; Rust *v.* Brittle Silver Co., 58 Fed. 611, 7 C. C. A. 389; Morris *v.* Lindauer, 54 Fed. 23, 4 C. C. A. 162. *Compare* Eau Claire *v.* Payson, 107 Fed. 552, 46 C. C. A. 466.

An action by bondholders to foreclose a mortgage in their own name, where the mortgagor and trustee are citizens of the same state, cannot be maintained without showing

against him.[10] But where an infant sues by his guardian or next friend, the jurisdiction of the court will be determined by the citizenship of the infant.[11] And in a suit by the curator or next friend of one who is *non compos mentis*, the citizenship of the latter will control.[12] Again in an action on a bond in the name of the governor of the state for the use of the person interested, jurisdiction may be determined by the citizenship of the one for whose use the suit is brought.[13]

(VIII) *INTERVENERS AND SUBSTITUTED PARTIES.* If jurisdiction of a federal court has completely attached it will not be affected by a subsequent change of parties.[14] But where jurisdiction of an action is dependent upon diverse citizenship it has been decided that jurisdiction of a petition of intervention will also be dependent on citizenship and will not be given by that of the original parties.[15] And where plaintiff and defendant are citizens of the same state it is declared that jurisdiction will not be conferred by the fact that a third party who is a citizen of another state intervenes.[16]

(IX) *CORPORATIONS.* The jurisdiction of the court, where it depends on diversity of citizenship, in an action where a corporation is a party, is not determined by the actual citizenship of the members,[17] since the stock-holders are conclusively presumed for the purposes of jurisdiction to be citizens of the state in

why the suit is not brought by the trustee. Needham *v.* Wilson, 47 Fed. 97. *Compare* Barry *v.* Missouri, etc., R. Co., 27 Fed. 1.

Where the trustee is not authorized to represent the beneficiary as to the particular property for the purposes of the suit, the citizenship of the beneficiary may control. Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907.

10. Smith *v.* Rackliffe, 87 Fed. 964, 31 C. C. A. 328; Farlow *v.* Lea, 8 Fed. Cas. No. 4,649; Van Antwerp *v.* Hulburd, 28 Fed. Cas. No. 16,827, 8 Blatchf. 282.

11. Voss *v.* Neineher, 68 Fed. 947; Dodd *v.* Ghiselin, 27 Fed. 405; Williams *v.* Ritchey, 29 Fed. Cas. No. 17,734, 3 Dill. 406. See also Blumenthal *v.* Craig, 81 Fed. 320, 26 C. C. A. 427.

The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name. Mexican Cent. R. Co. *v.* Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. ed. 245.

12. Stont *v.* Rigney, 107 Fed. 545, 46 C. C. A. 459; Wiggins *v.* Bethune, 29 Fed. 51.

13. Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822; McNutt *v.* Bland, 2 How. (U. S.) 9, 11 L. ed. 159.

14. Hardenbergh *v.* Ray, 151 U. S. 112, 14 S. Ct. 305, 38 L. ed. 93; Phelps *v.* Oaks, 117 U. S. 236, 6 S. Ct. 714, 29 L. ed. 888; Whyte *v.* Gibbes, 20 How. (U. S.) 541, 15 L. ed. 1016; Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 336.

15. Rouse *v.* Letcher, 156 U. S. 47, 15 S. Ct. 266, 39 L. ed. 341; United Electric Securities Co. *v.* Louisiana Electric Light Co., 68 Fed. 673; Clyde *v.* Richmond, etc., R. Co., 65 Fed. 336. *Compare* Conwell *v.* White Water Valley Canal Co., 6 Fed. Cas. No. 3,148, 4 Biss. 195.

Where a federal court has possession of the res it has been decided that parties may intervene to assert their rights therein. Henderson *v.* Goode, 49 Fed. 887. See also Lilienthal *v.* McCormick, 117 Fed. 89, 54 C. C. A. 475.

Where there is an unauthorized intervention of persons, to which the complainant voluntarily assents, as he does also to the rendition of a joint judgment in favor of himself and such interveners, it has been decided that the entire suit will fail for want of jurisdiction. Forest Oil Co. *v.* Crawford, 101 Fed. 849, 42 C. C. A. 54.

16. Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883.

17. Tunstall *v.* Madison Parish, 30 La. Ann. 471; Fargo *v.* McVicker, 55 Barb. (N. Y.) 437; St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802; National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Pacific R. Co. *v.* Missouri Pac. R. Co., 23 Fed. 565; National Park Bank *v.* Nichols, 17 Fed. Cas. No. 10,048, 4 Biss. 315; St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 21 Fed. Cas. No. 12,237, 9 Biss. 144. *Compare* North River Steam Boat Co. *v.* Hoffman, 5 Johns. Ch. (N. Y.) 300; Wheeden *v.* Camden, etc., R., etc., Co., 2 Phila. (Pa.) 23, 13 Leg. Int. (Pa.) 12; Irvine *v.* Lowry, 14 Pet. (U. S.) 293, 10 L. ed. 462; Breithaupt *v.* Georgia Bank, 1 Pet. (U. S.) 238, 7 L. ed. 127; Hope Ins. Co. *v.* Boardman, 5 Cranch (U. S.) 57, 3 L. ed. 36; Cumberland Bank *v.* Willis, 2 Fed. Cas. No. 885, 3 Sumn. 472.

A stock-holder living in a state other than that in which the corporation was created may bring a suit against the latter in the federal courts. Ohio Mechanics, etc., Bank *v.* Thomas, 18 How. (U. S.) 384, 15 L. ed. 460; Ohio Mechanics, etc., Bank *v.* Debolt, 18 How. (U. S.) 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

which it was created,[18] and a corporation is for such purposes to be regarded as a citizen of that state.[19] And its right to appear in the federal courts of such state is not impaired by the fact that it has appointed an attorney in another state on whom service of process may be had, and is doing business in such state.[20]

(x) *Joint-Stock Associations and Partnerships.* Joint-stock associations formed under the laws of New York state are declared to be citizens of that state for the purposes of jurisdiction of the federal court.[21] But in the case of a partnership the citizenship of the individual members controls.[22]

(xi) *Citizens of the District of Columbia or of a Territory.* The federal courts have no jurisdiction upon the ground of diverse citizenship of

18. U. S. *v.* Gillis, 95 U. S. 407, 24 L. ed. 503; Taylor *v.* Illinois Cent. R. Co., 89 Fed. 119. *Compare* Elkins *v.* Chicago, 119 Fed. 957.

This rule does not extend beyond such purpose, and there is no presumption that an individual who sues a corporation is a citizen of the same state, because he is a stockholder in such corporation. Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76.

19. Hobbs *v.* Manhattan Ins. Co., 56 Me. 417, 96 Am. Dec. 472; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363 [*reversing* 8 Fed. 458]; St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502; Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Averill *v.* Southern R. Co., 75 Fed. 736; Miller *v.* Wheeler, etc., Mfg. Co., 46 Fed. 882; Keithsburg Bridge Co. *v.* McKay, 42 Fed. 427.

Where a corporation is created in two or more states it has been decided that if sued in either state it is for the purposes of jurisdiction to be considered a citizen of the state alone. Phinizy *v.* Augusta, etc., R. Co., 56 Fed. 273; Union Trust Co. *v.* Rochester, etc., R. Co., 29 Fed. 609. But see Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130.

Where a corporation is formed by the consolidation of corporations of two or more states it has been decided that a suit may be maintained in the federal courts by a citizen of one of such states against the corporation (Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Smith *v.* New York, etc., R. Co., 96 Fed. 504; Baldwin *v.* Chicago, etc., R. Co., 86 Fed. 167; Williamson *v.* Krohn, 66 Fed. 655, 13 C. C. A. 668; St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 21 Fed. Cas. No. 12,237, 9 Biss. 144; Wheeling *v.* Baltimore, 29 Fed. Cas. No. 17,502, 1 Hughes 90. But see Missouri Pac. R. Co. *v.* Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; Burger *v.* Grand Rapids, etc., R. Co., 22 Fed. 561); and also that a corporation by the purchase of a corporation of another state is not disabled from maintaining a suit against a citizen of the latter state (Chicago, etc., R. Co. *v.* Dakota County, 28 Fed. 219; Antelope Co. *v.* Chicago, etc., R. Co., 16 Fed. 295, 4 McCrary 46; Williams *v.* Missouri, etc., R. Co., 29 Fed. Cas. No. 17,728, 3 Dill. 267).

20. Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; U. S. *v.* S. P. Shotter Co., 110 Fed. 1; Hollingsworth *v.* Southern R. Co., 86 Fed. 353; Fales *v.* Chicago, etc., R. Co., 32 Fed. 673; Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105.

Nor is the citizenship changed by such acts so as to subject it to the jurisdiction of the federal courts in a suit against it by a citizen of the state in which it was created. St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802 [*reversing* 46 Fed. 47]; Empire Coal, etc., Co. *v.* Empire Coal, etc., Co., 150 U. S. 159, 14 S. Ct. 66, 37 L. ed. 1037; Antelope Co. *v.* Chicago, etc., R. Co., 16 Fed. 295, 4 McCrary 46.

21. Fargo *v.* Louisville, etc., R. Co., 6 Fed. 787, 10 Biss. 273; Dinsmore *v.* Philadelphia, etc., R. Co., 7 Fed. Cas. No. 3,921, 11 Phila. (Pa.) 483; Maltz *v.* American Express Co., 16 Fed. Cas. No. 9,002, 1 Flipp. 611. See Baltimore, etc., R. Co. *v.* Adams Express Co., 22 Fed. 404.

But a limited partnership association created under the Pennsylvania laws of 1874 is not to be deemed a citizen of that state for such purpose. Great Southern Fireproof Hotel Co. *v.* Jones, 177 U. S. 449, 20 S. Ct. 690, 44 L. ed. 842 [*reversing* 86 Fed. 370, 30 C. C. A. 108]. *Contra*, Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293 [*affirming* 79 Fed. 669].

22. Carnegie *v.* Hulbert, 53 Fed. 10, 3 C. C. A. 391. See Poole *v.* West Point Butter, etc., Assoc., 30 Fed. 513. And *compare* Raphael *v.* Trask, 118 Fed. 777, where it is held that to a suit to restrain a partnership from selling the stock of a railroad company, in which it is acting for itself and as agent for other stock-holders, all the partners are necessary parties defendant, and that a federal court is without jurisdiction of such suit where some of the partners are citizens of the same state as the state of which the complainant is a citizen.

cases between citizens of the District of Columbia and of a state,[23] or between citizens of a territory and of a state.[24]

(XII) *JOINDER OF OR DISMISSAL OF PARTIES.* Where there are two or more joint plaintiffs each must be capable of suing in the federal courts in order to support the jurisdiction of such courts upon the ground of diverse citizenship, and for the purposes of jurisdiction a voluntary joinder will have the same effect as if they had been compelled to unite.[25] Again where it appears that the jurisdiction of the court will be ousted because of the citizenship of one of the parties to the action, and it appears that such party is not an indispensable one, the suit may be dismissed as to that party and the jurisdiction of the court retained as to the others.[26]

b. Conveyances and Transfers to Give Jurisdiction. Where there has been an assignment, sale, or transfer of the subject-matter of a suit which is colorable and collusive and made for the mere purpose of conferring jurisdiction upon the federal courts, the suit should be dismissed for want of jurisdiction;[27] but if the

23. The reason being that a citizen of the District of Columbia is not a citizen of a state within the meaning of the Judiciary Act. Hooe *v.* Jamieson, 166 U. S. 395, 17 S. Ct. 596, 41 L. ed. 1049; Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; New Orleans *v.* Winter, 1 Wheat. (U. S.) 91, 4 L. ed. 44; Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332; Holland *v.* Hyde, 41 Fed. 897; Vasse *v.* Mifflin, 28 Fed. Cas. No. 16,895, 4 Wash. 519.

24. New Orleans *v.* Winter, 1 Wheat. (U. S.) 91, 4 L. ed. 44; Weller *v.* Hanaur, 105 Fed. 193; Snead *v.* Sellers, 66 Fed. 371, 13 C. C. A. 518; Johnson *v.* Bunker Hill, etc., Min., etc., Co., 46 Fed. 417; Nickerson *v.* Crook, 45 Fed. 658; Dunton *v.* Muth, 45 Fed. 390. *Compare* Sere *v.* Pitot, 6 Cranch (U. S.) 332, 3 L. ed. 240.

25. Hooe *v.* Jamieson, 166 U. S. 395, 17 S. Ct. 596, 41 L. ed. 1049.

Although parties are improperly joined, as where citizens of the same state with plaintiffs are made defendants in a bill with citizens of another state who are properly made defendants, the court may in some cases exercise jurisdiction as to the property before it. Carneal *v.* Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297. But where a person is properly a plaintiff and his interests are all in common with the complainants, jurisdiction cannot be conferred by making him a defendant, where an antagonistic act of his toward the other complainants is alleged. Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225.

A trustee who refuses to act, although properly a plaintiff, may be made defendant. Omaha Hotel Co. *v.* Wade, 97 U. S. 13, 24 L. ed. 917.

In a suit by a taxpayer under the New York statutes, it has been decided that he cannot be compelled to admit others as co-complainants, although the entire body of taxpayers, the city itself, and the general public may be interested in the result. Seccomb *v.* Wurster, 83 Fed. 856.

26. Horn *v.* Lockhart, 17 Wall. (U. S.) 570, 21 L. ed. 657; Connolly *v.* Taylor, 2 Pet. (U. S.) 556, 7 L. ed. 518; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689; Grove *v.* Grove, 93 Fed. 865; Tug River Coal, etc., Co. *v.* Brigel, 86 Fed. 818, 30 C. C. A. 415; Smith *v.* Consumers' Cotton-Oil Co., 86 Fed. 359, 30 C. C. A. 103; Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Mason *v.* Dullagham, 82 Fed. 689, 27 C. C. A. 296; Sioux City Terminal R., etc., Co. *v.* Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73; Hicklin *v.* Marco, 56 Fed. 549, 6 C. C. A. 10; Whittle *v.* Artis, 55 Fed. 919; Claiborne *v.* Waddell, 50 Fed. 368; Frazer Lubricator Co. *v.* Frazer, 23 Fed. 305; Greeley *v.* Smith, 10 Fed. Cas. No. 5,747, 3 Story 76.

27. Hayden *v.* Manning, 106 U. S. 586, 1 S. Ct. 617, 27 L. ed. 306; Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; McLean *v.* Clark, 31 Fed. 501; Fountain *v.* Angelica, 12 Fed. 8, 20 Blatchf. 448; Coffin *v.* Haggin, 11 Fed. 219, 7 Sawy. 509; Greenwalt *v.* Tucker, 10 Fed. 884, 3 McCrary 450; Maxfield *v.* Levy, 16 Fed. Cas. No. 9,321, 4 Dall. (Pa.) 330, 1 L. ed. 854, 2 Dall. (Pa.) 381, 1 L. ed. 424; Starling *v.* Hawks, 22 Fed. Cas. No. 13,311, 5 McLean 318.

Burden of proof.— If it is claimed that a transfer was made for the mere purpose of conferring jurisdiction and that the suit should be dismissed on this ground, the party who makes such claim must establish the invalidity of the transfer by sufficient proof. Syracuse Third Nat. Bank *v.* Seneca Falls, 15 Fed. 783; Hotchkiss *v.* Glasgow, 12 Fed. Cas. No. 6,717, 5 McLean 424.

If the defendant, knowing the fact that such a transfer has been made, fails to raise the objection and jurisdiction is assumed, it has been decided that the judgment rendered will be valid. Mattocks *v.* Baker, 2 Fed. 455.

Transfer of bonds.— New Providence Tp. *v.* Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. ed. 904; Farmington Village Corp. *v.* Pillsbury, 114 U. S. 138, 5 S. Ct. 807, 29 L. ed. 114; Bernards Tp. *v.* Stebbins, 109 U. S. 341, 3 S. Ct. 252, 27 L. ed. 956; Norton *v.* European, etc., R. Co., 32 Fed. 865; Fountain *v.* Angelica, 12 Fed. 8, 20 Blatchf. 448.

Transfer of promissory note.— Welles *v.* Newberry, 29 Fed. Cas. No. 17,378, 4 McLean 226.

sale or transfer is an actual one the fact that it was made for such purpose is immaterial.[28]

c. Actions by Assignees. By acts of congress[29] it has been provided that the circuit and district courts of the United States shall not have cognizance of any

28. Lehigh Min., etc., Co. *v.* Kelly, 160 U. S. 327, 16 S. Ct. 307, 40 L. ed. 444; Jones *v.* League, 18 How. (U. S.) 76, 15 L. ed. 263; Smith *v.* Kernochen, 7 How. (U. S.) 198, 12 L. ed. 666; McDonald *v.* Smalley, 1 Pet. (U. S.) 620, 7 L. ed. 287; Woodside *v.* Ciceroni, 93 Fed. 1, 35 C. C. A. 177; Ashley *v.* Presque Isle County, 83 Fed. 534, 27 C. C. A. 585; Van Dolsen *v.* New York, 17 Fed. 817, 21 Blatchf. 454; Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525; Browne *v.* Browne, 4 Fed. Cas. No. 2,035, 1 Wash. 429; Newby *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,145, 1 Sawy. 63; Osborne *v.* Brooklyn City R. Co., 18 Fed. Cas. No. 10,597, 5 Blatchf. 366.

Transfer of bonds.— Foote *v.* Hancock, 9 Fed. Cas. No. 4,911, 15 Blatchf. 343; Perrine *v.* Thompson, 19 Fed. Cas. No. 10,997, 17 Blatchf. 18.

Transfer of judgment.— Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552.

Transfer of mortgage.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843.

Transfer of notes.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843; Lanier *v.* Nash, 121 U. S. 404, 7 S. Ct. 919, 30 L. ed. 947; Lanning *v.* Lockett, 10 Fed. 451.

29. Newgass *v.* New Orleans, 33 Fed. 196; Northern Ins. Co. *v.* St. Louis, etc., R. Co., 15 Fed. 840, 5 McCrary 126. *Compare* Ban *v.* Columbia Southern R. Co., 117 Fed. 21, 54 C. C. A. 407 [*reversing* 109 Fed. 499]. But see American Colortype Co. *v.* Continental Colortype Co., 188 U. S. 104, 23 S. Ct. 265, 47 L. ed. 404.

Such a statute is not in conflict with the constitutional provision which conferred jurisdiction upon the federal courts of controversies between citizens of different states. Sheldon *v.* Sill, 8 How. (U. S.) 441, 12 L. ed. 1147.

In determining the assignee's right to sue the state of facts at the commencement of the suit controls. Chamberlain *v.* Eckert, 5 Fed. Cas. No. 2,577, 2 Biss. 126; Thaxter *v.* Hatch, 23 Fed. Cas. No. 13,866, 6 McLean 68; White *v.* Leahy, 29 Fed. Cas. No. 17,551, 3 Dill. 378.

An executor or administrator has been held not to be an assignee within the meaning of the statute. Dodge *v.* Perkins, 7 Fed. Cas. No. 3,954, 4 Mason 435; Mayer *v.* Foulkrod, 16 Fed. Cas. No. 9,341, 4 Wash. 349.

What are choses in action.— In the construction of these acts it has been decided that a contract is a chose in action, and that a suit cannot be maintained by an assignee thereof for specific performance unless it could have been maintained by the assignor (Plant Invest. Co. *v.* Jacksonville, etc., R. Co., 152 U. S. 71, 14 S. Ct. 483, 38 L. ed. 358; Shoecraft *v.* Bloxham, 124 U. S. 730, 8 S. Ct. 686, 31 L. ed. 574; Corbin *v.* Black Hawk County, 105 U. S. 659, 26 L. ed. 1136; Boston Safety, etc., Co. *v.* Plattsmouth, 76 Fed. 881; Coler *v.* Grainger County, 74 Fed. 16, 20 C. C. A. 267), and that a claim founded on a contract is a chose in action (Mexican Nat. R. Co. *v.* Davidson, 157 U. S. 201, 15 S. Ct. 563, 39 L. ed. 672; Jackson *v.* Pearson, 60 Fed. 113; Republic Iron Min. Co. *v.* Jones, 37 Fed. 721, 2 L. R. A. 746; Simons *v.* Ypsilanti Paper Co., 33 Fed. 193). Again there is no jurisdiction under such circumstances of a suit on an open account (Chase *v.* Sheldon Roller-Mills Co., 56 Fed. 625), or of a suit by an assignee of a right to an account of the proceeds of sales of mortgaged property (Wilkinson *v.* Wilkinson, 29 Fed. Cas. No. 17,677, 2 Curt. 582).

Such an act has been declared not to apply to the case of the assignment of a claim against a railroad company for overcharges in freight (Conn *v.* Chicago, etc., R. Co., 48 Fed. 177), where a conveyance vests a purchaser with rights in real property to the full enjoyment of which the enforcement of the contract is a necessary incident (Portage City Water Co. *v.* Portage, 102 Fed. 769), to the assignment of a bail-bond (Bobyshall *v.* Oppenheimer, 3 Fed. Cas. No. 1,592, 4 Wash. 482), to the conveyance of land (Briggs *v.* French, 4 Fed. Cas. No. 1,871, 2 Sumn. 251), to a bill in equity, by the purchaser of an interest of one partner, against the remaining partner for a division of the assets and an accounting (McNichol *v.* Phelps, 16 Fed. 8), to an action to recover damages for a trespass in entering upon lands and cutting down trees (Ambler *v.* Eppinger, 137 U. S. 480, 11 S. Ct. 173, 34 L. ed. 765), to a proceeding in equity to compel the transfer of corporate stock upon the books of a corporation (Jewett *v.* Bradford Sav. Bank, etc., Co., 45 Fed. 801), to a suit to enforce a lien (Fitch *v.* Creighton, 24 How. (U. S.) 159, 16 L. ed. 596), to an action of replevin for a quantity of bank-bills (Deshler *v.* Dodge, 16 How. (U. S.) 622, 14 L. ed. 1084), to a suit on a chose in action payable to bearer, where the instrument was made to a corporation (Barling *v.* Bank of British North America, 50 Fed. 260, 1 C. C. A. 510; Newgass *v.* New Orleans, 33 Fed. 196), to a suit by a creditor who has become subrogated to a right of his debtor (New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102), to a suit against a bank to recover for neglecting to protest drafts (Barney *v.* Globe Bank, 2 Fed. Cas. No. 1,031, 5 Blatchf. 107), or to a suit by national banks on assigned paper (Commercial Nat. Bank *v.* Simmons, 6 Fed. Cas. No. 3,062, 1 Flipp. 449).

Declaration should show that suit might have been prosecuted in the court if no as-

suit, except upon foreign bills of exchange, to recover on any note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court if no assignment or transfer had been made. And it has been decided that such acts were intended to prohibit suits in the federal courts by assignees of choses in action, unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer and executed by a corporation.[30] So the assignee or indorsee of a note is precluded from bringing suit thereon except so far as the right may be conferred by statute.[31] And the federal courts have no jurisdiction of a suit by the assignee of a judgment to subject thereto property of the judgment debtor standing in the name of a third person, where the assignor and defendant are citizens of the same state.[32] So also it has been determined that a general assignee of the effects of an insolvent cannot sue in the federal courts if his assignor could not have done so.[33] Again it has been decided

signment had been made. Smith *v.* Fifield, 91 Fed. 561, 33 C. C. A. 681.

A municipal corporation is within the words "any corporation" as used in the statute. Loeb *v.* Columbia Tp. Trustees, 179 U. S. 472, 21 S. Ct. 174, 45 L. ed. 280; New Orleans *v.* Quinlan, 173 U. S. 191, 19 S. Ct. 329, 43 L. ed. 664.

A suit based on a chose in action by a party thereto may be brought against an assignee of the other party, who is an alien, without regard to citizenship of defendant's assignor. Brooks *v.* Laurent, 98 Fed. 647, 39 C. C. A. 201.

30. Wilson *v.* Knox County, 43 Fed. 481.

Instruments payable to bearer are excepted. Lake County *v.* Dudley, 173 U. S. 243, 19 S. Ct. 398, 43 L. ed. 684.

31. Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843; Gibson *v.* Chew, 16 Pet. (U. S.) 315, 10 L. ed. 977; Keary *v.* Farmers', etc., Bank, 16 Pet. (U. S.) 89, 10 L. ed. 897; U. S. National Bank *v.* McNair, 56 Fed. 323; Coe *v.* Cayuga Lake R. Co., 8 Fed. 534, 19 Blatchf. 522; Noell *v.* Mitchell, 18 Fed. Cas. No. 10,287, 4 Biss. 346; Shuford *v.* Cain, 22 Fed. Cas. No. 12,823, 1 Abb. 302; Thaxter *v.* Hatch, 23 Fed. Cas. No. 13,866, 6 McLean 68.

Record should also show citizenship of original payee. Parker *v.* Ormsby, 141 U. S. 81, 11 S. Ct. 912, 35 L. ed. 654; Montalet *v.* Murray, 4 Cranch (U. S.) 46, 2 L. ed. 545; Turner *v.* Bank of North America, 4 Dall. (U. S.) 8, 1 L. ed. 718.

Status at time suit is brought determines the jurisdiction, and if the payee is at such time a resident of a different state from defendant suit may be brought in the federal court. Jones *v.* Shapera, 57 Fed. 457, 6 C. C. A. 423.

An action on the relation of the assignee of a note on the official bond of a township trustee for illegally executing the note is not within the statutory restriction. Indiana *v.* Glover, 155 U. S. 513, 15 S. Ct. 186, 39 L. ed. 243.

A note for the accommodation of the payee is not subject to the restriction of the statute. Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 188 [*affirming* 36 Fed. 484, 13 Sawy. 526, 1 L. R. A. 816]. See also Wachusett Nat. Bank *v.* Sioux City Stove Works, 56 Fed. 321.

An indorsee suing a remote indorser should show that the intermediate indorsee could have maintained the action. Mollan *v.* Torrance, 9 Wheat. (U. S.) 537, 6 L. ed. 154; Campbell *v.* Jordan, 4 Fed. Cas. No. 2,362, Hempst. 534.

Indorsee may sue his immediate indorser in the federal court, although the maker could not be sued there. Coffee *v.* Tennessee Planters Bank, 13 How. (U. S.) 183, 14 L. ed. 105; Evans *v.* Gee, 11 Pet. (U. S.) 80, 9 L. ed. 639; Mollan *v.* Torrance, 9 Wheat. (U. S.) 537, 6 L. ed. 154; Young *v.* Bryan, 6 Wheat. (U. S.) 146, 5 L. ed. 228; Codman *v.* Vermont, etc., R. Co., 5 Fed. Cas. No. 2,936, 17 Blatchf. 1; Dennison *v.* Larned, 7 Fed. Cas. No. 3,798, 6 McLean 496. And likewise a first indorser may sue a second indorser upon an alleged contract as to sharing loss. Phillips *v.* Preston, 5 How. (U. S.) 278, 12 L. ed. 152.

Notes or bills of exchange payable to bearer.— Skinner *v.* Barr, 77 Fed. 816; Barling *v.* Bank of British North America, 50 Fed. 260, 1 C. C. A. 510 [*affirming* 46 Fed. 357]; Steel *v.* Rathbun, 42 Fed. 390; Towne *v.* Smith, 24 Fed. Cas. No. 14,115, 1 Woodh. & M. 115.

32. Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052 [*affirming* 39 Fed. 865]; Metcalf *v.* Watertown, 128 U. S. 586, 9 S. Ct. 173, 32 L. ed. 543; Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729.

A suit to vacate a satisfaction of judgments because of failure of consideration may be brought by the assignee of such judgments in the federal court, although assigned by a resident of the state in which the corporation defendant was created, and in which the judgments were rendered. Hay *v.* Alexandria, etc., R. Co., 20 Fed. 15. *Compare* Dexter *v.* Smith, 7 Fed. Cas. No. 3,866, 2 Mason 303.

33. Sere *v.* Pitot, 6 Cranch (U. S.) 332, 3 L. ed. 240.

that where both plaintiff's assignor and defendant are aliens and no federal question is involved, jurisdiction will be declined of an action to recover on an insurance policy and to reform the same, as such action is one to recover the contents of a chose in action.[34] But actions upon bonds or coupons which are negotiable instruments may be maintained by the assignee or holder thereof in the federal courts where the necessary diversity of citizenship exists, although a suit could not have been prosecuted to recover thereon in such court if no assignment had been made.[35] So also it has been decided that actions on county or municipal warrants, which are negotiable, may be maintained in the federal courts by a non-resident of the state in which the county or city is situated, although the payees in the warrants were citizens of that state.[36] And it has likewise been decided that an assignee of a note, and of mortgage securing the same, may sue in the federal courts to foreclose the mortgage.[37]

3. Pleading, Objections to Jurisdiction, and Evidence — a. Allegation in Pleadings — (i) *In General.* Where the jurisdiction of the court depends on the citizenship of the parties to the action it should affirmatively appear in the pleadings that the complainants are not citizens of the same state with the defendants.[38] And jurisdiction is not conferred by the mere fact that the title or

34. Laird *v.* Indemnity Mut. Mar. Assur. Co., 44 Fed. 712.

Suits by an alien assignee against a citizen see De Laveaga *v.* Williams, 7 Fed. Cas. No. 3,759, 5 Sawy. 573; Wilson *v.* Fisher, 30 Fed. Cas. No. 17,803, Baldw. 133.

35. New Providence Tp. *v.* Halsey, 117 U. S. 336, 6 S. Ct. 764, 29 L. ed. 904; Ackley Independent School Dist. *v.* Hall, 113 U. S. 135, 5 S. Ct. 371, 28 L. ed. 954; Chickaming *v.* Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. ed. 307; Thompson *v.* Perrine, 106 U. S. 589, 1 S. Ct. 564, 568, 27 L. ed. 298; White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1; Lyon County *v.* Keene Five-Cent Sav. Bank, 100 Fed. 337, 40 C. C. A. 391; Reynolds *v.* Lyon County, 97 Fed. 155; Ashley *v.* Presque Isle County, 83 Fed. 534, 27 C. C. A. 585; McLean *v.* Valley County, 74 Fed. 389; Farr *v.* Lyons, 13 Fed. 377, 21 Blatchf. 116; Porter *v.* Janesville, 3 Fed. 617; Bradly *v.* Marine, etc., Min., etc., Co., 3 Fed. Cas. No. 1,789, 3 Hughes 26 [*affirmed* in 105 U. S. 175, 26 L. ed. 1034]. *Compare* Blacklock *v.* Small, 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70; Thomson *v.* Elton, 100 Fed. 145; Clarke *v.* Janesville, 5 Fed. Cas. No. 2,854, 1 Biss. 98.

A plaintiff in attachment to whom the right is given to sue on a forthcoming bond as if it "had been assigned to him" is not an assignee within the meaning of the statute so as to prevent an action thereon by him in the federal court where he is a citizen of another state. Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294.

36. Kearney County *v.* McMaster, 68 Fed. 177, 15 C. C. A. 353; Thompson *v.* Searcy County, 57 Fed. 1030, 6 C. C. A. 674; Aylesworth *v.* Gratiot County, 43 Fed. 350; Adams *v.* Republic County, 23 Fed. 211; Jerome *v.* Rio Grande County, 18 Fed. 873, 5 McCrary 639. But *compare* New Orleans *v.* Benjamin, 153 U. S. 411, 14 S. Ct. 905, 38 L. ed. 764; Cloud *v.* Sumas, 52 Fed. 177; Rollins *v.* Chaffee County, 34 Fed. 91.

A purchaser of warrants at a judicial sale under authority of an order of the probate court is an assignee within the meaning of the act of congress of March 3, 1875. Glass *v.* Police Jury, 176 U. S. 207, 20 S. Ct. 346, 44 L. ed. 436.

37. Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641; Tredway *v.* Sanger, 107 U. S. 323, 2 S. Ct. 691, 27 L. ed. 582; Allen *v.* O'Donald, 28 Fed. 17; Whiting *v.* Wellington, 10 Fed. 810; Seckel *v.* Beckhaus, 21 Fed. Cas. No. 12,599, 7 Biss. 354. *Compare* Sheldon *v.* Sill, 8 How. (U. S.) 441, 12 L. ed. 1147; Hill *v.* Winne, 12 Fed. Cas. No. 6,503, 1 Biss. 275.

The right of a citizen of another state to foreclose a mortgage in a federal court is not affected by an assignment by the mortgagee for the benefit of creditors. Edwards *v.* Hill, 59 Fed. 723, 8 C. C. A. 233.

38. Houston *v.* Filer, etc., Co., 104 Fed. 163, 43 C. C. A. 457; Boston Safe-Deposit, etc., Co. *v.* Racine, 97 Fed. 817; Carsbad *v.* Tibbetts, 51 Fed. 852; Heriot *v.* Davis, 12 Fed. Cas. No. 6,404, 2 Woodb. & M. 229; Merserole *v.* Union Paper Collar Co., 17 Fed. Cas. No. 9,488, 6 Blatchf. 356; Rogers *v.* Linn, 20 Fed. Cas. No. 12,015, 2 McLean 126. And see Emory *v.* Grenough, 3 Dall. (U. S.) 369, 1 L. ed. 640. And *compare* Ban *v.* Columbia Southern R. Co., 117 Fed. 21, 54 C. C. A. 407 [*reversing* 109 Fed. 499].

The facts essential to give a federal court jurisdiction must be positively alleged, and not left to inference. Lownsdale *v.* Gray's Harbor Boom Co., 117 Fed. 983.

Citizenship of all the parties, both complainants and defendants, should be alleged. Continental L. Ins. Co. *v.* Rhoades, 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380; Findlay *v.* U. S. Bank, 9 Fed. Cas. No. 4,791, 2 McLean 44.

Not necessary to aver that a non-resident defendant was served in the district where the citizenship of the parties as shown by the declaration confers jurisdiction. McCloskey *v.* Cobb, 15 Fed. Cas. No. 8,702, 2 Bond 16.

caption of a bill shows that the parties are citizens of different states.[39] But it has been decided that a general allegation in the declaration of citizenship is sufficient,[40] as is also one where it fairly appears therefrom of what states the respective parties are citizens.[41] And an averment of citizenship in the first count has been held sufficient.[42]

(II) *In Actions by Assignees.* In an action by the assignee of a chose in action, if the citizenship of the assignor is material to the jurisdiction of the court, it should affirmatively appear in the pleadings that it might have been sustained in such court by the assignor if no assignment had been made.[43]

(III) *In Actions by or Against Corporations.* In a suit by or against a corporation in the federal court, the averment should be that it is created and organized under the laws of a certain state.[44]

On a bill by plaintiff for himself and others who may be interested it is not necessary to allege the citizenship of the latter. Vallette *v.* Whitewater Valley Canal Co., 28 Fed. Cas. No. 16,820, 4 McLean 192.

Sufficiency of averments.— That a party is "of" or a "resident" of a particular state is not a sufficient averment of citizenship. Cooper *v.* Newell, 155 U. S. 532, 15 S. Ct. 355, 39 L. ed. 249; Horne *v.* George H. Hammond Co., 155 U. S. 393, 15 S. Ct. 167, 39 L. ed. 197; Wolfe *v.* Hartford L., etc., Ins. Co., 148 U. S. 389, 13 S. Ct. 602, 37 L. ed. 493; Denny *v.* Pironi, 141 U. S. 121, 11 S. Ct. 966, 35 L. ed. 657; Timmons *v.* Elyton Land Co., 139 U. S. 378, 11 S. Ct. 585, 35 L. ed. 195; Menard *v.* Goggan, 121 U. S. 253, 7 S. Ct. 873, 30 L. ed. 914; Everhart *v.* Huntsville Female College, 120 U. S. 223, 7 S. Ct. 555, 30 L. ed. 623; Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Bingham *v.* Cabbot, 3 Dall. (U. S.) 382, 1 L. ed. 646; Laskey *v.* Newtown Min. Co., 56 Fed. 628; Pacific Postal Tel. Cable Co. *v.* Irvine, 49 Fed. 113. Nor is it sufficient to allege that defendant is "a citizen or a resident" of a certain state (Jackson *v.* Ashton, 8 Pet. (U. S.) 148, 8 L. ed. 898; Brown *v.* Keene, 8 Pet. (U. S.) 112, 8 L. ed. 885), that he is a resident of or lives at a certain place (Gale *v.* Southern Bldg., etc., Assoc., 117 Fed. 732), that he is an "inhabitant" (Allen B. Wrisley Co. *v.* George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496), or that the citizenship of a party is unknown (Tug River Coal, etc., Co. *v.* Biegel, 67 Fed. 625, 14 C. C. A. 577). But it has been decided that citizenship of a party in a certain state is sufficiently alleged by an averment that he was a citizen of the United States naturalized in Louisiana and residing there (Gassies *v.* Ballon, 6 Pet. (U. S.) 761, 8 L. ed. 573), that he is a citizen of the southern district of Alabama (Berlin *v.* Jones, 3 Fed. Cas. No. 1,343, 1 Woods 638. See also Edwards *v.* Nichols, 8 Fed. Cas. No. 4,296, 3 Day (Conn.) 16, Brunn. Col. Cas. 43), that he is "of the town and county of W., in the Connecticut district, . . . a citizen of the United States, and sheriff of said W. county" (Duryee *v.* Webb, 8 Fed. Cas. No. 4,198, 16 Conn. 558 note), or that he is a citizen of the United States and an actual resident of a state named (Littell *v.* Erie R. Co., 105 Fed. 539).

Declaration speaks from commencement of action. Chicago Lumber Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207. See also as to amendments Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Anderson *v.* Watt, 138 U. S. 694, 11 S. Ct. 449, 35 L. ed. 1078; Baltimore, etc., R. Co. *v.* McLaughlin, 73 Fed. 519, 19 C. C. A. 551.

39. Jackson *v.* Ashton, 8 Pet. (U. S.) 148, 8 L. ed. 898.

40. Thompson *v.* Cook, 23 Fed. Cas. No. 13,952, 2 McLean 122.

41. Jones *v.* Andrews, 10 Wall. (U. S.) 327, 19 L. ed. 935. See Bayerque *v.* Holey, 2 Fed. Cas. No. 1,135, McAll. 97.

42. Jones *v.* Heaton, 13 Fed. Cas. No. 7,468, 1 McLean 317.

43. King Iron Bridge, etc., Co. *v.* Otoe County, 120 U. S. 225, 7 S. Ct. 552, 30 L. ed. 623; Ban *v.* Columbia Southern R. Co., 109 Fed. 499; Benjamin *v.* New Orleans, 74 Fed. 417, 20 C. C. A. 591; U. S. National Bank *v.* McNair, 56 Fed. 323; Hudson *v.* Bishop, 38 Fed. 680; Republic Iron Min. Co. *v.* Jones, 37 Fed. 721, 2 L. R. A. 746; Stanton *v.* Shipley, 27 Fed. 498; Raisin Fertilizer Co. *v.* Snell, 21 Fed. 353; Hampton *v.* Truckee Canal Co., 19 Fed. 1, 9 Sawy. 381. And see Morgan *v.* Gay, 19 Wall. (U. S.) 81, 22 L. ed. 100; Kirkman *v.* Hamilton, 6 Pet. (U. S.) 20, 8 L. ed. 305; Turner *v.* Bank of North America, 4 Dall. (U. S.) 8, 1 L. ed. 718.

44. U. S. *v.* Gillis, 95 U. S. 407, 24 L. ed. 503; American Sugar Refining Co. *v.* Johnson, 60 Fed. 503, 9 C. C. A. 110; Frishie *v.* Chesapeake, etc., R. Co., 57 Fed. 1; St. Louis, etc., R. Co. *v.* Newcom, 56 Fed. 951, 6 C. C. A. 172; New York, etc., R. Co. *v.* Hyde, 56 Fed. 188, 5 C. C. A. 461; Lonergan *v.* Illinois Cent. R. Co., 55 Fed. 550. And see U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Piquiquot *v.* Pennsylvania R. Co., 16 How. (U. S.) 104, 14 L. ed. 863; Greeley *v.* Smith, 10 Fed. Cas. No. 5,747, 3 Story 76.

Citizenship of a corporate party need not appear in the caption of a petition, the aver-

(iv) *In Actions to Which Aliens Are Parties.* Where jurisdiction of a federal court is dependent on the alienage of one of the parties to the action, the fact that he is an alien is a necessary allegation;[45] and in addition to this the description of the parties should show the citizenship of the other party.[46]

(v) *Amendment.* Where the averments do not sufficiently show the diversity of citizenship necessary to sustain the jurisdiction of a federal court such defect may be cured by amendments.[47]

b. Manner of Making Objections.[48] Under the earlier practice in the federal courts the question of the citizenship of a party should be raised by a plea in abatement;[49] it has, however, been decided that this method of procedure is no longer necessary and that the court may and should upon its own motion stop the proceedings and dismiss the suit, if it appears that there is not the requisite diversity of citizenship.[50] Again the objection may be raised under any form of plea, answer, or demurrer which would have been open to defendant under a like proceeding in the state court.[51]

ment in the body thereof being sufficient. Mexico Southern Bank *v.* Reed, 17 Fed. Cas. No. 9,514.

Defective averment may be cured by subsequent pleadings. U. S. *v.* Gillis, 96 U. S. 407, 24 L. ed. 503.

Sufficient particular averments see Block *v.* Standard Distilling, etc., Co., 95 Fed. 978; Baltimore, etc., R. Co. *v.* McLaughlin, 73 Fed. 519, 19 C. C. A. 551; Chicago Lumber Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207; Grand Trunk R. Co. *v.* Tennard, 66 Fed. 922, 14 C. C. A. 190; Ward *v.* Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538. See also U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953.

Insufficient particular averments see St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 17 S. Ct. 925, 42 L. ed. 315; American Sugar Refining Co. *v.* Johnson, 60 Fed. 503, 9 C. C. A. 110; St. Louis, etc., R. Co. *v.* Newcom, 56 Fed. 951, 6 C. C. A. 172; New York, etc., R. Co. *v.* Hyde, 56 Fed. 188, 5 C. C. A. 461. See also Germania F. Ins. Co. *v.* Francis, 11 Wall. (U. S.) 210, 20 L. ed. 77; Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. (U. S.) 553, 19 L. ed. 998.

In a suit by a limited partnership association created by the laws of Pennsylvania the citizenship of the individual members should be alleged. Great Southern Fireproof Hotel Co. *v.* Jones, 177 U. S. 449, 20 S. Ct. 690, 44 L. ed. 842.

45. Stuart *v.* Easton, 156 U. S. 46, 15 S. Ct. 268, 39 L. ed. 341; Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328; La Croix *v.* May, 15 Fed. 236; Michaelson *v.* Denison, 17 Fed. Cas. No. 9,523, 3 Day (Conn.) 294, Brunn. Col. Cas. 63.

Description of a party as a "citizen of London, England," has been held not to be sufficient. Stuart *v.* Easton, 156 U. S. 46, 15 S. Ct. 268, 39 L. ed. 341.

That he is a citizen or subject of some one foreign state should be alleged. Wilson *v.* City Bank, 30 Fed. Cas. No. 17,797, 3 Sumn. 422. See Rondot *v.* Rogers Tp., 79 Fed. 676, 25 C. C. A. 145.

46 Connolly *v.* Taylor, 2 Pet. (U. S.) 556, 7 L. ed. 518; Jackson *v.* Twentyman, 2 Pet. (U. S.) 136, 7 L. ed. 374; Hodgson *v.* Bowerbank, 5 Cranch (U. S.) 303, 3 L. ed. 108; Mossman *v.* Higginson, 4 Dall. (U. S.) 12, 1 L. ed. 720.

47. Howard *v.* De Cordova, 177 U. S. 609, 20 S. Ct. 817, 44 L. ed. 908; Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248; Kelsey *v.* Pennsylvania R. Co., 14 Fed. Cas. No. 7,679, 14 Blatchf. 89.

In discretion of the court.— Pacific Mut. L. Ins. Co. *v.* Tompkins, 101 Fed. 539, 41 C. C. A. 488.

An amendment on appeal so as to show citizenship will not be allowed. See New York Preferred Acc. Ins. Co. *v.* Barker, 88 Fed. 814, 32 C. C. A. 124. But see Halsted *v.* Buster, 119 U. S. 341, 7 S. Ct. 276, 30 L. ed. 462. And see Fitchburg R. Co. *v.* Nichols, 85 Fed. 869, 29 C. C. A. 464.

48. By whom objection to jurisdiction may be made see Craig *v.* Cummings, 6 Fed. Cas. Cas. No. 3,331, Pet. C. C. 431, 2 Wash. 505; Hinckley *v.* Byrne, 12 Fed. Cas. No. 6,510, Deady 224.

Objection may be taken at any stage of the proceedings. Weller *v.* Hanaur, 105 Fed. 193. But it is held that it cannot be raised for the first time on appeal. Carter-Crume Co. *v.* Peurrung, 86 Fed. 439, 30 C. C. A. 174.

Waiver of objection see Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923; Kennedy *v.* Solar Refining Co., 69 Fed. 715.

49. Jones *v.* League, 18 How. (U. S.) 76, 15 L. ed. 263; Wickliffe *v.* Owings, 17 How. (U. S.) 47, 15 L. ed. 44; Smith *v.* Kernochen, 7 How. (U. S.) 198, 12 L. ed. 666; De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 7 L. ed. 227; Rae *v.* Grand Trunk R. Co., 14 Fed. 401; Boyreau *v.* Campbell, 3 Fed. Cas. No. 1,760, McAll. 119; Fremont *v.* Merced Min. Co., 9 Fed. Cas. No. 5,095, McAll. 267; Hinckley *v.* Byrne, 12 Fed. Cas. No. 6,510, Deady 224.

50. Rae *v.* Grand Trunk R. Co., 14 Fed. 401; Stanley *v.* Albany County, 5 Fed. 254.

51. Roberts *v.* Lewis, 144 U. S. 653, 12 S. Ct. 781, 36 L. ed. 579.

The fact that one of the complainants is a citizen of the state where the suit is brought is declared not to present a question of jurisdiction which would go to the whole case

c. **Evidence.** Proper averments in the pleadings as to the citizenship of the parties are *prima facie* sufficient,[52] and the citizenship alleged therein need not be proved unless specially denied by plea,[53] in which case the burden of proof is on the defendant.[54] But testimony in reference to the citizenship of the parties is only admissible in support of allegations properly made in the pleadings.[55]

D. Jurisdiction Dependent on Amount or Value in Controversy — 1. PRIMARY RULE. Primarily where a specified jurisdictional amount or value is required to give any federal court jurisdiction, such requirement is exclusive, and if the requisite amount or value exists said court has jurisdiction.[56]

2. GENERAL PRINCIPLES. The facts when made to appear of record should create a legal certainty that the amount involved does not give the court jurisdiction or the action cannot properly be dismissed.[57] The limitation as to amount refers to the sum in dispute and not to rights which are mere incidents.[58] And a subsequent act increasing the jurisdictional amount will not affect jurisdiction which has vested.[59]

3. GOVERNING FACTORS OR TEST — a. Generally. The test of jurisdiction may be the wrong done a corporation;[60] the amount claimed by a creditor against the judgment debtor, and not the value of property held by the debtor's alleged fraudulent assignee;[61] the value of a right;[62] the value of the right to be protected, or the extent of the injury to be prevented, as in injunction suits;[63] the

and which can be raised on demurrer to the whole bill, but such bill may in some cases be dismissed as to that particular complainant. Nebraska City Nat. Bank *v.* Nebraska City Hydraulic Gaslight, etc., Co., 14 Fed. 763, 4 McCrary 319.

The jurisdictional fact of citizenship is confessed where it is alleged that plaintiffs are "citizens . . . and residents" of a certain state, and the answer only puts in issue the question whether they reside in such state. Hoppenstedt *v.* Fuller, 71 Fed. 99, 17 C. C. A. 623.

52. Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25; Fremont *v.* Merced Min. Co., 9 Fed. Cas. No. 5,095, McAll. 267.

53. Blachley *v.* Davis, 3 Fed. Cas. No. 1,456, 1 McLean 412; Evans *v.* Davenport, 8 Fed. Cas. No. 4,558, 4 McLean 574; Hilliard *v.* Brevoort, 12 Fed. Cas. No. 6,505, 4 McLean 24. See also Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25.

Averments as to citizenship are not put in issue by a general denial. Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25; National Masonic Acc. Assoc. *v.* Sparks, 83 Fed. 225, 28 C. C. A. 399.

Sufficiency of evidence in particular cases. — See Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 35 L. ed. 1078; Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387; Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25; Allen *v.* Southern California R. Co., 70 Fed. 370; Loomis *v.* Rosenthal, 67 Fed. 369; Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190; Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

54. Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25; National Masonic Acc. Assoc. *v.* Sparks, 83 Fed. 225, 28 C. C. A. 399; Foster *v.* Cleveland, etc., R. Co., 56 Fed. 434.

55. New York Preferred Acc. Ins. Co. *v.* Barker, 93 Fed. 158, 35 C. C. A. 250.

As to sufficiency of evidence see Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25; Edwards *v.* Bates County, 117 Fed. 526.

56. This general principle runs through all the decisions, whether expressly or only impliedly so decided. Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225; Pierson *v.* Philips, 36 Fed. 837; Currey *v.* Fletcher, 6 Fed. Cas. No. 3,490, 1 Cranch C. C. 113; U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277; U. S. *v.* Stiner, 27 Fed. Cas. No. 16,404, 8 Blatchf. 544.

57. Wetmore *v.* Rymer, 169 U. S. 115, 18 S. Ct. 293, 42 L. ed. 682; Barry *v.* Edmunds, 116 U. S. 550, 6 S. Ct. 501, 29 L. ed. 729. But see Edwards *v.* Bates County, 55 Fed. 436.

58. New York Silk Mfg. Co. *v.* Paterson Second Nat. Bank, 10 Fed. 204.

59. Platt *v.* Manning, 34 Fed. 817.

60. Hill *v.* Glasgow R. Co., 41 Fed. 610.

61. Alkire Grocery Co. *v.* Richesin, 91 Fed. 79.

In an action by a creditor on claims not due when the debtor intends fraud a circuit court has jurisdiction of a suit on notes aggregating the requisite jurisdictional amount where plaintiff sues in good faith, although the amount of the notes past due is less than the jurisdictional sum. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 13 S. Ct. 416, 37 L. ed. 255 [*following* Upton *v.* McLaughlin, 105 U. S. 640, 26 L. ed. 1197; Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524, and *distinguishing* Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 6 S. Ct. 192, 29 L. ed. 502].

62. Lanning *v.* Osborne, 79 Fed. 657. *Compare* Hutchinson *v.* Beckham, 118 Fed. 399, 55 C. C. A. 333.

63. Ottumwa *v.* City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219; American Fisheries Co. *v.* Lennen, 118 Fed. 869; Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736; Hutchinson *v.* Beckham, 118 Fed. 399, 55 C. C. A.

value of the object to be gained, as in the case of a nuisance;[64] the value of land;[65] the value of property generally;[66] the value of the entire assets of a corporation;[67] or the value of property and rights which will be affected, if the relief prayed for is granted, and not the value of complainant's interest.[68] Again the case may not be subject to pecuniary limitations, and jurisdiction may attach without regard to the amount.[69]

333; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689; Northern Pac. R. Co. *v.* Cunningham, 103 Fed. 708; Humes *v.* Ft. Smith, 93 Fed. 857; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65.

For example the value of a contract for public work sought to be enjoined and not the amount of the tax assessable against complainant in case of performance is the amount. Johnston *v.* Pittsburg, 106 Fed. 753. So the value of the trade-mark to be protected is the amount and not the damages sustained (Hennessy *v.* Herrmann, 89 Fed. 669. See Symonds *v.* Greene, 28 Fed. 834), or the value of a flume as an entirety, the destruction of which is asked to be enjoined, is the amount (Maffet *v.* Quine, 93 Fed. 347, 95 Fed. 199); and where the suit is to enjoin the construction of a sewer to the injury of mortgaged property, the value of the security impaired thereby gives jurisdiction, if said value is sufficient (Clapp *v.* Spokane, 53 Fed. 515). So the value of the right to operate a railroad is the matter in dispute and not that of the railroad itself where an injunction is sought to restrain its operation. Oleson *v.* Northern Pac. R. Co., 44 Fed. 1.

Amount of a tax in suits to enjoin their enforcement is the amount involved. Douglas Co. *v.* Stone, 110 Fed. 812; Linehan Railway Transfer Co. *v.* Pendergrass, 70 Fed. 1, 16 C. C. A. 585. See Citizens' Bank *v.* Cannon, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451; Western Union Tel. Co. *v.* Poe, 61 Fed. 449. Again the amount is not limited to the tax imposed for a single year where plaintiff asks to be relieved from threatened penalties and interference with his business and places the damages in an amount more than sufficient to give jurisdiction. American Fertilizing Co. *v.* North Carolina Bd. of Agriculture, 43 Fed. 609, 11 L. R. A. 179.

Amount of assessment in a suit to enjoin the enforcement of an assessment for street improvement gives jurisdiction if the amount is sufficient. Eachus *v.* Hartwell, 112 Fed. 564.

64. Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311 [*followed* in Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183] which holds that the value of a protected erection claimed as a nuisance is the amount.

Threatened damages to property is a criterion in a bill to restrain a nuisance. Herbert *v.* Rainey, 54 Fed. 248.

65. Woodside *v.* Ciceroni, 93 Fed. 1, 35 C. C. A. 177 (suit to quiet title, value of entire land and not of defendant's claim is amount); Felch *v.* Travis, 92 Fed. 210 (value of land in suit to set aside tax-title); Smith *v.* Bivens, 56 Fed. 352 (deprivation of rights in land); Greene *v.* Tacoma, 53 Fed. 562 (value of entire street in ejectment against city and railroad company for projected street through plaintiff's land); Simon *v.* House, 46 Fed. 317 (suit to set aside conveyance as fraudulent and as cloud on title); Lovett *v.* Prentice, 44 Fed. 459 (suit to quiet title by owners of separate lots from a common grantor, value of all the lots and not of separate lots governs). See also Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 43 Fed. 545.

In an action to recover a piece of land on which a railroad had located its depot, the value of the land to the railroad company, according to its present situation and use, is the value to be considered in determining whether the amount involved in the litigation is sufficient to confer jurisdiction on the federal courts. King *v.* Southern R. Co., 119 Fed. 1016.

66. Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449 (property to be administered); Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68 (value of property mortgaged in suit to foreclose chattel mortgage).

Cash price at a forced sale is not the proper criterion for ascertaining the value of property, but what it could be sold for in the ordinary course of business should be estimated. Berthold *v.* Hoskins, 38 Fed. 772.

The value of the property in replevin, where consequential damages are not recoverable, does not, when insufficient, confer jurisdiction, although special damages to trade and business are laid in a very large sum. Vance *v.* W. A. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. ed. 1111 [*affirming* in part 80 Fed. 786].

67. Towle *v.* American Bldg., etc., Soc., 60 Fed. 131.

68. Cowell *v.* City Water-Supply Co., 96 Fed. 769.

69. Boudinot *v* Boudinot, 2 Indian Terr. 107, 48 S. W. 1019 (under an act abolishing tribal courts and transferring causes to the United States court, the latter has jurisdiction regardless of the amount in controversy); U. S. *v.* Sayward, 160 U. S. 493, 16 S. Ct. 371, 40 L. ed. 508 (court will take cognizance of an action in which the United States is plaintiff or petitioner regardless of the amount involved. See also U. S. *v.* Flournoy Live-Stock, etc., Co., 71 Fed. 576; U. S. *v.* Kentucky River Mills, 45 Fed. 273; U. S. *v.* Shaw, 39 Fed. 433, 3 L. R. A. 232. But see U. S. *v.* Huffmaster, 35 Fed. 81); National Bank of Commerce *v.* Allen, 90 Fed. 545, 33 C. C. A. 169 (Judiciary Act limiting amount does not apply to a peti-

b. Computation or Determination of Amount. Distinct demands cannot be aggregated or joined to make up the amount necessary to give jurisdiction, although the rights or liabilities arise out of the same transaction or subject-matter.[70] There are, however, decisions to the contrary, and determinations seemingly opposed to the rule, although some of these latter may be harmonized or distinguished,[71] and the rule does not prohibit the aggregation or joinder of

tion for intervention by another creditor claiming an interest in the fund sought to be reached by a creditors' bill, and the court will entertain jurisdiction, although such intervening creditors' judgment is less than the required jurisdictional sum); U. S. *v.* Mexican Nat. R. Co., 40 Fed. 769 (an action for a penalty criminal in its nature, brought under a United States statute, is within the jurisdiction of the circuit court, although not equal to presented jurisdictional amount). But *compare* Sullivan *v.* Swain, 96 Fed. 259, (in a suit brought by a receiver of another federal court, although regarded as arising under the laws of the United States, it is essential that a jurisdictional amount be involved); Robinson *v.* West Virginia Loan Co., 90 Fed. 770 (to enable the circuit court to appoint a receiver at the instance of a stockholder it must appear that the amount in controversy or the par value of complainant's stock equals the required jurisdictional amount); Werner *v.* Murphy, 60 Fed. 769 (creditors claim against an insolvent corporation must be of a sufficient jurisdictional amount, notwithstanding the suit in federal circuit court is based on diverse citizenship and other grounds).

70. Ogden City *v.* Armstrong, 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444 [*affirming* 12 Utah 476, 43 Pac. 119] (suit to enjoin collection of city taxes upon separate lots); Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494 [*following* Walter *v.* Northeastern R. Co., 147 U. S. 370, 13 S. Ct. 348, 37 L. ed. 206] (bill to enjoin collection of tax assessments, district in separate counties, against railroad company); Keels *v.* Central R. Co., 147 U. S. 374, 13 S. Ct. 350, 37 L. ed. 206; Wheless *v.* St. Louis, 96 Fed. 865 [*affirmed* in 180 U. S. 379, 21 S. Ct. 402, 45 L. ed. 583, *following* Hawley *v.* U. S., 108 U. S. 543, 2 S. Ct. 846, 27 L. ed. 820; Russell *v.* Stansell, 105 U. S. 303, 26 L. ed. 989, and *distinguishing* Parcher *v.* Cuddy, 105 U. S. 773, 26 L. ed. 937; Sinclair *v.* Cooper, 103 U. S. 754, 26 L. ed. 322; Washington Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. ed. 782; Shields *v.* Thomas, 17 How. (U. S.) 3, 15 L. ed. 93]; Smithson *v.* Hubbell, 81 Fed. 593 (suit by a creditor of an insolvent bank in behalf of himself and other creditors to enjoin the payment of dividends); Auer *v.* Lombard, 72 Fed. 209, 19 C. C. A. 72 (claims of creditors against shareholders of bank); Busey *v.* Smith, 67 Fed. 13 (liability of two or more heirs, etc., is several and not joint, and the rule applies even though a state statute provides that they may be jointly sued); Putney *v.* Whitmire, 66 Fed. 385 (creditors' bill by several complainants); Holt *v.* Bergevin, 60 Fed. 1 (rule applies, although joinder authorized by a state statute); Sioux Falls Nat. Bank *v.* Swenson, 48 Fed. 621 (suit by national bank in its own behalf and for individual stockholders to enjoin collection of tax); Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422.

Prosecutions of separate actions at law may be enjoined by bill to have the liabilities adjusted in equity upon removal into the federal court of said suits, except one below the jurisdictional amount. Virginia-Carolina Chemical Co. *v.* New York Home Ins. Co, 113 Fed. 1, 51 C. C. A. 21.

71. Thornton *v.* Tison, 95 Ala. 589, 10 So. 639 (jurisdiction of the federal court in suit by heirs, etc., is determined by the amount of the fund for distribution and not by the separate sums decreed to distributees); Handley *v.* Stutz, 137 U. S. 366, 11 S. Ct. 117, 34 L. ed. 706 (creditors' bill to subject stockholders to liability for unpaid subscriptions; jurisdiction includes creditors whose separate claims are less than the jurisdictional amount); Field *v.* Barber Asphalt Paving Co., 117 Fed. 925 (where complainant sued to set aside special tax bills assessed against certain lots in a city, of which he owned the fee, and he was the equitable owner of other lots assessed, and the tax bills on all the lots amounted to over two thousand dollars); Lillienthal *v.* McCormick, 117 Fed. 89, 54 C. C. A. 475 (suit to enforce a lien claimed to have been given by a contract, to secure advances made thereunder, and also damages for its breach); Brigham-Hopkins Co. *v.* Gross, 107 Fed. 769 (action at law by citizens of different states based upon separate claims, some of which were assigned and the statute of the state permitted such joinder); Bidwell *v.* Huff, 103 Fed. 362 (creditors holding judgments may unite or intervene); Pacific Live-Stock Co. *v.* Hanley, 98 Fed. 327 (a number of persons were separately charged with diverting water; held that allegations of joint liability were sufficient); Tennent-Stribling Shoe Co. *v.* Roper, 94 Fed. 739, 36 C. C. A. 455 (action based on several accounts); Weaver *v.* Norway Tack Co., 80 Fed. 700 (single agreement based upon the use of three distinct patents; total sum on all three confers jurisdiction if sufficient); Western Union Tel. Co. *v.* Norman, 77 Fed. 13 (equity jurisdiction; illegal tax in several counties; amounts of local taxes aggregated); Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524, 44 Fed. 151, 11 L. R. A. 623 (several insurers joined in submission to arbitration; held that the controversy was single and the amount of the award was the jurisdictional sum); Herbert *v.* Rainey, 54 Fed. 248 (amount of joint interest

certain claims or demands. And assignees of choses in action may aggregate their several claims,[72] since the prohibition as to assignees in the Judiciary Act does not refer to jurisdictional amount.[73] Again jurisdiction may be retained, although the amount of the claim is reduced;[74] but payments may or may not affect the jurisdiction.[75] Interest and costs are ordinarily excluded by statute,[76] although in certain instances interest may be included in or added to the jurisdictional amount either as interest or by becoming merged in the principal sum.[77] So an attorney's fee may be included under certain circumstances.[78]

c. Pleadings — Jurisdictional Averments — (i) *Bill, Declaration, or Complaint.* It is a general rule, subject to such qualifications as are hereafter stated, that the amount claimed or demanded governs the question of jurisdiction.[79] So

of life-tenants and remainder-men is the test in an injunction against threatened injury to estate); Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286 (action for killing stock; value of each animal not the test); Armstrong *v.* Ettlesohm, 36 Fed. 209 (declaration on three counts: One on a note, one for money had and received, and one for work and labor, and amounts aggregated); Stanley *v.* Albany County, 15 Fed. 483, 21 Blatchf. 249 (claim was at one time composed of several separate and distinct items); Judson *v.* Macon County, 14 Fed. Cas. No. 7,568, 2 Dill. 213 (amount is the sum of the claims on all the counts properly joined).

In a suit to quiet title if there is a joinder and no privity of title exists and each claims title to a separate part of the tract the value of the property as to each party must exceed the required amount. Stemmler *v.* McNeill, 102 Fed. 660.

Landowners may unite in a suit for injunctive relief for an injury caused by the overflow of a stream when the injury to each amounts to a jurisdictional sum. Hagge *v.* Kansas City, etc., R. Co., 104 Fed. 391.

72. Davis *v.* Mills, 99 Fed. 39; Bergman *v.* Inman, 91 Fed. 293. But see Chicago Cheese Co. *v.* Fogg, 53 Fed. 72.

73. Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248; Chase *v.* Sheldon Roller-Mills Co., 56 Fed. 625; Bernheim *v.* Birnbaum, 30 Fed. 885; Hammond *v.* Cleaveland, 23 Fed. 1, 10 Sawy. 621.

74. Turner *v.* Southern Home Bldg., etc., Assoc., 101 Fed. 308, 41 C. C. A. 379; Riggs *v.* Clark, 71 Fed. 560, 18 C. C. A. 242; Hardin *v.* Cass County, 42 Fed. 652; The Tolchester, 42 Fed. 180, all holding that jurisdiction is not divested by reduction of the claim by allegations in defense, by stipulation, or by appraisement. See Cooper *v.* Preston, 105 Fed. 403.

75. Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68 (court has jurisdiction if in order to ascertain the amount actually in controversy it must consider conflicting testimony, where payment is set up reducing the amount below jurisdictional sum); Lozano *v.* Wehmer, 22 Fed. 755 (distinction made between partial payment after suit brought and payment before action commenced); Hays *v.* Bell, 11 Fed. Cas. No. 6,270, 1 Cranch C. C. 440 (debt on note reduced by payments, action sustained); Smith *v.* Queen, 22 Fed. Cas. No. 13,096, 1 Cranch C. C. 483 (judgment of *non prosequitur* entered).

76. Baker *v.* Howell, 44 Fed. 113, holding, however, that protest fees are taxable as costs. See Greene County *v.* Kortrecht, 81 Fed. 241 (interest on negotiable bonds or coupons after maturity); Howard *v.* Bates County, 43 Fed. 276; Moore *v.* Edgefield, 32 Fed. 498.

Interest coupons cannot be considered as separate obligations for the purpose of making up the jurisdictional sum and at the same time be regarded as interest for the purpose of maturing the bond, and the court will therefore be without jurisdiction of a suit to enforce a mortgage securing a bond for two thousand dollars, and two detached coupons. Home, etc., Invest. Co. *v.* Ray, 69 Fed. 657. See Howard *v.* Bates County, 43 Fed. 276. But it is also held that matured coupons are not to be treated as interest due upon the bond, but as separable and independent promises. Edwards *v.* Bates County, 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155. See Greene County *v.* Kortrecht, 81 Fed. 241, 26 C. C. A. 381; Empire State Nail Co. *v.* American Solid Leather Button Co., 74 Fed. 864, 867, 21 C. C. A. 152.

77. Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796; Edwards *v.* Bates County, 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155.

The purchase-money with interest is the measure of recovery for the purposes of jurisdiction in an action for breach of warranty of title by the grantor, although if the amount demanded as damages is sufficiently large it will be held to be, exclusive of interest and costs, the amount in controversy. Brown *v.* Webster, 156 U. S. 328, 15 S. Ct. 377, 39 L. ed. 440.

78. Rogers *v.* Riley, 80 Fed. 759, debtor being liable for attorneys' fee by stipulation.

79. Kunkel *v.* Brown, 99 Fed. 593, 39 C. C. A. 665 (even though made under a mistake of fact); Ung Lung Chung *v.* Holmes, 98 Fed. 323 (provided the evidence sustains the pleadings); Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93; Healy *v.* Prevost, 11 Fed. Cas. No. 6,297, 6 Wkly. Notes Cas. (Pa.) 579 (holding also that where there is a bill of particulars that governs). See Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

This applies in actions for the recovery of money only (Greene County Bank *v.* J. H.

if the requisite jurisdictional facts are shown by the complaint it is sufficient;[80] and this applies to the allegations of a bill.[81] But the requisite jurisdictional facts must be shown[82] from the entire complaint;[83] and the averment must be certain,[84] although amendments may be allowed.[85] The use of the words "amount in dispute" instead of "matter in dispute" will not of itself be insufficient.[86] Again where the law gives no rule the plaintiff's demand must furnish one in determining the matter in dispute, although the amount of damages laid is not conclusive; but where the law does give the rule the legal cause of action and not the plaintiff's demand must be regarded.[87] The claim or demand of the plaintiff must, however, be made in good faith;[88] nor can the declaration on its face show bad faith and confer jurisdiction.[89] Nor for the mere purpose of conferring jurisdiction without reasonable foundation must the claim or demand be merely colorable,[90]

Teasdale Commission Co., 112 Fed. 801), in suits to recover damages, or those sounding in damages (Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84; Hulsecamp *v.* Teel, 12 Fed. Cas. No. 6,862, 2 Dall. (Pa.) 358, 1 L. ed. 414; Murphy *v.* Howard, 17 Fed. Cas. No. 9,949*a*, Hempst. 205; Sherman *v.* Clark, 21 Fed. Cas. No. 12,763, 3 McLean 91. See Hynes *v.* Briggs, 41 Fed. 468), or where the question of damages is appropriate for the determination of the jury (Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84, holding also that in such case no opinion of the court can justify holding the jurisdictional amount insufficient where a sufficient claim appears), where the damages in controversy are uncertain (American Wringer Co. *v.* Ionia, 76 Fed. 6), or where the amount is not fixed, but can be ascertained only by trial (Culver *v.* Crawford County, 6 Fed. Cas. No. 3,468, 4 Dill. 239, 4 N. Y. Wkly. Dig. 145), or in an action on a bond with a penalty (Martin *v.* Taylor, 16 Fed. Cas. No. 9,166, 1 Wash. 1; Postmaster-Gen. *v.* Cross, 19 Fed. Cas. No. 11,306, 4 Wash. 326. See Victor Sewing Mach. Co. *v.* Mingus, 28 Fed. Cas. No. 16,936. But see Cabot *v.* McMaster, 61 Fed. 129).

The mere ad damnum clause will not confer jurisdiction where the claim is one which plaintiff cannot be legally permitted to sustain by evidence to the extent of the jurisdictional amount. North America Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 20 S. Ct. 869, 44 L. ed. 1061 [*reversing* 85 Fed. 802].

80. Dakota Bldg., etc., Assoc. *v.* Price, 169 U. S. 45, 18 S. Ct. 251, 42 L. ed. 655; Maffet *v.* Quine, 93 Fed. 347, 95 Fed. 199; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397. See Holden *v.* Utah, etc., Mach. Co., 82 Fed. 209.

81. Illinois Cent. R. Co. *v.* Adams, 180 U. S. 28, 21 S. Ct. 251, 45 L. ed. 410; Interstate Bldg., etc., Assoc. *v.* Edgefield Hotel Co., 109 Fed. 692; Reese *v.* Zinn, 103 Fed. 97; Texas, etc., R. Co. *v.* Kuteman, 54 Fed. 547, 4 C. C. A. 503. As the pleading of plaintiff presenting his claim is the jurisdictional test as to the matter in dispute. West *v.* Woods, 18 Fed. 665.

82. Fishback *v.* Western Union Tel. Co., 161 U. S. 96, 16 S. Ct. 506, 40 L. ed. 630; Hagge *v.* Kansas City, etc., R. Co., 104 Fed. 391; Yellow Aster Min., etc., Co. *v.* Winchell, 95 Fed. 213; Harvey *v.* Raleigh, etc., R. Co., 89 Fed. 115; Less *v.* English, 85 Fed. 471, 29 C. C. A. 275 (averment must not be of a mere conclusion of law); New York Home Ins. Co. *v.* Nobles, 63 Fed. 641; Back *v.* Sierra Nevada Consol. Min. Co., 46 Fed. 673; Kenyon *v.* Knipe, 46 Fed. 309; Strasburger *v.* Beecher, 44 Fed. 209; U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708; Adams *v.* Douglas County, 1 Fed. Cas. No. 52, McCahon (Kan.) 235; Crawford *v.* Burnham, 6 Fed. Cas. No. 3,366, 1 Flipp. 116. See Cooper *v.* Preston, 105 Fed. 403.

83. Culver *v.* Crawford County, 6 Fed. Cas. No. 3,468, 4 Dill. 239, 4 N. Y. Wkly. Dig. 145.

If from the nature of the case as stated there would not legally be a judgment for the necessary jurisdictional amount jurisdiction cannot attach. Vance *v.* W. A. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. ed. 1111.

84. An allegation that the amount is unknown, but much more than two thousand dollars over and above certain claims, is insufficient to confer jurisdiction. Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225. See Murphy *v.* East Portland, 42 Fed. 308.

85. Whalen *v.* Gordon, 95 Fed. 305, 37 C. C. A. 70; Johnston *v.* Trippe, 33 Fed. 530; Davis *v.* Kansas City, etc., Co., 32 Fed. 863.

86. Blackburn *v.* Portland, etc., Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276.

87. Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438. See Texas, etc., R. Co. *v.* Kuteman, 54 Fed. 547, 4 C. C. A. 503.

Where the law liquidates the damages the amount so liquidated and not the amount claimed in the complaint constitutes the matter in dispute. Bergman *v.* Inman, 91 Fed. 293.

88. Interstate Bldg., etc., Assoc. *v.* Edgefield Hotel Co., 109 Fed. 692; Kunkel *v.* Brown, 99 Fed. 593, 39 C. C. A. 665; Ung Lung Chung *v.* Holmes, 98 Fed. 323; Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93.

89. Greene County Bank *v.* J. H. Teasdale Commission Co., 112 Fed. 801; Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621.

90. Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438 (holding also that what would be colorable depends upon the particular facts); American Wringer Co. *v.* Ionia City, 76 Fed. 6. See Greene County Bank *v.* J. H. Teasdale Commission Co., 112 Fed. 801.

fictitious,[91] or excessive.[92] Nor can the petition ignore a credit to which the defendant is entitled by agreement and the right to which is undisputed.[93]

(II) *Pleas, Answers, Denials, and Defenses; Recoupment, Set-Off, and Counter-Claim; Cross Bill.* In the absence of a plea to the jurisdiction,[94] an amendment in a bill of damages in excess of the jurisdictional sum, although denied by answer, is sufficient, in the absence of proof, to confer jurisdiction.[95] And where there is a sufficient allegation of the amount in controversy, the court is not ousted of jurisdiction by the fact that there is a good defense apparent on the face of the bill which will reduce said demand below the jurisdictional requirement;[96] nor is a sufficient demand defeated, although it appears on the bill that a portion of the claim is barred by the statute of limitations.[97] Again set-off, counter-claim, or recoupment may or may not affect the jurisdictional amount, and this is true as to matters set up in a cross bill.[98]

d. Waiver or Concession. A waiver may arise by failure to object in the pleadings[99] or jurisdiction may be conferred by a concession that the value of plaintiff's rights in controversy is sufficient therefor.[1]

e. Evidence. In the absence of evidence showing the demand or claim of plaintiff to be colorable or fictitious, it will confer jurisdiction if sufficient;[2] and in ejectment the value of the property may be shown at the trial to bring the case within jurisdiction, where such value is not stated in the pleadings.[3]

f. Recovery and Findings. Jurisdiction is not defeated by a recovery for less than the jurisdictional amount;[4] and this applies to a finding of less value.[5]

91. Arapahoe Bank *v.* Bradley, 72 Fed. 867, 19 C. C. A. 206.

92. Holden *v.* Utah, etc., Mach. Co., 82 Fed. 209. See Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621; Jones *v.* McCormick Harvesting Mach. Co., 82 Fed. 295, 27 C. C. A. 133.

93. Bedford Quarries Co. *v.* Welch, 100 Fed. 513.

94. If the plea is supported by undisputed testimony that the value of the land is much less than that alleged an order of dismissal will be entered. Simon *v.* House, 46 Fed. 317.

95. Pine *v.* New York City, 103 Fed. 337; Butchers, etc., Stock-Yards Co. *v.* Louisville, etc., R. Co., 67 Fed. 35, 14 C. C. A. 290.

Ex parte affidavits denying that the value is that alleged will not terminate jurisdiction, unless the fact is made to appear to the court's satisfaction. Put-in-Bay Waterworks, etc., Co. *v.* Ryan, 181 U. S. 409, 21 S. Ct. 709, 45 L. ed. 927.

Uncontradicted affidavits are sufficient. U. S. Express Co. *v.* Poe, 61 Fed. 475.

96. Interstate Bldg., etc., Assoc. *v.* Edgefield Hotel Co., 109 Fed. 692; Insurance Co. of North America *v.* Svendsen, 74 Fed. 346. This applies also to defense to part of the amount. Schunk *v.* Moline, 147 U. S. 500, 13 S. Ct. 416, 37 L. ed. 255.

97. Waterfield *v.* Rice, 111 Fed. 625, 49 C. C. A. 504.

98. Lee *v.* Continental Ins. Co., 74 Fed. 424 (counter-claim is to be added to amount sued for and is part of the matter in dispute); Bennett *v.* Forrest, 69 Fed. 421 (counter-claim; court not deprived of jurisdiction); Wheeler-Bliss Mfg. Co. *v.* Pickham, 69 Fed. 419 (set-off proved, the exact amount of which defendant did not know until trial; court retains jurisdiction); Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471 (cross bill should be dismissed where the amount claimed in the original bill is less than jurisdictional amount); Wolcott *v.* Sprague, 55 Fed. 545 (amount of a lien set up in a cross bill to a foreclosure suit is the amount in controversy which is not limited to the sum claimed in the original bill); Hellrigle *v.* Dulany, 11 Fed. Cas. No. 6,343, 4 Cranch C. C. 473 (debt reduced by offsets; judgment for sum found may be rendered). See also as to counter-claim for recoupment Pickham *v.* Wheeler-Bliss Mfg. Co., 77 Fed. 663, 23 C. C. A. 391.

99. Fitchett *v.* Blows, 74 Fed. 47, 20 C. C. A. 286.

1. Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648.

2. Von Schroeder *v.* Brittan, 93 Fed. 9; Horst *v.* Merkley, 59 Fed. 502. See Maxwell *v.* Atchison, etc., R. Co., 34 Fed. 286.

But if one of the causes is shown by plaintiff's evidence to have never had existence, jurisdiction is not supported where the remaining causes are of insufficient value.

3. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

4. Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632; Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621; Ung Lung Chung *v.* Holmes, 98 Fed. 323 (and so, even on plaintiff's own evidence); Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93.

5. Jones *v.* McCormick Harvesting Mach. Co., 82 Fed. 295, 27 C. C. A. 133. See Greene *v.* Tacoma, 53 Fed. 562; Hulsecamp *v.* Teel, 12 Fed. Cas. No. 6,862, 2 Dall. (Pa.) 358, 1 L. ed. 414; Murphy *v.* Howard, 17 Fed. Cas. No. 9,949*a*, Hempst. 205; Sherman *v.* Clark, 21 Fed. Cas. No. 12,763, 3 McLean 91.

E. Procedure and Conformity to State Practice — 1. In General — a. The Conformity Statute of 1872. By statute[6] it is provided that in the United States circuit and district courts the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.[7]

b. Condemnation Proceedings.[8] In condemnation proceedings substantial conformity with the practice of the state courts only is required.[9]

6. U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901 p. 684]; Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478. See U. S. Rev. Stat. (1878) § 646 [U. S. Comp. Stat. (1901) p. 523]; U. S. Rev. Stat. (1878) § 915 [U. S. Comp. Stat. (1901) p. 684]. See also Daniels *v.* Felt, 100 Fed. 727; McClellan *v.* Pyeatt, 50 Fed. 686, 1 C. C. A. 613; and cases cited *infra*, note 7 *et seq.*

It was intended to secure in each state one method of procedure in all common-law cases where a provision of a positive statute of the United States will not be invaded. Bills *v.* New Orleans, etc., R. Co., 3 Fed. Cas. No. 1,409, 13 Blatchf. 227.

Modes of procedure established by judicial construction of common-law remedies are not included. U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 983] confined the court to the practice, etc., established by state courts. Sanford *v.* Portsmouth, 21 Fed. Cas. No. 12,315, 2 Flipp. 105.

State statutes providing for discharge of plaintiff by the payment of money into court before answer are adopted by U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684]. Harris *v.* Hess, 10 Fed. 263, 20 Blatchf. 253.

State statutes will be rejected as to their subordinate provisions when the latter will unwisely encumber administration of the law or tend to defeat the ends of justice in the federal courts. Lowry *v.* Story, 31 Fed. 769.

Statutes of the several states regulating remedies by means of judicial proceedings are to be understood to apply only to proceedings in the courts of the particular states where adopted, unless it clearly appears that they were intended to have another scope. Majors *v.* Cowell, 51 Cal. 478.

Unconstitutional state statute cannot be regarded as furnishing a rule of practice. Chaffin *v.* Taylor, 116 U. S. 567, 6 S. Ct. 518, 29 L. ed. 727; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. ed. 200, 207; Chaffin *v.* Taylor, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. ed. 198; White *v.* Greenhow, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. ed. 199; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185.

While an anomalous proceeding at law may be brought in the federal court in the manner authorized by special act, yet if the special act is repealed the rule does not apply. Harvey *v.* Virginia, 20 Fed. 411.

7. U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684] should be construed in connection with section 918 allowing the federal courts to adopt rules of their own. Osborne *v.* Detroit, 28 Fed. 385.

The act only contemplates those rules of practice which are merely such, and does not intend those enactments of state legislation relating to practice which deprive them of the power to control the application of the rules of practice according to discretion. Mutual Bldg. Fund Soc., etc., Bank *v.* Bossieux, 17 Fed. Cas. No. 9,977, 1 Hughes 386.

For decisions under earlier conformity acts see Boyce *v.* Tabb, 18 Wall. (U. S.) 546, 21 L. ed. 757; Smith *v.* Cockrill, 6 Wall. (U. S.) 756, 18 L. ed. 973; U. S. *v.* Tillou, 6 Wall. (U. S.) 484, 18 L. ed. 920; Gaines *v.* Relf, 15 Pet. (U. S.) 9, 10 L. ed. 642; Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200; Livingston *v.* Story, 9 Pet. (U. S.) 632, 9 L. ed. 255; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732; Fullerton *v.* U. S. Bank, 1 Pet. (U. S.) 604, 7 L. ed. 280; Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658; *Ex p.* Biddle, 3 Fed. Cas. No. 1,391, 2 Mason 472; Binns *v.* Williams, 3 Fed. Cas. No. 1,423, 4 McLean 580; Brewster *v.* Gelston, 4 Fed. Cas. No. 1,853, 1 Paine 426; Butler *v.* Young, 4 Fed. Cas. No. 2,245, 1 Flipp. 276; Catherwood *v.* Gapete, 5 Fed. Cas. No. 2,513, 2 Curt. 94; Curtis *v.* Central R. Co., 6 Fed. Cas. No. 3,501, 6 McLean 401; Lane *v.* Townsend, 14 Fed. Cas. No. 8,054, 1 Ware 286; Pomeroy *v.* Manin, 19 Fed. Cas. No. 11,260, 2 Paine 476; Strachen *v.* Clyburn, 23 Fed. Cas. No. 13,520, 3 McLean 174; U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,395, 1 Abb. 495; Yaw *v.* Mead, 30 Fed. Cas. No. 18,129, 5 McLean 272. See also Majors *v.* Cowell, 51 Cal. 478.

8. See, generally, Eminent Domain.

9. U. S. *v.* Engeman, 45 Fed. 546; *In re* Secretary of Treasury, 45 Fed. 396, 11 L. R. A. 275.

Circuit court should not follow state statutes requiring condemnation commissioners to file a report in the county clerk's office, but the same should be filed in the office of the clerk of the circuit court. Luxton *v.* North River Bridge Co., 147 U. S. 337, 13 S. Ct. 356, 37 L. ed. 194.

Proceeding to ascertain compensation for land taken for public use is a suit at law within the constitution and acts of congress, notwithstanding a state statute as to appointment of commissioners, etc., unless a jury be demanded. Searl *v.* Lake County School Dist. No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. ed. 415.

c. Mandamus Proceedings.[10] The United States circuit courts have no jurisdiction to issue writs of mandamus except where the writ is ancillary to some other proceeding or in aid of existing jurisdiction;[11] but in issuing the writ practice should conform as near as possible to that of the state court.[12]

d. Limitation of Actions[13]**— Laches.**[14] Federal courts are not restricted by a state statute limiting the time for bringing creditors' suits to charge heirs, etc.,[15] and the bar of laches resulting from delay within the statutory time may be applied.[16]

e. Chancery or Equity Practice.[17] Federal courts in equity are precluded by the constitution from entertaining jurisdiction over or giving judgment upon a common-law demand, notwithstanding such a suit is authorized by the statutes of the state.[18] The chancery practice of said courts is derived directly from the English higher courts of chancery, and is not made to conform to, nor can their practice or jurisdiction as courts of equity be controlled by, the practice of the state courts, nor is it affected by state statutes giving remedies;[19] and their power and rules of decision are the same in all the states.[20] Nor can state statutes

State statute as to mode of procedure for condemnation applies in a federal court. U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441.

Trial by jury should be had in the circuit court if a trial by jury should be had by way of appeal under a state statute. Luxton *v.* North River Bridge Co., 147 U. S. 337, 13 S. Ct. 356, 37 L. ed. 194.

10. See, generally, MANDAMUS.

11. Rosenbaum *v.* Bauer, 120 U. S. 450, 7 S. Ct. 633, 30 L. ed. 743; Chickaming *v.* Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. ed. 307; Davenport *v.* Dodge County, 105 U. S. 237, 26 L. ed. 1018; Gares *v.* Northwest Nat. Bldg., etc., Assoc., 55 Fed. 209. See also Rusch *v.* Des Moines County, 21 Fed. Cas. No. 12,142, Woolw. 313. State statutes as to pleading and practice are not applicable to ancillary jurisdiction. U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,599, 2 Dill. 527.

12. Wisdom *v.* Memphis, 30 Fed. Cas. No. 17,903, 2 Flipp. 285. See Laird *v.* De Soto, 25 Fed. 76; Apperson *v.* Memphis, 1 Fed. Cas. No. 497, 2 Flipp. 363.

13. See, generally, LIMITATIONS OF ACTIONS.

14. See, generally, EQUITY.

15. Continental Nat. Bank *v.* Heilman, 81 Fed. 36.

A state statute limiting the time for presentation of claims cannot debar a federal court of jurisdiction of an action by a nonresident creditor against the executor or administrator of a decedent on a claim against his estate and cannot be applied to bar such an action in less than the full period during which the probate court might exercise its discretion. Security Trust Co. *v.* Dent, 104 Fed. 380, 43 C. C. A. 594.

16. Continental Nat. Bank *v.* Heilman, 86 Fed. 514, 30 C. C. A. 232, holding also that failure to proceed within such time may evidence laches.

17. See, generally, EQUITY; and *infra*, XII, F, 2, b.

18. Peacock, etc., Co. *v.* Williams, 110 Fed. 917.

19. Bronson *v.* Schulten, 104 U. S. 410, 26 L. ed. 997; Kendall *v.* Creighton, 23 How. (U. S.) 90, 16 L. ed. 419; Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Hudson *v.* Wood, 119 Fed. 764; Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. 970; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606; Fletcher *v.* New Orleans, etc., R. Co., 20 Fed. 345; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252; Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,516, 1 Cliff. 288; Cropper *v.* Coburn, 6 Fed. Cas. No. 3,416, 2 Curt. 465; Fletcher *v.* Morey, 9 Fed. Cas. No. 4,864, 2 Story 555; Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351; Gordon *v.* Hobart, 10 Fed. Cas. No. 5,609, 2 Sumn. 401; Lamson *v.* Mix, 14 Fed. Cas. No. 8,034; Mayer *v.* Foulkrod, 16 Fed. Cas. No. 9,341, 4 Wash. 349; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,999, McAll. 447. But see Gaines *v.* Chew, 2 How. (U. S.) 619, 11 L. ed. 402; Hale *v.* Continental L. Ins. Co., 12 Fed. 359, 20 Blatchf. 515.

Jurisdiction in equity is derived from and defined by the constitution and laws of the United States and is not affected or varied by state statutes. Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278; Strettell *v.* Ballou, 9 Fed. 256, 3 McCrary 46. But see Gaines *v.* Relf, 15 Pet. (U. S.) 9, 10 L. ed. 642; Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200.

20. Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278; Boyle *v.* Zacharie, 6 Pet. (U. S.) 648, 8 L. ed. 532; U. S. *v.* Howland, 4 Wheat. (U. S.) 108, 4 L. ed. 526; and cases cited *supra*, note 7.

Federal courts are regulated in equity by the judiciary acts and rules of equity practice. U. S. *v.* American Bell Tel. Co., 29 Fed. 17; Gaines *v.* New Orleans, 27 Fed. 411.

In those states where no chancery powers exist the equity powers of the federal courts are the same as in other states. Lorman *v.* Clarke, 15 Fed. Cas. No. 8,516, 2 McLean 568. See Livingston *v.* Story, 9 Pet. (U. S.) 632, 9 L. ed. 255. And examine Gaines *v.* Relf, 15 Pet. (U. S.) 9, 10 L. R. A. 642.

restrict or limit the equity powers of the federal courts, with this proviso, however, that state statutory provisions may be justly observed to the extent to which the court is authorized to exercise a discretion within the general rules of equity jurisprudence.[21] And such courts decide for themselves whether for an actual or threatened invasion of a conceded right equity may afford relief.[22] If, however, state statutes enlarge equitable rights by creating new remedies these may be enforced in the equity courts of the United States when not in conflict with constitutional rights.[23] Again within the rule that equity jurisdiction of the federal courts cannot be limited by state legislation, a mortgage may be foreclosed in said courts.[24] Said courts have also jurisdiction over injunctions;[25] over creditors' bills, or suits which are in the nature of, or substantially such bills, and over supplementary proceedings, notwithstanding state statutes;[26] over wills, probate,

21. Cowley *v.* Northern Pac. R. Co., 159 U. S. 569, 16 S. Ct. 127, 40 L. ed. 263. See also Massachusetts Ben. L. Assoc. *v.* Lohmiller, 74 Fed. 23, 20 C. C. A. 274; Ray *v.* Tatum, 72 Fed. 112, 18 C. C. A. 464; Gamewell Fire-Alarm Tel. Co. *v.* New York City, 31 Fed. 312; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606; Parsons *v.* Lyman, 18 Fed. Cas. No. 10,780, 32 Conn. 566, 5 Blatchf. 170.

Federal courts exercise their discretion as to following the practice of the state equity courts within the district where the questions arise. Deprez *v.* Thomson-Houston Electric Co., 66 Fed. 22.

Federal courts of equity may follow the rule of the statute of a state as to passing title to real estate. A. G. W. Sprague Mfg. Co. *v.* Hoyt, 29 Fed. 421.

Illustrations.— The federal courts in matters of equitable cognizance are not required to administer property under state laws as to receivers regulating claims of employees, their classification and privity, and distribution of funds. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150. Nor are the courts affected by modifications of the general practice which have grown up in the various states even in respect to land titles. Thomas *v.* Nantahala Marble, etc., Co., 58 Fed. 485, 7 C. C. A. 330. They may foreclose a mechanic's lien in equity, even though a state statute gives an action at law. Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574, 13 S. Ct. 936, 37 L. ed. 853. So an award may be set aside on the ground of misconduct of arbitrators. Missouri, etc., R. Co. *v.* Elliott, 56 Fed. 772. But a federal court of equity is not governed by a state statute as to a married woman suing in her own name. Wills *v.* Pauly, 51 Fed. 257. Nor can a special remedy in equity created by a state statute be enforced in a federal court where an adequate remedy at law exists. Whitehead *v.* Entwhistle, 27 Fed. 778. Nor will the equity court take cognizance of a cause by and consent to jurisdiction upon agreed facts. Nickerson *v.* Atchison, etc., R. Co., 30 Fed. 85. Nor are the circuit courts governed by the code as to dismissal of causes in the state courts. Scully *v.* Chicago, etc., R. Co., 46 Iowa 528. Nor is equitable jurisdiction defeated by the fact that the plaintiff may have redress by mandamus in the state court. Wheeling *v.* Baltimore, 29 Fed. Cas. No. 17,502, 1 Hughes 90.

22. General Electric R. Co. *v.* Chicago, etc., R. Co., 107 Fed. 771, 46 C. C. A. 629.

23. Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719 [*affirming* 45 Fed. 706]; Kieley *v.* McGlynn, 21 Wall. (U. S.) 503, 22 L. ed. 599; Southern Pine Co. *v.* Hall, 105 Fed. 84, 44 C. C. A. 363; Wells *v.* Miner, 25 Fed. 533; Lanmon *v.* Clark, 14 Fed. Cas. No. 8,071, 4 McLean 18. But see Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417.

24. Ray *v.* Tatum, 72 Fed. 112, 18 C. C. A. 464; Dow *v.* Chamberlin, 7 Fed. Cas. No. 4,037, 5 McLean 281. But see Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. 814.

Louisiana decisions.— In an equity foreclosure in the federal court in said state the state practice should be complied with as nearly as possible. Nalle *v.* Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560. See Ridings *v.* Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401; Benjamin *v.* Cavaroc, 2 Fed. Cas. No. 1,300, 2 Woods 168.

25. Ames *v.* Union Pac. R. Co., 64 Fed. 165.

Injunctions granted by federal courts are special and will not be granted as of course. Perry *v.* Parker, 19 Fed. Cas. No. 11,010, 1 Woodb. & M. 280. See Szymanski *v.* Zunts, 20 Fed. 361.

May receive a bond for indemnity for an injunction under the general principles of equity. Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 4 Fed. 688, 2 McCrary 260.

26. Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052 [*reversing* 39 Fed. 865]; U. S. *v.* Howland, 4 Wheat. (U. S.) 108, 4 L. ed. 526; Young *v.* Aronson, 27 Fed. 241; Frazer *v.* Colorado Dressing, etc., Co., 5 Fed. 163, 2 McCrary 11; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252.

Federal courts will and may, however, enforce or follow local modes of procedure or state statutes giving the benefit of special proceedings or regulations or practice, in such suits or proceedings. *Ex p.* Boyd, 105 U. S. 647, 26 L. ed. 1200; Flash *v.* Wilkerson, 22 Fed. 689; Lanmon *v.* Clark, 14 Fed. Cas. No. 8,071, 4 McLean 18; Lorman *v.* Clarke, 15 Fed. Cas. No. 8,516, 2 McLean 568; Suydam *v.* Beals, 23 Fed. Cas. No. 13,653, 4 McLean 12.

administration and estates of deceased persons, ineffectual by state statutes;[27] over partition suits;[28] and over bills to quiet title to land, or to remove a cloud therefrom, and the federal court may follow the state statute or apply the enlarged remedy thereunder.[29]

f. Criminal Causes.[30] The criminal laws of the United States are to be enforced by the federal judiciary without any regard to the criminal laws of the state in which the court is sitting or the nature of the crime under the state laws,[31] although a commissioner of the circuit court who acts as a committing magistrate must proceed according to the state law in similar cases.[32] And upon the trial of an indictment for murder removed to the federal court, the accused is called to answer to the offense as defined by the state laws.[33]

Proceedings supplementary to execution cannot be resorted to in a federal court. Byrd *v.* Badger, 4 Fed. Cas. No. 2,266, McAll. 443. But see *Ex p.* Boyd, 105 U. S. 647, 26 L. ed. 1200.

Simple contract creditors or those whose claims have not been reduced to payments have no standing in federal courts. England *v.* Russell, 71 Fed. 818; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417, such creditor must first have exhausted his legal remedy. See also Gates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 37 L. ed. 804; Atlanta, etc., R. Co. *v.* Alabama Western R. Co., 50 Fed. 790, 1 C. C. A. 676; U. S. *v.* Ingate, 48 Fed. 251 [*following* Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358]. But see Buford *v.* Holley, 28 Fed. 680.

27. Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532; Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225; Hull *v.* Dills, 19 Fed. 657; Pulliam *v.* Pulliam, 10 Fed. 23; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95. And the jurisdiction as courts of chancery over estates of deceased persons when the other conditions of federal jurisdiction exist and the state courts have not acquired exclusive jurisdiction cannot be abridged by a state law. Hershberger *v.* Blewett, 55 Fed. 170. So if nothing has been done in the probate court of exclusive jurisdiction except to file an assignment and give bond an objection to the jurisdiction of the circuit court cannot be sustained. George T. Smith Middlings Purifier Co. *v.* McGroarty, 136 U. S. 237, 10 S. Ct. 1017, 34 L. ed. 346. But see Cilley *v.* Patten, 62 Fed. 498; Sowles *v.* St. Albans First Nat. Bank, 54 Fed. 564.

No state has power to enact a statute which will impair the general equity jurisdiction of the circuit federal court to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction. Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279.

28. Klever *v.* Seawall, 65 Fed. 393, 12 C. C. A. 661. See McClaskey *v.* Barr, 48 Fed. 130.

Cannot hear partition suits on the law side. Klever *v.* Seawall, 65 Fed. 393, 12 C. C. A. 661.

Where title is denied federal courts of equity cannot entertain a partition suit, although a state statute permits equity cognizance. American Assoc. *v.* Eastern Kentucky Land Co., 68 Fed. 721.

29. Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719 [*affirming* 45 Fed. 706]; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733; Southern Pine Co. *v.* Hall, 105 Fed. 84, 44 C. C. A. 363; Prentice *v.* Duluth Storage, etc., Co., 58 Fed. 437, 7 C. C. A. 293; Sage *v.* Winona, etc., R. Co., 58 Fed. 297, 7 C. C. A. 237; Bowdoin College *v.* Merritt, 54 Fed. 55; Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402; Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263; Land, etc., Imp. Co. *v.* Bardon, 45 Fed. 706. See Holland *v.* Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. ed. 52; Partee *v.* Thomas, 11 Fed. 769. But examine Gordan *v.* Jackson, 72 Fed. 86.

30. See, generally, CRIMINAL LAW; and *infra*, XII, F, 1, d; XII, F, 2, c.

31. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,250, 2 Curt. 637.

Common law governs federal courts on questions of criminal practice not regulated by act of congress. U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

Criminal trials are not trials at common law within the meaning of those words in the Revised Statutes as to laws of the state being rules of decision as to the competency of witnesses in the courts of the United States. Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]; U. S. *v.* Hall, 53 Fed. 352. See U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235; U. S. *v.* Hawthorne, 26 Fed. Cas. No. 15,332, 1 Dill. 422.

32. U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90. Proceedings before such commissioners shall be agreeably to the usual mode of process in the state where they are appointed and the proceedings for holding persons accused of crime are to be assimilated to the state proceedings where such court is held. U. S. *v.* Harden, 10 Fed. 802, 4 Hughes 455.

33. Georgia *v.* O'Grady, 10 Fed. Cas. No. 5,352, 3 Woods 496. See U. S. *v.* Van Leuven, 65 Fed. 78, that judge should charge against uncorroborated testimony under state law.

In respect to the allowance of challenges to the jury in criminal cases, federal courts are not bound to follow the practice of state courts, the primary consideration being, by whatever mode of challenging adopted, to secure challenging. U. S. *v.* Davis, 103 Fed. 457.

2. Rules of Court, Forms of Action and Course of Procedure — a. Rules of Court. Every court possesses the power to make its own rules of practice, unless forbidden by law,[34] and the Judiciary Act[35] vests this power in the courts of the United States; but such rules must not be repugnant to law,[36] and a rule may be established by a long course of practice without adoption in writing.[37] Again, notwithstanding the object of the conformity act[38] was to give suitors in the federal courts the advantages of legislative remedies in the respective states by establishing a general uniformity in federal and state proceedings, nevertheless a discretion as to such uniformity was vested in said courts to be exercised by adopting rules regulating their own practice from time to time as might be most convenient and necessary, having in view the prevention of delays and the advancement of justice.[39]

34. Golden *v.* Prince, 10 Fed. Cas. No. 5,509, 3 Wash. 313.

35. U. S. Rev. Stat. (1878) § 918 [U. S. Comp. Stat. (1901) p. 695].

36. Golden *v.* Prince, 10 Fed. Cas. No. 5,509, 3 Wash. 313; Konihg *v.* Bayard, 14 Fed. Cas. No. 7,924, 2 Paine 251; Teese *v.* Phelps, 23 Fed. Cas. No. 13,818, McAll. 17. See also Amis *v.* Smith, 16 Pet. (U. S.) 303, 10 L. ed. 973.

U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684] only adopts such rules of statutes practice as are not inconsistent with any other act of congress. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

Between the act of May 8, 1792 (1 U. S. Stat. at L. 275) and the act of June 1, 1872 (U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684]) federal courts might by general rules adopt their practice to exigencies and conditions of the times; the latter act, however, required conformity in pleadings, forms and modes of proceedings, etc., to practice of statute courts subject to acts of congress. Amy *v.* Watertown, 130 U. S. 301, 9 S. Ct. 530, 32 L. ed. 946.

Circuit courts may adopt a rule of practice of state courts of the district from which a case has been removed, although the circuit court of that district had never adopted such a rule. Lee County *v.* U. S., 7 Wall. (U. S.) 175, 19 L. ed. 162. And a rule of said court adopting the forms of pleading and practice in the state courts makes the forms of the state courts govern in common-law cases concerning which the supreme court has prescribed no rules. Teese *v.* Phelps, 23 Fed. Cas. No. 13,818, McAll. 17. But circuit court rules when inconsistent with supreme court rules cannot control the latter. U. S. Bank *v.* White, 8 Pet. (U. S.) 262, 8 L. ed. 938. Again circuit court rules as to return of writs and docketing suits are not abrogated hy the passage of a state statute providing differently. Ewing *v.* Burnham, 74 Fed. 384.

Supreme court.— Rules established by the supreme court pursuant to law have the force of law (Seymour *v.* Phillips, etc., Constr. Co., 21 Fed. Cas. No. 12,689, 7 Biss. 460); but they are rules of practice, and not of decision (The Selt, 21 Fed. Cas. No. 12,649, 3 Biss. 344). And rules for the government of said court and of subordinate courts are held to be unaffected by state legislation (Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278); and said court may by rule regulate the manner of taking bail (Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424).

Equity.— The supreme court has the power to prescribe the forms of writs and process and to regulate the whole practice in suits in equity in the circuit courts; hut any circuit court may, in any manner not inconsistent with any law of the United States or any rule prescribed hy the supreme court, regulate its own practice to advance justice. Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200; McDonald *v.* Smalley, 1 Pet. (U. S.) 620, 7 L. ed. 287; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138; Martindale *v.* Waas, 11 Fed. 551, 3 McCrary 637. See Poultney *v.* Lafayette, 12 Pet. (U. S.) 472, 9 L. ed. 1161. And examine Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424; Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569.

When supreme court rules do not apply the practice of the circuit and district courts has been held to be regulated by the practice of the high court of chancery in England. Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200. See Northwestern Mut. L. Ins. Co. *v.* Keith, 77 Fed. 374, 23 C. C. A. 196; Gaines *v.* Relf, 15 Pet. (U. S.) 9, 10 L. ed. 642. Examine Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226.

Federal courts should follow rules of state courts in questions relating solely to a subject-matter within state control. Kowalski *v.* Chicago Great Western R. Co., 84 Fed. 586.

37. Citizens' Bank *v.* Farwell, 56 Fed. 570, 6 C. C. A. 25 (holding also that it will be presumed on appeal that such a rule has been adopted hy the trial court when necessary to sustain its judgment and there is no showing to the contrary); Koning *v.* Bayard, 14 Fed. Cas. No. 7,924, 2 Paine 251; U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,395, 1 Abb. 495.

38. U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684].

39. Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602. See Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

Subsequent changes in the practice of state courts are not embraced in a rule adopting such practice, and a departure from rules so previously adopted is unauthorized. *In re*

b. Forms of Action. The distinctions between law and equity are observed in the federal courts, notwithstanding state statutes relating either to the forms of procedure, to the joinder of legal and equitable causes of action, or to the litigation of matters of equity in an action at law; and the federal statute requiring conformity, etc., to state practice[40] does not render the adoption of such statutory provisions of the state necessary. The underlying, controlling, and constantly asserted principle being this, that the jurisdiction of a federal court of equity cannot be abridged by a state statute giving a remedy at law, even when such remedy is adequate and complete, there being no special ground for equitable interposition;[41] nor is the rule different because a suit has been removed from a state court.[42] The rule also precludes equitable defenses to actions at law.[43] The rule does not, however, prevent cognizance of remedies afforded by state courts.[44]

c. Course of Procedure — (i) *General and Particular Rules.* Whether a state mode of procedure must or will be followed or not in the federal court rests upon the nature and character of the remedy or cause of action, having in view the preceding principles and rules as well as the Revised Statutes of the United States,[45] and also the fact whether the state practice depends upon statute or is merely established by decision of the state supreme court as the proper mode

Craig, 6 Fed. Cas. No. 3,325, Pet. C. C. 1. See Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602, as to changing rules to conform to later state statutes.

40. U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684].

41. Lindsay *v.* Shreveport First Nat. Bank, 156 U. S. 485, 15 S. Ct. 472, 39 L. ed. 505; Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052 [*reversing* 39 Fed. 865]; Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Walker *v.* Dreville, 12 Wall. (U. S.) 440, 20 L. ed. 429; Thompson *v.* Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Schmidt *v.* West, 104 Fed. 272; Berkey *v.* Cornell, 90 Fed. 711; Alderson *v.* Dole, 74 Fed. 29, 20 C. C. A. 280; U. S. *v.* Swan, 65 Fed. 647, 13 C. C. A. 77; Union Pac. R. Co. *v.* U. S., 59 Fed. 813, 8 C. C. A. 282 [*reversing* 50 Fed. 28]; Hirsh *v.* Jones, 56 Fed. 137; De la Vergne Refrigerating Mach. Co. *v.* Montgomery Brewing Co., 46 Fed. 829; Duncan *v.* Greenwalt, 10 Fed. 800, 3 McCrary 378; Hall *v.* Yahoola River Min. Co., 11 Fed. Cas. No. 5,955, 1 Woods 544; Shuford *v.* Cain, 22 Fed. Cas. No. 12,823, 1 Abb. 302.

Circuit court will follow a state law transferring a cause to the proper docket, after demurrer sustained giving leave to amend the pleadings if necessary. U. S. Bank *v.* Lyon County, 48 Fed. 632.

Federal court followed the state practice as nearly as possible, retaining the separate forms of action in Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 7, 3 L. R. A. 189.

Question whether legal or equitable remedies shall be adopted is determined by the nature of the case, and not by state practice or legislation. Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574, 13 S. Ct. 936, 37 L. ed. 853.

42. Hill *v.* Northern Pac. R. Co., 104 Fed. 754; Elliott *v.* Shuler, 50 Fed. 454 (must on removal be placed on law docket if not within any recognized head of equity); Hunton *v.* Equitable L. Assur. Soc., 45 Fed. 661.

43. Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; Jewett Car Co. *v.* Kirkpatrick Constr. Co., 107 Fed. 622; Daniel *v.* Felt, 100 Fed. 727; Schoolfield *v.* Rhodes, 82 Fed. 153, 27 C. C. A. 95; Davis *v.* Davis, 72 Fed. 81, 18 C. C. A. 438; Johnson *v.* Merry Mt. Granite Co., 53 Fed. 569; Herklotz *v.* Chase, 32 Fed. 433; Church *v.* Spiegelburg, 31 Fed. 601, 24 Blatchf. 540; Butler *v.* Young, 4 Fed. Cas. No. 2,245, 1 Flipp. 276; Montejo *v.* Owen, 17 Fed. Cas. No. 9,722, 14 Blatchf. 324.

44. Substituted form of action for ejectment existing in a state court may be maintained in a circuit court. Sears *v.* Eastburn, 10 How. (U. S.) 187, 13 L. ed. 381.

Complainant is not entitled to claim greater equitable relief than is afforded by state courts. Ewing *v.* St. Louis, 5 Wall. (U. S.) 413, 18 L. ed. 657.

Ejectment in favor of a riparian owner to prevent interference with his rights, when recognized by a state court, will be sustained as a proper one by the supreme court on writ of error to the state court (Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126 [*affirming* 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484]); but the fact that ejectment may be based in some of the states on an equitable title cannot confer jurisdiction on federal courts to try ejectment on such titles (Hooper *v.* Scheimer, 23 How. (U. S.) 235, 16 L. ed. 452; Fenn *v.* Holme, 21 How. (U. S.) 481, 16 L. ed. 198).

Federal court can only maintain an action for recovery of land on a legal title, although under a state statute actions of ejectment and trespass to try title can be made on equitable titles. Sheirburn *v.* De Cordova, 24 How. (U. S.) 423, 16 L. ed. 741.

If a new liability under a state statute is created, it need not necessarily be enforced in a suit in equity in the federal court. National Park Bank *v.* Peavey, 64 Fed. 912.

45. Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407, 105 Fed. 659, 44 C. C. A. 653 (holding that a local practice permitting a

of procedure under the common law.[46] Again, where that which is provided for by state statute is not a rule of property or of practice and procedure, it is not within the conformity statute of the United States and not binding;[47] nor does the statute[48] adopting state practice, pleadings, and procedure apply in respect to matters upon which congress has prescribed a definite rule by a controlling act;[49] nor in a case where there are no like causes in state practice, or to courts over which the United States courts have exclusive jurisdiction;[50] nor to the personal conduct and administration of the judge in the discharge of his separate functions on the trial of a cause.[51] Nor does the conformity enactment bind the federal courts to rigidly follow all subordinate requirements of state practice, or abridge their right and duty to disregard niceties of form which in their judgment would unwisely encumber the administration of the law, or prevent their postponement of decisions on questions to a subsequent stage of the proceedings, where no substantial right will thereby be denied;[52] nor where an act of congress prescribes a mode "according to common usage" need the federal courts adopt all new regulations that may be enacted by state legislation, or adopted by state practice, although such courts are permitted by a later act to follow the mode prescribed by state laws "in addition" to the former method.[53]

(II) *Application of Rules.* The rules just stated, with their qualifications and exceptions, include the entire procedure in a cause from its commencement to its final disposition; accordingly these rules have been invoked and the extent of their application determined with respect to process[54] and service or execution

specified course of procedure may be followed by the federal courts of the state); Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33 (federal courts recognize no lien at common law in behalf of an attorney except that given by the local courts); New York City Bank *v.* Skelton, 5 Fed. Cas. No. 2,740, 2 Blatchf. 26 (federal circuit courts may control and stay actions pending before them, either by order on the common-law side of the court or by injunction on the equity side.

46. Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129.

47. Byrne *v.* Kansas City, etc., R. Co., 55 Fed. 44. See Hughey *v.* Sullivan, 80 Fed. 72.

48. U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684]. See also 27 U. S. Stat. at L. 7 [U. S. Comp. Stat. (1901) p. 664]; U. S. Rev. Stat. (1878) §§ 649, 700, 721, 724, 812, 858, 861, 863, 870, 915, 916, 985 [U. S. Comp. Stat. (1901) pp. 525, 570, 581, 583, 627, 659, 661, 665, 684, 707].

Several provisions of the Revised Statutes being in pari materia (U. S. Rev. Stat. (1878) §§ 914, 918, 954 [U. S. Comp. Stat. (1901) pp. 684, 685, 696]) and included in the codification of June 22, 1874, must be construed together. Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

The identity required is only in "practice, pleadings, and forms and modes of proceeding," under U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684]. Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286.

As to rights of federal courts prior to June 1, 1872, see Amy *v.* Watertown, 130 U. S. 301, 9 S. Ct. 530, 32 L. ed. 946.

49. Allnut *v.* Lancaster, 76 Fed. 131. See also National Cash Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372; Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553; U. S. *v.* National Lead Co., 75 Fed. 94; Easton *v.* Hodges, 8 Fed. Cas. No. 4,258, 7 Biss. 324.

Proceedings to restore records must conform to the act of congress regulating the same, and not to the state statute. Turner *v.* Newman, 24 Fed. Cas. No. 14,262, 3 Biss. 307.

50. U. S. *v.* Fifty Boxes and Packages of Lace, 92 Fed. 601; Marvin *v.* Aultman, 46 Fed. 338.

51. Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286.

52. Kent *v.* Bay State Gas Co., 93 Fed. 887.

53. U. S. *v.* Fifty Boxes and Packages of Lace, 92 Fed. 601, construing U. S. Rev. Stat. 1878) § 866 [U. S. Comp. Stat. (1901) p. 663]. And see Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602.

An act of congress may permit the adoption of subsequent legislation on the same subject. Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209, construing U. S. Rev. Stat. (1878) § 916 [U. S. Comp. Stat. (1901) p. 684]. And see Lamaster *v.* Keeler, 123 U. S. 376, 8 S. Ct. 197, 31 L. ed. 238.

54. Gillum *v.* Stewart, 112 Fed. 30, except as to signature. See also U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,395, 1 Abb. 495.

Process generally see PROCESS.

But U. S. Rev. Stat. (1878) § 911 [U. S. Comp. Stat. (1901) p. 683] is not abrogated by the Conformity Act. Martin *v.* Criscuola, 16 Fed. Cas. No. 9,159, 10 Blatchf. 211. See also to same effect Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305.

Federal circuit court may devise process for bringing any person before it who has committed an offense of which it has cognizance, without reference to process given by state law. U. S. *v.* Burr, 25 Fed. Cas. No.

thereof;[55] with respect to attachment;[56] with respect to garnishment; with respect to foreign attachment;[57] with respect to the removal of causes by writ of error from one federal court to another;[58] with respect to parties,[59]

14,694. See also Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138.

55. Amy *v.* Watertown, 130 U. S. 301, 9 S. Ct. 530, 32 L. ed. 946; Bentlif *v.* London, etc., Finance Corp., 44 Fed. 667 (for void service suit may be dismissed after removal); Lowry *v.* Story, 31 Fed. 769. And see Cortes Co. *v.* Thannauser, 9 Fed. 226, 20 Blatchf. 59. But see Schwabacker *v.* Reilly, 21 Fed. Cas. No. 12,501, 2 Dill. 127.

Return should show affirmatively that the subpœna was served within the district in which suit was brought. Thayer *v.* Wales, 23 Fed. Cas. No. 13,872.

In suits of a local nature to enforce a lien, a non-resident defendant must be brought in by order made in accordance with the provisions of the act of March 3, 1875, § 8, and not by service under U. S. Rev. Stat. (1878) § 741 [U. S. Comp. Stat. (1901) p. 588]. Seybert *v.* Shamokin, etc., Electric R. Co., 110 Fed. 810.

Constructive service on non-residents.—Parsons *v.* Howard, 18 Fed. Cas. No. 10,777, 2 Woods 1.

Service by publication.— Bronson *v.* Keokuk, 4 Fed. Cas. No. 1,928, 2 Dill. 498; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

Service on a non-resident corporation cannot be authorized where the relief sought is general and not *in rem*, and not one to enforce a claim to, or lien upon, property within the district, within the meaning of section 8, of the act of March 3, 1875. Eldred *v.* American Palace-Car Co., 105 Fed. 455, 45 C. C. A. 1.

The rules of procedure prescribed by a state for obtaining service upon a foreign corporation doing business therein govern the federal courts, and service as so prescribed confers jurisdiction upon such courts (McCord Lumber Co. *v.* Doyle, 97 Fed. 22, 38 C. C. A. 34; Union Associated Press *v.* Times Printing Co., 83 Fed. 822; Dinzy *v.* Illinois Cent. R. Co., 61 Fed. 49; Van Dresser *v.* Oregon R., etc., Co., 48 Fed. 202; Eaton *v.* St. Louis Shakspear Min., etc., Co., 7 Fed. 139, 2 McCrary 362; Brownell *v.* Troy, etc., R. Co., 3 Fed. 761, 18 Blatchf. 243; Fonda *v.* British-American Assur. Co., 9 Fed. Cas. No. 4,904; Schollenberger *v.* Forty-five Foreign Ins. Cos., 21 Fed. Cas. No. 12,475*a*, 5 Wkly. Notes Cas. (Pa.) 405. *Contra*, see Dallmeyer *v.* Farmers', etc., F. Ins. Co., 6 Fed. Cas. No. 3,546; Pomeroy *v.* New York, etc., R. Co., 19 Fed. Cas. No. 11,261, 4 Blatchf. 120), subject to the limitation that such courts will determine for themselves whether the prescribed mode violates defendant's fundamental rights not to be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction without a fair and reasonable notice (McCord Lumber Co. *v.* Doyle, 97 Fed. 22, 38 C. C. A. 34). And *compare* Cady *v.* Associated Colonies, 119 Fed. 420.

56. Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70 (under U. S. Rev. Stat. (1878) § 915 [U. S. Comp. Stat. (1901) p. 684], the method of making and prosecuting attachments in a federal court is governed by the state laws, either those in force when the statute was enacted, or such as have been subsequently enacted and adopted by rule of court); Perkins *v.* Hendryx, 40 Fed. 657 (attachment in state court, with no personal service on non-resident, does give jurisdiction to federal court on removal); Harland *v.* United Lines Tel. Co., 40 Fed. 308, 6 L. R. A. 252.

Attachment generally see ATTACHMENT.

Attachment dissolved under a state statute is dissolved in the federal court. Bates *v.* Days, 17 Fed. 167, 5 McCrary 342; Mather *v.* Nesbit, 13 Fed. 872, 4 McCrary 505, under U. S. Rev. Stat. (1878) §§ 915, 933 [U. S. Comp. Stat. (1901) pp. 684, 689].

Decision of the highest state court that an attachment is void, if the declaration is demurrable, necessitates that the attachment be quashed by the circuit court. Baltimore Third Nat. Bank *v.* Teal, 5 Fed. 503, 4 Hughes 572.

Joinder of debts in attachment without regard to state practice see Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248; O'Connell *v.* Reed, 56 Fed. 531, 5 C. C. A. 586.

57. Atlantic, etc., R. Co. *v.* Hopkins, 94 U. S. 11, 24 L. ed. 48; Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658; Randolph *v.* Tandy, 98 Fed. 939, 39 C. C. A. 351; Citizens' Bank *v.* Farwell, 56 Fed. 570, 6 C. C. A. 24; Guillon *v.* Fountain, 11 Fed. Cas. No. 5,861, 32 Leg. Int. (Pa.) 362; Springer *v.* Foster, 22 Fed. Cas. No. 13,265, 1 Story 601. But *compare* Central Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685; U. S. *v.* Swan, 65 Fed. 647, 13 C. C. A. 77; Booth *v.* Denike, 65 Fed. 43.

Garnishment generally see GARNISHMENT.

58. The manner or time of taking proceedings is regulated exclusively by act of congress, or if there be none such, then the rules and practice of federal courts or the methods derived from the common law or from ancient English statutes obtain. *In re* Chateaugay Ore, etc., Co., 128 U. S. 544, 9 S. Ct. 150, 32 L. ed. 508. See, generally, APPEAL AND ERROR.

59. New York Continental Jewell Filtration Co. *v.* Sullivan, 111 Fed. 179 (U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684]); Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407, 105 Fed. 659, 44 C. C. A. 653; Nederland L. Ins. Co. *v.* Hall, 84 Fed. 278, 27 C. C. A. 390; Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78; Allnut *v.* Lancaster, 76 Fed. 131; Hearfield *v.* Bridge, 67 Fed. 333; Morning Journal Assoc. *v.* Smith, 56 Fed. 141, 4 C. C. A. 8; Dexter, etc., Co. *v.* Sayward, 51 Fed. 729.

Parties generally see PARTIES.

appearance,[60] and pleadings;[61] with respect to matters of abatement and revival;[62] with respect to impaneling jurors,[63] etc.; with respect to the right of trial by jury or by the court without a jury;[64] with respect to continuances[65] and discontinuances;[66] with respect to references;[67] with respect to trial,[68] evidence,[69]

In bringing in absent parties, where a suit is in effect one to remove an encumbrance or cloud or lien upon title upon corporate property, a circuit court may summon in absent defendants and exercise jurisdiction under section 8 of the act of March 3, 1875. Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. ed. 178.

60. Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942.

Appearances generally see APPEARANCES.

61. Coffey *v.* U. S., 117 U. S. 233, 6 S. Ct. 717, 29 L. ed. 890; Rush *v.* Newman, 58 Fed. 158, 7 C. C. A. 136; Lewis *v.* Gould, 15 Fed. Cas. No. 8,324, 13 Blatchf. 216. And see Roberts *v.* Langenbach, 119 Fed. 349, 56 C. C. A. 253.

Pleading generally see PLEADING.

Complaint or declaration.— Evans *v.* Union Pac. R. Co., 58 Fed. 497.

Bill, petition, or complaint in equity.— Quincy *v.* Steel, 120 U. S. 241, 7 S. Ct. 520, 30 L. ed. 624; Phelps *v.* Elliott, 26 Fed. 881, 23 Blatchf. 470.

Sufficiency of a bill brought under a special act of congress against a particular corporation and others must be determined by the provisions of said statute, which is exclusive. U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

Amendments.— North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584; Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282; Hodges *v.* Kimball, 91 Fed. 845, 34 C. C. A. 103.

Plea to jurisdiction need not necessarily be united with a plea to merits, and the fact that an objection to jurisdiction is called a "plea in abatement," although properly designated in state practice as "answer," is no reason for striking it out. Jones *v.* Rowley, 73 Fed. 286.

Demurrer.— Quincy *v.* Steel, 120 U. S. 241, 7 S. Ct. 520, 30 L. ed. 324; Kent *v.* Bay State Gas Co., 93 Fed. 887; O'Connell *v.* Reed, 56 Fed. 531, 5 C. C. A. 586; Woodward *v.* Gould, 28 Fed. 736.

62. Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129; Byrne *v.* Kansas City, etc., R. Co., 55 Fed. 44; McArthur *v.* Williamson, 45 Fed. 154; Fitzpatrick *v.* Domingo, 14 Fed. 216, 4 Woods 163; Barker *v.* Ladd, 2 Fed. Cas. No. 990, 3 Sawy. 44; Ferguson *v.* Lambert, 8 Fed. Cas. No. 4,739; Hatfield *v.* Bushnell, 11 Fed. Cas. No. 6,211, 22 Vt. 659, 1 Blatchf. 393.

Abatement and revival generally see ABATEMENT AND REVIVAL.

State statute as to non-abatement of an administrator's action is inapplicable in a suit in equity in a federal circuit court. Carter *v.* Treadwell, 5 Fed. Cas. No. 2,480, 3 Story 25.

63. State laws control as to qualifications and exemptions of jurors. Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208. But see U. S. *v.* Gardner, 26 Fed. Cas. No. 15,187.

Juries generally see JURIES.

State laws and usages regulating the designation and impaneling of jurors have not been adopted, and do not bind federal courts except adopted by standing rule or order. Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208; U. S. *v.* Gardner, 26 Fed. Cas. No. 15,187.

State laws as to talesmen do not bind federal court. Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

Criminal causes are excluded; and federal courts are not bound to follow the practice of state courts in respect to challenges to jury (U. S. *v.* Davis, 103 Fed. 457); and upon removal, such right of challenge is regulated by the law of the United States (Georgia *v.* O'Grady, 11 Fed. Cas. No. 5,852, 3 Woods 496).

As to grand jurors see U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435; U. S. *v.* Tallman, 28 Fed. Cas. No. 16,429, 10 Blatchf. 21.

64. Sulzer *v.* Watson, 39 Fed. 414; Fitton *v.* Phœnix Assur. Co., 23 Fed. 3; Lanning *v.* Lockett, 11 Fed. 814, 4 Woods 455.

65. Texas, etc., R. Co. *v.* Humble, 97 Fed. 837, 38 C. C. A. 502.

Continuances generally see CONTINUANCES IN CIVIL CASES.

Rests in circuit court's discretion without regard to practice of state courts. Texas, etc., R. Co. *v.* Nelson, 50 Fed. 814, 1 C. C. A. 688.

66. Nussbaum *v.* Northern Ins. Co., 40 Fed. 337.

Discontinuances generally see DISMISSAL AND NONSUIT.

67. Parker *v.* Ogdensburg, etc., R. Co., 79 Fed. 817, 25 C. C. A. 205. Federal courts have power to try questions submitted by referee's report and may render judgments thereon. Heath *v.* Griswold, 5 Fed. 573, 18 Blatchf. 555.

References generally see REFERENCES.

68. Norton *v.* Portsmouth, 31 Fed. 326; Osborne *v.* Detroit, 28 Fed. 385.

Trial generally see TRIAL.

69. Phillips, etc., Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341; Parker *v.* Moore, 111 Fed. 470; Alexander *v.* Gordon, 101 Fed. 91, 41 C. C. A. 228; Nelson *v.* Killingsley First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425; *In re* Dugan, 7 Fed. Cas. No. 4,120, 2 Lowell 367.

Evidence generally see EVIDENCE.

depositions,[70] discovery,[71] witnesses,[72] and instructions;[73] with respect to nonsuits,[74] and the directing of verdicts;[75] with respect to verdicts; with respect to special

All modes of taking testimony in state courts under the statutes may be availed of by federal courts sitting in the state. International Tooth-Crown Co. *v.* Hanks' Dental Assoc., 101 Fed. 306.

Judicial notice of the laws of the respective states see Junction R. Co. *v.* Ashland Bank, 12 Wall. (U. S.) 226, 20 L. ed. 385; Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Owings *v.* Hull, 9 Pet. (U. S.) 607, 9 L. ed. 246; Jasper *v.* Porter, 13 Fed. Cas. No. 7,229, 2 McLean 579; Nelson *v.* Foster, 18 Fed. Cas. No. 10,105, 5 Biss. 44; Toppan *v.* Cleveland, etc., R. Co., 24 Fed. Cas. No. 14,099, 1 Flipp. 74.

Statute providing for perpetuating testimony cannot be held to furnish the purported maker of a forged note with means for providing for an adequate defense to such note in case an action at law should be brought thereon after his death, since the jurisdiction of a federal court of equity cannot be abridged by state laws. Schmidt *v.* West, 104 Fed. 272.

70. International Tooth-Crown Co. *v.* Carter, 112 Fed. 396; Smith *v.* Northern Pac. R. Co., 110 Fed. 341; National Cash-Register Co. *v.* Leland, 94 Fed. 502, 37 C. C. A. 372; U. S. *v.* Fifty Boxes and Packages of Lace, 92 Fed. 601; Seeley *v.* Kansas City Star Co., 71 Fed. 554; Walker *v.* Collins, 59 Fed. 70, 8 C. C. A. 1; Flint *v.* Crawford County, 9 Fed. Cas. No. 4,871, 5 Dill. 481; Sage *v.* Tauszky, 21 Fed. Cas. No. 12,214, construing U. S. Rev. Stat. (1878) §§ 721, 866, 914 [U. S. Comp. Stat. (1901) pp. 581, 663, 684]; 27 U. S. Stat. at L. 7 [U. S. Comp. Stat. (1901) p. 664.

Depositions generally see DEPOSITIONS.

71. *Ex p.* Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117; U. S. *v.* National Lead Co., 75 Fed. 94; Frescole *v.* Lancaster, 70 Fed. 337; Marvin *v.* Auntman, 46 Fed. 338. See also Gregory *v.* Chicago, etc., R. Co., 10 Fed. 529, 3 McCrary 374; Easton *v.* Hodges, 8 Fed. Cas. No. 4,258, 7 Biss. 324.

Discovery generally see DISCOVERY.

It is doubtful if production for inspection before trial could not be ordered under U. S. Rev. Stat. (1878) §§ 724, 914 [U. S. Comp. Stat. (1901) pp. 583, 684], and 20 Del. Laws, p. 187. Victor G. Bloede Co. *v.* Joseph Brancroft, etc., Co., 98 Fed. 175.

Practice in federal courts does not permit filing interrogatories with complaint at law to be answered by defendant. *Ex p.* Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117; Tabor *v.* Indianapolis Journal Newspaper Co., 66 Fed. 423; Pierce *v.* Union Pac. R. Co., 47 Fed. 709.

Surgical examination of plaintiff in an action for damages for personal injury in conformity with a state statute may be ordered. Camden, etc., R. Co. *v.* Stetson, 177 U. S. 172, 20 S. Ct. 617, 44 L. ed. 721. But U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684] does not apply to such physical examination. Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. ed. 734.

72. King *v.* Worthington, 104 U. S. 44, 26 L. ed. 652.

Witnesses generally see WITNESSES.

Competency of witnesses in criminal cases in federal courts in Texas is governed by the common law which was the law of that state when admitted to the Union, and statutes passed since its admission do not control. Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872].

Laws of the state where a court is held are rules of decision as to the competency of witnesses in federal courts except as otherwise provided. U. S. Rev. Stat. (1878) § 858 [U. S. Comp. Stat. (1901) p. 659]. See also Butler *v.* Fayerweather, 91 Fed. 458, 43 C. C. A. 625; Continental Nat. Bank *v.* Heilman, 81 Fed. 36; Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553; Mutual Ben. L. Ins. Co. *v.* Robinson, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325.

State statute as to suits in forma pauperis does not bind federal courts, although such a party may sue in said courts without giving security for costs, upon complying with certain conditions. Bradford *v.* Bradford, 3 Fed. Cas. No. 1,766, 2 Flipp. 280.

73. Federal courts are not limited or controlled by the constitution or laws of a state in charging juries either in relation to the charge itself upon matters of fact or as to the mode of giving such instructions. Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602; Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730; Rucker *v.* Wheeler, 127 U. S. 85, 8 S. Ct. 1142, 32 L. ed. 102; St. Louis, etc., R. Co. *v.* Vichers, 122 U. S. 360, 7 S. Ct. 1216, 30 L. ed. 1161; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 7 S. St. 1, 30 L. ed. 257; Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286; Western Union Tel. Co. *v.* Burgess, 108 Fed. 26, 47 C. C. A. 168; Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356, 46 C. C. A. 334; Consumers' Cotton Oil Co. *v.* Ashburn, 81 Fed. 331, 26 C. C. A. 436.

Instructions generally see TRIAL.

74. Right to nonsuit governed by state statute. Drummond *v.* Louisville, etc., R. Co., 109 Fed. 531.

Nonsuits generally see DISMISSAL AND NONSUIT.

Cannot grant peremptory nonsuit against plaintiff's will. Miller *v.* Baltimore, etc., R. Co., 17 Fed. Cas. No. 9,560.

75. May direct verdict where evidence insufficient. Sloss Iron, etc., Co. *v.* South Carolina, etc., R. Co., 85 Fed. 133, 29 C. C. A. 50.

Directing verdict generally see TRIAL.

findings,[76] judgments, decrees,[77] costs, and fees;[78] with respect to interest[79] and damages on appeal;[80] with respect to execution and other proceedings after judgment;[81] and with respect to matters relating to motions for new

76. State statute governs as to sufficiency of verdict returned on several counts, one count being sufficient (Bond *v.* Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. ed. 835. See Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; Hopkins *v.* Orr, 124 U. S. 510, 8 S. Ct. 590, 31 L. ed. 523), also form and effect of verdicts in federal courts in actions at law (Glenn *v.* Sumner, 132 U. S. 152, 10 S. Ct. 41, 33 L. ed. 301).

Refusal to submit special verdict is not error, although required by state practice. U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60.

State practice requiring submission of special questions to jury does not control a federal court. Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. ed. 898; McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 32.

State statute as to special findings does not bind federal courts. Dwyer *v.* St. Louis, etc., R. Co., 52 Fed. 87; U. S. *v.* Train, 12 Fed. 852.

That findings on special questions shall control a general verdict does not bind federal courts, although so provided by state practice. McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232.

77. State law is not binding on a federal court, which requires a decision in writing upon every issue (Martindale *v.* Waas, 11 Fed. 551, 3 McCrary 637); nor need judgments be recorded to become liens upon real estate (U. S. *v.* Humphreys, 26 Fed. Cas. No. 15,422, 3 Hughes 201).

Judgments and decrees generally see EQUITY; JUDGMENTS.

Judgment need not state separately findings of fact and conclusions of law. U. S. *v.* Tinsley, 68 Fed. 433, 15 C. C. A. 507.

Judgment obtained in one district is a lien upon defendant's real estate in all parts of the state. Prevost *v.* Gorrell, 19 Fed. Cas. No. 11,400, 5 Wkly. Notes Cas. (Pa.) 151.

State practice of opening decrees by default need not be followed. Austin *v.* Riley, 55 Fed. 833.

78. Morgan *v.* New York Nat. Bldg., etc., Assoc., 73 Conn. 151, 46 Atl. 877. *Compare* Ethridge *v.* Jackson, 8 Fed. Cas. No. 4,541, 2 Sawy. 598; Hathaway *v.* Roach, 11 Fed. Cas. No. 6,213, 2 Woodb. & M. 63.

Costs generally see COSTS.

Security for costs.— Miller *v.* Norfolk, etc., R. Co., 47 Fed. 264. State statute as to suits *in forma pauperis* does not bind federal courts. Bradford *v.* Bradford, 3 Fed. Cas. No. 1,766, 2 Flipp. 280.

Taxation of costs.— Primrose *v.* Fenno, 113 Fed. 375; Gillum *v.* Stewart, 112 Fed. 30.

Fees for taking and certifying deposition to be allowed to clerk or commissioner will not be taxed as are fees allowed by state law. Jerman *v.* Stewart, 12 Fed. 271.

Rules of equity court as to allowance of reasonable attorney's fees are exclusive of any state law or practice. Phinizy *v.* Augusta, etc., R. Co., 98 Fed. 776. See Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501; Aiken *v.* Smith, 57 Fed. 423, 6 C. C. A. 414.

79. Hagerman *v.* Moran, 75 Fed. 97, 21 C. C. A. 242.

80. Missouri, etc., R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179; Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188.

81. Merchants' Bank *v.* Evans, 51 Mo. 335; U. S. *v.* Train, 12 Fed. 852; Georgia *v.* Atlantic, etc., R. Co., 10 Fed. Cas. No. 5,351, 3 Woods 434.

Executions generally see EXECUTIONS.

Similar remedies by execution or otherwise to enforce judgments at law are given by U. S. Rev. Stat. (1878) § 916 [U. S. Comp. Stat. (1901) p. 684] as were then provided by the laws of the respective states, and under said enactment subsequent state legislation could be adopted by a rule of the federal courts. Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209; Lamaster *v.* Keeler, 123 U. S. 376, 8 S. Ct. 197, 31 L. ed. 238. See *In re* Chateaugay Ore, etc., Co., 128 U. S. 544, 9 S. Ct. 150, 32 L. ed. 508; U. S. *v.* Arnold, 69 Fed. 987, 16 C. C. A. 575. *Compare* Friedly *v.* Giddings, 119 Fed. 438; Clark *v.* Allen, 117 Fed. 699.

In enforcing rights of occupying claimant after judgment in ejectment the federal court need not follow the state statute but may conform to its ordinary procedure. Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

Issuance of execution against sureties on stay bond is void when issued in accordance with a state statute enacted subsequent to U. S. Rev. Stat. (1878) § 916 [U. S. Comp. Stat. (1901) p. 684], but not adopted at the time of issuance of said execution by the federal court. Lamaster *v.* Keeler, 123 U. S. 376, 8 S. Ct. 197, 31 L. ed. 238.

Temporary stay of execution may be granted by a federal circuit court. Eaton *v.* Cleveland, etc., R. Co., 41 Fed. 421.

What constitutes a final record in ejectment is regulated by state laws to which federal courts must conform. Smith *v.* McIntyre, 84 Fed. 721.

Writs of execution run into all districts of the state. Prevost *v.* Gorrell, 19 Fed. Cas. Nos. 11,400, 11,402, 13 Phila. (Pa.) 468, 5 Wkly. Notes Cas. (Pa.) 151, 152.

Equity executory process is within the equity jurisdiction of the federal courts of Louisiana. Marchand *v.* Sobral, 24 Fed. 316. And where execution is issued upon a decree a state statutory remedy may be adopted by the federal court. McGriff *v.* Baldwin, 23 Fed. 222. And a sale under a chancery decree

trials, writs of error, bills of exceptions, rehearing, appeal, and methods of review of judgments generally.[82]

F. State Laws as Rules of Decision — 1. General Rules — a. Common Law. The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise provide, are regarded as rules of decision

may be confirmed in vacation. Central Trust Co. *v.* Sheffield, etc., Coal, etc., R. Co., 60 Fed. 9. So after the term the court may amend the decree as to mode of execution, sale, etc. Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,259, 8 Biss. 380.

All modifications, conditions, and restrictions provided by state laws upon imprisonment for debt apply to process issuing from courts of the United States to be executed therein. Stroheim *v.* Deimel, 73 Fed. 430. Nor can state laws limiting the right to process against the person affect the power of federal courts to issue capias ad satisfaciendum to enforce their judgments (U. S. *v.* Arnold, 69 Fed. 987, 16 C. C. A. 575), although where imprisonment for debt has been abolished in a state a decree cannot be enforced in that state by the federal court by execution against the person (The Blanche Page, 3 Fed. Cas. No. 1,524, 16 Blatchf. 1). And a debtor's liability to arrest on execution under a judgment for the value of goods illegally imported depends on the local law. U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189. And see Thomas' Petition, 10 Phila. (Pa.) 82, 30 Leg. Int. (Pa.) 344; Gaines *v.* Travis, 9 Fed. Cas. No. 5,180, Abb. Adm. 422; *In re* Hopkins, 12 Fed. Cas. No. 6,683, 2 Curt. 567; U. S. *v.* Walsh, 28 Fed. Cas. No. 16,635, 1 Abb. 66, Deady 281.

82. The power or practice of the federal court was not intended to and does not conform by virtue of U. S. Rev. Stat. (1878) § 914 [U. S. Comp. Stat. (1901) p. 684] to those of the state courts in matters relating to bills of exceptions, motions for new trial, and methods of review and their judgments or proceedings (Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 11 S. Ct. 8, 34 L. ed. 585; Green *v.* Fitchburg R. Co., 119 Fed. 872, 56 C. C. A. 402; Hooven, etc., R. Co. *v.* Featherstone, 111 Fed. 81, 49 C. C. A. 229 [*reversing* 99 Fed. 180]; Manning *v.* German Ins. Co., 107 Fed. 52, 46 C. C. A. 144 [*reversing* 100 Fed. 581]; Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597; Louisville, etc., R. Co. *v.* White, 100 Fed. 239, 40 C. C. A. 352; Hughey *v.* Sullivan, 80 Fed. 72; Lowry *v.* Mt. Adams, etc., Incline Plane R. Co., 68 Fed. 827. But see Smalc *v.* Mitchell, 143 U. S. 99, 12 S. Ct. 353, 36 L. ed. 90; Equator Min., etc., Co. *v.* Hall, 106 U. S. 86, 1 S. Ct. 128, 27 L. ed. 114; Hiller *v.* Shattuck, 12 Fed. Cas. No. 6,504, 1 Flipp. 272), since congress has established a complete system for review of judgments and decrees (Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658); and this rule applies to appeals and writs of error (St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; Luxton *v.* North River Bridge Co., 147 U. S. 337, 13 S. Ct. 356, 37 L. ed. 194; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. ed. 898; Logan *v.* Goodwin, 101 Fed. 654, 41 C. C. A. 573; James P. Witherow Co. *v.* De Bardeleben Coal, etc., Co., 99 Fed. 670; U. S. *v.* Indian Grave Drainage Dist., 85 Fed. 928, 29 C. C. A. 578; Pritchard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504; Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 11 C. C. A. 42; New York, etc., R. Co. *v.* Hyde, 56 Fed. 188, 5 C. C. A. 461; Richmond, etc., R. Co. *v.* McGee, 50 Fed. 906, 2 C. C. A. 81; McClellan *v.* Pyeatt, 50 Fed. 686, 1 C. C. A. 613; U. S. *v.* Train, 12 Fed. 852; Whalen *v.* Sheridan, 10 Fed. 661, 18 Blatchf. 324, 5 Fed. 436, 18 Blatchf. 308. But see as to error to territorial supreme court Montana R. Co. *v.* Warren, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681 [*affirming* 6 Mont. 275, 12 Pac. 641]). Nor is a state statute as to new trials a rule of property binding on the federal court. Hughey *v.* Sullivan, 80 Fed. 72. Nor is the discretion of said court to grant new trials affected by state laws requiring an exception to be taken to the ruling complained of. U. S. *v.* Seufert Bros. Co., 78 Fed. 520.

Matters relating to review generally see Appeal and Error; Review.

State proceedings to set aside a law judgment apply to and govern federal courts when the ground therefor is fraud, unavoidable casualty, or misfortune preventing appearing and defending. Travelers' Protective Assoc. of America *v.* Gilbert, 111 Fed. 269, 4 C. C. A. 309, 55 L. R. A. 538.

State statute as to new trials is not binding in chancery on the federal court. Tice *v.* Adams County School-Dist. No. 18, 17 Fed. 283, 5 McCrary 360.

Motion for new trial may be heard in the circuit court without case settled as in the state court. Hynes *v.* Chicago, etc., R. Co., 23 Fed. 18. Motion for new trial on ground that the verdict is against the evidence may be heard by the trial judge. Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. ed. 1022.

Question of the finality of a decree is not affected by procedure in state courts. Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251.

Rehearing asked for after a decree which is not appealable does not come within rule 88 of equity. Wooster *v.* Handy, 21 Fed. 51.

Ruling on rejection or admission of evidence is not reviewable either on writ of error or on appeal in equity under the rules of practice of the supreme court and of the circuit court of appeals, unless the record discloses the ruling and the taking of excep-

in trials at common law in the courts of the United States in all cases where they apply.[83]

b. Equity.[84] State laws do not constitute a rule of decision in the federal courts of equity.[85] Chancery may, however, administer an enlargement of equitable rights[86] and enforce and protect rights given by a state statute when such rights are properly the subject of an equity suit,[87] unless the same contravenes the distinction between law and equity in violation of the United States statutes.[88] And this is so, where such rights are peculiar to the law of the state where the federal courts are held.[89]

c. Admiralty.[90] Section 721 of the Revised Statutes of the United States does not apply to proceedings in admiralty.[91]

d. Criminal Law.[92] The laws of the several states cannot, under the Judiciary Act,[93] be regarded as rules of decision in trials of offenses against the United States.[94]

tions thereto and there is a specific assignment of error on that ground. Kalamazoo R. Supply Co. *v.* Duff Mfg. Co., 113 Fed. 264, 51 C. C. A. 221.

83. Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795 (includes also laws and customs of a local character as well as common law); Golden *v.* Prince, 10 Fed. Cas. No. 5,509, 3 Wash. 313; Lamson *v.* Mix, 14 Fed. Cas. No. 8,034; Loring *v.* Marsh, 15 Fed. Cas. No. 8,514, 2 Cliff. 311; Meade *v.* Beale, 16 Fed. Cas. No. 9,371, Taney 339. And see Evans *v.* Nellis, 187 U. S. 271, 23 S. Ct. 74, 47 L. ed. 173. But see U. S. *v.* Capdevielle, 118 Fed. 809, 55 C. C. A. 421.

Rule applies when state laws relate to substantial rights of parties and not to mere matters of practice. Curtis *v.* Smith, 6 Fed. Cas. No. 3,505, 6 Blatchf. 537.

U. S. Rev. Stat. (1878) § 721 [U. S. Comp. Stat. (1901) p. 581] applies to cases in which the jurisdiction arises by reason of citizenship of the parties, but not where it arises because a federal question is involved, since state legislatures can exercise no authority over the latter. Schreiber *v.* Sharpless, 17 Fed. 589.

84. See, generally, EQUITY; and *supra*, XII, E, 2, b.

85. Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Burt *v.* Keyes, 4 Fed. Cas. No. 2,212, 1 Flipp. 61; McFarlane *v.* Griffith, 16 Fed. Cas. No. 8,790, 4 Wash. 585. But see Darragh *v.* H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609.

Analogous rules.— State laws cannot enlarge the subjects of chancery jurisdiction in the federal courts (Lamson *v.* Mix, 14 Fed. Cas. No. 8,034); nor can state legislation impose restraints thereon (Alger *v.* Anderson, 92 Fed. 696); nor are such courts in administering equitable relief bound by any restrictions prescribed by the local laws for state courts, although this rule does not seem inflexible (Boston, etc., R. Co. *v.* Slocum, 77 Fed. 345).

86. Davidson *v.* Calkins, 92 Fed. 230; Darragh *v.* H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609. See Boston, etc., R. Co. *v.* Slocum, 77 Fed. 345.

An additional remedy provided by a state law may be enforced where the federal court has acquired jurisdiction of a suit for specific performance. Single *v.* Scott Paper Mfg. Co., 55 Fed. 553.

87. Goldsmith *v.* Gilleland, 22 Fed. 865, 10 Sawy. 606.

But an injunction will not be granted by a federal court at the instance of a foreign corporation to prevent the creation under a state statute of a corporation with the same name as the foreign corporation. Lehigh Valley Coal Co. *v.* Hamblen, 23 Fed. 225.

Federal court will sustain a bill which on its face shows that plaintiffs are entitled to equitable relief, notwithstanding defendant attempts to justify his acts on demurrer under a state statute. Griffing *v.* Gibb, 2 Black (U. S.) 519, 17 L. ed. 353 [*reversing* 11 Fed. Cas. No. 5,819, McAll. 212].

Federal court will enforce an equitable lien, recognizing the practice of state courts as expressing the local law, where there is no special statutory provision. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921 [*affirming* 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290].

88. Adoue *v.* Strahan, 97 Fed. 691.

89. Fechheimer *v.* Baum, 37 Fed. 167, 2 L. R. A. 153. See Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615 (as to equitable right in relation to corporations); Aspen Min., etc., Co. *v.* Rucker, 28 Fed. 220 (holding that any rights of an equitable nature given by the state may be administered).

90. See, generally, ADMIRALTY.

91. Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Mutual Safety Ins. Co. *v.* George, 17 Fed. Cas. No. 9,981, Olcott Adm. 89. See The Canada, 7 Fed. 730, 7 Sawy. 184. But see Darragh *v.* H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609; Stapp *v.* The Swallow, 22 Fed. Cas. No. 13,305, 1 Bond 189.

92. See, generally, CRIMINAL LAW; and *supra*, XII, E, 1, f.

93. U. S. Rev. Stat. (1878) § 721 [U. S. Comp. Stat. (1901) p. 581].

94. Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; U. S. *v.* Burr, 25 Fed. Cas. No. 14,694.

2. Decisions of State Courts as Authority — a. Generally.[95] Acts of a state court done in the exercise of its jurisdiction and not conflicting with the proper decrees and jurisdiction of the federal courts are valid and binding upon the latter.[96] Federal courts will also conform, on local laws, to the decisions of the state courts;[97] but this rule does not apply where the question raised is not one of local but of general law.[98]

b. Equity.[99] United States courts are not bound to follow the decisions of the state courts in cases depending upon the general principles of equity jurisprudence;[1] but such a decision sustaining a state statute, which is the basis of equity jurisdiction of a federal court, has been decided to be binding upon the latter.[2] It has also been determined that federal courts of equity as well as of law are bound to accept the exposition of law by the state courts governing the rights of parties.[3]

c. Criminal Law.[4] A decision by the judges of the highest state court, construing the state constitution, concludes the federal courts on habeas corpus, where the prisoner is not thereby deprived of any rights or privileges under the constitution of the United States.[5]

d. Construction of State Constitutions and Statutes — (i) *Generally.* The decision of the highest court of a state upon questions wholly of constitutional law arising under the constitution of that state binds the United States courts;[6]

95. See *supra*, VII, B, 3, b.

96. *In re* Keiler, 14 Fed. Cas. No. 7,647. See Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; U. S. Rev. Stat. (1878) § 721 [U. S. Comp. Stat. (1901) p. 581]. Examine Cooper *v.* Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808; U. S. Const. art. 4, § 1; U. S. Rev. Stat. (1878) § 905 [U. S. Comp. Stat. (1901) p. 677].

Decision of a state court will be followed if possible even though not binding on the federal court, when the latter's jurisdiction is solely because of the citizenship of the parties and it is called upon to pass upon the question of law already determined in one state. Van Bokelen *v.* Brooklyn City R. Co., 28 Fed. Cas. No. 16,830, 5 Blatchf. 379.

Decision of a state court, if binding, will be presumed to be based upon a thorough consideration of questions involved and a suggestion *contra* will not be entertained. Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843 [*affirming* 28 Fed. 346].

Decision of a commission, appointed under a state constitution to aid the supreme court, on a question properly presented in a judicial proceeding, is entitled in United States supreme court to a like consideration and weight as a state supreme court decision. Ankeney *v.* Hannon, 147 U. S. 118, 13 S. Ct. 206, 37 L. ed. 105.

Need not follow state decisions in matters affecting their jurisdiction. O'Connell *v.* Reed, 56 Fed. 531, 5 C. C. A. 586.

97. Chesapeake, etc., R. Co. *v.* Kentucky, 179 U. S. 388, 21 S. Ct. 101, 45 L. ed. 244 [*affirming* 51 S. W. 160, 21 Ky. L. Rep. 228]; Clarke *v.* Clarke, 178 U. S. 186, 20 S. Ct. 873, 44 L. ed. 1028 [*affirming* 70 Conn. 483, 40 Atl. 111]; Green *v.* Neal, 6 Pet. (U. S.) 291, 8 L. ed. 402; Mutual Assur. Soc. *v.* Watts, 1 Wheat. (U. S.) 279, 4 L. ed. 91; Johnston *v.* Straus, 26 Fed. 57 (so where rights of parties are determined); Hollingsworth *v.* Tensas Parish, 17 Fed. 109, 4 Woods 280; Illius *v.* New York, etc., R. Co., 13 Fed. Cas. No. 7,010.

Claim that a law is local in character is not sufficient to bind a federal court where the decision merely regulates the practice of courts. Amis *v.* Smith, 16 Pet. (U. S.) 303, 10 L. ed. 973.

98. Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772. See U. S. Const. art. 6, § 2. See also *infra*, XII, F, 2, f.

99. See *supra*, XII, E, 2, b.

1. Neves *v.* Scott, 13 How. (U. S.) 268, 14 L. ed. 140; Russell *v.* Southard, 12 How. (U. S.) 139, 13 L. ed. 927; Butler *v.* Douglass, 3 Fed. 612, 1 McCrary 630; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

2. Beebe *v.* Louisville, etc., R. Co., 39 Fed. 481.

3. Johnston *v.* Straus, 26 Fed. 57.

4. See *supra*, XII, F, 1, d.

5. Lambert *v.* Barrett, 157 U. S. 697, 15 S. Ct. 722, 39 L. ed. 865.

So a construction of a statute by a state supreme court may be binding upon the federal circuit court. *In re* Converse, 42 Fed. 217.

6. Manley *v.* Park, 187 U. S. 547, 23 S. Ct. 208, 47 L. ed. 296 [*affirming* 62 Kan. 553, 64 Pac. 28]; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 22 S. Ct. 95, 46 L. ed. 298 [*affirming* 106 Ky. 633, 51 S. W. 164, 1012, 21 Ky. L. Rep. 232] (even though a different effect is given to similar language in the interstate commerce law); Danville Water Co. *v.* Danville, 180 U. S. 619, 21 S. Ct. 505, 45 L. ed. 696 [*affirming* 186 Ill. 326, 57 N. E. 1129]; Freeport Water Co. *v.* Freeport, 180 U. S. 587, 21 S. Ct. 493, 45 L. ed. 679 [*affirming* 186 Ill. 179, 57 N. E. 862] (as to functions of state circuit courts); Wilkes County Com'rs *v.* Coler, 180 U. S. 506, 21 S. Ct. 458, 45 L. ed. 642; Amoskeag Nat. Bank *v.* Ot-

and the construction of state statutes, or a determination as to the validity of their enactments or of their constitutionality by such courts constitutes a rule of decision for the federal courts,[7] provided no federal question,[8] or federal question and contract right,[9] or question affecting the constitution of the United States is involved;[10] provided also that such decision does not conflict with or impair the

tawa, 105 U. S. 667, 26 L. ed. 1204; Wade *v.* Walnut, 105 U. S. 1, 26 L. ed. 1027; Fairfield *v.* Gallatin County, 100 U. S. 47, 25 L. ed. 544; Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496; American Sugar Refining Co. *v.* New Orleans, 119 Fed. 691, 55 C. C. A. 328; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601. And see Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Chicago, etc., R. Co. *v.* Smyth, 103 Fed. 376; U. S. *v.* Stanford, 69 Fed. 25; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457; Reclamation Dist. No. 108 *v.* Hagar, 4 Fed. 366, 6 Sawy. 567.

7. Levy *v.* Mentz, 23 La. Ann. 261; Clarksburg Electric Light Co. *v.* Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; Manley *v.* Park, 187 U. S. 547, 23 S. Ct. 208, 47 L. ed. 296 [*affirming* 62 Kan. 553, 64 Pac. 28]; Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93]; Robinson *v.* Belt, 187 U. S. 41, 23 S. Ct. 16, 47 L. ed. 65 [*affirming* 100 Fed. 718, 40 C. C. A. 664]; Yazoo, etc., R. Co. *v.* Adams, 181 U. S. 580, 21 S. Ct. 729, 45 L. ed. 1011, 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395; Rasmussen *v.* Idaho, 181 U. S. 198, 21 S. Ct. 594, 45 L. ed. 820 [*affirming* 7 Ida. 1, 59 Pac. 933, 52 L. R. A. 78]; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. ed. 618 [*affirming* 77 Minn. 223, 79 N. W. 962]; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116 [*affirming* 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305]; Warburton *v.* White, 176 U. S. 484, 20 S. Ct. 404, 44 L. ed. 555 [*affirming* 18 Wash. 511, 52 Pac. 233, 532]; Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 20 S. Ct. 136, 44 L. ed. 192; Brown *v.* New Jersey, 175 U. S. 172, 20 S. Ct. 77, 44 L. ed. 119; Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 19 S. Ct. 755, 43 L. ed. 1093; Nobles *v.* Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. ed. 515 [*affirming* 98 Ga. 73, 26 S. E. 64, 38 L. R. A. 577]; Merchants', etc., Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 17 S. Ct. 829, 42 L. ed. 236; Oakes *v.* Mase, 165 U. S. 363, 17 S. Ct. 345, 41 L. ed. 746; Sanford *v.* Poe, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683 [*affirming* 69 Fed. 546, 16 C. C. A. 305] (even though decision was rendered in a friendly suit and actual controversy did not exist); Noble *v.* Mitchell, 164 U. S. 367, 17 S. Ct. 110, 41 L. ed. 472; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 16 S. Ct. 1096, 41 L. ed. 107; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 15 S. Ct. 896, 39 L. ed. 1043; Moses *v.* Lawrence County Nat. Bank, 149 U. S. 298, 13 S. Ct. 900, 37 L. ed. 743; Hallinger *v.* Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. ed. 986; Miller *v.* Ammon, 145 U. S. 421, 12 S. Ct. 884, 36 L. ed. 759; Leeper *v.* Texas, 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; German Sav. Bank *v.* Franklin County, 128 U. S. 526, 9 S. Ct. 159, 32 L. ed. 519; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 350, 25 L. ed. 185; Memphis, etc., R. Co. *v.* Gaines, 97 U. S. 697, 24 L. ed. 1091; Lamborn *v.* Dickinson County Com'rs, 97 U. S. 181, 24 L. ed. 926; Meister *v.* Moore, 96 U. S. 76, 24 L. ed. 826; Hall *v.* De Cuir, 95 U. S. 485, 24 L. ed. 547; Cass County *v.* Johnston, 95 U. S. 360, 24 L. ed. 416; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154; East Oakland Tp. *v.* Skinner, 94 U. S. 255, 24 L. ed. 125; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97; Leavenworth County *v.* Barnes, 94 U. S. 70, 24 L. ed. 63; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663.

See 13 Cent. Dig. tit. "Courts," §§ 956, 957.

City ordinances are within the rule. Whitmier, etc., Co. *v.* Buffalo, 118 Fed. 773.

Federal courts lean toward a decision that a state statute is penal, but it is not conclusive. Perkins *v.* Boston, etc., R. Co., 90 Fed. 321.

Single decision acquiesced in for years by courts of the state and its legislative department binds the federal court. German Ins. Co. *v.* Manning, 95 Fed. 597.

State supreme court may render a decision on a subsequent appeal different from that on a prior appeal where the ground is different, and the fact that it has so done does not affect its weight in a federal court. Oxford *v.* Union Bank, 96 Fed. 293, 37 C. C. A. 493.

8. Clarksburg Electric Light Co. *v.* Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1; Dundee Mortg., etc., Co. *v.* Multnomah County School Dist. No. 1, 19 Fed. 359. And see Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 51 Fed. 858.

9. Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1, although a state decision will be treated in such a case with consideration.

10. State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186 [*approved* in McCain *v.* Des Moines, 84 Fed. 726]. See U. S. Const. art. 6, § 2. See also Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601.

If not in conflict with a federal decision a state supreme court decision that the removal of an attorney without formal legal process

efficiency of some principle of the United States constitution, an act of congress, or a rule of commercial or general law;[11] and subject also to the exception that it is not otherwise provided by the constitution, treaties, or statutes of the United States.[12] Nor where conformity to subordinate details would result in substantial injustice to litigants, nor where such result would probably follow, are the powers of said courts limited or affected by judicial interpretation of a state statute relating to the matter, although they have by rule adopted the state practice, but not such interpretation.[13] Again the rule does not embrace mere *dicta* of a state court;[14] nor a construction based on implications from the language of a judicial opinion;[15] nor decisions of inferior state courts;[16] nor decisions subsequent to acquiring property or contract rights.[17] There are also other exceptions.[18]

(II) *Limitation Acts*[19] — *Laches*.[20] State statutes of limitation are within the general rule above stated, where they are applicable, and where the constitution, treaties, or acts of congress do not otherwise provide.[21] Such state statutes

does not violate the state constitution concludes a federal court. Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285.

11. Scott *v.* McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. ed. 896; Liebman *v.* San Francisco, 24 Fed. 705.

12. The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Michigan Ins. Bank *v.* Eldred, 130 U. S. 693, 9 S. Ct. 690, 32 L. ed. 1080.

13. Van Doren *v.* Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

14. Matz *v.* Chicago, etc., R. Co., 85 Fed. 180.

15. Cæsar *v.* Capell, 83 Fed. 403.

16. Patapsco Guano Co. *v.* Morrison, 18 Fed. Cas. No. 10,792, 2 Woods 395.

In Missouri only the supreme court's decision binds the federal court. Freund *v.* Yaegerman, 27 Fed. 248.

17. Southern Pine Co. *v.* Hall, 105 Fed. 84, 44 C. C. A. 363; Clapp *v.* Otoe County, 104 Fed. 473, 45 C. C. A. 579; Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; O'Brien *v.* Wheelock, 95 Fed. 883, 37 C. C. A. 309; Vermont L. & T. Co. *v.* Dygert, 89 Fed. 123; Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101; Jones *v.* Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108 [*reversing* 79 Fed. 477]; Bartholomew *v.* Austin, 85 Fed. 359, 29 C. C. A. 568; Cæsar *v.* Capell, 83 Fed. 403; Central Trust Co. *v.* Citizens', etc., R. Co., 82 Fed. 1; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

In construing a state statute or determining whether it has been repealed by a subsequent act, the rule that the highest state court's decision controls a federal court is subject to certain exceptions, as where prior acquired rights are affected; and where such court has independently rendered a contrary decision it will be recalled if still within the court's control in deference to a later decision of the state court. Southern R. Co. *v.* North Carolina Corp. Commission, 99 Fed. 162, 100 Fed. 1003. See also Folsom *v.* Abbeville County Tp. Ninety-Six, 159 U. S. 611, 16 S. Ct. 174, 40 L. ed. 278; Barnum *v.* Okolona, 148 U. S. 393, 13 S. Ct. 638, 37 L. ed. 495; Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93.

18. Carroll County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517 (construction of a state constitution by the highest state court does not bind the federal court as to rights of citizens foreign to such state when rights were acquired before the decision and same conflicts with previous decisions of supreme court of United States); New England Mortg. Security Co. *v.* Gay, 33 Fed. 636 (not binding in suits between citizens of different states in the administration of a state statute where no question of construction is involved).

Decisions of the state court of Maryland since the cession of the District of Columbia to the United States, giving a construction to state statutes different from that prevailing at that time, cannot control their construction by the courts of the United States as affecting property within the district over which they were continued in force by acts of congress. Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946. See Mutual Assur. Soc. *v.* Watts, 1 Wheat. (U. S.) 279, 4 L. ed. 91.

In actions between other litigants a finding by a state court as to the terms of a statute or of its title, on which a pronouncement of its unconstitutionality is based, is not conclusive or controlling upon a federal court. Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601.

19. See, generally, Limitations of Actions; and *supra*, XII, E, 1, d.

20. See, generally, Equity; and *supra*, XII, E, 1, d.

21. Security Trust Co. *v.* Black River Nat. Bank, 187 U. S. 211, 23 S. Ct. 52, 47 L. ed. 147 [*reversing* 104 Fed. 1006, 43 C. C. A. 683]; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 16 S. Ct. 939, 41 L. ed. 72; Balkam *v.* Woodstock Iron Co., 154 U. S. 177, 14 S. Ct. 1010, 38 L. ed. 953 [*affirming* 43 Fed. 648, 11 L. R. A. 230]; Bauserman *v.* Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316; Michigan Ins. Bank *v.* Eldred, 130 U. S. 693, 9 S. Ct. 690, 32 L. ed. 1080; Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; Chemung Canal Bank *v.* Lowery, 93 U. S. 72, 23 L. ed. 806; Tioga R. Co. *v.* Blossburg,

of limitation also apply to actions at law, for the infringement of letters patent, brought within the state's borders.[22] It is decided, however, that the federal courts of equity are not controlled by state statutes of limitations, but it is also determined in certain cases that they are or may be bound thereby, while in others it is held that they will follow, give due consideration to the same, regard them as reasonable, or apply them by analogy, especially so when justice will be the better subserved thereby, or the circumstances render it equitable that such state statutes should be adopted.[23] As to laches affecting rights relating to title or possession of realty, federal courts should by analogy to the statute of limitations follow the decisions of state courts.[24]

e. Construction of Federal Statutes. Federal statutes must be interpreted by

etc., R. Co., 20 Wall. (U. S.) 137, 22 L. ed. 331; Leffingwell *v.* Warren, 2 Black (U. S.) 599, 17 L. ed. 261; Harpending *v.* New York Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Green *v.* Neal, 6 Pet. (U. S.) 291, 8 L. ed. 402; Henderson *v.* Griffin, 5 Pet. (U. S.) 151, 8 L. ed. 79; McCluny *v.* Silliman, 3 Pet. (U. S.) 270, 7 L. ed. 676; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Shelby *v.* Guy, 11 Wheat. (U. S.) 361, 6 L. ed. 495; Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76; Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625; Reynolds *v.* Lyon County, 97 Fed. 155; Bullion, etc., Bank *v.* Hegler, 93 Fed. 890; Cockrill *v.* Butler, 78 Fed. 679; Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388; Hayden *v.* Thompson, 71 Fed. 60, 17 C. C. A. 592; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251; St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing* 32 Fed. 821, 44 Fed. 817]; Black *v.* Elkhorn Min. Co., 47 Fed. 600; Andrews *v.* Bacon, 38 Fed. 777; Moores *v.* Citizens' Nat. Bank, 11 Fed. 624 note; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523; Boyle *v.* Arledge, 3 Fed. Cas. No. 1,758, Hempst. 620; Nicolls *v.* Rodgers, 18 Fed. Cas. No. 10,260, 2 Paine 437; Price *v.* Yates, 19 Fed. Cas. No. 11,418.

When congress creates a new right of action without any limitation thereto, the state statute of limitations applies and binds federal courts. Copp *v.* Louisville, etc., R. Co., 50 Fed. 164.

When rule not followed or not applicable.— U. S. *v.* Thompson, 98 U. S. 486, 25 L. ed. 194; Brigham-Hopkins Co. *v.* Gross, 107 Fed. 769; Security Trust Co. *v.* Dent, 104 Fed. 380, 43 C. C. A. 594; Steves *v.* Carson, 42 Fed. 821; Stillman *v.* White Rock Mfg. Co., 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 538.

22. Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280; Hayden *v.* Oriental Mills, 15 Fed. 605; Parker *v.* Hawk, 18 Fed. Cas. No. 10,737; Rich *v.* Ricketts, 20 Fed. Cas. No. 11,762, 7 Blatchf. 230; Sayles *v.* Oregon Cent. R. Co., 21 Fed. Cas. No. 12,423, 4 Ban. & A. 429, 6 Sawy. 31. *Contra*, see Brickill *v.* Baltimore, 52 Fed. 737; Brickill *v.* Hartford, 49 Fed. 372; Brickill *v.* Buffalo, 49 Fed. 371; California Artificial Stone Paving Co. *v.* Starr, 48 Fed. 560; May *v.* Ralls County, 31 Fed. 473; May *v.* Buchanan County, 29 Fed. 469; Hayward *v.* St. Louis, 11 Fed. 427, 3 McCrary 614; Sayles *v.* Dubuque, etc., R. Co., 9 Fed. 516; Anthony *v.* Carroll, 1 Fed. Cas. No. 487, 2 Ban. & A. 195; Parker *v.* Hallock, 18 Fed. Cas. No. 10,735; Read *v.* Miller, 20 Fed. Cas. No. 11,610, 2 Biss. 12; Wetherill *v.* New Jersey Zinc Co., 29 Fed. Cas. No. 17,464, 1 Ban. & A. 485.

23. Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569; Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Frishmuth *v.* Farmers' L. & T. Co., 95 Fed. 5; Miles *v.* Vivian, 79 Fed. 848, 25 C. C. A. 208; Naddo *v.* Bardon, 47 Fed. 782; Pulliam *v.* Pulliam, 10 Fed. 53; Johnston *v.* Roe, 1 Fed. 692, 1 McCrary 162; Hall *v.* Russell, 11 Fed. Cas. No. 5,943, 3 Sawy. 506 [*affirmed* in 101 U. S. 503, 25 L. ed. 829]; Stevens *v.* Sharp, 23 Fed. Cas. No. 13,410, 6 Sawy. 113.

In the determination of questions of equity jurisdiction state and federal courts both refer to same source and are not dependent on each other for precedent. Butler *v.* Douglass, 3 Fed. 612, 1 McCrary 630.

When and where not applicable.— The rule established by the decisions of the supreme court, as to the effect of statutes of limitations in courts of equity, appears to be that in those states where the statutes of limitations are made applicable to suits in equity as well as to actions at law, where they embrace in terms the specific case, and in cases of concurrent jurisdiction, they are as obligatory, as such, upon the national courts of equity as they are upon the state court, and as they are in actions at law; and the courts of equity should act in obedience rather than upon analogy to them. But where they are not applicable to equity cases in the state courts, and there is not concurrent jurisdiction, and where the specific case is not covered in terms by the statute, then the time prescribed by the statute of limitations will ordinarily be applied by analogy, in accordance with the provisions most nearly analogous and applicable. Norris *v.* Haggin, 28 Fed. 275.

24. Wheeling Bridge, etc., R. Co. *v.* Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571.

But laches is not imputable to the government, nor can its right in a government matter be affected by state enactments. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582.

federal courts irrespective of state decisions, until they have been construed by the United States supreme court.[25]

f. Construction of Commercial or Other General Laws. If a question before the federal court depends upon principles of general jurisprudence, or rests upon general or general commercial law, the federal courts are not bound by state decisions;[26] but although such courts are not absolutely controlled by state decisions, yet they will give weight thereto if they are called upon to construe the general commercial law of a state upon a new question. They will also act upon principles of comity, to avoid conflict as far as possible, without sacrificing their own dignity, and in case of doubt may for the sake of harmony lean toward the views of the state court.[27]

25. Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 182 U. S. 499, 21 S. Ct. 885, 45 L. ed. 1200 [*affirming* 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209].

26. Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 14 S. Ct. 140, 37 L. ed. 1107; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 13 S. Ct. 261, 37 L. ed. 97; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. ed. 325; Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61; Oates *v.* Montgomery First Nat. Bank, 100 U. S. 239, 25 L. ed. 580; Chicago *v.* Robbins, 2 Black (U. S.) 418, 17 L. ed. 298; Elliott *v.* Felton, 119 Fed. 270, 56 C. C. A. 74; Bradley *v.* Lill, 3 Fed. Cas. No. 1,783, 4 Biss. 473; *Ex p.* Heidelback, 11 Fed. Cas. No. 6,322, 2 Lowell 526; Mohr *v.* Manierre, 17 Fed. Cas. No. 9,695, 7 Biss. 419 [*affirmed* in 101 U. S. 417, 25 L. ed. 1052]; Sawyer *v.* Oakman, 21 Fed. Cas. No. 12,404, 1 Lowell 134 [*affirmed* in 21 Fed. Cas. No. 12,402, 7 Blatchf. 290]. But see Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865; Sioux City Independent School Dist. *v.* Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Saginaw Bank *v.* Western Pennsylvania Title, etc., Co., 105 Fed. 491; Northern Nat. Bank *v.* Hoopes, 98 Fed. 935; Hunt *v.* Hurd, 98 Fed. 683, 39 C. C. A. 226; New York, etc., R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562; Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 88 Fed. 607; McPeck *v.* Central Vermont R. Co., 79 Fed. 590, 25 C. C. A. 110; Berry *v.* Lake Erie, etc., R. Co., 70 Fed. 679; Phipps *v.* Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. 129, 25 L. R. A. 527; Murray *v.* Chicago, etc., R. Co., 62 Fed. 24; Western Union Tel. Co. *v.* Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; Newport News, etc., Co. *v.* Howe, 52 Fed. 362, 3 C. C. A. 121; Northern Pac. R. Co. *v.* Peterson, 51 Fed. 182, 2 C. C. A. 157; Windsor Sav. Bank *v.* McMahon, 38 Fed. 283, 3 L. R. A. 192; Raymond *v.* Terrebonne Parish, 28 Fed. 773; Sherman Bank *v.* Apperson, 4 Fed. 25; Austen *v.* Miller, 2 Fed. Cas. No. 661, 5 McLean 153 [*affirmed* in 13 How. (U. S.) 218, 14 L. ed. 119]; Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366; Jewett *v.* Hone, 13 Fed. Cas. No. 7,311, 1 Woods 530; Meade *v.* Beale, 16 Fed. Cas. No. 9,371, Taney 339; Mutual Safety Ins. Co. *v.* The George, 17 Fed. Cas. No. 9,981, Olcott 89; Riley *v.* Anderson, 20 Fed. Cas. No. 11,835, 2 McLean 589; Robinson *v.* Massachusetts Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,738, 3 Sumn. 270.

Notwithstanding the general rule that a federal court is bound by the construction placed by the highest court of the state upon a local statute, "yet, when it becomes necessary to apply the statute, as construed by the local court, to a particular contract, and determine, upon a consideration of all of the provisions of the contract, whether it is violative of the statute as it has been construed, a federal court is entitled to express an independent judgment, the question involved being one of general law, rather than of statutory construction." Casserleigh *v.* Wood, 119 Fed. 308, 56 C. C. A. 212 [*followed* in Ottumwa *v.* City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219].

As to general power of brokers in dealing with principal's property, state court decisions do not control. Bragg *v.* Meyer, 4 Fed. Cas. No. 1,801, McAll. 408.

Master and servant.— There are upon this subject certain decisions which are opposed to, or at least not in harmony with, those cited above. Northern Pac. R. Co. *v.* Hogan, 63 Fed. 102, 11 C. C. A. 51; Becker *v.* Baltimore, etc., R. Co., 57 Fed. 188; Kerlin *v.* Chicago, etc., R. Co., 50 Fed. 185.

On questions belonging to the general domain of jurisprudence, where commercial securities and contracts between citizens of different states are involved, the jurisdiction of the United States courts is absolute, and they are not bound by decisions of a state court. Union Bank *v.* Oxford, 90 Fed. 7.

When binding.— Davie *v.* Hatcher, 7 Fed. Cas. No. 3,610, 1 Woods 456.

27. Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359; Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595. See also Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556; Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817; Branch *v.* Macon, etc., R. Co., 4 Fed. Cas. No. 1,808, 2 Woods 385.

g. Decision Without Judgment or Decree. A decision without judgment or decree has been decided to be binding upon the federal courts within the state.[28]

h. Inconsistent Decisions. The courts of the United States will follow the latest settled adjudications of the highest state court rather than the earlier ones, where there is any inconsistency between them, except in cases where rights have been acquired on the faith of the former ones, although it seems that they are not absolutely controlled even in such cases by the former decision. Nor are the federal courts necessarily bound to follow state decisions of an unsettled character, or adjudications which are but oscillations in the course of such judicial settlement, nor will they follow inconsistent state decisions at the sacrifice of justice and law.[29] If, however, the later state decision is under an amended statute radically departing from the prior one, the rule does not apply that federal courts will, in case of conflicting state decisions, follow the earlier one as to rights accruing thereunder.[30] Again if a state decision is rendered after the argument and before the decision in a federal court and appears to be in plain conflict with the weight of authority and distinctly inconsistent with previous decisions in said state the United States court of appeals is not bound to yield its own opinion thereto.[31] Nor need the federal court follow a state decision declaring a state law unconstitutional, where said decision is opposed to repeated decisions on other laws involving the same principle and to the unanimous decisions of courts of other states in analogous cases.[32]

In case of conflict between the federal and state decisions upon a question of commercial law, federal courts will follow a state court to avoid double payment by a party of the same debt, without the possibility of relief from the federal courts. Sonstiby *v.* Keeley, 7 Fed. 447, 2 McCrary 103.

State statutes which enlarge the commercial law will be enforced. Sherman Bank *v.* Apperson, 4 Fed. 25.

28. Cleveland, etc., R. Co. *v.* Franklin Canal Co., 5 Fed. Cas. No. 2,890.

29. Wilkes County *v.* Coler, 180 U. S. 506, 21 S. Ct. 458, 45 L. ed. 642; Wade *v.* Travis County, 174 U. S. 499, 19 S. Ct. 715, 43 L. ed. 1060 [*reversing* 81 Fed. 742, 26 C. C. A. 589]; Folsom *v.* Abbeville County Tp. Ninety-Six, 159 U. S. 611, 16 S. Ct. 174, 40 L. ed. 278; Pleasant Tp. *v.* Ætna L. Ins. Co., 138 U. S. 67, 11 S. Ct. 215, 34 L. ed. 864; Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523; Confarr *v.* Santa Anna Tp., 116 U. S. 366, 6 S. Ct. 418, 29 L. ed. 636; Anderson *v.* Santa Anna Tp., 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633; Douglass *v.* Pike County, 101 U. S. 677, 25 L. ed. 968; Lee County *v.* Rogers, 7 Wall. (U. S.) 181, 19 L. ed. 160; Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Leffingwell *v.* Warren, 2 Black (U. S.) 599, 17 L. ed. 261; Morgan *v.* Curtenius, 20 How. (U. S.) 1, 15 L. ed. 823; Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Stanly County *v.* Coler, 96 Fed. 284, 37 C. C. A. 484 [*reversing* 89 Fed. 257]; Loeb *v.* Columbia Tp., 91 Fed. 37 [*reversed* in 179 U. S. 472, 21 S. Ct. 174, 45 L. ed. 280]; Chisholm *v.* Caines, 67 Fed. 285; *In re* Copenhaver, 54 Fed. 660; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457. See National Foundry, etc., Works *v.* Oconto Water Co., 68 Fed. 1006; Mitchell *v.* Lippincott, 17 Fed. Cas. No. 9,665, 2 Woods 467 [*affirmed* in 94 U. S. 767, 24 L. ed. 315].

Even though the federal court below has followed a former state decision the supreme court on review of a case will apply the rule of law determined by a subsequent differing decision of the state court construing the law so as to validate bonds in the hands of *bona fide* holders and give effect to them. Wade *v.* Travis County, 174 U. S. 499, 19 S. Ct. 715, 43 L. ed. 1060 [*reversing* 81 Fed. 742, 26 C. C. A. 589]. See Green *v.* Neal, 6 Pet. (U. S.) 291, 8 L. ed. 402.

If an earlier state decision has been reaffirmed by the United States supreme court upon questions establishing title to land, the federal court, when the title is again before it, need not follow a later state court decision adverse to the prior ones. Wilson *v.* Ward Lumber Co., 67 Fed. 674.

Where conflicting decisions have been rendered by the highest state court and a commission created to assist said court, a federal court will follow the construction of the state statute adopted by the permanent court. Montgomery *v.* McDermott, 103 Fed. 801, 43 C. C. A. 348 [*affirming* 99 Fed. 502].

30. Jones *v.* Great Southern Fireproof Hotel Co., 79 Fed. 477. *Compare* Franklin County *v.* Gardiner Sav. Inst., 119 Fed. 36, 55 C. C. A. 614.

31. Forsytti *v.* Hammond, 71 Fed. 443, 18 C. C. A. 175.

32. Talcott *v.* Pine Grove, 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. 666, 22 L. ed. 227]. See Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727.

If the law of a territory before its division continues in force in the several states carved therefrom, and is variously interpreted in such state, the federal court will adopt the interpretation of the highest court of the state in

i. Federal Decision Prior to State Decision. Inasmuch as it is within the peculiar province of state courts to determine the construction of their own constitutions and laws, the federal courts have at least, so it is decided, great reluctance in breaking the way in the exposition of such constitutions and statutes, and will not do so except when really necessary.[33] The courts of the United States have therefore for these and similar reasons[34] given precedence, upon questions of the above character, to the decisions of the highest courts of a state over their own prior decisions in conflict therewith,[35] although this rule does not include judgments of territorial courts in mere matters of procedure.[36] Nor will a state decision be followed where it will render invalid contract rights determined to be valid under a previous decision of the supreme court of the United States.[37] Nor in the administration of state laws between citizens of different states will the federal courts, in reviewing the judgment of the circuit court, be bound by the ruling of a state court made after the federal decision.[38] There are also other exceptions and decisions not in accord with the above general rule as to the preference given to state decisions.[39]

j. Postponement Pending Decision in State Court. The federal court will not on motion, it is decided, postpone the trial to await a state supreme court decision if it is not clear that the point involved will be determined in the latter suit, and it is uncertain when it will be decided, and this is so where there is doubt as to the mode of raising the question.[40]

3. To What Extent Rules Applicable — a. In General. Federal courts are held to be bound by explicit and uniform decisions of the highest court of a state which it is possible to follow establishing a rule of property,[41] including

which the suit originates. Christy *v.* Pridgeon, 4 Wall. (U. S.) 196, 18 L. ed. 322.

33. Coates *v.* Muse, 5 Fed. Cas. No. 2,917, 1 Brock. 539. See also Currie *v.* Lewiston, 15 Fed. 377, 21 Blatchf. 236; Smith *v.* Fond du Lac, 8 Fed. 289, 10 Biss. 418; Gilchrist *v.* Little Rock, 10 Fed. Cas. No. 5,421, 1 Dill. 261.

34. See *supra*, XII, F, 2, a.

It is the duty of a federal court to construe a state statute not then construed, where a cause is pending before it. Loring *v.* Marsh, 15 Fed. Cas. No. 8,515, 2 Cliff. 469 [*affirmed* in 6 Wall. (U. S.) 337, 18 L. ed. 802].

35. Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523; Moores *v.* Citizens Nat. Bank, 104 U. S. 625, 26 L. ed. 870; Suydam *v.* Williamson, 24 How. (U. S.) 427, 16 L. ed. 742; Green *v.* Neal, 6 Pet. (U. S.) 291, 8 L. ed. 402; Tefft *v.* Stern, 74 Fed. 755, 21 C. C. A. 73 [*reaffirming* 73 Fed. 591, 21 C. C. A. 67] (so even though the reversal of an amending order is necessary); Sanford *v.* Poe, 69 Fed. 546, 16 C. C. A. 305; Western Union Tel. Co. *v.* Poe, 64 Fed. 9 (state decision before final decree in federal court; latter will reverse its former ruling in deference thereto); Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; Tomes *v.* Barney, 35 Fed. 112; Sonstiby *v.* Keeley, 11 Fed. 578; Leslie *v.* Urbana, 15 Fed. Cas. No. 8,276, 8 Biss. 435; Nessmith *v.* Sheldon, 18 Fed. Cas. No. 10,125, 4 McLean 375. See The Princess Alexandra, 19 Fed. Cas. No. 11,430, 8 Ben. 209.

36. Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475.

Will follow decision of state court in preference to that of territorial court, where territory has been admitted as a state. Stutsman County *v.* Wallace, 142 U. S. 293, 12 S. Ct. 227, 35 L. ed. 1018 [*explained* and *distinguished* in Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475].

37. Rowan *v.* Runnels, 5 How. (U. S.) 134, 12 L. ed. 85. See also Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1.

38. Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359.

39. Pease *v.* Peck, 18 How. (U. S.) 595, 15 L. ed. 518 (circuit court decision and subsequent state decision to the contrary; federal court not bound by the latter); Stryker *v.* Grand County, 77 Fed. 567, 23 C. C. A. 286 (circuit court of appeals will not reverse its decision, made prior to any state adjudication, in deference to a contrary ruling subsequently made by a court not the highest in the state, which decision does not commend itself as sound); King *v.* Dundee Mortg., etc., Inv. Co., 28 Fed. 33 (federal courts will not reverse a decision merely because of a subsequent state decision to the contrary).

That a state decision should not be given preference over a prior federal decision see Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; Foote *v.* Johnson County, 9 Fed. Cas. No. 4,912, 5 Dill. 281; Foote *v.* Linck, 9 Fed. Cas. No. 4,913, 5 McLean 616; Neal *v.* Green, 17 Fed. Cas. No. 10,065, 1 McLean 18; Perrine *v.* Thompson, 19 Fed. Cas. No. 10,997, 17 Blatchf. 18; Westerman *v.* Cape Girardeau County, 29 Fed. Cas. No. 17,432, 5 Dill. 112.

40. Detroit *v.* Detroit City R. Co., 55 Fed. 569.

41. Warburton *v.* White, 176 U. S. 484, 20 S. Ct. 404, 44 L. ed. 555 [*affirming* 18 Wash. 511, 52 Pac. 233, 532]; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795;

land,[42] estates and interests therein or relating thereto,[43] conveyances,[44] land titles,[45] and actions involving the determination thereof or of rights in land;[46] decisions of the highest court of a state relating to rights of parties under mortgages,[47] foreclosures and sale;[48] decisions of the highest court of a state relating to rights of redemption;[49] decisions of the highest conrt of a state relating to recording statutes as to mortgages;[50] decisions of the highest court of a state relating to mortgage liens;[51] decisions of the highest court of a state relating to chattel mortgages;[52] decisions

Taylor *v.* Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; Bondurant *v.* Watson, 103 U. S. 281, 26 L. ed. 447; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191; Thatcher *v.* Powell, 6 Wheat. (U. S.) 119, 5 L. ed. 221; New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229; Pella Independent Dist. *v.* Beard, 83 Fed. 5; Union Pac. R. Co. *v.* Reed, 80 Fed. 234, 25 C. C. A. 389; New York Security, etc., Co. *v.* Lombard Invest. Co., 65 Fed. 271; Santee River Cypress Lumber Co. *v.* James, 50 Fed. 360.

What does not establish rule of property.— Beard *v.* Pella City Independent Dist., 88 Fed. 375, 31 C. C. A. 562; Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 541.

An immaterial variance in a matter purely of practice within the control of the federal court does not affect the substantial rights and rule of property created by a state statute. Connecticut Mut. L. Ins. Co. *v.* Cushman, 108 U. S. 51, 2 S. Ct. 236, 27 L. ed. 648.

42. New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

43. Buford *v.* Kerr, 90 Fed. 513, 33 C. C. A. 166 [*affirming* 86 Fed. 97] (estates created by deed or other muniment of title); Foster *v.* Elk Fork Oil, etc., Co., 90 Fed. 178, 32 C. C. A. 560 (mining leases); U. S. *v.* Eisenbeis, 88 Fed. 4 (whether a mere equitable interest in lands becomes impressed with lien of judgment against owner of interest); Black *v.* Elkhorn Min. Co., 47 Fed. 600 (dower).

44. Oliver *v.* Clarke, 106 Fed. 402, 45 C. C. A. 360; Berry *v.* Northwestern, etc., Bank, 93 Fed. 44, 35 C. C. A. 185.

45. Abraham *v.* Casey, 179 U. S. 210, 21 S. Ct. 88, 45 L. ed. 156 [*affirming* 51 La. Ann. 840, 25 So. 441]; Case *v.* Kelley, 133 U. S. 21, 10 S. Ct. 216, 33 L. ed. 513; McKeen *v.* Delancy, 5 Cranch (U. S.) 22, 3 L. ed. 25; Belding *v.* Hebard, 103 Fed. 532, 43 C. C. A. 296; Rummuel *v.* Butler County, 93 Fed. 304; Hoge *v.* Magnes, 85 Fed. 355, 29 C. C. A. 564.

See further as establishing the rule as to property, etc., Hinde *v.* Vattier, 5 Pet. (U. S.) 398, 8 L. ed. 168; Henderson *v.* Griffin, 5 Pet. (U. S.) 151, 8 L. ed. 79; St. John *v.* Chew, 12 Wheat. (U. S.) 153, 6 L. ed. 583; Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665; Myrick *v.* Heard, 31 Fed. 241; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; Myers *v.* Reed, 17 Fed. 401, 9 Sawy. 132; Lauriat *v.* Stratton, 11 Fed. 107, 6 Sawy. 339.

What does not affect title to real estate.— Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 62 Fed. 904.

International law; if land titles depend on compacts between states, the rule of decision is one of international character, and is not to be drawn from the decisions of the courts of either of the states. Marlatt *v.* Silk, 11 Pet. (U. S.) 1, 9 L. ed. 609.

That questions of international comity are controlled by international law and that federal courts are not bound by state decision see Evey *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

46. Britton *v.* Thornton, 112 U. S. 526, 5 S. Ct. 291, 28 L. ed. 816; Harding *v.* Guice, 80 Fed. 162, 25 C. C. A. 352; Lobenstine *v.* Union El. R. Co., 80 Fed. 9, 25 C. C. A. 304; Bryar *v.* Bryar, 78 Fed. 657; McClaskey *v.* Barr, 62 Fed. 209; McClaskey *v.* Barr, 42 Fed. 609; Lamb *v.* Farrell, 21 Fed. 5. See Taylor *v.* Clark, 89 Fed. 7. But see Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286.

In federal courts, action of trespass to try title cannot be sustained on an equitable title. Kircher *v.* Murray, 54 Fed. 617.

State statute of partition of lands among tenants in common is within jurisdiction of federal court. *Ex p.* Biddle, 3 Fed. Cas. No. 1,391, 2 Mason 472.

47. Abraham *v.* Casey, 179 U. S. 210, 21 S. Ct. 88, 45 L. ed. 156 [*affirming* 51 La. Ann. 840, 25 So. 441].

Federal court is not bound to follow adjudications of state court as to what law governs a contract of loan between a building and loan association of one state and a member residing in the state in which the court is sitting, secured by mortgage on land in the latter state, no local statute or rule of property being involved. U. S. Savings, etc., Co. *v.* Harris, 113 Fed. 27.

Mortgages generally see MORTGAGES.

48. Orvis *v.* Powell, 98 U. S. 176, 25 L. ed. 238; Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212 [*affirmed* in 94 U. S. 806, 24 L. ed. 324].

It is the right and within the power, if not the duty, of the federal court in a suit to foreclose a mortgage to conform to state statutes regulating the remedy. Deck *v.* Whitman, 96 Fed. 873.

49. Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858.

50. Townsend *v.* Todd, 91 U. S. 452, 23 L. ed. 413.

51. Cumberland Bldg., etc., Assoc. *v.* Sparks, 106 Fed. 101.

52. American Surety Co. *v.* Worcester Cycle Mfg. Co., 100 Fed. 40; Wilson *v.* Perrin, 62 Fed. 629, 11 C. C. A. 66 (as to validity of chattel mortgage reserving exemptions from

of the highest court of a state relating to wills and inheritances;[53] decisions of the highest court of a state relating to bankruptcy, insolvency, and assignments therein;[54] decisions of the highest court of a state relating to receivers;[55] decisions of the highest court of a state relating to fraudulent assignments or conveyances, and creditors' rights;[56] decisions of the highest court of a state

execution under state laws); Morse *v.* Riblet, 22 Fed. 501.

Chattel mortgages generally see CHATTEL MORTGAGES.

53. McPike *v.* Wells, 54 Miss. 136; Middleton *v.* McGrew, 23 How. (U. S.) 45, 16 L. ed. 403; Aspden *v.* Nixon, 4 How. (U. S.) 467, 11 L. ed. 1059; Waring *v.* Jackson, 1 Pet. (U. S.) 570, 7 L. ed. 266; Davis *v.* Mason, 1 Pet. (U. S.) 503, 7 L. ed. 239; Dodd *v.* Ghiselin, 27 Fed. 405; Meade *v.* Beale, 16 Fed. Cas. No. 9,371, Taney 339.

Descent and distribution generally see DESCENT AND DISTRIBUTION.

Wills generally see WILLS.

State decision construing a will in a first ejectment suit does not control a subsequent ejectment suit in a federal court, unless the opinion is simply declaratory of settled state law and not merely the construction of a particular devise. Barber *v.* Pittsburgh, etc., R. Co., 166 U. S. 83, 17 S. Ct. 488, 41 L. ed. 925, 69 Fed. 501. See also Lane *v.* Vick, 3 How. (U. S.) 464, 11 L. ed. 681, as to last point above stated.

State decision that an estate by will is a statutory estate excluding further control by testator binds the federal court. Buford *v.* Kerr, 86 Fed. 97.

State decision that a trustee under a will had power to make partition will be followed, although the decision is not announced under such conditions as to be *res judicata*. Phelps *v.* Harris, 101 U. S. 370, 25 L. ed. 855.

54. Richardson *v.* Woodward, 104 Fed. 873, 44 C. C. A. 235; *In re* Stevenson, 93 Fed. 789; *In re* Camp, 91 Fed. 745; *In re* Curtis, 91 Fed. 737.

Assignment for benefit of creditors generally see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Bankruptcy generally see BANKRUPTCY.

Insolvency generally see INSOLVENCY.

Federal courts are not bound by any rule of decision of a state as to the effect of the bankruptcy law upon the validity of a general assignment made after its passage in accordance with a state statute (*In re* Plotke, 104 Fed. 964, 44 C. C. A. 282), nor can a federal court enforce on behalf of a creditor of another state a state statutory remedy that a voluntary assignment for creditors shall be for the benefit of all creditors (Clapp *v.* Dittman, 21 Fed. 15); and a local rule, as to a foreign assignment and its effect upon property in a state attached by a resident, having been annulled by a United States supreme court decision (Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432) as to discrimination the entire rule is abrogated (Belfast Sav. Bank *v.* Stowe, 92 Fed. 100, 34 C. C. A. 229 [*affirming* 92 Fed. 90]).

Insolvent law of a state does not dissolve attachment in federal courts under the antecedent state laws adopted by congress. Springer *v.* Foster, 22 Fed. Cas. No. 13,265, 1 Story 601.

State statute as to its being unnecessary to prove insolvency in applications for injunctions in specified cases may be administered by equity courts of the United States. Lanier *v.* Alison, 31 Fed. 100.

State decision in insolvency proceedings that a guaranty contract signed by a married woman in the state is invalid, although signed by others in another state, will be followed in federal court. Chicago First Nat. Bank *v.* Mitchell, 84 Fed. 90.

State decisions control as to the construction and effect of a state statute authorizing assignments for benefit of creditors and regulating the same. May *v.* Tenney, 148 U. S. 60, 13 S. Ct. 491, 37 L. ed. 368; South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Jencks *v.* Quidnick County, 135 U. S. 457, 10 S. Ct. 655, 34 L. ed. 200 (unless clearly convinced that ruling is wrong); Rothschild *v.* Hasbrouck, 72 Fed. 813; Rainwater-Boogher Hat Co. *v.* Malcolm, 51 Fed. 734, 2 C. C. A. 476; Appolos *v.* Brady, 49 Fed. 401, 1 C. C. A. 299.

55. Manship *v.* New South Bldg., etc., Assoc., 110 Fed. 845. And see Morgan *v.* New York Nat. Bldg., etc., Assoc., 73 Conn. 151, 46 Atl. 877.

Receivers generally see RECEIVERS.

Federal courts are not bound by a state statute regulating the appointment of receivers and defining their powers and duties (New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305), nor do state laws as to insolvency and assignments for creditors control federal courts in receivership cases as to right of creditor holding collateral to receive dividends without first surrendering collateral (London, etc., Bank *v.* Willamette Steam-Mill, etc., Co., 80 Fed. 226).

Classification and right to priority of payment of claims of employees in immediate service of railroad receivers appointed by United States court should be determined by that court. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

Statute of United States as to receivers does not interfere with the constitutional jurisdiction of its courts and require them to administer property in accordance with state laws. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

56. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 13 S. Ct. 416, 37 L. ed. 255; Marbury *v.*

relating to taxation,[57] and relief therefrom;[58] decisions of the highest court of a

Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393 [*reversing* Tod *v.* Kentucky Union Land Co., 57 Fed. 47]; Wyman *v.* Mathews, 53 Fed. 678; Sloane *v.* Chiniquy, 22 Fed. 213; Sonstiby *v.* Keeley, 11 Fed. 578; *In re* Oliver, 18 Fed. Cas. No. 10,492.

Fraudulent conveyances generally see FRAUDULENT CONVEYANCES.

State decision holding a deed valid as not in fraud of creditors binds. Moulton *v.* Chafee, 22 Fed. 26.

Federal equity courts can enforce rights as to declaring assignment void for fraud, such right existing under a state statute. Bernheim *v.* Birnbaum, 30 Fed. 885 [*following* Jaffrey *v.* Brown, 29 Fed. 476].

Where a conveyance is set aside as fraudulent as to creditors a state statute regulating parties' rights will be applied in a federal court in a state in respect to property there. Claflin *v.* Lisso, 27 Fed. 420.

Trust is not immediately created so as to authorize a bill to set aside a conveyance in a federal court under a state statute making all conveyances void in fraud of creditors and authorizing a probate judge to appoint a trustee to collect and administer the property, etc. England *v.* Russell, 71 Fed. 818.

Federal court may declare a fraudulent assignment void notwithstanding a state statute. Burt *v.* Keyes, 4 Fed. Cas. No. 2,212, 1 Flipp. 61.

State decisions as to statutes prescribing remedies of creditors are not followed. Butz *v.* Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490.

State statute giving priority of payment in a creditors' bill does not govern in a federal court. Talley *v.* Curtain, 54 Fed. 43, 4 C. C. A. 177.

57. Ogden Commercial Nat. Bank *v.* Chambers, 182 U. S. 556, 21 S. Ct. 863, 45 L. ed. 1227 [*affirming* 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346]; Osborne *v.* Florida, 164 U. S. 650, 17 S. Ct. 214, 41 L. ed. 586; Winona, etc., Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247; Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719; Lewis *v.* Monson, 151 U. S. 545, 14 S. Ct. 424, 38 L. ed. 265; Adams *v.* Nashville, 95 U. S. 19, 24 L. ed. 369; Carroll County *v.* U. S., 18 Wall. (U. S.) 71, 21 L. ed. 771; U. S. *v.* Gates, 7 Wall. (U. S.) 610, 19 L. ed. 202; Haley Live-Stock Co. *v.* Routt County, 94 Fed. 297, 36 C. C. A. 350; Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294.

Taxation generally see TAXATION.

State construction of its tax laws will be followed by federal courts. Games *v.* Dunn, 14 Pet. (U. S.) 322, 10 L. ed. 476; Parks *v.* Watson, 20 Fed. 764; Secor *v.* Singleton, 9 Fed. 809, 3 McCrary 230; Hodgdon *v.* Burleigh, 4 Fed. 111; Kountze *v.* Omaha, 14 Fed. Cas. No. 7,928, 5 Dill. 443.

State decision as to the exemption of a railroad corporation from taxation which does not establish a settled rule of property does not bind a federal court. Keokuk, etc., R. Co. *v.* Scotland County Ct., 41 Fed. 305.

Whether a law imposing a license is under the police or the taxing power is not conclusive as to the federal court by a state decision when the validity of the law is drawn in question on the ground of a conflict with the constitution, etc., of the United States. Pabst Brewing Co. *v.* Terre Haute, 98 Fed. 330. But see *In re* Ott, 95 Fed. 274.

State decision that taxes paid under a void law, in conflict with the federal constitution, cannot be recovered back does not bind the federal court. John Kyle Steamboat Co. *v.* New Orleans, 13 Fed. Cas. No. 7,354.

Suit provided by a statute, which is contrary to the constitution of the United States, that no action should be brought against a tax-collector in cases where he has refused coupons for taxes, other than an action to recover back money paid for taxes under protest, is no suit at all and is not validated by U. S. Rev. Stat. (1878) §§ 721, 914 [U. S. Comp. Stat. (1901) pp. 581, 684]. Chaffin *v.* Taylor, 116 U. S. 567, 6 S. Ct. 518, 29 L. ed. 727; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. ed. 200; Chaffin *v.* Taylor, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. ed. 198; White *v.* Greenhow, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. ed. 199; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185.

58. Altschul *v.* Gittings, 86 Fed. 200; Seccomb *v.* Wurster, 83 Fed. 856.

Relief against taxing power.—Relief against illegal assessment of back taxes may be granted by a federal court of equity where a state statute makes them a lien on real estate. Meyers *v.* Shields, 61 Fed. 713. But a federal court cannot correct an inequality of state taxation at suit of a non-resident. Savings, etc., Soc. *v.* Multnomah County, 60 Fed. 31. Nor can the United States supreme court afford relief to citizens of a state from enforcement of their laws prescribing the mode and subjects of taxation, if they neither branch upon federal authority nor violate constitutional rights. Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

Injunction.—Federal court may enjoin tax proceedings, although merely by certiorari in state court. Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537. But there must be some special circumstances to authorize interference by injunction with the exercise of the taxing power, mere irregularity or illegality being insufficient. Robinson *v.* Wilmington, 65 Fed. 856, 13 C. C. A. 177. And the federal court has no general jurisdiction to restrain a board of appraisement from certifying the amount to be assessed against a telegraph company in each county on the ground that the tax is illegal, even though a state statute gives relief. Western Union Tel. Co. *v.* Poe, 61 Fed. 449.

state relating to corporations;[59] decisions of the highest court of a state relating to state laws aiding railroads,[60] subject, however, to various exceptions;[61] decisions of the highest court of a state relating to the issuance of bonds,[62]

59. National Park Bank *v.* Remsen, 158 U. S. 337, 15 S. Ct. 891, 39 L. ed. 1008; U. S. *v.* Fox, 94 U. S. 315, 24 L. ed. 192; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. ed. 102; Zacher *v.* Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 480; Williams *v.* Gaylord, 102 Fed. 372, 42 C. C. A. 401; Schofield *v.* Goodrich Bros. Banking Co., 98 Fed. 271, 39 C. C. A. 76; Williams *v.* Gold Hill Min. Co., 96 Fed. 454; San Diego Flume Co. *v.* Souther, 90 Fed. 164, 32 C. C. A. 548; Sioux City Terminal R., etc., Co. *v.* Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73; Venner *v.* Atchison, etc., R. Co., 28 Fed. 581; Eaton *v.* St. Louis Shakspear Min., etc., Co., 7 Fed. 139, 2 McCrary 362; Semple *v.* Bank of British Columbia, 21 Fed. Cas. No. 12,659, 5 Sawy. 88.

Corporations generally see CORPORATIONS.

Although the charter of a corporation vests certain exclusive privileges therein, a state decision that the city council might grant like privileges governs a federal circuit court, especially when the right is conceded by the United States supreme court, notwithstanding a prior decision thereto, but one subsequent to a state decision is *contra*, all the parties being residents of the state where the state court decision is rendered. New Orleans Water-Works Co. *v.* Southern Brewing Co., 36 Fed. 833. And see New Orleans Waterworks Co. *v.* Louisiana Sugar Refinery Co., 35 La. Ann. 1111 [point *conceded* in 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607]. *Contra*, New Orleans Water-Works Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525.

Rule of comity regardless of state decisions may be enforced as to rights given creditor of corporation by state statute. Dexter *v.* Edmands, 89 Fed. 467.

State decision that corporation is legally organized is conclusive. Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. (U. S.) 108, 23 L. ed. 67; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812; Mooney *v.* Humphrey, 12 Fed. 612, 4 McCrary 112.

State law making shares of corporate stock personal property should be enforced by federal courts as to corporations created by the state. Jellenik *v.* Huron Copper-Min. Co., 177 U. S. 1, 20 S. Ct. 559, 44 L. ed. 647 [*reversing* 82 Fed. 778].

The state decision need not be followed where it construes a state statute as to the liability of stock-holders, when the liability occurred prior to such construction and correctness of the decision was subsequently doubted. Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 112 Fed. 812.

60. Scipio *v.* Wright, 101 U. S. 665, 25 L. ed. 1037; Elmwood *v.* Marcy, 92 U. S. 289, 23 L. ed. 710; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Amey *v.* Allegheny City, 24 How. (U. S.) 364, 16 L. ed. 614; Estill County *v.* Embry, 112 Fed. 882, 50 C. C. A. 573; Zane *v.* Hamilton County, 104 Fed. 63, 43 C. C. A. 416; Bolles *v.* Amboy, 45 Fed. 168; Hay *v.* Alexandria, etc., R. Co., 20 Fed. 15; Katzenberger *v.* Aberdeen, 16 Fed. 745; North Bennington First Nat. Bank *v.* Arlington, 9 Fed. Cas. No. 4,806, 16 Blatchf. 57; North Bennington First Nat. Bank *v.* Bennington, 9 Fed. Cas. No. 4,807, 16 Blatchf. 53.

Question whether a statute created a corporation by authorizing a designated portion of a county to subscribe stock, issue bonds, and levy taxes, is one of purely local nature, and a state affirmative decision binds the federal court. Hancock *v.* Louisville, etc., R. Co., 145 U. S. 409, 12 S. Ct. 969, 36 L. ed. 755.

61. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873 (railroad corporation here was created by an act of congress for national purposes and interstate commerce); Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523 (rule that the pendency of a suit in case of negotiable paper not matured is not notice to subsequent holders cannot in a federal court be affected by state laws or decisions when rights of persons not residing and not being in the state are involved); Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424 (although the federal court may yield against its own judgment to a state decision, and accept the same as local law, that an irregular election made bonds void, yet it will not follow state courts in its conclusion that bonds issued in pursuance thereof are void in the hands of *bona fide* holders); Venice *v.* Murdock, 92 U. S. 494, 23 L. ed. 583 (state decisions thereon which do not present a case of statutory construction, but which merely assert general principles, will not be followed); Pine Grove Tp. *v.* Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227 [*affirming* 23 Fed. Cas. No. 13,735, 1 Flipp. 120] (state decisions as to the constitutionality of a statute authorizing counties to subscribe to the aid of railroads will not be respected where not satisfactory to the judges of the United States supreme court); Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

62. Barnum *v.* Okolona, 148 U. S. 393, 13 S. Ct. 638, 37 L. ed. 495; Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93; Bolles *v.* Brimfield, 120 U. S. 759, 7 S. Ct. 736, 30 L. ed. 786; Oxford *v.* Union Bank, 96 Fed. 293, 37 C. C. A. 493.

Federal court is not concluded as to the rights of *bona fide* purchasers of municipal bonds, by a state decision that a statute authorizing the issuance of such bonds is unconstitutional, where the rights accrued prior to state decision and subsequent to federal supreme court decision holding such statute valid. Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1. Examine Zane *v.* Hamilton

warrants,[63] and creation of debts by counties, municipalities,[64] etc.; decisions of the highest court of a state relating to municipalities generally;[65] decisions of the highest court of a state relating to liability for negligence or torts;[66] decisions of the highest court of a state relating to laws and decisions concerning usury;[67] and decisions of the highest court of a state relating to contracts,[68] although there are decisions to the contrary;[69] nor does the general rule apply to decisions impairing the obligation of contracts,[70] although this rule is not abso-

County, 104 Fed. 63, 43 C. C. A. 416. And see Smith *v.* Tallapoosa County, 22 Fed. Cas. No. 13,113, 2 Woods 574. And where bonds are issued and sold after a township election authorizing other issuance, a subsequent state decision holding election invalid does not control the federal court. Rondot *v.* Rogers Tp., 99 Fed. 202, 39 C. C. A. 462. See Coler *v.* Stanly County, 89 Fed. 257. See further Quaker City Nat. Bank *v.* Nolan County, 59 Fed. 660; McCall *v.* Hancock, 10 Fed. 8, 20 Blatchf. 344. See also Folsom *v.* Township Ninety-Six, 59 Fed. 67; and see cases cited *supra*, notes 60, 61; and XII, F, 2, h.

Not necessarily conclusive yet it will be followed unless cogent reasons appear to the contrary. Thomas *v.* Scotland County, 23 Fed. Cas. No. 13,909, 3 Dill. 7.

Federal court may collect judgment on county bonds by assessing taxpayers in the same manner as authorized by statute in the state courts. Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 50 C. C. A. 435.

63. St. Paul Capital Bank *v.* Barnes County School Dist. No. 26, 63 Fed. 938, 11 C. C. A. 514. See Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

64. Wade *v.* Travis County, 81 Fed. 742, 26 C. C. A. 589.

Counties generally see COUNTIES.

Municipal corporations generally see MUNICIPAL CORPORATIONS.

65. Forsyth *v.* Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. ed. 1095.

Right of a municipality to take water from a navigable stream affirmed by a state court binds the federal court. St. Anthony Falls Water-Power Co. *v.* Board of Water Com'rs, 168 U. S. 349, 18 S. Ct. 157, 42 L. ed. 497.

Where a state statute extending the boundaries of a city is held void by a state court, but also that it constituted color of law and that the validity of a city government established thereunder could not be inquired into after organization and the exercise of authority for years without question, such decision binds the federal court. McCain *v.* Des Moines, 84 Fed. 726 [*affirmed* in 174 U. S. 168, 19 S. Ct. 644, 43 L. ed. 936].

Where the construction of a city charter is in question, a state decision binds the federal court. Goodrich *v.* Chicago, 10 Fed. Cas. No. 5,542, 4 Biss. 18 [*affirmed* in 5 Wall. 566, 18 L. ed. 511].

State statute requiring a demand against a county for unliquidated damages to be presented to the board of supervisors, etc., as a condition precedent to an action against it for the infringement of a patent, governs. May *v.* Buchanan County, 29 Fed. 469.

66. Clark *v.* Russell, 97 Fed. 900, 38 C. C. A. 541; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 353; Easton *v.* Houston, etc., R. Co., 32 Fed. 893; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Edgerton *v.* New York, 27 Fed. 230; Detroit *v.* Osborne, 135 U. S. 492, 10 S. Ct. 1012, 34 L. ed. 260 [*reversing* 32 Fed. 36]; Illinois Cent. R. Co. *v.* Ihlenberg, 75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393; Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. But see Sawyer *v.* Oakman, 21 Fed. Cas. No. 12,404, 1 Lowell 134 [*affirmed* in 21 Fed. Cas. No. 12,402, 7 Blackf. 290].

Negligence generally see NEGLIGENCE.

67. Missouri, etc., Trust Co. *v.* Krumseig, 172 U. S. 351, 19 S. Ct. 179, 43 L. ed. 474 [*affirming* 77 Fed. 32, 23 C. C. A. 1]; Brown *v.* Grundy, 111 Fed. 15; Union Mortg., etc., Co. *v.* Hagood, 97 Fed. 360; McIlwaine *v.* Iseley, 96 Fed. 62. See Matthews *v.* Warner, 6 Fed. 461.

Usury generally see USURY.

Not bound to follow a state decision which the federal court believes to be wrong. U. S. Savings, etc., Co. *v.* Harris, 113 Fed. 27.

It is a question of general commercial law and a decision of a state court is not binding where the question whether the contract is usurious depends upon whether it is solvable under the laws of one state or another. Manship *v.* New South Bldg., etc., Assoc., 110 Fed. 845.

Where there is a conflict of laws and the question is one of general law the federal court is not bound by a state decision that a promissory note is usurious. Dygert *v.* Vermont L. & T. Co., 94 Fed. 913, 37 C. C. A. 389.

68. McClain *v.* Provident Sav. L. Assur. Soc., 110 Fed. 80, 49 C. C. A. 31; Hill *v.* Hite, 85 Fed. 268, 29 C. C. A. 549; Small *v.* Westchester F. Ins. Co., 51 Fed. 789; Pioneer Gold Min. Co. *v.* Baker, 23 Fed. 258, 10 Sawy. 539.

Contracts generally see CONTRACTS.

69. Stearns *v.* Minnesota, 179 U. S. 223, 21 S. Ct. 73, 45 L. ed. 162 [*reversing* 72 Minn. 200. 75 N. W. 210]; Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49 [*affirming* 82 Fed. 296, 27 C. C. A. 134]; Jefferson Branch Bank *v.* Skelley, 1 Black (U. S.) 436, 17 L. ed. 173; Bancroft *v.* Hambly, 94 Fed. 975, 36 C. C. A. 595, 83 Fed. 444; Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7; Sullivan *v.* Beck, 79 Fed. 200. See also Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 106 Fed. 116.

70. Citizens' Sav. Bank *v.* Owensboro, 173 U. S. 636, 19 S. Ct. 530, 43 L. ed. 840; McCul-

lutely followed.[71] The general rule also applies to contract exemptions from liability.[72]

b. Rights, Wrongs, Remedies, Jurisdiction, and Procedure — (I) *GENERALLY.* Generally the rule of decision applies to rights given by state statutes,[73] and to rights and liabilities imposed by common as well as by statutory law.[74] It also extends to new rights and new remedies,[75] and rights conferred by state constitutional statutes not conflicting with the constitution or laws of the United States can and must be enforced in the federal courts of proper jurisdiction.[76]

(II) *SPECIFICALLY.* The rule of decision as to rights, wrongs, remedies, jurisdiction, and procedure has been invoked and the extent of its application determined with respect to special proceedings under state laws;[77] to relief by

lough *v.* Virginia, 172 U. S. 102, 19 S. Ct. 134, 43 L. ed. 382 [*reversing* 90 Va. 597, 19 S. E. 114]; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. ed. 922; Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921; Butz *v.* Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490.

Impairment of obligation of contract generally see CONSTITUTIONAL LAW.

71. Board of Liquidation *v.* Louisiana, 179 U. S. 622, 21 S. Ct. 263, 45 L. ed. 347 [*affirming* 51 La. Ann. 1849, 26 So. 679] (rule asserted but exception stated); Stone *v.* Frankfort Deposit Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1027 [*affirming* 88 Fed. 383].

72. Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 20 S. Ct. 33, 44 L. ed. 84 [*affirming* 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193]; Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280; Eells *v.* St. Louis, etc., R. Co., 52 Fed. 903. But see Liverpool, etc., R. Co. *v.* Insurance Co. of North America, 129 U. S. 464, 9 S. Ct. 480, 32 L. ed. 800; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680.

73. Whenever a state statute gives a right such right may on proper citizenship be enforced in suitable proceedings in the federal courts. Lilienthal *v.* Drucklieb, 80 Fed. 562. See *Ex p.* McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624. See also Goshorn *v.* Alexander, 10 Fed. Cas. No. 5,630, 2 Bond 158; Union Horse Shoe Works *v.* Lewis, 24 Fed. Cas. No. 14,365, 1 Abb. 518.

A remedy at law created by the statutes of a state cannot oust the jurisdiction of a federal court of equity. Barrett *v.* Twin City Power Co., 118 Fed. 861.

Rights created by state statutes may be enforced. Darragh *v.* H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609. But see Elliott *v.* Felton, 119 Fed. 270, 56 C. C. A. 74.

State laws must be fairly administered by federal courts which assume jurisdiction. Fuentes *v.* Gaines, 9 Fed. Cas. No. 5,145, 1 Woods 112.

That an action is wholly founded on a state statute does not necessarily defeat jurisdiction. Keith *v.* Rockingham, 2 Fed. 834, 18 Blatchf. 246.

That a right of action is created by a state statute recently enacted does not defeat the federal circuit court jurisdiction. Wheeler *v.* Bates, 29 Fed. Cas. No. 17,492, 6 Biss. 88.

Remedy by a summary proceeding under a state law by holders of bonds issued by levee commissioners against taxpayers may be enforced in a federal court by citizens of another state. Stansell *v.* Mississippi Levee Bd. Dist. No. 1, 13 Fed. 846.

Right to possessory lien upon a raft under state laws and extent thereof as well as the existence of possession are questions upon which federal courts will follow state decisions. Knapp *v.* McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 44 L. ed. 921.

Right of action under a state gambling statute is for penalty and the federal court has no jurisdiction. Stichtenoth *v.* Chicago Cent. Stock, etc., Exch., 99 Fed. 1.

74. The rule applies where the action is transitory and the court has jurisdiction of the subject-matter and parties. Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439.

75. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

Generally where controversies are brought before the federal court which do not arise under the laws of the United States, the rule of decision is found by reference to the local law, written or unwritten, and if a local law or usage originate a new right, it may be enforced by federal courts sitting in the state by the exercise of a common-law or chancery power as the case may require. This is not an enlargement of the jurisdictional powers of the court. It is the application of the ordinary powers to the enforcement of a new right. Lorman *v.* Clarke, 15 Fed. Cas. No. 8,516, 2 McLean 568.

76. Buford *v.* Holley, 28 Fed. 680. See Clark *v.* Sohier, 5 Fed. Cas. No. 2,835, 1 Woodb. & M. 368. Although the jurisdiction of such courts cannot be invoked on the ground of the unconstitutionality of the state statutes under which proceedings are had, unless they also violate the federal constitution. Gillette *v.* Denver, 21 Fed. 822.

Federal courts have no jurisdiction, irrespective of citizenship, of suits as to violations of state constitution or laws by state officers which do not impair rights granted or secured by the federal constitution or laws. Bertonneau *v.* City School Directors, 3 Fed. Cas. No. 1,361, 3 Woods 177.

77. *In re* Jarnecke Ditch, 69 Fed. 161.

mandamus;[78] to habeas corpus for the custody and possession of a child;[79] to condemation proceedings;[80] to the right of set-off and counter-claim;[81] to actions for death by wrongful act;[82] to actions begun in a state court and continued after removal in the federal court;[83] to process;[84] to execution and attachment

78. Butz *v.* Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490 [*followed* in U. S. *v.* Burlington, 154 U. S. 568, 14 S. Ct. 212, 19 L. ed. 495 (*reversing* 24 Fed. Cas. No. 14,687)].

Mandamus generally see MANDAMUS.

State decision that mandamus is the only proper remedy upon municipal bonds does not bind the federal courts. Sanford *v.* Portsmouth, 21 Fed. Cas. No. 12,315, 2 Flipp. 105.

79. *In re* Barry, 42 Fed. 113, 34 L. ed. 503 note.

80. Backus *v.* Ft. Street Union Depot Co., 169 U. S. 557, 18 S. Ct. 445, 42 L. ed. 853 [*affirming* 103 Mich. 556, 61 N. W. 787]; Long Island Water-Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165; Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828]; Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206; Pennsylvania R. Co. *v.* National Docks, etc., Co., 58 Fed. 929; Kennedy *v.* Indianapolis, 14 Fed. Cas. No. 7,703, 11 Biss. 13 [*affirmed* in 103 U. S. 599, 26 L. ed. 550].

State court decisions and statutory declarations as to public uses and the non-violation of the constitution of the United States do not bind federal courts. Bradley *v.* Fallbrook Irr. Dist., 68 Fed. 948.

State decisions covering only general principles of law of eminent domain and police power do not restrain federal courts. Hollingsworth *v.* Tensas Parish, 17 Fed. 109, 4 Woods 280.

81. Charnley *v.* Sibley, 73 Fed. 980, 20 C. C. A. 157.

Set-off permitted in state may be pleaded in defense in federal court. Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229; Frick *v.* Clements, 31 Fed. 542.

No local law or usage can influence questions of set-off in United States courts, as such rights arise exclusively under acts of congress. Watkins *v.* U. S., 9 Wall. (U. S.) 759, 19 L. ed. 820. See U. S. *v.* Robeson, 9 Pet. (U. S.) 319, 9 L. ed. 142.

82. Louisville, etc., R. Co. *v.* Lansford, 102 Fed. 62, 42 C. C. A. 160; The City of Norwalk, 55 Fed. 98. *Compare* Elliott *v.* Felton, 119 Fed. 270, 56 C. C. A. 74.

Such action and statute is penal and cannot be enforced in a federal court. Perkins *v.* Boston, etc., R. Co., 90 Fed. 321; Lyman *v.* Boston, etc., R. Co., 70 Fed. 409; Marshall *v.* Wabash R. Co., 46 Fed. 269. But see Joyce Damages, §§ 504, 507–509.

When a foreign administrator cannot sue in a federal court in such cases see Maysville St. R., etc., Co. *v.* Marvin, 59 Fed. 91, 8 C. C. A. 21.

83. Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 21 S. Ct. 526, 45 L. ed. 749 [*affirming* 97 Fed. 837, 38 C. C. A. 502]; Missouri, etc., Trust Co. *v.* Krumseig, 172 U. S. 351, 19 S. Ct. 179, 43 L. ed. 474 [*affirming* 77 Fed. 32, 23 C. C. A. 1]; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; King *v.* McLean Asylum, 64 Fed. 331, 12 C. C. A. 145 (dismissal of a petition in a state court if not there a bar to a new petition is not a bar to a petition in the federal court. See also Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 21 S. Ct. 526, 45 L. ed. 747); New York, etc., R. Co. *v.* Cockcroft, 49 Fed. 3; Lookout Mountain R. Co. *v.* Houston, 44 Fed. 449; Cleaver *v.* Traders' Ins. Co., 40 Fed. 711; New Orleans, etc., R. Co. *v.* New Orleans, 14 Fed. 373; Hazard *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,275, 1 Biss. 503.

In a proceeding begun in a state court to recover a legacy by a remedy given by the state statute, it will be held by the federal court to which it has been removed, in conformity to the decisions of the state courts, that a claim barred by the statute of limitations cannot be set off against such legacy. Wilson *v.* Smith, 117 Fed. 707.

State decision as to the prerequisites to the removal of a suit does not bind the federal court where the question is one of construction of a federal statute. Egan *v.* Chicago, etc., R. Co., 53 Fed. 675.

Upon an action removed to a federal court because of a federal question, the state court judgment does not deprive the federal court of jurisdiction or remove consideration of the laws of the United States as elements of decision. Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 62 Fed. 945.

Where the action is one at law, although equitable relief might be granted if complaint were properly framed, and though the suit is governed by the practice of the trial court on the removal of the cause from the state court, wherein distinctions between law and equity are to some extent obliterated, yet in the federal court the cause must be determined by the principles of common law, notwithstanding plaintiff might have had relief in the state court. Potts *v.* Accident Ins. Co., 35 Fed. 566.

84. Mutual L. Ins. Co. *v.* Patterson, 28 Pittsb. L. J. N. S. 413; Joseph *v.* New Albany Steam Forge, etc., Co., 53 Fed. 180. *Compare* Chamberlain *v.* Mensing, 47 Fed. 435.

Jurisdiction only attaches upon service of process in a federal court and not by filing the complaint and the issue of summons, notwithstanding state statutes. U. S. *v.* Eisenbeis, 112 Fed. 190, 50 C. C. A. 179.

Notwithstanding a state statute simple contract creditors cannot obtain in a federal court of equity a seizure of debtors' property in satisfaction of claims. Harrison *v.* Farmers' L. & T. Co., 94 Fed. 728, 36 C. C. A. 443.

State statute that a cause of action is com-

laws;[85] to substitution of parties;[86] to dismissal of case;[87] to pleadings,[88] and qualifiedly to amendments thereto;[89] to evidence;[90] to counsel fees;[91] to damages;[92] to judgments;[93] to interest;[94] to non-amendment of record in derogation

menced when complaint is filed and summons served does not apply to admiralty suits in federal courts. Laidlaw *v.* Oregon R., etc., Co., 81 Fed. 876, 26 C. C. A. 665 [*reversing* 73 Fed. 846].

State statute requiring permission of court to sue on a judgment does not apply to a federal court. Union Trust Co. *v.* Rochester, etc., R. Co., 29 Fed. 609.

Time when a cause of action accrues under the conclusion of a state court does not bind a federal court when based, not on a construction of a state statute, but in view of a rule of common law. Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62.

85. Dooley *v.* Pease, 180 U. S. 126, 21 S. Ct. 329, 45 L. ed. 457 [*affirming* 88 Fed. 446, 31 C. C. A. 582]; Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. ed. 954; Henry *v.* Pittsburgh Clay Mfg. Co., 80 Fed. 485, 25 C. C. A. 581 (effect of state statute as to sheriff's sale of land); Lant *v.* Manley, 75 Fed. 627, 21 C. C. A. 457; Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15; Lehman *v.* Berdin, 15 Fed. Cas. No. 8,215, 5 Dill. 340.

86. Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629.

87. Gassman *v.* Jarvis, 94 Fed. 603.

88. Iowa, etc., Land Co. *v.* Temescal Water Co., 95 Fed. 320 (cross demands); Taylor *v.* Brigham, 23 Fed. Cas. No. 13,781, 3 Woods 377.

89. North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584.

90. Sherman *v.* Grinnell, 144 U. S. 198, 12 S. Ct. 574, 36 L. ed. 403; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Ryan *v.* Bindley, 1 Wall. (U. S.) 66, 17 L. ed. 559; Camden, etc., R. Co. *v.* Stetson, 104 Fed. 651, 44 C. C. A. 107 (surgical examination); Stewart *v.* Morris, 89 Fed. 290, 32 C. C. A. 203 [*denying* rehearing 88 Fed. 461, 32 C. C. A. 7]; Fowler *v.* Hecker, 1 Fed. Cas. No. 5,001, 4 Blatchf. 425; Dibblee *v.* Furniss, 7 Fed. Cas. No. 3,888, 4 Blatchf. 262; Wright *v.* Taylor, 30 Fed. Cas. No. 18,096, 2 Dill. 23. See further Wright *v.* Bales, 2 Black (U. S.) 535, 17 L. ed. 264; McNiel *v.* Holbrook, 12 Pet. (U. S.) 84, 9 L. ed. 1009; Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231; Witters *v.* Sowles, 32 Fed. 130, 24 Blatchf. 550.

Special provisions of United States statutes control as to the competency or admissibility of testimony (Whitford *v.* Clark County, 119 U. S. 522, 7 S. Ct. 306, 30 L. ed. 500) and as to competency of witnesses (Travis *v.* Nederland L. Ins. Co., 104 Fed. 486, 43 C. C. A. 653).

State decision allowing a parol agreement to limit a written contract does not control a federal court, but it will follow the opposite rule. Van Vleet *v.* Sledge, 45 Fed. 743.

State decisions construing common-law rules of evidence are not obligatory on federal courts. Union Pac. R. Co. *v.* Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553.

State statute authorizing official acts of notaries to be given in evidence does not bind federal courts. Craig *v.* Brown, 6 Fed. Cas. No. 3,330, 3 Wash. 503.

Statute that the laws of a state as to the competency of witnesses in courts of the United States in trials at law, in equity, and admiralty does not apply to criminal actions or proceedings. U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531.

91. Willard *v.* Serpell, 62 Fed. 625.

As to a stipulation for and allowance of counsel fees and the duty of a federal court to follow a state decision against the same although provided for in mortgage see Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501. And examine Vitrified Paving, etc., Co. *v.* Snead, etc., Iron Works, 56 Fed. 64, 5 C. C. A. 418; Gray *v.* Havemeyer, 53 Fed. 174, 3 C. C. A. 497.

92. L. Bucki, etc., Lumber Co. *v.* Maryland Fidelity, etc., Co., 109 Fed. 393, 48 C. C. A. 436.

Federal courts are not required to follow a state statute as to the method of assessing damages by jury. Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475.

93. Packer *v.* Whittier, 81 Fed. 335 (effect of judgment in merging original cause of action); Pence *v.* Cochran, 6 Fed. 269 (lien of judgment). But see Clements *v.* Berry, 11 How. (U. S.) 398, 13 L. ed. 745.

Nunc pro tunc orders of inferior court see Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496.

State statute providing that the decree as to a sheriff's sales is conclusive binds the United States courts, even though one of the parties was a citizen of another state. Jeter *v.* Hewitt, 22 How. (U. S.) 352, 16 L. ed. 345.

United States supreme court, in an action upon a judgment of a state court, is not precluded from inquiring, in determining its jurisdiction, whether the cause of action upon which the judgment was rendered was such that said court would have had jurisdiction. State *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239. See also U. S. Const. art. 4, § 1; U. S. Rev. Stat. (1878) § 905 [U. S. Comp. Stat. (1901) p. 677].

94. Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925 [*following* Prouty *v.* Lake Shore, etc., R. Co., 95 N. Y. 667; O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64].

An amendatory statute reducing rate of interest may operate *proprio vigore*. Connecticut Mut. L. Ins. Co. *v.* Cushman, 108 U. S. 51, 2 S. Ct. 236, 27 L. ed. 648.

A court of admiralty as to the allowance of interest on a libel is not guided by a state law. New Zealand Ins. Co. *v.* Earnmoor Steamship Co., 79 Fed. 368, 24 C. C. A. 644.

of final judgment;[95] to appeal;[96] and to exemptions from execution.[97] But a defense, under a state anti-trust act, is not available, although the right to rely thereon was not questioned in the state court.[98]

G. Supreme Court — 1. Original Jurisdiction and Procedure in Exercise Thereof — a. In General. The original jurisdiction which is conferred upon the supreme court is limited, and it is intended that it should be sparingly exercised and not extended by construction.[99] Nor in those cases where such jurisdiction is given can it be exercised in its appellate form.[1] Again the supreme court may assume the original jurisdiction conferred upon it without any act of congress regulating the mode and form in which it should be exercised.[2]

b. In Prize Cases. No original jurisdiction is conferred upon the supreme court in prize cases; it can only exercise appellate jurisdiction.[3]

c. In Actions in Which a State Is a Party.[4] The original jurisdiction conferred upon the supreme court of controversies between a state and citizens of another state[5] may be exercised by such court under the authority conferred by the constitution and existing acts of congress.[6] And such jurisdiction rests solely upon the character of the parties, and not upon the nature of the case;[7] and a state must be a party either nominally or substantially.[8]

95. Fielden *v.* Illinois, 143 U. S. 452, 12 S. Ct. 528, 36 L. ed. 224.

96. New York, etc., R. Co. *v.* Cockcroft, 49 Fed. 3, special proceeding.

State decision is not reviewable unless fundamental rights under the United States constitution are infringed. Wilson *v.* North Carolina, 169 U. S. 586, 18 S. Ct. 435, 42 L. ed. 865.

97. Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219 (property generally); Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124 (real estate); Humboldt First Nat. Bank *v.* Glass, 79 Fed. 706, 25 C. C. A. 151 (homestead).

After suit commenced in a federal court a state law extending an exemption does not affect the same, such law never having been adopted by the court and the law previously adopted having authorized an exemption to a more limited extent. Lawrence *v.* Wickware, 15 Fed. Cas. No. 8,148, 4 McLean 56.

98. Lafayette Bridge Co. *v.* Streator, 105 Fed. 729.

99. California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683.

1. Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

Where the constitution declares that the jurisdiction of the supreme court shall be original congress cannot confer appellate jurisdiction upon such court, nor can it confer original jurisdiction where the constitution has given appellate. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

2. Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717.

3. The Alicia, 7 Wall. (U. S.) 571, 19 L. ed. 84; The Harrison, 1 Wheat. (U. S.) 298, 4 L. ed. 95.

4. Actions by or against states generally see States.

5. U. S. Const. art. 3, § 2.

6. New Jersey *v.* New York, 5 Pet. (U. S.) 284, 8 L. ed. 127. See also as to jurisdiction in actions generally between states Missouri *v.* Illinois, 180 U. S. 208, 21 S. Ct. 331, 45 L. ed. 497; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239; Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227; Georgia *v.* Madrazo, 1 Pet. (U. S.) 110, 7 L. ed. 73; Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

Extent of jurisdiction.— The original jurisdiction of the supreme court does not embrace the determination of political questions. Louisiana *v.* Texas, 176 U. S. 1, 20 S. Ct. 251, 44 L. ed. 347. Nor does it extend to a suit brought by a state against a citizen of another state with whom is joined a citizen of the state bringing the action. California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683 [*following* Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. (U. S.) 553, 19 L. ed. 998]. Nor can an original bill by one state against another be maintained as against a health officer of the latter state alone, on the theory that his conduct is in violation or in excess of a valid law of the state when there is no refusal of the state authorities to fulfil their duty in regard to a remedy. Louisiana *v.* Texas, 176 U. S. 1, 20 S. Ct. 251, 44 L. ed. 347. But a suit by a state to enjoin the erection of a bridge over a river is within the original jurisdiction of such court. Pennsylvania *v.* Wheeling, etc., Bridge Co., 9 How. (U. S.) 647, 13 L. ed. 294.

An original suit to determine a controversy as to a boundary line between states brought either by the United States or by a state against another state is within the jurisdiction of the supreme court. U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285; Virginia *v.* West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; New Jersey *v.* New York, 5 Pet. (U. S.) 284, 8 L. ed. 127; New York *v.* Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715.

7. California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683.

8. Fowler *v.* Lindsey, 3 Dall. (U. S.) 411, 1 L. ed. 658.

d. In Actions Affecting Consuls.[9] In actions affecting consuls, although the supreme court is given original jurisdiction it does not possess exclusive jurisdiction.[10]

e. Issuance of Writs — (I) *HABEAS CORPUS.*[11] The supreme court cannot isue any writ of habeas corpus except when necessary for the exercise of jurisdiction, original or appellate, which is given to it by the constitution or laws of the United States.[12]

(II) *MANDAMUS.*[13] By the judicial act power was conferred upon the supreme court to issue a mandamus to an inferior court to sign a bill of exceptions in a case tried before such court.[14] The discretion of the circuit court, however, cannot be controlled by the supreme court by a writ of mandamus;[15] nor can the latter court review by mandamus the judicial action of the circuit court of appeals in the exercise of its legitimate jurisdiction;[16] nor can it, on an application for such a writ, determine whether the power of a district judge in removing a clerk of the latter court has been abused or exercise in any way control over the appointment or removal of such clerk.[17] And it has no jurisdiction either original or appellate to issue a mandamus to persons holding office under the authority of the United States.[18]

(III) *PROHIBITION.*[19] Prohibition cannot be issued by the supreme court where there is no appellate power given by law or any special authority to issue the writ.[20]

f. Practice and Proceedings in Equity.[21] The supreme court will frame its proceedings in cases of original jurisdiction according to those which have been adopted in the English courts in similar cases, and the rules of court in chancery should govern in conducting the case to a final issue.[22]

9. Consuls generally see AMBASSADORS AND CONSULS.

10. Gittings *v.* Crawford, 10 Fed. Cas. No. 5,465, Taney 1; Graham *v.* Stucken, 10 Fed. Cas. No. 5,677, 4 Blatchf. 50; U. S. *v.* Ravara, 27 Fed. Cas. No. 16,122, 2 Dall. (Pa.) 297. And it has been determined that the clause of the constitution conferring jurisdiction in such actions upon the supreme court does not conflict with and render unconstitutional the act of congress which gave jurisdiction to district courts in civil cases against consuls and vice-consuls. Gittings *v.* Crawford, 10 Fed. Cas. No. 5,465, Taney 1.

11. Habeas corpus generally see HABEAS CORPUS.

12. *Ex p.* Barry, 2 How. (U. S.) 65, 11 L. ed. 181.

The supreme court can ordinarily only issue such writs under its appellate jurisdiction (*Ex p.* Hung Hang, 108 U. S. 552, 2 S. Ct. 863, 27 L. ed. 811; *Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676; *Ex p.* Parks, 93 U. S. 18, 23 L. ed. 787; *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872), except in cases affecting ambassadors, other public ministers, or consuls and those in which a state is a party (*Ex p.* Hung Hang, 108 U. S. 552, 2 S. Ct. 863, 27 L. ed. 811).

13. Mandamus generally see MANDAMUS.

14. *Ex p.* Crane, 5 Pet. (U. S.) 190, 8 L. ed. 92, mandamus to circuit court.

15. *In re* Haberman Mfg. Co., 147 U. S. 525, 13 S. Ct. 527, 37 L. ed. 266, holding that the discretion of such court in granting or refusing a supersedeas cannot be so controlled.

16. *In re* Hawkins, 147 U. S. 486, 13 S. Ct. 512, 37 L. ed. 251. See also *Ex p.* Newman, 14 Wall. (U. S.) 152, 20 L. ed. 877.

17. *In re* Hennen, 13 Pet. (U. S.) 225, 10 L. ed. 136.

18. McCluny *v.* Silliman, 2 Wheat. (U. S.) 369, 4 L. ed. 263.

Issuance of mandamus to the secretary of state is not within the power conferred upon the supreme court. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

19. Prohibition generally see PROHIBITION.

20. *Ex p.* Gordon, 1 Black (U. S.) 503, 17 L. ed. 134, where it was decided that prohibition to prevent a marshal from executing criminal process by the circuit court cannot be issued.

To district court. — It has been determined that there is no case where the supreme court is authorized to issue a writ of prohibition to the district court, except where the latter is proceeding as a court of admiralty and maritime jurisdiction. *Ex p.* Gordon, 1 Black (U. S.) 503, 17 L. ed. 134; *Ex p.* New Orleans City Bank, 3 How. (U. S.) 292, 11 L. ed. 603. The district court for the district of Alaska may be proceeded against by prohibition in an admiralty cause. *In re* Cooper, 138 U. S. 404, 11 S. Ct. 289, 34 L. ed. 993.

Until after an appeal was taken from a final decree in the circuit court it was declared that no power was vested in the supreme court to issue a writ of prohibition to restrain the former court from exercising the jurisdiction conferred on it by the act to enforce the rights of citizens of the United States to vote in the several states. *Ex p.* Warmouth, 17 Wall. (U. S.) 64, 21 L. ed. 543.

21. Equity practice generally see EQUITY.

22. California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683; Penn-

g. Expiration of Term. Where an application for an order for the identification and restoration of the boundary line between two states was made in pursuance of a decree in respect to such line which gave permission to file the application during the term, but the consideration was postponed to the next term when the motion was denied, it was determined that another application at a subsequent term could not be entertained, as the power of the court ceased with the expiration of the term at which the motion was denied, the denial of the application, however, being without prejudice to the filing of a new bill or petition for the purpose stated.[23]

h. Dismissal For Want of Necessary Parties.[24] It has been determined that a case will be dismissed where there are absent parties who cannot be made parties to the suit without ousting the jurisdiction of the court.[25]

i. Process and Appearance.[26] In a suit by one state against another service of process of the court on the governor and attorney-general of the defendant state sixty days before the return-day of the process was declared to be sufficient.[27] Again in a action against a state the filing of a demurrer to the complainant's bill by the attorney-general of the state may be an appearance and compliance with an order giving such state leave to appear and answer the bill.[28] And it has been determined that where a defendant state appears and pleads voluntarily, she does not thereby conclude herself, but may on motion be allowed to withdraw her appearance.[29]

2. Appellate Jurisdiction and Procedure in General[30]**— a. Source and Extent of** — (i) *In General.* All appellate jurisdiction of the supreme court not expressly conferred is by implication denied by the judiciary act of 1789 which affirmatively described such jurisdiction.[31] And such powers as are given by the constitution are limited and regulated by acts of congress[32] and must be exercised

sylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 460, 15 L. ed. 449. But see California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683, where it was declared that the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice.

Power to award or refuse costs is conferred in its discretion in a suit before it as a court of original jurisdiction. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 460, 15 L. ed. 449.

23. Virginia *v.* Tennessee, 158 U. S. 267, 15 S. Ct. 818, 39 L. ed. 976.

24. Dismissal generally see Dismissal and Nonsuit.

Parties generally see Parties.

25. California *v.* Southern Pac. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. ed. 683, where it is declared that when an original cause is pending in the supreme court, to be disposed of there in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed to judgment in the absence of parties, whose rights would be in effect determined thereby, even though they might not be technically bound in subsequent litigation in other tribunals.

26. Appearances generally see Appearances.

Process generally see Process.

27. New Jersey *v.* New York, 5 Pet. (U. S.) 284, 8 L. ed. 127.

Complainant or plaintiff may proceed ex parte where the state neglects or refuses to appear. Massachusetts *v.* Rhode Island, 12 Pet. (U. S.) 755, 9 L. ed. 1272.

In an early case it was determined that where a subpœna issued out of the supreme court in any suit in equity, it should be served on the defendant sixty days before the return-day of the writ, and that if the defendant did not appear at the return-day contained therein the complainant should be at liberty to proceed *ex parte*. Grayson *v.* Virginia, 3 Dall. (U. S.) 320, 1 L. ed. 619.

28. New Jersey *v.* New York, 6 Pet. (U. S.) 323, 8 L. ed. 414.

29. Massachusetts *v.* Rhode Island, 12 Pet. (U. S.) 755, 9 L. ed. 1272.

30. Appellate jurisdiction and procedure generally see Appeal and Error.

31. Durousseau *v.* U. S., 6 Cranch (U. S.) 307, 3 L. ed. 232.

A proceeding to obtain from the district court for the district of Alaska the license for ocean and coastwise vessels plying in Alaskan waters prescribed by act of congress of March 3, 1899, is not an action or suit in which a final judgment can be rendered from which petitioners can appeal to the supreme court of the United States, although their petition is coupled with a protest against being compelled to take out such a license. Pacific Coast Steamship Co. *v.* U. S., 187 U. S. 454, 23 S. Ct. 157, 47 L. ed. 256; Pacific Steam Whaling Co. *v.* U. S., 187 U. S. 447, 23 S. Ct. 154, 47 L. ed. 253 [*affirming* 99 Fed. 334].

32. National Exch. Bank *v.* Peters, 144 U. S. 570, 12 S. Ct. 767, 36 L. ed. 545;

in accordance with such regulations and no jurisdiction in a given case can be exercised by the supreme court if congress has made no provision therefor.[33]

(II) *A Pecuniary Limit.* A pecuniary limit was not imposed by the act of congress of March 3, 1891, upon the appellate jurisdiction of the supreme court over appeals from a circuit or district court.[34]

(III) *In Criminal Cases.*[35] No general authority is conferred upon the supreme court to review on error or appeal any judgment rendered in a criminal case, whether it be in the circuit or district courts or in the supreme courts of the territories or the District of Columbia, and an intention to confer such jurisdiction should be expressed in explicit terms.[36]

(IV) *In Prize Cases.* The supreme court, prior to the passage of the act of March 3, 1863, had no appellate jurisdiction in prize cases except where they were removed to this court by appeal from the circuit court.[37]

(V) *Habeas Corpus*[38]—(A) *In General.* It was early determined by the supreme court that it had authority to issue the writ of habeas corpus ad subjiciendum where a person was in jail under the warrant or authority of any other court of the United States;[39] and in such a case the exercise of the appellate jurisdiction of this court is involved.[40] Again it is declared that the supreme court may in the exercise of its appellate jurisdiction, by the writ of habeas corpus aided by the writ of certiorari, revise the decision of the circuit court in all cases[41] where the latter court has in the exercise of its original jurisdiction

Durousseau *v.* U. S., 6 Cranch (U. S.) 307, 3 L. ed. 232.

Jurisdiction to review final judgments or decrees of the circuit courts was not changed by the act of March 3, 1875, c. 137, which gave such courts original cognizance of civil suits arising under the constitution and laws of the United States where the value of the matter in dispute exceeded five hundred dollars. Whitsitt *v.* Union Depot, etc., R. Co., 103 U. S. 770, 26 L. ed. 337.

On appeals in admiralty congress has power to confine the jurisdiction to questions of law arising on the record. Duncan *v.* The Francis Wright, 105 U. S. 381, 26 L. ed. 1100.

33. U. S. *v.* More, 3 Cranch (U. S.) 159, 2 L. ed. 397; Wiscart *v.* Dauchy, 3 Dall. (U. S.) 321, 1 L. ed. 619.

34. The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

35. Criminal law generally see CRIMINAL LAW.

36. Cross *v.* U. S., 145 U. S. 571, 12 S. Ct. 842, 36 L. ed. 821; *In re* Ku-Klux Cases, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274.

A sentence of death imposed by the supreme court of the District of Columbia is not subject to review by writ of error by the supreme court of the United States. Cross *v.* U. S., 145 U. S. 571, 12 S. Ct. 842, 36 L. ed. 821.

Where a fine has been imposed by the circuit court for contempt there is no power in the supreme court to reverse the imposition of such fine which is in the nature of a judgment in a criminal case. New Orleans *v.* New York Mail Steamship Co., 20 Wall. (U. S.) 387, 22 L. ed. 354.

37. The Admiral, 3 Wall. (U. S.) 603, 18 L. ed. 58.

And where a case was so appealed it was the practice of the court to hear the cause in the first instance upon the evidence transmitted from the circuit court and to decide upon that whether it was proper to allow further proof. The London Packet, 2 Wheat. (U. S.) 371, 4 L. ed. 264.

38. Habeas corpus generally see HABEAS CORPUS.

39. *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex p.* Milburn, 9 Pet. (U. S.) 704, 9 L. ed. 280; *Ex p.* Watkins, 7 Pet. (U. S.) 568, 8 L. ed. 786; *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554.

Limitations under act of 1789.—It has been declared, however, that the jurisdiction and power of the supreme court in respect to habeas corpus as limited by the judicature act of 1789 did not extend to cases of imprisonment after conviction under sentences of competent tribunals nor to prisoners in jail, unless in custody under or by color of authority of the United States or committed for trial before some court of the United States or required to be brought to court to testify. These limitations have, however, been narrowed, and the benefits by reason of this writ have been extended by subsequent acts in respect thereto. *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332.

40. *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332.

Where a father prayed for a writ of habeas corpus to take his infant child from the mother's custody, it was determined that the circuit court having refused to grant the writ no appellate jurisdiction was vested in the supreme court. Barry *v.* Mercein, 5 How. (U. S.) 103, 12 L. ed. 70.

41. In an early case it was determined by the supreme court that it had no appellate jurisdiction in criminal cases and that it had no power to revise the judgment of a circuit court, by writ of error or habeas

caused a prisoner to be brought before it and has after inquiry into the cause of his detention remanded him to the custody from which he was taken.[42] And in the case of a prisoner under sentence of a court of the United States in a matter which was wholly beyond the court's jurisdiction, the supreme court may intervene in his interest.[43]

(B) *Nature of Right of Appeal.* In habeas corpus cases it has been decided that the right of appeal to the supreme court under the Revised Statutes[44] is absolute and is not dependent upon the discretion of the judge to allow or refuse.[45]

(C) *May Be Referred to the Court by a Justice.* Where a person under a conviction of the circuit court makes an application for discharge from imprisonment by habeas corpus, and the writ is returnable before a justice of the supreme court, such justice may refer it to the court for determination, as it is a case which involves its appellate jurisdiction.[46]

(D) *Admission to Bail.*[47] It was intended by congress that in case of a crime not capital it should be bailable of right before conviction, and any justice of the supreme court having power to allow the writ of error, to issue the citation, to take the security required by law, and to grant a supersedeas, has authority, incidental to this power, to order plaintiff to be admitted to bail independent of any rule of court on the subject.[48]

(VI) *Mode of Bringing Case Before the Court*—(A) *In General.* The supreme court will not take cognizance of a case which is not brought before it by regular process of law.[49] And under the judiciary act of 1789 any case which was removed to this court from the circuit court must have been removed by writ of error.[50] Under the act, however, of March, 1803, appeals were substituted in place of writs of error in certain cases,[51] the removal of causes, however, being subject to the same rules, regulations, and restrictions as controlled writs of error under the judiciary act of 1789, except that a citation was not required where the appeal was prayed at the same term in which the decree was announced.[52] Again under a more recent act which authorized suits against the United States, it has been determined that if the case is one at law it will be reviewed by the supreme court on a writ of error, but if the suit is in equity or admiralty that it will be reviewed on appeal.[53] Under a later act, however, it is decided that the review of a judgment of conviction of an infamous crime by appeal instead of by writ of error is not authorized by such act.[54]

(B) *From Territorial Courts.* The statute which provides that "the appellate jurisdiction of the supreme court of the United States over the judgments and decrees of territorial courts in cases of trial by jury shall be exercised by writ of error and in all other cases by appeal" is applicable alike to all territorial courts without regard to whether the distinction had been abolished between suits at law and in equity.[55]

corpus, in a case where a party had been imprisoned by the latter court for contempt. *Ex p.* Kearney, 7 Wheat. (U. S.) 38, 5 L. ed. 391.

42. Palmer *v.* Com., 6 Serg. & R. (Pa.) 245; *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332.

43. *In re* Ku-Klux Cases, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274.

44. U. S. Rev. Stat. (1878) § 764, as amended by 23 U. S. Stat. at L. 437 [U. S. Comp. Stat. (1901) p. 595].

45. *In re* Sun Hung, 24 Fed. 723.

46. *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715.

47. Admission to bail generally see BAIL.

48. Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424.

49. Dewhurst *v.* Coulthard, 3 Dall. (U. S.) 409, 1 L. ed. 658, where it was decided that it would not take cognizance of a case brought before it by a case stated.

50. Blaine *v.* The Charles Carter, 4 Dall. (U. S.) 22, 1 L. ed. 724.

51. The San Pedro, 2 Wheat. (U. S.) 132, 4 L. ed. 202, where this was declared to be the mode in causes in equity and of admiralty and maritime cases.

52. The San Pedro, 2 Wheat. (U. S.) 132, 4 L. ed. 202.

53. Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284.

54. Bucklin *v.* U. S., 159 U. S. 680, 16 S. Ct. 182, 40 L. ed. 304.

55. U. S. *v.* Union Pac. R. Co., 105 U. S. 263, 26 L. ed. 1021; Hecht *v.* Boughton, 105 U. S. 235, 26 L. ed. 1018. *Compare* Parish *v.* Ellis, 16 Pet. (U. S.) 451, 10 L. ed. 1028.

(VII) *TRANSFER OF CAUSE* — (A) *Proceedings For.* The clerk of the circuit court where the judgment was rendered was given power by the acts of 1789 and of 1792 to issue a writ of error, and the judges of such court had power to sign the citation and approve the bond,[56] and under the act of 1838 the same power was conferred upon the clerk and judge of the supreme court of a territory;[57] but it was decided in an early case that on return of the writ the original citation subscribed by the judge should also be returned.[58]

(B) *Proceedings in Lower Court After Transfer.* After an appeal to the supreme court from a decree in the circuit court of which a review is sought, the latter court may take cognizance of a bill of review which is brought on a newly discovered state of facts and may permit such a bill to be filed as an amendment by adding new matter and parties to the original record, although it is declared that such procedure is not permissible where the bill is brought for an error apparent in the body of the decree.[59] And pending an appeal from the circuit court to the supreme court it has been decided that the circuit court may pass orders for the preservation of the property which is the subject of the litigation.[60]

(VIII) *EFFECT OF CONSENT OF PARTIES.* The jurisdiction of the supreme court to affirm or reverse a judgment of an inferior or state court is dependent upon the constitution and the acts of congress, and cannot be conferred by agreement of the parties alone.[61]

(IX) *RECORD.* There can be no review on a writ of error of an error in law which does not appear upon the record or by a bill of exceptions made part of the record.[62] And where on an appeal from the supreme court of a territory[63] no statement of the facts is presented in the record, and the record does not show whether the facts found were sufficient to sustain the judgment rendered, and there were no exceptions taken to the rulings in the admission or rejection of evidence, no question is presented to the court for review.[64]

(X) *PREFERRING OR ADVANCING CAUSES.* The supreme court will not advance for a hearing in preference to other suits on the calendar a cause which merely involves private interests.[65] By an act of congress, however,[66] it is provided that certain cases involving the revenue laws of a state may be given priority over other cases.[67] But in the case of a motion to advance a criminal

56. Sheppard *v.* Wilson, 5 How. (U. S.) 210, 12 L. ed. 120.

57. Sheppard *v.* Wilson, 5 How. (U. S.) 210, 12 L. ed. 120.

58. Wilson *v.* Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655.

59. Poole *v.* Nixon, 19 Fed. Cas. No. 11,270, 9 Pet. 770, 9 L. ed. 305.

60. May *v.* Printup, 59 Ga. 128.

61. The Lucy, 8 Wall. (U. S.) 307, 19 L. ed. 394; Kelsey *v.* Forsyth, 21 How. (U. S.) 85, 16 L. ed. 32; Mills *v.* Brown, 16 Pet. (U. S.) 525, 10 L. ed. 1055; McDonald *v.* Smalley, 1 Pet. (U. S.) 620, 7 L. ed. 287.

62. Claasen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966.

63. But where a statement of evidence, upon which, together with findings of fact and law, the supreme court of a territory had determined the case, is not embodied in the record on appeal to the United States supreme court, the case may be determined by the latter court on the sufficiency of the findings in connection with the pleadings to support the judgment. O'Reilly *v.* Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. ed. 669.

And findings which are in effect adopted by the supreme court of a territory have been declared a sufficient statement of facts within an act of congress concerning the practice in a territorial court and appeals therefrom. Cannon *v.* Pratt, 99 U. S. 619, 25 L. ed. 446; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

An original bill signed by the trial judge, indorsed by the clerk as properly filed in the trial court, and by the clerk of the territorial supreme court as properly filed therein may be used in the United States supreme court. Bassett *v.* U. S., 137 U. S. 496, 11 S. Ct. 165, 34 L. ed. 762 [*reversing* 5 Utah 131, 13 Pac. 237].

64. Salina Stock Co. *v.* Salina Creek Irr. Co., 163 U. S. 109, 16 S. Ct. 1036, 41 L. ed. 90.

65. Sage *v.* Iowa Cent. R. Co., 93 U. S. 412, 23 L. ed. 933.

Nor will it, where other cases of great public importance have already been assigned for what may be the remainder of the term, take a case up on motion and assign a day for its argument, where it has already been called and placed at the foot of the docket. Barry *v.* Mercein, 4 How. (U. S.) 574, 11 L. ed. 1108.

66. 16 U. S. Stat. at L. 176 [U. S. Comp. Stat. (1901) p. 695].

67. Miller *v.* New York, 12 Wall. (U. S.) 159, 20 L. ed. 259, where it was decided that

cause in behalf of the United States, the facts should be stated in such a manner that the court may judge whether the administration of the affairs of the government will be embarrassed.[68]

(xi) *Hearing and Rehearing.* Where it is provided by the supreme court rules that causes shall be ready for hearing when they are reached it has been determined that such rules will be rigidly enforced.[69] And after the decision of a cause by the supreme court it will not rehear such cause upon new facts which are then first introduced by affidavit.[70]

(xii) *Determination and Disposition of Cause.* The supreme court may dispose of all the questions in a case of which it has acquired jurisdiction on the ground that the constitutionality of a law of the United States is drawn in question;[71] but after it has once reviewed a case and has remanded it to the subordinate court only the proceedings subsequent to the mandate will be reviewed on a second appeal or writ of error.[72]

(xiii) *Failure to Recognize the Doctrine of Comity.* The failure to sufficiently recognize the doctrine of comity will not of itself constitute a ground for the reversal by the supreme court of the judgment of a lower court which is correct upon the merits.[73]

(xiv) *Mandate to Circuit Court.* Where the merits of a case have been decided by the supreme court which has issued a mandate to the circuit court requiring only the execution of its decree, the circuit court is bound to carry that decree into effect, although the jurisdiction of the court is not alleged in the pleadings.[74]

(xv) *Dismissal and New Writ.* Where a writ of error has been dismissed because it does not clearly appear who the plaintiffs in error are it has been determined that a new writ to revise the judgment may thereafter be brought.[75]

(xvi) *Application of Forfeited Property.* Where the supreme court had indicated the mode to be pursued to ascertain and define the particular charitable uses lawful in their character to which the property of the Mormon church should be applied, and subsequently a different mode of application was prescribed by congress by joint resolution, it was declared that judicial action was not sought to be controlled by such resolution and that the supreme court would reverse its decree and direct further proceedings in accordance therewith.[76]

the act did not apply to a suit brought nominally by a state as plaintiff where the real plaintiffs were individuals.

Municipal ordinances laying taxes are not within such act. Davenport *v.* Dows, 15 Wall. (U. S.) 390, 21 L. ed. 96.

Where the operation of the government of a state is not embarrassed by the delay it was decided that a cause would not be given a preference on the calendar by such act. Hoge *v.* Richmond, etc., R. Co., 93 U. S. 1, 23 L. ed. 781.

68. U. S. *v.* Norton, 91 U. S. 558, 23 L. ed. 250.

69. Alvord *v.* U. S., 99 U. S. 593, 25 L. ed. 399.

70. U. S. *v.* Knight, 1 Black (U. S.) 227, 488, 17 L. ed. 76, 80.

71. Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510.

In case there is not a full court it has been declared that the supreme court will refuse to take up a case which involves constitutional questions. New York City *v.* Miln, 9 Pet. (U. S.) 85, 9 L. ed. 60.

Where an abstract question is presented to the court for the plain purpose of obtaining a declaration as to the constitutionality of certain state statutes it will not pass thereon where no equity in the complainant is shown by the bill and there are no averments therein that he has been injured by such statutes. Williams *v.* Hagood, 98 U. S. 72, 25 L. ed. 51.

72. Magwire *v.* Tyler, 17 Wall. (U. S.) 253, 21 L. ed. 576. See also Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97, where it was declared that the supreme court had no power to reverse its own judgments, no statute having so provided.

73. Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 708, 44 L. ed. 856 [*affirming* 89 Fed. 333, 32 C. C. A. 231].

74. *Ex p.* Story, 12 Pet. (U. S.) 339, 9 L. ed. 1108; Skillern *v.* May, 6 Cranch (U. S.) 267, 3 L. ed. 220.

Where a mandate is so issued requiring that a party be put into the possession of lands recovered in certain ejectment suits, the circuit court cannot extend the possession beyond the lands specified. Walden *v.* Bodley, 9 How. (U. S.) 34, 13 L. ed. 36.

75. Deneale *v.* Stump, 8 Pet. (U. S.) 526, 528, 8 L. ed. 1032, 1033.

76. U. S. *v.* Church of Jesus Christ, 150 U. S. 145, 14 S. Ct. 44, 37 L. ed. 1033.

b. Effect of Act Creating Circuit Courts of Appeals Upon Review of Decisions of Other Courts — (I) *In General.* By the act of congress which established the circuit courts of appeals[77] jurisdiction of any direct appeal or writ of error from the circuit or district courts could not be entertained by the supreme court except in certain cases provided for in section 5 of such act, which included those of a conviction for a capital or otherwise infamous crime,[78] and certain designated cases in habeas corpus proceedings,[79] and except in those cases where the cause was pending at the date of the act and the appeal was allowed or the writ of error sued out prior to July 1, 1891.[80] And by this act the supreme court was deprived of its appellate jurisdiction in those cases where the jurisdiction of the federal courts depended upon diverse citizenship,[81] although as to pending cases and those in which the appeal or error should be allowed before July 1, 1891, jurisdiction was preserved.[82] And that part of the act in reference to interstate commerce which gave the interstate commerce commission a summary proceeding in the circuit court to enforce its orders was also repealed in respect to that part which allowed an appeal direct to the supreme court where the matter in dispute exceeded two thousand dollars, and under the repealing act appeal should be taken to the circuit court of appeals.[83] Again where the record does not show that certain questions were raised in the court below and rulings were asked thereon an assignment of errors cannot be availed of so as to import such questions in the cause and give jurisdiction to the supreme court under this act.[84]

(II) *Constitutional Questions.* Under the act creating circuit courts of appeals it was determined that a case which involved the constitutionality of a law of the United States[85] might be taken direct to the supreme court,

77. 26 U. S. Stat. at L. 826 [U. S. Comp. Stat. (1901) p. 546].

78. U. S. *v.* Rider, 163 U. S. 132, 16 S. Ct. 983, 41 L. ed. 101.

This act went into immediate operation in respect to such cases so as to permit a writ of error to be allowed where the conviction occurred before its passage, but sentence was not pronounced until afterward. *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409.

79. *Ex p.* Lennon, 150 U. S. 393, 14 S. Ct. 123, 37 L. ed. 1120.

80. National Exch. Bank *v.* Peters, 144 U. S. 570, 12 S. Ct. 767, 36 L. ed. 545.

A review was not authorized where the appeal was taken or writ of error sued out after July 1, 1891. Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 159 U. S. 698, 16 S. Ct. 189, 40 L. ed. 311; Lutcher *v.* U. S., 157 U. S. 427, 15 S. Ct. 718, 39 L. ed. 759; Mason *v.* Pewabic Min. Co., 153 U. S. 361, 14 S. Ct. 847, 38 L. ed. 745; Hubbard *v.* Soby, 146 U. S. 56, 13 S. Ct. 13, 36 L. ed. 886; Cincinnati Safe, etc., Co. *v.* Grand Rapids Safety Deposit Co., 146 U. S. 54, 13 S. Ct. 13, 36 L. ed. 885.

An appeal was not governed by this act where the appeal-bond was given and filed prior to its passage, although the citation was not signed or served until afterward. Mattingly *v.* Northwestern Virginia R. Co., 158 U. S. 53, 15 S. Ct. 725, 39 L. ed. 894.

Jurisdiction was merely preserved by this provision and was not given in case of an appeal allowed and not perfected. Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986.

81. Vorhees *v.* John T. Noye Mfg. Co., 151 U. S. 135, 14 S. Ct. 295, 38 L. ed. 101; Cincinnati Safe, etc., Co. *v.* Grand Rapids Safety Deposit Co., 146 U. S. 54, 13 S. Ct. 13, 36 L. ed. 885; Wauton *v.* De Wolf, 142 U. S. 138, 12 S. Ct. 173, 35 L. ed. 965.

82. Wauton *v.* De Wolf, 142 U. S. 138, 12 S. Ct. 173, 35 L. ed. 965.

83. Interstate Commerce Commission *v.* Atchison, etc., R. Co., 149 U. S. 264, 13 S. Ct. 837, 37 L. ed. 727.

84. Ansbro *v.* U. S., 159 U. S. 695, 16 S. Ct. 187, 40 L. ed. 310.

85. When appeal not authorized.— But under this act which permits an appeal to the supreme court where the case involves the construction or application of the constitution of the United States an appeal to the supreme court is not authorized in the case of a refusal of a circuit court to issue a writ of habeas corpus, on the theory that the court making the commitment was without jurisdiction and therefore the person was deprived of his liberty without due process of law, and that the construction of the constitution is involved. *Ex p.* Lennon, 150 U. S. 393, 14 S. Ct. 123, 37 L. ed. 1120. Nor is such an appeal authorized where the only contention is that the foreclosure decree which is sought to be set aside deprives the complainants of their property without due process of law because of fraud, irregularities, and jurisdictional defects. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 14 S. Ct. 63, 37 L. ed. 1041. And a party is not entitled to bring a case direct to the supreme court by reason of the fact that the circuit court directed the jury to return a verdict for the

although the appeal was taken after the act creating the former court took effect.[86]

(III) *JURISDICTIONAL QUESTIONS.* By the judiciary act of 1891 it was provided that on an appeal or writ of error under section 5 of that act, in any case in which the jurisdiction of the court is in issue, the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.[87]

(IV) *CONSTRUCTION OF TREATY.*[88] The introduction of a treaty with a foreign state and an award merely as part of the history of the case in an action to recover a percentage of the award for services in procuring the same does not involve the validity or construction of the treaty so as to authorize a review by the supreme court.[89]

(V) *COPYRIGHT CASES.*[90] An appeal will not lie from the circuit court to the supreme court in a copyright case, which may be appealed from the circuit court of appeals, merely because the decree of such court affirming a decision of the circuit court has been made a decree of the latter court by the form of its entry.[91]

c. Review of Decisions — (I) *OF CIRCUIT COURT OF APPEALS* — (A) *In General.* A decree or a judgment of the circuit court of appeals is by the act of 1891 made final in many cases so that no appeal will lie therefrom to the supreme court;[92] as where the case was one dependent entirely upon the opposite parties to the suit or controversy being citizens of different states,[93] one arising under the revenue

opposite party, and that he was thus deprived of his right of trial by the jury, and that therefore the construction or application of the constitution of the United States is involved. Treat Mfg. Co. *v.* Standard Steel, etc., Co., 157 U. S. 674, 15 S. Ct. 718, 39 L. ed. 853.

86. Horner *v.* U. S., 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266; Nishimura Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146.

87. 26 U. S. Stat. at L. 827 [U. S. Comp. Stat. (1901) p. 549]. See also APPEAL AND ERROR, 2 Cyc. 751 *et seq.*, for certification of questions and cases in the federal courts.

88. Treaties generally see TREATIES.

89. Borgmeyer *v.* Idler, 159 U. S. 408, 16 S. Ct. 34, 40 L. ed. 199.

90. Copyright generally see COPYRIGHT.

91. Webster *v.* Daly, 163 U. S. 155, 16 S. Ct. 961, 41 L. ed. 111.

92. A judgment of the circuit court of appeals which is made final by the judiciary act of March 3, 1891 (26 U. S. Stat. at L. 828, c. 517 [U. S. Comp. Stat. (1901) pp. 549, 550]), is not reviewable by the supreme court of the United States on writ of error, although the suit involves constitutional rights, and therefore might have been brought directly from the circuit court to the supreme court. Cary Mfg. Co. *v.* Acme Flexible Clasp Co., 187 U. S. 427, 23 S. Ct. 211, 47 L. ed. 244 [*dismissing* writ of error in 108 Fed. 873, 48 C. C. A. 118].

93. Ayres *v.* Polsdorfer, 187 U. S. 585, 23 S. Ct. 196, 47 L. ed. 314 [*dismissing* writ of error in 105 Fed. 737, 45 C. C. A. 24]; Benjamin *v.* New Orleans, 169 U. S. 161, 18 S. Ct. 298, 42 L. ed. 700; Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003.

Although another ground is developed in the course of the proceedings the act applies where jurisdiction was originally invoked on the ground of diverse citizenship. Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 19 S. Ct. 500, 43 L. ed. 814 [*dismissing* appeal in 80 Fed. 745, 26 C. C. A. 131]; *Ex p.* Jones, 164 U. S. 691, 17 S. Ct. 222, 41 L. ed. 601.

In determining whether a decision is final on this ground, inquiry is limited to the face of the record in the circuit court at the institution of the suit. Colorado Cent. Consol. Min. Co. *v.* Turck, 150 U. S. 138, 14 S. Ct. 35, 37 L. ed. 1030. See Borgmeyer *v.* Idler, 159 U. S. 408, 16 S. Ct. 34, 40 L. ed. 199.

Rule applied.— See Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 19 S. Ct. 500, 43 L. ed. 814 [*dismissing* appeal in 80 Fed. 745, 26 C. C. A. 131]; Rouse *v.* Hornsby, 161 U. S. 588, 16 S. Ct. 610, 40 L. ed. 817; Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 16 S. Ct. 537, 40 L. ed. 638. But where one of the parties is a federal corporation a judgment will not be construed as final. Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003. And jurisdiction is not dependent on such citizenship alone where a United States marshal was joined as defendant in an action against an attaching creditor of an insolvent residing in another state for the wrongful seizure of the insolvent's assets. Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492 [*affirming* 75 Fed. 350, 21 C. C. A. 390]. Nor will a judgment of the circuit court of appeals be held final on such ground where it is claimed, and both courts dealt with the controversy on the assumption, that it turned on a construction of the laws of the United States. Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486 [*reversing* 87 Fed. 369, 31 C. C. A. 9].

laws[94] or under the patent laws,[95] or where the case is one in admiralty.[96] And where an action to recover damages for the infringement of a copyright is maintained wholly upon the right given by the common law and no right is claimed under the copyright laws of the United States, the supreme court cannot upon a writ of error review the action of the circuit court of appeals affirming a judgment of the circuit court rendered in such suit.[97] Nor will an appeal lie from a decree affirming an interlocutory order of the circuit court granting a temporary injunction.[98] But a decision is not final in this sense in case of an infamous crime.[99] Nor is a judgment of affirmance in an action against a receiver of a national bank, the action being one arising under the laws of the United States.[1] And where an application is made for a writ of error to review a judgment at law in the circuit court of appeals, a circuit judge in passing thereon must exercise the powers of that court.[2] And where a circuit court of appeals dismissed for want of jurisdiction a case in which its judgment is final its decision may be reviewed by the supreme court on certiorari.[3]

(B) *Certification of Questions.* The circuit court of appeals may certify a case to the supreme court for its opinion.[4]

(C) *Certiorari.* The judiciary act of 1891 conferred upon the supreme court power to review on a writ of certiorari judgments or decrees of the circuit court of appeals which are thereby made final.[5]

(II) *OF CIRCUIT COURTS*—(A) *In General.* In order to sustain a direct appeal to the supreme court from the circuit court under the act of 1891,[6] the question raised must be real and must present controversies which are substantial both from the nature of the principles invoked and the relation to them of the party by whom they are invoked.[7] And if a writ of error from the supreme court to a circuit court is taken while there is pending a prior writ to such court from the circuit court of appeals, that from the supreme court will be dismissed.[8]

94. Anglo-Californian Bank *v.* U. S., 175 U. S. 37, 20 S. Ct. 19, 44 L. ed. 64.

95. U. S. *v.* American Bell Tel. Co., 159 U. S. 548, 16 S. Ct. 69, 40 L. ed. 255.

96. Oregon R., etc., Co. *v.* Balfour, 179 U. S. 55, 21 S. Ct. 28, 45 L. ed. 82 [*dismissing* appeal in 90 Fed. 295, 33 C. C. A. 57], holding that proceedings under the act of congress to limit the liability of shipowners and the rules of the supreme court in that regard are of this character.

97. Press Pub. Co. *v.* Monroe, 164 U. S. 105, 17 S. Ct. 40, 41 L. ed. 367.

98. Kirwan *v.* Murphy, 170 U. S. 205, 18 S. Ct. 592, 42 L. ed. 1009.

99. Folsom *v.* U. S., 160 U. S. 121, 16 S. Ct. 222, 40 L. ed. 363.

1. Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920.

2. Threadgill *v.* Platt, 71 Fed. 1.

3. Kingman *v.* Western Mfg. Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. ed. 1192.

4. See APPEAL AND ERROR, 2 Cyc. 751 *et seq.*

5. 26 U. S. Stat. at L. 826 [U. S. Comp. Stat. (1901) p. 550]. See ADMIRALTY, 1 Cyc. 907 *et seq.* (describing the procedure on certiorari as exemplified in admiralty cases which, however, is the same in cases not in admiralty); CERTIORARI, 6 Cyc. 730 *et seq.* But see Ayres *v.* Polsdorfer, 187 U. S. 585, 23 S. Ct. 196, 47 L. ed. 314 [*dismissing* writ of error in 105 Fed. 737, 45 C. C. A. 24], holding that certiorari to the circuit court of appeals, sought because of the apprehension that a writ of error was improperly sued out, will not be granted where the judgment sought to be reviewed was rendered Dec. 7, 1900, a rehearing denied Feb. 23, 1901, the writ of error brought April 15, 1901, and the record filed and case docketed April 29, 1901, and the motion for such certiorari was not made until Oct. 9, 1902.

Effect of.—Any action which might be taken by the circuit court of appeals in a case decided by it or which might be taken by the trial court in obedience to its mandate is by the award of a certiorari in such cause thereby suspended. The trial court, however, is not thereby restored to its jurisdiction, nor is any authority conferred upon it to set aside orders which were legally and properly made in pursuance of the mandate of the circuit court of appeals prior to the awarding of such writ. Louisville, etc., R. Co. *v.* Louisville Trust Co., 78 Fed. 659.

Where the circuit court of appeals has no jurisdiction to determine a cause on the merits, and has rendered no decision in the case, but has merely certified the question of its jurisdiction, certiorari cannot properly be issued to such court. Good Shot *v.* U. S., 179 U. S. 87, 21 S. Ct. 33, 45 L. ed. 101.

6. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

7. Lampasas *v.* Bell, 180 U. S. 276, 21 S. Ct. 368, 45 L. ed. 527.

8. Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 20 S. Ct. 822, 44 L. ed. 911. And *compare* Carter *v.* Roberts, 177 U. S. 496,

(B) *Where Jurisdiction Is Involved.* There may be a direct appeal to the supreme court from a circuit court where the jurisdiction of the latter court is in issue;[9] but an appeal cannot be sustained on this ground where the question does not involve the jurisdiction of a circuit court as a federal court,[10] or where the decision is that the circuit court is unable to grant relief because of judgments by the state court.[11]

(C) *Criminal Cases.* A direct appeal to the supreme court is allowed in cases of conviction of a capital crime.[12]

(D) *Construction or Application of the Constitution.* A case may be taken directly to the supreme court where it involves the construction or application of the constitution of the United States.[13] And the jurisdiction of such court is not dependent on the question whether the right claimed under the constitution has been upheld or denied in the circuit court, nor is it limited to the constitutional question, but includes the entire case.[14]

(E) *Construction or Validity of Treaty.* Decisions which involve the construction or validity of a treaty are among those from which an appeal may be taken direct to the supreme court;[15] but by invoking the jurisdiction of the cir-

20 S. Ct. 713, 44 L. ed. 861 [*dismissing* appeal in 97 Fed. 496], holding that where a decision of the circuit court involving a constitutional right has been appealed from to the circuit court of appeals and been there decided, a direct appeal cannot be taken from the former decision to the supreme court, as independent appeals to both courts are not allowed by the judiciary act of 1891.

9. Huntington *v.* Laidley, 176 U. S. 668, 20 S. Ct. 526, 44 L. ed. 630; Wetmore *v.* Rymer, 169 U. S. 115, 18 S. Ct. 293, 42 L. ed. 682.

Sufficiency of certification of question of jurisdiction see Arkansas *v.* Schlierholz, 179 U. S. 598, 21 S. Ct. 229, 45 L. ed. 335.

That the certificate does not expressly state the jurisdictional question involved may be immaterial where the record plainly shows that the jurisdiction of the circuit court was involved. Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399.

10. Blythe *v.* Hinckley, 173 U. S. 501, 19 S. Ct. 497, 43 L. ed. 783.

11. Blythe *v.* Hinckley, 173 U. S. 501, 19 S. Ct. 497, 43 L. ed. 783.

12. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

Although a criminal case may not be one of such a conviction yet if the construction or application of the constitution of the United States is involved in the case it may be taken directly to the supreme court. Motes *v.* U. S., 178 U. S. 458, 20 S. Ct. 993, 44 L. ed. 1150.

Although the verdict is qualified by the words "without capital punishment" yet if the conviction is for murder punishable with death the supreme court has jurisdiction on a writ of error. Good Shot *v.* U. S., 179 U. S. 87, 21 S. Ct. 33, 45 L. ed. 101.

13. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

Decisions as to right of appeal in such case. — The question whether regulations of the treasury department adopted by merely executive officers are to be regarded as having the force of law under the constitution involves its construction and application and is reviewable (Boske *v.* Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846), as is also a decision as to the right to vote for members of congress (Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84). But an issue of this nature is not raised by a plea in abatement on the ground that the parties were "improperly or collusively" joined for the purpose of making a case cognizable in the federal courts. Merritt *v.* Bowdoin College, 169 U. S. 551, 18 S. Ct. 415, 42 L. ed. 850. Nor does a bare averment in a petition for a writ of habeas corpus that the petitioner having suffered the punishment of dismissal and publication, his "imprisonment is without authority of law," and his further punishment and detention and the carrying out of said sentence is contrary to law and to the provision of the constitution of the United States and is illegal, raise the constitutional objection that a sentence of any army court-martial imposed a double punishment for the same offense. Carter *v.* Roberts, 177 U. S. 496, 20 S. Ct. 713, 44 L. ed. 861 [*dismissing* appeal in 97 Fed. 496].

14. Holder *v.* Aultman, 169 U. S. 81, 18 S. Ct. 269, 42 L. ed. 669.

To give the supreme court jurisdiction on this ground it should appear from the record that the question was presented to the court below, it not being sufficient that the record shows that the question is contained in an assignment of errors made for the purpose of appeal. Arkansas *v.* Schlierholz, 179 U. S. 598, 21 S. Ct. 229, 45 L. ed. 335. The opinion of the circuit court annexed to and transmitted with the record may be examined on the question of jurisdiction to review on this ground. Loeb *v.* Columbia Tp., 179 U. S. 472, 21 S. Ct. 174, 45 L. ed. 280.

15. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

A suit to establish a land claim by virtue of the treaty of 1821 with Spain may be taken by direct appeal to the supreme court. Mitchell *v.* Furman, 180 U. S. 402, 21 S. Ct. 430, 45 L. ed. 596.

cuit court of appeals on the whole case the right of a defendant to a decision by the supreme court on direct appeal will be considered as waived.[16]

(F) *Constitution or Law of a State in Contravention of Constitution of United States.* The judiciary act of 1891[17] provided also for direct appeal to the supreme court in an action in which "the constitution or law of a state is claimed to be in contravention of the constitution of the United States."[18]

(III) *Of District Courts.* The supreme court has jurisdiction of an appeal from any final sentence and decree in prize cases without regard to the amount in dispute, and no certificate of the district judge as to the importance of the particular case is necessary.[19] Questions of jurisdiction are also reviewable in the supreme court by writ of error;[20] and likewise a conviction for a capital crime.[21] And an appeal, and not a writ of error, is authorized by the act of 1891[22] from a decision denying an application for a discharge upon a writ of habeas corpus where the construction of an extradition treaty is involved.[23]

(IV) *Of Territorial Courts*[24]—(A) *Questions Reviewable.* By the act of congress of 1885[25] it was provided that appeals might be taken to the supreme court of the United States from the territorial supreme courts in those cases in which the matter in dispute was money or some right ascertainable in money, provided the amount in controversy was in excess of a specific sum,[26] or in those

This question is not involved so as to authorize such an appeal in the case of a decision as to whether the petitioner was seeking an asylum in the United States so as to be subject to an extradition treaty. *In re* Newman, 79 Fed. 615.

16. Robinson *v.* Caldwell, 165 U. S. 359, 17 S. Ct. 343, 41 L. ed. 745.

17. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

18. The right extends to every case where either party claims that a state law is in contravention of the constitution of the United States and that claim is either sustained or rejected if the unsuccessful party seeks to have the decision reviewed. Loeb *v.* Columbia Tp., 179 U. S. 472, 21 S. Ct. 174, 45 L. ed. 280.

An appeal may be so taken in the case of a suit brought to enjoin the enforcement of a city ordinance to establish and operate a system of waterworks, where it is claimed that both the ordinance and the statute authorizing the construction of such works by the city impair the obligations of a previous contract made between a water company and the city. Penn Mut. L. Ins. Co. *v.* Austin, 168 U. S. 685, 18 S. Ct. 223, 42 L. ed. 626.

A writ of error, however, from the supreme court to the circuit court cannot be sustained under this act in the case of a question as to the constitutionality of a state statute, first raised in the assignment of errors in the circuit court of appeals, with nothing to present it in the circuit court except a general exception to an instruction in favor of the plaintiff's right to recover under the statute. Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 20 S. Ct. 822, 44 L. ed. 911.

19. The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

20. Shepard *v.* Adams, 168 U. S. 618, 18 S. Ct. 214, 42 L. ed. 602, where the question whether jurisdiction was acquired by the district court over the defendant by valid service is declared to be a question of this character.

21. Although imprisonment for life is actually imposed as the punishment the question may be so reviewable. Fitzpatrick *v.* U. S., 178 U. S. 304, 20 S. Ct. 944, 44 L. ed. 1078.

22. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

23. Rice *v.* Ames, 180 U. S. 371, 21 S. Ct. 406, 45 L. ed. 577.

24. Review of decisions of courts of District of Columbia see *infra*, XII, L, 2.

25. 23 U. S. Stat. at L. 443 [U. S. Comp. Stat. (1901) p. 572], requiring that the amount in controversy exceed five thousand dollars.

26. Simms *v.* Simms, 175 U. S. 162, 20 S. Ct. 58, 44 L. ed. 115 (determining that there may be an appeal from a decree for alimony, where the decree is a distinct and severable final judgment and for a sufficient amount, but not in the case of a controversy as to the continuances or dissolution of the marriage relation); Farnsworth *v.* Montana, 129 U. S. 104, 9 S. Ct. 253, 32 L. ed. 616 (refusing to allow an appeal from a judgment imposing a fine for violation of a territorial statute).

Construction of act.— This provision is restricted to those cases where the matter in dispute is measured by a pecuniary value (Farnsworth *v.* Montana, 129 U. S. 104, 9 S. Ct. 253, 32 L. ed. 616. See Caffrey *v.* Oklahoma, 177 U. S. 346, 349, 20 S. Ct. 664, 666, 44 L. ed. 799, 801. And see Sparrow *v.* Strong, 3 Wall. (U. S.) 97, 18 L. ed. 49); and did not repeal by implication U. S. Rev. Stat. (1878), § 1909, and section 10 of the organic law of New Mexico by which appeals in habeas corpus proceedings were allowed (Borrego *v.* Cunningham, 164 U. S. 612, 17 S. Ct. 182, 41 L. ed. 572 [*reversing* 8 N. M. 655, 46 Pac. 211].

Determination of amount.— Where a claim

cases where regardless of the amount in dispute there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.[27]

(B) *Courts of Indian Territory.* The provision of the act of 1891[28] in respect to appeals from the United States court in the Indian Territory to the United States supreme court or circuit court of appeals in the same manner as from the circuit or district courts does not authorize an appeal to the supreme court in a case in which the constitutionality of an act of congress is brought in question, but which is not affected by the Indian appropriation act of 1898;[29] and the appeal in such a case should be to the court of appeals in the territory.[30]

(C) *Effect of Admission of Territory as State.* Where, on the abolition of the territorial courts, the records are directed by statute to be placed in the keeping of the new state courts, the supreme court of the United States will not direct the records to be brought up and reviewed on writ of error, as there is no court to which a mandate could be directed.[31]

of right to land is involved of which the legal title remains in the United States, in determining the amount in controversy for the purposes of jurisdiction, the value of the land controls and not simply the value of the right of present possession. Black *v.* Jackson, 177 U. S. 349, 20 S. Ct. 648, 44 L. ed. 801 [*reversing* 6 Okla. 751, 52 Pac. 406]. And where there are affidavits showing the value of the land to be in excess of the jurisdictional amount required and the record contains an order made by the territorial supreme court on the application for appeal which states that such an amount is involved, a motion to dismiss the appeal from the territorial supreme court on the ground that the required amount is not involved will be denied. Potts *v.* Hollon, 177 U. S. 365, 20 S. Ct. 654, 44 L. ed. 808 [*reversing* 6 Okla. 696, 52 Pac. 917].

As to appeals from courts of Hawaii see Wilder's Steamship Co. *v.* Hind, 108 Fed. 113, 47 C. C. A. 243. The jurisdiction of the supreme court of the United States to review judgments of the courts of the territory of Hawaii is, under 31 U. S. Stat. at L. 141, c. 339, § 86, to be measured by the power conferred upon the former court to review judgments of state courts. Equitable L. Assur. Soc. *v.* Brown, 187 U. S. 308, 23 S. Ct. 123, 47 L. ed. 190.

27. Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796; Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 15 S. Ct. 391, 39 L. ed. 447.

Criminal cases do not come within the application of this part of the act which is in the nature of an exception carved out of the first section thereof. Farnsworth *v.* Montana, 129 U. S. 104, 9 S. Ct. 253, 32 L. ed. 616. And there can be no appeal under this exception in a criminal case in which there is involved neither the validity nor existence of the court, nor its jurisdiction over the crime or person of defendant. Snow *v.* U. S., 118 U. S. 346, 6 S. Ct. 1059, 30 L. ed. 207; Cannon *v.* U. S., 116 U. S. 55, 6 S. Ct. 278, 29 L. ed. 561.

The decisions not reviewable under this provision include those where the issues involve the regularity of the tax, the sum of penalties due, and the extent of a lien given by the territorial law (Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 15 S. Ct. 391, 39 L. ed. 447), or where the judgment involves merely the construction of an act of congress and the scope of the authority conferred on the territorial legislature (Linford *v.* Ellison, 155 U. S. 503, 15 S. Ct. 179, 39 L. ed. 239). And it has been decided that the validity of a statute is not involved within the meaning of this act so as to allow an appeal in the case of a proceeding which is in the nature of a quo warranto to determine the title to an office under a territorial statute which is declared to be void as in conflict with the organic act of the territory. People *v.* Clayton, 4 Utah 449, 11 Pac. 213.

28. 26 U. S. Stat. at L. 829 [U. S. Comp. Stat. (1901) p. 553].

29. The act of congress of July 1, 1898, providing that "appeals shall be allowed from the United States courts in Indian Territory direct to the supreme court of the United States to either party, in all citizenship cases, and in all cases between either of the five civilized tribes, and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the settlement of land in the Indian Territory, under the rules and regulations governing appeals to said court in other cases."

In construing this act it has been determined that the clause "involving the constitutionality or validity of any legislation" should be read as preceded by a comma and as applying to both classes of cases previously enumerated and that the supreme court is limited to a determination of the constitutionality or validity of the legislation involved. Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041.

30. Ansley *v.* Ainsworth, 180 U. S. 253, 21 S. Ct. 364, 45 L. ed. 517.

31. Hunt *v.* Palao, 4 How. (U. S.) 589, 11 L. ed. 1115.

Effect of transfer from territorial to state court.—That a case in which a judgment was rendered in a state court was transferred to such court from the territorial supreme court

(D) *Scope and Extent of Review.* Upon a review of a judgment in a case not tried by a jury and taken by appeal from the supreme court of a territory, the United States supreme court is restricted to an inquiry whether the findings of fact made by the court below support its judgment and to a review of exceptions duly taken to rulings on the admission or rejection of evidence.[32] And where there are no findings of fact the supreme court will assume that a judgment rendered by a territorial court on a trial without a jury was justified by the evidence.[33]

(V) *Of Court of Claims.* The supreme court in certain cases has jurisdiction of appeals from a judgment of the court of claims,[34] which can only be taken in the manner prescribed by the rules of the former court.[35] The judgment and

from which a writ of error would have lain to the United States supreme court is no ground for a writ of error to the latter court from such judgment. Hamilton *v.* Kneeland, 1 Nev. 60; Northern Pac. R. Co. *v.* Holmes, 155 U. S. 137, 15 S. Ct. 28, 39 L. ed. 99.

Where the subject-matter of a case is within the jurisdiction of the United States supreme court it has been determined that such court will have jurisdiction thereof where the case was decided in the supreme court of the territory before its admission as a state, although the writ of error was allowed and the record certified by the state supreme court after its admission. Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 761.

32. Apache County *v.* Barth, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878; Young *v.* Amy, 171 U. S. 179, 18 S. Ct. 802, 43 L. ed. 127; Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478; Bear Lake, etc., Waterworks, etc., Co. *v.* Garland, 164 U. S. 1, 17 S. Ct. 7, 41 L. ed. 327; Grayson *v.* Lynch, 168 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230. See also De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526 [*affirmed* in 171 U. S. 638, 19 S. Ct. 35, 43 L. ed. 315].

Questions of fact are not reviewable. Simms *v.* Simms, 175 U. S. 162, 20 S. Ct. 58, 44 L. ed. 115. See also Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

Findings of fact of the territorial supreme court are not reviewable. Young *v.* Amy, 171 U. S. 179, 18 S. Ct. 802, 43 L. ed. 127; Holloway *v.* Dunham, 170 U. S. 615, 18 S. Ct. 784, 42 L. ed. 1165; Kelsey *v.* Crowther, 162 U. S. 404, 16 S. Ct. 808, 40 L. ed. 1017.

Additional finding of facts.— Where findings of fact are made by the territorial supreme court in addition to those found by the trial court and which were also adopted by the former court both findings may be considered by the United States supreme court in determining the question of the sufficiency of facts to authorize the judgment. Apache County *v.* Barth, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878.

33. Marshall *v.* Burtis, 172 U. S. 630, 19 S. Ct. 290, 43 L. ed. 579. See Armijo *v.* Armijo, 181 U. S. 558, 21 S. Ct. 707, 45 L. ed. 1000.

34. 26 U. S. Stat. at L. 854 [U. S. Comp. Stat. (1901) p. 765]. And see U. S. *v.* Coe, 155 U. S. 76, 15 S. Ct. 16, 39 L. ed. 76; U. S. *v.* Alire, 6 Wall. (U. S.) 573, 18 L. ed. 947. *Compare* Gordon *v.* U. S., 2 Wall. (U. S.) 561, 17 L. ed. 921.

The treasury department has no power to revise the judgments of the court of claims. U. S. *v.* Jones, 119 U. S. 477, 7 S. Ct. 283, 30 L. ed. 440.

Where the jurisdiction of the court of claims has been enlarged by an act of congress which does not provide for an appeal it has been determined that under the act of 1863 an appeal will lie from a judgment rendered in a case arising under the subsequent act. *Ex p.* Zellner, 9 Wall. (U. S.) 244, 19 L. ed. 665; Bradshaw *v.* U. S., 14 Ct. Cl. 145. And see *In re* Vigo, 21 Wall. (U. S.) 648, 22 L. ed. 690, where jurisdiction over a particular claim is granted. But see *Ex p.* United States, 17 Wall. (U. S.) 439, 21 L. ed. 696; *Ex p.* United States, 9 Ct. Cl. 320.

When appeal does not lie.— Where an act provided that a case of a claim for abandoned and captured property should be decided by the court of claims "on proofs to the satisfaction of such court" it has been determined that its decision was final and that no appeal could be taken. Pargoud *v.* U. S., 4 Ct. Cl. 349.

35. Hubbell *v.* U. S., 6 Ct. Cl. 53. And where no request has been made to the court of claims to make a finding pursuant to the rules regulating appeals therefrom, a request for an order on a court of claims for an additional finding will be refused. U. S. *v.* Driscoll, 131 U. S. Appendix clix, 24 L. ed. 596.

Finding of facts generally see Mahan *v.* U. S., 14 Wall. (U. S.) 109, 20 L. ed. 764; Murdock *v.* District of Columbia, 23 Ct. Cl. 41; Spencer *v.* U. S., 11 Ct. Cl. 181.

Advisory findings of fact and conclusions of law such as are made to a department by the court of claims in accordance with section 12 of the act of March 3, 1887, is not in the nature of a judgment which is reviewable by the supreme court. *In re* Sanborn, 148 U. S. 222, 13 S. Ct. 577, 37 L. ed. 429 [*affirming* 27 Ct. Cl. 485].

Overruling of motion that the court of claims be directed to send up additional or specific findings where a jurisdiction in law is conferred and not in equity see Union Pac. R. Co. *v.* U. S., 116 U. S. 154, 6 S. Ct. 325,

discretion of the court of claims in respect to the admissibility or sufficiency of the evidence to sustain the verdict is absolute, and questions of this character cannot be reviewed by the supreme court.[36]

(VI) *Of Military Tribunal.* A military tribunal is not a court within the meaning of that word as used in the judiciary act of 1789,[37] and the supreme court has no jurisdiction to review by certiorari the proceedings of such a tribunal ordered by a general officer of the United States army, commanding a military department.[38]

(VII) *Of State Courts*—(A) *Source and Extent of Power*—(1) Constitutional and Statutory Provisions. It has been decided that the state courts are not within the application of the constitutional provision[39] conferring appellate jurisdiction upon the supreme court, and that such jurisdiction only extends to the inferior courts designated in the preceding section.[40] By the judiciary act of 1789,[41] however, the supreme court has appellate jurisdiction to review decisions of a state court of last resort in certain specified cases, which involve the validity or effect of the constitution, a statute or a treaty of, or authority exercised under, the United States;[42] and the appellate power which is conferred upon the supreme court by this provision is supported both by the letter and spirit of the constitution.[43]

(2) Judgment or Decree Should Be Final. In order that the supreme court of the United States may have jurisdiction to review a judgment or decree of a state court, such judgment or decree should be a final one.[44] And where it

29 L. ed. 584; McClure *v.* U. S., 116 U. S. 145, 6 S. Ct. 321, 29 L. ed. 572.

Where the findings do not sufficiently present questions of law in a case pending on appeal, the remedy is an application to the supreme court for an order remanding the case with instructions. Monroe *v.* U. S., 37 Ct. Cl. 79.

36. McKeever *v.* U. S., 14 Ct. Cl. 396; Ross *v.* U. S., 12 Ct. Cl. 565.

37. U. S. Rev. Stat. (1878) § 716 [U. S. Comp. Stat. (1901) p. 580].

38. *In re* Vidal, 179 U. S. 126, 21 S. Ct. 48, 45 L. ed. 118; *Ex p.* Vallandigham, 1 Wall. (U. S.) 243, 17 L. ed. 589. *Compare* Carter *v.* McClaughry, 183 U. S. 365, 22 S. Ct. 181, 46 L. ed. 236, determining that a contention that the accused was twice punished for the same offense by the sentence of an army court-martial is so raised as to authorize a direct appeal to the supreme court from an order of the circuit court discharging a writ of habeas corpus.

39. U. S. Const. art. 3, § 2.

40. Ferris *v.* Coover, 11 Cal. 175; Johnson *v.* Gordon, 4 Cal. 368; Padelford *v.* Savannah, 14 Ga. 438; Stunt *v.* The Steamboat Ohio, 3 Ohio Dec. (Reprint) 362, 4 Am. L. Reg. 49. But see Piqua Branch State Bank *v.* Knoup, 6 Ohio St. 342.

41. See U. S. Rev. Stat. (1878) § 709 [U. S. Comp. Stat. (1901) p. 575].

42. This provision will be strictly construed. Ferris *v.* Coover, 11 Cal. 175; McBride *v.* Hoey, 11 Pet. (U. S.) 167, 9 L. ed. 673.

Criminal cases are subject to the application of this jurisdiction as well as civil cases. Twitchell *v.* Pennsylvania, 7 Wall. (U. S.) 321, 19 L. ed. 223.

The record should show the necessary facts to bring the case within the section. Ferris *v.* Coover, 11 Cal. 175.

This appellate jurisdiction is not ousted as to suits in which a state is a party by the constitutional provision giving the supreme court original jurisdiction in such suits. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

43. Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97. *Contra*, see Padelford *v.* Savannah, 14 Ga. 438.

44. U. S. Rev. Stat. (1878) § 709 [U. S. Comp. Stat. (1901) p. 575].

Rights which are litigated need not be determined to render the judgment final, it being sufficient if the particular cause is determined. Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481.

A judgment reversing the judgment of the lower court and remanding the cause is not a final one. Hart *v.* Burnett, 20 Cal. 169; Rankin *v.* Tennessee, 11 Wall. (U. S.) 380, 20 L. ed. 175; Winn *v.* Jackson, 12 Wheat. (U. S.) 135, 6 L. ed. 577; Houston *v.* Moore, 3 Wheat. (U. S.) 433, 4 L. ed. 428. See also Clark *v.* Kansas City, 172 U. S. 334, 19 S. Ct. 207, 43 L. ed. 467. And see Pepper *v.* Dunlap, 5 How. (U. S.) 51, 12 L. ed. 46, where it appeared that the highest court of the state had decided that the party in whose favor a perpetual injunction had been granted was entitled to relief and remanded the cause for further proceedings.

As to final judgments in particular cases see Nonconnah Turnpike Co. *v.* Tennessee, 131 U. S. Appendix clviii, 24 L. ed. 368 (as to forfeiture of charter of corporation by abuse of its franchise); Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469 (as to decree setting aside an inquisition

is rendered by the highest court in the state in which a decision could be had, it will be of this character, although it was rendered upon an equal division of opinion among the judges.[45] Again if the validity of a judgment of an inferior court is either affirmed or denied by the highest court in the state, by any form of decision, such decision will, if it involve a federal question, be subject to review by the supreme court whose jurisdiction in such a case attaches upon a proper proceeding.[46]

(3) What Courts' Decisions Are Reviewable. The jurisdiction of the supreme court under this provision is limited to a review of the judgments of the highest court of a state in which a decision could be had.[47] The highest court, however, within the meaning of the act, may be a lower court whose judgment has by the laws of the state been made final in that class of cases.[48]

(4) Decision Involving Law of Public Body Not a State. A public body not duly organized or admitted into the Union is not a state, and cannot pass a statute within the meaning of the Judiciary Act, and therefore the supreme court has no jurisdiction to review a decision in which the validity of an act passed by such a body is drawn in question.[49]

(B) *Nature of Decisions Reviewable*—(1) In General. By the judiciary act of 1789[50] the supreme court was authorized in certain cases[51] to review the

upon lands taken by a railroad company and ordering a new inquisition); Dubuque Miners Bank *v.* U. S., 5 How. (U. S.) 213, 12 L. ed. 121 (as to a decree sustaining a demurrer).

45. Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271.

46. Williams *v.* Bruffy, 102 U. S. 248, 26 L. ed. 135.

47. U. S. Rev. Stat. (1878) § 709 [U. S. Comp. Stat. (1901) p. 575]. See Fleming *v.* Clark, 12 Allen (Mass.) 191.

Record should affirmatively show this.— Fisher *v.* Carrico, 122 U. S. 522, 7 S. Ct. 1227, 30 L. ed. 1192.

A judgment of a lower court cannot be reviewed, although in accordance with a decision of the highest court of the state on a former appeal and which the latter court will necessarily affirm. Great Western Tel. Co. *v.* Burnham, 162 U. S. 339, 16 S. Ct. 850, 40 L. ed. 997 [*distinguishing* Northern Pac. R. Co. *v.* Ellis, 144 U. S. 458, 12 S. Ct. 724, 36 L. ed. 504]; Fisher *v.* Carrico, 122 U. S. 522, 7 S. Ct. 1227, 30 L. ed. 1192. *Compare* Clark's Appeal, 70 Conn. 483, 40 Atl. 111.

An order of a state judge at chambers in a habeas corpus proceeding is not reviewable. McKnight *v.* James, 155 U. S. 685, 15 S. Ct. 248, 39 L. ed. 310.

Where the highest court of a state has denied a petition for a writ of error to an intermediate or inferior state court, a writ of error from the United States supreme court to review the judgment of the state court may be properly addressed to the lower court in which the record remains. Bacon *v.* Texas, 163 U. S. 207, 16 S. Ct. 1023, 41 L. ed. 132; Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960; Gregory *v.* McVeigh, 23 Wall. (U. S.) 294, 23 L. ed. 156. See also *Ex p.* Clark, 128 U. S. 395, 9 S. Ct. 2, 32 L. ed. 487.

48. Bryan *v.* Bates, 12 Allen (Mass.) 201; Downham *v.* Alexandria, 9 Wall. (U. S.) 659, 19 L. ed. 807.

49. Scott *v.* Jones, 5 How. (U. S.) 343, 12 L. ed. 181.

Where the validity of a territorial act is drawn in question by a decision in the highest court of the state, the supreme court cannot review such decision under section 25 of the Judiciary Act. Messenger *v.* Mason, 10 Wall. (U. S.) 507, 19 L. ed. 1028; Dubuque Miners' Bank *v.* Iowa, 12 How. (U. S.) 1, 13 L. ed. 867.

50. U. S. Rev. Stat. (1878) § 709 [U. S. Comp. Stat. (1901) p. 575].

51. New York Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

Decisions reviewable.— See American Express Co. *v.* Maynard, 177 U. S. 404, 20 S. Ct. 695, 44 L. ed. 823 [*reversing* 118 Mich. 682, 77 N. W. 317]; Bohanan *v.* Nebraska, 118 U. S. 231, 6 S. Ct. 1049, 30 L. ed. 71; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481.

Decisions not reviewable.— See New Orleans Debenture Redemption Co. *v.* Louisiana, 180 U. S. 320, 21 S. Ct. 378, 45 L. ed. 550; McDonald *v.* Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. ed. 542; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 26, 21 S. Ct. 282, 45 L. ed. 408; Avery *v.* Popper, 179 U. S. 305, 21 S. Ct. 94, 45 L. ed. 203; Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725; Forsyth *v.* Vehmeyer, 177 U. S. 177, 20 S. Ct. 623, 44 L. ed. 723 [*affirming* 176 Ill. 359, 52 N. E. 55]; Abbott *v.* National Bank of Commerce, 175 U. S. 409, 20 S. Ct. 153, 44 L. ed. 217; Columbia Water Power Co. *v.* Columbia Electric St. R., etc., Co., 172 U. S. 475, 19 S. Ct. 247, 43 L. ed. 521 [*affirming* 43 S. C. 154, 20 S. E. 1002]; Chappell Chemical, etc., Co. *v.* Sulphur Mines Co., 172 U. S. 465, 19 S. Ct. 265, 43 L. ed. 517; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 18 S. Ct. 403, 42 L. ed. 807; Clarke *v.* McDade, 165 U. S. 168, 17 S. Ct. 284, 41 L. ed. 673; Noble *v.* Mitchell, 164 U. S. 367, 17 S. Ct. 110, 41 L. ed. 472; Tregea *v.* Modesto Irr. Dist.,

decisions of the highest court of a state. By this act it was decided that the supreme court might reëxamine, reverse, or affirm a final judgment or decree of the highest court of a state in which a decision could be had, where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity;[52] where there is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity;[53] or where there is drawn in question the construction of any clause of the constitution, or of a treaty, a statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up

164 U. S. 179, 17 S. Ct. 52, 41 L. ed. 395; Smith *v.* Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. ed. 1082; Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986 [*affirming* 83 Iowa 430, 50 N. W. 45]; Iowa Cent. R. Co. *v.* Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. ed. 467; Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 15 S. Ct. 991, 40 L. ed. 85; *In re* Buchanan, 158 U. S. 31, 15 S. Ct. 723, 39 L. ed. 884; Wailes *v.* Smith, 157 U. S. 271, 15 S. Ct. 624, 39 L. ed. 698; Newport Light Co. *v.* Newport, 151 U. S. 527, 14 S. Ct. 429, 38 L. ed. 259; Wood *v.* Brady, 150 U. S. 18, 14 S. Ct. 6, 37 L. ed. 981; Adams *v.* Louisiana Bd. of Liquidation, 144 U. S. 651, 12 S. Ct. 756, 36 L. ed. 578; Sherman *v.* Grinnell, 144 U. S. 198, 12 S. Ct. 574, 36 L. ed. 403; Tripp *v.* Santa Rosa St. R. Co., 144 U. S. 126, 12 S. Ct. 655, 36 L. ed. 371; San Francisco *v.* Itsell, 133 U. S. 65, 10 S. Ct. 241, 33 L. ed. 570; Roth *v.* Ehman, 107 U. S. 319, 2 S. Ct. 312, 27 L. ed. 499; Poppe *v.* Langford, 104 U. S. 770, 26 L. ed. 922; Twitchell *v.* Pennsylvania, 7 Wall. (U. S.) 321, 19 L. ed. 223; Adams *v.* Preston, 22 How. (U. S.) 473, 16 L. ed. 273; Michigan Cent. R. Co. *v.* Michigan Southern R. Co., 19 How. (U. S.) 378, 15 L. ed. 689; Walworth *v.* Kneeland, 15 How. (U. S.) 348, 14 L. ed. 724.

Ejectment suits.— Decisions not reviewable see Carothers *v.* Mayer, 164 U. S. 325, 17 S. Ct. 106, 41 L. ed. 452; Brown *v.* Colorado, 106 U. S. 95, 1 S. Ct. 175, 27 L. ed. 132; Burke *v.* Gaines, 19 How. (U. S.) 388, 15 L. ed. 655.

That parties are citizens of different states is not sufficient to sustain a writ of error to the supreme court from a final judgment of the highest court of a state. Hamilton *v.* Kneeland, 1 Nev. 60; French *v.* Hopkins, 124 U. S. 524, 8 S. Ct. 589, 31 L. ed. 536.

Judgment "contrary to law."— The ground assigned in a motion for a new trial, that the judgment is "contrary to law" is not of itself sufficient to authorize a review by the supreme court on a writ of error, where it does not appear from the record that any federal rights were asserted or in issue and necessarily determined. Capitol Nat. Bank *v.* Cadiz First Nat. Bank, 172 U. S. 425, 19 S. Ct. 202, 43 L. ed. 502 [*affirming* 49 Nebr. 795, 69 N. W. 1151].

A judgment dismissing an appeal because prematurely taken disposes of no federal question, although such question may be invalid in the case. Chappell Chemical, etc., Co. *v.* Sulphur Mines Co., 172 U. S. 474, 19 S. Ct. 268, 43 L. ed. 520.

Certificate of chief justice of state court that a question as to a violation of the federal constitution was submitted to the court and decided will not confer jurisdiction on the supreme court. See Henkel *v.* Cincinnati, 177 U. S. 170, 20 S. Ct. 573, 44 L. ed. 720.

52. If decision is in favor of the validity or authority there is no power to review it. Baker *v.* Baldwin, 187 U. S. 61, 23 S. Ct. 19, 47 L. ed. 75; Bartlett *v.* Lockwood, 160 U. S. 357, 16 S. Ct. 334, 40 L. ed. 455; Ferry *v.* King County, 141 U. S. 668, 12 S. Ct. 128, 35 L. ed. 895, 141 U. S. 673, 12 S. Ct. 130, 35 L. ed. 898; Ryan *v.* Thomas, 4 Wall. (U. S.) 603, 18 L. ed. 460; Reddall *v.* Bryan, 24 How. (U. S.) 420, 16 L. ed. 740; Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169; Strader *v.* Baldwin, 9 How. (U. S.) 261, 13 L. ed. 130; Menard *v.* Aspasia, 5 Pet. (U. S.) 505, 8 L. ed. 207; Montgomery *v.* Hernandez, 12 Wheat. (U. S.) 129, 6 L. ed. 575; Williams *v.* Norris, 12 Wheat. (U. S.) 117, 6 L. ed. 571; McClung *v.* Silliman, 6 Wheat. (U. S.) 598, 5 L. ed. 340; McIntire *v.* Wood, 7 Cranch (U. S.) 504, 3 L. ed. 420; Gordon *v.* Caldcleugh, 3 Cranch (U. S.) 268, 2 L. ed. 436.

Decisions as to authority which are reviewable see Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960; McNulta *v.* Lochridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796; Buck *v.* Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257; Clements *v.* Berry, 11 How. (U. S.) 398, 18 L. ed. 745; Buchanan *v.* Alexander, 4 How. (U. S.) 20, 11 L. ed. 857.

Particular decisions not reviewable on the ground of involving question of authority see Abbott *v.* National Bank of Commerce, 175 U. S. 409, 20 S. Ct. 153, 44 L. ed. 217 [*affirming* 20 Wash. 552, 56 Pac. 376]; Ferry *v.* King County, 141 U. S. 668, 12 S. Ct. 128, 35 L. ed. 895, 141 U. S. 673, 12 S. Ct. 130, 35 L. ed. 898; Manning *v.* French, 133 U. S. 186, 10 S. Ct. 258, 33 L. ed. 582; Millingar *v.* Hartupee, 6 Wall. (U. S.) 258, 18 L. ed. 829; Derby *v.* Gallup, 2 Wall. (U. S.) 97, 17 L. ed. 855.

53. See *infra*, XII, G, 2, c, (VII), (B), (2), (b).

or claimed by either party thereunder.[54] And a decision of a state court which involves no federal question of law,[55] but a mere inference of fact from the evidence, is not subject to review by the supreme court on a writ of error;[56] nor is it any foundation for a writ of error that the jurisdiction of the state court was objected to on the untenable ground that exclusive jurisdiction of that class of cases was conferred on the federal courts.[57]

(2) PARTICULAR CLASSES OF DECISIONS REVIEWABLE — (a) IN GENERAL. The supreme court has been called upon, in the exercise of the power which it possesses to review the decisions of a state court, to review such decisions where it appeared that rights under a treaty were involved;[58] where it appeared that the constitutional amendment that no person shall be deprived, by a state, of his life or property without due process of law was involved;[59] where it appeared that

54. Pittsburgh, etc., R. Co. *v.* Long Island L. & T. Co., 172 U. S. 493, 19 S. Ct. 238, 43 L. ed. 528; Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81; Gregory *v.* McVeigh, 23 Wall. (U. S.) 294, 23 L. ed. 156; Ross *v.* Barland, 1 Pet. (U. S.) 655, 7 L. ed. 302; Buel *v.* Van Ness, 8 Wheat. (U. S.) 312, 5 L. ed. 624.

Decision must be against the right, title, privilege, or immunity in order to give jurisdiction. Sayward *v.* Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. ed. 941; Smith *v.* Adsit, 16 Wall. (U. S.) 185, 21 L. ed. 310; Hoyt *v.* Thompson, 1 Black (U. S.) 518, 17 L. ed. 65; Farney *v.* Towle, 1 Black (U. S.) 350, 17 L. ed. 216; Massachusetts *v.* Federal St. Meeting-House, 1 Black (U. S.) 262, 17 L. ed. 61; Gordon *v.* Caldcleugh, 3 Cranch (U. S.) 268, 2 L. ed. 436.

It is essential to the jurisdiction of the supreme court in such cases that it should appear from the record that the right was specifically claimed, or that it be distinctly deducible therefrom that there was a definite issue as to the possession of such right (Capital Nat. Bank *v.* Cadiz First Nat. Bank, 172 U. S 425, 19 S. Ct. 202, 43 L. ed. 502 [*affirming* 49 Nebr. 795, 69 N. W. 1151]. See also Zadig *v.* Baldwin, 166 U. S. 485, 17 S. Ct. 485, 41 L. ed. 1087); and that the title or right must be one of the plaintiff in error (Conde *v.* York, 168 U. S. 642, 18 S. Ct. 234, 42 L. ed. 611. See also De Lamar's Nevada Gold Min. Co. *v.* Nesbitt, 177 U. S. 523, 20 S. Ct. 715, 44 L. ed. 872). It may not, however, be necessary that the claim should have been set up in the original pleadings. Meyer *v.* Richmond, 172 U. S. 82, 19 S. Ct. 106, 43 L. ed. 374.

Decision as to sufficiency of allegations is not conclusive on the federal court. Covington, etc., Turnpike R. Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560.

Particular cases reviewable.— See Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91; Murdock *v.* Memphis, 20 Wall. (U. S.) 590, 22 L. ed. 429; McGuire *v.* Massachusetts, 3 Wall. (U. S.) 382, 18 L. ed. 164.

Particular cases not reviewable.— See State *v.* Gleason, 12 Fla. 190; Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. ed. 1187 [*dismissing* writ of error in 108 Ky. 278, 56 S. W. 177, 21 Ky. L. Rep. 1735, 49 L. R. A. 258]; Kipley *v.* Illinois, 170 U. S. 182, 18 S. Ct. 550, 42 L. ed. 998; Union Mut. L. Ins. Co. *v.* Kirchoff, 169 U. S. 103, 18 S. Ct. 260, 42 L. ed. 677; Marrow *v.* Brinkley, 129 U. S. 178, 9 S. Ct. 267, 32 L. ed. 654.

55. But if the judgment of the state court was based solely on a ground involving a determination of a federal question, the supreme court may review the same, although the judgment might have been based on a question of general or local law. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823.

56. Turner *v.* New York, 168 U. S. 90, 18 S. Ct. 38, 42 L. ed. 392.

57. Schuyler Nat. Bank *v.* Bollong, 150 U. S. 90, 14 S. Ct. 26, 37 L. ed. 1010, 150 U. S. 85, 14 S. Ct. 24, 37 L. ed. 1008.

58. California Powder Works *v.* Davis, 151 U. S. 389, 14 S. Ct. 350, 38 L. ed. 206; Burthe *v.* Denis, 133 U. S. 514, 10 S. Ct. 335, 33 L. ed. 768; San Francisco *v.* Scott, 111 U. S. 768, 4 S. Ct. 688, 28 L. ed. 593; Williams *v.* Oliver, 12 How. (U. S.) 111, 13 L. ed. 915, 921; Maney *v.* Porter, 4 How. (U. S.) 55, 11 L. ed. 873; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483. *Compare* Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143].

Treaty of cession of Louisiana.— As to review of decision on ground of involving such treaty see McDonogh *v.* Millaudon, 3 How. (U. S.) 693, 11 L. ed. 787; New Orleans *v.* De Armas, 9 Pet. (U. S.) 224, 9 L. ed. 109.

The supreme court is not confined to the abstract construction of the treaty itself. Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

59. American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. ed. 102; Wheeler *v.* New York, etc., R. Co., 178 U. S. 321, 20 S. Ct. 945, 44 L. ed. 1085 [*affirming* 70 Conn. 326, 39 Atl. 443]; Abbott *v.* National Bank of Commerce, 175 U. S. 409, 20 S. Ct. 153, 44 L. ed. 217 [*affirming* 20 Wash. 552, 56 Pac. 376]; Bellingham Bay, etc., R. Co. *v.* New Whatcom, 172 U. S. 314, 19 S. Ct. 205, 43 L. ed. 460 [*affirming* 16 Wash. 131, 47 Pac. 236]; Backus *v.* Ft. Street Union Depot Co., 169 U. S. 557, 18 S. Ct. 445, 42 L. ed. 853 [*affirming* 103 Mich. 556, 61 N. W. 787]; Tregea *v.* Modesto Irr. Dist., 164 U. S.

there had been a denial of full faith and credit to a judgment of a federal court;[60] where it appeared that there had been failure to give full faith and credit to the public acts, records, and judicial proceedings of another state;[61] or where it appeared that there had been a denial by a state court of the right to remove a cause to a federal court,[62] and also to review decisions affecting commerce and navigable waters;[63] decisions in respect to public lands; decisions in respect to titles derived from the United States;[64] decisions affecting mines or mining

179, 17 S. Ct. 52, 41 L. ed. 395; Aultman, etc., Co. *v.* Brumfield, 102 Fed. 7.

Particular decisions not reviewable on ground of depriving a person of property without due process of law. Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. ed. 1187; McQuade *v.* Trenton, 172 U. S. 636, 19 S. Ct. 292, 43 L. ed. 581; Wilson *v.* North Carolina, 169 U. S. 586, 18 S. Ct. 435, 42 L. ed. 865; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 17 S. Ct. 709, 41 L. ed. 1149; Cornell *v.* Green, 163 U. S. 75, 16 S. Ct. 969, 41 L. ed. 76; St. Louis, etc., R. Co. *v.* Missouri, 156 U. S. 478, 15 S. Ct. 443, 39 L. ed. 502: Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751; Israel *v.* Arthur, 152 U. S. 355, 14 S. Ct. 583, 38 L. ed. 474; Snell *v.* Chicago, 152 U. S. 191, 14 S. Ct. 489, 38 L. ed. 408; Baltimore Traction Co. *v.* Baltimore Belt R. Co., 151 U. S. 137, 14 S. Ct. 294, 38 L. ed. 102; Marrow *v.* Brinkley, 129 U. S. 178, 9 S. Ct. 267, 32 L. ed. 654.

Matters not reviewable on conviction for crime see *In re* Buchanan, 146 N. Y. 264, 40 N. E. 883; Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249; *In re* Robertson, 156 U. S. 183, 15 S. Ct. 324, 39 L. ed. 389; McNulty *v.* California, 149 U. S. 645, 13 S. Ct. 959, 37 L. ed. 882; Davis *v.* Texas, 139 U. S. 651, 11 S. Ct. 675, 35 L. ed. 300.

60. National Foundry, etc., Works *v.* Oconto City Water Supply Co., 183 U. S. 216, 22 S. Ct. 111, 46 L. ed. 157; Des Moines Nav., etc., Co. *v.* Iowa Homestead Co., 123 U. S. 552, 8 S. Ct. 217, 31 L. ed. 202; Crescent City Live-Stock, etc., Co. *v.* Butchers' Union Slaughter House, etc., Co., 120 U. S. 141, 7 S. Ct. 472, 30 L. ed. 614; Embrey *v.* Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. ed. 346; Dupasseur *v.* Rochereau, 21 Wall. (U. S.) 130, 22 L. ed. 588.

Decisions not reviewable on this ground see Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Northern Pac. R. Co. *v.* Ellis, 144 U. S. 458, 12 S. Ct. 724, 36 L. ed. 504; Chapman *v.* Crane, 123 U. S. 540, 8 S. Ct. 211, 31 L. ed. 235; Lange *v.* Benedict, 99 U. S. 68, 25 L. ed. 469.

A decision disregarding a decision of a federal court in another suit is not reviewable. Giles *v.* Little, 134 U. S. 645, 10 S. Ct. 623, 33 L. ed. 1062.

61. Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 20 S. Ct. 506, 44 L. ed. 619; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123. *Compare* Balk *v.* Harris, 130 N. C. 381, 41 S. E. 940, 132 N. C. 10, 43 S. E. 477.

Particular decisions not involving this question see Lloyd *v.* Matthews, 155 U. S. 222, 15 S. Ct. 70, 39 L. ed. 128; Blount *v.* Walker, 134 U. S. 607, 10 S. Ct. 606, 33 L. ed. 1036; White *v.* Wright, 22 How. (U. S.) 19, 16 L. ed. 279; Terry *v.* Davy, 107 Fed. 50, 46 C. C. A. 141.

If the construction of a statute is determined, and not its validity, there is no ground for review. Johnson *v.* New York L. Ins. Co., 187 U. S. 491, 23 S. Ct. 194, 47 L. ed. 273 [*dismissing* writ of error in 109 Iowa 708, 78 N. W. 905, 50 L. R. A. 99]; Glenn *v.* Garth, 147 U. S. 360, 13 S. Ct. 350, 37 L. ed. 203.

A decision based on the authority of the decision of the state in which the statute was passed is not reviewable. Banholzer *v.* New York L. Ins. Co., 178 U. S. 402, 20 S. Ct. 972, 44 L. ed. 1124.

A decision in favor of full faith and credit is not reviewable. Lynde *v.* Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. ed. 810.

Record of judgment offered should be authenticated in the mode prescribed to authorize the supreme court to review. Caperton *v.* Ballard, 14 Wall. (U. S.) 238, 20 L. ed. 885.

62. State *v.* Johnson, 29 La. Ann. 399; Oakley *v.* Goodnow, 118 U. S. 43, 6 S. Ct. 944, 30 L. ed. 61; Kanouse *v.* Martin, 14 How. (U. S.) 23, 14 L. ed. 310.

Dismissal of petition for removal by a state court and remanding of cause to a lower court for further proceedings is not reviewable. Kimball *v.* Evans, 93 U. S. 320, 23 L. ed. 920.

Refusal to permit amendment of a petition for removal after a cause has been remanded by the federal court is not a denial of a right which is reviewable. Carr *v.* Nichols, 157 U. S. 370, 15 S. Ct. 640, 39 L. ed. 736 [*affirming* 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514].

63. Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 20 S. Ct. 393, 44 L. ed. 548; Belden *v.* Chase, 150 U. S. 674, 14 S. Ct. 264, 37 L. ed. 1218; Baltimore, etc., R. Co. *v.* Maryland, 21 Wall. (U. S.) 456, 22 L. ed. 678.

Decisions not reviewable.— See Yesler *v.* Washington Harbor Line Com'rs, 146 U. S. 646, 13 S. Ct. 190, 36 L. ed. 1119; Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224; Kennedy *v.* Hunt, 7 How. (U. S.) 586, 12 L. ed. 829.

64. Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143]; Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 19 S. Ct. 97, 43 L. ed. 364; Hussman *v.* Durham, 165 U. S. 144, 17 S. Ct. 253, 41 L. ed. 664; Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 17

claims;[65] decisions in respect to national banks;[66] decisions involving the laws as

S. Ct. 98, 41 L. ed. 479; Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331; Pickering *v.* Lomax, 145 U. S. 310, 12 S. Ct. 860, 36 L. ed. 716 [*reversing* 120 Ill. 289, 11 N. E. 175]; Anderson *v.* Carkins, 135 U. S. 483, 10 S. Ct. 905, 34 L. ed. 272 [*reversing* 21 Nebr. 364, 32 N. W. 155]; Mills County *v.* Burlington, etc., R. Co., 107 U. S. 557, 2 S. Ct. 654, 27 L. ed. 578; Magwire *v.* Tyler, 1 Black (U. S.) 196, 17 L. ed. 137; Carondelet *v.* St. Louis, 1 Black (U. S.) 179, 17 L. ed. 102; Berthold *v.* McDonald, 22 How. (U. S.) 334, 16 L. ed. 318; Neilson *v.* Lagow, 7 How. (U. S.) 772, 12 L. ed. 908; Chouteau *v.* Eckhart, 2 How. (U. S.) 344, 11 L. ed. 293; Pollard *v.* Kibbe, 14 Pet. (U. S.) 353, 10 L. ed. 490; Wallace *v.* Parker, 6 Pet. (U. S.) 680, 8 L. ed. 543; Ross *v.* Barland, 1 Pet. (U. S.) 655, 7 L. ed. 302.

Particular decisions not reviewable see Athearn *v.* Poppe, 25 Cal. 631; Greely *v.* Townsend, 25 Cal. 604; Ferris *v.* Coover, 11 Cal. 175; Iowa *v.* Rood, 187 U. S. 87, 23 S. Ct. 49, 47 L. ed. 86 [*dismissing* appeal in 109 Iowa 5, 79 N. W. 449]; Allen *v.* Southern Pac. R. Co., 173 U. S. 479, 19 S. Ct. 518, 43 L. ed. 775 [*dismissing* appeal in 112 Cal. 455, 44 Pac. 796]; Galveston, etc., R. Co. *v.* Texas, 170 U. S. 226, 18 S. Ct. 603, 42 L. ed. 1017; Budzisz *v.* Illinois Steel Co., 170 U. S. 41, 18 S. Ct. 503, 42 L. ed. 941; Central Pac. R. Co. *v.* Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Northern Pac. R. Co. *v.* Patterson, 153 U. S. 130, 14 S. Ct. 977, 38 L. ed. 934; Michigan *v.* Flint, etc., R. Co., 152 U. S. 363, 14 S. Ct. 586, 38 L. ed. 478; Miller *v.* Anderson, 150 U. S. 132, 14 S. Ct. 52, 37 L. ed. 1028; Yesler *v.* Washington Harbor Line Com'rs, 146 U. S. 646, 13 S. Ct. 190, 36 L. ed. 1119; Tyler *v.* Cass County, 142 U. S. 288, 12 S. Ct. 225, 35 L. ed. 1016; Chever *v.* Horner, 142 U. S. 122, 12 S. Ct. 184, 35 L. ed. 959 [*affirming* 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217]; Cook County *v.* Calumet, etc., Canal, etc., Co., 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110 [*affirming* 131 Ill. 505, 23 N. E. 629]; Phillips *v.* Mound City Land, etc., Assoc., 124 U. S. 605, 8 S. Ct. 657, 31 L. ed. 588; Stryker *v.* Crane, 123 U. S. 527, 8 S. Ct. 203, 31 L. ed. 194; Mace *v.* Merrill, 119 U. S. 581, 7 S. Ct. 330, 30 L. ed. 503; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 5 S. Ct. 77, 28 L. ed. 678; Gaines *v.* Hale, 93 U. S. 3, 23 L. ed. 782; Semple *v.* Hagar, 4 Wall. (U. S.) 431, 18 L. ed. 402; Lownsdale *v.* Parrish, 21 How. (U. S.) 290, 16 L. ed. 80; Moreland *v.* Page, 20 How. (U. S.) 522, 15 L. ed. 1009; Wynn *v.* Morris, 20 How. (U. S.) 3, 15 L. ed. 800; Henderson *v.* Tennessee, 10 How. (U. S.) 311, 13 L. ed. 434; Barbarie *v.* Eslava, 9 How. (U. S.) 421, 13 L. ed. 200; Almonester *v.* Kenton, 9 How. (U. S.) 1, 13 L. ed. 21; Udell *v.* Davidson, 7 How. (U. S.) 769, 12 L. ed. 907; Kennedy *v.* Hunt, 7 How. (U. S.) 586, 12 L. ed. 829; Downes *v.* Scott, 4 How. (U. S.) 500, 11 L. ed. 1074; New Orleans *v.* De Armas, 9 Pet. (U. S.) 224, 9 L. ed. 109.

A decision based on the construction of apparently conflicting patents from a state to the land in dispute is not reviewable by the supreme court. White *v.* Leovy, 174 U. S. 91, 19 S. Ct. 604, 43 L. ed. 907.

It is essential to the review of a decision involving the rights of a claimant to land under an act of congress that such decision be against the rights claimed. Hale *v.* Gaines, 22 How. (U. S.) 144, 16 L. ed. 264; Fulton *v.* McAffee, 16 Pet. (U. S.) 149, 10 L. ed. 918.

Where parties claim under common grants. — California *v.* Jackson, 112 U. S. 233, 5 S. Ct. 113, 28 L. ed. 712; McStay *v.* Friedman, 92 U. S. 723, 23 L. ed. 767; Romie *v.* Casanova, 91 U. S. 379, 23 L. ed. 374; Shaffer *v.* Scudday, 19 How. (U. S.) 16, 15 L. ed. 592.

Whether the error be one of fact or of law the supreme court has jurisdiction to review a decision against the validity of an entry sanctioned by United States land officers. Berthold *v.* McDonald, 22 How. (U. S.) 334, 16 L. ed. 318; Lytle *v.* Arkansas, 22 How. (U. S.) 193, 16 L. ed. 306.

65. Merced Min. Co. *v.* Boggs, 3 Wall. (U. S.) 304, 18 L. ed. 245.

For decisions not involving a federal question which is reviewable in controversies in respect to mining claims see Speed *v.* McCarthy, 181 U. S. 269, 21 S. Ct. 613, 45 L. ed. 855; Lowry *v.* Silver City Gold, etc., Min. Co., 179 U. S. 196, 21 S. Ct. 104, 45 L. ed. 151; De Lamar's Nevada Gold Min. Co., *v.* Nesbitt, 177 U. S. 523, 20 S. Ct. 715, 44 L. ed. 872; Gillis *v.* Stinchfield, 159 U. S. 658, 16 S. Ct. 131, 40 L. ed. 295; Bushnell *v.* Crooke Min., etc., Co., 148 U. S. 682, 13 S. Ct. 771, 37 L. ed. 610; Quimby *v.* Boyd, 128 U. S. 488, 9 S. Ct. 147, 32 L. ed. 502. And see Beals *v.* Cone, 188 U. S. 184, 23 S. Ct. 275, 47 L. ed. 435 [*dismissing* writ of error in 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92].

66. As to assessment of shares in national banks for taxes see Williams *v.* Weaver, 100 U. S. 547, 25 L. ed. 708; Austin *v.* Boston, 7 Wall. (U. S.) 694, 19 L. ed. 224.

As to prohibited contracts by national banks see Grand Forks First Nat. Bank *v.* Anderson, 172 U. S. 573, 19 S. Ct. 284, 43 L. ed. 558; McCormick *v.* Market Nat. Bank, 165 U. S. 538, 17 S. Ct. 433, 41 L. ed. 817; Chicago Chemical Nat. Bank *v.* Portage City Bank, 160 U. S. 646, 16 S. Ct. 417, 40 L. ed. 568; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. ed. 107; Swope *v.* Leffingwell, 105 U. S. 3, 26 L. ed. 939.

Decisions not reviewable see Seeberger *v.* McCormick, 175 U. S. 274, 20 S. Ct. 128, 44 L. ed. 161 [*dismissing* appeal in 162 Ill. 100, 44 N. E. 381]; Lincoln Capital Nat. Bank

to bankrupts;[67] decisions involving the effect upon contracts of the exercise of the war power;[68] decisions arising under the patent laws of the United States;[69] decisions concerning the citizenship of a party;[70] and decisions as to legal tender or the medium of payment.[71] Similarly the same court has been called upon to review a decision that a deed was admitted in evidence after its admission had been objected to for want of a sufficient internal revenue stamp.[72]

(b) Decisions Affecting State Constitutions or Statutes. If a controversy is dependent upon the validity of state laws and no right is claimed under the federal constitution or laws, the state court has jurisdiction of the same and no appellate power is vested in the supreme court of the United States to review its judgment.[73] Again a decision of a state court which merely determines that a state law is void under the constitution of that state is not reviewable by the

v. Cadiz First Nat. Bank, 172 U. S. 425, 19 S. Ct. 202, 43 L. ed. 502 [*affirming* 49 Nebr. 795, 69 N. W. 1151]; Layson *v.* Davis, 170 U. S. 36, 18 S. Ct. 500.

The construction of a state usury law in the case of a loan by a national bank is not a federal question. Union Nat. Bank *v.* Louisville, etc., R. Co., 163 U. S. 325, 16 S. Ct. 1039, 41 L. ed. 177.

That jurisdiction may be acquired by the supreme court of an appeal from a state court under the National Bank Act, it is necessary that there should have been a denial of a right thereunder claimed by the appellant for himself and not for a third person in whose title he had no interest. Miller *v.* Lancaster Nat. Bank, 106 U. S. 542, 1 S. Ct. 536, 27 L. ed. 289.

67. Roby *v.* Calehour, 146 U. S. 153, 13 S. Ct. 47, 36 L. ed. 922; Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550 [*reversing* 146 Mass. 545, 16 N. E. 437]; Mays *v.* Fritton, 131 U. S. Appendix cxiv, 21 L. ed. 127; Palmer *v.* Hussey, 119 U. S. 96, 7 S. Ct. 158, 30 L. ed. 362; O'Brien *v.* Weld, 92 U. S. 81, 23 L. ed. 675.

Decisions not reviewable in this connection see Remington Paper Co. *v.* Watson, 173 U. S. 443, 19 S. Ct. 456, 43 L. ed. 762; Bausman *v.* Dixon, 173 U. S. 113, 19 S. Ct. 316, 43 L. ed. 633; Ludeling *v.* Chaffe, 143 U. S. 301, 12 S. Ct. 439, 36 L. ed. 313; McKenna *v.* Simpson, 129 U. S. 506, 9 S. Ct. 365, 32 L. ed. 771; Boatmen's Sav. Bank *v.* State Sav. Assoc., 114 U. S. 265, 5 S. Ct. 878, 29 L. ed. 174; Scott *v.* Kelly, 22 Wall. (U. S.) 57, 22 L. ed. 729; Linton *v.* Stanton, 12 How. (U. S.) 423, 13 L. ed. 1050; Strader *v.* Baldwin, 9 How. (U. S.) 261, 13 L. ed. 130.

Title should be claimed by the plaintiff in error to give jurisdiction to the supreme court to review a decision against a title, right, privilege, or claim under a United States statute and one who claims property, not under but adverse to the assignee in bankruptcy in whom he alleges title for the purpose of defeating the title of a receiver under the state law, cannot maintain a writ of error. Long *v.* Converse, 91 U. S. 105, 23 L. ed. 233.

68. Matthews *v.* McStea, 20 Wall. (U. S.) 646, 22 L. ed. 448.

Federal questions not involved see Grame *v.* Virginia Mut. Assur. Soc., 112 U. S. 273, 5 S. Ct. 150, 28 L. ed. 716; Old Dominion Bank *v.* McVeigh, 98 U. S. 332, 25 L. ed. 110; Rockhold *v.* Rockhold, 92 U. S. 129, 23 L. ed. 507; Harrison *v.* Myer, 92 U. S. 111, 23 L. ed. 606; Mechanics, etc., Bank *v.* Union Bank, 22 Wall. (U. S.) 276, 22 L. ed. 871.

69. Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526.

Decisions not reviewable as arising under the patent laws see Pittsburgh, etc., Iron Co., *v.* Cleveland Iron Min. Co., 178 U. S. 270, 20 S. Ct. 931, 44 L. ed. 1065; Walter A. Wood Mowing, etc., Mach. Co. *v.* Skinner, 139 U. S. 293, 11 S. Ct. 528, 35 L. ed. 193; Felix *v.* Scharnweber, 125 U. S. 54, 8 S. Ct. 759, 31 L. ed. 687; Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 8 S. Ct. 756, 31 L. ed. 683.

70. Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602].

71. Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 673 [*reversing* (Tex. Civ. App. 1897) 41 S. W. 157]; Woodruff *v.* Mississippi, 162 U. S. 291, 16 S. Ct. 820, 40 L. ed. 973; Dooley *v.* Smith, 13 Wall. (U. S.) 604, 20 L. ed. 547; Trebilcock *v.* Wilson, 12 Wall. (U. S.) 687, 20 L. ed. 460.

Decision not reviewable as involving this question see Rae *v.* Homestead Loan, etc., Co., 176 U. S. 121, 20 S. Ct. 341, 44 L. ed. 398.

A contention that coin was not legal tender is not a claim to a right under the United States laws, and a decision adverse to such contention is not reviewable. Jersey City, etc., R. Co. *v.* Morgan, 160 U. S. 288, 16 S. Ct. 276, 40 L. ed. 430.

72. Hall *v.* Jordan, 15 Wall. (U. S.) 393, 21 L. ed. 72. *Compare* Campau *v.* Lewis, 3 Wall. (U. S.) 106, 18 L. ed. 211.

73. Telluride Power Transmission Co. *v.* Rio Grande Western R. Co., 187 U. S. 569, 23 S. Ct. 178, 47 L. ed. 307 [*dismissing* writ of error in 23 Utah 22, 63 Pac. 995]; Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143]; Congdon *v.* Goodman, 2 Black (U. S.) 574, 17 L. ed. 257.

If a decision is based entirely on grounds arising under the laws of a state the supreme court **connot** review the same, although it may appear that a question involving rights under the federal constitution or statutes was made under the pleadings. California

supreme court on a writ of error.[74] Nor can the supreme court review a decision which involves merely the construction of a statute and not its validity, as in such a case no federal question is presented.[75] But the supreme court may review the decision of a state court which holds that a statute of the state is not repugnant to the constitution and laws of the United States.[76]

(c) IMPAIRMENT OF OBLIGATION OF CONTRACT. The supreme court has jurisdiction to review a decision of a state court, where it appears by the record that the question whether the obligation of a contract was impaired by a state law was necessarily involved therein and that such decision was against the appealing party by reason of the supposed validity of such law.[77] And where the supreme

Nat. Bank *v.* Thomas, 171 U. S. 441, 19 S. Ct. 4, 43 L. ed. 231 [*dismissing* appeal in 113 Cal. 414, 45 Pac. 704].

74. Frey *v.* Kirk, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581; Smith *v.* Parsons, 1 Ohio 236, 13 Am. Dec. 608; Layton *v.* Missouri, 187 U. S. 356, 23 S. Ct. 137, 47 L. ed. 214 [*dismissing* appeal in 160 Mo. 474, 61 S. W. 171, 83 Am. St. Rep. 487, 62 L. R. A. 163]; Missouri, etc., R. Co. *v.* Ferris, 179 U. S. 602, 21 S. Ct. 231, 45 L. ed. 337; Kipley *v.* Illinois, 170 U. S. 182, 18 S. Ct. 550, 42 L. ed. 998; Levy *v.* San Francisco Super. Ct., 167 U. S. 175, 17 S. Ct. 769, 42 L. ed. 126; Murray *v.* Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. ed. 87; Leeper *v.* Texas, 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; Salmon *v.* Graham, 15 Wall. (U. S.) 208, 21 L. ed. 37; Withers *v.* Buckley, 20 How. (U. S.) 84, 15 L. ed. 816; Scott *v.* Jones, 5 How. (U. S.) 343, 12 L. ed. 181; Hart *v.* Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

A municipal ordinance is subject to this rule. Lombard *v.* West Chicago Park Com'rs, 181 U. S. 33, 21 S. Ct. 507, 45 L. ed. 731; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

Questions as to the sufficiency of evidence to justify the verdict and of compliance with the state constitution on the trial are not reviewable. Baldwin *v.* Kansas, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640.

75. Orr *v.* Gilman, 183 U. S. 278, 22 S. Ct. 213, 46 L. ed. 196; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86; Turner *v.* Wilkes County, 173 U. S. 461, 19 S. Ct. 464, 43 L. ed. 768; Castillo *v.* McConico, 168 U. S. 674, 18 S. Ct. 229, 42 L. ed. 622; Louisville, etc., R. Co. *v.* Louisville, 166 U. S. 709, 17 S. Ct. 725, 41 L. ed. 1173; Electric Co. *v.* Dow, 166 U. S. 489, 17 S. Ct. 645, 41 L. ed. 1088; Powell *v.* Brunswick County, 150 U. S. 433, 14 S. Ct. 166, 37 L. ed. 1134; Loeber *v.* Schroeder, 149 U. S. 580, 13 S. Ct. 934, 37 L. ed. 856; Sage *v.* Board of Liquidation, 144 U. S. 647, 12 S. Ct. 755, 36 L. ed. 577; Missouri *v.* Harris, 144 U. S. 210, 12 S. Ct. 838, 36 L. ed. 407; French *v.* Hopkins, 124 U. S. 524, 8 S. Ct. 589, 31 L. ed. 536; Price *v.* Pennsylvania R. Co., 113 U. S. 218, 5 S. Ct. 427, 28 L. ed. 980; Grand Gulf R., etc., Co. *v.* Marshall, 12 How. (U. S.) 165, 13 L. ed. 938; Commercial Bank *v.* Buckingham, 5 How. (U. S.) 317, 12 L. ed. 169.

76. Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481. See Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 22 S. Ct. 120, 46 L. ed. 171.

If the invalidity of a statute is not set up in the state court except in a motion for a rehearing filed a considerable time after the judgment of the lower court has been affirmed by the state supreme court, a writ of error to the latter court cannot be sustained on the ground that the validity of a statute is drawn in question. Miller *v.* Cornwall R. Co., 168 U. S. 131, 18 S. Ct. 34, 42 L. ed. 409.

Power to review a decision which involves this question is limited to those cases where such decision is in favor of the validity of the statute. Frost *v.* Ilsley, 55 Me. 376; Walker *v.* Taylor, 5 How. (U. S.) 64, 12 L. ed. 52; Kentucky Bank *v.* Griffith, 14 Pet. (U. S.) 56, 10 L. ed. 352; McKinney *v.* Carroll, 12 Pet. (U. S.) 66, 9 L. ed. 1002.

The facts as found by the jury are binding on the supreme court. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878 [*affirming* 56 Kan. 694, 44 Pac. 632].

77. Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705. See also Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86; Illinois Cent. R. Co. *v.* Chicago, 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622 [*affirming* 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408]; Columbia Water-Power Co. *v.* Columbia Electric St. R., etc., Co., 172 U. S. 475, 19 S. Ct. 247, 43 L. ed. 521 [*affirming* 43 S. C. 154, 20 S. E. 1002]; McCullough *v.* Virginia, 172 U. S. 102, 19 S. Ct. 134, 43 L. ed. 382 [*reversing* 90 Va. 597, 19 S. E. 114]; Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57, 18 S. Ct. 513, 42 L. ed. 948; Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 13 S. Ct. 72, 36 L. ed. 972; Yazoo, etc., R. Co. *v.* Thomas, 132 U. S. 174, 10 S. Ct. 68, 33 L. ed. 302; Williams *v.* Louisiana, 103 U. S. 637, 26 L. ed. 595; Northwestern University *v.* People, 99 U. S. 309, 25 L. ed. 387; Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825; Dubuque, etc., R. Co. *v.* Richmond, 15 Wall. (U. S.) 3, 21 L. ed. 118; Delmas *v.* Merchants Mut. Ins. Co., 14 Wall. (U. S.) 661, 20 L. ed. 757; Sevier *v.* Haskell, 14 Wall. (U. S.) 12, 20 L. ed. 827; West Tennessee Bank *v.* Citizens Bank, 13 Wall. (U. S.) 432, 14 Wall. (U. S.) 9, 20 L. ed. 514; Chenango Bridge Co. *v.* Bingham-

court reviews a decision on this ground it has paramount authority to determine for itself the existence or non-existence of the contract set up and whether its obligation has been impaired by the state statute.[78] It is essential, however, to the jurisdiction of the supreme court to review a decision of a state court in this class of cases that the state statute alleged to impair the obligation of the particular contract in question shall have been held to be valid.[79] And the court will not assume jurisdiction on a writ of error of a decision which is in favor of an act said to violate a contract, but in which the point is not necessarily involved.[80] Nor can it review a decision which declares that a contract is void and never had any legal existence.[81]

(d) Impairment of Religious Liberty. The question whether religious liberty has been impaired by the operation of a state law is not within the jurisdiction conferred upon the supreme court by section 25 of the Judiciary Act.[82]

(e) Denial of Full Faith and Credit to Judgments of Same State. The fact that a state court refuses to give a judgment rendered by a court of the same state its

ton Bridge Co., 3 Wall. (U. S.) 51, 18 L. ed. 137; Bridge Proprietors Passaic, etc., Rivers *v.* Hoboken Land, etc., Co., 1 Wall. (U. S.) 116, 17 L. ed. 571.

A change of view by the highest court of a state with respect to the limit of private ownership upon tide waters does not raise a case under the contract clause of the federal constitution, which can be reviewed in the supreme court of the United States. Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645].

Particular decisions not reviewable on this ground see Bacon *v.* Texas, 163 U. S. 207, 16 S. Ct. 1023, 41 L. ed. 132; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 16 S. Ct. 113, 40 L. ed. 284; Newport Light Co. *v.* Newport, 151 U. S. 527, 14 S. Ct. 429, 38 L. ed. 259; Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 12 S. Ct. 530, 36 L. ed. 191; St. Paul, etc., R. Co. *v.* Todd County, 142 U. S. 282, 12 S. Ct. 281, 35 L. ed. 1014; Hopkins *v.* McLure, 133 U. S. 380, 10 S. Ct. 407, 33 L. ed. 660; New Orleans Water-Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607; Washington Bank *v.* Arkansas, 20 How. (U. S.) 530, 15 L. ed. 993; Beers *v.* Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991; Robertson *v.* Coulter, 16 How. (U. S.) 106, 14 L. ed. 864; Miners Bank *v.* Iowa, 12 How. (U. S.) 1, 13 L. ed. 867; East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511, 541, 13 L. ed. 518, 531; Mills *v.* St. Clair County, 8 How. (U. S.) 569, 12 L. ed. 1201; Smith *v.* Hunter, 7 How. (U. S.) 738, 12 L. ed. 894.

State constitution is not a contract within the meaning of the clause of the federal constitution which prohibits a state from passing laws which impair the obligation of contracts. Church *v.* Kelsey, 121 U. S. 282, 7 S. Ct. 897, 30 L. ed. 960.

A federal right need not be "specially set up or claimed" to give jurisdiction to review. Columbia Water-Power Co. *v.* Columbia Electric St. R., etc., Co., 172 U. S. 475, 19 S. Ct. 247, 43 L. ed. 521.

The disposal of a case on the construction of a contract does not deprive the supreme court of jurisdiction to review the decision, if the question of the impairment of a contract by state legislation is involved. Columbia Water-Power Co. *v.* Columbia Electric St. R., etc., Co., 172 U. S. 475, 19 S. Ct. 247, 43 L. ed. 521 [*affirming* 43 S. C. 154, 20 S. E. 1002].

The question of waiver, by laches or acquiescence, of the right to claim that the obligation of a contract has been impaired by a state statute is not a federal question. Pierce *v.* Somerset R. Co., 171 U. S. 641, 19 S. Ct. 64, 43 L. ed. 316.

Estoppel of right to claim that the obligation of a contract has been impaired see New Orleans *v.* New Orleans Water-Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943.

78. Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57, 18 S. Ct. 513, 42 L. ed. 948; Douglas *v.* Kentucky, 168 U. S. 488, 18 S. Ct. 199, 42 L. ed. 553.

79. Bacon *v.* Texas, 163 U. S. 207, 16 S. Ct. 1023, 41 L. ed. 132; West Virginia Cent. Land Co. *v.* Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. ed. 91; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 7 S. Ct. 916, 30 L. ed. 1059.

That a decision impairs or fails to give effect to a contract is no ground for review. Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925; New York *v.* New Jersey Cent. R. Co., 12 Wall. (U. S.) 455, 20 L. ed. 458; Knox *v.* Virginia Exch. Bank, 12 Wall. (U. S.) 379, 20 L. ed. 287; Mississippi, etc., R. Co. *v.* Rock, 4 Wall. (U. S.) 177, 18 L. ed. 381.

80. Mills *v.* Brown, 16 Pet. (U. S.) 525, 10 L. ed. 1055.

81. Bacon *v.* Texas, 163 U. S. 207, 16 S. Ct. 1023, 41 L. ed. 132; New Orleans *v.* New Orleans Water-Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943. See also Kizer *v.* Texarkana, etc., R. Co., 179 U. S. 199, 21 S. Ct. 100, 45 L. ed. 152. *Compare* Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 14 S. Ct. 968, 38 L. ed. 793.

82. Permoli *v.* New Orleans Municipality No. 1, 3 How. (U. S.) 589, 11 L. ed. 739.

proper effect as an estoppel does not present a federal question reviewable by the supreme court.[83]

(f) Cruel and Excessive Punishment. A decision of the highest court in New York state that the punishment of death by electricity, as provided by the law of such state,[84] is not a cruel and unusual punishment within the meaning of the constitution of that state,[85] is not a decision which is reviewable by the supreme court;[86] nor is the determination of its courts that the provision of its laws as to solitary confinement prior to execution[87] is not a punishment of this character reviewable;[88] and the supreme court will not interfere with the decision of a state court that a writ of habeas corpus will not lie in behalf of a convicted prisoner, who has been sentenced in excess of the maximum punishment fixed by the laws of the state.[89]

(g) Suit by Indian Tribe in State Court. No federal question is involved by a decision that where an Indian tribe has availed itself of the privilege, given by a statute of a state, to sue in its tribal name in the state courts, it is bound by the statutory limitation as to the time when the suit must be brought.[90]

(c) *Procedure, Record, and Review* — (1) Right of Review. Where a federal question is clearly raised a writ of error will not be dismissed merely because the claim by which it is presented is not well founded.[91] But no appeal will lie to the supreme court from a decision of a state court as to a federal statute where the decision is in accordance with the appellant's construction.[92] And a decision as to a right or an immunity claimed under a United States statute will not be reviewed unless the right or immunity is one in the plaintiff in error.[93]

(2) Federal Question Must Be Real and Not Fictitious. In order that the supreme court may have jurisdiction to review a judgment of a state court there must be a real and not a fictitious federal question involved.[94]

(3) Manner and Time of Raising Federal Question. It is essential to the jurisdiction of the supreme court to review a decision of a state court that a federal question should have been actually raised in the latter court,[95] and no

83. Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 S. Ct. 471, 40 L. ed. 660.

84. N. Y. Laws (1888), c. 489.

85. N. Y. Const. art. 1, § 5.

86. *In re* Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519.

87. N. Y. Code Crim. Proc. §§ 491, 492.

88. Trezza *v.* Brush, 142 U. S. 160, 12 S. Ct. 158, 35 L. ed. 974; McElvaine *v.* Brush, 142 U. S. 155, 12 S. Ct. 156, 35 L. ed. 971.

89. *In re* Graham, 138 U. S. 461, 11 S. Ct. 363, 34 L. ed. 1051.

90. Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 16 S. Ct. 828, 40 L. ed. 970.

91. Blythe *v.* Hinckley, 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557. See also Andrews *v.* Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. ed. 366 [*affirming* 176 Mass. 92, 57 N. E. 333], where it is held that the supreme court of the United States is not without jurisdiction of a writ of error to a state court because that court committed no error in deciding the federal question involved.

92. Oceans Ins. Co. *v.* Polleys, 13 Pet. (U. S.) 157, 10 L. ed. 105.

93. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81; Missouri *v.* Andriano, 138 U. S. 496, 11 S. Ct. 385, 34 L. ed. 1012 [*affirming* 92 Mo. 70, 4 S. W. 263].

Persons not affected.— The objection that by the provisions of a state statute persons may be deprived of their rights without due process of law cannot be raised so as to give jurisdiction to the supreme court on a writ of error, by one who is not affected by such provisions. Tyler *v.* Judges Registration Ct., 179 U. S. 405, 21 S. Ct. 206, 45 L. ed. 252. Nor can the question of the impairment of a contract be raised by a stranger thereto so as to give jurisdiction to the supreme court on a writ of error. Phinney *v.* Sheppard, etc., Hospital, 177 U. S. 170, 20 S. Ct. 573, 44 L. ed. 720.

94. St. Louis, etc., R. Co. *v.* Missouri, 156 U. S. 478, 15 S. Ct. 443, 39 L. ed. 502; Hamblin *v.* Western Land Co., 147 U. S. 531, 13 S. Ct. 353, 37 L. ed. 267; New Orleans *v.* New Orleans Water-Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943; Millingar *v.* Hartupee, 6 Wall. (U. S.) 258, 18 L. ed. 829. *Compare* Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645].

95. Lynde *v.* Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. ed. 810 [*affirming* 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679]; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 21 S. Ct. 256, 45 L. ed. 415 [*dismissing* writ of error in 76 Miss. 545, 25 So. 366]; Kizer *v.* Texarkana, etc., R. Co., 179 U. S. 199, 21 S. Ct. 100, 45 L. ed. 152 [*dismissing* writ of error in 66 Ark. 348, 50 S. W. 871]; Chapin

jurisdiction exists where it was not raised until after final judgment and in the petition for the writ of error,[96] or in a petition for a rehearing after a judgment in the highest state court.[97] The supreme court may, however, on a writ of error review a question which is raised in the supreme court of a state and there decided on its merits, and not on the ground that it was not raised in the lower court;[98] and the supreme court will review a question, although it was not put in issue by the pleadings nor directly passed upon in the opinion, where it is apparent both from the pleadings and the record that the decision in the state court could not have been reached except by disposing of the federal question.[99]

(4) Issuance and Allowance of Writ of Error — (a) In General. An appli-

v. Fye, 179 U. S. 127, 21 S. Ct. 71, 45 L. ed. 119; Sully *v.* American Nat. Bank, 178 U. S. 289, 20 S. Ct. 935, 44 L. ed. 1072; Citizens' Sav. Bank *v.* Owensboro, 173 U. S. 636, 19 S. Ct. 530, 43 L. ed. 840; *In re* Buchanan, 158 U. S. 31, 15 S. Ct. 723, 39 L. ed. 884; Hagar *v.* California, 154 U. S. 639, 14 S. Ct. 1186, 24 L. ed. 1044; Duncan *v.* State, 152 U. S. 377, 14 S. Ct. 570, 38 L. ed. 485; O'Neil *v.* Vermont, 144 U. S. 323, 12 S. Ct. 693, 36 L. ed. 450.

A federal question not specially set up or claimed in the state court cannot be considered merely because another federal question not connected with it was raised in the state court. Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 20 S. Ct. 205, 44 L. ed. 299 [*affirming* 176 Ill. 267, 52 N. E. 117].

An intention to raise such a question is not sufficient. Matheson *v.* Alabama Branch Bank, 7 How. (U. S.) 260, 12 L. ed. 692.

96. Telluride Power Transmission Co. *v.* Rio Grande Western R. Co., 187 U. S. 569, 23 S. Ct. 178, 47 L. ed. 307 [*dismissing* writ of error in 23 Utah 22, 63 Pac. 995]; Manley *v.* Park, 187 U. S. 547, 23 S. Ct. 208, 47 L. ed. 296 [*affirming* 62 Kan. 553, 64 Pac. 28]; Johnson *v.* New York L. Ins. Co., 187 U. S. 491, 23 S. Ct. 194, 47 L. ed. 273 [*dismissing* writ of error in 109 Iowa 708, 78 N. W. 905, 50 L. R. A. 99]; Layton *v.* Missouri, 187 U. S. 356, 23 S. Ct. 137, 47 L. ed. 214 [*dismissing* appeal in 160 Mo. 474, 61 S. W. 171, 83 Am. St. Rep. 487, 62 L. R. A. 163]; Home for Incurables *v.* New York, 187 U. S. 155, 23 S. Ct. 84, 47 L. ed. 117 [*dismissing* writ of error in 166 N. Y. 602, 59 N. E. 1123]; Jacobi *v.* Alabama, 187 U. S. 133, 23 S. Ct. 48, 47 L. ed. 106; Loeber *v.* Schroeder, 149 U. S. 580, 13 S. Ct. 934, 37 L. ed. 856; Butler *v.* Gage, 138 U. S. 52, 11 S. Ct. 235, 34 L. ed. 869; Baldwin *v.* Kansas, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640; Calhoun *v.* Lanaux, 127 U. S. 634, 8 S. Ct. 1345, 32 L. ed. 297; Simmerman *v.* Nebraska, 116 U. S. 54, 6 S. Ct. 333, 29 L. ed. 535; Santa Cruz County *v.* Santa Cruz R. Co., 111 U. S. 361, 4 S. Ct. 474, 28 L. ed. 456; Worthy *v.* Barrett, 9 Wall. (U. S.) 611, 19 L. ed. 965.

The right should be set up in the trial court or the supreme court cannot on a writ of error review a decision as one against a right under the constitution of the United States. Chicago Chemical Nat. Bank *v.* Portage City Bank, 160 U. S. 646, 16 S. Ct. 417, 40 L. ed. 568; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 540, 16 S. Ct. 88, 40 L. ed. 252; Morrison *v.* Watson, 154 U. S. 111, 14 S. Ct. 995, 38 L. ed. 927; Miller *v.* Texas, 153 U. S. 535, 14 S. Ct. 874, 38 L. ed. 812; Chappell *v.* Bradshaw, 128 U. S. 132, 9 S. Ct. 40, 32 L. ed. 369.

After a state court has decided and remanded a case for a new trial a federal question which is then set up is not presented soon enough to sustain a writ of error from the supreme court. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395 [*affirming* 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33].

97. Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882; Eastern Bldg., etc., Assoc. *v.* Welling, 181 U. S. 47, 21 S. Ct. 531, 45 L. ed. 739; Turner *v.* Richardson, 180 U. S. 87, 21 S. Ct. 295, 45 L. ed. 438 [*affirming* 52 La. Ann. 1613, 28 So. 158]; Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 19 S. Ct. 202, 43 L. ed. 502 [*affirming* 49 Nebr. 794, 69 N. W. 1151]; Weber *v.* Rogan, 188 U. S. 10, 23 S. Ct. 263, 47 L. ed. 363 [*dismissing* writ of error in 94 Tex. 62, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 940]; Pim *v.* St. Louis, 165 U. S. 273, 17 S. Ct. 322, 41 L. ed. 714; Sayward *v.* Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. ed. 941; Loeber *v.* Schroeder, 149 U. S. 580, 13 S. Ct. 934, 37 L. ed. 856; Bushnell *v.* Crooke Min., etc., Co., 148 U. S. 682, 13 S. Ct. 771, 37 L. ed. 610; Texas, etc., R. Co. *v.* Southern Pac. R. Co., 137 U. S. 48, 11 S. Ct. 10, 34 L. ed. 614; Susquehanna Boom Co. *v.* West Branch Boom Co., 110 U. S. 57, 3 S. Ct. 438, 28 L. ed. 69. But see Mallett *v.* North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. ed. 1015.

On motion to set aside judgment. — A decision of a state court adverse to a claim under the federal constitution, specially made in a motion to set aside the judgment, raises a federal question, for the purpose of a review in the supreme court of the United States. Manley *v.* Park, 187 U. S. 547, 23 S. Ct. 208, 47 L. ed. 296 [*affirming* 62 Kan. 553, 64 Pac. 28].

98. Sully *v.* American Nat. Bank, 178 U. S. 289, 20 S. Ct. 935, 44 L. ed. 1072.

99. Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828].

action for a writ of error is not allowable as a matter of right, but its allowance is to be determined by the court from an examination of the record.[1]

(b) To What Court Directed. A writ of error should be directed to the court in which the decision was rendered.[2]

(c) Limitation of Time. It has been determined that a limitation by statute of a certain time within which writs of error to circuit and district courts must be brought applies also to state courts.[3]

(d) Effect of Writ of Error. By a writ of error the jurisdiction of the state courts is suspended until it is again restored by some act of the supreme court itself.[4]

(5) Necessity and Sufficiency of Showing of Jurisdiction — (a) Record — aa. *What Should Be Shown.* The facts which give the supreme court jurisdiction to review a decision of a state court should either appear on the record or be necessarily deducible therefrom.[5] And it should affirmatively appear from the record that a federal question necessary to the determination of the cause was raised in the state court,[6] and that the point giving jurisdiction to the supreme court was

1. Greely *v.* Townsend, 25 Cal. 604; Twitchell *v.* Pennsylvania, 7 Wall. (U. S.) 321, 19 L. ed. 223.

If the decision is plainly right a writ of error should not be allowed from the supreme court. *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. ed. 80.

On an application for a writ of habeas corpus by a prisoner convicted of murder, the application being based on the ground that his confinement was without due process of law, the federal court in which the proceeding is brought has discretion either to grant the writ or to require the prisoner to take a writ of error to the state supreme court, and in case its judgment is against him to have the same reviewed on writ of error from the United States supreme court. *Ex p.* Frederich, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653 [*affirming* 51 Fed. 747].

Proceedings will not be stayed to enable an unsuccessful party to an appeal to sue out a writ of error in the absence of a statement of some cogent fact as a ground for such action. Bradley *v.* Gamelle, 7 Minn. 331.

State court has no power to set aside or pass upon the regularity of a writ of error to the United States supreme court to review a judgment of the former court. State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

2. Atherton *v.* Fowler, 91 U. S. 143, 23 L. ed. 265. See also Lane *v.* Wallace, 131 U. S. Appendix ccxi, 26 L. ed. 703.

If it appear that the record has been remitted by such court to another state court it may be directed either to the latter court or to the former in order that through its instrumentality the record may be obtained from the inferior court. Atherton *v.* Fowler, 91 U. S. 143, 23 L. ed. 265. See also Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381.

3. Cummings *v.* Jones, 104 U. S. 419, 26 L. ed. 824.

4. No order or action can be taken in the state court. *Ex p.* Dunn, 6 S. C. 307.

5. Wolf *v.* Stix, 96 U. S. 541, 24 L. ed. 640; Murray *v.* Charleston, 96 U. S. 432, 24 L. ed. 760; Gibson *v.* Chouteau, 8 Wall. (U. S.) 314, 19 L. ed. 317; The Victory *v.* Boylan, 6 Wall. (U. S.) 382, 18 L. ed. 848; Walker *v.* Villavosa, 6 Wall. (U. S.) 124, 18 L. ed. 853; Carter *v.* Bennett, 15 How. (U. S.) 354, 14 L. ed. 727; Ocean Ins. Co. *v.* Polleys, 13 Pet. (U. S.) 157, 10 L. ed. 105; Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Miller *v.* Nicholls, 4 Wheat. (U. S.) 311, 4 L. ed. 578.

Evidence on which requested instructions involving a federal question were based should be made a part of the record to sustain a writ of error for refusal to give such instructions. Clark *v.* Pennsylvania, 128 U. S. 395, 9 S. Ct. 113, 32 L. ed. 487.

6. Dewey *v.* Des Moines, 173 U. S. 193, 19 S. Ct. 379, 43 L. ed. 665 [*reversing* 101 Iowa 416, 70 N. W. 605]; Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 17 S. Ct. 129, 41 L. ed. 511; Fowler *v.* Lamson, 164 U. S. 252, 17 S. Ct. 112, 41 L. ed. 424; Ansbro *v.* U. S., 159 U. S. 695, 16 S. Ct. 187, 40 L. ed. 310; Powell *v.* Brunswick County, 150 U. S. 433, 14 S. Ct. 166, 37 L. ed. 1134; Brooks *v.* Missouri, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454; Kansas Endowment, etc., Assoc. *v.* Kansas, 120 U. S. 103, 7 S. Ct. 499, 30 L. ed. 593; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 5 S. Ct. 77, 28 L. ed. 678; Edwards *v.* Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487; Caperton *v.* Bowyer, 14 Wall. (U. S.) 216, 20 L. ed. 882; Parmalee *v.* Lawrence, 11 Wall. (U. S.) 36, 20 L. ed. 48; Atty.-Gen. *v.* Federal St. Meeting House, 1 Black (U. S.) 262, 17 L. ed. 61; Crawford *v.* Mobile Branch Alabama Bank, 7 How. (U. S.) 279, 12 L. ed. 700; Fisher *v.* Cockerell, 5 Pet. (U. S.) 248, 8 L. ed. 114; Hickie *v.* Starke, 1 Pet. (U. S.) 94, 7 L. ed. 67; Inglee *v.* Coolidge, 2 Wheat. (U. S.) 363, 4 L. ed. 261.

Although a federal question may be somewhat obscurely raised the supreme court will review the decision. Scott *v.* Eaton, 15 Wall. (U. S.) 380, 21 L. ed. 72.

The question should be made by the pleadings.— Sayward *v.* Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. ed. 941; Chouteau *v.* Gibson,

also decided in the state court.[7] In the absence of such a showing the supreme court will not assume jurisdiction.

bb. *Limited by Record in Determining Jurisdiction.* Nothing outside of the record can be taken into consideration in determining whether the supreme court has jurisdiction to review a decision of a state court.[8] If, however, the grounds of a decision given by the highest state court are not shown by the record of such court, the record of the proceedings of the inferior court may be considered in connection therewith in order to ascertain the grounds of such decision.[9] And the opinion of the highest court may be examined where by statute all decisions of such court are required to be in writing stating the grounds of the decision and to be recorded.[10]

cc. *Dismissal For Failure to Show Jurisdiction.* The supreme court will dismiss an appeal or writ of error where it does not appear from the record that a question of the nature required to give it jurisdiction was involved.[11]

(b) Effect of Assignment of Error. If the record fails to show that a federal question has been raised an assignment of errors cannot be availed of to import such a question into the cause.[12]

111 U. S. 200, 4 S. Ct. 340, 28 L. ed. 400; Cincinnati Commercial Bank *v.* Buckingham, 5 How. (U. S.) 317, 12 L. ed. 169.

Where a decision upholds a state statute against the objection that it violates the constitution, laws, or treaties of the United States the record should show what provisions of the federal laws are relied upon. Messenger *v.* Mason, 10 Wall. (U. S.) 507, 19 L. ed. 1028; Hoyt *v.* Thompson, 1 Black (U. S.) 518, 17 L. ed. 65; Maxwell *v.* Newhold, 18 How. (U. S.) 511, 15 L. ed. 506; Lawler *v.* Walker, 14 How. (U. S.) 149, 14 L. ed. 364. But see Furman *v.* Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370.

Modification of record.—Where no reference is made to a federal question either in the pleadings in the trial court, in the assignment of errors, or in the opinion of the supreme court there is color for a motion to dismiss, although a few days after entry of the decree affirming the trial court it was so modified as to show that a federal question was presented by appellants and decided adverse to them. East Tennessee, etc., R. Co. *v.* Frazier, 139 U. S. 288, 11 S. Ct. 517, 35 L. ed. 196 [*affirming* 88 Tenn. 138, 12 S. W. 537].

7. Nauer *v.* Thomas, 13 Allen (Mass.) 572; Kansas Endowment, etc., Assoc. *v.* Kansas, 120 U. S. 103, 7 S. Ct. 499, 30 L. ed. 593; Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 5 S. Ct. 811, 29 L. ed. 118; Cockroft *v.* Vose, 14 Wall. (U. S.) 5, 20 L. ed. 875; Gibson *v.* Chouteau, 8 Wall. (U. S.) 314, 19 L. ed. 317; The Victory *v.* Boylan, 6 Wall. (U. S.) 382, 18 L. ed. 848; Taylor *v.* Morton, 2 Black (U. S.) 481, 17 L. ed. 277; Hoyt *v.* Thompson, 1 Black (U. S.) 518, 17 L. ed. 65; Maxwell *v.* Newhold, 18 How. (U. S.) 511, 15 L. ed. 506; Grand Gulf R., etc., Co. *v.* Marshall, 12 How. (U. S.) 165, 13 L. ed. 938; Cincinnati Commercial Bank *v.* Buckingham, 5 How. (U. S.) 317, 12 L. ed. 169; Coons *v.* Gallaher, 15 Pet. (U. S.) 18, 10 L. ed. 645; Crowell *v.* Randell, 10 Pet. (U. S.) 368, 9 L. ed. 458.

8. Warfield *v.* Chaffe, 91 U. S. 690, 23 L. ed. 383; Moore *v.* Mississippi, 21 Wall. (U. S.) 636, 22 L. ed. 653; Walker *v.* Villavosa, 6 Wall. (U. S.) 124, 18 L. ed. 853; Armstrong *v.* Athens County, 16 Pet. (U. S.) 281, 10 L. ed. 965.

Neither the petition for a writ of error nor the arguments of counsel form a part of the record. Sayward *v.* Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. ed. 941; Warfield *v.* Chaffe, 91 U. S. 690, 23 L. ed. 838.

9. Neilson *v.* Lagow, 12 How. (U. S.) 98, 13 L. ed. 909.

10. Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 16 S. Ct. 939, 41 L. ed. 72; Kreiger *v.* Shelby R. Co., 125 U. S. 39, 8 S. Ct. 752, 31 L. ed. 675; Gross *v.* U. S. Mortgage Co., 108 U. S. 477, 2 S. Ct. 940, 27 L. ed. 795. See also Philadelphia F. Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342.

In Louisiana decisions the opinion is treated by the supreme court as part of the record. Crescent City Live-Stock, etc., Co. *v.* Butchers' Union Slaughter House, etc., Co., 120 U. S. 141, 7 S. Ct. 472, 30 L. ed. 614; Crossley *v.* New Orleans, 108 U. S. 105, 2 S. Ct. 300, 27 L. ed. 667; Delmas *v.* Merchants Mut. Ins. Co., 14 Wall. (U. S.) 661, 20 L. ed. 757.

The opinion of the court below annexed to the record will not be examined if the record of the highest court does not disclose a federal question. Otis *v.* Oregon Steamship Co., 116 U. S. 548, 6 S. Ct. 523, 29 L. ed. 719.

11. Goodenough Horseshoe Mfg. Co. *v.* Rhode Island Horseshoe Co., 154 U. S. 635, 14 S. Ct. 1180, 24 L. ed. 368; Millingar *v.* Hartupee, 6 Wall. (U. S.) 258, 18 L. ed. 829; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978; Christ Church *v.* Philadelphia County, 20 How. (U. S.) 26, 15 L. ed. 802; Carter *v.* Bennett, 15 How. (U. S.) 354, 14 L. ed. 727; Crawford *v.* Alabama Branch Bank, 7 How. (U. S.) 279, 12 L. ed. 700.

12. Cornell *v.* Green, 163 U. S. 75, 16 S. Ct. 969, 41 L. ed. 76. See also Edwards *v.* Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487.

But a motion made before the record is printed to dismiss a writ of error to a state court on the ground that no federal question

(c) Certificate of Presiding Justice. A certificate of the chief justice of the highest court of the state that a federal question was raised and determined is not of itself sufficient to give jurisdiction to the supreme court to review a decision on a writ of error,[13] although it may be considered for the purpose of rendering a federal question, which is raised on the record in general and indefinite terms, more certain and specific.[14]

(6) Decision of Question Other Than Federal Question. No jurisdiction exists in the supreme court to review a judgment of a state court, unless it is shown by the record either affirmatively or by fair implication that a federal question necessary to the determination of the cause is involved;[15] and a judgment of a state court will not be reviewed merely because a federal question may have been raised and decided, where it appears that the determination, not federal, was involved in such decision, which is sufficient in itself to sustain the judgment.[16]

(7) Scope and Extent of Review — (a) In General. Where a case is removed to the supreme court by a writ of error to the highest state court the former court is authorized to determine all questions as to its jurisdiction and as to the form of the writ, the parties, citation, and service or otherwise.[17] But the supreme court is confined on an appeal from the state court to an examination of the right, title, claim, or exemption set up by the party as depending on the construction of the law or treaty of the United States under which it is set up.[18]

is involved will be denied if the assignment of errors as printed in the briefs of counsel presents such a question. Crane Iron Co. *v.* Hoagland, 108 U. S. 5, 1 S. Ct. 17, 27 L. ed. 630.

13. Home for Incurables *v.* New York, 187 U. S. 155, 23 S. Ct. 84, 47 L. ed. 117; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 21 S. Ct. 256, 45 L. ed. 415 [*dismissing* writ of error in 76 Miss. 545, 25 So. 366]; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 16 S. Ct. 939, 41 L. ed. 72; Sayward *v.* Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. ed. 941; Newport Light Co. *v.* Newport, 151 U. S. 527, 14 S. Ct. 429, 38 L. ed. 259; Powell *v.* Brunswick County, 150 U. S. 433, 14 S. Ct. 166, 37 L. ed. 1134; Felix *v.* Scharnweber, 125 U. S. 54, 8 S. Ct. 759, 31 L. ed. 687; Parmalee *v.* Lawrence, 11 Wall. (U. S.) 36, 20 L. ed. 48; Roosevelt *v.* Meyer, 1 Wall. (U. S.) 512, 17 L. ed. 500; Lawler *v.* Walker, 14 How. (U. S.) 149, 14 L. ed. 364. *Compare* Caperton *v.* Bowyer, 14 Wall. (U. S.) 216, 20 L. ed. 882. And see Armstrong *v.* Athens County, 16 Pet. (U. S.) 281, 10 L. ed. 965, where it is declared sufficient when certified as part of the record.

14. Roby *v.* Colehour, 146 U. S. 153, 13 S. Ct. 47, 36 L. ed. 922. See Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86.

15. Boughton *v.* American Exch. Nat. Bank, 104 U. S. 427, 26 L. ed. 765; State *v.* Board of Liquidation, 98 U. S. 140, 25 L. ed. 114; Brown *v.* Atwell, 92 U. S. 327, 23 L. ed. 511; Furman *v.* Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370; Cincinnati Commercial Bank of Buckingham, 5 How. (U. S.) 317, 12 L. ed. 169; Mills *v.* Brown, 16 Pet. (U. S.) 525, 10 L. ed. 1055; Davis *v.* Packard, 6 Pet. (U. S.) 41, 8 L. ed. 312; Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683; Willson *v.* Black Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. ed. 412; Hickie *v.* Starke. 1 Pet. (U. S.) 94, 7 L. ed. 67; Williams *v.* Norris, 12 Wheat. (U. S.) 117, 6 L. ed. 571.

16. Moran *v.* Horsky, 178 U. S. 205, 20 S. Ct. 856, 44 L. ed. 1038; Harrison *v.* Morton, 171 U. S. 38, 18 S. Ct. 742, 43 L. ed. 63; Bacon *v.* Texas, 163 U. S. 207, 16 S. Ct. 1023, 41 L. ed. 132; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 16 S. Ct. 939, 41 L. ed. 72; Gillis *v.* Stinchfield, 159 U. S. 658, 16 S. Ct. 131, 40 L. ed. 295; Winter *v.* Montgomery, 156 U. S. 385, 15 S. Ct. 649, 39 L. ed. 460; Eustis *v.* Bolles, 150 U. S. 361, 14 S. Ct. 131, 37 L. ed. 1111; Brown *v.* Massachusetts, 144 U. S. 573, 12 S. Ct. 757, 36 L. ed. 546; Haley *v.* Breeze, 144 U. S. 130, 12 S. Ct. 836, 36 L. ed. 373; Delaware City, etc., Steamboat Nav. Co. *v.* Reybold, 142 U. S. 636, 12 S. Ct. 290, 35 L. ed. 1141; Hammond *v.* Johnston, 142 U. S. 73, 12 S. Ct. 141, 35 L. ed. 941; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679, 12 S. Ct. 114, 35 L. ed. 900; Johnson *v.* Risk, 137 U. S. 300, 11 S. Ct. 111, 34 L. ed. 683; Beatty *v.* Benton, 135 U. S. 244, 10 S. Ct. 747, 34 L. ed. 124; De Saussure *v.* Gaillard, 127 U. S. 216, 8 S. Ct. 1053, 32 L. ed. 125; Kreiger *v.* Shelby R. Co., 125 U. S. 39, 8 S. Ct. 752, 31 L. ed. 675; Jacks *v.* Helena, 115 U. S. 288, 6 S. Ct. 39, 29 L. ed. 392; Jenkins *v.* Lœwenthal, 110 U. S. 222, 3 S. Ct. 638, 28 L. ed. 129; Bolling *v.* Lersner, 91 U. S. 594, 23 L. ed. 366; Klinger *v.* Missouri, 13 Wall. (U. S.) 257, 20 L. ed. 635; Gibson *v.* Chouteau, 8 Wall. (U. S.) 314, 19 L. ed. 317. But see Crossley *v.* New Orleans, 108 U. S. 105, 2 S. Ct. 300, 27 L. ed. 667; Minnesota *v.* Bachelder, 1 Wall. (U. S.) 109, 17 L. ed. 551.

17. *Ex p.* Chetwood, 165 U. S. 443, 17 S. Ct. 385, 41 L. ed. 782.

18. Matthews *v.* Zane, 7 Wheat. (U. S.) 164, 5 L. ed. 425. See Corry *v.* Campbell, 154 U. S. 629, 14 S. Ct. 1183, 24 L. ed. 926. *Compare* Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

(b) Questions of Law and of Fact. Questions of law as distinguished from questions of fact, so far as they are necessarily involved in the judgment of a state court against the validity of an authority claimed by the defendants under the United States, should be reviewed by the supreme court whether the questions depend on the United States constitution, laws, or treaties or on the local law, or on principles of general jurisprudence.[19] Questions of fact are not reviewable by the supreme court on a writ of error to a state court.[20]

(8) Determination and Disposition of Cause.[21] The supreme court may, where the statutes and practice of a state provide that an appellate court of such state may, on reviewing a judgment of the court below, render such a judgment as should have been rendered by that court, on reversing the decision of the appellate court, enter a judgment finally disposing of the case;[22] and it has been decided that the decision of the supreme court in a case brought before it from the state court will be the binding law of the case.[23] Again, where it appears that the assignments of error are frivolous[24] and the court is convinced that the

Other than federal questions should only be considered when the federal question involved has been decided erroneously, and then only for the purpose of determining whether the judgment can stand notwithstanding the error in deciding the federal question. McLaughlin *v.* Fowler, 154 U. S. 663, 14 S. Ct. 1192, 26 L. ed. 176.

A distinct equity creating a new and independent title cannot be taken into consideration in reviewing a decision as to a title claimed under an act of congress. Matthews *v.* Zane, 7 Wheat. (U. S.) 164, 5 L. ed. 425.

Rights under the statute of limitations of a state cannot be determined in reviewing a decision as to the validity of an entry of land which had been allowed by United States officers. Lytle *v.* Arkansas, 22 How. (U. S.) 193, 16 L. ed. 306.

The supreme court will not reverse a decision sustaining a law enacted in the exercise of the police power of the state, upon general ideas of the requirements of natural justice, apart from the provisions of the constitution involved. New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

Where but one federal question has been raised another cannot be argued, although facts are disclosed by the record on which it might have been raised. Dewey *v.* Des Moines, 173 U. S. 193, 19 S. Ct. 379, 43 L. ed. 665 [*reversing* 101 Iowa 416, 70 N. W. 605].

19. Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960.

20. U. S. Trust Co. *v.* New Mexico, 183 U. S. 535, 22 S. Ct. 172, 46 L. ed. 315; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765; Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 20 S. Ct. 205, 44 L. ed. 299 [*affirming* 176 Ill. 267, 52 N. E. 117]; Atchison, etc., R. Co. *v.* Matthews, 174 U. S. 96, 19 S. Ct. 609, 43 L. ed. 909; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979; Egan *v.* Hart, 165 U. S. 188, 17 S. Ct. 300, 41 L. ed. 680; Dower *v.* Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305. *Compare* Lammers *v.* Nissen, 154 U. S. 650, 14 S. Ct. 1189, 25 L. ed. 562.

Agreed statement of facts.— The supreme court of the United States, although bound by an agreed statement of facts when reviewing the judgment of a state court, may inquire whether the facts agreed upon support the judgment. Kelley *v.* Rhoads, 188 U. S. 1, 23 S. Ct. 259, 47 L. ed. 359 [*reversing* 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 959].

Questions of evidence are not within the jurisdiction of the supreme court unless it is sought to give effect to such evidence for other purposes over which the court has jurisdiction. Mackay *v.* Dillon, 4 How. (U. S.) 421, 11 L. ed. 1038. *Compare* Mallett *v.* North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. ed. 1015.

21. **Although one of the parties may die** between the time of the decision in the state court and the filing of the mandate of the supreme court it has been decided that no change of parties will be made in the former court before carrying into effect the judgment of the United States court. Cunningham *v.* Ashley, 13 Ark. 653.

U. S. Rev. Stat. (1878) § 709 [U. S. Comp. Stat. (1901) p. 575], providing that the supreme court may reëxamine, reverse, or affirm a judgment of a state court in the same manner as if it was rendered in a United States court, had reference to the manner of hearing the writ and the general rules governing the process to final judgment and was not intended to prescribe the considerations which should govern the court in forming its judgment. Murdock *v.* Memphis, 20 Wall. (U. S.) 590, 22 L. ed. 429.

22. Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960.

23. Lytle *v.* State, 17 Ark. 608. But see Dennie *v.* Harris, 9 Pick. (Mass.) 364; Hunter *v.* Martin, 4 Munf. (Va.) 1.

The decision is conclusive only on the point decided, and the state court is not thereby prohibited from examining the record and deciding the case upon some other point which did not arise in the supreme court. Goodtitle *v.* Kibbe, 1 Ala. 403.

24. **The jurisdiction of the supreme court is limited to those cases which involve actual controversies** and in which its judgment will

writ of error was only taken for delay, a motion to affirm the judgment should be granted.[25] And if a cause has been remanded to the state court which refuses to execute the mandate of the supreme court the latter court may proceed to a final decision and award execution thereon.[26]

H. Circuit Court of Appeals — 1. Time of Creation and Beginning of Appellate Jurisdiction. The judiciary act of 1891,[27] creating the circuit court of appeals and providing in what cases appeals could be taken to it and to the supreme court took effect immediately, notwithstanding the jurisdiction of the supreme and circuit courts was not thereby to be impaired in cases of appeals taken or pending before July 1, 1891.[28]

2. Rules of Procedure. The requirements of rules as to specifications of error must be complied with,[29] but the rules as to the return-day of appeals and the filing of the transcript are directory, and the court may in its discretion relieve parties who have not complied therewith.[30]

3. Final Decision of District or Circuit Courts. The circuit court of appeals must exercise appellate jurisdiction to review by appeal or by writ of error, final decisions in the district courts and the existing circuit courts in all cases not within the exceptions of the statute creating such appellate court.[31]

4. Extent of Appellate Jurisdiction — a. Generally. Section 6 of the Judiciary

be effective, and if events occurring subsequent to the rendition of the judgment in the state court will prevent the particular relief sought from being given the writ of error will be dismissed. Kimball *v.* Kimball, 174 U. S. 158, 19 S. Ct. 639, 43 L. ed. 932.

25. Blythe *v.* Hinckley, 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557.

Where judgment is affirmed effect should be given thereto. Thorman *v.* Broderick, 52 La. Ann. 1298, 27 So. 735. See also Stewart *v.* Bloom, 23 La. Ann. 748.

26. Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

27. 26 U. S. Stat. at L. 826 [U. S. Comp. Stat. (1901) pp. 547–556].

28. *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; U. S. *v.* National Exch. Bank, 53 Fed. 9, 3 C. C. A. 390; Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. 728, 1 C. C. A. 636, 17 L. R. A. 190; Northern Pac. R. Co. *v.* Amato, 49 Fed. 881, 1 C. C. A. 468 [*affirmed* in 144 U. S. 465, 12 S. Ct. 740, 36 L. ed. 596]; New York, etc., R. Co. *v.* Bennett, 49 Fed. 598, 1 C. C. A. 392. See also The Alijandro *v.* Wallace, 56 Fed. 621, 6 C. C. A. 54; Marine, R., etc., Co. *v.* The Mattano, 52 Fed. 876, 3 C. C. A. 325.

In case of decrees before and after creation of the circuit court of appeals, the former decree being one of sale on a bill of foreclosure and the latter being on a cross bill only the decree on the cross bill is appealable to said court. Courtney *v.* Insurance Co. of North America, 49 Fed. 309, 1 C. C. A. 249.

29. Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407, 105 Fed. 659, 44 C. C. A. 653 [writ of error *denied* in 180 U. S. 638, 21 S. Ct. 920, 45 L. ed. 710], construing rule 11 and in connection therewith rules 10, 24 (90 Fed. cxlvi).

In case of a petition for a rehearing only the judges who joined in rendering the decision are responsible for granting or refusing the same. World's Columbian Exposition Co. *v.* Republic of France, 96 Fed. 687, 38 C. C. A. 483, construing rule 27 (90 Fed. cxviii).

Only questions of law are to be examined in cases coming to the circuit court of appeals on writ of error. Hume *v.* U. S., 118 Fed. 689, 55 C. C. A. 407.

The circuit court of appeals will not, unless in exceptional cases, consider an assignment of errors in plain disregard of rule 11, which requires that it "shall set out separately and particularly each error asserted and intended to be urged," and when, in addition, the appellant's brief fails to comply with rule 24, requiring a reference to the pages of the record relied on to support each point. Mitchell Transp. Co. *v.* Green, 120 Fed. 49, 56 C. C. A. 455.

Under the rule permitting the allowance of an appeal or writ of error, a district judge while sitting in his own district is not authorized to allow an appeal from a court of another district. U. S. *v.* Moy Yee Tai, 109 Fed. 1, 48 C. C. A. 203.

30. Florida *v.* Charlotte Harbor Phosphate Co., 70 Fed. 883, 17 C. C. A. 472.

31. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

Circuit court's judgment in compliance with a mandate of the circuit court of appeals is in effect a judgment of the latter court, and cannot be taken to said court for review, and a refusal of the circuit court to entertain a defense in enforcing the mandate is not a ground for a second writ of error. White *v.* Bruce, 109 Fed. 355, 48 C. C. A. 400.

From final decision of a district judge at chambers an appeal will lie. Webb *v.* York, 74 Fed. 753, 21 C. C. A. 65.

Judgment is not final where subject to the court's control, until final disposition of motion to set aside or for a new trial. Kingman *v.* Western Mfg. Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. ed. 1192.

Act[32] extends to "all cases other than those provided for in the preceding section[33] of this act, unless otherwise provided by law."[34] The effect of this enactment was to distribute the entire appellate jurisdiction, and to vest in the circuit courts of appeals so much thereof as was not thereby vested in the supreme court, while the words, "unless otherwise provided by law," do not refer merely to prior laws, but were intended to guard against implied repeals.[35] Said appellate courts are also, in respect to the review of judgments by writs of error and bills of exceptions, controlled exclusively by the acts of congress and the rules and practice of the United States courts without regard to state statutes or practice.[36] And they cannot review judgments of a state supreme court.[37] Nor is the right to an appeal or writ of error an unqualified one, since there is an implied power and duty to refuse applications therefor in some cases.[38]

b. Jurisdictional Questions. Although an appeal does not lie to the federal circuit court of appeals, in cases in which the jurisdiction of the court below is alone in issue and the decision is upon that point,[39] nevertheless, if other ques-

32. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 549].

33. Section five of said act provides specifically in what cases appeal or writ of error lie to the supreme court directly from the district or circuit courts. 26 U. S. Stat. at L. 827 [U. S. Comp. Stat. (1901) p. 549].

34. **Decisions** reviewable include generally a suit by contractors against the United States to recover for materials furnished for the construction of a levee (Ogden *v.* U. S., 148 U. S. 390, 13 S. Ct. 602, 37 L. ed. 493 [*following* Hubbard *v.* Soby, 146 U. S. 56, 13 S. Ct. 13, 36 L. ed. 886]; National Exch. Bank *v.* Peters, 144 U. S. 570, 12 S. Ct. 767, 36 L. ed. 545); a judgment rendered by the circuit court in an action against the United States, brought under the Tucker Act, March 3, 1887 (U. S. *v.* Coudert, 73 Fed. 505, 19 C. C A. 543); an appeal by the United States from an adverse judgment in the circuit court, in a suit by a clerk of a district court to recover his fees, under the act of March 3, 1887 (U. S. *v.* Morgan, 64 Fed. 4, 12 C. C. A. 6); and a cause improperly removed, to the extent of determining that fact and to awarding costs (Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237).

Cannot review the amount of damages or the denial by the trial court of a motion for a new trial on the ground of excessive damages (Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. 925, 49 C. C. A. 163); or the refusal of the lower court to set aside a verdict as contrary to the weight of evidence (O'Donohue *v.* Bruce, 92 Fed. 858, 35 C. C. A. 52).

As to jurisdictional amount, U. S. Rev. Stat. (1878) § 631 [U. S. Comp. Stat. (1901) p. 518] is not repealed by the act of March 3, 1891, but remains applicable to appeals in the circuit court of appeals. North American Trading, etc., Co. *v.* Smith, 93 Fed. 7, 35 C. C. A. 183.

Application to file supplemental bill, in the nature of a bill of review, made to the circuit court of appeals, after its affirmance of a decree, will be referred to circuit court with permission to entertain it. Bliss *v.* Reed, 106 Fed. 314, 45 C. C. A. 304.

In reviewing habeas corpus proceedings in the district courts, the circuit court of appeals has succeeded to the appellate jurisdictions of the circuit courts (U. S. *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394), although said circuit court of appeals has no jurisdiction where the application for a writ is based on an alleged violation of the United States constitution (*Ex p.* Jacobi, 104 Fed. 681).

As to appeals in bankruptcy cases see U. S. *v.* Moy Yee Tai, 109 Fed. 1, 48 C. C. A. 203; Huntington *v.* Saunders, 72 Fed. 10, 18 C. C. A. 409; Hutchins *v.* Briggs, 61 Fed. 498, 9 C. C. A. 585; Duff *v.* Carrier, 55 Fed. 433, 5 C. C. A. 177; and generally, BANKRUPTCY.

35. Lau Ow Bew *v.* U. S., 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340.

36. Duncan *v.* Atchison, etc., R. Co., 72 Fed. 808, 19 C. C. A. 202.

Uniformity of decision on jurisdictional questions should exist until the supreme court has settled the question and therefore a decision by the circuit court of appeals in one circuit as to its own jurisdiction should be followed in other circuits. *In re* Aspinwall, 90 Fed. 675, 33 C. C. A. 217.

37. Terry *v.* Davy, 107 Fed. 50, 46 C. C. A. 141.

38. White *v.* Bruce, 109 Fed. 355, 48 C. C. A. 400.

39. 26 U. S. Stat. at L. 826 [U. S. Comp. Stat. (1901) p. 549]; U. S. *v.* Jahn, 155 U. S. 109, 15 S. Ct. 39, 39 L. ed. 87; Excelsior Wooden-Pipe Co. *v.* Pacific Bridge Co., 109 Fed. 497, 48 C. C. A. 349; Dudley *v.* Lake County, 103 Fed. 209, 43 C. C. A. 184; Evans-Snider-Buel Co. *v.* McCaskill, 101 Fed. 658, 41 C. C. A. 577; Coe Brass Mfg. Co. *v.* Savlik, 93 Fed. 519, 35 C. C. A. 390; *In re* Aspinwall, 90 Fed. 675, 33 C. C. A. 217; U. S. *v.* Severens, 71 Fed. 768, 18 C. C. A. 314; White *v.* Ewing, 66 Fed. 2, 13 C. C. A. 276; U. S. *v.* Swan, 65 Fed. 647, 13 C. C. A. 77; Cabot *v.* McMaster, 65 Fed. 533, 13 C. C. A. 39; Davis, etc., Bldg., etc., Co. *v.* Barber, 60 Fed. 465, 9 C. C. A. 79; U. S. *v.* Sutton, 47 Fed. 129, 2 C. C. A. 115. But see King *v.* McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 L. R. A. 784.

tions are involved sufficient to confer jurisdiction upon said court, within the intent of the act of 1891, the fact that an issue as to the jurisdiction of the circuit court is also raised is not exclusive.[40] Nor does the fact that a question of jurisdiction of the circuit court is before the supreme court on a writ of error preclude the circuit court of appeals from entertaining a writ of error to review an order, made after entry of the judgment, denying a new trial claimed under a state statute.[41] Again the circuit court of appeals has power to reverse on a writ of error the judgment of the circuit court, if the record fails to show the requisite diversity of citizenship[42] or jurisdictional facts.[43] And it seems that a party may appeal at his election upon the question of jurisdiction alone to the supreme court, and he may take the whole case to the circuit court of appeals.[44]

c. Capital Crime — Infamous Crime. Appeals or writs of error may be taken from the district or circuit courts to the proper circuit court of appeal in cases of an infamous crime not capital.[45] The circuit court of appeals has no jurisdiction in a case of conviction of a capital crime, but the test of its jurisdiction is the penalty which may be and not that which actually is imposed. If the crime is punishable with death and there is a conviction, it is a case of conviction of a capital crime.[46]

Jurisdictional question must actually exist to deprive the circuit court of jurisdiction. It is not sufficient that there is a mere denial of the right of the plaintiff to the judgment entered in his favor, or that there is an allegation that the judgment is erroneous. Woodbridge, etc., Engineering Co. *v.* Ritter, 70 Fed. 679. *Compare* Chapman *v.* Atlantic Trust Co., 119 Fed. 257, 56 C. C. A. 61.

40. U. S. *v.* Jahn, 155 U. S. 109, 15 S. Ct. 39, 39 L. ed. 87 [*following* Evans-Snider-Buel Co. *v.* McCaskill, 101 Fed. 658, 41 C. C. A. 577] (even if the question of jurisdiction is raised and sustained in the circuit court, but the judgment or decree is upon the merits, the appeal must or may be taken to the circuit court of appeals, dependent upon the point in whose favor the question of jurisdiction has been sustained, and said court may certify up the question of jurisdiction; there may also be a cross appeal or writ of error to said court. See also Mills *v.* Provident L. & T. Co., 100 Fed. 344, 40 C. C. A. 394); Reliable Incubator, etc., Co. *v.* Stahl, 105 Fed. 663, 44 C. C. A. 657 (primarily at least the assignment of errors determines the scope of appeals to the circuit court of appeals; and if in any case errors other than the lack of jurisdiction in the lower court are asserted, the whole case is before the court, including the question of jurisdiction, if there be such question, notwithstanding other questions are found upon examination not to be presented or imperfectly presented); The Presto, 93 Fed. 522, 35 C. C. A. 394; U. S. Freehold Land, etc., Co. *v.* Gallegos, 89 Fed. 769, 32 C. C. A. 470; Beck, etc., Lithographing Co. *v.* Wacker, etc., Brewing Co., 76 Fed. 10, 22 C. C. A. 11; Coler *v.* Grainger County, 74 Fed. 16, 20 C. C. A. 267; Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16; Baltimore, etc., R. Co. *v.* Meyers, 62 Fed. 367, 10 C. C. A. 485; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237.

41. Shreve *v.* Cheesman, 69 Fed. 785, 16 C. C. A. 413.

42. Houston *v.* Filer, etc., Co., 104 Fed. 163, 43 C. C. A. 457, plaintiff will, however, be permitted to amend his declaration to show such jurisdictional facts. See Snead *v.* Sellers, 66 Fed. 371, 3 C. C. A. 518.

43. Jurisdiction of the circuit court must appear affirmatively upon the record, where the cause has been removed from the state to the federal court and carried thence to the circuit court of appeals, otherwise the judgment will be reversed with directions to remand to a state court. Southwestern Tel., etc., Co. *v.* Robinson, 48 Fed. 769, 1 C. C. A. 91.

Appellate court should take notice of the lack of jurisdiction appearing from the bill, on appeal from a decree dismissing a suit for want of equity. Wetherby *v.* Stinson, 62 Fed. 173, 10 C. C. A. 243.

44. McLish *v.* Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. ed. 893.

45. 29 U. S. Stat. at L. 492 [U. S. Comp. Stat. (1901) p. 556], amending 26 U. S. Stat. at L. 827 [U. S. Comp. Stat. (1901) p. 549].

Amendment of 1897 did not change the common-law distinction between appeals and writs of error as recognized in the appellate procedure of the courts of the United States, and it cannot be held to confer jurisdiction on the circuit court of appeals to review a criminal case by appeal. De Lemos *v.* U. S., 107 Fed. 121, 46 C. C. A. 196.

As to decisions as to infamous crimes before said amendment see Folsom *v.* U. S., 160 U. S. 121, 16 S. Ct. 222, 40 L. ed. 363; Stokes *v.* U. S., 60 Fed. 597, 9 C. C. A. 152; U. S. *v.* Sutton, 47 Fed. 129, 2 C. C. A. 115. Examine Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909.

46. Good Shot *v.* U. S., 104 Fed. 257, 43 C. C. A. 525.

If the conviction is only for a crime which is not capital, the circuit court of appeals has jurisdiction even though a charge of murder is involved. Davis *v.* U. S., 107 Fed. 753, 46 C. C. A. 619.

d. Constitutional Questions. Although such constitutional questions as come clearly within the purview of section 5 of the act of 1891 are not within the jurisdiction of the federal circuit court of appeals,[47] it being also so decided, even though a consideration of other questions is involved,[48] still that court has assumed jurisdiction to decide the whole case in the first instance, where it is one of considerable importance, involving a constitutional question and its dismissal would cause a delay of years.[49] Nor is it sufficient to defeat the jurisdiction of said court that the constitutional question might have been raised by the defeated party,[50] or that a question as to the construction or application of the constitution of the United States arose incidentally in the trial of the action in the circuit court.[51] Nor is said appellate court prevented from assuming jurisdiction on the ground that the federal constitution is involved, where such claim would only arise in case the state statute was passed in violation of the state constitution, when it would be invalid without reference to the constitutional question raised.[52] Nor is said jurisdiction excluded by an issue whether due force and effect has been given to a judgment or decree of another state;[53] or by the fact that one of the defenses is the unconstitutionality of an ordinance, where such jurisdiction rests upon the question of diverse citizenship and not on any other ground.[54] Again it is decided that an appeal may be taken to the supreme court upon a constitutional question, and also one to the circuit court of appeals upon questions there appealable, for a party is not put to an election of remedies; but the latter court will continue the cause to await the decision of the supreme court.[55]

e. Patent, Revenue, and Admiralty Causes. Under the provisions of section 6 of the act of 1891 the circuit court of appeals has appellate jurisdiction in all cases arising under the patent laws,[56] and in cases under the revenue laws.[57]

47. St. Clair County *v.* Interstate Sand, etc., Co., 110 Fed. 785, 49 C. C. A. 169; J. C. Hubinger Co. *v.* Quincy Horse-Railway, etc., Co., 98 Fed. 897, 39 C. C. A. 336; Davis *v.* Burke, 97 Fed. 501, 38 C. C. A. 299; Illinois Cent. R. Co. *v.* Adams, 93 Fed. 852, 35 C. C. A. 635; Barr *v.* New Brunswick, 72 Fed. 689, 19 C. C. A. 71; Hastings *v.* Ames, 68 Fed. 726, 15 C. C. A. 628; Macon *v.* Georgia Packing Co., 60 Fed. 781, 9 C. C. A. 262; Chicago, etc., Co. *v.* Evans, 58 Fed. 433, 7 C. C. A. 290. See also Wrightman *v.* Boone County, 88 Fed. 435, 31 C. C. A. 570; Pauley Jail Bldg., etc., Co. *v.* Crawford County, 84 Fed. 942, 28 C. C. A. 579; King *v.* McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 C. C. A. 784; Hamilton *v.* Brown, 53 Fed. 753, 3 C. C. A. 639.

City ordinance is within the act of 1891 conferring appellate jurisdiction on the supreme court. Pike's Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

48. Wrightman *v.* Boone County, 88 Fed. 435, 31 C. C. A. 570; Pauley Jail Bldg., etc., Co. *v.* Crawford County, 84 Fed. 942, 28 C. C. A. 579.

49. Pike's Peak Power Co. *v.* Colorado Springs, 105 Fed. 1, 44 C. C. A. 333, also holding that where the state constitution or laws is claimed to be in contravention of the United States constitution the circuit court of appeals has the option to take or decline jurisdiction as seems proper.

50 World's Columbian Exposition *v.* U. S., 56 Fed. 654, 6 C. C. A. 58.

51. As for example upon objection to the admission in evidence of an act of a state legislature as a muniment of title, on the ground that it was in contravention of the constitution, does not deprive the circuit court of appeals of jurisdiction to review the whole case on a writ of error. Watkins *v.* King, 118 Fed. 524, 55 C. C. A. 290.

52. Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1, 83 Fed. 529, 27 C. C. A. 580.

53. Merritt *v.* American Steel-Barge Co., 75 Fed. 813, 21 C. C. A. 525.

54. American Sugar Refining Co. *v.* New Orleans, 181 U. S. 277, 21 S. Ct. 646, 45 L. ed. 859; Keyser *v.* Lowell, 117 Fed. 400, 54 C. C. A. 574.

55. Pullman's Palace Car Co. *v.* Central Transp. Co., 76 Fed. 401, 22 C. C. A. 246 [*distinguishing* McLish *v.* Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. ed. 893]. See also Pullman's Palace Car Co. *v.* Central Transp. Co., 171 U. S. 138, 18 S. Ct. 808, 43 L. ed. 108.

56. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 550]; U. S. *v.* American Bell Telephone Co., 159 U. S. 548, 16 S. Ct. 69, 40 L. ed. 255, including the case of a bill by the United States to cancel a patent for an invention.

Suit is not one arising under the patent laws, so as to confer jurisdiction on the circuit court of appeals, where it is sought to enjoin the collection of a state tax on the value of patent rights on the ground that the state statute authorizing the same contravenes the federal constitution. Holt *v.* Indiana Mfg. Co., 80 Fed. 1, 25 C. C. A. 301.

57. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 550]; U. S. *v.* Hopewell, 51 Fed. 798, 2 C. C. A. 510; Louisville Public Warehouse Co. *v.* Collector of Customs, 49 Fed. 561, 1 C. C. A. 371, construing also the

Appellate jurisdiction "in admiralty cases" [58] is also conferred on such court by the same section.

f. Opinion of Supreme Court. It is determined that a circuit court of appeals will not withhold a decision of other questions presented, because on one out of many it desires the opinion of the supreme court.[59]

5. Interlocutory Orders or Decrees as to Injunctions and Receivers. Where upon a hearing in equity in a district or circuit court or by a judge thereof in vacation an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a case in which an appeal from a final decree may be taken, under the provisions of the act of 1891, to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree [60] granting

clause "unless otherwise provided by law" in section 6 of the act.

58. 26 U. S. Stat. at L. 828 [U. S. Comp. Stat. (1901) p. 550]; Laidlaw *v.* Oregon R., etc., Co., 81 Fed. 876, 26 C. C. A. 665; The Pilot *v.* U. S., 53 Fed. 11, 3 C. C. A. 392. But see The Annie Faxon, 87 Fed. 961, 31 C. C. A. 325; The Alliance, 70 Fed. 273, 17 C. C. A. 124.

59. Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443.

60. 26 U. S. Stat. at L. 828; 28 U. S. Stat. at L. 666; 31 U. S. Stat. at L. 660 [U. S. Comp. Stat. (1901) pp. 550, 551]; *In re* Tampa Suburban R. Co., 168 U. S. 583, 18 S. Ct. 177, 42 L. ed. 589; American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486; Pacific Northwest Packing Co. *v.* Allen, 109 Fed. 515, 48 C. C. A. 521; Berliner Gramophone Co. *v.* Seaman, 108 Fed. 714, 47 C. C. A. 630; Texas Consol. Compress, etc., Assoc. *v.* Storrow, 92 Fed. 5, 34 C. C. A. 182; Lake Nat. Bank *v.* Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195; Lockwood *v.* Wickes, 75 Fed. 118, 21 C. C. A. 257; Bissell Carpet-Sweeper Co. *v.* Goshen Sweeper Co., 72 Fed. 545, 19 C. C. A. 25.

Extent of jurisdiction.— Appeal may be taken from the whole decree, and need not be restricted to the part granting the injunction. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 17 S. Ct. 407, 41 L. ed. 810. In case of an appeal from an order appointing a receiver and granting an injunction, the entire order is carried up and the merits of the case may be reviewed. *In re* Tampa Suburban R. Co., 168 U. S. 583, 18 S. Ct. 177, 42 L. ed. 589; Texas Consol. Compress, etc., Assoc. *v.* Storrow, 92 Fed. 5, 34 C. C. A. 182. Other decisions also give to the circuit court of appeals the right to pass upon and determine the merits of the case. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 17 S. Ct. 407, 41 L. ed. 810; Berliner Gramophone Co. *v.* Seaman, 110 Fed. 30, 49 C. C. A. 208; Tornanses *v.* Melsing, 109 Fed. 710, 47 C. C. A. 596; Carson *v.* Combe, 86 Fed. 202, 29 C. C. A. 660. But see Murray *v.* Bender, 109 Fed. 585, 48 C. C. A. 555; Lake Nat. Bank *v.* Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195; Duplex Printing-Press Co. *v.* Campbell Printing-Press, etc., Co., 69 Fed. 250, 16 C. C. A. 220. Although a distinction is made in respect to questions of law and a case where the rights of the parties depend upon proof of facts. Knoxville *v.* Africa, 77 Fed. 501, 23 C. C. A. 252. But the propriety of the entire order may be considered. U. S. Rubber Co. *v.* American Oak Leather Co., 82 Fed. 248, 27 C. C. A. 118. It is further determined that on review said appellate court cannot be hampered or restricted by any prior ruling of the circuit court, involving the same question or any phase thereof, especially when such ruling relates to the jurisdiction of the court. Lake St. El. R. Co. *v.* Farmers' L. & T. Co., 77 Fed. 769, 23 C. C. A. 448. An appeal may also be taken, even though the jurisdiction of the circuit court is involved (*In re* Tampa Suburban R. Co., 168 U. S. 583, 18 S. Ct. 177, 42 L. ed. 589), or even though such appeal raises only the question of such jurisdiction (Lake Nat. Bank *v.* Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195. But see *supra*, XII, H, 4, b. A jurisdictional question may, however, be left until the final decree below, so that the parties if they desire may take it direct to the supreme court (Carson *v.* Combe, 86 Fed. 202, 29 C. C. A. 660); or the circuit court of appeals may also, where the question is raised whether the cause is one of equitable cognizance, dissolve the injunction and dismiss the bill, said court being of opinion that equity has no jurisdiction (Green *v.* Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90). Again the action of the appellate court in discharging the receiver and restoring the property, even though erroneous, constitutes no ground for interference by the supreme court, by mandamus. American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486. Said circuit court of appeals may also affirm an order granting an injunction in one case, and an order refusing one in another, on substantially the same evidence, the matter being one of judicial discretion and not involving the exercise of exact legal judgment below. Société Anonyme, etc. *v.* Allen, 90 Fed. 815, 33 C. C. A. 282. Jurisdiction also exists in said court, in case of an appeal from an order granting an injunction, even though an amended bill raises a constitutional question. Stafford *v.* King, 90 Fed. 136, 32 C. C. A. 536. See *supra*, XII, H, 4, d.

Appeal will not lie from an order appointing a receiver, although it contains a mandatory direction, in the nature of an injunction, to deliver property to the receiver (Highland

or continuing such injunction or appointing such receiver to the circuit court of appeals. If appeal is not taken within the prescribed statutory time it should be dismissed,[61] the only remedy in such case being by appeal after final decree. An appeal will not lie from an order denying a motion, thereafter made, to dissolve the injunction.[62]

6. Time For Appeal or Review. The judiciary act of 1891 limits the time within which appeals or writs of error shall be sued out, and this requirement is obligatory and said court has not jurisdiction where the enactment is not complied with.[63]

7. Proceedings For Appeal, Etc.—Power to Issue Writs. The jurisdiction of the circuit court of appeals as to the proceedings for appeal or writ of error for review, and as to the issuance of writs generally, as well as the power of its judges in the premises, is established and limited by the judiciary act of 1891, which must be complied with.[64] The sections, however, of said enactment are not infrequently interdependent or dependent upon other acts of congress.

Ave., etc., R. Co. *v.* Columbian Equipment Co., 168 U. S. 627, 18 S. Ct. 240, 42 L. ed. 605); from an interlocutory order denying an injunction (Western Electric Co. *v.* Williams-Abbott Electric Co., 108 Fed. 952, 48 C. C. A. 159; American School Furniture Co. *v.* Vaught, 108 Fed. 571, 47 C. C. A. 496; National Automatic Mach. Co. *v.* Automatic Weighing, etc., Co., 105 Fed. 670, 44 C. C. A. 664; Westinghouse Air-Brake Co. *v.* Christensen Engineering Co., 104 Fed. 622, 44 C. C. A. 92; Columbia Wire Co. *v.* Boyce, 104 Fed. 172, 44 C. C. A. 588); from an order denying a motion restraining the prosecution of a suit to foreclose a mortgage, pending the determination of a cross bill, which latter as filed contained no prayer for an injunction, an effort made to amend the prayer being "manifestly pretentious," and there being no necessity for an injunction and no final decree until the merits of the cross bill had been determined (American Trust, etc., Bank *v.* Farmers' L. & T. Co., 81 Fed. 924, 27 C. C. A. 4); from an order dismissing an application to set aside an injunction (Heinze *v.* Butte, etc., Consol. Min. Co., 107 Fed. 165, 46 C. C. A. 219); from a decree refusing to dissolve, discharge, or vacate an injunction (Rowan *v.* Ide, 107 Fed. 161, 46 C. C. A. 214); from an order, in a cause involving questions of which said court would have no jurisdiction on an appeal from the final decree (Macon *v.* Georgia Packing Co., 60 Fed. 781, 9 C. C. A. 262); from a decree or order, in the case of the assembling of a prayer for an unnecessary injunction with a prayer for modification of a decree or order, when a direct appeal is unauthorized (Fidelity Ins., etc., Co. *v.* Dickson, 78 Fed. 205, 24 C. C. A. 60); from a harmless order dissolving an injunction, in order to decide a question of jurisdiction (Lake St. El. R. Co. *v.* Farmers' L. & T. Co., 77 Fed. 769, 23 C. C. A. 448); nor, after demurrer overruled, from an order allowing appellees to intervene and to move for a rehearing or review of all former orders, suspending and modifying certain orders relating to a receiver's acts, and requiring bonds of the original parties for compliance with further orders in regard to funds already paid them by the receiver (Jack *v.* State, 102 Fed. 210, 42 C. C. A. 267); nor where a federal constitutional question is involved (Dawson *v.* Columbia Ave. Saving-Fund, etc., Co., 102 Fed. 200, 42 C. C. A. 258; Indianapolis *v.* New York Cent. Trust Co., 83 Fed. 529, 27 C. C. A. 580 [*dismissing* appeal 82 Fed. 1]; Westerly *v.* Seamen's Friend Soc., 76 Fed. 467, 22 C. C. A. 278. See *supra*, XII, H, 4, d), although the case may involve other questions (Dawson *v.* Columbia Ave. Saving-Fund, etc., Co., 102 Fed. 200, 42 C. C. A. 258). Nor can said court, its jurisdiction being only appellate, vacate an order directing that an injunction theretofore ordered to be issued should not issue until further orders. North Bloomfield Gravel Min. Co. *v.* U. S., 83 Fed. 2, 27 C. C. A. 395.

Complainant should be allowed to waive his right to an injunction until the decree becomes final, so as to deprive defendant of an opportunity to appeal from the interlocutory decree, in a cause where a patent is sustained after a full hearing upon the merits, and the taking of an account would involve little labor and expense. Lockwood *v.* Wickes, 75 Fed. 118, 21 C. C. A. 257.

61. Rowan *v.* Ide, 107 Fed. 161, 46 C. C. A. 214.

62. Baker *v.* Baker, 83 Fed. 3, 27 C. C. A. 396 [*dismissing* appeal in 77 Fed. 181].

63. Reynolds *v.* Manhattan Trust Co., 109 Fed. 97, 48 C. C. A. 249; Brewster *v.* Evans, 93 Fed. 628, 35 C. C. A. 500.

Jurisdiction cannot be conferred to review a judgment six months after its entry by the voluntary appearance of necessary parties to appeal. Dodson *v.* Fletcher, 79 Fed. 129, 24 C. C. A. 466.

64. 26 U. S. Stat. at L. 829 [U. S. Comp. Stat. (1901) pp. 552, 553]. Section 11 of this act conferred upon the circuit court of appeals the powers specified in U. S. Rev. Stat. (1878) § 716 [U. S. Comp. Stat. (1901) p. 580], which are to issue writs of scire facias and all writs, not specifically provided for, necessary to the exercise of their respective jurisdictions and agreeable to the usages and principles of the law.

Effect is given to appeal by a certified copy of the order allowing the appeal, and of the assignment of errors and bond, together with

8. Jurisdiction as to Territorial Courts. Appeals and writs of error may be taken from the supreme courts of the several territories to the circuit courts of appeals;[65] but said appellate jurisdiction is limited to said supreme courts,[66] and does not extend to causes which are not between aliens and citizens of the United States or citizens of different states, or in causes not arising under the patent, revenue, or criminal laws, or to those not in admiralty,[67] although interlocutory orders appointing receivers are appealable.[68]

I. Circuit Courts — 1. Creation, Constitution, and Organization — a. Judicial Districts. The creation of districts may be merely for the convenience of business.[69]

the original writ of supersedeas and the citation. Tornanses *v.* Melsing, 106 Fed. 775, 45 C. C. A. 615.

Supersedeas cannot be allowed unless the appeal is perfected, or writ of error sued out and served within the period prescribed. Logan *v.* Goodwin, 101 Fed. 654, 41 C. C. A. 573. See also New England R. Co. *v.* Hyde, 101 Fed. 397, 41 C. C. A. 404.

Writ of supersedeas is not void when issued by a clerk of the court because directed by a judge and not by the court as such (*In re* McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. ed. 657), and under section 11 a single judge, upon granting a writ of error or appeal, may also grant a supersedeas, and prescribe its form and terms, and the circuit court of appeals alone, subject to review by the supreme court, may determine its jurisdiction of the case and any question in relation to the form or scope of the writs and the manner of their service (Tornanses *v.* Melsing, 106 Fed. 775, 45 C. C. A. 615).

Writs of certiorari cannot be issued as original process. Travis County *v.* King Iron Bridge, etc., Co., 92 Fed. 690, 34 C. C. A. 620.

Has no power to award habeas corpus, in the absence of an express statutory authorization, to be served outside of the circuit in which it sits to secure the release of a person there in custody. *In re* Boles, 48 Fed. 75, 1 C. C. A. 48.

Can only issue mandamus in aid of their own jurisdiction and cannot thereby direct a circuit court to dismiss a cause *in limine* on the ground that no jurisdiction has been acquired by the mode of service followed. U. S. *v.* Severens, 71 Fed. 768, 18 C. C. A. 314.

65. 26 U. S. Stat. at L. 830 [U. S. Comp. Stat. (1901) p. 554], being section 15 of the act of March 3, 1891.

Assignment of Hawaii to a judicial circuit cannot give a right of appeal inconsistent with section 86 of the act of April 30, 1900. Wilder's Steamship Co., Petitioner, 183 U. S. 545, 22 S. Ct. 225, 46 L. ed. 321.

Indian Territory.— For particular enactments relating to Indian Territory see 28 U. S. Stat. at L. 693, modifying 26 U. S. Stat. at L. 829 [U. S. Comp. Stat. (1901) p. 553]. And see U. S. Stat. at L. 6 [U. S. Comp. Stat. (1901) p. 555]. Over final decisions of the appellate court of Indian Territory, the circuit court of appeals has full appellate jurisdiction including cases of infamous crimes. Harless *v.* U. S., 88 Fed. 97, 31 C. C. A. 397. But see Gowen *v.* Bush, 72 Fed. 299, 18 C. C. A. 572; Scott *v.* Hammer, 72 Fed. 298, 18 C. C. A. 565.

66. *In re* Boles, 48 Fed. 75, 1 C. C. A. 48.

May review judgment of district court of Alaska which is in effect the supreme court of the territory. The Coquitlam *v.* U. S., 163 U. S. 346, 16 S. Ct. 1117, 41 L. ed. 184.

67. Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 14 S. Ct. 236, 38 L. ed. 80 [*affirming* 53 Fed. 7, 3 C. C. A. 388]. See also Simms *v.* Simms, 175 U. S. 162, 20 S. Ct. 58, 44 L. ed. 115.

No appeal lies in admiralty from decree of supreme court of Hawaii, in suit pending when the act of April 30, 1900, providing a government for that territory took effect. Wilder's Steamship Co., Petitioner, 183 U. S. 545, 22 S. Ct. 225, 46 L. ed. 321. But see Wilder's Steamship Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473.

Only those causes are "final" which are enumerated in the first clause of section 6 of the act of 1891. Badaracco *v.* Cerf, 53 Fed. 169, 3 C. C. A. 491 [*applied* in Aztec Min. Co. *v.* Ripley, 53 Fed. 7, 3 C. C. A. 388].

68. *In re* McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. ed. 657.

Decree is final and appealable where it turns over to a receiver a placer mining claim with personal property not involved in the litigation with instructions to work the claim, and in so doing to use the personal property. Tornanses *v.* Melsing, 106 Fed. 775, 45 C. C. A. 615 (Alaska Code, § 504).

Inherent power to stay or supersede proceedings on appeal from an order appointing a receiver is not interfered with by the Alaska code, section 507. *In re* McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. ed. 657.

69. So that the circuit court, although held in different parts of the state, may be for one entire district. Lucker *v.* Phœnix Assur. Co., 66 Fed. 161. And *compare* Pacific R. Imp. Co. *v.* Metcalf, 16 Fed. 7, 4 Woods 404.

Although a state is divided into two geographical divisions yet if it comprises but one judicial district the grand and petit jurors on an indictment may be drawn from both divisions irrespective of where the crime is laid (Barrett *v.* U. S., 169 U. S. 218, 18 S. Ct. 327, 42 L. ed. 723), and an indictment found in the circuit court in one district may properly be remitted to the district where the crime is laid (Barrett *v.* U. S., 169 U. S. 231, 18 S. Ct. 332, 42 L. ed. 727).

b. "Justices" and "Judges." These words are defined by statute,[70] and provision is also made that certain judges shall hold the circuit court.[71] If a judge of the district court sits alone as circuit judge,[72] he has the same powers and jurisdiction as any other judge sitting in the same court.[73] And where a cause is otherwise within the act of congress, and two judges are on the bench, one alone may have jurisdiction if the other does not sit in the case, for the latter will then be deemed in law to be absent.[74] Again there may, by consent of the parties to a cause in equity, be a hearing outside of the district and final decision, by a circuit judge within his circuit, and a recital in the decree that the cause was heard in open court in the district concludes the parties.[75]

c. Special Sessions. The enactment providing for special sessions for criminal trials near the place of the offense[76] vests a legal discretion in the court.[77]

2. Rules of Procedure.[78] Circuit courts may make rules and orders as to practice, not inconsistent with any law of the United States, or with any rule prescribed by the supreme court.[79] And a circuit court, in exercising jurisdiction concurrent with the court of claims, is governed by its own rules of procedure, as to the time of granting new trials.[80] Nor if said court tries a case without a jury is it required to make special findings.[81]

3. Transfer of Causes.[82] The statute authorizing the transfer of causes from

70. "The words 'circuit justice' and 'justice of the circuit,' when used in this Title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word 'judge,' when applied generally to any circuit, shall be understood to include such justice." U. S. Rev. Stat. (1878) § 605 [U. S. Comp. Stat. (1901) p. 486].

71. U. S. Rev. Stat. (1878) § 609 [U. S. Comp. Stat. (1901) p. 494].

For other provisions as to judges, etc., see U. S. Rev. Stat. (1878) §§ 610, 611, 612, 615, 616, 617, 618 [U. S. Comp. Stat. (1901) pp. 494, 495, 496]. Section 610 requires the attendance of justices of the supreme court every two years. Section 611 provides that judges of the circuit court may sit apart. Section 612 makes provision as to circuit courts held at the same time in different districts. Section 615 relates to the transfer of suits from one circuit to another. Section 613 provides as to causes certified back. Section 617 provides that justices may hold courts of other circuits on request. Section 618 relates to the non-allotment of a justice to a circuit.

Power of a judge of one district to hold court in another.— Statutes construed as to eastern and southern districts of New York. See *In re* Nicolas, 18 Fed. Cas. No. 10,256, 8 Blatchf. 102.

72. **District judge may alone hold a circuit court,** although no judge of the supreme court be allotted to their circuit. Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666.

Right of district judges to sit in the circuit court in Missouri was not affected by the act of April 10, 1869. *In re* Circuit Court, 5 Fed. Cas. No. 2,728, 1 Dill. 1.

73. Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134.

74. Bingham *v.* Cabbot, 3 Dall. (U. S.) 19, 1 L. ed. 491.

75. Continental Trust Co. *v.* Toledo, etc., R. Co., 99 Fed. 171.

76. U. S. Rev. Stat. (1878) § 662 [U. S. Comp. Stat. (1901) p. 543].

77. U. S. *v.* Insurgents, 26 Fed. Cas. No. 15,442, 3 Dall. 513.

When special session will not be appointed see U. S. *v.* Hamilton, 3 Dall. (U. S.) 17, 1 L. ed. 490.

78. **In case of a petition for a rehearing it** will be forwarded by the circuit court to the justice of the supreme court who tried the cause and made the decree, and the latter will there dispose of the same and send the judgment to the circuit court to be entered. Giant Powder Co. *v.* California Vigoret Powder Co., 5 Fed. 197, 6 Sawy. 527, decided in 1880.

79. U. S. Rev. Stat. (1878) § 918 [U. S. Comp. Stat. (1901) p. 685].

Circuit courts will enforce the same rules as local courts administer in favor of their own citizens, in case of an adjustment of claims under a bill against executors where the former court has jurisdiction. Walker *v.* Beal, 9 Wall. (U. S.) 743, 19 L. ed. 814.

Forms of mesne process and rules of proceeding in suits in equity and of admiralty and maritime jurisdiction in circuit and district courts see U. S. Rev. Stat. (1878) § 913 [U. S. Comp. Stat. (1901) p. 683].

80. Lynah *v.* U. S., 106 Fed. 121 [*citing* Chase *v.* U. S., 155 U. S. 489, 15 S. Ct. 174, 39 L. ed. 284].

81. Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827, under U. S. Rev. Stat. (1878) § 649 [U. S. Comp. Stat. (1901) p. 525], and also stating the effect of a general finding.

82. **If a criminal cause is remitted to the circuit court from the district court,** its jurisdiction is not affected by the fact that no record of the indictment has returned in the district court. Jewett *v.* U. S., 100 Fed. 832,

one circuit into another[83] must be construed as giving all the powers necessary to the court in order to carry the litigation between the parties into judgment or decree;[84] and the court to which the cause is transferred has the same power over the parties as the first court would have had.[85]

4. Jurisdiction and Procedure in Exercise Thereof — a. Generally. Under the Judiciary Act, as amended, of the United States[86] three things only are necessary to confer jurisdiction on the circuit court: (1) A suit of a civil nature at common law or in equity; (2) involving two thousand dollars, exclusive of interest and costs; (3) and arising between citizens of different states, or presenting one of the other conditions mentioned in the statutes.[87] If these three things concur no

41 C. C. A. 88, 53 L. R. A. 568 [*affirming* 84 Fed. 142]. See also *infra*, XII, J, 3.

83. U. S. Rev. Stat. (1878) § 615 [U. S. Comp. Stat. (1901) p. 495]; Lee County *v.* U. S., 7 Wall. (U. S.) 175, 19 L. ed. 162.

Transfer of business see U. S. Rev. Stat. (1878) § 653 [U. S. Comp. Stat. (1901) p. 527].

Transfer of causes in Missouri districts see U. S. Rev. Stat. (1878) § 655 [U. S. Comp. Stat. (1901) p. 528].

Transfer on account of disability, etc., from district courts see U. S. Rev. Stat. (1878) § 637 [U. S. Comp. Stat. (1901) p. 519].

Court will not grant transfer when there is not a sufficient cause to justify the exercise of its discretion. O'Donnell *v.* Atchison, etc., R. Co., 49 Fed. 689.

Defendant may be precluded from the right to demand a transfer to one division by procuring the removal of a cause from a state court and filing a transcript in another division. O'Donnell *v.* Atchison, etc., R. Co., 49 Fed. 689.

"Either party" refers to all the parties in the suit on both sides thereof, under a statute permitting a transfer "on application of either party." Mexican Nat. Coal, etc., Co. *v.* Macdonell, 105 Fed. 266, construing 30 U. S. Stat. at L. 1002 [U. S. Comp. Stat. (1901) p. 432].

Suits commenced in an existing circuit may, upon alteration of the circuits, be constitutionally transferred by such act to a court in the newly constituted circuit. Stuart *v.* Laird, 1 Cranch (U. S.) 299, 2 L. ed. 115. But see Culver *v.* Woodruff County, 6 Fed. Cas. No. 3,469, 5 Dill. 392.

There is no authority for removing causes irregularly brought in the federal circuit court to a federal district court invested with circuit court powers. Kerrison *v.* Stewart, 14 Fed. Cas. No. 7,734, 1 Hughes 67, decided in 1874.

84. May *v.* Le Claire, 18 Fed. 49.

85. U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77.

86. 25 U. S. Stat. at L. 433 [U. S. Comp. Stat. (1901) p. 508].

87. Wahl *v.* Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62.

Circuit court has jurisdiction of suits against railroad commissioners under the Texas act of April 3, 1891, in an action brought by a citizen of another state (Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014); of a proceeding to enjoin, in a proper case in equity, a state officer from executing a state law in conflict with the constitution or laws of the United States and in violation of plaintiff's rights (Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447 [*following* Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204]); of an action of replevin, authorized by a state statute, against a sheriff holding property under a wrongful execution or attachment (Marden *v.* Starr, 107 Fed. 199); of a claim against the United States for salvage in the sum of ten thousand dollars (U. S. *v.* Morgan, 99 Fed. 570, 39 C. C. A. 653); of a proceeding to foreclose a mortgage given by a railroad corporation (Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785); upon its right of way through the United States reservation at West Point (Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3); and of a proceeding for condemnation of real estate (Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372); and all questions which may be raised in the state court may be raised in the federal court in an action in which the latter court has jurisdiction conferred by statute (Lamar *v.* Dana, 14 Fed. Cas. No. 8,005, 10 Blatchf. 34).

Circuit court has no jurisdiction to determine the question of title to land in dispute, or of the right to possession thereof, where no federal question is involved, nor is said jurisdiction in such case aided by the fact that mesne profits are demanded (Florida Cent., etc., Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486 [*reversing* 87 Fed. 369, 31 C. C. A. 9, and *considering* Evans *v.* Durango Land, etc., Co., 80 Fed. 433, 25 C. C. A. 531), or, within the judiciary act of 1888, of a proceeding for the probate of a will (Wahl *v.* Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62). Nor in the absence of a special statute may it authorize a marshal to levy taxes to satisfy a judgment. Barkley *v.* Levee Com'rs, 93 U. S. 258, 23 L. ed. 893. Nor has it jurisdiction of an original creditors' bill, where the district court in which the bankrupt obtained his discharge has jurisdiction thereof. Commercial Bank *v.* Buckner, 20 How. (U. S.) 108, 15 L. ed. 862. Nor may it enforce proceedings for limiting the liability of shipowners. Elwell *v.* Geibel, 33 Fed. 71. See also The Mary Lord, 31 Fed. 416, admiralty rule 58. And see as to admiralty jurisdiction The Hollen, 12 Fed. Cas. No. 6,608, 1 Mason 431, decided in 1818.

method of procedure prescribed by a state for its own courts can deprive said circuit courts of original jurisdiction thereof.[88] And if the question is one of merits it cannot be treated as one of jurisdiction, and the case dismissed for want thereof.[89]

b. Specifically. Outside of the general provisions of the statute jurisdiction is also conferred upon said circuit courts in specifically enumerated cases,[90] including suits under impost, internal revenue, or postal laws;[91] suits for penalties;[92] suits under patent or copyright laws;[93] suits for the protection of rights secured by the constitution of the United States or by any law providing for equal rights of citizens,[94] which provision includes civil rights only;[95] and a suit on a bond for government work is one arising under the laws of the United States, where the matter in dispute exceeds two thousand dollars.[96]

c. Claims Against United States. The act of 1887[97] gave to the circuit courts concurrent jurisdiction over certain claims against the United States,[98] not sounding in tort,[99] and excepting claims theretofore rejected,[1] etc., and by the amendment of 1898[2] there was also excepted from such jurisdiction cases brought to

88. Wahl *v.* Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62.

89. Huntington *v.* Laidley, 176 U. S. 668, 20 S. Ct. 526, 44 L. ed. 630.

90. U. S. Rev. Stat. (1878) § 629, and acts amendatory thereof [U. S. Comp. Stat. (1901) p. 503 *et seq.*].

91. U. S. Rev. Stat. (1878) § 629 [U. S. Comp. Stat. (1901) p. 503, cl. 4].

If an act conferring jurisdiction in an internal revenue case is repealed without a saving clause suits pending at the passage of the latter act fall. Merchants' Ins. Co. *v.* Ritchie, 5 Wall. (U. S.) 541, 18 L. ed. 540.

92. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 27 L. ed. 1150; Coffey *v.* U. S., 116 U. S. 427, 6 S. Ct. 432, 29 L. ed. 681 (although such suits are more frequently brought in district courts); U. S. *v.* Mooney, 116 U. S. 104, 6 S. Ct. 304, 29 L. ed. 550. See also Evans *v.* Bollen, 8 Fed. Cas. No. 4,554, 4 Dall. 342; Grant *v.* Hamilton, 10 Fed. Cas. No. 5,695, 3 McLean 100; Ketland *v.* The Cassius, 14 Fed. Cas. No. 7,743, 2 Dall. 365.

Have not exclusive jurisdiction of penalty under importing contract labor law. U. S. *v.* Whitcomb Metallic Bedstead Co., 45 Fed. 89. See also *infra*, XII, J, 4.

93. U. S. Rev. Stat. (1878) § 629 [U. S. Comp. Stat. (1901) p. 504, cl. 9].

Suit to enjoin the collection of taxes on patent rights is not within the act. Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 20 S. Ct. 272, 44 L. ed. 374 [*affirming* 80 Fed. 1, 25 C. C. A. 301].

Action at law for damages for the infringement of a patent is not within the statute. Brady *v.* Daly, 175 U. S. 148, 20 S. Ct. 62, 44 L. ed. 109 [*affirming* 83 Fed. 1007, 28 C. C. A. 253]. But see Falk *v.* Curtis Pub. Co., 100 Fed. 77.

Cannot entertain a bill in equity against the commissioner of patents to compel the issuance of a patent. Prentiss *v.* Elsworth, 19 Fed. Cas. No. 11,386.

Such suits can be maintained only in the district of which defendant is an inhabitant or in the district in which he has committed acts of infringement and has a regular and established place of business. Shaw *v.* American Tobacco Co., 108 Fed. 842, 48 C. C. A. 68.

94. U. S. Rev. Stat. (1878) § 629 [U. S. Comp. Stat. (1901) p. 506, c. 16].

95. Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 20 S. Ct. 272, 44 L. ed. 374 [*affirming* 80 Fed. 1, 25 C. C. A. 301].

96. Mullin *v.* U. S., 109 Fed. 817, 48 C. C. A. 678.

97. 24 U. S. Stat. at L. 505 [U. S. Comp. Stat. (1901) pp. 752, 753].

98. Statute simply removes exemption of United States from suits in cases specified. Sioux City, etc., R. Co. *v.* U. S., 36 Fed. 610.

"Claims" in the statute embraces a claim to a patent of lands earned by a land-grant railroad company, and the circuit court may determine the right to a patent under the grant. Southern Pac. R. Co. *v.* U. S., 38 Fed. 55. It also includes a claim, by a purchaser of timber lands, under 20 U. S. Stat. at L. 89 [U. S. Comp. Stat. (1901) p. 1545] to have a patent issued therefor. Montgomery *v.* U. S., 36 Fed. 4, 13 Sawy. 383. See also Jones *v.* U. S., 35 Fed. 561, 13 Sawy. 341.

Circuit court cannot restrain the public land department from allowing land, claimed to have been earned by a railroad company under its grant, to be entered as the public domain. Sioux City, etc., R. Co. *v.* U. S., 36 Fed. 610.

99. **If a claim sounds in tort** a suit in assumpsit will not confer jurisdiction (Hill *v.* U. S., 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862. But see Chappell *v.* U. S., 34 Fed. 673); and demurrer will be sustained to an action sounding in tort (Carpenter *v.* U. S., 42 Fed. 264).

1. As to claims **"heretofore rejected or reported on adversely,"** etc., see Harmon *v.* U. S., 43 Fed. 560; Stanton *v.* U. S., 37 Fed. 252; Rand *v.* U. S., 36 Fed. 671; Bliss *v.* U. S., 34 Fed. 781; Baker *v.* U. S., 34 Fed. 353, 13 Sawy. 221.

2. 30 U. S. Stat. at L. 494, 495 [U. S. Comp. Stat. (1901) pp. 752, 753].

recover fees, salary, or compensation for official services of officers, the effect of which was to deprive said court of jurisdiction to further proceed in such cases then pending therein, so that a judgment thereafter rendered in such a case was subject to reversal and dismissal on appeal.[3]

5. Power to Issue Writs and Process. Circuit courts have power to issue process to execute their own judgments and may issue mandamus to make an execution sale of corporate stock effective.[4] But if the power to issue an injunction in a specific case is derived solely from a statute, said court can exercise such power only within the terms of the enactment, nor is said statute retroactive in this respect.[5] And a substantially similar rule, as to conformity with statutory requirements, applies to allowance of a supersedeas.[6] Again if certiorari issues prematurely, and is therefore unauthorized by any statute, obedience thereto may be refused and the cause may proceed as if it had not issued.[7]

6. Review of Decisions. By the judiciary act of 1891[8] it is provided that no appellate jurisdiction shall be exercised or allowed by circuit courts.[9]

J. District Courts — 1. Creation, Constitution, and Organization — a. Judicial Districts. An act creating a division of a judicial district should sufficiently show a distribution of territorial jurisdiction between the two divisions, as against a prior enactment making the jurisdiction of district courts coextensive with the district.[10] And a division may not operate to abolish the original district, but merely affect its name and territorial jurisdiction, the organization of the original district not being changed, and its officers continuing in office charged with the same duties.[11] If, however, a district is divided into distinct districts and district courts established in each with all the essential features of courts as originally created, such courts are limited in their jurisdiction over proceedings *in rem* in admiralty to cases in which the *res* is situated within their territorial limits.[12]

b. Judges. The number and qualifications of district judges are regulated by statute.[13]

c. Terms and Sessions.[14] Acts of a court done at a session held in conformity with a repealed act and before the time appointed under the repealing act which divided the district are void.[15] And a court sitting in one division cannot, it is decided, make an order between terms of court of another division affect-

3. U. S. *v.* Marsh, 92 Fed. 689, 34 C. C. A. 619. See Marsh *v.* U. S., 88 Fed. 879.

The act of 1898 applies to suits pending at the time of its passage so far as it relates to suits brought by officers to recover fees or salaries. Amsden *v.* U. S., 111 Fed. 1.

4. Hair *v.* Burnell, 106 Fed. 280.

Chief justice of the supreme court has no power, when residing in circuit and holding court, to grant rule for mandamus or rule to show cause why it should not issue. *Ex p.* Hennen, 13 Pet. (U. S.) 225, 10 L. ed. 136.

Circuit court when held by a district judge can issue an injunction. Goodyear Dental Vulcanite Co. *v.* Folsom, 3 Fed. 509.

5. McLoughlin *v.* Tuck, 99 Fed. 562.

6. New England R. Co. *v.* Hyde, 101 Fed. 397, 41 C. C. A. 404.

7. Patterson *v.* U. S., 2 Wheat. (U. S.) 221, 4 L. ed. 224.

8. 26 U. S. Stat. at L. 827 [U. S. Comp. Stat. (1901) p. 548].

9. Cannot review judgments of state courts and hold judges responsible for failure to discharge official duties. Siddall *v.* Bregy, 64 Fed. 610. And see Tobey *v.* Bristol County, 23 Fed. Cas. No. 14,065, 3 Story 800.

10. Rosencrans *v.* U. S., 165 U. S. 257, 17 S. Ct. 302, 41 L. ed. 708.

11. *In re* Mason, 85 Fed. 145.

12. The L. B. X., 88 Fed. 290. See Williams *v.* The Sea Gull, 29 Fed. Cas. No. 17,736.

13. U. S. Rev. Stat. (1878) § 551 [U. S. Comp. Stat. (1901) p. 446].

For Alabama, Georgia, Mississippi, North Carolina, and Tennessee there are special provisions. U. S. Rev. Stat. (1878) § 552 [U. S. Comp. Stat. (1901) p. 447].

In case of disability of a district judge his powers are vested in a circuit judge. U. S. Rev. Stat. (1878) § 589 [U. S. Comp. Stat. (1901) p. 480]. See also U. S. Rev. Stat. (1878) § 587 [U. S. Comp. Stat. (1901) p. 479].

See as to powers of circuit justice or circuit judge in district court with circuit court powers Kerrison *v.* Stewart, 14 Fed. Cas. No. 7,734, 1 Hughes 67, decided in 1874. But see Bronson *v.* La Crosse, etc., R. Co., 1 Wall. (U. S.) 405, 17 L. ed. 616.

14. Adjournment by marshal. — See Pitman *v.* U. S., 45 Fed. 159.

15. McGlashan *v.* U. S., 71 Fed. 434, 18 C. C. A. 172.

ing a marshal's acts under an order of sale in admiralty made in the latter division.[16]

d. Character of Jurisdiction. The federal district courts are not technically courts of inferior or limited jurisdiction.[17]

2. Rules of Procedure. The powers of district courts as to rules and orders, and as to forms of mesne process and rules of proceeding in suits in equity, and of admiralty and maritime jurisdiction, are the same as those of circuit courts and are provided for by the same statutes.[18]

3. Transfer of Causes. Business may be certified to the circuit court in case of the disability of a district judge.[19] If causes are transferred to a newly established court, under a statute depriving the district court of all jurisdiction, its power over a transferred cause is thereby terminated.[20]

4. Jurisdiction — a. Generally and Specifically. Under the statute[21] district courts have jurisdiction of: (1) All crimes and offenses cognizable under authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section 5412 of the Revised Statutes; (2) piracy when no circuit court is held in the district of such court; (3) suits for penalties and forfeitures incurred under any law of the United States;[22] (4) all suits at common law brought by the United States or by any officer thereof authorized to sue;[23] (5) suits in equity to enforce internal revenue taxes;[24] (6) suits for penalties and damages for frauds against the United States; (7) suits under postal laws; (8) admiralty causes and seizures on land and on waters not within admiralty and maritime jurisdiction; also original and exclusive cognizance of all prizes except as provided by para-

16. Williams *v.* The Sea Gull, 29 Fed. Cas. No. 17,736.

17. Reed *v.* Vaughn, 10 Mo. 447. See Chemung Canal Bank *v.* Judson, 8 N. Y. 254, Seld. Notes (N. Y.) 49. And examine *In re* Booth, 3 Wis. 157.

District court as court of bankruptcy is court of record. *In re* Columbia Real-Estate Co., 101 Fed. 965.

District court sitting in admiralty is a court of record. Brown *v.* Bridge, 106 Mass. 563.

18. U. S. Rev. Stat. (1878) §§ 913, 918 [U. S. Comp. Stat. (1901) pp. 683, 685]. And see *supra*, XII, I, 2.

District court cannot by rule abolish chancery practice in that court, in violation of rules of supreme court for the regulation of federal courts in equity. Story *v.* Livingston, 13 Pet. (U. S.) 359, 10 L. ed. 200.

Principles, rules, and usages of equity apply to the district court in Louisiana. Gaines *v.* Relf, 15 Pet. (U. S.) 9, 10 L. ed. 642, decided in 1841.

Rules of practice for its own government should be made by the federal district court in Ohio under a decision in 1828. Fullerton *v.* U. S. Bank, 1 Pet. (U. S.) 604, 7 L. ed. 280.

19. U. S. Rev. Stat. (1878) § 587 [U. S. Comp. Stat. (1901) p. 479]. See also U. S. Rev. Stat. (1878) §§ 589, 601 [U. S. Comp. Stat. (1901) pp. 480, 484].

Disability of judge terminates with his death and the cause will be remanded. *Ex p.* United States, 24 Fed. Cas. No. 14,411, 1 Gall. 338.

Record of a suit may be ordered to be transmitted to the circuit court in case of the disqualification of the district judge. Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

In case of the remission of a criminal cause from the district to the circuit court it is not error for the former court to send up the original copy of the indictment as a part of the record. Jewett *v.* U. S., 100 Fed. 832, 41 C. C. A. 88, 53 L. R. A. 568 [*affirming* 84 Fed. 142].

20. Soutter *v.* Milwaukee, etc., R. Co., 5 Wall. (U. S.) 660, 18 L. ed. 678.

21. U. S. Rev. Stat. (1878) § 563 [U. S. Comp. Stat. (1901) p. 455 *et seq.*].

22. U. S. *v.* Winchester, 99 U. S. 372, 25 L. ed. 479; Bradley *v.* U. S., 12 Ct. Cl. 578; Burke *v.* Trevitt, 4 Fed. Cas. No. 2,163, 1 Mason 96; U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277; U. S. *v.* The Helena, 26 Fed. Cas. No. 15,341.

This subdivision includes penalties under contract labor law imposed by 23 U. S. Stat. at L. 332 [U. S. Comp. Stat. (1901) p. 1290] (Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150; Rosenberg *v.* Union Iron Works, 109 Fed. 844); but said courts have concurrent jurisdiction only with the circuit courts; nor is such jurisdiction taken away by the act of Aug. 13, 1888, as the act of 1885 is of a penal and quasi-criminal nature (U. S. *v.* Whitcomb Metallic Bedstead Co., 45 Fed. 89).

23. District courts have jurisdiction of suits brought by the postmaster-general and other officers of the United States. Southwick *v.* Postmaster-Gen., 2 Pet. (U. S.) 442, 7 L. ed. 479.

24. See also 14 U. S. Stat. at L. 110 [U. S. Comp. Stat. (1901) p. 2083].

graph 6 of section 629 of the Revised Statutes;[25] (9) condemnation of property taken as prize;[26] (10) suits on debentures for drawbacks of duties; (11) suits on account of injuries by conspirators in certain cases; (12) suits to redress deprivation of rights secured by the constitution and laws to persons within the jurisdiction of the United States;[27] (13) suits to recover offices; (14) suits for removal of officers holding contrary to the fourteenth amendment; (15) suits against national banks;[28] (16) suits by aliens for torts in violation of the law of nations; (17) suits against consuls or vice-consuls, with certain exceptions;[29] and (18) proceedings in bankruptcy in their respective districts.[30] In addition to these provisions of the general statute said court has also jurisdiction in various specific cases under the acts of congress.[31]

b. Claims Against United States. The district court has concurrent jurisdiction with the court of claims when the claim does not exceed one thousand dollars, and subject to the exceptions above noted.[32]

5. Power to Issue Writs and Process. This power is governed in general by the same statute as applies to circuit courts.[33]

6. Equity Jurisdiction. District courts of the United States have only such equity jurisdiction as relates to the enumerated subjects[34] over which congress has

25. Exclusive original cognizance is conferred in admiralty and maritime causes under U. S. Const. art. 3, § 2, and the judiciary act of 1789. Bird *v.* The Josephine, 39 N. Y. 19. See also Admiralty, 1 Cyc. 807.

Jurisdiction of marine insurance is not exclusive. New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371 [*affirming* 8 Fed. Cas. No. 4,152, 1 Lowell 253].

26. See also U. S. Rev. Stat. (1878) §§ 5309, 5311 [U. S. Comp. Stat. (1901) p. 3614].

27. Has jurisdiction of prosecutions for violation of Civil Rights Act. 18 U. S. Stat. at L. 336 [U. S. Comp. Stat. (1901) pp. 1260, 1261].

28. See Banks and Banking, 5 Cyc. 584, 597.

When jurisdiction is not conferred the district court has none of a suit by a bank. U. S. Bank *v.* Martin, 5 Pet. (U. S.) 479, 8 L. ed. 198.

29. This clause is constitutional, since the jurisdiction of the supreme court is not exclusive under U. S. Const. art. 3, § 2, and U. S. Rev. Stat. (1878) § 687 [U. S. Comp. Stat. (1901) p. 565]. Pooley *v.* Luco, 76 Fed. 146.

30. See Bankruptcy, 5 Cyc. 242. See also 30 U. S. Stat. at L. 545 [U. S. Comp. Stat. (1901) p. 3420].

31. 32 U. S. Stat. at L. 1220, 26 U. S. Stat. at L. 1086 [U. S. Comp. Stat. (1901) p. 1300]; 25 U. S. Stat. at L. 42, 357, 384 [U. S. Comp. Stat. (1901) pp. 3589, 2516, 3584]; 24 U. S. Stat. at L. 383 [U. S. Comp. Stat. (1901) p. 3159]; 13 U. S. Stat. at L. 116 [U. S. Comp. Stat. (1901) p. 3515].

As to decisions involving title to lands under earlier statutes see Umbarger *v.* Chaboya, 49 Cal. 525; U. S. *v.* Sepulveda, 1 Wall. (U. S.) 104, 17 L. ed. 569; U. S. *v.* Gusman, 14 How. (U. S.) 193, 14 L. ed. 383; U. S. *v.* Rillieux, 14 How. (U. S.) 189, 14 L. ed. 381; Delassus *v.* U. S., 9 Pet. (U. S.) 117, 9 L. ed. 71; Bullitt *v.* U. S., 4 Fed. Cas. No. 2,128, Hempst. 333; Putnam *v.* U. S., 20 Fed. Cas. No. 11,484, Hempst. 332.

32. 24 U. S. Stat. at L. 505, amended by 30 U. S. Stat. at L. 494 [U. S. Comp. Stat. (1901) pp. 752, 753]. See also *supra*, XII, I, 4, c.

As to claims "heretofore rejected or reported on adversely," etc., see Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229 (rejection of claim by accounting officers of treasury not within statute); Preston *v.* U. S., 37 Fed. 417 (claim rejected, by controller of treasury included). See also Gayer *v.* U. S., 33 Fed. 625.

As to suit by commissioner to recover fees before passage of the act of 1887 see Hoyne *v.* U. S., 38 Fed. 542.

Has no jurisdiction of action sounding in tort.— Mills *v.* U. S., 46 Fed. 738, 12 L. R. A. 673.

Letter carriers in postal service are officers within 30 U. S. Stat. at L. 495, taking away jurisdiction of suits by officers to recover fees or compensation. U. S. *v.* McCrory, 91 Fed. 295, 33 C. C. A. 515.

33. U. S. Rev. Stat. (1878) § 716 [U. S. Comp. Stat. (1901) p. 580].

Has power to issue writs and process in accordance with the law to enforce judgments and decrees and also such powers as are necessary to regulate and control its officers in the execution of final process. Bronson *v.* La Crosse, etc., R. Co., 1 Wall. (U. S.) 405, 17 L. ed. 616.

Injunction to stay proceedings in a state court cannot issue from a district court. Dudley's Case, 7 Fed. Cas. No. 4,114.

Peremptory writ of mandamus may be issued by a judge in vacation under N. M. Comp. Laws, § 2005. Delgado *v.* Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. ed. 578 [*affirming* 5 N. M. 646, 25 Pac. 948].

34. See *supra*, XII, J, 4, a. And see Pooley *v.* Luco, 76 Fed. 146.

If an act of congress gives equity powers the court may exercise the same. Livingston *v.* Story, 9 Pet. (U. S.) 632, 9 L. ed. 255.

given jurisdiction to the district courts.[35] No other equity jurisdiction is conferred upon them.

K. Territorial and Provisional Courts — 1. Rules Deduced From Decisions as to Former Territories — a. Creation, Constitution, and Organization — (I) *Character of Court.*[36] Territorial district courts created by act of congress are statutory and not federal courts within the constitution of the United States;[37] and it has been decided that such courts were not of inferior,[38] but of general, jurisdiction;[39] while on the other hand their jurisdiction has been held to be special and limited.[40]

(II) *Place For Holding Court.*[41] The organic law and the acts of congress relative to a place of holding court may be such, when coupled with a lack of negative legislation by congress and an indirect ratification by it, as by an appropriation for expenses, that the law will, where there is jurisdiction of the subject-matter, presume everything in favor of a court held at a certain place and so sustain a conviction by virtue of the jurisdiction thereof.[42]

(III) *Original Civil Jurisdiction.*[43] The underlying governing principle of all the cases is that the original jurisdiction of a territorial court rests upon the constitution of the United States, the acts of congress, the organic law and the acts of the territorial legislature, and these are ordinarily construed with reference each to the other in determining the controlling law as to the extent of jurisdiction or the limitations thereon;[44] beyond this general rule the question of jurisdiction becomes one of specific construction and application to particular cases under special provisions of the law, of little value outside of the special case, except by possible analogy.

May enforce a decree of a state court, which has not the benefit of final process against the adverse party because of his residence in a different state. Shields *v.* Thomas, 18 How. (U. S.) 253, 15 L. ed. 368.

35. Sanders *v.* Farwell, 1 Mont. 599. See also Dudley's Case, 7 Fed. Cas. No. 4,114.

36. See also *infra*, XII, K, 2, a, (I).

37. *Idaho.*—U. S. *v.* Hailey, 2 Ida. (Hasb.) 26, 3 Pac. 263.

Iowa.— Lorimier *v.* Illinois State Bank, Morr. 223.

Montana.— U. S. *v.* Upham, 2 Mont. 170; Kleinschmidt *v.* Dunphy, 1 Mont. 118.

Washington.— Nickels *v.* Griffin, 1 Wash. Terr. 374.

United States.—Clough *v.* Curtis, 134 U. S. 361, 10 S. Ct. 573, 33 L. ed. 945; Clinton *v.* Engelbrecht, 13 Wall. 434, 20 L. ed. 659; American Ins. Co. *v.* Three Hundred and Sixty-five Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; Howard *v.* U. S., 22 Ct. Cl. 305.

But see Beery *v.* U. S., 2 Colo. 186; Choteau *v.* Rice, 1 Minn. 192; *In re* Osterhaus, 18 Fed. Cas. No. 10,609.

See 13 Cent. Dig. tit. "Courts," § 1133.

The words "courts of United States" do not include territorial courts. Goode *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

38. Wright *v.* Marsh, 2 Greene (Iowa) 94.

39. Stephens *v.* Hartley, 2 Mont. 504.

40. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

Statute conferring limited jurisdiction will be construed strictly. Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3.

41. See also *infra*, XII, K, 2, a, (II).

42. *Ex p.* Kongres, 3 Wyo. 204, 19 Pac. 441. See Murphy *v.* Murphy, 4 Dak. 107, 25 N. W. 806.

43. See also *infra*, XII, K, 2, a, (III).

44. *Dakota.*— St. Paul F. & M. Ins. Co. *v.* Coleman, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87.

Oregon.—Woodsides *v.* Rickey, 1 Oreg. 108.

Utah.— Shepperd *v.* Second Judicial Dist. Ct., 1 Utah 340.

Washington.— Colwell *v.* Smith, 1 Wash. Terr. 92.

United States.— McDougall *v.* Hayes, 46 Fed. 817; Clark *v.* Shelton, 5 Fed. Cas. No. 2,833*a*, Hempst. 190.

See 13 Cent. Dig. tit. "Courts," § 1135.

Equity jurisdiction exists in circuit and district courts of territories when vested therein by act of congress. Zimmerman *v.* Zimmerman, 7 Mont. 114, 14 Pac. 665. See U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118. But examine Sanders *v.* Farwell, 1 Mont. 599.

Jurisdiction in admiralty may be vested in the district courts of a territory by act of congress. The City of Panama, 101 U. S. 453, 25 L. ed. 1061.

Cases arising under constitution and laws of United States.— The number of courts having jurisdiction of this class of cases may be limited by act of congress, or the statute may merely operate by construction as a designation of the courts which may exercise such jurisdiction instead of being regarded as creating them (Beery *v.* U. S., 2 Colo. 186); or the organic act may confer jurisdiction in such causes (U. S. *v.* Upham, 2 Mont. 113). Concurrent jurisdiction with the court of claims may by act of congress be vested in

b. Procedure and Rules of Practice[45] — (i) *GENERALLY.* Territorial legislatures may prescribe rules of practice in the territorial district courts, or where that is not done the courts themselves may adopt rules of practice in United States cases.[46] But the rules in equity, adopted by the supreme court of the United States, are determined to be binding on the territorial courts when acting as courts in chancery, in the absence of any local system of practice.[47]

(ii) *TITLE OF COURT IN PLEADINGS.* Although these courts are decided not to be entitled to be styled in pleadings as courts of the United States,[48] inaccuracy in giving title to them is not fatal.[49]

c. Appellate Jurisdiction.[50] Generally an appeal lies to the supreme court of a territory where expressly provided for by act of congress,[51] or in cases where one or more such enactments upon the subject allow such appeal by construction thereof.[52]

2. PRESENT TERRITORIES — a. Creation, Construction, and Organization — (i) *CHARACTER OF COURT.*[53] A county court having civil and criminal jurisdiction, whose judgments and decrees the supreme court has a right to review on appeal, is an inferior court under an act of congress vesting the judicial power of the territory in a supreme and such inferior courts as the legislative council may by law prescribe.[54]

the district courts of a territory. Johnson *v.* U. S., 6 Utah 403, 24 Pac. 256, 677. Jurisdiction may also exist over an action by an assignee in bankruptcy to recover possession or value of property against one who has received the same in violation of the bankrupt law. McKiernan *v.* King, 2 Mont. 72.

Injunction may issue under the organic act conferring jurisdiction on the supreme court in chancery. Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831.

Jurisdiction in mandamus may exist within the organic act or other enactment (Kendall *v.* Raybould, 13 Utah 226, 44 Pac. 1034; Maxwell *v.* Burton, 2 Utah 595; Clough *v.* Curtis, 134 U. S. 361, 10 S. Ct. 573, 33 L. ed. 945), and if vested by the organic act granting common-law jurisdiction in the supreme court it cannot be taken away by the legislature (Chumasero *v.* Potts, 2 Mont. 242). But that the writ is confined to the exercise of appellate jurisdiction see Shepperd *v.* Second Judicial Dist. Ct., 1 Utah 340; Howell *v.* Crutchfield, 12 Fed. Cas. No. 6,778*a*, Hempst. 99.

45. See *infra*, XII, K, 2, b.

46. U. S. *v.* Mays, 1 Ida. 763. See also Hornbuckle *v.* Toombs, 18 Wall. (U. S.) 648, 21 L. ed. 966.

An act of congress providing a rule of evidence may be binding upon territorial courts. Patterson *v.* Gile, 1 Colo. 200, stamp law.

Particular decisions.— U. S. Rev. Stat. (1878) § 955 [U. S. Comp. Stat. (1901) p. 697] directing how administrators may become parties does not apply (U. S. *v.* Hailey, 2 Ida. (Hasb.) 22, 3 Pac. 263); nor, in adjudicating cases under the laws of the territory, is the supreme court thereof bound by or subject to the restriction in U. S. Const. Amendm. art. 7, as to review of matters tried by a jury, but it must conform in its practice and course of decision to the laws of the territory (Rogers *v.* Bradford, 1 Pinn. (Wis.) 418); and a practice act providing for but one form of action will govern territorial courts when sitting to hear causes under federal laws as well as when sitting as territorial courts (U. S. *v.* Flaherty, 8 Mont. 31, 19 Pac. 553; U. S. *v.* Bisel, 8 Mont. 20, 19 Pac. 251. See also U. S. *v.* Ensign, 2 Mont. 396. But examine Creighton *v.* Hershfield, 1 Mont. 639); and an appeal taken within the time prescribed by the laws of the territory repealing the territorial act is valid (Cannon *v.* Pratt, 99 U. S. 619, 25 L. ed. 446).

Statute regulating procedure will be construed liberally. Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3.

47. Stevens *v.* Baker, 1 Wash. Terr. 315. See also Sampeyrac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665.

48. U. S. *v.* Upham, 2 Mont. 170; Sanders *v.* Farwell, 1 Mont. 599.

49. Lorimier *v.* Illinois State Bank, Morr. (Iowa) 223; Choteau *v.* Rice, 1 Minn. 192.

50. See also *infra*, XII, K, 2, c.

51. A territorial legislative enactment is void, as to appellate jurisdiction of the supreme court, where it conflicts with a limitation of such jurisdiction under a statute of the United States. *In re* McFarland, 10 Mont. 445, 26 Pac. 185.

52. U. S. *v.* Burdick, 1 Dak. 142, 46 N. W. 571, holding that an appeal lies to a territorial supreme court in a case within a United States law, where an act of congress expressly allows an appeal in all cases under such regulations as may be prescribed by law, and another enactment allows appeals to such court in all cases arising under the constitution and laws of the United States. See also Johnson *v.* U. S., 6 Utah 403, 24 Pac. 677, an appeal in an action on a claim against the United States. See further Carr *v.* Tweedy, 5 Fed. Cas. No. 2,440*a*, Hempst. 287; Searcy *v.* Hogan, 21 Fed. Cas. No. 12,584*a*, Hempst. 20.

53. See also *supra*, XII, K, 1, a, (i).

54. *Ex p.* Lothrop, 118 U. S. 113, 6 S. Ct. 984, 30 L. ed. 108, construing Ariz. Rev. Stat. § 1908.

(II) *Indian Reservation Attached to County For Judicial Purposes.*[55] If the organic act attaches certain Indian reservations to a county for judicial purposes, and a subsequent act requires the district court to be held at a certain place on said reservation, said acts should be construed together.[56]

(III) *Original Civil Jurisdiction.*[57] The same governing principles apply here as above stated.[58] The United States, in a strict sense, has and exercises sole and exclusive jurisdiction in the territories, and the jurisdiction exercised by the territorial government is an exercise of a portion of that belonging to the United States and exercised through its subordinate governmental agency, the territory,[59] the power of congress to make any needful laws for a territory, or any portion thereof, or for any particular class of its inhabitants not being open to question. Again the district courts organized under the United States statutes have concurrent jurisdiction in actions by receivers of national banks.[60] And under the act of 1863 the district court for the territory might administer revenue laws, but the enactment did not embrace proceedings under the confiscation act of 1862.[61] The power of the territorial supreme court, however, to issue writs of habeas corpus was not limited by implication by section 1912 of the United States Revised Statutes.[62] A proceeding by information, in the nature of quo warranto, to oust a usurper from office is also held to be within the jurisdiction of the district court.[63] The courts of the territory may also pass upon the constitutionality of the acts of its legislature.[64]

55. See also *supra*, XII, K, 1, a, (II), as to place of holding court.

56. The latter act should be held to modify and supplement the former, so as not to repeal the jurisdiction, except as to causes in which the members of the attached reservations are sued or prosecuted. Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423.

Officers of court.— Where a county and certain Indian reservations attached thereto are in one judicial subdivision, and for all judicial purposes constitute practically one county, if the sessions of said court are required to be held at a place on said reservation, and no provision is made for any executive or clerical officers for such court, the same officers must attend thereupon and perform therein the same class of duties required of them when in attendance upon the division of such court holding its session at the county-seat. Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423.

57. See also *supra*, XII, K, 1, a, (III).

58. See also *supra*, XII, K, 1, a, (III).

59. Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423, 429.

In Alaska the district courts are invested with all the admiralty jurisdiction belonging to the district courts of the United States, and may declare a forfeiture of vessels guilty of taking fur seal, in violation of the Revised Statutes of the United States governing the same. *Ex p.* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232. See also Bird *v.* U. S., 187 U. S. 118, 23 S. Ct. 42, 47 L. ed. 100, as to murder cases. But said court is without jurisdiction to bind minors as apprentices. *Ex p.* Emma, 48 Fed. 211.

In Arizona the supreme court may, under its general powers as to the issuance of writs necessary to its jurisdiction, issue writs of prohibition. Crowned King Min. Co. *v.* Fourth Judicial Dist. Ct., (Ariz. 1901) 64 Pac. 439.

In Indian Territory the amount in controversy to confer jurisdiction on United States commissioners as justices of the peace in civil cases is, where no fictitious claim is alleged, that claimed in the declaration even though a less sum be recovered. Boyt *v.* Mitchell, (Indian Terr. 1901) 64 S. W. 610. *Compare* Crowell *v.* Young, (Indian Terr. 1902) 69 S. W. 829.

In New Mexico the courts may exercise chancery jurisdiction (Perea *v.* Barela, 6 N. M. 239, 27 Pac. 507; Gutierres *v.* Pino, 1 N. M. 392); but this does not apply to probate courts under the organic act (Perea *v.* Barela, 6 N. M. 239, 27 Pac. 507 [*affirming* 5 N. M. 458, 23 Pac. 766]).

In Oklahoma the legislative act extending the jurisdiction of probate courts is given the same force and effect as a congressional enactment. Wetz *v.* Elliott, 4 Okla. 618, 51 Pac. 657. *Compare* U. S. *v.* Warren, (Okla. 1903) 71 Pac. 685.

60. Schofield *v.* Stephens, 7 N. M. 619, 38 Pac. 319.

61. U. S. *v.* Hart, 6 Wall. (U. S.) 770, 18 L. ed. 914.

62. Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580. There seems, however, to be some doubt expressed on this point in the decision. See also Territory *v.* Ortiz, 1 N. M. 5, holding that the supreme court of the territory may issue the writ.

63. Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879.

64. Notwithstanding a requirement by act of congress for the submission to congress of all the laws passed by the territorial legisla-

b. Procedure and Rules of Practice.[65] A territorial court may execute the powers conferred upon it by law to carry into effect its jurisdiction,[66] and conformity may be required with the procedure and practice provided by codes or statutes, which may be those of a state, adopted and of governing force in the territory.[67] But it is decided that none of the rules of the United States supreme court except the ninety-second apply to territorial courts.[68]

c. Appellate Jurisdiction.[69] Where an appeal is granted all proper exceptions brought into the record pursuant to law will be considered.[70] But a decision overruling a demurrer to plaintiff's evidence is not a final judgment from which an appeal lies.[71] Nor does an appeal lie direct to the supreme court from a probate court, where it is authorized by statute to be taken to the district court with a review of the proceedings of the latter in said supreme court.[72] A writ of prohibition is, however, held to be an exercise of appellate jurisdiction.[73] Again the amount in controversy is material in determining the right to appeal; it may, however, be connected with other factors, or it may when so connected be immaterial.[74]

d. Transfer of Causes. Congress has power to legislate as to appeals taken from disputed territory to a state court and also to provide for the transfer of causes from said disputed territory;[75] but a cause cannot be transferred from a territory to a federal court in a state except in conformity with the intent of the statute.[76]

e. Change of Venue. A territorial act is void which, by authorizing a change of venue, attempts to revest a court with jurisdiction in territorial causes in contravention of a specific provision, under an act of congress, which had divested

tive assembly to be annulled if disapproved. Torrez *v.* Socorro County, 10 N. M. 670, 65 Pac. 181.

65. See also *supra*, XII, K, 1, b.

66. U. S. *v.* Falshaw, (Ariz. 1895) 40 Pac. 209.

67. Finn *v.* Hoyt, 52 Fed. 83. See also Chandler *v.* Concord, 1 Okla. 260, 32 Pac. 330.

Indian Territory.— Under section 6 of the act of congress of March 1, 1889, the practice, pleading, and forms of proceeding in civil cases shall conform to the same in like cases in the courts of record of Arkansas, and this applies to garnishment proceedings (Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061) and to the action of ejectment (Wilson *v.* Owens, 1 Indian Terr. 163, 38 S. W. 976). But the court may refuse to submit questions for special findings. W. B. Grimes Dry-Goods Co. *v.* Malcolm, 58 Fed. 670, 7 C. C. A. 426.

In commissioners' courts in Indian Territory the proceedings are the same as in district courts, and a party may sue and join as many causes of action as he may have against the same defendants in the same complaint, where each separate cause is within the statutory amount, and plaintiff may take judgment on each cause of action or consolidate the several sums into one judgment. Harris *v.* Castleberry, 3 Indian Terr. 576, 64 S. W. 541.

What is a sufficient allegation of jurisdictional facts as to the residence of defendant and the location of the premises see Springston *v.* Wheeler, 3 Indian Terr. 388, 58 S. W. 658.

68. Huntington *v.* Moore, 1 N. M. 489.

69. See also *supra*, XII, K, 1, c.

70. Liverpool, etc., Ins. Co. *v.* Kearney, 1 Indian Terr. 328, 37 S. W. 143.

71. Johnson *v.* Hays, 6 Okla. 582, 55 Pac. 1068.

72. Matter of Roddick, 1 Ariz. 411, 25 Pac. 797.

73. Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580.

74. The right of appeal may depend upon the amount in controversy as fixed by judgment where there is no question of counterclaim or set-off (Decker *v.* Williams, 73 Fed. 308, appeal from United States commissioners in Alaska acting as justices' courts); or such right may depend not only upon the amount in dispute, but may rest also upon the character of the subject-matter, as where there is a question of the legality of a tax, toll, or impost; and this, irrespective of the fact that a judgment was recovered in a sum less than the specified jurisdictional amount, no affirmative relief being asked (Phœnix Wholesale Meat Co. *v.* Moss, (Ariz. 1901) 64 Pac. 443). Again an appeal may be authorized when questions of fact are to be retried, although questions of law are involved, without regard to the amount in controversy. Randolph *v.* Hudson, 10 Okla. 398, 61 Pac. 1103; Decker *v.* Cahill, 10 Okla. 251, 61 Pac. 1101. See as to questions of law and fact Johnson *v.* Hays, 6 Okla. 582, 55 Pac. 1068; Brickner *v.* Sporleder, 3 Okla. 561, 41 Pac. 726.

75. Cullins *v.* Overton, 7 Okla. 470, 54 Pac. 702.

76. Lewis *v.* Johnson, 90 Fed. 673, holding that Washington is not an "adjoining state" to Alaska within the statute authorizing in

said court of jurisdiction and given it to another, which latter had been established by the territory.[77]

f. United States Courts in Indian Territory — (I) *Jurisdiction Generally.* Tribal courts in the territory were abolished by an act of congress of 1898, which also provided that all actions pending in said courts should be transferred to the United States courts in the territory, by filing with the clerk thereof the original papers.[78] But under the act of 1890[79] the latter courts had jurisdiction of an action on the bond of a postmaster of an office in the territory[80] and in matters of probate[81] they also had cognizance where citizens of the United States were creditors or distributees.[82]

(II) *Place For Holding Court.* The acts of congress of 1889 and of 1890[83] required, as construed together, at least two regular terms in each of the districts every year, and the judge might establish as many special terms as might be necessary for the despatch of the business of the court.[84]

(III) *Appeals.* Under the act of congress of 1895[85] appeals could be taken to the United States courts in Indian Territory from the final judgments of commissioners, acting as justices of the peace, in all cases, but the limitation of the jurisdictional amount in civil causes was exclusive.[86]

(IV) *New Trials.* A new trial could, under the act of congress of 1890, and the Arkansas statute thereby made applicable, be granted for newly discovered

certain contingencies a transfer of causes by a district court "to the next circuit court in an adjoining state."

77. Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580.

78. 30 U. S. Stat. at L. 495 [U. S. Comp. Stat. (1901) p. 776]. See Boudinot *v.* Boudinot, 2 Indian Terr. 107, 48 S. W. 1019, where the statute is construed with reference to the procedure thereunder, the disposition of the case, and the jurisdictional amount. And *compare* Crowell *v.* Young, (Indian Terr. 1902) 69 S. W. 829.

79. 26 U. S. Stat. at L. 91 [U. S. Comp. Stat. (1901) p. 1598], giving jurisdiction to the United States courts in Indian Territory in all civil causes except those whereof the tribal courts had exclusive jurisdiction. But neither this enactment nor that of March 1, 1889 (25 U. S. Stat. at L. 783 [U. S. Comp. Stat. (1901) p. 3295]), gave said courts jurisdiction of an action for the collection of taxes, imposed by the laws of the Creek tribe upon citizens of the United States residing in such territory (Crabtree *v.* Madden, 54 Fed. 426, 4 C. C. A. 408. See also Crabtree *v.* Byrne, 54 Fed. 432, 4 C. C. A. 414); nor had such courts jurisdiction of an action against the Choctaw nation or its executive officers as such (Thebo *v.* Choctaw Tribe of Indians, 66 Fed. 372, 13 C. C. A. 519. See also Crowell *v.* Young, (Indian Terr. 1902) 69 S. W. 829).

An inhabitant of a nation in Indian Territory could maintain an action, under the act of July 4, 1884, in a court designated in said enactment, against a railroad company passing through the territory of such nation, to recover for stock killed by said company. Briscoe *v.* Southern Kansas R. Co., 40 Fed. 273.

80. Weeks *v.* U. S., 2 Indian Terr. 162, 48 S. W. 1036.

81. Equitable liens on personalty by contract of the parties, jurisdiction of the case arising in the Choctaw nation, were enforceable, in a suit against an administrator by a non-resident, in the United States court for Indian Territory and not in the probate court of the Choctaw nation. Riddle *v.* Hudgins, 58 Fed. 490, 7 C. C. A. 335.

United States court in Indian Territory has no jurisdiction in probate of controversy, between two guardians, as to the amount of money owing by one to the other. *In re* Frazee, 3 Indian Terr. 590, 64 S. W. 545.

82. *In re* Delk, 2 Indian Terr. 572, 52 S. W. 52.

83. 25 U. S. Stat. at L. 784, c. 333, § 7; 26 U. S. Stat. at L. 94, c. 182, § 30; Indian Terr. Anno. Stat. (1899) §§ 7, 30.

As to change of boundaries between the southern and central districts see 32 U. S. Stat. at L. 90.

As to western judicial districts see 32 U. S. Stat. at L. 275.

84. Denison, etc., Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496.

85. 28 U. S. Stat. at L. 696; Indian Terr. Anno. Stat. (1899) c. 41.

Said enactment also conferred jurisdiction upon the court of appeals of said territory, in cases appealed from the United States courts therein, the effect of which was to nullify the granting, after the date of said act, of an appeal to the circuit court of appeals; but by filing the transcript in the appellate court of the territory within the prescribed statutory time, the latter court was vested with jurisdiction. Grady *v.* Newman, 1 Indian Terr. 284, 37 S. W. 54.

86. Butler *v.* Penn, 3 Indian Terr. 505, 61 S. W. 987.

That congress has power to provide for a review of proceedings from commissioners' courts see Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041.

evidence in an action at law, by the United States court in the Indian Territory, after a final decision of the case in the supreme court of the United States.[87]

3. ADMISSION OF TERRITORY AS STATE — a. Effect in General. Upon the admission of a territory as a state, the territorial government, including the territorial courts established and organized under its laws, is extinguished,[88] notwithstanding any provision impliedly to the contrary in the state constitution, and so, even though there is no appointment of a district judge to the United States district court established therein.[89]

b. Transfer of Causes — (1) *PRIMARY TEST OF JURISDICTION.* The primary test as to the transfer of causes upon the admission of a territory as a state is whether pending suits[90] are of a federal or municipal character.[91] This being ascertained the law should provide as to the former that they should be transferred to and proceed in proper courts of the United States,[92] but all such as are not within the former, or are within the latter class, should go to the courts of the new state.[93] If, however, the federal and state courts have concurrent jurisdiction of pending causes, they may be transferred to either the state or federal courts by either party possessing that option under existing laws. As to federal courts inferior to the supreme court congressional legislation is necessary to enable them, after the admission of a state into the Union, to take jurisdiction of causes previously commenced in the territorial courts and not yet finally adjudged, and such legislation will be construed as far as possible consistently with its terms and with the constitution of the United States, so as to give effect to the apparent intention of congress to vest in the federal courts the jurisdiction of such cases, so far as they are of a federal character, either because of their arising under the laws of the

87. *Ex p.* Fuller, 182 U. S. 562, 21 S. Ct. 871, 45 L. ed. 1230.

88. Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 754, 39 L. ed. 889 (per Gray, J.); McNulty *v.* Batty, 10 How. (U. S.) 27, 13 L. ed. 333, 576 [*followed* in Preston *v.* Bracken, 10 How. (U. S.) 81, 13 L. ed. 336, 576]; Simpson *v.* U. S., 9 How. (U. S.) 578, 13 L. ed. 265; Forsythe *v.* U. S., 9 How. (U. S.) 571, 13 L. ed. 262; Ames *v.* Colorado Cent. R. Co., 1 Fed. Cas. No. 324, 4 Dill. 251. See Trench *v.* Strong, 4 Nev. 87. But see Wilson *v.* People, 3 Colo. 325. And *compare* Cotton *v.* U. S., 9 How. (U. S.) 579, 13 L. ed. 265; Benner *v.* Porter, 9 How. (U. S.) 235, 13 L. ed. 119.

Territorial laws do not affect the question whether a cause is "pending" under the enabling act so as to be transferable. Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 12 S. Ct. 593, 36 L. ed. 409.

89. Benner *v.* Porter, 9 How. (U. S.) 235, 13 L. ed. 119. But see Beatty *v.* Ross, 1 Fla. 198.

Territorial judges exercising the jurisdiction and powers of district and circuit courts of the United States, under authority of an act of congress, retain their powers until their offices are abolished by express legislation of congress. Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119. See Smith *v.* Tosini, 1 S. D. 632, 48 N. W. 299.

90. "Pending" cases, what are, see Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 60 Fed. 981, 9 C. C. A. 303 [*affirmed* in 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355]. And see Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 12 S. Ct. 593, 36 L. ed. 409.

91. Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 39 L. ed. 889.

92. Cases transferable to federal courts include: Adultery committed in territory prior to its admission as a state (U. S. *v.* Baum, 74 Fed. 43); a suit in which the plaintiff claims a vested right, under the United States homestead law, as against a patent issued to another (Carr *v.* Fife, 44 Fed. 713); cases of a federal character pending on appeal in the supreme court of the territory at the time of its admission (Bates *v.* Payson, 2 Fed. Cas. No. 1,103, 4 Dill. 265); actions which might have been commenced originally in the federal court, but the record must show the requisite jurisdictional amount (Back *v.* Sierra Nevada Consol. Min. Co., 46 Fed. 673. *Compare* Johnson *v.* Bunker Hill, etc., Co., 46 Fed. 417).

93. Transfer to state courts.— If the federal character of the case does not appear of record the state court may proceed. Ames *v.* Colorado Cent. R. Co., 1 Fed. Cas. No. 324, 4 Dill. 251. But the state has no authority to enact that records of territorial courts of appeal shall become records of its own courts or to provide for proceedings based thereon. Hunt *v.* Palao, 4 How. (U. S.) 589, 11 L. ed. 1115. The concurrence of both federal and state governments is requisite to transfer the records. Inerarity *v.* Curtis, 4 Fla. 175. A transfer may, however, be made to the state court by concurrent action of its legislature and the sanction of congress. Carter *v.* Bennett, 4 Fla. 283. Again the supreme court of the state of Florida had not the power to award process to execute decrees of the territorial court. Inerarity *v.* Curtis, 4 Fla. 175. But see Beatty *v.* Ross, 1 Fla. 198; Stewart *v.* Preston, 1 Fla. 1, 44 Am. Dec. 621. But in some states certain state courts have been held to have taken the place of the terri-

United States or because of their being between citizens of different states.[94] Another rule has been asserted, and that is that the transfer of causes depends upon the judicial status of states, when the law was passed, with reference to judicial circuits and whether or not they were then attached to any circuit.[95]

(II) *Federal Courts as Successors of Territorial Courts.*[96] If the newly created federal courts are made successors of both the supreme and district courts of the territory, it is proper to allow the transfer to the circuit court of causes which were pending in the supreme court of the territory on appeal.[97]

(III) *Causes Whereof Federal Courts Might Have Had Jurisdiction — Diversity of Citizenship.* Where an act admitting a state authorizes the transfer to the newly created federal courts of the state of all causes pending in the territorial courts at the time of admission whereof such federal courts "might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases," said provision was intended to designate cases of which those courts might have had jurisdiction under the laws of the United States had those courts, like the other circuit and district courts of the United States generally, existed at the time in question in a state in the Union, whose inhabitants consequently were citizens of that state.[98]

(IV) *Request For Transfer.* The requirement of a written request and the proviso that in the absence of such request the case should be proceeded with in the proper state court were intended to permit parties to proceed in the proper state court in all cases where such courts have concurrent jurisdiction, unless one of the parties invoked the jurisdiction of the federal courts in cases of a federal

torial courts as to causes therein. Irvine *v.* Marshall, 3 Minn. 72; Hamilton *v.* Kneeland, 1 Nev. 40; Braithwaite *v.* Power, 1 N. D. 455, 48 N. W. 354; Talliaferro *v.* Porter, Wright (Ohio) 610. See *In re* Dewar, 10 Mont. 426, 25 Pac. 1026.

94. Per Gray, J., in Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 754, 39 L. ed. 889; Baker *v.* Morton, 12 Wall. (U. S.) 150, 20 L. ed. 262 [*quoted* in Glaspell *v.* Northern Pac. R. Co., 144 U. S. 211, 12 S. Ct. 593, 36 L. ed. 409].

95. U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457.

96. See *infra*, XII, K, 3, b, (III).

97. Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 39 L. ed. 889.

Provision as to transfer of federal courts as successors, etc., does not authorize a cause which has been once transferred to a state court under the enabling act to be again transferred from the state court to a federal court. Bluebird Min. Co. *v.* Murray, 45 Fed. 388. But a cause pending in the territorial supreme court may be reviewed by the federal circuit court. U. S. *v.* Lynde, 44 Fed. 215. The provisions of the general statute regulating the removal of causes do not, however, apply to transfers made under the act admitting Montana to the Union. Strasburger *v.* Beecher, 44 Fed. 209. Again if the federal courts are created successors of the territorial courts as to all causes pending in the latter of which the former would have had jurisdiction had they been in existence when the suits were instituted, an admiralty case on appeal to the territorial supreme court but not docketed there on admission of the state must be transferred to the federal district court. Hamilton *v.* The Walla Walla, 44 Fed. 4. And within the same enabling act the circuit court for the district may punish as a contempt the violation of an injunction, granted by final decree of the territorial court, against interference with fishery privileges guaranteed the Indians by treaty with the United States. U. S. *v.* Taylor, 44 Fed. 2. But the district court of Arkansas is not the successor of the supreme court of that territory. U. S. *v.* Ta-wan-ga-ca, 28 Fed. Cas. No. 16,435, Hempst. 304.

98. In other words the requisite diversity of citizenship none the less exists because one of the parties was a citizen of the territory which became a state. Per Gray, J., in Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 49, 15 S. Ct. 751, 39 L. ed. 889 [*cited* in Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 S. Ct. 231, 236, 40 L. ed. 355], who said: "This construction of the Act is in accord with all the reported decisions in the courts, Federal or state, held within the eighth circuit." And see Miller *v.* Sunde, 1 N. D. 1, 44 N. W. 301; Herman *v.* McKinney, 43 Fed. 689. It is supported by the judgment of the circuit court of appeals of the ninth circuit in Blackburn *v.* Wooding, 56 Fed. 545, 6 C. C. A. 6 [*overruling* Johnson *v.* Bunker Hill, etc., Co., 46 Fed. 417; Carson *v.* Donaldson, 45 Fed. 821; Nickerson *v.* Crook, 45 Fed. 658; Dunton *v.* Muth, 45 Fed. 390; Strasburger *v.* Beecher, 44 Fed. 209]. And the like construction seems to have been assumed to be the true one of the similar clause in the act of June 26, 1876, relating to Colorado. Ames *v.* Colorado Cent. R. Co., 1 Fed. Cas. No. 324, 4 Dill. 251.

character.[99] The required request should, however, be filed in the proper court,[1] and in time,[2] although the statute may fail to provide either as to the court or time.[3] But notice of application for transfer need not be given the adverse party where the statute does not require it,[4] and the facts necessary to give the federal court jurisdiction are properly shown in the petition for transfer or in affidavits accompanying it.[5]

(v) *Effect of Transfer.* If the request for transfer is made in conformity with the statutory requirements,[6] the state court is deprived of jurisdiction and that of the federal court becomes exclusive.[7]

(vi) *Procedure on Transfer.* After transfer the proper federal court may do all things that were left undone in the territorial court and may proceed as that court would have proceeded if it had retained the case,[8] and therefore it may affirm, modify, or reverse the judgment, and if necessary, try the case again.[9]

4. Provisional Courts. A provisional court established in conquered territory by the provisional governor of that state, under authority of the president of the United States, is not a state but a federal court, deriving its existence and all its powers from the federal government.[10]

L. Courts of District of Columbia — 1. In General. By the act of March 3, 1901, establishing a code of law for the government of the District of Columbia, judicial power was vested in certain courts;[11] and provision was made therein

99. Sargent *v.* Kindred, 49 Fed. 485.

1. Sargent *v.* Kindred, 49 Fed. 485, holding that the proper court in which to file a request is the court where the files and records of the case are found at the time the request is to be filed.

Judge of state court is not disqualified by the fact that he had been an attorney of record, as he exercises no judicial function and his order is merely formal. Strasburger *v.* Beecher, 44 Fed. 209.

2. Fraser *v.* Trent, 74 Fed. 423; Crown Point Min. Co. *v.* Ontario Silver Min., etc., Co., 74 Fed. 419; Sargent *v.* Kindred, 49 Fed. 485.

3. Carr *v.* Fife, 44 Fed. 713.

4. Strasburger *v.* Beecher, 44 Fed. 209.

5. Kenyon *v.* Knipe, 46 Fed. 309. And see Burke *v.* Bunker Hill, etc., Min., etc., Co., 46 Fed. 644, holding that if an action is commenced in territorial courts before admission it is not necessary to state jurisdictional facts sufficient to confer jurisdiction on a federal court, but such facts may be stated in a request for transfer or by affidavit, and such request, like a petition in a removal case, becomes upon filing and transfer thereafter a part of the record for determining the question of jurisdiction.

6. There may, however, be a waiver of the right to transfer notwithstanding the filing of a request, so that the state court will not be ousted of jurisdiction. Sargent *v.* Kindred, 5 N. D. 8, 63 N. W. 151, 49 Fed. 485.

No waiver if petition for transfer is filed in state supreme court before any action taken in the case by that court (Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 39 L. ed. 889; Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508), nor is the filing of a stipulation for continuance a waiver (Strasburger *v.* Beecher, 44 Fed. 209).

7. Dorne *v.* Richmond Silver Min. Co., 43 Fed. 690. See Miller *v.* Sunde, 1 N. D. 1, 44 N. W. 301; Burke *v.* Bunker Hill, etc., Min., etc., Co., 46 Fed. 644.

8. A special proceeding begun in a territorial court remains as such upon transfer to a federal court, although properly triable as an equity suit. Cowley *v.* Northern Pac. R. Co., 159 U. S. 569, 16 S. Ct. 127, 40 L. ed. 263.

Federal courts cannot, however, compel state courts to transmit original papers, and upon the latter's refusal so to do it may proceed upon certified transcripts. Burke *v.* Bunker Hill, etc., Min., etc., Co., 46 Fed. 644. See also Back *v.* Sierra Nevada Consol. Min. Co., 46 Fed. 673.

9. Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 15 S. Ct. 751, 39 L. ed. 889.

10. Scott *v.* Billgerry, 40 Miss. 119.

As to provisional courts established at the time of the Civil war see Mechanics', etc., Bank *v.* Union Bank, 25 La. Ann. 387 [*affirmed* in 22 Wall (U. S.) 276, 22 L. ed. 871]; Burke *v.* Tregre, 22 La. Ann. 629; Walsh *v.* Porter, 12 Heisk. (Tenn.) 401.

Jurisdiction of Civil war courts see Mechanics', etc., Bank *v.* Union Bank, 25 La. Ann. 387; Tharp *v.* Marsh, 40 Miss. 158; Scott *v.* Billgerry, 40 Miss. 119; Hefferman *v.* Porter, 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459; Myers *v.* Whitfield, 22 Gratt. (Va.) 780.

Duration of Civil war courts see Isbell *v.* Farris, 5 Coldw. (Tenn.) 426; Burke *v.* Tregre, 19 Wall. (U. S.) 519, 22 L. ed. 158.

As to Alabama claims court see Manning *v.* French, 149 Mass. 391, 21 N. E. 945, 4 L. R. A. 339.

As to jurisdiction of commissioners under treaty with Spain of 1819 see Meade *v.* U. S., 2 Ct. Cl. 224.

11. Judicial power is vested in superior and inferior courts. The former are the supreme court of the United States, the court of appeals of the District of Columbia, and the supreme court of the District of Colum-

with respect to the laws which should remain in force after the establishment of the code.[12]

2. Supreme Court of United States. Any final judgment or decree of the court of appeals may be reëxamined, and affirmed, reversed, or modified by the supreme court of the United States, upon writ of error[13] or appeal,[14] in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars,[15] in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District on February 9, 1893,[16] and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright,[17] or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.[18]

bia. The latter are justices of the peace and police courts. D. C. Code (1902), § 2.

Distinguished from territorial courts.—The superior courts of general jurisdiction of the district have been repeatedly held to be courts of the United States as distinguished from mere territorial courts. But where the question was what jurisdiction had been conferred on the court and how that jurisdiction was to be exercised, the court of appeals of the district declared that it was immaterial whether said courts belonged to the class of inferior courts provided for by the constitution, or to the class of territorial courts that congress might provide for and establish in the organization of territorial governments. U. S. *v.* Sampson, 19 App. Cas. (D. C.) 419. See Noerr *v.* Brewer, 1 MacArthur (D. C.) 507.

12. The common law, all British statutes in force in Maryland on Feb. 27, 1801, the principles of equity and admiralty, all general acts of congress not locally inapplicable in the District of Columbia, and all acts of congress by their terms applicable in the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of the act of 1901, remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code. D. C. Code (1902), § 1.

13. Writs of error are governed by the rules and regulations applicable to the circuit courts. Stanton *v.* Embrey, 93 U. S. 548, 23 L. ed. 983.

Writs of error under special circumstances as provided for in D. C. Rev. Stat. §§ 706, 847, will not be issued, the statutes being no longer in force. U. S. *v.* Wanamaker, 147 U. S. 149, 13 S. Ct. 279, 37 L. ed. 118; Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896; Dennison *v.* Alexander, 103 U. S. 522, 26 L. ed. 313; Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. ed. 231.

14. Appeal lies to the supreme court of the United States in prize cases, not to the court of appeals of the District. U. S. *v.* Sampson, 19 App. Cas. (D. C.) 419.

The entire record is brought up on an appeal from a final decree of the general term of the supreme court of the District of Columbia. Spalding *v.* Mason, 161 U. S. 375, 16 S. Ct. 592, 40 L. ed. 738.

By the repeal by the act of March 3, 1897, of the act of Feb. 13, 1895, and the enactment that all proceedings pending under such act are to be vacated and that no judgment rendered in pursuance of such act shall be paid, the supreme court is precluded from taking jurisdiction of a judgment so rendered, although the application for the appeal was made and notice given before the statute was repealed. District of Columbia *v.* Eslin, 183 U. S. 62, 22 S. Ct. 17, 46 L. ed. 85.

15. Determination of amount.—On a contest of a will the amount of the estate which passes constitutes the matter in dispute, and not the interest of any one of the contestants. Overby *v.* Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. ed. 741. And jurisdiction is not given by allegations of damages in excess of five thousand dollars caused by a levy on property not worth more than one thousand eight hundred dollars, and compelling the payment of a judgment of less than one hundred dollars where no facts are alleged which would justify exemplary damages. Magruder *v.* Armes, 180 U. S. 496, 21 S. Ct. 454, 45 L. ed. 638.

16. This provision applies in the case of a decision that the act of congress establishing a system of water-works in the district is constitutional and that an assessment thereunder without notice to a property holder is valid. Parsons *v.* District of Columbia, 170 U. S. 45, 18 S. Ct. 521, 42 L. ed. 943.

Criminal cases are not within the statute. Chapman *v.* U. S., 164 U. S. 436, 17 S. Ct. 76, 41 L. ed. 504. See in this connection *In re* Schneider, 148 U. S. 157, 13 S. Ct. 572, 37 L. ed. 404; Cross *v.* U. S., 145 U. S. 571, 12 S. Ct. 842, 36 L. ed. 821; *In re* Heath, 144 U. S. 92, 12 S. Ct. 615, 36 L. ed. 358.

17. The validity of a patent or copyright is not involved by a decree refusing to issue a mandamus to a commissioner of patents to register a trade-mark (U. S. *v.* Seymour, 153 U. S. 353, 14 S. Ct. 871, 38 L. ed. 742); or by a decree dismissing a bill under U. S. Rev. Stat. (1878) § 4915 [U. S. Comp. Stat. (1901) p. 3392], to procure an adjudication that complainant is entitled to the issuance of a patent for an invention. Durham *v.* Seymour, 161 U. S. 235, 16 S. Ct. 452, 40 L. ed. 682 [*distinguishing* Sparrow *v.* Strong, 3 Wall. (U. S.) 97, 18 L. ed. 49].

18. D. C. Code (1902), § 233.

Decree refusing mandamus to government officials see U. S. *v.* Seymour, 153 U. S. 353,

3. Court of Appeals of District of Columbia. The appellate jurisdiction of the court of appeals of the District of Columbia is regulated by the act of March 3, 1901,[19] including appeals from final orders, judgments, or decrees of the supreme court of the District of Columbia or any justice thereof,[20] and appeals from all interlocutory orders of the supreme court of the District of Columbia or by any justice thereof whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like,[21] as well as appeals from the decisions of the commissioner of patents.[22] A writ of error may issue from this court in certain cases to the police court,[23] but certiorari will not issue to said court.[24] Such court also has power to issue all necessary and proper remedial and prerogative writs in aid of its appellate jurisdiction.[25]

14 S. Ct. 871, 38 L. ed. 742; U. S. *v.* Lynch, 137 U. S. 280, 11 S. Ct. 114, 34 L. ed. 700.

Certiorari and certification.— In any case heretofore made final in the court of appeals, it shall be competent for the supreme court of the United States to require, by certiorari or otherwise, any such case to be certified to said supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said supreme court. D. C. Code (1902), § 234.

19. D. C. Code (1902), § 226 *et seq.*

20. D. C. Code (1902), § 226.

Action of a trial court on a motion for a new trial is not appealable to court of appeals. West *v.* U. S., 20 App. Cas. (D. C.) 347.

An order in habeas corpus is final and appealable to the court of appeals when made by the supreme court of the District dismissing the petition on writ of capias ad satisfaciendum. Contello *v.* Palmer, 20 App. Cas. (D. C.) 210. See Matter of Taylor, 3 MacArthur (D. C.) 426.

From judgments of the supreme court on appeal from a justice of the peace an appeal did not lie under the act of Feb. 9, 1893. *Ex p.* Redmond, 3 App. Cas. (D. C.) 317. But under D. C. Code (1902), § 226, such an appeal is now allowed.

Appeal may be docketed and dismissed for default in filing transcript in time limited, whether appeal operates or not as a supersedeas. U. S. *v.* Alvey, 182 U. S. 456, 21 S. Ct. 876, 45 L. ed. 1180.

Cases pending in the supreme court in general term at the date of the act of Feb. 9, 1893, abolishing the appellate jurisdiction of the supreme court were to be determined by the court of appeals. Ambler *v.* Archer, 1 App. Cas. (D. C.) 94.

21. D. C. Code (1902), § 226.

As to interlocutory decrees and review by general term see Spalding *v.* Mason, 161 U. S. 375, 16 S. Ct. 592, 40 L. ed. 738, decided in 1896.

22. D. C. Code (1902), § 228.

Appeal from the commissioner in a reissue case will be dismissed when not taken from the original order refusing the reissue, either of the supreme court of the district or to the court of appeals, within the limit prescribed by the rule of this court after the adoption of the act. *In re* Messinger, 12 App. Cas. (D. C.) 532.

Appeal will not lie from the ruling of the commissioner refusing a rehearing to an applicant for the reissue of a patent, or for refusing an application for leave to amend the claims of an original patent. *In re* Messinger, 12 App. Cas. (D. C.) 532.

Jurisdiction of appeals in interference cases was conferred upon the court of appeals by the act of 1893, in addition to the jurisdiction previously possessed by the supreme court of the District. Before this act appeals were only allowed in cases in which the commissioner had finally rejected an *ex parte* application and not in interference cases. The statute thus placed the two kinds of cases on an equality, and therefore the defeated party in an interference case could not maintain a suit in equity to review the commissioner's decision under U. S. Rev. Stat. (1878) § 4915 [U. S. Comp. Stat. (1901) p. 3392], until he had first taken an appeal to the court of appeals in the District. Smith *v.* Muller, 75 Fed. 612. The act of Feb. 9, 1893, is constitutional in giving the court of appeals jurisdiction of appeals from decisions of the commissioner of patents rejecting applications and in interference cases. U. S. *v.* Duell, 172 U. S. 576, 19 S. Ct. 286, 43 L. ed. 559 [*affirming* 10 App. Cas. (D. C.) 294].

The court cannot award costs or execute any judgment therefor in appeals from the commissioner. Wells *v.* Reynolds, 5 App. Cas. (D. C.) 20.

The court may frame rules to limit the time for appeals taken from the commissioner of patents. Hein *v.* Pungs, 9 App. Cas. (D. C.) 492.

23. D. C. Code (1902), § 327.

24. Sullivan *v.* District of Columbia, 19 App. Cas. (D. C.) 210. See *Ex p.* Dries, 3 App. Cas. (D. C.) 165.

25. D. C. Code (1902), § 230.

Under the act of Feb. 9, 1893 (27 U. S. Stat. at L. 434) giving the court of appeals of the District of Columbia power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction, the court has authority to issue the writ of certiorari as ancillary process in aid of its appellate jurisdiction, but no power to issue the original common-law writ of certiorari to remove to the court the proceedings in a criminal case

4. SUPREME COURT OF DISTRICT OF COLUMBIA — a. General Powers. The supreme court of the District of Columbia possesses the same powers and exercises the same jurisdiction as the circuit and district court of the United States, and is to be deemed a court of the United States, and also has and exercises all the jurisdiction possessed and exercised by the supreme court of the District of Columbia under the act approved March 3, 1863, creating that court, and at the date of the passage of the code of law in 1901.[26]

b. Power and Jurisdiction of Justices. The justices of the supreme court of the District of Columbia,[27] in addition to the powers and jurisdiction exercised by them as such, under the act of March 3, 1863, and of the date of the adoption of the code of 1901 severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the circuit and district courts of the United States.[28]

c. General and Special Terms — (I) *GENERALLY.* The supreme court of the district is required to hold general and special terms.[29]

(II) *GENERAL TERM.* The general term of the supreme court of the District of Columbia is required to be held by at least three justices,[30] and shall not hear any causes except certain causes pending at the time of the establishment of the code of 1901 and those under certain specified statutes.[31]

(III) *SPECIAL TERM* — (A) *Constitution of Court.* Each special term of the supreme court of the District of Columbia is required to be held by a single justice;[32] and the special terms shall be known respectively as the circuit court, the equity court, the criminal court, the probate court, and the district court of the United States.[33]

(B) *Circuit Court.* All common-law civil causes must be tried and determined in the circuit court, except as otherwise provided in the code,[34] and all

pending in the police court. Sullivan *v.* District of Columbia, 19 App. Cas. (D. C.) 210.

26. D. C. Code (1902), § 61.

Has jurisdiction of a suit to enforce a mechanic's lien, although less than fifty dollars. Hellohan *v.* Young, 21 D. C. 183. It also has jurisdiction over a fund in the United States treasury if parties claiming it are before the court, provided no different provision is made by statute. McManus *v.* Standish, 1 Mackey (D. C.) 1473.

If the government sues a disbursing officer in the court of the District for a balance of money in his hands, it may determine such officer's claim of a set-off of unpaid salary. Fendall's Case, 12 Ct. Cl. 305.

Jurisdiction of libel in prize cases under D. C. Rev. Stat. § 762, see U. S. *v.* Sampson, 19 App. Cas. (D. C.) 419.

Has no jurisdiction in actions involving less than fifty dollars, so as to allow the issuing of attachments. Singleton *v.* Frank, 21 D. C. 46. When no jurisdiction over foreign corporation see Dallas *v.* Atlantic, etc., R. Co., 2 MacArthur (D. C.) 146.

Rehearing could be granted under 16 U. S. Stat. at L. 161. Washington, etc., R. Co. *v.* Board of Public Works, 1 MacArthur (D. C.) 119.

The act of March 3, 1863, transferred the jurisdiction to the supreme court theretofore vested in the circuit and criminal courts of the District to be exercised within the limitations before existing, except that appeal to the general term was substituted for writ of error. U. S. *v.* Wood, 1 MacArthur (D. C.) 241.

27. Consists of a chief justice and five justices. D. C. Code (1902), § 60.

28. D. C. Code (1902), § 62.

Penalty on an appeal-bond and sufficiency of the sureties could be fixed and determined by either of the justices, and when this had been done there could be no readjudication of the same matter before any other justice. Whitney *v.* Frishie, 6 D. C. 262, decided in 1868.

29. D. C. Code (1902), § 63.

30. D. C. Code (1902), § 63.

31. D. C. Code (1902), § 65.

For decisions relating to appeals prior to the adoption of the act of 1893 see Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. ed. 1022; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 118, 7 S. Ct. 849, 30 L. ed. 909; Hoeling *v.* McCord, 20 D. C. 35, 19 Wash. L. Rep. 388; *In re* Talty, 20 D. C. 32; District of Columbia *v.* Rapley, 6 Mackey (D. C.) 526; Stewart *v.* Elliott, 2 Mackey (D. C.) 307; Bryan *v.* Sanderson, 3 MacArthur (D. C.) 402; Coughlan *v.* Poulson, 2 MacArthur (D. C.) 208; Luchs *v.* Jones, 1 MacArthur (D. C.) 345; Doddridge *v.* Gaines, 1 MacArthur (D. C.) 335.

All causes in the supreme court of the District shall be heard and determined in special term. D. C. Code (1902), § 66.

32. D. C. Code (1902), § 63.

33. D. C. Code (1902), § 64.

34. D. C. Code (1902), § 69.

For decisions prior to 1901 the date of the establishment of the code of law see Clark *v.* Clark, 17 How. (U. S.) 315, 15 L. ed. 77; Hard *v.* Stone, 11 Fed. Cas. No. 6,046, 5

appeals from justices of the peace are also to be heard and determined in said circuit court.[35]

(c) *Equity Court.* The equity court has jurisdiction of all causes formerly cognizable in equity, and of all petitions for divorce, except where the relief sought is authorized to be given by the probate court only, and also the special powers otherwise provided.[36]

(d) *Criminal Court.* The trial of crimes and misdemeanors committed in the District must be had in the supreme court of the District holding a special term as a criminal court, except such misdemeanors as are within the jurisdiction of the police court, as to which said court has concurrent jurisdiction with said police court.[37]

(e) *Probate Court.* The special term of the supreme court of the District of Columbia, formerly known as the orphans' court, is now designated the probate court, and its powers and jurisdiction are specially provided for by the act of March 3, 1901.[38]

(f) *District Court.* The district court has and may exercise the same powers and jurisdiction as the other district courts of the United States, and such further special jurisdiction as may from time to time be conferred by congress, and of all proceedings instituted in exercise of the right of eminent domain.[39]

Cranch C. C. 503; Rutter *v.* Merchant, 21 Fed. Cas. No. 12,179, 1 Cranch C. C. 36; U. S. *v.* Williams, 28 Fed. Cas. No. 16,712, 4 Cranch C. C. 372; Vasse *v.* Comegyss, 28 Fed. Cas. No. 16,894, 2 Cranch C. C. 564.

35. D. C. Code (1902), § 74.

36. D. C. Code (1902), § 85.

For decisions prior to 1901, the date of the establishment of the code of law, see Cochrane *v.* Deener, 94 U. S. 780, 24 L. ed. 139; Duncanson *v.* National Bank of Republic, 7 Mackey (D. C.) 348; *In re* Brent, 5 Mackey (D. C.) 352.

37. D. C. Code (1902), § 83.

Civil causes may be certified to justices of the criminal court, etc. D. C. Code of Law (1902), § 67. See Gilbert *v.* Morgan, 7 Mackey (D. C.) 296, decided in 1889, as to the trial of civil causes in the criminal court with relation to the terms of said court.

38. D. C. Code (1902), §§ 116 *et seq.*, 145, 150, 259, 391, 1125. And see *In re* McIntire, 5 Mackey (D. C.) 293.

Extent of jurisdiction.—The orphans' court can enforce the distribution of the residue of a testator's estate remaining in the hands of his executrix. Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1 [*reversed* in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339]. See Sinnott *v.* Kenaday, 12 App. Cas. (D. C.) 115. And a justice presiding in the supreme court of the District holding a special term for probate business, in the trial of issues framed under a caveat to a will of realty, may direct a verdict for the caveatees, where the caveators offer no testimony entitling them to go to a jury. Leach *v.* Burr, 17 App. Cas. (D. C.) 128, under the act of June 8, 1898. Again the authority of said court to order a reference of executor's accounts to the auditor is included in the right of this court to acquire information by any of the instrumentalities known to the practice, notwithstanding the legislation of Maryland that the statement of such account shall be made to the register of wills only. *In re* Wagner, MacArthur & M. (D. C.) 395. But said court has no jurisdiction to admit a will to probate as a devise of real estate. Campbell *v.* Porter, 162 U. S. 478, 16 S. Ct. 871, 40 L. ed. 1044. Nor upon the petition of a creditor of a decedent can it require money in the hands of a third person claimed as part of the assets to be paid into court, when the right to such fund is in controversy between the next of kin, and such third person claims an interest therein. Cook *v.* Speare, 13 App. Cas. (D. C.) 446. The jurisdiction of said court is also limited by Md. Acts (1798), c. 101. Cook *v.* Speare, 13 App. Cas. (D. C.) 446. Its power is also limited to the institution of suits and does not authorize suits against an executor or administrator. Vaughan *v.* Northrup, 15 Pet. (U. S.) 1, 10 L. ed. 639, under the act of June, 1822. Nor is an order of the orphans' court admitting a will of personalty to probate after a trial by jury of contested issues certified to the circuit court conclusive as to the realty when offered in evidence by the devisees in a subsequent action of ejectment between the same parties, as such court has no jurisdiction over the devise of real property. Perrey *v.* Sweeney, 11 App. Cas. (D. C.) 404. Again said orphans' court had no jurisdiction over conflicting powers of attorney. Richardson *v.* Cameron, 20 Fed. Cas. No. 11,780*a*, 2 Hayw. & H. (D. C.) 155.

39. D. C. Code (1902), § 84.

The supreme court of the District of Columbia, sitting as a district court of the United States, has jurisdiction, under D. C. Rev. Stat. § 762, to take cognizance of a libel for the condemnation of prizes of war and to adjudicate the question of prize or no prize, having the same jurisdiction as a prize court as other district courts of the United States. U. S. *v.* Sampson, 19 App. Cas. (D. C.) 419.

(G) *Power to Issue Writs.*[40] The supreme court of the District may, in its appropriate special terms, issue writs of quo warranto, mandamus,[41] prohibition,[42] scire facias, certiorari, injunction, prohibitory and mandatory, ne exeat, and all other writs known in common-law and equity practice that may be necessary to the effective exercise of its jurisdiction. Any justice of said court may issue writs of habeas corpus to inquire into the cause of detention or to discharge on giving bail.[43]

5. JUSTICES OF THE PEACE. Justices of the peace have jurisdiction in civil cases; their jurisdiction is limited and is prescribed by the act of March 3, 1901.[44]

6. POLICE COURT. The police court has original criminal jurisdiction of certain crimes and offenses committed in the district; its jurisdiction is specially provided for by statute.[45]

7. TERMS AND SESSIONS. The supreme court of the district is a court of general jurisdiction, and its terms are fixed by law, of which the court of appeals will take notice;[46] but notwithstanding its terms are fixed by law, said court could, under a decision rendered in 1893, indefinitely extend a term up to and beyond the beginning of the succeeding term for the purpose of settling a bill of exceptions.[47]

M. Court of Claims — 1. JURISDICTION — a. Suits Against United States. Under the act of 1887[48] it was provided that the court of claims should have jurisdiction of all claims founded upon the constitution of the United States or any law of congress, except for pensions,[49] or upon any regulation of an executive department,[50] or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated,[51] not sounding in

40. **Power of court of appeals** to issue writs see *supra*, XII, L, 3.

41. **May issue mandamus** as original process in cases where by the principles of common law the petitioner is entitled thereto (U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167); also to an executive officer residing within the District, commanding him to perform a ministerial act required of him by law; but this power is strictly limited to the enforcement of ministerial duties not involving the necessity of taking proof (Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579. And see Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181, under the act of Feb. 27, 1801). Has no jurisdiction of petition by widow for mandamus to commissioner of general land-office to issue and deliver to her certificates of new location. U. S. *v.* Stockslager, 129 U. S. 470, 9 S. Ct. 382, 32 L. ed. 785.

42. **Cannot restrain by writ of prohibition** the proceedings of a naval court-martial. U. S. *v.* Whitney, 4 Mackey (D. C.) 535.

43. D. C. Code (1902), § 68.

44. D. C. Code (1902), §§ 9, 10.

45. D. C. Code (1902), § 43.

Is not a court of United States.— U. S. *v.* Mills, 11 App. Cas. (D. C.) 500.

May punish an insurance agent under the act of Jan. 26, 1887, regulating insurance and prescribing penalty for its violation. Ransdell *v.* Patterson, 1 App. Cas. (D. C.) 489.

46. And it is not necessary to the legality of the session of its several branches that the minutes should recite the appearance of the clerk and marshal at the opening of the term, or that the sitting was in the District and in the building designated for the purpose. Regularity in these respects is necessarily presumed. Lanckton *v.* U. S., 18 App. Cas. (D. C.) 348.

47. Hume *v.* Bowie, 148 U. S. 245, 13 S. Ct. 582, 27 L. ed. 438.

Courts of the District had authority to adjourn without discontinuing the term and creating a new one under a decision in 1821. Alexandria Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106, 5 L. ed. 217.

48. 24 U. S. Stat. at L. 505 [U. S. Comp. Stat. (1901) p. 752]. See also 10 U. S. Stat. at L. 612 [U. S. Comp. Stat. (1901) p. 734].

49. **Pension claims excluded.**—Cole *v.* U. S., 29 Ct. Cl. 47; Gordon *v.* U. S., 26 Ct. Cl. 307; Daily *v.* U. S., 17 Ct. Cl. 144.

Bounty land warrant claims excluded.— U. S. *v.* Alire, 6 Wall. (U. S.) 573, 18 L. ed. 947, 3 Ct. Cl. 447 [*reversing* 1 Ct. Cl. 233].

50. **Jurisdiction** generally see Medbury *v.* U. S., 173 U. S. 492, 19 S. Ct. 503, 43 L. ed. 779; Maddux *v.* U. S., 20 Ct. Cl. 193; Thomas *v.* U. S., 16 Ct. Cl. 522.

No jurisdiction generally see Perin *v.* U. S., 12 Wall. (U. S.) 315, 20 L. ed. 412; Garcia *v.* U. S., 14 Ct. Cl. 121.

Grant of jurisdiction under the Tucker Act (24 U. S. Stat. at L. 505 [U. S. Comp. Stat. (1901) p. 752]) did not include cases for which specific jurisdiction had been provided by earlier enactments. When congress creates a specific class of claims and provides a certain jurisdiction for the ascertainment and allowance thereof that jurisdiction is exclusive. There are, however, certain exceptions. Foster *v.* U. S., 32 Ct. Cl. 170.

51. **Contracts expressed or implied or for damages.**— Smithmeyer *v.* U. S., 147 U. S. 342, 13 S. Ct. 321, 37 L. ed. 196; U. S. *v.*

tort,[52] in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States

Great Falls Mfg. Co., 112 U. S. 645, 5 S. Ct. 306, 28 L. ed. 846; U. S. *v.* Clyde, 13 Wall. (U. S.) 35, 20 L. ed. 479; Cameron *v.* U. S., 30 Ct. Cl. 340; Morris *v.* U. S., 30 Ct. Cl. 162; Dunnington *v.* U. S., 24 Ct. Cl. 404; Dunbar *v.* U. S., 22 Ct. Cl. 109; Blount *v.* U. S., 21 Ct. Cl. 274; Mitchell *v.* U. S., 18 Ct. Cl. 281; Northern Pac. R. Co. *v.* U. S., 15 Ct. Cl. 428; Devlin *v.* U. S., 12 Ct. Cl. 266; Morrell *v.* U. S., 7 Ct. Cl. 421; Bright *v.* U. S., 6 Ct. Cl. 118; Radovich *v.* U. S., 5 Ct. Cl. 541; Sweeney *v.* U. S., 5 Ct. Cl. 285. See Bogert *v.* U. S., 3 Ct. Cl. 18. But some consideration must have moved to the United States to constitute a cognizable contract for the payment of money, or the money must have been received charged with a duty of paying it over, or the claimant must have had a lawful right to it when it was received, as in case of money paid by mistake. Knote *v.* U. S., 95 U. S. 149, 24 L. ed. 442. Nor can said court direct what adjustment of salaries shall be made by the postmaster-general. Birdsong *v.* U. S., 34 Ct. Cl. 437. See Hopkins *v.* U. S., 15 Ct. Cl. 624. Nor was it instituted to try cases of mere nominal damages for breach of contract. Grant *v.* U. S., 7 Wall. (U. S.) 331, 19 L. ed. 194. Nor does any implied contract exist to repay proceeds of property confiscated and sold by the Confederate government. Fawcett *v.* U. S., 25 Ct. Cl. 178. Nor will the court take cognizance of a contract, based on the statement of a commanding officer of a frontier post that he thought the government would pay a reasonable compensation for services. Legare *v.* U. S., 24 Ct. Cl. 513. Nor has it jurisdiction of an action to recover fees as a witness before a committee of congress, where there is no statute allowing the same nor any implied contract therefor. Lilley *v.* U. S., 14 Ct. Cl. 539. Nor will said court entertain a petition to cancel a judgment lien unlawfully placed on property of the petitioner by a United States officer. Holmes *v.* U. S., 78 Fed. 513.

In patent cases claims over which said court has jurisdiction extend to those for compensation for the use thereof arising from contract expressed or implied. U. S. *v.* Palmer, 128 U. S. 262, 9 S. Ct. 104, 32 L. ed. 442; Coston *v.* U. S., 33 Ct. Cl. 438; Berdan Fire-arms Mfg. Co. *v.* U. S., 26 Ct. Cl. 48; Gill *v.* U. S., 25 Ct. Cl. 415; Morse Arms Mfg. Co. *v.* U. S., 16 Ct. Cl. 296; McKeever *v.* U. S., 14 Ct. Cl. 396; Burns *v.* U. S., 4 Ct. Cl. 113. But in the absence of such contract said jurisdiction does not extend to infringement cases. Russell *v.* U. S., 182 U. S. 516, 21 S. Ct. 899, 45 L. ed. 1210; U. S. *v.* Berdan Firearms Mfg. Co., 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530; Coston *v.* U. S., 33 Ct. Cl. 438.

Claims arising under revenue laws.—Where a drawback is refused by the collector, acting under the instructions of the secretary of the treasury, such claim is founded on an act of congress and arises out of the implied contract of the United States to refund the duty. Campbell *v.* U. S., 107 U. S. 407, 2 S. Ct. 759, 27 L. ed. 592. See also U. S. *v.* Pittsburgh Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Durant *v.* U. S., 28 Ct. Cl. 356; Kennedy *v.* U. S., 23 Ct. Cl. 363; Broulatour *v.* U. S., 7 Ct. Cl. 555 (cases where importer pays under protest distinguished); Schlesinger *v.* U. S., 1 Ct. Cl. 16 (duties paid under protest); Beatty *v.* U. S., Ct. Cl. (Dev.) § 184 (duties paid by mistake). But see Campbell *v.* U. S., 12 Ct. Cl. 470; Nicoll *v.* U. S., 7 Ct. Cl. 36; Portland Co. *v.* U. S., 5 Ct. Cl. 441. So an excess of tax paid is within the statute. U. S. *v.* Kaufman, 96 U. S. 567, 24 L. ed. 792. The court also has cognizance where the proper officer has determined a question, awarded an allowance, filed a certificate, and exhausted his jurisdiction, and the treasury has refused to carry out the award and pay (Kaufman *v.* U. S., 11 Ct. Cl. 659), and where money is deposited with a collector of internal revenue to be applied on a proposed compromise which is rejected by the government and the money applied to an assessment of taxes and penalties against the depositor, the court of claims has jurisdiction of an action to recover it back (Boughton *v.* U. S., 12 Ct. Cl. 330). Jurisdiction also exists where the secretary of the treasury has found the facts on which the claim was based, but, being in doubt as to the law, has declined to order payment. Ramsay *v.* U. S., 21 Ct. Cl. 443. Again a claim by an informer for his portion of a forfeiture or fine is one founded on a law of congress. Shelton *v.* U. S., 8 Ct. Cl. 487. See also *In re* Jayne, 28 Fed. 419. The United States supreme court decided, however, in 1868, that cases under the revenue laws are not within the jurisdiction of the court of claims (Nicholl *v.* U. S., 7 Wall. (U. S.) 122, 19 L. ed. 125. See also Shelton *v.* U. S., 8 Ct. Cl. 487; Doherty *v.* U. S., 6 Ct. Cl. 90), since a controversy under such laws is required to be determined by other tribunals and officers (Kaufman *v.* U. S., 11 Ct. Cl. 659. See also Campbell *v.* U. S., 12 Ct. Cl. 470; Turner *v.* U. S., 9 Ct. Cl. 367; Nicoll *v.* U. S., 7 Ct. Cl. 36).

Where a state is a party in an action for a demand, arising upon an act of congress, against the United States, the court of claims has jurisdiction. U. S. *v.* Louisiana, 123 U. S. 32, 8 S. Ct. 17, 31 L. ed. 69. See also U. S. *v.* Alabama, 123 U. S. 39, 8 S. Ct. 21, 31 L. ed. 73; Louisiana *v.* U. S., 22 Ct. Cl. 85. But examine Milwaukee, etc., Canal Co. *v.* U. S., 1 Ct. Cl. 187.

52. Langford *v.* U. S., 101 U. S. 341, 25 L. ed. 1010; Gibbons *v.* U. S., 8 Wall. (U. S.) 269, 19 L. ed. 453; St. Louis, etc., Transp. Co. *v.* U. S., 33 Ct. Cl. 251; Hayward *v.* U. S., 30 Ct. Cl. 219; Lanman *v.* U. S., 27 Ct. Cl. 260. See also Mann *v.* U. S., 32 Ct. Cl. 580; Dennis *v.* U. S., 2 Ct. Cl. 210. See further Carpenter *v.* U. S., 45 Fed. 341; Pugh

were suable;[53] provided, however, that nothing in said section of the statute shall be construed as giving to said court jurisdiction to hear and determine claims growing out of the late Civil war, and commonly known as "war claims,"[54] or to hear and determine other claims which had theretofore been rejected or reported on adversely, by any court, department, or commission authorized to hear and determine the same.

b. Set-Off and Counter-Claims. The court of claims has jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government against any claimant in a suit against the government in said court.[55]

c. Claims Against District of Columbia. Claims against the United States and

v. U. S., 5 Ct. Cl. 113; Spicer *v.* U. S., 1 Ct. Cl. 316; Milwaukee, etc., Canal Co. *v.* U. S., 1 Ct. Cl. 187.

Where injury to premises was a consequence and not an immediate result of the construction of the tunnel for the water-supply of Washington city the court of claims had jurisdiction. Alexander *v.* U. S., 25 Ct. Cl. 329.

53. The court now has equitable jurisdiction to reform a contract so as to effectuate the full intention of the parties. South Boston Iron Works *v.* U. S., 34 Ct. Cl. 174. *Contra*, prior to the act of March 3, 1887, see Bonner *v.* U. S., 9 Wall. (U. S.) 156, 19 L. ed. 666; Jackson *v.* U. S., 27 Ct. Cl. 74; Fawcett *v.* U. S., 25 Ct. Cl. 178. Although said court was held of competent power to protect itself against frauds. U. S. *v.* Moore, 3 MacArthur (D. C.) 226.

Cannot adjust equities of parties in cases of disputed partnership rights, although it will protect the rightful beneficiaries. McKinzie *v.* U. S., 34 Ct. Cl. 278.

Cannot compel specific performance. U. S. *v.* Jones, 131 U. S. 1, 9 S. Ct. 669, 33 L. ed. 90.

Cannot enforce resulting trust. Fawcett *v.* U. S., 25 Ct. Cl. 178.

54. U. S. *v.* Winchester, etc., R. Co., 163 U. S. 244, 16 S. Ct. 993, 41 L. ed. 145; Stovall *v.* U. S., 26 Ct. Cl. 226.

Decisions under statute prior to the act of 1887 as to "war claims" see U. S. *v.* Kimbal, 13 Wall. (U. S.) 636, 20 L. ed. 503; Pugh *v.* U. S., 13 Wall. (U. S.) 633, 20 L. ed. 711; U. S. *v.* Russell, 13 Wall. (U. S.) 623, 20 L. ed. 474. See Filor *v.* U. S., 9 Wall. (U. S.) 45, 19 L. ed. 549; Grimes *v.* U. S., 32 Ct. Cl. 38; Lynch *v.* U. S., 31 Ct. Cl. 62; Green *v.* U. S., 18 Ct. Cl. 93; Dykes *v.* U. S., 16 Ct. Cl. 289; Pennsylvania Co. *v.* U. S., 7 Ct. Cl. 401; Patterson *v.* U. S., 6 Ct. Cl. 40; Provine *v.* U. S., 5 Ct. Cl. 455; Kimball *v.* U. S., 5 Ct. Cl. 252; Russell *v.* U. S., 5 Ct. Cl. 121; Bishop *v.* U. S., 4 Ct. Cl. 448; Waters *v.* U. S., 4 Ct. Cl. 389; Slawson *v.* U. S., 4 Ct. Cl. 87; Ayres *v.* U. S., 3 Ct. Cl. 1; Corbett *v.* U. S., 1 Ct. Cl. 139.

As to "war claims" under the Bowman Act of March 3, 1883, see Stovall *v.* U. S., 26 Ct. Cl. 226; Conard *v.* U. S., 25 Ct. Cl. 433; Nance *v.* U. S., 23 Ct. Cl. 463; Carter *v.* U. S., 23 Ct. Cl. 326; Madison Female Institute *v.* U. S., 23 Ct. Cl. 188; Overton Hotel Co. *v.* U. S., 23 Ct. Cl. 186; Furlong *v.* U. S., 23 Ct. Cl. 32; Norfolk County Ferry Committee *v.* U. S., 23 Ct. Cl. 19; Myers *v.* U. S., 22 Ct. Cl. 80.

Claims for the proceeds of captured or abandoned property see U. S. *v.* Pugh, 99 U. S. 265, 25 L. ed. 322; Spencer *v.* U. S., 91 U. S. 577, 23 L. ed. 462; U. S. *v.* Home Ins. Co., 22 Wall. (U. S.) 99, 22 L. ed. 816; Sprott *v.* U. S., 20 Wall. (U. S.) 459, 22 L. ed. 371; Slawson *v.* U. S., 16 Wall. (U. S.) 310, 21 L. ed. 356; Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Duffy *v.* U. S., 24 Ct. Cl. 380; Blair *v.* U. S., 21 Ct. Cl. 253; Thomas *v.* U. S., 12 Ct. Cl. 273; Haycraft *v.* U. S., 8 Ct. Cl. 483; Cones *v.* U. S., 8 Ct. Cl. 329; Terry *v.* U. S., 8 Ct. Cl. 277; Brown *v.* U. S., 6 Ct. Cl. 171; Bryan *v.* U. S., 6 Ct. Cl. 128; Gaither *v.* U. S., 3 Ct. Cl. 191; Gearing *v.* U. S., 3 Ct. Cl. 165.

55. Allen *v.* U. S., 17 Wall. (U. S.) 207, 21 L. ed. 553. See 24 U. S. Stat. at L. 505 [U. S. Comp. Stat. (1901) p. 735].

Cannot go beyond the terms of a private act allowing a deduction and allow another set-off. Ely *v.* U. S., 19 Ct. Cl. 658.

An income tax imposed on the pay of officers of the government cannot be set off against a judgment against the government for salary. Jones *v.* U. S., 4 Ct. Cl. 197.

If the court is without jurisdiction of the claim a counter-claim pleaded falls with it. Baltimore, etc., R. Co. *v.* U. S., 34 Ct. Cl. 484.

The government may, as assignee of a judgment, set off the same against an award by congress, even though said award was assigned, if assigned before notice. Macauley *v.* U. S., 11 Ct. Cl. 693.

The government may plead as a set-off a release of an internal revenue tax on property, released by mistake of a treasury agent, but not on that retained by the agent. Roman *v.* U. S., 11 Ct. Cl. 761.

For proviso relating to suits by officers for fees see 30 U. S. Stat. at L. 494, repealing part of 24 U. S. Stat. at L. 505 [U. S. Comp. Stat. (1901) p. 753] does not apply to pending suits. Strong *v.* U. S., 93 Fed. 257. A commissioner of the circuit court is an officer, and where he has presented no account for his services to the proper court for approval, or to the attorney-general for examination, the court of claims has no jurisdiction. Collins *v.* U. S., 35 Ct. Cl. 146.

not against the District of Columbia are intended by section 1059 of the Revised Statutes.[56] Under the act of 1880,[57] however, which provided that no claim should be presented to or considered by the court of claims which was rejected by the board of audit, the fact that the amount of damages claimed before the court of claims is larger than that presented by the board of audit is of no importance where the contract relied on is the same.[58] Again this court had jurisdiction of a suit brought by the holder of an "improvement certificate" of indebtedness of the District.[59]

d. Relief of Disbursing Officers From Losses. The act of 1866[60] conferred jurisdiction on said court as to relief of certain disbursing officers from responsibility for losses sustained by capture or otherwise, while in the line of their duty, of government funds, vouchers, records, or papers in their charge, and for which they were responsible.[61]

e. Claims Referred by Congress or Executive Departments. Whenever a claim or matter is pending before any committee of the senate or house of representatives, or before either house of congress,[62] which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims of the United States.[63] It has also been provided that congress may refer bills, except for a pension, providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, to be proceeded with as provided by the aforesaid act of 1883.[64]

56. Strachan *v.* District of Columbia, 20 Ct. Cl. 484.

57. 21 U. S. Stat. at L. 284, 286.

The act of 1880 conferred jurisdiction as to certain contracts made by the District of Columbia. Genau *v.* District of Columbia, 20 Ct. Cl. 389. See Dearing *v.* District of Columbia, 19 Ct. Cl. 292. *Compare* Barnes *v.* District of Columbia, 37 Ct. Cl. 342.

58. Brown *v.* District of Columbia, 127 U. S. 579, 8 S. Ct. 1314, 32 L. ed. 262.

59. Dickson *v.* District of Columbia, 18 Ct. Cl. 643.

60. 14 U. S. Stat. at L. 44 [U. S. Comp. Stat. (1901) p. 736].

61. Under this statute one could petition the court for relief so long as the government held him responsible for losses by capture or otherwise neglected to sue him in court where his defense could be heard. Hobbs *v.* U. S., 17 Ct. Cl. 189.

A broader discretion was conferred for relief under 20 U. S. Stat. at L. 617, authorizing said court to relieve a certain army officer and his sureties from the consequences of a robbery of public funds in his custody. Reynolds *v.* U. S., 15 Ct. Cl. 314.

62. **Private claims** in congress, when transmitted to court of claims, see 12 U. S. Stat. at L. 765 [U. S. Comp. Stat. (1901) pp. 736, 737].

63. And the same shall there be proceeded in under such rules as the court may adopt. Said jurisdiction does not, however, extend to certain war claims or claims barred by law. 22 U. S. Stat. at L. 485 [U. S. Comp. Stat. (1901) p. 748].

64. 24 U. S. Stat. at L. 507 [U. S. Comp. Stat. (1901) p. 757] repealing all inconsistent laws or parts of laws.

Particular decisions.— If the claim is referred by act of congress, the court will not go behind the act to ascertain what relief was intended by it. U. S. *v.* Weil, 35 Ct. Cl. 42. Accompanying papers may be examined, however, to determine what claim is intended to be investigated, since this will not be determined from the letter of transmission. Cofer *v.* U. S., 30 Ct. Cl. 131. Where a committee transmits a pending bill said court is restricted to the relief claimed therein (Choteau *v.* U. S., 20 Ct. Cl. 250), and if a condition is imposed by the act so referring it, it must be complied with (St. Louis, etc., Transp. Co. *v.* U. S., 33 Ct. Cl. 251). Referring a claim does not, however, confer jurisdiction on said court, where jurisdiction is exclusive in another tribunal or officer. Boehm *v.* U. S., 21 Ct. Cl. 290. But the use of the word "claim" in a reference, under the Tucker Act (24 U. S. Stat. at L. 505 [U. S. Comp. Stat. (1901) p. 752]) will not divest it of jurisdiction if it appears that the reference was under the act and that a bill was pending in the house referring it. Dowdy *v.* U. S., 26 Ct. Cl. 220.

Under the Bowman Act the court has no jurisdiction of questions of law except as incident to the settlement of facts. Griffin *v.* U. S., 33 Ct. Cl. 228.

Special reference.— The jurisdiction conferred by a private act cannot be extended to one not named therein, claiming to be owner of the cause of action by anterior assignment. Atocha *v.* U. S., 6 Ct. Cl. 69. Again a claim for extra service is not ratified by a reference under an act to "determine and adjudge whether any, and if any, what amount is due said trustees for said extra service," even though it at the same time prescribes a rule for the measure of damages, and the extra service was rendered with the understanding

When a [any][65] claim or matter is [may be] pending, in any of the executive departments which may involve [involves] controverted questions of fact or law, the head of such department [with the consent of the claimant], may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court [of claims].[66]

f. Assigned Claims. The act establishing the court of claims[67] did not repeal

that it was to be subject to the approval of congress. Roberts *v.* U. S., 6 Ct. Cl. 84.

Equities.— If the act remanding the case opens up the whole case and confers "equitable jurisdiction" to "render judgment for such amount as right and justice may demand" broader powers are conferred than existed when the case was before the court under its general jurisdiction. Inquiry should, however, be nevertheless conferred to the items of claims originally presented to the proper department. Murphy *v.* U. S., 35 Ct. Cl. 494. And under the Bowman Act the court may find the facts, in a claim transmitted to it wherein the petitioner seeks a reconveyance from the government of realty wrongfully conveyed to it, whereof he has the equitable title. Taylor *v.* U. S., 25 Ct. Cl. 75. Again where a claim for rent is referred, and a technical defense that claimant had no legal right as assignee to enforce the claim is waived by congress by joint resolution, which remands the case and also provides that if claimant is found to be the equitable owner of the lease and in justice and equity entitled to the rents the court should render judgment in his favor, the court may also entertain an action for all the rent, even that in addition to that included in claimant's first petition, but the terms of such joint resolution cannot be extended to other than the particular case. Cross *v.* U. S., 14 Wall. (U. S.) 479, 20 L. ed. 721. But an authorization to proceed as a court of equity to adjust accounts for work done and materials furnished in bridge construction does not confer equity jurisdiction of a claim for loss and damage from a charge made by the United States in the original plans. Harvey *v.* U. S., 13 Ct. Cl. 322. Nor is equity jurisdiction conferred to reform a contract by correcting a mistake therein under a reference of a claim "to be heard and determined according to law and justice." Braden *v.* U. S., 16 Ct. Cl. 389.

65. The words in brackets [ ] indicate the difference in the phraseology of the two statutes.

66. And the same shall be there proceeded in under such rules as the court may adopt. 22 U. S. Stat. at L. 485, c. 116, § 2 [U. S. Comp. Stat. (1901) p. 748]; 24 U. S. Stat. at L. 507, c. 359, § 12 [U. S. Comp. Stat. (1901) p. 756]. See also U. S. Rev. Stat. (1878) § 1063 [U. S. Comp. Stat. (1901) p. 738].

Claim must be pending in an executive department. Armstrong *v.* U. S., 29 Ct. Cl. 148, under U. S. Rev. Stat. (1873) § 1063 [U. S. Comp. Stat. (1901) p. 738].

Head of department cannot transmit a claim unless it be one over which he then has jurisdiction, and which has not been finally disposed of (Cotton *v.* U. S., 29 Ct. Cl. 207); nor can the secretary of the interior delegate claims under Indian treaty stipulations for a final adjustment (Chickasaw Nation *v.* U. S., 22 Ct. Cl. 222); nor can the navy department transmit a claim over which it has itself no jurisdiction (Pitman *v.* U. S., 20 Ct. Cl. 253); nor can the head of a department transmit a claim if he is forbidden by law to pay the same (Hart *v.* U. S., 15 Ct. Cl. 414), and this applies to the postmaster-general (Chesapeake, etc., R. Co. *v.* U. S., 20 Ct. Cl. 49).

When a claim is transmitted without the consent of a claimant, without specifying the statute under which it is so transmitted, jurisdiction may be taken under the Bowman Act of 1883 which did not require consent. Matter of Billings, 23 Ct. Cl. 166.

Court has jurisdiction where the secretary refuses to act on direct tax claim or adjust it on an erroneous basis, and under 26 U. S. Stat. at L. 822 the secretary has exclusive jurisdiction of such claims. Sams *v.* U. S., 35 Ct. Cl. 151. Said court may also take cognizance of demands for unliquidated damages. Myerle *v.* U. S., 33 Ct. Cl. 1, 31 Ct. Cl. 105. And the secretary of the interior may, notwithstanding section 1066, delegate for investigation claims growing out of Indian treaty stipulations. Chickasaw Nation *v.* U. S., 22 Ct. Cl. 222. Jurisdiction may also exist of cases transmitted arising from or connected with the revenue laws. Campbell *v.* U. S., 12 Ct. Cl. 470.

Court has not jurisdiction of a diplomatic claim, presented by the British government to the state department and submitted by it, for damages consequent on the capture of a British vessel by an American war vessel. Berger *v.* U. S., 36 Ct. Cl. 243. Nor has said court jurisdiction over a claim within the express prohibition of a statute. Hart *v.* U. S., 16 Ct. Cl. 459. And if a claim for transportation services has been disallowed in part and the balance certified for the residue which is paid, and a reopening of accounts has been denied by the controller, the head of the department cannot refer the disallowed portion. Baltimore, etc., R. Co. *v.* U. S., 34 Ct. Cl. 484.

Amount.— Under the acts of 1887 and of 1883 the amount is immaterial, while the act of 1868 specifies the amount of three thousand dollars as one of the factors. U. S. *v.* New York, 160 U. S. 598, 16 S. Ct. 402, 40 L. ed. 551; Glyn *v.* U. S., 32 Ct. Cl. 82; Bright *v.* U. S., 6 Ct. Cl. 118; Amoskeag Mfg. Co. *v.* U. S., 6 Ct. Cl. 99.

67. 10 U. S. Stat. at L. 612 [U. S. Comp. Stat. (1901) p. 729].

the act[68] intended to prevent frauds upon the treasury by avoiding all assignments of unliquidated claims against it.[69]

g. Claims Growing Out of Treaties. The jurisdiction of such court does not extend to any claim against the government not pending therein on Dec. 1, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with Indian tribes.[70]

h. Indian Depredation Claims. The act of 1891[71] provided that in addition to the jurisdiction then or thereafter conferred on the court of claims it could inquire into and finally adjudicate,[72] in the manner therein provided, all claims for property[73] of citizens of the United States[74] taken or destroyed by Indians in amity with the United States,[75] without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for. Such jurisdiction also extended to cases which had been examined and allowed by the interior department and also to such cases as were authorized to be examined by the act of March 3, 1885, subject to certain limitations.[76]

i. Review of Decisions of Other Tribunals and of Executive Departments. If a claim be subject to revision "only by congress or the proper court" and its disallowance by the controller is not opened for fraud, mistake in calculation, or the

68. U. S. Rev. Stat. (1878) § 3477 [U. S. Comp. Stat. (1901) p. 2320].

69. U. S. *v.* Gillis, 95 U. S. 407, 24 L. ed. 503.

And it was decided in an early case that said court had no jurisdiction of an action by the assignee of a claim against the United States. Sines *v.* U. S., 1 Ct. Cl. 12. But see Forehand *v.* U. S., 23 Ct. Cl. 477.

70. U. S. Rev. Stat. (1878) § 1066 [U. S. Comp. Stat. (1901) p. 739]; Alling *v.* U. S., 114 U. S. 562, 5 S. Ct. 1080, 29 L. ed. 272; Great Western Ins. Co. *v.* U. S., 112 U. S. 193, 5 S. Ct. 99, 28 L. ed. 687; Paulison *v.* U. S., 112 U. S. 193, 5 S. Ct. 103, 28 L. ed. 689; *Ex p.* United States, 17 Wall. (U. S.) 439, 21 L. ed. 696; Weld *v.* U. S., 23 Ct. Cl. 126; Kinkead *v.* U. S., 18 Ct. Cl. 504; Dainese *v.* U. S., 15 Ct. Cl. 64; Langford *v.* U. S., 12 Ct. Cl. 338.

Jurisdiction has, however, been conferred upon this court by special acts of congress relating to claims under Indian treaties. Blackfeather *v.* U. S., 190 U. S. 368, 23 S. Ct. 772, 47 L. ed. 1099 [*affirming* 37 Ct. Cl. 233]; Pam-po-pee *v.* U. S., 187 U. S. 371, 23 S. Ct. 142, 47 L. ed. 221 [*affirming* 36 Ct. Cl. 427]; Choctaw Nation *v.* U. S., 119 U. S. 1, 7 S. Ct. 75, 30 L. ed. 306 [*reversing* 21 Ct. Cl. 50]; Western Cherokee Indians *v.* U. S., 27 Ct. Cl. 1.

No jurisdiction to determine the relative rights of parties to an Indian treaty to the land therein conveyed, upon the ground of mere justice or fairness, was conferred upon such court by the act of March 2, 1895. U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291.

71. 26 U. S. Stat. at L. 851 [U. S. Comp. Stat. (1901) p. 758].

72. Allowance of depredation claims by the secretary is not binding, but if made according to law it may be the basis of a judgment by consent. Crow *v.* U. S., 32 Ct. Cl. 16.

73. Limited to property depredations and does not extend to personal injuries. Swope *v.* U. S., 33 Ct. Cl. 223.

Consequential damages cannot be allowed, for taking property, either under the act of March 3, 1891, or under the act of March 3, 1885, as courts cannot by construction enlarge their powers. Price *v.* U. S., 174 U. S. 373, 19 S. Ct. 765, 43 L. ed. 1011 [*affirming* 33 Ct. Cl. 106].

74. Contzen *v.* U. S., 179 U. S. 191, 21 S. Ct. 98, 45 L. ed. 148 [*affirming* 33 Ct. Cl. 475]; Yerke *v.* U. S., 173 U. S. 439, 19 S. Ct. 441, 43 L. ed. 760; Johnson *v.* U. S., 160 U. S. 546, 16 S. Ct. 377, 40 L. ed. 529; Johnson *v.* U. S., 29 Ct. Cl. 1; Valk *v.* U. S., 28 Ct. Cl. 241.

Corporations organized under state laws are citizens within the act. U. S. *v.* Northwestern Express, etc., Co., 164 U. S. 686, 17 S. Ct. 206, 41 L. ed. 599.

Depredations committed in Mexico and property brought into the United States are not within the statute. Corralitos Co. *v.* U. S., 178 U. S. 280, 20 S. Ct. 941, 44 L. ed. 1069.

75. Salois *v.* U. S., 32 Ct. Cl. 68; Tully *v.* U. S., 32 Ct. Cl. 1; Marks *v.* U. S., 28 Ct. Cl. 147.

Depredation by two tribes.— Where there is jurisdiction over one the award will be enforced. Crow *v.* U. S., 32 Ct. Cl. 16.

If depredations are committed by a particular band of a tribe it is sufficient. Tully *v.* U. S., 32 Ct. Cl. 1.

76. Marks *v.* U. S., 161 U. S. 297, 16 S. Ct. 476, 40 L. ed. 706; Litchfield *v.* U. S., 33 Ct. Cl. 203.

The statute also embraces all just offsets and counter-claims to any claim of either of the preceding classes which may be before such court for determination. Labadie *v.* U. S., 32 Ct. Cl. 368.

All power over fees is transferred to the jurisdiction of the court, so that an attorney cannot waive an allowance by the court un-

filing of material new evidence, the decision is final[77] and cannot be transmitted by the secretary of war to the court of claims;[78] nor can such court hear a cause decided adversely[79] to the claimant on investigation of the quartermaster-general, no additional evidence being offered;[80] nor where congress has directed the secretary[81] to pay a certain amount to vessel owners, can the court review the secretary's action in rejecting the claim of one and paying the amount to others.[82]

2. Procedure — a. Generally. The judiciary act of 1789[83] which precludes the taking advantage of any defect or want of form, etc., applies to actions against the government in the court of claims.[84]

b. Parties. No general rule can be stated as to parties, since this question rests upon the character of the claim and the statute conferring jurisdiction.[85]

c. Process and Appearance. Where a claim is transmitted by the executive department, the claimant, under the earlier statute,[86] could voluntarily appear and file his petition, or the court, on defendant's application, would order a citation to issue requiring him to appear.[87]

d. Pleading — (I) *Generally.* The court of claims is not bound by special rules of pleading.[88] But allegations to sustain the equitable jurisdiction of the

less he waives all compensation by his client. Tanner *v.* U. S., 32 Ct. Cl. 192.

77. A case which involves the exercise of judicial discretion by the postmaster-general as to postal service is final. Chorpenning *v.* U. S., 3 Ct. Cl. 140.

The decision of a prize court allowing a claim for weighing and gauging the cargo of a condemned prize is a judicial determination which said court of claims cannot question. Root *v.* U. S., 5 Ct. Cl. 408.

Where there is no disputed question of fact, and the decision of the secretary of the interior turns exclusively on the proper construction of an act of congress, his decision is not final, and, if adverse to a claimant, the court of claims has jurisdiction of the case. Commonwealth Title Ins., etc., Co. *v.* U. S., 37 Ct. Cl. 532.

78. Armstrong *v.* U. S., 29 Ct. Cl. 148.

79. An adverse decision of a commission on a French spoliation claim, even though it appeared to have been incorrect, was not reviewable. Adams *v.* U. S., 23 Ct. Cl. 226.

80. Calhoon *v.* U. S., 24 Ct. Cl. 414.

81. Nor can said secretary's action in distributing certain fines and penalties to informers before suit is brought be reviewed by the court. Kellogg *v.* U. S., 15 Ct. Cl. 372.

82. Bofinger *v.* U. S., 18 Ct. Cl. 148.

83. 1 U. S. Stat. at L. 269, § 32.

84. Molina *v.* U. S., 6 Ct. Cl. 269.

If notice is required that parties come in and assert their claims it may be done sufficiently by acts which constitute an actual notice. Pam-to-pee *v.* U. S., 36 Ct. Cl. 427.

The terms in which jurisdiction is conferred may be so specific as to be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree so comprehensive and flexible as to secure to each suitor his joint and individual rights, and not hamper the court by rules of procedure or by distinctions between law and equity. U. S. *v.* Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509, under 25 U. S. Stat. at L. 694.

If, while a departmental case is pending in the court, congress enact that the accounting officers shall reëxamine and allow such claims, further action by the court will be unnecessary, and the papers in the case will be returned to the secretary who transmitted them. Massachusetts *v.* U. S., 37 Ct. Cl. 524.

85. Tryon *v.* U. S., 32 Ct. Cl. 425 (administrator); Davenport *v.* U. S., 31 Ct. Cl. 430 (administrator); Osborne *v.* U. S., 24 Ct. Cl. 416 (partner); Brown *v.* District of Columbia, 17 Ct. Cl. 303 (assignor); Burdette *v.* U. S., 15 Ct. Cl. 465 (administrator). See also U. S. *v.* Burns, 12 Wall. (U. S.) 246, 20 L. ed. 388; Shaw *v.* U. S., 8 Ct. Cl. 488; Woodruff *v.* U. S., 5 Ct. Cl. 645.

Aliens who are citizens or subjects of any government which accords to the citizens of the United States the right to prosecute claims against such governments in its courts have the privilege of prosecuting claims against the United States in the court of claims, whereof said court by reason of their subject-matter and character might take jurisdiction. U. S. Rev. Stat. (1878) § 1068 [U. S. Comp. Stat. (1901) p. 740]; U. S. *v.* O'Keefe, 11 Wall. (U. S.) 178, 20 L. ed. 131 (English subject within statute); Dauphin *v.* U. S., 6 Ct. Cl. 221 (French subject within statute). See also Rothschild *v.* U. S., 6 Ct. Cl. 204.

86. 15 U. S. Stat. at L. 76 [U. S. Comp. Stat. (1901) p. 738].

87. Bright *v.* U. S., 6 Ct. Cl. 118. *Compare* Burdette *v.* U. S., 15 Ct. Cl. 465, decided under U. S. Rev. Stat. (1878) § 1060, holding that a mere reference by congress does not of itself confer jurisdiction, but that claimant must appear or be cited.

88. U. S. *v.* Burns, 12 Wall. (U. S.) 246, 20 L. ed. 388.

Forms of pleading will not preclude a recovery of what is justly due complainant on the facts stated, although due in a different aspect. Clark *v.* U. S., 95 U. S. 539, 24 L. ed. 518.

If the petition raises questions of importance affecting the interests of persons before the court it will not be dismissed on the

court, under the Tucker Act, should not be too general and indefinite;[89] and compliance with a condition precedent should be alleged and proved.[90] Again distinct causes of action cannot be brought together, by proceedings subsequent to the bringing of the original action, without the consent of both parties.[91]

(II) *Demurrer or Plea.*[92] Objection to claimant's right to maintain his action should be raised by demurrer[93] or plea,[94] and where it goes to the jurisdiction then by plea thereto.[95]

(III) *Amendments — Supplemental Claim.* Amendments designed to present a cause as the parties may be supposed to have understood it will be allowed, but amendments to introduce new parties not in privity, to introduce a new cause of action, to enforce a penalty, or where the opposite party has been misled, or where an unfair advantage would result, will not be allowed.[96] An amended petition cannot be filed, where a claim has been referred by a committee of congress and dismissed for want of jurisdiction,[97] nor can an amended petition be filed, without submission to and specific leave from the court, where a case is

ground that it shows no cause of action, but the real facts will be ascertained. Morrison *v.* U. S., 22 Ct. Cl. 206.

If verification is a jurisdictional requirement the petition must be verified. Eastern Band of Cherokee Indians *v.* Cherokee Nation West, 19 Ct. Cl. 35. See also Gray *v.* U. S., 23 Ct. Cl. 277; Woody *v.* U. S., 23 Ct. Cl. 160.

The exact rules of special pleading are not necessarily adapted to the jurisdiction of the court of claims, nor is it requisite that the pleadings should present a single issue for determination, such as is generally considered indispensable in trial by jury. Peirce *v.* U. S., 1 Ct. Cl. 195.

The petition will not be dismissed in a transmitted claim, where it contains counts for liquidated and counts for unliquidated damages, although there is a want of jurisdiction as to the latter. Dennis *v.* U. S., 20 Ct. Cl. 119.

Under rules of the court requiring that the petition must set forth a full statement of the claim and of the action thereon by any of the departments, and must show, where the claim is such as is ordinarily settled in any executive department, that the application had been made to that department, and its decision thereon, an allegation in the complaint that the allegation had been made "to the proper department" is insufficient. Clyde *v.* U. S., 5 Ct. Cl. 134.

89. Schierling *v.* U. S., 23 Ct. Cl. 361.

A general charge by contractors for a government building of mismanagement or delay on the part of the United States, or of fraud or dishonesty on the part of their agents, is insufficient, as the claimant's pleading and request for findings should contain specific allegations. McLaughlin *v.* U. S., 37 Ct. Cl. 150.

90. Hoffeld *v.* U. S., 36 Ct. Cl. 230.

Averments as to loyalty see Carter *v.* U. S., 23 Ct. Cl. 326; Woody *v.* U. S., 23 Ct. Cl. 160.

91. Eager *v.* U. S., 33 Ct. Cl. 336.

92. **Set-off or counter-claim.**— Defendants in an Indian depredation case, allowed by the secretary of the interior, may file a plea of set-off without electing to reopen the case. But, in such a suit by a firm, defendants' right to set up a counter-claim against one partner will not be considered on motion to strike from the files. Labadie *v.* U. S., 31 Ct. Cl. 436.

93. **Demurrer also lies** to the sufficiency of the petition without exercising the right to reopen the case. Price *v.* U. S., 33 Ct. Cl. 106.

94. **But a plea** by defendant that the cause of action declared on in a second suit against the government had accrued when the first suit was filed and might have been united in it is bad. Shrewsbury *v.* U. S., 9 Ct. Cl. 263.

95. Pennsylvania Co. *v.* U. S., 7 Ct. Cl. 401.

An issue to the jurisdiction is raised by a plea traversing the allegations of the petition that the original owners of the claim have at all times borne true allegiance, and such plea will not be stricken out. Peirce *v.* U. S., 1 Ct. Cl. 195.

96. Thomas *v.* U. S., 15 Ct. Cl. 335.

But if the rightful claimant brings suit, but inadvertently neglects to describe her representative capacity, or to correctly allege a requisite ownership, and there is no conflict of interests between claimants, and the proper party is before the court in due time, amendments will be allowed accordingly. Thomas *v.* U. S., 15 Ct. Cl. 335.

Amendment should be allowed where the statute of limitations will bar a new action, and defendant raises no objection to the party claimant, but pleads to merits. Skelly *v.* U. S., 32 Ct. Cl. 227.

Consent to filing amendments may also be based upon acquiescence, without a formal agreement, and after delay by defendants to strike out amended petitions and when the statute of limitations would cut off part of the demands if a new suit were instituted, the court will on motion dismiss amendments, sever the causes of action, and treat the amended petitions as original petitions as of the time when each was filed, and the cases will proceed as distinct suits. Eager *v.* U. S., 33 Ct. Cl. 336.

97. Dunbar *v.* U. S., 19 Ct. Cl. 674.

remanded to the general docket with merely a general leave to amend.[98] Again a supplemental claim may be asserted, under the act of 1890, although it was not presented to the accounting officers until after payment of the original claim.[99]

e. Limitations — Claims Barred by Law. The United States cannot plead limitations without a law of congress authorizing it.[1] Under the act of 1863,[2] however, every claim against the United States cognizable by the court of claims is forever barred unless the statement of the claim be filed in the court, or transmitted to it, under the provisions of said act, within six years after the claim first accrues, except in cases of disability, which may be brought within three years after removal thereof.[3] The running of a statute of limitations may, however, be suspended in favor of the person legally entitled to prosecute a claim where it is presented by proper averments within the jurisdictional period, even though by a party who could not maintain an action thereon.[4] Again under the Bowman Act of 1883,[5] providing for the transmission of certain cases, the court has no jurisdiction of any claim against the United States which was barred by virtue of the provisions of any law thereof.[6] If the provisions of a statute requiring suit

98. Shaw *v.* U. S., 9 Ct. Cl. 301.

99. Webster *v.* U. S., 32 Ct. Cl. 362, construing the act of Feb. 19, 1890, for reimbursement to survivors of officers and crews of The Trenton and The Vandalia.

1. Todd *v.* U. S., Ct. Cl. (Dev.) § 470.

Where fees have been allowed and paid to a clerk, and the legality of the allowance subsequently becomes a question, and the fees paid are deducted, in the settlement of subsequent accounts the statute of limitations does not run against the original cause of action. Chinn *v.* U. S., 37 Ct. Cl. 521.

2. U. S. Rev. Stat. (1878) § 1069 [U. S. Comp. Stat. (1901) p. 740]. See also 24 U. S. Stat. at L. 507, c. 359, § 14 [U. S. Comp. Stat. (1901) p. 757].

The act of 1887 as to set-offs and counterclaims also provides that no suit against the government of the United States shall be allowed thereunder unless the same shall have been brought within six years after the right accrued for which the claim is made. 24 U. S. Stat. at L. 505, c. 359, § 1 [U. S. Comp. Stat. (1901) p. 753].

3. See U. S. *v.* Louisiana, 127 U. S. 182, 8 S. Ct. 1047, 32 L. ed. 66; Finn *v.* U. S., 123 U. S. 227, 8 S. Ct. 82, 31 L. ed. 128; Rice *v.* U. S., 122 U. S. 611, 7 S. Ct. 1377, 30 L. ed. 793; Myers *v.* U. S., 22 Ct. Cl. 80.

Claim accrues from the time the demand arose (Kendall *v.* U. S., 107 U. S. 123, 2 S. Ct. 277, 27 L. ed. 437) or on the completion of a contract and its presentation to a department within six years (Curtis *v.* U. S., 34 Ct. Cl. 1).

Claim does not accrue until demand for its payment by the proper person and refusal, where the sum was to be paid at any time when certain checks issued against his credit should be presented. U. S. *v.* Wardwell, 172 U. S. 48, 19 S. Ct. 86, 43 L. ed. 360 [*affirming* 32 Ct. Cl. 30].

Disability arising from connection with rebellion not excluded (Kendall *v.* U. S., 107 U. S. 123, 2 S. Ct. 277, 27 L. ed. 437); and rejection of a claim by a department does not postpone the right of action nor suspend the statute (Curtis *v.* U. S., 34 Ct. Cl. 1).

Statute is not applicable to an application by a disbursing officer to be relieved from responsibility for funds lost. U. S. *v.* Clark, 96 U. S. 37, 24 L. ed. 696.

Where a statute conferring jurisdiction contains no provision as to when suit shall be brought thereunder, as in case of the abandoned property act, such a suit falls within section 1069 of the Revised Statutes and is barred within six years. Rice *v.* U. S., 122 U. S. 611, 7 S. Ct. 1377, 30 L. ed. 793. See further as to abandoned, etc., property claims Haycraft *v.* U. S., 8 Ct. Cl. 483; Hill *v.* U. S., 8 Ct. Cl. 361.

4. Gray *v.* U. S., 23 Ct. Cl. 277.

5. 22 U. S. Stat. at L. 485, c. 116, § 3 [U. S. Comp. Stat. (1901) p. 748].

6. Nutt *v.* U. S., 26 Ct. Cl. 15.

Statute does not apply if claims were such as the department might have examined and settled, although they were barred from consideration of the court on a voluntary petition of claimant (McClure *v.* U. S., 19 Ct. Cl. 18); nor does it apply to cases barred under the provisions of the act of July 5, 1884, providing that on the payment of certain enumerated claims receipts thereof by the claimants shall be a full and complete discharge thereof (Nutt *v.* U. S., 26 Ct. Cl. 15).

Claims are barred when *res adjudicata* in the executive department at the time of the passage of the act, it being also barred by the statute of limitations at said time. Neal *v.* U. S., 36 Ct. Cl. 49. And if a claim is transmitted by the executive department without authority, it will, if treated as voluntarily brought by the claimant, be subject to the bar of the statute of which the court is bound to take notice. Baltimore, etc., R. Co. *v.* U. S., 34 Ct. Cl. 484. It is held, however, that a committee of congress cannot invest the court with jurisdiction, even for the investigation of facts, of a claim barred at the time of passage of the statute (Balmer *v.* U. S., 26 Ct. Cl. 82); and this is true substantially as to a claim for unliquidated damages referred by congress (Dennis *v.* U. S., 23 Ct. Ct. 324), and likewise as to

to be brought within a specified time are jurisdictional and not in the nature of a statute of limitations they cannot be waived by the defendant nor overlooked by the court.[7]

f. Trial. The court determines the facts as well as the law;[8] but the court is not obliged to rule specifically on separate requests of counsel;[9] nor is a claim entitled to precedence under the Indian depredation act where it has neither been allowed nor approved.[10]

g. Reference. The court may in certain cases refer a cause to a special commissioner, and after due deliberation approve his report, and the judgment rendered will be that of the court and not that of the commissioner alone.[11]

h. Evidence and Taking Proof — (i) *GENERALLY.* The common-law rules of evidence govern the court of claims.[12] Under the statutes, however, special pro-

a claim barred at the time of its presentment to the department of state (Savage *v.* U. S., 23 Ct. Cl. 255), and also of a claim arising in 1864 and transmitted by the house in 1886 (Furlong *v.* U. S., 23 Ct. Cl. 32. See also Payne *v.* U. S., 22 Ct. Cl. 144). And see Belt *v.* U. S., 23 Ct. Cl. 317; Burwell *v.* U. S., 22 Ct. Cl. 92; Marshall *v.* U. S., 21 Ct. Cl. 307.

Statute does not bar a claim presented within six years, and which was never abandoned or formally rejected, and such claim may be properly referred to said court (New York *v.* U. S., 26 Ct. Cl. 467); and it is held that a claim may be referred on which a right of action in the court of claims is barred by the statute of limitations (Webb *v.* U. S., 20 Ct. Cl. 487); nor does the statute apply if the claims were such as the department might have examined and settled, although they were barred from consideration by the court on the voluntary petition of claimants (McClure *v.* U. S., 19 Ct. Cl. 18).

Limitation is not pleadable against a claim referred by the head of an executive department which was presented at the proper department within six years after accrual. U. S. *v.* New York, 160 U. S. 598, 16 S. Ct. 402, 40 L. ed. 551.

Court is not at liberty to declare claims stale, where they are referred by congress, even though they are barred by the statute of limitations. Valdez *v.* U. S., 16 Ct. Cl. 550.

Patents.— Claims for the use of patented inventions are not barred although transmitted by congress after six years. Forehand *v.* U. S., 23 Ct. Cl. 477. And in a suit involving a patent in said court the statute of limitations will be applied as in case of a contract and not of infringement. Hartman *v.* U. S., 35 Ct. Cl. 106.

7. Hanauer *v.* U. S., 12 Ct. Cl. 705.

8. Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346.

If an Indian depredation claim is reopened for trial before the court it is reopened for all purposes, and the question of liability as well as for amount is before the court for adjudication. Price *v.* U. S., 174 U. S. 373, 19 S. Ct. 765, 43 L. ed. 1011 [*affirming* 33 Ct. Cl. 106]. And in such a claim the jurisdictional facts of citizenship and amity are regarded as put in issue by the general traverse, but if either party ask a severance of issues the jurisdictional issues must be first tried and determined. Gamel *v.* U. S., 31 Ct. Cl. 321.

Questions of law and fact may be inquired into by the court where the terms of the reference under a special act so authorize. Oakes *v.* U. S., 174 U. S. 778, 19 S. Ct. 864, 43 L. ed. 1169 [*affirming* 30 Ct. Cl. 378].

The court may make a comparison of handwriting. Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346.

The court will not examine voluminous testimony to ascertain whether in trifling matters rates charged for transportation of government freight exceeded the legal limitation attached to a grant of the road. Northern Pac. R. Co. *v.* U. S., 15 Ct. Cl. 428.

Where claims against a foreign country are authorized to be heard, and this government, formally and with knowledge of the facts, asserted them to be valid and demanded reparation, the point is settled, as between this government and the claimant, that the claims constituted a legitimate reclamation upon the other country. Hubbell *v.* U. S., 15 Ct. Cl. 546.

Where claims are referred to the court by the executive departments under the Bowman Act and the references are accompanied with data sufficient to enable the court to determine what were the controverted issues on which the accounting officers refused payment, the court will consider and determine every issue necessary to the proper disposition of the matter. Pennsylvania *v.* U. S., 37 Ct. Cl. 514.

Whether a claim for taking a private vessel for blockade purposes is based upon a taking for government use or for destruction is a question of fact. Walker *v.* U. S., 34 Ct. Cl. 345.

9. Union Pac. R. Co. *v.* U. S., 20 Ct. Cl. 508.

10. Hegwer *v.* U. S., 30 Ct. Cl. 405.

11. *In re* Intermingled Cotton Cases, 92 U. S. 651, 23 L. ed. 756.

Appointment of a special commissioner to take testimony may be revoked on the court's own motion, where the person is of bad character, etc. Martin *v.* U. S., 3 Ct. Cl. 384.

12. Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346.

visions have been made in certain cases as to evidence, witnesses, and taking proof,[13] and by the terms of the reference, letters and papers presented before congress, although not admissible under the ordinary rules of evidence, may be considered.[14] Again the evidence should be relevant,[15] and evidence of a material fact should be direct and sufficient.[16]

(II) *Burden of Proof — Corroboration.* The burden of proof may be cast upon the claimant by the general traverse;[17] and where citizenship goes to the jurisdiction, is preliminary and is questioned, the burden of proof rests upon the claimant.[18] So the facts upon which the relief sought is based must be shown by sufficient proof.[19] Again the evidence should not be that alone of one uncorroborated witness whose testimony is insufficient of itself.[20]

(III) *Depositions.* If by a rule of court certain requirements exist as to reading and signing of depositions, they must be complied with, or the court may suppress the same on its own motion;[21] and where a deposition fixes a jurisdictional fact, a second deposition inconsistent therewith on such point will be disregarded.[22]

If recovery rests upon expert testimony the competency of the witness must be satisfactorily established. Shultz *v.* U. S., 2 Ct. Cl. 380.

Information for congress must be obtained in congressional cases in strict conformity with the rules of judicial procedure and from competent evidence, and letters and *ex parte* statements of every character must be excluded, except where a statute directs that they be considered. West Virginia *v.* U. S., 37 Ct. Cl. 201.

Where a state paid money for raising and equipping troops, and for the occupation of lands for camps, and the vouchers taken used the word "damages," it is open to either party to show what was included in that term, whether use of or injury to property, or both. Pennsylvania *v.* U. S., 37 Ct. Cl. 514.

13. The Ship Parkman, 35 Ct. Cl. 406; *In re* Calls for Evidence, 33 Ct. Cl. 354; Truitt *v.* U. S., 30 Ct. Cl. 19; Woolverton *v.* U. S., 26 Ct. Cl. 215; Atchison, etc., R. Co. *v.* U. S., 15 Ct. Cl. 1.

14. Irwin *v.* U. S., 23 Ct. Cl. 149.

If the petition sets forth a good cause of action and defendants have records in their possession which will defeat the claim they should produce them. Smith *v.* U. S., 36 Ct. Cl. 304.

15. Birdsong *v.* U. S., 34 Ct. Cl. 437.

An agreed statement of facts, on which a suit between owners and underwriters was based at a time contemporaneous with the loss, is not evidence for the representatives of the owners in a suit between them and the United States under the French spoliations act. The Sloop Margaret, 37 Ct. Cl. 13.

The recitals of a decree are considered a part of the evidence in a case, but the essential things to be investigated in such cases are the regularity of the proceeding in the prize court and the opportunity to appear and defend. The Snow Thetis, 37 Ct. Cl. 470.

Where the question is the worth of an invention in the market the claimants cannot show what their patent as used by the government is worth to commerce. Wood *v.* U. S., 36 Ct. Cl. 418.

16. Gray *v.* U. S., 23 Ct. Cl. 277.

In case of an award the proof required to set it aside need not be new, but the court will not take up conflicting evidence and from it draw conclusions different from those reached by the secretary. Montoya *v.* U. S., 32 Ct. Cl. 71.

17. King *v.* U. S., 31 Ct. Cl. 304.

18. Hernandez *v.* U. S., 34 Ct. Cl. 455.

If, however, the secretary has found facts from which the court may infer its own jurisdiction, the burden of proof rests on defendant to show the want thereof. Montoya *v.* U. S., 32 Ct. Cl. 71.

19. U. S. *v.* Ross, 92 U. S. 281, 23 L. ed. 707.

A statutory provision that the party electing to reopen the case shall assume the burden of proof requires the establishment of such facts as will lead the court to a conclusion different from that of the secretary. Montoya *v.* U. S., 32 Ct. Cl. 71.

Presumptions.—Where the decree of a prize court is silent as to the appearance of the master or owners, and there is neither protest nor proof to show that they were denied a hearing, the presumption is that they were given an opportunity to defend. The Snow Thetis, 37 Ct. Cl. 470.

The court may take judicial notice of the laws of the several states and the claimant is not required to call witnesses to prove as a foreign law a rule of law of a state. Sykes *v.* U. S., 8 Ct. Cl. 330.

20. Salois *v.* U. S., 32 Ct. Cl. 68. Especially where it does not appear that such witness was qualified to testify as to the fact. Brooke *v.* U. S., 2 Ct. Cl. 180.

Where the military transactions of a state for the state and of the state for the United States were mingled in one account, it cannot be regarded as the account of the principal, the United States; and the state, as agent, must establish its expenditures specifically by other proof. Rhode Island *v.* U. S., 37 Ct. Cl. 141.

21. Martin *v.* U. S., 3 Ct. Cl. 384.

22. Johnson *v.* U. S., 35 Ct. Cl. 552.

(iv) *AFFIDAVITS.* Although the testimony of witnesses subjected to oral and cross-examination is ordinarily of a higher character than their *ex parte* affidavits it is not exclusively so.[23]

(v) *VARIANCE.* There is a variance where the allegation and proof as to a material fact differ substantially.[24]

i. Rules of Decision. Outside of such exception as may arise as to supreme court decisions governing the court of claims[25] no general rule is deducible as to rules of decision, since the law in this respect necessarily rests upon the various factors entering into specific cases in said court of claims, and is therefore ordinarily of no general value, except perhaps by analogy.[26]

j. Findings or Report — (i) *GENERALLY.* With the trial in the court of claims the rights of counsel over the findings of fact cease and those of the court begin.[27] If a finding is made in an action at law it determines all matters of fact,[28] and is final where there is any evidence of the fact, and no exception is taken.[29] The court may be required to state whether a particular item or charge of damage is included in its finding, and if so to what amount;[30] but a mass of immaterial details need not be included, neither party requesting it, although if on appeal a question of law is thereafter raised on the facts not included, the findings may include such omitted details.[31] If the suit is a proceeding in equity, a finding of the ultimate facts for the consideration of the supreme court is not required, as the whole record goes up.[32]

23. Small *v.* U. S., 33 Ct. Cl. 451.

Ex parte affidavits taken by agents of the southern claims commission were held not admissible as depositions in the court. Main *v.* U. S., 21 Ct. Cl. 54.

Affidavits of Indians, taken by an Indian agent in an investigation authorized by treaty and returned as part thereof and found among documents transmitted with the case to the court, will not be summarily struck out as *ex parte*. Chickasaw Nation *v.* U. S., 19 Ct. Cl. 133.

24. Salois *v.* U. S., 32 Ct. Cl. 68.

But if the variance is a matter of form not going to the merits judgment may be rendered in accordance with the proven facts. Molina *v.* U. S., 6 Ct. Cl. 269.

25. Illinois Cent. R. Co. *v.* U. S., 18 Ct. Cl. 118. *Compare* Chicago, etc., R. Co. *v.* U. S., 18 Ct. Cl. 359.

It is decided, however, that such court will construe a law of congress, on which a claim is alleged to be founded, according to the rules of construction which long and continued experience has determined to be best adapted to the purpose. Todd *v.* U. S., Ct. Cl. (Dev.) § 118. And see Barnett *v.* U. S., 37 Ct. Cl. 49.

26. See De Groot *v.* U. S., 5 Wall. (U. S.) 419, 18 L. ed. 700; U. S. *v.* Weil, 35 Ct. Cl. 42; Johnson *v.* U. S., 29 Ct. Cl. 1; Ravenel *v.* U. S., 23 Ct. Cl. 192; Cumming *v.* U. S., 22 Ct. Cl. 344; Bogert *v.* U. S., 3 Ct. Cl. 18.

Recitals of ownership in a statute referring a certain claim for rentals does not require the court of claims to accept such ownership as a fact, nor operate as an estoppel, but said court may consider the question of title. Kinkead *v.* U. S., 150 U. S. 483, 14 S. Ct. 172, 37 L. ed. 1152 [*distinguishing* U. S. *v.* Jordan, 113 U. S. 418, 5 S. Ct. 585, 28 L. ed. 1013].

Rules in force at the treasury department for the methodical conduct of business there cannot in said court supersede the ordinary principles and requirements of the law of evidence, nor can they add anything to what the law requires of a claimant to make out his case. Todd *v.* U. S., Ct. Cl. (Dev.) § 610.

27. Neal *v.* U. S., 14 Ct. Cl. 477.

The court need not find the facts, and may dismiss a case as unsupported by sufficient proof. Gossett *v.* U. S., 31 Ct. Cl. 325.

28. U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769; Stone *v.* U. S., 164 U. S. 380, 17 S. Ct. 71, 41 L. ed. 477.

29. U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769.

30. And in estimating damages it must be governed by the proof submitted, although it need not set forth the elements of the calculations on which the final result is based. U. S. *v.* Smith, 94 U. S. 214, 24 L. ed. 115.

Findings should show the amount of loss sustained in case of a claim to losses by robbery of funds of the United States. U. S. *v.* Clark, 94 U. S. 73, 24 L. ed. 67.

31. Central Pac. R. Co. *v.* U. S., 26 Ct. Cl. 109.

But after appeal allowed and record filed in the supreme court, the court cannot change the findings of fact. Kirk *v.* U. S., 28 Ct. Cl. 276.

If only the character of the testimony is described and its sufficiency, but not its competency, is questioned in the finding, the scope thereof cannot be controlled or modified by the supreme court by referring to the opinion, nor is a reversal justified on the ground of an attempt to create a rule of evidence as to the number of witnesses, although there is also a recital that the claim is supported by only two witnesses. Stone *v.* U. S., 164 U. S. 380, 17 S. Ct. 71, 41 L. ed. 477.

32. U. S. *v.* La Abra Silver Min. Co., 32 Ct. Cl. 462.

(II) *French Spoliation Claims.* The act of 1885[33] conferred jurisdiction on this court over certain claims to indemnity against the French government, arising out of illegal capture, etc., prior to September, 1800, but the findings[34] of that court were not conclusive and therefore did not estop the next of kin.[35]

(III) *Indian Depredation Claims.* If the facts found are equivalent to a finding that the trail on which claimant was traveling when his property was taken and carried away by Indians was a lawfully established trail permitted by the laws of the United States, it shows that he was not a trespasser, but was lawfully on the reservation at the time of the taking of his property.[36]

k. Judgment and Relief[37]—(I) *Generally.* The court of claims can properly render a judgment against the United States which is in duty bound to respond thereto.[38]

(II) *Dismissal.* If the court is equally divided as to the claimant's right to recover, in an action on a mail contract, the petition will be dismissed in order that he may take his appeal.[39]

(III) *Default and Reopening.* Where the attorney-general fails to file a plea, the claimant cannot have judgment by default, but must establish his claim by evidence.[40]

(IV) *Ascertainment of Amounts Due From Officers, Etc.* The court cannot under a petition in such a case, under the statute, go further than to adjudge that petitioner owes the government nothing and cannot render a money judgment in his favor.[41]

(V) *Impressed or Captured Property — Apportionment.* If a claim is referred for adjudication as to property taken[42] and impressed into the service of the United States, it is erroneous for the court to render judgment based on damages arising from mere detention and delay of the property.[43]

(VI) *French Spoliation Claims* — (A) *Generally.* The court will not attempt to determine conflicting rights, titles, or equities in the fund, but will

33. 23 U. S. Stat. at L. 283 [U. S. Comp Stat. (1901) p. 750 *et seq.*].

34. If a counter-claim against the original sufferer is set up the court will report its findings as to the claimant's and defendant's rights. The Ship Parkman, 35 Ct. Cl. 406.

35. Patterson *v.* Buchanan, 92 Md. 334, 48 Atl. 158.

36. U. S. *v.* Andrews, 179 U. S. 96, 21 S. Ct. 46, 45 L. ed. 105.

37. Entry of judgment will be suspended until it is ascertained who are the living claimants and who the administrators, etc., where several claims of a large number of Indians are united in a single suit. Navarre *v.* U. S., 33 Ct. Cl. 235.

Pro forma judgment for appeal purposes.—If the court is adverse to the claimant on the merits it cannot render judgment against the United States *pro forma* for the purpose of an appeal to the supreme court, because it would affect a class of cases. U. S. *v.* Gleeson, 124 U. S. 255, 8 S. Ct. 502, 31 L. ed. 421.

38. U. S. *v.* More, 3 MacArthur (D. C.) 226. *Compare* Clark *v.* U. S., 37 Ct. Cl. 503.

39. Reeside *v.* U. S., 2 Ct. Cl. 481.

A claim was also dismissed where it had been disallowed by the southern claims commission and was resubmitted to the court on the same evidence. Stern *v.* U. S., 32 Ct. Cl. 533.

40. King *v.* U. S., 31 Ct. Cl. 304.

If, however, a cause has been dismissed for non-prosecution, the court may open the default after the expiration of the term. Book *v.* U. S., 31 Ct. Cl. 272.

Where by statute congress directed the court to reopen a claim and correct an error in rendering judgment upon its being so found, it being apparent that congress supposed that an error had been made and the evidence not being inconsistent therewith, the judgment was corrected. Grant *v.* U. S., 18 Ct. Cl. 732.

41. Gerding *v.* U. S., 28 Ct. Cl. 531.

42. If property is captured, intermingled, sold, and the proceeds paid into the treasury in a common fund, judgment may be rendered in each case for a sum which bore the same proportion to the whole fund still on hand that the quantity of claimant's property did to the whole number represented by the fund. *In re* Intermingled Cotton Cases, 92 U. S. 651, 23 L. ed. 756. See also as to apportionment Minor *v.* U. S., 6 Ct. Cl. 393.

43. U. S. *v.* Irwin, 127 U. S. 125, 8 S. Ct. 1033, 32 L. ed. 99.

The recovery may also be pro rata, or the case may be continued until all the parties are brought into court, since the claimant whose suit is first tried cannot have judgment for the full amount of which he is shown to be the owner. Geilfuss *v.* U. S., 5 Ct. Cl. 697.

ascertain only the validity of the claim and its amount and the legal representatives of the parties entitled thereto.[44]

(B) *Payment of Awards — Certification by Court.* The act of 1899[45] providing that awards were not to be paid until certification to the secretary of the treasury as to the next of kin limits the authority of the court to such certification;[46] nor can it upon motion for a certificate consider the question of counterclaim.[47] Again the provision of the statute directing payment in pursuance of the findings of the court does not impart finality thereto, except as to the validity and amount of such claims.[48]

(VII) *Indian Depredation Claims.* Under the act of 1891[49] the court may enter judgment against the United States alone for the value of property destroyed or taken, where the tribe to which the depredations belong cannot be identified and such inability is stated.[50] If judgment is entered against a tribe[51] and the depredation was committed by a band thereof not in amity, the judgment will not be vacated, but will be made definite and certain by filing an additional finding of fact.[52] If the party electing to abide by the finding of the department has a *prima facie* right of recovery or defense, the award must stand, unless it is shown by the party reopening the case that it is erroneous in fact and law.[53]

(VIII) *Equitable Relief.* If equity powers are specifically conferred by statute[54] upon the court it may reform a contract and adjust the accounts of the parties thereunder.[55]

(IX) *Reports or Judgment on Transmitted or Referred Claims.* The acts of 1883[56] and of 1887[57] provide for a report of findings to the house committee, or heads of departments, without authorizing the court to render judgment.[58]

44. Buchanan *v.* U. S., 24 Ct. Cl. 74.

Under the act of 1885 the power of the court is limited to the terms expressed, and it was its duty to determine both that the French seizures were illegal and that the American claims were valid. Gray *v.* U. S., 21 Ct. Cl. 340.

45. 30 U. S. Stat. at L. 1191.

46. The Ship Juliana, 35 Ct. Cl. 400; The Schooner Henry and Gustavus, 35 Ct. Cl. 393.

Notwithstanding a provision that any claim shall not be paid if held by assignment or owned by an insurance company the court cannot certify that it is not so held or owned. The Ship Juliana, 35 Ct. Cl. 400.

47. The Schooner Henry and Gustavus, 35 Ct. Cl. 393.

48. Patterson *v.* Buchanan, 92 Md. 334, 48 Atl. 158, under the act of March 3, 1899.

49. 26 U. S. Stat. at L. 851 [U. S. Comp. Stat. (1901) p. 758 *et seq.*].

50. U. S. *v.* Gorham, 165 U. S. 316, 17 S. Ct. 382, 41 L. ed. 729.

51. Under the authority given to render judgment against the tribe committing the wrong when it can be identified, the court has implied power to bring in a tribe at any time before judgment, even after the statutory period for bringing suits has expired. Duran *v.* U. S., 31 Ct. Cl. 353.

52. Valencia *v.* U. S., 31 Ct. Cl. 388.

53. Price *v.* U. S., 33 Ct. Cl. 106.

54. If a private statute authorizes the court to investigate, ascertain, determine, and adjudge the amount equitably due, if any, for the loss or damage, remote damages cannot be received, nor interest for delay in payment while accounts were being audited at the treasury in the regular routine of business. Tillson *v.* U. S., 11 Ct. Cl. 758.

55. Harvey *v.* U. S., 105 U. S. 671, 26 L. ed. 1206. See also Pam-to-pee *v.* U. S., 36 Ct. Cl. 427.

56. 22 U. S. Stat. at L. 485 [U. S. Comp. Stat. (1901) p. 748].

57. 24 U. S. Stat. at L. 507 [U. S. Comp. Stat. (1901) p. 757].

58. Pennsylvania R. Co. *v.* U. S., 35 Ct. Cl. 584; White *v.* U. S., 33 Ct. Cl. 368; Murfreesboro Presb. Church *v.* U. S., 33 Ct. Cl. 339.

Court will find facts only, leaving congress to apply the law and afford the relief, unless jurisdiction of the subject-matter is conferred. Webb *v.* U. S., 20 Ct. Cl. 487.

Court cannot enter judgment, where the statute on which the proceding was based was repealed after the former judgment reversed and mandate filed and a motion for judgment, but before its entry. *In re* Hall, 167 U. S. 38, 17 S. Ct. 723, 42 L. ed. 69.

Although the reference is by a special statute to hear, determine, and report to the house, yet, the case being a congressional one, the court can find the facts only and report them. Griffin *v.* U. S., 33 Ct. Cl. 228.

If facts have been once found and it is again referred by the house it will reëxamine the case and again report the facts. White *v.* U. S., 33 Ct. Cl. 368.

If a claim is referred back after disallowance and the resolution so provides, the court may allow the actual value of supplies fur-

By section 13 of the act of 1887,[59] however, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing law or under the provisions of said act, it must proceed so to do, giving to either party such further opportunity for hearing as in its judgment justice may require, and report its proceedings therein to either house of congress or to the department by which the same was referred to said court.[60] In addition to said enactment the terms of the reference may be such as to authorize the entry of judgment, or they may be so qualified that the court may omit the entry of judgment and report the facts to congress with its opinion.[61] Again if by the terms of a reference by congress the court is to pass on a claim and determine the amount due, it may allow extra compensation.[62]

(x) *Whether Judgment Final.* Judgments rendered prior to the reorganization of the court under the act of 1863[63] had not the final and conclusive character of judicial decrees, and said court could not under said act give effect to a decree in a case reported to congress and still pending there;[64] but a judgment rendered under the general jurisdiction of the court which stands unvacated and unreversed is a final judgment, although founded on an erroneous ruling of law.[65]

(xi) *Bar or Conclusiveness of Judgment.* The doctrine of *res adjudicata* is applicable to cases referred to the court of claims.[66] The United States is not, however, bound by judgments against a state in state courts for moneys expended by the state for the benefit of the United States.[67]

(xii) *Payment.* Where the statute provides that payment shall be a full discharge of claims against the government, the court of claims cannot afterward correct the amount of the judgment.[68] Nor can a claim be reëxamined by the court by virtue of a second reference where the claim is paid, since by such payment it becomes absolutely extinguished.[69] Acceptance of payment of a judg-

nished, but it cannot under such reference award the claimant the contract price. Norris *v.* U. S., 2 Ct. Cl. 155.

Bounty claims.— Court may render a final judgment thereon, although referred by the secretary of the navy. Sampson *v.* U. S., 35 Ct. Cl. 578.

59. 24 U. S. Stat. at L. 507 [U. S. Comp. Stat. (1901) p. 757].

60. U. S. *v.* New York, 160 U. S. 598, 16 S. Ct. 402, 40 L. ed. 551; *In re* Engagement off Santiago Bay, 36 Ct. Cl. 200.

Rendition of judgment is obligatory and cannot be waived by the parties. Stovall *v.* U. S., 26 Ct. Cl. 226.

Head of department is bound by findings of fact and conclusions of law. Berger *v.* U. S., 36 Ct. Cl. 243.

61. Fond du Lac Band of Chippewa Indians *v.* U. S., 34 Ct. Cl. 426. See also Irwin *v.* U. S., 23 Ct. Cl. 149.

62. Roberts *v.* U. S., 92 U. S. 41, 23 L. ed. 646.

63. 12 U. S. Stat. at L. 755. See also 10 U. S. Stat. at L. 612 [U. S. Comp. Stat. (1901) p. 729].

Under a statute providing for reimbursement by the states on account of expenses in raising troops during the Civil war, final judgment can be rendered only where the claimant could recover if the suit had been brought under the court's general jurisdiction. Pennsylvania *v.* U. S., 36 Ct. Cl. 131.

64. Nourse *v.* U. S., 2 Ct. Cl. 214.

65. Adams *v.* U. S., 36 Ct. Cl. 104.

Where a claim has been referred by the secretary of war, a judgment upon the merits from which no appeal has been taken, and in which no motion for a new trial has been made, is final and conclusive as to all questions which were or might have been properly considered by the court. U. S. *v.* Moore, 3 MacArthur (D. C.) 226.

66. Le More *v.* U. S., 35 Ct. Cl. 9.

Under the Bowman Act.— A judgment rendered under the court's general jurisdiction which is unreversed and existing at the time of the passage of the Bowman Act excludes a suit under that statute from the jurisdiction of the court. Adams *v.* U. S., 36 Ct. Cl. 104. Again where a claim under said enactment is submitted by congress to said court, its determination as to questions of fact and admissibility of evidence is conclusive upon the parties. Vance *v.* U. S., 30 Ct. Cl. 252.

67. Pennsylvania *v.* U. S., 36 Ct. Cl. 131.

68. Especially is this so where there was an arithmetical error as to the amount and the claimant remitted a part of the judgment to avoid a new trial. Russell *v.* U. S., 15 Ct. Cl. 168.

69. Pilkington *v.* U. S., 36 Ct. Cl. 357.

Notwithstanding a stipulation that an acceptance of the amount shall be without prejudice to claimant's moving for a further allowance, yet if before he files such motion the judgment is satisfied the controversy is dead and cannot be reinstated by the motion. Vaughn *v.* U. S., 34 Ct. Cl. 342.

ment, rendered on report of a commissioner, waives an error of computation by the latter.[70]

(XIII) *INTEREST.* Where the statute so provides the court shall not on rendering judgment against the United States allow any interest on the claim up to the rendition of the judgment.[71]

l. New Trial — (I) *GROUNDS.* Under section 1087 of the Revised Statutes the court may grant a new trial for any reason which by the rules of common law or chancery would furnish a sufficient ground.[72] The statute allowing a new trial in case "any fraud, wrong, or injustice[73] in the premises has been done to the United States" refers to matters of fact.[74]

(II) *GRANTING APPLICATION[75] AND ITS EFFECT.* The court may grant a new trial, on behalf of the United States,[76] if moved within two years[77] after final disposition of the suit,[78] and such power in the court is not taken away by affirmance of the judgment on appeal.[79] Upon a proper showing made on a motion for a new trial the court may remand the cause for reargument[80] or for further

70. Michot *v.* U. S., 31 Ct. Cl. 299.

71. New York Cent., etc., R. Co. *v.* U. S., 24 Ct. Cl. 22, construing U. S. Rev. Stat. (1878) § 1092 [U. S. Comp. Stat. (1901) p. 747].

In the absence of a contract to pay interest the court does not occupy the position of a jury to determine whether the allowance of interest is justified, on a claim against the United States. Todd *v.* U. S., Ct. Cl. (Dev.) § 364. And although a reference is by special act, yet the rules of law applicable to the adjudication of claims by the court in the exercise of its general jurisdiction may so control as that interest not stipulated for under the contract claim referred cannot be allowed therein. Tillson *v.* U. S., 100 U. S. 43, 25 L. ed. 543.

72. Nance *v.* U. S., 23 Ct. Cl. 463.

If newly discovered evidence was discovered in time to be produced at the first trial a new trial will not be granted. Garrison *v.* U. S., 2 Ct. Cl. 382.

What constitutes newly discovered evidence in captured property case see Douglas *v.* U. S., 11 Ct. Cl. 655.

73. Where a judgment is wholly in favor of the United States, it cannot be held that "fraud, wrong, or injustice" has been done to them, within the intent of U. S. Rev. Stat. (1878) § 1088 [U. S. Comp. Stat. (1901) p. 745]; and a new trial cannot be granted under that statute. Monroe *v.* U. S., 37 Ct. Cl. 79.

74. A new trial cannot be granted by the court on the ground that the decision is shown by a later decision of the supreme court to have been erroneous. *In re* District of Columbia, 180 U. S. 250, 21 S. Ct. 357, 45 L. ed. 516.

The provision is mandatory and the court cannot compel the United States, as a condition precedent to granting a new trial, to pay the attorneys of record of the claimants the amount paid by them as the commissioner's compensation. Henry *v.* U. S., 15 Ct. Cl. 162.

The court may, under a special act, determine whether there should be a new trial, if the award in question rested upon fraud and perjury, and if certain property was abandoned in Mexico and its value. U. S. *v.* La Abra Silver Min. Co., 32 Ct. Cl. 462.

75. Amendment to motion by striking out the words, "in accordance with the provisions of section 1088 of the Revised Statutes," does not impair the motion if it be authorized by other statutes. McCollum *v.* U. S., 33 Ct. Cl. 469.

76. The United States is not estopped to move for a new trial for want of jurisdiction, by the attorney-general's consent that judgment be rendered for the amount allowed by the secretary or by his signing a stipulation and agreeing not to reopen the case. McCollum *v.* U. S., 33 Ct. Cl. 469.

77. McCollum *v.* U. S., 33 Ct. Cl. 469; Murdock *v.* District of Columbia, 23 Ct. Cl. 41.

78. If the decision was in effect an interlocutory decree and not a final judgment, a motion for a new trial may be made after the term, if made before final judgment. Sampson *v.* U. S., 36 Ct. Cl. 194.

79. *Ex p.* United States, 16 Wall. (U. S.) 699, 21 L. ed. 507; *Ex p.* Russell, 13 Wall. (U. S.) 664, 20 L. ed. 632. But see Monroe *v.* U. S., 37 Ct. Cl. 79.

After judgment and while appeal is pending, if a new trial is granted, the judgment is vacated and the court of claims resumes control of the case and the parties. U. S. *v.* Young, 94 U. S. 258, 24 L. ed. 153.

80. If the court is equally divided and no judgment is announced, but the case is remanded for reargument, the fact that an equal number of the judges in the divided opinion file their decision that the motion be denied upon the merits does not decide the question involved nor deprive the court of jurisdiction to hear and determine the reargument. *Ex p.* United States, 16 Wall. (U. S.) 699, 21 L. ed. 507.

It constitutes no ground for a rehearing in a spoliation case, where the court has fixed the value of the vessel for the purposes of the decision, that the underwriter was bound to pay the full amount of the insurance, irrespective of the fact that the owners pur-

evidence.[81] The strict rules of the common law, which require a party seeking a new trial on the ground of newly discovered evidence to show that the absence of the evidence on the former trial was not the result of negligence, apply to cases under the Bowman Act.[82]

XIII. CONCURRENT AND CONFLICTING JURISDICTION.

A. Courts of Same State and Transfer of Causes — 1. EXCLUSIVE OR CONCURRENT JURISDICTION — a. Jurisdiction Conferred on One Court. Where jurisdiction over a particular subject-matter is conferred in express terms by the constitution of a state upon one court and not upon another, it will be presumed that it was the intention that the jurisdiction thus conferred should be exclusive.[83]

b. Power of Legislature to Confer Concurrent Jurisdiction. The legislature may confer upon a court jurisdiction concurrent with that of another court, where such act is a legitimate exercise of the power conferred upon the legislature, having regard also to such jurisdiction as may be conferred upon the latter court by the constitution of the state.[84] So if the jurisdiction conferred upon a court by the constitution is not exclusive, concurrent jurisdiction may be conferred upon another court.[85] If, however, the jurisdiction so conferred is exclusive an act of the legislature conferring the same jurisdiction upon another court will be unconstitutional.[86] And the legislature is not authorized to establish a court with a jurisdiction concurrent with that of another court by a constitutional provision that it may establish courts inferior to the latter court, with a limited jurisdiction.[87]

c. Effect on Court Previously Possessing Jurisdiction of Act Conferring Jurisdiction on Another Court. A court is not ousted of the jurisdiction which it possesses over a subject by a subsequent legislative enactment conferring jurisdiction on another court over the same subject, unless such an intention is plainly manifested either from the words of the statute or by a necessary implication therefrom.[88]

chased the vessel from the captors for a much smaller amount. Adams *v.* U. S., 24 Ct. Cl. 31.

81. Where a cause has been remanded to the docket for further evidence, either party is at liberty to take testimony, and on the second trial every fact found at the first is open to be controverted. Culliton *v.* U. S., 5 Ct. Cl. 627.

82. Nance *v.* U. S., 23 Ct. Cl. 463.

83. Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; Messner *v.* Giddings, 65 Tex. 301.

84. *California.*— Harper *v.* Freelon, 6 Cal. 76.

Illinois.— Myers *v.* People, 67 Ill. 503.

Louisiana.— Cecil *v.* Board of Liquidation, 30 La. Ann. 34.

Nebraska.— *In re* Creighton, 12 Nebr. 280, 11 N. W. 313.

New York.— *In re* Stilwell, 139 N. Y. 337, 34 N. E. 777; Brooklyn *v.* New York, 25 Hun 612.

Ohio.— Hagany *v.* Cohnen, 29 Ohio St. 82; Phelon *v.* Pittsburg, etc., R. Co., 5 Ohio Cir. Ct. 545.

Pennsylvania.— Com. *v.* Green, 58 Pa. St. 226.

Tennessee.— Jackson *v.* Nimmo, 3 Lea 597.

Wisconsin.— American L. & T. Co. *v.* Bond, 91 Wis. 204, 64 N. W. 854; Geise *v.* Greene, 49 Wis. 334, 5 N. W. 869.

See 13 Cent. Dig. tit. "Courts," § 1223.

85. *California.*— Seale *v.* Mitchell, 5 Cal. 401.

New York.— Matter of Bernstein, 3 Redf. Surr. 20.

North Carolina.— Johnson *v.* Futrell. 86 N. C. 122.

Ohio.— State *v.* Archibald, 52 Ohio St. 1, 38 N. E. 314.

Texas.— Johnson *v.* Happell, 4 Tex. 96.

See 13 Cent. Dig. tit. "Courts," § 1223.

86. *Ex p.* Batesville, etc., R. Co., 39 Ark. 82; Zander *v.* Coe, 5 Cal. 230; Edenton *v.* Wool, 65 N. C. 379; Timmins *v.* Bonner, 58 Tex. 554. See also Perea *v.* Barela, 5 N. M. 458, 23 Pac. 766; Burge *v.* Willis, 5 S. C. 212.

87. State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

88. *California.*—Courtwright *v.* Bear River, etc., Water, etc., Co., 30 Cal. 573; Fitzgerald *v.* Urton, 4 Cal. 235.

Connecticut.— Loomis *v.* Bourn, 63 Conn. 445, 28 Atl. 569.

District of Columbia.— Dawson *v.* Woodward, 6 D. C. 301.

Florida.— Hays *v.* McNealy, 16 Fla. 409.

Georgia.— Tritt *v.* Bize, 51 Ga. 494.

Illinois.— People *v.* Young, 72 Ill. 411.

Indiana.— Browning *v.* Smith, 139 Ind. 280, 37 N. E. 540; Brookville *v.* Gagle, 73 Ind. 117; Redden *v.* Covington, 29 Ind. 118.

d. Statute Creating Cause of Action and Conferring Jurisdiction on Particular Court. Where a new cause of action is created by a statute which provides that a particular tribunal shall take cognizance thereof, no other court will have jurisdiction.[89]

e. Jurisdiction Concurrent With Court of Equity. Courts of law may be invested with jurisdiction concurrent with courts of equity.[90]

f. Election of Tribunal. Where two courts have concurrent jurisdiction a party may elect to bring his action in either.[91]

g. Exclusive and Concurrent Jurisdiction of Particular Courts. The question whether a particular court has exclusive jurisdiction or whether another court has jurisdiction concurrent therewith is governed by the constitutional provision or legislative enactment creating such courts and conferring the jurisdiction. This principle applies in determining whether the jurisdiction of a probate court,[92] a

Mississippi.— Walker *v.* State, 53 Miss. 532.

Missouri.— Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687; Tackert *v.* Vogler, 85 Mo. 480; Purdy *v.* Gault, 19 Mo. App. 191.

New York.— Pollock *v.* Morris, 105 N. Y. 676, 12 N. E. 179; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Delafield *v.* Illinois, 2 Hill 159.

Pennsylvania.—McGeorge *v.* Hancock Steel, etc., Co., 11 Phila. 602.

Tennessee.— Taylor *v.* Pope, 5 Coldw. 413.

Texas.— Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

Wisconsin.— Gould *v.* Dodge, 30 Wis. 621.

United States.— Fidelity Trust Co. *v.* Gill Car Co., 25 Fed. 737.

See 13 Cent. Dig. tit. "Courts," § 1200.

Where original and exclusive jurisdiction is conferred, the court formerly possessing jurisdiction will be ousted of the same. Fisher *v.* Prewitt, 7 Ind. 519. But the mere creation of a court for the trial of a particular class of cases will not oust another court of the jurisdiction which it previously possessed in such cases. State *v.* Abram, 4 Ala. 272.

89. Smith *v.* Omnibus R. Co., 36 Cal. 281; Reed *v.* Omnibus R. Co., 33 Cal. 212; Aldrich *v.* Hawkins, 6 Blackf. (Ind.) 125; State *v.* Souder, 14 Ind. App. 472, 41 N. E. 468.

90. *Georgia.*— Mordecai *v.* Stewart, 37 Ga. 364; Justices Inferior Ct. *v.* Hemphill, 9 Ga. 65.

Illinois.—Equitable jurisdiction may be exercised by a court of law over its own processes and judgments, but not where justice can only be done by a court of full equity powers. Watson *v.* Reissig, 24 Ill. 281, 76 Am. Dec. 746.

Maryland.— Gott *v.* Carr, 6 Gill & J. 309.

Mississippi.— Tooley *v.* Kane, Sm. & M. Ch. 518.

Tennessee.— Fleming *v.* Talliafer, 4 Heisk. 352.

United States.— U. S. *v.* Spalding, 27 Fed. Cas. No. 16,365, 2 Mason 478.

See 13 Cent. Dig. tit. "Courts," § 1203; and, generally, EQUITY.

Although cases for the sole purpose of interpreting wills are within the exclusive jurisdiction of courts of chancery, other courts in which cases have been brought involving rights under wills may interpret their language when necessary for the decision of the case. Covert *v.* Sebern, 73 Iowa 564, 35 N. W. 636.

91. Slade *v.* His Creditors, 10 Cal. 483; Humble *v.* Hinkson, 3 A. K. Marsh. (Ky.) 468, 13 Am. Dec. 195; Rochester *v.* Roberts, 29 N. H. 360.

Effect of election.— If a party elects to bring his action in a particular court it will generally operate to confer exclusive jurisdiction on such court (Clement *v.* Story, 4 La. Ann. 371), unless the action is one at law of which equity may also take cognizance, and it appears that the court of law in which it is brought cannot recognize or administer certain equitable elements disclosed by the answer, in which case a court of equity may interfere (Ely *v.* Crane, 37 N. J. Eq. 157). And where a case is within the concurrent jurisdiction of common law and admiralty if the parties elect the common-law remedy they will be subject to the principles and rules of practice which prevail in that jurisdiction. Sawyer *v.* Eastern Steamboat Co., 46 Me. 400, 74 Am. Dec. 463. But where an action has been commenced both in a court of law and in a court of equity for the same cause, and a court of law, upon an allegation of this fact, makes an order that plaintiff elect whether he will pursue his remedy at law or in chancery, although a forced election is made at law and entered on the record, the court of chancery will not be concluded by such order and election. Planters', etc., Bank *v.* Walker, 7 Ala. 926.

92. *California.*— Toland *v.* Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100; Auguisola *v.* Arnaz, 51 Cal. 435; Griggs *v.* Clark, 23 Cal. 427.

Colorado.— People *v.* Barton, 16 Colo. 75, 26 Pac. 149; Loveland *v.* Sears, 1 Colo. 194.

Connecticut.— Benedict *v.* Chase, 58 Conn. 196, 20 Atl. 448, 8 L. R. A. 120.

Idaho.— Greathouse *v.* Heed, 1 Ida. 494.

Illinois.— Darling *v.* McDonald, 101 Ill. 370; Langworthy *v.* Baker, 23 Ill. 484.

Indiana.— Williams *v.* Perrin, 73 Ind. 57; High *v.* Taylor, 6 Blackf. 555.

Iowa.— Cooley *v.* Smith, 17 Iowa 99; Hummer *v.* Hummer, 3 Greene 42.

Kansas.— McLean *v.* Webster, 45 Kan. 644, 26 Pac. 10.

justice of the peace,[93] a court of common pleas,[94] a circuit court,[95] a district court,[96]

Louisiana.— Thompson *v.* Comeau, 23 La. Ann. 555; Hart *v.* Hoss, 22 La. Ann. 517; New Orleans *v.* Wire, 20 La. Ann. 500; James *v.* Fellowes, 20 La. Ann. 116; Babin *v.* Nolan, 4 Rob. 278.

Massachusetts.— Lynes *v.* Hayden, 119 Mass. 482; Bemis *v.* Stearns, 16 Mass. 200.

Mississippi.— Walker *v.* State, 53 Miss. 532; Ragland *v.* Green, 14 Sm. & M. 194; Sanders *v.* Douglass, 3 Sm. & M. 454; McRea *v.* Walker, 4 How. 455.

Missouri.— Pearce *v.* Calhoun, 59 Mo. 271; Chandler *v.* Dodson, 52 Mo. 128; Dodson *v.* Scroggs, 47 Mo. 285; Erwin *v.* Henry, 5 Mo. 469; Graham *v.* O'Fallon, 3 Mo. 507; Richardson *v.* Palmer, 24 Mo. App. 480; Woerther *v.* Miller, 13 Mo. App. 567.

Nebraska.— Stevenson *v.* Valentine, 38 Nebr. 902, 57 N. W. 746.

New York.— Haddow *v.* Lundy, 59 N. Y. 320; Cass *v.* Cass, 61 Hun 460, 16 N. Y. Suppl. 229; Chicago Mar. Bank *v.* Van Brunt, 61 Barb. 361; Nagle *v.* McGinniss, 49 How. Pr. 193; Matter of Valentine, 3 Dem. Surr. 563.

North Carolina.—Pegram *v.* Armstrong, 82 N. C. 326; Haywood *v.* Haywood, 79 N. C. 42.

Pennsylvania.—Palethorp *v.* Palethorp, 168 Pa. St. 102, 31 Atl. 917; Mercer Home for Disabled Clergymen *v.* Fisher, 162 Pa. St. 239, 29 Atl. 733; Brown *v.* Bailey, 159 Pa. St. 121, 28 Atl. 245; St. Margaret Memorial Hospital *v.* Pennsylvania Ins. Co., 158 Pa. St. 441, 27 Atl. 1053; Weimer *v.* Karch, 153 Pa. St. 385, 26 Atl. 432; Brotzman *v.* Riehl, 119 Pa. St. 645, 13 Atl. 483; Wapples' Appeal, 74 Pa. St. 100; Gilliland *v.* Bredin, 63 Pa. St. 393; Linsenbigler *v.* Gourley, 56 Pa. St. 166, 94 Am. Dec. 51; Reed *v.* Palmer, 53 Pa. St. 379.

Texas.— Fort *v.* Fitts, 66 Tex. 593, 1 S. W. 563; Huppman *v.* Schmidt, 65 Tex. 583; Frank *v.* De Lopez, 2 Tex. Civ. App. 245, 21 S. W. 279.

Vermont.— Goff *v.* Robinson, 60 Vt. 633, 15 Atl. 339; Robinson *v.* Stanley, 38 Vt. 570.

Wisconsin.— Lamberton *v.* Pereles, 87 Wis. 449, 58 N. W. 776, 23 L. R. A. 824; Lannon *v.* Hackett, 49 Wis. 261, 5 N. W. 474.

United States.— Chapman *v.* Borer, 1 Fed. 274, 1 McCrary 49; Lupton *v.* Janney, 15 Fed. Cas. No. 8,607, 5 Cranch C. C. 474.

See 13 Cent. Dig. tit. "Courts," § 1204 *et seq.*

93. *Alabama.*— Kansas City, etc., R. Co. *v.* Whitehead, 109 Ala. 495, 19 So. 705; Carew *v.* Lillienthall, 50 Ala. 44.

California.— Hicks *v.* Bell, 3 Cal. 219.

Connecticut.— Loomis *v.* Bourn, 63 Conn. 445, 28 Atl. 569.

Dakota.— St. Paul F. & M. Ins. Co. *v.* Hanson, 4 Dak. 162, 28 N. W. 193.

District of Columbia.— Dawson *v.* Woodward, 6 D. C. 301.

Florida.— McMillan *v.* Savage, 6 Fla. 748.

Georgia.— McDonald *v.* Feagin, 43 Ga. 360.

Indiana.— Witz *v.* Haynes, 43 Ind. 470; Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882.

Iowa.— Hutton *v.* Drebilis, 2 Greene 593; Nelson *v.* Gray, 2 Greene 397.

Kansas.— Henderson *v.* Kennedy, 9 Kan. 163.

Kentucky.— Sams *v.* Stockton, 14 B. Mon. 232; Sayre *v.* Lewis, 5 B. Mon. 90.

Maine.—Abbott *v.* Knowlton, 31 Me. 77; Ridlon *v.* Emery, 6 Me. 261.

Minnesota.— Castner *v.* Chandler, 2 Minn. 86.

Missouri.— Murphy *v.* Camphell, 36 Mo. 110; Pollock *v.* Hudgens, 12 Mo. 67; Talbot *v.* Greene, 6 Mo. 458; Mason *v.* Hannah, 30 Mo. App. 190.

New Hampshire.— Stevens *v.* Chase, 61 N. H. 340; Rochester *v.* Roberts, 29 N. H. 360.

New Mexico.— Romero *v.* Silva, 1 N. M. 157.

New York.— Price *v.* Grant, 15 Daly 436, 7 N. Y. Suppl. 904.

North Carolina.— Montague *v.* Mial, 89 N. C. 137.

Pennsylvania.— Moyer *v.* Illig, 52 Pa. St. 444; Campbell *v.* Com., 8 Serg. & R. 414; Richards *v.* Gage, 1 Ashm. 192.

South Carolina.— Burge *v.* Willis, 5 S. C. 212.

Texas.— Johnson *v.* Happell, 4 Tex. 96; Love *v.* McIntyre, 3 Tex. 10.

Washington.—State *v.* Hunter, 3 Wash. 92, 27 Pac. 1076.

See 13 Cent. Dig. tit. "Courts," § 1208.

94. Tyler *v.* Wilkerson, 20 Ind. 473; Holcroft *v.* Halbert, 16 Ind. 256; Herron *v.* Herron, 16 Ind. 129; Kiger *v.* Franklin, 15 Ind. 102; Love *v.* Mikals, 11 Ind. 227; Mills *v.* State, 10 Ind. 114; Morrel *v.* Buckley, 20 N. J. L. 667; Voss *v.* Loomis, 1 Ohio Cir. Ct. 20; Com. *v.* Alleghany County, 6 Pa. St. 445; Clark *v.* Rush, 1 Phila. (Pa.) 572.

95. *Alabama.*—McDaniel *v.* Moody, 3 Stew. 314.

Illinois.— Samuel *v.* Agnew, 80 Ill. 553.

Iowa.— Davey *v.* Burlington, etc., R. Co., 31 Iowa 553.

Kentucky.— Curtis *v.* Com., 1 Bush 125.

Missouri.— Mason *v.* Hannah, 30 Mo. App. 190.

Tennessee.— England *v.* Pearson, 16 Lea 443, 1 S. W. 42.

Virginia.— Com. *v.* Latham, 85 Va. 632, 8 S. E. 488; Ragland *v.* Broadnax, 29 Gratt. 401.

Wisconsin.— Geise *v.* Greene, 49 Wis. 334, 5 N. W. 869; Lewis *v.* Sercomb, 1 Wis. 394.

See 13 Cent. Dig. tit. "Courts," § 1209.

96. Com. *v.* Denny, 29 Pa. St. 380; Cosgrove *v.* Merz, 19 R. I. 278, 33 Atl. 370; Swan *v.* State, 48 Tex. 120; Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Heidenheimer *v.* Marx, 1 Tex. App. Civ. Cas. § 171.

a county court,[97] a superior court,[98] or a supreme court[99] is exclusive or concurrent with that of another court.

h. Exclusive and Concurrent Jurisdiction Over Particular Matters. In actions concerning infants[1] or lunatics,[2] in actions involving real estate[3] or claims to escheated property,[4] in actions to abate a nuisance,[5] in actions to enforce mechanics' or vendors' liens,[6] in actions to recover penalties,[7] in proceedings to recover taxes and assessments,[8] in the issuance of writs of prohibition,[9] and in habeas corpus, quo warranto, and mandamus proceedings[10] recourse must be had to the constitutional and statutory provisions creating courts and conferring jurisdiction upon them to determine whether different courts have concurrent jurisdiction or whether the jurisdiction of one court is exclusive.

2. Scope and Effect of Proceedings in Another Court — a. Priority and Retention of Jurisdiction. Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy.[11] This rule has been applied to proceed-

97. Danville Second Nat. Bank *v.* English, 21 Ill. App. 317.

98. Whitaker *v.* Daly, 78 Iowa 31, 42 N. W. 569; Humphrey *v.* Berkshire Woolen Co., 10 Allen (Mass.) 420.

99. People *v.* Chicago, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833; Langmaid *v.* Reed, 159 Mass. 409, 34 N. E. 593; Baldwin *v.* Wilbraham, 140 Mass. 459, 4 N. E. 829; White *v.* Quarles, 14 Mass. 451; Charleston *v.* Weller, 34 S. C. 357, 13 S. E. 628.

1. *Arkansas.*— Heilman *v.* Martin, 2 Ark. 158.

Illinois.— Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; Bond *v.* Lockwood, 33 Ill. 212.

Indiana.— Hollingsworth *v.* State, 8 Ind. 257.

Louisiana.— Cawthorn *v.* Cawthorn, 30 La. Ann. 1181; Fraser *v.* Zylicz, 29 La. Ann. 534; Balsineur *v.* Bills, 7 Mart. N. S. 105.

New York.— Wilcox *v.* Wilcox, 14 N. Y. 575.

Ohio.— Gorman *v.* Taylor, 43 Ohio St. 86, 1 N. E. 227.

Pennsylvania.— Com. *v.* Raser, 62 Pa. St. 436.

Tennessee.— Lake *v.* McDavitt, 13 Lea 26; Martin *v.* Keeton, 10 Humphr. 536.

Vermont.— Rutland Probate Ct. *v.* Slason, 23 Vt. 306.

Wisconsin.— Glasscott *v.* Warner, 20 Wis. 654.

See 13 Cent. Dig. tit. "Courts," § 1211; and, generally, Guardian and Ward; Infants.

2. Segur *v.* Pellerin, 16 La. 63; Walker *v.* Russell, 10 S. C. 82. See, generally, Insane Persons.

3. Robert *v.* Palmer, 14 Ga. 349.

4. *In re* Bouimo, 83 Mo. 433; State *v.* Allen, 2 Tenn. Ch. 42. See, generally, Escheat.

5. Natchitoches *v.* Coe, 3 Mart. N. S. (La.) 140. See, generally, Nuisances.

6. Stamps *v.* Bridwell, 57 Mo. 22; Ashburn *v.* Ayres, 28 Mo. 75; Gaty *v.* Brown, 11 Mo. 138; Phillips, etc., Mfg. Co. *v.* Campbell, 93 Tenn. 469, 25 S. W. 961; Hargave *v.* Simpson, 25 Tex. 396; Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160. See, generally, Mechanics' Liens; Vendor and Purchaser.

7. *Georgia.*— Western Union Tel. Co. *v.* Brightwell, 94 Ga. 434, 21 S. E. 518; Dicken *v.* Western Union Tel. Co., 94 Ga. 433, 21 S. E. 228; Solomon *v.* Western Union Tel. Co., 92 Ga. 360, 17 S. E. 265.

Indiana.— Aldrich *v.* Hawkins, 6 Blackf. 125.

Kentucky.— Com. *v.* Louisville, etc., R. Co., 30 S. W. 607, 17 Ky. L. Rep. 111.

Ohio.— Pittsburgh, etc., R. Co. *v.* State, 5 Ohio Dec. (Reprint) 552, 6 Am. L. Rec. 501.

Texas.— Morris *v.* State, (App. 1892) 18 S. W. 137. See also James *v.* State, (App. 1891) 16 S. W. 769; State *v.* Stoutsenberger, (App. 1891) 16 S. W. 304.

See 13 Cent. Dig. tit. "Courts," § 1218; and, generally, Penalties.

8. Meikel *v.* Meikel, 119 Ind. 421, 20 N. E. 720; Tackett *v.* Vogler, 85 Mo. 480 [*overruling* Williams *v.* Payne, 80 Mo. 409; Stamps *v.* Bridwell, 57 Mo. 22]; Deane *v.* Todd, 22 Mo. 90. See, generally, Municipal Corporations; Taxation.

9. Perry *v.* Shepherd, 78 N. C. 83. See, generally, Prohibition.

10. *Iowa.*— U. S. *v.* Dubuque County, Morr. 31.

Kansas.— State *v.* Kelly, 2 Kan. App. 178, 43 Pac. 299.

Missouri.— State *v.* Miller, 1 Mo. App. 48.

New York.—People *v.* Humphreys, 24 Barb. 521.

Pennsylvania.— Com. *v.* Swank, 79 Pa. St. 154.

Virginia.— Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262; Taylor *v.* Williams, 78 Va. 422.

Washington.— Jones *v.* Reed, 3 Wash. 57, 27 Pac. 1067.

See 13 Cent. Dig. tit. "Courts," § 1221; and, generally, Habeas Corpus; Mandamus; Quo Warranto.

11. *Alabama.*— Gould *v.* Hayes, 19 Ala. 438; Eaton *v.* Patterson, 2 Stew. & P. 9.

Arkansas.— State *v.* Devers, 34 Ark. 188; Ellis *v.* McHenry, 1 Ark. 205.

Colorado.— Consolidated Home Supply

ings in different probate courts of concurrent jurisdiction,[12] and likewise to proceedings in a probate court, and a court of equity, where the probate court has assumed jurisdiction and nothing intervenes to render such jurisdiction inade-

Ditch, etc., Co. *v.* New Loveland, etc., Irr., etc., Co., 27 Colo. 521, 62 Pac. 364; Louden Irrigating Canal Co. *v.* Handy Ditch Co., 22 Colo. 102, 43 Pac. 535.

Delaware.— Thomas *v.* Adams Express Co., 1 Pennew. 142, 39 Atl. 1014; Waples *v.* Waples, 1 Harr. 392; Beeson *v.* Elliott, 1 Del. Ch. 368.

District of Columbia.— Mason *v.* Jones, 7 D. C. 247.

Florida.— Byrne *v.* Brown, 40 Fla. 109, 23 So. 877; Beatty *v.* Ross, 1 Fla. 198.

Georgia.— Hardeman *v.* Battersby, 53 Ga. 36; Mordecai *v.* Stewart, 37 Ga. 364; Pope *v.* Solomons, 36 Ga. 541.

Illinois.—Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Freydenhall *v.* Baldwin, 103 Ill. 325; Ross *v.* Buchanan, 13 Ill. 55; Mason *v.* Piggott, 11 Ill. 85; Lancashire Ins. Co. *v.* Corbett, 62 Ill. App. 236; Mount *v.* Scholes, 21 Ill. App. 192.

Indiana.— Taylor *v.* Ft. Wayne, 47 Ind. 274; Hughes *v.* Lake Erie, etc., R. Co., 21 Ind. 175.

Iowa.— Gregory *v.* Howell, 118 Iowa 26, 91 N. W. 778.

Kansas.— Ewing *v.* Mallison, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299; State *v.* Chinault, 55 Kan. 326, 40 Pac. 662; Chicago, etc., R. Co. *v.* Chase County, 42 Kan. 223, 21 Pac. 1071.

Kentucky.— Hawes *v.* Orr, 10 Bush 431; McCann *v.* Louisville, 63 S. W. 446, 23 Ky. L. Rep. 558.

Louisiana.—Weymouth *v.* Roselins, 36 La. Ann. 527; Babin *v.* Delahoussaye, 31 La. Ann. 725; Poutz *v.* Bistes, 15 La. Ann. 636.

Maryland.— Wright *v.* Williams, (1901) 48 Atl. 397; State *v.* Dilley, 64 Md. 314, 1 Atl. 612; Cole *v.* Flitcraft, 47 Md. 312; Withers *v.* Denmead, 22 Md. 135; Winn *v.* Albert, 2 Md. Ch. 42; Brook *v.* Delaplaine, 1 Md. Ch. 351.

Massachusetts. — Miller *v.* Barnstable County Com'rs, 119 Mass. 485.

Michigan.— Hogan *v.* Wayne Cir. Judge, 106 Mich. 254, 64 N. W. 37.

Minnesota. — Duxbury *v.* Shanahan, 84 Minn. 353, 87 N. W. 944.

Mississippi. — Alexander *v.* Manning, 58 Miss. 634; Martin *v.* O'Brien, 34 Miss. 21; Glidewell *v.* Hite, 5 How. 110; Green *v.* Robinson, 5 How. 80.

New Jersey.—Heinselt *v.* Smith, 34 N. J. L. 215.

New York.— Schuehle *v.* Reiman, 86 N. Y. 270; Westerfield *v.* Rogers, 63 N. Y. App. Div. 18, 71 N. Y. Suppl. 401; Matter of Wing, 83 Hun 284, 31 N. Y. Suppl. 941; Conover *v.* New York, 25 Barb. 513; People *v.* Edson, 52 N. Y. Super. Ct. 53; Niblo *v.* Harrison, 9 Bosw. 668; McCarthy *v.* Peake, 9 Abb. Pr. 164, 18 How. Pr. 138; Whitney *v.* Stevens, 16 How. Pr. 369; Miles *v.* James, 2 N. Y. City Ct. 33.

North Carolina.—Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. 488; Young *v.* Rollins, 85 N. C. 485; Haywood *v.* Haywood, 79 N. C. 42; Childs *v.* Martin, 69 N. C. 126.

Ohio.— *Ex p.* Bushnell, 8 Ohio St. 599; Pugh *v.* Brown, 19 Ohio 202; Merrill *v.* Lake, 16 Ohio 373, 47 Am. Dec. 377.

Pennsylvania. — Wheatland's Appeal, 125 Pa. St. 38, 17 Atl. 251; Lorenz *v.* Wightman, 44 Pa. St. 27; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Slyhoof *v.* Flitcroft, 1 Ashm. 171.

Rhode Island.— Boston, etc., Corp. *v.* New York, etc., R. Co., 12 R. I. 220; Chapin *v.* James, 11 R. I. 86, 23 Am. Rep. 412.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204; Jordan *v.* Moses, 10 S. C. 431.

Tennessee.— Thompson *v.* Hill, 3 Yerg. 167.

Texas.— Bonner *v.* Hearne, 75 Tex. 242, 12 S. W. 38; Burdett *v.* State, 9 Tex. 43; Clepper *v.* State, 4 Tex. 242; McCorkle *v.* McCorkle, 25 Tex. Civ. App. 149, 60 S. W. 434.

Vermont.— Bellows Falls Bank *v.* Rutland, etc., Co., 28 Vt. 470. But see Sabin *v.* Kelton, 54 Vt. 283.

Virginia.— Spiller *v.* Wells, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878; Craig *v.* Hoge, 95 Va. 275, 28 S. E. 317.

West Virginia. — State *v.* Fredlock, 52 W. Va. 232, 43 S. E. 153; Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285.

Wisconsin. — Northwestern Iron Co. *v.* Land, etc., Imp. Co., 92 Wis. 487, 66 N. W. 515; Falk *v.* Goldberg, 45 Wis. 94.

United States.— Buck *v.* Colbath, 3 Wall. 334, 18 L. ed. 257; Owens *v.* Ohio Cent. R. Co., 20 Fed. 10; Davis *v.* Life Assoc. of America, 11 Fed. 781; Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 422; Gaylord *v.* Ft. Wayne, etc., R. Co., 10 Fed. Cas. No. 5,284, 6 Biss. 286; Haines *v.* Carpenter, 11 Fed. Cas. No. 5,905, 1 Woods 262 [*affirmed* in 91 U. S. 254, 23 L. ed. 345]; Mallett *v.* Dexter, 16 Fed. Cas. No. 8,988, 1 Curt. 178; Parsons *v.* Lyman, 18 Fed. Cas. No. 10,780, 32 Conn. 566, 5 Blatchf. 170.

See 13 Cent. Dig. tit. "Courts," § 1229.

An exception to the rule is held to exist in the case of a creditors' suit. Craig *v.* Hoge, 95 Va. 275, 28 S. E. 317.

12. *Illinois.*— People *v.* White, 11 Ill. 341.

Louisiana.—Hereford *v.* Babin, 14 La. Ann. 333; Stanbrough *v.* Garrett, 1 Rob. 13; State *v.* Probate Judge, 17 La. 500; Oakey *v.* Ducker, 13 La. 375; Hodge *v.* Durnford, 13 La. 187.

New York.— *In re* Buckley, 41 Hun 106; People *v.* Waldron, 52 How. Pr. 221.

Pennsylvania.— Holt's Estate, 11 Phila. 13. See also Whiteside *v.* Whiteside, 20 Pa. St. 473.

Washington.— Territory *v.* Klee, 1 Wash. 183, 23 Pac. 417.

See 13 Cent. Dig. tit. "Courts," § 1231.

quate;[13] and also generally where a probate court and some other state court has concurrent jurisdiction of a particular proceeding.[14]

b. Prior Proceedings Prosecuted to Judgment. If a proceeding has been prosecuted to a final judgment in a court of competent jurisdiction such judgment will be conclusive upon another court which has concurrent jurisdiction of the matter in controversy.[15]

c. Actions Subsequently Commenced. An action subsequently commenced in a court of concurrent jurisdiction by a party to a previous action will not deprive the former court of its power to determine the issues involved,[16] although if the parties during the pendency of a suit submit the controversy without objection to another court of concurrent jurisdiction a judgment in the latter suit will be binding upon them.[17]

d. Taking Paper From Custody of Another Court. No power exists in a court to draw an original paper from another court.[18]

13. *Alabama.*— Hause *v.* Hause, 57 Ala. 262; Moore *v.* Lesueur, 33 Ala. 237.

Connecticut.— Pitkin *v.* Pitkin, 7 Conn. 315.

Massachusetts.— Jenison *v.* Hapgood, 7 Pick. 1, 9 Am. Dec. 258.

Missouri.— Gray *v.* Clement, 12 Mo. App. 579.

New Jersey.—Van Mater *v.* Sickler, 9 N. J. Eq. 483.

New York.—Whitney *v.* Monro, 4 Edw. 5.

Vermont.—Merriam *v.* Hemmenway, 26 Vt. 565.

See 13 Cent. Dig. tit. "Courts," § 1234.

A court of equity may take jurisdiction where the probate court has no power in the matter (Gould *v.* Hayes, 19 Ala. 438; Young *v.* Brown, 75 Ga. 1; Hickman *v.* Stewart, 69 Tex. 255, 5 S. W. 833) or the ends of justice require it (Clarke *v.* Johnston, 10 N. J. Eq. 287). And where the jurisdiction of the orphans' court and the chancery court are concurrent it has been held that where the relief sought by a party requires the exercise of equitable powers the jurisdiction of the latter court is paramount. King *v.* Berry, 3 N. J. Eq. 44.

Different parties.— A proceeding before a surrogate by a creditor for an account is not barred by a suit in a court of chancery by another creditor for the same purpose. Rogers *v.* King, 8 Paige (N. Y.) 210.

14. *California.*—Gurnee *v.* Maloney, 38 Cal. 85, 99 Am. Dec. 352.

Illinois.— Hupp *v.* Hupp, 61 Ill. App. 445.

Indiana.— Coon *v.* Cook, 6 Ind. 268.

Kansas.— Johnson *v.* Cain, 15 Kan. 532.

Louisiana.— Gee *v.* Thompson, 37 La. Ann. 598; Bussy *v.* Nelson, 30 La. Ann. 25; Guilbeau *v.* Wiltz, 26 La. Ann. 600; Butterly's Succession, 10 La. Ann. 258.

Massachusetts.— Stearns *v.* Stearns, 16 Mass. 167.

Minnesota.— Jacobs *v.* Fouse, 23 Minn. 51.

Missouri.— Overton *v.* McFarland, 15 Mo. 312.

New Jersey.— Search *v.* Search, 27 N. J. Eq. 137; *In re* Coursen, 4 N. J. Eq. 408.

New York.— Garlock *v.* Vandevort, 128 N. Y. 374, 28 N. E. 599 [*affirming* 58 Hun 601, 12 N. Y. Suppl. 955]; Matter of Ayrault, 81 Hun 107, 30 N. Y. Suppl. 654; Matter of De Pierris, 79 Hun 279, 29 N. Y. Suppl. 360; Lewis *v.* Maloney, 12 Hun 207; Lawrence *v.* Parsons, 27 How. Pr. 26.

North Carolina.— Haywood *v.* Haywood, 79 N. C. 42.

Ohio.— Longley *v.* Sewell, 4 Ohio S. & C. Pl. Dec. 1.

Pennsylvania.— Schenck's Estate, 4 Wkly. Notes Cas. 511; Frey's Estate, 12 Phila. 1.

Rhode Island.— Dean *v.* Rounds, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802.

South Carolina.—Witte *v.* Clarke, 17 S. Ct. 313.

See 13 Cent. Dig. tit. "Courts," § 1232.

If the jurisdiction is too limited to give the relief sought for the rule does not apply. Hiatt *v.* Hiatt, 30 Ind. 190; Dwyer *v.* Garlough, 31 Ohio St. 158; Guth's Appeal, (Pa. 1886) 5 Atl. 728.

15. King *v.* Smith, 15 Ala. 264; Cleveland, etc., R. Co. *v.* Erie, 1 Grant (Pa.) 212; Wimmer's Appeal, 1 Whart. (Pa.) 96; Hibshman *v.* Dulleban, 4 Watts (Pa.) 183; Nalen *v.* Burke, 12 Pa. Co. Ct. 490; Parkes *v.* Gilbert, 1 Baxt. (Tenn.) 97; Thompson *v.* Hill, 3 Yerg. (Tenn.) 167.

Although a decree for alimony has been obtained in one court, a subsequent action may be maintained in another to compel the husband to support the children. State *v.* Schuman, 8 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 619.

Although a court may have concurrent jurisdiction with another in certain matters, but no jurisdiction is conferred on the former court in such matters in those cases that had their inception in the latter court, all orders in such cases made after a final decree in the latter court must be in such court. Preston *v.* Preston, 44 Vt. 630.

16. Barkdull *v.* Herwig, 30 La. Ann. 618. See also Mount *v.* Scholes, 21 Ill. App. 192; and ABATEMENT AND REVIVAL, II, W [1 Cyc. 45].

A subsequent suit by a defendant not served will not deprive the former court of jurisdiction. Totten *v.* Lawton, 8 Ohio Cir. Ct. 377.

17. Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685.

18. Gray *v.* Garnsey, 32 Me. 180.

The production of a deposition in the hands

3. Jurisdiction as to Prisoners Under Arrest, Commitment, or Sentence. Where a person is under prosecution or has been committed or sentenced by one court, no other court will upon application discharge such prisoner from arrest in the absence of authority conferred upon it to so act either expressly or by necessary implication.[19]

4. Jurisdiction as to Property in Custody of Another Court — a. In General. Where property is in the possession of, and subject to the jurisdiction of, one court another court of concurrent jurisdiction cannot interfere with the possession of the former.[20] This rule, however, only applies where the former court is in the actual or constructive possession of the property.[21] Nor does the rule oust the jurisdiction of all other courts to determine the same controversy, so far as they may rightfully do so, but only operates to protect the immediate possession of the first court.[22]

b. Replevin Against Officer Attaching Property. Where property has been wrongfully attached by an officer it is not necessary that an action of replevin to recover such property shall be brought in the court which issued the attachment.[23]

5. Jurisdiction as to Process, Judgment, or Records of Another Court — a. In General. Where a party chooses the remedies of one forum he cannot avail himself of, or call to his aid, those of another forum.[24] And the court from

of a commissioner who has taken the same under a commission from the chancery court cannot be compelled by the circuit court in the absence of an order authorizing it from the former court. Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

19. *Ex p.* Fennessy, 54 Cal. 101; Stryker *v.* Rea, 11 N. J. L. 319; Hatch *v.* St. Clair, 2 Ohio Cir. Ct. 163; Respublica *v.* Philadelphia, 2 Yeates (Pa.) 349. See, generally, Habeas Corpus.

Where one is arrested and bound over by a justice of the peace another justice cannot settle the case. State *v.* Mousely, 4 Harr. (Del.) 553.

Where it is provided by statute that the legality of any judgment or process whereby a party is in custody shall not be inquired into by any court, if such custody is upon final process issued on final judgment by a court of competent jurisdiction, one who has been sentenced by a court of general jurisdiction cannot be released on habeas corpus. *In re* Lybarger, 2 Wash. 131, 25 Pac. 1075.

20. *California.*— Averill *v.* The Hartford, 2 Cal. 308.

Idaho.—Thum *v.* Pyke, (1901) 66 Pac. 157.

Illinois. — Newman *v.* Commercial Nat. Bank, 156 Ill. 530, 41 N. E. 156 [*affirming* 55 Ill. App. 534].

Kansas.— Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072.

Kentucky.— Stemmons *v.* King, 8 B. Mon. 559; Biggs *v.* Garrard, 6 B. Mon. 484, 44 Am. Dec. 778.

Louisiana.— Lamorere *v.* Cox, 32 La. Ann. 246; Adams *v.* Daunis, 29 La. Ann. 315; Shiff *v.* Carprette, 14 La. Ann. 801; Twitty *v.* Clarke, 14 La. Ann. 503.

Maryland.— Jones *v.* Jones, 1 Bland 443, 18 Am. Dec. 327.

Missouri.—Metzner *v.* Graham, 57 Mo. 404.

New Jersey.— Day *v.* Compton, 37 N. J. L. 514.

New York.— People *v.* Murray Hill Bank, 10 N. Y. App. Div. 328, 41 N. Y. Suppl. 804, 26 N. Y. Civ. Proc. 1; Kenny *v.* Geoghegan, 9 N. Y. Civ. Proc. 378.

North Carolina.— Morris *v.* Whitehead, 65 N. C. 637; Bear *v.* Cohen, 65 N. C. 511.

Ohio.— *In re* Cincinnati Consumers' Brewing Co., 9 Ohio S. & C. Pl. Dec. 519, 6 Ohio N. P. 472.

Texas. — *Compare* Crow *v.* Red River County Bank, 52 Tex. 362.

Virginia.— Ford *v.* Watts, 95 Va. 192, 28 S. E. 179.

United States.—Logan *v.* Greenlaw, 12 Fed. 10.

See 13 Cent. Dig. tit. "Courts," § 1261.

Property in the custody of a court's officer is in the custody of the court within the meaning of the rule. Southern *v.* Fisher, 6 S. C. 345.

Property in receiver's possession.— Property in the custody of a court through its receiver will not be interfered with by another court. People *v.* Murray Hill Bank, 10 N. Y. App. Div. 328, 41 N. Y. Suppl. 804, 26 N. Y. Civ. Proc. 1; Brown *v.* Carolina Cent. R. Co., 83 N. C. 128; State *v.* Marietta, etc., R. Co., 35 Ohio St. 154; Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273; Hammond *v.* Tarver, 11 Tex. Civ. App. 48, 31 S. W. 841. *Compare* Conley *v.* Deere, 11 Lea (Tenn.) 274. And where a receiver has been appointed by a court, but no authority is given him to execute notes, another court cannot reform notes executed by him, so as to bind him in his representative capacity. Peoria Steam Marble Works *v.* Hickey, 110 Iowa 276, 81 N. W. 473, 80 Am. St. Rep. 296.

21. *In re* Hall, etc., Co., 73 Fed. 527.

22. Logan *v.* Greenlaw, 12 Fed. 10.

23. Johnson *v.* Jones, 16 Colo. 138, 26 Pac. 584; Wilde *v.* Rawles, 13 Colo. 583, 22 Pac. 897. See also Seaton *v.* Higgins, 50 Iowa 305; Ramsden *v.* Wilson, 49 Iowa 211.

24. Sherill *v.* Parrott, 26 Ga. 388. See, generally, Election of Remedies.

which process originally issues or the judge thereof has control of such process for every purpose.[25]

b. Process. Where mesne or final process is issued by a court of general jurisdiction, a court of another jurisdiction will not review or decide upon the regularity of such process.[26]

c. Judgments — (i) *In General.* In the absence of statutory authority, one court has no power to review the decree of another court.[27]

(ii) *Enforcement.* Resort should generally be had to the court in which a decree or judgment is obtained for the enforcement of the same,[28] although in some cases another court has been permitted to assume jurisdiction for this purpose.[29]

(iii) *Satisfaction.* Every court ordinarily has power to control its own process, and the satisfaction of its judgments, and no other court has any power in respect thereto.[30]

d. Execution — (i) *Enforcement.* A judge of a court has no jurisdiction to enforce by rule the performance of any duty imposed by statute upon the sheriff, such as the enforcement of an execution issued by another court, in a matter of which the former court has not acquired jurisdiction in some recognized mode of proceeding, unless expressly authorized by law to so act.[31]

25. Com. *v.* Smith, 4 Phila. (Pa.) 419.

26. How *v.* Kane, 2 Pinn. (Wis.) 531, 2 Chandl. (Wis.) 222, 54 Am. Dec. 152. See also Nelson *v.* Turner, 2 Md. Ch. 73; and, generally, Process.

27. Hancock *v.* Hutcherson, 76 Va. 609. See also Freeman *v.* Nelson, 4 Redf. Surr. (N. Y.) 374; Walton *v.* Pearson, 85 N. C. 34; and, generally, Judgments.

No power to grant a supersedeas to a judgment, a decree of the supreme court, exists in a circuit court. Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 507.

Set-off of judgment of other court.— A justice of the peace cannot order a judgment recovered in another court to be set off against a judgment recovered before him. Flavell *v.* Britton, 56 N. J. L. 218, 27 Atl. 1012.

28. State *v.* Livaudias, 39 La. Ann. 984, 3 So. 185; Gee *v.* Thompson, 37 La. Ann. 598; Canal Bank *v.* Copeland, 12 La. 34; Niles *v.* Perry, 29 How. Pr. (N. Y.) 192; Blake *v.* Locy, 6 How. Pr. (N. Y.) 108; Rusk *v.* Sackett, 28 Wis. 400. See also Boltz *v.* Schutz, 61 Minn. 444, 64 N. W. 48.

Action at law to enforce decree in equity.— Where a court of equity has rendered a decree that a sum of money be paid, an action at law within the same jurisdiction to recover such sum will not lie. Boyle *v.* Schindel, 52 Md. 1.

An independent suit to revive a judgment and obtain execution cannot be maintained in a county other than that in which the judgment was rendered. Thompson *v.* Parker, 83 Ind. 96. So rights to be exercised under the order and direction of the court making an interlocutory and administrative decree cannot be asserted by an independent suit in another court. Cheever *v.* Rutland, etc., R. Co., 39 Vt. 653.

Payment of costs recovered in a suit in one court cannot be ordered by another court. Flintham *v.* Forsythe, 9 Serg. & R. (Pa.) 133.

If one court is entirely without remedy to enforce a judgment another court may assume jurisdiction. McKibben *v.* Salinas, 41 S. C. 105, 19 S. E. 302.

29. Honore *v.* Colmesnil, 4 Dana (Ky.) 291 (holding that where a judgment was recovered in one county against a resident of another county and a bill was filed in the latter county to subject defendant's interest in the real estate in such county and his choses in action to the payment of the judgment the circuit court of either county might take jurisdiction); Hull *v.* Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125 (holding that the district court has jurisdiction of an action to foreclose a lien of a judgment rendered by the county court); Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39 (holding that a circuit court has jurisdiction of a creditors' bill founded on a judgment of a superior court).

Actions involving title to property.— Jurisdiction has been assumed by a circuit court, under its power to try all cases where title to land is in issue, of an action to set aside a conveyance of land as fraudulent and to subject the same to sale on execution of a judgment of a court of common pleas (Bray *v.* Hussey, 24 Ind. 228), and by a court of concurrent jurisdiction of ancillary proceedings by a judgment creditor to remove clouds from titles to property subject to the lien of his judgment (Scottish-American Mortg. Co. *v.* Follanshee, 14 Fed. 125, 9 Biss. 482).

30. Burney *v.* Hunter, 32 Ill. App. 441; Maupin *v.* Franklin County, 67 Mo. 327; Provost *v.* Millard, 3 Oreg. 370.

Where it is provided by statute that judgments of the courts of one county may be transferred to those of another for the purposes of execution and satisfaction the courts of the latter county will not inquire into the validity of a satisfaction entered on the order of the court where the judgment was rendered after it was transferred under the statute and execution was issued thereon. King *v.* Nimick, 34 Pa. St. 297.

31. Gibbes *v.* Morrison, 39 S. C. 369, 17 S. E. 803.

(II) *STAY.* Under a statute which confers jurisdiction on the judges of the county courts concurrent with those of the circuit courts to issue writs of certiorari and supersedeas, a judge of the former court is not authorized to supersede an execution issued by a justice of the peace unless such action is ancillary to a certiorari to remove the cause from the justice for a trial *de novo.*[32]

(III) *QUASHAL.* Where an execution is issued by the court of one county to the sheriff of another county, a court of the latter county has no jurisdiction to quash the same.[33]

6. INJUNCTION OR PROHIBITION AGAINST PROCEEDINGS — a. In General. A court has no power to restrain a suit brought before another court which has complete jurisdiction thereof, and is able to afford adequate relief.[34] Such action may, however, be taken where the former court is unable because of want of jurisdiction to afford the relief sought.[35]

b. Enforcement of Judgment. The enforcement of a judgment rendered by one court will not be enjoined by another court of concurrent jurisdiction.[36] And

32. Gray *v.* Dennis, 3 Ala. 716. See, generally, SUPERSEDEAS.

33. McDonald *v.* Tiemann, 17 Mo. 603. See, generally, EXECUTIONS.

34. *California.*— Wilson *v.* Baker, 64 Cal. 475, 2 Pac. 253; Uhlfelder *v.* Levy, 9 Cal. 607.

Georgia.— Arnold *v.* Arnold, 62 Ga. 627.

Indiana.—Indiana, etc., R. Co. *v.* Williams, 22 Ind. 198.

Louisiana.— State *v.* Voorhies, 40 La. Ann. 1, 3 So. 460; State *v.* Judge, 39 La. Ann. 619, 2 So. 385; State *v.* Judge, 39 La. Ann. 132, 1 So. 437; Brott *v.* Eager, 28 La. Ann. 937; Rising Sun Soc. *v.* Rising Sun Benev. Assoc., 28 La. Ann. 548; Wilmot *v.* New Orleans, 27 La. Ann. 158.

Maryland.— Brown *v.* Wallace, 4 Gill & J. 479.

Massachusetts.— Hunt *v.* Maynard, 6 Pick. 489.

Michigan.— Maclean *v.* Wayne Cir. Judge, 52 Mich. 257, 18 N. W. 396.

New York.—Rutherfurd *v.* Myers, 50 N. Y. App. Div. 298, 63 N. Y. Suppl. 939; Perault *v.* Rand, 10 Hun 222; Schell *v.* Erie R. Co., 51 Barb. 368, 4 Abb. Pr. N. S. 287, 35 How. Pr. 438; Winfield *v.* Bacon, 24 Barb. 154; Grant *v.* Quick, 5 Sandf. 612; Bennett *v.* Le Roy. 5 Abb. Pr. 55, 14 How. Pr. 178; Davis *v.* Davis, 4 Redf. Surr. 355. *Compare* Garrison *v.* Marie, 7 N. Y. Civ. Proc. 113, 1 How. Pr. N. S. 348.

Ohio.— Merrill *v.* Lake, 16 Ohio 373, 47 Am. Dec. 377; Ries *v.* Farmers', etc., Bank, 10 Ohio Cir. Ct. 656, 5 Ohio Cir. Dec. 20.

Texas.— Lopez *v.* Rodrigues, 3 Tex. App. Civ. Cas. § 112. *Compare* Kitchen *v.* Crawford, 13 Tex. 516; Cannon *v.* Hendricks, 5 Tex. 339.

See 13 Cent. Dig. tit. "Courts," § 1270; and, generally, INJUNCTIONS.

But an administrator who is an officer of a court may be ordered by such court to dismiss an action brought by him in another court merely for his own benefit. Raugh *v.* Weis, 138 Ind. 42, 37 N. E. 331.

35. *Alabama.*— Eaton *v.* Patterson, 2 Stew. & P. 9.

California.— Uhlfelder *v.* Levy, 9 Cal. 607.

Florida.— Scarlett *v.* Hicks, 13 Fla. 314.

Georgia.— English *v.* Thorn, 96 Ga. 557, 23 S. E. 843.

New Jersey.— Crane *v.* Ely, 37 N. J. Eq. 564.

See 13 Cent. Dig. tit. "Courts," § 1270.

36. *California.*— Flaherty *v.* Kelly, 51 Cal. 145; Crowley *v.* Davis, 37 Cal. 268; Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

Colorado.— Pueblo Chicago Lumber Co. *v.* Danziger, 7 Colo. App. 149, 42 Pac. 683.

Georgia.— Reynolds *v.* Dunlap, 94 Ga. 727, 19 S. E. 906.

Indiana.— Scott *v.* Runner, 146 Ind. 12, 44 N. E. 755, 58 Am. St. Rep. 345.

Kentucky.—Mallory *v.* Dauber, 83 Ky. 239; Neeters *v.* Clements, 12 Bush 359; Lamaster *v.* Lair, 1 Dana 109; McConnell *v.* Rowe, 1 S. W. 582, 8 Ky. L. Rep. 343. *Compare* Mitchell *v.* Stewart, 4 J. J. Marsh. 551.

Louisiana.— Shields *v.* Pipes, 31 La. Ann. 765; State *v.* Judge Sixth Dist. Ct., 30 La. Ann. 1350; Cobb *v.* Richardson, 30 La. Ann. 1228; Dufossat *v.* Berens, 18 La. Ann. 339.

Montana.— Beck *v.* Fransham, 21 Mont. 117, 53 Pac. 96.

New York.— See Wright *v.* Fleming, 12 Hun 469.

Wisconsin.—Orient Ins. Co. *v.* Sloan, 70 Wis. 611, 36 N. W. 388; Platto *v.* Deuster, 22 Wis. 482.

See 13 Cent. Dig. tit. "Courts," § 1272; and, generally, JUDGMENTS.

Limitations of rule.— The execution of a writ of possession may be enjoined where the sheriff in executing it would be merely a trespasser, as this is not the enjoining of the judgment on which the writ was issued. Reagan *v.* Evans, 2 Tex. Civ. App. 35, 21 S. W. 427. So a judgment against a receiver rendered by one court subsequent to his appointment by another court of coördinate jurisdiction may be enjoined from enforcement. Gardner *v.* Caldwell, 16 Mont. 221, 40 Pac. 590. And the execution of a judgment taken on a forged note by motion in one chancery court without notice to the maker may be enjoined in another. Douglass *v.* Joyner, 1 Baxt. (Tenn.) 32.

a superior court will not enjoin the enforcement of a judgment rendered by an inferior court of competent jurisdiction unless some statute conferring jurisdiction upon the former court to so act is shown.[37]

c. Enforcement of Execution. One court cannot control the process of another court, and therefore cannot enjoin the levy of an execution issued on the judgment of another tribunal.[38]

d. Execution of Writ of Mandamus. If a peremptory writ of mandamus is issued by the highest court of a state or another court of competent jurisdiction, an inferior court has no power to stay the same.[39]

7. Vacating, Modifying, or Annulling Decisions — a. In General. Where a judgment or decree has been rendered by a court of competent jurisdiction it can only be reviewed by such methods as are provided by law, and no other court of concurrent jurisdiction has any power to modify, annul, or set aside such a judgment or decree.[40] Thus a judgment or decree of a probate court in respect to

37. Green *v.* Tittman, 124 Mo. 372, 27 S. W. 391.

In case of fraud an injunction may be granted. Pueblo Chicago Lumber Co. *v.* Danziger, 7 Colo. App. 149, 42 Pac. 683; State *v.* Engelmann, 86 Mo. 551.

In Texas district courts may under the constitution enjoin the enforcement of a judgment rendered by a justice of the peace. Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

38. *Indiana.*— Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537.

Louisiana.—Arthurs *v.* Sheriff, 43 La. Ann. 414, 9 So. 126.

Missouri.— Kinealy *v.* Staed, 55 Mo. App. 176.

Ohio.— Sample *v.* Ross, 16 Ohio 419.

Texas. — Lincoln *v.* Anderson, (Civ. App. 1899) 51 S. W. 278; Bowser *v.* Willett, 1 Tex. App. Civ. Cas. § 401; Wheeler, etc., Mfg. Co. *v.* Collins, 1 Tex. App. Civ. Cas. § 132. *Compare* Corbett *v.* Provident Nat. Bank, 23 Tex. Civ. App. 602, 57 S. W. 61.

See 13 Cent. Dig. tit. "Courts," § 1273.

Limitations of rule.— An injunction has been sustained where granted by a district court of a county in which it is sought to be enforced, to restrain the enforcement of an execution upon a judgment of the supreme court. Massie *v.* Mann, 17 Iowa 131; Davis *v.* Bonar, 15 Iowa 171. So where an execution is issued upon the judgment of a district court, another district court has been held to have the power to enjoin the sale of property situated within the district. Hobgood *v.* Brown, 2 La. Ann. 323. See also Arenstein *v.* Weber, 21 La. Ann. 199. Again an injunction may be granted where the ground of the application is that the property levied upon is not that of the execution defendant (Davis *v.* Clark, 26 Ind. 424, 89 Am. Dec. 471) or that it has been satisfied (Greenfield *v.* Hutton, 1 Baxt. (Tenn.) 216).

39. Weber *v.* Zimmerman, 23 Md. 45.

40. *California.*— Anthony *v.* Dunlap, 8 Cal. 26. *Compare* Borland *v.* Thornton, 12 Cal. 440.

Illinois.— Mathias *v.* Mathias, 104 Ill. App. 344 [*affirmed* in 202 Ill. 125, 66 N. E. 1042].

Indiana.— Black *v.* Plunkett, 132 Ind. 599, 31 N. E. 567; Coleman *v.* Barnes, 33 Ind. 93; Gregory *v.* Perdue, 29 Ind. 66.

Kansas.— Meixell *v.* Kirkpatrick, 28 Kan. 315.

Kentucky.— Stahl *v.* Brown, 84 Ky. 325, 1 S. W. 540, 8 Ky. L. Rep. 279.

Louisiana.— Stevenson *v.* Weber, 29 La. Ann. 105; Vaughn's Succession, 26 La. Ann. 149; Clark *v.* Christine, 12 La. 394.

Maryland.— McDowell *v.* Goldsmith, 2 Md. Ch. 370.

Michigan.— Dodge *v.* Northrop, 85 Mich. 243, 48 N. W. 505.

New Jersey.— Brady *v.* Atlantic City, 53 N. J. Eq. 440, 32 Atl. 271.

New York.— Fisher *v.* Hepburn, 48 N. Y. 41; Matter of Trimm, 30 Misc. 493, 63 N. Y. Suppl. 952. But see Cruikshank *v.* Cruikshank, 30 N. Y. App. Div. 381, 51 N. Y. Suppl. 926.

North Carolina.— Birdsey *v.* Harris, 68 N. C. 92.

Ohio.— Carey *v.* Wyandot County Com'rs, 20 Ohio 624; Griffith *v.* Crawford County Com'rs, 20 Ohio 609.

Pennsylvania.— Doyle *v.* Com., 107 Pa. St. 20; *In re* Clayton, 1 Chest. Co. Rep. 21.

Rhode Island.— Kinkead *v.* Keene, 22 R. I. 336, 47 Atl. 887.

South Carolina.— Harvey *v.* Huggins, 2 Bailey 252.

Tennessee.— Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968.

Vermont.— Buffum *v.* Haynes, 68 Vt. 534, 35 Atl. 474.

Wisconsin.— Parish *v.* Marvin, 15 Wis. 247.

See 13 Cent. Dig. tit. "Courts," § 1279.

Fraud.— Where a judgment is collusively obtained in a circuit court, upon proceedings instituted in the orphans' court, the latter court may entertain proceedings to set such judgment aside. Munnikhuysen *v.* Magraw, 57 Md. 172. So where authority is by statute conferred upon a county court to set aside a judgment rendered by a justice of the peace by default, when the party has been deprived of his day in court by fraud, accident, or mistake, the former court has the same power in examining those cases which come within the operation of the statute as it would have in examining its own proceedings. Mosseaux *v.* Brigham, 19 Vt. 457. See

matters particularly within the jurisdiction of such court cannot be modified or annulled by an original proceeding in another court.[41]

b. Judgment Only Incidentally Involved. If the question of the nullity of a judgment is only incidentally involved in an action, such action may be brought before any court of competent jurisdiction.[42]

c. Order by One Department of Court. One department of a court may by order vacate an order previously made by another department of the same court authorizing the issuance of an execution.[43]

d. Judicial Sales. Where a sale has been made under the order of, and confirmed by, a court of competent jurisdiction, a proceeding for the annulment of such sale should be brought before the court issuing the order.[44]

e. Change of Venue. If a change of venue is granted to another court after a proceeding has been commenced to set aside a decree in the court which granted it, the action of the former court in setting aside the decree is valid.[45]

8. Transfer of Causes — a. In General — (i) *Constitutionality of Statute Authorizing.* As a general rule it is within the constitutional powers conferred upon the legislature of a state to provide by statute for the removal of causes from one court to another.[46]

(ii) *Constitutional and Statutory Provisions Control.* The question as to the courts from or to which a cause may be removed must be determined in each case from the particular constitutional or statutory provisions in respect thereto.[47] And this applies in determining what causes may be transferred from

also Stapleton *v.* Wilcox, 2 Tex. Civ. App. 542, 21 S. W. 972.

41. *Louisiana.*— Rhodes *v.* Union Bank, 7 Rob. 63.

Mississippi.— Griffith *v.* Vertner, 5 How. 736.

Missouri.— Sheetz *v.* Kirtley, 62 Mo. 417.

New Mexico.— Spiegelberg *v.* Mink, 1 N. M. 308.

North Carolina.— Westcott *v.* Hewlett, 67 N. C. 191.

See 13 Cent. Dig. tit. "Courts," § 1282.

Where the probate of a will is conclusive "as to its due execution," under the provisions of a statute, no original jurisdiction exists in a district court to set aside the will or the probate thereof. Loosemore *v.* Smith, 12 Nebr. 343, 11 N. W. 493.

In case of fraud in connection with the proceedings in the probate court relief may be granted. Gafford *v.* Dickinson, 37 Kan. 287, 15 Pac. 175; Vanmeter *v.* Jones, 3 N. J. Eq. 520; Boulton *v.* Scott, 3 N. J. Eq. 231.

42. Bledsoe *v.* Erwin, 33 La. Ann. 615, where it was so held in the case of a judgment void by reason of a defective citation, and a suit was brought for the recovery of land sold in execution of such judgment.

43. Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

44. Graham *v.* Gibson, 14 La. 146; Baker *v.* Lamkin, 11 Ohio Cir. Ct. 103; Nash *v.* Milburn, 25 Tex. 783; Nicholson *v.* Harvey, (Tex. Civ. App. 1894) 25 S. W. 458; Griffin *v.* Birkhead, 84 Va. 612, 5 S. E. 685. But see Stapleton *v.* Butterfield, 34 La. Ann. 822; Choppin *v.* Forstall, 28 La. Ann. 303; Gulley *v.* Macy, 81 N. C. 356. See, generally, Judicial Sales.

45. State *v.* Whitcomb, 52 Iowa 85, 2 N. W. 970, 35 Am. Rep. 258. See, generally, Venue.

46. *Arkansas.*— *Ex p.* Block, 11 Ark. 281.

Maryland.— Wright *v.* Hamner, 5 Md. 370.

Michigan.— Wood *v.* Adsit, 105 Mich. 378, 63 N. W. 419.

Mississippi.— Linn *v.* Kyle, Walk. 315; Blanchard *v.* Buckholt, Walk. 64.

New Jersey.— Embley *v.* Hunt, 29 N. J. Eq. 306.

New York.— *Compare* Cashman *v.* Johnson, 4 Abb. Pr. 256.

Texas.— Treasurer *v.* Wygall, 46 Tex. 447; Armstrong *v.* Emmet, 16 Tex. Civ. App. 243, 41 S. W. 87.

Virginia.— Danville *v.* Blackwell, 80 Va. 38.

Wisconsin.— McNab *v.* Noonan, 28 Wis. 434.

See 13 Cent. Dig. tit. "Courts," § 1289.

The power to alter and abolish courts carries with it the power to authorize removal. Embley *v.* Hunt, 29 N. J. Eq. 306.

47. *Maryland.*— De Murguiondo *v.* Frazier, 63 Md. 94; Weiskittle *v.* State, 58 Md. 155.

Missouri.— *In re* Garesche, 85 Mo. 469.

New York.— Matter of Munger, 10 N. Y. App. Div. 347, 41 N. Y. Suppl. 882.

Pennsylvania.— Cobbs *v.* Burns, 61 Pa. St. 278; Hogsett *v.* Columbia Iron, etc., Co., 15 Pa. Super. Ct. 474.

South Carolina.— Riddle *v.* Reese, 53 S. C. 198, 31 S. E. 222.

Tennessee.— Miller *v.* Conlee, 5 Sneed 432.

See 13 Cent. Dig. tit. "Courts," § 1291.

Where there is no such court as that designated in the order of removal, by reason of the adoption of a constitutional provision creating new courts, the order will be void as will also the recognizance for the appearance of the party before the court specified. State *v.* Manly, 1 Md. 135.

one court to another,[48] and also the sufficiency of the grounds for removal in general.[49]

(III) *Discretion of Court.* Where it is provided by statute that when a case has been pending in a certain court for a certain period of time it shall be removed to another court on motion, without notice, although no discretion is left to the court as to the cause of removal, yet some discretion is conferred upon it as to the time when the motion will be entertained.[50]

(IV) *Issues of Fact.* Issues of fact may in some cases be transmitted from one court to another for trial.[51]

(V) *Cross Appeals.* In Missouri, where cross appeals are taken, one to the supreme court and one to the court of appeals, the case should be transferred by the latter court to the former.[52]

(VI) *Actions Brought in Court Without Jurisdiction.* Where an action is brought in a court which has no jurisdiction thereof, such court has no power to transfer the same but should dismiss it.[53]

48. *Arkansas.*—Jackson *v.* Gorman, 70 Ark. 88, 66 S. W. 346.

Florida.— See *Ex p.* Ivey, 26 Fla. 537, 8 So. 427.

Indiana.— Kiefer *v.* Klinsick, 13 Ind. App. 253, 37 N. E. 1048.

Kentucky.— Salyer *v.* Arnett, 62 S. W. 1031, 23 Ky. L. Rep. 321.

Maine.— Thorn *v.* Mosher, 60 Me. 463.

Maryland.— Trayhern *v.* Hamill, 53 Md. 90.

Massachusetts.— Bliss *v.* Hurd, 168 Mass. 463, 47 N. E. 245; Carter *v.* Wabash, etc., R. Co., 137 Mass. 187; Dion *v.* Powers, 128 Mass. 192; Sullivan *v.* Fall River, 125 Mass. 568; Martin *v.* Tobin, 123 Mass. 85; Humphrey *v.* Berkshire Woolen Co., 10 Allen 420.

Michigan.— Pruyn *v.* Kent Cir. Judge, 126 Mich. 244, 85 N. W. 733; Scott *v.* Wayne Cir. Judges, 58 Mich. 311, 25 N. W. 200.

Minnesota.— Norton *v.* Beckman, 53 Minn. 456, 55 N. W. 603.

Missouri.— State *v.* Rombauer, 125 Mo. 632, 28 S. W. 968.

New Jersey.— Bumstead *v.* Monmouth Pl. Judges, 56 N. J. L. 414, 28 Atl. 558.

New York.— Goldman *v.* Jacobs, 38 Misc. 781, 78 N. Y. Suppl. 833; Greve *v.* Wallowitz, 24 Misc. 601, 54 N. Y. Suppl. 175; Tuttle *v.* Galligan, 23 Misc. 457, 51 N. Y. Suppl. 359.

North Carolina.— Wood *v.* Skinner, 79 N. C. 92.

Pennsylvania.— Com. *v.* Clark, 10 Phila. 419.

Tennessee.— Mayo *v.* Dickens, 6 Yerg. 490.

Texas.— Taber *v.* Chapman, 92 Tex. 263, 47 S. W. 710.

Virginia.— Virginia, etc., R. Co. *v.* Campbell, 22 Gratt. 437.

See 13 Cent. Dig. tit. "Courts," § 1292 *et seq.*

A removal from the probate court to the chancery court, where the former court's jurisdiction in the matter is inadequate, may be had in Alabama. Malone *v.* Marriott, 64 Ala. 486; Stewart *v.* Stewart, 31 Ala. 207. If, however, the former court's jurisdiction is complete and no equitable reason for removal is disclosed. a cause will not be removed. Dolan *v.* Dolan, 91 Ala. 152, 8 So. 491; Marsh *v.* Richardson, 49 Ala. 430.

49. State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329; Horton *v.* Jenkins, Wright (Ohio) 66.

50. Spengler *v.* Davy, 15 Gratt. (Va.) 381.

51. Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401; Yingling *v.* Hesson, 16 Md. 112; Powell *v.* Morisey, 98 N. C. 426, 4 S. E. 185, 2 Am. St. Rep. 343; Thomas' Appeal, 124 Pa. St. 640, 17 Atl. 181; *In re* Kittera, 17 Pa. St. 416; Gordon's Estate, 9 Phila. (Pa.) 350.

If issues are irrelevant and immaterial the orphans' court may refuse to send them to a court of law. Williamson *v.* Montgomery, 40 Md. 373.

Opinion on point of law.— In Pennsylvania an orphans' court cannot send a case to the common pleas court for its opinion on a point of law. Robinson *v.* Zollinger, 9 Watts (Pa.) 169. So where the issue depends on both fact and law the orphans' court is incompetent to send it to the common pleas court. Mothland *v.* Wireman, 3 Penr. & W. (Pa.) 185, 33 Am. Dec. 71.

52. Washington Sav. Bank *v.* Butchers', etc., Bank, 61 Mo. App. 448. *Compare* Reed *v.* Painter, 58 Mo. App. 661.

53. Roman *v.* Roman, 4 La. 202; Breckenridge *v.* Johnson, 57 Miss. 371; State *v.* Southard, 61 Mo. App. 296; Barnett *v.* Brown, (Tex. Civ. App. 1898) 45 S. W. 206. But see Cobb *v.* Stewart, 4 Metc. (Ky.) 255, 83 Am. Dec. 465; Bartlett *v.* Lee, 60 N. H. 168.

Allowing cause to be withdrawn.— Where on appeal from a judgment of dismissal the appellate court allows the case to be withdrawn and the papers returned to the proper court, such action is equivalent to a dismissal from the court having no jurisdiction. Dawson *v.* Garland, 83 Ga. 304, 9 S. E. 838.

Transfer by stipulation.— A stipulation to transfer has been held equivalent to a dismissal of a case. Lundgren *v.* Crum, 47 Nebr. 242, 66 N. W. 284. But the filing of an answer to the merits of the cause, where a scire facias proceeding has been instituted in the wrong court, does not operate as a written stipulation, within the meaning of a stat-

(VII) *ACTIONS APPEALED TO WRONG COURT.* Where an appeal has been taken to the wrong court a transfer of the same by such court to the proper court is in some cases authorized by constitutional or statutory provisions.[54]

(VIII) *WAIVER OF RIGHT.* The right to the removal of an action may be waived by delay in making an application therefor,[55] or by submitting to the jurisdiction without objection.[56] An ineffectual trial is not, however, a waiver.[57]

b. Mode of Effecting Transfer and Procedure Therefor — (I) *IN GENERAL.* A defendant is chargeable with an order transferring a cause to another court, on account of the disqualification of the judge, where he has been properly brought into court by citation.[58] Such requirements, however, as may be imposed by the statute authorizing the transfer of a cause should be complied with.[59] And where an order removing a cause becomes final, a subsequent order by the same court which has the effect of depriving the court to which the case was removed of jurisdiction has been declared to be a mere nullity.[60]

(II) *NECESSITY OF ORDER.* A statute which provides for the removal of a cause on the written motion of a party impliedly requires an order of the court for such transfer.[61]

ute authorizing a transfer of causes on the written agreement of the parties. Danbury Sav. Bank *v.* Downs, 74 Conn. 87, 49 Atl. 913.

54. *Indiana.*— Huntington *v.* Burke, 139 Ind. 162, 38 N. E. 597; Dearborn County *v.* Kyle, (App. 1894) 36 N. E. 763; Claypool *v.* Jaqua, (App. 1892) 30 N. E. 152.

Kentucky.— Stone *v.* Cromie, 87 Ky. 173, 7 S. W. 920, 10 Ky. L. Rep. 19.

Louisiana.— Lamarque *v.* New Orleans, 32 La. Ann. 276.

Missouri.— Tracey *v.* Greffet, 112 Mo. 237, 20 S. W. 493; State *v.* Gilmore, 106 Mo. 436, 17 S. W. 490; Forsee *v.* Gates, 89 Mo. App. 577; Karnes *v.* American F. Ins. Co., 64 Mo. App. 458; *In re* Opening Essex Ave., 44 Mo. App. 288; Schuster *v.* Weiss, 39 Mo. App. 633; Arnold *v.* Hawkins, 27 Mo. App. 476; Myers *v.* Myers, 22 Mo. App. 94.

Pennsylvania.— *In re* Shoemaker, 175 Pa. St. 159, 34 Atl. 627; Christner *v.* John, 171 Pa. St. 527, 33 Atl. 107.

See 13 Cent. Dig. tit. "Courts," § 1303.

Jurisdiction doubtful.— In Missouri if in case of an appeal to the court of appeals it is doubtful whether that court or the supreme court has jurisdiction the case will be transferred to the supreme court. Heman *v.* Wade, 63 Mo. App. 363; Miller Grain, etc., Co. *v.* Union Pac. R. Co., 61 Mo. App. 295; Holland *v.* Depriest, 56 Mo. App. 513; Reichenbach *v.* United Masonic Ben. Assoc., 47 Mo. App. 77; Musick *v.* Kansas City, etc., R. Co., 43 Mo. App. 326; Gartside *v.* Gartside, 42 Mo. App. 513; Null *v.* Howell, 40 Mo. App. 329. In Pennsylvania it has been held that if it is impossible to determine from the record whether the amount involved is such as to give the superior court jurisdiction, the case will be certified to the supreme court. *In re* Misselwitz, 1 Pa. Super. Ct. 221.

55. *Ex p.* Rhodes, 43 Ala. 373; Smissaert *v.* Prudential Ins. Co. of America, (Colo. 1900) 61 Pac. 598; Krahner *v.* Heilman, 16 Daly (N. Y.) 132, 9 N. Y. Suppl. 633; Halperin *v.* Schermerhorn, 8 Misc. (N. Y.) 336, 28 N. Y. Suppl. 562.

Division of county.— Where a new county is formed out of old counties and a right of removal is given, in the case of suits pending in the old counties, to courts of the new county having jurisdiction thereof, the application should be made within a reasonable time or the right will be considered as waived. *Ex p.* Rhodes, 43 Ala. 373.

56. Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234; Enright *v.* Franklin Pub. Co., 24 Misc. (N. Y.) 180, 52 N. Y. Suppl. 704.

A motion to dismiss a complaint when based on proceedings preliminary to the joinder of issue is not a waiver. Schnitzpahn *v.* Davis Sewing Mach. Co., 19 Misc. (N. Y.) 621, 44 N. Y. Suppl. 385.

57. Danville *v.* Blackwell, 80 Va. 38.

58. Perkins *v.* Wood, 63 Tex. 396.

59. *Alabama.*— *Compare Ex p.* Rice, 102 Ala. 671, 15 So. 450.

Florida.— Swepson *v.* Call, 13 Fla. 337.

Maine.— Powers *v.* Mitchell, 75 Me. 364.

Massachusetts.— Rice *v.* Nickerson, 4 Allen 66.

New Jersey.— Collins *v.* Keller, 58 N. J. L. 429, 34 Atl. 753.

Ohio.— Knaggs *v.* Conant, 2 Ohio 26.

Oregon.— Connor *v.* Clark, 30 Oreg. 382, 48 Pac. 364.

Wisconsin.— Brown *v.* Streng, 32 Wis. 59.

See 13 Cent. Dig. tit. "Courts," § 1307.

Payment of costs may be a condition precedent to removal. *Ex p.* Burton, 100 Ala. 391, 14 So. 651.

Removal by consent.— A suit at law cannot be removed to the supreme court by consent. Rodman *v.* Davis, 53 N. C. 134.

On application of one of several defendants a cause will not be removed where it is provided by statute that a defendant may apply for removal. People *v.* Roesch, 27 Misc. (N. Y.) 44, 57 N. Y. Suppl. 295.

60. Franco-Texan Land Co. *v.* Howe, 3 Tex. Civ. App. 315, 22 S. W. 766.

61. Armstrong *v.* Emmet, 16 Tex. Civ. App. 242, 41 S. W. 87.

An order may be unnecessary where by constitutional provision a court is abolished

(III) *TIME OF MAKING APPLICATION.* Until a defendant has appeared in a suit he cannot be heard on a motion to remove the cause.[62] And a motion for removal, made after verdict for defendant and before a motion for a new trial by plaintiff has been acted upon, should not be granted, although the statute in respect to the transfer of causes provides that "where any suit, . . . shall have remained pending in a county court more than one year without being determined, such court on motion of any party to such suit, . . . shall order it to be moved to the circuit court."[63]

(IV) *TRANSFER OF PAPERS.* Where an issue can be intelligently tried without the original petition a transfer of such petition as part of the papers in the case has been held unnecessary.[64]

c. Effect of Transfer and Proceedings Had Thereafter — (I) *IN GENERAL.* Where an order of removal of a cause from one court to another is made, the former court is thereby divested of jurisdiction and the jurisdiction of the latter court attaches and the cause proceeds as if originally instituted there.[65] The jurisdiction of the court to which a cause is transmitted may, however, cease by reason of the failure of a party to the action to comply with an order of such court, as a result of which there is no issue to try.[66]

and the jurisdiction of such court is vested in another. People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976.

62. Taylor *v.* Williamson, McMull. Eq. (S. C.) 348.

63. Jelenko *v.* Coleman, 22 W. Va. 221.

After issuance of preliminary injunction.— Proceedings for divorce may be removed after the issuance of a preliminary injunction restraining defendant from disposing of his property and after defendant has entered appearance. Wood *v.* Adsit, 105 Mich. 378, 63 N. W. 419.

At the expiration of the term at which a final decision has been entered by a court of appeals, it has no jurisdiction to make an order transferring the cause to the supreme court, and its only remaining jurisdiction is to order its mandate to the trial court. Hess *v.* Gansz, 90 Mo. App. 439.

Before adjournment.— In New York an application for the removal of a cause from the municipal court to a city court of New York city, if made before an adjournment has been granted, and accompanied by the undertaking required by the code, is in time to authorize a removal. Leverson *v.* Zimmerman, 31 Misc. (N. Y.) 642, 64 N. Y. Suppl. 723.

64. Harreld *v.* Howard, 80 Ky. 51.

Where by a special law authorizing the transfer of the administration of an estate to another county, a transmission by the probate judge was required of the administrator's original bond with a full and complete copy of the record of all proceedings theretofore had, it was held that the acts of the court to which the cause was transferred were not rendered void by the accidental omission of the proceedings during the original administration. Learned *v.* Matthews, 40 Miss. 210.

Recall of papers.— Where papers are certified back, as required by statute, to the court from which the cause was transmitted, and an order is made in the case by the court to which it was removed, the latter court has no jurisdiction to set aside the order and recall the papers. McClaskey *v.* Barr, 54 Fed. 781.

65. *Georgia.*— Denham *v.* Kirkpatrick, 64 Ga. 71.

Kentucky.— Schroll *v.* Speed, 14 Bush 186.

Louisiana.— Hammett *v.* Sprowl, 31 La. Ann. 325.

Maryland.— Schultze *v.* State, 43 Md. 295; Phelps *v.* Stewart, 17 Md. 231.

Massachusetts.— Coffin *v.* Hussey, 12 Pick. 289.

Missouri.— Fischer *v.* Johnson, (1897) 39 S. W. 785; State *v.* Chandler, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483; Bosard *v.* Powell, 79 Mo. App. 184; Syenite Granite Co. *v.* Bobb, 37 Mo. App. 483. See also Benoist *v.* Murrin, 48 Mo. 48.

Montana.— Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

North Carolina.— Ammon *v.* Ammon, 82 N. C. 398.

Ohio.— Barr *v.* Closterman, 7 Ohio Cir. Ct. 371.

Tennessee.— Chester *v.* Embree, Peck 370; Elkins *v.* Sams, 3 Hayw. 44.

Texas.— Cleveland *v.* Tufts, 69 Tex. 580, 7 S. W. 72.

United States.— Armstrong *v.* Johnson, 30 Fed. Cas. No. 18,226, 2 Hayw. & H. 13.

See 13 Cent. Dig. tit. "Courts," § 1316.

Amendment of record after removal.— Where a court has transmitted a cause to another court, the former court may amend the record by supplying an omission as to something done prior to the removal and transmit a new transcript of the amended record. State *v.* Reid, 18 N. C. 377, 28 Am. Dec. 572.

No greater jurisdiction is conferred by the transfer than the court originally had. State Invest., etc., Co. *v.* San Francisco Super. Ct., 101 Cal. 135, 35 Pac. 549.

On the second removal of a cause the trial may be had on the papers sent with the first removal. State *v.* Lewis, 10 N. C. 410.

Parties are bound to take notice, where the papers have been transmitted, of the transmission and subsequent proceedings. Phelps *v.* Stewart, 17 Md. 231.

66. Vaughan *v.* Vincent, 88 N. C. 116.

(II) *Improper Transfer.* In case it appears that a cause has been erroneously transferred from one court to another, the one to which it has been so transferred should strike it from the docket.[67]

(III) *Retransfer and Remanding.* Where a cause which has been taken to the supreme court on the ground that it involved a constitutional point is transferred by that court to another, such transfer will be regarded as a decision that such a question was not involved.[68] The court, however, to which a cause has been removed should not send it back because it does not appear from the transcript of the record that it was transferred according to law.[69]

B. State Courts and United States Courts — 1. Exclusive or Concurrent Jurisdiction in General — a. State Courts. Generally, whenever a legal right arises and the state court is competent to administer justice, the right may be asserted in such court, although the federal court may have concurrent jurisdiction, unless the jurisdiction is limited by law to the federal courts,[70] or the state courts are expressly or by necessary implication excluded by statute.[71] There is this proviso, however, that the state courts must have competent jurisdiction in other respects.[72] Again it was held in an early case that where a right of action, given by a statute of the United States, is in advancement of a common-law right, existing independently of the legislation of congress, in pursuance of the powers delegated by the constitution of the United States, the concurrent jurisdiction of the state courts is not taken away.[73] State courts have therefore jurisdiction of a suit brought by a state against citizens of other states;[74] over controversies between citizens and aliens;[75] of an action by a foreign sovereign against a citizen of the state;[76] of actions by or against foreign consuls, in the absence of statutory

67. Ewing *v.* Brooks, 69 Mo. 49. But see Hindman *v.* Toney, 97 Ky. 413, 30 S. W. 1006.

68. State *v.* Kaub, 23 Mo. App. 177; State *v.* Farrell, 23 Mo. App. 176.

A cause may be again transferred to the supreme court where it had entirely overlooked a question involving the construction of a revenue law. Hilton *v.* St. Louis, 63 Mo. App. 179.

69. Boyden *v.* Williams, 84 N. C. 608.

If properly transferred there is no authority in Texas for a retransfer. Hawes *v.* Foote, 64 Tex. 22; Gulf, etc., R. Co. *v.* Kerfoot, 3 Tex. App. Civ. Cas. § 452.

The act of remanding should be that of the judge and not of the clerk, although no formal order may be necessary. Berry *v.* Safe-Deposit, etc., Co., 93 Md. 240, 48 Atl. 502.

Where a cause is transferred to the supreme court from the court of appeals, on motion of the defendant in error, who fails to enter any appearance in the latter court on a motion to remand of which he has notice, the motion to remand will be granted. People *v.* Denman, 28 Colo. 217, 64 Pac. 194.

70. Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

71. Ordway *v.* Baltimore Cent. Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593; Bletz *v.* Columbia Nat. Bank, 87 Pa. St. 87, 30 Am. Rep. 343; Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833.

Unless it appears by the pleadings that federal courts have exclusive jurisdiction state courts will not refuse to take cognizance. Trevor *v.* The Ad. Hine, 17 Iowa 349.

72. Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833. See also Wilkinson *v.* Wait, 44 Vt. 508, 8 Am. Rep. 391.

Where the matter in dispute arises out of state and not federal laws, the state courts cannot be deprived of jurisdiction. Ulster County Sav. Inst. *v.* New York City Fourth Nat. Bank, 59 How. Pr. (N. Y.) 482.

73. Battin *v.* Kear, 2 Phila. (Pa.) 301.

A state court is not ousted of jurisdiction by reason of the unexercised jurisdiction of a federal court over a question, when such question arises collaterally, by way of defense to an action in which the state court has jurisdiction of the parties and the subject-matter. Wilkinson *v.* Wait, 44 Vt. 508, 8 Am. Rep. 391. Again a state court is not deprived of jurisdiction over controversies between the Gulf, Colorado & Sante Fé Railway Company and the inhabitants of the nations and tribes in the Indian Territory within the limits thereof by virtue of a federal statute conferring concurrent jurisdiction on certain federal courts. Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638, 30 S. W. 494.

74. Plaquemines Tropical Fruit Co. *v.* Henderson, 170 U. S. 511, 18 S. Ct. 685, 42 L. ed. 1126, holding, however, that the right is subject to the right of removal to the proper federal court, as authorized by act of congress, and subject also to the power of the supreme court of the United States to review the final judgment if the case is properly within the appellate jurisdiction of said court. See, generally, States.

75. Jones *v.* Minogue, 29 Ark. 637. See, generally, Aliens.

76. King of Prussia *v.* Kuepper, 22 Mo. 550, 66 Am. Dec. 639.

or treaty provisions to the contrary;[77] of a suit against a federal officer or an officer of the general government, except where exclusive jurisdiction is given to the federal courts;[78] of mandamus against national bank officers to compel the exhibition to a county assessor of a list of shareholders;[79] of an action by a stockholder of a national bank against its directors for damages for gross negligence;[80] of actions against carriers, notwithstanding interstate commerce legislation;[81] of causes arising from interstate commerce, even though its subject is beyond state legislative control;[82] of a suit to inquire into the usurpation or misuser of a railroad corporation franchise, even though such corporation is engaged in interstate commerce;[83] of suits relating to public lands;[84] of a petitory action to recover lands illegally taken by officers of the United States for its use;[85] of a suit to determine the title to land in the state, between citizens thereof, even though the

77. *Georgia.*— De Give *v.* Grand Rapids Furniture Co., 94 Ga. 605, 21 S. E. 582.

New York.— Mechanics' Bank *v.* Webb, 14 Abb. Pr. 72 note, 21 How. Pr. 450.

South Carolina.— State *v.* De la Foret, 2 Nott & M. 217.

Texas.— Redmond *v.* Smith, 22 Tex. Civ. App. 323, 54 S. W. 636.

Wisconsin.— Scott *v.* Hobe, 108 Wis. 239, 84 N. W. 181.

United States.—Sagory *v.* Wissman, 21 Fed. Cas. No. 12,217, 2 Ben. 240. See also Bors *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419.

See 13 Cent. Dig. tit. "Courts," § 1341; and AMBASSADORS AND CONSULS, VII, B, 1 [2 Cyc. 269].

Contra.— Wilcox *v.* Luco, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 62 Am. St. Rep. 305, 45 L. R. A. 579; Miller *v.* Van Loben Sels, 66 Cal. 341, 5 Pac. 512; Sartori *v.* Hamilton, 13 N. J. L. 107; Valario *v.* Thompson, 7 N. Y. 576; *In re* Bruni, 1 Barb. (N. Y.) 187; Matter of Tracy, 46 N. Y. Super. Ct. 48; Griffin *v.* Dominguez, 2 Duer (N. Y.) 656; *In re* Aycinena, 1 Sandf. (N. Y.) 690; Sippile *v.* Albites, 5 Abb. Pr. N. S. (N. Y.) 76; Naylor *v.* Hoffman, 14 Abb. Pr. (N. Y.) 72, 22 How. Pr. (N. Y.) 510; Com. *v.* Kosloff, 5 Serg. & R. (Pa.) 545; Mannhardt *v.* Soderstrom, 1 Binn. (Pa.) 138; Durand *v.* Halbach, 1 Miles (Pa.) 46.

78. Crawford *v.* Waterson, 5 Fla. 472; Freeman *v.* Robinson, 7 Ind. 321; Edwards *v.* Nicholson, 13 La. 582; Kimball *v.* Nicholson, 7 La. 529; Johnston *v.* Wall, 1 Mart. N. S. (La.) 541; Dunn *v.* Vail, 7 Mart. (La.) 416, 12 Am. Dec. 512; Wilson *v.* Mackenzie, 7 Hill (N. Y.) 95, 42 Am. Dec. 51. See also Kneedler *v.* Lane, 45 Pa. St. 238. But see Sheriff *v.* Turner, 119 Fed. 231.

An action lies, against a postmaster, in a state court for refusing to deliver mail or for improperly detaining the same. Teall *v.* Felton, 1 N. Y. 537, 49 Am. Dec. 352 [*affirmed* in 12 How. (U. S.) 284, 13 L. ed. 990]. See also POST-OFFICE.

Wrongful seizure.— A state court has jurisdiction of a remedy against an officer wrongfully seizing property. Bauduc *v.* Nicholson, 4 La. 81; Schroeder *v.* Nicholson, 2 La. 350; Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672; Buck *v.* Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257; Porter *v.* Davidson, 62 Fed. 626. See also Lewis *v.* Buck, 7 Minn. 104, 82 Am. Dec. 73; Beckett *v.* Hartford County Sheriff, 21 Fed. 32.

79. Paul *v.* Chapin, 3 Wash. 433, 28 Pac. 760; Paul *v.* McGraw, 3 Wash. 296, 28 Pac. 532. But see McClung *v.* Silliman, 6 Wheat. (U. S.) 598, 5 L. ed. 340.

80. Brinckerhoff *v.* Bostwick, 88 N. Y. 52 [*reversing* 23 Hun 237].

81. St. Joseph, etc., R. Co. *v.* Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335. See, generally, COMMERCE.

Over questions of the right of a common carrier to limit its liability by contract, the federal and state courts have coördinate jurisdiction. Mynard *v.* Syracuse, etc., R. Co., 7 Hun (N. Y.) 399.

82. Murray *v.* Chicago, etc., R. Co., 62 Fed. 24. See, generally, COMMERCE.

83. State *v.* Cincinnati, etc., R. Co., 47 Ohio St. 130, 23 N. E. 928.

84. *Arkansas.*— James *v.* Belding, 33 Ark. 536.

Colorado.— Fulmele *v.* Camp, 20 Colo. 495, 39 Pac. 407.

Indiana.— Moyer *v.* McCullough, Smith 211.

Iowa.— Bisson *v.* Curry, 35 Iowa 72.

Louisiana.— Ludeling *v.* Vester, 20 La. Ann. 433; Cannon *v.* White, 16 La. Ann. 85.

Minnesota.— Matthews *v.* O'Brien, 84 Minn. 505, 88 N. W. 12; State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410. See also State *v.* Stevens, 5 Minn. 521; Camp *v.* Smith, 2 Minn. 155.

Mississippi.— Land *v.* Land, Sm. & M. Ch. 158.

Missouri.— Grove *v.* Fulsome, 16 Mo. 543, 57 Am. Dec. 247; Ott *v.* Soulard, 9 Mo. 581; Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540.

See 13 Cent. Dig. tit. "Courts," § 1333; and, generally, PUBLIC LANDS.

State courts cannot interfere with primary disposition of the soil by the general government (Grove *v.* Fulsome, 16 Mo. 543, 57 Am. Dec. 247); or in a case where there is a contest between the United States and its grantee in respect to the lands granted (Ott *v.* Soulard, 9 Mo. 581); or where no title is vested in either party (Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560).

85. Dreux *v.* Kennedy, 12 Rob. (La.) 489.

A bill to enforce the execution of a trust in lands should be dismissed where the post-

construction of acts of congress are involved;[86] of a bill, filed by a citizen of the state against a citizen of another state to compel the performance of a contract of sale of land within the former state;[87] of a proceeding by the federal government in taking private property for a fort site;[88] of a suit to determine the constitutionality of a state statute, which is attacked as in violation of the federal constitution;[89] of an action to recover duties, where there is no act of congress to the contrary;[90] to grant an injunction, at the suit of another state, to restrain the transfer, in the state where the suit is brought, of negotiable securities issued by the former state;[91] to compel by mandamus the acceptance of sureties for removal of a cause to the circuit court;[92] of an action on a bond given by the collector of customs, for the delivery of certain property seized or forfeited to the United States, the facts being conceded in the bond;[93] of actions on undertakings given in a federal court;[94] of actions relating to or involving patents, which do not arise under the patent laws or involve the validity or infringement of patents, or which generally are not within the exclusive jurisdiction of the federal courts;[95] of suits to restrain the

master-general has exclusive jurisdiction by virtue of illegal acts of a postoffice employee. Laws *v.* Burt, 129 Mass. 202.

86. Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

87. Telfair *v.* Telfair, 2 Desauss. (S. C.) 271.

88. Gilmer *v.* Line Point, 18 Cal. 229. And see *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717, as to the character of the jurisdiction in places acquired for the erection of forts, arsenals, magazines, etc.

89. Blythe *v.* Hinckley, 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557.

State court may decide on the validity of laws of other states, with reference to the United States constitution whenever necessary in a case before such state court. Stoddart *v.* Smith, 5 Binn. (Pa.) 355. But a state court has no jurisdiction where a federal question is raised involving the construction of an act of congress. Western Union Tel. Co. *v.* Franklin Constr. Co., 70 N. H. 37, 47 Atl. 616.

90. Ammidown *v.* Freeland, 101 Mass. 303, 3 Am. Rep. 359. See also U. S. *v.* Graff, 4 Hun (N. Y.) 634; and CUSTOMS DUTIES.

91. Delafield *v.* Illinois, 26 Wend. (N. Y.) 192.

92. State *v.* Fairfield County Ct. C. Pl., 15 Ohio St. 377. See, generally, REMOVAL OF CAUSES.

Mandamus cannot be granted where a federal law is sought to be invoked in a state court, as in the case of a claimed violation of the anti-trust law. Star Pub. Co. *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

93. Sailly *v.* Cleveland, 10 Wend. (N. Y.) 156. See also U. S. *v.* Dodge, 14 Johns. (N. Y.) 95; and, generally, CUSTOMS DUTIES.

94. *Alabama.*— Wood *v.* Coman, 56 Ala. 283.

Illinois.— Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118 [*affirming* 71 Ill. App. 242].

Louisiana.— Aiken *v.* Leathers, 37 La. Ann. 482; Saunders *v.* Taylor, 6 Mart. N. S. 519.

Montana.— Montana Min. Co. *v.* St. Louis Min., etc., Co., 23 Mont. 311, 58 Pac. 870.

North Carolina.— U. S. *v.* Douglas, 113 N. C. 190, 18 S. E. 202.

North Dakota.— Braithwaite *v.* Jordan, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238.

See 13 Cent. Dig. tit. "Courts," § 1373.

95. *Illinois.*— Pratt *v.* Paris Gas Light, etc., Co., 155 Ill. 531, 40 N. E. 1032; Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873 [*affirming* 48 Ill. App. 454].

Iowa.—Meyers *v.* Funk, 56 Iowa 52, 8 N. W. 788; Lockwood *v.* Lockwood, 33 Iowa 509; Hunt *v.* Hoover, 24 Iowa 231.

Maine.— Carleton *v.* Bird, 94 Me. 182, 47 Atl. 154.

Massachusetts.— Holt *v.* Silver, 169 Mass. 435, 48 N. E. 837; Bhinney *v.* Annan, 107 Mass. 94, 9 Am. Rep. 10; David *v.* Park, 103 Mass. 501.

Michigan.— Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Nichols *v.* Marsh, 61 Mich. 509, 28 N. W. 699.

Minnesota.—Fuller *v.* Schutz, 88 Minn. 372, 93 N. W. 118.

Mississippi.— Beavers *v.* Spinks, 77 Miss. 346, 26 So. 930.

Missouri.— Keith *v.* Hobbs, 69 Mo. 84; Billings *v.* Ames, 32 Mo. 265.

New Jersey.— Green *v.* Wilson, 21 N. J. Eq. 211.

New York.— Waterman *v.* Shipman, 130 N. Y. 301, 29 N. E. 111 [*reversing* 55 Hun 611, 8 N. Y. Suppl. 814]; Mayer *v.* Hardy, 127 N. Y. 125, 27 N. E. 837 [*reversing* 53 Hun 630, 7 N. Y. Suppl. 947]; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285 [*affirming* 49 N. Y. Super. Ct. 375]; Middlebrook *v.* Broadbent, 47 N. Y. 443, 7 Am. Rep. 457; Denise *v.* Swett, 68 Hun 188, 22 N. Y. Suppl. 950; Annin *v.* Wren, 44 Hun 352; Snow *v.* Judson, 38 Barb. 210; Creighton *v.* Haggerty, 50 N. Y. Super. Ct. 9; Herzog *v.* Heyman, 8 Misc. 27, 28 N. Y. Suppl. 74 [*affirmed* in 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646]; Croft *v.* Richardson, 59 How. Pr. 356; Hammer *v.* Barnes, 26 How. Pr. 174.

Ohio.— Blakeney *v.* Goode, 30 Ohio St. 350; Standard Combustion Co. *v.* Farr, 9 Ohio Dec. (Reprint) 509, 14 Cinc. L. Bul. 201; Gordon *v.* Deckebach, 9 Ohio Dec. (Reprint) 324, 12 Cinc. L. Bul. 169.

infringement of a trade-mark;[96] of suits relating to literary property and the prevention of wrongs connected therewith;[97] of actions involving the construction or enforcement of federal bankruptcy laws, of assignments for the benefit of creditors and insolvency and bankruptcy proceedings generally in cases where the jurisdiction of the federal courts is not exclusive;[98] of suits for the enforcement of

Texas.— Brown *v.* Texas Cactus Hedge Co., 64 Tex. 396.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

West Virginia.— Hotchkiss *v.* Fitzgerald Patent Prepared Plaster Co., 41 W. Va. 357, 23 S. E. 576; Maurice *v.* Devol, 23 W. Va. 247.

Wisconsin.— Fuller, etc., Mfg. Co. *v.* Bartlett, 68 Wis. 73, 31 N. W. 747, 60 Am. Rep. 838; Leonard *v.* Barnum, 34 Wis. 105; Page *v.* Dickerson, 28 Wis. 694, 9 Am. Rep. 532.

United States.— Standard Sewing Mach. Co. *v.* Leslie, 118 Fed. 557, 55 C. C. A. 323; Merserole *v.* Union Paper Collar Co., 17 Fed. Cas. No. 9,488, 6 Blatchf. 356. See also Pratt *v.* Paris Gaslight, etc., Co., 168 U. S. 255, 18 S. Ct. 62, 42 L. ed. 458 [*affirming* 155 Ill. 531, 40 N. E. 1032]; Wade *v.* Lawder, 165 U. S. 624, 17 S. Ct. 425, 41 L. ed. 851; White *v.* Rankin, 144 U. S. 628, 12 S. Ct. 768, 36 L. ed. 569; Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413; Hartell *v.* Tilghman, 99 U. S. 547, 25 L. ed. 357; Kurtz *v.* Strans, 106 Fed. 414, 44 C. C. A. 366 [*affirming* 100 Fed. 800]; Reliable Incubator, etc., Co. *v.* Stahl, 105 Fed. 663, 44 C. C. A. 657; McMullen *v.* Bowers, 102 Fed. 494, 42 C. C. A. 470; Pliable Shoe Co. *v.* Bryant, 81 Fed. 521; Routh *v.* Boyd, 51 Fed. 821; Montgomery Palace Stock-Car Co. *v.* Street Stable-Car Line, 43 Fed. 329; Rapp *v.* Kelling, 41 Fed. 792; Williams *v.* Star Sand Co., 35 Fed. 369; Brooklyn Watch-Case Co. *v.* Leach, 35 Fed. 2; Wren *v.* Annin, 34 Fed. 435; McCarty, etc., Trading Co. *v.* Glaenzer, 30 Fed. 387; Kelly *v.* Porter, 17 Fed. 519, 8 Sawy. 482; Bloomer *v.* Gilpin, 3 Fed. Cas. No. 1,558; Brooks *v.* Stolley, 4 Fed. Cas. No. 1,962, 3 McLean 523.

See 13 Cent. Dig. tit. "Courts," §§ 1327, 1328; and, generally, PATENTS.

But a state court has no jurisdiction of causes arising under the laws of the United States respecting patent rights (Parsons *v.* Barnard, 7 Johns. (N. Y.) 144); to try disputed claims (Croft *v.* Richardson, 59 How. Pr. (N. Y.) 356); to enforce a patent right, or to receive a plea thereof (Livingston *v.* Van Ingen, 9 Johns. (N. Y.) 507); to enjoin the unlawful use of patented articles (Kayser *v.* Arnold, 41 Hun (N. Y.) 275); of actions to restrain, or recover damages for injuries to rights under the patent laws (Hovey *v.* Rubber Tip Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470 [*affirming* 35 N. Y. Super. Ct. 81]); of cases of infringement (Montgomery Palace Stock Car Co. *v.* Street Stable Car Line, 142 Ill. 315, 31 N. E. 434 [*affirming* 37 Ill. App. 289]); of a suit to enjoin a person from suing for an infringement (Childs *v.* Tuttle, 54 Hun (N. Y.) 57, 7 N. Y. Suppl. 59, 227); of an action which is in effect for an infringement (Mayer *v.* Hardy, 3 N. Y. Suppl. 881); of a suit to enjoin an infringement, or to determine matters relating thereto (Continental Store Service Co. *v.* Clark, 100 N. Y. 365, 3 N. E. 335 [*affirming* 7 N. Y. Civ. Proc. 183, 1 How. Pr. N. S. 497]); of a suit for infringement, or of a direct suit to decree a patent void (Merserole *v.* Union Paper Collar Co., 17 Fed. Cas. No. 9,488, 6 Blatchf. 356); of a defense of invalidity in an action by a licensee to recover royalties (Herzog *v.* Heyman, 8 Misc. (N. Y.) 27, 28 N. Y. Suppl. 74); to determine validity (Maitland *v.* Central Gas, etc., Co., 7 Misc. (N. Y.) 245, 27 N. Y. Suppl. 421; Slemmer's Appeal, 58 Pa. St. 155, 98 Am. Dec. 248); or of a suit in which the existence and validity of a patent must necessarily be shown to enable plaintiff to make out his case (Tomlinson *v.* Battel, 4 Abb. Pr. (N. Y.) 266).

96. Smail *v.* Sanders, 118 Ind. 105, 20 N. E. 296. See, generally, TRADE-MARKS AND TRADE-NAMES.

97. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 11 How. Pr. (N. Y.) 49; Widmer *v.* Greene, 56 How. Pr. (N. Y.) 91. See, generally, LITERARY PROPERTY.

98. *Alabama.*— Mosby *v.* Steele, 7 Ala. 299.

Arkansas.— Rison *v.* Powell, 28 Ark. 427.

California.— Goodhue *v.* King, 55 Cal. 377.

Indiana.— Miller *v.* Hardy, 131 Ind. 13, 29 N. E. 776; Hastings *v.* Fowler, 2 Ind. 216.

Iowa.— Radford *v.* Thornell, 81 Iowa 709, 45 N. W. 890.

Kentucky.— Anderson *v.* Anderson, 80 Ky. 638.

Louisiana.— Bayly's Succession, 30 La. Ann. 75; Thompson *v.* Lemelle, McGloin 245.

Massachusetts.— Otis *v.* Hadley, 112 Mass. 100; Ward *v.* Jenkins, 10 Metc. 583.

Michigan.— Ives *v.* Tregent, 29 Mich. 390.

New Hampshire.— Gage *v.* Dow, 58 N. H. 420; Peck *v.* Jenness, 16 N. H. 516, 43 Am. Dec. 573.

New York.— Ansley *v.* Patterson, 77 N. Y. 156; Olcott *v.* Maclean, 73 N. Y. 223; Berford *v.* Barnes, 45 Hun 253; Abbott *v.* People, 15 Hun 437; Wente *v.* Young, 12 Hun 220; Burlingame *v.* Parce, 12 Hun 144; Gilbert *v.* Priest, 63 Barb. 339; Southard *v.* Benner, 7 Daly 40.

North Carolina.— Whitridge *v.* Taylor, 66 N. C. 273.

United States.— Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833; Eyster *v.* Gaff, 91 U. S. 521, 23 L. ed. 403; Rumsey *v.* Town, 20 Fed. 558.

See 13 Cent. Dig. tit. "Courts," §§ 1331, 1332; and, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY.

police regulations relating to navigation;[99] of actions relating to obstructions of navigable waters;[1] of actions to enforce a penalty given by a federal statute;[2] of certain proceedings and matters relating to the probate and to the administration of decedents' estates;[3] and over questions of the right of a father to the custody of his child.[4]

b. Federal Courts. Under the act of congress of 1875 the federal circuit courts were given concurrent jurisdiction with the state courts of all suits of a civil nature arising under the constitution and laws of the United States, irrespective of the citizenship of the parties, and this included jurisdiction over an action to recover premises, the title to which was acquired from the United States.[5] So the federal courts are the most appropriate forum in which to test the constitutionality of legislation by congress, even though the state courts have

But state courts have no jurisdiction to reform a deed by an assignee made under orders of a federal court (Ritchie *v.* Pease, 114 Ill. 353, 3 N. E. 897); of an action by an assignee to recover a claim due the estate of a bankrupt (Sherwood *v.* Burns, 58 Ind. 502); to inquire into or set aside fraudulent preferences (Putnam *v.* Swinney, 63 Iowa 383, 19 N. W. 286; Brewster *v.* Dryden, 53 Iowa 657, 6 N. W. 16); of an action by an assignee to recover property conveyed by the bankrupt in fraud of his creditors (Frost *v.* Hotchkiss, 1 Abb. N. Cas. (N. Y.) 27); in a suit to foreclose a mortgage, of a defense that the mortgage was void under the federal bankruptcy laws (Brewster *v.* Dryden, 53 Iowa 657, 6 N. W. 16 [*following* Hecht *v.* Springstead, 51 Iowa 502, 1 N. W. 773, and *distinguishing* Wiswall *v.* Campbell, 93 U. S. 347, 23 L. ed. 923; Claflin *v.* Houseman, 93 U. S. 130, 23 L. ed. 833]); of a bill in equity, by a trustee in bankruptcy, to set aside a conveyance alleged to be in violation of the bankruptcy law (Voorhies *v.* Frisbie, 25 Mich. 476, 12 Am. Rep. 291); to vacate a judgment valid under state laws but invalid as in fraud of the federal bankruptcy law (Hecht *v.* Springstead, 51 Iowa 502, 1 N. W. 773); to set aside a sale by an assignee in bankruptcy (Akins *v.* Stradley, 51 Iowa 414, 1 N. W. 609); of a creditor's petition for the settlement of a decedent bankrupt's estate where under the allegations the state court has no jurisdiction of the subject-matter (Buckler *v.* Brewer, (Ky. 1894) 27 S. W. 988); or of a creditor's suit upon the bankrupt's failure to comply with the terms of his composition (Shelly *v.* Bayly, 32 La. Ann. 1171).

99. State *v.* Watts, 7 La. 440, 26 Am. Dec. 507; Andrews *v.* Betts, 8 Hun (N. Y.) 322; Ogdensburgh *v.* Lyon, 7 Lans. (N. Y.) 215; Chisholm *v.* Northern Transp. Co., 61 Barb. (N. Y.) 363; Smith *v.* Maryland, 18 How. (U. S.) 71, 15 L. ed. 269; Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371.

The enforcement of a maritime lien given by a state statute cannot be had in a state court. Hankins *v.* Cox, etc., Co., 63 N. J. L. 512, 44 Atl. 206. See, generally, MARITIME LIENS.

1. Silver *v.* Missouri Pac. R. Co., 101 Mo. 79, 13 S. W. 410; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 79 Mo. 478. See, generally, NAVIGABLE WATERS.

2. *Massachusetts.*— Lapham *v.* Almy, 13 Allen 301.

New Jersey.— U. S. *v.* Smith, 4 N. J. L. 33.

Ohio.— Hade *v.* McVay, 31 Ohio St. 231.

Pennsylvania.— Buckwalter *v.* U. S., 11 Serg. & R. 193; Bank *v.* Snyder, 2 Leg. Rec. 356.

Tennessee.— Hartley *v.* U. S., 3 Hayw. 45.

Virginia.—Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

West Virginia.— Lynch *v.* West Virginia Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

See 13 Cent. Dig. tit. "Courts," § 1334; and, generally, PENALTIES.

But state courts have no jurisdiction of an action for the penalty under the act of congress relating to the census (Haney *v.* Sharp, 1 Dana (Ky.) 442); for the penalty for injury to animals by carriers not unloading same, etc. (Illinois Cent. R. Co. *v.* Peterson, 68 Miss. 454, 10 So. 43, 14 L. R. A. 550. *Contra*, Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449); or for the penalty for a violation of the revenue laws (Jackson *v.* Rose, 2 Va. Cas. 34. *Contra*, U. S. *v.* Smith, 4 N. J. L. 33). It has also been held that jurisdiction of penal laws of the United States cannot be conferred upon a state court. U. S. *v.* Lathrop, 17 Johns. (N. Y.) 4.

3. Kennard *v.* Stanbrough, 9 Rob. (La.) 254; Collier *v.* Stanbrough, 6 Rob. (La.) 230; Blythe *v.* Hinckley, 173 U. S. 501, 19 S. Ct. 497, 43 L. ed. 783 (concurrent jurisdiction to decide federal questions involved in probate proceedings to determine the capacity of aliens to inherit lands); Johnson *v.* Ford, 109 Fed. 501; Bedford Quarries Co. *v.* Thomlinson, 95 Fed. 208, 36 C. C. A. 272; Hearfield *v.* Bridges, 75 Fed. 47, 21 C. C. A. 212; Allen *v.* Lyons, 1 Fed. Cas. No. 227, 2 Wash. 475; Parsons *v.* Lyman, 18 Fed. Cas. No. 10,780, 32 Conn. 566, 5 Blatchf. 170.

4. *Ex p.* Burrus, 136 U. S. 586, 10 S. Ct. 850, 34 L. ed. 1500, holding that such jurisdiction belongs exclusively to the polity of the state. See, generally, PARENT AND CHILD.

5. Eaton *v.* Calhoun, 47 Fed. 422.

concurrent jurisdiction.[6] But the concurrent jurisdiction of the national government with that of the states, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the constitution in the District of Columbia.[7] The federal circuit court as a court of equity has also concurrent jurisdiction with the state court, if the requisite jurisdictional facts exist, in all cases of fraud, excepting fraud in obtaining a will of real and personal estate.[8] Such courts have exclusive jurisdiction over causes arising under the interstate commerce act;[9] over certain matters relating to rights to patented inventions;[10] of matters and proceedings in bankruptcy under the federal bankruptcy or other laws so providing;[11] and over litigation arising out of the construction of a bridge over navigable waters as well as for the condemnation of property therefor.[12] The federal courts may also exercise jurisdiction in certain matters of assignments for

Land grants from different states.— The jurisdiction of federal courts is not exclusive over suits between citizens of the same state claiming land under grants from different states. Shepherd *v.* Young, 1 T. B. Mon. (Ky.) 203.

6. People *v.* Hurlburt, 67 How. Pr. (N. Y.) 362.

A federal court will not willingly pronounce a state statute unconstitutional in advance of a state court decision, but will determine its validity when necessary. Union Pac. R. Co. *v.* Alexander, 113 Fed. 347. See also *supra*, VII, B, 4, f.

7. *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717.

8. Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516.

The fact that plaintiff has a plain, adequate, and speedy remedy at law in the state courts does not exclude the jurisdiction of a federal court of equity where the requisite facts exist to give such court jurisdiction of the parties and the subject-matter, and a proper case for equitable relief is shown. Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816.

Rights and remedies, legal or equitable, provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in the federal courts, and the terms "law" and "equity," although intended to mark a distinction between the two systems of jurisprudence as known and practised at the time of its adoption, do not restrict the jurisdiction conferred to the very rights and remedies recognized and employed, but embrace as well not only rights created by the statutes of the states, but new forms and remedies to be administered in the courts of the United States according to the nature of the case. Williams *v.* Crab, 117 Fed. 193, 54 C. C. A. 213.

9. Sheldon *v.* Wabash R. Co., 105 Fed. 785. But see cases cited *supra*, notes 81–83.

10. *Illinois.*— Kelly *v.* Kelly Scroll Mfg. Co., 15 Ill. App. 547.

Kentucky.— Smith *v.* McClelland, 11 Bush 523.

New York.— Hat Sweat Mfg. Co. *v.* Reinoehl, 102 N. Y. 167, 6 N. E. 264, 55 Am. Rep. 793; De Witt *v.* Elmira Nobles Mfg. Co., 66 N. Y. 459, 23 Am. Rep. 73 [*affirming* 5 Hun 301]; Dudley *v.* Mayhew, 3 N. Y. 9; Wilcox, etc., Sewing Mach. Co. *v.* Kruse, etc., Mfg. Co., 14 Daly 116, 3 N. Y. St. 590; Continental Store Service Co. *v.* Clark, 7 N. Y. Civ. Proc. 183, 1 How. Pr. N. S. 497; Parsons *v.* Barnard, 7 Johns. 144; Gibson *v.* Woodworth, 8 Paige 132; Burrall *v.* Jewett, 2 Paige 134.

Pennsylvania. — Battin *v.* Kear, 2 Phila. 301.

Texas.— Stone *v.* Edwards, 35 Tex. 556.

West Virginia. — Maurice *v.* Devol, 23 W. Va. 247.

Wisconsin.— Rice *v.* Garnhart, 34 Wis. 453, 17 Am. Rep. 448.

See 13 Cent. Dig. tit. "Courts," § 1327; and cases cited *supra*, note 95.

11. *Indiana.*— Markson *v.* Haney, 47 Ind. 31.

Iowa.— Hecht *v.* Springstead, 51 Iowa 502, 1 N. W. 773.

Michigan.— Sheldon *v.* Rounds, 40 Mich. 425.

New York.—Olcott *v.* Maclean, 10 Hun 277.

Wisconsin.— Bromley *v.* Goodrich, 40 Wis. 131, 22 Am. Rep. 685.

United States.—White *v.* Rankin, 144 U. S. 628, 12 S. Ct. 768, 36 L. ed. 569; Littlefield *v.* Perry, 21 Wall. 205, 22 L. ed. 577; Atherton Mach. Co. *v.* Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72; Everett *v.* Haulenbeck, 68 Fed. 911; Elgin Wind Power, etc., Co. *v.* Nichols, 65 Fed. 215, 12 C. C. A. 578; Wood Harvester Co. *v.* Minneapolis-Esterly Harvester Co., 61 Fed. 256; Vermont Farm-Mach. Co. *v.* Gibson, 50 Fed. 423; Sherman *v.* Nutt, 35 Fed. 149; Hammacher *v.* Wilson, 26 Fed. 239; Gordon *v.* St. Paul Harvester Works, 23 Fed. 147; Vermont Farm Mach. Co. *v.* Marble, 20 Fed. 117; Blank *v.* Manufacturing Co., 3 Fed. Cas. No. 1,532, 3 Wall. Jr. 196; Smith *v.* Standard Laundry Mach. Co., 19 Fed. 825, 20 Blatchf. 360; Stanley Rule, etc., Co. *v.* Bailey, 22 Fed. Cas. No. 13,287, 3 Ban. & A. 297, 14 Blatchf. 510.

See 13 Cent. Dig. tit. "Courts," § 1331; and cases cited *supra*, note 95.

12. Lincks *v.* Amend, (N. J. Ch. 1895) 32 Atl. 755. But see cases cited *supra*, note 1.

Columbia river.— The jurisdiction of the federal district court is concurrent with the state courts in relation to matters occurring or situate upon the waters of the Columbia river. The Annie M. Smull, 1 Fed. Cas. No. 423, 2 Sawy. 226.

the benefit of creditors or of insolvency,[13] of actions on bonds given in state courts,[14] and of certain suits relating to matters of the probate or the administration of decedents' estates.[15] But the jurisdiction of the federal courts is not exclusive, under a charter of a corporation declaring it capable of suing and being sued in such courts;[16] nor does an act of congress providing that federal courts shall have power to restrain the publication of manuscripts without the consent of the respective authors confer exclusive jurisdiction on such courts.[17]

c. Election of Tribunal. A claimant of property taken possession of by a receiver of a federal court submits himself to the jurisdiction of such court by filing a petition claiming such property in the suit in which the property was seized and cannot maintain a subsequent action to recover the property in a state court.[18] So plaintiff may by his acts in the state court waive his right to sue in the federal court.[19] But where parties, who are non-residents, have a right to file a cross bill in the state court, they are not bound to do so but may sue in the federal court.[20] In case the relief sought is in the main identical the state court may require the parties to elect between the two suits, although there are parties in the suit in the federal court who are not parties in the state court.[21]

2. Comity in General.[22] The exercise of jurisdiction by a federal court becomes one of discretion, where the only reason why it should not take cognizance of a cause rests on the ground of comity.[23] But comity between a state and federal

13. Kurtz *v.* Philadelphia, etc., R. Co., 187 Pa. St. 59, 40 Atl. 988; Brochon *v.* Wilson, 91 Fed. 617, 34 C. C. A. 31; Morris *v.* Lindauer, 54 Fed. 23, 4 C. C. A. 162; Halsted *v.* Straus, 32 Fed. 279; Fleisher *v.* Greenwald, 20 Fed. 547; Black *v.* Scott, 9 Fed. 186; Adler *v.* Ecker, 2 Fed. 126, 1 McCrary 256. And see cases cited *supra*, note 98.

A federal court will not entertain a bill to have a mortgage declared to be for the benefit of all the mortgagor's creditors. Keys Mfg. Co. *v.* Kimpel, 22 Fed. 466.

14. Bartlett *v.* Spicer, 75 N. Y. 528; Dawson *v.* Rankin, 7 Fed. Cas. No. 3,671.

15. Stockton *v.* Stanbrough, 3 La. Ann. 390; Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46; Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; Crider *v.* Shelby, 95 Fed. 212; Hampton Lumber Co. *v.* Ward, 95 Fed. 3; Davis *v.* Davis, 89 Fed. 532; Comstock *v.* Herron, 55 Fed. 803, 5 C. C. A. 266; Ball *v.* Tompkins, 41 Fed. 486; Allen *v.* Allen, 1 Fed. Cas. No. 211, 3 Wall. Jr. 248; Mallett *v.* Dexter, 16 Fed. Cas. No. 8,988, 1 Curt. 178; Parkes *v.* Aldridge, 18 Fed. Cas. No. 10755. See also cases cited *supra*, note 3.

Federal courts have not jurisdiction concurrent with state courts over contests involving the removal of executors and the appointment of their successors (Burnside's Succession, 34 La. Ann. 728), or over the appointment of administrators, the confirmation of executors, or the probate of wills (Ball *v.* Tompkins, 41 Fed. 486). They cannot issue executory process against the property of an insolvent succession (Kennard *v.* Stanbrough, 9 Rob. (La.) 254; Collier *v.* Stanbrough, 6 Rob. (La.) 230); nor can they take cognizance of a bill by a citizen of another state against the administrator, to recover a share in the property, and to take the administration of the estate out of the state court, and they cannot make a decree of distribution, determining rights of citizens of the same state as between themselves (Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867).

Validity of will.— A federal court has concurrent jurisdiction of suits to contest the validity of a probated will, where the amount in controversy is sufficient and the parties are citizens of different states, and this includes the right to set aside a deed for fraud and undue influence. Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524; Kieley *v.* McGlynn, 21 Wall. (U. S.) 503, 22 L. ed. 599; Williams *v.* Crabb, 117 Fed. 193, 54 C. C. A. 213 [*citing* Ellis *v.* Davis, 109 U. S. 485, 3 S. Ct. 327, 27 L. ed. 1006]; Kirby *v.* Chicago, etc., R. Co., 106 Fed. 551; Oakley *v.* Taylor, 64 Fed. 245; Richardson *v.* Green, 61 Fed. 423, 9 C. C. A. 565; Brodhead *v.* Shoemaker, 44 Fed. 518, 11 L. R. A. 567; Reed *v.* Reed, 31 Fed. 49.

16. Scheffer *v.* National L. Ins. Co., 25 Minn. 534.

17. Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 11 How. Pr. (N. Y.) 49. See also cases cited *supra*, note 97.

18. Steele *v.* Walker, 115 Ala. 485, 21 So. 942, 67 Am. St. Rep. 62.

19. Hyatt *v.* Challiss, 55 Fed. 267.

20. Pierce *v.* Feagans, 39 Fed. 587. See also Sawyer *v.* Concordia Parish, 12 Fed. 754, 4 Woods 273.

21. New Jersey Cent. R. Co. *v.* New Jersey West Line R. Co., 32 N. J. Eq. 67.

22. As to state laws as rules of decision see *supra*, XII, F.

23. Gilman *v.* Perkins, 7 Fed. 887, 10 Biss. 430. But see Covell *v.* Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390; Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

Where creditors of a corporation had notice of receivership proceedings in the state courts, and ample opportunity to prove their claim, a federal court will not interfere to protect their rights, even though their prayer has some equitable aspects. Dobson *v.* Peck, 119 Fed. 254.

court should not preclude the determination of a cause by the latter, where it has jurisdiction thereof and can speedily hear the same and give the desired relief, and such cause is one of great moment to the parties and the public;[24] nor does the rule of comity deprive the federal court of jurisdiction as against a plea of possession as receivers under an order of the state court, and that the accounting prayed for had been made and the subject-matter adjudicated;[25] nor does judicial comity require a federal court to allow the use of pleadings and papers in a pending suit, by a state court which has assumed jurisdiction of the same controversy.[26] But plaintiffs will be left to their remedy in the state court, where a temporary injunction is sought in the federal court merely as ancillary to such remedy and a decree rendered in the former court makes the acts sought to be enjoined a contempt if done.[27] There is also a rule of comity against rendering a decree that may practically destroy the effect of a supersedeas, and under this rule it is the duty of a state court to preserve an entire fund, pending an appeal or writ of error to the state court, where others in the United States supreme court are also claiming payment out of such fund.[28]

3. Jurisdiction as to Territory Ceded to United States. If the United States acquires territory by convention with another sovereign power, it has authority to enact laws for the protection and determination of property rights of the inhabitants of such territory in accordance with the terms of such treaty, and such laws, affecting title to real property within a state, must be construed by the United States courts;[29] and if property is ceded to the federal government the state court has no jurisdiction over it.[30]

4. Priority and Retention of Jurisdiction — a. Statement of Rule. Where a state and federal court have concurrent jurisdiction over the same parties or privies and the same subject-matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case.[31] It therefore follows that such jurisdiction or right

24. *In re* Langford, 57 Fed. 570.

25. Andrews *v.* Smith, 5 Fed. 833, 19 Blatchf. 100.

26. Wadley *v.* Blount, 65 Fed. 667.

27. Garrett *v.* New York Transit, etc., Co., 36 Fed. 513.

A state court will not enjoin the prosecution of a suit to set aside an executor's sale pending a decision on appeal, allowed, on a question of title of a testator to certain property, by a federal court to the supreme court. Jones *v.* Warnock, 67 Ga. 484.

28. State *v.* Burke, 35 La. Ann. 185.

29. Gardiner *v.* Miller, 47 Cal. 570.

30. State *v.* Intoxicating Liquors, 78 Me. 401, 6 Atl. 4; Dibble *v.* Clapp, Sheld. (N. Y.) 123, 31 How. Pr. (N. Y.) 420; Armstrong *v.* Foote, 19 How. Pr. (N. Y.) 237; Foley *v.* Shriver, 81 Va. 568; *Ex p.* Tatem, 23 Fed. Cas. No. 13,759, 1 Hughes 588. But see Lotterle *v.* Murphy. 67 Hun (N. Y.) 76, 21 N. Y. Suppl. 1120; *In re* Carlton, 7 Cow. (N. Y.) 471; Willis *v.* State, 3 Heisk. (Tenn.) 141; *In re* Bradley, 96 Fed. 969.

If there is a proviso in the act of session the state court has jurisdiction to the extent thereof.

Massachusetts.— Mitchell *v.* Tibbetts, 17 Pick. 298.

New Hampshire.— State *v.* Dimick, 12 N. H. 194, 37 Am. Dec. 197.

New York.— Barrett *v.* Palmer, 16 N. Y. Suppl. 94 [*affirmed* in 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. Rep. 835, 17 L. R. A. 720].

Pennsylvania.— Allegheny County *v.* McCung, 53 Pa. St. 482.

Wisconsin.— Sauer *v.* Steinbauer, 14 Wis. 70.

While state courts may dispose of rights in such property by decrees *in personam*, the federal courts have jurisdiction of a suit which involves the corporeal custody and possession thereof. Woodfin *v.* Phœbus, 30 Fed. 289.

31. *Colorado.*— Parks *v.* Wilcox, 6 Colo. 489.

Georgia.— Hines *v.* Rawson, 40 Ga. 356, 2 Am. Rep. 581.

Illinois.— Mail *v.* Maxwell, 107 Ill. 554; Crown Coal, etc., Co. *v.* Taylor, 90 Ill. App. 569.

Massachusetts.— Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

New York.— Farnsworth *v.* Western Union Tel. Co., 53 Hun 636, 6 N. Y. Suppl. 735.

Ohio.— Stunt *v.* The Steamboat Ohio, 3 Ohio Dec. (Reprint) 362, 4 Am. L. Reg. 49; Coopers *v.* Central Ohio R. Co., 2 Ohio Dec. (Reprint) 199, 2 West. L. Month. 63.

Pennsylvania.—Taylor *v.* Carryl, 24 Pa. St. 259.

Rhode Island.— Boston, etc., R. Corp. *v.* New York, etc., R. Co., 12 R. I. 220.

Texas.— Palestine Water, etc., Co. *v.* Pal-

cannot be divested or arrested by subsequent proceedings instituted in another court.[32]

b. Qualifications of and Exceptions to Rule. The rule just stated[33] does not include all matters which may possibly become involved or arise in the suit, and only extends to questions which properly and ordinarily arise in the progress of the first suit.[34] Jurisdiction of the court having priority may, however, be exclusive

estine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203; Riesner *v.* Gulf, etc., R. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171.

United States.— Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399; *Ex p.* Chetwood, 165 U. S. 443, 17 S. Ct. 385, 41 L. ed. 782; *In re* N. Y., etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981; Heidritter *v.* Elizabeth Oil-cloth Co., 112 U. S. 294, 5 S. Ct. 135, 28 L. ed. 729; Ober *v.* Gallagher, 93 U. S. 199, 23 L. ed. 829; U. S. *v.* Johnson County, 6 Wall. 166, 18 L. ed. 768; Buck *v.* Colbath, 3 Wall. 334, 18 L. ed. 257; Freeman *v.* Howe, 24 How. 450, 16 L. ed. 749; Orton *v.* Smith, 18 How. 263, 15 L. ed. 393; Baltimore, etc., R. Co. *v.* Wabash R. Co., 119 Fed. 678, 57 C. C. A. 322; U. S. *v.* Eisenbeis, 112 Fed. 190, 50 C. C. A. 179; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3; Mercantile Trust, etc., Co. *v.* Roanoke, etc., R. Co., 109 Fed. 3; Pitt *v.* Rodgers, 104 Fed. 387, 43 C. C. A. 600; Hughes *v.* Green, 84 Fed. 833, 28 C. C. A. 537; Thorpe *v.* Sampson, 84 Fed. 63; Foster *v.* Abingdon Bank, 68 Fed. 723; Hatch *v.* Bancroft-Thompson Co., 67 Fed. 802; Cohen *v.* Solomon, 66 Fed. 411; Clark *v.* Five Hundred and Five Thousand Feet of Lumber, 65 Fed. 236, 12 C. C. A. 628; Mack *v.* Winslow, 59 Fed. 316, 8 C. C. A. 134; Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572; Evans *v.* Smith, 21 Fed. 1; Bruce *v.* Manchester, etc., R. Co., 19 Fed. 342; *In re* James, 18 Fed. 853; Parkes *v.* Aldridge, 8 Fed. 220; Presbyterian Church Bd. of Foreign Missions *v.* McMaster, 3 Fed. Cas. No. 1,586; Burt *v.* Keyes, 4 Fed. Cas. No. 2,212, 1 Flipp. 61; Union Trust Co. *v.* Rockford, etc., R. Co., 24 Fed. Cas. No. 14,401, 6 Biss. 197.

See 13 Cent. Dig. tit. "Courts," § 1345 *et seq.*; and *supra*, XIII, A, 2.

It is a fixed rule of the federal court never to take jurisdiction of a case which presents the same issues and seeks the same relief as a case pending in a state court having concurrent jurisdiction. State Trust Co. *v.* National Land Imp., etc., Co., 72 Fed. 575; Gates *v.* Bucki, 53 Fed. 961, 4 C. C. A. 116; Martin *v.* Baldwin, 19 Fed. 340, 9 Sawy. 632; Elting *v.* U. S., 27 Ct. Cl. 158; Parkes *v.* Aldridge, 18 Fed. Cas. No. 10,755; Turner *v.* Beacham, 24 Fed. Cas. No. 14,252, Taney 583.

Jurisdiction attaches, so as to give priority, upon service of process (Owens *v.* Ohio Cent. R. Co., 20 Fed. 10; Union Mut. L. Ins. Co. *v.* Chicago University, 6 Fed. 443, 10 Biss. 191; Bell *v.* Ohio L., etc., Co., 3 Fed. Cas. No. 1,260, 1 Biss. 260), provided it is properly served (Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324), by the filing of a petition and the issuance of summons (Spinning *v.* Ohio L. Ins., etc., Co., 2 Disn. (Ohio) 336), by filing a bill for foreclosure and issuing a subpœna (Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 177 U. S. 51, 20 S. Ct. 564, 44 L. ed. 667 [*reversing* 173 Ill. 439, 51 N. E. 55]), or by an order of publication making nonresident legatees parties (Reid *v.* Kerfoot, 20 Fed. Cas. No. 11,668, Chase 349). But actual seizure of the property is not always necessary (Adams *v.* Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1), and a service of summons without the appointment of a receiver does not give such priority (Coopers *v.* Central Ohio R. Co., 2 Ohio Dec. (Reprint) 199, 2 West. L. Month. 63), nor are mere incipient steps in a suit sufficient (Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. 849, 4 Hughes 415). Proof will be heard as to which suit was first instituted (Gamble *v.* San Diego, 79 Fed. 487), and the condition of the alleged pending suit will be material (Lake Nat. Bank *v.* Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195).

32. *Louisiana.*— Lake Bisteneau Lumber Co. *v.* Mimms, 49 La. Ann. 1283, 22 So. 730; Van Wych *v.* Gaines, 13 La. Ann. 235.

Massachusetts.— Hill Mfg. Co. *v.* Providence, etc., Steamship Co., 113 Mass. 495, 18 Am. Rep. 527.

Missouri.— Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335; Seibel *v.* Simeon, 62 Mo. 255.

Ohio.— Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. 14, 3 Ohio N. P. 15.

Texas.— Arthur *v.* Batte, 42 Tex. 159.

United States.— *Ex p.* Chetwood, 165 U. S. 443, 17 S. Ct. 385, 41 L. ed. 782; U. S. *v.* Johnson County, 6 Wall. 166, 18 L. ed. 768; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3; Jenks *v.* Brewster, 96 Fed. 625; Appleton Waterworks Co. *v.* New York Cent. Trust Co., 93 Fed. 286, 35 C. C. A. 302; Lanning *v.* Osborne, 79 Fed. 657; New York Cent. Trust Co. *v.* South Atlantic, etc., R. Co., 57 Fed. 3; Claflin *v.* Lisso, 16 Fed. 897, 4 Woods 252; Apperson *v.* Memphis, 2 Fed. Cas. No. 497, 2 Flipp. 363; New York City Bank *v.* Skelton, 5 Fed. Cas. No. 2,739, 2 Blatchf. 14; Mallett *v.* Dexter, 16 Fed. Cas. No. 8,988, 1 Curt. 178.

See 13 Cent. Dig. tit. "Courts," § 1345 *et seq.*

33. See *supra*, XIII, B, 4, a.

34. Buck *v.* Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257. See also Beach *v.* Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

only so far as to render the decision of the other court subordinate thereto, and so, without regard to which judgment or decree is first rendered.[35] And where the statute makes the jurisdiction of the federal court exclusive in special proceedings it is limited to determining matters material to and directly connected with the judgment sought to be obtained, and does not necessarily extend to other questions growing out of the subject-matter as between different parties to the exclusion of the jurisdiction of other competent courts.[36] Again it has been held that the general rule as to the retention of jurisdiction does not apply where the parties and privies in the two suits are different,[37] and the relief sought is not the same,[38]

Limitations of rule.— Where a suit removed to a federal court has been dismissed without prejudice, and the amount is such that said court has not jurisdiction, plaintiff may sue in a state court. Adams Express Co. *v.* Schofield, 64 S. W. 903, 23 Ky. L. Rep. 1120. And it is no defense that before the action in the state court was commenced a suit on the same cause of action was pending in a federal court, which suit was dismissed subsequently to the entry of judgment in the state court. Capwell *v.* Sipe, 51 Fed. 667. Nor is a transfer of a suit from one state court to another a bar to a subsequent suit in a federal court. Hyde *v.* Stone, 20 How. (U. S.) 170, 15 L. ed. 874. Nor is the dominion exercised in a former suit over the *res* revived by a proceeding in a state court to set aside a former decree, so as to exclude the jurisdiction of a federal court which has attached in the meantime. Boston Cent. Nat. Bank *v.* Hazard, 49 Fed. 293. Again where a federal court orders a receiver of a railroad lying wholly within a state to destroy the same the matter is of such importance as to require mature deliberation, and an application of the attorney-general to the state supreme court for leave to bring an action to enjoin such destruction will be granted and said destruction enjoined pending such action. Atty.-Gen. *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915. So where a federal court no longer has jurisdiction and plaintiff's rights were not adjudicated therein a state court may proceed. Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14. And federal courts may, to prevent injustice, take action, upon the mere suggestion of counsel, as to the condition of related litigation in the state courts, although the facts do not appear upon the record. Rice *v.* Sharpleigh Hardware Co., 85 Fed. 559.

Estates of decedents.— Notwithstanding prior proceedings in a state court and the laws of a state, a creditor of a deceased person, where the two resided in different states, may establish his debt in the federal court against decedent's representative. Kendall *v.* Creighton, 23 How. (U. S.) 90, 16 L. ed. 419. See also Chewett *v.* Moran, 17 Fed. 820. So an assessment against the estate of an owner of national bank-stock is enforceable in the federal court, although settlement proceedings are pending in a state court. Brown *v.* Ellis, 86 Fed. 357. And where the executor rejects such a claim the federal court may determine the liability. Zimmerman *v.* Carpenter, 84 Fed. 747. So, pending such settlement, a citizen of another state, who is a legatee under the will, may bring suit in a federal court against the resident executor and heirs to recover such legacy. Brendel *v.* Charch, 82 Fed. 262. It has been held, that the pendency of administration proceedings in the state probate court does not bar action in a federal court involving the same issues (Holton *v.* Guinn, 76 Fed. 96), unless it is distinctly shown that the probate court has possession of the *res*, as where a bill is brought to set aside an alleged fraudulent assignment under a will, and to enforce a distributee's rights in the estate (Briggs *v.* Stroud, 58 Fed. 717). Again a federal court has jurisdiction of a suit by aliens to establish their relationship to a decedent and their status as heirs, and to determine the validity of a will under which a citizen of the state claims the estate, notwithstanding the pendency of probate proceedings in the state court, and although there are other persons claiming an interest in the estate who are not parties. O'Callaghan *v.* O'Brien, 116 Fed. 934.

35. Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572.

36. U. S. *v.* Eisenbeis, 112 Fed. 190, 50 C. C. A. 179.

37. Gay *v.* Brierfield Coal, etc., Co., 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564; Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751; Put-in-Bay Waterworks, etc., R. Co. *v.* Ryan, 181 U. S. 409, 21 S. Ct. 709, 45 L. ed. 927; Straine *v.* Bradford Sav. Bank, etc., Co., 88 Fed. 571; Powers *v.* Blue Grass Bldg., etc., Assoc., 86 Fed. 705; Deming *v.* Orient Ins. Co., 78 Fed. 1; New York State Trust Co. *v.* National Land Imp., etc., Co., 72 Fed. 575; Chicago Trust, etc., Bank *v.* Bentz, 59 Fed. 645; Coe *v.* Aiken, 50 Fed. 640; Beekman *v.* Hudson River West Shore R. Co., 35 Fed. 3; Errett *v.* Crane, 8 Fed. Cas. No. 4,523; Hay *v.* Alexandria, etc., R. Co., 11 Fed. Cas. No. 6,254*a*, 4 Hughes 331.

38. Gay *v.* Brierfield Coal, etc., Co., 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564; Puech *v.* Daret, 45 La. Ann. 1281, 14 So. 71; Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413 [*affirming* 61 Mich. 509, 28 N. W. 699]; Hubinger *v.* New York Cent. Trust Co., 94 Fed. 788, 36 C. C. A. 494; Straine *v.* Bradford Sav. Bank, etc., Co., 88 Fed. 571; Powers *v.* Blue Grass Bldg., etc., Assoc., 86 Fed. 705; Cohen *v.* Solomon, 66 Fed. 411. See also Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am.

or the two suits involve a different controversy;[39] where the subject-matter is different,[40] or rests upon a contract connected with the prior suit;[41] where the subject-matter is located in different states, in the respective territorial jurisdictions of which the suits are brought;[42] where the proceedings in the other court are a mere evasion of jurisdiction;[43] where the proceedings in the other court, as in case of assignees filing an account, cannot be considered as a suit;[44] where the action in one court is at equity and in the other at law, the latter not affecting the custody of the property;[45] or where one suit is *in personam* and the other *in rem*.[46]

5. PRISONERS UNDER ARREST, COMMITMENT, OR SENTENCE — a. In General. It is a well-settled rule that a court having possession of a person cannot be deprived of the right to deal with such person until its jurisdiction is exhausted and no other court has the right to interfere with such custody.[47]

b. Persons Detained Under Process of State Courts. Subject to the exceptions hereinafter specified the rule just stated[48] applies to interference by federal courts in the case of persons detained under the process of a state court;[49] nor was it intended by congress that federal courts should by writs of habeas corpus obstruct the ordinary administration of the state criminal laws in the state tribunals.[50] Moreover state courts are equally with federal courts charged with

St. Rep. 751; Deming *v.* Orient Ins. Co., 78 Fed. 1; Errett *v.* Crane, 8 Fed. Cas. No. 4,523; Hay *v.* Alexandria, etc., R. Co., 11 Fed. Cas. No. 6,254*a*, 4 Hughes 331.

39. Hubbard *v.* Bellew, 3 Fed. 447.

Where the question is one which is so entirely separate and distinct from those involved in general proceedings, under an assignment in the state court, that it can properly be eliminated therefrom without prejudice thereto, it is one which the federal court may determine. Gould *v.* Mullanphy Planing-Mill Co., 32 Fed. 181.

40. Whitney *v.* Frisbie, 6 D. C. 262; National Foundry, etc., Works *v.* Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125; Put-in-Bay Waterworks, etc., R. Co. *v.* Ryan, 181 U. S. 409, 21 S. Ct. 709, 45 L. ed. 927.

Where property involved in a suit in one court is not involved in an action in the other the rule does not apply. Farnsworth *v.* Western Union Tel. Co., 6 N. Y. Suppl. 735.

41. Union Mut. L. Ins. Co. *v.* Kirchoff, 149 Ill. 536, 36 N. E. 1031.

42. Woodbury *v.* Allegheny, etc., R. Co., 72 Fed. 371.

43. Clark *v.* Gaines, 13 La. Ann. 138; People *v.* State Treasurer, 24 Mich. 468.

44. Shelby *v.* Bacon, 10 How. (U. S.) 56, 13 L. ed. 326.

45. Ogden *v.* Weaver, 108 Fed. 564, 47 C. C. A. 485; Defiance Water Co. *v.* Defiance, 100 Fed. 178; Brooks *v.* Vermont Cent. R. Co., 4 Fed. Cas. No. 1,964, 14 Blatchf. 463.

46. Ahlhauser *v.* Butler, 50 Fed. 705.

47. *Ex p.* Johnson, 167 U. S. 120, 17 S. Ct. 735, 42 L. ed. 103. See also People *v.* Westchester County Sheriff, 2 Edm. Sel. Cas. (N. Y.) 324; *Ex p.* Bushnell, 8 Ohio St. 599.

A federal court has jurisdiction where the petition alleges an illegal restraint under color of federal authority, although certiorari proceedings are pending in a state court to review the decision dismissing a writ of habeas corpus on the prisoner's petition. *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197.

Subsequent indictment or arrest.— A person in custody under commitment of federal authorities and escaping may be indicted in a state court. Com. *v.* Ramsey, 1 Brewst. (Pa.) 422. And a person on bail to answer an indictment in a federal court may be arrested on a state process for a crime against the state, where the federal authorities do not insist upon the prior jurisdiction of the federal court. *In re* Fox, 51 Fed. 427 [*following* U. S. *v.* French, 25 Fed. Cas. No. 15,165, 1 Gall. 1]. So if a prisoner confined under sentence of a federal court is released by a writ out of a state court he may be rearrested by the federal court. *In re* Johnson, 46 Fed. 477. But see Bagnall *v.* Ableman, 4 Wis. 163.

48. See *supra*, XIII, B, 5, a.

49. *Ex p.* Ulrich, 43 Fed. 661; *In re* Shaner, 39 Fed. 869; U. S. *v.* French, 25 Fed. Cas. No. 15,165, 1 Gall. 1; U. S. *v.* Rector, 27 Fed. Cas. No. 16,132, 5 McLean 174.

50. Wood *v.* Brush, 140 U. S. 278, 11 S. Ct. 738, 35 L. ed. 505. See also New York *v.* Eno, 155 U. S. 89, 15 S. Ct. 30, 39 L. ed. 80; Duncan *v.* McCall, 139 U. S. 449, 11 S. Ct. 573, 35 L. ed. 219; *In re* Nelson, 69 Fed. 712.

The case of an alien committing a crime within the territorial jurisdiction of a state is not within U. S. Rev. Stat. (1878), § 753, giving power to courts and judges of the United States to grant writs of habeas corpus in certain cases. *In re* Wildenhus, 28 Fed. 924.

Questions for state courts include the prosecution of a writ of error in criminal cases punishable with death (Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432), the effect of a recognizance for appearance, and the meaning of the word "resides" in a clause of a statute relating to commitments (Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406), state constitutional provisions securing to criminals a public trial (Gut *v.* Minnesota, 9 Wall. (U. S.) 35, 19 L. ed. 573), and inquiries involving the legality of a detention for contempt which is a matter peculiarly within the exclusive ju-

the duty of protecting the accused in the enjoyment of his rights under the constitution of the United States whenever those rights are involved in any suit pending before them.[51] It is also a general rule that a federal court will not review the proceedings of a state court on habeas corpus procured by a state prisoner, on the ground of a violation of his constitutional rights, where the petitioner's remedy in the state courts has not been exhausted, and the construction and effect of local statutes must be determined before it is clear that any constitutional right is involved, but will leave him to such remedy, and to a final appeal to the supreme court of the United States to determine any constitutional question raised and adversely determined by the state tribunals.[52] Again the general rule is that habeas corpus will not issue unless the court under whose warrant the petitioner is held is without jurisdiction and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal, but in rare exceptional cases it may be issued although such remedy exists.[53] These rules do not, however, preclude the right of federal courts to determine summarily by a writ of habeas corpus whether the alleged restraint of the liberty of a person in custody of a state court is in violation of the constitution,[54] or of a law or treaty of the United States,[55] and upon its being so found federal courts may restore such person to liberty.[56] Again the authority given by the statute[57] is not only a discretionary one, but is also one of great delicacy, and should not be exercised in any case where suitable relief can be had through the regular procedure of state tribunals.[58]

c. Persons Detained Under Indictment or Sentence of State Courts. Where a state court has exclusive jurisdiction to proceed in a criminal matter and to exhaust the remedies therein, a federal court cannot, except as hereinafter stated, interfere with the custody by a state court of a prisoner under indictment or

risdiction of the state (*In re* Lawrence, 80 Fed. 99; *In re* Jordan, 49 Fed. 238).

51. New York *v.* Eno, 155 U. S. 89, 14 S. Ct. 1150, 38 L. ed. 1073; Cook *v.* Hart, 146 U. S. 183, 13 S. Ct. 40, 36 L. ed. 934; Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542.

52. *In re* O'Brien, 95 Fed. 131. See also *Ex p.* Crouch, 112 U. S. 178, 5 S. Ct. 96, 28 L. ed. 690; *In re* Lawrence, 80 Fed. 99; *Ex p.* Jervey, 66 Fed. 957.

If a statute does not violate the federal constitution federal courts have no jurisdiction. *In re* Brosnahan, 18 Fed. 62, 4 McCrary 1.

53. *Ex p.* Belt, 159 U. S. 95, 15 S. Ct. 987, 40 L. ed. 88. See also *In re* Chapman, 156 U. S. 211, 15 S. Ct. 331, 39 L. ed. 401.

A debtor arrested on a state court process for a violation of a penal statute against fraudulent insolvency and committed for trial will not be released on habeas corpus in a federal court on the ground that the state statute is superseded by the bankruptcy law, and no circumstances of special urgency being shown, the federal courts will not assume the determination of the federal question thus raised until the prisoner has exhausted his remedy in the state courts. U. S. *v.* McAleese, 93 Fed. 656, 35 C. C. A. 529.

54. *Ex p.* Royall, 117 U. S. 241, 6 S. Ct. 734, 29 L. ed. 868; *Ex p.* Hanson, 28 Fed. 127; *In re* Ah Lee, 5 Fed. 899, 6 Sawy. 410. See also *In re* Wong Yung Quy, 47 Fed. 717.

If the validity of a state statute has been sustained by the state court the prisoner has the right to have its validity under the federal constitution passed upon by the federal court on habeas corpus. Dreyer *v.* Pease, 88 Fed. 978.

The petition must clearly show irreconcilable antagonism between a federal and a state law, where a writ of habeas corpus is sought from a federal court. *In re* Hoover, 30 Fed. 51.

55. *Ex p.* Hanson, 28 Fed. 127.

If acts are committed in performance of duties created by federal laws and persons doing them are committed for contempt by a state court, the federal courts will issue a writ of habeas corpus in favor of them. *In re* Electoral College, 8 Fed. Cas. No. 4,336, 1 Hughes 571.

Whether a member of an Indian tribe is illegally restrained of his liberty in violation of a treaty with the tribe is within the jurisdiction of a federal court. *In re* Race Horse, 70 Fed. 598.

Where a person is acting under the authority of a federal statute in constructing a telegraph line upon a military or post road, he will be released by the federal court from the custody of the state authorities. *Ex p.* Conway, 48 Fed. 77.

56. *Ex p.* Royall, 117 U. S. 241, 6 S. Ct. 734, 29 L. ed. 868; *Ex p.* Hanson, 28 Fed. 127; *In re* Electoral College, 8 Fed. Cas. No. 4,336, 1 Hughes 571.

57. U. S. Rev. Stat. (1878) § 753 [U. S. Comp. Stat. (1901) p. 592].

58. *In re* Bradley, 96 Fed. 969. See also *In re* Anderson, 94 Fed. 487; *In re* Huse, 79 Fed. 305, 25 C. C. A. 1; *In re* Flinn, 57 Fed. 496; *In re* Jordan, 49 Fed. 238.

sentence therein by discharging him on habeas corpus,[59] unless the circumstances are extraordinary,[60] exceptional,[61] special,[62] of peculiar urgency,[63] or the case is clear,[64] even though the federal court may believe that the statute on which the indictment is based is in conflict with the constitution of the United States,[65] as such question can properly be raised and determined in defense to the indictment, subject to review by the supreme court.[66] Nor will the federal court interfere where the matter is one of error for the state supreme court,[67] or one for the determination of the judges thereof or of the trial judge.[68] The federal court has jurisdiction, however, to interfere by habeas corpus and release the prisoner where he is restrained of his liberty in violation of the constitution of the United States.[69]

d. Extradition. Congress has not undertaken to invest judicial tribunals of the United States with exclusive jurisdiction of issuing writs of habeas corpus in proceedings for the arrest of fugitives from justice and their delivery to the

59. Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399; Fitzgerald *v.* Green, 134 U. S. 377, 10 S. Ct. 586, 33 L. ed. 951; *Ex p.* Dorr, 3 How. (U. S.) 103, 11 L. ed. 514; Nesbit *v.* Hert, 91 Fed. 123; *In re* Murphy, 87 Fed. 549; *In re* Grice, 79 Fed. 627; *In re* Welch, 57 Fed. 576; *In re* King, 51 Fed. 434; *Ex p.* Skiles, 50 Fed. 524; *In re* Jordan, 49 Fed. 238; U. S. *v.* Wells, 28 Fed. Cas. No. 16,665.

A federal court is not required to inquire into the cause of restraint of liberty upon habeas corpus under U. S. Rev. Stat. (1878) §§ 751–753 [U. S. Comp. Stat. (1901) p. 592], where upon the face of the petition it appears that an inquiry would result in remanding the petitioner to prison. *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. ed. 405.

Refusing to assign counsel for prisoner's defense and forcing him to trial without time for preparation and without opportunity to secure by process material witnesses, in violation of the constitution and laws of the state, cannot be considered by the federal court on habeas corpus. *In re* McKnight, 52 Fed. 799 [*following Ex p.* Harding, 120 U. S. 782, 7 S. Ct. 780, 30 L. ed. 824].

That the indictment lacked the words "a true bill" and was found by the grand jury by mistake and misconception afford no ground for interposition by the federal courts by writ of habeas corpus. Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406.

60. Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535.

61. Nesbit *v.* Hert, 91 Fed. 123.

For comity's sake the power will not be exercised unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay necessary to prosecute a writ of error, or unless the state court, in convicting the prisoner, has disregarded a decision of the federal supreme court upon the question at issue. *In re* Brundage, 96 Fed. 963.

62. *In re* Grice, 79 Fed. 627; U. S. *v.* Chapel, 54 Fed. 140.

63. Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91.

64. *In re* Murphy, 87 Fed. 549.

65. Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535.

66. Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535.

Interference with execution of sentence of state court by habeas corpus is properly refused by a federal court, where the question on which the relief is based has not been raised in the state court either by way of defense or by application for a writ of habeas corpus. Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249.

67. Crossley *v.* California, 168 U. S. 640, 18 S. Ct. 242, 42 L. ed. 610; *In re* Bennett, 84 Fed. 324; *In re* Welch, 57 Fed. 576; *In re* Friedrick, 51 Fed. 747.

A refusal of a state court to grant a writ of error will not of itself warrant interference on the part of a federal court. Kohl *v.* Lehlback, 160 U. S. 293, 16 S. Ct. 304, 40 L. ed. 432.

A federal court should not grant the writ unless the pivotal point has been finally determined by the state supreme court. *In re* May, 82 Fed. 422. See also Gusman *v.* Marrero, 180 U. S. 81, 21 S. Ct. 293, 45 L. ed. 436.

68. *In re* Durrant, 169 U. S. 39, 18 S. Ct. 291, 42 L. ed. 653.

69. U. S. *v.* Chapel, 54 Fed. 140; *In re* Ah Jow, 29 Fed. 181; *Ex p.* Reynolds, 20 Fed. Cas. No. 11,720, 3 Hughes 559.

An order of a state court directing the infliction of the death penalty pending an appeal from an order of a federal court denying a writ of habeas corpus to release the prisoner is null under U. S. Rev. Stat. (1878) § 766 [U. S. Comp. Stat. (1901) p. 597]. *In re* Ebanks, 84 Fed. 311.

That appeal from an order directing execution in a capital case does not of itself operate to stay execution does not render a statute unconstitutional under the laws of the United States, and a federal court will not interfere by habeas corpus based on the ground that the failure to stay will deprive the prisoner of the privilege to sue out a writ of error from the supreme court to review the final judgment to be entered by the state su-

authorities of the state in which they stand charged with crime.[70] And a federal court will decline interposition in an extradition case by writ of habeas corpus, and will leave the question of the lawfulness of the prisoner's detention in the state in which he was indicted to be determined in the first instance by the state courts.[71]

e. Persons in Custody of Courts or Officers of National Government. The powers of the states to inquire by its courts or the judges thereof into the grounds upon which persons within their limits are restrained of their liberty and to discharge them if such restraint is illegal is subject to the exclusive and paramount authority of the national government to determine whether persons in the custody of its courts or officers are held in conformity with law.[72]

f. Federal Officers Detained by State Authorities. Federal circuit courts have power and authority to issue writs of habeas corpus on petition of one in custody for an act done in pursuance of a law of the United States, or on petition of one in custody in violation of the constitution or laws of the United States.[73] It has been determined that this rule applies to a federal officer generally,[74]

preme court. *In re* Durrant, 169 U. S. 39, 18 S. Ct. 291, 42 L. ed. 653.

70. Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542. See also *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121.

71. Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406. See also U. S. *v.* McClay, 26 Fed. Cas. No. 15,660.

If the prisoner has been extradited and a writ of habeas corpus is sued out upon the ground that the extradition was in violation of the constitution and laws of the United States, it is discretionary with the circuit court to refuse to discharge him, where it is not an urgent case, involving either the authority and operations of the general government or the obligations of this country to, or its relations with, foreign nations, and state courts are also bound to protect the accused as to his rights under the federal constitution. Cook *v.* Hart, 146 U. S. 183, 13 S. Ct. 40, 36 L. ed. 934. Again where a prisoner, having escaped, has been forcibly seized by the governor demanding his extradition the federal court will not release the prisoner where the illegal mode in which he was brought from the state violated no right secured by the constitution or laws of the United States, but solely concerned that state, which might bring the parties abducting him to justice. Mahon *v.* Justice, 127 U. S. 700, 8 S. Ct. 1204, 32 L. ed. 283. See also Kerr *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421; U. S. *v.* Johnson, 26 Fed. Cas. No. 15,487.

72. *California.*— *Ex p.* Le Bur, 49 Cal. 159.

Illinois.— *In re* Salisbury, 16 Ill. 350.

Missouri.— Copenhaver *v.* Stewart, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382.

Nevada.— *Ex p.* Hill, 5 Nev. 154.

New Jersey.— State *v.* Zulich, 29 N. J. L. 409.

New York.— People *v.* Fiske, 45 How. Pr. 294.

Ohio.— *Ex p.* Bushnell, 8 Ohio St. 599; *Ex p.* Early, 3 Ohio Dec. (Reprint) 105, 3 Wkly. L. Gaz. 234.

Pennsylvania.—*In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

Texas.— *Ex p.* Chance, (Civ. App. 1900) 58 S. W. 110.

Wisconsin.— See *Ex p.* Booth, 3 Wis. 145. *Compare In re* Tarble, 25 Wis. 390, 3 Am. Rep. 85.

United States.—Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542; U. S. *v.* Tarble, 13 Wall. 397, 20 L. ed. 597; Ableman *v.* Booth, 21 How. 506, 16 L. ed. 169; *In re* Farrand, 8 Fed. Cas. No. 4,678, 1 Abb. 140; *Ex p.* Sifford, 22 Fed. Cas. No. 12,848. See also Motherwell *v.* U. S., 107 Fed. 437, 48 C. C. A. 97; *In re* Hamilton, 11 Fed. Cas. No. 5,976, 1 Ben. 455.

See 13 Cent. Dig. tit. "Courts," § 1376.

That a marshal should obey a writ as he does not thereby part with custody see *Ex p.* Sifford, 22 Fed. Cas. No. 12,848.

73. U. S. Rev. Stat. (1878) § 753 [U. S. Comp. Stat. (1901 p. 592]; *In re* Lewis, 83 Fed. 159; *In re* Watts, 81 Fed. 359 [*affirmed* in 88 Fed. 102, 31 C. C. A. 403]; *In re* Bull, 4 Fed. Cas. No. 2,119, 4 Dill. 323; U. S. *v.* Fayette County Jailer, 26 Fed. Cas. No. 15,463, 2 Abb. 265.

Federal courts may go behind the indictment or information and ascertain by independent inquiry whether the act was in truth done in pursuance of a law of the United States. *In re* Waite, 81 Fed. 359 [*affirmed* in 88 Fed. 102, 31 C. C. A. 403]. See also *Ex p.* Jenkins, 13 Fed. Cas. No. 7,259, 1 Phila. (Pa.) 451, 2 Wall. Jr. 521.

The federal court will not inquire into the truth or justice of the charge, but the inquiry will be limited to determining whether the alleged unlawful acts were done in pursuance of a law of the United States. *In re* Marsh, 51 Fed. 277.

74. *In re* Thomas, 87 Fed. 453, 31 C. C. A. 80 [*affirmed* in 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699]; Ramsey *v.* Warren County Jailer, 20 Fed. Cas. No. 11,547, 2 Flipp. 451; *Ex p.* Jenkins, 13 Fed. Cas. No. 7,259, 1 Phila. (Pa.) 451, 2 Wall. Jr. 521.

The authority of a state court to punish a

officers of a federal court,[75] an officer of the United States executing process of a federal court,[76] a United States marshal,[77] or his deputy,[78] an officer of the treasury department,[79] a deputy revenue collector,[80] agents of the secret service division of the treasury department,[81] an officer of the United States army,[82] and to a soldier in the regular service during the time of war.[83]

g. Persons Detained by Federal Military Authorities. State courts cannot interfere with persons held under authority or color of authority of military authorities of the United States or release them, where such facts appear,[84] such power being exclusive in the United States court or officers.[85]

6. Property in Custody of Another Court — a. In General. Where property is in the custody of one court of competent jurisdiction, another court of concurrent jurisdiction cannot deprive it of the right to deal with such property or interfere with its possession.[86] So property in the custody of a federal court of competent jurisdiction cannot be interfered with by process from a state court;[87]

licensed pilot of the United States is not affected by the federal law or the regulations of a federal officer. State *v.* Livaudais, 36 La. Ann. 122.

75. *Ex p.* Turner, 24 Fed. Cas. No. 14,246, 3 Woods 603.

76. *In re* Anderson, 94 Fed. 487.

Persons assisting officer.— U. S. *v.* Morris, 26 Fed. Cas. No. 15,811.

77. *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; Anderson *v.* Elliott, 101 Fed. 609, 41 C. C. A. 521; U. S. *v.* Fullhart, 47 Fed. 802; *Ex p.* Robinson, 20 Fed. Cas. No. 11,934, 1 Bond 39. See also Beckett *v.* Harford County Sheriff, 21 Fed. 32.

A marshal specially charged with the duty of protecting and guarding a federal judge will be within the rule. *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55.

78. Kelly *v.* Georgia, 68 Fed. 652; U. S. *v.* Fullhart, 47 Fed. 802; Illinois *v.* Fletcher, 22 Fed. 776.

79. *In re* Comingore, 96 Fed. 552 [*affirmed* in 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846].

80. *In re* Huttman, 70 Fed. 699.

81. U. S. *v.* Fuellhart, 106 Fed. 911.

82. *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332; *In re* Neill, 17 Fed. Cas. No. 10,089, 8 Blatchf. 156.

83. *In re* Hurst, 12 Fed. Cas. No. 6,926, 2 Flipp. 510.

84. U. S. *v.* Tarble, 13 Wall. (U. S.) 397, 20 L. ed. 597; *Ex p.* Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332; *In re* Neill, 17 Fed. Cas. No. 10,089, 8 Blatchf. 156. See also *In re* Spangler, 11 Mich. 298; *In re* Hopson, 40 Barb. (N. Y.) 34. But see State *v.* Dimick, 12 N. H. 194, 37 Am. Dec. 197; Dabbs' Case, 12 Abb. Pr. (N. Y.) 113; *In re* Ferguson, 9 Johns. (N. Y.) 239; Com. *v.* Fox, 7 Pa. St. 336; Com. *v.* Blake, 8 Phila. (Pa.) 523; Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

85. U. S. *v.* Tarble, 13 Wall. (U. S.) 397, 20 L. ed. 597. See also State *v.* Zulich, 29 N. J. L. 409.

86. *Ex p.* Johnson, 167 U. S. 120, 17 S. Ct. 735, 42 L. ed. 103; *Ex p.* Chetwood, 165 U. S. 443, 17 S. Ct. 385; 41 L. ed. 782; Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660; Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; Covell *v.* Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390; Krippendorf *v.* Hyde, 110 U. S. 276, 4 S. Ct. 27, 28 L. ed. 145; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666; U. S. *v.* Tarble, 13 Wall. (U. S.) 397, 20 L. ed. 597; Freeman *v.* Howe, 24 How. (U. S.) 450, 16 L. ed. 749; Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169; Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028; Holland Trust Co. *v.* International Bridge, etc., Co., 85 Fed. 865, 29 C. C. A. 460; Hale *v.* Bugg, 82 Fed. 33. See also Booth *v.* Ableman, 16 Wis. 460, 84 Am. Dec. 711; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 18 S. Ct. 403, 42 L. ed. 807; Chase *v.* Cannon, 47 Fed. 674.

The court which first seizes the property first acquires jurisdiction to the exclusion of another. Brown *v.* Clarke, 4 How. (U. S.) 4, 11 L. ed. 850; The Robert Fulton, 20 Fed. Cas. No. 11,890, 1 Paine 620; Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

The levy of an attachment upon real estate gives the court neither actual nor constructive possession. *In re* Hall, etc., Co., 73 Fed. 527.

Property in the hands of an assignee for creditors is not *in custodia legis* (Rothschild *v.* Hasbrouck, 65 Fed. 283; Hogue *v.* Frankfort, 62 Fed. 1006; Hyland *v.* The James Roy, 59 Fed. 784; Lehman *v.* Rosengarten, 23 Fed. 642; Lapp *v.* Van Norman, 19 Fed. 406) except the assignee be by statute an officer of the court (McCaffrey *v.* The J. G. Chapman, 62 Fed. 939).

Validity of levy.— In an action of trover brought in a state court by a United States marshal to recover property seized under process from a federal court, the state court may decide as to the validity of the levy. Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206.

When the custody ceases the property is open to process from another court. Lazarus *v.* McCarthy, 32 N. Y. Suppl. 833; The Roslyn, 20 Fed. Cas. No. 12,068, 9 Ben. 119.

87. *California.*—Swinnerton *v.* Oregon Pac. R. Co., 123 Cal. 417, 56 Pac. 40.

Colorado.— Smith *v.* Bauer, 9 Colo. 380, 12 Pac. 397; Parks *v.* Wilcox, 6 Colo. 489.

Georgia.—Home Bldg., etc., Assoc. *v.* Cherry, 62 Ga. 269.

Illinois.— Munson *v.* Harroun, 34 Ill. 422, 85 Am. Dec. 316; Hannebutt *v.* Cunningham, 3 Ill. App. 353.

nor on the other hand if property has come into the possession of a state court of competent jurisdiction can a federal court interfere by replevin or otherwise with such possession.[88]

b. Effect of Receivership[89]— (i) *In Federal Courts.* A state court is not deprived of the jurisdiction of a mandamus proceeding brought by a subscriber to the stock of a consolidated association to compel the recorder of mortgages, on the ground that the state stock subscribed has been fully paid for, to cancel the record of a mortgage given to secure the subscription, the mortgage having been pledged by the association to the state as security for a loan, by the fact that

Louisiana.— Moore *v.* Withenburg, 13 La. Ann. 22.

Minnesota.— Talbott *v.* Gere, 8 Minn. 85; Lewis *v.* Buck, 7 Minn. 104, 82 Am. Dec. 73.

Nevada.— Feusier *v.* Lammon, 6 Nev. 209.

New York.— Passage *v.* Dansville, etc., R. Co., 41 N. Y. App. Div. 182, 58 N. Y. Suppl. 770; Morrison *v.* Menhaden Co., 37 Hun 522.

South Carolina.—Burrell *v.* Letson, 1 Strobh. 239.

Wisconsin.— Booth *v.* Ableman, 18 Wis. 495.

United States.—Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981; Rio Grande R. Co. *v.* Vinet, 132 U. S. 478, 10 S. Ct. 155, 35 L. ed. 400; Heidritter *v.* Elizabeth Oil-Cloth Co., 112 U. S. 294, 5 S. Ct. 135, 28 L. ed. 729; Freeman *v.* Howe, 24 How. 450, 16 L. ed. 749; Slocum *v.* Mayberry, 2 Wheat. 1, 4 L. ed. 169; Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 21 C. C. A. 568; Clark *v.* Five Hundred and Five Thousand Feet of Lumber, 70 Fed. 1020, 17 C. C. A. 555; Central Nat. Bank *v.* Hazard, 49 Fed. 293; Farmers' L. & T. Co. *v.* San Diego St. Car Co., 49 Fed. 188; Patterson *v.* Mater, 26 Fed. 31; Alabama Gold L. Ins. Co. *v.* Girardy, 9 Fed. 142; Azcarati *v.* Fitzsimmons, 2 Fed. Cas. No. 690, 3 Wash. 134; The Croatan, 6 Fed. Cas. No. 3,395, Chase 546; The Joseph Gorham, 13 Fed. Cas. No. 7,537; *Ex p.* Turner, 24 Fed. Cas. No. 14,246, 3 Woods 603.

See 13 Cent. Dig. tit. "Courts," § 1387.

Replevin will not lie in a state court to recover property seized by a marshal under writs of attachment from a federal court. Summers *v.* White, 71 Fed. 106, 17 C. C. A. 631. But see Cooper *v.* Tompkins, 43 Mich. 406, 5 N. W. 456; Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219. But if consent has been given by the federal court the property may be replevied by suit in a state court. Hill *v.* Corcoran, 15 Colo. 270, 25 Pac. 171; Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Mitchell *v.* Smith, 13 Colo. 170, 21 Pac. 1026; Weil *v.* Smith, 11 Colo. 310, 18 Pac. 30; Smith *v.* Bauer, 9 Colo. 380, 12 Pac. 397. So where property of a stranger is seized replevin will lie in a state court. Howe *v.* Freeman, 14 Gray (Mass.) 566; Heyman *v.* Covell, 44 Mich. 332, 6 N. W. 846, 38 Am. Rep. 272; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am Dec. 593; Sifford *v.* Beaty, 12 Ohio St. 189.

The question of title of property attached under process from a federal court may be determined in a state court. Montgomery *v.* McDermott, 87 Fed. 374.

88. *Louisiana.*— Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556.

Maryland.— Jordan *v.* Downey, 40 Md. 401.

Missouri.— State *v.* Taylor, 3 Mo. App. 351.

Pennsylvania.— Dungan's Appeal, 68 Pa. St. 204, 8 Am. Rep. 169.

United States.— Pulliam *v.* Osborne, 17 How. 471, 15 L. ed. 154; Peck *v.* Jenness, 7 How. 612, 12 L. ed. 841; Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 21 C. C. A. 568; Porter *v.* Davidson, 62 Fed. 626; Cole *v.* Oil-Well Supply Co., 57 Fed. 534; Pickett *v.* Filer, etc., Co., 40 Fed. 313; Tefft *v.* Sternberg, 40 Fed. 2, 5 L. R. A. 221; Williams *v.* Morrison, 32 Fed. 177; Melvin *v.* Robinson, 31 Fed. 634; Senior *v.* Pierce, 31 Fed. 625; Attleborough Nat. Bank *v.* Northwestern Mfg., etc., Co., 28 Fed. 113; Beckett *v.* Harford County Sheriff, 21 Fed. 32; Walker *v.* Flint, 7 Fed. 435, 2 McCrary 341; Levi *v.* Columbia L. Ins. Co., 1 Fed. 206, 1 McCrary 34.

See 13 Cent. Dig. tit. "Courts," § 1390.

The rule applies where property is in the custody of a state court by reason of being in the hands of a receiver (Mutual Reserve Fund L. Assoc. *v.* Phelps, 103 Fed. 515; Metropolitan Trust Co. *v.* Lake Cities Electric R. Co., 100 Fed. 897; Foster *v.* Lebanon Springs R. Co., 100 Fed. 543; Ross *v.* Heckman, 84 Fed. 6; Garner *v.* Southern Mut. Bldg., etc., Assoc., 84 Fed. 3, 28 C. C. A. 381; Adams *v.* Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1), of a trustee (Peale *v.* Phipps, 14 How. (U. S.) 368, 14 L. ed. 459), where it has been assigned for the benefit of creditors (Collier *v.* Stanbrough, 6 Rob. (La.) 230; Val Blatz Brewing Co. *v.* Walsh, 84 Fed. 5; Milliken *v.* Barrow, 55 Fed. 148; Cleveland Rolling-Mill Co. *v.* Joliet Enterprise Co., 53 Fed. 683), or where it is a part of a decedent's estate and is in process of administration (Yonley *v.* Lavender, 21 Wall. (U. S.) 276, 22 L. ed. 536; Jordan *v.* Taylor, 98 Fed. 643; Lant *v.* Manley, 71 Fed. 7).

The pendency of a suit in relation to property does not prevent a federal court from taking possession of the same. Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397.

A proceeding against maritime freights in a state court without jurisdiction will not prevent a subsequent attachment in admiralty to enforce a maritime lien. Huntington *v.* Vigilancia, 63 Fed. 733. See also Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589; The Sailor Prince, 21 Fed. Cas. No. 12,218, 1 Ben. 234.

89. See, generally, RECEIVERS.

receivers for such association have been appointed by the United States circuit court.[90] And where the subject-matter of a receivership in a federal court has been disposed of, it is proper to issue an order of sale where a judgment has been obtained in a state court foreclosing a tax lien.[91] So a suit may be brought by a mortgagee in a state court for the purpose of establishing his mortgage rights in property, notwithstanding a receiver has been appointed in a federal court for the grantee of the mortgagor.[92] A state court will not, however, interfere with the jurisdiction of a circuit court over a receiver and questions which grow out of the administration of an insolvent bank's assets.[93] And the rights of a receiver of a corporation who has been appointed by a federal court will not be affected by a subsequent judgment in a state court forfeiting the charter of such corporation.[94]

(II) *In State Courts.* Where a receiver has been lawfully appointed by a state court and is in possession of the property, his possession will not be interfered with by proceedings or process from a federal court.[95] If, however, the property of an insolvent corporation is once in the possession of a federal court, in proceedings instituted by the corporate creditors, its jurisdiction will not be divested by the dissolution of the corporation and the appointment of a receiver in a state court.[96] And a federal court will not be prevented from entertaining jurisdiction of a suit to set aside conveyances, as void against judgment creditors, by the fact that a receiver has been appointed in the state court.[97]

90. Calhoun *v.* Lanaux, 127 U. S. 634, 8 S. Ct. 1345, 32 L. ed. 297.

91. Houston City St. R. Co. *v.* Storrie, (Tex. Civ. App. 1898) 44 S. W. 693.

A suit in a state court, by a judgment creditor of a corporation to ascertain the validity of, and construe, a deed of assignment by the corporation and to have an account taken of its debts, is not affected or rendered void by an equity suit brought by a stock-holder in a federal court, against the officers and directors of such corporation, to restrain certain acts as *ultra vires* and in which a decree is sought winding up the corporation affairs, and in which a receiver is appointed, where the latter suit is dismissed before any action is taken by the state court as to the possession of the corporate property. Glenn *v.* Liggett, 47 Fed. 472.

92. Spencer *v.* Welch, 51 La. Ann. 753, 25 So. 405.

93. Schaberg *v.* McDonald, 60 Nebr. 493, 83 N. W. 737. See also Baltimore, etc., R. Co. *v.* Flaherty, 87 Md. 102, 39 Atl. 524, 1076, where it is held that a state court cannot supervise the conduct of receivers appointed by a federal court.

94. City Water Co. *v.* State, 88 Tex. 600, 32 S. W. 1033. See also Mercantile Trust Co. *v.* Missouri, etc., R. Co., 48 Fed. 351.

Mortgagees of a leased line belonging to a system which is in the hands of a receiver appointed by a federal court will not be prevented from intervening in such court at any time for the purpose of regaining possession of the mortgaged property, by the fact that they have brought suit in a state court to foreclose the same and that the receivers have filed a general denial thereto. Seney *v.* Wabash Western R. Co., 150 U. S. 310, 14 S. Ct. 94, 37 L. ed. 1092; U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085.

95. *In re* Schuyler's Steam Tow Boat Co., 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391 [*affirming* 64 Hun 384, 19 N. Y. Suppl. 565]; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disn. (Ohio) 336. See also Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324, where it is held, however, that a stay of proceedings in a federal court will not be granted in a cause of which such court has jurisdiction and in which the complainant is entitled to some relief by the fact that a receiver of a state court has possession of the subject-matter of the controversy.

Mere irregularities in the appointment of a receiver by a state court will not be inquired into by a federal court. Remington Paper Co. *v.* Louisiana Printing, etc., Co., 56 Fed. 287.

A suit for the appointment of a receiver by other complainants while a receivership under appointment by a state court exists will not be entertained by a federal court. Central Trust Co. *v.* South Atlantic, etc., R. Co., 57 Fed. 3. See also Alabama, etc., R. Co. *v.* Jones, 1 Fed. Cas. No. 127; Blake *v.* Alabama, etc., R. Co., 3 Fed. Cas. No. 1,493.

A federal court may appoint a receiver for an entire line of railroad which is inseparable and runs through several states where receivers are appointed by different courts in different jurisdictions. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

Where a receivership has ceased in a state court, prior to an action in the federal court, and the former court has so determined, the fact that no order discharging the receivers has ever been entered will not deprive the latter court of jurisdiction. Andrews *v.* Smith, 5 Fed. 833, 19 Blatchf. 100.

96. Lake Superior Iron Co. *v.* Brown, 44 Fed. 539.

97. Bacon *v.* Harris, 62 Fed. 99.

A creditors' bill in the federal court by parties not before the state court is not barred by the fact that an action is pending in the latter court to set aside an assignment for

(III) *ACTIONS AGAINST RECEIVERS APPOINTED BY ANOTHER COURT.* Where a state court has jurisdiction of the parties and the subject-matter it may entertain a suit against a receiver appointed by a federal court for the purpose of recovering a money judgment.[98] And a federal court of one state will not refuse to entertain garnishment against a receiver appointed by a court of equity of another state, although he is exempt from said proceeding in the latter state, where the petition is properly presented by citizens within the jurisdiction of the former court, and no objection to jurisdiction exists on other grounds.[99] Where, however, the state court appointing a receiver of an insolvent's property, refuses to permit him to be made a party defendant to certain actions, the federal courts have no jurisdiction to entertain such an action.[1]

(IV) *ACTIONS BY RECEIVERS IN FEDERAL COURTS.* A receiver appointed by a state court may in some cases bring an action in the federal court affecting the receivership property.[2] If, however, the former court refuses to permit a receiver appointed by it, of an insolvent corporation, to sue the officers for fraudulent misappropriation of its property, jurisdiction of the suit will not be entertained by a federal court.[3]

(V) *POSSESSION BY RECEIVER.* After property has come into the possession of a receiver appointed by a federal court, such possession cannot be interfered with by subsequent process from a state court;[4] nor can a federal court interfere

creditors as fraudulent, and the appointment of a receiver. Rejall *v.* Greenhood, 60 Fed. 784.

98. *Indiana.*— Ft. Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535.

Kansas.— St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225.

Louisiana.— New Orleans *v.* New Orleans Sav. Inst., 32 La. Ann. 527.

Ohio.— Schonberg *v.* Cowen, 7 Ohio S. & C. Pl. Dec. 522.

Texas.— Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634.

Wisconsin.— Kinney *v.* Crocker, 18 Wis. 74.

United States.— Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551.

See 13 Cent. Dig. tit. "Courts," § 1409; and, generally, RECEIVERS.

After the discharge of a receiver appointed by a federal court a state court cannot authorize the rendering of a judgment against him. Fordyce *v.* Du Bose, 87 Tex. 78, 26 S. W. 1050.

99. Central Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685.

1. Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815 [*affirming* 36 Fed. 475]. See also Rejall *v.* Greenhood, 60 Fed. 784.

2. Chambers *v.* McDougal, 42 Fed. 694; Wilkinson *v.* Culver, 25 Fed. 639, 23 Blatchf. 416, where it was held that where he sues as a judgment creditor the suit may be maintained.

An action against a stock-holder, where the liability of defendant is fixed, and no accounting necessary, may be maintained in a federal court by a receiver appointed in a suit in equity by a state court. Hale *v.* Hardon, 89 Fed. 283.

Set-off against receiver.— Where an action is brought in a state court by a receiver appointed by a federal court to recover money which he alleges is due to him as receiver, the jurisdiction of the state court to decide as to a set-off pleaded by the defendant cannot be objected to by the former. Grant *v.* Buckner, 172 U. S. 232, 19 S. Ct. 163, 43 L. ed. 430.

3. Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815 [*affirming* 36 Fed. 475].

4. *Indiana.*— Ft. Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535; Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498.

Kansas.— State *v.* Miller, 54 Kan. 244, 38 Pac. 269.

Louisiana.— New Orleans *v.* New Orleans Sav. Inst., 32 La. Ann. 527; Gest *v.* New Orleans, etc., R. Co., 30 La. Ann. 28.

Pennsylvania.— Anderson *v.* Buffalo, etc., R. Co., 2 Pa. Co. Ct. 402.

Texas.— Sanborn *v.* Gunter, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 20 Wis. 165, 88 Am. Dec. 735.

United States.— Earle *v.* Pennsylvania, 178 U. S. 449, 20 S. Ct. 915, 44 L. ed. 1146; Leadville Coal Co. *v.* McCreery, 141 U. S. 475, 12 S. Ct. 28, 35 L. ed. 824 [*affirming* 44 Fed. 539]; People's Bank *v.* Winslow, 102 U. S. 256, 26 L. ed. 101; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334; De la Vergne Refrigerating Mach. Co. *v.* Palmetto Brewing Co., 72 Fed. 579; Oakes *v.* Myers, 68 Fed. 807; Hayes *v.* Columbus, etc., R. Co., 67 Fed. 630; Central Trust Co. *v.* Chattanooga, etc., R. Co., 62 Fed. 950; East Tennessee, etc., Co. *v.* Atlanta, etc., R. Co., 49 Fed. 608, 15 L. R. A. 109.

See 13 Cent. Dig. tit. "Courts," § 1407.

If actual possession is not had by a receiver the rule is held not to apply. Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286.

Proceedings for contempt may be entertained by a federal court for interference with possession of its receiver. *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207.

with the possession of a receiver appointed by a state court of competent jurisdiction.[5]

7. Jurisdiction as to Process or Judgment[6] of Other Court — a. Of Federal Court Over That of State Court. A federal court may take jurisdiction of a suit on a judgment rendered in a state court;[7] give equitable relief under a state statute, upon a judgment and execution in a state court, where property has been fraudulently conveyed to defeat creditors;[8] may relieve against a title fraudulently obtained in a state court, by enjoining the assertion of such title;[9] or may in a proper case dissolve an *ex parte* preliminary injunction which has been granted in a state court before removal of a cause therefrom.[10] It has, however, no power to vacate, modify, or annul a judgment rendered by a state court of competent jurisdiction;[11] or to allow an amendment of an execution where the state supreme court has refused to allow such amendment.[12] It has also been held that it has no jurisdiction to set aside a judicial sale made by a state court.[13]

b. Of State Court Over That of Federal Court. A state court may take jurisdiction of a proceeding to enforce a judgment rendered by a federal court,[14]

Where a receiver is appointed by both a federal and a state court, the latter court, although first appointing him, is held to have no jurisdiction over him as to property out of the state. Lehigh Coal, etc., Co. *v.* Central R. Co., 15 Fed. Cas. No. 8,213, 4 Wkly. Notes Cas. (Pa.) 187.

5. Lancaster *v.* Asheville St. R. Co., 90 Fed. 129; Judd *v.* Bankers, etc., Tel. Co., 31 Fed. 182, 24 Blatchf. 420; Bruce *v.* Manchester, etc., R. Co., 19 Fed. 342; Logan *v.* Greenlaw, 12 Fed. 10; Hutchinson *v.* Green, 6 Fed. 833, 2 McCrary 471; Hamilton *v.* Chouteau, 6 Fed. 339, 2 McCrary 509; Conkling *v.* Butler, 6 Fed. Cas. No. 3,100, 4 Biss. 22; Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324.

An action which does not interfere with the possession of the receiver may be maintained in the federal court, as where a bill is brought in the latter court by a partnership creditor to settle a partnership. Logan *v.* Greenlaw, 12 Fed. 10.

A vessel in the possession of a receiver appointed by a state court under whose direction such receiver employs the vessel as a common carrier in trade and commerce between that state and another state is subject to the enforcement of maritime liens on libels in the United States district court of the latter state. The Willamette Valley, 66 Fed. 565, 13 C. C. A. 635 [*affirming* 62 Fed. 293]; Roxbury *v.* The Lotta, 65 Fed. 319.

6. See, generally, Judgments.

7. Bacon *v.* Harris, 62 Fed. 99; Barr *v.* Simpson, 2 Fed. Cas. No. 1,038, Baldw. 543; Wilson *v.* City Bank, 30 Fed. Cas. No. 17,797, 3 Sumn. 422.

8. Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16.

9. Robb *v.* Vos, 36 Fed. 132.

10. Sharp *v.* Whiteside, 19 Fed. 156.

11. Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Nougue *v.* Clapp, 101 U. S. 551, 25 L. ed. 1026; Randall *v.* Howard, 2 Black (U. S.) 585, 17 L. ed. 269; Nugent *v.* Boyd, 3 How. (U. S.) 426, 11 L. ed. 664; Allen *v.* Allen, 97 Fed. 525, 38 C. C. A. 336; Nantahala Marble, etc., Co. *v.* Thomas, 76 Fed. 59; Little Rock Junction R. Co. *v.* Burke, 66 Fed. 83, 13 C. C. A. 341; Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551; Weil *v.* Polack, 30 Fed. 813; Lauderdale County *v.* Foster, 23 Fed. 516; Ellis *v.* Davis, 8 Fed. Cas. No. 4,402, 4 Woods 6 [*affirmed* in 109 U. S. 485, 3 S. Ct. 327, 27 L. ed. 1006]; Pierce *v.* Strickland, 19 Fed. Cas. No. 11,147, 2 Story 292. But a suit to set aside a decree of a state court for matters dehors the record is within the jurisdiction of a federal court (Little Rock Junction R. Co. *v.* Burke, 66 Fed. 83, 13 C. C. A. 341), as is also a suit in case of diverse citizenship, to surcharge and correct a settlement of accounts by administrators which has been confirmed by decree of the proper state court (Bertha Zinc, etc., Co. *v.* Vaughan, 88 Fed. 566). See, generally, Judgments.

Where a judgment by confession is regularly entered in a state court, a federal court has no jurisdiction to decree it to be an assignment for the benefit of creditors. Goldsmith *v.* Brown, 33 Fed. 691.

Fraud in obtaining the judgment in a state court may be a ground for relief in a federal court. Cooper *v.* Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808; Robb *v.* Vos, 155 U. S. 13, 15 S. Ct. 4, 39 L. ed. 52; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547; McNeil *v.* McNeil, 78 Fed. 834; Davenport *v.* Moore, 74 Fed. 945; Hatch *v.* Ferguson, 52 Fed. 833. But see Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196.

12. Kent *v.* Roberts, 14 Fed. Cas. No. 7,715, 2 Story 591.

13. White *v.* Crow, 17 Fed. 98, 5 McCrary 310; Sahlgaard *v.* Kennedy, 13 Fed. 242, 4 McCrary 133. But see De Forest *v.* Thompson, 40 Fed. 375. See, generally, Judicial Sales.

Fraud is a ground on which a federal court may assume jurisdiction. Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630.

14. *Iowa.*— Brown *v.* Crego, 32 Iowa 498.

and also in some cases of proceedings in respect to a title asserted under a judgment or execution sale of a federal court.[15] It has also been held that relief may be granted by a state court where there has been fraud on the federal court in procuring the judgment.[16] An application, however, for redress for abuse of process of a federal court should properly be directed to such court,[17] and where land has been sold on execution under a judgment of a federal court a bill to set aside such sale should not be brought in a state court.[18] Nor can a decree of a federal court be corrected by a state court, but application should be made to the court which has rendered such decree.[19]

8. Injunction Against Proceedings in Other Court — a. By State Court Against Those of Federal Court. Where a federal court has obtained jurisdiction of the parties to, and the subject-matter of, a controversy, proceedings in such court cannot be enjoined by a state court,[20] nor can the enforcement of a judgment rendered by a federal court in such a case be enjoined by a state court.[21]

Louisiana.— Adams *v.* Coons, 37 La. Ann. 305.

Mississippi.— Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

Missouri.— Bush *v.* Arnold, 50 Mo. App. 8.

North Carolina.— Coughlan *v.* White, 66 N. C. 102.

Wisconsin.— State *v.* Beloit, 20 Wis. 79.

See 13 Cent. Dig. tit. "Courts," § 1363.

15. Wetherell *v.* Eberle, 123 Ill. 666, 14 N. E. 675, 5 Am. St. Rep. 524; Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556; Dowell *v.* Applegate, 24 Oreg. 440, 33 Pac. 937.

16. Wonderly *v.* Lafayette County, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386, holding that in such a case a state court of equity might set the judgment aside. But see Ontario *v.* Andes First Nat. Bank, 59 Hun (N. Y.) 29, 12 N. Y. Suppl. 434.

A state court has no jurisdiction, in a proceeding to attack a federal decree as fraudulent, to review acts of receivers whom the latter court had appointed prior to such decree to administer the property subject to it. Kurtz *v.* Philadelphia, etc., R. Co., 187 Pa. St. 59, 40 Atl. 988.

17. Sproehnle *v.* Dietrich, 110 Ill. 202.

18. Sproehnle *v.* Dietrich, 110 Ill. 202. But see Garrard *v.* Reed, 5 Rob. (La.) 506.

19. Maloney *v.* Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131.

20. *Alabama.*— Opelika *v.* Daniel, 59 Ala. 211.

Arkansas.—Gaines *v.* Springer, 46 Ark. 502.

California.— Phelan *v.* Smith, 8 Cal. 520.

Georgia.— Bryan *v.* Hickson, 40 Ga. 405.

Iowa.— Shimer *v.* Hammond, 51 Iowa 401, 1 N. W. 656.

Michigan.— Carroll *v.* Farmers', etc., Bank, Harr. 197.

New York.— Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Thompson *v.* Van Vechten, 5 Duer 618; Thompson *v.* Norris, 11 Abb. N. Cas. 163, 63 How. Pr. 418; Mariposa Co. *v.* Garrison, 26 How. Pr. 448; Mead *v.* Merritt, 2 Paige 402; Coster *v.* Griswold, 4 Edw. 364.

Rhode Island.— Kendall *v.* Winsor, 6 R. I. 453.

United States.— Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 177 U. S. 51, 20 S. Ct. 564, 44 L. ed. 667; Washington County *v.* U. S., 9 Wall. 415, 19 L. ed. 732; U. S. *v.* Keokuk, 6 Wall. 514, 18 L. ed. 933; U. S. *v.* King, 74 Fed. 493; Central Nat. Bank *v.* Hazard, 49 Fed. 293.

See 13 Cent. Dig. tit. "Courts," § 1411.

A mandamus issued by a federal court to state officials commanding them to levy a tax sufficient to satisfy a judgment of such court cannot be interfered with by an injunction issued by a state court or by other proceedings in such court. *Ex p.* Holman, 28 Iowa 88, 5 Am. Rep. 159; Lea *v.* Memphis, 9 Baxt. (Tenn.) 103; Memphis Merchants *v.* Memphis, 9 Baxt. (Tenn.) 76; Amy *v.* Barkholder, 11 Wall. (U. S.) 136, 20 L. ed. 101; Davenport *v.* U. S., 9 Wall. (U. S.) 409, 19 L. ed. 704; Hill *v.* Scotland County Ct., 32 Fed. 716.

21. *Georgia.*— Stozier *v.* Howes, 30 Ga. 578.

Illinois.— Logan *v.* Lucas, 59 Ill. 237.

Louisiana.— Shields *v.* Pipes, 31 La. Ann. 765.

Nebraska.— Prugh *v.* Portsmouth Sav. Bank, 48 Nebr. 414, 67 N. W. 309.

New York.— Gernsheim *v.* Olcott, 7 N. Y. Suppl. 872. *Compare* Stevens *v.* Boston Cent. Nat. Bank, 144 N. Y. 50, 39 N. E. 68.

Rhode Island.— Chapin *v.* James, 11 R. I. 86, 23 Am. Rep. 412; Kendall *v.* Winsor, 6 R. I. 453.

South Carolina.— English *v.* Miller, 2 Rich. Eq. 320.

Virginia.— Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106.

United States.— Central Nat. Bank *v.* Stevens, 169 U. S. 432, 18 S. Ct. 403, 42 L. ed. 807; McKim *v.* Voorhies, 7 Cranch 279, 3 L. ed. 342; Holt County *v.* National L. Ins. Co., 80 Fed. 686, 25 C. C. A. 469; U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77.

See 13 Cent. Dig. tit. "Courts," § 1412.

Seizure of a third person's property under an execution of a federal court may be enjoined. Mock *v.* Kennedy, 11 La. Ann. 525, 66 Am. Dec. 203; Dunn *v.* Vail, 7 Mart. (La.) 416, 12 Am. Dec. 512. So the sale of a third

b. By Federal Court Against Those of State Court. It is a general rule that a federal court has no power to enjoin proceedings in a state court.[22] Thus the enforcement of a judgment rendered by a state court having jurisdiction of the controversy cannot be enjoined by a federal court.[23] So the latter court cannot enjoin the enforcement of quarantine regulations of a state;[24] an action of trespass against a federal officer for seizing the property of a stranger to the writ;[25] criminal proceedings in a state court;[26] the receipt of property by a person as directed by a state court;[27] the acts of receivers appointed by a state court;[28] or the removal of a city officer by the municipal authorities.[29] Exceptions to the rule, however, exist where action by the federal court may be necessary to render effective a decree of such court,[30] or where such court has been vested with priority of jurisdiction over the subject-matter and the parties, and in order to protect its jurisdiction it is necessary to enjoin the proceeding in the state court.[31] It

person's property under execution on a judgment of a federal court may be enjoined. Howard *v.* Cannon, 11 Rich. Eq. (S. C.) 23, 75 Am. Dec. 736. But the process of a federal court cannot be enjoined on an allegation by a party that the property seized belongs to him and not to the one against whom the writ is directed. Brooks *v.* Montgomery, 23 La. Ann. 450.

22. *Georgia.*— Bryan *v.* Hickson, 40 Ga. 405.

Louisiana.— Goodrich *v.* Hunton, 29 La. Ann. 372.

Nebraska.— State *v.* Chicago, etc., R. Co., 62 Nebr. 123, 87 N. W. 188.

New Hampshire.—Peck *v.* Jenness, 16 N. H. 516, 43 Am. Dec. 573; Kittredge *v.* Emerson, 15 N. H. 227.

United States.— U. S. *v.* Parkhurst-Davis Mercantile Co., 176 U. S. 317, 20 S. Ct. 423, 44 L. ed. 485; Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399; Parcher *v.* Cuddy, 110 U. S. 742, 4 S. Ct. 194, 28 L. ed. 312; Dial *v.* Reynolds, 96 U. S. 340, 24 L. ed. 644; Haines *v.* Carpenter, 91 U. S. 254, 23 L. ed. 345; Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666; Diggs *v.* Wolcott, 4 Cranch 179, 2 L. ed. 587; New York Farmers' L. & T. Co. *v.* McAndrews, 109 Fed. 109, 48 C. C. A. 261; Oliver *v.* Parlin, etc., Co., 105 Fed. 272, 45 C. C. A. 200; Aultman, etc., Co. *v.* Brumfield, 102 Fed. 7; Mills *v.* Provident L. & T. Co., 100 Fed. 344, 40 C. C. A. 394; Coeur D'Alene R., etc., Co. *v.* Spalding, 93 Fed. 280, 35 C. C. A. 295; Chicago, etc., R. Co. *v.* St. Joseph Union Depot Co., 92 Fed. 22; Provident L. & T. Co. *v.* Mills, 91 Fed. 435; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 82 Fed. 943; Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 21 C. C. A. 568; Fenwick Hall Co. *v.* Old Saybrook, 66 Fed. 389; Chicago Trust, etc., Bank *v.* Bentz, 59 Fed. 645; American Assoc. *v.* Hurst, 59 Fed. 1, 7 C. C. A. 598; Whitney *v.* Wilder, 54 Fed. 554, 4 C. C. A. 510; Gates *v.* Bucki, 53 Fed. 961, 4 C. C. A. 116; Molony *v.* Massachusetts Ben. Assoc., 53 Fed. 209; Hemsley *v.* Myers, 45 Fed. 283; Yick Wo *v.* Crowley, 26 Fed. 207; Hamilton *v.* Walsh, 23 Fed. 420.

See 13 Cent. Dig. tit. "Courts," § 1418.

23. Johnstown Min. Co. *v.* Butte, etc., Consol. Min. Co., 60 N. Y. App. Div. 344, 70 N. Y. Suppl. 257; Douglas Co. *v.* Stone, 110 Fed. 812; James *v.* New York Cent. Trust Co., 98 Fed. 489, 39 C. C. A. 126; Leathe *v.* Thomas, 97 Fed. 136, 38 C. C. A. 75; Simpson *v.* Ward, 80 Fed. 561; Baker *v.* Ault, 78 Fed. 394; Louisville Trust Co. *v.* Cincinnati, 73 Fed. 716; Union Pac. R. Co. *v.* Denver, etc., R. Co., 37 Fed. 179; Wagner *v.* Drake, 31 Fed. 849; White *v.* Crow, 17 Fed. 98, 5 McCrary 310; Carlisle *v.* Bundy, 5 Fed. Cas. No. 2,410; Daly *v.* Sheriff, 6 Fed. Cas. No. 3,553, 1 Woods 175.

The sale of property of a third person under judgment of a state court may be enjoined by a federal court. Provident L., etc., Co. *v.* Mills, 91 Fed. 435; Breeden *v.* Lee, 4 Fed. Cas. No. 1,828, 2 Hughes 484; Cropper *v.* Coburn, 6 Fed. Cas. No. 3,416, 2 Curt. 465. But see Daly *v.* Sheriff, 6 Fed. Cas. No. 3,553, 1 Woods 175.

24. Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276.

25. Evans *v.* Pack, 8 Fed. Cas. No. 4,566, 2 Flipp. 267.

26. Rhodes, etc., Mfg. Co. *v.* New Hampshire, 70 Fed. 721; Minneapolis, etc., R. Co. *v.* Milner, 57 Fed. 276.

27. Domestic, etc., Missionary Soc. *v.* Hinman, 13 Fed. 161, 2 McCrary 543; Hutchinson *v.* Green, 6 Fed. 833, 2 McCrary 471.

28. Phelps *v.* Mutual Reserve Fund L. Assoc., 112 Fed. 453, 50 C. C. A. 339 [*reversing* 103 Fed. 515]; Reinach *v.* Atlantic, etc., R. Co., 58 Fed. 33; McCoy *v.* Marietta, etc., R. Co., 15 Fed. Cas. No. 8,730*b*.

29. *In re* Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402.

30. New York Cent. Trust Co. *v.* Western North Carolina R. Co., 112 Fed. 471; James *v.* New York Cent. Trust Co., 98 Fed. 489, 39 C. C. A. 126. See also Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 111 Fed. 431.

31. Stewart *v.* Wisconsin Cent. R. Co., 117 Fed. 782; New York Cent. Trust Co. *v.* Western North Carolina R. Co., 112 Fed. 471; State Trust Co. *v.* Kansas City, etc., R. Co., 110 Fed. 10; Boston Mercantile Trust, etc., Co. *v.* Roanoke, etc., R. Co., 109 Fed. 3; Pitt *v.* Rodgers, 104 Fed. 387, 43 C. C. A. 600 [*affirming* 96 Fed. 668]; Memphis Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410; Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 88 Fed. 815; Bowdoin College *v.* Merritt, 59 Fed. 6; Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572.

has also been held that a federal court may enjoin proceedings before a body which is not legally a court;[32] prevent a plaintiff from making an unfair use of the processes of courts of law to deprive complainants of rights which, under the facts alleged in the bill, the state court cannot adequately protect;[33] or prevent a person from being subjected to a multiplicity of suits.[34]

C. Courts of Different States or Countries — 1. Comity. Comity does not require that it should be assumed by the courts of one state that those of another state are more competent to determine a case and do justice between the parties than are the courts of the state to whose jurisdiction the actor in the suit has voluntarily submitted it.[35] So a court of one state in construing an act of congress as to its effect on a contract made in another state is not compelled to follow the construction which the court of the latter state has placed on such act.[36] And where the person or property of a non-resident is within the jurisdiction of a state court, it may retain such jurisdiction for the purpose of administering justice to its own citizens.[37] Again a contract may be enforced by the courts of a state, where it was legal in the state in which it was made and was to be performed, provided it is not dangerous, inconvenient, immoral, or contrary to public policy to so enforce it.[38] And it has been held that a court may exercise a jurisdiction which is ancillary to that of a court of another state, where an attempt is made by a litigant by trick or fraud to avoid service of process in the latter court which is that of his place of residence.[39] But a court of one state is not authorized, by the comity between states, to collate advancements made by an intestate, who had resided and died in another state, to his children therein.[40] So where a liability is created only by the statutes of a state, the question of its enforcement is not one of comity but of the power of the courts of the forum.[41]

2. Constitutionality of Statute of Another State. The doctrine has been affirmed in Massachusetts that the supreme judicial court of that state may, when necessary to the decision of a cause within its jurisdiction, determine the question whether a statute of another state violates the constitution of that state.[42]

3. Scope and Effect of Other Proceedings. Where proceedings are pending in a state court the rule generally prevails that a court of another state will not

If by removal of a cause to a federal court such court acquires jurisdiction, it may enjoin a subsequent action in a state court. Kern *v.* Huidekoper, 103 U. S. 494, 26 L. ed. 497; French *v.* Hay, 22 Wall. (U. S.) 250, 22 L. ed. 857; Abeel *v.* Culberson, 56 Fed. 329; Frishman *v.* Insurance Cos., 41 Fed. 449; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170; Wagner *v.* Drake, 31 Fed. 849; Missouri, etc., R. Co. *v.* Scott, 13 Fed. 793, 4 Woods 386. But see Coeur D'Alene R., etc., Co. *v.* Spalding, 93 Fed. 280, 35 C. C. A. 295, where it was held that an injunction could not be granted on the ground of removal to the federal court where, although a petition and bond for removal had been filed, the state court had taken no action thereon nor had a copy of the record been entered in the federal court.

32. Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.

33. New York Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 109 Fed. 681.

34. New York Cent. Trust Co. *v.* St. Louis, etc., R. Co., 59 Fed. 385; Texas, etc., R. Co. *v.* Kuteman, 54 Fed. 547, 4 C. C. A. 503.

35. Engel *v.* Scheuerman, 40 Ga. 206, 2 Am. Rep. 573.

Where proceedings have been instituted against a receiver in the court which appointed him to compel the construction by him of a highway over the company's tracks comity does not require that the proceedings shall be delayed to await the action of the court of another state which appointed him receiver as to the mortgaged property in such state. Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243.

36. Southern R. Co. *v.* Harrison, 119 Ala. 539, 24 So. 552, 72 Am. St. Rep. 936, 43 L. R. A. 385.

37. Callaway *v.* Jones, 19 Ga. 277.

38. Schlee *v.* Guckenheimer, 179 Ill. 593, 54 N. E. 302 [*reversing* 76 Ill. App. 681].

39. Com. *v.* Sage, 2 Pa. Dist. 553.

40. Parkes *v.* Gilbert, 1 Baxt. (Tenn.) 97.

41. Crippen *v.* Laighton, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467.

42. Woodward *v.* Central Vermont R. Co., 180 Mass. 599, 62 N. E. 1051. See also Stoddart *v.* Smith, 5 Binn. (Pa.) 355; and Constitutional Law, 8 Cyc. 726, note 27. But see Kean *v.* Rice, 12 Serg. & R. (Pa.) 203.

In Missouri, however, it has been declared that the court of appeals of that state has no jurisdiction of the question whether a statute of another state, which prohibits telegraph companies from contracting against their own negligence, so far as it is applicable to interstate messages, is in conflict with the federal constitution. Reed *v.* Western Union Tel. Co., 56 Mo. App. 168.

entertain jurisdiction of another proceeding between the same parties, and involving the same subject-matter, where the former court has complete jurisdiction.[43] This rule is declared to rest entirely on the comity between the courts of different states.[44]

4. Persons Under Arrest. Where a person is held in one state under a requisition from the governor of another state a court of the former state may compel the production of the body of the prisoner before it and inquire into the cause of the detention.[45]

5. Property in Custody of Court. The rights of a court of one state as to the control of property which has come into its possession and over which it has jurisdiction will be recognized by courts of other states, and such possession will not be interfered with by the latter.[46]

6. Enforcing Judgment of Court of Another State. A state court may take jurisdiction of proceedings for the purpose of enforcing a judgment of a court of competent jurisdiction of another state.[47]

7. Injunction Against Proceedings. A state court may enjoin a party within its jurisdiction from prosecuting an action in a court of another state.[48] It has, however, been held that after a suit has been commenced in a state court a court of another state will not enjoin the prosecution of the same.[49]

43. Cement Gravel Co. *v.* Wylly, 105 Ga. 204, 31 S. E. 161; Cole *v.* Flitcraft, 47 Md. 312; Winn *v.* Albert, 2 Md. Ch. 42; Matter of Colles, 4 Dem. (N. Y.) 387; Cooper *v.* Dismal Swamp Canal Co., 6 N. C. 195. See also Kentucky Bank *v.* Poyntz, 60 Mo. 531.

Cases involving the construction of wills and the administration of decedents' estates are subject to the application of this rule. Worthy *v.* Lyon, 18 Ala. 784; Woodruff *v.* Young, 43 Mich. 548, 6 N. W. 85; Sulz *v.* Mutual Reserve Fund L. Assoc., 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; Parker *v.* Murray, 14 N. Y. Suppl. 79; Freeman's Appeal, 68 Pa. St. 151; Seitzinger's Estate, 2 Woodw. (Pa.) 348. *Compare* Sherwood *v.* Wooster, 11 Paige (N. Y.) 441. It has, however, been held that the interpretation given to a will upon the question whether it worked an equitable conversion of land situated in another state is not binding on the courts of the latter state. Clarke's Appeal, 70 Conn. 195, 39 Atl. 155. So where letters of administration are taken by an executor in a state in which land lies, it has been decided that the court may take jurisdiction of the administration account within such state, although proceedings against the executor respecting his account may be pending in another state where the principal administration was granted. Jennison *v.* Hapgood, 2 Aik. (Vt.) 31. And state courts may assist in enforcing a will made by a citizen of another country where part of the estate is located within the state. State *v.* Crescent City Gas Light Co., 24 La. Ann. 318.

An action against a lunatic may be within the jurisdiction of a state court, although a committee of the person and estate of such lunatic has been appointed by a court of another state. Bayard *v.* Scanlon, 1 N. Y. City Ct. 487.

44. Cole *v.* Flitcraft, 47 Md. 312.

45. *In re* Robb, 64 Cal. 431, 1 Pac. 881, holding such power to be vested in the superior court of San Francisco. See, generally, Extradition.

46. Denny *v.* Faulkner, 22 Kan. 89; Myers *v.* Myers, 8 La. Ann. 369, 58 Am. Dec. 689; Wingate *v.* Wheat, 6 La. Ann. 238; Continental Ins. Co. *v.* Chase, 89 Tex. 212, 34 S. W. 93; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. ed. 454; Connor *v.* Hanover Ins. Co., 28 Fed. 549.

In case funds have been settled in trust upon certain designated beneficiaries who are domiciled in another state they may be transferred to the control of a court of the latter state, where it appears that such transfer is manifestly for the interest of the beneficiaries. Yandell *v.* Elam, 1 Tenn. Ch. 102.

47. Page *v.* McKee, 3 Bush (Ky.) 135, 96 Am. Dec. 201. See also Jordan *v.* Black, 1 Rob. (La.) 575; and, generally, Judgments.

48. *Alabama.*— Allen *v.* Buchanan, 97 Ala. 399, 11 So. 777, 38 Am. St. Rep. 187.

Arkansas.— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

Massachusetts.—Cunningham *v.* Butler, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; Dehon *v.* Foster, 4 Allen 545.

New York.— Locomobile Co. of America *v.* American Bridge Co., 80 N. Y. App. Div. 44, 80 N. Y. Suppl. 288; Bowers *v.* Durant, 43 Hun 348; Dainese *v.* Allen, 3 Abb. Pr. N. S. 212; Field *v.* Holbrook, 3 Abb. Pr. 377; Clafflin *v.* Hamlin, 62 How. Pr. 284.

Ohio.— See Besuden *v.* Besuden, 4 Ohio S. & C. Pl. Dec. 144.

United States.— Gage *v.* Riverside Trust Co., 86 Fed. 984.

See 13 Cent. Dig. tit. "Courts," § 1441.

49. Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416; Carroll *v.* Farmers', etc., Bank, Harr. (Mich.) 197; Mead *v.* Merritt, 2 Paige (N. Y.) 402; Boyd *v.* Hawkins, 17 N. C. 329. See also Durant *v.* Pierson, 12 N. Y. Suppl. 145, 19 N. Y. Civ. Proc. 203 [*distinguishing* Bowers *v.* Durant, 43 Hun 348; Mariposa Co. *v.* Garrison, 26 How. Pr. 448].

8. Receivers. Upon the principles of interstate comity, a receiver of a railroad corporation appointed in one state may be allowed to institute proceedings in another state to obtain possession of the rolling-stock, although such stock has been attached in the former state by a creditor of the corporation.[50] But where mortgages on land in a state are sent to a domestic receiver by a foreign receiver of a foreign corporation, the courts of such state will have jurisdiction of the proceeds in the absence of any agreement or condition for collection.[51] Again where a person is appointed receiver in actions in courts of several states, in each of which states the corporation was incorporated, relief may be obtained against the receiver in one of such states without conflicting with the jurisdiction of the others.[52]

9. Obtaining Leave of Court to Sue. A statutory or code provision that no action shall be brought after final judgment in foreclosure to recover any part of the mortgage debt without leave of the court in which foreclosure was had does not apply to an action to recover a balance due after foreclosure of a mortgage in the court of another state on land situated in the latter state.[53]

D. Different United States Courts — 1. In General. Where several actions are instituted in different United States courts of concurrent jurisdiction between the same parties or their privies, and which invoke the same subject-matter, that court which first acquires sufficient jurisdiction of the parties and the cause of action should dispose of the controversy.[54] And where in such proceedings in a federal court of one state a decree of foreclosure rendered in a federal court of another state is ratified, with a reservation by the former court of certain rights as to the distribution of funds and the priority of liens, such court may determine the priority of claims filed therein on a judgment recovered in such state over the lien of the mortgage.[55]

2. Recovery of Interest on Judgment of Another Court. Where a judgment has been rendered in a court of claims, interest thereon cannot be recovered in the United Sates circuit court, the question being incidental to the original suit and one for the former court to determine.[56]

3. Where Receiver Has Been Appointed. The possession by a receiver of the property involved in a suit, where he has been appointed by a federal court, cannot be interfered with by another federal court of coördinate jurisdiction.[57] Where, however, a claim is made by a citizen of a state in the federal court for such state against an insolvent corporation, which is in the hands of a receiver appointed by

50. Merchants' Bank *v.* McLeod, 38 Ohio St. 174.

51. People *v.* Granite State Provident Assoc., 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510.

52. Matter of U. S. Rolling Stock Co., 55 How. Pr. (N. Y.) 286.

53. Mutual L. Ins. Co. *v.* Smith, 54 N. Y. Super. Ct. 400.

54. Dady *v.* Georgia, etc., R. Co., 112 Fed. 838. See also Powell *v.* Redfield, 19 Fed. Cas. No. 11,359, 4 Blatchf. 45.

No right to restrain proceedings in another court see Powell *v.* Redfield, 19 Fed. Cas. No. 11,359, 4 Blatchf. 45; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,132, 11 Blatchf. 552.

In ancillary proceedings in a federal court of one state, where receivers' certificates are issued by a federal court of another state, the lien of such certificates may be enforced by the former court. Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 50 Fed. 874.

A subsequent seizure of the property in controversy by an officer of a court having jurisdiction concurrent with that of a court which has acquired prior jurisdiction by service of process will not deprive the latter court of such jurisdiction. Owens *v.* Ohio Cent. R. Co., 20 Fed. 10.

55. Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658.

Ancillary proceedings.— Where proceedings are pending in one court, ancillary to proceedings in another court for the foreclosure of a mortgage, the former court should only consider and dispose of rights and liens peculiar to its jurisdiction and to the property particularly within its charge. Clyde *v.* Richmond, etc., R. Co., 65 Fed. 336. But it has been held that a creditors' bill in the circuit court of the United States to enforce the collection of a district court judgment rendered in an admiralty suit is not ancillary to the action in the district court. Winter *v.* Swinburne, 8 Fed. 49, 10 Biss. 454.

56. Bunton *v.* U. S., 62 Fed. 171.

57. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606. See also U. S. Trust Co. *v.* Wabash, etc., R. Co., 42 Fed. 343; Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618.

a federal court for another state, the former court may assume jurisdiction to the extent of determining the existence and amount of such claim.[58]

E. Civil Courts and Courts-Martial. Although no supervisory or correcting power is possessed by civil courts, by the writ of habeas corpus, over the proceedings of a court-martial, yet by means of this writ they may in all cases inquire into the jurisdiction of such court and may discharge a person from sentence, if it appears that he was not amenable to its jurisdiction.[59] A military tribunal, however, while proceeding regularly in the exercise of its jurisdiction to try a person for alleged desertion from the army, cannot be interfered with by the civil courts,[60] nor can such courts be availed of in a habeas corpus proceeding by one who is legally in custody awaiting trial by court-martial.[61]

COURTS CHRISTIAN. The ecclesiatical courts in England as distinguished from the civil courts.[1]

COURTS OF ASSIZE AND NISI PRIUS. Courts in England, composed of two or more commissioners, called judges of assize, (or of assize and *nisi prius*,) who are twice in every year sent by the queen's special commission, on circuits all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall.[2] (See ASSIZE; COURT OF NISI PRIUS; and, generally, COURTS.)

COURTS OF CINQUE PORTS. In English law, courts of limited local jurisdiction, formerly held before the mayor and *jurats* (aldermen) of the Cinque Ports.[3] (See BARONS OF THE CINQUE PORTS; CINQUE PORTS; COURT OF SHEPWAY; and, generally, COURTS.)

COURTS OF CONSCIENCE. See CONSCIENCE, COURTS OF.

COURTS OF WESTMINSTER HALL. The superior courts, both of law and equity, which for centuries were fixed at Westminster, an ancient palace of the monarchs of England.[4]

COURTYARD.[5] A court or an enclosure about a house or adjacent to it.[6] (See, generally, COUNTIES; COURTS.)

COUSINS.[7] The children of brothers and sisters, otherwise called first cousins

58. New York Security, etc., Co. *v.* Equitable Mortg. Co., 71 Fed. 556.

Where a federal circuit court, acting within its circuit, removes a receiver appointed by another circuit court, although such action is not in accordance with the rule of comity between such courts, the latter court may issue an order to the receiver appointed by it to surrender the control of the property within the jurisdiction of the court making the order of removal to the receiver whom it has appointed. Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 618.

Where, after possession of a vessel, the property of a railroad company, has been taken by receivers of the company appointed by a circuit court, such vessel comes into collision with another vessel and is libeled therefor in the district court, the former court may refuse in its discretion, on the petition of the receivers, to enjoin the proceedings in admiralty. Paxson *v.* Cunningham, 63 Fed. 132, 11 C. C. A. 111.

59. U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636 [*reversing* 38 Fed. 84]. See also *In re* Esmond, 5 Mackey (D. C.) 64; and ARMY AND NAVY, VIII, I, 11, b, (I), [3 Cyc. 861].

60. *In re* White, 17 Fed. 723, 9 Sawy. 49.

61. *In re* Davison, 21 Fed. 618.

1. Burrill L. Dict. [*citing* 3 Bl. Comm. 64; 1 Bl. Comm. 83].

2. Burrill L. Dict. [*citing* 3 Bl. Comm. 57; 3 Stephen Comm. 421, 422]. And see Henderson *v.* Beaton, 52 Tex. 29, 42; *Ex p.* Fernandez, 10 C. B. N. S. 3, 28, 57, 7 Jur. N. S. 571, 4 L. T. Rep. N. S. 324, 9 Wkly. Rep. 832, 100 E. C. L. 3.

3. Cyclopedic L. Dict.

4. Brown L. Dict.

5. "Curtilage" and "courtyard" used as synonyms see 3 Cyc. 988, note 29.

6. Century Dict.

7. "The term 'cousin' [is] one in which the dominant idea is consanguinity." Per Bowen, L. J., and Fry, L. J., dissenting opinion in *In re* Taylor, 56 L. J. Ch. 171, 173.

In old English "cousin" often means any collateral relative. Wharton L. Lex.

In Devonshire, the word is still used to signify a "nephew." Burrill L. Dict. [*citing* Ford *v.* Peering, 1 Ves. Jr. 72, 73, 30 Eng. Reprint 236; Hubback 427 note].

Coke says: "Here Littleton expoundeth parents to be his cousins, under which name of cousins [he] includeth uncles and other cousins, who when the father is dead are *in loco parentum*." Coke Litt. 81*b*.

As used in instruments directed to peers, etc.— In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved cousin," an appellation as ancient as the reign of Henry IV. who being either by his wife, his mother, or his sisters, actually re-

or cousins german;[8] FIRST COUSINS,[9] *q. v.*, or COUSINS GERMAN,[10] *q. v.* (See BROTHER; CHILDREN; COLLATERAL; CONNECTED; CONNECTIONS; CONSANGUINITY; COSENAGE; COSIN; COUSINS GERMAN; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

COUSINS GERMAN. FIRST COUSINS, *q. v.*, or children of a brother or sister.[11] (See BROTHER; CHILDREN; COLLATERAL; CONNECTED; CONNECTIONS; CONSANGUINITY; COSENAGE; COSIN; COUSINS; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

COUSTUM.[12] Toll or tribute.[13] (See, generally, CUSTOMS DUTIES.)

COUTHUTLAUGH.[14] In Saxon and early English law, a person who willingly and knowingly received an outlaw, and cherished or concealed him.[15]

COVE. A small inlet, creek, or bay; a recess or nook in the shore of any considerable body of water.[16]

lated or allied to every earl then in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts from whence the usage has descended to his successors, though the reason has long ago failed. 1 Bl. Comm. 398. And see *In re* Taylor, 56 L. J. Ch. 171, 173.

"Aunt" and "cousins" as used in a will see Moffett *v.* Elmendorf, 152 N. Y. 475, 483, 46 N. E. 845, 57 Am. St. Rep. 529.

"Cousin and heir at law" in a declaration see Lidghird *v.* Judd, 7 D. & R. 517, 16 E. C. L. 292. See also Colvil *v.* Huddleston, Dyer 79*a*.

8. Century Dict. [*quoted* in People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 474.

Does not include cousins by marriage.— It is not accurate to say that a lady who marries a cousin of a testatrix is a cousin. Per Bowen, L. J., in *In re* Taylor, 56 L. J. Ch. 171, 173.

9. Stevenson *v.* Abingdon, 31 Beav. 305, 308, 9 Jur. N. S. 1063, 9 L. T. Rep. N. S. 74, 11 Wkly. Rep. 935, where it is said: "*Prima facie* the word 'cousin' means first cousin, and not a first cousin once or more times removed; still less does it mean a second or third cousin, which might go on indefinitely." See also Saunderson *v.* Bailey, 2 Jur. 958, 4 Myl. & C. 56, 8 L. J. Ch. 18, 18 Eng. Ch. 56.

Other degrees of consanguinity indicated by the word "cousin" are: "Second cousins." *In re* Parker, 15 Ch. D. 528, 530 [*affirmed* in 17 Ch. D. 262, 264, 50 L. J. Ch. 639, 44 L. T. Rep. N. S. 885, 29 Wkly. Rep. 855]. See also People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 695. "Third cousins." People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 695 [*quoting* Century Dict.].

When first cousins will be intended.— A bequest to "cousins" *simpliciter*, in the absence of anything to explain the meaning of the testator, will include first cousins only. Stoddart *v.* Nelson, 6 De G. M. & G. 68, 73, 2 Jur. N. S. 27, 25 L. J. Ch. 176, 4 Wkly. Rep. 109, 55 Eng. Ch. 54; Caldecott *v.* Harrison, 9 Sim. 457, 461, 16 Eng. Ch. 457. And see Burbey *v.* Burbey, 9 Jur. N. S. 96, 97, 6 L. T. Rep. N. S. 573; Saunderson *v.* Bailey, 2 Jur. 958, 8 L. J. Ch. 18, 4 Myl. & C. 56, 18 Eng. Ch. 56; Gregg *v.* Taylor, 5 Russ. 19, 22, 5 Eng. Ch. 19; Chorge *v.* Goodyer, 3 Russ. 140, 27 Rev. Rep. 42, 3 Eng. Ch. 140, 141, note 1.

10. *In re* Parker, 15 Ch. D. 528, 529.

11. People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 695; *In re* Parker, 15 Ch. D. 528, 529 [*affirmed* in 17 Ch. D. 262, 50 L. J. Ch. 639, 44 L. T. Rep. N. S. 885, 29 Wkly. Rep. 855]; Saunderson *v.* Bailey, 2 Jur. 958, 8 L. J. Ch. 18, 4 Myl. & C. 56, 18 Eng. Ch. 56 [*quoting* Johnson Dict. (Chambers ed.)].

"First cousin — cousin german — children of brothers and sisters." Boniface French Dict. [*quoted* in Saunderson *v.* Bailey, 4 Myl. & C. 56, 60, 18 Eng. Ch. 56].

"'Patruelis' — a cousin german by the father's side, a father's brother's son." Ainsworth Dict. [*quoted* in Saunderson *v.* Bailey, 4 Myl. & C. 56, 60, 18 Eng. Ch. 56].

"Frater patruelis, the father's brother's son or cousin german." Ainsworth Dict. [*quoted* in Saunderson *v.* Bailey, 4 Myl. & C. 56, 60, 18 Eng. Ch. 56].

Among the civilians, sons who are the issue of the same father and the same mother are called "brothers-german." The word german, *germanus*, signifying in matters of descent, whole or entire, and it is applied not only to brothers or sisters, but to cousins, hence the expression "cousins-german." 2 Bouvier Inst. 358, No. 1959, note *a*.

12. **The appellation seems to be derived from** the French word *coustum* or *coutum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, charge, or, as we have adopted it in English, *cost*. 1 Bl. Comm. 314, note *v*.

13. Burrill L. Dict.

14. **Derived from "couth,"** knowing, and "utlaugh," an outlaw. Burrill L. Dict.

15. For which offense he was anciently subject to the same punishment as the outlaw himself. Burrill L. Dict. [*citing* Bracton, fol. 128*b*].

16. Century Dict.

"Cove lands."— A conveyance of "cove lands" contained the descriptive words "now or heretofore flowed by tide-water." A large tract of land had formerly been a part of the cove, and was still called "cove lands" but the tide had ceased to flow thereon because of the filling by the city. The court said: "Hence 'cove-lands,' according to the explanation of the deed, was to cover land that was then flowed by the tide and land which had been a part of the cove and was still traceable as such, and which had not been already made the subject of legal grant or appropriation." Murphy *v.* Bullock, 20 R. I. 35, 39, 37 Atl. 348.

COVENANT, ACTION OF

By Frank E. Jennings

CROSS-REFERENCES

For Matters Relating to:
Action:
For Breach of Covenant, see Covenants; Vendor and Purchaser.
Of Assumpsit, see Assumpsit, Action of.

For Matters Relating to — (*continued*)
Action — (*continued*)
Of Debt, see DEBT, ACTION OF.
Bail in Action of Covenant, see BAIL.
Covenants Generally, see COVENANTS.
Election of Remedy, see ELECTION OF REMEDIES.
Remedy on Covenants, see COVENANTS.

I. DEFINITION.

An action of covenant is a remedy recognized by law for the recovery of damages for the breach of a covenant or contract under seal.[1]

II. ORIGIN AND HISTORY.

This action is said to have descended from the ancient writ breve de conventione.[2] Primarily its purpose seemed to be to enforce the specific performance of the covenant broken,[3] although if the breach was such that performance could not be enforced, or defendant continued refractory, damages occasioned thereby in proportion to the injury sustained were accorded the plaintiff.[4] It was also by virtue of this action that fines were collected at common law.[5] Likewise it was the ancient remedy of a lessee, if ejected, against his lessor to recover the term and damages, or if the term had expired, or the ouster had been committed by a stranger claiming paramount title, then to recover damages only.[6] Its use as a real action, except in conveyancing, early disappeared, however, but as a personal action *ex contractu* it has been brought down to the present time.[7]

III. NATURE AND SCOPE OF REMEDY.

A. Distinguished From Other Actions. Where there is a sum certain due on an instrument under seal, covenant is usually spoken of and considered as a

1. Stickney *v.* Stickney, 21 N. H. 61.
Other definitions are: "A form of action at common law to recover damages for the breach of a contract under seal." Abbott L. Dict.; Anderson L. Dict.; Black L. Dict.
"The name of one of the modern forms of action *ex contractu*, which lies for the recovery of damages for breach of a covenant, or contract under seal." Burrill L. Dict.
See also the following cases in which this action is defined:
Arkansas.— McLaughlin *v.* Hutchins, 3 Ark. 207.
Illinois.— See Haynes *v.* Lucas, 50 Ill. 436.
Maine.— Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114.
Michigan.— Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. 759.
Ohio.— Brachman *v.* Warden, 1 Ohio Dec. (Reprint) 494, 10 West. L. J. 193.
South Carolina.—Barry *v.* Iseman, 14 Rich. 129, 91 Am. Dec. 262.
"**Covenant**" is often used by the courts as the equivalent of "action of covenant," when the nature and purposes of this action is under discussion. Century Dict.
2. Martin Civ. Proc. § 46.
3. 3 Bl. Comm. 156. See also Martin Civ. Proc. § 46, where it is said that the common-law courts never exercised such power directly, although they reached substantially the same end in certain cases by awarding a recovery of the thing covenanted, to the use and enjoyment of another instead of giving damages for breach of the covenant; and in so doing discharged both the functions of a real and mixed action.
The Pennsylvania court in its earlier procedure attempted by a modification of the action of covenant to use this action as a remedy for a failure to convey lands, but the result was unsatisfactory, and the court was forced to acknowledge that as a substitute for an equitable remedy it was bungling and inadequate, and that a recourse to equity should be encouraged. Finley *v.* Aiken, 1 Grant (Pa.) 83.
4. 3 Bl. Comm. 157.
5. 3 Bl. Comm. 157, where it is said: "The plaintiff or person to whom the fine is levied, bringing a right of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And for the end of this supposed difference, the fine, or *finalis concordia* (final agreement) is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff." And see 2 Bl. Comm. 350.
6. 3 Bl. Comm. 157.
7. Martin Civ. Proc. § 47.

concurrent remedy with debt.[8] Since generally speaking it lies only on a sealed instrument,[9] while assumpsit lies only on an unsealed one,[10] it is never concurrent with that remedy.[11] Where the damages are unliquidated, or where the covenant is for the performance of something, or for a payment other than money, covenant alone is the proper remedy.[12] And while the rule is otherwise, yet there are certain instances in which a party may elect between covenant and case.[13]

B. Upon What Instruments Maintainable — 1. Necessity of Seal — a. Rule. Generally speaking covenant can be maintained only upon an agreement in writing which has been properly and lawfully[14] signed and sealed,[15] and which is in

8. *Alabama.*—North *v.* Eslava, 12 Ala. 240; Hill *v.* Rushing, 4 Ala. 212; Jackson *v.* Waddill, 1 Stew. 579; Hatch *v.* Pittus, Minor 49.

Arkansas.— Lee *v.* State, 22 Ark. 231; McLaughlin *v.* Hutchins, 3 Ark. 207.

Maine.— Baldwin *v.* Emery, 89 Me. 496, 36 Atl. 994.

Maryland.— Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134.

Missouri.— State *v.* Woodward, 8 Mo. 353. See Clark *v.* Murphy, 1 Mo. 114, where it was held that debt and not covenant was the proper remedy on an administrator's bond.

North Carolina.— Taylor *v.* Wilson, 27 N. C. 214.

Ohio.— Abrams *v.* Kounts, 4 Ohio 214, which holds that where the sum is certain, as a penalty, covenant will not lie, but the party must resort to debt.

Pennsylvania.— New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442.

Rhode Island.— Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

Tennessee.— Haley *v.* Long, Peck 93.

England.— Harrison *v.* Wright, 13 East 343, 12 Rev. Rep. 369.

See 14 Cent. Dig. tit. "Covenant, Action of," § 1.

9. See *infra*, III, B, 1, a.

10. See 4 Cyc. 323, 324.

11. Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114; McKay *v.* Darling, 65 Vt. 639, 27 Atl. 324; Tait *v.* Atkinson, 3 U. C. Q. B. 152; Bouvier L. Dict.

12. *Alabama.*— Jackson *v.* Waddill, 1 Stew. 579.

Arkansas.— Fortenbury *v.* Tunstall, 5 Ark. 263; Sims *v.* Whitlock, 5 Ark. 103; McLaughlin *v.* Hutchins, 3 Ark. 207.

Illinois.— Haynes *v.* Lucas, 50 Ill. 436.

Indiana.— Wilson *v.* Hickson, 1 Blackf. 230; Hedges *v.* Gray, 1 Blackf. 216.

Kentucky.— Kennedy *v.* Vanwinkle, 6 T. B. Mon. 398; Feemster *v.* Ringo, 5 T. B. Mon. 336; January *v.* Henry, 2 T. B. Mon. 58.

Maine.— Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114; Jenness *v.* Parker, 24 Me. 289.

New Jersey.— Scott *v.* Conover, 6. N. J. L. 222; Bell *v.* Curtis, 2 N. J. L. 142.

Tennessee.— Haley *v.* Long, Peck 93.

United States.— Fontaine *v.* Aresta, 9 Fed. Cas. No. 4,905, 2 McLean 127.

13. The true distinction seems to be that where the covenant creates the liability no action can be maintained except upon the instrument, but if there is a legal liability independent of the covenant, the remedy may be sought either upon the instrument or by an appropriate action for the wrong. Luckey *v.* Rowzee, 1 A. K. Marsh. (Ky.) 295.

Distinguished from account.— While theoretically the actions of covenant and account have different provinces, they may practically overreach each other at some points (Addams *v.* Tutton, 39 Pa. St. 447); and it would therefore seem that the mere fact that an action of account can be maintained would not defeat the action of covenant if the parties had entered into mutual stipulations and agreements (Hall *v.* Stewart, 12 Pa. St. 211). See also, generally, Election of Remedies.

14. For if the sealing of the instrument has not been performed as required by law, this action is not maintainable. Mitchell *v.* St. Andrew's Bay Land Co., 4 Fla. 200 (holding that inasmuch as the private seals of a committee did not in law constitute the seal of the corporation, covenant would not lie against such corporation when the instrument declared on had only the seal of the committee affixed thereto); Herzog *v.* Sawyer, 61 Md. 344 (holding that the action could not be maintained where the instrument declared on had been signed in the name of the firm without authority from one of the partners); Hanford *v.* McNair, 9 Wend. (N. Y.) 54 (holding that the action could not be maintained on an instrument sealed by an agent whose authority to so act was not under seal, although a counterpart of the agreement had been delivered to, and acted upon by, the principal); Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303.

15. *Alabama.*— McVoy *v.* Wheeler, 6 Port. 201.

Illinois.— Walker *v.* Kesner, 86 Ill. App. 244.

Kentucky.— Tribble *v.* Oldham, 5 J. J. Marsh. 137.

Maine.— Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114.

New Jersey.— Bilderback *v.* Pouner, 7 N. J. L. 64; Pierson *v.* Pierson, 6 N. J. L. 168; Ludlum *v.* Wood, 2 N. J. L. 55.

New York.— Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Langworthy *v.* Smith, 2 Wend. 587, 20 Am. Dec. 652; Jewell *v.* Schroeppel, 4 Cow. 564.

Pennsylvania.— Wilson *v.* Brechemin, Brightly N. P. 445.

Vermont.— McKay *v.* Darling, 65 Vt. 639, 27 Atl. 324.

Wisconsin.— Davis *v.* Judd, 6 Wis. 85.

law recognized as a sealed instrument.[16] Nor will the fact that the instrument in conclusion states that it is signed and sealed justify an action of covenant thereon if it does not in law constitute a specialty.[17]

b. Exceptions to Rule — (I) *IN ABSENCE OF STATUTE.* An exception to the above rule, founded on the custom of London and other particular places, existed at common law, the action in such cases being maintainable in the absence of a seal;[18] so too it could be maintained on an unsealed instrument where defendant derived title under a grant or patent from the crown.[19] In this country it has been held that the action could be maintained against the grantee in an instrument who had recognized and accepted the same, although it be signed and sealed by the grantor only;[20] but the decided weight of authority is to the contrary.[21]

(II) *BY VIRTUE OF STATUTE.* The statutes in some states having abolished the distinction between sealed and unsealed instruments the action may in such jurisdictions be maintained upon any writing operating as a deed,[22] or on which

England.— Moore *v.* Jones, 2 Ld. Raym. 1536; Littler *v.* Holland, 3 T. R. 590.

See 14 Cent. Dig. tit. "Covenant, Action of," § 2.

16. Luciani *v.* American F. Ins. Co., 2 Whart. (Pa.) 167; Wolf *v.* Violett, 78 Va. 57.

The fact that the seal has been torn off does not, however, defeat the right to this form of action, as such spoliation in no way vitiates the legality of the instrument. Rees *v.* Overbaugh, 6 Cow. (N. Y.) 746. See also, generally, DEEDS.

A sealed recognition of an instrument is insufficient to constitute it a covenant and justify an action of covenant thereon. Gale *v.* Nixon, 6 Cow. (N. Y.) 445.

17. Cutts *v.* Frost, Smith (N. H.) 309. And to a similar effect see Davis *v.* Judd, 6 Wis. 85.

18. Comyns Dig. tit. Covenant; Viner Abr. tit. Covenant.

19. Bret *v.* Cumberland, Cro. Jac. 399, 521; Ewre *v.* Strickland, Cro. Jac. 240; Comyns Dig. tit. Covenant.

For American authorities recognizing the existence of this exception, and citing generally the above authorities thereto, see the following:

Connecticut.— Hinsdale *v.* Humphrey, 15 Conn. 431.

Michigan.— Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. 759 [*citing* Fitzherbert Nat. Brev. 146*a*].

New Jersey.—Finley *v.* Simpson, 22 N. J. L. 311, 53 Am. Dec. 252.

Pennsylvania.— Maule *v.* Weaver, 7 Pa. St. 329; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38.

Vermont.— Johnson *v.* Muzzy, 45 Vt. 419, 12 Am. Rep. 214.

See 14 Cent. Dig. tit. "Covenant, Action of," § 6.

20. Finley *v.* Simpson, 22 N. J. L. 311, 53 Am. Dec. 252 [*followed* in Sparkman *v.* Gove, 44 N. J. L. 252; Golden *v.* Knapp, 41 N. J. L. 215; Patten *v.* Huestis, 26 N. J. L. 293]. See also Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556, where, although the point was not in issue, the court used language from which it might be inferred that this is the proper doctrine.

21. *Connecticut.*— Hinsdale *v.* Humphrey, 15 Conn. 431.

Illinois.— Rockford, etc., R. Co. *v.* Beckemeier, 72 Ill. 267.

Maine.— Baldwin *v.* Emery, 89 Me. 496, 36 Atl. 994.

Ohio.— Hocking County *v.* Spencer, 7 Ohio 149, Pt. II.

Pennsylvania.— Maule *v.* Weaver, 7 Pa. St. 329.

Vermont.— Johnson *v.* Muzzy, 45 Vt. 419, 12 Am. Rep. 214.

See 14 Cent. Dig. tit. "Covenant, Action of," § 6.

So too in England.— See Burnett *v.* Lynch, 5 B. & C. 589, 8 D. & R. 368, 4 L. J. K. B. O. S. 274, 29 Rev. Rep. 343, 11 E. C. L. 597.

Extent of exception.— In those jurisdictions where the exceptions to the general rule have been the farthest extended, it is nevertheless held that the exceptions did not embrace mere personal contracts by which no estate in land passed. Harrison *v.* Vreeland, 38 N. J. L. 366.

Reason for exception.— The supposition that a grantee who has taken an estate by a deed poll may be compelled to perform the conditions of the grant by an action of covenant instead of an action of debt or assumpsit seems to have its root in the cases cited in Coke Litt. 331*a*. That the grantee is bound and may be compelled to perform the conditions in some sort of action is admitted (see COVENANTS), but the cases cited by Coke were actions of debt, and are not authority for the proposition that covenant can be maintained, that author merely saying that an action would lie, and not that the technical action of covenant was available. See Hocking County *v.* Spencer, 7 Ohio 149, Pt. II; Maule *v.* Weaver, 7 Pa. St. 329; Johnson *v.* Muzzy, 45 Vt. 419, 12 Am. Rep. 214.

22. Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. 759.

debt or assumpsit might have been maintained before the abolition of such distinction.[23]

c. Application of Rule — Binding on Defendant Only. The rule that the instrument must be sealed applies only to the execution by the defendant; the fact that the execution by the plaintiff may be so defective that he can be proceeded against only in assumpsit is immaterial.[24]

2. Nature of Promise or Agreement — a. In General. The form or nature of the instrument is entirely immaterial. So long as it is a writing under seal and contains an agreement or obligation the action will lie.[25]

b. May Be Implied. While a binding agreement or obligation is of course necessary to support this action,[26] it is not essential that the covenant be an express one; it is sufficient if the words used are such that the law will imply an agreement.[27]

c. Conditions of Bonds. Covenant may be maintained upon a condition of a bond provided such condition, as is often the case, contains in itself, either expressly or impliedly, an agreement at law;[28] but it will not lie for the breach of words in an instrument, constituting mere matter of defeasance where, by the performance of some collateral act, the bond might become void.[29] Where the

23. Graves *v.* Smede, 7 Dana (Ky.) 344; Steele *v.* Curle, 4 Dana (Ky.) 381.

24. Brown *v.* Bostian, 51 N. C. 1; Directors of Poor *v.* McFadden, 1 Grant (Pa.) 230. Hence although the covenant by an infant does not bind him, yet the action lies by an infant against a man of full age. Comyns Dig. tit. Covenant [*citing* 1 Sid. 446].

25. *Alabama.*— Bassett *v.* Jordan, 1 Stew. 352.

Illinois.— Haynes *v.* Lucas, 50 Ill. 436; Northwestern Benev., etc., Aid Assoc. *v.* Wanner, 24 Ill. App. 357.

Kentucky.— Withers *v.* Pricket, Litt. Sel. Cas. 192.

New Hampshire.— Ewins *v.* Gordon, 49 N. H. 444; Stickney *v.* Stickney, 21 N. H. 61.

New Jersey.—Outcalt *v.* Huffman, 3 N. J. L. 818.

New York.— See Jansen *v.* Ball, 6 Cow. 628.

North Carolina.— Rickets *v.* Dickens, 5 N. C. 343, 4 Am. Dec. 555; Brickell *v.* Batchelor, 1 N. C. 326.

Ohio.— Bridgmans *v.* Wells, 13 Ohio 43, holding that the mere fact that a lease was not valid by reason of its not being recorded as required by statute would not preclude an action of covenant thereon, if it contained a valid personal agreement.

Pennsylvania.— Trutt *v.* Spotts, 87 Pa. St. 339.

Virginia.— Tabb *v.* Binford, 4 Leigh 132, 26 Am. Dec. 317.

England.—Comyns Dig. tit. Covenant, Viner Abr. tit. Covenant.

See 14 Cent. Dig. tit. "Covenant, Action of," § 2 *et seq.*

Covenant in præsenti.— In the old authorities it is said that this action could not be maintained upon a covenant *in præsenti.* Stickney *v.* Stickney, 21 N. H. 61 [*citing* 1 Chitty Pl. 115]; Comyns Dig. tit. Covenant. But it may be said that this distinction has not been generally recognized. Martin Civ. Proc. § 45.

Covenant between tenants in common.—An action of covenant will lie upon the mutual covenants of tenants in common as in any other case. Hall *v.* Stewart, 12 Pa. St. 211.

26. Wilcoxen *v.* Rix, 1 A. K. Marsh. (Ky.) 421; Western *v.* Brooklyn, 23 Wend. (N. Y.) 334.

27. *Kentucky.*— Tribble *v.* Oldham, 5 J. J. Marsh. 137.

New Jersey.—Patten *v.* Huestis, 26 N. J. L. 293.

Ohio.— Huddle *v.* Worthington, 1 Ohio 423; Brachman *v.* Warden, 1 Ohio Dec. (Reprint) 494, 10 West. L. J. 193.

Rhode Island.— Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,670, 1 Paine 422; Wilson *v.* Griswold, 30 Fed. Cas. No. 17,806, 9 Blatchf. 267.

England.— Saltoun *v.* Houstoun, 1 Bing. 433, 2 L. J. C. P. O. S. 93, 25 Rev. Rep. 665, 8 E. C. L. 581; Comyns Dig. tit. Covenant; Viner Abr. tit. Covenant.

See 14 Cent. Dig. tit. "Covenant, Action of," § 2 *et seq.*

Where the obligation rises from the nature of the transaction and not the instrument, and the obligation and remedy would exist if there was no instrument in writing in the case, no action of covenant can be maintained. Wilcoxen *v.* Rix, 1 A. K. Marsh. (Ky.) 421.

28. *Iowa.*— Sweem *v.* Steele, 5 Iowa 352.

Kentucky.— Dougherty *v.* Lewellen, 3 Bibb 364; Kennedy *v.* Kennedy, 2 Bibb 464, 5 Am. Dec. 629.

North Carolina.— Jasper *v.* Tooley, 3 N. C. 339.

Ohio.— Taylor *v.* Browder, 1 Ohio St. 225; Huddle *v.* Worthington, 1 Ohio 423; Brachman *v.* Warden, 1 Ohio Dec. (Reprint) 494, 10 West. L. J. 193; Flinn *v.* Elliot, 1 Ohio Dec. (Reprint) 56, 1 West. L. J. 394.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,670, 1 Paine 422.

See 14 Cent. Dig. tit. "Covenant, Action of," § 2 *et seq.*

29. *Indiana.*— Smith *v.* Stewart, 6 Blackf. 162.

conditions are secured by a penalty, it is generally held that the obligee may elect either to proceed in debt for the penalty or in covenant for damages;[30] but the use of one remedy precludes a subsequent resort to the other.[31]

d. Moneys Payable in Instalments. Although the plaintiff must set out in his declaration the covenant as made,[32] yet as a failure to pay the instalments of a debt when due constitutes a breach, a party may nevertheless have this action to recover such instalments without depriving him of his remedy for other breaches which may subsequently occur.[33]

e. When Modified by Parol. Covenant cannot be maintained on a sealed instrument which is shown to have been modified or enlarged by parol.[34] The action may, however, be maintained on a specialty, although an unexecuted parol agreement be attached thereto.[35]

f. Where Part Performance Is Waived. The waiver of performance of a part of a specialty does not constitute the contract a new one, and covenant may still be brought thereon;[36] but unless such waiver be shown plaintiff cannot recover in

Missouri.— State *v.* Woodward, 8 Mo. 353.

New Jersey.— Powell *v.* Clark, 3 N. J. L. 517 [*cited* and *explained* in Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583].

Ohio.— See Huddle *v.* Worthington, 1 Ohio 423, holding that the action could not be maintained upon the condition of a common title bond to convey land, where it is separated in the declaration from the penal or obligatory part of the bond, but the court say that it might be different if the entire bond was declared on.

Pennsylvania.— New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442.

Rhode Island.— Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

Virginia.—Drummond *v.* Richards, 2 Munf. 537.

United States.— Summers *v.* Watson, 23 Fed. Cas. No. 13,605, 1 Cranch C. C. 254; U. S. *v.* Brown, 24 Fed. Cas. No. 14,670, 1 Paine 422.

England.— Comyns Dig. tit. Covenant.

Canada.— Niven *v.* Jardine, 23 U. C. Q. B. 470.

See 14 Cent. Dig. tit. "Covenant, Action of," § 5.

30. *Arkansas.*— McLaughlin *v.* Hutchins, 3 Ark. 207.

New Hampshire.— Stickney *v.* Stickney, 21 N. H. 61.

Ohio.— Huddle *v.* Worthington, 1 Ohio 423.

Pennsylvania.— New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442.

England.— Lowe *v.* Peers, 4 Burr. 2225; Harrison *v.* Wright, 13 East 343, 12 Rev. Rep. 369.

See 14 Cent. Dig. tit. "Covenant, Action of," § 5.

31. McLaughlin *v.* Hutchins, 3 Ark. 207; Stickney *v.* Stickney, 21 N. H. 61; Lowe *v.* Peers, 4 Burr. 2225; Harrison *v.* Wright, 13 East 343, 12 Rev. Rep. 369. See also, generally, ELECTION OF REMEDIES.

Which remedy preferable.— Inasmuch as when the party proceeds in debt for the penalty his recovery must necessarily be limited to that amount, it would seem that resort to the action of covenant would be the more preferable, as the courts usually hold that the amount of recovery in this action is not necessarily limited to the penalty. See Sweem *v.* Steele, 5 Iowa 352; Stickney *v.* Stickney, 21 N. H. 61; Huddle *v.* Worthington, 1 Ohio 423; Lowe *v.* Peers, 4 Burr. 2225 [*cited* in New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442]. But see Hill *v.* Rushing, 4 Ala. 312, where it was held that the damages in covenant could not be more than the penalty.

32. Adams *v.* Essex, 1 Bibb (Ky.) 149, 4 Am. Dec. 623. See *infra*, VIII, A, 1, *et seq.*

33. *Alabama.*— North *v.* Eslava, 12 Ala. 240.

Kentucky.— Adams *v.* Essex, 1 Bibb 149, 4 Am. Dec. 623.

Pennsylvania.— Hepburn *v.* Mans, 31 Leg. Int. 356.

Vermont.—Stevens *v.* Chamberlin, 1 Vt. 25.

United States.— Fontaine *v.* Aresta, 9 Fed. Cas. No. 4,905, 2 McLean 127.

England.— Thompson *v.* Chambers, 2 U. C. Q. B. 191.

34. *Alabama.*— McVoy *v.* Wheeler, 6 Port. 201.

Missouri.— Raymond *v.* Fisher, 6 Mo. 29.

Pennsylvania.— Carrier *v.* Dilworth, 59 Pa. St. 406; Lehigh Coal, etc., Co. *v.* Harlan, 27 Pa. St. 429; Vicary *v.* Moore, 2 Watts 451, 27 Am. Dec. 323 [*explaining* Jordan *v.* Cooper, 3 Serg. & R. 564].

Vermont.—Sherwin *v.* Rutland, etc., R. Co., 24 Vt. 347.

United States.—Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341.

England.— Littler *v.* Holland, 3 T. R. 590.

See 14 Cent. Dig. tit. "Covenant, Action of," § 7.

35. Ellmaker *v.* Franklin F. Ins. Co., 6 Watts & S. (Pa.) 439, the agreement being made to regulate the application of the instrument as a specialty and not to modify it.

As to what constitutes a variation of a specialty by parol see Potts *v.* Point Pleasant Land Co., 49 N. J. L. 411, 8 Atl. 109.

36. Monocacy Bridge Co. *v.* American Iron Bridge Mfg. Co., 83 Pa. St. 517; District of

this action if he has not strictly performed his part of the agreement,[37] except where such performance is prevented by defendant.[38]

IV. BY WHAT LAW GOVERNED.

As the remedy by which an agreement may be enforced is determined by the *lex fori*,[39] it follows that covenant will not lie on an instrument which is not by the law of the forum in which the action is brought a specialty, although it would be considered as under seal in the place where it was made.[40]

V. JURISDICTION[41] AND VENUE.[42]

In the absence of a statute regulating the place in which actions shall be brought,[43] the action of covenant, when founded on privity of contract, is transitory and may be brought as a transitory action; but when founded on privity of estate the action is local.[44]

VI. LIMITATION OF ACTION.[45]

Unless barred by the statute of limitations the action may be brought at any time.[46]

VII. PARTIES.[47]

A. Rule — Necessity of Privity. Generally speaking the action of covenant will lie only between those parties between whom exists a privity of contract or estate,[48] and who have executed the instrument declared on;[49] and where the covenant is joint[50] all the parties thereto must be joined.[51] In the application of

Columbia *v.* Camden Iron Works, 181 U. S. 453, 21 S. Ct. 680, 45 L. ed. 948.

37. Manuel *v.* Campbell, 3 Ark. 324; Stagg *v.* Munro, 8 Wend. (N. Y.) 399; Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564.

38. Potts *v.* Point Pleasant Land Co., 49 N. J. L. 411, 8 Atl. 109.

39. See, generally, CONTRACTS.

40. Broadhead *v.* Noyes, 9 Mo. 56; Douglas *v.* Oldham, 6 N. H. 150; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508; Le Roy *v.* Beard, 8 How. (U. S.) 451, 12 L. ed. 1151.

41. For jurisdiction generally see COURTS.

42. For venue generally see VENUE.

43. State University *v.* Joslyn, 21 Vt. 52, where the common law, as modified by the statutes of that state, is explained and recognized.

44. *Massachusetts.*— Lienow *v.* Ellis, 6 Mass. 331.

New Hampshire.— White *v.* Sanborn, 6 N. H. 220.

New York.— Port *v.* Jackson, 17 Johns. 239.

Pennsylvania.— Henwood *v.* Cheeseman, 3 Serg. & R. 500.

South Carolina.— Bowdre *v.* Hampton, 6 Rich. 208.

Vermont.— State University *v.* Joslyn, 21 Vt. 52.

England.— Barker *v.* Damer, 1 Salk. 80; Thursby *v.* Plant, 1 Saund. 237.

See 14 Cent. Dig. tit. "Covenant, Action of," § 13.

45. For statutes of limitations generally see LIMITATIONS OF ACTIONS.

46. Burrus *v.* Wilkinson, 31 Miss. 537; Maeder *v.* Carondelet, 26 Mo. 112. See also Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095.

47. See 1 Cyc. 58, note 96.

For parties generally see PARTIES.

48. *Maine.*— Lyon *v.* Parker, 45 Me. 474.

Maryland.— Howard *v.* Ramsay, 7 Harr. & J. 113.

Massachusetts.— Hurd *v.* Curtis, 19 Pick. 459; Plymouth *v.* Carver, 16 Pick. 183.

New Hampshire.— Adams *v.* French, 2 N. H. 387.

New York.— Van Rensselaer *v.* Palmatier, 2 How. Pr. 24; Port *v.* Jackson, 17 Johns. 239; Gardner *v.* Gardner, 10 Johns. 47.

North Carolina.—Nesbit *v.* Nesbit, 1 N. C. 490; Nesbit *v.* Montgomery, 1 N. C. 181.

South Carolina.— McCrady *v.* Brisbane, 1 Nott & M. 104, 9 Am. Dec. 676.

England.— Chancellor *v.* Poole, Dougl. (3d ed.) 764; Cole's Case, 1 Salk. 196; Bally *v.* Wells, 3 Wils. K. B. 25.

See 14 Cent. Dig. tit. "Covenant, Action of," § 15.

Statutory provisions.— In some jurisdictions the right of the parties to bring this action is determined by the statutes of the state. See Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134; New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282.

49. Metcalfe *v.* Rycroft, 6 M. & S. 75.

50. As to what constitutes joint covenants see Childress *v.* McCullough, 5 Port (Ala.) 54, 30 Am. Dec. 549; Belknap *v.* Paddock, 52 Vt. 1; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157. And see, generally, Covenants.

51. Hays *v.* Lasater, 3 Ark. 565.

this rule it has been universally held that where the covenant runs with the land the action may be maintained by the assignee thereof;[52] where the covenant is *inter partes* it would seem that no matter for whose benefit it may have been made the action must be brought in the name of the parties to the instrument or their legal representatives,[53] although the opposite has also been held.[54] And while it generally lies against one's executor,[55] the rule is otherwise where it is to be performed by the testator in person.[56]

B. Effect of Partnership Relations. Where there is a valid and subsisting covenant existing between the parties, the mere fact that there is a relation of partnership also existing between them does not preclude a resort to this remedy for a breach of such covenant.[57] This has been held to be true, although there may be accounts between the parties which would require unraveling in a court of equity.[58]

VIII. PLEADINGS.[59]

A. Declaration — 1. In General. The declaration in an action of covenant must show with whom the defendant covenanted,[60] and aver the amount of damages claimed;[61] the instrument need not, however, be declared on *in hæc verba*,[62]

52. Fisher *v.* Lewis, 1 Pa. L. J. Rep. 422, 3 Pa. L. J. 73; Brisbane *v.* McCrady, Nott & M. (S. C.) 104, 9 Am. Dec. 676; Coke Litt. 384; Comyns Dig. tit. Covenant; Viner Abr. tit. Covenant. See also Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278, which decision, however, was held to rest upon the statute, although the court says that there was at least reasonable ground to affirm that a party claiming by a devise or assignment from a party in whose favor rent was reserved could maintain covenant therefor at common law.

Actions to recover rent generally see LANDLORD AND TENANT.

What constitutes a covenant running with the land see COVENANTS.

Covenant as substitute for warrantia chartæ.— It was the rule in England that a party who had conveyed away an estate with a covenant of warranty which ran with the land could not sustain a *warrantia chartæ*, but that it must be brought by the last grantee, and each grantee must vouch his warrantor to the end of the chain of title. As the remedy by *warrantia chartæ* is not used in this country, it has been held that the action of covenant lies in its stead against a remote grantor. Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167; Booker *v.* Bell, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; Rickets *v.* Dickens, 5 N. C. 343, 4 Am. Dec. 555.

53. Gardner *v.* Gardner, 10 Johns. (N. Y.) 47; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68, 33 Am. Dec. 38 [*followed* in Mississippi Cent. R. Co. *v.* Southern R. Assoc., 8 Phila. (Pa.) 107].

54. Fellows *v.* Gilman, 4 Wend. (N. Y.) 414, 419 [*citing* Comyns Dig. tit. Covenant; Viner Abr. tit. Covenant], where the court says: "It must undoubtedly appear that the covenant which is alleged to have been broken, was made for the benefit of the person bringing the action. He must in some manner be pointed out or designated in the instrument; but it is not necessary that his name should in terms be used."

55. Comyns. Dig. tit. Covenant; Viner Abr. tit. Covenant.

56. Brisbane *v.* McCrady, 8 Nott & M. (S. C.) 104, 9 Am. Dec. 676 [*citing* Browning *v.* Wright, 2 B. & P. 13; 1 Chitty Pl. 37].

57. *Alabama.*— Stone *v.* Dennis, 3 Port. 231.

New York.— Glover *v.* Tuck, 24 Wend. 153.

Pennsylvania.— Addams *v.* Tutton, 39 Pa. St. 447; Hall *v.* Stewart, 12 Pa. St. 211, the latter, however, holding that the agreement in question constituted the parties rather as tenants in common than as partners.

South Carolina.— Terrill *v.* Richards, 1 Nott & M. 20.

Vermont.— Coburn *v.* Cassie, 65 Vt. 550, 27 Atl. 317.

England.— Venning *v.* Leckie, 13 East 7.

See 14 Cent. Dig. tit. "Covenant, Action of," § 11.

58. Glover *v.* Tuck, 24 Wend. (N. Y.) 153; Denning *v.* Lecke, 13 East 7. But it is held that the action would not lie to compel the payment of a balance due to the partnership from one of the partners, but that the only remedy is by a bill in equity or by an action of account. Niven *v.* Spickerman, 12 Johns. (N. Y.) 401.

59. For pleadings generally see PLEADING.

60. Keatly *v.* McLaugherty, 4 Mo. 221; Tate *v.* Barcroft, 1 Mo. 163. And see Hennessy *v.* Hennessy, 30 U. C. Q. B. 38, where a declaration averring that the defendant covenanted to pay to the plaintiff, etc., without alleging that he made the covenant with the plaintiff, was held good on demurrer, since it was evident that the plaintiff must, on a denial of the making of the deed, prove that it was made with himself.

61. Robertson *v.* Waters, 1 Yerg. (Tenn.) 200; Martin *v.* Woods, (Trin. T.) 3 & 4 Vict.

62. Withers *v.* Pricket, Litt. Sel. Cas. (Ky.) 192; Hall *v.* Cazenove, 4 East 477, 1 Smith K. B. 272, 7 Rev. Rep. 611.

and where there has been a mistake in the wording of the instrument the declaration may be drawn according to the actual agreement of the parties.[63]

2. AVERMENT OF BREACH. It is necessary that the declaration allege with certainty a breach of the covenant declared on;[64] and where the declaration is sufficient as to some and insufficient as to other breaches, the plaintiff may recover for those sufficiently assigned.[65] Generally speaking such breaches may be assigned in the words of the instrument,[66] if such general assignment necessarily amounts to a breach.[67]

3. AVERMENT OF PERFORMANCE OF CONDITIONS PRECEDENT. If the liability of the defendant depends upon the performance of a prior covenant or condition on the part of the plaintiff, performance, or a tender of performance of such condition, must be averred;[68] but defendant need not aver the performance of other acts which he is not legally bound to perform.[69]

4. AVERMENT OF SEALING. The declaration must also allege that defendant entered into and sealed the covenant declared on.[70] It is not sufficient to allege that he made his covenant,[71] or that he executed a writing setting it forth *in hæc*

63. Gower *v.* Sterner, 2 Whart. (Pa.) 75.

Sufficiency.— According to the general rules of pleading, the declaration of the plaintiff in covenant states a good cause of action where it declares upon the instrument according to its legal operation and assigns breaches substantially in the words of the covenant (Withers *v.* Pricket, Litt. Sel. Cas. (Ky.) 192); and where the covenant is set forth with sufficient certainty to prevent any reasonable mistake as to the ground of action, inconsistent and immaterial allegations may be rejected as surplusage (Hearn *v.* Cole, 1 Dow 459).

For further illustrations of sufficiency of declaration see Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692; Baynon *v.* Batley, 8 Bing. 256, 1 L. J. C. P. 75, 1 M. & S. 339, 21 E. C. L. 530.

Conclusion.— The usual conclusion in a declaration of covenant is "that the defendant (though often requested to do so), hath not kept his said covenant, but hath broken the same," and then demands damages. But this conclusion is merely formal and not necessary to the legality of the declaration. Outtons *v.* Dulin, 72 Md. 536, 542, 20 Atl. 134.

Amendment of declaration.— If it appears upon oyer of a deed that some of the defendants are not parties thereto, the declaration may be amended by striking out their names, upon the payment of costs. McClure *v.* Burton, 4 N. C. 84.

64. *Alabama.*— Ridgell *v.* Dale, 16 Ala. 36; Hill *v.* Rushing, 4 Ala. 212.

Arkansas.— The reason is that the damages for which the party sues must be governed by the testimony adduced in support of the breaches assigned; therefore where there is a failure to assign a breach no damages can be recovered. McLaughlin *v.* Hutchins, 3 Ark. 207.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 151.

South Carolina.— Lewis *v.* McFadden, 3 Rich. 108.

Canada.— Scott *v.* McCabe, 31 U. C. Q. B. 220.

See 14 Cent. Dig. tit. "Covenant, Action of," § 16.

65. Gaster *v.* Ashley, 1 Ark. 325; Blanchard *v.* Hoxie, 34 Me. 376.

66. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151; Cully *v.* Winter, 25 U. C. Q. B. 34; Rowand *v.* Tyler, 4 U. C. Q. B. O. S. 257.

67. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151, 175, where it is said: "This qualification, which however is not usually appended to the rule as laid down in the books, embraces all those cases which are admitted to be exceptions to the general rule; that is, they are cases where the general negation of the words of the covenant would not necessarily constitute a breach."

68. *Alabama.*— Bassett *v.* Stewart, 1 Stew. 352.

Arkansas.— McLaughlin *v.* Hutchins, 3 Ark. 207.

Ohio.— Courcier *v.* Graham, 1 Ohio 330.

Pennsylvania.— Burk *v.* Bear, 3 Pa. L. J. Rep. 355, 5 Pa. L. J. 304. See also Hawman *v.* Yellow House, etc., Tp. Road Co., 2 Woodw. 332, holding that plaintiff, after averring and showing a performance, might be cross-examined as to his manner of performance.

Canada.— Kay *v.* Gamble, 6 U. C. Q. B. 267; Tanner *v.* D'Everado, 3 U. C. Q. B. 154.

See 14 Cent. Dig. tit. "Covenant, Action of," § 16.

69. Rector *v.* Purdy, 1 Mo. 186, 13 Am. Dec. 494.

70. *Arkansas.*— Hays *v.* Lasater, 3 Ark. 565.

Illinois.— Walker *v.* Kesner, 86 Ill. App. 244.

New Jersey.— Bilderback *v.* Pouner, 7 N. J. L. 64.

New York.— Van Santwood *v.* Sandford, 12 Johns. 197 [*citing* Southwel *v.* Brown, Cro. Eliz. 571].

England.— Moore *v.* Jones, 2 Ld. Raym. 1536.

See 14 Cent. Dig. tit. "Covenant, Action of," § 16.

71. Hays *v.* Lasater, 3 Ark. 565.

verba, concluding with "sealed and delivered," etc., and the name of the covenantor, with the letters L. S., nowhere else alleging that the instrument was sealed.[72]

B. Pleas — 1. Necessity of Special Pleas. Inasmuch as there is no one plea which would put in issue every material allegation in the declaration in covenant, there is strictly speaking no plea which can be termed the general issue;[73] hence generally speaking the defendant must plead specially the performance of the covenant,[74] or excuse of performance,[75] or matters in discharge thereof.[76] And while to constitute a good plea he must confess and avoid or traverse all the allegations in the declaration,[77] the part not answered being admitted,[78] a plea as broad as the declaration and responsive to it is sufficient.[79]

72. Van Santwood *v.* Sandford, 12 Johns. (N. Y.) 197 (where a declaration stating that the defendant made and executed a writing in certain words and figures with the conclusion: "In witness whereof, I have set my hand and seal. *Stephen Sandford.* [L. S.]" was held insufficient); Moore *v.* Jones, 2 Ld. Raym. 1536. See also Macomb *v.* Thompson, 14 Johns. (N. Y.) 207.

73. *Alabama.*— Stone *v.* Dennis, 3 Port. 231.

District of Columbia.— Clark *v.* Harmer, 5 App. Cas. 114.

Illinois.— Longley *v.* Norvall, 2 Ill. 389.

Mississippi.— Winn *v.* Skipwith, 14 Sm. & M. 14.

New York.— Hebberd *v.* Delaplaine, 3 Hill 187.

Ohio.— Granger *v.* Granger, 6 Ohio 35; Courcier *v.* Graham, 1 Ohio 330.

Pennsylvania.— Smith *v.* Justice, 6 Phila. 234, 24 Leg. Int. 244, holding that therefore no special plea could be objected to because it amounted to the general issue. And see Oeser *v.* Union Ins. Co., 2 Pa. Co. Ct. 210.

Tennessee.— Jones *v.* Johnson, 10 Humphr. 184.

United States.— Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. ed. 200.

See 14 Cent. Dig. tit. "Covenant, Action of," § 17.

74. Where performance is pleaded by defendant, such plea being a direct denial of the averments in the declaration, should conclude to the country. Overton *v.* Crabb, 4 Hayw. (Tenn.) 109. But a plea of performance, although defective in form, may be aided by the verdict. Winn *v.* Skipwith, 14 Sm. & M. (Miss.) 14.

75. And where defendant pleads a discharge because of an accident his plea must show that his carelessness or mismanagement in no way contributed to the cause of the mishap. Counter *v.* Hamilton, 6 U. C. Q. B. O. S. 612. See also Singleton *v.* Carroll, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95.

Mutual abandonment of a sealed contract, and that the plaintiff afterward within the time provided therein made a new agreement to perform the same services on different terms, is a good plea of defense to an action of covenant. Herzog *v.* Sawyer, 61 Md. 344.

76. *Arkansas.*— McLaughlin *v.* Hutchins, 3 Ark. 207.

Mississippi.— Winn *v.* Skipwith, 14 Sm. & M. 14.

Ohio.— Courcier *v.* Graham, 1 Ohio 330.

Tennessee.— Jones *v.* Johnson, 10 Humphr. 184.

West Virginia.— Arnold *v.* Cole, 42 W. Va. 663, 26 S. E. 312.

United States.— Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. ed. 200.

See 14 Cent. Dig. tit. "Covenant, Action of," § 17.

77. Champ *v.* Ardery, 2 A. K. Marsh. (Ky.) 246; Colgan *v.* Sharp, 4 Mo. 263; Slocum *v.* Despard, 8 Wend. (N. Y.) 615.

A traverse of a delivery of a deed should specifically deny that the plaintiff made a delivery, and a plea "that the writing declared on was not delivered to the plaintiffs or any other person for them" is insufficient. McCoy *v.* Hill, 2 Litt. (Ky.) 372.

Joinder of plea.— It has been held that in an action of covenant the pleas of *non est factum* and payment may be joint. Merry *v.* Gay, 3 Pick. (Mass.) 388.

78. Freeman *v.* Henry, 48 Vt. 553.

79. Burroughs *v.* Clancey, 53 Ill. 30.

Fraud as a defense to an action of covenant may be pleaded in general terms. Lacey *v.* Spencer, 3 U. C. Q. B. 169.

Payment.— A plea of payment in money in an action of covenant brought to enforce the payment of a note in property is bad. Barnes *v.* Lloyd, 1 How. (Miss.) 584. See also Russell *v.* Smith, Thomps. Cas. (Tenn.) 34.

Set-off.— It is no objection to a plea of set-off that the action is covenant; such plea being as appropriate to this form of action as any other. Roebuck *v.* Tennis, 5 T. B. Mon. (Ky.) 82. And see Vicary *v.* Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323.

Tender may be pleaded in an action of covenant for the payment of money, although such plea goes only in mitigation of damages, and not as a defense to the cause of action. Johnston *v.* Clay, 1 Moore C. P. 200, 7 Taunt. 486.

Duplicity.— In an action of covenant brought to recover the price for which land was sold, the vendor having covenanted at the same time to make title, the plea by the vendee that the plaintiff had no title when he was required to make the conveyance, and that

2. Non Est Factum. A plea of *non est factum* has, however, been considered of the nature of a general issue to the extent that special matters of defense may be subjoined thereto, where such matters could be subjoined to the general issue.[80] The plea itself puts in issue only the execution of the covenant in a lawful manner;[81] hence defendant may under this plea show that his agent by whom the deed was executed had no power so to do,[82] but he cannot question the power of the plaintiff to enter into the covenant,[83] nor can the question of title to land arise under such plea in an action between a lessor and lessee.[84]

3. Non Infregit Conventionem. The plea of *non infregit conventionem*, which puts in issue the breach assigned,[85] when properly supported by evidence, is a good plea.[86] Such plea would not, however, be proper where the breach of the covenant is assigned in the negative.[87]

IX. Issues, Proof,[88] and Variance.

A. In General. In an action of covenant the evidence must be responsive to the pleadings and conform to the declaration and instrument declared on;[89]

the lands were encumbered by a mortgage, would be bad for duplicity. Camp *v.* Morse, 5 Den. (N. Y.) 161.

A plea of leave and license is not a good plea to an action of covenant. McDonald *v.* Great Western R. Co., 21 U. C. Q. B. 223 [*citing* Dobson *v.* Espie, 2 H. & N. 79].

An attachment execution which has been served on the defendant as garnishee may be pleaded, although such a plea is neither one in abatement nor in bar, as under the modern practice a defense need not be clearly one or the other of these pleas. Kase *v.* Kase, 34 Pa. St. 128.

Pennsylvania procedure.— In Pennsylvania the courts allow a plea of performance without leave, etc. This plan was peculiar to Pennsylvania, and is unknown in England. Its purpose is to save the trouble of special pleading, inasmuch as it gives the defendant every advantage which he could derive from resorting to the particular and technical labor of forming special pleas. For upon notice to the plaintiff he may under this plea give anything in evidence which he might have pleaded. Bender *v.* Fromberger, 4 Dall. 436, 1 L. ed. 898.

80. Granger *v.* Granger, 6 Ohio 35; Courcier *v.* Graham, 1 Ohio 330. And see Hebberd *v.* Delaplaine, 3 Hill (N. Y.) 187; Provost *v.* Calder, 2 Wend. (N. Y.) 517.

81. Kellogg *v.* Ingersoll, 1 Mass. 5; Courcier *v.* Graham, 1 Ohio 330; Smith *v.* Justice, 6 Phila. (Pa.) 234, 24 Leg. Int. (Pa.) 244; Snell *v.* Snell, 4 B. & C. 741, 7 D. & R. 294, 4 L. J. K. B. O. S. 44, 10 E. C. L. 782. See also Daines *v.* Heath, 3 C. B. 938, 11 Jur. 185, 16 L. J. C. P. 117, 54 E. C. L. 938.

82. State Prison *v.* Lathrop, 1 Mich. 438.

Sufficiency of plea.— A plea that the instrument sued on was without consideration and void, although defective as a plea of *non est factum*, will nevertheless be regarded as sufficient for that purpose, if plaintiff fails to demur thereto. Clark *v.* Harmer, 5 App. Cas. (D. C.) 114.

83. Holcomb *v.* Illinois, etc., Canal, 3 Ill. 228.

84. Barney *v.* Keith, 6 Wend. (N. Y.) 555.

85. Smith *v.* Justice, 6 Phila. (Pa.) 234, 24 Leg. Int. (Pa.) 244.

86. Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095, holding that inasmuch as the plea that defendant had not broken his covenant at all was a good plea, it was also sufficient to plead that he did not break it within twenty years next before the institution of the suit, inasmuch as this was equal to saying that the right of action did not accrue at any time within that period.

87. Boone *v.* Eyre, 1 H. Bl. 273 note, 2 Rev. Rep. 768; Hodgson *v.* East India Co., 8 T. R. 278; Boone *v.* Eyre, 2 W. Bl. 1312. See also Taylor *v.* Needham, 2 Taunt. 279, 11 Rev. Rep. 572; Mitchell *v.* Linton, 5 U. C. Q. B. 331.

88. **For evidence** generally see Evidence.

89. *Maryland.*— O'Brien *v.* Fowler, 67 Md. 561, 11 Atl. 174 [*distinguishing* Herzog *v.* Sawyer, 61 Md. 344].

South Carolina.— Mathews *v.* Sims, 2 Mill 103.

Tennessee.— Jones *v.* Johnson, 10 Humphr. 184.

United States.— Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341.

England.— Van Sandau *v.* Burt, 5 B. & Ald. 42, 7 E. C. L. 34; Ratcliff *v.* Pemberton, 1 Esp. 35.

Canada.— Stewart *v.* Clark, 13 U. C. C. P. 203.

See 14 Cent. Dig. tit. "Covenant, Action of," § 18.

Procedure on variance.— Where there is a variance between the covenant as made and as declared upon, the defendant must, in order to have the benefit of it, crave oyer and demurrer. Steele *v.* McKinnie, 5 Yerg. (Tenn.) 449.

What constitutes a variance see Ross *v.* Parker, 1 B. & C. 358, 2 D. R. 662, 8 E. C. L. 153; Mayelston *v.* Palmerston, 2 C. & P. 474, M. & M. 6, 12 E. C. L. 684; Price *v.* Birch, 1 Dowl. P. C. N. S. 720, 11 L. J. C. P. 193, 4 M. & G. 1, 43 E. C. L. 1; Hennessey *v.* Weir, 11 U. C. C. P. 179.

hence any evidence of an alteration or variation of the covenant by parol would be inadmissible.[90]

B. Burden of Proof. Inasmuch as the plaintiffs must prove the damages occasioned by the breach of the covenant, the right to open and close the argument lies with them;[91] and as a covenant not only implies, but generally expresses, a consideration, the burden would be upon a party pleading no consideration in an action of covenant to sustain his plea.[92]

X. TRIAL.[93]

A. Right to Demand Oyer. Although the plaintiff in his declaration may claim damages for certain breaches of the covenant only, the defendant may nevertheless demand oyer and have the whole instrument read.[94]

B. Effect of Default. The default by defendant in an action of covenant admits all the traversable averments in the declaration, and leaves nothing to be done but the ascertainment and assessment of the damages.[95]

XI. VERDICT[96] AND JUDGMENT.[97]

A. Form and Requisites. Where a part of the breaches are defectively assigned in the declaration, a general verdict or judgment is erroneous;[98] nor will the verdict cure a declaration so defective as to recite no cause of action;[99] but mere technical informality in a judgment in an action of covenant will not invalidate it.[1]

B. Amount Recoverable and Ascertainment Thereof. The amount recoverable as damages is the equivalent of the injury or loss occasioned by the breach or breaches,[2] which have been sufficiently alleged in the declaration,[3] and

90. *Maryland.*— Franklin F. Ins. Co. *v.* Hamill, 6 Gill 87.

Pennsylvania.—Heckscher *v.* Sheaffer, (1888) 14 Atl. 53; Gower *v.* Sterner, 2 Whart. 75.

South Carolina.— See Marks *v.* Robinson, 1 Bailey (S. C.) 89, affirming this principle, but holding that where defendant pleaded that plaintiff could under proper averments show that the defendant consented that the time should be enlarged within which he might perform the required services, although such an agreement to extend the time was by parol; inasmuch as this evidence did not vary or contradict the deed, but on the contrary fully recognized its existence and legal operation.

United States.— Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341.

England.— Littler *v.* Holland, 3 T. R. 590.

See 14 Cent. Dig. tit. "Covenant, Action of," § 18.

91. Moncure *v.* Dermott, 17 Fed. Cas. No. 9,707, 5 Cranch C. C. 445 [*reversed* on other grounds in 13 Pet. (U. S.) 345, 10 L. ed. 193].

92. Taylor *v.* Ashby, 2 J. J. Marsh. (Ky.) 415.

Sufficiency of evidence.— It is *prima facie* sufficient for plaintiff to prove the execution of the covenant by the defendant, and he need not produce or prove the counterpart; it being incumbent upon the defendant if he wished to show that he sealed and delivered it only on condition that the plaintiff seal and deliver the counterpart, to introduce proof to that effect. Patten *v.* Huestis, 26 N. J. L. 293.

93. For trial generally see TRIAL.

94. Frick *v.* Hugle, 1 Pa. Co. Ct. 572; Building Assoc. *v.* Kribs, 7 Leg. & Ins. Rep. (Pa.) 21.

95. Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320; Courcier *v.* Graham, 1 Ohio 330.

96. For verdict generally see TRIAL.

97. For judgment generally see JUDGMENTS.

98. The reason being that the jury may have assessed damages upon the breaches faultily assigned as well as upon those sufficiently alleged. Wilson *v.* Bowens, 2 T. B. Mon. (Ky.) 86.

99. McDonald *v.* Hobson, 7 How. (U. S.) 745, 12 L. ed. 897.

1. Jenkins *v.* Yeates, 2 J. J. Marsh. (Ky.) 48, where the fact that the judgment rendered declared the amount recovered to be the debt mentioned in the declaration instead of putting the principal and interest together and calling it damages was held to be immaterial.

If infancy is pleaded by one of two defendants in covenant the plaintiff may enter a *nolle prosequi* as to him, and judgment may be rendered against the other. Kurtz *v.* Becker, 14 Fed. Cas. No. 7,951, 5 Cranch C. C. 671.

2. Hill *v.* Rushing, 4 Ala. 212; Dills *v.* Dougherty, 6 Dana (Ky.) 253; Loosemore *v.* Radford, 1 Dowl. P. C. N. S. 881, 11 L. J. Exch. 284, 9 M. & W. 657. But see Hey *v.* Wyche, 2 G. & D. 569, 6 Jur. 559, 12 L. J. Q. B. 83.

3. Eastham *v.* Crowder, 10 Humphr. (Tenn.) 194.

proven by the evidence.[4] Such damages when unliquidated should of course be assessed by a jury;[5] but where they are by virtue of the instrument rendered fixed and certain, the court may award the damages without the intervention of a jury.[6]

COVENANTEE. He to whom the covenant is made.[1] (See, generally, COVENANTS.)

COVENANT EN FAIT. A COVENANT IN FACT OR IN DEED,[2] *q. v.* (See, generally, COVENANTS.)

COVENANT IN FACT OR IN DEED. That which is expressly agreed between the parties in specified terms;[3] a covenant expressed in words, or inserted in a deed in specific terms.[4] (See, generally, COVENANTS.)

COVENANT IN GROSS. A covenant which does not run with the land.[5] (See, generally, COVENANTS.)

COVENANT IN LAW. An agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate.[6] (See, generally, COVENANTS.)

COVENANT NOT TO SUE. A covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action.[7] (See, generally, COMMERCIAL PAPER;[8] CONTRACTS;[9] RELEASE.)

COVENANT OF NON-CLAIM. A covenant sometimes employed, particularly in the New England states, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed.[10]

COVENANTOR. He that makes the covenant.[11] (See, generally, COVENANTS.)

COVENANT TO STAND SEIZED TO USES. See TRUSTS.

4. Baker *v.* Jordan, 5 Humphr. (Tenn.) 485.

Damages must be proximate.— The general rule that the damages must be the necessary and immediate consequence of the breach, and not remote or inferential, applies to this action. Walton *v.* Fothergill, 7 C. & P. 392, 32 E. C. L. 672.

Damages on covenant payable in bank-notes.— Where an action of covenant is brought to recover a sum of money payable in bank-notes, the measure in damages is the value of the notes when the contract becomes due. Van Vleet *v.* Adair, 1 Blackf. (Ind.) 346; Coldren *v.* Miller, 1 Blackf. (Ind.) 296. But if the bank-notes circulated currently as money their value will, in the absence of proof to the contrary, be taken the same as money, and if the defendant is not willing that their value should be so considered he must introduce proof showing their deteriorated value. Baker *v.* Jordan, 5 Humphr. (Tenn.) 485. See also Bizzell *v.* Brewer, 9 Ark. 58.

5. Johnson *v.* Pierce, 12 Ark. 599; Van Vleet *v.* Adair, 1 Blackf. (Ind.) 346; Coldren *v.* Miller, 1 Blackf. (Ind.) 296; Lindsay *v.* Anesley, 28 N. C. 186; Walker *v.* Broadhurst, 8 Exch. 889, 23 L. J. Exch. 71.

6. Clark *v.* Harmer, 5 App. Cas. (D. C.) 114; Jenkins *v.* Yeates, 2 J. J. Marsh. (Ky.) 48; Dicken *v.* Smith, 1 Litt. (Ky.) 209.

1. Kent *v.* Edmondston, 49 N. C. 529, 531 [*citing* Sheppard Touchst.].

2. English L. Dict.

3. English L. Dict.

4. Burrill L. Dict. [*citing* Termes de la Ley].

5. English L. Dict.

6. Lovering *v.* Lovering, 13 N. H. 513, 518; Williams *v.* Burrell, 1 C. B. 402, 429, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402.

There are two kinds of covenants, a covenant in deed, and a covenant in law. Coke Litt. 139*b* [*quoted* in Williams *v.* Burrell, 1 C. B. 402, 430, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402]. And see Hays *v.* Lasater, 3 Ark. 565, 568, where it is said: "There is a distinction between covenants in deed and covenants in law, and to show that it is the former an express averment is necessary."

7. Black L. Dict.

8. See 7 Cyc. 876, note 73.

9. See 9 Cyc. 695.

10. Black L. Dict. [*citing* Rawle Cov. § 22].

11. Kent *v.* Edmondston, 49 N. C. 529, 531 [*citing* Sheppard Touchst.].

COVENANTS

By J. Breckinridge Robertson

CROSS-REFERENCES

For Matters Relating to:
Covenants:
Creating Easement, see EASEMENTS.
For Annuity, see ANNUITIES.
For Support, see ANNUITIES.
Not to Sue, see CONTRACTS; RELEASE.
Relating to Party-Wall, see PARTY-WALLS.
Relating to Sale of Personalty, see SALES.
To Pay Mortgage Debt, see MORTGAGES.
To Pay Rent, see GROUND RENTS; LANDLORD AND TENANT.
To Perform Award, see ARBITRATION AND AWARD.
To Stand Seized, see TRUSTS.
Covenants in Particular Instruments:
Charter-Party, see SHIPPING.
Contract:
Generally, see CONTRACTS.
Insurance Contract, see INSURANCE and the Insurance Titles.
To Convey Land, see VENDOR AND PURCHASER.
Deed:
Generally, see DEEDS.
Ground-Rent Deed, see GROUND-RENTS.
Exchange of Property, see EXCHANGE OF PROPERTY.

For Matters Relating to — (*continued*)
Covenants in Particular Instruments — (*continued*)
Lease:
Generally, see LANDLORD AND TENANT.
Mining Lease, see MINES AND MINERALS.
Mortgage, see CHATTEL MORTGAGES; MORTGAGES.
Covenants of Particular Persons:
Administrator, see EXECUTORS AND ADMINISTRATORS.
Ancestor, see ESTATES.
Assignee of Mortgagor, see MORTGAGES.
Devisee, see WILLS.
Executor, see EXECUTORS AND ADMINISTRATORS.
Heir, see DESCENT AND DISTRIBUTION.
Grantee, see DEEDS; MORTGAGES.
Guardian, see GUARDIAN AND WARD.
Husband, see DOWER; HUSBAND AND WIFE.
Life-Tenant, see ESTATES.
Married Woman, see HUSBAND AND WIFE.
Partitioner, see PARTITION.
Partner, see PARTNERSHIP.
Tenant in Tail, see ESTATES.
Widow, see DOWER.
Wife, see HUSBAND AND WIFE.
Enforcement of Covenant:
Generally, see ASSUMPSIT, ACTION OF; ATTACHMENT; CASE, ACTION ON; COVENANT, ACTION OF; DEBT, ACTION OF.
Election of Remedy, see ELECTION OF REMEDIES.
In Equity, see CANCELLATION OF INSTRUMENTS; EQUITY; INJUNCTIONS; SPECIFIC PERFORMANCE.
Survival or Abatement of Proceedings, see ABATEMENT AND REVIVAL.
Released Covenantor as Witness, see WITNESSES.
Subrogation of Covenantee to Rights of Covenantor, see SUBROGATION.

I. REQUISITES AND VALIDITY.

A. Express Covenants — 1. Nature and Essentials — a. In General — Definition. As a noun,[1] a covenant has been defined to be an agreement[2] between two or more parties, reduced to writing[3] and executed by a sealing[4] and delivery thereof; whereby some of the parties named therein engage, or one of them engages with the other, or others, or some of them, therein also named, that some act[5] hath or hath not already been done; or for the performance or non-perform-

1. **Distinguished from "condition."** — Langley *v.* Ross, 55 Mich. 163, 165, 20 N. W. 886 [*quoting* Wood Landl. & Ten. § 279]. The instrument may contain both a condition and a covenant. Hale *v.* Finch, 104 U. S. 261, 270, 26 L. ed. 732 [*citing* Coke Litt. 203*b*].

The terms "indenture" and "covenant," although usually found in deeds, have not a technical meaning. An instrument may be indented, whether under seal or not, and the practice has in fact become obsolete. Magee *v.* Fisher, 8 Ala. 320, 322.

As a verb, to covenant means "to agree, to contract, to enter into an agreement, compact, or contract." Richardson Dict. [*quoted* in Hayne *v.* Cummings, 16 C. B. N. S. 421, 426, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421].

2. **Every covenant implies an agreement.** Reade *v.* Bullocke, Dyer 57*a*.

3. **Must be in writing.** Petty *v.* Church of Christ. 70 Ind. 290.

4. **If the seal affixed is not that of the party** who substantially makes the promise, and who is to be charged by it, the promise remains, and is not changed into a contract of a higher nature. Cram *v.* Bangor House, 12 Me. 354.

5. **"There may be a covenant** for almost anything." Church *v.* Brown, 15 Ves. Jr. 258, 264, 10 Rev. Rep. 74, 33 Eng. Reprint 752.

ance of some specified duty;[6] an agreement between two or more persons, by an instrument under seal, to do or not to do some particular thing;[7] a contract of a special nature;[8] a contract under seal, made by the parties, in which they mutually state what is to be performed by each;[9] a promise under seal.[10] In common parlance, however, the term is applied to any agreement whether under seal or not.[11] An express covenant is a covenant explicitly stated in words.[12] Any words that amount to or import an agreement, being under seal, are sufficient to constitute a covenant. No precise or technical language is required by law.[13] A

6. De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68, 33 Am. Dec. 38.

For similar definitions see Sabin *v.* Hamilton, 2 Ark. 485, 490; Kent *v.* Edmondston, 49 N. C. 529, 530; Benbury *v.* Benbury, 22 N. C. 235, 238; Jacob L. Dict. [*quoted* in Com. *v.* Robinson, 1 Watts (Pa.) 158, 160].

7. Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492, 494.

8. Clark *v.* Devoe, 124 N. Y. 120, 124, 26 N. E. 275, 21 Am. St. Rep. 652; Fox *v.* International Hotel Co., 41 N. Y. App. Div. 140, 143, 58 N. Y. Suppl. 441.

9. Woods *v.* Woods, 44 N. C. 290.

10. *Arkansas.*— Sabin *v.* Hamilton, 2 Ark. 485, 490.

Connecticut.—Kennedy *v.* Howell, 20 Conn. 349, 352.

Georgia.— Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492, 494.

Indiana.— Petty *v.* Church of Christ, 70 Ind. 290, 297 [*citing* Wharton L. Lex.].

Maine.— Cram *v.* Bangor House, 12 Me. 354, 358.

Massachusetts.— Greenleaf *v.* Allen, 127 Mass. 248, 253.

Michigan.— Johnson *v.* Hollensworth, 48 Mich. 140, 142, 11 N. W. 843.

Nebraska.— Kelley *v.* Palmer, 42 Nebr. 423, 426, 60 N. W. 924 [*citing* Rapalje & L. L. Dict.]; Cheney *v.* Straube, 35 Nebr. 521, 522, 53 N. W. 479 [*citing* Rapalje & L. L. Dict.].

North Carolina.— Kent *v.* Edmondston, 49 N. C. 529, 530; Woods *v.* Woods, 44 N. C. 290; Benbury *v.* Benbury, 22 N. C. 235, 238.

England.— Randall *v.* Lynch, 12 East 179, 182, 11 Rev. Rep. 340.

11. Hayne *v.* Cummings, 16 C. B. N. S. 421, 426, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421. See also Magee *v.* Fisher, 8 Ala. 320, 322; Riddle *v.* McKinney, 67 Tex. 29, 32, 2 S. W. 748 [*citing* Abbott L. Dict.].

Other definitions are: "A contract or stipulation." Johnson Dict. [*quoted* in Hayne *v.* Cummings, 16 C. B. N. S. 421, 426, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421].

"An agreement." Seddon *v.* Senate, 13 East 63, 77, 12 Rev. Rep. 299.

"An agreement duly made between the parties to do or not to do a particular act." Johnson *v.* Gurley, 52 Tex. 222, 226 [*citing* Taylor Landl. & Ten. § 245].

"A mutual consent or agreement of two or more persons to do or forbear some act or thing; a contract; stipulation." Webster Dict. [*quoted* in Hayne *v.* Cummings, 16 C. B. N. S. 421, 426, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421].

12. Anderson L. Dict.

All covenants between a lessor and his lessee are either covenants in law or express covenants. Hayes *v.* Bickerstaff, Vaugh. 118 [*quoted* in Lovering *v.* Lovering, 13 N. H. 510, 513]. And see Greenleaf *v.* Allen, 127 Mass. 248, 253.

13. *Alabama.*—Minge *v.* Smith, 1 Ala. 415, 417.

Arkansas.— Vaughan *v.* Mattock, 23 Ark. 9; Davis *v.* Tarwater, 15 Ark. 286; Sabin *v.* Hamilton, 2 Ark. 485.

California.— Levitzky *v.* Canning, 33 Cal. 299; Smith *v.* Brennan, 13 Cal. 107.

Connecticut.—Tomlinson *v.* Ousatonic Water Co., 44 Conn. 99; Davis *v.* Lyman, 6 Conn. 249; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Wright *v.* Tuttle, 4 Day 313.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 233.

Georgia.— McDonough *v.* Martin, 88 Ga. 675, 677, 16 S. E. 59, 18 L. R. A. 343.

Kentucky.— Yocum *v.* Barnes, 8 B. Mon. 496; Kendal *v.* Talbot, 2 Bibb 614; Marshall *v.* Craig, 1 Bibb 379, 4 Am. Dec. 647.

Maine.— Cole *v.* Lee, 30 Me. 392.

Massachusetts.— Newcomb *v.* Presbrey, 8 Metc. 406.

Michigan.— Johnson *v.* Hollensworth, 48 Mich. 140, 11 N. W. 843.

New Hampshire.— Fletcher *v.* Chamberlin, 61 N. H. 438; Lovering *v.* Lovering, 13 N. H. 513.

New Jersey.— Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467, inclusion in deed not necessary.

New York.— Graves *v.* Deterling, 3 N. Y. St. 128 [*affirmed* in 120 N. Y. 447, 24 N. E. 655]; Bull *v.* Follett, 5 Cow. 170; Hallett *v.* Wylie, 3 Johns. 44, 3 Am. Dec. 457.

North Carolina.— Kent *v.* Edmondston, 49 N. C. 529; Midgett *v.* Brooks, 34 N. C. 145, 55 Am. Dec. 405.

Pennsylvania.— Lehman *v.* Given, 177 Pa. St. 580, 35 Atl. 864; Trutt *v.* Spotts, 87 Pa. St. 339; Taylor *v.* Preston, 79 Pa. St. 436; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38; Campbell *v.* Shrum, 3 Watts 60. See McCrelish *v.* Churchman, 4 Rawle 26, 34; Christine *v.* Whitehill, 16 Serg. & R. 98, 111 [*citing* Sheppard Touchst. 160, 161, 162].

United States.— Hale *v.* Finch, 104 U. S. 261, 270, 26 L. ed. 732; Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541, 552.

England.— Aspdin *v.* Austin, 5 Q. B. 671, Dav. & M. 515, 8 Jur. 355, 13 L. J. Q. B. 155,

covenant, however, must be express and distinct, and not gathered as arising consequentially by reason of something else in the deed.[14]

b. Parties.[15] Any person *sui juris*, although owning only a limited estate, may make a valid covenant;[16] but a person who is not a party to a deed cannot take anything by it, unless it be by way of remainder. A grantor cannot covenant with a stranger to the deed;[17] and similarly the name of the person covenanting must be stated in the covenant.[18]

2. Formal Requisites[19]**— a. In General.** An express covenant can only be created by deed,[20] which in order to effect the validity of the covenant must itself be valid and binding.[21]

48 E. C. L. 671; *In re* Dickson, L. R. 12 Eq. 154, 25 L. T. Rep. N. S. 118, 40 L. J. Ch. 707; Saltoun *v.* Houstoun, 1 Bing. 433, 2 L. J. C. P. O. S. 93, 25 Rev. Rep. 665, 8 E. C. L. 581; Great Northern R. Co. *v.* Harrison, 12 C. B. 576, 16 Jur. 565, 22 L. J. C. P. 49, 74 E. C. L. 576; Rashleigh *v.* South Eastern R. Co., 10 C. B. 612, 70 E. C. L. 612; Wood *v.* Copper Miners Co., 7 C. B. 906, 18 L. J. C. P. 293, 62 E. C. L. 906; Lay *v.* Mottram, 19 C. B. N. S. 479, 12 Jur. N. S. 6, 115 E. C. L. 479; Hayne *v.* Cummings, 16 C. B. N. S. 421, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421; Farrall *v.* Hilditch, 5 C. B. N. S. 840, 5 Jur. N. S. 962, 28 L. J. C. P. 221, 7 Wkly. Rep. 409, 94 E. C. L. 840; Brookes *v.* Drysdale, 3 C. P. D. 52, 37 L. T. Rep. N. S. 467, 26 Wkly. Rep. 331; Monypenny *v.* Monypenny, 3 De G. & J. 572, 28 L. J. Ch. 303, 5 Jur. N. S. 253, 7 Wkly. Rep. 276, 60 Eng. Ch. 443 [*affirmed* in 9 H. L. Cas. 114, 31 L. J. Ch. 269]; Barfoot *v.* Treswell, 3 Keb. 465; Severn's Case, 1 Leon. 122; Aveline *v.* Whisson, 12 L. J. C. P. 58, 4 M. & G. 801, 43 E. C. L. 414; *Re* Cadogan, 73 L. T. Rep. N. S. 387; Courtney *v.* Taylor, 6 M. & G. 851, 46 E. C. L. 851; Holles *v.* Carr, 3 Swanst. 647. And see Easterby *v.* Sampson, 6 Bing. 644, 650, 1 Cromp. & J. 105, 4 M. & P. 601, 19 E. C. L. 291; Wolverridge *v.* Steward, 1 Cromp. & M. 644, 657, 2 L. J. Exch. 303, 2 L. J. Exch. 360, 3 M. & S. 561, 3 Tyrw. 637; Comyns Dig. tit. Covenant [*quoted* in Williams *v.* Burrell, 1 C. B. 402, 429, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402].

Canada.— Link *v.* Hunter, 27 U. C. Q. B. 187.

See 14 Cent. Dig. tit. "Covenants," § 1.

Every obligation which on a fair construction of the language of a deed is imposed on one of the parties thereto amounts to an express covenant by him to perform that obligation. *Re* Cadogan, 73 L. T. Rep. N. S. 387.

The word "covenant" is not necessary. Newcomb *v.* Presbrey, 8 Metc. (Mass.) 406; Saltoun *v.* Houstoun, 1 Bing. 433, 2 L. J. C. P. O. S. 93, 25 Rev. Rep. 665, 8 E. C. L. 581 [*citing* Stevinson's Case, 1 Leon. 324]. And the word "covenant" in an agreement may be construed to mean a contract not under seal in order to effectuate the intention of the parties. Hayne *v.* Cummings, 16 C. B. N. S. 421, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421.

Signature is not necessary to deeds; and the statute of frauds has no operation as to them. Aveline *v.* Whisson, 4 M. & G. 801, 12 L. J. C. P. 58, 43 E. C. L. 414. See also Bowen *v.* Beck, 94 N. Y. 86, 46 Am. Rep. 124; Graves *v.* Deterling, 3 N. Y. St. 128 [*affirmed* in 120 N. Y. 447, 24 N. E. 655].

14. Liddell *v.* Monro, 4 Q. B. 474. See also *Re* Cadogan, 73 L. T. Rep. N. S. 387.

"Sometimes words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties." Hale *v.* Finch, 104 U. S. 261, 270, 26 L. ed. 732 [*citing* 2 Parsons Contr. 510, 511].

15. **Parties in actions for breach of covenant** see *infra*, IV, C.

16. Barlow *v.* Delaney, 40 Fed. 97.

17. Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73; Kent *v.* Edmondston, 49 N. C. 529; Salter *v.* Kidgly, Carth. 76; Whitlock's Case, 8 Coke 69*b*.

18. Day *v.* Brown, 2 Ohio 345.

"A covenant then being an agreement, it is plain that in legal as also in common parlance, there must be at least two parties to it; or, it cannot be regarded as an agreement or covenant in any sense. And it would seem to be equally plain that no such covenant can be deemed perfect, unless the names of the parties are set forth or made known by it in some way; for without this it does not appear, that there are parties to it; *quod non apparet, non est*, seems to be the rule in this respect; and without parties, it is obvious that there can be no agreement or covenant." De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 67, 71, 33 Am. Dec. 38.

19. **For formal requisites of instruments containing covenants** see Contracts; Deeds; Landlord and Tenant; Mortgages.

20. Hord *v.* Montgomery, 26 Ill. App. 41; Boston, etc., R. Co. *v.* Briggs, 132 Mass. 24 (a receipt); Fitch *v.* Seymour, 9 Metc. (Mass.) 462 (a parol agreement); Scott *v.* Scott, 70 Pa. St. 244 (a writing in form of deed, but in fact a will).

21. *Illinois.*— Dalton *v.* Taliaferro, 101 Ill. App. 592.

Indiana.—Gordon *v.* Goodman, 98 Ind. 269 (defective description of premises); Axtel *v.* Chase, 83 Ind. 546.

Kentucky.— Sibley *v.* Holcomb, 104 Ky. 670, 47 S. W. 765, 20 Ky. L. Rep. 862, where there was fraud or mistake.

Maryland.— Herzog *v.* Sawyer, 61 Md. 344.

Massachusetts.— Howe *v.* Walker, 4 Gray 318, violation of statute of frauds.

b. Acceptance of Deed Containing Covenants on Part of Grantee.[22] The acceptance of a deed, whether poll or *inter partes*, containing a covenant on the part of the grantee is equivalent to an agreement on his part to perform the same, and it is immaterial that the deed is not signed by him. As to the nature of his liability, however, whether as upon an express covenant,[23] or as upon an implied undertaking,[24] the courts are utterly at variance.

B. Implied Covenants — 1. In General. An implied covenant has been defined to be such a covenant as is inferred or imputed in law from the words used.[25] While no covenant of title will be implied from the fact of the conveyance of land,[26] nor, independently of statute, and with the exception of the words

North Carolina.— Kent *v.* Edmondston, 49 N. C. 529.

Pennsylvania.— Scott *v.* Scott, 70 Pa. St. 244.

Tennessee.— Louisville, etc., R. Co. *v.* Webster, 106 Tenn. 586, 61 S. W. 1018.

Vermont.— Crane *v.* Collard, Brayt. 49.

See 14 Cent. Dig. tit. "Covenants," § 3; and, generally, DEEDS.

But see Vattier *v.* Findlay, 1 Ohio Dec. (Reprint) 58, 1 West. L. J. 398, where it was held that although a deed with one witness, the statute requiring two, was not valid as a deed, a personal covenant therein was binding on the obligor.

22. As to the form of action for enforcement of covenants contained in deeds not signed by the grantee see *infra*, IV, A, 1.

23. *Georgia.*— Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492.

Indiana.— Maxon *v.* Lane, 102 Ind. 364, 1 N. E. 796.

Iowa.— Peden *v.* Chicago, etc., R. Co., 73 Iowa 328, 35 N. W. 424, 5 Am. St. Rep. 680.

Kentucky.— Kentucky Cent. R. Co. *v.* Kenney, 82 Ky. 154.

Missouri.— See Poage *v.* Wabash, etc., R. Co., 24 Mo. App. 199.

New Hampshire.— Burbank *v.* Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.

New Jersey.— Hagerty *v.* Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631, 50 N. J. Eq. 464, 26 Atl. 537; Sparkman *v.* Gove, 44 N. J. L. 252; Earle *v.* New Brunswick, 38 N. J. L. 47; Finley *v.* Simpson, 22 N. J. L. 311, 53 Am. Dec. 252. But see Bilderback *v.* Pouner, 7 N. J. L. 64; Ludlum *v.* Wood, 2 N. J. L. 52.

New York.— Hodge *v.* Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Bowen *v.* Beck, 94 N. Y. 86, 46 Am. Rep. 124; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556 [*affirming* 50 Barb. 135]; Spaulding *v.* Hallenbeck, 35 N. Y. 204; Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278; Trotter *v.* Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Wilcox *v.* Campbell, 35 Hun 254; Countryman *v.* Deck, 13 Abb. N. Cas. 110. But see Rogers *v.* Eagle Fire Co., 9 Wend. 611; Gale *v.* Nixon, 6 Cow. 445; Bowen *v.* Bell, 20 Johns. 338, 11 Am. Dec. 286; Van Santwood *v.* Sandford, 12 Johns. 197.

North Carolina.— Maynard *v.* Moore, 76 N. C. 158; Norfleet *v.* Cromwell, 64 N. C. 1.

Ohio.— Hickey *v.* Lake Shore, etc., R. Co., 51 Ohio St. 40, 36 N. E. 672, 46 Am. St. Rep. 545, 23 L. R. A. 396; Wright *v.* Heidorn, 6 Ohio S. & C. Pl. Dec. 151, 4 Ohio N. P. 124.

England.— Wilkins *v.* Fry, 1 Meriv. 244, 2 Rose 371, 15 Rev. Rep. 110; Staines *v.* Morris, 1 Ves. & B. 8; 1 Esp. N. P. Pt. II, 114.

See 14 Cent. Dig. tit. "Covenants," § 6.

24. Covenant not implied.— *Connecticut.*— Randall *v.* Latham, 36 Conn. 48; Hinsdale *v.* Humphrey, 15 Conn. 431.

Massachusetts.— Martin *v.* Drinan, 128 Mass. 515; Parish *v.* Whitney, 3 Gray 516; Braman *v.* Dowse, 12 Cush. 227; Pike *v.* Brown, 7 Cush. 133; Newell *v.* Hill, 2 Metc. 180; Nugent *v.* Riley, 1 Metc. 117, 35 Am. Dec. 355; Plymouth *v.* Carver, 16 Pick. 183; Goodwin *v.* Gilbert, 9 Mass. 510. *Compare* Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335.

Pennsylvania.— Maule *v.* Weaver, 7 Pa. St. 329; Com. *v.* Mt. Moriah Cemetery Assoc., 10 Phila. 385. *Compare* Shoenberger *v.* Hay, 40 Pa. St. 132.

Vermont.— Johnson *v.* Muzzy, 45 Vt. 419, 12 Am. Rep. 214. But see Kellogg *v.* Robinson, 6 Vt. 276, 27 Am. Dec. 550.

England.— Chancellor *v.* Poole, Dougl. (3d ed.) 764; Lock *v.* Wright, 1 Str. 569.

25. Anderson L. Dict.

26. *California.*— Fowler *v.* Smith, 2 Cal. 39.

Connecticut.— Pollard *v.* Lyman, 1 Day 156, 2 Am. Dec. 63.

District of Columbia.— Smoot *v.* Coffin, 4 Mackey 407.

Iowa.— Nelson *v.* Hamilton County, 102 Iowa 229, 71 N. W. 206; Allen *v.* Pegram, 16 Iowa 163; Brandt *v.* Foster, 5 Iowa 287; Funk *v.* Creswell, 5 Iowa 62.

Kentucky.— Henderson *v.* Bradford, 1 Bibb 509.

Louisiana.— Laville *v.* Rightor, 17 La. 303.

New York.— Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Sandford *v.* Travers, 7 Bosw. 498.

North Carolina.— Barden *v.* Stickney, 130 N. C. 62, 40 S. E. 842; Zimmerman *v.* Lynch, 130 N. C. 61, 40 S. E. 841 (sale of standing timber); Huntley *v.* Waddell, 34 N. C. 32.

South Carolina.— Lessly *v.* Bowie, 27 S. C. 193, 3 S. E. 199. But see Biggus *v.* Bradly, 1 McCord 500.

United States.— Baldwin *v.* LeRoy, 2 Fed. Cas. No. 800*a*.

England.— Buckhurst *v.* Fenner, 1 Coke 1; Roswell *v.* Vaughan, 2 Cro. Jac. 196; Bree *v.* Holbech, Dougl. (3d ed.) 655; Medina *v.* Stoughton, 1 Salk. 210.

"*do*" or "*dedi*" in deeds of feoffment,[27] from the use of words usual and necessary in a conveyance, such as "grant," "bargain," "sell," "convey," and "warrant,"[28] yet where, from the text of an agreement under seal, either in the body of the instrument or in its references, there is manifested a clear intention that one of the parties shall do or forbear to do certain acts, a covenant to that effect will be implied.[29] So too where land is conveyed with full covenants, and it is at the time in possession of a tenant, an agreement to accept the deed and the ten-

Contra, Ripley *v.* Withee, 27 Tex. 14.

See 14 Cent. Dig. tit. "Covenants," § 7 *et seq.*

In case of exchange or partition a covenant of title may be implied. Brandt *v.* Foster, 5 Iowa 287.

27. Mack *v.* Patchin, 29 How. Pr. (N. Y.) 20; Kent *v.* Welch, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; Frost *v.* Raymond, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228; Richets *v.* Dickens, 5 N. C. 343, 4 Am. Dec. 555. See also Young *v.* Hargrave, 7 Ohio 63, Pt. II. *Contra*, in deeds under the statute of uses, Bates *v.* Foster, 59 Me. 157, 8 Am. Rep. 406; Allen *v.* Sayward, 5 Me. 227, 17 Am. Dec. 221; Deakins *v.* Hollis, 7 Gill & J. (Md.) 311.

"When the word 'dedi' is accompanied with a perdurable tenure of the feoffor and his heirs, then 'dedi' imports a perdurable warranty, from the feoffor and his heirs to the feoffee and his heirs." 2 Coke Inst. 275.

28. *Indiana.*— Bethell *v.* Bethell, 54 Ind. 428, 23 Am. Rep. 650.

Kentucky.— Pringle *v.* Sturgeon, Litt. Sel. Cas. 112.

Maine.— Allen *v.* Sayward, 5 Me. 227, 17 Am. Dec. 221.

Maryland.— Deakins *v.* Hollis, 7 Gill & J. 311.

Massachusetts.—Dow *v.* Lewis, 4 Gray 468.

Minnesota.— Aiken *v.* Franklin, 42 Minn. 91, 43 N. W. 839, 6 L. R. A. 360.

New Mexico.— Douglass *v.* Lewis, 3 N. M. 345, 9 Pac. 377 [*affirmed* in 131 U. S. 75, 9 S. Ct. 634, 33 L. ed. 53]; Armijo *v.* New Mexico Town Co., 3 N. M. 244, 5 Pac. 709.

New York.— Frost *v.* Raymond, 2 Cai. 188, 2 Am. Dec. 228.

North Carolina.— Powell *v.* Lyles, 5 N. C. 348; Rickets *v.* Dickens, 5 N. C. 343, 4 Am. Dec. 555.

Ohio.— See Young *v.* Hargrave, 7 Ohio 63, Pt. II.

Pennsylvania.— Cadwalader *v.* Tryon, 37 Pa. St. 318.

Virginia.— Black *v.* Gilmore, 9 Leigh 446, 33 Am. Dec. 253.

United States.— Lamb *v.* Kamm, 14 Fed. Cas. No. 8,017, 1 Sawy. 238. See also Traver *v.* Baker, 15 Fed. 186, 8 Sawy. 535.

England.— *Contra*, Browning *v.* Wright, 2 B. & P. 13, 5 Rev. Rep. 521.

See 14 Cent. Dig. tit. "Covenants," § 11.

The words "bargain, sell, alien, and confirm" never imply a covenant. Frost *v.* Raymond, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228.

The words "concessi" or "feoffavi" imply a warranty in an estate for years, but not in an estate in fee. Frost *v.* Raymond, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228.

29. *Illinois.*— Jobbins *v.* Gray, 34 Ill. App. 208, stating the extent of the rule.

Louisiana.—Bruning *v.* New Orleans Canal, etc., Co., 12 La. Ann. 541.

Massachusetts.— See Christ Church *v.* Lavezzolo, 156 Mass. 89, 30 N. E. 471; Gates *v.* Caldwell, 7 Mass. 68.

New Hampshire.— French *v.* Bent, 43 N. H. 448.

New Jersey.— Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190, stating the basis of the rule.

New York.— Booth *v.* Cleveland Rolling Mill Co., 74 N. Y. 15. *Compare* Sandford *v.* Travers, 40 N. Y. 140.

Pennsylvania.— Penn *v.* Preston, 2 Rawle 14.

England.— Wood *v.* Copper Miners Co., 7 C. B. 906, 18 L. J. C. P. 293, 62 E. C. L. 906.

See 14 Cent. Dig. tit. "Covenants," § 10 *et seq.*

"Implied covenants depend for their existence on the intendment and construction of law. There are some words which do not of themselves import an express covenant; yet, being made use of in certain contracts, have a similar operation and are called covenants in law, and are as effectually binding on the parties as if expressed in the most unequivocal terms. There may be implied covenants in a deed in which there are express covenants, but there can be none contradictory to or inconsistent with or repugnant to express covenants." Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541, 552 [*citing* Randel *v.* Chesapeake Canal, 1 Harr. (Del.) 233, 270; Platt Cov. 40].

Analagous to express covenants.— In Williams *v.* Burrell, 1 C. B. 402, 431, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402, it is said: "But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant."

The words "intended to be recorded" used in a deed, in reference to a power of attorney, under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the power to be recorded

ant's possession as the possession of the purchaser will be inferred, where nothing appears to the contrary, and the purchaser has full knowledge of the tenancy and the rights of the tenant.[30]

2. Statutory Provisions — a. Use of Particular Words. In many jurisdictions statutes have been enacted providing that covenants of title shall be implied from the use of particular words in conveyances of realty.[31] Such statutes, being

within a reasonable time. Penn *v.* Preston, 2 Rawle (Pa.) 14.

30. Page *v.* Lashley, 15 Ind. 152; Lindley *v.* Dakin, 13 Ind. 388. See also Spaulding *v.* Thompson, 119 Iowa 484, 93 N. W. 498.

31. **"Grant, bargain, and sell."**—*Alabama.* — Heflin *v.* Phillips, 96 Ala. 561, 11 So. 729; Parker *v.* Parker, 93 Ala. 80, 9 So. 426; Stewart *v.* Anderson, 10 Ala. 504; Roebuck *v.* Duprey, 2 Ala. 535.

Arkansas.— Brodie *v.* Watkins, 31 Ark. 319; Winston *v.* Vaughan, 22 Ark. 72, 76 Am. Dec. 418.

Georgia.— McDonough *v.* Martin, 88 Ga. 675, 16 S. E. 59, 60, 18 L. R. A. 343 [*citing* 4 Kent Comm. 473, 474; Rawle Cov. § 285 *et seq.*].

Illinois.—Hawk *v.* McCullough, 21 Ill. 220; Prettyman *v.* Wilkey, 19 Ill. 235.

Iowa.— Brown *v.* Tomlinson, 2 Greene 525. See also Funk *v.* Creswell, 5 Iowa 62.

Mississippi.— Latham *v.* Morgan, Sm. & M. Ch. 611. But under the present statute there is no implied covenant that the grantor was seized in fee, even though the *habendum* is to have and hold "in fee simple." The words only operate as a covenant that the grantor was seized of "an estate," which is satisfied by a seizin of any estate of freehold. Cunningham *v.* Dillard, 71 Miss. 61, 13 So. 882 [*distinguishing* and *approving* Bush *v.* Cooper, 26 Miss. 599, 59 Am. Dec. 270, decided under an earlier statute].

Missouri.— Altringer *v.* Capeheart, 68 Mo. 441; Magwire *v.* Riggin, 44 Mo. 512; Blossom *v.* Van Court, 34 Mo. 390, 86 Am. Dec. 114; Mosely *v.* Hunter, 15 Mo. 322.

Pennsylvania.— Memmert *v.* McKeen, 112 Pa. St. 315, 4 Atl. 542; Shaffer *v.* Greer, 87 Pa. St. 370; Knepper *v.* Kurtz, 58 Pa. St. 480; Whitehill *v.* Gotwalt, 3 Penr. & W. 313; Seitzinger *v.* Weaver, 1 Rawle 377; Funk *v.* Voneida, 11 Serg. & R. 109, 14 Am. Dec. 617; Gratz *v.* Ewalt, 2 Binn. 95; Browne *v.* Lewis, 13 Phila. 7.

United States.— Schnelle, etc., Lumber Co. *v.* Barlow, 34 Fed. 853; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

See 14 Cent. Dig. tit. "Covenants," § 11.

"Grant" and "convey."— A conveyance in fee simple containing the words "grant" and "convey" implies a covenant that at the date of the conveyance the land was free from encumbrances. Cruger *v.* Ginnuth, 3 Tex. App. Civ. Cas. § 24.

The words "convey and warrant" in a deed for the conveyance of lands are to be deemed and held as a covenant by the grantor that the premises conveyed were at the execution of such conveyance free from all encumbrances (Dalton *v.* Taliaferro, 101 Ill. App. 592), and also for quiet enjoyment (Jackson *v.* Green, 112 Ind. 341, 14 N. E. 89; Dehority *v.* Wright, 101 Ind. 382; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260). They have the force of the special covenants of warranty that are usually contained in common-law deeds. Keiper *v.* Klein, 51 Ind. 316; Kent *v.* Cantrall, 44 Ind. 452; Carver *v.* Louthain, 38 Ind. 530.

"Bargained and sold."— Under N. M. Comp. Laws (1884), § 2750, the words "bargained and sold," or words to the same effect, unless restricted in express terms, amount to a covenant of seizin, and against encumbrances made or suffered by the grantor or the person claiming under him. Douglass *v.* Lewis, 131 U. S. 75, 9 S. Ct. 634, 33 L. ed. 53 [*affirming* 3 N. M. 345, 9 Pac. 377].

General warranty.—In South Carolina, since the act of 1795, a deed of general warranty has been "interpreted to embrace all the covenants used in conveyances of land prior to that time, viz., that the vendor is seized in fee; that he has a right to convey; that the vendee shall quietly enjoy; and that free from all encumbrances; and also it seems for further assurances." Lessly *v.* Bowie, 27 S. C. 193, 197, 3 S. E. 199. See also Evans *v.* McLucas, 12 S. C. 56; Jeter *v.* Glenn, 9 Rich. (S. C.) 374.

By the words "I warrant the title against all persons whomsoever" (Iowa Code (1897), § 2958) is understood a covenant warranting not less against all manner of defect of title than against all encumbrances existing at the date of the deed. Funk *v.* Creswell, 5 Iowa 62. They imply all the usual covenants in a deed of conveyance in fee simple. Van Wagner *v.* Van Nostrand, 19 Iowa 422.

"Grant."— Under Cal. Civ. Code, § 1113, subd. 1, the use of the word "grant" in any conveyance of an estate of inheritance or fee simple implies a covenant that previous to the time of the execution of the conveyance the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee. Lyles *v.* Perrin, 134 Cal. 417, 66 Pac. 472.

The word "suffered," as used in the statutory construction of conveyances, necessarily implies that the covenant is not confined to the voluntary acts of the grantor. Thus it will extend to and include a tax for a municipal improvement assessed on the land during his title thereto. Shaffer *v.* Greer, 87 Pa. St. 370.

Applicable to contracts to convey.— The covenants raised by the words "grant, bargain, and sell," by force of the statute of May 28, 1715, are not applicable alone to deeds executed, but extend to articles of agreement

in derogation of the common law, must be strictly construed,[32] and consequently, in order to constitute the statutory covenants, the words of the statute must be strictly followed. The use of less than all of the words implying the covenants is insufficient.[33]

b. Abolition of Implied Covenants. It is sometimes provided by statute that no covenant shall be implied in a conveyance, whether the conveyance contains any special covenant or not.[34]

3. From Language of Express Covenants. Covenants may be implied from the language of express covenants in order to effectuate their clear intention and to give them their full and beneficial operation.[35]

4. From Recitals. While a covenant, when expressed by way of recital, may be as obligatory as if expressed in the formal part of the agreement,[36] the sounder view seems to be that no covenants of title can be implied from a recital.[37]

for the conveyance of land. Seitzinger *v.* Weaver, 1 Rawle (Pa.) 377.

32. Finley *v.* Steele, 23 Ill. 56; Bethell *v.* Bethell, 54 Ind. 428, 23 Am. Rep. 650; Armijo *v.* New Mexico Town Co., 3 N. M. 244, 5 Pac. 709; Douglass *v.* Lewis, 131 U. S. 75, 9 S. Ct. 634, 33 L. ed. 53 [*affirming* 3 N. M. 345, 9 Pac. 377].

33. Claunch *v.* Allen, 12 Ala. 159; Gee *v.* Pharr, 5 Ala. 586, 39 Am. Dec. 339; Wheeler *v.* Wayne County, 132 Ill. 599, 24 N. E. 625; Frink *v.* Darst, 14 Ill. 304, 58 Am. Dec. 575; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366; Lamb *v.* Kamm, 14 Fed. Cas. No. 8,017, 1 Sawy. 238.

34. N. Y. Laws (1896), c. 547, § 216; Wis. Rev. Stat. (1898), § 2204. See also Sandford *v.* Travers, 40 N. Y. 140; New York *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Burwell *v.* Jackson, 9 N. Y. 535; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455; Coyle *v.* Nies, 6 N. Y. St. 194 [*affirmed* in 120 N. Y. 621, 23 N. E. 1152]; Koch *v.* Hustis, 113 Wis. 599, 87 N. W. 834, 113 Wis. 604, 89 N. W. 838.

35. French *v.* Bent, 43 N. H. 448; Abbott *v.* Allen, 14 Johns. (N. Y.) 248; Mills *v.* Catlin, 22 Vt. 98; Pierce *v.* Johnson, 4 Vt. 247; Catlin *v.* Hurlbut, 3 Vt. 403; Wood *v.* Copper Miners Co., 7 C. B. 906, 18 L. J. C. P. 293, 62 E. C. L. 906. See also Bentley *v.* Bentley, 12 Manitoba 436. But a covenant of warranty does not imply a covenant of seizin. Vanderkarr *v.* Vanderkarr, 11 Johns. (N. Y.) 122.

Implication of negative from affirmative covenants.— "Unless an affirmative covenant implies a negative one so clearly and definitely that, to use an expression of Lindley, M. R., you can put your finger upon it, the Court will refuse to interfere by an injunction." Bentley *v.* Bentley, 12 Manitoba 436, 441 [*citing* Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416; Mutual Reserve Fund L. Assoc. *v.* New York L. Ins. Co., 75 L. T. Rep. N. S. 528].

36. Horry *v.* Frost, 10 Rich. Eq. (S. C.) 109.

Recital in a deed, when equivalent to a covenant.— In some cases it has been held that a mere recital in a deed may amount to a covenant. Hale *v.* Finch, 104 U. S. 261, 26 L. ed. 732 [*citing* Severn's Case, 1 Leon. 122]. In Great Northern R. Co. *v.* Harrison, 12 C. B. 576, 609, 16 Jur. 565, 22 L. J. C. P. 49, 74 E. C. L. 576, it is said, by Parke, B.: "Whenever the court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument." In Farrall *v.* Hilditch, 5 C. B. N. S. 840, 854, 5 Jur. N. S. 962, 28 L. J. C. P. 221, 7 Wkly. Rep. 409, 94 E. C. L. 840, Williams, J., said: "On the other hand, it is plain that the court ought to be cautious in spelling a covenant out of a recital of a deed; because that is not the part of a deed in which covenants are usually expressed. The proper office of a recital, said Lord Mansfield in Moore *v.* Magrath, Cowp. 9, like that of a preamble of an act of parliament, is, to serve as a key to what comes afterwards."

37. Ferguson *v.* Dent, 8 Mo. 667; Whitehill *v.* Gotwalt, 3 Penr. & W. (Pa.) 313 [*overruling* Christine *v.* Whitehill, 16 Serg. & R. (Pa.) 98, on the ground that the judge delivering the opinion of the majority of the court (Gibson, C. J., dissenting) misapprehended the ground upon which Procter *v.* Johnson, 1 Bulstr. 2, Yelv. 175, was decided, a mistake also fallen into by Lord Eldon in Browning *v.* Wright, 2 B. & P. 13, 25, 5 Rev. Rep. 521]; Delmer *v.* McCabe, 14 Ir. C. L. 377 [*cited* in Rawle Cov. § 280 note]. But see Severn's Case, 1 Leon. 122.

True ground of decision in Procter v. Johnson.— In Procter *v.* Johnson, 1 Bulstr. 2, Yelv. 175, A and B were joint tenants for years of a mill; A assigned all his interest to C without the assent of B and died. B afterward by indenture reciting the lease, and that it came to him by survivorship, "granted the residue of the term" to J. S. and covenanted for quiet enjoyment of it, notwithstanding any act done by him. B also gave the purchaser a bond conditioned to perform the covenants, "grants," articles, and agreements in the assignment; and the purchaser having been evicted by C, of the moiety assigned to him by A, brought an action on the bond and obtained judgment. The decision of the court according to the report of the case is placed most expressly

5. From Description of Premises. No covenant will be implied from matter contained in a deed merely descriptive of the premises conveyed.[38] And as a general rule the statement of the quantity of land conveyed in the deed is merely matter of description, and implies no covenant that the land contains the quantity stated, unless clearly so expressed;[39] but where an intention is clearly manifest to regard the quantity stated as an essential element of the contract,[40] as upon a sale of land in gross for a sum certain upon a statement of the quantity,[41] or where land conveyed is described by metes and bounds, and includes land which the grantor did not own,[42] a covenant that the land contains the stipulated quantity will be implied.[43] Again the conveyance of land described as bounded upon an existing street or way creates an implied covenant that such way or street exists,[44] and that the purchaser shall have the use of it,[45] but not that it is of the width

and distinctly upon the force of the word "grant," in the deed of assignment, which by the court was held to amount to a warranty of title, and that the recital was merely explanatory of the subject-matter of the grant, showing the extent of it; that it was the residue of the "whole term," and not an undivided moiety of it that was granted. "It seems material to refer the case of Procter *v.* Johnson, 1 Bulstr. 2, Yelv. 175, to the true ground of the decision, because if the case turned solely on the recital, it might perhaps be thought that a general recital in a conveyance of the inheritance of an estate that the vendor is seized in fee would amount to a general warranty and would not be controlled by the limited covenants for the title — a proposition which certainly cannot be supported." Sugden Vend. 574, 575. See also Rawle Cov. § 280 and note.

38. Dryden *v.* Holmes, 9 Mo. 135; Ferguson *v.* Dent, 8 Mo. 667; Whitehill *v.* Gotwalt, 3 Penr. & W. (Pa.) 313 [*overruling* Christine *v.* Whitehill, 16 Serg. & R. (Pa.) 98].

As to what property passes by deed in general see Deeds.

Pointing out line.— Where land is conveyed as bounded by an adjoining owner, there is no covenant that a conventional line pointed out by the parties is the true line. Cornell *v.* Jackson, 9 Metc. (Mass.) 150.

39. *Alabama.*— Rogers *v.* Peebles, 72 Ala. 529; Wright *v.* Wright, 34 Ala. 194.

Arkansas.— Harrell *v.* Hill, 19 Ark. 102, 68 Am. Dec. 202.

Connecticut. — Elliott *v.* Weed, 44 Conn. 19; Belden *v.* Seymour, 8 Conn. 19; Johnson *v.* Moor, 2 Root 252, 1 Am. Dec. 69; Snow *v.* Chapman, 1 Root 528.

Georgia.— Beall *v.* Berkhalter, 26 Ga. 564.

Maryland.— Hall *v.* Mayhew, 15 Md. 551; Bryan *v.* Smallwood, 4 Harr. & M. 483.

Massachusetts.—Pickman *v.* Trinity Church, 123 Mass. 1, 25 Am. Rep. 1; Davis *v.* Atkins, 9 Cush. 13; Powell *v.* Clark, 5 Mass. 355, 4 Am. Dec. 67.

Minnesota.—Austrian *v.* Dean, 23 Minn. 62.

Missouri.— Ferguson *v.* Dent, 8 Mo. 667; Martin *v.* Stone, 79 Mo. App. 309; Adkins *v.* Quest, 79 Mo. App. 36; Wood *v.* Murphy, 47 Mo. App. 539.

New Hampshire.— Perkins *v.* Webster, 2 N. H. 287.

New Jersey.—Smith *v.* Negbauer, 42 N. J. L. 305.

New York.— Roat *v.* Puff, 3 Barb. 353; Whallon *v.* Kauffman, 19 Johns. 97; Mann *v.* Pearson, 2 Johns. 37.

North Carolina.— McArthur *v.* Morris, 84 N. C. 405; Huntly *v.* Waddell, 34 N. C. 32; Powell *v.* Lyles, 5 N. C. 348; Rickets *v.* Dickens, 5 N. C. 343, 4 Am. Dec. 555.

Pennsylvania.—Large *v.* Penn, 6 Serg. & R. 488; Dagne *v.* King, 1 Yeates 322.

South Carolina. — Jones *v.* Bauskett, 2 Speers 68.

Tennessee.—Austin *v.* Richards, 7 Heisk. 663; Allison *v.* Allison, 1 Yerg. 16.

Texas.—Webb *v.* Brown, 2 Tex. Unrep. Cas. 36.

Vermont.—Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753; Beach *v.* Stearns, 1 Aik. 325.

Virginia.— Tucker *v.* Cocke, 2 Rand. 51.

West Virginia.—Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028.

See 14 Cent. Dig. tit. "Covenants," § 14.

40. Beall *v.* Berkhalter, 26 Ga. 564; Morris *v.* Owens, 3 Strohh. (S. C.) 199.

41. Mendenhall *v.* Steckel, 47 Md. 453, 28 Am. Rep. 481; Marbury *v.* Stonestreet, 1 Md. 147; Pearce *v.* Chouteau, 13 Mo. 527; Lorick *v.* Hawkins, 1 Rich. (S. C.) 417.

42. Chesnutt *v.* Chism, 20 Tex. Civ. App. 23, 48 S. W. 549; Hynes *v.* Packard, (Tex. Civ. App. 1897) 44 S. W. 548; Meade *v.* Warring, (Tex. Civ. App. 1896) 35 S. W. 308; Meade *v.* Jones, 13 Tex. Civ. App. 320, 35 S. W. 310; Reeves *v.* Lindsey, 2 Tex. Unrep. Cas. 309.

43. The true test in all cases is the determination as to whether the specification of quantity is mere matter of description, or of the essence of the contract. Beall *v.* Berkhalter, 26 Ga. 564.

44. Garstang *v.* Davenport, 90 Iowa 539, 57 N. W. 876; Tufts *v.* Charlestown, 2 Gray (Mass.) 271; Parker *v.* Framingham, 8 Metc. (Mass.) 260; Van O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; Emerson *v.* Wiley, 10 Pick. (Mass.) 310; Parker *v.* Smith, 17 Mass. 413, 9 Am. Dec. 157; Transue *v.* Sell, 105 Pa. St. 604; Trutt *v.* Spotts, 87 Pa. St. 339. But see King *v.* New York, 102 N. Y. 171, 6 N. E. 395.

45. Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276; White *v.* Flannigain, 1 Md. 525, 54

set out in the conveyance,[46] or that the street has been actually opened and put into condition for use, but only that it has been laid out.[47] Still less will it impose on the grantor any obligation to grade and construct it at his own expense.[48] It has also been decided that the descriptive words as to the street or way, particularly if the deed refers to an accompanying plan of lots or streets, are not to be understood merely as signifying that the street in question is coextensive with the lot conveyed, but that its extent, direction, and termini are to be such as are delineated on the plan or otherwise indicated by the deed.[49] But if land be conveyed as bounded on a street and the grantor has no interest in the adjacent land so described, this does not amount to an implied covenant that there is such a street legally laid out.[50]

6. Reservations. Where a reservation in a deed cannot be construed as an exception,[51] as where the thing reserved is not a part of that previously granted, it will be construed as an implied covenant on the part of the grantee.[52]

7. Conditions. As conditions subsequent tend to destroy estates, they are not favored in law, and if it is reasonably doubtful whether a provision in a conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be the latter.[53]

Am. Dec. 668; Livingston *v.* New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *In re* New York, 2 Wend. (N. Y.) 472. *Contra*, Clap *v.* McNeil, 4 Mass. 589; *In re* New York, 4 Cow. (N. Y.) 542. See also Underwood *v.* Stuyvesant, 19 Johns. (N. Y.) 181, 10 Am. Dec. 215, where a boundary on a street as exhibited on a plan, but not yet laid out in fact, was held not to carry an absolute right to have such street even as against the grantor and those claiming under him.

46. Walker *v.* Worcester, 6 Gray (Mass.) 548; Clap *v.* McNeil, 4 Mass. 589. But see Dailey *v.* Beck, Brightly (Pa.) 107, 4 Pa. L. J. Rep. 58, 6 Pa. L. J. 383.

47. Loring *v.* Otis, 7 Gray (Mass.) 563.

48. Hennessey *v.* Old Colony, etc., R. Co., 101 Mass. 540, 100 Am. Dec. 127; *In re* New York, 4 Cow. (N. Y.) 542. See also Bechtel *v.* Carslake, 11 L. J. Eq. 500.

49. Thomas *v.* Poole, 7 Gray (Mass.) 83; Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885; Hoffman *v.* Wahlen, 3 Lanc. L. Rev. 217. See also Lennig *v.* Ocean City Assoc., 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16.

But this does not apply to the streets not adjacent to, but lying in the vicinity of, the land granted, as to which there is no implied agreement that they shall remain as platted. Coolidge *v.* Dexter, 129 Mass. 167. See also Light *v.* Goddard, 11 Allen (Mass.) 5.

Extent of rule.— The implied covenant that the streets and ways named in the plot of a proposed town referred to in a deed shall be open to public use goes no further than the streets upon which the lot faces and such other convenient streets as may be required to give a convenient way to the public roads. Hoffman *v.* Wahlen, 3 Lanc. L. Rev. 217.

50. Howe *v.* Alger, 4 Allen (Mass.) 206; Greenwood *v.* Wilton R. Co., 23 N. H. 261.

"**The whole extent of the doctrine,** . . . **is,** that a grantor of land, describing the same by a boundary on a street or way, if he be the owner of such adjacent land, is estopped from setting up any claim, or doing any acts inconsistent with the grantee's use of the street or way." Per Dewey, J., in Howe *v.* Alger, 4 Allen (Mass.) 206, 211. See also Light *v.* Goddard, 11 Allen (Mass.) 5.

51. Limitations and exceptions see *infra*, II, A, 9.

52. Hoyt *v.* Carter, 16 Barb. (N. Y.) 212; Case *v.* Haight, 3 Wend. (N. Y.) 632 [*affirming* 1 Paige 447].

53. *Alabama.*— Elyton Land Co. *v.* South Alabama, etc., R. Co., 100 Ala. 396, 14 So. 207.

California.— Maynard *v.* Polhemus, 74 Cal. 141, 15 Pac. 451.

Connecticut.—Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58.

Georgia. — Anthony *v.* Stephens, 46 Ga. 241; Thornton *v.* Trammell, 39 Ga. 202.

Iowa.— Peden *v.* Chicago, etc., R. Co., 73 Iowa 328, 35 N. W. 424, 5 Am. St. Rep. 680.

Maine.— Bragdon *v.* Blaisdell, 91 Me. 326, 39 Atl. 1036.

Massachusetts. — Wheeler *v.* Dascomb, 3 Cush. 285.

Missouri.— St. Louis *v.* Wiggins Ferry Co., 88 Mo. 615.

New Hampshire. — Hoyt *v.* Kimball, 49 N. H. 322; Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

New Jersey. — Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

New York.— Clement *v.* Burtis, 121 N. Y. 708, 24 N. E. 1013; Graves *v.* Deterling, 120 N. Y. 447, 24 N. E. 655; Post *v.* Weil, 115 N. Y. 361, 22 N. E. 145, 12 Am. St. Rep. 809, 5 L. R. A. 422 [*affirming* 1 N. Y. Suppl. 807]; Avery *v.* New York Cent., etc., R. Co., 106 N. Y. 142, 12 N. E. 619; Aiken *v.* Albany, etc., R. Co., 26 Barb. 289; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. 455; Countryman *v.* Deck, 13 Abb. N. Cas. 110.

Pennsylvania. — McKnight *v.* Kreutz, 51 Pa. St. 232; Paschall *v.* Passmore, 15 Pa. St.

8. RESTRICTIONS ON USE OF PROPERTY. A covenant not to use premises conveyed for any other purpose than that stipulated or recited in the conveyance will not be inferred in the absence of words of restriction,[54] where the use to which the premises are put is not inconsistent with or preventive of the use prescribed in the conveyance.[55]

II. CONSTRUCTION AND OPERATION.

A. Covenants in General — 1. GENERAL RULES OF CONSTRUCTION. Covenants are to be so construed as to carry into effect the intention of the parties, which is to be collected from the whole instrument and from the circumstances surrounding its execution,[56] so as to make an entire and consistent construction of the

295. See also Sharon Iron Co. *v.* Erie, 41 Pa. St. 341.

Tennessee.— Doty *v.* Chattanooga Union R. Co., 103 Tenn. 564, 53 S. W. 944, 48 L. R. A. 160.

Wisconsin. — Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175. But see Koch *v.* Hustis, 113 Wis. 599, 87 N. W. 834, 113 Wis. 604, 89 N. W. 838.

United States.— Hale *v.* Finch, 104 U. S. 261, 26 L. ed. 732; American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563.

England.— Cromwel's Case, 2 Coke 69*a*.

See 14 Cent. Dig. tit. "Covenants," § 18; and, generally, DEEDS.

"Express condition."—A provision in a deed that the conveyance is upon the "express condition" that the grantee, "his heirs or assigns," shall not erect certain buildings on the demised premises is not a condition but a covenant. Clement *v.* Burtis, 121 N. Y. 708, 24 N. E. 1013; Post *v.* Weil, 115 N. Y. 361, 22 N. E. 145, 12 Am. St. Rep. 809, 5 L. R. A. 422. *Compare* Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

Limitation of rule.—Although words of proviso and condition may be construed as words of covenant, if such be the apparent intent and meaning of the parties, covenant will not arise unless it can be collected from the whole instrument that there was on the part of the person sought to be charged an agreement or engagement to do or not to do some act. Hale *v.* Finch, 104 U. S. 261, 26 L. ed. 732.

54. Even where restrictive words are used, as that the land shall be used for certain purposes "only," there is no covenant express or implied that the grantee shall use them for those purposes. Madore's Appeal, 129 Pa. St. 15, 17 Atl. 804.

55. French *v.* Quincy, 3 Allen (Mass.) 9; Chautauqua Assembly *v.* Alling, 46 Hun (N. Y.) 582; Button *v.* Ely, 46 Hun (N. Y.) 100; Brugman *v.* Noyes, 6 Wis. 1. *Compare* De Forest *v.* Bryne, 1 Hilt. (N. Y.) 43.

On the other hand, if the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, parks, squares, or in other modes of a general nature calculated to give additional value to the lots delineated thereon, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated. Bridgewater *v.* Ocean City R. Co., 62 N. J. Eq. 276, 49 Atl. 801 [*affirmed* in 63 N. J. Eq. 798, 52 Atl. 1130]; Lennig *v.* Ocean City Assoc., 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16. See also Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106. And see *infra*, II, C.

56. *Arkansas.*— Vaughan *v.* Matlock, 23 Ark. 9; Childress *v.* Foster, 3 Ark. 252.

Colorado.— Dunn *v.* Dunn, 3 Colo. 510.

Connecticut.— Davis *v.* Lyman, 6 Conn. 249.

Delaware. — Randel *v.* Chesapeake, etc., Canal, 1 Harr. 151.

Georgia.— Howard Mfg. Co. *v.* Water-lot Co., 39 Ga. 574.

Illinois.— Baker *v.* Hunt, 40 Ill. 264, 89 Am. Dec. 346; *In re* Holmes, 79 Ill. App. 59.

Maine.— Stubbs *v.* Page, 2 Me. 378.

Maryland.— Boyd *v.* Keinzle, 46 Md. 294; Slater *v.* Magraw, 12 Gill & J. 265; Watchman *v.* Crook, 5 Gill & J. 239; Harper *v.* Hampton, 1 Harr. & J. 622.

Michigan. — Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997. See also Johnson *v.* Hollensworth, 48 Mich. 140, 11 N. W. 843.

Mississippi.— Greenwood *v.* Ligon, 10 Sm. & M. 615, 48 Am. Dec. 775; Wadlington *v.* Hill, 10 Sm. & M. 560.

New Hampshire.—Fowler *v.* Kent, 71 N. H. 388, 52 Atl. 554.

New Jersey.—White *v.* Stretch, 22 N. J. Eq. 76; Grigg *v.* Landis, 21 N. J. Eq. 494. See also Helmsley *v.* Marlborough Hotel Co., 63 N. J. Eq. 804, 52 Atl. 1132 [*affirming* 62 N. J. Eq. 164, 50 Atl. 14].

New York.— Clark *v.* Devoe, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652; Graves *v.* Deterling, 120 N. Y. 447, 24 N. E. 655 [*affirming* 31 N. Y. St. 695]; Mahaiwe Bank *v.* Culver, 30 N. Y. 313; Ludlow *v.* McCrea, 1 Wend. 228; Marvin *v.* Stone, 2 Cow. 781; Whallon *v.* Kauffman, 19 Johns. 97; Quackenboss *v.* Lansing, 6 Johns. 49; Hills *v.* Miller, 3 Paige 254, 24 Am. Dec. 218.

North Carolina.— Killian *v.* Harshaw, 29 N. C. 497.

Ohio.— Worthington *v.* Hewes, 19 Ohio St. 66.

Pennsylvania.— Lehman *v.* Given, 177 Pa. St. 580, 35 Atl. 864; Shoenberger *v.* Hay, 40 Pa. St. 132.

South Carolina. — Casterby *v.* Heilbron, McMull. 462.

whole, which should be such as to support, rather than defeat, the instrument. Except in the case of covenants of forfeiture,[57] or of statutory covenants implied from the use of particular words,[58] covenants will be most strongly construed against the covenantor.[59] Technical words will be construed as they are understood by scientific men and mechanics acquainted with the business in regard to which the covenant is made.[60]

2. What Law Governs. The construction of personal covenants is governed by the *lex loci contractus*;[61] the construction of covenants running with the lands by the *lex loci rei sitæ*.[62]

3. Real or Personal Covenants. All covenants are either real or personal. Those so closely connected with the realty that their benefit or burden passes with the realty are construed to be covenants real;[63] all others are personal.[64]

Tennessee.— Halloway *v.* Lacy, 4 Humphr. 468.

Texas.— James *v.* Adams, 64 Tex. 193.

Utah.— George *v.* Robison, 23 Utah 79, 63 Pac. 819.

Vermont.— Everts *v.* Brown, 1 D. Chipm. 96, 1 Am. Dec. 699.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

Wyoming.— Balch *v.* Arnold, 9 Wyo. 17, 59 Pac. 434.

England.— Pickering *v.* Ilfracombe R. Co., L. R. 3 C. P. 235, 37 L. J. C. P. 118, 17 L. T. Rep. N. S. 650, 16 Wkly. Rep. 458; Hayne *v.* Cummings, 16 C. B. N. S. 421, 10 Jur. N. S. 773, 10 L. T. Rep. N. S. 341, 111 E. C. L. 421.

Canada.— Kitching *v.* Hicks, 6 Ont. 739.

See 14 Cent. Dig. tit. "Covenants," § 20.

57. Presbyterian Church *v.* Picket, Wright (Ohio) 57.

58. See *supra*, I, B, 2, a.

59. *Delaware.*— Randel *v.* Chesapeake, etc., Canal, 1 Harr. 151.

District of Columbia.— Sawyer *v.* Weaver, 2 MacArthur 1.

Maine.— Carleton *v.* Tyler, 16 Me. 392, 33 Am. Dec. 673.

Michigan.— Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997.

Missouri.— *Compare* Coleman *v.* Clark, 80 Mo. App. 339.

New Jersey.— Pope *v.* Bell, 37 N. J. Eq. 495.

New York.— Gifford *v.* Syracuse First Presb. Soc., 56 Barb. 114.

Vermont.— Olcott *v.* Dunklee, 16 Vt. 478.

England.—Warde *v.* Warde, 16 Beav. 103; Fowle *v.* Welsh, 1 B. & C. 29, 2 D. & K. 133, 1 L. J. K. B. O. S. 17, 25 Rev. Rep. 291, 8 E. C. L. 14.

See 14 Cent. Dig. tit. "Covenants," § 20 *et seq.*; and, generally, Deeds.

60. Rogers *v.* Danforth, 9 N. J. Eq. 289.

Technical terms in a conveyance are presumed to have been used with their accustomed meaning, unless the circumstances and context indicate a different intent. Graves *v.* Deterling, 120 N. Y. 447, 24 N. E. 655 [*affirming* 31 N. Y. St. 695].

61. Jackson *v.* Green, 112 Ind. 341, 14 N. E. 89; Bethell *v.* Bethell, 92 Ind. 318, 54 Ind. 428, 23 Am. Rep. 650; Craig *v.* Donavan, 63 Ind. 513; Carver *v.* Louthain, 38 Ind. 530; Looney *v.* Reeves, 5 Kan. App. 279, 48 Pac. 606; Polson *v.* Stewart, 167 Mass. 211, 45 N. E. 737, 57 Am. St. Rep. 452, 36 L. R. A. 771; Phelps *v.* Decker, 10 Mass. 267. See also Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260. *Contra*, Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

62. Dalton *v.* Taliaferro, 101 Ill. App. 592; Fisher *v.* Parry, 68 Ind. 465 [*disapproved*, although not *overruled*, in Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260]; Cassidy's Succession, 39 La. Ann. 827, 5 So. 292; Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

63. Davis *v.* Lyman, 6 Conn. 249; Fowler *v.* Kent, 71 N. H. 388, 52 Atl. 554; Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927. See also Hatcher *v.* Galloway, 2 Bibb (Ky.) 180; Carter *v.* Denman, 23 N. J. L. 260; 3 Bl. Comm. 156; 2 Bl. Comm. 304.

The law does not require any particular form of words to constitute such a covenant. Trull *v.* Eastman, 3 Metc. (Mass.) 121, 37 Am. Dec. 126.

64. *Arkansas.*— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.— Maynard *v.* Polhemus, 74 Cal. 141, 15 Pac. 451.

Georgia.— Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492.

Maine.— Allen *v.* Little, 36 Me. 170.

Massachusetts.— Wheelock *v.* Thayer, 16 Pick. 68.

New Jersey.— Chapman *v.* Holmes, 10 N. J. L. 20.

New York.— Townsend *v.* Morris, 6 Cow. 123. See also Clark *v.* Devoe, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652.

North Carolina.— Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878; Gilliam *v.* Jacocks, 11 N. C. 310.

Tennessee.— Hitchcock *v.* Southern Iron, etc., Co., (Ch. App. 1896) 38 S. W. 588. See also Curtis *v.* Brannon, 98 Tenn. 153, 38 S. W. 1073.

Virginia.— Tabb *v.* Binford, 4 Leigh 132, 26 Am. Dec. 317.

West Virginia.— Rex *v.* Creel, 22 W. Va. 373.

Wisconsin.— Divan *v.* Loomis, 68 Wis. 150, 31 N. W. 760.

England.— Russell *v.* Stokes, 1 H. Bl. 562;

4. Collateral and Auxiliary Covenants. A collateral covenant is one made in connection with a thing granted, but which does not relate immediately thereto, and does not run with the land.[65] An auxiliary covenant is what the term implies, one in aid or support of the principal covenant, although not immediately connected therewith.[66]

5. Alternative and Disjunctive Covenants. Covenants are alternative[67] or disjunctive[68] in the proper legal sense of the term, when they give an election to the party bound by them to perform one or the other of the acts to which they relate, and by the fulfilment of one covenant to discharge himself wholly from the performance of the other.[69] Such covenants are to be construed according to the manifest intent of the parties.[70]

6. Dependent or Independent Covenants.[71] The question whether covenants are to be held dependent[72] on, or independent[73] of, each other, is to be determined by the intention and meaning of the parties as it appears in the instrument and

Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725. See also Canham *v.* Rust, 2 Moore C. P. 164, 172, 8 Taunt. 227, 4 E. C. L. 120.

See 14 Cent. Dig. tit. "Covenants," § 22.

Warranty of title.—Although under N. C. Code, § 1334, as judicially construed, a warranty of title to land is treated as a personal contract, an action of covenant can be maintained thereon only where the party could have vouched in an action real; and where a deed contains a warranty to the grantee but not to his assigns, since such assigns could not have vouched the grantor in an action real, they can neither maintain an action on such covenant, nor defend under it against the grantor. Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

65. Bouvier L. Dict. [*citing* Platt Cov. 69; Sheppard Touchst. 161]. See also Wade *v.* Merwin, 11 Pick. (Mass.) 280; Grigg *v.* Landis, 21 N. J. Eq. 494; Worthington *v.* Hewes, 19 Ohio St. 66; Vernon *v.* Smith, 5 B. & Ald. 1, 24 Rev. Rep. 257, 7 E. C. L. 13; Mayor *v.* Steward, 4 Burr. 2439; Canham *v.* Rust, 2 Moore C. P. 164, 8 Taunt. 227, 4 E. C. L. 120; Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725.

Collateral covenants have been defined as such as are beneficial to the lessor, without regard to his continuing the owner of the estate. Such covenants do not pass to the assignee. Vernon *v.* Smith, 5 B. & Ald. 1, 17, 24 Rev. Rep. 257, 7 E. C. L. 13.

Enforcement in equity.— A collateral covenant restraining the assignment of an agreement will not be enforced in equity, where it appears in the contract that such restraint is but an incident to the objects of the principal covenants, which have been substantially performed. Grigg *v.* Landis, 21 N. J. Eq. 494.

66. Bouvier L. Dict.

Collateral and auxiliary covenants also differ in the extent of the covenantor's liability. On a collateral covenant he is liable, although the conveyance is void (Wade *v.* Merwin, 11 Pick. (Mass.) 280; Gaskell *v.* King, 11 East 165, 10 Rev. Rep. 462; Kerrison *v.* Cole, 8 East 231; Mouys *v.* Leake, 8 T. R. 411); but it is otherwise in the case of an auxiliary covenant; all dependent covenants share the fate of the principal covenant (Guppy *v.* Jennings, 1 Anstr. 256; Kerrison *v.* Cole, 8 East 231; Northcote *v.* Underhill, 1 Salk. 199).

67. Covenants alternative constitute a species of covenants which arise, "in the proper legal sense of the term, when they give an election to the party bound by them to perform one or other of the acts to which they relate, and by the fulfilment of one covenant to discharge himself, wholly, from the performance of the other." Harmony *v.* Bingham, 1 Duer (N. Y.) 209, 230.

68. Disjunctive covenants have been defined as those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be. Black L. Dict. [*citing* Platt Cov. 21].

69. White *v.* Stretch, 22 N. J. Eq. 76; Harmony *v.* Bingham, 1 Duer (N. Y.) 209; Stewart *v.* Bedell, 79 Pa. St. 336; Benson *v.* Dunn, 23 L. T. Rep. N. S. 848.

Where the breach of one covenant is necessary to give effect to the other they are not alternative. Stewart *v.* Bedell, 79 Pa. St. 336.

70. White *v.* Stretch, 22 N. J. Eq. 76. See also Benson *v.* Dunn, 23 L. T. Rep. N. S. 848.

71. As to the necessity of averring performance of dependent covenants see *infra*, IV, D, 1, c.

72. Dependent covenant has been defined to be "An agreement to do, or to omit to do, something which respects the thing on which it depends, and to which it relates." Bally *v.* Wells, Wilm. 341, 347, 3 Wils. C. P. 25 [*quoted* in Norman *v.* Wells, 17 Wend. (N. Y.) 136, 148].

One "which depends on the prior performance of some act or condition." Bailey *v.* White, 3 Ala. 330, 331.

73. An independent covenant has been defined to be one which "goes only to a part of the consideration on both sides, and a breach may be paid for in damages." Boone *v.* Eyre, 1 H. Bl. 273, note *a*, 2 W. Bl. 1312, 2 Rev. Rep. 768 [*quoted* in Bean *v.* Atwater, 4 Conn. 3, 15, 10 Am. Dec. 91]. See M'Crelish *v.* Churchman, 4 Rawle (Pa.) 26, 34. See also White *v.* Atkins, 8 Cush. (Mass.) 367 [*quoted* in Matthews *v.* Jenkins, 80 Va. 463, 467], giving the test to determine whether

by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way.[74] Where covenants, although mutual, are independent, either party may recover damages from the other for an injury which he may have sustained by reason of non-performance, although he has failed to comply with the stipulations on his part.[75]

the covenant is dependent or independent; Chew *v.* Egbert, 14 N. J. L. 446.

"Lord Mansfield, in Jones *v.* Barkley, Dougl. (3rd ed.) 684, makes three classes of covenants; 1. Such as are mutual and independent, where separate actions lie for breaches on either side; 2. Covenants which are conditions, and dependent on each other, in which the performance of one depends upon the prior performance of the other; 3. Covenants which are mutual conditions to be performed at the same time, as to which the party who would maintain an action must, in general, offer or tender performance." Northrup *v.* Northrup, 6 Cow. (N. Y.) 296, 297. See also Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541, 553.

74. Stavers *v.* Curling, 3 Bing. N. Cas. 355, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169. And to the same effect see the following cases:

Alabama.— Nesbitt *v.* McGehee, 26 Ala. 748.

Arkansas.— Sayre *v.* Craig, 4 Ark. 10, 37 Am. Dec. 757; Taylor *v.* Patterson, 3 Ark. 238.

Illinois.— Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233; Davis *v.* Wiley, 4 Ill. 234.

Massachusetts.— Powers *v.* Ware, 2 Pick. 451; Gardiner *v.* Corson, 15 Mass. 500; Hopkins *v.* Young, 11 Mass. 302.

Michigan.— Eldridge *v.* Bliss, 20 Mich. 269.

Mississippi.— Clopton *v.* Bolton, 23 Miss. 78; Liddell *v.* Sims, 9 Sm. & M. 596.

New Jersey.— Coursen *v.* Canfield, 21 N. J. Eq. 92.

New York.— Tompkins *v.* Elliot, 5 Wend. 496; Cunningham *v.* Morrell, 10 Johns. 203, 6 Am. Dec. 332; Barruso *v.* Madan, 2 Johns. 145.

Oregon.— Powell *v.* Dayton, etc., R. Co., 12 Oreg. 488, 8 Pac. 544.

Pennsylvania.— McCrelish *v.* Churchman, 4 Rawle 26.

Wisconsin.— Bowen *v.* Van Nortwick, 38 Wis. 279.

United States.— Lowber *v.* Bangs, 2 Wall. 728, 17 L. ed. 768; Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157 [*quoted* in Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541, 558].

England.— Rose *v.* Poulton, 2 B. & Ad. 822, 1 L. J. K. B. 5, 22 E. C. L. 346.

Canada.— Macarthur *v.* Leckie, 9 Manitoba 110; Manitoba Electric Light, etc., Co. *v.* Winnipeg, 2 Manitoba 177; Hunter *v.* Gifford, 6 N. Brunsw. 701; Goodall *v.* Elmsley, 1 U. C. Q. B. 457.

See 14 Cent. Dig. tit. "Covenants," § 25.

One of the means of discovering such intention has been laid down by Lord Ellenborough to be this, "that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent." Ritchie *v.* Atkinson, 10 East 295, 306 [*adopting* the rule as laid down by Lord Mansfield in Boone *v.* Eyre, 1 H. Bl. 273, note *a*, 2 W. Bl. 1312, 2 Rev. Rep. 768 (*cited* and *adopted* by Lord Kenyon in Campbell *v.* Jones, 6 T. R. 570, 573, 3 Rev. Rep. 263)]. See also the following cases:

Arkansas.— Manuel *v.* Campbell, 3 Ark. 324.

Delaware.— Houston *v.* Spruance, 4 Harr. 117.

New York.— McCullough *v.* Cox, 6 Barb. 386.

Oregon.— Powell *v.* Dayton, etc., R. Co., 12 Oreg. 488, 8 Pac. 544.

United States.— Lowber *v.* Bangs, 2 Wall. 728, 17 L. ed. 768; Goodwin *v.* Lynn, 10 Fed. Cas. No. 5,553, 4 Wash. 714.

England.— Carpenter *v.* Cresswell, 4 Bing. 409, 6 L. J. C. P. O. S. 27, 1 M. & P. 66, 29 Rev. Rep. 587, 13 E. C. L. 564; St. Albans *v.* Shore, 1 H. Bl. 270; Pordage *v.* Cole, 1 Saund. 319*h*, 320 note. See also Stavers *v.* Curling, 3 Bing. N. Cas. 355, 368, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169 [*quoted* in Evans *v.* Harris, 19 Barb. (N. Y.) 416, 423]; Jones *v.* Barkley, Dougl. (3d ed.) 684, 690.

Canada.— Macarthur *v.* Leckie, 9 Manitoba 110.

Covenants will be construed as dependent where the act of each party is to be done at the same time. Powell *v.* Dayton, etc., R. Co., 12 Oreg. 488, 8 Pac. 544.

In doubtful cases courts are inclined to hold all covenants to be dependent. Clopton *v.* Bolton, 23 Miss. 78; Liddell *v.* Sims, 9 Sm. & M. (Miss.) 596; Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 465, 7 L. ed. 219 [*quoted* in Ackley *v.* Richman, 10 N. J. L. 304, 305].

If the covenants be once established to be independent covenants they continue so throughout. Wilcox *v.* Ten Eyck, 5 Johns. (N. Y.) 78, 79.

The question as to whether covenants are dependent or independent only arises where the non-performance of one covenant is pleaded directly or peremptorily to an action upon another; it does not arise where the breach of one is offered as a set-off against the breach of the other. Ewart *v.* Irwin, 1 Phila. (Pa.) 78.

Two covenants which cannot both be performed are independent covenants. Hemans *v.* Picciotto, 1 C. B. N. S. 646, 26 L. J. C. P. 163, 5 Wkly. Rep. 322, 87 E. C. L. 646.

75. *Maryland.*— Benson *v.* Hobbs, 4 Harr. & J. 285; Morrison *v.* Galloway, 2 Harr. & J. 461.

On the other hand, where the covenants are dependent on each other, the rule is otherwise.[76]

7. PARTIES TO COVENANTS[77] — a. In General. While a clearly manifested intention to the contrary will always control, there is a strong presumption that a grantor intends to bind himself, even though he covenants only for his heirs, executors, administrators, or assigns.[78] So too persons acting in a fiduciary capacity are held personally bound by their covenants,[79] even though expressly made in such capacity, on the ground that where a party contracts in the right of another, having no authority to bind his principal, he is to be held personally liable, as otherwise the covenantee would have no remedy for a breach of the contract.

b. Joint or Several Covenants — (i) *As to Covenantors.* As to covenantors, they may covenant jointly or severally, or jointly and severally, and it seems that they may be bound severally, although their interests are joint.[80] It is a general

Missouri.— Cook *v.* Johnson, 3 Mo. 239.

New York.—Goodwin *v.* Holbrook, 4 Wend. 377.

Pennsylvania.— Obermyer *v.* Nichols, 6 Binn. 159, 6 Am. Dec. 439.

United States.— Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180.

England.— Boone *v.* Eyre, 1 H. Bl. 273, note *a*, 2 W. Bl. 1312, 2 Rev. Rep. 768; Phillips *v.* Clift, 4 H. & N. 168, 5 Jur. N. S. 74, 28 L. J. Exch. 153, 7 Wkly. Rep. 295; Campbell *v.* Jones, 6 T. R. 570, 3 Rev. Rep. 263.

Canada.—Tisdale *v.* Dallas, 11 U. C. C. P. 238; Cullen *v.* Nickerson, 10 U. C. C. P. 549; Leonard *v.* Wall, 5 U. C. C. P. 9; Port Whitby, etc., R. Co. *v.* Dumble, 32 U. C. Q. B. 36, 22 U. C. C. P. 39; Stovin *v.* Dean, 26 U. C. Q. B. 600; Great Western R. Co. *v.* Dundas, 20 U. C. Q. B. 523; Tate *v.* Port Hope, etc., R. Co., 17 U. C. Q. B. 354.

See 14 Cent. Dig. tit. "Covenants," § 25.

76. *Kentucky.*—Harrison *v.* Taylor, 3 A. K. Marsh. 168; Pollard *v.* McClain, 3 A. K. Marsh. 24.

Massachusetts.—Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94.

Oregon.— Powell *v.* Dayton, etc., R. Co., 12 Oreg. 488, 8 Pac. 544.

Pennsylvania.— Jennings *v.* McComb, 112 Pa. St. 518, 4 Atl. 812; Cassell *v.* Cooke, 8 Serg. & R. 268, 11 Am. Dec. 610.

England.— Hotham *v.* East India Co., Dougl. (3d ed.) 272; Campbell *v.* Jones, 6 T. R. 570, 3 Rev. Rep. 263.

Canada.— Murphy *v.* Scarth, 16 U. C. Q. B. 48; Tanner *v.* D'Everado, 3 U. C. Q. B. 154; Barton *v.* Fisher, 3 U. C. Q. B. 75; Walker *v.* Kelly, 24 U. C. C. P. 174; Chatham *v.* McCrea, 12 U. C. C. P. 352; Coatsworth *v.* Toronto, 10 U. C. C. P. 73.

77. Parties to actions for breach of covenant see *infra*, IV, C.

78. Smith *v.* Lloyd, 29 Mich. 382; Judd *v.* Randall, 36 Minn. 12, 29 N. W. 589; Hilmert *v.* Christian, 29 Wis. 104. *Contra*, Bowne *v.* Wolcott, 1 N. D. 497, 48 N. W. 426.

79. *Connecticut.*—Sterling *v.* Peet, 14 Conn. 245; Belden *v.* Seymour, 8 Conn. 19; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Coe *v.* Talcott, 5 Day 88.

Georgia.— Aven *v.* Beckom, 11 Ga. 1.

Illinois.— Mason *v.* Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

Iowa.— Foster *v.* Young, 35 Iowa 27.

Kansas.— Klopp *v.* Moore, 6 Kan. 27.

Kentucky.— Graves *v.* Mattingly, 6 Bush 361.

Maine.— Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

Maryland.— See Glenn *v.* Allison, 58 Md. 527.

Massachusetts.—Donahoe *v.* Emery, 9 Metc. 63; Heard *v.* Hall, 16 Pick. 457; Whiting *v.* Dewey, 15 Pick. 428; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Mississippi.— Magee *v.* Mellon, 23 Miss. 585; Mellen *v.* Boarman, 13 Sm. & M. 100.

Missouri.— Foote *v.* Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; Murphy *v.* Price, 48 Mo. 247.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

New Hampshire.— Holyoke *v.* Clark, 54 N. H. 578.

New York.— Bennett *v.* Buchan, 53 Barb. 578, 5 Abb. Pr. N. S. 412.

North Carolina.—Godley *v.* Taylor, 14 N. C. 178.

Ohio.— Lockwood *v.* Gilson, 12 Ohio St. 526.

Tennessee.— Kain *v.* Humes, 5 Sneed 610; Jordan *v.* Trice, 6 Yerg. 479.

United States.— Taylor *v.* Mayo, 110 U. S. 330, 4 S. Ct. 147, 28 L. ed. 163; Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180.

England.— Appleton *v.* Binks, 5 East 148, 1 Smith K. B. 361, 7 Rev. Rep. 672.

Canada.— McDonald *v.* McDonell, 6 U. C. Q. B. O. S. 109.

See 14 Cent. Dig. tit. "Covenants," § 26 *et seq.*; and, generally, EXECUTORS AND ADMINISTRATORS; PRINCIPAL AND AGENT; TRUSTS.

If trustees do not intend to bind themselves personally care should be taken to express on the face of the paper the nature and extent of their covenant. Jordan *v.* Trice, 6 Yerg. (Tenn.) 479. See also Manifee *v.* Morrison, 1 Dana (Ky.) 208; Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385; Glenn *v.* Allison, 58 Md. 527; Wright *v.* De Groff, 14 Mich. 164; Thayer *v.* Wendell, 23 Fed. Cas. No. 13,873, 1 Gall. 37.

80. Westcott *v.* King, 14 Barb. (N. Y.) 32; Ludlow *v.* McCrea, 1 Wend. (N. Y.) 228; Quackenboss *v.* Lansing, 6 Johns. (N. Y.) 49; Ernst *v.* Bartle, 1 Johns. Cas. (N. Y.) 319;

presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption.[81] As a general rule the question as to whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instrument;[82] and according to some courts at them alone — the subject-matter of the contract and the interests of the parties assuming the liability being regarded by them as having nothing to do with the question.[83] On the other hand it is held that where from the subject-matter of the covenants it is the evident intent of the parties that they should be taken distributively, they may be so taken, although there are no words of severalty.[84]

(II) *As to Covenantees.* As to covenantees, the rule is that if the language of the covenant is capable of being so construed, it will be taken to be joint or several, according to the interest of the parties to it;[85] the law being now well

Enys *v.* Donnithorne, 2 Burr. 1190; Mansell *v.* Burredge, 7 T. R. 352; Northumberland *v.* Errington, 5 T. R. 522, 2 Rev. Rep. 666. See also Simson *v.* Cooke, 1 Bing. 452, 2 L. J. C. P. O. S. 74, 8 Moore C. P. 558, 8 E. C. L. 590; Birkley *v.* Presgrave, 1 East 220; Lilly *v.* Hodges, 8 Mod. 166; Robinson *v.* Walker, 1 Salk. 393; Coope *v.* Twynam, 1 Turn. & R. 426, 12 E. C. L. 425. *Contra,* Johnson *v.* Wilson, Willes 248.

Implied covenants.— The covenant implied by *dimiserunt* is joint as to the interest granted, but several as to subsequent acts. Coleman *v.* Sherwin, 1 Salk. 137, 1 Show. 79.

Liability of heirs.— Although land be devised in severalty to his heirs by a grantee thereof, yet the heirs have a joint interest in the covenants in the deed of their ancestor. Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480. See also Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628, in which it was held that whatever the number of coparceners they all constitute one heir, and that they are connected together by unity of interest and unity of title.

81. *Illinois.*— See Bardill *v.* School Trustees, 4 Ill. App. 94.

Maine.— Carleton *v.* Tyler, 16 Me. 392, 33 Am. Dec. 673.

Massachusetts.—Donahoe *v.* Emery, 9 Metc. 63; Comings *v.* Little, 24 Pick. 266.

Pennsylvania.— Philadelphia *v.* Reeves, 48 Pa. St. 472 [*affirming* 5 Phila. 357].

Virginia.— Click *v.* Green, 77 Va. 827.

United States.— Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

See 14 Cent. Dig. tit. "Covenants," § 27.

82. *Kentucky.*— Elkin *v.* Moore, 6 B. Mon. 462.

Maine.— Carleton *v.* Tyler, 16 Me. 392, 33 Am. Dec. 673.

Maryland.— Boyd *v.* Kienzle, 46 Md. 294.

New York.— Van Alstyne *v.* Van Slyck, 10 Barb. 383.

Pennsylvania.— Philadelphia *v.* Reeves, 48 Pa. St. 472 [*affirming* 5 Phila. 357].

Virginia.— Click *v.* Green, 77 Va. 827.

England.— Enys *v.* Donnithorne, 2 Burr. 1190; Sorsbie *v.* Park, 13 L. J. Exch. 9, 12 M. & W. 146.

Canada.— Rankin *v.* McKenzie, 3 Manitoba 323; Elliott *v.* Stanley, 7 Ont. 350.

See 14 Cent. Dig. tit. "Covenants," § 27.

The obvious, common-sense meaning of the words of the covenant itself controls. Click *v.* Green, 77 Va. 827.

Where the words of a covenant are expressly joint, it will be so construed, although the interest may be several, and *vice versa*; but where the words are ambiguous in this respect, they may be construed to be joint or several according to the interest. Sorsbie *v.* Park, 13 L. J. Exch. 9, 12 M. & W. 146.

Limitation of rule.— When an obligation exists only by virtue of the covenant its extent is to be measured only by the words of the covenant; it is different where the obligation is independent of the particular contract. Sumner *v.* Powell, 2 Meriv. 30, Turn. & R. 423, 16 Rev. Rep. 136. See also Rankin *v.* McKenzie, 3 Manitoba 323.

83. Boyd *v.* Kienzle, 46 Md. 294; Philadelphia *v.* Reeves, 48 Pa. St. 472 [*affirming* 5 Phila. 357].

The language of severalty or joinder, and not the interest, is the test of the quality of the covenant *quoad* the covenantors. Boyd *v.* Kienzle, 46 Md. 294.

84. *Kentucky.*—Evans *v.* Sanders, 10 B. Mon. 291.

Maine.— Walker *v.* Webber, 12 Me. 60.

Maryland.— Slater *v.* Mcgraw, 12 Gill & J. 265.

Michigan.—Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997.

New York.— Ludlow *v.* McCrea, 1 Wend. 228; Quackenboss *v.* Lansing, 6 Johns. 49; Ernst *v.* Bartle, 1 Johns. Cas. 319.

England.— Sorsbie *v.* Park, 13 L. J. Exch. 9, 12 M. & W. 146.

See 14 Cent. Dig. tit. "Covenants," § 27.

Joint and separate interests.— In case several parties grant the separate interest of each in an estate, the covenants shall be considered coextensive with the interest granted; and where there shall be a several interest granted, these shall be several, and where there is a joint interest granted, these shall be joint. Evans *v.* Sanders, 10 B. Mon. (Ky.) 291.

85. *Illinois.*— Buckner *v.* Hamilton, 16 Ill. 487.

Maryland.— Boyd *v.* Kienzle, 46 Md. 294; Jacobs *v.* Davis, 34 Md. 204; Lahy *v.* Holland, 8 Gill 445, 1 Am. Rep. 705; Slater *v.* Mcgraw, 12 Gill & J. 265.

settled that the insertion or omission of words of severance can make no difference as to the covenantees, and that the action will in all cases follow the interest, without regard to the words of the covenant.

c. Persons Entitled to Enforce Personal Covenants.[86] An action on a covenant will not lie in favor of a person not a party to it, although the covenant was made for his benfit.[87]

Massachusetts.—Comings *v.* Little, 24 Pick. 266.

New York.—Westcott *v.* King, 14 Barb. 32; Ludlow *v.* McCrea, 1 Wend. 228.

North Carolina.— Little *v.* Hobbs, 53 N. C. 179, 78 Am. Dec. 275.

Virginia.— Carthrae *v.* Brown, 3 Leigh 98, 23 Am. Dec. 255.

United States.— Calvert *v.* Bradley, 16 How. 580, 14 L. ed. 1066. But see Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67.

England.—Harrold *v.* Whitaker, 11 Q. B. 147, 63 E. C. L. 147; Addison *v.* Gibson, 10 Q. B. 106, 11 Jur. 654, 16 L. J. Q. B. 165, 59 E. C. L. 106; Wakefield *v.* Brown, 9 Q. B. 209, 15 L. J. Q. B. 373, 58 E. C. L. 209; Hopkinson *v.* Lee, 6 Q. B. 964, 9 Jur. 616, 14 L. J. Q. B. 101, 51 E. C. L. 964; Foley *v.* Addenbrooke, 4 Q. B. 197, 3 G. & D. 64, 7 Jur. 234, 12 L. J. Q. B. 163, 45 E. C. L. 197; Servante *v.* James, 10 B. & C. 410, 8 L. J. K. B. O. S. 64, 5 M. & R. 299, 21 E. C. L. 177; Withers *v.* Bircham, 3 B. & C. 254, 10 E. C. L. 123; Story *v.* Richardson, 6 Bing. N. Cas. 123, 4 Jur. 26, 9 L. J. C. P. 43, 8 Scott 291, 37 E. C. L. 541; Scott *v.* Godwin, 1 B. & P. 67; Lane *v.* Drinkwater, 1 C. M. & R. 599, 3 Dowl. P. C. 223, 4 L. J. Exch. 32, 5 Tyrw. 40; Slingsby's Case, 5 Coke 18*b* (where the reason of the rule is stated at length); Spencer *v.* Durant, Comb. 115; Poole *v.* Hill, 9 Dowl. P. C. 300, 10 L. J. Exch. 81, 6 M. & W. 835; Anderson *v.* Martindale, 1 East 497, 6 Rev. Rep. 334; Keightley *v.* Watson, 3 Exch. 716, 18 L. J. Exch. 339; Mills *v.* Ladbroke, 8 Jur. 247, 13 L. J. C. P. 122, 7 M. & G. 218, 7 Scott N. R. 1005, 49 E. C. L. 218; Palmer *v.* Sparshott, 11 L. J. C. P. 204, 4 M. & G. 137, 4 Scott N. R. 743, 43 E. C. L. 79; Bradburne *v.* Botfield, 14 L. J. Exch. 330, 14 M. & W. 559; James *v.* Emery, 2 Moore C. P. 195, 5 Price 529, 8 Taunt. 245, 19 Rev. Rep. 503, 4 E. C. L. 129; Sorsbie *v.* Park, 12 M. & W. 146, 13 L. J. Exch. 9; Eccleston *v.* Clispham, 1 Saund. 153; Saunders *v.* Johnson, Skin. 401; Southcote *v.* Hoare, 3 Taunt. 87, 12 Rev. Rep. 600.

Canada.— Conley *v.* Wellband, 3 Manitoba 207.

Contra, Catlin *v.* Barnard, 1 Aik. (Vt.) 9.

See 14 Cent. Dig. tit. "Covenants," § 28.

A covenant with two and every of them is joint, although the two are several parties to the deed. Southcote *v.* Hoare, 3 Taunt. 87, 12 Rev. Rep. 600.

Coparceners.— One coparcener cannot sue separately for his portion of rents accruing to him and his fellows. Decharms *v.* Horwood, 10 Bing. 526, 3 L. J. C. P. 198, 4 Moore & S. 400, 25 E. C. L. 251. See also Tapscott *v.* Williams, 10 Ohio 442.

"Where the covenant is to several for the performance of several duties to each, there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends." Anderson *v.* Martindale, 1 East 497, 501, 6 Rev. Rep. 334.

86. Persons entitled to enforce real covenants see *infra,* II, D, 4.

87. *Alabama.*— Douglass *v.* Mobile Branch Bank, 19 Ala. 659.

Arkansas.— Bozeman *v.* State Bank, 7 Ark. 328, 46 Am. Dec. 291.

Connecticut.—Bishop *v.* Quintard, 18 Conn. 395; Davis *v.* Lyman, 6 Conn. 249.

Illinois.—People *v.* Chicago, etc., R. Co., 57 Ill. 436.

Kentucky.— McNeal *v.* Blackburn, 7 Dana 170; Asher Lumber Co. *v.* Cornett, 58 S. W. 438, 22 Ky. L. Rep. 569, 56 L. R. A. 672.

Maine.— Lyon *v.* Parker, 45 Me. 474.

Maryland.— Lahy *v.* Holland, 8 Gill 445, 1 Am. Rep. 705.

Massachusetts.— Hurd *v.* Curtis, 19 Pick. 459; Plymouth *v.* Carver, 16 Pick. 183.

New Hampshire.— How *v.* How, 1 N. H. 49.

New Jersey.— National Union Bank *v.* Segur, 39 N. J. L. 173; Smith *v.* Emery, 12 N. J. L. 53; Bell *v.* Reading, 2 N. J. L. 132.

New York.— Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219; Van Gelder *v.* Van Gelder, 77 N. Y. 446; Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Dolph *v.* White, 12 N. Y. 296.

North Carolina.— Nesbit *v.* Brown, 16 N. C. 30.

Pennsylvania.— Harkins *v.* Doran, (1888) 15 Atl. 928; Strohecker *v.* Grant, 16 Serg. & R. 237.

England.— Barford *v.* Stuckey, 2 B. & B. 333, 5 Moore C. P. 23, 6 E. C. L. 170; Berkeley *v.* Hardy, 5 B. & C. 365, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 29 Rev. Rep. 261, 11 E. C. L. 495; Scudamore *v.* Vandenstone, 2 Coke Inst. 673, 2 Rolle Abr. 22; Metcalf *v.* Rycroft, 6 M. & S. 75; Storer *v.* Gordon, 3 M. & S. 308, 15 Rev. Rep. 409; Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725.

See 14 Cent. Dig. tit. "Covenants," § 29.

To give a third person who may derive a benefit from the performance of the covenant an action there must be an intent by the promisee to secure some benefit to the third person and also some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or an equitable claim to the benefit of the promise, or an equivalent from him personally. National Union Bank *v.* Segur, 39 N. J. L. 173; Smith *v.* Emery, 12 N. J. L. 53; Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253 (stating fully the reason

d. Persons Liable on Personal Covenants.[88] On a personal covenant only the covenantor and his executors or administrators are bound.[89] Heirs are only bound when expressly named,[90] while assigns, although not bound at law, may be held liable in equity where they have taken with notice of the covenant.[91]

8. Subject-Matter. In determining the subject-matter of a covenant, it is the duty of the court to ascertain the intention of the parties, and if that be lawful to give effect to it, and when the language employed is so ambiguous and contradictory as to leave it doubtful what the parties did intend, it must call to its aid the surrounding circumstances, the object had in view by the parties, and their state and condition.[92]

9. Limitations and Exceptions — a. In General. Limitations and exceptions are subject to the general rules of construction applicable to covenants,[93] that is, that the intention of the parties, as evinced by the language used, the object contemplated by them, and the subject-matter of the agreement controls.

of the rule); Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327; Lawrence *v.* Fox, 20 N. Y. 268; Duncan *v.* Moon, Dudley (S. C.) 332; Allen *v.* Brazier, 2 Bailey (S. C.) 55; John Brothers Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188, 24 J. P. 153, 69 L. J. Ch. 149, 81 L. T. Rep. N. S. 771, 48 Wkly. Rep. 236; Moyle *v.* Ewer, Cro. Eliz. 905. See also Gilby *v.* Copley, 3 Lev. 138; and, generally, Contracts.

The purchaser at a foreclosure sale may enforce the covenants contained in the deed of trust in which the sale is had. Blanchard *v.* Hazeltine, 79 Mo. App. 248.

88. Persons liable on real covenants see *infra*, II, D, 5.

89. Gould *v.* Stanton, 16 Conn. 12; Wood *v.* Wood, 1 Metc. (Ky.) 512; Stanton *v.* Sauk Rapids Co., 74 Minn. 286, 77 N. W. 1; Jones *v.* Chapman, (Tex. Civ. App. 1897) 41 S. W. 527.

Covenants made by an executor do not bind devisees. Cicalla *v.* Miller 105 Tenn. 255, 58 S. W. 210.

Covenants of cotenant.— One is not bound by covenants in a deed for the sole reason that they are made by a cotenant or a coparcener holding the record title. Jones *v.* Chapman, (Tex. Civ. App. 1897) 41 S. W. 527.

90. Maynard *v.* Polhemus, 74 Cal. 141, 15 Pac. 451; McDonald *v.* McElroy, 60 Cal. 484; Fowler *v.* Kent, 71 N. H. 388, 52 Atl. 554.

91. Van Doren *v.* Robinson, 16 N. J. Eq. 256. See also John Brothers Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188, 64 J. P. 153, 69 L. J. Ch. 149, 81 L. T. Rep. N. S. 771, 48 Wkly. Rep. 236. And see *infra*, II, C, 2.

Implied covenants under Cal. Civ. Code, § 1113, see Holzheier *v.* Hayes, 133 Cal. 456, 65 Pac. 968.

92. If possible effect is to be given to the entire instrument, and if that cannot be done, such a construction must be put upon it as appears best to comport with the motives the parties had in view in entering into it.

Alabama.— Peacey *v.* Peacey, 27 Ala. 683; Taliaferro *v.* Brown, 11 Ala. 702.

Connecticut.— Griswold *v.* Allen, 22 Conn. 89.

District of Columbia.— Sawyer *v.* Weaver, 2 MacArthur 1.

Kentucky.— Seller *v.* Thompson, (1899) 52 S. W. 968; Wilson *v.* Bowens, 2 T. B. Mon. 86.

Maine.— Walker *v.* Webber, 12 Me. 60, where it is said, however, that unless there is a reference thereto in the covenant, no other instrument can be looked to in arriving at the intention of the parties.

Maryland.— Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206; Second Universalist Soc. *v.* Dugan, 65 Md. 460, 5 Atl. 415.

Missouri.—McCammon *v.* Baldwin, 165 Mo. 579, 65 S. W. 986.

New York.— Duryea *v.* New York, 62 N. Y. 592; Beach *v.* Crain, 2 N. Y. 86, 49 Am. Dec. 369 [*affirming* 2 Barb. 120]; Gubbins *v.* Peterson, 21 N. Y. App. Div. 241, 47 N. Y. Suppl. 685 [*affirmed* in 163 N. Y. 583, 57 N. E. 1111]; Garcia *v.* Callender, 53 Hun 12, 5 N. Y. Suppl. 934; Cheesebrough *v.* Agate, 26 Barb. 603, 7 Abb. Pr. 32; Hosack *v.* Rogers, 25 Wend. 313.

Pennsylvania.—*In re* Hoerr, 31 Pittsb. Leg. J. N. S. 337.

Tennessee.— Davis *v.* Smith, 9 Humphr. 557.

Virginia.— Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737; Lockridge *v.* Carlisle, 6 Rand. 20.

Washington.— West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97.

United States.— Lamb *v.* Vaughn, 14 Fed. Cas. No. 8,023, 2 Sawy. 161.

England.— Fowle *v.* Welsh, 1 B. & C. 29, 2 D. & R. 133, 1 L. J. K. B. 17, 25 Rev. Rep. 291, 8 E. C. L. 14, ambiguous words being taken most strongly against the covenantor.

The plain and obvious meaning of the language to an ordinary understanding will control. Sawyer *v.* Weaver, 2 MacArthur (D. C.) 1. See also Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737; Lamb *v.* Vaughn, 14 Fed. Cas. No. 8,023, 2 Sawy. 161.

93. *Connecticut.*— Quintard *v.* Bishop, 29 Conn. 366; Bishop *v.* Quintard, 18 Conn. 395.

Illinois.— Bowman *v.* Long, 89 Ill. 19, construing the words "legal representatives."

Iowa.— Bankson *v.* Lagerlof, (1898) 75 N. W. 661; Johnson *v.* Nichols, 105 Iowa 122, 74 N. W. 750.

b. Limitation to Premises and Estate Conveyed.[94] Subject always to a manifest intention to the contrary,[95] general covenants will be construed as limited to the premises and estate purported and intended to be conveyed;[96] they are intended to protect, and cannot be construed to enlarge, the estate granted.

Maine.— Shaw *v.* Bisbee, 83 Me. 400, 22 Atl. 361; Powers *v.* Patten, 71 Me. 583; Hardy *v.* Nelson, 27 Me. 525.

Massachusetts.— Cornell *v.* Jackson, 3 Cush. 506.

Michigan.— Welbon *v.* Welbon, 109 Mich. 356, 67 N. W. 338; Cooper *v.* Bigly, 13 Mich. 463.

Minnesota.— Sandwich Mfg. Co. *v.* Zellmer, 48 Minn. 408, 51 N. W. 379.

Missouri.— Langenberg *v.* Chas. H. Heer Dry Goods Co., 74 Mo. App. 12, liability of prior grantors.

Nebraska.—Orr *v.* Omaha, (1902) 90 N. W. 301.

New York.— Bridger *v.* Pierson, 45 N. Y. 601.

Vermont.— Potter *v.* Taylor, 6 Vt. 676.

Virginia.— Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298, construing words "will warrant specially."

United States.— Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667.

England.— Bowler *v.* Wolley, 15 East 444.

See 14 Cent. Dig. tit. "Covenants," § 32.

Exceptions and restrictions are to be construed strictly against the grantor, and are not to be extended beyond the fair import of the language expressed except by necessary implication. Duryea *v.* New York, 62 N. Y. 592. See also Gubbins *v.* Peterson, 21 N. Y. App. Div. 241, 47 N. Y. Suppl. 685 [*affirmed* in 163 N. Y. 583, 57 N. E. 1111].

Where a covenant of warranty contains no exception, the previous mention of the existence of an encumbrance does not take it out of the covenant of warranty to defend the title against all lawful claims whatsoever. Welbon *v.* Welbon, 109 Mich. 356, 67 N. W. 338. See also Sandwich Mfg. Co. *v.* Zellmer, 48 Minn. 408, 51 N. W. 379.

94. As to enlargement of estate by estoppel see ESTOPPEL.

Covenant implied from description of premises see *supra*, I, B, 5.

95. *Massachusetts.*— Hubbard *v.* Apthorp, 3 Cush. 419.

New Hampshire.— Loomis *v.* Bedel, 11 N. H. 74.

Pennsylvania.— Steiner *v.* Baughman, 12 Pa. St. 106.

Texas.— Peck *v.* Hensley, 20 Tex. 673.

Vermont.— Mills *v.* Catlin, 22 Vt. 98.

Wyoming.— Balch *v.* Arnold, 9 Wyo. 17, 59 Pac. 434.

England.— Calvert *v.* Sebright, 15 Beav. 156; Cookes *v.* Fowns, 1 Keb. 95, 1 Lev. 40.

See 14 Cent. Dig. tit. "Covenants," § 34.

96. *Alabama.*— Kyle *v.* McKenzie, 94 Ala. 236, 10 So. 654.

Arkansas.— Reynolds *v.* Shaver, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356 (quitclaim deed); Vance *v.* Pena, 33 Cal. 631; Kimball *v.* Semple, 25 Cal. 440.

Georgia.— McDonough *v.* Martin, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343 (a deed in its essence a quitclaim of title); Jordan *v.* Jordan, Dudley 181 (sale of a special interest in land not amounting to a general warranty).

Illinois.— Drury *v.* Holden, 121 Ill. 130, 13 N. E. 547; People *v.* Herbel, 96 Ill. 384.

Indiana.— Allen *v.* Kersey, 104 Ind. 1, 3 N. E. 557, covenants of title.

Iowa.— Johnson *v.* Nichols, 105 Iowa 122, 74 N. W. 750; McNear *v.* McComber, 18 Iowa 12.

Kansas.— Young *v.* Clippinger, 14 Kan. 148.

Maine.— Bates *v.* Foster, 59 Me. 157, 8 Am. Rep. 406; Ballard *v.* Child, 46 Me. 152; Cole *v.* Lee, 30 Me. 392.

Maryland.— Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Massachusetts.— Lively *v.* Rice, 150 Mass. 171, 22 N. E. 888; Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382; Stockwell *v.* Couillard, 129 Mass. 231; Hoxie *v.* Finney, 16 Gray 332; Cornell *v.* Jackson, 3 Cush. 506, 9 Metc. 150; Sweet *v.* Brown, 12 Metc. 175, 45 Am. Dec. 243; Allen *v.* Holton, 20 Pick. 458; Blanchard *v.* Brooks, 12 Pick. 47.

Minnesota.— Walther *v.* Briggs, 69 Minn. 98, 71 N. W. 909; Hope *v.* Stone, 10 Minn. 141.

New Jersey.— Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237; Ross *v.* Adams, 28 N. J. L. 160; Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467.

New York.— Tymason *v.* Bates, 14 Wend. 671 [*reversing* 13 Wend. 300]; Jackson *v.* Hoffman, 9 Cow. 271; Kellogg *v.* Wood, 4 Paige 578. See also Long Island R. Co. *v.* Conklin, 32 Barb. 381.

Ohio.— Meek *v.* Breckenridge, 29 Ohio St. 642; White *v.* Brocaw, 14 Ohio St. 339.

South Carolina.—Singleton *v.* Singleton, 60 S. C. 216, 38 S. E. 462.

Texas.— Bumpass *v.* Anderson, (Civ. App. 1899) 51 S. W. 1103.

Virginia.— Wynn *v.* Harman, 5 Gratt. 157.

Washington.— West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

Wisconsin.— Koch *v.* Hustis, 113 Wis. 604, 89 N. W. 838 [*affirming* 113 Wis. 599, 87 N. W. 834].

United States.— Hall *v.* Scott County, 7 Fed. 341, 2 McCrary 356; Lamb *v.* Wakefield, 14 Fed. Cas. No. 8,024, 1 Sawy. 251.

England.— Clanrickard *v.* Sidney, Hob. 1.

Right, title, and interest.— If a deed pur-

c. Limitation by Other Covenants[97] — (I) *In General.* In all cases where several covenants are contained in a deed, the courts endeavor to ascertain the intention of the parties from an attentive consideration of the whole deed, and construe the covenants, either as independent of or as restrictive of each other, according to such apparent intention.[98]

(II) *Express Covenants Control Inconsistent, Implied Covenants* — (A) *In General.* Express covenants, whether general or limited, override and control inconsistent, implied covenants.[99] Where, however, there is no inconsistency between the express and the implied covenants effect will be given to both.[1]

(B) *Covenants Implied by Statute.* In the case of statutory covenants implied from the use of particular words, there is a conflict of authority as to the effect of express covenants upon them. On the one hand, on the ground that such covenants are only intended to operate when the parties themselves have omitted to insert covenants, it is held that they are limited by the terms of the express covenants,[2] some cases going to the extent of holding that they do not even arise when

ports to convey the right, title, and interest of the grantor to the land described instead of conveying the land itself, a general covenant of warranty will be limited to that right or interest. Reynolds *v.* Shaver, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36. See also McNear *v.* McComber, 18 Iowa 12; Ballard *v.* Child, 46 Me. 152; Sweet *v.* Brown, 12 Metc. (Mass.) 175, 45 Am. Dec. 243; Allen *v.* Holton, 20 Pick. (Mass.) 458; Bumpass *v.* Anderson, (Tex. Civ. App. 1899) 51 S. W. 1103.

Where tenants in common, but in unequal shares, convey, all joining in one deed, and one of them covenants therein to warrant and defend the title to the premises to the extent of his share, stating what his share is, and no further, and there is a failure of title to a part of the premises, he will be liable on such covenant only in proportion to the share held by him. Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467.

Where the habendum clause declares the property subject to a mortgage, the warranty following, although not expressly excepting the mortgage, does not make the grantor liable therefor. Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206. See also Drury *v.* Holden, 121 Ill. 130, 13 N. E. 547; People *v.* Herbel, 96 Ill. 384; Lively *v.* Rice, 150 Mass. 171, 22 N. E. 888; Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

97. Covenants implied from language of express covenants see *supra*, I, B, 3.

98. "Every case therefore must depend upon the particular words used in the instrument before the court, and the distinctions will be found very nice and difficult." Gainsford *v.* Griffith, 1 Saund. 58*g*, 60, note *l* [*citing* Stannard *v.* Forbes, 6 A. & E. 572, 6 L. J. K. B. 185, 1 N. & P. 633, W. W. D. 321, 33 E. C. L. 308; Nind *v.* Marshall, 1 B. & B. 319, 3 Moore C. P. 703, 21 Rev. Rep. 610, 5 E. C. L. 659; Belcher *v.* Sikes, 8 B. & C. 184, 6 L. J. K. B. O. S. 314, 15 E. C. L. 99; Hesse *v.* Stevenson, 3 B. & P. 565; Browning *v.* Wright, 2 B. & P. 13, 5 Rev. Rep. 521; Barton *v.* Fitzgerald, 15 East 530, 13 Rev. Rep. 519; Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287; Foord *v.* Wilson, 2 Moore C. P. 592, 8 Taunt. 543, 20 Rev. Rep. 554, 4 E. C. L. 269; Sicklemore *v.* Thistleton, 6 M. & S. 9, 18 Rev. Rep. 280]. See also Fitch *v.* Belding, 49 Conn. 469; Johnson *v.* Blydenburgh, 31 N. Y. 427; Braman *v.* Johnson, 26 How. Pr. (N. Y.) 27; Smith *v.* Compton, 3 B. & Ad. 189, 1 L. J. K. B. 43, 23 E. C. L. 91.

99. *Alabama.*— Roebuck *v.* Duprey, 2 Ala. 535.

Kentucky. — Blair *v.* Hardin, 1 A. K. Marsh. 231.

Maryland.— Glenn *v.* Baltimore, 67 Md. 390, 10 Atl. 70; Morris *v.* Harris, 9 Gill 19.

Massachusetts. — Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Gates *v.* Caldwell, 7 Mass. 68.

Missouri.— Alexander *v.* Schreiber, 10 Mo. 460.

New Hampshire.—Crouch *v.* Fowle, 9 N. H. 219, 32 Am. Dec. 350, stating the reason of the rule.

New York.— Lynch *v.* Onondaga Salt Co., 64 Barb. 558 (stating the extent of this rule); Vanderkarr *v.* Vanderkarr, 11 Johns. 122; Kent *v.* Welch, 7 Johns. 258, 5 Am. Dec. 266 (stating the extent of this rule).

England.—Nokes' Case, 4 Coke 80*b*, stating the reason of the rule.

Canada.— Ritbet *v.* Beaven, 5 Brit. Col. 457.

See 14 Cent. Dig. tit. "Covenants," § 35.

Implied covenants relating to title may be restrained by express covenants relating to possession. Crouch *v.* Fowle, 9 N. H. 219, 32 Am. Dec. 350.

1. Roebuck *v.* Duprey, 2 Ala. 535; Jones *v.* Waggoner, 7 J. J. Marsh. (Ky.) 144; Gates *v.* Caldwell, 7 Mass. 68; Kent *v.* Welch, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266.

2. *Illinois.*— Finley *v.* Steele, 23 Ill. 56.

Kentucky.— Henderson *v.* Bradford, 1 Bibb 509.

Mississippi.—Witty *v.* Hightower, 12 Sm. & M. 478; Duncan *v.* Lane, 8 Sm. & M. 744; Weems *v.* McCaughan, 7 Sm. & M. 422, 45 Am. Dec. 314; Brown *v.* Smith, 5 How. 387.

Missouri.— Geer *v.* Redman, 92 Mo. 375, 4 S. W. 745; Shelton *v.* Pease, 10 Mo. 473.

New Mexico.— Douglas *v.* Lewis, 3 N. M. 345, 9 Pac. 377.

express covenants are inserted.[3] On the other hand, it is held that the implied covenants are not qualified or restrained by those which are expressed.[4] Where the statutory and express covenants are not inconsistent, or are independent of each other, the courts will give effect to both.[5]

(III) *Restrictive Words in First of Covenants Having Same Object.* Restrictive words inserted in the first of several covenants having the same object will be construed as extending to all the covenants, although they are distinct.[6]

(IV) *First General Covenant Not Limited by Subsequent Restrictive Covenant.* Where the first covenant is general, a subsequent limited covenant will not restrict the generality of the preceding covenant, unless an express intention to do so appear or the covenants be inconsistent, unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant itself amounting to a qualification.[7]

North Dakota.— Dun *v.* Dietrich, 3 N. D. 3, 53 N. W. 81; Bowne *v.* Wolcott, 1 N. D. 497, 48 N. W. 426.

See 14 Cent. Dig. tit. "Covenants," § 35; and *supra*, I, B, 2.

3. Douglass *v.* Lewis, 3 N. M. 345, 9 Pac. 377 [*affirmed* in 131 U. S. 75, 9 S. Ct. 634, 33 L. ed. 53]; Leddy *v.* Enos, 6 Wash. 247, 33 Pac. 508, 34 Pac. 665. See Milot *v.* Reed, 11 Mont. 568, 29 Pac. 343.

4. Brown *v.* Tomlinson, 2 Greene (Iowa) 525; Parish *v.* White, 5 Tex. Civ. App. 71, 24 S. W. 572.

Especial stress is laid in some cases upon the fact that such covenants are declared by the statutes to be "express," or, as sometimes worded, that the words shall be construed as if the covenants had been fully written in the deed at length. Under such circumstances it is considered that the rule that an earlier general covenant cannot be limited by a subsequent restricted covenant is applicable. Hawk *v.* McCullough, 21 Ill. 220; Jackson *v.* Green, 112 Ind. 341, 14 N. E. 89. See *infra*, II, A, 9, c, (IV).

5. Locke *v.* White, 89 Ind. 492; Walker *v.* Deaver, 79 Mo. 664; Alexander *v.* Schreiber, 10 Mo. 460; Tracy *v.* Greffet, 54 Mo. App. 562; Dun *v.* Dietrich, 3 N. D. 3, 53 N. W. 81; Funk *v.* Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; Bender *v.* Fromberger, 4 Dall. (Pa.) 436, 1 L. ed. 898.

Effect given to implied covenants.— "Under the rule that covenants should be construed most strongly against the covenantor, courts have generally given effect to these implied covenants, even in cases where there were limited express covenants, where the two were not inconsistent or were independent of each other, limiting the implied covenant against incumbrances to the personal act or sufferance of the grantor." Dun *v.* Dietrich, 3 N. D. 3, 6, 53 N. W. 81 [*citing* Finley *v.* Steele, 23 Ill. 56; Shelton *v.* Pease, 10 Mo. 473; Alexander *v.* Schreiber, 10 Mo. 460; Shaffer *v.* Greer, 87 Pa. St. 370; Seitzinger *v.* Weaver, 1 Rawle (Pa.) 377; Funk *v.* Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; Gratz *v.* Ewalt, 2 Binn. (Pa.) 95].

6. Sugden Vend. (8th Am. ed.) 606; and, generally, the following cases:

Connecticut.—Davis *v.* Lyman, 6 Conn. 249.

Massachusetts.— Lively *v.* Rice, 150 Mass. 171, 22 N. E. 888; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83. But see Estabrook *v.* Smith, 6 Gray 572, 66 Am. Dec. 445.

New York.— Whallon *v.* Kauffman, 19 Johns. 97.

Ohio.— Bricker *v.* Bricker, 11 Ohio St. 240.

Pennsylvania.— Miller *v.* Heller, 7 Serg. & R. 32, 10 Am. Dec. 413.

Virginia.—Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298. But see Dickinson *v.* Hoomes, 8 Gratt. 353.

England.— Stannard *v.* Forbes, 6 A. & E. 572, 6 L. J. K. B. 185, 1 N. & P. 633, W. W. & D. 321, 33 E. C. L. 308; Nind *v.* Marshall, 1 B. & B. 319, 3 Moore C. P. 703, 21 Rev. Rep. 610, 5 E. C. L. 659; Hesse *v.* Stevenson, 3 B. & P. 565; Browning *v.* Wright, 2 B. & P. 13, 5 Rev. Rep. 521; Gervis *v.* Peade, Cro. Eliz. 615; Broughton *v.* Conway, Dyer 240*a*; Peles' Case, Dyer 240*a* note; Gale *v.* Reed, 8 East 80, 9 Rev. Rep. 376; Nervin *v.* Munns, 3 Lev. 46; Foord *v.* Wilson, 2 Moore C. P. 592, 8 Taunt. 543, 20 Rev. Rep. 554, 4 E. C. L. 269. But see Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287. See also Blatchford *v.* Plymouth, 3 Bing. N. Cas. 691, 3 Hodges 86, 6 L. J. C. P. 217, 4 Scott 429, 32 E. C. L. 319; Young *v.* Raincock, 7 C. B. 310, 13 Jur. 539, 18 L. J. C. P. 193, 62 E. C. L. 310.

But see Duvall *v.* Craig, 2 Wheat. (U. S.) 45, 4 L. ed. 180.

See 14 Cent. Dig. tit. "Covenants," § 35.

7. Sugden Vend. (8th Am. ed.) 608; and, generally, the following cases:

Indiana.— Jackson *v.* Green, 112 Ind. 341, 14 N. E. 89; Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Iowa.— Duroe *v.* Stephens, 101 Iowa 358, 70 N. W. 610; Morrison *v.* Morrison, 38 Iowa 73; Crum *v.* Loud, 23 Iowa 219 (dissenting opinion of Wright, J.); Brown *v.* Tomlinson, 2 Greene 525.

Massachusetts.—Cornell *v.* Jackson, 3 Cush. 506.

Missouri.— Grimsley *v.* White, 3 Mo. 257.

New York.—Atty.-Gen. *v.* Purmort, 5 Paige 620.

(v) *Preceding General Covenant Does Not Enlarge Subsequent Limited Covenant.* As on the one hand a subsequent limited covenant does not restrain a preceding general covenant, so on the other a preceding general covenant will not enlarge a subsequent limited covenant.[8]

(vi) *Covenants of Diverse Natures and Concerning Different Things.* Where the covenants are of diverse natures and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land.[9]

10. Duration of Personal Covenants.[10] A personal covenant may be unlimited in duration,[11] but the death of the covenantee will determine the covenantor's liability.[12]

11. Release or Discharge of Personal Covenants. Liability on a personal covenant can only be discharged by the covenantee,[13] and at common law this could be done, before breach, only by an instrument under seal;[14] after breach an agreement or transaction that would operate as an accord and satisfaction in ordinary cases may be pleaded in discharge.[15] This technical distinction has, however, been to a considerable extent modified, and it has been repeatedly held that whenever the breach complained of has been superinduced by the action or agreement of the plaintiff, and the matter is properly availed of in defense, he will not be allowed to recover on the technical breach thus produced.[16] A personal covenant may also be discharged by an act of law which renders its performance impossible.[17]

Pennsylvania.— Bender *v.* Fromberger, 4 Dall. 441, 1 L. ed. 901.

Texas.— Rowe *v.* Heath, 23 Tex. 614.

England.— Smith *v.* Compton, 3 B. & Ad. 189, 1 L. J. K. B. 43, 23 E. C. L. 91; Nind *v.* Marshall, 1 B. & B. 319, 3 Moore C. P. 703, 21 Rev. Rep. 610, 5 E. C. L. 659; Hesse *v.* Stevenson, 3 B. & P. 565; Browning *v.* Wright, 2 B. & P. 13, 5 Rev. Rep. 521; Martyn *v.* Macnamara, 2 C. & L. 541, 4 Dr. & W. 411; Rigby *v.* Great Western R. Co., 4 Exch. 220, 18 L. J. Exch. 404; Norman *v.* Foster, 1 Mod. 101; Gainsford *v.* Griffith, 1 Saund. 58*g*. But see Milner *v.* Horton, McClel. 647.

See 14 Cent. Dig. tit. "Covenants," § 35.

Limitation of rule.— The professed object of the rule is the ascertainment of the intentions of the parties to the covenants, but when the enforcement of the rule would evidently fail of this purpose, it should not be applied. Dunn *v.* Dunn, 3 Colo. 510. See also Cole *v.* Hawes, 2 Johns. Cas. (N. Y.) 203.

8. Sugden Vend. (8th Am. ed.) 609. See also Browning *v.* Wright, 2 B. & P. 13, 5 Rev. Rep. 521; Gamsford *v.* Griffith, 1 Sid. 328; Trenchard *v.* Hoskins, Winch. 91.

9. Sugden Vend. (8th Am. ed.) 609. See also McLane *v.* Allison, 7 Kan. App. 263, 53 Pac. 781; Sandwich Mfg. Co. *v.* Zellmer, 48 Minn. 408, 51 N. W. 379; Crossfield *v.* Morrison, 7 C. B. 286, 13 Jur. 565, 18 L. J. C. P. 135, 62 E. C. L. 286; Hughes *v.* Bennett, Cro. Car. 495; Crayford *v.* Crayford, Cro. Car. 160; Nervin *v.* Munns, 3 Lev. 46. *Compare* Rich *v.* Rich, Cro. Eliz. 43.

10. **Duration of real covenants** see *infra*, II, D, 2.

11. Bishop *v.* Quintard, 18 Conn. 395.

12. Anderson *v.* Faulconer, 30 Miss. 145.

13. Davis *v.* Lyman, 6 Conn. 249, assignee of covenantee cannot discharge.

14. Herzog *v.* Sawyer, 61 Md. 344; Harper *v.* Hampton, 1 Harr. & J. (Md.) 622; Fitch *v.* Forman, 14 Johns. (N. Y.) 172.

Indorsement upon agreement.— It is no objection to such release that it is indorsed upon the agreement and has remained, after the execution of it, with the covenantee. Fitch *v.* Forman, 14 Johns. (N. Y.) 172.

15. Nesbitt *v.* McGehee, 26 Ala. 748; Herzog *v.* Sawyer, 61 Md. 344; Bridgeman *v.* Eaton, 3 Vt. 166. See also Accord and Satisfaction.

The acceptance of a part performance after breach does not release the covenantee's right of action. The cause of action cannot be discharged by any act of the plaintiff short of a release. Nesbitt *v.* McGehee, 26 Ala. 748.

16. *Maryland.*— Herzog *v.* Sawyer, 61 Md. 344; Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170.

New York.—Langworthy *v.* Smith, 2 Wend. 587, 20 Am. Dec. 652; Dearborn *v.* Cross, 7 Cow. 48; Fleming *v.* Gilbert, 3 Johns. 528.

Pennsylvania.— Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696.

United States.—Chesapeake, etc., Canal Co. *v.* Ray, 101 U. S. 522, 25 L. ed. 792.

England.— 1 Rolle Abr. 453, pl. 5.

See 14 Cent. Dig. tit. "Covenants," § 37.

"Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity." Chesapeake, etc., Canal Co. *v.* Ray, 101 U. S. 522, 25 L. ed. 792.

17. *In re* Holmes, 79 Ill. App. 59; Great Pond Min., etc., Co. *v.* Buzzell, 39 Me. 173.

B. Covenants of Title — 1. In General — a. Necessity. As has been previously stated,[18] covenants of title are never implied. Consequently, in the absence of fraud or mistake,[19] if a deed contains no covenants of title, all questions of title are at the risk of the grantee. If the title fail, he is without remedy, either at law or in equity, against the grantor.[20]

b. Usual Covenants of Title[21] — (i) *England.*[22] The covenants usually entered into in England by a vendor seized in fee are that he is seized in fee; that he has power to convey; for quiet enjoyment by the purchaser, his heirs, and assigns; that the estate is free from encumbrances; and for further assurance.[23]

18. See *supra*, I, B, 1.

19. As to relief in equity on the ground of fraud or mistake see Equity.

As to the right of action for fraud see Fraud.

20. *District of Columbia.*—Smoot *v.* Coffin, 4 Mackey 407.

Illinois.— Botsford *v.* Wilson, 75 Ill. 132; Sheldon *v.* Harding, 44 Ill. 68; Stookey *v.* Hughes, 18 Ill. 55; Slack *v.* McLagan, 15 Ill. 242; Owens *v.* Thompson, 4 Ill. 502; Snyder *v.* Laframboise, 1 Ill. 343, 12 Am. Dec. 187.

Iowa. — Allen *v.* Pegram, 16 Iowa 163; Crocker *v.* Robertson, 8 Iowa 404; Brandt *v.* Foster, 5 Iowa 287; Funk *v.* Creswell, 5 Iowa 62.

Kentucky.—Wallace *v.* Barlow, 3 Bibb 168.

New Jersey.— Hopper *v.* Lutkins, 4 N. J. Eq. 149.

New York.— Coyle *v.* Nies, 6 N. Y. St. 194 [*affirmed* in 120 N. Y. 621, 23 N. E. 1152].

North Carolina.— McKesson *v.* Hennessee, 66 N. C. 473.

Tennessee.— Stipe *v.* Stipe, 2 Head 169; Maney *v.* Porter, 3 Humphr. 347 [*approved* in Baker *v.* Shy, 9 Heisk. 85; Stipe *v.* Stipe, 2 Head 169].

United States.— Buckner *v.* Street, 15 Fed. 365, 5 McCrary 59.

See 14 Cent. Dig. tit. "Covenants," § 38 *et seq.*

21. As to the usual covenants: In leases or assignments of leasehold interests see Landlord and Tenant. In mortgages see Mortgages. In settlements see Husband and Wife. In trust deeds see Trusts.

22. For forms of the usual covenants of title in England see Rawle Cov. § 20.

23. Sugden Vend. (8th Am. ed.) 573. *Compare* Rawle Cov. (5th ed.) § 20. See also 3 Washburn Real Prop. (6th ed.) § 2370.

A purchaser is entitled to various covenants according to the nature of the vendor's title. Church *v.* Brown, 15 Ves. Jr. 258, 10 Rev. Rep. 74, 33 Eng. Reprint 752.

Common and usual covenants must mean covenants incidental to the particular kind of conveyance — in this case a lease. Henderson *v.* Hay, 3 Bro. Ch. 632, 29 Eng. Reprint 738.

Conveyances made under a decree of court are to be settled by the like rule as men of judgment among conveyancers would direct. Loyd *v.* Griffith, 3 Ark. 264, 26 Eng. Reprint 954. The covenants are, as in every other conveyance, only against the covenantor's own acts and those of the person immediately preceding him. Wakeman *v.* Rutland, 3 Ves. Jr. 233, 30 Eng. Reprint 985.

Extent of covenants.— See Browning *v.* Wright, 2 B. & P. 13, 5 Rev. Rep. 521. See also Buckhurst *v.* Fenner, 1 Coke 1.

The general, well-known practice determines what are the usual covenants. Church *v.* Brown, 15 Ves. Jr. 258, 10 Rev. Rep. 74, 33 Eng. Reprint 752.

Where an estate is decreed to be sold for payment of debts and no surplus remains, the court will not require the heir to covenant any further than his own acts, and the same rule applies as to devisee. But where the surplus is considerable the heir must covenant that neither he nor his immediate ancestor, and in the case of the devisee, that neither he nor his devisor, have done any act to encumber. Loyd *v.* Griffith, 3 Atk. 264, 26 Eng. Reprint 954.

Where the vendor claims immediately under the person who bought the estate there he need not covenant any further back than from that person, for the buyer has the benefit of the covenants in the conveyance to that person at the time he purchased. Loyd *v.* Griffith, 3 Atk. 264, 26 Eng. Reprint 954.

Heirs.— According to the usual course upon the conveyance of an estate derived by descent, the covenants are against the acts of the ancestor from whom it descended and the acts of the party conveying, and if there should have been an immediate heir, supposed to be dead, it is reasonable that the covenants should extend to his acts. Pickett *v.* Loggon, 14 Ves. Jr. 215, 33 Eng. Reprint 503. See also Pool *v.* Pool, 1 Ch. Rep. 18, 21 Eng. Reprint 494.

Tenants for life.— If settled estates are sold under a power to sell them with the consent of the tenant for life, he must covenant for the title. The vice-chancellor said that he apprehended that where the only persons who were immediately interested in the estates were tenants for life, it was the usual course to make them covenant for the title; that the tenants for life in this case stood in the same situation as if there had been a power to sell the estates with their consent; in which case it would be a matter of course for them to enter into the covenants. *In re* London Bridge Acts, 13 Sim. 176, 36 Eng. Ch. 176.

A trustee cannot be compelled to do more than enter into the usual covenant that he has done no act to encumber the property.

(II) *United States.*[24] Subject to variations arising from local usage in the different states, and even in different parts of the same state, it may be broadly stated that in the United States[25] the usual covenants of title in conveyances of

Worley *v.* Frampton, 5 Hare 560, 10 Jur. 1092, 16 L. J. Ch. 102, 26 Eng. Ch. 560.

24. Form of usual covenants in the United States see Rawle Cov. § 21, where what are called "full covenants" are enumerated.

25. Foote *v.* Burnet, 10 Ohio 317 note; Rawle Cov. (5th ed.) § 21; Washburn Real Prop. (6th ed.) § 2370; Tiedeman Real Prop. § 849; Williams Real Prop. 447. See also McKleroy *v.* Tulane, 34 Ala. 78; Davis *v.* Tarwater, 15 Ark. 286; Carter *v.* Denman, 23 N. J. L. 260. *Compare* Wilson *v.* Wood, 17 N. J. Eq. 216, 88 Am. Dec. 231.

In Maine the deeds of conveyance most frequently in use generally contain three covenants: (1) A covenant of seizin and good right to sell and convey which amount to the same thing. (2) A covenant of freedom from encumbrances. (3) A covenant of general or special warranty. Griffin *v.* Fairbrother, 10 Me. 91.

A deed with full covenants should contain covenants of seizin, of right to convey, for quiet enjoyment, against encumbrances, and for further assurance. Murphy *v.* Lockwood, 21 Ill. 611. See also Colby *v.* Osgood, 29 Barb. (N. Y.) 339.

General warranty.— In the following states a purchaser under a contract of sale is entitled to a deed of general warranty.

Alabama.— Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36. See also McKleroy *v.* Tulane, 34 Ala. 78.

Arkansas.— Witter *v.* Biscoe, 13 Ark. 422. See also Rudd *v.* Savelli, 44 Ark. 145. *Compare* Bagley *v.* Fletcher, 44 Ark. 153.

Georgia.— Leary *v.* Durham, 4 Ga. 593.

Illinois.— Clark *v.* Lyons, 25 Ill. 105.

Indiana.— An executory contract for a general warranty deed calls for a deed with full covenants. Bethell *v.* Bethell, 92 Ind. 318; Parker *v.* McAllister, 14 Ind. 12; Linn *v.* Barkey, 7 Ind. 69; Dawson *v.* Shirley, 6 Blackf. 531; Clark *v.* Redman, 1 Blackf. 379; Leonard *v.* Bates, 1 Blackf. 172.

Iowa.— The general covenant of warranty, under the code of Iowa, includes and implies all the usual covenants in a deed of conveyance in fee simple (Van Wagner *v.* Van Nostrand, 19 Iowa 422), which are seizin, right to convey, freedom from encumbrances, for quiet enjoyment, and to warrant and defend the title against all lawful claims (Funk *v.* Creswell, 5 Iowa 62).

Kentucky.— Andrews *v.* Word, 17 B. Mon. 518; Hedges *v.* Kerr, 4 B. Mon. 526; Vanada *v.* Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92; Slack *v.* Thompson, 4 T. B. Mon. 462; Fleming *v.* Harrison, 2 Bibb 171, 4 Am. Dec. 691.

Michigan.— Dwight *v.* Cutler, 3 Mich. 566, 64 Am. Dec. 105.

Minnesota.— Johnston *v.* Piper, 4 Minn. 192.

Mississippi.—The general covenant of warranty of title is to a great extent the only covenant inserted in conveyances of land. Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

Missouri.— Herryford *v.* Turner, 67 Mo. 296.

North Carolina.— Faircloth *v.* Isler, 75 N. C. 551. See also Gilchrist *v.* Buie, 21 N. C. 346.

Ohio.— Tremain *v.* Liming, Wright 644.

Rhode Island.— Point St. Iron Works *v.* Simmons, 11 R. I. 496.

Texas.— Taul *v.* Bradford, 20 Tex. 261; Vardeman *v.* Lawson, 17 Tex. 10. See also Rhode *v.* Alley, 27 Tex. 443.

Vermont.— In a contract for a warranty deed, a deed containing the usual covenants of seizin and against encumbrances is intended. Bowen *v.* Thrall, 28 Vt. 382.

Virginia.— Hoback *v.* Kilgores, 26 Gratt. 442, 21 Am. Rep. 317; Goddin *v.* Vaughn, 14 Gratt. 102; Dickinson *v.* Hoomes, 8 Gratt. 353. *Compare* Pennington *v.* Hanby, 4 Munf. 140.

West Virginia.— Tavenner *v.* Barrett, 21 W. Va. 656; Allen *v.* Yeater, 17 W. Va. 128. And see Boggess *v.* Robinson, 5 W. Va. 402.

But see Lloyd *v.* Farrell, 48 Pa. St. 73, 86 Am. Dec. 563. And see Cadwalader *v.* Tryon, 37 Pa. St. 318; Espy *v.* Anderson, 14 Pa. St. 308; Withers *v.* Baird, 7 Watts 227, 32 Am. Dec. 754.

See 14 Cent. Dig. tit. "Covenants," § 38 *et seq.*

Good and sufficient deed.— An agreement or covenant to convey land by a good and sufficient deed, or by warranty deed, or other like words, is not complied with by giving or tendering a deed sufficient in form merely, unless a good title passes by the deed. These words must on a fair construction be held to refer to the title and not to the deed.

Alabama.— Hunter *v.* O'Neil, 12 Ala. 37.

California.— Haynes *v.* White, 55 Cal. 38; Thayer *v.* White, 3 Cal. 228.

Connecticut.— Dodd *v.* Seymour, 21 Conn. 476; Mead *v.* Johnson, 3 Conn. 592.

Illinois.— Thompson *v.* Shoemaker, 68 Ill. 256; Morgan *v.* Smith, 11 Ill. 194; Brown *v.* Cannon, 10 Ill. 174.

Indiana.— Davar *v.* Cardwell, 27 Ind. 478; Warner *v.* Hatfield, 4 Blackf. 392; Clark *v.* Redman, 1 Blackf. 379.

Iowa.— Shreck *v.* Pierce, 3 Iowa 350; Fitch *v.* Casey, 2 Greene 300. *Compare* Corbett *v.* Berryhill, 29 Iowa 157.

Kentucky.— Andrews *v.* Word, 17 B. Mon. 518; Brown *v.* Starke, 3 Dana 316.

Maine.— Babcock *v.* Wilson, 17 Me. 372, 35 Am. Dec. 263; Hill *v.* Hobart, 16 Me. 164; Brown *v.* Gammon, 14 Me. 276; Porter *v.* Noyes, 2 Me. 22, 11 Am. Dec. 30.

Massachusetts.— Mead *v.* Fox, 6 Cush. 199 [*distinguishing* Tinney *v.* Ashley, 15 Pick.

estates in fee simple are the covenants of seizin, of right to convey, against encumbrances, for quiet enjoyment, and of warranty. A covenant for further assurance

546, 26 Am. Dec. 620; Aiken *v.* Sanford, 5 Mass. 494]; Swan *v.* Drury, 22 Pick. 485.

Mississippi.— Mobley *v.* Keys, 13 Sm. & M. 677; Feemster *v.* May, 13 Sm. & M. 275, 53 Am. Dec. 83; Greenwood *v.* Ligon, 10 Sm. & M. 615, 48 Am. Dec. 775.

Missouri.— Carter *v.* Alexander, 71 Mo. 585; Herryford *v.* Turner, 67 Mo. 296; Luckett *v.* Williamson, 31 Mo. 54, 37 Mo. 388.

New Hampshire.— Little *v.* Paddleford, 13 N. H. 167. See also Beach *v.* Steele, 12 N. H. 82.

New Jersey.— Den *v.* Tindall, 20 N. J. L. 214, 40 Am. Dec. 220; Lounsbery *v.* Locander, 25 N. J. Eq. 554; New Barbadoes Toll Bridge Co. *v.* Vreeland, 4 N. J. Eq. 157.

New York.— Story *v.* Conger, 36 N. Y. 673, 93 Am. Dec. 546; Fletcher *v.* Button, 4 N. Y. 396 [*approving* Judson *v.* Wass, 11 Johns. 525, 6 Am. Dec. 392; Clute *v.* Robison, 2 Johns. 595, *explaining* Van Eps *v.* Schenectady, 12 Johns. 436, 7 Am. Dec. 330, and *questioning* Parker *v.* Parmele, 20 Johns. 130, 11 Am. Dec. 253; Gazley *v.* Price, 16 Johns. 267]; Atkins *v.* Bahrett, 19 Barb. 639; Pomeroy *v.* Drury, 14 Barb. 418 [*repudiating* Parker *v.* Parmele, 20 Johns. 130, 11 Am. Dec. 253; Gazley *v.* Price, 16 Johns. 267]; Traver *v.* Halsted, 23 Wend. 66; Carpenter *v.* Bailey, 17 Wend. 244; Jones *v.* Gardner, 10 Johns. 266; Everson *v.* Kirtland, 4 Paige 628, 27 Am. Dec. 91. But see Parker *v.* Parmele, 20 Johns. 130, 11 Am. Dec. 253; Gazley *v.* Price, 16 Johns. 267, both of which were *questioned* in Fletcher *v.* Button, 4 N. Y. 396, and *overruled* in Atkins *v.* Bahrett, 19 Barb. 639; Pomeroy *v.* Drury, 14 Barb. 418.

North Carolina.—Gilchrist *v.* Buie, 21 N. C. 346.

Ohio.— Pugh *v.* Chesseldine, 11 Ohio 109, 37 Am. Dec. 414. See also Tremain *v.* Liming, Wright 644.

Oregon.— Sanford *v.* Wheelan, 12 Oreg. 301, 7 Pac. 324; Collins *v.* Delashmutt, 6 Oreg. 51.

Pennsylvania.— Wilson *v.* Getty, 57 Pa. St. 266; Withers *v.* Baird, 7 Watts 227, 32 Am. Dec. 754; Dearth *v.* Williamson, 2 Serg. & R. 498, 7 Am. Dec. 652.

South Carolina.— Breithaupt *v.* Thurmond, 3 Rich. 216; Tharin *v.* Fickling, 2 Rich. 361.

Tennessee.— Cunningham *v.* Sharp, 11 Humphr. 116.

Texas.— Jones *v.* Philips, 59 Tex. 609; Vardeman *v.* Lawson, 17 Tex. 10; Patterson *v.* Goodrich, 3 Tex. 331.

Vermont.— Joslyn *v.* Taylor, 33 Vt. 470; Lawrence *v.* Dole, 11 Vt. 549; Stow *v.* Stevens, 7 Vt. 27, 29 Am. Dec. 139.

Virginia.—Rucker *v.* Lowther, 6 Leigh 259.

Wisconsin.— Davis *v.* Henderson, 17 Wis. 106; Taft *v.* Kessel, 16 Wis. 273.

United States.— Watts *v.* Waddle, 29 Fed. Cas. No. 17,295, 1 McLean 200.

England.— See Souter *v.* Drake, 5 B. & Ad. 992, 3 L. J. K. B. 31, 3 N. & M. 40, 27 E. C. L. 417; Doe *v.* Stanion, 2 Gale 154, 5 L. J. Exch. 253, 1 M. & W. 695.

Canada.— See Cameron *v.* Carter, 9 Ont. 426.

See 14 Cent. Dig. tit. "Covenants," § 38 *et seq.*

A contract for a good and sufficient warranty deed is not a contract to convey a good title, the words "good and sufficient" relating only to the validity of the deed to pass the vendor's title. Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620; Aiken *v.* Sandford, 5 Mass. 494.

A covenant to convey by a "warranty deed" is complied with by the tender of a deed containing the common covenant of warranty, that is, for quiet enjoyment. The term does not include a deed with a covenant against encumbrances. Wilsey *v.* Dennis, 44 Barb. (N. Y.) 354.

A covenant "to give a deed of the premises is performed by the tender of a quitclaim deed without covenant of warranty. Ketchum *v.* Evertson, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; Van Eps *v.* Schenectady, 12 Johns. (N. Y.) 436, 7 Am. Dec. 330.

A covenant to make a good and perfect title, with a general warranty deed, containing the usual covenants, binds the obligor for a perfect title, with a general covenant of warranty. Clark *v.* Redman, 1 Blackf. (Ind.) 379.

An agreement to convey land must be construed as an agreement to convey a good title free from all encumbrances. Swan *v.* Drury, 22 Pick. (Mass.) 485.

An agreement "to sell" land binds the party to execute a proper deed of conveyance. Smith *v.* Haynes, 9 Me. 128.

A quitclaim deed is all that a purchaser can claim under a contract to convey with good title. Kyle *v.* Kavanagh, 103 Mass. 356, 4 Am. Rep. 560.

A question of fact.— What are the usual covenants in a given case is a question of fact to be determined by a jury (Bennett *v.* Womack, 7 B. & C. 627, 14 E. C. L. 283, 3 C. & P. 96, 14 E. C. L. 468, 6 L. J. K. B. O. S. 175, 1 M. & R. 644, 31 Rev. Rep. 270), or to be referred to a master (Wilson *v.* Wood, 17 N. J. Eq. 216, 88 Am. Dec. 231 [*citing* Henderson *v.* Hay, 3 Bro. Ch. 632, 29 Eng. Reprint 738; Boardman *v.* Mostyn, 6 Ves. Jr. 467, 31 Eng. Reprint 1147]). *Compare* Gault *v.* Van Zile, 37 Mich. 22.

Presumption from unusual covenant.— The refusal of a vendor to take upon himself the ordinary liability, as where he gives only a special warranty, although a general warranty is usual, must be regarded as sufficient, unless satisfactorily explained, to put every one of ordinary prudence upon inquiry as to the source and validity of the title thus brought under suspicion (Lowry *v.* Brown, 1 Coldw. (Tenn.) 456). It is a "significant

is sometimes, although infrequently, added;[26] and in some states there is in use a covenant of non-claim, which, however, is no more than the ordinary covenant of warranty, and chiefly operates by way of estoppel.[27]

c. Effect of Knowledge of Defects of Title and of Encumbrances — (i) *Defects of Title.* The fact that either or both of the parties knew at the time of conveyance that the grantor had no title in a part or in the whole of the land does not affect the right of recovery for a breach of covenant.[28]

(ii) *Encumbrances.* Knowledge on the part of the purchaser of the existence of an encumbrance on the land will not prevent him from recovering damages on account of it, where he protects himself by proper covenants in his deed.[29]

circumstance" tending to show a knowledge of defects (Oliver *v.* Piatt, 3 How. (U. S.) 333, 410, 11 L. ed. 622. See also Miller *v.* Fraley, 23 Ark. 735; Woodfolk *v.* Blount, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736); and in Iowa the grantee of a quitclaim deed is not to be regarded as a *bona fide* purchaser without notice of outstanding equities (Springer *v.* Bartle, 46 Iowa 688; Watson *v.* Phelps, 40 Iowa 482), although his vendee, with warranty, is not affected by the vendor's implied *mala fides* (Winkler *v.* Miller, 54 Iowa 476, 6 N. W. 698). But see *contra*, Grant *v.* Bennett, 96 Ill. 513; Mansfield *v.* Dyer, 131 Mass. 200. And see Forster *v.* Gillam, 13 Pa. St. 340; Cresson *v.* Miller, 2 Watts (Pa.) 272.

26. Foote *v.* Burnet, 10 Ohio 317 note.

A covenant for further assurance is implied in Missouri by the use of the words "grant, bargain, and sell." Armstrong *v.* Darby, 26 Mo. 517.

27. *Alabama.*— Claunch *v.* Allen, 12 Ala. 159.

California.— Gee *v.* Moore, 14 Cal. 472.

Illinois.— Holbrook *v.* Debo, 99 Ill. 372; Bostwick *v.* Williams, 36 Ill. 65, 85 Am. Dec. 382.

Maine.— Partridge *v.* Patten, 33 Me. 483, 54 Am. Dec. 633; Cole *v.* Lee, 30 Me. 392; Pike *v.* Galvin, 29 Me. 183; Fairbanks *v.* Williamson, 7 Me. 96.

Massachusetts.— Porter *v.* Sullivan, 7 Gray 441; Lothrop *v.* Snell, 11 Cush. 453; Miller *v.* Ewing, 6 Cush. 34; Gibbs *v.* Thayer, 6 Cush. 30; Newcomb *v.* Presbrey, 8 Metc. 406; Trull *v.* Eastman, 3 Metc. 121, 37 Am. Dec. 126.

New Hampshire.— Kimball *v.* Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

Vermont.— Everts *v.* Brown, 1 D. Chipm. 96, 1 Am. Dec. 699.

See 14 Cent. Dig. tit. "Covenants," § 38 *et seq.*; and, generally, Estoppel.

28. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Abernathy *v.* Boazman, 24 Ala. 189, 60 Am. Dec. 459.

Georgia.— Godwin *v.* Maxwell, 106 Ga. 194, 32 S. E. 114; Miller *v.* Desverges, 75 Ga. 407.

Illinois.— Weiss *v.* Binnian, 78 Ill. App. 292 [*affirmed* in 178 Ill. 241, 52 N. E. 969]; Wadhams *v.* Innes, 4 Ill. App. 642.

Iowa.— Ballard *v.* Burrows, 51 Iowa 81, 50 N. W. 74; Van Wagner *v.* Van Nostrand, 19 Iowa 422.

Kansas.— Batterton *v.* Smith, 3 Kan. App. 419, 43 Pac. 275.

Massachusetts.—Townsend *v.* Weld, 8 Mass. 146. *Compare* Greenhood *v.* Carroll, 114 Mass. 588.

Michigan.—Eaton *v.* Chesebrough, 82 Mich. 214, 46 N. W. 365; Sparrow *v.* Smith, 63 Mich. 209, 29 N. W. 691.

North Carolina.— Martin *v.* Martin, 12 N. C. 413.

Washington.— West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97.

United States.— New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102; Barlow *v.* Delaney, 40 Fed. 97. *Contra*, Feurer *v.* Stewart, 83 Fed. 793. And see Waples *v.* U. S., 16 Ct. Cl. 126.

But see Allen *v.* Kersey, 104 Ind. 1, 3 N. E. 557, which seems, however, to have been decided on the ground of estoppel.

See 14 Cent. Dig. tit. "Covenants," § 39.

In Louisiana a buyer who acquires under a clause of non-warranty, having at the time knowledge of the danger of eviction, is held by implication from those facts to purchase at his risk and peril, and cannot therefore sue for restitution of the price. When on the other hand the act contains an express stipulation that the buyer purchases at his peril and risk, it is of no consequence what knowledge he had of the danger of eviction, or even perhaps whether there was a stipulation of no warranty or not. New Orleans, etc., R. Co. *v.* Jourdain, 34 La. Ann. 648, construing La. Civ. Code 2505. See also Jeannin *v.* Millaudon, 5 Rob. 76; Canal Bank *v.* Copeland, 6 La. 543.

29. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Dunn *v.* White, 1 Ala. 645.

Arkansas.— Worthington *v.* Curd, 22 Ark. 277.

Connecticut.— Russel *v.* Case, 2 Root 211.

Georgia.—Osburn *v.* Pritchard, 104 Ga. 145, 30 S. E. 656.

Illinois.— Weiss *v.* Binnian, 178 Ill. 241, 52 N. E. 969 [*affirming* 78 Ill. App. 292]; Morgan *v.* Smith, 11 Ill. 194; Schmisseur *v.* Penn, 47 Ill. App. 278; Wadhams *v.* Innes, 4 Ill. App. 642.

Indiana.— Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Watts *v.* Fletcher, 107 Ind. 391, 8 N. E. 111; Morehouse *v.* Heath, 99 Ind. 509; Burk *v.* Hill, 48 Ind. 52, 17 Am. Rep. 731; Snyder *v.* Lane, 10 Ind. 424; Medler *v.* Hiatt, 8 Ind. 171; Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41. But see Ream *v.* Goslee, 21 Ind. App. 241, 52 N. E. 93, in which it was

In some jurisdictions, however, it is held that where the encumbrance does not affect the title, but only the physical condition of the property, as in the case of an open notorious easement, of which it is the servient tenement, the purchaser must be presumed to have seen it, and to have fixed his price with reference to the actual condition of the land at the time, and that such encumbrance is no breach of the covenant;[30] and the same is true of easements and servitudes imposed by law.[31] But other courts do not recognize this distinction, and hold

held that the existence of an outstanding term, known to the vendee, was not a breach of the covenant. And see *infra*, III, C, 4, c.

Iowa.— Yancey *v.* Tatlock, 93 Iowa 386, 61 N. W. 997; Johnson *v.* Walter, 60 Iowa 315, 14 N. W. 325; McGowen *v.* Myers, 60 Iowa 256, 14 N. W. 788; Gerald *v.* Elley, 45 Iowa 322; Barlow *v.* McKinley, 24 Iowa 69; Van Wagner *v.* Van Nostrand, 19 Iowa 422.

Maine.— See Donnell *v.* Thompson, 10 Me. 170, 25 Am. Dec. 216. But see *contra*, Safford *v.* Annis, 7 Me. 168.

Massachusetts.— Ladd *v.* Noyes, 137 Mass. 151; Batchelder *v.* Sturgis, 3 Cush. 201; Harlow *v.* Thomas, 15 Pick. 66; Townsend *v.* Weld, 8 Mass. 146.

Missouri.— Clore *v.* Graham, 64 Mo. 249; Williamson *v.* Hall, 62 Mo. 405; Whiteside *v.* Magruder, 75 Mo. App. 364.

Nebraska.— Burr *v.* Lamaster, 30 Nebr. 688, 46 N. W. 1015, 27 Am. St. Rep. 428, 9 L. R. A. 637; Scott *v.* Twiss, 4 Nebr. 133.

New Hampshire.— Foster *v.* Foster, 62 N. H. 532; Sargent *v.* Gutterson, 13 N. H. 467.

New Jersey.—Demars *v.* Koehler, 62 N. J. L. 203, 41 Atl. 720, 72 Am. St. Rep. 642 [*reversing* 60 N. J. L. 314, 38 Atl. 808]; Van Winkle *v.* Earl, 26 N. J. Eq. 242.

New York.— Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; Doctor *v.* Darling, 68 Hun 70, 22 N. Y. Suppl. 594; Rea *v.* Minkler, 5 Lans. 196; Mohr *v.* Parmelee, 43 N. Y. Super. Ct. 320; Roberts *v.* Levy, 3 Abb. Pr. N. S. 311; Suydam *v.* Jones, 10 Wend. 180, 25 Am. Dec. 552. But see Bridge *v.* Pierson, 66 Barb. 514.

North Carolina.— Gragg *v.* Wagner, 71 N. C. 316.

Ohio.— Long *v.* Moler, 5 Ohio St. 271.

Oregon.— Corbett *v.* Wrenn, 25 Oreg. 305, 35 Pac. 658.

Pennsylvania.— Evans *v.* Taylor, 177 Pa. St. 286, 35 Atl. 635; Memmert *v.* McKeen, 112 Pa. St. 315, 4 Atl. 542; Cathcart *v.* Bowman, 5 Pa. St. 317; Funk *v.* Voneida, 11 Serg. & R. 109, 14 Am. Dec. 617. *Compare* Bellas *v.* Lloyd, 2 Watts 401; Bricker *v.* Grover, 10 Phila. 91.

South Carolina.— Grice *v.* Scarborough, 2 Speers 649, 42 Am. Dec. 391.

Tennessee.— Perkins *v.* Williams, 5 Coldw. 512.

Texas.— Bigham *v.* Bigham, 57 Tex. 238; Parish *v.* White, 5 Tex. Civ. App. 71, 47 S. W. 572.

Vermont.— Taylor *v.* Gilman, 25 Vt. 411.

Wisconsin.—Bennett *v.* Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112.

England.— Levett *v.* Withrington, Lutw. 317. But see Savage *v.* Whitebread, 3 Ch. Rep. 24, 21 Eng. Reprint 717.

Canada.— Good *v.* End, 6 N. Brunsw. 603. See 14 Cent. Dig. tit. "Covenants," § 40.

Outstanding term.— See Demars *v.* Koehler, 62 N. J. L. 203, 41 Atl. 720, 72 Am. St. Rep. 642 [*reversing* 60 N. J. L. 314, 38 Atl. 808]. But see Ream *v.* Goslee, 21 Ind. App. 241, 52 N. E. 93. See also *infra*, III, C, 4, c.

30. *Georgia.*— Desvergers *v.* Willis, 56 Ga. 515, 21 Am. Rep. 289.

Iowa.— Harrison *v.* Des Moines, etc., R. Co., 91 Iowa 114, 58 N. W. 1081.

Louisiana.—Lallande *v.* Wentz, 18 La. Ann. 289.

Maine.— Holmes *v.* Danforth, 83 Me. 139, 21 Atl. 845.

Maryland.— Janes *v.* Jenkins, 34 Md. 1, 6 Am. Rep. 300.

New Jersey.— Denman *v.* Mentz, 63 N. J. Eq. 613, 52 Atl. 1117.

New York.—Bacharach *v.* Von Eiff, 74 Hun 533, 26 N. Y. Suppl. 842; *In re* Whitlock, 32 Barb. 48.

Pennsylvania.— Memmert *v.* McKeen, 112 Pa. St. 315, 4 Atl. 542; Ake *v.* Mason, 101 Pa. St. 17; Wilson *v.* Cochran, 46 Pa. St. 229; Bonebrake *v.* Summers, 8 Pa. Super. Ct. 55.

Wisconsin.—Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653; Kutz *v.* McCune, 22 Wis. 628, 99 Am. Dec. 85.

See 14 Cent. Dig. tit. "Covenants," § 40.

A public highway through lands conveyed, in use and known to the parties at the time of conveyance, is not an encumbrance, so that its existence will constitute a breach of the covenants.

Georgia.— Desverges *v.* Willis, 56 Ga. 515, 21 Am. Rep. 289.

Iowa.— Harrison *v.* Des Moines, etc., R. Co., 91 Iowa 114, 58 N. W. 1081.

Maine.— Holmes *v.* Danforth, 83 Me. 139, 21 Atl. 845.

Pennsylvania.— Ake *v.* Mason, 101 Pa. St. 17; Wilson *v.* Cochran, 46 Pa. St. 229.

Wisconsin.— Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653. *Contra*, Hubbard *v.* Norton, 10 Conn. 422; Butler *v.* Gale, 27 Vt. 739.

See 14 Cent. Dig. tit. "Covenants," § 40.

An elevated railroad in the street upon which the property sold abuts is not within the covenant against encumbrances. Bacharach *v.* Von Eiff, 74 Hun (N. Y.) 533, 26 N. Y. Suppl. 842.

Levee.— A vendor does not warrant against an apparent servitude, such as a public levee. Lallande *v.* Wentz, 18 La. Ann. 289.

31. Bourg *v.* Niles, 6 La. Ann. 77; Neeson *v.* Bray, 19 N. Y. Suppl. 841.

any existing easement or servitude a breach of the covenant.[32] Manifestly there is no breach where the grantee knowingly assumes the encumbrance.[33]

d. Effect of Covenants as Merging Previous Representations. One important effect of covenants of title has been held to be that representations made to the purchaser by the vendor as to the title or possession of the land are merged in the covenants of the deed subsequently made.[34] These decisions are, however, contrary to the decided weight of authorities, which hold that if the representations are known to be false when made, and have produced damage to the opposite party, the subsequent consummation of the agreement will not shield the grantor, whether there are covenants in the deed or not.[35] Undoubtedly, when the false and fraudulent representations relate to some matter collateral to the title of the property, and the right of possession which follows its acquisition, such as the location, quantity, quality, and the condition of the land, the privileges connected with it, or the rents and profits derived therefrom, in such cases they may be ground for an action for damages.[36]

2. Covenant of Seizin.[37] Although seizin was originally regarded as merely an

32. *Connecticut.*— Hubbard *v.* Norton, 10 Conn. 422.

Illinois.— Beach *v.* Miller, 51 Ill. 206, 2 Am. Rep. 290.

Indiana.— Quick *v.* Taylor, 113 Ind. 540, 16 N. E. 588.

Iowa.— Flynn *v.* White Breast Coal, etc., Co., 72 Iowa 738, 32 N. W. 471; Gerald *v.* Elley, 45 Iowa 322; Barlow *v.* McKinley, 24 Iowa 69.

Massachusetts.— Harlow *v.* Thomas, 15 Pick. 66.

Missouri.— Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426.

New York.— Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; Ladue *v.* Cooper, 32 Misc. 544, 67 N. Y. Suppl. 319.

Tennessee.—Perry *v.* Williamson, (Ch. App. 1897) 47 S. W. 189.

Vermont.— Butler *v.* Gale, 27 Vt. 739.

See 14 Cent. Dig. tit. "Covenants," § 40; and *infra*, III, C, 4, i.

33. Allen *v.* Lee, 1 Ind. 58, Smith 12, 48 Am. Dec. 352. And see *infra*, III, C, 4, l.

34. Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054; Wright *v.* Phipps, 90 Fed. 556 [*affirmed* in 98 Fed. 1007, 37 C. C. A. 702]. See also Leonard *v.* Pitney, 5 Wend. (N. Y.) 30; Hume *v.* Pocock, L. R. 1 Ch. 379, 12 Jur. N. S. 445, 35 L. J. Ch. 731, 14 L. T. Rep. N. S. 386, 14 Wkly. Rep. 681. And see dissenting opinion of Bronson, J., in Whitney *v.* Allaire, 1 N. Y. 305.

35. *Connecticut.*— Watson *v.* Atwood, 25 Conn. 313.

Illinois.— Eames *v.* Morgan, 37 Ill. 260.

Indiana.— West *v.* Wright, 98 Ind. 335.

Kansas.— Claggett *v.* Crall, 12 Kan. 393.

Kentucky.— Upshaw *v.* Debow, 7 Bush 442; Wade *v.* Thurman, 2 Bibb 583.

Michigan.— Bristol *v.* Braidwood, 28 Mich. 191; Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230.

Minnesota.— Kiefer *v.* Rogers, 19 Minn. 32.

Mississippi.— Gilpin *v.* Smith, 11 Sm. & M. 109; Parham *v.* Randolph, 4 How. 435, 35 Am. Dec. 403.

Missouri.— Bailey *v.* Smock, 61 Mo. 213; Holland *v.* Anderson, 38 Mo. 55.

New York.— Updike *v.* Abel, 60 Barb. 15; Ward *v.* Wiman, 17 Wend. 193; Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586.

Pennsylvania.— Babcock *v.* Case, 61 Pa. St. 427, 100 Am. Dec. 654.

Texas.— Rhode *v.* Alley, 27 Tex. 443; Moreland *v.* Atchison, 19 Tex. 303; Hays *v.* Bonner, 14 Tex. 629.

36. Representations as to matters collateral.— Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054 [*citing* Van Epps *v.* Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; Sandford *v.* Handy, 23 Wend. (N. Y.) 260; Monell *v.* Colden, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390; Dobell *v.* Stevens, 3 B. & C. 623, 5 D. & R. 490, 3 L. J. K. B. O. S. 89, 10 E. C. L. 286; Lyfney *v.* Selby, 2 Ld. Raym. 1118].

By vendor out of possession.— Such representations by the vendor, as to his having title to the premises sold, may also be the ground of action where he is not in possession, and has neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them. Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054. Thus, in Wardell *v.* Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383, an action for deceit was sustained against the vendor of land which had no actual existence, the court holding that in such case the purchaser might treat the deed as a nullity. The land not being in existence there could be no possession, and of course no eviction, and consequently no remedy upon the covenants, and the purchaser would be remediless if he could not maintain the action.

37. A covenant of seizin has been defined to be "an assurance that the grantor has the very estate in quantity and quality, which he purports to convey."

Iowa.— Brandt *v.* Foster, 5 Iowa 287, 294.

Nebraska.— Real *v.* Hollister, 20 Nebr. 112, 118, 29 N. W. 189.

element of title,[38] it later came to be looked upon as synonymous with title itself, and consequently the covenant of seizin was considered a covenant for title.[39] In some of the United States, however, it is construed as a covenant of actual, as contradistinguished from legal, seizin, and it is held that it is not necessary that the covenantor should have a seizin under an indefeasible title. A seizin in fact is sufficient, whether the covenantor gained it by his own disseizin, or whether he was in under a disseizor. In the view of the courts of such states he was sufficiently seized and had full right to convey, if, at the time he executed the deed, he had exclusive possession of the premises, claiming the same by a title adverse to the true owner.[40] As a corollary it follows that in these jurisdictions the cove-

North Dakota.— Bowne *v.* Wolcott, 1 N. D. 415, 418, 48 N. W. 336.

Ohio.— Wetzell *v.* Richcreek, 53 Ohio St. 62, 68, 40 N. E. 1004.

Tennessee.— Curtis *v.* Brannon, 98 Tenn. 153, 156, 38 S. W. 1073; Park *v.* Cheek, 4 Coldw. 20, 27; Recohs *v.* Younglove, 8 Baxt. 385, 387; Kincaid *v.* Brittain, 5 Sneed 119, 121.

England.— Howell *v.* Richards, 11 East 633, 642, 11 Rev. Rep. 287.

A covenant of seizin is equivalent to a covenant to sell and convey.

Colorado.— Adams *v.* Schiffer, 11 Colo. 15, 36, 17 Pac. 21, 7 Am. St. Rep. 202.

Iowa.— Brandt *v.* Foster, 5 Iowa 287, 293.

Maine.— Griffin *v.* Fairbrother, 10 Me. 91, 95; Allen *v.* Sayward, 5 Me. 227, 231, 17 Am. Dec. 221.

New York.— Rickert *v.* Snyder, 9 Wend. 416, 421.

United States.—Peters *v.* Bowman, 98 U. S. 56, 61, 25 L. ed. 91.

Compared with covenant of right to convey see Howell *v.* Richards, 11 East 633, 642, 11 Rev. Rep. 287.

Compared with and distinguished from covenant of warranty see Thompson *v.* Thompson, 19 Me. 235, 240, 36 Am. Dec. 751; Abbott *v.* Allen, 14 Johns. (N. Y.) 248, 252; Baird *v.* Goodrich, 5 Heisk. (Tenn.) 20, 23; Le Roy *v.* Beard, 8 How. (U. S.) 451, 465, 12 L. ed. 1151.

Distinguished from covenant against encumbrances see Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, 439, 19 Am. Dec. 139.

Distinguished from covenant for quiet enjoyment see Abbott *v.* Allen, 14 Johns. (N. Y.) 248, 252.

38. Rawle Cov. § 38.

39. Howell *v.* Richards, 11 East 633, 642, 11 Rev. Rep. 287. See also the following cases:

Alabama.— Lindsey *v.* Veasy, 62 Ala. 421; Anderson *v.* Knox, 20 Ala. 156.

Connecticut.— Comstock *v.* Comstock, 23 Conn. 349; Lockwood *v.* Sturdevant, 6 Conn. 373.

Illinois.— Clapp *v.* Herdman, 25 Ill. App. 509, in which it was held that the covenant implied by statute is not satisfied by an actual seizin. *Compare* Watts *v.* Parker, 27 Ill. 224.

Iowa.— Zent *v.* Picken, 54 Iowa 535, 6 N. W. 750; Van Wagner *v.* Van Nostrand, 19 Iowa 422.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Triplett *v.* Gill, 7 J. J. Marsh. 432; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

Missouri.— Evans *v.* Fulton, 134 Mo. 653, 36 S. W. 230; Cockrell *v.* Proctor, 65 Mo. 41; Murphy *v.* Price, 48 Mo. 247; Pecare *v.* Chouteau, 13 Mo. 527; Tapley *v.* Labeaume, 1 Mo. 550; Langenberg *v.* Chas. H. Heer Dry Goods Co., 74 Mo. App. 12.

Nebraska.— Real *v.* Hollister, 20 Nebr. 112, 29 N. W. 189. *Contra,* Scott *v.* Twiss, 4 Nebr. 133.

New Hampshire.— Partridge *v.* Hatch, 18 N. H. 494; Parker *v.* Brown, 15 N. H. 176 [*overruling* Breck *v.* Young, 11 N. H. 485; Willard *v.* Twitchell, 1 N. H. 177].

New Jersey.— Chapman *v.* Holmes, 10 N. J. L. 20.

New York.— Mott *v.* Palmer, 1 N. Y. 564; Nichols *v.* Nichols, 5 Hun 108; Coit *v.* McReynolds, 2 Rob. 655; McCarty *v.* Leggett, 3 Hill 134; Tanner *v.* Livingstone, 12 Wend. 83; Fitch *v.* Baldwin, 17 Johns. 161; Abbott *v.* Allen, 14 Johns. 248; Sedgwick *v.* Hollenback, 7 Johns. 376; Morris *v.* Phelps, 5 Johns. 49, 4 Am. Dec. 323; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379.

North Carolina.— See Woodard *v.* Ramsay, 9 N. C. 335.

South Carolina.— Pringle *v.* Witten, 1 Bay 256, 1 Am. Dec. 612.

Tennessee.— Woods *v.* North, 6 Humphr. 309, 44 Am. Dec. 312.

Vermont.— Downer *v.* Smith, 38 Vt. 464; Mills *v.* Catlin, 22 Vt. 98; Richardson *v.* Dorr, 5 Vt. 9; Pierce *v.* Johnson, 4 Vt. 247; Catlin *v.* Hurlburt, 3 Vt. 403.

Wisconsin.— Walker *v.* Wilson, 13 Wis. 522.

United States.—Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666; Thomas *v.* Perry, 23 Fed. Cas. No. 13,908, Pet. C. C. 49.

England.— Young *v.* Raincock, 7 C. B. 310, 13 Jur. 539, 18 L. J. C. P. 193, 62 E. C. L. 310; Gregory *v.* Mayo, 3 Keb. 744; Cookes *v.* Fowns, 1 Keb. 95, 1 Lev. 40; Gray *v.* Briscoe, Noy 142.

See 14 Cent. Dig. tit. "Covenants," § 41.

40. Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61. See also the following cases:

Illinois.—Watts *v.* Parker, 27 Ill. 224. But see Clapp *v.* Herdman, 25 Ill. App. 509, construing the statutory covenant.

Indiana.— Axtel *v.* Chase, 77 Ind. 74; Bur-

nants of seizin and of right to convey are equivalent and synonymous.[41] In all jurisdictions, however, an indefeasible seizin is required where the covenant expressly provides that the seizin is of such an estate.[42]

3. COVENANT OF RIGHT TO CONVEY.[43] The covenant of good right to convey imports only that the grantor had a right to convey, and does not imply that he had possession.[44] But in those states which have adopted the doctrine of actual seizin this covenant does not imply a warranty of absolute title, but only of actual seizin and possession.[45]

4. COVENANT AGAINST ENCUMBRANCES.[46] The covenant against encumbrances is in itself alone a covenant *in præsenti*,[47] and extends to all adverse claims and liens

ton *v.* Reeds, 20 Ind. 87; Hooker *v.* Folsom, 4 Ind. 90. But see Martin *v.* Baker, 5 Blackf. 232.

Maine.— Montgomery *v.* Reed, 69 Me. 510; Wilson *v.* Widenham, 51 Me. 566; Ginn *v.* Hancock, 31 Me. 42; Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49; Boothby *v.* Hathaway, 20 Me. 251; Wheeler *v.* Hatch, 12 Me. 389; Griffin *v.* Fairbrother, 10 Me. 91; Hacker *v.* Storer, 8 Me. 228; Cushman *v.* Blanchard, 2 Me. 266, 11 Am. Dec. 76.

Massachusetts.— Follett *v.* Grant, 5 Allen 174; Baldwin *v.* Timmins, 3 Gray 302; Raymond *v.* Raymond, 10 Cush. 134; Cornell *v.* Jackson, 3 Cush. 506; Slater *v.* Rawson, 6 Metc. 439; Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Chapel *v.* Bull, 17 Mass. 213; Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Bickford *v.* Page, 2 Mass. 455.

New Hampshire.—Breck *v.* Young, 11 N. H. 485; Willard *v.* Twitchell, 1 N. H. 177 [both *overruled* in Parker *v.* Brown, 15 N. H. 176].

Ohio.— Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004; Great Western Stock Co. *v.* Saas, 24 Ohio St. 542; Stambaugh *v.* Smith, 23 Ohio St. 584; Devore *v.* Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90; Robinson *v.* Neil, 3 Ohio 525; Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91; Kirkendall *v.* Mitchell, 14 Fed. Cas. No. 7,841, 3 McLean 144.

Origin of the rule is stated in the note to Foote *v.* Burnet, 10 Ohio 317, 327. See also CHAMPERTY AND MAINTENANCE.

The rule was criticized in Lockwood *v.* Sturdevant, 6 Conn. 373. See also Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169.

41. See cases cited *supra*, notes 37, 40.

42. *Illinois.*— Frazer *v.* Peoria County, 74 Ill. 282.

Massachusetts.— Smith *v.* Strong, 14 Pick. 128. See also Raymond *v.* Raymond, 10 Cush. 134; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249.

Missouri.— Collier *v.* Gamble, 10 Mo. 467.

New York.— Abbott *v.* Allen, 14 Johns. 248.

Vermont.— Garfield *v.* Williams, 2 Vt. 327. See also Pierce *v.* Johnson, 4 Vt. 247.

See 14 Cent. Dig. tit. "Covenants," § 41.

43. **Covenant of right to convey** is defined to be "an assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey. Black L. Dict.

The covenant of right to convey amounts to a covenant of seizin; they are synonymous. Adams *v.* Schiffer, 11 Colo. 15, 36, 17 Pac. 21, 7 Am. St. Rep. 202.

In English deeds there is sometimes inserted a covenant that the grantor has good right to convey an indefeasible estate in fee. This covenant is not usually, if ever, introduced into our deeds of conveyance, and upon the construction of covenants against encumbrances is unnecessary. Prescott *v.* Trueman, 4 Mass. 627, 630, 3 Am. Dec. 249.

44. Such a covenant is not broken by an adversary possession merely, but only by a want of legal title in the grantor such as he had a right to sell and convey. Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 432. See also Thackeray *v.* Wood, 5 B. & S. 325, 117 E. C. L. 325 [*affirmed* in 6 B. & S. 766, 118 E. C. L. 766].

The covenant relates directly to the title. Lockwood *v.* Sturdevant, 6 Conn. 373.

Capacity to convey.— This covenant has also been construed to refer to the capacity of the grantor to convey. Nash *v.* Ashton, Skin. 42, T. Jones 195.

45. Baldwin *v.* Timmins, 3 Gray (Mass.) 302; Raymond *v.* Raymond, 10 Cush. (Mass.) 134; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Willard *v.* Twitchell, 1 N. H. 177. See also *supra*, II, B, 2.

46. **Covenant against encumbrance** has been defined to be: "An assurance that the property, at the time of the ensealing and delivery of the deed, is then free from encumbrance." Sanford *v.* Wheelan, 12 Oreg. 301, 307, 7 Pac. 324.

"One which has for its object security against those rights to, or interest in, the land granted, which may subsist in third persons to the diminution in value of the estate, though consistent with the passing of the fee of the estate." Scott *v.* Twiss, 4 Nebr. 133, 137 [*quoting* 1 Bouvier L. Dict.; 2 Greenleaf Ev. § 242].

47. *Alabama.*—Sayre *v.* Sheffield Land, etc., Co., 106 Ala. 440, 18 So. 101; Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Thomas *v.* St. Paul's M. E. Church, 86 Ala. 138, 5 So. 508; Anderson *v.* Knox, 20 Ala. 156; Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669.

Arkansas.— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.—Salmon *v.* Vallejo, 41 Cal. 481; Lawrence *v.* Montgomery, 37 Cal. 183.

Colorado.— Fisk *v.* Cathcart, 3 Colo. App. 374, 33 Pac. 1004.

on the estate conveyed, whereby the same may be defeated, wholly or in part, whether the claims or liens be uncertain and contingent or otherwise.[48] Where, however, the covenant is coupled with and supplemental to the covenant for quiet enjoyment — as is usually the case in England[49] — or the covenant of warranty, it is said to become to all intents and for all purposes a covenant *in futuro*,[50] although the more reasonable view would seem to be that in its operation it is no more than a covenant against encumbrances, *in præsenti*, joined with a covenant of quiet enjoyment, or covenant of warranty, *in futuro*.[51] What will constitute a covenant against encumbrances, as well as its scope, is a question of construction, to be determined by the intention of the parties as manifested by the deed.[52] In this connection a distinction is to be observed between a covenant that the land is free from encumbrances, and one that the purchaser shall enjoy the premises free from encumbrance. In the latter case the covenant is not broken, notwithstanding the existence of encumbrances, so long as undisturbed possession is enjoyed.[53]

Connecticut.— Davis *v.* Lyman, 6 Conn. 249; Mitchell *v.* Warner, 5 Conn. 497.

Illinois.— Christy *v.* Ogle, 33 Ill. 295.

Kansas.— Scoffins *v.* Grandstaff, 12 Kan. 467; Dale *v.* Shively, 8 Kan. 276.

Maine.— Reed *v.* Pierce, 36 Me. 455, 58 Am. Dec. 761; Clark *v.* Perry, 30 Me. 148.

Massachusetts.— Kramer *v.* Carter, 136 Mass. 504; Whitney *v.* Dinsmore, 6 Cush. 124; Clark *v.* Swift, 3 Metc. 390; Chapel *v.* Bull, 17 Mass. 213; Ingersoll *v.* Jackson, 14 Mass. 109; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249.

Missouri.— Shelton *v.* Pease, 10 Mo. 473; Buren *v.* Hubbell, 54 Mo. App. 617; Winningham *v.* Pennock, 36 Mo. App. 688.

Nebraska.— Campbell *v.* McClure, 45 Nebr. 608, 63 N. W. 920; Chapman *v.* Kimble, 7 Nebr. 399.

New Hampshire.— Morrison *v.* Underwood, 20 N. H. 369.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260; Garrison *v.* Sandford, 12 N. J. L. 261; Chapman *v.* Holmes, 10 N. J. L. 20; Stewart *v.* Drake, 9 N. J. L. 139.

New York.— Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; Barlow *v.* St. Nicholas Nat. Bank, 63 N. Y. 399, 20 Am. Rep. 547.

Pennsylvania.— Cathcart *v.* Bowman, 5 Pa. St. 317; Seitzinger *v.* Weaver, 1 Rawle 377; Funk *v.* Voneida, 11 Serg. & R. 109.

Tennessee.— Robinson *v.* Bierce, 102 Tenn. 428, 52 S. W. 992, 47 L. R. A. 275; Kenney *v.* Norton, 10 Heisk. 384.

Wisconsin.— Eaton *v.* Lyman, 30 Wis. 41.

United States.— Lamb *v.* Kamm, 14 Fed. Cas. No. 8,017, 1 Sawy. 238.

See 14 Cent. Dig. tit. "Covenants," § 43.

48. Shearer *v.* Ranger, 22 Pick. (Mass.) 447. See also Williamson *v.* Hall, 62 Mo. 405.

Guaranty.— "A covenant against incumbrances in a conveyance of land is a guaranty against the existence of any charge upon it, which will compel the grantee to pay money to relieve the land." Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 293, 300, 8 N. W. 226, 37 Am. Rep. 830.

49. Rawle Cov. § 70.

50. Rawle Cov. § 73.

51. Operation when coupled with other covenant.— Carter *v.* Denman, 23 N. J. L. 260. And see the following cases:

New York.— Hall *v.* Dean, 13 Johns. 105.

Rhode Island.—Green *v.* Creighton, 7 R. I. 1.

South Carolina.— Jeter *v.* Glenn, 9 Rich. 374; Grice *v.* Scarborough, 2 Speers 649, 42 Am. Dec. 391.

Vermont.— Hutchins *v.* Moody, 30 Vt. 655.

England.— Vane *v.* Barnard, Gilb. 6, 25 Eng. Reprint 5; Griffith *v.* Harrison, 4 Mod. 249 (but see this case as reported in 1 Salk. 196, 197, Skin. 397, from which it appears that the court also took exception to the assignment of breach, "for that the plaintiff did not shew a disturbance in the enjoyment, or other special damnification, without which the rent being behind, is not a breach of the covenant").

See 14 Cent. Dig. tit. "Covenants," § 43.

52. See, generally, Hall *v.* Allis, 73 Conn. 238, 47 Atl. 114, 362; Cole *v.* Lee, 30 Me. 392; Milot *v.* Reed, 11 Mont. 568, 29 Pac. 343; Stanard *v.* Eldridge, 16 Johns. (N. Y.) 254.

The covenant "ought to be liberally construed, so as to extend to all claims and liens, whether contingent or not." Shearer *v.* Ranger, 22 Pick. (Mass.) 447, 448. See also Duffy *v.* Sharp, 73 Mo. App. 316.

An exception as to encumbrances to a certain amount binds the covenantor to pay any encumbrance then on the premises, in excess of the sum named. Baring *v.* Bohn, 64 Ill. App. 196. See also Reagle *v.* Dennis, 8 Kan. App. 151, 55 Pac. 469.

Joint and several encumbrances.— Where grantors covenant generally against encumbrances made by them, it may be construed as extending to several as well as joint encumbrances. Duvall *v.* Craig, 2 Wheat. (U. S.) 45, 4 L. ed. 180. See also Merriton's Case, Latch 161, Noy 86, Poph. 200.

53. Vane *v.* Barnard, Gilb. Cas. 6, 25 Eng. Reprint 5. And see, generally, as to this distinction, the following cases:

Alabama.— Hogan *v.* Calvert, 21 Ala. 194.

Connecticut.— Lathrop *v.* Atwood, 21 Conn.

5. Covenant For Quiet Enjoyment. The covenant for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbance thereupon.[54] In its operation and effect it is practically identical with the covenant of warranty, and extends to all lawful, outstanding, adverse claims upon the premises conveyed.[55] This covenant is to be construed according to the true intention of the parties to the deed.[56]

117; Booth *v.* Starr, 1 Conn. 244, 6 Am. Dec. 233.

Maine.— Gennings *v.* Norton, 35 Me. 308; Gardner *v.* Niles, 16 Me. 279.

Maryland.— Dorsey *v.* Dashiell, 1 Md. 198.

Massachusetts.— Williams *v.* Fowle, 132 Mass. 385; Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341; Boynton *v.* Dalrymple, 16 Pick. 147; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249.

Michigan.— S. C. Hall Lumber Co. *v.* Gustin, 54 Mich. 624, 20 N. W. 616.

Missouri.— Shelton *v.* Pease, 10 Mo. 473.

Nebraska.— Hartley *v.* Gregory, 9 Nebr. 279, 2 N. W. 878.

New Jersey.—Sparkman *v.* Gove, 44 N. J. L. 252.

New York.— Terrett *v.* Brooklyn Imp. Co., 87 N. Y. 92; Trinity Church *v.* Higgins, 48 N. Y. 532; Gilbert *v.* Wiman, 1 N. Y. 550, 49 Am. Dec. 359; Cady *v.* Allen, 22 Barb. 388; McGee *v.* Roen, 4 Abb. Pr. 8; Churchill *v.* Hunt, 3 Den. 321; Aberdeen *v.* Blackmar, 6 Hill 324; Thomas *v.* Allen, 1 Hill 145; Webb *v.* Pond, 19 Wend. 423; Mann *v.* Eckford, 15 Wend. 502; Chace *v.* Hinman, 8 Wend. 452, 24 Am. Dec. 39; *In re* Negus, 7 Wend. 499; Jackson *v.* Port, 17 Johns. 479.

Pennsylvania.— Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375.

England.— Lethbridge *v.* Mytton, 2 B. & Ad. 772, 9 L. J. K. B. O. S. 330, 22 E. C. L. 323; Holmes *v.* Rhodes, 1 B. & P. 638; Abbots *v.* Johnson, 3 Bulstr. 233; Norwich *v.* Bradshaw, Cro. Eliz. 53; Hodgson *v.* Wood, 2 H. & C. 649, 10 Jur. N. S. 591, 33 L. J. Exch. 76; Griffith *v.* Harrison, 1 Salk. 196; Cutler *v.* Southern, 1 Saund. 116; Farquhar *v.* Morris, 7 T. R. 124; Hodgson *v.* Bell, 7 T. R. 97; Martin *v.* Court, 2 T. R. 640; Toussaint *v.* Martinnante, 2 T. R. 100.

Canada.— Leeming *v.* Smith, 25 Grant Ch. 256.

See 14 Cent. Dig. tit. "Covenants," § 43.

54. Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287. See also Moore *v.* Weber, 71 Pa. St. 429, 10 Am. Rep. 708; Bouvier L. Dict. [*quoted* in Kane *v.* Mink, 64 Iowa 84, 86, 19 N. W. 852].

This covenant is also said to be "an assurance consequent upon a defective title" (Poposkey *v.* Munkwitz, 68 Wis. 322, 327, 32 N. W. 35, 60 Am. Rep. 858 [*citing* Rawle Cov. 125]); "a covenant for possession" (Price *v.* Deal, 90 N. C. 290, 294), "one of the covenants for title in a conveyance" (Poposkey *v.* Munkwitz, 68 Wis. 322, 327, 32 N. W. 35, 60 Am. Rep. 858 [*citing* Rawle Cov. 17]).

A covenant to indemnify and save harmless from all demands, dues, and damages which might arise on account of a certain mortgage of land is tantamount to a covenant for quiet enjoyment against the mortgage. Van Slyck *v.* Kimball, 8 Johns. (N. Y.) 198.

Where a party covenants against himself and those claiming under him he excludes the idea of a covenant against all the world. Morris *v.* Harris, 9 Gill (Md.) 19.

What will and what will not constitute a covenant for quiet enjoyment is a question dependent upon the true intention of the parties as shown by the whole instrument. Ingersoll *v.* Hall, 30 Barb. (N. Y.) 392; Midgett *v.* Brooks, 34 N. C. 145, 55 Am. Dec. 405; Moffit *v.* Coffin, 3 Oreg. 426; Lamb *v.* Starr, 14 Fed. Cas. No. 8,022, Deady 447.

55. Equivalent to covenant of warranty.— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Mitchell *v.* Warner, 5 Conn. 497; Bostwick *v.* Williams, 36 Ill. 65, 85 Am. Dec. 385; Athens *v.* Nale, 25 Ill. 195; Rea *v.* Minkler, 5 Lans. (N. Y.) 196; Fowler *v.* Poling, 2 Barb. (N. Y.) 303; Howard *v.* Doolittle, 3 Duer (N. Y.) 464.

A distinction has been made that in a covenant of quiet enjoyment the eviction is merely required to be of lawful right, while the covenant of warranty relates to the title, and the eviction must not only be of lawful right but by paramount title. Fowler *v.* Poling, 6 Barb. (N. Y.) 165.

56. Calvert *v.* Sebright, 15 Beav. 156. See also Evans *v.* Vaughan, 4 B. & C. 261, 6 D. & R. 349, 3 L. J. K. B. O. S. 217, 28 Rev. Rep. 250, 10 E. C. L. 571.

The word "default" will include quit rents in arrear before and at the time of a conveyance, although it is not shown that the rent accrued during the time the vendor held the estate. Howes *v.* Brushfield, 3 East 491. But see Sugden Vend. (8th Am. ed.) 602. *Compare* Cavan *v.* Pulteney, 2 Ves. Jr. 544, 3 Ves. Jr. 384, 30 Eng. Reprint 768.

The words "acts" and "means" import something done by the person against whose acts the covenant is made. Sugden Vend. (8th Am. ed.) 602 [*citing* Spencer *v.* Marriott, 1 B. & C. 457, 2 D. & R. 665, 1 L. J. K. B. O. S. 134, 25 Rev. Rep. 453, 8 E. C. L. 195].

A covenant against the lawful claims and demands of all persons, claiming by, through, or under the grantor, in a quitclaim deed, will not include taxes assessed against a prior mortgagor in possession under a mortgage in which the grantor was the mortgagee; nor taxes assessed against such mortgagor after he had quitclaimed his equity of redemption to the grantor, the mortgagee, if at the same time, and as part of the same transaction, he took back an agreement for a reconveyance to himself, in one year, upon payment of a

6. Covenant For Further Assurance.[57] The covenant for further assurance[58] relates both to the title of the vendor and to the instrument of conveyance to the

sum named, and remained in possession during that time as equitable owner. West *v.* Spaulding, 11 Metc. (Mass.) 556. See also Ingalls *v.* Cooke, 21 Iowa 560; Rundell *v.* Lakey, 40 N. Y. 513.

57. Covenant for further assurance is an undertaking, in the form of a covenant, on the part of the vendor of real estate to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require. Black L. Dict.

58. Cochran *v.* Pascault, 54 Md. 1. See also Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163; Lamb *v.* Burbank, 2 Fed. Cas. No. 8,012, 1 Sawy. 227; Davis *v.* Tollemache, 2 Jur. N. S. 1181.

Its object is to give full effect and operation to the estate and interest conveyed by the deed (Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163), but it cannot enlarge that estate or interest (Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340).

The effect of the covenant is that the grantor binds himself and his heirs to make all such further assurances of the land as shall be lawfully and reasonably required by the grantee, or his heirs. Davis *v.* Tarwater, 15 Ark. 286.

There is an element of mutuality in this covenant. Cochran *v.* Pascault, 54 Md. 1.

A release of a mortgage is a further assurance. Colby *v.* Osgood, 29 Barb. (N. Y.) 339.

The mode of procedure is dependent upon the form of the covenant. Thus where the covenant was "to make such assurance as his counsel should advise," it was held that if the covenantee himself devised the assurance, and made it, the covenantor was not bound to perform it and that it was a good plea that *concilium non dedit advisamentum* (Bennet's Case, Cro. Eliz. 9. See also Lamb's Case, 5 Coke 23*b*; Rosewel's Case, 5 Coke 19*b*; Cro. Eliz. 297); but where the covenant is to execute a deed to the satisfaction of the covenantee's counsel, the covenantor must tender the deed (Baker *v.* Bulstrode, 2 Danv. 39, 3 Keb. 273, 2 Lev. 95, 1 Mod. 104, T. Raym. 232, 1 Vent. 255). In the ordinary course of business the draft of the intended assurance is sent to the seller for his perusal, and to enable him to take counsel's advice upon it (Sugden Vend. (8th Am. ed.) 614), and if the assurance is to be made at the cost of the covenantee, he is bound to tender it before he can call upon the covenantor to make the assurance (Heron *v.* Treyne, 2 Ld. Raym. 750. See also Hallings *v.* Connard, Cro. Eliz. 517).

The covenantee must give notice of the assurance, specifying its nature (Miller *v.* Parsons, 9 Johns. (N. Y.) 336), for otherwise the covenantor would not know his counsel or their advice (Bennet's Case, Cro. Eliz. 9). On the other hand, if the particular assurance is not ascertained, the covenantor must give the covenantee notice what assurance he will make. Heron *v.* Treyne, 2 Ld. Raym. 750.

Advice of counsel.— In Bennet's Case, Cro. Eliz. 9, it was held that the covenantee is not only to show the covenantor the assurance that he is to make, but is to permit him to read it, and to go to his own counsel to consider it; and the covenantor is to have convenient time after the assurance shown him to perfect it. *Compare* Manser's Case, 2 Coke 3*a*. See also Andrews *v.* Eddon, And. 122; Wotton *v.* Cooke, Dyer 337*b*. And see Symms *v.* Smith, Cro. Car. 299.

Requisites of act.— The act required to be done must be necessary (Warn *v.* Bickford, 9 Price 43. See also Gwynn *v.* Thomas, 2 Gill & J. (Md.) 420); it must be lawful (Heath *v.* Crealock, L. R. 10 Ch. 22, 44 L. J. Ch. 157, 31 L. T. Rep. N. S. 650. See also Johnson *v.* Nott, 1 Vern. Ch. 271); it must be reasonable (Pet's Case, 1 Leon. 304); and the request must be made within a time in which the act is possible of performance (Nash *v.* Ashton, Skin. 42, T. Jones 195). The assurance must be reasonably devised and must not differ from the nature and purport of the original bargain. Miller *v.* Parsons, 9 Johns. (N. Y.) 336.

Removal of encumbrances.— Under a covenant for further assurance a purchaser may of course require the removal of a judgment or other encumbrances. Sugden Vend. (8th Am. ed.) 613 [*citing* King *v.* Jones, 1 Marsh. 107, 5 Taunt. 427, 15 Rev. Rep. 533, 1 E. C. L. 219; Stock *v.* Aylward, 8 Ir. Ch. 429]. See also Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163. This proposition must, however, be limited to those cases in which the covenants for title are not limited or restrained either by the acts of the vendor or by the particular estate conveyed. Where the other covenants are limited to the acts of the vendor, or restrained by any particular estate, the purchaser will have no right under the covenant for further assurance to require the conveyance of any other estate, or the removal of an encumbrance not created by the vendor. Rawle Cov. §§ 104, 105 [*citing* Armstrong *v.* Darby, 26 Mo. 517; Colby *v.* Osgood, 29 Barb. (N. Y.) 339; Davis *v.* Tollemache, 2 Jur. N. S. 1181, *explaining* Taylor *v.* Dabar, 1 Ch. Cas. 274, 2 Ch. Cas. 212; Smith *v.* Baker, 1 Y. & Coll. Ch. 223, 20 Eng. Ch. 223, and *criticizing* Sugden Vend. (14th ed. (8th Am. ed.) 612)]. See also Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340, where it is said that the covenant applies only to the estate granted.

The statutory covenant for further assurance implied in the words "grant, bargain, and sell," embraces such encumbrances only as the vendor has control of. Armstrong *v.* Darby, 26 Mo. 517.

Duplicate of conveyance.— Under a covenant of further assurance it seems that the purchaser may require a duplicate of his con-

vendee, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter. No technical words are required to create this covenant.[59]

7. Covenant of Warranty[60] — a. In General. The covenant of warranty in general use throughout the United States, although in the same language as the common-law warranty, is entirely distinct therefrom both in nature and effect. Warranty[61] was in its nature essentially real, and was only applicable to estates of

veyance. Napper *v.* Allington, 1 Eq. Cas. Abr. 166, 21 Eng. Reprint 962.

Production of deeds.— If a vendor retains the title-deeds, and covenants for further assurance only, the purchaser may under that covenant compel him to enter into a covenant for the production of the deeds. Fain *v.* Ayers, 4 L. J. Ch. O. S. 166, 2 Sim. & St. 533, 25 Rev. Rep. 264, 1 Eng. Ch. 533. But see Hallett *v.* Middleton, 1 Russ. 243, 46 Eng. Ch. 243.

The assignees in bankruptcy of a tenant in tail who has made a mortgage, with covenant for further assurance, are bound by the covenant. Pye *v.* Danbuz, 3 Bro. Ch. 595, 29 Eng. Reprint 719.

59. Davis *v.* Tarwater, 15 Ark. 286. See also Wholey *v.* Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Smith *v.* Brannan, 13 Cal. 107. And see *supra*, I, A, 1, a.

A covenant that if the grantors obtain title from the United States they will convey the same to the grantees by deed of general warranty is a covenant for further assurance, entitling the grantees to a conveyance of the legal title when the contingency happens (Lamb *v.* Burbank, 14 Fed. Cas. No. 8,012, 1 Sawy. 227), but it does not cover the acquisition of the title of the United States from any intermediate party (Davenport *v.* Lamb, 13 Wall. (U. S.) 418, 20 L. ed. 655. *Contra*, Hope *v.* Stone, 10 Minn. 141).

60. **A covenant of warranty has been defined** to be: "A contract by which the grantor of land undertakes to protect the land granted from all lawful claims and demands existing at the time of the grant." King *v.* Kilbride, 58 Conn. 109, 116, 19 Atl. 519 [*citing* Mitchell *v.* Warner, 5 Conn. 497; Booth *v.* Starr, 1 Conn. 244, 6 Am. Dec. 233; Rawle Cov. (4th ed.) 334].

"A covenant to defend." Williams *v.* Wetherbee, 1 Aik. (Vt.) 233, 241 [*quoted* in Kramer *v.* Carter, 136 Mass. 504, 508].

Distinguished from covenant of seizin see Norman *v.* Wells, 17 Wend. (N. Y.) 136, 160; Kincaid *v.* Brittain, 5 Sneed (Tenn.) 119, 125.

Distinguished from seizin and right to convey see Allison *v.* Allison, 1 Yerg. (Tenn.) 16.

61. *Kentucky.*— Booker *v.* Bell, 3 Bibb 173, 6 Am. Dec. 641.

Massachusetts.— Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

New Jersey.— Chapman *v.* Holmes, 10 N. J. L. 20.

New York.—Townsend *v.* Morris, 6 Cow. 123.

North Carolina.— Rickets *v.* Dickens, 5 N. C. 343, 4 Am. Dec. 555.

Ohio.— Foote *v.* Burnet, 10 Ohio 317 note.

Pennsylvania.— Jourdan *v.* Jourdan, 9 Serg. & R. 268, 11 Am. Dec. 724; Paxson *v.* Lefferts, 3 Rawle 59.

Tennessee.— Allison *v.* Allison, 1 Yerg. 16.

Virginia.— Tabb *v.* Binford, 4 Leigh 132, 26 Am. Dec. 317; Stout *v.* Jackson, 2 Rand. 132.

West Virginia.— Rex *v.* Creel, 22 W. Va. 373.

England.—Williams *v.* Burrell, 1 C. B. 402, 9 Jur. 282, 14 L. J. C. P. 98, 50 E. C. L. 402; Pincombe *v.* Rudge, Hob. 3*g*, Noy 131, Yelv. 139; Williamson *v.* Codrington, 1 Ves. 511, 27 Eng. Reprint 1174.

See 14 Cent. Dig. tit. "Covenants," § 46.

"Warrant was a technical term, having its own peculiar signification, and without the use of which, the contract, imported by that term, could not be created, unless in cases in which the law implied the contract. Co. Litt. 384, a. The import of the word, when applied to freehold estates, was 'that the warrantor would, upon voucher, or by judgment in a writ of *warrantia chartæ*, yield other lands and tenements to the value of those that shall be evicted by a former title.' Ibid. 365, a, and 366, a. The contract to warrant had the same effect in all respects, as if the party had contracted in the terms of this definition, if such a contract were allowed, and the specific execution of it could be enforced. Co. Litt. 366, a; Ibid. 389, a. Such a contract was not permitted in relation to any interest, other than freehold, because no other interest could be claimed in a real action; and voucher lay in none but real actions, except in cases of wardship. Co. Litt. 101, b. The writ of *warrantia chartæ* also lay only for a tenant of the freehold, and was only used when voucher did not lie, because the tenant was not impleaded, or because he was impleaded in an action in which it was the policy of the law to prohibit delay, and therefore forbid the voucher; and it lay in such cases, only because the voucher did not lie. Vin. Abr. tit. Warr. Char. D. It was then supplementary to, and in lieu of, voucher. If the word warrant was applied to chattel interests or personal property, it operated as a personal covenant for the title, not because such was its strict technical meaning, but because, although improperly used, (as it could not have its technical effect, and the parties intended that it should have some effect), it must have that of a personal covenant, or none. This recovery in value, could only be had upon voucher or *warrantia chartæ*, its substitute, and only in lands or tenements; and if the warrantor had no lands or tenements at the time of his entering into warranty, (that is,

freehold, and then only when the disturbance was by an estate of freehold; although it seems that in order to prevent a failure of justice it might be construed as a personal covenant, where it could not operate as a covenant real. On the other hand the covenant of warranty[62] is, in its nature, altogether personal, and

appearing on the voucher, and taking upon himself to warrant by defending the suit,) or, at the time of suing out the writ of *warrantia chartæ*; or, if the tenant failed to vouch, or to sue out his *warrantia chartæ* before he was evicted, he was wholly without remedy upon his warranty. Bac. Abr. tit. Warranty, M.; a proof, that it had in no case the effect of a personal covenant. There is, however, one case mentioned in Coke Littleton, 102, b, in which the warrantor might be personally responsible in some form. But, if he was, it was on account of his wrong in voluntarily defeating the effect of his warranty, by alienating the lands which he had specially bound to warranty." Per Green, J., in Stout *v.* Jackson, 2 Rand. (Va.) 132, 142.

Covenant did not lie upon eviction of freehold.— Bacon Abr. tit. Covenant (C).

62. Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. (N. Y.) 36. See also Booker *v.* Bell, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; Chapman *v.* Holmes, 10 N. J. L. 20.

As to running with the land see *infra*, II, D.

"**The term warrant**, as applied to real estate in that country [England], having obtained a technical and legal signification derived from feudal principles; I do not perceive the necessity, so far as regards the remedy or form of action, of understanding the term in the same sense, when used here. If effect is given to such a covenant by action to recover damages, as on a warranty of things personal, I apprehend no principle of law will be violated. Such a construction will, no doubt, correspond with the intention of the parties; while the ancient remedy is inconsistent with what must be supposed to be the intent." Townsend *v.* Morris, 6 Cow. (N. Y.) 123, 127.

Covenant of warranty relates only to the title, and does not warrant the quantity of land stated in it (Huntley *v.* Waddell, 34 N. C. 32; Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028), or pass any estate, or enlarge or restrict the estate conveyed (West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97).

Other covenants, except for quiet enjoyment, are not embraced in the covenant of warranty.

Maine.— Griffin *v.* Fairbrother, 10 Me. 91.

Mississippi.— Witty *v.* Hightower, 12 Sm. & M. 478.

Missouri.— State Sav. Bank *v.* Gregg, 67 Mo. App. 303.

New Hampshire.— Reed *v.* Hatch, 55 N. H. 327.

New York.— Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. 36; Blydenburgh *v.* Cotheal, 1 Duer 176; Greenvault *v.* Davis, 4 Hill 643; Vanderkarr *v.* Vanderkarr, 11 Johns. 122.

Pennsylvania.—Stewart *v.* West, 14 Pa. St. 336; Patton *v.* McFarlane, 3 Penr. & W. 419; Clarke *v.* McAnulty, 3 Serg. & R. 364.

Tennessee.— Allison *v.* Allison, 1 Yerg. 16; Randolph *v.* Meeks, Mart. & Y. 58; Crutcher *v.* Stump, 5 Hayw. 100. *Contra*, Talbot *v.* Bedford, Cooke 447.

Virginia.— Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909.

Contra, by statute, in Georgia, Iowa, and Kentucky, and independently of statute, in South Carolina, in which the covenant of warranty is held to embrace all the usual common-law covenants, save possibly that for further assurance. Godwin *v.* Maxwell, 106 Ga. 194, 32 S. E. 114; A. P. Brantley Co. *v.* Johnson, 102 Ga. 850, 29 S. E. 486; Burk *v.* Burk, 64 Ga. 632; Funk *v.* Creswell, 5 Iowa 62; Smith *v.* Jones, 97 Ky. 670, 31 S. W. 475, 17 Ky. L. Rep. 456; Pryse *v.* McGuire, 81 Ky. 608; Butt *v.* Riffe, 78 Ky. 352; Evans *v.* McLucas, 12 S. C. 56; Welsh *v.* Kibler, 5 S. C. 405; Faries *v.* Smith, 11 Rich. (S. C.) 80; Jeter *v.* Glenn, 9 Rich. (S. C.) 374; Mackey *v.* Collins, 2 Nott & M. (S. C.) 186, 10 Am. Dec. 586; Sumpter *v.* Welsh, 2 Bay (S. C.) 558; Bell *v.* Huggins, 1 Bay (S. C.) 326; Pringle *v.* Witten, 1 Bay (S. C.) 256, 1 Am. Dec. 612.

See 14 Cent. Dig. tit. "Covenants," § 46.

Only claims and suits based on a legal foundation are protected against by the covenant. Adverse claims or suits for which the grantor is not responsible are not included. Thorne *v.* Clark, 112 Iowa 548, 84 N. W. 701, 84 Am. St. Rep. 356.

Easements not appurtenant to the land are not within the general covenant. George *v.* Robison, 23 Utah 79, 63 Pac. 819.

"**In the United States**, however, the Warranty, has been converted altogether into a personal covenant." Foote *v.* Burant, 10 Ohio 317, 329 note.

Distinguished from common-law warranty. — See Bricker *v.* Bricker, 11 Ohio St. 240.

Whenever there is a departure from the form of real warranty as found in the books, from which to infer a change of contract, it must be considered a personal covenant, whether executors are named or not, and although the heirs are named. Tabb *v.* Binford, 4 Leigh (Va.) 132, 26 Am. Dec. 317.

The addition of the word "defend" has been held to differentiate the covenant of warranty from warranty, and to render the former personal, or rather of a double character, the word "warrant" being construed technically, so as to bind the warrantor to compensate in lands or tenements of equal value, upon voucher, or *warrantia chartæ*; the word "defend" being construed as making a personal covenant equivalent to a covenant for quiet enjoyment. Stout *v.* Jackson, 2 Rand. (Va.) 132 [*citing* Williamson *v.* Codrington, 1 Ves. 511, 27 Eng. Reprint 1174;

is an assurance that the grantee and his heirs and assigns shall not be deprived of the possession by force of a paramount title; it runs with the land, and passes with the fee to any subsequent grantee of the same title. In effect it is to all intents and purposes identical with the covenant for quiet enjoyment,[63] although the distinction has been drawn that the latter is to defend the possession merely, while the covenant of warranty is in addition an undertaking to defend the land and the estate in it.[64] On the other hand it has been said that under the covenant for quiet enjoyment, as sometimes expressed, a recovery may be had where it would be denied under the covenant of warranty.[65] As with the other covenants of title, no technical words are indispensable to a covenant of warranty.[66]

b. General Warranty. The obligation in a general warranty of title is not that the covenantor is the true owner, or that he is seized in fee, with the right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons thereafter asserted.[67]

Viner Abr. Voucher B, pl. 6]. See also Tabb *v.* Binford, 4 Leigh (Va.) 132, 26 Am. Dec. 317.

63. *Alabama.*— Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36.

Arkansas.— See Logan *v.* Moulder, 1 Ark. 313, 320, 33 Am. Dec. 338.

Illinois.— Bostwick *v.* Williams, 36 Ill. 65, 85 Am. Dec. 385; Athens *v.* Nale, 25 Ill. 195.

Massachusetts.— See Kramer *v.* Carter, 136 Mass. 504, 508.

Michigan.— Peck *v.* Houghtaling, 35 Mich. 127.

Nebraska.— Real *v.* Hollister, 20 Nebr. 112, 114, 29 N. W. 189 [*citing* 4 Kent Comm. 471].

New Hampshire.— Reed *v.* Hatch, 55 N. H. 327.

New York.— Rea *v.* Minkler, 5 Lans. 196; Fowler *v.* Poling, 2 Barb. 300, 6 Barb. 165.

Tennessee. — See Kincaid *v.* Brittain, 5 Sneed 119, 124.

Virginia.— Dickinson *v.* Hoomes, 8 Gratt. 353.

United States.—Wright *v.* Phipps, 90 Fed. 556.

See 14 Cent. Dig. tit. "Covenants," § 46.

64. Russ *v.* Steele, 40 Vt. 310; Williams *v.* Wetherbee, 1 Aik. (Vt.) 233; Drury *v.* Shumway, 1 D. Chipm. (Vt.) 110, 1 Am. Dec. 704; West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97.

65. Rawle Cov. § 114 [*citing* Dobbins *v.* Brown, 12 Pa. St. 75, "in which a recovery was denied upon the covenant of warranty, though it is evident that had the covenant been one for quiet enjoyment the plaintiff must have recovered"].

"Whatever may be the true doctrine, it is far safer, to say the least, to plead the covenant according to the form of it in the deed, and leave the effect to be eventually ascertained, without raising any embarrassing question of variance." Peck *v.* Houghtaling, 35 Mich. 127, 131.

66. The intention of the parties, as shown by the deed and the circumstances surrounding its execution, determines whether a covenant of warranty is embraced in the deed. Wheeler *v.* Wayne County, 132 Ill. 599, 24 N. E. 625; Kerngood *v.* Davis, 21 S. C. 183; Little *v.* Allen, 56 Tex. 133; Everts *v.* Brown, 1 D. Chipm. (Vt.) 96, 1 Am. Dec. 699.

Whether warranty or quitclaim.— Where there is a clear intention apparent on the face of the deed to convey the land itself, and not merely the grantor's right, title, and interest in the land, the deed will be construed as a warranty, and not a quitclaim deed. Kempner *v.* Beaumont Lumber Co., 20 Tex. Civ. App. 307, 49 S. W. 412. See also Garrett *v.* Christopher, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850.

67. West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97. See also Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Burk *v.* Burk, 64 Ga. 632; Wade *v.* Comstock, 11 Ohio St. 71; Bender *v.* Fromberger, 4 Dall. (Pa.) 441, 443, 1 L. ed. 901.

"A general warranty, in its nature, is a covenant real, which runs with the land conveyed, descends to heirs, and vests in assignees." Mitchell *v.* Warner, 5 Conn. 497, 517 [*citing* Coke Litt. 365*a*; Comyns Dig. tit. Guaranty; 3 Cruise Dig. p. 49, § 1]; Bender *v.* Fromberger, 4 Dall. (Pa.) 441, 443, 1 L. ed. 901.

State included.— A deed containing a general covenant of warranty includes a warranty against the state.

California.— McGary *v.* Hastings, 39 Cal. 360, 2 Am. Rep. 456.

Iowa.— Meservey *v.* Snell, 94 Iowa 222, 62 N. W. 767, 58 Am. St. Rep. 391.

Kansas.—Herrington *v.* Clark, 56 Kan. 644, 44 Pac. 624; Kansas Pac. R. Co. *v.* Dunmeyer, 19 Kan. 539; State *v.* Herold, 9 Kan. 194.

Mississippi.— Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

New Hampshire. — Loomis *v.* Bedel, 11 N. H. 74.

New York.— Honduras *v.* Soto, 112 N. Y. 310, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642.

Texas.— Martin *v.* State, 24 Tex. 61.

Washington.— West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97.

See 14 Cent. Dig. tit. "Covenants," § 47.

c. Special Warranty. A covenant of warranty is special when it applies only to certain persons or claims to which its operation is limited or restricted, its usual form being a warranty against the grantor and all persons claiming by, through, or under him.[68] It is well settled that such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by title acquired subsequent to the making of his own deed.[69]

C. Covenants as to Use of Real Property — 1. In General. Covenants restraining the use of real property, although not favored,[70] will nevertheless be enforced by the courts, where the intention of the parties is clear in their creation, and the restrictions or limitations are confined within reasonable bounds;[71] but where there has been such a change in conditions as to defeat the object and purpose of the covenant, and to render it inequitable to deprive the covenantor of the privilege of using his property as the new conditions require, equity will not enforce specific performance.[72] In construing such covenants effect is to be given

Where a grantor conveys with "warranty" only, the covenant will be regarded as a "general warranty," since a covenant in a deed must be construed most strongly against the grantor. Allen *v.* Yeater, 17 W. Va. 128.

68. Sanders *v.* Betts, 7 Wend. (N. Y.) 287; Western Min., etc., Co. *v.* Peytonia Cannel Coal Co., 8 W. Va. 406; Buckner *v.* Street, 15 Fed. 365, 5 McCrary 59.

Liability of devisees.— Under a conveyance containing only special warranties, the responsibility of the grantor's devisees is dependent upon and limited by the covenants contained in the conveyances, by which he was not to be answerable for any losses which might occur from the assertion of a title superior to his own. Gittings *v.* Worthington, 67 Md. 139, 9 Atl. 228.

Such a covenant cannot be extended to a general covenant of warranty against all persons; and the rule is that a party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the transaction. Buckner *v.* Street, 15 Fed. 365, 5 McCrary 59.

69. *California.*— Gee *v.* Moore, 14 Cal. 472.

Massachusetts.— Doane *v.* Willcutt, 5 Gray 328, 66 Am. Dec. 369; Trull *v.* Eastman, 3 Metc. 121, 37 Am. Dec. 126; Comstock *v.* Smith, 13 Pick. 116, 23 Am. Dec. 670.

New Hampshire.— Bell *v.* Twilight, 26 N. H. 401.

New York.— Jackson *v.* Peek, 4 Wend. 300.

West Virginia.—Western Min., etc., Co. *v.* Peytonia Cannel Coal Co., 8 W. Va. 406.

United States.— Davenport *v.* Lamb, 13 Wall. 418, 20 L. ed. 655; Lamb *v.* Burbank, 14 Fed. Cas. No. 8,012, 1 Sawy. 227; Lamb *v.* Kamm, 14 Fed. Cas. No. 8,017, 1 Sawy. 238.

See 14 Cent. Dig. tit. "Covenants," § 48.

70. Hutchinson *v.* Ulrich, 145 Ill. 336, 342, 34 N. E. 556, 21 L. R. A. 391.

"It is contrary to the well recognized business policy of the country to tie up real estate where the fee is conveyed, with restrictions and prohibitions as to its use." Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687.

71. *California.*—Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308.

Illinois.— Hutchinson *v.* Ulrich, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391.

Massachusetts.—Chase *v.* Walker, 167 Mass. 293, 45 N. E. 916; Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715.

New Jersey.— Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Grigg *v.* Landis, 21 N. J. Eq. 494; Evans *v.* Mary A. Riddle Co., (Ch. 1899) 43 Atl. 849.

New York.— Columbia College *v.* Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Atlantic Dock Co. *v.* Libby, 45 N. Y. 499; Uihlein *v.* Matthews, 57 N. Y. App. Div. 476, 68 N. Y. Suppl. 309; Hurley *v.* Brown, 44 N. Y. App. Div. 480, 60 N. Y. Suppl. 846; Levy *v.* Schreyer, 27 N. Y. App. Div. 282, 50 N. Y. Suppl. 584 [*reversing* 19 Misc. 227, 43 N. Y. Suppl. 199]; Atlantic Dock Co. *v.* Leavitt, 50 Barb. 135; Amerman *v.* Dean, 57 N. Y. Super. Ct. 175, 6 N. Y. Suppl. 542; Roberts *v.* Levy, 3 Abb. Pr. N. S. 311; Barrow *v.* Richard, 8 Paige 351, 25 Am. Dec. 713.

Pennsylvania.— Meigs *v.* Milligan, 177 Pa. St. 66, 35 Atl. 600.

Rhode Island.— Greene *v.* Creighton, 7 R. I. 1.

England.—Western *v.* Macdermott, L. R. 2 Ch. 72, 36 L. J. Ch. 76, 15 L. T. Rep. N. S. 64, 15 Wkly. Rep. 265 [*affirming* L. R. 1 Eq. 499, 12 Jur. N. S. 366, 35 L. J. Ch. 190]; Mitchell *v.* Steward, L. R. 1 Eq. 541, 35 L. J. Ch. 393, 14 Wkly. Rep. 453.

See 14 Cent. Dig. tit. "Covenants," § 49 *et seq.*

Where they are inserted for the benefit of other lands devoted to the same purpose and are reasonable and adapted to the purpose intended, they are held to create a servitude in favor of such other lands. Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308.

72. Page *v.* Murray, 46 N. J. Eq. 325, 19 Atl. 11; Amerman *v.* Dean, 132 N. Y. 355, 30 N. E. 741, 28 Am. St. Rep. 584 [*modifying* 57 N. Y. Super. Ct. 175, 6 N. Y. Suppl. 542, 58 N. Y. Super. Ct. 582, 15 N. Y. Suppl. 327]; Columbia College *v.* Thatcher, 87 N. Y. 311,

to the intention of the parties, as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction, and the object had in view by the parties;[73] but all doubts must be resolved in favor of natural rights and a free use of property, and against restrictions.[74]

2. Enforcement in Equity. Covenants restraining the use of real property afford an instance of that class of cases in which equity will charge the conscience of a grantee of land with an agreement relating to the land, although the agreement neither creates an easement nor runs with the land. The jurisdiction is not confined to cases in which an action at law can be maintained, and such covenants, although not binding at law, will be enforced in equity, provided the person into whose hands the land passes has taken it with notice of the covenants.[75] It must

41 Am. Rep. 365; Holt *v.* Fleishman, 37 Misc. (N. Y.) 172, 74 N. Y. Suppl. 894; Leonard *v.* Hotel Majestic Co., 17 Misc. (N. Y.) 229, 40 N. Y. Suppl. 1044; Roth *v.* Jung, 79 N. Y. Suppl. 822. See also Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308.

Change from residence to business uses.— Where lots are conveyed subject to a covenant that no buildings shall be erected thereon within fifteen feet of the street, such covenant is enforceable, although the street on which the lot abuts has changed from a residence street to a business street. Zipp *v.* Barker, 6 N. Y. App. Div. 609, 40 N. Y. Suppl. 325.

73. *New Jersey.*— Hemsley *v.* Marlborough Hotel Co., 63 N. J. Eq. 804, 52 Atl. 1132; Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Buck *v.* Backarack, 45 N. J. Eq. 557, 17 Atl. 548.

New York.— Levy *v.* Schreyer, 27 N. Y. App. Div. 282, 50 N. Y. Suppl. 584 [*reversing* 19 Misc. 227, 43 N. Y. Suppl. 199]; Ryckman *v.* Gillis, 6 Lans. 79; Porter *v.* Waring, 2 Abb. N. Cas. 230; Wright *v.* Evans, 2 Abb. Pr. N. S. 308; Schenck *v.* Campbell, 11 Abb. Pr. 292.

Pennsylvania.— St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512.

Tennessee.—Oldham *v.* Kennedy, 3 Humphr. 260.

Vermont.— Clement *v.* Putnam, 68 Vt. 285, 35 Atl. 181; Cross *v.* Frost, 64 Vt. 179, 23 Atl. 916.

England.—Long Eaton Recreation Grounds Co. *v.* Midland R. Co., 71 L. J. K. B. 74, 85 L. T. Rep. N. S. 278, 50 Wkly. Rep. 120.

See 14 Cent. Dig. tit. "Covenants," § 50.

"Tenement house."—A deed forbidding the erection upon certain premises of a tenement house is to be construed according to its ordinary sense, and not according to the definition in N. Y. Laws (1867), c. 908, § 17. Kitchings *v.* Brown, 37 Misc. (N. Y.) 439, 75 N. Y. Suppl. 768.

In cases of covenants against nuisances there can be no definite or fixed standard to control every case in any locality, the question being one of reasonableness or unreasonableness in the use of the property, which is largely dependent upon the locality and its surroundings. Gilford *v.* Babies' Hospital, 1 N. Y. Suppl. 448, 21 Abb. N. Cas. (N. Y.) 159. See also Rowland *v.* Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 [*affirming* 61 N. Y. Super. Ct. 163, 18 N. Y. Suppl. 793 (*affirming* 15 N. Y. Suppl. 701)]; Atlantic Dock Co. *v.* Libby, 45 N. Y. 499.

Dead houses, morgues, dissecting rooms, and establishments for autopsies and post mortems, or for the reception of dead bodies, are within a covenant against the use of the premises for any trade or business "injurious or offensive to the neighboring inhabitants." Rowland *v.* Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 [*affirming* 61 N. Y. Super. Ct. 163, 18 N. Y. Suppl. 792 (*affirming* 15 N. Y. Suppl. 701)].

Acts of God or of the government do not come within the meaning of covenants as to the use of property. Oldham *v.* Kennedy, 3 Humphr. (Tenn.) 260.

74. *Illinois.*— Hutchinson *v.* Ulrich, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391; Eckhart *v.* Irons, 128 Ill. 568, 20 N. E. 687.

New Jersey.—Walker *v.* Renner, 60 N. J. Eq. 493, 46 Atl. 626.

New York.—Conger *v.* New York, etc., R. Co., 120 N. Y. 29, 23 N. E. 983; Hurley *v.* Brown, 44 N. Y. App. Div. 480, 60 N. Y. Suppl. 846; Kurtz *v.* Potter, 44 N. Y. App. Div. 262, 60 N. Y. Suppl. 764 [*affirmed* in 167 N. Y. 586, 60 N. E. 1116]; Gubbins *v.* Peterson, 21 N. Y. App. Div. 241, 47 N. Y. Suppl. 685; Longworth *v.* Deane, 15 N. Y. App. Div. 461, 44 N. Y. Suppl. 433; Kitchings *v.* Brown, 37 Misc. 439, 74 N. Y. Suppl. 768; Holt *v.* Fleischman, 37 Misc. 172, 74 N. Y. Suppl. 894; Leonard *v.* Hotel Majestic Co., 17 Misc. 229, 40 N. Y. Suppl. 1044.

Pennsylvania.— Ludwig *v.* St. Andrew's Church, 28 Leg. Int. 213.

England.— Ind *v.* Hamblin, 84 L. T. Rep. N. S. 168.

75. *Massachusetts.*— Peck *v.* Conway, 119 Mass. 546; Parker *v.* Nightingale, 6 Allen 341, 83 Am. Dec. 632; Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715; Atkins *v.* Chilson, 7 Metc. 398.

New Jersey.— De Gray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388; Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Brewer *v.* Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679; Van Doren *v.* Robinson, 16 N. J. Eq. 256; Rogers *v.* Danforth, 9 N. J. Eq. 289.

New York.— Columbia College *v.* Lynch, 70

be shown, however, that the use of the land by such person for the purposes covenanted against will materially injure the premises for the benefit of which the covenant was made,[76] and that it relates to or concerns the land, or its use or enjoyment.[77] And the tendency of the later decisions, both in England and in the United States, is, it seems, to restrict rather than to extend this equitable doctrine.[78] In the absence of notice, a personal covenant imposing a burden will adhere exclusively to the covenantor, unless a privity of estate or tenure subsisted

N. Y. 440, 26 Am. Rep. 615; Tallmadge *v.* East River Bank, 26 N. Y. 105; Gilbert *v.* Peteler, 38 Barb. 488 [*affirmed* in 38 N. Y. 165, 97 Am. Dec. 785]; Brouwer *v.* Jones, 23 Barb. 153; Roberts *v.* Levy, 3 Abb. Pr. N. S. 311; Berringer *v.* Schaefer, 52 How. Pr. 69; Birdsall *v.* Tiemann, 12 How. Pr. 551; Barrow *v.* Richard, 8 Paige 351, 35 Am. Dec. 713; Hills *v.* Miller, 3 Paige 254, 24 Am. Dec. 218; Steward *v.* Winters, 4 Sandf. Ch. 588; Seymour *v.* McDonald, 4 Sandf. Ch. 502.

Ohio.— Stines *v.* Dorman, 25 Ohio St. 580; Easter *v.* Little Miami R. Co., 14 Ohio St. 48.

Pennsylvania.— Clark *v.* Martin, 49 Pa. St. 298; Coleman *v.* Coleman, 19 Pa. St. 100, 57 Am. Dec. 641.

Vermont.— Trudeau *v.* Field, 69 Vt. 446, 38 Atl. 162.

Wisconsin.— Brugman *v.* Noyes, 6 Wis. 1.

United States.—American Strawboard Co. *v.* Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634.

England.— Catt *v.* Tourle, L. R. 4 Ch. 654, 38 L. J. Ch. 665, 21 L. T. Rep. N. S. 188; Keates *v.* Lyon, L. R. 4 Ch. 218, 38 L. J. Ch. 357, 20 L. T. Rep. N. S. 255, 17 Wkly. Rep. 338; Western *v.* Macdermott, L. R. 2 Ch. 72, 36 L. J. Ch. 76, 15 L. T. Rep. N. S. 64, 15 Wkly. Rep. 265 [*affirming* L. R. 1 Eq. 499, 12 Jur. N. S. 366, 35 L. J. Ch. 190]; Carter *v.* Williams, L. R. 9 Eq. 678, 39 L. J. Ch. 560, 23 L. T. Rep. N. S. 183, 18 Wkly. Rep. 593; Bowes *v.* Law, L. R. 9 Eq. 636, 39 L. J. Ch. 483, 22 L. T. Rep. N. S. 267, 18 Wkly. Rep. 640; Feilden *v.* Slater, L. R. 7 Eq. 523; Peek *v.* Matthews, L. R. 3 Eq. 515; Clements *v.* Welles, L. R. 1 Eq. 200, 11 Jur. N. S. 991, 35 L. J. Ch. 265, 13 L. T. Rep. N. S. 548, 14 Wkly. Rep. 187; McLean *v.* McKay, L. R. 5 P. C. 327, 29 L. T. Rep. N. S. 352, 21 Wkly. Rep. 798; Bristow *v.* Wood, 1 Coll. 480, 9 Jur. 99, 14 L. J. Ch. 50, 28 Eng. Ch. 480; Piggott *v.* Stratton, 1 De G. F. & J. 33, 6 Jur. N. S. 129, 29 L. J. Ch. 1, 1 L. T. Rep. N. S. 111, 8 Wkly. Rep. 13, 62 Eng. Ch. 25; Lloyd *v.* London, etc., R. Co., 2 De G. J. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 444; Child *v.* Douglas, 5 De G. M. & G. 739, 1 Kay 560, 2 Wkly. Rep. 701, 54 Eng. Ch. 580; Coles *v.* Sims, 5 De G. M. & G. 1, 2 Eq. Rep. 951, 18 Jur. 683, 23 L. J. Ch. 258, 2 Wkly. Rep. 151, 54 Eng. Ch. 1; Wilson *v.* Hart, 2 Hem. & M. 551, 11 Jur. N. S. 735, 13 Wkly. Rep. 988 [*affirmed* in L. R. 1 Ch. 463, 12 Jur. N. S. 460, 35 L. J. Ch. 569, 14 L. T. Rep. N. S. 499, 14 Wkly. Rep. 748]; Patching *v.* Gubbins, 17 Jur. 1113, 1 Kay 1, 23 L. J. Ch. 45, 2 Wkly. Rep. 2; Mann *v.* Stephens, 10 Jur. 650, 15 Sim. 377, 38 Eng. Ch. 777; Whatman *v.* Gibson, 2 Jur. 273, 7 L. J. Ch. 160, 9 Sim. 196, 16 Eng. Ch. 196; Tulk *v.* Moxhay, 2 Phil. 774, 22 Eng. Ch. 774; Dietrichsen *v.* Cabburn, 2 Phil. 52, 22 Eng. Ch. 52; Rankin *v.* Huskisson, 4 Sim. 13, 6 Eng. Ch. 13; Hall *v.* Box, 18 Wkly. Rep. 820.

"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." De Mattos *v.* Gibson, 4 De G. & J. 276, 282, 61 Eng. Ch. 218.

This rule is not inflexible, and will only be applied by a court of equity in the exercise of its sound discretion. See Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308; Norcross *v.* James, 140 Mass. 188, 2 N. E. 946; Brewer *v.* Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 697; Sayers *v.* Collyer, 24 Ch. D. 180, 52 L. J. Ch. 770, 47 J. P. 741, 48 L. T. Rep. N. S. 939, 32 Wkly. Rep. 200; Renals *v.* Cowlishaw, 11 Ch. D. 866; Keppell *v.* Bailey, Coop. t. Brough. 298, 2 Myl. & K. 517, 7 Eng. Ch. 517; Bedford *v.* British Museum, 2 L. J. Ch. 129, 2 Myl. & K. 552, 7 Eng. Ch. 552.

76. Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308.

77. It is not enough that it affects the use of land, the enjoyment of an easement therein, or the value or profitableness of the use thereof, in a collateral way. Norcross *v.* James, 140 Mass. 188, 2 N. E. 946; Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Keppell *v.* Bailey, Coop. t. Brough. 298, 2 Myl. & K. 517, 7 Eng. Ch. 517; Congleton *v.* Pattison, 10 East 130.

78. Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111. See also Norcross *v.* James, 140 Mass. 188, 2 N. E. 946; Grigg *v.* Landis, 21 N. J. Eq. 494; Brewer *v.* Marshall, 18 N. J. Eq. 337; West Virginia Transp. Co. *v.* Ohio River Pipe Line R. Co., 22 W. Va. 600, 46 Am. Rep. 527; Haywood *v.* Brunswick Permanent Ben. Bldg. Soc., 8 Q. B. D. 403, 51 L. J. Q. B. 73, 45 L. T. Rep. N. S. 699, 30 Wkly. Rep. 299; Austerberry *v.* Oldham, 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch. 633, 53 L. T. Rep. N. S.

or was created between the covenantor and the covenantee at the time when the covenant was made;[79] and to be entitled to enforce such covenants the owner of the land must either be the original covenantee or hold in privity of estate with him, unless the rights in question are of that class of cases, of which easements are the most conspicuous example, which, when once acquired, attach to the land and pass with it, irrespective of privity, into all hands, even those of a disseizor.[80]

D. Covenants Running With the Land[81] — **1. What Covenants May Run With the Land — a. In General** — (i) *Must Concern Land or Estate Conveyed.* In order that a covenant may run with the land, that is, that its benefit or obligation may pass with the ownership, it must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed.[82] Whether a covenant will or will not run with the land does not,

543, 33 Wkly. Rep. 807; London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620.

79. Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308; Hurd *v.* Curtis, 19 Pick. (Mass.) 459; Keppell *v.* Bailey, Coop. t. Brough. 298, 2 Myl. & K. 517, 7 Eng. Ch. 517; Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725; Bally *v.* Wells, Wilm. 341, 3 Wils. C. P. 25.

80. Norcross *v.* James, 140 Mass. 188, 2 N. E. 946; Philpot *v.* Hoare, 2 Atk. 219, 26 Eng. Reprint 535; Windsor's Case, 5 Coke 24*a*, Cro. Eliz. 552; Chudleigh's Case, 1 Coke 120*a*; Middlemore *v.* Goodale, Cro. Car. 503, W. Jones 406; Bain *v.* Cooper, 1 Dowl. P. C. N. S. 11, 11 L. J. Exch. 325, 9 M. & W. 701; Nevil's Case, Plowd. 377; Overton *v.* Sydall, Poph. 120; Dillon *v.* Fraine, Poph. 70.

The privity of estate that is thus required is privity of estate with the original covenantee, not with the original covenantor. Norcross *v.* James, 140 Mass. 188, 2 N. E. 946.

81. A covenant running with the land is defined in Gilmer *v.* Mobile, etc., R. Co., 79 Ala. 569, 572, 58 Am. Rep. 623; Scheidt *v.* Belz, 4 Ill. App. 431, 436; Savage *v.* Mason, 3 Cush. (Mass.) 500, 505; Shaber *v.* St. Paul Water Co., 30 Minn. 179, 182, 14 N. W. 874. It is "a covenant for something relating to the land." Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353, 403 [*citing* Spencer's Case, 43 Law Lib. p. 99].

"A covenant is said to run with the land when such covenant, given by a prior owner, inures to the benefit of the subsequent owners in the chain of title" (Clarke *v.* Priest, 21 N. Y. App. Div. 174, 175, 47 N. Y. Suppl. 489), or "when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey" (Post *v.* Campau, 42 Mich. 90, 97, 3 N. W. 272).

82. *Alabama.*— Gilmer *v.* Mobile, etc., R. Co., 79 Ala. 569, 572, 58 Am. Rep. 623.

California.— Weill *v.* Baldwin, 64 Cal. 476, 2 Pac. 249.

Illinois.—Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83; Dalton *v.* Taliaferro, 101 Ill. App. 592; Scheidt *v.* Belz, 4 Ill. App. 431, 436.

Indiana.— Indiana Natural Gas, etc., Co. *v.* Hinton, 159 Ind. 398, 64 N. E. 224; Indianapolis Water Co. *v.* Nulte, 126 Ind. 373, 26 N. E. 72; Wells *v.* Benton, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; Conduitt *v.* Ross, 102 Ind. 166, 26 N. E. 198; Graber *v.* Duncan, 79 Ind. 565.

Massachusetts.— Savage *v.* Mason, 3 Cush. 500; Hurd *v.* Curtis, 19 Pick. 459.

Minnesota.—Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; Shaber *v.* St. Paul Water Co., 30 Minn. 179, 14 N. W. 874.

New Jersey.— National Union Bank *v.* Segur, 39 N. J. L. 173; Brewer *v.* Marshall, 18 N. J. Eq. 337.

New York.— Dolph *v.* White, 12 N. Y. 296; Van Rensselaer *v.* Smith, 27 Barb. 104; Allen *v.* Culver, 3 Den. 284; Norman *v.* Wells, 17 Wend. 136. And see Columbia College *v.* Lynch, 39 N. Y. Super. Ct. 372, 378.

North Carolina.— Nesbit *v.* Nesbit, 1 N. C. 403.

North Dakota.— Northern Pac. R. Co. *v.* McClure, 9 N. D. 73, 81 N. W. 52, 47 L. R. A. 149.

Pennsylvania.— Horn *v.* Miller, 136 Pa. St. 640, 20 Atl. 706, 9 L. R. A. 810.

West Virginia.—West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

Wisconsin.— Crawford *v.* Witherbee, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561.

England.— Campbell *v.* Lewis, 3 B. & Ald. 392, 21 Rev. Rep. 520, 5 E. C. L. 230; Rogers *v.* Hosegood, [1900] 2 Ch. 388, 69 L. J. Ch. 652, 83 L. T. Rep. N. S. 186, 48 Wkly. Rep. 659; Keppell *v.* Bailey, Coop. t. Brough. 298, 2 Myl. & K. 517, 7 Eng. Ch. 517; Middlemore *v.* Goodale, Cro. Car. 503; Noke *v.* Awder, Cro. Eliz. 373; Congleton *v.* Pattison, 10 East 130; Cook *v.* Arundel, Hard. 87; Lougher *v.* Williams, 2 Lev. 92; Lewis *v.* Campbell, 3 Moore C. P. 35, 8 Taunt. 715, 21 Rev. Rep. 516, 4 E. C. L. 350; Kingdon *v.* Nottle, 4 M. & S. 53, 16 Rev. Rep. 379; Sacheverell *v.* Froggatt, 2 Saund. 367*a*; Spencer *v.* Boyes, 4 Ves. Jr. 370, 31 Eng. Reprint 188. And see Thomas *v.* Hayward, L. R. 4 Exch. 311, 312, 38 L. J. Exch. 175, 20 L. T. Rep. N. S. 814.

In Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 174, Spencer demised a house and lot to S for years. S covenanted for himself, his executors, and administrators, that he, his executors, administrators, or assigns, would build a brick wall on part of the land de-

however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied, for if this be the case every successive assignee of the land will be entitled to enforce the covenant.[83]

(II) *Necessity of Privity of Estate.* A covenant which may run with the land can do so only when there is a subsisting privity of estate between the covenantor and the covenantee,[84] that is, when the land itself, or some estate or

mised. S assigned the term to J, and J to Clark. Spencer sued Clark for a breach of the covenant to build the wall. The court by the first resolve held that a covenant only bound the assignee when it was concerning a thing *in esse*, parcel of the demise, not when it related to a wall to be built. By the second resolve, they held that if the covenant had bound the "assigns" by express words, it would have bound the assignee, although it was for a thing to be newly made, as it was to be upon the thing demised; but that if the covenant was for a thing to be done collateral to the land, and did not touch or concern the thing demised, in any sort, as if it were to build a house upon other lands of the lessor, the assignee should not be charged, although the covenant was for the covenantor and "his assigns." The two principles thus settled have always been acknowledged as law: that the assignee when not named is not bound by a covenant, except it relates to a thing *in esse* at the time; and that when named, he is not bound by a covenant collateral to the land, but only for things to be done on or concerning the land.

Incidental covenants in a contract to convey, which are not merged in the conveyance, do not pass to the second vendee as covenants running with the land. Colvin *v.* Schell, 1 Grant (Pa.) 226.

Estates by estoppel.— Under the authority of an early decision (Noke *v.* Awder, Cro. Eliz. 436), it has been supposed that covenants would not run with estates created by estoppel (Carvick *v.* Blagrave, 1 B. & B. 531, 4 Moore C. P. 303, 5 E. C. L. 783; Whitton *v.* Peacock, 2 Bing. N. Cas. 411, 5 L. J. C. P. 124, 2 Scott 630, 29 E. C. L. 595); but it has since been held that covenants will run with such estates (Cuthbertson *v.* Irving, 4 H. & N. 742, 5 Jur. N. S. 740, 28 L. J. Exch. 306. See also Rennie *v.* Robinson, 1 Bing. 147, 1 L. J. C. P. O. S. 30, 7 Moore C. P. 539, 25 Rev. Rep. 604, 8 E. C. L. 446; Palmer *v.* Ekins, 2 Ld. Raym. 1550; Gouldsworth *v.* Knights, 12 L. J. Exch. 282, 11 M. & W. 337). And see ESTOPPEL.

Covenants will not run with personal property. Spencer's Case, 5 Coke 16. See also Garton *v.* Gregory, 3 B. & S. 90, 31 L. J. Q. B. 302; Mears *v.* Southwestern R. Co., 11 C. B. N. S. 850, 31 L. J. C. P. 220; Lancashire Wagon Co. *v.* Fitzhugh, 6 H. & N. 502, 30 L. J. Exch. 231; Tancred *v.* Allgood, 4 H. & N. 438; Milnes *v.* Branch, 5 M. & S. 411; Randall *v.* Rigby, 4 M. & W. 135. *Compare* Martyn *v.* Williams, 1 H. & N. 817; Norvel *v.* Pascoe, 34 L. J. Ch. 83; Bailey *v.* Wells, 3 Wils. 25.

Statutory provisions.— N. D. Rev. Codes §§ 3784–3787, which declare what covenants in grants of real property run with the land, and designate a number of such covenants by name, do not confine covenants which run with the land to those specifically named; but such covenants as by reason of their character are within the meaning of said sections also run with the land. Northern Pac. R. Co. *v.* McClure, 9 N. D. 73, 81 N. W. 52, 47 L. R. A. 149.

83. Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Gibson *v.* Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83; National Union Bank *v.* Segur, 39 N. J. L. 173; Norman *v.* Wells, 17 Wend. (N. Y.) 136.

Covenants are to be regarded as affecting the land, although not directly to be performed upon it, provided they tend to increase or diminish its value in the hands of a holder. Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104.

It is a question of intention in each case, to be determined on the construction of the particular instrument, and with due regard to the nature of the covenant and the surrounding circumstances, whether the benefit or burden of a covenant which possesses the above-mentioned characteristics does in fact run with the land at law. Rogers *v.* Hosegood, 69 L. J. Ch. 59, 81 L. T. Rep. N. S. 515. See also Maryland Coal Co. *v.* Cumberland, etc., R. Co., 41 Md. 343; Brown *v.* Southern Pac. Co., 36 Oreg. 128, 58 Pac. 1104, 47 L. R. A. 409.

84. *Alabama.*—Allen *v.* Greene, 19 Ala. 34.

Arkansas.— Ross *v.* Turner, 7 Ark. 132, 44 Am. Dec. 531.

California.—Fresno Canal, etc., Co. *v.* Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112.

Georgia.—Waycross Air Line R. Co. *v.* Southern Pine Co., 115 Ga. 7, 41 S. E. 271; Atlanta Consol. St. R. Co. *v.* Jackson, 108 Ga. 634, 34 S. E. 184; Tucker *v.* McArthur, 103 Ga. 409, 30 S. E. 283; Martin *v.* Gordon, 24 Ga. 533.

Illinois.— Fitch *v.* Johnson, 104 Ill. 111; Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83; Dalton *v.* Taliaferro, 101 Ill. App. 592; Keegan *v.* O'Callaghan, 35 Ill. App. 142.

Indiana.—Indianapolis Water Co. *v.* Nulte, 126 Ind. 373, 26 N. E. 72; Hazlett *v.* Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Sage *v.* Jones,

interest therein, even though less than the entire title, to which the covenant may attach as its vehicle of conveyance, is transferred; if there is no privity of

47 Ind. 122; Taylor *v.* Owen, 2 Blackf. 301; Allen *v.* Wooley, 1 Blackf. 148.

Louisiana.— Barkley *v.* Steers, 47 La. Ann. 951, 17 So. 438.

Maine.— Smith *v.* Kelley, 56 Me. 64; Pike *v.* Galvin, 29 Me. 183. And see Lyon *v.* Parker, 45 Me. 474, 478.

Maryland.— Pyle *v.* Gross, 92 Md. 132, 48 Atl. 713.

Massachusetts. — Norcross *v.* James, 140 Mass. 188, 2 N. E. 946; Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; Clark *v.* Swift, 3 Metc. 390; White *v.* Whitney, 3 Metc. 81; Slater *v.* Rawson, 1 Metc. 450, 6 Metc. 439; Hurd *v.* Curtis, 19 Pick. 459; Morse *v.* Aldrich, 19 Pick. 449; Plymouth *v.* Carver, 16 Pick. 183; Wheelock *v.* Thayer, 16 Pick. 68; Bartholomew *v.* Candee, 14 Pick. 167; Bickford *v.* Page, 2 Mass. 455.

Michigan.—Mason *v.* Kellogg, 38 Mich. 132.

Minnesota.—Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111. But see Shaber *v.* St. Paul Water Co., 30 Minn. 179, 14 N. W. 874.

Missouri.— Miller *v.* Noonan, 83 Mo. 343 [*affirming* 12 Mo. App. 370].

Nevada.—Wheeler *v.* Schad, 7 Nev. 204.

New Hampshire. — Chase *v.* Weston, 12 N. H. 413.

New Jersey.— Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Garrison *v.* Sandford, 12 N. J. L. 261; Brewer *v.* Marshall, 18 N. J. Eq. 337. *Compare* National Union Bank *v.* Segur, 39 N. J. L. 173.

New York.— Mygatt *v.* Coe, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521, 147 N. Y. 456, 42 N. E. 17, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Nye *v.* Hoyle, 120 N. Y. 195, 24 N. E. 1 [*affirming* 8 N. Y. St. 513]; Hart *v.* Lyon, 90 N. Y. 663; Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400; Scott *v.* McMillan, 76 N. Y. 141; Columbia College *v.* Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Sprague Nat. Bank *v.* Erie R. Co., 22 N. Y. App. Div. 526, 48 N. Y. Suppl. 65; Denman *v.* Prince, 40 Barb. 213; Waterbury *v.* Head, 12 N. Y. St. 361; Wilbur *v.* Brown, 3 Den. 356; Beddoe *v.* Wadsworth, 21 Wend. 120; Norman *v.* Wells, 17 Wend. 136; Demarest *v.* Willard, 8 Cow. 206; Kane *v.* Sanger, 14 Johns. 89.

Ohio.— Newburg Petroleum Co. *v.* Weare, 44 Ohio St. 604, 9 N. E. 845; Easter *v.* Little Miami R. Co., 14 Ohio St. 48; Masury *v.* Southworth, 9 Ohio 340; Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585; Cincinnati *v.* Springer, 10 Ohio Dec. (Reprint) 745, 23 Cinc. L. Bul. 250.

Pennsylvania.—Manderbach *v.* Bethany Orphans' Home, 109 Pa. St. 231, 2 Atl. 422.

Rhode Island. — Middletown *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191.

Tennessee.— Hopkins *v.* Lane, 9 Yerg. 79.

Vermont. — Morton *v.* Thompson, 69 Vt. 432, 38 Atl. 88; Beardsley *v.* Knight, 4 Vt. 471; Garfield *v.* Williams, 2 Vt. 327.

Virginia. — Burtners *v.* Keran, 24 Gratt. 42; Dickinson *v.* Hoomes, 8 Gratt. 353; Randolph *v.* Kinney, 3 Rand. 394.

Wisconsin.— Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 893, 53 L. R. A. 644; Crawford *v.* Witherbee, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561; McLennan *v.* Prentice, 77 Wis. 124, 45 N. W. 943; McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405; Nichol *v.* Alexander, 28 Wis. 118; Wright *v.* Sperry, 21 Wis. 331; Noonan *v.* Orton, 4 Wis. 335.

England.— Vyvyan *v.* Arthur, 1 B. & C. 410, 2 D. & R. 670, 1 L. J. K. B. O. S. 138, 25 Rev. Rep. 437, 8 E. C. L. 175; Cooke *v.* Chilcott, 3 Ch. D. 694, 34 L. T. Rep. N. S. 207; Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 174; Lewes *v.* Ridge, Cro. Eliz. 863; Randall *v.* Rigby, 6 Dowl. P. C. 650, 7 L. J. Exch. 240, 4 M. & W. 130; Lucy *v.* Levington. 2 Lev. 26, 1 Vent. 175; Rogers *v.* Hosegood, 69 L. J. Ch. 59, 81 L. T. Rep. N. S. 515; Milnes *v.* Branch, 5 M. & S. 411, 17 Rev. Rep. 373; Webb *v.* Russell, 3 T. R. 393, 1 Rev. Rep. 725; Bally *v.* Wells, Wilm. 345, 3 Wils. C. P. 25.

See 14 Cent. Dig. tit. "Covenants," § 54.

An opinion contrary to the statement of the text has been expressed by most respectable authorities, where the act to be done is for the benefit of the estate and upon the land itself. Shaber *v.* St. Paul Water Co., 30 Minn. 179, 183, 14 N. W. 874, per Berry, J.; Allen *v.* Culver, 3 Den. (N. Y.) 284, 301, per Jewett, J.; Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353, 404, per Moncure, J.; Spencer's Case, 1 Smith Lead. Cas. (8th Am. ed.) 192, note by Judge Hare. See also National Union Bank *v.* Segur, 39 N. J. L. 173. To sustain this view reference is made to Packenham's Case, Y. B. 42 Edw. III, which, however, has been completely overthrown as authority by Lord St. Leonards, who shows that the point was not decided, but is merely a *dictum* by Finchden. Sugden Vend. (8th Am. ed.) 586. See also Pendleton *v.* Fosdick, 6 Ohio Dec. (Reprint) 795, 8 Am. L. Rec. 148. And see Lydick *v.* Baltimore, etc., R. Co., 17 W. Va. 427. But see the note to Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 174.

The maxim transit terra cum onere presupposes a transfer of the land, and when that actually takes place, it forms the medium of a privity between the assignees. Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646.

Covenants run only with the legal title to lands and tenements. Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 898,

estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the contract. In such a case the covenants are personal and collateral to the land. On the other hand, if there is a privity of estate, a covenant which may run with the land will pass as an incident to a subsequent conveyance. But if any estate passes, so as to create privity, it is sufficient to carry the covenants;[85] and the decided weight of authority is to the effect that covenants run with incorporeal as well as with corporeal hereditaments.[86]

53 L. R. A. 644 [*citing* Allen *v.* Wooley, 1 Blackf. (Ind.) 148; Watson *v.* Blaine, 12 Serg. & R. (Pa.) 131, 14 Am. Dec. 669; Beardsley *v.* Knight, 4 Vt. 471; Randolph *v.* Kinney, 3 Rand. (Va.) 394; Wright *v.* Sperry, 21 Wis. 331]. But see McGoodwin *v.* Stephenson, 11 B. Mon. (Ky.) 21; Carlisle *v.* Blamire, 8 East 487, 9 Rev. Rep. 491.

What privity necessary.— See Van Rensselaer *v.* Read, 26 N. Y. 558. And see Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646.

Actual or constructive seizin.— "The rule is universal that, in order to carry the covenants in a deed to subsequent grantees, there must be actual or constructive seizin." Wallace *v.* Pereles, 109 Wis. 316, 322, 85 N. W. 371, 83 Am. St. Rep. 898, 53 L. R. A. 644. See also McLennan *v.* Prentice, 77 Wis. 124, 45 N. W. 943; McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405; Nichol *v.* Alexander, 28 Wis. 118.

The legal possession of land, although the lowest interest or title that a person can have, is an estate therein, capable of being conveyed, and when conveyed, creates a sufficient privity of estate between the grantor and grantee to carry the covenants of warranty and quiet enjoyment through successive conveyances to a remote grantee. Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646, 147 N. Y. 456, 42 N. E. 17, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521; Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 120; Morton v. Thompson, 69 Vt. 432, 38 Atl. 88; Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353; Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 898, 53 L. R. A. 644.

The covenant of a stranger to the title is personal to the covenantee, and is incapable of transmission by a mere conveyance of the land. Mygatt *v.* Coe, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521.

A wife's inchoate right of dower is a mere chose in action, and hence a covenant of warranty in a deed from her husband, which she has signed to release her dower interest, is not a covenant by her running with the land, so as to make her liable for a breach thereof. Pyle *v.* Gross, 92 Md. 132, 48 Atl. 713. See also Strawn *v.* Strawn, 50 Ill. 33; Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211; Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151; Baird *v.* Patillo (Tex. Civ. App. 1894) 24 S. W. 813. And the same is true of a husband's covenants in a conveyance of his wife's land, unless it appears that he as well as his wife is in possession of the land and delivers such possession to the grantee. Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521.

Covenant subsequent to deed.—See Wheeler *v.* Schad, 7 Nev. 204. See also Smith *v.* Kelley, 56 Me. 64 [*citing* with approval Plymouth *v.* Carver, 16 Pick. (Mass.) 183].

85. *Alabama.*— Allen *v.* Greene, 19 Ala. 34.

Georgia.— Martin *v.* Gordon, 24 Ga. 533.

Illinois.— Fitch *v.* Johnson, 104 Ill. 111.

Massachusetts.— Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335; Slater *v.* Rawson, 1 Metc. 450, 6 Metc. 439; Morse *v.* Aldrich, 19 Pick. 449.

New York.— Hart *v.* Lyon, 90 N. Y. 663; Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400; Scott *v.* McMillan, 76 N. Y. 141; Columbia College *v.* Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Nye *v.* Hoyle, 8 N. Y. St. 513 [*affirmed* in 120 N. Y. 195, 24 N. E. 1]; Wilbur *v.* Brown, 3 Den. 356; Norman *v.* Wells, 17 Wend. 136.

Ohio.— Devore *v.* Sunderland, 17 Ohio 52, 49 Am. Dec. 442.

Pennsylvania.— Manderbach *v.* Bethany Orphans' Home, 109 Pa. St. 231, 2 Atl. 422.

Vermont.— Beardsley *v.* Knight, 4 Vt. 471.

Virginia.— Burtners *v.* Keran, 24 Gratt. 42.

England.— Cook *v.* Chilcott, 3 Ch. D. 694, 34 L. T. Rep. N. S. 207.

See 14 Cent. Dig. tit. "Covenants," § 54.

86. *Arkansas.*— St. Louis, etc., R. Co. *v.* O'Baugh, 49 Ark. 418, 5 S. W. 711.

Georgia.— Howard Mfg. Co. *v.* Water Lot Co., 53 Ga. 689.

Illinois.— Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Webster *v.* Nichols, 104 Ill. 160; Fitch *v.* Johnson, 104 Ill. 111 (stating reason of rule); Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 94 Ill. 83; Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230; Sterling Hydraulic Co. *v.* Williams, 66 Ill. 393.

Indiana.— Scott *v.* Stetler, 128 Ind. 385, 27 N. E. 721; Hazlett *v.* Sinclair, 76 Ind. 488, 40 Am. Rep. 254.

New York.— Van Rensselaer *v.* Read, 26 N. Y. 558; Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278; Willard *v.* Tillman, 2 Hill 274.

(III) *Covenant For Heirs and Assigns.* An heir or assign when not named is not bound by a covenant, except where it relates to a thing *in esse* at the time; and when named he is not bound by a covenant collateral to the land, but only for things to be done on or concerning the land.[87]

(IV) *Effect of Agreement of Parties.* The contracting parties may, by the express terms of their contract, provide that the covenant shall not run with the land; although if nothing was said about it it would so run. But however clearly and strongly expressed may be the intent and agreement of the parties that the covenant shall run with the land, yet if it be of such a character that the law does not permit it to be attached, it cannot be attached by agreement of the parties, and the assignee will take the estate clear of any such covenant.[88]

Vermont.— Morton *v.* Thompson, 69 Vt. 432, 434, 38 Atl. 88.

United States.— Scott *v.* Lunt, 7 Pet. 596, 8 L. ed. 797.

England.— Paynter *v.* Williams, 1 H. & N. 810, 26 L. J. Exch. 117, 5 Wkly. Rep. 351. See also Norval *v.* Pascoe, 10 Jur. N. S. 792, 34 L. J. Ch. 83, 10 L. T. Rep. N. S. 809, 4 New Rep. 390, 12 Wkly. Rep. 973.

But see Mitchell *v.* Warver, 5 Conn. 497; Wheelock *v.* Thayer, 16 Pick. (Mass.) 68.

See 14 Cent. Dig. tit. "Covenants," § 54.

87. Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 174. And see the following cases:

Georgia.— Redwine *v.* Brown, 10 Ga. 311.

Illinois.— Pittsburg, etc., R. Co. *v.* Reno, 22 Ill. App. 470 [*affirmed* in 123 Ill. 273, 14 N. E. 195]. *Compare* Dorsey *v.* St. Louis, etc., R. Co., 58 Ill. 65.

Massachusetts.— Norcross *v.* James, 140 Mass. 188, 2 N. E. 946; Hurd *v.* Curtis, 19 Pick. 459. And see Savage *v.* Mason, 3 Cush. 500, 505.

Missouri.—Sturgeon *v.* Schaumberg, 40 Mo. 482, 93 Am. Dec. 311.

New Jersey.—Winfield *v.* Henning, 21 N. J. Eq. 188; Brewer *v.* Marshall, 18 N. J. Eq. 337; Conover *v.* Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247.

New York.— Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850; Dexter *v.* Beard, 130 N. Y. 549, 29 N. E. 983; Clark *v.* Devoe, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652; Hart *v.* Lyon, 90 N. Y. 663; Tallman *v.* Coffin, 4 N. Y. 134; Andrews *v.* Appel, 22 Hun 429; Denman *v.* Prince, 40 Barb. 213; Jacques *v.* Short, 20 Barb. 269; Fowler *v.* Poling, 2 Barb. 300; Beddoe *v.* Wadsworth, 21 Wend. 120; Norman *v.* Wells, 17 Wend. 136; Thompson *v.* Rose, 8 Cow. 266; Lametti *v.* Anderson, 6 Cow. 302.

Ohio.— Hickey *v.* Lake Shore, etc., R. Co., 51 Ohio St. 40, 36 N. E. 672, 46 Am. St. Rep. 545, 23 L. R. A. 396; Newburg Petroleum Co. *v.* Weare, 44 Ohio St. 604, 9 N. E. 845; Easter *v.* Little Miami R. Co., 14 Ohio St. 48; Masury *v.* Southworth, 9 Ohio St. 340; Pendleton *v.* Fosdick, 6 Ohio Dec. (Reprint) 795, 8 Am. L. Rec. 149.

Oregon.— Brown *v.* Southern Pac. Co., 36 Oreg. 128, 58 Pac. 1104, 47 L. R. A. 409.

Tennessee.— Cicalla *v.* Miller, 105 Tenn. 255, 58 S. W. 210; Bream *v.* Dickerson, 2 Humphr. 126; Hopkins *v.* Lane, 9 Yerg. 79.

Texas.— Gulf, etc., R. Co. *v.* Smith, 72 Tex. 122, 9 S. W. 865, 2 L. R. A. 281.

Vermont.— Smith *v.* Perry, 26 Vt. 279.

Virginia.— Dickinson *v.* Hoomes, 8 Gratt. 353.

England.— Jourdain *v.* Wilson, 4 B. & Ald. 266, 23 Rev. Rep. 268, 6 E. C. L. 478; Easterby *v.* Sampson, 6 Bing. 644, 1 C. & J. 105, 4 M. & P. 601, 19 E. C. L. 291; Keppell *v.* Bailey, Coop. t. Brough. 298, 2 Myl. & K. 517, 7 Eng. Ch. 517; Congleton *v.* Pattison, 10 East 130; Roach *v.* Wadham, 6 East 289; Sharp *v.* Waterhouse, 7 E. & B. 816, 3 Jur. N. S. 1022, 27 L. J. Q. B. 70, 90 E. C. L. 816; Bally *v.* Wells, Wilm. 345, 3 Wils. C. P. 25.

See 14 Cent. Dig. tit. "Covenants," § 56.

Necessity of privity.— Whatever confusion may exist in the cases with reference to the use of the words "heirs and assigns," it is clear that they cannot dispense with some privity of estate in order to carry the covenant with the land, and it has never been held that a covenant which, in its nature or otherwise, is personal, is made to run with the land by the mere employment of the words. Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17.

The failure to include the word "assigns" in a deed is not controlling if it can reasonably be inferred from the language of the instrument that the parties intended that the covenant should run with the land. Brown *v.* Southern Pac. Co., 36 Oreg. 128, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409. See also Masury *v.* Southworth, 9 Ohio St. 340; Kellogg *v.* Robinson, 6 Vt. 276, 27 Am. Dec. 550.

88. Wilmurt *v.* McGrame, 16 N. Y. App. Div. 412, 417, 45 N. Y. Suppl. 32. See also Fresno Canal, etc., Co. *v.* Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112; Maryland Coal Co. *v.* Cumberland, etc., R. Co., 41 Md. 343; Masury *v.* Southworth, 9 Ohio St. 340; Louisville, etc., R. Co. *v.* Webster, 106 Tenn. 586, 61 S. W. 1018.

Such an agreement may, however, create a lien on the land as against a subsequent purchaser with notice, although it does not bind such purchaser personally. Fresno Canal, etc., Co. *v.* Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112.

(v) *Effect of Apportionment.* While it is true as a general principle of law that covenants are not apportionable, yet covenants which run with the land are nevertheless apportionable because the land itself is apportionable.[89]

(vi) *What Law Governs.* Covenants which run with the land are to be governed and construed by the same law as the granting part of the deed — that is, by the *lex loci rei sitæ*.[90]

b. Covenants of Title — (i) *In General.* Of the covenants usually contained in a conveyance of land some run with the land and some do not.[91]

(ii) *Covenant of Seizin.* In England and Canada the covenant of seizin as well as all other covenants of title runs with the land.[92] In the United States a large majority of the courts have held that the covenant of seizin, if broken at all, is broken as soon as made, and consequently cannot run with the land nor pass to an assignee;[93] in a few jurisdictions, however, the contrary view has been

89. A covenant running with the land would be of very little value, if it ceased to run whenever the land was divided, whether by act of law or by the act of the owner. Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353 [*citing* Kane *v.* Sanger, 14 Johns. (N. Y.) 89; Astor *v.* Miller, 2 Paige (N. Y.) 68; Van Horne *v.* Crain, 1 Paige (N. Y.) 455]. See also Gaines *v.* Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Dougherty *v.* Duvall, 9 B. Mon. (Ky.) 57; Van Horne *v.* Crain, 1 Paige (N. Y.) 455. And see Sugden Vend. (8th Am. ed.) 598. *Contra*, 3 Preston Abstr. 56, 58 [*cited* in Rawle Cov. § 214*a*].

90. Dalton *v.* Taliaferro, 101 Ill. App. 592, because such covenants cannot be separated from the land and transferred without it, but go with it as annexed to the estate, and bind the parties in respect to the privity of estate. See also *supra*, II, A, 2.

91. Those which are broken, if at all, at the instant of their being made, such as the covenant of seizin, of right to convey, or against encumbrances, do not run with the land; while those which may be broken afterward, such as the covenant of warranty, for quiet enjoyment, or for further assurance, do run with the land. But even the latter, when broken, cease to run with the land from the time they are broken; for a broken covenant is a mere chose in action, which by the common law is not assignable; being no longer inherent in the land, which alone gives the covenant its assignable quality. Per Moncure, J., in Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353, 395.

92. Salman *v.* Bradshaw, Cro. Jac. 304; Paynter *v.* Williams, 1 H. & N. 810, 26 L. J. Exch. 117, 5 Wkly. Rep. 351; Lucy *v.* Levington, 2 Lev. 26, 1 Vent. 175; King *v.* Jones, 1 Marsh. 107, 5 Taunt. 418, 15 Rev. Rep. 533, 1 E. C. L. 219; Kingdon *v.* Nottle, 1 M. & S. 355, 14 Rev. Rep. 462, 4 M. & S. 53, 16 Rev. Rep. 379; Riddell *v.* Riddell, 7 Sim. 529, 5 L. J. Ch. 102, 8 Eng. Ch. 529; Platt *v.* Grand Trunk R. Co., 11 Ont. 246.

The rule criticized.— "To the determination in Kingdon *v.* Nottle, 1 M. & S. 355, 14 Rev. Rep. 462, there is a sound objection. It is opposed to principles, uniformly, and for centuries, established in Westminster-Hall. It was said by Lord Ellenborough, in the case alluded to, that 'if the executor could recover nominal damages, it would preclude the heir, who is the party actually damnified, from recovering at all!' The force of this reasoning depends entirely on the assertion that the heir is 'the party actually damnified'; and if this is an incorrect position, the argument wholly fails. Now, it is not true, that the heir is the party damnified. The damage arises entirely by the breach of the covenant in the life-time of the testator: and the testator is the only person, who receives damage. Thus were all the determinations before the last mentioned decision. To this effect was Lewes *v.* Ridge, Cro. Eliz. 863; Lucy *v.* Levington, 2 Lev. 26, 1 Vent. 175, and the law as laid down in Comyns Digest (tit. Covenant, B. 3); and not a case or *Dictum* was there to the contrary. Indeed, the admission of Lord Ellenborough, that the covenant was broken in the life-time of the testator, most conclusively shews, that the heir was not damnified. His own damage must result from his title to the land, and not from the covenant broken, to which he was no party." Mitchell *v.* Warner, 5 Conn. 497, 505.

93. *Alabama.*— Sayre *v.* Sheffield Land, etc., Co., 106 Ala. 440, 18 So. 101; Anderson *v.* Knox, 20 Ala. 156.

Arkansas.— Abbott *v.* Rowan, 33 Ark. 593; Hendricks *v.* Keesee, 32 Ark. 714; Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Ross *v.* Turner, 7 Ark. 132, 44 Am. Dec. 531; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.— Salmon *v.* Vallejo, 41 Cal. 481; Lawrence *v.* Montgomery, 37 Cal. 188.

Connecticut.— Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112; Davis *v.* Lyman, 6 Conn. 249; Mitchell *v.* Warner, 5 Conn. 497; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Booth *v.* Starr, 5 Day 419.

Georgia.— Redwine *v.* Brown, 10 Ga. 311.

Illinois.— Tone *v.* Wilson, 81 Ill. 529; Jones *v.* Warner, 81 Ill. 343; Baker *v.* Haab, 40 Ill. 264, 89 Am. Dec. 346; King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Brady *v.* Spruck, 27 Ill. 478.

Kansas.— Scoffins *v.* Grandstaff, 12 Kan. 467; Dale *v.* Shively, 8 Kan. 276; Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950.

Kentucky.— Pence *v.* Duvall, 9 B. Mon.

adopted,[94] while in others statutes have been enacted which either directly[95] or indirectly accomplish the same end.[96]

(III) *COVENANT OF RIGHT TO CONVEY.* What has been said of the covenant of seizin applies with equal force to the covenant of right to convey.[97]

48; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Rice *v.* Spotswood, 6 T. B. Mon. 40, 17 Am. Dec. 115; South *v.* Hoy, 3 T. B. Mon. 88.

Maine.— Heath *v.* Whidden, 24 Me. 383; Hacker *v.* Storer, 8 Me. 228. But see cases cited *infra*, note 95.

Massachusetts.— Cornell *v.* Jackson, 3 Cush. 506; Clark *v.* Swift, 3 Metc. 390; Slater *v.* Rawson, 1 Metc. 450; Thayer *v.* Clemence, 22 Pick. 490; Wheelock *v.* Thayer, 16 Pick. 68; Bartholomew *v.* Candee, 14 Pick. 167; Wyman *v.* Ballard, 12 Mass. 304; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249; Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Michigan.— Sherwood *v.* Landon, 57 Mich. 219, 23 N. W. 778; Matteson *v.* Vaughn, 38 Mich. 373, 39 Mich. 758.

Minnesota.— Allen *v.* Allen, 48 Minn. 462, 51 N. W. 473; Lowry *v.* Tileny, 31 Minn. 500, 18 N. W. 452; Kimball *v.* Bryant, 25 Minn. 496.

Nebraska.— Real *v.* Hollister, 20 Nebr. 112, 29 N. W. 189; Davidson *v.* Cox, 10 Nebr. 150, 4 N. W. 1039; Chapman *v.* Kimball, 7 Nebr. 399.

New Hampshire.— Dickey *v.* Weston, 61 N. H. 23; Smith *v.* Jefts, 44 N. H. 482; Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260; Garrison *v.* Sandford, 12 N. J. L. 261; Chapman *v.* Holmes, 10 N. J. L. 20; Lot *v.* Thomas, 2 N. J. L. 407, 2 Am. Dec. 354.

New York.— Coit *v.* McReynolds, 2 Rob. 655; Blydenburgh *v.* Cotheal, 1 Duer 176; McCarty *v.* Leggett, 3 Hill 134; Beddoe *v.* Wadsworth, 21 Wend. 120; Townsend *v.* Morris, 6 Cow. 123; Abbott *v.* Allen, 14 Johns. 248; Hamilton *v.* Wilson, 4 Johns. 72, 4 Am. Dec. 253; Bennett *v.* Irwin, 3 Johns. 363; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379.

North Carolina.— Grist *v.* Hodges, 14 N. C. 178; Wilson *v.* Forbes, 13 N. C. 30.

North Dakota.— Bowne *v.* Wolcott, 1 N. D. 497, 48 N. W. 426, construing N. D. Comp. Laws, §§ 3444, 3445, 3446.

Pennsylvania.— Wilson *v.* Cochran, 46 Pa. St. 229.

South Carolina.— Johnson *v.* Veal, 3 McCord 449.

Tennessee.— Kenney *v.* Norton, 10 Heisk. 384.

Texas.— Westrope *v.* Chambers, 51 Tex. 178.

Vermont.— Swasey *v.* Brooks, 30 Vt. 692; Potter *v.* Taylor, 6 Vt. 676; Richardson *v.* Dorr, 5 Vt. 9; Pierce *v.* Johnson, 4 Vt. 247; Garfield *v.* Williams, 2 Vt. 327; Williams *v.* Witherbee, 1 Aik. 233.

Virginia.— Dickinson *v.* Hoomes, 8 Gratt. 353.

Washington.— See Rombough *v.* Koons, 6 Wash. 558, 34 Pac. 135.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91; Pollard *v.* Dwight, 4 Cranch 421, 6 L. ed. 666.

See 14 Cent. Dig. tit. "Covenants," § 59.

94. *Indiana.*— Wright *v.* Nipple, 92 Ind. 310; Wilson *v.* Peelle, 78 Ind. 384; Coleman *v.* Lyman, 42 Ind. 289; Overhiser *v.* McCollister, 10 Ind. 42; Martin *v.* Baker, 5 Blackf. 232. But see Craig *v.* Donovan, 63 Ind. 513.

Iowa.— Boon *v.* McHenry, 55 Iowa 202, 7 N. W. 503 [*following* Schofield *v.* Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 197]. See also Knadler *v.* Sharp, 36 Iowa 232.

Missouri.— Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142; Jones *v.* Whitsett, 79 Mo. 188; Magwire *v.* Riggin, 44 Mo. 512; Chambers *v.* Smith, 23 Mo. 174; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661 [*explaining* and *reconciling* Collier *v.* Gamble, 10 Mo. 467]; White *v.* Stevens, 13 Mo. App. 240; Walker *v.* Deaver, 5 Mo. App. 139; Schnelle, etc., Lumber Co. *v.* Barlow, 34 Fed. 853; Hall *v.* Scott County, 7 Fed. 341, 2 McCrary 356 [*following* Chambers *v.* Smith, 23 Mo. 174; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661]. But see Blondeau *v.* Sheridan, 81 Mo. 545.

Ohio.— The English rule has been adopted with some modification. Devore *v.* Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90; Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585; Stites *v.* Hobbs, 2 Disn. 573; Williams *v.* Holcomb, 6 Ohio Dec. (Reprint) 860, 8 Am. L. Rec. 484, 4 Cinc. L. Bul. 1147.

Wisconsin.— Mecklem *v.* Blake, 22 Wis. 495, 99 Am. Dec. 68 [*overruling* in effect, although without mentioning, Pillsbury *v.* Mitchell 5 Wis. 17].

See 14 Cent. Dig. tit. "Covenants," § 59.

95. Littlefield *v.* Pinkham, 72 Me. 369; Trask *v.* Wilder, 50 Me. 450; Allen *v.* Little, 36 Me. 170; Stowell *v.* Bennett, 34 Me. 422; Prescott *v.* Hobbs, 30 Me. 345. *Compare* Wilson *v.* Widenham, 51 Me. 566.

96. Under a statute which provides that all actions must be prosecuted by the real party in interest, it has been held that an assignee of the grantee must sue for a breach of the covenant of seizin. Hall *v.* Plaine, 14 Ohio St. 417. See also Clarke *v.* Priest, 18 Misc. (N. Y.) 501, 42 N. Y. Suppl. 766; Boyd *v.* Belmont, 58 How. Pr. (N. Y.) 513. But this view had already been adopted in Ohio independently of statute. See *supra*, note 94.

97. If broken at all it is broken as soon as made, and the right of action thereon is a mere chose in action and does not run with the land.

Arkansas.— Ross *v.* Turner, 7 Ark. 132,

(iv) *COVENANT AGAINST ENCUMBRANCES.* The covenant against encumbrances is regarded in most jurisdictions as a covenant *in præsenti*, broken immediately, and not passing with the land.[98] In others it is held that it runs with the land and passes to a remote grantee, although technically broken upon the execution of the original deed;[99] and in those cases where a manifest intention that it shall operate *in futuro* appears, as where it is intimately associated with the cove-

44 Am. Dec. 531; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.— Salmon *v.* Vallejo, 41 Cal. 481.

Georgia.— Redwine *v.* Brown, 10 Ga. 311.

Illinois.— Tone *v.* Wilson, 81 Ill. 529; King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Brady *v.* Spurck, 27 Ill. 478.

Kansas.— Dale *v.* Shively, 8 Kan. 276.

Maine.— Since Me. Rev. Stat. c. 115, §§ 16, 17, the covenant of good right to convey passes to the assignee of the grantee. Prescott *v.* Hobbs, 30 Me. 345.

Missouri.— See Missouri cases cited *supra*, note 94.

New Hampshire.— Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260.

Ohio.— Where a grantor is in actual possession at the date of the delivery of the deed, although by his own disseizin, his covenant of right to convey is real and runs with the land. Devore *v.* Sunderland, 17 Ohio 52, 49 Am. Dec. 442.

United States.— Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91.

See 14 Cent. Dig. tit. "Covenants," § 60.

98. *Arkansas.*— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.— McPike *v.* Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335; Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Salmon *v.* Vallejo, 41 Cal. 481.

Connecticut.— Mitchell *v.* Warner, 5 Conn. 497.

Kansas.— Dale *v.* Shively, 8 Kan. 276.

Maine.— Heath *v.* Whidden, 24 Me. 383. But under Me. Rev. Stat. c. 115, §§ 16, 17, the covenant runs with the land. Allen *v.* Little, 36 Me. 170.

Massachusetts.— Smith *v.* Richards, 155 Mass. 79, 28 N. E. 1132; Osborne *v.* Atkins, 6 Gray 423; Whitney *v.* Dinsmore, 6 Cush. 124; Clark *v.* Swift, 3 Metc. 390; Thayer *v.* Clemence, 22 Pick. 490; Tufts *v.* Adams, 8 Pick. 547. But see Sprague *v.* Baker, 17 Mass. 586; Estabrook *v.* Hapgood, 10 Mass. 313; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49.

Michigan.— Guerin *v.* Smith, 62 Mich. 369, 28 N. W. 906; Smith *v.* Lloyd, 29 Mich. 382.

Missouri.— Blondeau *v.* Sheridan, 81 Mo. 545; Buren *v.* Hubbell, 54 Mo. App. 617.

Nebraska.— Waters *v.* Bagley, (1902) 92 N. W. 637; Sears *v.* Broady, (1902) 92 N. W. 214.

New Hampshire.— Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260.

Virginia.— Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909.

Wisconsin.— Pillsbury *v.* Mitchell, 5 Wis. 17.

United States.— Fuller *v.* Jillett, 2 Fed. 30, 9 Biss. 296.

See 14 Cent. Dig. tit. "Covenants," § 61.

"An agreement to discharge an existing lien or incumbrance on the land conveyed, although contained in the deed, does not create a covenant running with the land." Graber *v.* Duncan, 79 Ind. 565, 566. But see Gaines *v.* Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559, in which a covenant to save the covenantee, his heirs, etc., free from any claim of dower on the part of the covenantee's wife, was held to run with the land of the covenantee.

99. *Georgia.*—Tucker *v.* McArthur, 103 Ga. 409, 30 S. E. 283; Redwine *v.* Brown, 10 Ga. 311.

Illinois.— Richard *v.* Bent, 59 Ill. 38, 14 Am. Rep. 1.

Indiana.— Dehority *v.* Wright, 101 Ind. 382.

Minnesota.— Security Bank *v.* Holmes, 68 Minn. 538, 71 N. W. 699.

New York.— Since the enactment of the code making choses in action assignable, it has been held that the covenant against encumbrances passes with the land through conveyance to a remote grantee. Geiszler *v.* De Graaf, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659 [*affirming* 44 N. Y. App. Div. 178, 60 N. Y. Suppl. 651]. See also Clarke *v.* Priest, 21 N. Y. App. Div. 174, 47 N. Y. Suppl. 489 [*affirming* 18 Misc. 501, 42 N. Y. Suppl. 766]; Coleman *v.* Bresnaham, 54 Hun 619, 8 N. Y. Suppl. 158; Andrews *v.* Appel, 22 Hun 429; Boyd *v.* Belmont, 58 How. Pr. 513. But see McGuckin *v.* Milbank, 152 N. Y. 297, 46 N. E. 490; Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850, 147 N. Y. 456, 42 N. E. 17, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521; Seventy-Third St. Bldg. Co. *v.* Jencks, 19 N. Y. App. Div. 314, 46 N. Y. Suppl. 2.

Ohio.—Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90; Stites *v.* Hobbs, 2 Disn. 571; Lescaleet *v.* Rickner, 16 Ohio Cir. Ct. 461.

South Carolina.— Brisbane *v.* McCrady, 1 Nott & M. 104, 9 Am. Dec. 676.

Texas.— Taylor *v.* Lane, 18 Tex. Civ. App. 545, 45 S. W. 317.

Vermont.— Cole *v.* Kimball, 52 Vt. 639. But see Swasey *v.* Brooks, 30 Vt. 692.

But see Fuller *v.* Jillett, 2 Fed. 30, 9 Biss. 296.

See 14 Cent. Dig. tit. "Covenants," § 61.

nant for quiet enjoyment, or for further assurance, this effect will undoubtedly be given it.[1]

(v) *Covenants For Quiet Enjoyment, Further Assurance, and of Warranty.* Unless themselves expressly negativing such transmission,[2] covenants for quiet enjoyment, for further assurance, and of warranty, whether general or special, until breach, run with the land in all jurisdictions. They descend to heirs and vest in assignees,[3] and cannot pass or be assigned otherwise than with the

1. Post *v.* Campau, 42 Mich. 90, 3 N. W. 272; Clarke *v.* Priest, 21 N. Y. App. Div. 174, 47 N. Y. Suppl. 489 [*affirming* 18 Misc. 501, 42 N. Y. Suppl. 766]; Andrews *v.* Appel, 22 Hun (N. Y.) 429; Colby *v.* Osgood, 29 Barb. (N. Y.) 339; Ernst *v.* Parsons, 54 How. Pr. (N. Y.) 163; Jeter *v.* Glenn, 9 Rich. (S. C.) 374.

The suggestion has been made that the covenant may be said to run with the land when the purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and that it does not run with the land when its whole force is spent in giving assurance against something which immediately affects the title and causes present damage. Cooley, J., in Post *v.* Campau, 42 Mich. 90, 3 N. W. 272 [*citing* Richard *v.* Bent, 59 Ill. 38, 14 Am. Rep. 1; Knadler *v.* Sharp, 36 Iowa 232; Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90].

2. See *supra*, II, D, 1, a, (IV).

3. *Alabama.*— Gunter *v.* Williams, 40 Ala. 561.

Arkansas.— Ross *v.* Turner, 7 Ark. 132, 44 Am. Dec. 531; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.— Blackwell *v.* Atkinson, 14 Cal. 470.

Connecticut.— Butler *v.* Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273; Mitchell *v.* Warner, 5 Conn. 497.

Georgia.— Tucker *v.* McArthur, 103 Ga. 409, 30 S. E. 283; Redwine *v.* Brown, 10 Ga. 311; Leary *v.* Durham, 4 Ga. 593.

Illinois.— Illinois Land, etc., Co. *v.* Bonner, 91 Ill. 114; Claycomb *v.* Munger, 51 Ill. 373; Brady *v.* Spruck, 27 Ill. 478; Bennett *v.* Waller, 23 Ill. 97.

Indiana.— Fisher *v.* Parry, 68 Ind. 465; McClure *v.* McClure, 65 Ind. 482; Blair *v.* Allen, 55 Ind. 409; Martin *v.* Baker, 5 Blackf. 232; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Kansas.— Scoffins *v.* Grandstaff, 12 Kan. 467.

Kentucky.—Asher Lumber Co. *v.* Cornett, 63 S. W. 974, 23 Ky. L. Rep. 602; Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240; Nunnally *v.* White, 3 Metc. 584; Pence *v.* Duvall, 9 B. Mon. 48; Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45; Lot *v.* Parish, 1 Litt. 393; Bradford *v.* Long, 4 Bibb 225.

Louisiana.— Cassidy's Succession, 40 La. Ann. 827, 5 So. 292.

Maine.— Allen *v.* Little, 36 Me. 170; Crooker *v.* Jewell, 29 Me. 527; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504; Heath *v.* Whidden, 24 Me. 383; Donnell *v.* Thompson, 10 Me. 170, 25 Am. Dec. 216; Griffin *v.* Fairbrother, 10 Me. 91.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Massachusetts.— Baker *v.* Bradt, 168 Mass. 58, 46 N. E. 409.

Michigan.— Ely *v.* Hergesell, 46 Mich. 325, 9 N. W. 435; May *v.* Specht, 1 Mich. 187.

Mississippi.— White *v.* Presly, 54 Miss. 313.

Missouri.— Collier *v.* Gamble, 10 Mo. 467.

Nebraska.— Real *v.* Hollister, 17 Nebr. 661, 24 N. W. 333.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370; Russ *v.* Perry, 49 N. H. 547.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260; Zabriskie *v.* Baudendistel, (Ch. 1890) 20 Atl. 163.

New York.— Clarke *v.* Priest, 21 N. Y. App. Div. 174, 47 N. Y. Suppl. 489 [*affirming* 18 Misc. 501, 42 N. Y. Suppl. 766]; Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. 36; Colby *v.* Osgood, 29 Barb. 339; Fowler *v.* Poling, 2 Barb. 300; Cunningham *v.* Knight, 1 Barb. 399; Ernst *v.* Parsons, 54 How. Pr. 163; Beddoe *v.* Wadsworth, 21 Wend. 120; Suydam *v.* Jones, 10 Wend. 180, 25 Am. Dec. 552; Garlock *v.* Closs, 5 Cow. 143; Withy *v.* Mumford, 5 Cow. 137. See also Blydenburgh *v.* Cotheal, 1 Duer 176.

North Carolina.— Lewis *v.* Cook, 35 N. C. 193; Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Pennsylvania.— Whitehill *v.* Gotwalt, 3 Penr. & W. 313; Le Ray de Chaumont *v.* Forsythe, 2 Penr. & W. 507; Ott *v.* Masters, 1 Lehigh Val. L. Rep. 137.

South Carolina.— Jeter *v.* Glenn, 9 Rich. 374.

Tennessee.— Kenney *v.* Norton, 10 Heisk. 384; Lawrence *v.* Senter, 4 Sneed 52; Hopkins *v.* Lane, 9 Yerg. 79; Pile *v.* Benham, 3 Hayw. 176.

Texas.— Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212; Rutherford *v.* Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625.

Vermont.— Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753; Clark *v.* Winchell, 53 Vt. 408; Russ *v.* Steele, 40 Vt. 310; Williams *v.* Wetherbee, 1 Aik. 233.

Virginia.— Dickinson *v.* Hoomes, 8 Gratt. 353.

West Virginia.— McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

Wisconsin.— Schwallback *v.* Chicago, etc.,

land to which they are annexed;[4] and this is true, although the assignment be by quitclaim deed.[5]

c. Covenants Conferring Benefits. As has been seen it has been broadly stated by respectable authorities that covenants conferring benefits will in all cases run with the land,[6] but this is true only in a limited sense and in those cases in which the rights conferred are of such a character as to attach to the land and pass as incidents thereto.[7] In all other cases privity of estate is essential.[8]

d. Covenants Imposing Burdens — (I) *In General.* It has been thought that in no case will a covenant imposing a burden pass with the land so as to bind a subsequent owner,[9] but the overwhelming weight of authority is to the effect that where there is the requisite privity of estate, and the covenant is connected

R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91.

See 14 Cent. Dig. tit. "Covenants," § 62 *et seq.*

If the covenant of warranty is broken at the time of the execution of the conveyance, as where the land is then in the adverse possession of strangers, it will not run. Pigeon River Lumber, etc., Co. *v.* Mims, (Tenn. Ch. App. 1897) 48 S. W. 385.

4. Ely *v.* Hergesell, 46 Mich. 325, 9 N. W. 435; Lewis *v.* Cook, 35 N. C. 193; McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

5. Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781; Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737; Hunt *v.* Amidon, 4 Hill (N. Y.) 345, 40 Am. Dec. 283.

6. See *supra*, II, C, 2; II, D, 1, a, (I).

7. *California.*— Bean *v.* Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39. See also Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 68 Pac. 308, construing Cal. Civ. Code, §§ 1461, 1462.

Illinois.— Fitch *v.* Johnson, 104 Ill. 111; Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230.

Indiana.— Scott *v.* Stetler, 128 Ind. 385, 27 N. E. 721.

Louisiana.—Delogny *v.* Mercer, 43 La. Ann. 205, 8 So. 903.

Massachusetts.— Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335.

Minnesota.— Hamm *v.* St. Paul Water Co., 30 Minn. 185, 14 N. W. 876; Shaber *v.* St. Paul Water Co., 30 Minn. 179, 14 N. W. 874.

New Jersey.— Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190.

North Carolina.— Norfleet *v.* Cromwell, 64 N. C. 1.

Ohio.— Easter *v.* Little Miami R. Co., 14 Ohio St. 48.

Tennessee.— Doty *v.* Chattanooga Union R. Co., 103 Tenn. 564, 53 S. W. 944, 48 L. R. A. 160; Brew *v.* Van Deman, 6 Heisk. 433 [*distinguishing* McNairy *v.* Paine, 9 Humphr. 533].

England.— Cooke *v.* Chilcott, 3 Ch. D. 694, 34 L. T. Rep. N. S. 207.

See 14 Cent. Dig. tit. "Covenants," § 58.

8. See *supra*, II, D, 1, a, (II). And see Norcross *v.* James, 140 Mass. 188, 189, 2 N. E. 946, for an elaborate discussion of this subject by Holmes, J.

"So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land." Chudleigh's Case, 1 Coke 120*a*, 122*b*, Poph. 70.

9. English note to Spencer's Case, 1 Smith Lead. Cas. (9th Am. ed.) 199 [*citing* Brewster *v.* Kitchin, Comb. 424, 466, Holt 175, 669, Ld. Raym. 317, 12 Mod. 166, 1 Salk. 198 (which is so divergently reported as to make a clear understanding of the case impossible, save that a majority of the judges held the heir bound by the ancestor's covenant); Roach *v.* Wadham, 6 East 289 (where the question might have arisen, but did not); Holmes *v.* Buckley, 1 Eq. Cas. Abr. 27, 21 Eng. Reprint 848 (where the covenant was held to run); Cook *v.* Arundel, 1 Eq. Cas. Abr. 26, 21 Eng. Reprint 848 (where the covenant was clearly collateral to the land sought to be bound); Cornbury *v.* Middleton, 1 Eq. Cas. Abr. 26, 21 Eng. Reprint 848 (in which the covenant was held to run); Barclay *v.* Raine, 1 Sim. & St. 449, 24 Rev. Rep. 206, 1 Eng. Ch. 449 (in which the point did not arise, and the vice-chancellor's reported *dictum* that the covenant did not run seems to have been repudiated by him [7 Jarman Blythewood 375 note]); and other cases clearly within that class enforceable in equity, whether the covenant runs or not, on purely equitable grounds]. The writers of the note, however, come to the conclusion that "upon the whole, there appears to be no authority [which has decided apart from the doctrine of notice] that the burden of a covenant will run with land in any case, except that of landlord and tenant; while the opinion of Lord Holt in Brewster *v.* Kitchin, Comb. 424, 466, Holt 175, 669, 1 Ld. Raym. 317, 12 Mod. 166, 1 Salk. 198, that of Lord Brougham in Keppell *v.* Bailey, Coop. t. Brough. 298, 2 Myl. & K. 517, 7 Eng. Ch. 517, and the reason and convenience of the thing, all militate the other way." See also Richards *v.* Harper, L. R. 1 Exch. 199, 4 H. & C. 55, 12 Jur. N. S. 770, 35 L. J. Exch. 130, 14 Wkly. Rep. 643; Ellis *v.* Bridgnorth, 15 C. B. N. S. 52, 32 L. J. C. P. 273, 109 E. C. L. 52; Bailey *v.* Stephens, 12 C. B. N. S. 91, 8 Jur. N. S. 1063, 31 L. J. C. P. 226, 6 L. T. Rep. N. S. 356, 10

with or concerns the land or estate conveyed, it will run with the land as readily as one conferring a benefit.[10] When it is said that in this class of cases there must be a privity of estate between the covenantor and covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance or to carry with it a grant of an easement or quasi-easement, or must be in aid of such a grant.[11]

(II) *COVENANTS AS TO FENCES.* Where the above stated requisites — a sufficient privity of estate and relation to the land, or interest or estate therein, conveyed — exist, covenants stipulating for the erection and maintenance of fences

Wkly. Rep. 868, 104 E. C. L. 91; Austerberry *v.* Oldham, 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch. 633, 53 L. T. Rep. N. S. 543, 33 Wkly. Rep. 807.

10. *Alabama.*— Gilmer *v.* Mobile, etc., R. Co., 79 Ala. 569, 58 Am. Rep. 623.

Georgia. — Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492.

Illinois.— Fitch *v.* Johnson, 104 Ill. 111; Dorsey *v.* St. Louis, etc., R. Co., 58 Ill. 65.

Indiana.— Hazlett *v.* Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Moore *v.* Crose, 43 Ind. 30; Lake Erie, etc., R. Co. *v.* Griffin, (App. 1899) 53 N. E. 1042.

Iowa.— Peden *v.* Chicago, etc., R. Co., 73 Iowa 328, 35 N. W. 424, 5 Am. St. Rep. 680.

Kentucky.— Kentucky Cent. R. Co. *v.* Kenney, 82 Ky. 154.

Massachusetts. — Martin *v.* Drinan, 128 Mass. 515; Bronson *v.* Coffin, 118 Mass. 156 (stating reason of rule); Thomas *v.* Poole, 7 Gray 83; Savage *v.* Mason, 3 Cush. 500; Morse *v.* Aldrich, 19 Pick. 449, 1 Metc. 544; Plymouth *v.* Carver, 16 Pick. 183.

Minnesota.— Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

Missouri.— Dickey *v.* Kansas City, etc., R. Co., 122 Mo. 223, 26 S. W. 685; Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570; Helton *v.* St. Louis, etc., R. Co., 25 Mo. App. 322.

Nevada.— Wheeler *v.* Schad, 7 Nev. 204.

New Hampshire.—Burbank *v.* Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.

New Jersey.— Brewer *v.* Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679.

New York.— Nye *v.* Hoyle, 120 N. Y. 195, 24 N. E. 1 [*affirming* 8 N. Y. St. 513]; Cole *v.* Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Harsha *v.* Reid, 45 N. Y. 415; Van Rensselaer *v.* Read, 26 N. Y. 558; Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278; Wilcox *v.* Campbell, 35 Hun 254; Denman *v.* Prince, 40 Barb. 213; Blain *v.* Taylor, 19 Abb. Pr. 228; Allen *v.* Culver, 3 Den. 284.

North Carolina.—Norfleet *v.* Cromwell, 64 N. C. 1, 70 N. C. 634, 16 Am. Rep. 787.

Ohio.— Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199; Huston *v.* Cincinnati, etc., R. Co., 21 Ohio St. 235; Steible *v.* Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 47, 18 Cinc. L. Bul. 202.

Pennsylvania.— Pennsylvania Co. *v.* Erie, etc., R. Co., 108 Pa. St. 621; Carr *v.* Lowry, 27 Pa. St. 257.

Texas.— Eddy *v.* Hinnant, 82 Tex. 354, 18 S. W. 562.

Vermont.— Kellogg *v.* Robinson, 6 Vt. 276, 27 Am. Dec. 550.

West Virginia.—West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Lydick *v.* Baltimore, etc., R. Co., 17 W. Va. 427.

Wisconsin. — Crawford *v.* Witherbee, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561; Cook *v.* Milwaukee, etc., R. Co., 36 Wis. 45; Wooliscroft *v.* Norton, 15 Wis. 198.

United States.— Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 31 L. ed. 130.

England.— Standen *v.* Chrismas, 10 Q. B. 135, 11 Jur. 694, 16 L. J. Q. B. 265, 59 E. C. L. 135; Morland *v.* Cook, L. R. 6 Eq. 252, 37 L. J. Ch. 825, 18 L. T. Rep. N. S. 496, 16 Wkly. Rep. 777; Bickford *v.* Parson, 5 C. B. 920, 12 Jur. 377, 17 L. J. C. P. 192, 57 E. C. L. 920; Austerberry *v.* Oldham, 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch. 633, 53 L. T. Rep. N. S. 543, 33 Wkly. Rep. 807; Holmes *v.* Buckley, 1 Eq. Cas. Abr. 27, 21 Eng. Reprint 848; Rogers *v.* Hosegood, 69 L. J. Ch. 59, 81 L. T. Rep. N. S. 515; Tulk *v.* Moxhay, 2 Phil. 774, 22 Eng. Ch. 774.

Canada.— Philps *v.* St. John Water Co., 9 N. Brunsw. 24.

See 14 Cent. Dig. tit. "Covenants," § 65.

Under Cal. Civ. Code, §§ 1460–1466, specifying what covenants run with the land when contained in a grant of the estate, the covenants in a contract to furnish water to certain land for irrigation purposes do not run with the land, not being contained in the grant of the estate, and no personal judgment can be had against a purchaser of the land for his refusal to perform them. Fresno Canal, etc., Co. *v.* Dunbar, 80 Cal. 530, 22 Pac. 275; Fresno Canal, etc., Co. *v.* Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112.

11. Norcross *v.* James, 140 Mass. 188, 191, 2 N. E. 946. See also Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335; Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Brewer *v.* Marshal, 19 N. J. Eq. 537, 97 Am. Dec. 679; Louisville, etc., R. Co. *v.* Webster, 106 Tenn. 586, 61 S. W. 1018; Leech *v.* Schweder, L. R. 9 Ch. 463, 43 L. J. Ch. 487, 30 L. T. Rep. N. S. 586, 22 Wkly. Rep. 633; Richards *v.* Harper, L. R. 1 Exch. 199, 4 H. & C. 55, 12 Jur. N. S. 770, 35 L. J. Exch. 130, 14 Wkly. Rep. 643; Austerberry *v.* Oldham, 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch.

will run with the land, and bind remote assignees of the covenantor.[12] Such a covenant cannot, however, be created by parol agreement,[13] nor, it has been held, by a stipulation in a deed poll.[14]

e. Covenants as to Use of Property. Covenants as to the use of property will run with the land, where they concern the land or estate conveyed and there is the necessary privity of estate between the covenantor and the covenantee. The benefit of the covenant runs with the land for the benefit of which it is entered into; its burden runs with the land out of which the easement or quasi-easement is granted, or upon which the restriction is imposed.[15] In that not uncommon class of cases in which the owner of a tract or block sells lots with covenants as to their use, or as to the sale and use of the remaining lots, such covenants inure to the benefit of all subsequent purchasers of the remaining lots, and create rights in the

633, 53 L. T. Rep. N. S. 543, 33 Wkly. Rep. 807.

There is, however, another class of covenants in which either one or both of the above-stated requisites is lacking, but which will nevertheless be enforced in equity, not because they run with the land, but for equitable reasons, and in spite of the fact that they do not run, and are not enforceable at law. Repeated failures clearly to distinguish the two classes have caused great confusion and much apparent conflict in the adjudged cases. See *supra*, II, C; and *infra*, II, D, 1, e. And see, generally, EQUITY; INJUNCTIONS; SPECIFIC PERFORMANCE.

12. *Indiana.*— Lake Erie, etc., R. Co. *v.* Priest, 131 Ind. 413, 41 N. E. 77; Midland R. Co. *v.* Fisher, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189, 8 L. R. A. 604; Hazlett *v.* Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Lake Erie, etc., R. Co. *v.* Griffin, (App. 1899) 53 N. E. 1042; Lake Erie, etc., R. Co. *v.* Power, 15 Ind. App. 179, 43 N. E. 959; Toledo, etc., R. Co. *v.* Burgan, 9 Ind. App. 604, 37 N. E. 31; Toledo, etc., R. Co. *v.* Cosand, 6 Ind. App. 222, 33 N. E. 251.

Kentucky.— Kentucky Cent. R. Co. *v.* Kenney, 82 Ky. 154.

Massachusetts.— Bronson *v.* Coffin, 118 Mass. 156.

New York.— Dey *v.* Prentice, 90 Hun 27, 35 N. Y. Suppl. 563; Duffy *v.* New York, etc., R. Co., 2 Hilt. 496; Moxley *v.* New Jersey, etc., R. Co., 21 N. Y. Suppl. 347; Countryman *v.* Deck, 13 Abb. N. Cas. 110.

Ohio.— Hickey *v.* Lake Shore, etc., R. Co., 51 Ohio St. 40, 36 N. E. 672, 46 Am. St. Rep. 545, 23 L. R. A. 396; Walsh *v.* Barton, 24 Ohio St. 28; Easter *v.* Little Miami R. Co., 14 Ohio St. 48. See also Pittsburg, etc., R. Co. *v.* Bosworth, 46 Ohio St. 81, 18 N. E. 533, 2 L. R. A. 199 [*affirming* 1 Ohio Cir. Ct. 69].

Vermont.— Kellogg *v.* Robinson, 6 Vt. 276, 27 Am. Dec. 550.

Wisconsin.— Hartung *v.* Witte, 59 Wis. 285, 18 N. W. 175, in which it was said, however, that a covenant to build and maintain a fence is personal only. But this would seem to depend upon the use or failure to use the words "heirs and assigns." See *supra*, II, D, 1, a, (III).

See 14 Cent. Dig. tit. "Covenants," § 66.

The covenant runs with the land to which the servitude is attached, but no further. Bronson *v.* Coffin, 118 Mass. 156. See also Walsh *v.* Barton, 24 Ohio St. 28.

Usage cannot constitute a covenant. Wright *v.* Wright, 21 Conn. 329.

13. Guilfoos *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 593, 23 N. Y. Suppl. 925. See also Wilder *v.* Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698.

14. Kennedy *v.* Owen, 136 Mass. 199. See also *supra*, I, A, 2, b.

15. *Illinois.*— Hutchinson *v.* Ulrich, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391.

Maryland.— Halle *v.* Newbold, 69 Md. 265, 14 Atl. 662.

Massachusetts.— *Compare* Skinner *v.* Shepard, 130 Mass. 180.

Missouri.— Baker *v.* St. Louis, 75 Mo. 671 [*affirming* 7 Mo. App. 429].

New Jersey.— Winfield *v.* Henning, 21 N. J. Eq. 188. See also De Gray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388.

New York.— Dexter *v.* Beard, 130 N. Y. 549, 29 N. E. 983 [*affirming* 7 N. Y. Suppl. 11]; Plumb *v.* Tubbs, 41 N. Y. 442; Zipp *v.* Barker, 40 N. Y. Suppl. 325; Phenix Ins. Co. *v.* Continental Ins. Co., 14 Abb. Pr. N. S. 266; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80. *Compare* Equitable L. Assur. Soc. *v.* Brennan, 148 N. Y. 661, 43 N. E. 173 [*reversing* 24 N. Y. Suppl. 784, 30 Abb. N. Cas. 260, 74 Hun 576, 26 N. Y. Suppl. 600].

Pennsylvania.— Hansell *v.* Downing, 17 Pa. Super. Ct. 235.

See 14 Cent. Dig. tit. "Covenants," § 67; and *supra*, II, C.

Nuisances and particular occupations.— *Alabama.*— Robbins *v.* Webb, 68 Ala. 393.

Indiana.— *Compare* Taylor *v.* Owen, 2 Blackf. 301, 20 Am. Dec. 115.

Kentucky.— Sutton *v.* Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274.

New York.— Clement *v.* Burtis, 121 N. Y. 708, 24 N. E. 1013; Uihlein *v.* Matthews, 57 N. Y. App. Div. 476, 68 N. Y. Suppl. 309; Brouwer *v.* Jones, 23 Barb. 153; Spencer *v.* Stevens, 18 Misc. 112, 41 N. Y. Suppl. 39; Birdsall *v.* Tiemann, 12 How. Pr. 551; Norman *v.* Wells, 17 Wend. 136; Barron *v.* Rich-

nature of easements in their favor, which are enforceable against the successors of the original purchasers.[16]

f. Covenants Creating Easements. Covenants creating easements on land will run with the land so as to bind subsequent owners.[17]

g. Covenants Creating Charges and Liens. A lien or charge may be fixed upon land by a covenant, following it into the hands of subsequent purchasers;[18] but in order that a covenant creating a charge or lien may run with the land, it must be contained in a grant thereof, or of some estate therein,[19] and relate directly thereto;[20] and where no limitation is put to the absolute and unqualified ownership of the grantee, and there is no condition, charge, or lien, a covenant of the grantee contained in the conveyance is a personal covenant, and does not run with the land.[21]

ard, 3 Edw. 96. But see Harsha *v.* Reid, 45 N. Y. 415. And see *In re* Covenant, 2 N. Y. City Ct. 396.

Ohio.— Heidorn *v.* Wright, 6 Ohio S. & C. Bl. Dec. 315, 4 Ohio N. P. 235.

Pennsylvania. — St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512; *In re* Snyder, 2 Pa. Dist. 785.

England.—See Hodson *v.* Coppard, 29 Beav. 4, 30 L. J. Ch. 20, 9 Wkly. Rep. 9.

But see Tardy *v.* Creasy, 81 Va. 553, 59 Am. Rep. 676, Lewis, P., and Fauntleroy, J., dissenting.

See 14 Cent. Dig. tit. "Covenants," § 68.

Railroad rights of way.— *Alabama.*— Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138; Gilmer *v.* Mobile, etc., R. Co., 79 Ala. 569, 58 Am. Rep. 623.

Arkansas. — St. Louis, etc., R. Co. *v.* O'Baugh, 49 Ark. 418, 5 S. W. 711.

Connecticut.— Chappell *v.* New York, etc., R. Co., 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420.

Illinois.— Pittsburg, etc., R. Co. *v.* Reno, 22 Ill. App. 470 [*affirmed* in 123 Ill. 273, 14 N. E. 195].

Maryland.— *Compare* Lynn *v.* Mt. Savage Iron Co., 34 Md. 603.

Ohio.— Huston *v.* Cincinnati, etc., R. Co., 21 Ohio St. 235.

Tennessee.— Doty *v.* Chattanooga Union R. Co., 103 Tenn. 564, 53 S. W. 944, 48 L. R. A. 160.

See 14 Cent. Dig. tit. "Covenants," § 69.

Under Cal. Civ. Code, § 1462, providing that every covenant contained in a grant of realty which is made for the direct benefit of the property runs with the land; and section 1461, directing that "the only covenants which run with the land are those specified in this title, and those which are incidental thereto,"— a covenant that the property conveyed shall not be used for any business purposes does not run with the land. Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 42, 68 Pac. 308.

A covenant restricting the height of buildings to be erected on certain lots conveyed, containing no reservation to the grantee's heirs, does not create a condition subsequent, or covenant running with the land. Krekeler *v.* Aulbach, 51 N. Y. App. Div. 591, 64 N. Y. Suppl. 908.

Not to trespass.—A grantee's covenant not to trespass on adjacent lands of his grantor does not run with the land. Hinckel *v.* Stevens, 35 N. Y. App. Div. 5, 54 N. Y. Suppl. 457.

16. See *supra*, II, C, 1.

Enforceable in equity.— See *supra*, II, C, 2.

17. *California.*— Bean *v.* Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39.

Illinois.—Willoughby *v.* Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758.

Kentucky.—Gibson *v.* Porter, 15 S. W. 871, 12 Ky. L. Rep. 917. *Compare* M. & L. T. P. R. Co. *v.* Linville, 9 Ky. L. Rep. 684.

Louisiana— Delogny *v.* Mercer, 43 La. Ann. 205, 8 So. 903.

Massachusetts. — But see Wheelock *v.* Thayer, 16 Pick. 68.

New Jersey.— Brewer *v.* Marshall, 18 N. J. Eq. 337.

New York.—Avery *v.* New York Cent., etc., R. Co., 106 N. Y. 142, 12 N. E. 619.

North Carolina.— Norfleet *v.* Cromwell, 64 N. C. 1.

Pennsylvania.— Campbell *v.* McCoy, 31 Pa. St. 263.

Tennessee.— Doty *v.* Chattanooga Union R. Co., 103 Tenn. 564, 53 S. W. 944, 48 L. R. A. 160; Brew *v.* Van Deman, 6 Heisk. 433 [*distinguishing* McNairy *v.* Paine, 9 Humphr. 533].

Wisconsin.— Noonan *v.* Orton, 4 Wis. 335.

See 14 Cent. Dig. tit. "Covenants," § 70; and *supra*, II, C, 2.

18. Dexter's Appeal, 81 Pa. St. 403.

19. Fresno Canal, etc., Co. *v.* Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112; Asher Lumber Co. *v.* Cornett, 63 S. W. 974, 23 Ky. L. Rep. 602; Barron *v.* Whiteside, 89 Md. 448, 43 Atl. 825. *Compare* Middlefield *v.* Church Mills Knitting Co., 160 Mass. 267, 35 N. E. 780.

Covenants for support.—Where land is conveyed in consideration of a covenant by the grantee to support the grantor, such covenant runs with the land, and is binding upon subsequent owners. Martin *v.* Martin, 44 Kan. 295, 24 Pac. 418; Goudy *v.* Goudy, Wright (Ohio) 410. But see Harkins *v.* Doran, (Pa. 1888) 15 Atl. 928.

20. Howard Mfg. Co. *v.* Water Lot Co., 53 Ga. 689; Morse *v.* Garner, 1 Strohh. (S. C.) 514, 47 Am. Dec. 565.

21. Hepburn *v.* Snyder, 3 Pa. St. 72.

2. Duration of Real Covenants.[22] A warranty in a deed is coextensive with the estate to which it is annexed, and when the estate ceases the warranty ceases.[23] But an estate is determined only when it expires by its own limitations; and consequently, when the estate is in fee and the covenants run with the land, they may be sued on by the covenantee or his assignees whenever they are evicted by a title paramount.[24] In the case of covenants restricting the use of property, their duration, whether for a limited or unlimited period, is said to depend upon the intention of the parties as expressed in the written instrument.[25]

3. Release or Discharge From Liability[26] — **a. In General.** In England, and in a few cases in the United States, it is held that a covenant which runs with the land can only be released by an instrument of as high a nature as the deed containing it;[27] but the preponderance of authority in the latter country is to the effect that such a covenant may be released either by matter *in pais* or by parol.[28] In order that a release may bind a subsequent assignee it must have been made

22. Duration of personal covenants see *supra*, II, A, 10.

23. Hastings *v.* Hastings, 123 Mass. 158; Register *v.* Rowell, 48 N. C. 312 [*citing* Seymore's Case, 10 Coke 96, 97].

Presumption of continuance.— All covenants or restrictions contained in a deed are to be presumed to continue for the whole duration of the estate created, unless the contrary manifestly appears. Gifford *v.* Syracuse First Presb. Soc., 56 Barb. (N. Y.) 114.

24. Lewis *v.* Cook, 35 N. C. 193.

After breach of a covenant of warranty it can no longer run with the land, nor has it any existence or virtue, save for the purpose of supporting a right of action for damages, on the part of him who held it at the time of the breach against the covenantor. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

25. Landell *v.* Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227. See also St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512, where it was held that when a covenant confines the erection of buildings on the land to certain specified buildings, and it is provided that such restriction is to cease only when the land shall be "improved" by such buildings, the word "improved" means the erection of permanent buildings.

26. As to discharge of covenant restricting the use of property through change of conditions see *supra*, II, C.

27. Heath *v.* Whidden, 29 Me. 108; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504; West *v.* Blakeway, 9 Dowl. P. C. 846, 5 Jur. 630, 10 L. J. C. P. 173, 2 M. & G. 729, 3 Scott N. R. 199, 40 E. C. L. 828; Harris *v.* Goodwyn, 9 Dowl. P. C. 409, 10 L. J. C. P. 62, 2 M. & G. 405, 2 Scott N. R. 459, 40 E. C. L. 664; May *v.* Taylor, 12 L. J. C. P. 314, 6 M. & G. 261, 262, note *a*, 6 Scott N. R. 974, 46 E. C. L. 261; Cordwent *v.* Hunt, 2 Moore C. P. 660, 8 Taunt. 596, 20 Rev. Rep. 578, 4 E. C. L. 294; Kaye *v.* Waghorne, 1 Taunt. 428; Rogers *v.* Payne, 2 Wils. C. P. 376. See also Yeaton's Appeal, 105 Pa. St. 125. *Compare* Jones *v.* Barkley, Dougl. (3d ed.) 684; Blackwell *v.* Nash, 1 Str. 535.

Intention of the parties governs. Uihlein *v.* Matthews, 57 N. Y. App. Div. 476, 68 N. Y. Suppl. 309. See also Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145. And see Black *v.* Barton, 13 Tex. 82.

Effect of release on title.— The grantee of land, by releasing his grantor from liability on a covenant of warranty, does not affect his own title. Dawley *v.* Rugg, 35 Hun (N. Y.) 143.

Recordation of the release is not necessary. Littlefield *v.* Getchell, 32 Me. 390. See also Pile *v.* Benham, 3 Hayw. (Tenn.) 176. But see Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328. And see Field *v.* Snell, 4 Cush. (Mass.) 504.

The neglect to record his title by the vendee does not release the vendor from his obligation of warranty. Boyer *v.* Amet, 41 La. Ann. 721, 6 So. 734.

Conditional waiver.— Wittenberg *v.* Mollyneaux, 55 Nebr. 429, 75 N. W. 835.

28. *Georgia.*— White *v.* Furtzwangler, 81 Ga. 66, 6 S. E. 692.

Indiana.— Rinehart *v.* Rinehart, 91 Ind. 89.

Massachusetts.— Drury *v.* Tremont Imp. Co., 13 Allen 168, in equity an agreement under seal may be discharged by matter *in pais*.

Michigan.— Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161.

Nebraska.—Wittenberg *v.* Mollyneaux, 55 Nebr. 429, 75 N. W. 835.

New York.—Langworthy *v.* Smith, 2 Wend. 587, 20 Am. Dec. 652; Dearborn *v.* Cross, 7 Cow. 48; Fleming *v.* Gilbert, 3 Johns. 528. See also Durnherr *v.* Rau, 60 Hun (N. Y.) 358, 15 N. Y. Suppl. 344, release by quitclaim.

United States.— U. S. *v.* Howell, 26 Fed. Cas. No. 15,405, 4 Wash. 620.

See 14 Cent. Dig. tit. "Covenants," § 73.

Presumption from long-continued breach.— See Hepworth *v.* Pickles, [1900] 1 Ch. 108, 69 L. J. Ch. 55, 81 L. T. Rep. N. S. 818, 48 Wkly. Rep. 184 [*following* Gibson *v.* Doeg, 2 H. & N. 615, 27 L. J. Exch. 37, 6 Wkly. Rep. 107].

Promise after sale to discharge encumbrance.— See Taylor *v.* Witherspoon, 23 Tex. 642.

Release by act of law.— See Bailey *v.* De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B.

prior to the assignment,[29] unless the releasor has paid the damages occasioned by a breach of the covenant to such assignee.[30] Similarly an assignment by a vendor to a third person of his rights against his warrantors, made after the eviction of his vendee, in possession under contract of sale, cannot in equity deprive the vendee of his recourse against such warrantors.[31]

b. Merger or Revesting of Estate in Covenantor. Where an estate becomes revested in the covenantor his real covenants are discharged,[32] provided the estate revesting in him is the same as that originally conveyed;[33] nor has such covenantor any claim in warranty for dangers of eviction, existing when he himself sold, as against the intermediate holders.[34] So too a covenant of warranty does

98, 19 L. T. Rep. N. S. 681, 17 Wkly. Rep. 494.

29. Abby *v.* Goodrich, 3 Day (Conn.) 433; Claycomb *v.* Munger, 51 Ill. 373; Crooker *v.* Jewell, 29 Me. 527.

Where a grantee of lands has conveyed parts thereof, his release of his grantor from the covenants in his deed will not bar the subsequent grantees from suing the original covenantor on his warranty. Sherwood *v.* Hubbel, 1 Root (Conn.) 498.

Covenant for benefit of adjoining lands.— Where in a deed of land a covenant is inserted intended to confer certain benefits on adjacent lands retained by the grantor, the latter has no power, after conveying such adjacent lands to a third person, to modify such covenant. Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190. See also Hills *v.* Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218.

Breach of continuity.— Where a deed of land contained a covenant against encumbrances, and the land at the time was subject to a local assessment, and thereafter was conveyed subject to the assessment, it was held that such conveyance broke the continuity of the covenant, and that a subsequent grantee acquiring title under a deed containing a covenant against encumbrances could not recover on it against the original grantor. Geiszler *v.* De Graaf, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659 [*affirming* 44 N. Y. App. Div. 178, 60 N. Y. Suppl. 651].

30. Chase *v.* Weston, 12 N. H. 413.

31. Stewart *v.* Wilson, 5 Dana (Ky.) 50.

32. *Georgia.*— Willis *v.* McGough, 56 Ga. 198.

Illinois.—Silverman *v.* Loomis, 104 Ill. 137; Brown *v.* Metz, 33 Ill. 339, 85 Am. Dec. 277.

Iowa.— Carroll *v.* Carroll, 113 Iowa 419, 85 N. W. 639.

Massachusetts. — Eveleth *v.* Crouch, 15 Mass. 307.

New York.—Waterbury *v.* Head, 12 N. Y. St. 361.

Texas.— Green *v.* Edwards, 15 Tex. Civ. App. 382, 39 S. W. 1005.

Wisconsin.— Goodel *v.* Bennett, 22 Wis. 565.

See 14 Cent. Dig. tit. "Covenants," § 75.

Bond to reconvey.— Where the grantee in a deed has given a bond to the grantor to reconvey the granted premises on demand, he cannot maintain an action upon the covenants. Hatch *v.* Kimball, 14 Me. 9.

Reconveyance with special warranty.— Where land is conveyed with covenants of warranty, and the grantee reconveys the estate with a special warranty against all persons claiming under him, such special warranty will operate so as to defeat the first warranty. Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Kellogg *v.* Wood, 4 Paige (N. Y.) 578.

Reconveyance without covenants.— Where A conveyed land to B with covenant of seizin, and B reconveyed it to A without covenant, it was held that B might notwithstanding recover against A for a breach of his covenant of seizin. Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189. See also Waterbury *v.* Head, 12 N. Y. St. 361.

33. Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167; Andrews *v.* Wolcott, 16 Barb. (N. Y.) 21. See also Hobbs *v.* King, 2 Metc. (Ky.) 139. And see Coke Litt. 390*a*.

Purchase-money mortgage.— Where land is conveyed by deed of warranty, and the same premises at the same time are reconveyed in mortgage with like covenants, the covenants in the mortgage deed will not operate to preclude the maintenance of an action on the covenants of the absolute deed.

Connecticut.— King *v.* Kilbride, 58 Conn. 109, 19 Atl. 519; Hubbard *v.* Norton, 10 Conn. 422.

Maine.— Harrington *v.* Bean, 89 Me. 470, 36 Atl. 986; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504; Hardy *v.* Nelson, 27 Me. 525. *Compare* Smith *v.* Cannell, 32 Me. 123.

Massachusetts. — Sumner *v.* Barnard, 12 Metc. 459. *Compare* Gilman *v.* Haven, 11 Cush. 330.

Minnesota.— Resser *v.* Carney, 52 Minn. 397, 54 N. W. 89.

Missouri.— Connor *v.* Eddy, 25 Mo. 72.

New Hampshire.— Haynes *v.* Stevens, 11 N. H. 28.

New York.— Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246.

Vermont. — Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753.

Wisconsin.— Davis *v.* Judd, 6 Wis. 85.

See 14 Cent. Dig. tit. "Covenants," § 75.

A release of an estate does not work an extinguishment of a covenant of seizin previously broken. Bennett *v.* Irwin, 3 Johns. (N. Y.) 363 [*citing* Austin *v.* Moyle, Noy 118].

34. Wright *v.* Wood, 6 La. Ann. 176.

not include an encumbrance which the grantee by an instrument of as high a nature as the deed has engaged to discharge; and consequently the grantee, or one holding under him with notice, cannot enforce such covenant as an estoppel against his own covenant of warranty of the same premises to the original covenantor.[35]

4. Persons Entitled to Enforce Real Covenants — a. Covenantees. Persons with whom[36] or for whose benefit[37] a real covenant is made are entitled to enforce such covenant upon its breach.

b. Grantees and Assignees — (i) *In General.* In case of a covenant running with the land, the owner of the land at the time of its breach, whether he holds directly or through intermediate conveyances, may bring an action for the breach of it in his own name against the original or any subsequent covenantor.[38] So too

35. Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504.

36. Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136; Devin *v.* Hendershott, 32 Iowa 192.

Where a covenant is broken at the time of the execution of a deed, the covenantee and his personal representatives are alone entitled to maintain an action thereon. Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136. See also Washington City Sav. Bank *v.* Thornton, 83 Va. 157, 2 S. E. 193 [*citing* Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909].

Insertion of name after execution and delivery.— A person whose name has been inserted as that of grantee in a deed after execution and delivery, although with the consent of the grantor and grantee, cannot maintain an action on the covenants thereof. Hilmert *v.* Christian, 29 Wis. 104.

37. Barker *v.* Kuhn, 38 Iowa 392; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Deering *v.* Farrington, 3 Keb. 304; Lowther *v.* Kelly, 8 Mod. 115; Moot *v.* Gibson, 21 Ont. 248. But see *Ex p.* Richardson, 14 Ves. Jr. 184, 33 Eng. Reprint 491; *Ex p.* Peele, 6 Ves. Jr. 602, 31 Eng. Reprint 1216. *Compare* Faulkner *v.* Faulkner, 23 Ont. 252 [*distinguishing* West *v.* Houghton, 4 C. P. D. 197, 40 L. T. Rep. N. S. 364, 27 Wkly. Rep. 678].

"It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance." Durnherr *v.* Rau, 135 N. Y. 219, 222, 32 N. E. 49 [*affirming* 60 Hun 358, 15 N. Y. Suppl. 344]. See also Root *v.* Wright, 84 N. Y. 72, 38 Am. Dec. 495.

Right of equitable owner.— Where a purchaser of real estate has the conveyance thereof executed to a third person, from whom he borrowed the purchase-money, and as security therefor the purchaser will be considered the equitable owner and entitled to maintain an action on the covenants in the deed. Harper *v.* Perry, 28 Iowa 57.

Creditors can exercise all their debtor's rights of action in Louisiana, save those reserved by La. Civ. Code, pp. 1986, 1987; and the reservation does not include actions of warranty. Lynch *v.* Kitchen, 2 La. Ann. 843.

But a mortgagor cannot maintain an action on the covenants in the conveyance to him, while the debt secured by the mortgage remains unpaid, the mortgagee being regarded in law as the legal owner until such payment is made. McGoodwin *v.* Stephenson, 11 B. Mon. (Ky.) 21; Williams *v.* Holcomb, 6 Ohio Dec. (Reprint) 860, 8 Am. L. Rec. 484.

38. *Alabama.*—Gunter *v.* Williams, 40 Ala. 561.

Connecticut.— Mitchell *v.* Warner, 5 Conn. 497.

Kentucky.—See Bradford *v.* Long, 4 Bibb. 225.

Massachusetts.— Sprague *v.* Baker, 17 Mass. 586; Wyman *v.* Ballard, 12 Mass. 304. And see Clark *v.* Swift, 3 Metc. 390.

Mississippi.— See Chaplain *v.* Briscoe, 5 Sm. & M. 198.

Missouri.— Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142; Collier *v.* Gamble, 10 Mo. 467; Blanchard *v.* Haseltine, 79 Mo. App. 248. *Compare* Thomas *v.* Cox, 6 Mo. 506.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370; Loomis *v.* Bedel, 11 N. H. 74.

New York.— Suydam *v.* Jones, 10 Wend. 180, 25 Am. Dec. 552; Withy *v.* Mumford, 5 Cow. 137.

North Carolina.— Williams *v.* Beeman, 13 N. C. 483. *Compare* Smith *v.* Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Pennsylvania.— Le Ray de Chaumont *v.* Forsythe, 2 Penr. & W. 507.

Tennessee.— Kenney *v.* Norton, 10 Heisk. 384; Lawrence *v.* Senter, 4 Sneed 52; Hopkins *v.* Lane, 9 Yerg. 79.

Vermont.— Williams *v.* Wetherbee, 1 Aik. 233.

England.— Middlemore *v.* Goodale, Cro. Car. 503.

See 14 Cent. Dig. tit. "Covenants," § 78.

Contra, under Md. Stat. (1829), c. 51, as to covenant for quiet enjoyment. Dakin *v.* Pomeroy, 9 Gill 1.

A grantee from his cotenants may maintain an action for the benefit of lands held by them as tenants in common by a railroad

where a covenant runs with the land conveyed for the benefit of adjacent lands of the grantor, as in the case of covenants restricting the use of property, subsequent assignees of the grantor may maintain an action for the breach thereof against the original covenantor, his heirs, or assigns.[39] Such a covenant is enforceable only by the covenantee or his assignee,[40] and in the absence of a covenant on the part of the grantor to exact a similar covenant from purchasers of other lots, a prior purchaser who gives restrictive covenants as to the use of the property purchased by him cannot enforce similar covenants given by purchasers of adjacent lands.[41]

(II) *One Who Has Parted With Title.* Where land has been conveyed with real covenants and has passed by subsequent conveyances through the hands of various covenantees, the last covenantee or assignee in whose possession the land is when the covenant is broken can as a rule alone sue for breach of covenant, and he has a right of action against any or all of the prior covenantors.[42] If, however, by the nature and terms of the assignment, the assignor is bound to indemnify the assignee, he may sue in his own name,[43] and the same is true where

company to which they have conveyed a right of way. Toledo, etc., R. Co. *v.* Cosand, 6 Ind. App. 222, 33 N. E. 251.

Suit by tenant.— Where a railroad company has a right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath the right of way to be mined, a tenant of such owner, the terms of whose lease give him the right to mine all the coal in the land demised, may sue in the name of the landlord for a breach of such covenant. Mine Hill, etc., R. Co. *v.* Lippincott, 86 Pa. St. 468. See also Lake Erie, etc., R. Co. *v.* Power, 15 Ind. App. 179, 43 N. E. 959.

39. Covenants imposing burdens.—Hemsley *v.* Marlborough Hotel Co., 62 N. J. Eq. 164, 50 Atl. 14; De Gray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388; Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Murray *v.* Jayne, 8 Barb. (N. Y.) 612; Perkins *v.* Coddington, 4 Rob. (N. Y.) 647; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Nalder, etc., Brewery Co. *v.* Harman, 83 L. T. N. S. 257. See also Kellogg *v.* Wood, 4 Paige (N. Y.) 578. And see *supra*, II, C; II, D, 1, d.

General scheme of improvement.— Where there is a general scheme, adopted and made public by the owner of a tract for the improvement of the property, by which it is divided into streets and lots, and contemplating a restriction, as to the uses to which the buildings or lots shall be put, to be secured by a covenant embodying the restriction to be inserted in each deed to a purchaser; and it appears by writings or by the circumstances that such covenants are intended for the benefit of all the lands and that each purchaser is to be subject to and have the benefit thereof; and the covenants are actually inserted in all the deeds, one purchaser and his assigns may enforce the covenants against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenants have been part of the subject-matter of his purchase. De Gray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388. See also Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Nalder, etc., Brewery Co. *v.* Harman, 83 L. T. Rep. N. S. 257.

40. Graves *v.* Deterling, 120 N. Y. 447, 24 N. E. 655 [*affirming* 41 Hun 643].

41. Clark *v.* McGee, 159 Ill. 518, 42 N. E. 965; Hemsley *v.* Marlborough Hotel Co., 62 N. J. Eq. 164, 50 Atl. 14 [*affirmed* in 63 N. J. Eq. 804, 52 Atl. 1132]; Mulligan *v.* Jordan, 50 N. J. Eq. 363, 24 Atl. 543.

42. *Alabama.*— Claunch *v.* Allen, 12 Ala. 159.

Georgia.— Leary *v.* Durham, 4 Ga. 593.

Illinois.— Claycomb *v.* Munger, 51 Ill. 373.

Kentucky.— Nunnally *v.* White, 3 Metc. 584.

Maine.— Crooker *v.* Jewell, 29 Me. 527; Griffin *v.* Fairbrother, 10 Me. 91.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370; Chase *v.* Weston, 12 N. H. 413.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Virginia.— Jones *v.* Richmond, 88 Va. 231, 13 S. E. 414.

Canada.—Wallace *v.* Vernon, 3 N. Brunsw. 5. See 14 Cent. Dig. tit. "Covenants," § 79.

A quitclaim by a covenantee of his interest in certain land is not an extinguishment of a covenant of seizin previously executed. Bennett *v.* Irwin, 3 Johns. (N. Y.) 363.

A tax-sale will not pass a covenant of warranty to the purchaser so as to preclude the original covenantee from suing for a breach of the covenant. Bellows *v.* Litchfield, 83 Iowa 36, 48 N. W. 1062.

43. *Alabama.*— Claunch *v.* Allen, 12 Ala. 159.

Kentucky.— Lot *v.* Parish, 1 Litt. 393.

Massachusetts.— Bickford *v.* Page, 2 Mass. 455.

Missouri.— Jones *v.* Whitsett, 79 Mo. 188.

Nebraska.— Pritchett *v.* Redick, 62 Nebr. 296, 86 N. W. 1091.

New York.— Baxter *v.* Ryerss, 13 Barb. 267; Kane *v.* Sanger, 14 Johns. 89.

Vermont.— See Keith *v.* Day, 15 Vt. 660.

the former conveys to the latter after actual breach of the covenant or *pendente lite*.[44]

(III) *ASSIGNEE TAKING CONVEYANCE BEFORE BREACH.* Where an assignee, whether direct or remote from the covenantee, acquires his title to land before the breach of a covenant running therewith, he may maintain an action in his own name against either the original or any intermediate covenantor for a breach occurring during his tenure.[45]

(IV) *ASSIGNEE TAKING CONVEYANCE AFTER BREACH.* The preponderating weight of American authority is to the effect that the assignee of a real covenant cannot maintain an action for its breach which has accrued before the assignment, such breach being a chose in action not running with the land.[46] A few of the United States, however, follow the English doctrine,[47] and hold that even such

See 14 Cent. Dig. tit. "Covenants," § 79.

44. Adams *v.* Conover, 22 Hun (N. Y.) 424; Grasselli *v.* Lowden, 11 Ohio St. 349; Lewis *v.* Ross, (Tex. Civ. App. 1901) 65 S. W. 504; Clement *v.* Rutland Bank, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425; Keith *v.* Day, 15 Vt. 660; Catlin *v.* Hurlburt, 3 Vt. 403.

In one or more earlier cases it was said that if the assignor be himself bound in his deed to indemnify the assignee he alone can bring the action. Kane *v.* Sanger, 14 Johns. (N. Y.) 89 [*citing* Bickford *v.* Page, 2 Mass. 455, which, however, does not seem to admit of such an interpretation]. See also Buckhurst *v.* Fenner, 1 Coke 1. But this contention has since been repudiated. Withy *v.* Mumford, 5 Cow. (N. Y.) 137; Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230.

45. *Georgia.*— Redwine *v.* Brown, 10 Ga. 311.

Kentucky.— Lot *v.* Parish, 1 Litt. 393.

Louisiana.—Carter *v.* Caldwell, 15 La. 471.

New York.— Norman *v.* Wells, 17 Wend. 136.

South Carolina.— Jeter *v.* Glenn, 9 Rich. 374.

Covenant against encumbrances.— In Richard *v.* Bent, 59 Ill. 38, 14 Am. Rep. 1, it was held, following the English doctrine as to the covenant of seizin, that where the substantial breach of the covenant against encumbrances occurs after the assignment of lands to a remote grantee and the whole actual damages are sustained by him, he may bring suit in his own name against the original covenantor.

Equitable relief.— Where the owner in fee of land gives his bond for conveyance with warranty, and after the vendee has paid most of the purchase-price, and the vendor has become insolvent, a holder of the paramount title recovers the land, the right of recourse which the vendor has against his grantor will in equity vest in the vendee. Stewart *v.* Wilson, 5 Dana (Ky.) 50.

Similarly where a recovery has been had by an evicted covenantee against his immediate grantor, the latter may on payment of damages and costs recover at once on the original covenant. It is not necessary that he should sue his immediate grantor. Garlock *v.* Closs, 5 Cow. (N. Y.) 143.

46. *Arkansas.*— Ross *v.* Turner, 7 Ark. 132, 44 Am. Dec. 531; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

Connecticut.— Davis *v.* Lyman, 6 Conn. 249; Mitchell *v.* Warner, 5 Conn. 497.

Iowa.— Peden *v.* Chicago, etc., R. Co., 73 Iowa 328, 35 N. W. 424, 5 Am. St. Rep. 680. But see Knadler *v.* Sharp, 36 Iowa 232.

Kentucky.— South *v.* Hoy, 3 T. B. Mon. 88.

Massachusetts.— Smith *v.* Richards, 155 Mass. 79, 28 N. E. 1132; Ladd *v.* Noyes, 137 Mass. 151; Whitney *v.* Dinsmore, 6 Cush. 124; Shelton *v.* Codman, 3 Cush. 318.

Nebraska.—Blodgett *v.* McMurtry, 54 Nebr. 69, 74 N. W. 392; Davidson *v.* Cox, 10 Nebr. 150, 4 N. W. 1035.

New Jersey.— Garrison *v.* Sandford, 12 N. J. L. 261; Chapman *v.* Holmes, 10 N. J. L. 20.

New York.— Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Geiszler *v.* De Graaf, 44 N. Y. App. Div. 178, 60 N. Y. Suppl. 651; Hamilton *v.* Wilson, 4 Johns. 72, 4 Am. Dec. 253. But see Andrews *v.* Appel, 22 Hun 429.

Oregon.— Wesco *v.* Kern, 86 Oreg. 433, 59 Pac. 548, 60 Pac. 563.

Pennsylvania.— Provident Life, etc., Co. *v.* Fiss, 147 Pa. St. 232, 23 Atl. 560; Dailey *v.* Beck, Brightly N. P. 107, 6 Pa. L. J. 383.

Vermont.— Garfield *v.* Williams, 2 Vt. 327; Williams *v.* Wetherbee, 1 Aik. 233; Phelps *v.* Sawyer, 1 Aik. 150.

See 14 Cent. Dig. tit. "Covenants," § 81.

Equitable assignment.— Covenants that do not run with the land may be assigned in equity, so as to pass the right to enforce them to the assignee in the name of the covenantee. Hagar *v.* Buck, 44 Vt. 285, 8 Am. Dec. 368. See also Raymond *v.* Squire, 11 Johns. (N. Y.) 47.

Under the territorial laws of Arkansas the assignment of a covenant passed no legal interest in the covenant to the assignee, so as to enable him to sue upon it in his own name. The equity, however, did pass. Sabin *v.* Hamilton, 2 Ark. 485.

47. Mascal's Case, 1 Leon. 62; King *v.* Jones, 1 Marsh. 107, 5 Taunt. 418, 15 Rev. Rep. 533, 1 E. C. L. 219 [*affirmed* in 4 M. & S. 188]; Kingdon *v.* Nottle, 1 M. & S.

covenants as are technically broken upon the execution and delivery of the deed may be sued on by a remote assignee where the substantial damage occurs during his tenure.[48] Obviously if the eviction or actual damage has occurred prior to the assignment, the doctrine of continuing breach is inapplicable, and the assignee acquires no right of action.[49]

(v) *Owner of Part of Tract.* A covenant that runs with the land is divisible into as many parts or interests as the land itself may be divided into by subsequent successive conveyances, and the grantee of each parcel or interest may as to the same maintain suit upon such covenant against the original covenantor or his legal representatives.[50]

e. Conveyance as Transfer of Covenant — (i) *In General.* Covenants which run with the land pass with the title even though the immediate grantor declines to warrant the title which he conveys;[51] but if the covenant has been broken

355, 14 Rev. Rep. 462, 4 M. & S. 53, 16 Rev. Rep. 379 (doctrine of continuing breach).

48. *Illinois.*— Richard *v.* Bent, 59 Ill. 38, 74 Am. Rep. 1.

Indiana.— Coleman *v.* Lyman, 42 Ind. 289; Martin *v.* Baker, 5 Blackf. 232.

Maine.— By statute, the assignee of a grantee may maintain an action on the covenants of seizin and against encumbrances against the original grantor, provided he will release the intermediate grantee from his covenants. Wilson *v.* Widenham, 51 Me. 566; Allen *v.* Little, 36 Me. 170. *Compare* Ballard *v.* Child, 34 Me. 355; Heath *v.* Whidden, 24 Me. 383; Hacker *v.* Storer, 8 Me. 228.

Minnesota.— Kimball *v.* Bryant, 25 Minn. 496.

Missouri.— Chambers *v.* Smith, 23 Mo. 174; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661; Lawless *v.* Collier, 19 Mo. 480; Winningham *v.* Pennock, 36 Mo. App. 688.

Ohio.— Betz *v.* Bryan, 39 Ohio St. 320; Devore *v.* Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585, stating the rule with its limitations. See also Hall *v.* Plaine, 14 Ohio St. 417.

South Carolina.— Brishane *v.* McCrady, 1 Nott & M. 104, 9 Am. Dec. 676.

See 14 Cent. Dig. tit. "Covenants," § 81.

49. Barry *v.* Guild, 28 Ill. App. 39; Junction R. Co. *v.* Sayers, 28 Ind. 318.

50. *Kentucky.*— Dougherty *v.* Duvall, 9 B. Mon. 57.

Massachusetts.— Blake *v.* Everett, 1 Allen 248. See also White *v.* Whitney, 3 Metc. 81.

New Hampshire.— Hall *v.* Stone, Smith 389.

New York.— Kane *v.* Sanger, 14 Johns. 89, unless the assignor has conveyed with warranty, in which case, being obliged to indemnify his assignee, the action should be brought by him. See also Hunt *v.* Amidon, 4 Hill 345, 40 Am. Dec. 283; Astor *v.* Miller, 2 Paige 68; Van Horne *v.* Crato, 1 Paige 455.

Ohio.— Tapscott *v.* Williams, 10 Ohio 442. See also St. Clair *v.* Williams, 7 Ohio 110, Pt. II, 30 Am. Dec. 194.

United States.— Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

England.— Twynam *v.* Pickard, 2 B. & Ald. 105. See also Merceron *v.* Dowson, 5 B. & C. 479, 8 D. & R. 264, 4 L. J. K. B. O. S. 211, 11 E. C. L. 549; Curtis *v.* Spitty, 1 Bing. N. Cas. 756, 4 L. J. C. P. 236, 4 Moore & S. 554, 27 E. C. L. 849; Hare *v.* Cator, Cowp. 766; Stevenson *v.* Lambard, 2 East 575, 6 Rev. Rep. 511; Noble *v.* Cass, 2 Sim. 343, 29 Rev. Rep. 115, 2 Eng. Ch. 343.

See 14 Cent. Dig. tit. "Covenants," § 82.

Mutual covenants between the grantor and grantees of several city lots that neither will erect obnoxious buildings on the tract owned by the grantor or any portion thereof conveyed by him are for the mutual benefit of all purchasers of lots belonging to the tract; and upon a breach the owner of any lot, whether by direct grant or by subsequent assignment, may maintain an action therefor. Barrow *v.* Richard, 8 Paige (N. Y.) 351, 35 Am. Dec. 713.

51. A covenant running with the land is not conveyed by a succeeding similar covenant, but by the words of the conveyance; and any word that conveys the title conveys the covenant that the grantor holds.

Georgia.— Redwine *v.* Brown, 10 Ga. 311.

Illinois.— Brady *v.* Spurck, 27 Ill. 478.

Kentucky.— Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240; Hunt *v.* Orwig, 17 B. Mon. 73, 66 Am. Dec. 144; Reed *v.* Hornback, 4 J. J. Marsh. 375; Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45.

Louisiana.— In Louisiana an express subrogation is necessary to enable the purchaser of a tract of land to exercise the rights of his vendor against the party from whom the title was acquired. Chambliss *v.* Miller, 15 La. Ann. 713; Smith *v.* Wilson, 11 Rob. 522; Davison *v.* Chabres, 6 Mart. N. S. 317; Vannorght *v.* Foreman, 1 Mart. N. S. 352.

Maine.— Powers *v.* Patten, 71 Me. 583; Wilson *v.* Widenham, 51 Me. 566; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504.

Massachusetts.— Hodges *v.* Saunders, 17 Pick. 470.

Michigan.— Post *v.* Campau, 42 Mich. 90, 3 N. W. 272. *Compare* Davenport *v.* Davenport, 52 Mich. 587, 18 N. W. 371.

before the conveyance, it ceases to run with the land, and the right of action can only pass by an express assignment, enforceable in equity.[52]

(II) *Conveyance by Operation of Law.* Covenants running with the land pass with the title, whether transferred by assignment from the grantor or by act of law.[53]

(III) *Conveyance Without Warranty.* Upon a conveyance without warranty, all deeds, warranties, covenants, and other muniments of title belong to the grantee as appurtenant and incident to the land granted.[54] A deed of release or quitclaim is sufficient.[55]

(IV) *Judicial and Execution Sales.* A purchaser at a judicial or execution sale is entitled to the benefit of all covenants running with the land contained in a prior deed to the land conveyed.[56]

Minnesota.— Kimball *v.* Bryant, 25 Minn. 496.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260.

New York.— Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80 (covenant imposing burdens); Hills *v.* Miller, 3 Paige 254. See also Roberts *v.* Levy, 3 Abb. Pr. N. S. 311.

North Carolina.— Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230.

Pennsylvania.— Le Ray de Chaumont *v.* Forsythe, 2 Penr. & W. 507.

Texas.—Saunders *v.* Flaniken, 77 Tex. 662, 14 S. W. 236; Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91.

See 14 Cent. Dig. tit. "Covenants," § 83.

52. Davenport *v.* Davenport, 52 Mich. 587, 18 N. W. 371 [*distinguishing* Post *v.* Campau, 42 Mich. 90, 3 N. W. 272, in which the covenant looked to the future, and was intended to give protection to the title against demands coming against it subsequently]. See also New York, etc., R. Co. *v.* Drury, 133 Mass. 167.

But in England and in some of the United States, as has been previously stated, a merely technical breach will not prevent covenants technically broken when executed from running with the land, and consequently in those jurisdictions the conveyance itself is sufficient to transfer such covenants until actual breach. See *supra*, II, D, 1, b, (II).

53. Chandler *v.* Brown, 59 N. H. 370; Carter *v.* Denman, 23 N. J. L. 260. See also St. Clair *v.* Williams, 7 Ohio 110, Pt. II, 30 Am. Dec. 194. *Compare* Vancourt *v.* Moore, 26 Mo. 92, to the effect that a decree for specific performance will not pass to the vendee a right of action against his vendor's grantor for breach of warranty, where the vendee has been ousted from his possession under the contract of sale by title paramount to his vendor's grantor.

54. *Georgia.*— Redwine *v.* Brown, 10 Ga. 311.

Illinois.— Brady *v.* Spurck, 27 Ill. 478.

Kentucky.— Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240; Perkins *v.* Coleman, 90 Ky. 611, 14 S. W. 640, 12 Ky. L. Rep. 501; Hunt *v.* Orwig, 17 B. Mon. 73, 66 Am. Dec. 144; Reed *v.* Hornback, 4 J. J. Marsh. 375; Young *v.* Triplett, 5 Litt. 247; Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45.

Massachusetts.— Hodges *v.* Saunders, 17 Pick. 470.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370.

North Carolina.—Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967; Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230.

Pennsylvania.— Le Ray de Chaumont *v.* Forsythe, 2 Penr. & W. 507.

Texas.— Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212.

Contra, Beardsley *v.* Knight, 4 Vt. 471.

See 14 Cent. Dig. tit. "Covenants," § 85.

"If the immediate vendor has a covenant of warranty, as it runs with the land, it is included in the sale of his title, notwithstanding the fact that he declines to warrant the title thus conveyed." Thomas *v.* Bland, 91 Ky. 1, 3, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240.

55. *Georgia.*— Redwine *v.* Brown, 10 Ga. 311.

Maine.— Powers *v.* Patten, 71 Me. 583; Wilson *v.* Widenham, 51 Me. 566; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504.

New York.— Beddoe *v.* Wadsworth, 21 Wend. 120.

Texas.—Saunders *v.* Flaniken, 77 Tex. 662, 14 S. W. 236.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91.

See 14 Cent. Dig. tit. "Covenants," § 85.

That a vendee expressly waives a warranty from his vendor and takes only a quitclaim deed does not deprive him of the benefit of a covenant of warranty contained in the deed through which his vendor claimed title. Saunders *v.* Flaniken, 77 Tex. 662, 14 S. W. 236.

Covenant against encumbrances.—The heirs of a decedent who had conveyed certain land which was encumbered by a deed of trust have no cause of action against a former grantor to decedent, the deed containing the proper covenants, unless the encumbrance had been discharged by decedent or out of the assets of the estate. Ladd *v.* Montgomery, 83 Mo. App. 355.

56. *Alabama.*— Claunch *v.* Allen, 12 Ala. 159.

d. Privity of Estate Between Covenantee and Grantee. In order that a covenant may run with the land so as to give a right of action against the covenantor to the alienee of the covenantee, a privity of estate must subsist between them. Mere privity of contract is insufficient, and some estate to which the covenant may attach should as a rule have passed from the covenantor to the covenantee;[57] although it has been held in Illinois and Vermont that if the covenantee takes possession of and conveys the land to another a sufficient privity is established between himself and his grantee to give the latter a right of action against the

Georgia.— Redwine *v.* Brown, 10 Ga. 311.

Kentucky.— Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240. *Compare* Campbell *v.* Johnston, 4 Dana 177.

Louisiana.— Smith *v.* Wilson, 11 Rob. 522; Pepper *v.* Dunlap, 9 Rob. 283.

Massachusetts.—White *v.* Whitney, 3 Metc. 81; Hodges *v.* Saunders, 17 Pick. 470.

Minnesota.— Security Bank *v.* Holmes, 65 Minn. 531, 68 N. W. 113, 60 Am. St. Rep. 495.

Mississippi.— White *v.* Presly, 54 Miss. 313.

Missouri.— Chambers *v.* Smith, 23 Mo. 174; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260.

New York.— Mygatt *v.* Coe, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850 (mortgage sale); Christ Protestant Episcopal Church *v.* Mack, 93 N. Y. 488, 45 Am. Rep. 260; Boyd *v.* Belmont, 58 How. Pr. 513; Hunt *v.* Amidon, 4 Hill 345, 40 Am. Dec. 283 [*reversing* 1 Hill 147]; Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246.

North Carolina.— Lewis *v.* Cook, 35 N. C. 193; Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230.

Ohio.— See Cincinnati *v.* Springer, 10 Ohio Dec. (Reprint) 745, 23 Cinc. L. Bul. 250.

Pennsylvania.— Whitehill *v.* Gotwalt, 3 Penr. & W. 313.

South Carolina.— Brisbane *v.* McCrady, 1 Nott & M. 104, 9 Am. Dec. 676.

Texas.— Saunders *v.* Flaniken, 77 Tex. 662, 14 S. W. 236; Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91.

See 14 Cent. Dig. tit. "Covenants," § 86.

A sale under the power of sale contained in a mortgage or trust deed will vest in the purchaser the right to the benefit of the covenants running with the land contained in prior deeds of the land. Gunter *v.* Williams, 40 Ala. 561; Ely *v.* Hergesell, 46 Mich. 325, 9 N. W. 435; Andrews *v.* Wolcott, 16 Barb. (N. Y.) 21. See also Brown *v.* Metz, 33 Ill. 339, 85 Am. Dec. 277.

57. As to what constitutes a sufficient privity of estate see *supra*, II, D, 1, a, (II). And see the following cases:

Georgia.— Martin *v.* Gordon, 24 Ga. 533.

Maine.— Wilson *v.* Widenham, 51 Me. 566; Ballard *v.* Child, 34 Me. 355.

Massachusetts.— Slater *v.* Rawson, 1 Metc. 450, 6 Metc. 439.

Missouri.— Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142; Vancourt *v.* Moore, 26 Mo. 92.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370; Russ *v.* Perry, 49 N. H. 547; Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New York.— Fowler *v.* Poling, 2 Barb. 300, 6 Barb. 165; Beddoe *v.* Wadsworth, 21 Wend. 120.

North Carolina.— Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230. And see Nesbit *v.* Brown, 16 N. C. 30; Nesbit *v.* Neshit, 1 N. C. 490; Neshit *v.* Montgomery, 1 N. C. 82.

Ohio.— Williams *v.* Holcomb, 6 Ohio Dec. (Reprint) 860, 8 Am. L. Rec. 484, 4 Cinc. L. Bul. 1147.

Vermont.— Beardsley *v.* Knight, 4 Vt. 471.

Virginia.— Burtners *v.* Keran, 24 Gratt. 42; Randolph *v.* Kinney, 3 Rand. 394.

United States.— Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

See 14 Cent. Dig. tit. "Covenants," § 87.

"The general doctrine is, that the assignee, by reason of the privity of estate, is entitled to the benefit of all covenants running with the land (Spencer's Case, 5 Coke 16*a*, 1 Smith Lead. Cas. 174). But it has been held that when that estate is determined, the covenants cease to be assignable. Being merely accessories of the estate, they cannot pass by a deed that, for want of an estate upon which to operate, is ineffectual as a conveyance." Moore *v.* Merrill, 17 N. H. 75, 81, 43 Am. Dec. 593.

Where a covenantor has neither title nor possession of land which he conveys by deed with covenants, the covenants will not pass by a conveyance of such land by his covenantee so as to allow the assignee to sue thereon. Martin *v.* Gordon, 24 Ga. 533; Ballard *v.* Child, 34 Me. 355; Randolph *v.* Kinney, 3 Rand. (Va.) 394.

Covenants imposing burdens.— A covenant will not run with the land so as to be a burden upon it in the hands of a purchaser, unless there be some privity of estate between him and the covenantee. Brewer *v.* Marshall, 18 N. J. Eq. 337. See also Columbia College *v.* Lynch, 47 How. Pr. (N. Y.) 273.

Privity of contract.— A judgment creditor of a vendee, who has a covenant against encumbrances, cannot call the vendor in warranty and require the latter to make his covenant good — there being no privity of contract between the parties. Hardy *v.* Pecot, 104 La. 136, 28 So. 936.

covenantor, even though he had neither title nor possession at the time of the execution of his covenant.[58]

e. Heirs and Devisees. The heirs or devisees of a covenantee are entitled to enforce covenants running with the land,[59] unless an evident intention be manifested to confine them to the covenantee,[60] or unless the covenant has been broken in the lifetime of the decedent.[61]

5. Persons Liable on Real Covenants — a. Covenantors. Unless personal responsibility is expressly or by reason of the nature of the transaction impliedly excluded,[62] not only the original, but every intermediate covenantor is liable to the holder of a real covenant at the time of breach. The holder, however, can have only one satisfaction.[63]

b. Grantees. Where a covenant imposing burdens upon, or restricting the use of land, runs with the land, the grantee of the covenantor is bound thereby, and may be sued for its breach;[64] and even where the covenant does not technically attach to or concern the land, and consequently does not run with the title,

58. Wead *v.* Larkin, 54 Ill. 489, 5 Am. Rep. 149; Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

59. *Indiana.*— Wright *v.* Nipple, 92 Ind. 310; Martin *v.* Baker, 5 Blackf. 232.

Kentucky.— Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559; Pence *v.* Duvall, 9 B. Mon. 48.

Maine.— Heath *v.* Whidden, 24 Me. 383.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

New York.— Preiss *v.* Le Poidevin, 19 Abb. N. Cas. 123.

Pennsylvania.— Dunbar *v.* Jumper, 2 Yeates 74.

Vermont.— Kimpton *v.* Walker, 9 Vt. 191.

England.— King *v.* Jones, 1 Marsh. 107, 5 Taunt. 418, 15 Rev. Rep. 533, 1 E. C. L. 219; Sale *v.* Kitchingham, 10 Mod. 158; Jones *v.* King, 4 M. & S. 188; Kingdon *v.* Nottle, 1 M. & S. 355, 14 Rev. Rep. 462, 4 M. & S. 53, 16 Rev. Rep. 379; Brudnell *v.* Roberts, 2 Wils. C. P. 143.

See 14 Cent. Dig. tit. "Covenants," §§ 88, 89.

Heirs of covenantee's grantee.— See Preiss *v.* Le Poidevin, 19 Abb. N. Cas. (N. Y.) 123.

60. Martin *v.* Baker, 5 Blackf. (Ind.) 232. See also Roe *v.* Hayley, 12 East 464.

61. Cunningham *v.* Scoullar, 9 N. Brunsw. 385; Beck *v.* Barlow, 6 N. Brunsw. 465.

62. Sterling *v.* Peet, 14 Conn. 245; Abbott *v.* Hills, 158 Mass. 396, 33 N. E. 592; Mygatt *v.* Coe, 12 N. Y. App. Div. 245, 42 N. Y. Suppl. 734; Blank *v.* German, 5 Watts & S. (Pa.) 36.

Covenant "for heirs, executors, and administrators."— No recovery can be had at law on a covenant by a grantor simply "for his heirs, executors, and administrators." An agreement to covenant for himself also cannot be enforced, unless the instrument is reformed accordingly. Traynor *v.* Palmer, 86 Ill. 477. See also Rufner *v.* McConnel, 14 Ill. 168.

Where a deed executed by the attorney in fact of the grantor shows that the property is in the grantor, and that the purchase-money is payable to him, and the receipt is acknowledged by the attorney in fact as such, the fact that the granting and warranting clauses purport to be the act of the attorney will not make him liable on the covenant of warranty. Daughtrey *v.* Knolle, 44 Tex. 450.

Liability of equitable owner.— See Bowling *v.* Benge, 55 S. W. 422, 21 Ky. L. Rep. 1424.

Liability of nominal to real purchaser.— See Runkle *v.* Gaylord, 1 Nev. 123.

63. *Connecticut.*— Sterling *v.* Peet, 14 Conn. 245.

Kansas.— Dunn *v.* Jaffray, 36 Kan. 408, 13 Pac. 781, liability of partners.

Massachusetts.—Palmer *v.* Wall, 128 Mass. 475.

New York.— Cornish *v.* Capron, 136 N. Y. 232, 32 N. E. 773; Preiss *v.* Le Poidevin, 19 Abb. N. Cas. 123 (deed executed in assumed name); Gere *v.* Clark, 6 Hill 350 (survivorship in case of two covenantors).

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Texas.— Whatley *v.* Patten, 10 Tex. Civ. App. 77, 31 S. W. 60.

See 14 Cent. Dig. tit. "Covenants," § 90.

Alteration.— In Basford *v.* Pearson, 9 Allen (Mass.) 387, 85 Am. Dec. 764, a deed was signed and sealed by husband and wife, but the grantee was not named. The husband by parol authority from his wife, but during her absence and without her knowledge, filled in plaintiff's name and changed a limited covenant into a general one; and it was held that the wife was not liable on the covenants.

64. *Georgia.*— Perkins Mfg. Co. *v.* Williams, 98 Ga. 388, 25 S. E. 556.

Massachusetts.— Morse *v.* Aldrich, 1 Metc. 544.

Missouri.— Poage *v.* Wabash, etc., R. Co., 24 Mo. App. 199.

New York.— Birdsall *v.* Tiemann, 12 How. Pr. 551; Astor *v.* Hoyt, 5 Wend. 603; Armstrong *v.* Wheeler, 9 Cow. 88; Astor *v.* Miller, 2 Paige 68; Van Horne *v.* Crain, 1 Paige 455. *Compare* Columbia College *v.* Thacher, 87 N. Y. 311, 10 Abb. N. Cas. 235, 41 Am. Rep. 365 [*reversing* 46 N. Y. Super. Ct. 305].

Pennsylvania.— Bald Eagle Valley R. Co.

it may be enforced in equity against a grantee with notice.[65] But an assignee is liable only for such breaches of covenant as occur while he is assignee.[66]

c. Heirs. At common law there must have been a concurrence of two circumstances to render an heir liable on his ancestor's covenant: (1) The terms of the covenant must have specially provided for its performance by the heir, and (2) the heir must have had assets by descent from the covenantor to answer the claim, and he was bound only to the extent of such assets.[67] In the United States the general rule is that an heir is liable upon the covenant of his ancestor, if the damages cannot be made out of the executor or administrator.[68]

d. Devisees. At common law a devisee was not bound by his testator's covenants,[69] but at the present day devisees are liable in the same manner as heirs, that is, to the extent of the property reaching their hands.[70]

III. PERFORMANCE OR BREACH.

A. In General — **1. Obligation to Perform.** To excuse the performance of an express covenant it must be shown either that it is a covenant prohibited by law or that the performance of the covenant has become impossible by the intervention of causes which human agency could not prevent,[71] or that the perform-

v. Nittany Valley R. Co., 171 Pa. St. 284, 33 Atl. 239, 50 Am. St. Rep. 807, 29 L. R. A. 423.

See 14 Cent. Dig. tit. "Covenants," § 91.

65. The question in such a case being, not whether the covenant runs with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. Atlantic City *v.* Atlantic City Steel-Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Hodge *v.* Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Phenix Ins. Co. *v.* Continental Ins. Co., 14 Abb. Pr. N. S. (N. Y.) 266; Norfleet *v.* Cromwell, 70 N. C. 634, 16 Am. Rep. 787; Fulk *v.* Moxhay, 11 Beav. 571, 2 Phil. 774, 22 Eng. Ch. 774; Luker *v.* Dennis, 7 Ch. D. 227, 47 L. J. Ch. 174, 37 L. T. Rep. N. S. 827, 2 Wkly. Rep. 167. And see *supra*, II, C; and, generally, Injunctions; Specific Performance.

66. Hurley *v.* Brown, 44 N. Y. App. Div. 480, 60 N. Y. Suppl. 846; Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 516; Astor *v.* Hoyt, 5 Wend. (N. Y.) 603; Armstrong *v.* Wheeler, 9 Cow. (N. Y.) 88.

67. Holder *v.* Mount, 2 J. J. Marsh. (Ky.) 187; Lawrence *v.* Hayden, 4 Bibb (Ky.) 229; Cook *v.* Arundel, Hard. 87; Lloyd *v.* Thursby, 9 Mod. 463; Neeve *v.* Keck, 9 Mod. 106; Buckley *v.* Nightingale, 1 Str. 665; Dyke *v.* Sweeting, Willes 585.

68. See Descent and Distribution. And see the following cases:

Arkansas.— Higgins *v.* Johnson, 14 Ark. 309, 60 Am. Dec. 544.

California.— McDonald *v.* McElroy, 60 Cal. 484.

Maine.— Webber *v.* Webber, 6 Me. 127.

New Hampshire.— Hall *v.* Martin, 46 N. H. 337; Hutchinson *v.* Stiles, 3 N. H. 404.

North Carolina.— Carter *v.* Long, 114 N. C. 187, 19 S. E. 632.

South Dakota.— Woods *v.* Ely, 7 S. D. 471, 64 N. W. 531.

United States.— Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

See 14 Cent. Dig. tit. "Covenants," § 92.

Title must be derived from ancestor. Barlow *v.* Delaney, 86 Mo. 583.

Fraudulent conveyance to heir.— See Higgins *v.* Johnson, 14 Ark. 309, 60 Am. Dec. 544.

69. Platt Cov. 452.

70. McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093; Thompson *v.* Shoeman, 1 Bibb (Ky.) 401. See also Descent and Distribution; Wills.

A married woman, not being bound by a covenant of quiet enjoyment in a lease of her lands in which her husband joins, her heirs and devisees are not answerable after her death for any breach thereof. Foster *v.* Wilcox, 10 R. I. 443, 14 Am. Rep. 698.

The devisee of an equity of redemption — the legal fee being in a mortgagee — is not liable as assignee of all the estate, right, title, and interest of the original covenantor. Carlisle *v.* Blamire, 8 East 487, 9 Rev. Rep. 491.

71. *Alabama.*— Morrow *v.* Campbell, 7 Port. 41, 31 Am. Dec. 794.

Kentucky.— Bainbridge *v.* Owen, 3 B. Mon. 204; Singleton *v.* Carroll, 6 J. J. Marsh. 527, 22 Am. Dec. 95.

Missouri.— Bohlcke *v.* Buchanan, 94 Mo. App. 320, 68 S. W. 92.

New Jersey.— Green *v.* Kelly, 20 N. J. L. 544.

New York.— Beebe *v.* Johnson, 19 Wend. 500, 32 Am. Dec. 518.

Pennsylvania.— Plymouth Mfg. Co.'s Appeal, 31 Leg. Int. 277.

See 14 Cent. Dig. tit. "Covenants," § 93.

If a covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld. Beebe *v.* Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518. See also Wheeler *v.* Connecticut Mut. L. Ins. Co., 16 Hun (N. Y.)

ance of the covenant by the covenantor has been prevented by the act of the covenantee himself.[72]

2. Notice of Breach and Demand of Performance. Notice of breach and demand of performance are not required of the covenantee in order to entitle him to an action against the covenantor upon breach of his covenant,[73] unless the event upon which the action accrues is mainly or exclusively within the knowledge of the covenantee,[74] or unless performance is impossible without his coöperation,[75] or unless it is fixed at an indefinite future time,[76] or unless by the terms of the instrument itself a demand of performance is required.[77]

3. Sufficiency of Performance. The true intent of the parties as shown by the instrument itself, viewed in connection with the circumstances surrounding its execution, determines the sufficiency of the performance of a covenant.[78] As a general rule, however, a substantial and reasonable performance of the covenant is sufficient;[79] and if the covenant be once properly performed, the covenantor is absolved from liability, although the performance may be defeated or rendered unavailing by matter subsequent.[80]

4. Time of Performance. Where no time is limited for the performance of the act covenanted to be done it must be performed within a reasonable time.[81]

5. Breach. A covenant may be broken by the falsity of alleged facts covenanted to be true,[82] by the failure to perform an act covenanted to be performed,[83]

317; Warfield *v.* Watkins, 30 Barb. (N. Y.) 395; Cobb *v.* Harmon, 29 Barb. (N. Y.) 472; Van Dorn *v.* Young, 13 Barb. (N. Y.) 286; Warner *v.* Hitchins, 5 Barb. (N. Y.) 666; Baldwin *v.* New York L. Ins., etc., Co., 3 Bosw. (N. Y.) 530; O'Reily *v.* Mutual L. Ins. Co., 2 Abb. Pr. N. S. (N. Y.) 167; Kemp *v.* Knickerbocker Ice Co., 51 How. Pr. (N. Y.) 31.

Inevitable accident.— Performance is not excused by inevitable accident or other contingency, although not foreseen by nor within the control of the parties. Cobb *v.* Harmon, 23 N. Y. 148; Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

72. Huntingdon, etc., R. Co. *v.* McGovern, 29 Pa. St. 78.

As to averment of performance of condition precedent see *infra*, IV, D, 1, c.

73. Johnson *v.* Mays, 8 Ark. 386; Steele *v.* Steele, 4 T. B. Mon. (Ky.) 110; Van Rensselaer *v.* Miller, Lalor (N. Y.) 237; Johnson *v.* Nasworthy, (Tex. App. 1890) 16 S. W. 758.

74. Fitzpatrick *v.* Hanrick, 11 Ala. 783; Huff *v.* Campbell, 1 Stew. (Ala.) 543.

75. Humphries *v.* Goulding, 3 Ark. 581; Childress *v.* Foster, 3 Ark. 252.

76. Taylor *v.* Patterson, 3 Ark. 238; Stainton *v.* Brown, 6 Dana (Ky.) 248. See also Pearsoll *v.* Frazer, 14 Barb. (N. Y.) 564.

77. Miller *v.* Cook, 2 J. J. Marsh. (Ky.) 80; Bush *v.* Stevens, 24 Wend. (N. Y.) 256.

Sufficiency of demand.— In Morse *v.* Aldrich, 1 Metc. (Mass.) 544, it was held that where the owner of land, by a covenant binding himself, his heirs, and assigns, covenanted to do a certain act on request, a written request, addressed to all the heirs and assigns and left at the house of one was sufficient.

78. See *supra*, II, A, 1.

Thus, although the covenantor perform the letter of his covenant, yet if he does any act to defeat its intent or use he is guilty of a breach. Robinsoon *v.* Amp, 1 Keb. 103, Sid. 48, T. Raym. 25; Anonymous, Skin. 39, T. Raym. 464. See also Hathaway *v.* Hathaway, 159 Mass. 584, 35 N. E. 85.

79. Phipps *v.* Tarpley, 24 Miss. 597; Avery *v.* New York Cent., etc., R. Co., 121 N. Y. 31, 24 N. E. 20, 121 N. Y. 649, 24 N. E. 24; Madore's Appeal, 129 Pa. St. 15, 17 Atl. 804; Withers *v.* Hestend, 5 Gratt. (Va.) 456. *Compare* Hoard *v.* Garner, 10 N. Y. 261.

If either one of alternative covenants is performed there is no breach. Stewart *v.* Bedell, 79 Pa. St. 336. And see *supra*, II, A, 5.

80. Boulter *v.* Fourd, 1 Keb. 284, 1 Sid. 76, *sub nom.* Porter *v.* Harris, 1 Lev. 63; Leigh's Case, 1 Leon. 52.

81. Allen *v.* Greene, 19 Ala. 34; Stuyvesant *v.* New York, 11 Paige (N. Y.) 414.

82. *California.*— Salmon *v.* Vallejo, 41 Cal. 481.

Kansas.— Dale *v.* Shively, 8 Kan. 276.

Kentucky.— Bullock *v.* Pottinger, 3 J. J. Marsh. 94, 19 Am. Dec. 164.

Louisiana.— De Armas *v.* Gray, 10 La. 575.

Massachusetts.— Dorr *v.* Fenno, 12 Pick. 521.

New York.— Jansen *v.* Ball, 6 Cow. 628. See 14 Cent. Dig. tit. "Covenants," § 96.

83. *Alabama.*— Hogan *v.* Calvert, 21 Ala. 194.

Kentucky.— Ogden *v.* Grant, 6 Dana 473.

Nebraska.— Hartley *v.* Gregory, 9 Nebr. 279, 2 N. W. 878.

New York.— Newburgh *v.* Galatian, 4 Cow. 340.

North Carolina.— See Murrell *v.* Weathers, 48 N. C. 525.

Pennsylvania.— Mine Hill, etc., R. Co. *v.* Lippincott, 86 Pa. St. 468.

Tennessee.— Steele *v.* McKinnie, 5 Yerg. 449.

or by the failnre to abstain from an act covenanted against.[84] So too any act on the part of the covenantor which renders the performance of the covenant impossible will constitute a breach;[85] and in case of a mutual covenant the failure of either party to perform his part gives a right of action to the other.[86]

B. Notice to Maintain or Defend Title — 1. In General. Where suit is brought on a paramount claim against one who is entitled to the benefit of a covenant for title, by giving proper notice of the action to the party bound by the covenant, he can relieve himself of the burden of proving, in a subsequent action on the covenant against the covenantor so notified, the validity of the title of the adverse claimant.[87] So too a covenantor may be brought in to defend against a

Virginia.— Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

Canada.— Leonard *v.* Young, 9 N. Brunsw. 111.

See 14 Cent. Dig. tit. "Covenants," § 96.

Covenant to pay the heirs of the covenantee is not broken by reason of failure to pay him, the covenantee. Steele *v.* Steele, 4 T. B. Mon. (Ky.) 110.

Covenant to save harmless — Proof of damage.— Where defendant has covenanted to save plaintiffs harmless from all damages, etc., which they may be put to on account of being security for a third person, plaintiffs, to maintain an action, must show damage by an actual payment in regard to such security, proof of an unsatisfied judgment against them being insufficient. Jeffers *v.* Johnson, 21 N. J. L. 73. *Compare* Hogan *v.* Calvert, 21 Ala. 194.

84. Wing *v.* Chase, 35 Me. 260; Anderson *v.* Faulconer, 30 Miss. 145; Hustons *v.* Winans, 5 Wend. (N. Y.) 163.

A joint covenant not to do a particular act is broken when either covenantor does it. Wing *v.* Chase, 35 Me. 260.

Enjoining breach.— See Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145.

85. Hopkins *v.* Young, 11 Mass. 302. *Compare* Safford *v.* Annis, 7 Me. 168.

86. Lucas *v.* Clemens, 7 Mo. 367.

87. *Alabama.*— Graham *v.* Tankersley, 15 Ala. 634.

Arkansas.— Boyd *v.* Whitfield, 19 Ark. 447.

Connecticut.— Hinds *v.* Allen, 34 Conn. 185.

Georgia.— Wimberly *v.* Collier, 32 Ga. 13.

Kentucky.— Jones *v.* Waggoner, 7 J. J. Marsh. 144; Cox *v.* Strode, 4 Bibb 4; Prewit *v.* Kenton, 3 Bibb 280; Booker *v.* Bell, 3 Bibb 173, 6 Am. Dec. 641.

Louisiana.— Guerin *v.* Bagneries, 13 La. 14; Delacroix *v.* Cenas, 8 Mart. N. S. 356; Flotte *v.* Aubert, 2 Mart. 329. See also Howrin *v.* Clark, 8 Rob. 27; Cawthorn *v.* McDonald, 1 Rob. 55.

Massachusetts.— Chamberlain *v.* Preble, 11 Allen 370; Hamilton *v.* Cutts, 4 Mass. 349, 3 Am. Dec. 222.

Missouri.— St. Louis *v.* Bissell, 46 Mo. 157; Fields *v.* Hunter, 8 Mo. 128.

New Jersey.— Morris *v.* Rowan, 17 N. J. L. 304; Chapman *v.* Holmes, 10 N. J. L. 20.

New York.— Charman *v.* Tatum, 54 N. Y. App. Div. 61, 66 N. Y. Suppl. 275; Kelly *v.* Schenectady Dutch Church, 2 Hill 105; Miner *v.* Clark, 15 Wend. 425; Cooper *v.* Watson, 10 Wend. 202.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777; Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193.

Pennsylvania.— Paul *v.* Whitman, 3 Watts & S. 407; Ives *v.* Niles, 5 Watts 323; Collingwood *v.* Irwin, 3 Watts 306; Leather *v.* Poultney, 4 Binn. 352; Swenk *v.* Stout, 2 Yeates 470; Bender *v.* Fromberger, 4 Dall. 436, 1 L. ed. 898.

South Carolina.— Wilson *v.* McElwee, 1 Strobh. 65; Middleton *v.* Thompson, 1 Speers 67; Davis *v.* Wilbourne, 1 Hill 27, 26 Am. Dec. 154.

Vermont.—Turner *v.* Goodrich, 26 Vt. 707; Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618; Pitkin *v.* Leavitt, 13 Vt. 379; Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347; Williams *v.* Wetherbee, 2 Aik. 329.

Wisconsin.— Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Dec. 191; Wendel *v.* North, 24 Wis. 223.

England.— Smith *v.* Compton, 3 B. & Ad. 407, 1 L. J. K. B. 146, 23 E. C. L. 184; Duffield *v.* Scott, 3 T. R. 374. *Compare* Pomeroy *v.* Partington, 3 T. R. 665, 668, note *a*.

See 14 Cent. Dig. tit. "Covenants," § 97.

The intent of notice to the warrantor is to conclude him in respect to the title. Morris *v.* Rowan, 17 N. J. L. 304.

Successive vouchers.— If one who has conveyed land with warranty is vouched in by his grantee he may in turn vouch in his grantor with like covenants to defend the same suit (Chamberlain *v.* Preble, 11 Allen (Mass.) 370); but the last vouchee may show that notwithstanding the eviction was by title paramount to the first vouchee yet it was not paramount to his title (Middleton *v.* Thompson, 1 Speers (S. C.) 67).

Confession of judgment by vendor.— The vendor called in warranty may defend the suit or confess judgment, as he may think proper; but if the vendee upon such confession suspects collusion he may defend the suit on his own responsibility. Delacroix *v.* Cenas, 8 Mart. N. S. (La.) 356.

The right of a judicial purchaser to call in warranty parties to the execution cannot be defeated because the latter's relationship disqualifies plaintiff's witness. Guerin *v.* Bagneries, 13 La. 14.

title set up against his grantee in a suit by the latter, as well as to make defense to a suit against his grantee.[88]

2. NECESSITY. It is not essential to a right of action against his covenantor that the covenantee should give him notice to come in and defend the title for which he has covenanted.[89]

3. FORM AND SUFFICIENCY. In order to conclude the covenantor, the notice given by the covenantee should be unequivocal, certain, and explicit.[90] No particular form of notice is required,[91] and the weight of authority is to the effect that it need not be written, or of record.[92] But where the notice does not appear

88. *Georgia.*— Gragg *v.* Richardson, 25 Ga. 566, 71 Am. Dec. 190.

Louisiana.— See Parrott *v.* Edwards, 19 La. 366.

New Hampshire.—Andrews *v.* Denison, 16 N. H. 469, 43 Am. Dec. 565, stating limitation of this right.

Texas.— White *v.* Williams, 13 Tex. 258; McCreary *v.* Douglass, 5 Tex. Civ. App. 492, 24 S. W. 367; Norton *v.* Collins, 1 Tex. Civ. App. 272, 20 S. W. 1113.

Vermont.— Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618; Pitkin *v.* Leavitt, 13 Vt. 379. See also Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347.

See 14 Cent. Dig. tit. "Covenants," § 97.

Contra.— See Ferrell *v.* Alder, 8 Humphr. (Tenn.) 44.

A simulated suit against a pretended trespasser, brought only to ingraft thereon one against plaintiff's vendor by a call in warranty, will, there being no attempt to obtain judgment against defendant, be dismissed as to the warrantor. Parrott *v.* Edwards, 19 La. 366.

89. *Illinois.*— Claycomb *v.* Munger, 51 Ill. 373; Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313.

Indiana.— Blair *v.* Allen, 55 Ind. 409; Rhode *v.* Green, 26 Ind. 83; Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41.

Louisiana.— Rivas *v.* Hunstock, 2 Rob. 187; Mayer *v.* Neraut, 12 La. 30; Johnston *v.* Bell, 6 Mart. N. S. 384; Sterling *v.* Fusilier, 7 Mart. 442. See also Landry *v.* Gamet, 1 Rob. 362; Carter *v.* Caldwell, 15 La. 471.

Massachusetts.—Burrage *v.* Smith, 16 Pick. 56.

Michigan.— Mason *v.* Kellogg, 38 Mich. 132.

New Jersey.— Chapman *v.* Holmes, 10 N. J. L. 20.

Ohio.— King *v.* Kerr, 5 Ohio 155, 22 Am. Dec. 777.

Pennsylvania.— See McCune *v.* Scott, 18 Pa. Super. Ct. 263.

South Carolina.— Garvin *v.* Garvin, 13 Rich. 160.

Texas.— Sherman City Bank *v.* Dugan, 5 Tex. Civ. App. 713, 24 S. W. 953.

But see Long *v.* Wheeler, 84 Mo. App. 101, to the effect that a covenantor should have notice of the assertion of a paramount title, as his covenant is not to pay for the defense but himself to defend the title.

See 14 Cent. Dig. tit. "Covenants," § 98.

Death of covenantor pending suit — Notice to representatives.—If a person claiming land by deed of warranty commences a suit to recover the possession of the land, and gives notice to his grantor to appear and make title, and his grantor dies pending the suit, the grantee is under no obligation to give notice to the representatives of such grantor to bind them. Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618.

90. A knowledge of the action, and a notice to attend the trial will not do, unless it is attended with express notice that he will be required to defend the title. Paul *v.* Witman, 3 Watts & S. (Pa.) 407. And see also the following cases:

Indiana.— Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41.

Missouri.— Collins *v.* Baker, 6 Mo. App. 588.

Nevada.— Dalton *v.* Bowker, 8 Nev. 190.

Ohio.— Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193.

Texas.— Clark *v.* Mumford, 62 Tex. 531.

See 14 Cent. Dig. tit. "Covenants," § 99.

Mere knowledge of the suit, brought to the covenantor by an outside party, is not sufficient conclusively to charge him with liability on his covenant. Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Rep. 191. But *compare* Harding *v.* Larkin, 41 Ill. 413, in which it was held that the fact that one of the grantors who conveyed with covenants of warranty appeared as attorney in an ejectment suit which resulted in the eviction of the grantee by the holder of a paramount title was evidence that the grantors had notice of the suit.

Notice to the covenantor's agent, appointed for the purpose of collecting the purchase-money, is not sufficient notice of the pendency of a suit against the covenantee for the recovery of the land. Graham *v.* Tankersley, 15 Ala. 634.

91. Williams *v.* Burg, 9 Lea (Tenn.) 455; Greenlaw *v.* Williams, 2 Lea (Tenn.) 533.

92. *Mississippi.*— Cummings *v.* Harrison, 57 Miss. 275.

New York.— Miner *v.* Clark, 15 Wend. 425, Bronson, J., dissenting.

Pennsylvania.— Collingwood *v.* Irwin, 3 Watts 306.

Tennessee.— Williams *v.* Burg, 9 Lea 455; Greenlaw *v.* Williams, 2 Lea 533.

Wisconsin.— Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Dec. 191.

of record, the question whether it has been actually given becomes a matter *in pais* for the determination of the jury.[93]

4. Time of Notice. In cases within the summary jurisdiction, notice ought if practicable to be given at or before the return-day of the process. In cases within the general jurisdiction notice at any time before the expiration of the rule to plead would seem to be in time.[94]

5. Effect on Liability. A covenantor to whom due notice has been given to come in and defend an action against his covenantee involving the title of the land conveyed, and in which judgment is rendered adversely to the covenantee, is in a subsequent action on his covenant concluded by such judgment and is estopped to deny its regularity and justice.[95]

C. Covenants of Title — 1. In General. All covenants that are not prospective, and that do not pass with the land, are strictly personal covenants; and if there is no right or authority in the party executing them, they are declared to

See 14 Cent. Dig. tit. "Covenant," § 99.

Contra.— See Mason *v.* Kellogg, 38 Mich. 132; Mann *v.* Mathews, 82 Tex. 98, 17 S. W. 927.

Waiver.— Notice, whether parol or in writing, may be waived by the covenantor, either expressly or impliedly, as by appearing and undertaking the defense. Morgan *v.* Muldoon, 82 Ind. 347; Mason *v.* Kellogg, 38 Mich. 132; Mann *v.* Mathews, 82 Tex. 98, 17 S. W. 927.

93. Collingwood *v.* Irwin, 3 Watts (Pa.) 306. And see *infra*, IV, G, 1.

94. Davis *v.* Wibourne, 1 Hill (S. C.) 27, 28, 26 Am. Dec. 154 [*quoted* and *approved* in Middleton *v.* Thompson, 1 Speers (S. C.) 67, 69], in which it is said: "The object is to enable the warrantor to come in and defend his title. He ought, therefore, to have a reasonable time to prepare for it, and the time which the law allows to a defendant, furnishes, perhaps, the safest rule. In the first class of cases, however, the process might be served on the last hour of the last day before the return. . . . In those cases, notice within a reasonable time afterwards, would be all that could be expected. So, where the warrantee had entered an appearance, and put in his plea to the merits, I should think notice, even after the continuance, if the warrantor had sufficient time to prepare evidence for the trial, would be sufficient." See also Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193; Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Rep. 191.

After plea to merits.— Where defendant in ejectment, after pleading to the merits, gives notice to his warrantor two months before the case is tried he has reasonable notice. Middleton *v.* Thompson, 1 Speers (S. C.) 67.

After a case is set and called for trial a call in warranty will not be allowed. Hyman *v.* Bailey, 13 La. Ann. 450.

Notice of appeal.—A notice of the pendency of a suit against the covenantee, given for the first time after an adverse judgment, advising the covenantor that the covenantee is about to appeal from the judgment against him, is not sufficient to charge the covenantor with costs. Finton *v.* Egelston, 61 Hun (N. Y.) 246, 16 N. Y. Suppl. 721.

An irregularity as to the time of service on covenantee will not affect the sufficiency of the notice from him to his covenantor. Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692.

Plaintiff cannot be delayed by defendant's neglect to bring in his warrantor. Defendant must use due diligence to have him cited, or a curator appointed if he reside out of the state. Zimmer *v.* Thompson, 13 La. 22.

95. Leet *v.* Gratz, 92 Mo. App. 422. See also cases cited *supra*, note 87.

Statement of rule.— "The warrantor of the title, as between him and his warrantee, or those claiming under the latter, shall not be permitted to gainsay the propriety and the justice of the recovery of the land from the warrantee, under an adverse title alleged to be paramount to that of the warrantee, where the warrantor has been a party himself to the ejectment in which the recovery is had, or has had notice of the action being brought from the warrantee, in time to enable him to defend, if he pleases. The warrantor is estopped by the recovery in such case from denying that it was under a better title the recovery was had, than that which he passed to his warrantee." Ives *v.* Niles, 5 Watts (Pa.) 323, 325.

Effect on duty of covenantee.— The covenantee is not bound to defend, after notice to the covenantor and refusal on his part to defend. Jackson *v.* Marsh, 5 Wend. (N. Y.) 44.

Vouching in an immediate warrantor does not impair the covenantee's claim against the original warrantor on his covenant. Crooker *v.* Jewell, 29 Me. 527.

Refusal to permit grantor to defend will not discharge his liability for a breach of the covenant of warranty. Boyle *v.* Edwards, 114 Mass. 373.

Proof of fraud or collusion on the part of the grantee will destroy the conclusiveness of the judgment, and allow the warrantor to prove that the recovery was not had under paramount title. McConnell *v.* Downs, 48 Ill. 271; Sisk *v.* Woodruff, 15 Ill. 15.

Negligence of vendee.— The vendor is only liable on his warranty for causes anterior to the sale, and if the vendee should be evicted without calling him in warranty, and he can

be broken as soon as made, and may be sued on at any time, and a recovery had, without alleging an eviction or an interruption in the title.[96]

2. Covenant of Seizin — a. In General. As has been previously stated,[97] the covenant of seizin is a covenant *in præsenti*, and is broken the moment it is made, if the covenantor is not then seized of the land attempted to be conveyed — a right of action immediately accruing to the grantee.[98]

establish the fact that he had a good defense, which he lost in consequence of his neglect, the vendee cannot recover of him. Kelly *v.* Wiseman, 14 La. Ann. 661. See also Wilson *v.* McElwee, 1 Strobh. (S. C.) 65; Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618.

96. Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 38. And see the following cases:

Alabama.—Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669.

Connecticut. — Johnson *v.* Moor, 2 Root 252, 1 Am. Dec. 69.

Illinois.— Clapp *v.* Herdman, 25 Ill. App. 509.

Indiana.— Blair *v.* Allen, 55 Ind. 409.

Iowa.—Wright *v.* McCormick, 22 Iowa 545.

Massachusetts.—Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Nebraska.— Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737; Scott *v.* Twiss, 4 Nebr. 133.

New York.—Stanard *v.* Eldridge, 16 Johns. 254; Abbott *v.* Allen, 14 Johns. 248; Delavergne *v.* Norris, 7 Johns. 358, 5 Am. Dec. 281; Morris *v.* Phelps, 5 Johns. 49, 4 Am. Dec. 323; Hamilton *v.* Wilson, 4 Johns. 72, 4 Am. Dec. 253; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379.

Pennsylvania.— Edmunds' Appeal, (1897) 8 Atl. 31.

Vermont.— Flint *v.* Steadman, 36 Vt. 210. But see Everts *v.* Brown, 1 D. Chipm. 96, 1 Am. Dec. 699.

England.— May *v.* Platt, [1900] 1 Ch. 616, 69 L. J. Ch. 357, 83 L. T. Rep. N. S. 123, 48 Wkly. Rep. 617.

See 14 Cent. Dig. tit. "Covenants," § 101.

A "paper writing" from the grantor to another, amounting to nothing more than a pretext for a lawsuit, in which the grantee's title is not disturbed, is no breach of a covenant in a deed to such grantee that the premises are free and clear from all former grants, bargains, and sales. Rittmaster *v.* Richner, 14 Colo. App. 361, 60 Pac. 189.

Conveyance by grantee of minor.— A deed by a minor conveys to his grantee a valid title, and the covenants in such grantee's deed to others are not broken until the minor thereafter disaffirms the deed. Pritchett *v.* Redick, 62 Nebr. 296, 86 N. W. 1091 [*citing* Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781].

Conveyance by metes and bounds.— Where a grantee of land, under a deed describing the premises by metes and bounds, was evicted from a portion of the house standing over the line, it was held no breach of the covenants. Burke *v.* Nichols, 2 Keyes (N. Y.) 670.

Subsequent failure of title.— The rule that a grantor of land with covenants of title is not liable for a failure of title subsequently accruing does not apply to a case in which the grantor in a deed, which was insufficiently acknowledged and unrecorded, subsequently made a conveyance to another grantee which defeated the first deed. Hamilton *v.* Doolittle, 37 Ill. 473.

The mere existence of an equitable title in another, by virtue of a parol agreement to convey, is not a breach of any of the usual covenants in a deed conveying the legal title. Wilson *v.* Irish, 57 Iowa 184, 6 N. W. 591, 10 N. W. 343. *Contra*, Dugger *v.* Oglesby, 99 Ill. 405, to the effect that the usual covenants extend to equitable as well as legal claims.

Where one of two administrators covenanted that a certain slave "belongs to him, and that the sole right of the said slave is in him as the administrator of A," it was held no breach of the covenant that the title to the slave was in the two administrators. Cowles *v.* Rowland, 47 N. C. 219.

97. See *supra*, II, B, 2.

98. *Alabama.*—Sayre *v.* Sheffield Land, etc., Co., 106 Ala. 440, 18 So. 101; Anderson *v.* Knox, 20 Ala. 156.

Arkansas.— Abbott *v.* Rowan, 33 Ark. 593; Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114.

California.— Salmon *v.* Vallejo, 41 Cal. 481; Lawrence *v.* Montgomery, 37 Cal. 183.

Connecticut.— Mitchell *v.* Warner, 5 Conn. 497; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Booth *v.* Starr, 5 Day 419.

Illinois.— Jones *v.* Warner, 81 Ill. 343; Baker *v.* Hunt, 40 Ill. 264, 89 Am. Dec. 346; King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Brady *v.* Spurck, 27 Ill. 478; Furness *v.* Williams, 11 Ill. 229.

Indiana.— Jackson *v.* Green, 112 Ind. 341, 14 N. E. 89; Craig *v.* Donovan, 63 Ind. 513; Bottorf *v.* Smith, 7 Ind. 673; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Iowa.— Mitchell *v.* Kepler, 75 Iowa 207, 39 N. W. 241; Zent *v.* Picken, 54 Iowa 535, 6 N. W. 750; Camp *v.* Douglas, 10 Iowa 586; Brandt *v.* Foster, 5 Iowa 287.

Kansas.— Scoffins *v.* Grandstaff, 12 Kan. 467; Dale *v.* Shively, 8 Kan. 276; Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950.

Kentucky.— Fitzhugh *v.* Crogan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Daisy Realty Co. *v.* Brown, 35 S. W. 637, 18 Ky. L. Rep. 155.

Maine. — Morrison *v.* McArthur, 43 Me. 567; Ballard *v.* Child, 34 Me. 355; Griffin *v.* Fairbrother, 10 Me. 91; Hacker *v.* Storer, 8 Me. 228; Cushman *v.* Blanchard, 2 Me. 266, 11 Am. Dec. 76.

Massachusetts.— Bacon *v.* Lincoln, 4 Cush. 210, 50 Am. Dec. 765; Bartholomew *v.* Can-

b. Sufficiency of Seizin to Support Covenant. In some jurisdictions it is held that the actual seizin of the grantor, whether he gained it by his own disseizin, or whether he was in under a disseizor, is sufficient to support his covenant of seizin, irrespective of his having an indefeasible title.[99] In a majority of the jurisdictions, however, a seizin in fact alone is insufficient to support the covenant. To this end there must be a transfer of the title — the right — as well as the actual possession;[1] and a possession adverse to the grantor at the time of his conveyance

dee, 14 Pick. 167; Caswell *v.* Wendell, 4 Mass. 108; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Michigan.— Sherwood *v.* Landon, 57 Mich. 219, 23 N. W. 778; Vaughn *v.* Matteson, 39 Mich. 758; Matteson *v.* Vaughn, 38 Mich. 373. See also Seckler *v.* Fox, 51 Mich. 92, 16 N. W. 246.

Minnesota.— Allen *v.* Allen, 48 Minn. 462, 51 N. W. 473; Kimball *v.* Bryant, 25 Minn. 496. See also Horrigan *v.* Rice, 39 Minn. 49, 38 N. W. 765.

Missouri.— Adkins *v.* Tomlinson, 121 Mo. 487, 26 S. W. 573; Tapley *v.* Lablaume, 1 Mo. 550; Coleman *v.* Clark, 80 Mo. App. 339.

New Hampshire.— Dickey *v.* Weston, 61 N. H. 23; Morrison *v.* Underwood, 20 N. H. 369; Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New Jersey.—Carter *v.* Deaman, 23 N. J. L. 260.

New York.— Mygatt *v.* Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Bingham *v.* Weiderwax, 1 N. Y. 509; Fowler *v.* Poling, 2 Barb. 300; McCarty *v.* Leggett, 3 Hill 134; Fitch *v.* Baldwin, 17 Johns. 161; Abbott *v.* Allen, 14 Johns. 248; Sedgwick *v.* Hollenback, 7 Johns. 376; Hamilton *v.* Wilson, 4 Johns. 72, 4 Am. Dec. 253; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379.

Pennsylvania.—Wilson *v.* Cochran, 46 Pa. St. 229.

South Carolina.— Johnson *v.* Veal, 3 McCord 449.

Tennessee. — Kenny *v.* Norton, 10 Heisk. 384; Kincaid *v.* Britain, 5 Sneed 119; Ingram *v.* Morgan, 4 Humphr. 66, 40 Am. Dec. 626.

Texas.—Westrope *v.* Chambers, 51 Tex. 178.

Vermont.— Clement *v.* Rutland Bank, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425; Pierce *v.* Johnson, 4 Vt. 247; Catlin *v.* Hurlburt, 3 Vt. 403; Garfield *v.* Williams, 2 Vt. 327; Williams *v.* Wetherbee, 1 Aik. 233.

Washington. — Rombough *v.* Koons, 6 Wash. 558, 34 Pac. 135.

United States. — Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91. But see Thomas *v.* Perry, 23 Fed. Cas. No. 13,908, Pet. C. C. 49.

See 14 Cent. Dig. tit. "Covenants." § 104.

A subsequent conveyance by defendant's grantor is not a breach. Vorhis *v.* Forsythe, 28 Fed. Cas. No. 17,004, 4 Biss. 409.

Any absolute deed may be assailed by parol evidence to show that it was intended for a mortgage, but proof that defendant's grantor asserts that his deed to defendant was in fact a mortgage is insufficient to make out even a *prima facie* case for the plaintiff in an action for breach of contract of seizin. The plaintiff must not only establish that the claim is made, but also that the deed was in fact so intended. Wilson *v.* Parshall, 129 N. Y. 233, 29 N. E. 297 [*affirming* 4 Silv. Supreme 374, 7 N. Y. Suppl. 479].

Perfection of title.— Where the grantor perfects his title before the commencement of suit on the covenant, and where the grantees have not been either actually or constructively evicted, there is no breach. Sanborn *v.* Knight, 100 Wis. 216, 75 N. W. 1009. And see ESTOPPEL.

The covenant of seizin only extends to a title existing in a third person which may defeat the estate granted by the covenantor. Furness *v.* Williams, 11 Ill. 229. See also Fitch *v.* Baldwin, 17 Johns. (N. Y.) 161. *Compare* Zarkowski *v.* Schroeder, 71 N. Y. App. Div. 526, 75 N. Y. Suppl. 1021.

The setting aside of a foreclosure sale under which the covenantor acquired title is no breach. Coit *v.* McReynolds, 25 N. Y. Super. Ct. 655.

Where lands are conveyed by reference to a recorded plat the grantee is chargeable with notice of all streets and alleys shown by the plat, and the existence of a street or alley within the metes and bounds of the lands described in the conveyance is not a breach of the ordinary covenant of seizin. Burbach *v.* Schweinler, 56 Wis. 386, 14 N. W. 449.

99. *Indiana.*— Axtel *v.* Chase, 77 Ind. 74; Burton *v.* Reeds, 20 Ind. 87. See also Hooker *v.* Folsom, 4 Ind. 90.

Massachusetts.— Follett *v.* Grant, 5 Allen 174; Raymond *v.* Raymond, 10 Cush. 134; Slater *v.* Rawson, 1 Metc. 450; Chapel *v.* Bull, 17 Mass. 213; Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61. See also Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391.

Nebraska.— Scott *v.* Twiss, 4 Nebr. 133.

Ohio.— Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585.

United States. — Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91; Kirkendall *v.* Mitchell, 14 Fed. Cas. No. 7,841, 3 McLean 144.

See 14 Cent. Dig. tit. "Covenants," § 105.

1. *Connecticut.*— Lockwood *v.* Sturtevant, 6 Conn. 373.

Illinois.— Frazer *v.* Peoria County, 74 Ill. 282; Clapp *v.* Hardman, 25 Ill. App. 509. See also Watts *v.* Parker, 27 Ill. 224.

Iowa.— Zent *v.* Picken, 54 Iowa 535, 6 N. W. 750.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

is, independently of champerty and maintenance,[2] a breach of his covenant of seizin, no matter how good his right and title.[3]

c. Encumbrances. It is a general rule that the covenant of seizin is not broken by the existence of an encumbrance or easement which does not affect the technical seizin of the covenantee;[4] as for example an inchoate or contingent right of dower,[5] an outstanding judgment against the covenantor,[6] a lease,[7] a mortgage,[8] a railroad right of way,[9] a street or highway,[10] or a right to erect a wall on the granted premises.[11]

d. Appurtenances. There is a breach of the covenant of seizin where there is a failure of title to anything properly appurtenant to the land conveyed,[12] or to any appurtenant right purported to be conveyed.[13]

Missouri.— Evans *v.* Fulton, 134 Mo. 653, 36 S. W. 230; Cockrell *v.* Proctor, 65 Mo. 41; Murphy *v.* Price, 48 Mo. 247; Tapley *v.* Labeaume, 1 Mo. 550; Coleman *v.* Clark, 80 Mo. App. 339.

New Hampshire.— Partridge *v.* Hatch, 18 N. H. 494; Parker *v.* Brown, 15 N. H. 176. *Contra,* Breck *v.* Young, 11 N. H. 485; Willard *v.* Twitchell, 1 N. H. 177. And see Greely *v.* Steele, 2 N. H. 284.

New York.—Tanner *v.* Livingston, 12 Wend. 83. See also Nichols *v.* Nichols, 5 Hun 108; Staats *v.* Garrett, 23 N. Y. Wkly. Dig. 529.

Tennessee.— Kincaid *v.* Brittain, 5 Sneed 119.

Vermont.— Mills *v.* Catlin, 22 Vt. 98; Richardson *v.* Dorr, 5 Vt. 9; Catlin *v.* Hurlburt, 3 Vt. 403.

See 14 Cent. Dig. tit. "Covenants," § 105.

2. See 6 Cyc. 867.

3. *Alabama.*— Lindsey *v.* Veasy, 62 Ala. 421.

Maine.— Wheeler *v.* Hatch, 12 Me. 398.

New York.— See Fitch *v.* Baldwin, 17 Johns. 161.

North Carolina.— Wilson *v.* Forbes, 13 N. C. 30.

Vermont.— Phelps *v.* Sawyer, 1 Aik. 150.

United States.— Thomas *v.* Perry, 23 Fed. Cas. No. 13,908, 1 Pet. C. C. 49.

See 14 Cent. Dig. tit. "Covenants," § 105.

4. Stockwell *v.* Couillard, 129 Mass. 231.

Tax liens and tax deeds.— See Zerfing *v.* Seelig, 14 S. D. 303, 85 N. W. 585 [*affirming* 12 S. D. 25, 80 N. W. 140]. But see Daggett *v.* Reas, 79 Wis. 60, 48 N. W. 127. See also Vorhis *v.* Forsythe, 28 Fed. Cas. No. 17,004, 4 Biss. 409.

Water rights.— In Clark *v.* Conroe, 38 Vt. 469, it was held that where a third person, under a prior grant, has the right to the water of a spring on the premises, and to convey it away by means of an aqueduct, it is a breach of the covenant of seizin in a subsequent conveyance.

5. *Indiana.*— Whisler *v.* Hicks, 5 Blackf. 100, 33 Am. Dec. 454.

Kentucky.— Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

Ohio.— Tuite *v.* Miller, 10 Ohio 382.

South Carolina.— Lewis *v.* Lewis, 5 Rich. 12; Massey *v.* Craine, 1 McCord 489.

Virginia.— Building, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58.

See 14 Cent. Dig. tit. "Covenants," § 106.

6. Sedgwick *v.* Hollenback, 7 Johns. (N. Y.) 376.

7. Lindley *v.* Dakin, 13 Ind. 388; Hebler *v.* Brown, 18 Misc. (N. Y.) 395, 41 N. Y. Suppl. 441. But see Langenberg *v.* Chas. H. Heer Dry Goods Co., 74 Mo. App. 12.

8. Reasoner *v.* Edmundson, 5 Ind. 393; Stanard *v.* Eldridge, 16 Johns. (N. Y.) 254; Sedgwick *v.* Hollenback, 7 Johns. (N. Y.) 376.

9. Douglass *v.* Thomas, 103 Ind. 187, 2 N. E. 562; Brown *v.* Young, 69 Iowa 625, 29 N. W. 941; Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426; Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653; Kutz *v.* McCune, 22 Wis. 628, 99 Am. Dec. 85. *Compare* Messer *v.* Oestrich, 52 Wis. 684, 10 N. W. 6 [*distinguishing* Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653; Kutz *v.* McCune, 22 Wis. 628, 99 Am. Dec. 85].

10. *Alabama.*— Moore *v.* Johnston, 87 Ala. 220, 6 So. 50.

Connecticut.— Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216.

Indiana.— Shelbyville, etc., Turnpike Co. *v.* Green, 99 Ind. 205; Vaughn *v.* Stuzaker, 16 Ind. 338.

Massachusetts.— See Parker *v.* Moore, 118 Mass. 552.

New York.—Whitbeck *v.* Cook, 15 Johns. 483, 8 Am. Dec. 272; Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Cortelyou *v.* Van Brundt, 2 Johns. 357, 3 Am. Dec. 439.

Pennsylvania.— Lewis *v.* Jones, 1 Pa. St. 336, 44 Am. Dec. 138. See also Patterson *v.* Arthurs, 9 Watts 152. *Compare* Dobbins *v.* Brown, 12 Pa. St. 75.

England.— Goodtitle *v.* Alker, 1 Burr. 133, 1 Ken. K. B. 427.

See 14 Cent. Dig. tit. "Covenants," § 106.

11. Blondeau *v.* Sheridan, 81 Mo. 545.

12. Mott *v.* Palmer, 1 N. Y. 564.

The title-deeds to land are not appurtenant thereto so as to render the grantor liable on his covenant of seizin for failing to deliver them to the grantee. Abbott *v.* Allen, 14 Johns. (N. Y.) 248.

The wrongful removal of fixtures by a tenant is not a breach of the landlord's covenant of seizin, in a deed of the premises made by him. Loughran *v.* Ross, 45 N. Y. 792, 6 Am. Rep. 173. See also McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405.

13. Traster *v.* Snelson, 29 Ind. 96; Walker *v.* Wilson, 13 Wis. 522, right to raise a dam.

e. Incorrect Descriptions. Incorrect description of the land conveyed will not as a rule constitute a breach of the covenant of seizin contained in the deed if the premises are in other respects sufficiently identified.[14]

f. Eviction. An eviction is not necessary to constitute a breach of the covenant of seizin.[15]

3. Covenant of Right to Convey. What has been said in regard to the performance or breach of the covenant of seizin, with which the covenant of good right to convey is very generally held to be synonymous, applies with full force to the latter covenant. If broken at all, it is broken at its inception, and an actual eviction is unnecessary to consummate the breach.[16] Neither the existence

Encroachment of buildings on other premises.— In a conveyance of premises by metes and bounds, "with the buildings and improvements thereon erected," the covenant of seizin is not broken by the fact that the buildings encroach on the adjoining premises. Stearn *v.* Hesdorfer, 9 Misc. (N. Y.) 134, 29 N. Y. Suppl. 281.

14. *Connecticut.*—Elliott *v.* Weed, 44 Conn. 19.

Massachusetts.— Perry *v.* Clark, 157 Mass. 330, 32 N. E. 226. But see Cornell *v.* Jackson, 3 Cush. 506.

Michigan.—Wiley *v.* Lovely, 46 Mich. 83, 8 N. W. 716.

New Hampshire.—Breck *v.* Young, 11 N. H. 485.

New York.— Mann *v.* Pearson, 2 Johns. 37. But see Hunt *v.* Raplee, 44 Hun 149.

North Carolina.— McArthur *v.* Morris, 84 N. C. 405. But see Wilson *v.* Forbes, 13 N. C. 30.

See 14 Cent. Dig. tit. "Covenants," § 108.

15. *Arkansas.*— Benton County *v.* Rutherford, 33 Ark. 640; Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Bird *v.* Smith, 8 Ark. 368; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

Connecticut.— Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169.

Illinois.— Tone *v.* Wilson, 81 Ill. 529.

Iowa.— Zent *v.* Picken, 54 Iowa 535, 6 N. W. 750; Brandt *v.* Foster, 5 Iowa 287.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

Michigan.— See Long *v.* Sinclair, 40 Mich. 569, a case of technical eviction by reason of adverse judgment in ejectment.

Missouri.—Hall *v.* Bray, 51 Mo. 288; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661; Egan *v.* Martin, 71 Mo. App. 60. See also Magwire *v.* Riggin, 44 Mo. 512.

New Hampshire. — Parker *v.* Brown, 15 N. H. 176.

New Jersey.— Lot *v.* Thomas, 2 N. J. L. 407, 2 Am. Dec. 354.

South Carolina.—Mackey *v.* Collins, 2 Nott & M. 186, 10 Am. Dec. 586; Pringle *v.* Witten, 1 Bay 256, 1 Am. Dec. 612.

Tennessee.—Miller *v.* Bentley, 5 Sneed 671; Kincaid *v.* Brittain, 5 Sneed 119.

Vermont. — Mills *v.* Catlin, 22 Vt. 98; Everts *v.* Brown. 1 D. Chipm. 96, 1 Am. Dec. 699.

Wisconsin.—Akerly *v.* Vilas, 21 Wis. 88. See also Semple *v.* Whorton, 68 Wis. 626, 32 N. W. 690.

United States.— Le Roy *v.* Beard, 8 How. 451, 12 L. ed. 1151; Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666; Schnelle, etc., Lumber Co. *v.* Barlow, 34 Fed. 853.

See 14 Cent. Dig. tit. "Covenants," § 109.

Contra.— In Nebraska and Ohio the doctrine of actual seizin prevails, with the modification, however, that whereas in Massachusetts, Maine, and some other states the covenant is held to be fully and completely satisfied, once for all, by the transfer of the actual seizin — the possession — in these two states it is held to be satisfied only "until actual eviction by title paramount." Scott *v.* Twiss, 4 Nebr. 133; Great Western Stock Co. *v.* Saas, 24 Ohio St. 542; Stambaugh *v.* Smith, 23 Ohio St. 584; Devore *v.* Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Robinson *v.* Neil, 3 Ohio 525; Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585; Barker *v.* Blanchard, 7 Ohio S. & C. Pl. Dec. 537, 5 Ohio N. P. 398; Gest *v.* Kenner, 2 Handy 87, 12 Ohio Dec (Reprint) 343.

Where a grantor voluntarily surrenders possession, and not to parties having the paramount title with the right of immediate possession, there is no such breach of the covenant of seizin as will entitle him or his assignee to a recovery of the purchase-price of the land. Freymoth *v.* Nelson, 84 Mo. App. 293.

16. *Alabama.*— Sayre *v.* Sheffield Land, etc., Co., 106 Ala. 440, 18 So. 101.

Arkansas.— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California. — Salmon *v.* Vallejo, 41 Cal. 481; Lawrence *v.* Montgomery, 37 Cal. 183.

Connecticut.— Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Booth *v.* Starr, 5 Day 419.

Illinois. — Tone *v.* Wilson, 81 Ill. 529; Baker *v.* Heab, 40 Ill. 264, 89 Am. Dec. 346; King *v.* Gilsons, 32 Ill. 348, 83 Am. Dec. 269; Brady *v.* Spurck, 27 Ill. 478.

Iowa.— Mitchell *v.* Kepler, 75 Iowa 207, 39 N. W. 241.

Kansas.— Scantlin *v.* Allison, 12 Kan. 85; Dale *v.* Shively, 8 Kan. 276.

Massachusetts.— Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Missouri. — Collins *v.* Clamorgan, 5 Mo.

of a public highway over the land conveyed,[17] nor an inchoate right of dower,[18] nor an outstanding mortgage,[19] nor the fact that the grantor had a voidable title[20] will constitute a breach.

4. Covenant Against Encumbrances — a. In General. As usually expressed in England — that is in connection with the covenant for quiet enjoyment — the covenant against encumbrances is a covenant of indemnity, and is only broken upon an actual interruption, claim, or demand against the covenantee.[21] As usually expressed in the United States, that is, that the premises are free and clear of all encumbrances, the covenant is a covenant *in præsenti*, and if not true is broken as soon as made.[22] If, however, the covenant is clearly one of indemnity against future disturbance, no breach will occur until such disturbance, although the

272; Stuart *v.* Rector, 1 Mo. 361; Eagan *v.* Martin, 81 Mo. App. 676.

New Hampshire. — Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New Jersey.— Carter *v.* Denman, 23 N. J. L. 260; Chapman *v.* Holmes, 10 N. J. L. 20; Lot *v.* Thomas, 2 N. J. L. 407, 2 Am. Dec. 354.

New York.— Fowler *v.* Poling, 2 Barb. 300.

South Carolina. — Mackey *v.* Collins, 2 Nott & M. 186, 10 Am. Dec. 586; Pringle *v.* Witten, 1 Bay 256, 1 Am. Dec. 612.

Tennessee. — Kenny *v.* Norton, 10 Heisk. 384.

Texas. — Westrope *v.* Chambers, 51 Tex. 178.

Vermont.— Richardson *v.* Dorr, 5 Vt. 9.

England.—Turner *v.* Moon, [1901] 2 Ch. 825, 70 L. J. Ch. 822, 85 L. T. Rep. N. S. 90; Reynolls *v.* Woolmer, Freem. K. B. 41; King *v.* Jones, 1 Marsh. 107, 5 Taunt. 418, 15 Rev. Rep. 533, 1 E. C. L. 219.

Canada.— Beck *v.* Barlow, 6 N. Brunsw. 465.

See 14 Cent. Dig. tit. "Covenants," § 110.

Effect of champerty act.— In Kentucky, prior to the act of July, 1824, the covenant of right to convey was not broken by an adverse possession. Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 432.

Incorrect description.— That the sides of a piece of land are not as long as stated in the description, the names of the owners of the adjacent tracts being also given, is not a breach of the covenant of right to convey. Belden *v.* Seymour, 8 Conn. 19.

The doctrine of actual seizin is applied in some jurisdictions to the covenant of right to convey as well as to the covenant of seizin. Follett *v.* Grant, 5 Allen (Mass.) 174; Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91.

17. Whitbeck *v.* Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272. See also Burbach *v.* Schweinler, 56 Wis. 386, 14 N. W. 449.

18. Whisler *v.* Hicks, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; Tuite *v.* Meller, 10 Ohio 382.

19. Reasoner *v.* Edmundson, 5 Ind. 393.

20. Wait *v.* Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391.

21. The mere existence of outstanding encumbrances, unless they prevent entry and enjoyment, will not constitute an immediate breach. Vane *v.* Barnard, Gilb. 6, 25 Eng. Reprint 5. See also Hammond *v.* Hill, Comyns 180; King *v.* Standish, 1 Keb. 927; Griffith *v.* Harrison, 4 Mod. 249, 1 Salk. 196, Skin. 397.

22. *Alabama.*—Sayre *v.* Sheffield Land, etc., Co., 106 Ala. 440, 18 So. 101; Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Thomas *v.* St. Paul's M. E. Church, 86 Ala. 138, 5 So. 508.

Arkansas.— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California. — Salmon *v.* Vallejo, 41 Cal. 481; Lawrence *v.* Montgomery, 37 Cal. 183.

Colorado.— Fisk *v.* Cathcart, 3 Colo. App. 374, 33 Pac. 1004.

Connecticut. — Davis *v.* Lyman, 6 Conn. 249; Mitchell *v.* Warner, 5 Conn. 497.

Kansas.— Scoffins *v.* Grandstaff, 12 Kan. 467; Dale *v.* Shively, 8 Kan. 276.

Maine.— Reed *v.* Pierce, 36 Me. 455, 58 Am. Dec. 761. See also Clark *v.* Perry, 30 Me. 148.

Massachusetts. — Kramer *v.* Carter, 136 Mass. 504; Whitney *v.* Dinsmore, 6 Cush. 124; Clark *v.* Swift, 3 Metc. 390; Chapel *v.* Hill, 17 Mass. 213. *Compare* Spring *v.* Tongue, 9 Mass. 28, 6 Am. Dec. 21.

Missouri.— Shelton *v.* Pease, 10 Mo. 473; Buren *v.* Habbell, 54 Mo. App. 617; Winningham *v.* Peacock, 36 Mo. App. 688.

Nebraska.— Campbell *v.* McClure, 45 Nebr. 608, 63 N. W. 920; Chapman *v.* Kimball, 7 Nebr. 399. *Compare* Scott *v.* Twiss, 4 Nebr. 133.

New Hampshire.— Morrison *v.* Underwood, 20 N. H. 369.

New Jersey.— Carter *v.* Denman, 23 N. J. L. 260; Garrison *v.* Sandford, 12 N. J. L. 261; Chapman *v.* Holmes, 10 N. J. L. 20; Stewart *v.* Drake, 9 N. J. L. 139.

New York.— Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; Barlow *v.* St. Nicholas Nat. Bank, 63 N. Y. 399, 20 Am. Rep. 547.

Pennsylvania.—Cathcart *v.* Bowman, 5 Pa. St. 317; Seitzinger *v.* Weaver, 1 Rawle 377; Funk *v.* Voneida, 11 Serg. & R. 109, 14 Am. Dec. 614. See also Stutt *v.* Building Assoc., 12 Pa. Co. Ct. 344.

Tennessee.— Kenney *v.* Norton, 10 Heisk. 384.

Wisconsin.— Eaton *v.* Lyman, 30 Wis. 41.

See 14 Cent. Dig. tit. "Covenants," § 111.

encumbrance was in existence at the time of the conveyance.[23] An encumbrance, within the meaning of the covenant, embraces every right to or interest in the land, diminishing the value of the estate, but not inconsistent with the transfer of the fee.[24]

b. Dower. The weight of authority is to the effect that the covenant against encumbrances is broken by the existence of a right of dower in the land conveyed, although at the time of the conveyance the right may be inchoate and contingent.[25]

c. Leases. An outstanding lease is an encumbrance, within the meaning of the covenant against encumbrances in a deed of conveyance of the land.[26]

d. Liens. A lien on the land conveyed is a breach of the covenant against encumbrances.[27]

23. See Van Slyck *v.* Kimball, 8 Johns. (N. Y.) 198; Nyce *v.* Obertz, 17 Ohio 71; Grice *v.* Scarborough, 2 Speers (S. C.) 649, 42 Am. Dec. 391.

24. Chapman *v.* Kimball, 7 Nebr. 399. See also Christy *v.* Ogle, 33 Ill. 295; Jarvis *v.* Buttrick, 1 Metc. (Mass.) 480; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249.

An adverse equitable claim is not an encumbrance. Marple *v.* Scott, 41 Ill. 50.

A previous sale by articles of agreement is an encumbrance. Seitzinger *v.* Weaver, 1 Rawle (Pa.) 377.

A right of seizure under the embargo laws, unexercised at the time of the conveyance, is not a breach of the covenant against encumbrances. Ingersoll *v.* Jackson, 13 Mass. 182, 14 Mass. 109.

A valid possession in a third person without right is not a breach. Dinsmore *v.* Savage, 68 Me. 191.

Expenses incurred to remove a cloud on the title are not within the covenant. Luther *v.* Brown, 66 Mo. App. 227.

25. *Alabama.*— Barnett *v.* Gaines, 8 Ala. 373.

Indiana.— Smith *v.* Ackerman, 5 Blackf. 541; Whisler *v.* Hicks, 5 Blackf. 100, 33 Am. Dec. 454.

Maine.— Runnells *v.* Webber, 59 Me. 488; Donnell *v.* Thompson, 10 Me. 170, 25 Am. Dec. 216; Porter *v.* Noyes, 2 Me. 22, 11 Am. Rep. 30.

Massachusetts.— Bigelow *v.* Hubbard, 97 Mass. 195; Shearer *v.* Ranger, 22 Pick. 447; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249. *Compare* Fuller *v.* Wright, 18 Pick. 403, 405, in which Shaw, C. J., said: "Whether under all circumstances an inchoate right of dower, where husband and wife are both living, shall be deemed an encumbrance, is a question which must depend upon the contract and the circumstances. It is true that it is no estate or interest, but only a possibility. But it is a possibility which may give the wife an estate, by the happening of a contingent event, the death of her husband, without any new act to be done, or new right to be acquired. . . . But we think no general rule can be laid down, to determine absolutely whether such inchoate right of dower is an incumbrance; it must depend on many and various circumstances and considerations."

Minnesota.— See Crowley *v.* C. N. Nelson Lumber Co., 66 Minn. 400, 69 N. W. 321.

Missouri.— Walker *v.* Deaver, 79 Mo. 664; Ward *v.* Ashbrook, 78 Mo. 515; Durrett *v.* Piper, 58 Mo. 551. But see Blair *v.* Rankin, 11 Mo. 440.

New Hampshire.— Russ *v.* Perry, 49 N. H. 547.

New Jersey.—Carter *v.* Denman, 23 N. J. L. 260.

New York.— Jones *v.* Gardner, 10 Johns. 266.

Pennsylvania.— See Bitner *v.* Brough, 11 Pa. St. 127.

But see Nyce *v.* Obertz, 17 Ohio 71.

See 14 Cent. Dig. tit. "Covenants," § 112.

Contra, as to inchoate right of dower, see Humphrey *v.* Clement, 44 Ill. 299; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

The right of a divorced wife to have dower assigned in the real estate of her divorced husband is a breach of his covenant against encumbrances. Runnells *v.* Webber, 59 Me. 488.

The widow's right of election to waive a jointure, etc., and be endowed of the husband's lands, is such an existing encumbrance upon land acquired by him after such jointure or pecuniary provision during her life as will support an action by a subsequent grantee of the land upon his grantee's covenant against encumbrances. Bigelow *v.* Hubbard, 97 Mass. 195.

26. *Kansas.*—Clark *v.* Fisher, 54 Kan. 403, 38 Pac. 493; Smith *v.* Davis, 44 Kan. 362, 24 Pac. 428.

Minnesota.— Fritz *v.* Pusey, 31 Minn. 368, 18 N. W. 94.

New Jersey.— Demars *v.* Koehler, 62 N. J. L. 203, 41 Atl. 720, 72 Am. St. Rep. 642 [*reversing* 60 N. J. L. 314, 38 Atl. 808].

South Carolina.— Grice *v.* Scarborough, 4 Speers 649, 42 Am. Dec. 391.

Vermont.— Sawyer *v.* Little, 4 Vt. 414.

But see Weld *v.* Traip, 14 Gray 330, to the effect that a covenant for the future renewal of a lease is not such a present demise as will constitute an encumbrance upon the land in the hands of a third person, after the first term has been surrendered by agreement.

See 14 Cent. Dig. tit. "Covenants," § 113.

27. Thomas *v.* St. Paul's M. E. Church, 86 Ala. 138, 5 So. 508, vendor's lien.

e. Mortgages. The covenant against encumbrances is broken immediately, where there is an outstanding mortgage on the premises conveyed.[28] The mortgage may, however, be excepted from the covenant, and in such case neither accrued interest,[29] nor proceedings to foreclose and the filing of a *lis pendens*,[30] will constitute a breach of the covenant against encumbrances.

f. Attachments. An attachment of land is an encumbrance within the meaning of a covenant against encumbrances.[31]

g. Judgments. A judgment outstanding against the grantor at the time of the conveyance of land is a breach of the covenant against encumbrances.[32]

h. Taxes — (i) *In General.* Unpaid taxes, constituting a valid and subsisting lien on land at the time of its conveyance, are within the covenant against encumbrances,[33] notwithstanding the fact that a personal liability also rests upon

A mechanic's lien or the right to file a mechanic's lien upon the premises conveyed is a breach of the covenant against encumbrances implied from the use of the words "grant, bargain, and sell," in the deed of conveyance. Duffy *v.* Sharp, 73 Mo. App. 316; Dyer *v.* Ladomus, 2 Del. Co. (Pa.) 422; Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830.

28. *Arkansas.*— Brooks *v.* Moody, 25 Ark. 452.

Connecticut. — Davis *v.* Lyman, 6 Conn. 249. See also St. Andrews *v.* Lockwood, 2 Root 239.

Indiana.— Snyder *v.* Lane, 10 Ind. 424; Reasoner *v.* Edmundson, 5 Ind. 393.

Iowa. — McLaughlin *v.* Royce, 108 Iowa 254, 78 N. W. 1105.

Maine.— Bean *v.* Mayo, 5 Me. 94.

Massachusetts.— Tufts *v.* Adams, 8 Pick. 547; Wyman *v.* Ballard, 12 Mass. 304. *Compare* Foster *v.* Woodward, 141 Mass. 160, 6 N. E. 853.

Michigan. — See Twitchell *v.* Drury, 25 Mich. 393.

New Jersey.— Stewart *v.* Drake, 9 N. J. L. 139.

Oregon.— Corbett *v.* Wrenn, 25 Oreg. 305, 35 Pac. 658.

Pennsylvania.— Funk *v.* Voneida, 11 Serg. & R. 109, 14 Am. Dec. 617. *Compare* Johnston *v.* Markle Paper Co., 153 Pa. St. 189, 25 Atl. 560, 885.

Vermont.— Potter *v.* Taylor, 6 Vt. 676; Richardson *v.* Dorr, 5 Vt. 9. *Compare* Judevine *v.* Pennock, 15 Vt. 683.

Canada.— Good *v.* End, 6 N. Brunsw. 603.

See 14 Cent. Dig. tit. "Covenants," § 115.

A mortgage created by the grantee himself is not embraced in the covenant against encumbrances. Judd *v.* Seekins, 62 N. Y. 266.

A mortgagee who takes a warranty deed of the same land from one who has through mesne conveyances the mortgagor's right of redemption will not, in an action against one of the intermediate grantors for breach of covenant, be sustained in pleading that he has been evicted by the mortgage title which he himself holds, nor in a claim of damages on account of the encumbrance. Trask *v.* Wilder, 50 Me. 450.

In case of the statutory covenant implied by the use of the words "grant, bargain, and sell," the mortgage encumbrance must have been done or suffered by the grantor, or some "person claiming under him." Clore *v.* Graham, 64 Mo. 249.

29. King *v.* Sea, 6 Ill. App. 189.

30. Monell *v.* Douglass, 17 N. Y. Suppl. 178.

31. Kelsey *v.* Remer, 43 Conn. 129, 21 Am. Rep. 638; Johnson *v.* Collins, 116 Mass. 392; Norton *v.* Babcock, 2 Metc. (Mass.) 510; Harlow *v.* Thomas, 15 Pick. (Mass.) 66.

32. *Indiana.*— Smith *v.* McCampbell, 1 Blackf. 100.

Massachusetts. — Jenkins *v.* Hopkins, 8 Pick. 346.

Missouri.— Priest *v.* Deaver, 22 Mo. App. 209.

New York.— Hall *v.* Dean, 13 Johns. 105.

Wisconsin.— Jones *v.* Davis, 24 Wis. 229, which was a sale on an execution dormant, but not void.

See 14 Cent. Dig. tit. "Covenants," § 117.

A judgment between the sale and the conveyance of land is a lien as to the unpaid purchase-money, and therefore an encumbrance. Holman *v.* Creagmiles, 14 Ind. 177.

Judgment charging annuity.— See Priest *v.* Deaver, 22 Mo. App. 276.

33. *Arkansas.*— Crowell *v.* Packard, 35 Ark. 348.

Indiana.— Robinson *v.* Murphy, 33 Ind. 482.

Iowa.— Ingalls *v.* Cooke, 21 Iowa 560.

Michigan.—Eaton *v.* Chesebrough, 82 Mich. 214, 46 N. W. 365.

Missouri.— Patterson *v.* Yancey, 81 Mo. 379.

Nebraska.— Campbell *v.* McClure, 45 Nebr. 608, 63 N. W. 920.

New Jersey.—Cadmus *v.* Fagan, 47 N. J. L. 549, 4 Atl. 323.

Pennsylvania.— Large *v.* McClain, (1886) 7 Atl. 101, unpaid collateral inheritance tax.

Tennessee.— Plowman *v.* Williams, 6 Lea 268.

Wisconsin.— Mitchell *v.* Pillsbury, 5 Wis. 407.

United States.—Fuller *v.* Jillett, 2 Fed. 30, 9 Biss. 296.

See 14 Cent. Dig. tit. "Covenants," § 118.

Extent of grantor's liability.— See Baldwin *v.* Mayne, 42 Iowa 131, personal taxes.

Recital in a collector's deed that the land

the covenantor.[34] But the covenant is not broken by a claim on account of taxes, which is invalid, and founded in falsehood, and is defeated, although at the expense of a litigation.[35]

(II) *Special Assessments.* Special assessments which constitute a lien upon land at the time of its conveyance are within the meaning of a covenant against encumbrances contained in the deed.[36]

(III) *When Lien Attaches.* The circumstances under which a tax or special assessment lien attaches so as to render a grantor liable on his covenant against encumbrances are completely controlled by the statute law of the various states.[37]

was sold for unpaid taxes is not proof of an encumbrance upon the land in an action for breach of the covenant. Maddocks *v.* Stevens, 89 Me. 336, 36 Atl. 398.

Right of assignee.— Mass. Pub. Stat. c. 126, § 18, giving a right of action against the grantor in a deed to the assignee of the grantee for a breach of a covenant against encumbrances, where the encumbrance "appears of record," applies only where it is of record in the registry of deeds; and a lien for unpaid taxes, which only appears in the records of a city or town, is not within the statute. Carter *v.* Peak, 138 Mass. 439.

Taxes assessed after a contract of sale, but before the execution of the deed, are within the covenant against encumbrances contained in the deed. Eaton *v.* Chesebrough, 82 Mich. 214, 46 N. W. 365. *Compare* Gheen *v.* Harris, 170 Pa. St. 644, 32 Atl. 1094. And see Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558.

To maintain an action for the recovery of taxes paid by the grantee under a deed containing a covenant against encumbrances, the plaintiff must prove the deed, the existence of the taxes as an encumbrance, and his payment thereof (Patterson *v.* Yancy, 81 Mo. 379); and if the lien has been lost by laches, the grantee is not justified in paying off back taxes, where there has been no threat of eviction (Robinson *v.* Bierce, 102 Tenn. 428, 52 S. W. 992, 47 L. R. A. 275).

34. Cochran *v.* Guild, 106 Mass. 29, 8 Am. Rep. 296. But see Briggs *v.* Morse, 42 Conn. 258.

35. Rittmaster *v.* Richner, 14 Colo. App. 361, 60 Pac. 189.

36. *Arkansas.*— Sanders *v.* Brown, 65 Ark. 498, 47 S. W. 461.

Indiana.— Robinson *v.* Murphy, 33 Ind. 482; Barker *v.* Hobbs, 6 Ind. 385.

Louisiana.—*Compare* Ranney *v.* Burthe, 15 La. Ann. 343.

Massachusetts.— Foley *v.* Haverhill, 144 Mass. 352, 11 N. E. 554; Blackie *v.* Hudson, 117 Mass. 181.

Michigan.— Lindsay *v.* Eastwood, 72 Mich. 336, 40 N. W. 455.

Missouri.— Cleveland Park Land, etc., Co. *v.* Campbell, 65 Mo. App. 109.

New Jersey.— Hartshorn *v.* Cleveland, 52 N. J. L. 473, 19 Atl. 974 [*affirmed* in 54 N. J. L. 391, 25 Atl. 963].

New York.— Ernst *v.* Parsons, 54 How. Pr. 163. See also Dowdney *v.* New York, 54 N. Y. 186; De Peyster *v.* Murphy, 39 N. Y. Super. Ct. 255.

Pennsylvania.— Lafferty *v.* Milligan, 165 Pa. St. 534, 30 Atl. 1030; Devine *v.* Rawle, 148 Pa. St. 208, 23 Atl. 1119; Shaffer *v.* Greer, 87 Pa. St. 370; De Arment *v.* Kennedy, 14 Pa. Super. Ct. 539.

See 14 Cent. Dig. tit. "Covenants," § 119.

Notice to grantor.— An assessment of benefit from a street widening is held to be a breach of the covenant against encumbrances in a deed of the assessed premises afterward executed, although the grantor at the time of the conveyance had only constructive notice of the widening. Blackie *v.* Hudson, 117 Mass. 181. But see McLaughlin *v.* Miller, 124 N. Y. 510, 26 N. E. 1104.

Reassessment after payment of invalid assessment by vendors.— In Green *v.* Tidball, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879, defendants sold a lot to plaintiffs by a deed warranting against encumbrances. After the sale vendors paid an assessment for a public improvement levied prior to the sale. Thereafter the assessment was found illegal by the court, which passed an act providing for a reassessment. It was held that such reassessment was a breach of the covenant, and that the amount paid thereon by the vendees could be recovered by them of the vendors. See also Cadmus *v.* Fagan, 47 N. J. L. 549, 4 Atl. 323. But see Barth *v.* Ward, 63 N. Y. App. Div. 193, 71 N. Y. Suppl. 340.

37. *Illinois.*— Almy *v.* Hunt, 48 Ill. 45.

Indiana.— Langsdale *v.* Nicklaus, 38 Ind. 289; Overstreet *v.* Dobson, 28 Ind. 256.

Iowa.— Sackett *v.* Osborn, 26 Iowa 146.

Kansas.— Tull *v.* Royston, 30 Kan. 617, 2 Pac. 866.

Massachusetts.— Carr *v.* Dooley, 119 Mass. 294; Davis *v.* Bean, 114 Mass. 358.

Michigan.— Lindsay *v.* Eastwood, 72 Mich. 336, 40 N. W. 455.

Missouri.— Blossom *v.* Van Court, 34 Mo. 390, 86 Am. Dec. 114; Barnhart *v.* Hughes, 46 Mo. App. 318.

Nebraska.— Reid *v.* Colby, 26 Nebr. 469, 42 N. W. 485.

New Jersey.— Bradley *v.* Dike, 57 N. J. L. 471, 32 Atl. 132; Hartshorn *v.* Cleveland, 52 N. J. L. 473, 19 Atl. 974 [*affirmed* in 54 N. J. L. 391, 25 Atl. 963]; Fagan *v.* Cadmus, 46 N. J. L. 441.

New York.— McLaughlin *v.* Miller, 124 N. Y. 510, 26 N. E. 1104 [*affirming* 57 Hun 430, 10 N. Y. Suppl. 830]; Harper *v.* Dowdney, 113 N. Y. 644, 21 N. E. 63; Lathers *v.* Keogh, 109 N. Y. 583, 17 N. E. 131; De Peyster *v.* Murphy, 66 N. Y. 622; Barlow *v.* St.

As has hitherto been stated the lien must have attached prior to the time of the conveyance.[38]

(IV) *TAX-TITLES.* A valid certificate of the sale of land for taxes,[39] held by a third person at the time a warranty deed is given, is a breach of the covenant against encumbrances in such deed.[40]

i. Easements — (I) *IN GENERAL.* As a general rule the covenant against encumbrances is broken by any outstanding easement which diminishes the value of the land conveyed, nor will the knowledge by the grantee of the existence of the easement make any difference.[41] If, however, the right is merely an inconvenience, inseparable from the nature of the estate, it is not within the meaning of the covenant.[42]

(II) *PUBLIC HIGHWAYS.* The decided weight of authority is to the effect that a public highway over land is a breach of the covenant against encumbrances in a conveyance of the land.[43]

Nicholas Nat. Bank, 63 N. Y. 399, 20 Am. Rep. 547; Dowdney *v.* New York, 54 N. Y. 186; Real Estate Corp. *v.* Harper, 70 N. Y. App. Div. 64, 74 N. Y. Suppl. 1065; Hastings *v.* Twenty-Third Ward Land Imp. Co., 46 N. Y. App. Div. 609, 61 N. Y. Suppl. 998; Harper *v.* Dowdney, 47 Hun 227 [*affirmed* in 113 N. Y. 644, 21 N. E. 63]; People *v.* Gillon, 9 N. Y. Suppl. 563, 18 N. Y. Civ. Proc. 112, 24 Abb. N. Cas. 125.

Ohio.— Craig *v.* Heis, 30 Ohio St. 550; Newcomb *v.* Fiedler, 24 Ohio St. 463; Long *v.* Moler, 5 Ohio St. 271.

Pennsylvania. — Lafferty *v.* Milligan, 165 Pa. St. 534, 30 Atl. 1030; Hosie *v.* Egerton, 2 Walk. 351 [*affirming* 2 C. Pl. 43].

Vermont.— Hutchins *v.* Moody, 34 Vt. 433.

Wisconsin.— Peters *v.* Myers, 22 Wis. 602.

38. See *supra*, III, C, 4, h, (I).

When tax liens attach see TAXATION.

39. **An illegal sale,** however, is no breach of the covenant. Cummings *v.* Holt, 56 Vt. 384.

The existence of a recorded tax deed which passes no valid title is no breach of the covenant against encumbrances. Tibbetts *v.* Leeson, 148 Mass. 102, 18 N. E. 679.

Perfection of invalid title.— See Lonergan *v.* Baber, 59 Ark. 15, 26 S. W. 13.

40. Daggett *v.* Reas, 79 Wis. 60, 48 N. W. 127. *Compare* Fisk *v.* Cathcart, 3 Colo. App. 374, 33 Pac. 1004.

41. *Connecticut.*— Ensign *v.* Colt, (1902) 52 Atl. 829, 946.

Illinois.— Weiss *v.* Binnian, 178 Ill. 241, 52 N. E. 969 [*affirming* 78 Ill. App. 292]; Cream City Mirror Plate Co. *v.* Swedish Bldg., etc., Assoc., 74 Ill. App. 362.

Indiana.— Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41.

Kansas.— Smith *v.* Davis, 44 Kan. 362, 24 Pac. 428.

Massachusetts.— Spear *v.* Andrew, 6 Allen 420.

New Jersey.— Denman *v.* Mentz, 63 N. J. Eq. 613, 52 Atl. 1117.

New York.— Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; McMullin *v.* Wooley, 2 Lans. 394. *Compare* Farley *v.* Howard, 33 Misc. 57, 68 N. Y. Suppl. 159 [*affirmed* in 60 N. Y. App. Div. 193, 70 N. Y. Suppl. 51].

Ohio.— Stambaugh *v.* Smith, 23 Ohio St. 584.

Pennsylvania.— Edmunds' Appeal, (1887) 8 Atl. 31; Cathcart *v.* Bowman, 5 Pa. St. 317. But see Memmert *v.* McKeen, 112 Pa. St. 315, 4 Atl. 542.

See 14 Cent. Dig. tit. "Covenants," § 122.

As to knowledge of parties as affecting breach see *supra*, II, B, 1, c.

A written license, without seal and unacknowledged, to enter upon and imbed water pipes in the land conveyed, with privilege to enter and repair them, does not create an encumbrance. Wilkins *v.* Irvine, 33 Ohio St. 138.

42. Marsh *v.* Holley, 42 Conn. 453.

43. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545.

Connecticut.—Hubbard *v.* Norton, 10 Conn. 422.

Indiana.— Burk *v.* Hill, 48 Ind. 52, 17 Am. Rep. 731 [*disapproving dictum* in Scribner *v.* Holmes, 16 Ind. 142].

Maine.—Lamb *v.* Danforth, 59 Me. 322, 8 Am. Rep. 426; Haynes *v.* Young, 36 Me. 557; Herrick *v.* Moore, 19 Me. 313.

Massachusetts.—Parish *v.* Whitney, 3 Gray 516; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249; Kellogg *v.* Ingersoll, 2 Mass. 97.

Missouri.—Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426.

New Hampshire.— Prichard *v.* Atkinson, 3 N. H. 335.

Vermont.— Clark *v.* Conroe, 38 Vt. 469; Butler *v.* Gale, 27 Vt. 739.

Virginia.— Trice *v.* Kayton, 84 Va. 217, 4 S. E. 377, 10 Am. St. Rep. 836 [*distinguishing* Jordan *v.* Eve, 31 Gratt. 1].

See 14 Cent. Dig. tit. "Covenants," § 124.

Contra.— Desvergers *v.* Willis, 56 Ga. 515, 21 Am. Rep. 289; Harrison *v.* Des Moines, etc., R. Co., 91 Iowa 114, 58 N. W. 1081; Wilson *v.* Cochran, 46 Pa. St. 229; Patterson *v.* Arthurs, 9 Watts (Pa.) 152; Kutz *v.* McCune, 22 Wis. 628, 99 Am. Dec. 85, in all of which the decisions are either directly or inferentially based upon the existence of notice in the covenantee.

(III) *Private Ways.* The existence and use of a private right of way over granted premises, to which they were subject at the time of the conveyance, is a breach of the covenant of warranty.[44]

(IV) *Railroad Rights of Way.* The existence of a railroad right of way over the land conveyed is a breach of the covenant against encumbrances in the deed of conveyance.[45]

(V) *Water Rights.* The existence of outstanding water rights which prevent a grantee's full enjoyment of the premises conveyed is as a rule a breach of the covenant against encumbrances in the deed of conveyance.[46]

As to knowledge of parties as affecting breach see *supra*, II, B, 1 c.

Viewing premises and staking out a road over them by selectmen of a town do not constitute an encumbrance thereon until a location is filed and accepted. Shute *v.* Barnes, 2 Allen (Mass.) 598.

Where a deed refers to a plat on which a street is traced and describes the lands conveyed as extending to the middle of the street "as to be extended," the grant is subject to the street; and the subsequent use of such street as a public highway does not constitute a breach of covenants against encumbrances and of general warranty. Cincinnati *v.* Brachman, 35 Ohio St. 289.

44. Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645; Rea *v.* Menkler, 5 Lans. (N. Y.) 196; Wilson *v.* Cochran, 46 Pa. St. 229; Russ *v.* Steele, 40 Vt. 310; Clark *v.* Conroe, 38 Vt. 469.

Recovery of right.— A covenant in a deed of general warranty is broken upon a recovery by a stranger of a permanent use of a part of the land as a private passage-way. Butt *v.* Riffe, 78 Ky. 352.

Damages for obstructing way.—If a grantee be mulcted in damages for obstructing a prescriptive right of way over the land held by a third party, he may recover over from his grantor. Bridger *v.* Pierson, 1 Lans. (N. Y.) 481.

The maintenance of gates at the end of a way excludes the presumption that the way was dedicated to the public under Ill. Rev. Stat. c. 30, § 10, providing that no covenant of warranty shall be considered broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed. Schmisseur *v.* Penn, 47 Ill. App. 278.

45. *Illinois.*— Beach *v.* Miller, 51 Ill. 206, 2 Am. Rep. 290.

Indiana.— Quick *v.* Taylor, 113 Ind. 540, 16 N. E. 540; Burk *v.* Hill, 48 Ind. 52, 17 Am. Rep. 731.

Iowa.— Jerald *v.* Elly, 51 Iowa 321, 1 N. W. 639; Barlow *v.* McKinley, 24 Iowa 69; Van Wagner *v.* Van Nostrand, 19 Iowa 422.

Missouri.— Purcell *v.* Hannibal, etc., R. Co., 50 Mo. 504; Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426; Whiteside *v.* Magruder, 75 Mo. App. 364.

United States.— Farrington *v.* Tourtelott, 39 Fed. 738.

See 14 Cent. Dig. tit. "Covenants," § 125.

The mere use of a way by a railroad company does not show a right thereto, and raises no presumption of the existence of the encumbrance. Jerald *v.* Elly, 51 Iowa 321, 1 N. W. 639.

46. *Illinois.*— Morgan *v.* Smith, 11 Ill. 194; Patterson *v.* Sweet, 3 Ill. App. 550.

Indiana.— Medler *v.* Hiatt, 8 Ind. 171.

Maine.— Harrington *v.* Bean, 89 Me. 470, 36 Atl. 986; Ginn *v.* Hancock, 31 Me. 42. See also Lamb *v.* Danforth, 59 Me. 322, 8 Am. Rep. 426.

Massachusetts.— Isele *v.* Arlington Five Cents Sav. Bank, 135 Mass. 142; Hovey *v.* Newton, 7 Pick. 29. See also Prescott *v.* White, 21 Pick. 341, 32 Am. Dec. 266.

New York.— Hnyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; McMullin *v.* Wooley, 2 Lans. 394.

Vermont.— Clark *v.* Conroe, 38 Vt. 469.

See 14 Cent. Dig. tit. "Covenants," § 126.

A parol license by a covenantor to flow lands by a dam will not bind his grantee, and consequently is not a breach of his covenant against encumbrances. Fitch *v.* Seymour, 9 Metc. (Mass.) 462.

Flowage by owner.— It is not a breach of the covenant against encumbrances that the grantor has, prior to the conveyance, caused water to flow upon the land by means of a dam which he had a right to build. Kidder *v.* George, 18 N. H. 511. See also Harwood *v.* Benton, 32 Vt. 724.

Reservation of water rights.— Where a grant of land on or near a road or stream reserves the mill and water privileges, the grantee takes subject to the easement of flowing the land so far as may be necessary, and such easement is not an encumbrance on the premises granted. Pettee *v.* Hawes, 13 Pick. (Mass.) 323. See also Davis *v.* Wilson, 6 Cush. (Mass.) 203.

An artificial race-way built by the owner of the land is not an encumbrance within the meaning of a covenant against encumbrances in a deed of a part of the land afterward executed. Dunklee *v.* Wilton R. Co., 24 N. H. 489.

The right of a proprietor to the flow and fall of water on his own land is not an easement; it is inseparably connected with an interest in the land. is parcel of the inheritance and passes with it. Consequently the exercise of such right below certain granted premises, in accordance with a previous appropriation, is not an encumbrance within the meaning of a covenant against encum-

j. Restrictions and Obligations as to Use of Property. A covenant against encumbrances in a deed from a grantor who is restricted in, or has assumed obligations as to the use of, the property conveyed is broken by reason of the existence of such restrictions or obligations.[47]

k. Eviction. An actual eviction is not necessary to a right of action for a breach of the covenant against encumbrances,[48] but the purchaser may satisfy the outstanding encumbrance and then resort to his action against the covenantor.[49] Where, however, there has been no eviction, either actual or constructive, he is entitled to only nominal damages,[50] and in some jurisdictions no right of action accrues until the grantee has been evicted or has removed the encumbrance.[51]

brances, but a parcel of such lower estate. Cary *v.* Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532.

The right to have a natural stream flow freely over the land of a lower proprietor carries with it the right to enter on the land below to clean out the stream and remove obstructions. Consequently the exercise of the latter right is not such an encumbrance upon the land below as will sustain an action for breach of the covenant against encumbrances in a conveyance of such land. Prescott *v.* Williams, 5 Metc. (Mass.) 429, 39 Am. Dec. 688. *Compare* Prescott *v.* White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266.

47. *Kentucky.*— Hatcher *v.* Andrews, 5 Bush 561.

Massachusetts.— Locke *v.* Hale, 165 Mass. 20, 42 N. E. 331; Kramer *v.* Carter, 136 Mass. 504; Ayling *v.* Kramer, 133 Mass. 12; Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335. *Contra*, as to obligation to maintain fence (Parish *v.* Whitney, 3 Gray 516, which seems only supportable on the ground that the obligation was imposed in a deed poll, not signed or sealed by the party to be bound); and as to obligation to build within specified time (Estabrook *v.* Smith, 6 Gray 572, 66 Am. Dec. 445).

Minnesota.— Mackey *v.* Harmon, 34 Minn. 168, 24 N. W. 702.

New Hampshire.— Foster *v.* Foster, 62 N. H. 46; Burbank *v.* Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.

New York.— Doctor *v.* Darling, 68 Hun 70, 22 N. Y. Suppl. 594; Mohr *v.* Parmelee, 43 N. Y. Super. Ct. 320; Levy *v.* Schreyer, 19 Misc. 227, 43 N. Y. Suppl. 199; Schaeffler *v.* Michling, 13 Misc. 520, 34 N. Y. Suppl. 693; Roberts *v.* Levy, 3 Abb. Pr. N. S. 311.

Ohio.— Heidorn *v.* Wright, 6 Ohio S. & C. Pl. Dec. 315, 4 Ohio N. P. 235.

Rhode Island.—Greene *v.* Creighton, 7 R. I. 1.

See 14 Cent. Dig. tit. "Covenants," § 127.

Stipulations as to nuisances.— Where a mortgage provided that "no part of the premises conveyed are to be used for any trade, business, or purpose that will prove a nuisance to the owners of the adjoining premises." but did not inhibit any particular trade, calling, or purpose, it was held that the provision was not such a covenant as amounted to an encumbrance, since the law inhibits such a use as that described, and no force is added to the inhibition by the insertion of the provision in the instrument. *In re* Covenant, 2 N. Y. City Ct. 396.

The right of an adjoiner to cut away overlapping parts of a house does not constitute a breach of a covenant against encumbrances in a conveyance of the house by its owner to a third person, where the right to such projection and its use do not belong to the vendor, and is not included in the description of the premises in the deed. Meek *v.* Breckenridge, 29 Ohio St. 642.

48. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Anderson *v.* Knox, 20 Ala. 156.

Indiana.— Reasoner *v.* Edmundson, 5 Ind. 393.

Missouri.— Streeper *v.* Abeln, 59 Mo. App. 485.

New York.— See Juliand *v.* Burgott, 11 Johns. 477.

Ohio.— The covenant is not broken until eviction (Stites *v.* Hobbs, 2 Disn. 571), but an actual physical eviction is unnecessary (Stow *v.* Gilbert, 4 Ohio Dec. (Reprint) 252, 1 Clev. L. Rep. 172).

Wisconsin.— Nichol *v.* Alexander, 28 Wis. 118, constructive eviction.

See 14 Cent. Dig. tit. "Covenants," § 128.

If the covenant merely extended to quiet enjoyment against encumbrances, it is broken only by an entry or expulsion from the premises or some disturbance in the possession. Anderson *v.* Knox, 20 Ala. 156.

49. *Indiana.*— Kent *v.* Cantrall, 44 Ind. 452.

Iowa.— See Harwood *v.* Lee, 85 Iowa 622, 52 N. W. 521.

Massachusetts.—Brooks *v.* Moody, 20 Pick. 474; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 246.

New Jersey.— Garrison *v.* Sandford, 12 N. J. L. 261.

New York.—Stanard *v.* Eldridge, 16 Johns. 254; Delavergne *v.* Morris, 7 Johns. 358, 5 Am. Dec. 281.

Washington.— Potwin *v.* Blasher, 9 Wash. 460, 37 Pac. 710, compromise of suit.

See 14 Cent. Dig. tit. "Covenants," § 128.

50. Bartlett *v.* Ball, 142 Mo. 28, 43 S. W. 783. See also New Orleans *v.* Ferriere, 17 La. Ann. 183. And see *infra*, IV, F, 1, c.

51. Tibbetts *v.* Leeson, 148 Mass. 102, 18 N. E. 679; Hunt *v.* Marsh, 80 Mo. 396. See

But grantees are not deprived of the right to recover on the covenant against encumbrances because they have not been able to redeem their land by paying off the encumbrances, where they have exhausted their defenses in the courts.[52]

1. **Assumption by Grantee.** The covenant against encumbrances does not extend to an encumbrance which the covenantee has either expressly or impliedly assumed to remove.[53] Such an assumption by the covenantee may be shown by an agreement to take the deed subject to the encumbrance as part of the consideration for the land,[54] by an express exclusion of the encumbrance from the operation of the covenant,[55] by the receipt from the covenantor of money wherewith to discharge the encumbrance,[56] or by a reconveyance in trust or by mortgage with full covenants.[57] Where, however, the assumption is limited in amount to a specified sum, and the encumbrance is of a greater amount, the covenant against encumbrances is broken to the extent of the excess.[58]

5. **Covenant For Quiet Enjoyment — a. In General.** To sustain an action for breach of an absolute or unlimited covenant for quiet enjoyment[59] it is necessary

also Bartlett *v.* Ball, 142 Mo. 28, 43 S. W. 783.

52. Seibert *v.* Bergman, (Tex. Civ. App. 1898) 44 S. W. 872.

53. Parol agreement.— The assumption of an encumbrance by a covenantee may be by parol. Fitzer *v.* Fitzer, 29 Ind. 468; Medler *v.* Hiatt, 8 Ind. 171; Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558. See also Weld *v.* Nichols, 17 Pick. (Mass.) 538. *Contra*, Holley *v.* Young, 27 Ala. 203.

Agreement to indemnify against personal liability.— See Weld *v.* Nichols, 17 Pick. (Mass.) 538.

Assumption by real purchaser.— See Reid *v.* Sycks, 27 Ohio St. 285.

No defense to action on covenant of seizin. — See Bingham *v.* Weiderwax, 1 N. Y. 509.

54. Fitzer *v.* Fitzer, 29 Ind. 468; Pitman *v.* Conner, 27 Ind. 337; Medler *v.* Hiatt, 8 Ind. 171; Eastman *v.* Simpson, 139 Mass. 348, 1 N. E. 346; Watts *v.* Welman, 2 N. H. 458; Andrews *v.* Wolcott, 16 Barb. (N. Y.) 21. See also Keim *v.* Robeson, 23 Pa. St. 456.

Retention of part of purchase-money.— Where the covenantee, on accepting a deed with a covenant against encumbrances, retains out of the consideration money an amount sufficient to satisfy an encumbrance on the property, he has no right of action on the covenant. Reading *v.* Gray, 37 N. Y. Super. Ct. 79.

55. Freeman *v.* Foster, 55 Me. 508 (conveyance subject to mortgage); Copeland *v.* Copeland, 30 Me. 446 (stipulation that grantee shall pay off liens).

The mention in a deed of an existing mortgage of a certain amount, between certain parties, and recorded in a certain book and page of the registry, is only by way of description and identification of the mortgage, which to the extent of all sums due thereon for principal and interest is a single encumbrance. Shanahan *v.* Perry, 130 Mass. 460.

56. Blood *v.* Wilkins, 43 Iowa 565; Perley *v.* Taylor, 21 Kan. 712, receipt of money from debtor of grantor.

57. Geer *v.* Redman, 92 Mo. 375, 4 S. W. 745; Cleveland Park Land, etc., Co. *v.* Campbell, 65 Mo. App. 109; Frank *v.* Cobban, 20 Mont. 168, 50 Pac. 423.

58. Johnson *v.* Hollensworth, 48 Mich. 140, 11 N. W. 843; Braman *v.* Bingham, 26 N. Y. 483; Corbett *v.* Wrenn, 25 Oreg. 305, 35 Pac. 658.

59. *Kansas.*— Bedell *v.* Christy, 62 Kan. 760, 64 Pac. 629 [*reversing* 10 Kan. App. 435, 61 Pac. 1095]; Molitor *v.* Sheldon, 37 Kan. 246, 15 Pac. 231.

Nebraska.— Heyn *v.* Ohman, 42 Nebr. 693, 60 N. W. 952.

New York.— Adams *v.* Conover, 87 N. Y. 422, 41 Am. Rep. 381 [*affirming* 22 Hun 424]; Shattuck *v.* Lamb, 65 N. Y. 499, 22 Am. Rep. 656 [*overruling* Kortz *v.* Carpenter, 5 Johns. 120, and *distinguishing* Waldron *v.* McCarty, 3 Johns. 471, on the ground that the covenantee was in undisturbed possession at the time of bringing suit]; Gardner *v.* Keteltas, 3 Hill 330, 38 Am. Dec. 637; Kelly *v.* Schenectady Dutch Church, 2 Hill 105.

North Carolina.—Parker *v.* Richardson, 53 N. C. 452; Parker *v.* Dunn, 47 N. C. 203; Grist *v.* Hodges, 14 N. C. 198; Martin *v.* Martin, 12 N. C. 413; Williams *v.* Shaw, 4 N. C. 630, 7 Am. Dec. 706.

South Carolina.— Faries *v.* Smith, 11 Rich. 80.

Vermont.— Knapp *v.* Marlboro, 34 Vt. 235.

Virginia.— Trice *v.* Kayton, 84 Va. 217, 4 S. E. 377, 10 Am. St. Rep. 836.

Wisconsin.— Falkner *v.* Woodward, 104 Wis. 608, 80 N. W. 940.

England.— Hacket *v.* Glover, 10 Mod. 142; Ludwell *v.* Newman, 6 T. R. 458, 3 Rev. Rep. 231; Cloake *v.* Hooper, 6 Vin. Abr. 427.

Canada.— Wells *v.* Trenholm, 7 N. Brunsw. 371.

See 14 Cent. Dig. tit. "Covenants," § 130.

A demand of possession by one having title is not a breach of the covenant for quiet enjoyment. Cowan *v.* Silliman, 15 N. C. 46.

Failure of grantor's remainder during his life is no breach of the covenant for quiet enjoyment, where he has a good title to the life-estate. Wilder *v.* Ireland, 53 N. C. 85.

for the plaintiff to show that he has been prevented from taking possession or has been evicted by a person having a lawful and paramount title existing at the time of the defendant's covenant, as the covenant for quiet enjoyment applies only to the acts of those claiming title at the time it is entered into.

b. Acts of Covenantor. The covenant for quiet enjoyment extends to all acts of the covenantor, whether tortious or not, if committed under color of title.[60] If, however, the disturbance or entry is without claim of title the covenant is not broken.[61]

c. Acts of Trespassers. To constitute a breach of a full and absolute covenant for quiet enjoyment against all persons, there must be a union of acts of disturbance and lawful title. A possession or disturbance by a mere intruder is not sufficient.[62]

d. Outstanding Lease. Occupancy by a tenant of property sold with a covenant for quiet enjoyment, where the fact of occupancy and the title of the tenant are known to the purchaser at the time of sale, is not a breach of the covenant

Partial eviction of undivided interest.— In an action for breach of covenant for quiet enjoyment, plaintiff cannot recover as for an eviction from the whole of certain lands on proof that one claiming under a paramount title had recovered in ejectment an undivided half interest therein, as such recovery is not a constructive recovery of the other half interest for his cotenants. McGrew *v.* Harmon, 164 Pa. St. 115, 30 Atl. 265, 268.

Possession by grantee.— A party who accepts a deed with a covenant for quiet enjoyment cannot allege that the covenant is broken because he himself is in possession at the time. Beebe *v.* Swartwout, 8 Ill. 162.

Premature redemption.—The redemption by the grantee of premises, when sold for taxes, before the time to redeem has expired, is not of itself a breach of the covenant for quiet enjoyment. Mead *v.* Stackpole, 40 Hun (N. Y.) 473.

60. *Alabama.*— Claunch *v.* Allen, 12 Ala. 159.

New York.— Sedgwick *v.* Hollenback, 7 Johns. 376.

Pennsylvania.— Ott *v.* Masters, 1 Lehigh Val. L. Rep. 137.

South Carolina.— Faries *v.* Smith, 11 Rich. 80, eviction under prior deed from grantor.

Wisconsin.—Akerly *v.* Vilas, 23 Wis. 207, 99 Am. Dec. 165.

England.— Corus *v.* ——, Cro. Eliz. 544; Wotton *v.* Hele, 2 Saund. 177, 180, note 9; Crosse *v.* Young, 2 Show. 425; Lloyd *v.* Tomkies, 1 T. R. 671.

See 14 Cent. Dig. tit. "Covenants," § 131.

61. Claunch *v.* Allen, 12 Ala. 159; Penn *v.* Glover, Cro. Eliz. 421; Seddon *v.* Senate, 13 East 63, 12 Rev. Rep. 299.

Withholding title-deed.— Where a vendee brought his action against an intruder and failed to recover because his grantor withheld a title-deed, the vendee having given him notice that the action was pending, it was held that these facts did not constitute a breach of the covenant for quiet enjoyment. Wilder *v.* Ireland, 53 N. C. 85.

62. *Arkansas.*— Hoppes *v.* Cheek, 21 Ark. 585.

California.— Branger *v.* Manceit, 30 Cal. 624; Playter *v.* Cunningham, 21 Cal. 229.

Illinois.— Barry *v.* Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334 [*affirming* 28 Ill. App. 39].

Mississippi.— Surget *v.* Arighi, 11 Sm. & M. 87, 49 Am. Dec. 46, a forcible and unlawful eviction by strangers.

New York.— Folliard *v.* Wallace, 2 Johns. 395; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379.

North Carolina.— Wilder *v.* Ireland, 53 N. C. 85, failure to recover against intruder.

Oregon.— Poley *v.* Lacert, 35 Oreg. 166, 58 Pac. 37.

South Carolina.— Rantin *v.* Robertson, 2 Strobh. 366.

United States.—Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054.

England.— Nokes *v.* James, Cro. Eliz. 674; Tisdale *v.* Essex, Hob. 48; Nash *v.* Palmer, 5 M. & S. 374, 17 Rev. Rep. 364 (stating the reason of the rule); Wotton *v.* Hele, 2 Saund. 177, 180, note 9; Griffiths *v.* Bromf, 6 T. R. 66; Hayes *v.* Bickerstaff, Vaugh. 118.

See 14 Cent. Dig. tit. "Covenants," § 132.

Limitations of rule.— It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether from lawful title or otherwise. Nash *v.* Palmer, 5 M. & S. 374, 17 Rev. Rep. 364. See also Patton *v.* Kennedy, 1 A. K. Marsh. (Ky.) 389, 10 Am. Dec. 744; Fowle *v.* Welsh, 1 B. & C. 29, 8 E. C. L. 14; Foster *v.* Mapes, Cro. Eliz. 212. So too if a clear intention is manifested to extend the covenant to all acts whatsoever, whether tortious or under title paramount, the expressed intention will prevail, and the covenantor will be held liable for any disturbance or eviction, although committed by a mere trespasser. Chaplain *v.* Southgate, 10 Mod. 384.

for quiet enjoyment, and if no special contract is made with reference thereto[63] the occupant becomes tenant to the purchaser.[64]

e. Dower. Where dower is claimed and assigned, or the value thereof assessed, a covenant for quiet enjoyment contained in a conveyance of the land is broken.[65] But an inchoate right of dower in the premises is not a breach of the covenant.[66]

f. Mortgages. A covenant for quiet enjoyment is broken by the eviction of the grantee by reason of the enforcement of a mortgage executed by the grantor prior to the conveyance.[67]

g. Easement. The existence and exercise of an easement in the premises conveyed is a breach of the covenant for quiet enjoyment contained in the deed of conveyance.[68]

h. Eviction. While it has been repeatedly said that the covenant for quiet enjoyment is broken only by eviction,[69] the true rule, and that which is most consonant to the form of the covenant as usually expressed, is that any actual disturbance of the possession, equivalent to an eviction, by one having a lawful and paramount title at the time of its execution, is a breach of the covenant.[70] A

63. Gibbs *v.* Ely, 13 Ind. App. 130, 41 N. E. 351.

64. Lindley *v.* Dakin, 13 Ind. 388.

65. Jackson *v.* Hanna, 53 N. C. 188; Welsh *v.* Kibler, 5 S. C. 405; Lewis *v.* Lewis, 5 Rich. (S. C.) 12. See also Hudson *v.* Steere, 9 R. I. 106.

66. Massey *v.* Craine, 1 McCord (S. C.) 489.

67. McLean *v.* Webster, 45 Kan. 644, 26 Pac. 10; Sprague *v.* Baker, 17 Mass. 586 (in which the grantee was obliged to pay the mortgage); St. John *v.* Palmer, 5 Hill (N. Y.) 599; Jackson *v.* McAuley, 13 Wash. 298, 43 Pac. 41. *Contra*, Waldron *v.* McCarty, 3 Johns. (N. Y.) 471. But see Shattuck *v.* Lamb, 65 N. Y. 499, 22 Am. Rep. 656.

68. Hymes *v.* Estey, 116 N. Y. 501, 22 N. E. 1087, 15 Am. St. Rep. 421, 133 N. Y. 342, 31 N. E. 105; Scriver *v.* Smith, 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224; Eller *v.* Moore, 48 N. Y. App. Div. 403, 63 N. Y. Suppl. 88.

69. *Maine.*— Boothby *v.* Hathaway, 20 Me. 251.

Nebraska.—Anderson *v.* Buchanan, 20 Nebr. 272, 29 N. W. 935; Real *v.* Hollister, 20 Nebr. 112, 29 N. W. 189.

New York.— McCoy *v.* Lord, 19 Barb. 18; Wood *v.* Fornerook, 3 Thomps. & C. 303; Beddoe *v.* Wadsworth, 21 Wend. 120; Kerr *v.* Shaw, 13 Johns. 236; Hall *v.* Dean, 13 Johns. 105; Van Slyck *v.* Kimball, 8 Johns. 198.

North Carolina.— Hagler *v.* Simpson, 44 N. C. 384; Coble *v.* Wellborn, 13 N. C. 388.

Tennessee.— Hayes *v.* Ferguson, 15 Lea 1, 54 Am. Rep. 398.

See 14 Cent. Dig. tit. "Covenants," § 137.

A recovery in trespass or ejectment against the covenantee is not a breach of the covenant for quiet enjoyment. There must be an actual ouster. Webb *v.* Alexander, 7 Wend. (N. Y.) 281; Kerr *v.* Shaw, 13 Johns. (N. Y.) 236; Hagler *v.* Simpson, 44 N. C. 384; Coble *v.* Wellborn, 13 N. C. 388. *Contra*, McAlester *v.* Landers, 70 Cal. 79, 11 Pac. 505; Williams *v.* Shaw, 4 N. C. 630, 7 Am. Dec. 706.

70. *California.*— McAlester *v.* Landers, 70 Cal. 79, 11 Pac. 505; McGary *v.* Hastings, 39 Cal. 360, 2 Am. Rep. 456; Levitzky *v.* Canning, 33 Cal. 299.

Illinois.— Beebe *v.* Swartwout, 8 Ill. 162.

Indiana.— Christy *v.* Bedell, 61 N. E. 1095.

Massachusetts.— Sprague *v.* Baker, 17 Mass. 586.

Minnesota.— Ogden *v.* Ball, 40 Minn. 94, 41 N. W. 453; Moore *v.* Frankenfield, 25 Minn. 540.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

New Jersey.— Stewart *v.* Drake, 9 N. J. L. 139.

New York.— Cowdrey *v.* Colt, 44 N. Y. 382, 4 Am. Rep. 690 [*reversing* 3 Rob. 210]; Mead *v.* Stackpole, 40 Hun 473; Fowler *v.* Poling, 6 Barb. 165; Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212; Howard *v.* Doolittle, 3 Duer 464; Kelly *v.* Schenectady Dutch Church, 2 Hill 105.

North Carolina.— Coble *v.* Wellborn, 13 N. C. 338; Williams *v.* Shaw, 4 N. C. 630, 7 Am. Dec. 706.

Pennsylvania.— Brown *v.* Dickerson, 12 Pa. St. 372.

Washington.— Morgan *v.* Henderson, 2 Wash. Terr. 367, 8 Pac. 491.

See 14 Cent. Dig. tit. "Covenants," § 137.

Commencement of action.—"A covenant for quiet enjoyment, which resembles the modern covenant of warranty, differs from it in this, that the former is broken by the very commencement of an action on the better title." Stewart *v.* West, 14 Pa. St. 336, 338.

Entry under process is unnecessary to constitute breach. Parker *v.* Dunn, 47 N. C. 203.

The paramount title need not be established by judgment before the covenantee will be authorized to surrender possession, nor need there be an actual dispossession.

failure to obtain possession, as well as a disturbance of, or eviction from, the possession is, according to the weight of authority, within the meaning of the covenant.[71] If, however, the grantee enters and remains in undisturbed possession of the land, the fact that the title is in a third person does not constitute a breach.[72]

6. Covenant For Further Assurance. The covenant for further assurance is technically broken by the failure or neglect of the covenantor to make such other and further assurance of the title conveyed as the terms of the covenant require, or as may be reasonably demanded by the covenantee.[73] A substantial breach of the covenant, however, only occurs upon a disturbance or eviction, actual or constructive, of the covenantee.[74]

7. Covenant of Warranty — a. In General. The covenant of general warranty is broken by eviction, actual or constructive, under a lawful and paramount title.[75]

McGary *v.* Hastings, 39 Cal. 360, 2 Am. Rep. 456. See also Ogden *v.* Ball, 40 Minn. 94, 41 N. W. 453; Coble *v.* Wellborn, 13 N. C. 388.

The recovery of a right of way across lands conveyed, and the enforcement thereof by a third person, is such an eviction as to constitute a breach of the covenant for quiet enjoyment. Bridger *v.* Pierson, 45 N. Y. 601.

Voluntary surrender.— A covenantee may voluntarily surrender possession to one having paramount title, and then maintain his action for breach of covenant. Greenvault *v.* Davis, 4 Hill (N. Y.) 643. See also Fowler *v.* Poling, 6 Barb. (N. Y.) 165; St. John *v.* Palmer, 5 Hill (N. Y.) 599.

71. *Alabama.*— Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36. See also Banks *v.* Whitehead, 7 Ala. 83.

California.— Playter *v.* Cunningham, 21 Cal. 229.

Illinois.— Moore *v.* Vail, 17 Ill. 185.

Indiana.— Small *v.* Reeves, 14 Ind. 163.

Kentucky.— Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45, stating the reason of the rule.

Minnesota.— Fritz *v.* Pusey, 31 Minn. 368, 18 N. W. 94.

Mississippi.— Witty *v.* Hightower, 12 Sm. & M. 478.

Missouri.— Murphy *v.* Price, 48 Mo. 247.

New York.— Shattuck *v.* Lamb, 65 N. Y. 499, 22 Am. Rep. 656 [*overruling* Kortz *v.* Carpenter, 5 Johns. 120 and *distinguishing* Waldron *v.* McCarty, 3 Johns. 471, on the ground that the covenantee there was in undisturbed possession at the time of bringing suit]; Winslow *v.* McCall, 32 Barb. 241; Gardner *v.* Keteltas, 3 Hill 330, 38 Am. Dec. 637; Withers *v.* Powers, 2 Sandf. Ch. 350 note. *Contra*, Hartman *v.* Spencer, 5 How. Pr. 135. And see Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. 36; Beddoe *v.* Wadsworth, 21 Wend. 120; St. John *v.* Palmer, 5 Hill 599.

Vermont.— Clark *v.* Conroe, 38 Vt. 469. See also Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347.

United States.— See Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278; Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180.

England.— Hacket *v.* Glover, 10 Mod. 142; Ludwell *v.* Newman, 6 T. R. 458, 3 Rev. Rep. 231; Cloake *v.* Hooper, 6 Vin. Abr. 427.

[71]

72. Bryan *v.* Swain, 56 Cal. 616; Grist *v.* Hodges, 14 N. C. 198. See also Clark *v.* Lineberger, 44 Ind. 223.

73. *California.*— Vance *v.* Pena, 41 Cal. 686.

District of Columbia.— Smoot *v.* Coffin, 4 Mackey 407.

Maryland.— See Gwynn *v.* Thomas, 2 Gill & J. 420.

New York.— Miller *v.* Parsons, 9 Johns. 336.

United States.— Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

England.— Napper *v.* Lord Allington, 1 Eq. Cas. Abr. 166, 21 Eng. Reprint 962; Taylor *v.* Debar, 1 Eq. Cas. Abr. 26, 21 Eng. Reprint 848.

See 14 Cent. Dig. tit. "Covenants," § 138.

Encumbrances embraced by covenant.—The covenant for further assurance relates to defects only which can be supplied by the vendor himself, and he cannot be required to procure conveyances from persons who hold apparent encumbrances. Luther *v.* Brown, 66 Mo. App. 227. See also Armstrong *v.* Darby, 26 Mo. 517.

Perfection of seizin before injury.—Where, under a covenant for further assurance, the covenantor perfects the seizin before injury sustained, by supplying the missing link in his chain of title, the grantee cannot rescind the conveyance and recover the price, as for breach of covenant of seizin. Building, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58. But see Ross *v.* Turner, 7 Ark. 132, 44 Am. Dec. 531.

Payment of mortgage by vendee.— An action may be maintained for a breach of the covenant for further assurance, where the grantee has paid a mortgage outstanding at the execution of the deed. Colby *v.* Osgood, 29 Barb. (N. Y.) 339.

74. Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163.

75. *Connecticut.*— Comstock *v.* Comstock, 23 Conn. 349.

Georgia.— See Sheppard *v.* Reese, 114 Ga. 411, 40 S. E. 282.

Illinois.— Jones *v.* Warner, 81 Ill. 343.

Indiana.— Woodford *v.* Leavenworth, 14 Ind. 311; Hooker *v.* Folsom, 4 Ind. 90.

Iowa.— Williamson *v.* Test, 24 Iowa 138; Funk *v.* Creswell, 5 Iowa 62. See also Meservey *v.* Snell, 94 Iowa 222, 62 N. W. 767, 58 Am. St. Rep. 391.

[III, C, 7, a]

b. Subsequent Acts of Covenantor. An eviction of the covenantee by reason of a paramount title derived from the covenantor subsequently to his conveyance with covenant of warranty[76] is a breach of the warrant.

c. Laches of Covenantee. A covenantee cannot recover any damages which could have been prevented or avoided by reasonable diligence on his part, and he owes it to the covenantor so to conduct himself as to make the damages as little as possible.[77]

d. Unsuccessful Attack of Third Person. A covenantor is not liable to the covenantee for damages sustained by the latter by reason of an unsuccessful attack upon his title by a third person.[78]

e. Wrongful Acts of Strangers. In an action upon a covenant of warranty in a deed, the covenantor is not bound to defend the title conveyed by him against a mere trespasser who has no title.[79]

f. Removal of Buildings by Tenant. The removal by a tenant of the grantor

Kentucky.— Pryse *v.* McGuire, 81 Ky. 608; Leonard *v.* Cary, 65 S. W. 124, 23 Ky. L. Rep. 1325. See also Henderson *v.* Bradford, 1 Bibb 509.

Massachusetts.— Comstock *v.* Son, 154 Mass. 389, 28 N. E. 296; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Pennsylvania.— Wilson *v.* Cochran, 46 Pa. St. 229. *Compare* Anshutz *v.* Miller, 81 Pa. St. 212.

Tennessee.— Talbot *v.* Bedford, Cooke 447. See also Read *v.* Staton, 3 Hayw. 159, 9 Am. Dec. 740.

Texas.— Sanborn *v.* Gunter, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72. But see Kelso *v.* Pratt, 26 Tex. 381.

Vermont.— Clark *v.* Winchell, 53 Vt. 408; Keith *v.* Day, 15 Vt. 660; Pitkin *v.* Leavitt, 13 Vt. 379. See also Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753.

Wisconsin.—McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764.

See 14 Cent. Dig. tit. "Covenants," § 139 *et seq.*

The temporary interruption of an easement, although it may have existed at the time of the purchase and continued until the action to recover the purchase-money is brought, cannot be regarded as a breach of any of the covenants of seizin and warranty, and against encumbrances. Gest *v.* Kenner, 2 Handy (Ohio) 86, 12 Ohio Dec. (Reprint) 343. See also Bliss *v.* Greeley, 45 N. Y. 671, 6 Am. Rep. 157.

Title dependent on contingency.— Where the validity of a conveyance was dependent upon the contingency of proof of the grantor's title, subsequently to be made, it was held that there was a breach of covenant of warranty, for which the grantee was entitled to damages as if the failure of the title had been absolute. Shorthill *v.* Ferguson, 44 Iowa 249.

Title vested in covenantee.—Covenants only extend to a title existing in a third person which may defeat the estate granted by the covenantor, and not to a title already vested in the covenantee. Horrigan *v.* Rice, 39 Minn. 49, 38 N. W. 765.

76. The failure of the covenantee to record his deed, whereby a subsequent grantee of the covenantor is enabled to evict him by first recording the later deed, is no defense to an action for breach of the covenant of warranty contained in the earlier deed. Clark *v.* O'Neal, 13 La. Ann. 381; Williamson *v.* Williamson, 71 Me. 442; Curtis *v.* Deering, 12 Me. 499. *Contra,* Foster *v.* Woodward, 141 Mass. 160, 6 N. E. 853. But see Wade *v.* Comstock, 11 Ohio St. 71.

Eviction by covenantor.— Jones *v.* Timmons, 21 Ohio St. 596; Ott *v.* Masters, 1 Lehigh Val. L. Rep. (Pa.) 137.

77. Jenks *v.* Quinn, 137 N. Y. 223, 33 N. E. 376, where, however, no such laches were shown in the covenantee as to preclude his recovery. See also Templeman *v.* Hamilton, 37 La. Ann. 754.

Extent and limits of rule.— Thus a covenant of warranty is not broken by the fact that a third person is in possession of the land at the time of the execution of the deed and afterward acquires a title to land by force of the statute of limitations; the laches of the covenantee in not sooner recovering the possession precludes his recovery on the covenant. Claflin *v.* Case, 53 Kan. 560, 36 Pac. 1062; Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. (N. Y.) 36; Phelps *v.* Sawyer, 1 Aik. (Vt.) 150. *Compare* Winslow *v.* McCall, 32 Barb. (N. Y.) 241. Similarly the fact that if a grantee who has been dispossessed had taken possession at the time of the conveyance to him, he would have acquired title by adverse possession, does not relieve his grantor from liability to him on his warranty of title. Graham *v.* Dyer, 29 S. W. 346, 16 Ky. L. Rep. 541. But a judgment in ejectment against the grantee, and an abandonment of the premises, is a breach of the covenant, although the land was vacant when the action was brought, and the grantee did not urge that fact as an objection to the form of action brought to try the title. Allis *v.* Ninninger, 25 Minn. 525.

78. West *v.* Masson, 67 Cal. 169, 7 Pac. 452; Rittmaster *v.* Richner, 14 Colo. App. 361, 60 Pac. 189; Norton *v.* Schmucker, 83 Tex. 212, 18 S. W. 720; Smith *v.* Parsons, 33 W. Va. 644, 11 S. E. 68.

79. *Colorado.*— Tierney *v.* Whiting, 2 Colo. 620.

of buildings upon the premises granted, under an agreement giving the tenant the right of removal, is a breach of the covenant of warranty, whether general or special, contained in the deed of conveyance, in the absence of an express exception or reservation.[80]

g. Encumbrances — (I) *In General.* The eviction of a grantee by reason of an encumbrance resting on the land at the time of its conveyance is a breach of the covenant of warranty in the deed,[81] unless, knowing of its existence at the time of the execution of the deed, he has agreed to discharge it.[82]

(II) *Dower.* The eviction of a grantee under a paramount right of dower is a breach of the covenant of warranty in the deed to him;[83] but until assertion, the mere existence of a right of dower is no breach of the covenant.[84]

(III) *Leases.* The eviction of a grantee of land conveyed with covenant of warranty by reason of an unexpired lease upon the premises, is a breach of the covenant.[85]

(IV) *Mortgages and Deeds of Trust.* Unless specially excepted,[86] a mort-

Illinois.— Barry *v.* Guild, 28 Ill. App. 39 [*affirmed* in 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334].

Iowa.— Jerald *v.* Elly, 51 Iowa 321, 1 N. W. 639.

Louisiana.— Coco *v.* Hardie, 25 La. Ann. 230.

Texas.— Norton *v.* Schmucker, 83 Tex. 212, 18 S. W. 720.

Vermont.— Noyes *v.* Rockwood, 56 Vt. 647; Gleason *v.* Smith, 41 Vt. 293; Phelps *v.* Sawyer, 1 Aik. 150.

United States.— Andrus *v.* St. Louis Smelting, etc., Co., 130 U. S. 643, 9 S. Ct. 645, 32 L. ed. 1054.

See 14 Cent. Dig. tit. "Covenants," § 143.

Effect of champerty.— Adverse possession in a stranger at the time of giving a deed, although the deed and the covenants reserved to the grantee be void by statute, is not of itself a breach of the covenant of warranty. Phelps *v.* Sawyer, 1 Aik. (Vt.) 150. And see CHAMPERTY AND MAINTENANCE.

80. Van Wagner *v.* Van Nostrand, 19 Iowa 422; Stewart *v.* West, 14 Pa. St. 336; West *v.* Stewart, 7 Pa. St. 122.

81. Clark *v.* Winchell, 53 Vt. 408.

82. *Illinois.*— Sidders *v.* Riley, 22 Ill. 109.

Indiana.— McDill *v.* Gunn, 43 Ind. 315; Pea *v.* Pea, 35 Ind. 396; Heavilon *v.* Heavilon, 29 Ind. 509; Fitzer *v.* Fitzer, 29 Ind. 468; Pitman *v.* Conner, 27 Ind. 337; Page *v.* Lashley, 15 Ind. 152; Snodgrass *v.* Smith, 13 Ind. 393; Rockhill *v.* Spraggs, 9 Ind. 30, 68 Am. Dec. 607; Medler *v.* Hiatt, 8 Ind. 171; Baker *v.* Railsback, 4 Ind. 533; Brake *v.* Vigo County, 2 Ind. 606; Allen *v.* Lee, 1 Ind. 58, 48 Am. Dec. 352.

Ohio.— Bricker *v.* Bricker, 11 Ohio St. 240.

South Carolina.— See Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304.

Tennessee.— Snyder *v.* Summers, 1 Lea 534, 27 Am. Rep. 778.

See 14 Cent. Dig. tit. "Covenants," § 139 *et seq.*

83. *Kentucky.*— Davis *v.* Logan, 5 B. Mon. 341.

Maine.— Blanchard *v.* Blanchard, 48 Me. 174.

Maryland.— Dimond *v.* Billingslea, 2 Harr. & G. 264.

North Carolina.— Jackson *v.* Hanna, 53 N. C. 188.

Ohio.— McAlpin *v.* Woodruff, 11 Ohio St. 120; Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193; Tuite *v.* Miller, 1 Ohio Dec. (Reprint) 247, 5 West. L. J. 413.

See 14 Cent. Dig. tit. "Covenants," § 145.

Extinguishment by grantor.— Where the former owner of the fee in land in which a dower right still exists has conveyed the same with warranty, he may purchase the right of dower for the benefit of his grantee, however remote, and thus prevent a breach of his covenant. La Framboise *v.* Grow, 56 Ill. 197.

If dower is assigned out of the rents, issues, and profits of the land conveyed, it is a breach of the covenant of warranty in the deed. McAlpin *v.* Woodruff, 11 Ohio St. 120 [*citing* Johnson *v.* Nyce, 17 Ohio 66, 49 Am. Dec. 444].

Money in lieu of dower.— In Ohio a covenant of warranty is not broken by a personal decree for a sum in full of dower, to be enforced by execution, since there is no actual eviction. Johnson *v.* Nyce, 17 Ohio 66, 49 Am. Dec. 444; Tuite *v.* Miller, 10 Ohio 382. *Compare* Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193. *Contra*, Jackson *v.* Hanna, 53 N. C. 188.

84. Ayres *v.* McConnel, 15 Ill. 230.

An inchoate right of dower is not a breach of a covenant of warranty. Bostwick *v.* Williams, 36 Ill. 65, 85 Am. Dec. 385; Black *v.* Kuhlman, 30 Ohio St. 196. But see Jeter *v.* Glenn, 9 Rich. (S. C.) 374.

85. Van Wagner *v.* Van Nostrand, 19 Iowa 422; Leonard *v.* Cary, 65 S. W. 124, 33 Ky. L. Rep. 1325; Rickert *v.* Snyder, 9 Wend. (N. Y.) 416. *Compare* Spaulding *v.* Thompson, 119 Iowa 484, 93 N. W. 498.

Under Ind. Rev. Stat. (1881), § 5215, a warranty deed of premises in the actual occupancy of the vendor's tenant transfers the possession without attornment; and the continued occupancy constitutes no breach of any covenant in the deed. Kellum *v.* Berkshire L. Ins. Co., 101 Ind. 455.

86. King *v.* Kilbride, 58 Conn. 109, 19 Atl. 519. See also Bemis *v.* Smith, 10 Metc. (Mass.) 194.

gage or deed of trust is embraced within a covenant of warranty, and an eviction thereunder is a breach of the covenant.[87]

(v) *Taxes and Assessments.* The enforcement of a tax or assessment lien against a grantee, due and unpaid at the time of the conveyance of the land with covenant of warranty, is a breach of the covenant.[88] There must, however, be an eviction or something equivalent thereto.[89]

(vi) *Private Ways.* The existence and use of a private right of way over granted premises, to which they were subject at the time of the conveyance, is a breach of the covenant of warranty.[90]

(vii) *Public Highways.* A public highway over land conveyed with covenants of warranty is such an easement as to constitute a breach of the covenants.[91]

(viii) *Railroad Rights of Way.* There is an irreconcilable conflict of authority as to whether a covenant of warranty embraces a railroad right of way or not.[92]

87. *Alabama.*— Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669. *Compare* Truss *v.* Miller, 116 Ala. 494, 22 So. 863.

Connecticut.— King *v.* Kilbride, 58 Conn. 109, 19 Atl. 519.

Illinois.— Ingram *v.* Ingram, 71 Ill. App. 497.

Indiana.— *Compare* Sebrell *v.* Hughes, 72 Ind. 186.

Iowa.— McCrary *v.* Deming, 38 Iowa 527.

Maine.— Cole *v.* Lee, 30 Me. 392.

Massachusetts.— Estabrook *v.* Smith, 6 Gray 572, 66 Am. Dec. 445; Tufts *v.* Adams, 8 Pick. 547.

New Jersey.— Shannon *v.* Marselis, 1 N. J. Eq. 413.

Virginia.— Haffey *v.* Birchetts, 11 Leigh 83.

West Virginia.— Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. 89.

See 14 Cent. Dig. tit. "Covenants," § 147.

The existence of a mortgage is not a breach of warranty of title if the covenantee has not the right of possession, and has not been evicted or kept out of possession by parties in under a better title. Washington City Sav. Bank *v.* Thornton, 83 Va. 157, 2 S. E. 193; Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909. See also Koenig *v.* Branson, 73 Mo. 634.

88. *Indiana.*—See Rinehart *v.* Rinehart, 91 Ind. 89.

Massachusetts.— Hill *v.* Bacon, 110 Mass. 387. *Compare* West *v.* Spaulding, 11 Metc. 556.

Missouri.— Eau Claire Lumber Co. *v.* Anderson, 13 Mo. App. 429.

New York.— Rundell *v.* Lakey, 40 N. Y. 513.

Texas.— Witte *v.* Pigott, (Civ. App. 1900) 55 S. W. 753.

See 14 Cent. Dig. tit. "Covenants," § 148.

When lien accrues.— In New York no tax or assessment can become a lien or encumbrance upon real estate within a covenant of warranty, until the amount thereof is ascertained and determined. Dowdney *v.* New York, 54 N. Y. 186.

89. Bruington *v.* Barber, 63 Kan. 28, 64 Pac. 963; Leddy *v.* Enos, 6 Wash. 247, 33 Pac. 508, 34 Pac. 665.

Premature redemption.— The redemption by the grantee of premises, when sold for taxes, before the time to redeem has expired, is not of itself a breach of the covenant of warranty. Mead *v.* Stackpole, 40 Hun (N. Y.) 473.

90. Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645; Rea *v.* Minkler, 5 Lans. (N. Y.) 196; Wilson *v.* Cochran, 46 Pa. St. 229; Russ *v.* Steele, 40 Vt. 310; Clark *v.* Conroe, 38 Vt. 469.

Damages for obstructing way.— If a grantee be mulcted in damages for obstructing a prescriptive right of way over the land held by a third party, he may recover over from his grantor. Bridger *v.* Pierson, 1 Lans. (N. Y.) 481.

Recovery of right.— A covenant in a deed of general warranty is broken upon a recovery by a stranger of a permanent use of a part of the land as a private passageway. Butt *v.* Riffe, 78 Ky. 352.

The maintenance of gates at the end of a way excludes the presumption that the way was dedicated to the public, under Ill. Rev. Stat. c. 30, § 10, providing that no covenant of warranty shall be considered broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed. Schmisseur *v.* Penn, 47 Ill. App. 278.

91. Alling *v.* Burlock, 46 Conn. 504; Southern Wood Mfg., etc., Co. *v.* Davenport, 50 La. Ann. 505, 23 So. 448; Haynes *v.* Young, 36 Me. 557; Herrick *v.* Moore, 19 Me. 313. *Contra,* Hymes *v.* Esty, 36 Hun (N. Y.) 147 [*reversed* in 116 N. Y. 501, 22 N. E. 1087, 15 Am. St. Rep. 421]. *Compare* Schmisseur *v.* Penn, 47 Ill. App. 278.

92. **On the one hand** it is held that the existence of an easement or right of way of a railroad, which excludes the owner from the beneficial use and enjoyment of the land affected thereby, constitutes such an encumbrance as will support an action, even though the grantee knew of its existence at the time he received the conveyance. Quick *v.* Taylor, 113 Ind. 540, 16 N. E. 588 [*distinguishing* Douglass *v.* Thomas, 103 Ind. 187, 2 N. E. 562]; Flynn *v.* White Breast Coal, etc., Co., 72 Iowa 738, 32 N. W. 471. *Compare* Blodgett *v.* McMurtry, 54 Nebr. 69, 74 N. W. 392.

h. Exercise of Right of Eminent Domain. A covenantee cannot maintain an action upon the covenant of warranty in his deed, against the covenantor, in consequence of the exercise of the right of eminent domain by the government.[93]

i. Failure of Title to Appurtenances. Appurtenances are within the meaning of the covenant of warranty, and a failure of title thereto is a breach of the covenant.[94]

j. Description of Premises. An eviction caused by a mistake in a mere matter of description of the land conveyed is not a breach of a covenant of warranty contained in the deed,[95] unless such erroneous description is of the essence of the contract.[96]

k. Building Restrictions. The existence of building restrictions upon land conveyed with a covenant of warranty is, upon enforcement, a breach of the covenant.[97]

l. Paramount Title or Right. In order to constitute a breach of the covenant of warranty, the title or right to which a covenantee yields must be not only paramount to his own, but paramount to that of any one else.[98]

m. Eviction — (I) *Necessity* — (A) *In General.* To constitute a breach of the covenant of warranty an eviction or equivalent disturbance by title paramount must occur.[99]

On the other hand it is held that one who purchases land will be presumed to take with notice of railroads or other highways in use over it, and their existence will not constitute a breach of the covenant of warranty. Brown *v.* Young, 69 Iowa 625, 29 N. W. 941 [*unnoticed* in Flynn *v.* White Breast Coal, etc., Co., 72 Iowa 738, 32 N. W. 471]; Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178, 23 N. W. 432.

93. Real estate is held subject to the right of eminent domain, and a purchaser always takes his title subject to that right.

Illinois.— Stevenson *v.* Loehr, 57 Ill. 509, 11 Am. Rep. 36.

New York.— Folts *v.* Huntley, 7 Wend. 210.

Pennsylvania.— Peck *v.* Jones, 70 Pa. St. 83; Bailey *v.* Miltenberger, 31 Pa. St. 37; Dobbins *v.* Brown, 12 Pa. St. 75.

Tennessee.— Lewis *v.* Woodfolk, 2 Baxt. 25.

West Virginia.— Barre *v.* Fleming, 29 W. Va. 314, 1 S. E. 731.

Wisconsin.— Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653.

See 14 Cent. Dig. tit. "Covenants," § 152.

94. Adams *v.* Conover, 87 N. Y. 422, 41 Am. Rep. 381; Scriver *v.* Smith, 30 Hun (N. Y.) 129; Bowling *v.* Burton, 101 N. C. 176, 7 S. E. 701, 2 L. R. A. 285. *Compare* Green *v.* Collins, 86 N. Y. 246, 40 Am. Rep. 531 [*reversing* 20 Hun 474], in which the right to use a sewer over the land of a third person was held not to be a legal appurtenance within the meaning of the deed. And see Burke *v.* Nichols, 34 Barb. (N. Y.) 430.

95. *Maine.*— Shaw *v.* Bisbee, 83 Me. 400, 22 Atl. 361.

Massachusetts.— Cornell *v.* Jackson, 9 Metc. 150.

New Jersey.— Smith *v.* Negbauer, 42 N. J. L. 305.

South Carolina.— Elmore *v.* Davis, 48 S. C. 388, 26 S. E. 680; Erskine *v.* Wilson, 41 S. C. 198, 19 S. E. 489; Jones *v.* Bauskett, 2 Speers 68. "Where it [land] is sold as a whole, in gross, under the name by which it is known as a certain tract, though the number of acres in the general description is mentioned, yet, accompanied with words, 'more or less,' an abatement will not be allowed as a matter of course, because there is a deficiency in the quantity afterwards ascertained. On the contrary, abatement will be refused ordinarily." Douthit *v.* Hipp, 23 S. C. 205, 208, per Simpson, C. J.

Texas.— Stark *v.* Homuth, (Civ. App. 1898) 45 S. W. 761; Weeks *v.* Barton, (Civ. App. 1895) 31 S. W. 1071; McCreary *v.* Douglass, 5 Tex. Civ. App. 492, 24 S. W. 367.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

See 14 Cent. Dig. tit. "Covenants," § 154.

96. *Massachusetts.*—Cecconi *v.* Rodden, 147 Mass. 164, 16 N. E. 749.

New York.— Hunt *v.* Raplee, 44 Hun 149.

South Carolina.— Peay *v.* Briggs, 2 Mill 97, 12 Am. Dec. 656.

Texas.— Blount *v.* Bleker, 13 Tex. Civ. App. 227, 35 S. W. 863.

Virginia.— Nelson *v.* Matthews, 2 Hen. & M. 164, 3 Am. Dec. 620.

See 14 Cent. Dig. tit. "Covenants," § 154.

97. Kramer *v.* Carter, 136 Mass. 504.

98. Sheetz *v.* Longlois, 69 Ind. 491; Crance *v.* Collenbaugh, 47 Ind. 256; Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. 596. And see *infra*, III, C, 7, m, (II), (B).

99. *Alabama.*— Oliver *v.* Bush, 125 Ala. 534, 27 So. 923; Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Heflin *v.* Phillips, 96 Ala. 561, 11 So. 729; Thomas *v.* St. Paul's M. E. Church, 86 Ala. 138, 5 So. 508; Anderson *v.* Knox, 20 Ala. 156; Griffin *v.* Reynolds, 17 Ala. 198; Davenport *v.* Bartlett, 9 Ala. 177; Dupuy *v.* Roebuck, 7 Ala. 484; Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36.

Arkansas.— Thompson *v.* Brazile, 65 Ark. 495, 47 S. W. 299; Abbott *v.* Rowan, 33 Ark. 593; Bird *v.* Smith, 8 Ark. 368.

Connecticut.— Mitchell *v.* Warner, 5 Conn.

(B) *Disturbance of Possession.* The mere existence of an outstanding paramount title to land will not authorize a recovery by the grantee in an action for breach of the covenant of warranty.[1]

(II) *SUFFICIENCY* — (A) *In General.* A technical eviction is not necessary to

497; Giddings *v.* Canfield, 4 Conn. 482; Booth *v.* Starr, 5 Day 419.

District of Columbia.— Smoot *v.* Coffin, 4 Mackey 407.

Georgia.— Clements *v.* Collins, 59 Ga. 124.

Illinois.— Jones *v.* Warner, 81 Ill. 343; Bostwick *v.* Williams, 36 Ill. 65, 85 Am. Dec. 385; Brady *v.* Spurck, 27 Ill. 478.

Indiana.— Marvin *v.* Applegate, 18 Ind. 425; Hannah *v.* Henderson, 4 Ind. 174. But see Woodford *v.* Leavenworth, 14 Ind. 311; Hooker *v.* Folsom, 4 Ind. 90.

Iowa.— Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511.

Kentucky.— Simpson *v.* Hawkins, 1 Dana 303; Fowler *v.* Chiles, 4 J. J. Marsh. 504.

Louisiana.— Pharr *v.* Gall, 108 La. 307, 32 So. 418; Hale *v.* New Orleans, 13 La. Ann. 499; Hopkins *v.* Van Wickle, 2 La. Ann. 143.

Maine.— Reed *v.* Pierce, 36 Me. 455, 58 Am. Dec. 761.

Maryland.— Boulden *v.* Wood, 96 Md. 332, 53 Atl. 911.

Massachusetts.— Gilman *v.* Haven, 11 Cush. 330; Chapel *v.* Bull, 17 Mass. 213; Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Hamilton *v.* Cutts, 4 Mass. 349, 3 Am. Dec. 222; Emerson *v.* Minot Land Proprietors, 1 Mass. 464, 2 Am. Dec. 34.

Minnesota.— Allis *v.* Nininger, 25 Minn. 525.

Mississippi.— Dyer *v.* Britton, 53 Miss. 270; Burrus *v.* Wilkinson, 31 Miss. 537; Witty *v.* Hightower, 12 Sm. & M. 478; Dennis *v.* Heath, 11 Sm. & M. 206, 49 Am. Dec. 51; Hoy *v.* Taliaferro, 8 Sm. & M. 727.

Missouri.— Mosely *v.* Hunter, 15 Mo. 322; Holladay *v.* Menifee, 30 Mo. App. 207; White *v.* Stevens, 13 Mo. App. 240.

Nebraska.— Merrill *v.* Suing, (1902) 92 N. W. 618; Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

New Hampshire.— Loomis *v.* Bedel, 11 N. H. 74.

New Jersey.— Carter *v.* Denman, 23 N. J. L. 260. But see Kellog *v.* Platt, 33 N. J. L. 328.

New York.— Mead *v.* Stackpole, 40 Hun 473; Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. 36; Beddoe *v.* Wadsworth, 21 Wend. 120; Miller *v.* Watson, 5 Cow. 195; Vanderkarr *v.* Vanderkarr, 11 Johns. 122; Kent *v.* Welch, 7 Johns. 258, 5 Am. Dec. 266; Folliard *v.* Wallace, 2 Johns. 395; Utica Bank *v.* Messereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Griffith *v.* Kempshall, Clarke 571. But see Abbott *v.* Allen, 14 Johns. 248.

North Carolina.— Britton *v.* Ruffin, 123 N. C. 67, 31 S. E. 271; Lewis *v.* Cook, 35 N. C. 193.

Ohio.— Johnson *v.* Nyce, 17 Ohio 66, 49 Am. Dec. 444; King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777; Gest *v.* Kenner, 2 Handy 87, 12 Ohio Dec. (Reprint) 343. But see Foote *v.* Burnet, 10 Ohio 317, 328 note, 36 Am. Dec. 90.

Pennsylvania.— McGrew *v.* Harmon, 164 Pa. St. 115, 3 Atl. 265, 268; Knepper *v.* Kurtz, 58 Pa. St. 480; Wilson *v.* Cochran, 46 Pa. St. 229; Stewart *v.* West, 14 Pa. St. 336; Patton *v.* McFarlane, 3 Penr. & W. 419; Clarke *v.* McAnulty, 3 Serg. & R. 364; Hauck *v.* Single, 10 Phila. 551; Klemons *v.* Voetter, 35 Pittsb. Leg. J. 420.

South Carolina.— "[The covenant of warranty] has always been considered as broken, whenever a paramount title could be shewn in another; and it has been uniformly held that the vendee might bring covenant on the warranty, or resist an action for the price, without actual eviction." Moore *v.* Lanham, 3 Hill 299, 305 [*citing* Mackey *v.* Collins, 2 Nott & M. 186, 10 Am. Dec. 586; Sumpter *v.* Welsh, 2 Bay 558; Bell *v.* Huggins, 1 Bay 326; Pringle *v.* Whitten, 1 Bay 256, 1 Am. Dec. 612]. See also Biggus *v.* Bradly, 1 McCord 500.

Tennessee.— Stipe *v.* Stipe, 2 Head 169; McNew *v.* Walker, 3 Humphr. 186; Allison *v.* Allison, 1 Yerg. 16; Ferriss *v.* Harshea, Mart. & Y. 48, 17 Am. Dec. 782. See also Crutcher *v.* Stump, 5 Hayw. 100 [*overruling* (it is said in Randolph *v.* Meek, Mart. & Y. 58) Talbot *v.* Bedford, Cooke 447, in which it was said that "the modern covenant to warrant and defend the title of land, includes a covenant of seisin of an indefeasible estate, and of a right to sell, and, as to the mode of redress, of quiet enjoyment"].

Texas.— Rancho Bonito Land, etc., Co. *v.* North, 92 Tex. 72, 45 S. W. 994; McGregor *v.* Tabor, (Civ. App. 1894) 26 S. W. 443. But see Groesbeck *v.* Harris, 82 Tex. 411, 19 S. W. 850; Peck *v.* Hensley, 20 Tex. 673; Gass *v.* Sanger, (Civ. App. 1893) 30 S. W. 502.

Vermont.— Rich *v.* Wait, N. Chipm. 68.

Virginia.— Jones *v.* Richmond, 88 Va. 231, 13 S. E. 414 [*citing* Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909; Findlay *v.* Toncray, 2 Rob. 374].

United States.— Montgomery *v.* Northern Pac. R. Co., 67 Fed. 445; Burr *v.* Greeley, 52 Fed. 926, 3 C. C. A. 357; Barlow *v.* Delaney, 40 Fed. 97.

But see Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950, to the effect that where a deed passes no title, the grantee is not bound to wait for an eviction before he can bring an action for breach of covenant.

See 14 Cent. Dig. tit. "Covenants," § 157.

1. In order to constitute a breach of the covenant, there must be some disturbance of the grantee's possession.

Illinois.— Scott *v.* Kirkendall, 88 Ill. 465, 30 Am. Rep. 562.

Iowa.— Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511.

warrant an action for breach of covenant of warranty, but it is sufficient if the grantee is hindered or prevented from entering and enjoying the premises granted by one having a paramount title.[2]

(B) *Title of Evictor.* An eviction, to constitute a breach of the covenant of warranty, must be under a lawful and paramount title.[3]

(C) *Voluntary Surrender.* A voluntary surrender of the possession of the land by the covenantee to the holder of the legal and paramount title, either before or after an adverse judgment, is a sufficient constructive eviction to entitle him to an action against his covenantor on the covenant of warranty.[4]

Minnesota.— Allis *v.* Nininger, 25 Minn. 525.

Mississippi.— Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

New York.— Fowler *v.* Poling, 6 Barb. 165.

North Carolina.— Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967; Ross *v.* Davis, 122 N. C. 265, 29 S. E. 338.

Texas.— Jones *v.* Paul, 59 Tex. 41; McGregor *v.* Tabor, (Civ. App. 1894) 26 S. W. 443.

Vermont.— Boyd *v.* Bartlett, 36 Vt. 9. But see Eureka Marble Co. *v.* Windsor Mfg. Co., 47 Vt. 430.

Virginia.— Jones *v.* Richmond, 88 Va. 231, 13 S. E. 414.

See 14 Cent. Dig. tit. "Covenants," § 158.

2. *California.*—McGary *v.* Hastings, 39 Cal. 360, 2 Am. Rep. 456. *Contra,* Norton *v.* Jackson, 5 Cal. 262; Fowler *v.* Smith, 2 Cal. 568.

Connecticut.— Ensign *v.* Colb, (1902) 52 Atl. 829, 946; Mitchell *v.* Warner, 5 Conn. 497 (statement of the rule); Booth *v.* Starr, 5 Day 275, 5 Am. Dec. 149.

Georgia.— Leary *v.* Durham, 4 Ga. 593.

Illinois.— Bailey *v.* Moore, 21 Ill. 165.

Indiana.— Reasoner *v.* Edmundson, 5 Ind. 393; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Mississippi.— White *v.* Presly, 54 Miss. 313; Dyer *v.* Britton, 53 Miss. 270; Burrus *v.* Wilkinson, 31 Miss. 537; Witty *v.* Hightower, 12 Sm. & M. 478; Dennis *v.* Heath, 11 Sm. & M. 206, 49 Am. Dec. 51.

Nebraska.— But see Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781.

New Jersey.— Carter *v.* Denman, 23 N. J. L. 260.

New York.— Rea *v.* Minkler, 5 Lans. 196; Fowler *v.* Poling, 6 Barb. 165; Greenvault *v.* Davis, 4 Hill 643. *Contra,* Blydenburgh *v.* Cotheal, 1 Duer 176; Lansing *v.* Van Alstyne, 2 Wend. 563 note.

North Carolina.— Grist *v.* Hodges, 14 N. C. 198; Coble *v.* Wellborn, 13 N. C. 388.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777; Tuite *v.* Miller, 1 Ohio Dec. (Reprint) 247, 5 West. L. J. 413.

Oregon.— Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

Pennsylvania.— Anderson *v.* Washabaugh, 43 Pa. St. 115; Hauck *v.* Single, 10 Phila. 551.

South Carolina.— Moore *v.* Lanham, 3 Hill 299; Furman *v.* Elmore, 2 Nott & M. 189 note; Mackey *v.* Collins, 2 Nott & M. 186, 10 Am. Dec. 586.

Tennessee.— Talbot *v.* Bedford, Cooke 447.

Texas.—Westrope *v.* Chambers, 51 Tex. 178.

Vermont.— Smith *v.* Scribner, 59 Vt. 96, 7 Atl. 711; Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347. See also Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753.

Virginia.— Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909; Sheffey *v.* Gardiner, 79 Va. 313.

West Virginia.— Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. 89.

Wisconsin.— McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405.

An eviction from the occupied portion of a tract is not an eviction from the constructive possession of the unoccupied portion. Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

A United States survey of the whole land along a stream on which the tract sold is situated, over which the surveyors must have passed, is not an eviction to authorize the recovery back of the price. Keene *v.* Clark, 8 La. 114.

3. *Georgia.*—Hamilton *v.* Lusk, 88 Ga. 520, 15 S. E. 10; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Illinois.— Barry *v.* Guild, 126 Ill. 439, 18 N. E. 759, 2 L. R. A. 334; Moore *v.* Vail, 17 Ill. 185; Sisk *v.* Woodruff, 15 Ill. 15; Dugger *v.* Oglesby, 3 Ill. App. 94.

Kentucky.— Booker *v.* Meriwether, 4 Litt. 212.

Louisiana.— Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108.

Massachusetts.— Jenkins *v.* Hopkins, 8 Pick. 346.

Missouri.— Morgan *v.* Hannibal, etc., R. Co., 63 Mo. 129.

New York.— Fowler *v.* Poling, 6 Barb. 165; Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212.

Texas.— Flanagan *v.* Ward, 12 Tex. 209; Maverick *v.* Routh, 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008.

Vermont.— Swazey *v.* Brooks, 34 Vt. 451; Williams *v.* Wetherbee, 2 Aik. 329.

See 14 Cent. Dig. tit. "Covenants," § 161.

Quiet enjoyment and warranty distinguished.— See Fowler *v.* Poling, 6 Barb. (N. Y.) 165.

4. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Watson *v.* Holly, 57 Ala. 335; Gunter *v.* Williams, 40 Ala. 561. See also Hester *v.* Hunnicutt, 104 Ala. 282, 16 So. 162. *Compare* Dupuy *v.* Roebuck, 7 Ala. 484.

Connecticut.— Sterling *v.* Peet, 14 Conn. 245.

Georgia.— Leary *v.* Durham, 4 Ga. 593; McDowell *v.* Hunter, Dudley 4.

(D) *Purchase of Paramount Title.* The purchase by the covenantee of an elder and paramount title asserted against him is a sufficient eviction to amount to a breach of the covenant of warranty.[5]

(E) *Adverse Possession of Third Person.* Where there is an adverse possession, by virtue of a paramount title, of lands conveyed, such possession is regarded as an eviction, and involves a breach of the covenant of warranty.[6] So too where

Illinois.— Harding *v.* Larkin, 41 Ill. 413; Beebe *v.* Swartwout, 8 Ill. 164. See also Ohling *v.* Luitjens, 32 Ill. 23.

Indiana.— Axtel *v.* Chase, 83 Ind. 546; Mason *v.* Cooksey, 51 Ind. 519.

Kentucky.— Hanson *v.* Buckner, 4 Dana 251, 29 Am. Dec. 401; Woodward *v.* Allen, 3 Dana 164; Reed *v.* Hornback, 4 J. J. Marsh. 375; Radcliff *v.* Ship, Hard. 292.

Louisiana.— Melancon *v.* Duhamel, 11 La. 317. See also Cassidy's Succession, 40 La. Ann. 827, 5 So. 292, construing the law of Texas. But see Laborde *v.* New Orleans, 13 La. Ann. 326; Minor *v.* Alexander, 6 Rob. 166.

Massachusetts.— Hamilton *v.* Cutts, 4 Mass. 349, 3 Am. Dec. 222.

Missouri.— Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284; Morgan *v.* Hannibal, etc., R. Co., 63 Mo. 129 (in which, however, the plaintiff having failed to establish the paramount title to which he yielded, did not recover); Eagan *v.* Martin, 81 Mo. App. 676.

Nebraska.— Cheney *v.* Straube, 43 Nebr. 879, 62 N. W. 234.

New Hampshire.—Loomis *v.* Bedel, 11 N. H. 74.

New York.— Fowler *v.* Poling, 6 Barb. 165; Greenvault *v.* Davis, 4 Hill 643; Stone *v.* Hooker, 9 Cow. 154.

North Carolina.— See Mizzell *v.* Ruffin, 118 N. C. 69, 23 S. E. 927.

Pennsylvania.— Knepper *v.* Kurtz, 58 Pa. St. 480; Clarke *v.* McAnulty, 3 Serg. & R. 364.

Tennessee.— Callis *v.* Cogbill, 9 Lea 137.

Vermont.—Drury *v.* Shumway, 1 D. Chipm. 110, 1 Am. Dec. 704; Rich *v.* Wait, N. Chipm. 68.

Virginia.— See Haffey *v.* Birchetts, 11 Leigh 83.

See 14 Cent. Dig. tit. "Covenants," § 159.

Paramount title must be shown. See Beebe *v.* Swartwout, 8 Ill. 162.

5. *Alabama.*—Davenport *v.* Bartlett, 9 Ala. 179; Dupuy *v.* Roeback, 7 Ala. 484.

Arkansas.— Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1062, 28 S. W. 657.

California.— McGary *v.* Hastings, 39 Cal. 360, 2 Am. Rep. 456.

Illinois.—Claycomb *v.* Munger, 51 Ill. 373; McConnell *v.* Downs, 48 Ill. 271.

Indiana.— Burton *v.* Reeds, 20 Ind. 87. See also Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Iowa.— Eversole *v.* Early, 80 Iowa 601, 44 N. W. 897; Snell *v.* Iowa Homestead Co., 59 Iowa 701, 13 N. W. 848.

Louisiana.— Coxe's Succession, 15 La. Ann. 514; Thomas *v.* Clement, 11 Rob. 397; Landry *v.* Gamet, 1 Rob. 362. But see Kling *v.* Sejour, 4 La. Ann. 128, in which the law is stated to be contrary in a common-law state.

Massachusetts.— Sprague *v.* Baker, 17 Mass. 586.

Missouri.— Hall *v.* Bray, 51 Mo. 283; Leet *v.* Gratz, 92 Mo. App. 422. *Contra*, Caldwell *v.* Bower, 17 Mo. 564.

New Hampshire.— Loomis *v.* Bedel, 11 N. H. 74.

New York.—Tucker *v.* Cooney, 34 Hun 227; Petrie *v.* Folz, 54 N. Y. Super. Ct. 223. *Compare* Ingersoll *v.* Hall, 30 Barb. 392; Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212.

Ohio.— Mathews *v.* Rentz, 5 Ohio Dec. (Reprint) 72, 2 Am. L. Rec. 371.

Pennsylvania.— Hauck *v.* Single, 10 Phila. 551.

Tennessee.— Kenney *v.* Norton, 10 Heisk. 384.

Texas.— Clark *v.* Mumford, 62 Tex. 531.

Vermont.— Turner *v.* Goodrich, 26 Vt. 707.

See 14 Cent. Dig. tit. "Covenants," § 162.

Contra.—Dyer *v.* Britton, 53 Miss. 270 [*citing* Burrus *v.* Wilkinson, 31 Miss. 537; Witty *v.* Hightower, 12 Sm. & M. 478; Dennis *v.* Heath, 11 Sm. & M. 206, 49 Am. Dec. 51], in which the law is stated to be that in order to sustain an action on the covenant of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid subsisting paramount legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter. The court, however, remarks that, were the question *res integra*, it would adopt the reasons and conclusions of that line of cases which admit constructive or equitable evictions as of equal import with an actual eviction, in certain circumstances. And see Huff *v.* Cumberland Valley Land Co., 30 S. W. 660, 17 Ky. L. Rep. 213; Kellog *v.* Platt, 33 N. J. L. 328.

6. *Alabama.*— Banks *v.* Whitehead, 7 Ala. 83; Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36.

Illinois.— Moore *v.* Vail, 17 Ill. 185.

Indiana.— Small *v.* Reeves, 14 Ind. 163.

Kentucky.—Pryse *v.* McGuire, 81 Ky. 608; Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45.

Maine.— Curtis *v.* Deering, 12 Me. 499.

Michigan.— Matteson *v.* Vaughn, 38 Mich. 373. See also Vaughn *v.* Matteson, 39 Mich. 758.

Mississippi.— Witty *v.* Hightower, 12 Sm. & M. 478.

the covenantor has no title, and the lands are in the possession of third persons under color of title, there is a breach of the covenant of warranty.[7] But where the paramount title is in the warrantor of title to lands, and there is a tortious adverse possession, there is no eviction, actual or constructive, and no breach of the covenant.[8]

(F) *Judgment Against Grantee's Title.* A final judgment or decree adverse to the grantee's title, whether the suit is brought by or against him, is sufficient to entitle him to an action for breach of the covenant of warranty, without an actual eviction thereunder.[9]

(G) *Foreclosure of Mortgage or Other Lien.* The foreclosure of a mortgage or other lien is a sufficient constructive eviction to entitle the covenantee to sue for breach of the covenant of warranty;[10] and this is true, although the

Missouri.— Blondeau *v.* Sheridan, 81 Mo. 545; Murphy *v.* Price, 48 Mo. 247.

Nebraska.— Heyn *v.* Ohman, 42 Nebr. 693, 60 N. W. 952.

North Carolina.— See Hodges *v.* Latham, 98 N. C. 239, 3 S. E. 495, 2 Am. St. Rep. 333.

Pennsylvania.— Klemons *v.* Voetter, 35 Pittsb. Leg. J. 420.

Tennessee.— Miller *v.* Bentley, 5 Sneed 671; Randolph *v.* Meek, Mart. & Y. 58. *Contra*, Williams *v.* Hogan, Meigs 187.

Vermont.— Clark *v.* Conroe, 38 Vt. 469.

Virginia.— Sheffey *v.* Gardiner, 79 Va. 313.

West Virginia.— McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540; Rex *v.* Creel, 22 W. Va. 373.

Wisconsin.— See McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764.

United States.—Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91; Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278; Duvall *v.* Craig, 2 Wheat. 45, 4 L. ed. 180.

See 14 Cent. Dig. tit. "Covenants," § 163.

7. Caldwell *v.* Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 30; Pryse *v.* McGuire, 81 Ky. 608; Heyn *v.* Ohman, 42 Nebr. 693, 60 N. W. 952. See also Jenkins *v.* Hopkins, 8 Pick. (Mass.) 346.

8. Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91; Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278.

9. *Connecticut.*— Sterling *v.* Peet, 14 Conn. 245.

Georgia.— Leary *v.* Durham, 4 Ga. 593.

Illinois.— Harding *v.* Larkin, 41 Ill. 413.

Indiana.— Wright *v.* Nipple, 92 Ind. 310; Wilber *v.* Buchanan, 85 Ind. 42; Mooney *v.* Burchard, 84 Ind. 285; McClure *v.* McClure, 65 Ind. 482.

Kentucky.— Hanson *v.* Buckner, 4 Dana 251, 29 Am. Dec. 401; Woodward *v.* Allan, 3 Dana 164; Fowler *v.* Chiles, 4 J. J. Marsh. 504; Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45.

Louisiana.— De St. Romes *v.* New Orleans, 34 La. Ann. 1201. *Contra*, Fletcher *v.* Cavelier, 10 La. 116.

Michigan.— Mason *v.* Kellogg, 38 Mich. 132.

Minnesota.—Wagner *v.* Finnegan, 65 Minn. 115, 67 N. W. 795; Allis *v.* Nininger, 25 Minn. 525.

Missouri.— Tracy *v.* Greffet, 54 Mo. App. 562. *Contra*, Pence *v.* Gabbert, 63 Mo. App. 302; Waugh *v.* Goode, 6 Mo. App. 600.

Montana.— King *v.* Merk, 6 Mont. 172, 9 Pac. 827, construing the Kansas statute.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370.

New Jersey.— Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467.

North Carolina.— Herrin *v.* McIntyre, 8 N. C. 410. But see Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967.

Texas.— Simpson *v.* Belvin, 37 Tex. 674; Peck *v.* Hensley, 20 Tex. 673.

Vermont.— Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347; Williams *v.* Wetherbee, 1 Aik. 233.

United States.— Flowers *v.* Foreman, 23 How. 132, 16 L. ed. 405.

Contra.— Evans *v.* Lewis, 5 Harr. (Del.) 162; Real *v.* Hollister, 20 Nebr. 112, 29 N. W. 189 [*overruling* 17 Nebr. 661, 24 N. W. 333].

See 14 Cent. Dig. tit. "Covenants," § 164.

An alternative judgment or decree does not constitute an eviction. Thus the entry of a decree in the alternative, unless he pay, etc., is not an eviction (Kirkendall *v.* Keogh, 2 Ill. App. 492); nor is a judgment establishing a superior outstanding title, and ordering the holder thereof to be given possession on payment of a sum found to be the value of betterments, or should he fail to do so, establishing the title in the disseizor on his paying the value of the land, until the demandant has paid the sum stated and taken possession (Hall *v.* Pierson, 1 Tex. App. Civ. Cas. § 1210).

Collusive judgment.— See Vincent *v.* Hicks, 64 S. W. 456, 23 Ky. L. Rep. 859.

Verdict not followed by judgment.— See Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582.

10. *Arkansas.*— Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

New York.— Jenks *v.* Quinn, 137 N. Y. 223, 33 N. E. 376; Cornish *v.* Capron, 136 N. Y. 232, 32 N. E. 773.

Ohio.— Smith *v.* Dixon, 27 Ohio St. 471.

West Virginia.— Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. 89.

But see Reasoner *v.* Edmundson, 5 Ind.

covenantee himself[11] or his tenant,[12] is the purchaser at the foreclosure sale. So too where, upon condition broken, the mortgagee may enter, such entry by him will constitute a sufficient constructive eviction to enable the covenantee to sue for breach of covenant.[13]

(H) *Levy of Execution Against Covenantor.* The levy of an execution against the covenantor on lands conveyed with covenant of warranty is such an eviction of the covenantee as to entitle him to an action on the covenant.[14]

(I) *Exercise of Easement or Other Right.* The assertion and exercise of an easement or other paramount right in premises conveyed with a covenant of warranty constitutes an eviction within the covenant.[15]

(J) *Public Lands.* Where the title to land attempted to be conveyed is in the public, there is such a hostile possession as amounts to an eviction the instant the deed is made.[16] *A fortiori* a sale of land by the government is such an assertion of paramount title as to constitute an eviction of persons in possession under defective titles.[17]

8. Covenants as to Use of Property. While covenants restraining the free use and enjoyment of property are not favored,[18] yet such as are reasonable will be enforced, and any use in contravention of the terms and objects of such covenants will constitute a breach, for which relief may be obtained either in equity or by an action at law.[19]

393; Murray *v.* Bacon, 7 Mart. N. S. (La.) 271.

See 14 Cent. Dig. tit. "Covenants," § 165.

The subsequent reversal of a judgment of sale does not affect a sale made under the judgment, and consequent eviction of the covenantee, and does not deprive him of his right of action on the covenants of warranty. Smith *v.* Dixon, 27 Ohio St. 471.

11. Cowdrey *v.* Coit, 44 N. Y. 382, 4 Am. Rep. 690 [*reversing* 3 Rob. 210].

12. Stewart *v.* Drake, 9 N. J. L. 139.

13. Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341; White *v.* Whitney, 3 Metc. (Mass.) 81; Tufts *v.* Adams, 8 Pick. (Mass.) 547.

14. Whitney *v.* Dinsmore, 6 Cush. (Mass.) 124 (in which the covenantee himself became the purchaser at the execution sale); Bigelow *v.* Jones, 4 Mass. 512; Wyman *v.* Brigden, 4 Mass. 150; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182. But see Landry *v.* Gamet, 1 Rob. (La.) 362, where it was held that where, after a sale of land, it is seized under an execution against the vendor and bought in by the vendee, the sheriff's deed transferring only the vendor's title, there is no eviction, and the vendee can only claim to be reimbursed the price of adjudication.

15. Harrington *v.* Bean, 89 Me. 470, 36 Atl. 986; Smith *v.* Richards, 155 Mass. 79, 28 N. E. 1132; Burrage *v.* Smith, 16 Pick. (Mass.) 56. See also cases cited *supra*, notes 90–92. But see Mitchell *v.* Warner, 5 Conn. 497.

Flowing lands under a prior grant constitutes an eviction, within a covenant of warranty. Smith *v.* Richards, 155 Mass. 79, 28 N. E. 1132. See also Harrington *v.* Bean, 89 Me. 470, 36 Atl. 986.

Land subject to public rights.— Since the ownership of tide-water flats is subject to the public easement of the right of general navigation, a judgment declaring certain buildings erected on such premises by plaintiff a nuisance is not such an eviction as will constitute a breach of the covenant of warranty. Montgomery *v.* Reed, 69 Me. 510.

16. Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; Herrington *v.* Clark, 56 Kan. 644, 44 Pac. 624; Kansas Pac. R. Co. *v.* Danmeyer, 19 Kan. 539; Giddings *v.* Holter, 19 Mont. 263, 48 Pac. 8; Brown *v.* Allen, 57 Hun (N. Y.) 219, 10 N. Y. Suppl. 714.

A refusal to confirm a claim under a Spanish grant does not amount to an eviction. Rightor *v.* Kohn, 16 La. 501; Bessy *v.* Pintado, 3 La. 488.

The final decision of the land department upon questions of title previous to the issuing of patents or divestiture of title is of itself so far equivalent to an actual eviction as to sustain an action, unless the defendant in warranty shall perfect the title. Butler *v.* Watts, 13 La. Ann. 390.

17. Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360; Glenn *v.* Thistle, 23 Miss. 42.

18. See *supra*, II, C.

19. The question of what is or what is not a breach of such a covenant is dependent upon a reasonable construction of its terms, taking into consideration the intent of the parties and the circumstances surrounding the transaction, for the resolution of which no definite or fixed rule can be laid down. See *supra*, II, C. And see the following cases:

Illinois.— Keith *v.* Goldsmith, 194 Ill. 488, 62 N. E. 866; Hawes *v.* Favor, 161 Ill. 440, 43 N. E. 1076.

Nebraska.— Witteuberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842.

New Jersey.— Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; McCormick *v.* Stephany, 57 N. J.

IV. ACTIONS FOR BREACH.

A. Rights of Action Generally — 1. NATURE AND FORM OF REMEDY. The most usual form of remedy for breach of covenant is an action of covenant, in which damages are sought and recovered in proportion to the injury sustained by the covenantee, although where the covenant is for the payment of a sum certain, debt is a concurrent remedy. For matters peculiarly within its jurisdiction, such as suits for specific performance, for injunction, or for relief against forfeitures, recourse must be had to equity.[20]

Eq. 257, 41 Atl. 840; Skillman *v.* Smatheurst, 57 N. J. Eq. 1, 40 Atl. 855; Buck *v.* Adams, 45 N. J. Eq. 552, 17 Atl. 961; Gawtry *v.* Leland, 31 N. J. Eq. 385; Rogers *v.* Danforth, 9 N. J. Eq. 289.

New York.— Clarke *v.* Devoe, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652 [*affirming* 48 Hun 512, 1 N. Y. Suppl. 132]; Atlantic Dock Co. *v.* Libby, 45 N. Y. 499; Hurley *v.* Brown, 54 N. Y. App. Div. 619, 66 N. Y. Suppl. 295; Skinner *v.* Allison, 54 N. Y. App. Div. 47, 66 N. Y. Suppl. 288, 8 N. Y. Annot. Cas. 155; Clark *v.* Jammes, 87 Hun 215, 33 N. Y. Suppl. 1020; Atlantic Dock Co. *v.* Leavitt, 50 Barb. 135; Perkins *v.* Coddington, 4 Bosw. 647; Voorhies *v.* Anthon, 5 Duer 178; Phenix Ins. Co. *v.* Continental Ins. Co., 14 Abb. Pr. N. S. 266; Musgrave *v.* Sherwood, 54 How. Pr. 338, 53 How. Pr. 311; Schumacher *v.* Reichardt, 2 N. Y. City Ct. 341; Barron *v.* Richard, 3 Edw. 96.

Pennsylvania.— St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512.

United States.— Los Angeles University *v.* Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262; Doty *v.* Lawson, 14 Fed. 892.

England.— Harrison *v.* Good, L. R. 11 Eq. 338, 40 L. J. Ch. 294, 24 L. T. Rep. N. S. 263, 19 Wkly. Rep. 346; Bowes *v.* Law, L. R. 9 Eq. 636, 39 L. J. Ch. 483, 22 L. T. Rep. N. S. 267, 18 Wkly. Rep. 640; Doe *v.* Peck, 1 B. & Ad. 428, 20 E. C. L. 546; Doe *v.* Woodbridge, 9 B. & C. 376, 4 M. & R. 302, 17 E. C. L. 173; Rogers *v.* Hosegood, [1900] 2 Ch. 388, 69 L. J. Ch. 652, 83 L. T. Rep. N. S. 186, 48 Wkly. Rep. 659; Kimber *v.* Admans, [1900] 1 Ch. 412, 69 L. J. Ch. 296, 28 L. T. Rep. N. S. 136, 48 Wkly. Rep. 322; Wanton *v.* Coppard, [1899] 1 Ch. 92, 68 L. J. Ch. 8, 79 L. T. Rep. N. S. 467, 47 Wkly. Rep. 72; Hobson *v.* Tulloch, [1898] 1 Ch. 424, 67 L. J. Ch. 205, 78 L. T. Rep. N. S. 224, 46 Wkly. Rep. 331; German *v.* Chapman, 7 Ch. D. 271, 47 L. J. Ch. 250, 37 L. T. Rep. N. S. 685, 26 Wkly. Rep. 149; Manners *v.* Johnson, 1 Ch. D. 673, 45 L. J. Ch. 404, 24 Wkly. Rep. 481; Long Eaton Recreation Grounds Co. *v.* Midland R. Co., 71 L. J. K. B. 74, 85 L. T. Rep. N. S. 278, 50 Wkly. Rep. 120; Ind *v.* Hamblin, 81 L. T. Rep. N. S. 779, 48 Wkly. Rep. 238; Webb *v.* Fagotti, 79 L. T. Rep. N. S. 683; Reeves *v.* Cattell, 24 Wkly. Rep. 485; Russell *v.* Baber, 18 Wkly. Rep. 1021.

See 14 Cent. Dig. tit. "Covenants," § 169; and, generally, NUISANCES.

20. See ACTIONS; COVENANT, ACTION OF; ELECTION OF REMEDIES; EQUITY. And see Hoffman *v.* Kirby, 136 Cal. 26, 68 Pac. 321; North Chicago Hebrew Congregation *v.* Garibaldi, 70 Ill. App. 33; Matteson *v.* Vaughn, 38 Mich. 373, 39 Mich. 758; Ryerson *v.* Willis, 8 Daly (N. Y.) 462; Hastings *v.* Hastings, 27 Misc. (N. Y.) 244, 58 N. Y. Suppl. 416.

An assignee of only a part of a claim for breach of warranty has no remedy at law, but must seek his recovery in a court of equity, although the relief sought is merely pecuniary. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

In Michigan assumpsit lies for breach of covenants of title. Guerin *v.* Smith, 62 Mich. 369, 28 N. W. 906; Sherwood *v.* Landon, 57 Mich. 219, 23 N. W. 778; Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607.

On the purchase of an existing mortgage the grantee may either protect himself by foreclosing or recover on his covenants of warranty. Royer *v.* Foster, 62 Iowa 321, 17 N. W. 516. But see Dyer *v.* Britton, 53 Miss. 270. And see Skinner *v.* Moye, 69 Ga. 476.

Personal actions will lie upon covenants of warranty and other covenants relating to the title to land. Nunnally *v.* White, 3 Metc. (Ky.) 584.

The remedy on a deed containing covenants inter partes must depend upon its terms, considered with reference to the interest of the several individuals who are parties in the deed. Sharp *v.* Conkling, 16 Vt. 355.

Trespass or assumpsit.—Where covenantees failed to record their deed, and lost the land to a later purchaser at an execution sale, who recorded the sheriff's deed and a quit-claim deed from the covenantor, it was held that as such subsequent conveyance was not a breach of the covenant of warranty, the remedy of the covenantees, if any, was an action for damages actually sustained, or as the case might be for money paid to the use of their grantor. Wade *v.* Comstock, 11 Ohio St. 71.

Bill for correction of deed.— Where land conveyed by a deed with covenants of seizin and warranty is described in the deed as bounded on one side by land of an adjoining proprietor, and the grantor shows to the grantee, during the negotiation and before the deed is given, what he states to be the divisional line, which proves to be beyond the true line and within the land of an adjoining proprietor, the remedy of the grantee is wholly by a proceeding in equity to correct

2. WHAT LAW GOVERNS. A conveyance, as to its operation, is local, and determinable only where the land lies which is pretended to be conveyed by it; but respecting the consideration paid and the personal contracts collateral to the title, for the assurance of the purchaser the *lex loci contractus* governs.[21]

3. GROUNDS OF ACTION GENERALLY. Whatever constitutes a breach of a covenant is a ground of action thereon,[22] although until the covenantee has suffered actual loss, he can recover only nominal damages.[23] But while each breach is itself a separate and distinct ground of action,[24] yet it is proper, as avoiding a multiplicity of suits, to unite in one action claims for breaches occurring at different times.[25] In case of covenants running with the land, the last grantee is upon breach entitled to an action against the covenantor, and need not allege nor prove that the intermediate assignees have kept their covenants.[26]

4. CONDITIONS PRECEDENT — a. Demand of Performance. A demand of performance is not in general a condition precedent[27] to an action on a covenant if the covenantor have notice that the contingency has arisen upon which the covenant is to be performed.[28]

b. Performance of Mutual Concurrent Covenants. In cases of mutual concurrent covenants, where the acts to be done are simultaneous, neither party can maintain an action for a failure on the part of the other without showing a performance or a tender of performance on his own part.[29]

c. Payment of Purchase-Money. Payment of the purchase-money is not a condition precedent to a right of action for breach of the covenant of warranty.[30]

d. Payment of Encumbrance by Covenantee. A purchaser cannot avail himself of a breach of the covenant against encumbrances, either by action or by set-off, without proving that the sum paid by him to remove the encumbrance was either actually due, or else that he had notified the vendor, requiring him to remove

the deed, and not by an action on the covenants. Broadway *v.* Buxton, 43 Conn. 282.

21. Phelps *v.* Decker, 10 Mass. 267.

In all cases the law in force at the time of sale determines the vendor's obligation upon his covenants. Durnford's Succession, 8 Rob. (La.) 488, 11 Rob. (La.) 183; Edwards *v.* Martin, 19 La. 284; Fletcher *v.* Cavelier, 10 La. 116; Aiken *v.* McDonald, 43 S. C. 29, 20 S. E. 796, 49 Am. St. Rep. 817.

22. Lewis *v.* Harris, 31 Ala. 689; Wood *v.* Thornton, 85 Tex. 109, 19 S. W. 1034.

A void judgment of eviction is no ground of action for breach of warranty. Pritchard *v.* Smith, 107 Ky. 483, 54 S. W. 717, 21 Ky. L. Rep. 1197.

If a deed be void, the grantee cannot recover upon the warranty of his grantors; but if the deed was made by mistake as to the interests of the parties, the grantee may recover back the purchase-money. Mundy *v.* Vawter, 3 Gratt. (Va.) 518.

The execution of a purchase-money mortgage does not extinguish the mortgagor's right of action for subsequently broken covenants in the deed to him. Wesco *v.* Kern, 36 Oreg. 433, 59 Pac. 548, 60 Pac. 563.

Uncompelled purchase of outstanding title. — Munford *v.* Keet, 154 Mo. 36, 55 S. W. 271.

23. Metz *v.* McAvoy Brewing Co., 98 Ill. App. 584. And see Swall *v.* Clarke, 51 Cal. 227, to the effect that in order to enable one to maintain an action on a covenant, there must not only be a breach of the covenant, but some loss or damage to the covenantee. *Compare* Rubens *v.* Prindle, 44 Barb. (N. Y.) 336.

24. Davis *v.* Harrison, 1 A. K. Marsh. (Ky.) 514.

Where a covenant contains various stipulations, and a suit is brought thereon and breaches assigned of one or more of the stipulations, plaintiff is not estopped in a new action to assign new breaches in parts of the covenant not before put in issue. Breckenridge *v.* Lee, 3 A. K. Marsh. (Ky.) 446.

25. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Breach after action brought. — An interference with the contract rights of a covenantee, after the commencement of an action by him for breach of the covenant in question, cannot avail him in such action. Safford *v.* Annis, 7 Me. 168.

26. Brady *v.* Spurck, 27 Ill. 478.

27. But where a covenant is to do a certain thing on demand, a demand becomes an express condition precedent to an action for breach of the covenant. Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171. And see ACTIONS, 1 Cyc. 694.

28. Thomas *v.* Woods, 4 Cow. (N. Y.) 173.

29. Hawley *v.* Mason, 9 Dana (Ky.) 32, 33 Am. Dec. 522; Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90; Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332.

30. Pence *v.* Duvall, 9 B. Mon. (Ky.) 48.

the encumbrance within a specified time;[31] but on breach of an absolute covenant by the grantor to pay and satisfy an outstanding judgment, the covenantee may recover the amount of the judgment, although he has neither paid nor been called upon to pay anything on account thereof.[32]

e. Reformation of Deed. An action for breach of covenant of seizin in a deed cannot be maintained before the reformation of the deed, if the description is so defective that it can convey no title.[33]

f. Exhaustion of Remedies by Covenantee. A covenantee against whom a judgment has been rendered in an action of trespass is not bound, before suing on his covenant of warranty, to bring ejectment against the plaintiffs in the trespass suit, unless his grantor pays the judgment, or tenders security for the expenses of the ejectment suit.[34]

g. Waiver of Condition. A person entitled to avail himself of a condition precedent, who waives it by proceeding to fulfil on his part, cannot plead it in bar of an action on the covenant for negligent performance on his part.[35]

h. To Action by Intermediate Grantee. An intermediate grantee cannot maintain an action against his immediate or a remote grantor until he has been damnified,[36] unless the suit is brought in the name of the intermediate grantee for the benefit of the person evicted.[37]

5. Set-Off and Counter-Claim. No distinction exists as to pleading set-offs and counter-claims between actions for breach of covenant and actions for breach of contract generally.[38]

6. Jurisdiction and Venue. At common law, if an action for the breach of a covenant was founded upon privity of contract it was transitory;[39] but if founded

31. Grant *v.* Tallman, 20 N. Y. 191, 75 Am. Dec. 384. And see Vendor and Purchaser.

By whom payment to be made.— In an action by husband and wife to recover on a covenant against encumbrances contained in a deed to the wife, it is immaterial which of plaintiffs actually paid the money to remove the encumbrance, if it was in fact done with their money. Green *v.* Tidball, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879.

32. Bristor *v.* McBean, 1 N. Y. App. Div. 217, 37 N. Y. Suppl. 181. And see Bohlcke *v.* Buchanan, 94 Mo. App. 320, 68 S. W. 92.

As a covenant to indemnify the grantor against liability on an encumbrance is broken when judgment is secured against him, he is entitled to sue on the covenant without proof of payment of the judgment. McAbee *v.* Cribbs, 194 Pa. St. 94, 44 Atl. 1066.

33. Gordon *v.* Goodman, 98 Ind. 269.

But when it appears that the description is merely insufficient and not such as to render the deed void, it is not essential to the grantee's right of recovery that there should first be a reformation of the deed. Calton *v.* Lewis, 119 Ind. 181, 21 N. E. 475.

34. McCune *v.* Scott, 18 Pa. Super. Ct. 263.

35. Betts *v.* Perine, 14 Wend. (N. Y.) 219.

36. *Connecticut.*— Booth *v.* Starr, 1 Conn. 244, 6 Am. Dec. 233.

Illinois.— Claycomb *v.* Munger, 51 Ill. 373.

Iowa.— Rose *v.* Schaffner, 50 Iowa 483.

Kansas.— Lane *v.* Woodruff, 1 Kan. App. 241, 40 Pac. 1079.

Kentucky.— Birney *v.* Hann, 3 A. K. Marsh. 322, 13 Am. Dec. 167.

Maine.— Allen *v.* Little, 36 Me. 170.

Massachusetts.—Wheeler *v.* Sohier, 3 Cush. 219. See also Estabrook *v.* Smith, 6 Gray 572, 66 Am. Dec. 445.

Missouri.— Vancourt *v.* Moore, 26 Mo. 92.

Nebraska.— Kern *v.* Kloke, 21 Nebr. 529, 32 N. W. 574.

New Hampshire.— Chase *v.* Weston, 12 N. H. 413.

New York.— Baxter *v.* Ryerss, 13 Barb. 267.

North Carolina.— Markland *v.* Crump, 18 N. C. 94, 27 Am. Dec. 230.

Texas.— Eustis *v.* Fosdick, 88 Tex. 615, 32 S. W. 872.

Vermont.— Smith *v.* Perry, 26 Vt. 279; Williams v. Witherbee, 1 Aik. 233.

Contra.— Simmins *v.* Parker, 4 Mart. N. S. (La.) 200; Goodwin *v.* Chesneau, 3 Mart. N. S. (La.) 409.

See 14 Cent. Dig. tit. "Covenants," § 174.

37. Smith *v.* Perry, 26 Vt. 279.

38. The same set-offs may be pleaded, under the same circumstances, in such actions as in other cases. See Recoupment, Set-Off and Counter-Claim. And see the following cases:

Connecticut.—Beecher *v.* Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57; Cochran *v.* Leister, 2 Root 348.

Indiana.— Quick *v.* Durham, 115 Ind. 302, 16 N. E. 601; Kent *v.* Cantrall, 44 Ind. 452.

Iowa.— McCrary *v.* Deming, 38 Iowa 527.

Louisiana.— Woolfolk *v.* The Graham's Polly, 18 La. Ann. 693.

New York.— Boyle *v.* Youmans, 55 Hun 612, 9 N. Y. Suppl. 14.

South Carolina.— Lowrance *v.* Robertson, 10 S. C. 8.

39. *Indiana.*— Coleman *v.* Lyman, 42 Ind. 289.

upon privity of estate, as in case of an action by an assignee of an estate conveyed with covenants running with the land, against the covenantor, it was local.[40] Statutes have, however, been enacted in several of the states regulating such actions.[41]

7. LIMITATIONS AND ACCRUAL OF ACTION. The limitation of actions for breach of covenant is governed by the *lex fori*.[42] Short of the statutory period of limitation, an action for the breach of a covenant is not barred by reason of the fact that notes, for the payment of which the instrument was executed, are barred.[43] The right of action for a breach of covenant accrues at the time of breach, from which time the statute begins to run, and not from the time of the execution of the covenant.[44] In the case of covenants of title which are broken

Massachusetts.— Phelps *v.* Decker, 10 Mass. 267.

New Hampshire.— Holyoke *v.* Clark, 54 N. H. 578.

New Jersey.— Ward *v.* Holmes, 7 N. J. L. 171, to the effect that in an action for breach of covenant of seizin the court will not change the venue to the county where the land lies, without an affidavit stating special circumstances.

New York.— But see Clarkson *v.* Gifford, 1 Cai. 5, to the effect that an action on the covenant of seizin is local.

North Carolina.— Jackson *v.* Hanna, 53 N. C. 188.

See 14 Cent. Dig. tit. "Covenants," § 176.

In Louisiana, where a party called in warranty resides in a parish different from that in which the suit is brought, an exception to the jurisdiction of the court *ratione materiæ* should be sustained. Hardy *v.* Pecot, 104 La. 136, 25 So. 936. *Contra,* in Texas, McCreary *v.* Douglass, 5 Tex. Civ. App. 492, 24 S. W. 367.

40. Birney *v.* Haim, 2 Litt. (Ky.) 262; Clark *v.* Scudder, 6 Gray (Mass.) 122; Lienow *v.* Ellis, 6 Mass. 331; White *v.* Sanborn, 6 N. H. 220. But see Oliver *v.* Loye, 59 Miss. 320, where it is said that the common-law rule that no recovery can be had on a covenant running with the land by an assignee of the covenantee, except in the state where the land lies, even though the covenantor resides elsewhere, does not prevail in Mississippi.

41. See Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260; Chaison *v.* Beauchamp, 12 Tex. Civ. App. 109, 34 S. W. 303; Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

42. **Lex fori.**— New York L. Ins. Co. *v.* Aitken, 125 N. Y. 660, 26 N. E. 732 [*reversing* 58 N. Y. Super. Ct. 586, 11 N. Y. Suppl. 349]; Flowers *v.* Foreman, 23 How. (U. S.) 132, 16 L. ed. 405.

Period of limitation.— *Arkansas.*— Bird *v.* Smith, 8 Ark. 368.

Indiana.— Hyatt *v.* Mattingly, 68 Ind. 271.

Iowa.— Yancey *v.* Tatlock, 93 Iowa 386, 61 N. W. 997; Mitchell *v.* Kepler, 75 Iowa 207, 39 N. W. 241.

Kentucky.— Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240.

Maine.—See Heath *v.* Whidden, 24 Me. 383.

Massachusetts.— Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335; Clark *v.* Swift, 3 Metc. 390.

Michigan.— Guerin *v.* Smith, 62 Mich. 369, 28 N. W. 906; Sherwood *v.* Landon, 57 Mich. 219, 23 N. W. 778; Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607; Post *v.* Campau, 42 Mich. 90, 3 N. W. 272.

Mississippi.— Burrus *v.* Wilkinson, 31 Miss. 537.

Missouri.— Pennington *v.* Castleman, 6 Mo. 257.

Nebraska.— Kern *v.* Kloke, 21 Nebr. 529, 32 N. W. 574.

New York.— Dwinelle *v.* Edey, 102 N. Y. 423, 7 N. E. 422; Stephens *v.* Hockemeyer, 19 N. Y. Suppl. 666.

South Carolina.— Johnson *v.* Veal, 3 McCord 449.

Tennessee.— Pigeon River Lumber, etc., Co. *v.* Mims, (Ch. App. 1897) 48 S. W. 385.

Texas.— Blount *v.* Bleker, 13 Tex. Civ. App. 227, 35 S. W. 863.

Vermont.— See Wilder *v.* Davenport, 58 Vt. 642, 5 Atl. 753.

Washington.— West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97.

See 14 Cent. Dig. tit. "Covenants," § 177.

Continuing breach.— Where a deed of land to a railroad company covenanted that the grantor and his heirs would maintain a fence through the whole length of that part of the railroad running through the land, perpetually, the obligation was not impaired by the omission to perform it for twenty years, without any evidence of release or extinguishment. Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335.

Easements.— A covenant between proprietors of opposite banks of a stream, their heirs and assigns, to rebuild a dam, runs with the land; and if one grants an easement on his land to the other, there is no statute of limitations against it, without actual adverse possession, and no prescription or presumption from mere nonuser. Lindeman *v.* Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219.

43. American Bank *v.* Baker, 4 Metc. (Mass.) 164; Dinniny *v.* Gavin, 4 N. Y. App. Div. 298, 39 N. Y. Suppl. 485. See also Hyatt *v.* Mattingly, 68 Ind. 271.

44. Peden *v.* Chicago, etc., R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 401; Rowsey *v.* Lynch, 61 Mo. 560.

as soon as made, if broken at all, the right of action accrues immediately upon their execution,[45] except in those jurisdictions in which, notwithstanding their immediate technical breach, they are held to run with the land until an actual and substantial breach.[46] Upon covenants which run with the land, the right of action accrues upon breach, whether that occurs at the time of the execution of the deed or subsequently.[47]

B. Defenses — 1. In General. In actions founded upon covenants broken it has been held that the defendants could not set up by way of defense a bond of indemnity given by the vendor to the vendee,[48] a promise of the vendee not to use the deed against the vendor,[49] ignorance of law,[50] the covenantor's own wrongful acts or neglect,[51] the existence of an older encumbrance,[52] the existence of a previous judgment in favor of the covenantor against the evictor,[53] the failure of

On the sale of a chattel the law implies a warranty of title in the vendor, which is broken immediately, if he have no title, and from that time the statute of limitations begins to run. Chancellor *v.* Wiggins, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; Perkins *v.* Whelan, 116 Mass. 542.

45. *Kansas.*—Jewett *v.* Fisher, 9 Kan. App. 630, 58 Pac. 1023; Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950.

Michigan.— Matteson *v.* Vaughn, 38 Mich. 373, 39 Mich. 758.

Nebraska.— Bellamy *v.* Chambers, 50 Nebr. 146, 69 N. W. 770; Chapman *v.* Kimball, 7 Nebr. 399.

Texas.—Westrope *v.* Chambers, 51 Tex. 178.

Vermont.— Pierce *v.* Johnson, 4 Vt. 247.

See 14 Cent. Dig. tit. "Covenants," § 178.

46. *Iowa.*— Foshay *v.* Shafer, 116 Iowa 302, 89 N. W. 1106; McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093.

Maine.— Heath *v.* Whidden, 24 Me. 383.

Massachusetts.— Kramer *v.* Carter, 136 Mass. 504.

Missouri.— Wyatt *v.* Dunn, 93 Mo. 459, 2 S. W. 402, 6 S. W. 273; White *v.* Stevens, 13 Mo. App. 240.

Texas.— Seibert *v.* Bergman, 91 Tex. 411, 44 S. W. 63.

United States.— Wood *v.* Dubuque, etc., R. Co., 28 Fed. 910.

See 14 Cent. Dig. tit. "Covenants," § 178.

Recovery for technical breach.—Where land conveyed by deed covenanting against encumbrances was subject to a lien at the time of conveyance, an immediate recovery by the grantee of nominal damages for the breach of such covenant would not have barred an action for substantial damages when the lien was asserted, and hence limitations did not begin to run until the assertion of the lien. McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093.

47. *Georgia.*— Durand *v.* Williams, 53 Ga. 76.

Illinois.— Moore *v.* Vail, 17 Ill. 185.

Iowa.— Foshay *v.* Shafer, 116 Iowa 302, 89 N. W. 1106.

Kentucky.— Norris *v.* Evans, 22 S. W. 328, 15 Ky. L. Rep. 77.

Maine.— Heath *v.* Whidden, 24 Me. 383.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Missouri.— Blondeau *v.* Sheridan, 81 Mo. 545.

Montana.— Giddings *v.* Holter, 19 Mont. 263, 48 Pac. 8.

Nebraska.— Troxell *v.* Johnson, 52 Nebr. 46, 71 N. W. 968; Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

New York.— Finton *v.* Egelston, 61 Hun 246, 16 N. Y. Suppl. 721.

Pennsylvania.— Stewart *v.* West, 14 Pa. St. 336.

South Carolina.— Bratton *v.* Guy, 12 S. C. 42; McCaskill *v.* McCaskill, 3 Rich. 196.

Tennessee.— Word *v.* Cavin, 1 Head 506.

Texas.— Eustis *v.* Fosdick, 88 Tex. 615, 32 S. W. 872 [*affirming* (Civ. App. 1895) 29 S. W. 797]; Jones *v.* Paul, 59 Tex. 41; Richardson *v.* Harrison, 6 Tex. Civ. App. 661, 25 S. W. 438; Eustis *v.* Cowherd, 4 Tex. Civ. App. 343, 23 S. W. 737.

West Virginia.— Ilsley *v.* Wilson, 42 W. Va. 757, 26 S. E. 551.

United States.— Northern Pac. R. Co. *v.* Montgomery, 86 Fed. 251, 30 C. C. A. 17.

See 14 Cent. Dig. tit. "Covenants," § 178.

48. A bond taken by the vendee of encumbered land, from the vendor, to indemnify him against the encumbrance, will not be considered a compensation or satisfaction for a breach of the covenants of warranty in the deed. Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669.

49. That the vendee promised never to use the deed against the vendor is no defense to an action upon the covenants in the deed. Holley *v.* Younge, 27 Ala. 203.

50. The fact that a covenantor did not know that the existence of a railroad right of way over the land conveyed would constitute a breach of his covenant against encumbrances is no defense to an action against him on such covenant. Gerald *v.* Elley, 45 Iowa 322.

51. A party cannot excuse a breach of covenant by his own wrongful acts or neglect. Booth *v.* Cleveland Rolling Mill Co., 74 N. Y. 15.

52. The existence of an older unpaid encumbrance is no defense to an action upon a covenant against encumbrances on account of a junior encumbrance paid off by the covenantee. Dehority *v.* Wright, 101 Ind. 382.

53. In an action for breach of warranty, the fact that there has been a former judgment in favor of the covenantor in an action between him and the evictor of the covenantee

the covenantee to appeal from an adverse decision,[54] the failure of the grantee to object until eviction,[55] the failure of the plaintiff to perform a collateral agreement,[56] the failure to vouch the covenantor,[57] the purchase of the premises at a foreclosure sale,[58] the refusal of the covenantee to buy in the title or compromise with the holder of such title,[59] the want of actual possession in the covenantee,[60] that plaintiff allowed the premises to deteriorate,[61] or that the covenantor was not the real grantor;[62] but fraud or false representations[63] or a mistake of fact[64] may constitute a valid defense. So too it has been held that it is a good defense in an action for breach of covenant that the plaintiff has yielded to an invalid and

constitutes no defense to the action for the breach of warranty, where that judgment has been pleaded in the action between the covenantee and his evictor. Louisville Public Warehouse Co. *v.* James, 56 S. W. 19, 21 Ky. L. Rep. 1726.

54. **The failure of a covenantee to appeal** from an adverse decision is no defense to an action brought by him for breach of a covenant of warranty by reason of such decision. Butler *v.* Watts, 13 La. Ann. 390.

55. **That a grantee has taken possession** under his deed, and has made no complaint as to the quantity of land conveyed until suit brought against him, is no defense to an action upon the covenant of warranty in his deed, brought by him upon eviction. Walterhouse *v.* Garrard, 70 Ind. 400.

56. **In an action for breach of an implied covenant against encumbrances,** that the plaintiff failed to perform his agreement as to the satisfaction of a deficiency judgment against one of the defendants is immaterial, where no damage was suffered thereby. Holzbeier *v.* Hayes, 133 Cal. 456, 65 Pac. 968.

57. **For a breach of a covenant of title** by reason of an eviction under a paramount title, it is no excuse that the covenantor had no notice of the suit on the paramount title. Winters *v.* Earl, (N. J. Sup. 1899) 43 Atl. 671.

58. **That the plaintiff** caused the property to be bid in at a foreclosure sale, under a prior mortgage, at a very cheap rate, and had the deed made to himself, is no answer to an action for breach of the covenant against encumbrances. Eckhardt *v.* Neracher, 4 Ohio Dec. (Reprint) 324, 1 Clev. L. Rep. 313.

That the defendant has bid in the land at the foreclosure sale and thus perfected his title is no defense to an action against him on his covenant against encumbrances. Stow *v.* Gilbert, 4 Ohio Dec. (Reprint) 528, 2 Clev. L. Rep. 321.

59. **The refusal of the plaintiff to buy in the paramount title** or encumbrance, even when offered on moderate terms, or to compromise with the holder of such title, is no defense to his action for breach of covenant. Miller *v.* Halsey, 14 N. J. L. 48; Clarke *v.* McAnulty, 3 Serg. & R. (Pa.) 364; Seibert *v.* Bergman, (Tex. Civ. App. 1898) 44 S. W. 872.

60. **The want of actual possession in the covenantee** is no bar to an action for breach of the covenant for quiet enjoyment. Miller *v.* Halsey, 14 N. J. L. 48.

Adverse possession by third person.— It is no defense to an action for breach of warranty that the sale was a nullity because the land belonged to another person. New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102, construing La. Civ. Code, art. 2452.

61. **That plaintiff has allowed the premises to deteriorate** is no bar to an action for breach of covenant. Miller *v.* Halsey, 14 N. J. L. 48.

Use of timber by plaintiffs.— It is no defense to an action for breach of warranty that the plaintiff used the timber on the land before he was dispossessed. Seibert *v.* Bergman, (Tex. Civ. App. 1898) 44 S. W. 872.

62. **In an action for breach of a covenant of warranty,** an agreement between the defendant and his grantor, that on resale by defendant to plaintiff defendant should convey with general warranty to plaintiff, to whom, it is claimed, defendant's grantor, and not the defendant, sold the land, is no defense, in the absence of fraud on the part of the plaintiff. Brady *v.* Peck, 99 Ky. 42, 34 S. W. 906, 35 S. W. 623, 17 Ky. L. Rep. 1356, where it was also held that where the defendant claims the purchase-price was paid to another, and not to him, the fact that the land conveyed was not worth the purchase-price is no defense to an action to recover back the price on failure of title.

63. **Fraud or false representations** on the part of a covenantee, by reason of which the covenantor is induced to execute the covenant, may be set up in defense of an action thereon. Scott *v.* Stetler, 128 Ind. 385, 27 N. E. 721. But see Grant *v.* Grant, 56 Me. 573.

64. **Mistake of fact.**— In an action for breach of a covenant not to infringe a patent right, stated in the covenant to be the property of the plaintiff, the defendant may show that the patent right did not in fact belong to the plaintiff, and that he made the covenant under the mistaken belief that it did. Rich *v.* Atwater, 16 Conn. 409.

Mistake in a description of the premises conveyed is no defense to an action for breach of covenant (Wright *v.* Nipple, 92 Ind. 310; Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284; Delap *v.* Taber, 16 Wis. 654. But see Stewart *v.* Hadley, 55 Mo. 235); but the deed

inferior claim,[65] or that against the grantor's wishes he has yielded to a claim which was being contested by the grantor, it not appearing that the proceedings must necessarily have resulted adversely.[66] Again in an action on a covenant the defendant may plead an attachment execution against the plaintiff, which has been served on himself as garnishee, although such plea be neither in abatement nor in bar of the action, for the purpose of qualifying the judgment according to the facts.[67]

2. Other Breaches. The breach of another distinct covenant in the same agreement is no defense to an action for breach of covenant;[68] and in an action for breach of a covenant restricting the use of property, the complainant's right to enforce such covenant is not affected by acquiescence in the violation of another covenant, nor by another lot owner's violation of a like covenant, so long as the covenant is of any value to him.[69]

3. Subsequent Perfection of Title. If prior to the eviction of the grantee a grantor of land with covenant of warranty purchases an outstanding title, it inures to his own benefit in discharge of his covenant;[70] but where a grantor purchases a paramount title after the eviction of his grantee, such title does not inure to his grantee by way of estoppel, without his consent, so as to defeat his right to sue for breach of covenant and to recover damages; nor can the grantor avail himself of it in mitigation of damages.[71]

may be reformed and the mistake corrected in equity (Johnson *v.* Taber, 10 N. Y. 319; Raines *v.* Calloway, 27 Tex. 678).

65. Balfour *v.* Whitman, 89 Mich. 202, 50 N. W. 744; McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405.

An irregularity in proceedings to foreclose a mortgage cannot be shown in defense to an action for breach of a covenant against encumbrances by reason of such mortgage, the covenantee not being a party to the proceedings. De Forest *v.* Leete, 16 Johns. (N. Y.) 122.

Fraud and collusion.— It is a defense to an action for breach of covenant of warranty that through fraud and collusion between plaintiff and another the land in question, when found subsequent to plaintiff's purchase to be public land, was entered as a homestead for the use of plaintiff, and that his eviction therefrom was only pretended. Frix *v.* Miller, 115 Ala. 476, 22 So. 146, 67 Am. St. Rep. 57.

66. Tuggle *v.* Hamilton, 100 Ga. 292, 27 S. E. 897. *Compare* Wimberly *v.* Collier, 32 Ga. 13, to the effect that a grantor of land, of which the grantee has been evicted, cannot avoid his liability on his covenant of warranty on the ground that at the trial of the action by which the grantee was evicted such grantee failed to produce on request a certain deed in his possession, it appearing that the deed alone would have been of no avail without proof of certain facts, which of themselves would have prevented the eviction.

67. Kase *v.* Kase, 34 Pa. St. 128.

68. Keefer *v.* Zimmerman, 22 Md. 274.

69. Rowland *v.* Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182; Lattimer *v.* Livermore, 72 N. Y. 174 [*modifying* 6 Daly 501]; Dexter *v.* Beard, 53 Hun (N. Y.) 638, 7 N. Y. Suppl. 11; Du Bois *v.* Darling, 44 N. Y. Super. Ct. 436.

Breach by complainant.—In Buck *v.* Adams, 45 N. J. Eq. 552, 17 Atl. 961, in which it was held that the fact that complainants have added a portico to their buildings, beyond the line allowed by a covenant that certain lands should not be built on, is no excuse for the building of a pavilion on said land; the defendants alleging that it was understood at the time of the execution of the conveyance that such portico might be erected.

Breach by grantor.— Where the porches, and in some instances, the bow windows, of all the houses built on several of a block of lots, conveyed subject to a restriction not to build within thirty feet of the front line, were built within such distance, the building of a house on one of the lots by the grantor of the other lots so that the bow window and porch thereof will extend over said line cannot be enjoined. Moore *v.* Murphy, 89 Hun (N. Y.) 175, 34 N. Y. Suppl. 1130.

70. Middlebury College *v.* Cheney, 1 Vt. 336. And see Estoppel.

Action for breach of covenant of seizin.— The rule applies in a suit upon the covenant of seizin, where the covenantee is in possession. Burton *v.* Reeds, 20 Ind. 87.

71. *Indiana.*— Bethell *v.* Bethell, 92 Ind. 318; Burton *v.* Reeds, 20 Ind. 87.

Massachusetts.— Wetherbee *v.* Bennett, 2 Allen 428; Blanchard *v.* Ellis, 1 Gray 195, 61 Am. Dec. 417.

Minnesota.— Resser *v.* Carney, 52 Minn. 397, 54 N. W. 89.

New York.— McCarty *v.* Leggett, 3 Hill 134; Morris *v.* Phelps, 5 Johns. 49, 4 Am. Dec. 323; Tucker *v.* Clark, 2 Sandf. Ch. 96.

Vermont.— Judevine *v.* Pennock, 14 Vt. 438.

Washington.—Rombough *v.* Koons, 6 Wash. 558, 34 Pac. 135.

Wisconsin.— McInnis *v.* Lyman, 62 Wis. 191, 22 N. W. 405; Nichol *v.* Alexander, 28 Wis. 118.

See 14 Cent. Dig. tit. "Covenants," § 185.

Covenant to convey with good title.— In an action for breach of a covenant to convey

4. Want of Consideration. The weight of authority is to the effect that independently of statute want or failure of, or fraud in, the consideration of an instrument is no defense to an action on a covenant contained therein.[72] It has been held, however, that while natural love and affection between near relatives is a sufficient consideration to support a deed, yet it will not render obligatory a mere covenant or promise.[73]

5. Equities Between Original Parties. The covenants in a deed are unaffected in the hands of an assignee by equities existing between the original parties.[74]

C. Parties — 1. In General. A covenant in a deed cannot be sued upon by a person who is not a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made,[75] or in case of covenants for title in the name of the holder of the legal title at the time of breach,[76] except

land by good title, the question whether a tender of title was made before or after the commencement of the action is immaterial, where it appears that the title tendered was insufficient. Clark *v.* Redman, 1 Blackf. (Ind.) 379.

72. Comstock *v.* Son, 154 Mass. 389, 28 N. E. 296; Slocum *v.* Despard, 8 Wend. (N. Y.) 615; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Champion *v.* White, 5 Cow. (N. Y.) 509.

Contra.— Calcote *v.* Elkin, (Tenn. Sup. 1891) 15 S. W. 85.

Action by remote grantee.— The fact that a grantee paid nothing for his land does not affect his right to recover from a remote grantor for breach of warranty of title. Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Collusion between plaintiff and defendant. — There can be no recovery on the covenants in a deed which defendant gave plaintiff without consideration, for the purpose of establishing adverse possession under color of title, both parties knowing that the defendant had no title. Glenn *v.* Mathews, 44 Tex. 400.

Consideration measure of damages.—Under a statute providing that the measure of damages in an action for breach of warranty shall be the consideration received by the grantor, no recovery can be had for a breach of warranty in a voluntary conveyance. *Ex p.* Hardin, 34 S. C. 377, 13 S. E. 615, 27 Am. St. Rep. 820, 13 L. R. A. 723.

Failure of consideration.— Where a warranty deed expressed the usual money consideration, the grantor could not urge, as a defense to the action of the vendee's purchaser on the covenant of seizin, that the consideration consisted of horses which his grantee warranted to be sound, and that there had been a breach of such warranty. Randall *v.* Macbeth, 81 Minn. 376, 84 N. W. 119, 83 Am. St. Rep. 387.

In New York the statute relative to evidence in certain cases puts the defense to actions upon sealed and unsealed instruments, in respect to want of consideration, on the same footing, except as relates to the form of pleading. Tallmadge *v.* Wallis, 25 Wend. 107.

73. Duvoll *v.* Wilson, 9 Barb. (N. Y.) 487 [*disapproving dictum* in Hayes *v.* Kershow, 1 Sandf. Ch. (N. Y.) 258]; Jefferys *v.* Jefferys, 1 C. & P. 138, 18 Eng. Ch. 138 [*overruling* Ellis *v.* Nimmo, Ll. & G. t. S. 333]. See also Holloway *v.* Headington, 6 L. J. Ch. 199, 8 Sim. 324, 8 Eng. Ch. 324.

74. Illinois Land, etc., Co. *v.* Bonner, 91 Ill. 114; Jenks *v.* Quinn, 137 N. Y. 223, 33 N. E. 376 [*affirming* 61 Hun 427, 16 N. Y. Suppl. 240]; Suydam *v.* Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552. And see Assignments.

75. Webster *v.* Fleming, 73 Ill. App. 234; Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 29 Rev. Rep. 261, 11 E. C. L. 495; Barford *v.* Stuckey, 1 Bing. 225, 1 L. J. C. P. O. S. 73, 8 Moore C. P. 88, 8 E. C. L. 483; Chesterfield, etc., Silkstone Colliery Co. *v.* Hawkins, 3 H. & C. 677, 11 Jur. N. S. 468, 34 L. J. Exch. 12, 12 L. T. Rep. N. S. 427, 13 Wkly. Rep. 840.

Where party to covenant has not executed. — A covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself has not executed it, notwithstanding there may be cross covenants on the part of the covenantee, which are stated in the deed to be the consideration for the covenants on the part of the covenantor. Morgan *v.* Pike, 14 C. B. 473, 2 C. L. R. 696, 23 L. J. C. P. 64, 2 Wkly. Rep. 193, 78 E. C. L. 473; Rose *v.* Poulton, 2 B. & Ad. 822, 1 L. J. K. B. 5, 22 E. C. L. 346. See also Smith *v.* Tallcott, 21 Wend. (N. Y.) 202.

76. Sinker *v.* Floyd, 104 Ind. 291, 4 N. E. 10; Brann *v.* Maine Ben. L. Assoc., 92 Me. 341, 42 Atl. 500; Clark *v.* Swift, 3 Metc. (Mass.) 390; Haynes *v.* Buffalo, etc., R. Co., 38 Hun (N. Y.) 17; Keteltas *v.* Penfold, 4 E. D. Smith (N. Y.) 122; Beach *v.* Barons, 13 Barb. (N. Y.) 305. The right to recover for breach of warranty cannot exist in an intermediate warrantor and the last warrantee at the same time. Taylor *v.* Lane, 18 Tex. Civ. App. 545, 45 S. W. 317.

A cestui que trust is not a necessary party to an action for the breach of a covenant running with the land, the legal estate being vested in the trustee. Keteltas *v.* Penfold, 4 E. D. Smith (N. Y.) 122.

A covenant with one for benefit of another should be sued on in the name of the covenantee, or if he be dead of his legal repre-

where by statute the action is to be brought in the name of the real party in interest.[77]

2. JOINDER. The criterion by which the propriety of the joinder or the non-joinder of parties to a covenant in an action for breaches is to be ascertained is the nature of the interest of the covenantees. If the interest is several, the action may be several; if joint, it must be joint; and the terms or language of the covenant do not control that principle.[78] As to defendants the rule is, independently of statute, that where the liability is joint all the defendants must be joined;[79] where several, the action must be several; and where joint and several, the action must be against all or one.[80]

sentative. Brann *v.* Maine Ben. L. Assoc., 92 Me. 341, 42 Atl. 500.

One holding under an executory contract to purchase is not the proper party plaintiff in an action for breach of covenant. Haynes *v.* Buffalo, etc., R. Co., 38 Hun (N. Y.) 17.

Reservation of benefit of covenant on sale of land.—Actions for breach of covenants real may be brought by the grantee, in his own name, although he has sold the land, if the benefit of the covenants is reserved, although not by writing under seal, at the time of the sale. Thompson *v.* Shattuck, 2 Metc. (Mass.) 615.

Survivorship.— Where one of two joint covenantees dies, the action on the contract must be in the name of the survivor; and if he should die, then in the name of his executor or administrator. Stowell *v.* Drake, 23 N. J. L. 310. See also Ayer *v.* Wilson, 2 Mill (S. C.) 319, 12 Am. Dec. 677; Crocker *v.* Beal, 7 Fed. Cas. No. 3,396, 1 Lowell 416.

77. Van Doren *v.* Relfe, 20 Mo. 455, to the effect that where a broken covenant of seizin is assigned, the assignee must sue in his own name. And see Newberry Land Co. *v.* Newberry, 95 Va. 119, 27 S. E. 899.

78. James *v.* Emery, 2 Moore C. P. 195, 5 Price 529, 8 Taunt. 245, 19 Rev. Rep. 503, 4 E. C. L. 129. See also the following cases:

Arkansas.— Hays *v.* Lasater, 3 Ark. 565.

Illinois.— Buckner *v.* Hamilton, 16 Ill. 487.

Kentucky.— Linconfelter *v.* Kelly, 6 J. J. Marsh. 339; Miller *v.* Hill, 4 J. J. Marsh. 399.

Maine.— Lamb *v.* Danforth, 59 Me. 322, 8 Am. Rep. 426; Swett *v.* Patrick, 11 Me. 179.

Missouri.— Blondeau *v.* Sheridan, 81 Mo. 545.

New York.— Smith *v.* Kerr, 3 N. Y. 144; Smith *v.* Tallcott, 21 Wend. 202.

North Carolina.— Little *v.* Hobbs, 53 N. C. 179, 78 Am. Dec. 275.

Pennsylvania.— McClure *v.* Gamble, 27 Pa. St. 288.

United States.— Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67.

England.— Petrie *v.* Bury, 3 B. & C. 353, 5 D. & R. 152, 3 L. J. K. B. O. S. 29, 27 Rev. Rep. 383, 10 E. C. L. 165; Withers *v.* Bircham, 3 B. & C. 254, 5 D. & R. 106, 3 L. J. K. B. O. S. 30, 27 Rev. Rep. 350, 10 E. C. L. 123; Pugh *v.* Stringfield, 3 C. B. N. S. 2, 91 E. C. L. 2, 27 L. J. C. P. 34, 4 C. B. N. S. 364, 93 E. C. L. 364, 27 L. J. C. P. 225, 6 Wkly. Rep. 487; Poole *v.* Hill, 9 Dowl. P. C. 300, 10 L. J. Exch. 81, 6 M. & W. 835; Palmer *v.* Sparshott, 11 L. J. C. P. 204, 4 M. & G. 137, 4 Scott N. R. 743.

A grantee who has conveyed his estate, without having been damnified, cannot join with his co-grantee in a suit against their grantor on his covenants. Allen *v.* Little, 36 Me. 170.

Covenantees and tenants.—In an action for breach of a covenant to maintain switch connections with the covenantees' land, it is proper for the covenantees to join as parties plaintiff the tenants of the land which was benefited by the covenant. Pittsburg, etc., R. Co. *v.* Reno, 22 Ill. App. 470 [*affirmed* in 123 Ill. 273, 14 N. E. 195].

Grantee of part of land not benefited.— Where a plaintiff agreed to furnish the defendants water-power to run their mill situated on a certain lot, and thereafter defendants sold a part of the lot having no connection with the power, it was held that their grantee was not a necessary party to a cross-action against the plaintiff for damages for breach of the covenant. Moline Water Power Co. *v.* Waters, 10 Ill. App. 159.

Tenants in common, holding under the same deed as grantees, have several freeholds, and are not obliged to join in an action against their grantor for breach of covenants of warranty in his deed. Lamb *v.* Danforth, 59 Me. 322, 8 Am. Rep. 426; Swett *v.* Patrick, 11 Me. 179. Conversely persons who become tenants in common by successive deeds of part interests made by the same grantor, may maintain a joint action for a breach of covenants running with the land. Blondeau *v.* Sheridan, 81 Mo. 545.

The heirs or devisees of a grantee may maintain a joint action upon a covenant of warranty. Paul *v.* Witman, 3 Watts & S. (Pa.) 407.

To a suit in equity on a covenant in writing, brought by a remote assignee, the covenantee is a necessary party, and the intermediate assignees are proper parties. Wickliffe *v.* Clay, 1 Dana (Ky.) 585. See also Letcher *v.* Shroeder, 5 J. J. Marsh. (Ky.) 513.

79. Fowler *v.* Kent, 71 N. H. 388, 52 Atl. 554.

80. See, generally, JOINDER AND SPLITTING OF ACTIONS.

In Louisiana, under Civ. Code art. 2599, and Code Prac. art. 711, creditors of an estate, whose property is sold by order of court to pay their claims, are quasi-vendors, and should be made parties to an action to evict

D. Pleading[81] — **1. Declaration, Complaint, Petition, or Statement — a. In General.** The declaration, complaint, petition, or statement in an action for breach of covenant must clearly show that the covenant is broken,[82] and must in all cases state facts sufficient to constitute a cause of action;[83] although a failure to do so may be cured by the plea of the covenantor,[84] or by the verdict.[85] It must set forth at least in substance a sufficiency of the contents of the deed to show the covenant sued on,[86] and must show that the contract was under seal,[87] and was delivered,[88] and should usually make profert thereof, or

the purchaser. He cannot be compelled to bring as many actions in their different parishes as there may be creditors liable to refund. Rivas *v.* Hunstock, 2 Rob. (La.) 187.

In North Carolina, under Rev. Stat. c. 31, § 89, an action may be sustained against one or more of the joint obligors in a covenant of warranty, contained in a conveyance of land, for a breach of the covenant. Grier *v.* Fletcher, 23 N. C. 417.

Joinder of covenantor and assignees.— In an action by the vendor, on a covenant made by the purchaser of land, in the deed, the assignees of the purchaser cannot be joined with him as parties defendant. Brooks *v.* Columbus Water Lot Co., 7 Ga. 101.

Death of joint covenantor.—Where two entered into a covenant and one died before suit, it is error to sue both, and a subsequent abatement of the writ as to the deceased obligor will not render the writ good. Rowan *v.* Woodward, 2 A. K. Marsh. (Ky.) 140.

81. See, generally, Pleading.

82. Ridgell *v.* Dale, 16 Ala. 36; King *v.* Sea, 6 Ill. App. 189. *Compare* Thurmond *v.* Brownson, 69 Tex. 597, 6 S. W. 778.

An averment that the acts set forth are "a violation of the defendant's covenants" is insufficient. It should show by express words or necessary implication that the defendant has broken his covenant. Schenck *v.* Naylor, 2 Duer (N. Y.) 675.

Breach of special warranty.— In an action for breach of a covenant to defend the title to certain land against all persons claiming under the covenantor, a failure to allege that the parties stated to have recovered the land from the plaintiff claimed under the covenantor renders the complaint essentially defective. Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. 967.

Necessary implication.— In an action on a covenant to sell certain lands at the best price obtainable and apply the proceeds in a certain way, a declaration that defendant did not apply the proceeds as agreed, without alleging a sale, is sufficient. Brown *v.* Stebbins, 4 Hill (N. Y.) 154.

83. *Georgia.*— St. John *v.* Leyden, 111 Ga. 152, 36 S. E. 610.

Indiana.— Indianapolis Water Co. *v.* Nulte, 126 Ind. 373, 26 N. E. 72; Axtel *v.* Chase, 83 Ind. 546; Rhode *v.* Green, 26 Ind. 83; Smith *v.* Eigerman, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281.

Kentucky.— Warner *v.* Bledsoe, 4 Dana 73; Wilson *v.* Bowens, 2 T. B. Mon. 86; Hord *v.* Trimble, 3 A. K. Marsh. 532.

Maryland.— Jacobs *v.* Davis, 34 Md. 204.

Massachusetts.— Niles *v.* Sawtell, 7 Mass. 444.

Pennsylvania.— Swenk *v.* Stout, 2 Yeates 470.

Texas.— Thiele *v.* Axell, 5 Tex. Civ. App. 548, 24 S. W. 552, 803. See also Bennett *v.* Latham, 18 Tex. Civ. App. 403, 45 S. W. 934.

Wisconsin.— Pillsbury *v.* Mitchell, 5 Wis. 17. See also Jones *v.* Davis, 22 Wis. 421.

See 14 Cent. Dig. tit. "Covenants," § 189.

Allegation of liability to assignee.— See Niles *v.* Sawtell, 7 Mass. 444.

Alternative covenants.— In pleading the breach of an alternative covenant, it is necessary so to assign it as to show breach of both. See Harmony *v.* Bingham, 1 Duer (N. Y.) 209.

Designation of land.— See Carter *v.* Denman, 23 N. J. L. 260.

Irrelevant and immaterial allegations will be stricken out. West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97. See also Sisson *v.* Stevenson, 7 N. Y. Leg. Obs. 255.

Satisfaction of encumbrance.— See Pillsbury *v.* Mitchell, 5 Wis. 17.

Setting out accounts.— In Hurbaugh *v.* Jones, 5 N. Y. Leg. Obs. 19, it was held that where the covenant was to pay certain accounts which the plaintiff had paid, it was not necessary to set out in the narr. the accounts so paid, thereby producing great prolixity.

Where plaintiff relies on a paramount title without eviction, defendant cannot object that the petition does not show the owner and his title, nor offer to reconvey the full unencumbered title acquired from defendant, when it alleges that a patent was issued to a certain third person long before the location on the same land of the certificate under which defendant claims; that defendant knew, and plaintiff was ignorant, of the existence of such prior grant when the conveyance was made to plaintiff; that defendant never had title in fee to the land so conveyed; and that plaintiff has never sold or encumbered the land. White *v.* Holley, 3 Tex. Civ. App. 590, 24 S. W. 831.

84. Harmon *v.* Crook, 2 Yerg. (Tenn.) 127. See also Fowle *v.* Welsh, 1 B. & C. 29, 2 D. & R. 133, 1 L. J. K. B. O. S. 17, 25 Rev. Rep. 291, 8 E. C. L. 14; Nash *v.* Palmer, 5 M. & S. 374, 17 Rev. Rep. 364.

85. Ingersoll *v.* Jackson, 9 Mass. 495.

86. Gano *v.* Green, 116 Ga. 22, 42 S. E. 371.

87. See *infra*, IV, D, 1, d.

88. Perkins *v.* Reeds, 8 Mo. 33. See also Gazley *v.* Price, 16 Johns. (N. Y.) 267, to

offer some excuse for the omission.[89] It is not necessary to state the consideration of the defendant's covenant,[90] unless the performance of it constituted a condition precedent, in which case performance must be averred;[91] and only so much of the deed and covenant should be set forth as is essential to the cause of action,[92] and each may be stated according to the legal effect,[93] although it is more usual to declare in the words of the deed;[94] the breach also may be in the negative of the covenant generally, or according to the legal effect, and sometimes in the alternative;[95] and several breaches may be assigned at common law.[96] Damages, being the object of the suit, should be laid sufficient to cover the real amount.[97]

b. Averments as to Parties. In an action for breach of covenant it must be averred with whom the covenant was made,[98] although where an action is by an assignee of the covenant, it is not necessary that he should be described as "assignee."[99] Where all the covenantees do not join, and a sufficient excuse is not alleged for the omission, the declaration is demurrable.[1] A declaration, both as

the effect that an averment that a deed was given implies that it was accepted by the grantee.

89. Platt Cov. 546.

Misrecital of covenant.— In declaring in covenant, if profert be made of the deed, and the covenant be misrecited, the defendant cannot demur specially, alleging the misrecital as the cause of demurrer, without first craving oyer of the deed, and setting it out *in hæc verba*, so as to make it a part of the record. Killian *v.* Herndon, 4 Rich. (S. C.) 196.

Mutilated instrument.— An instrument which one of the parties thereto has mutilated, by tearing off his seal, should not be declared on as a deed with profert, but the facts should be stated as an excuse for not making profert. Powers *v.* Ware, 2 Pick. (Mass.) 451.

Profert of certified copy.— In a declaration of covenant, contained in a recorded conveyance of land, the plaintiff may make profert of a certified copy without the original. Clark *v.* Nixon, 5 Hill (N. Y.) 36.

Words of reference, "as by the said covenant and agreement, reference being thereunto had, may more fully appear," inserted in the declaration after the statement of the contents of the instrument, are no profert, nor sufficient to supply the want thereof. Smith *v.* Emery, 12 N. J. L. 53.

90. Buckmaster *v.* Grundy, 2 Ill. 310; Jones *v.* Thomas, 21 Gratt. (Va.) 96. See also Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869. But see Holmes *v.* Northern Pac. R. Co., 65 N. Y. App. Div. 49, 72 N. Y. Suppl. 476, to the effect that the complaint must aver that the covenant was made on consideration.

91. See *infra*, IV, D, 1, c. See also Dodge *v.* McKay, 4 Ala. 346.

92. *New York.*— Grannis *v.* Clark, 8 Cow. 36; Henry *v.* Cleland, 14 Johns. 400; Dunham *v.* Pratt, 14 Johns. 372; Quackenboss *v.* Lansing, 6 Johns. 49.

Pennsylvania.— Hill *v.* Pardee, 143 Pa. St. 98, 22 Atl. 815.

South Carolina.— Killian *v.* Herndon, 4 Rich. 196.

United States.— Wilcox *v.* Cohn, 29 Fed. Cas. No. 17,640, 5 Blatchf. 346.

England.— Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622.

See 14 Cent. Dig. tit. "Covenants," § 191.

Contra.—Woodford *v.* Leavenworth, 14 Ind. 311; McCampbell *v.* Vastine, 10 Iowa 538.

Implied covenants may be declared on as though they were expressed. Barney *v.* Keith, 4 Wend. (N. Y.) 502, 6 Wend. (N. Y.) 555; Grannis *v.* Clark, 8 Cow. (N. Y.) 36.

Matter of defeasance need not be set out. Hatch *v.* Pittus, Minor (Ala.) 49. See also Hall *v.* Allan, 15 N. Brunsw. 192.

Where the covenant contains an exception or proviso qualifying the defendant's liability, the declaration must state the exception or proviso, and exclude its subject-matter from the breaches assigned. Dunn *v.* Dunn, 3 Colo. 510. See also Sullivan *v.* Hamilton, 13 N. Y. App. Div. 140, 43 N. Y. Suppl. 302; Stuart *v.* Nelson, 4 Hayw. (Tenn.) 200; Hall *v.* Allan, 15 N. Brunsw. 192.

93. *Illinois.*— Hawk *v.* McCullough, 21 Ill. 220.

Indiana.— Hughes *v.* Houlton, 5 Blackf. 180.

Kentucky.— Brady *v.* Peck, 99 Ky. 42, 34 S. W. 906, 35 S. W. 623, 17 Ky. L. Rep. 1356.

Massachusetts.— Gates *v.* Caldwell, 7 Mass. 68.

Virginia.— Jarrett *v.* Jarrett, 7 Leigh 93.

England.— Ackland *v.* Pring, 10 L. J. C. P. 231, 2 M. & G. 937, 3 Scott N. R. 297, 40 E. C. L. 931; Southcote *v.* Hoare, 3 Taunt. 87, 12 Rev. Rep. 600.

See 14 Cent. Dig. tit. "Covenants," § 189.

94. Platt Cov. 546. *Contra*, McCampbell *v.* Vastine, 10 Iowa 538, where it is said the practice of merely setting out the deed as part of the pleading is bad.

95. See *infra*, IV, D, 1, h, (III).

96. Thome *v.* Haley, 1 Dana (Ky.) 268; McCoy *v.* Hill, 2 Litt. (Ky.) 372.

One good breach is sufficient. Gaster *v.* Ashley, 1 Ark. 325.

97. See *infra*, IV, F, 9, a.

98. Keatly *v.* McLaugherty, 4 Mo. 221; Ladd *v.* Montgomery, 83 Mo. App. 355. See also Jones *v.* Thomas, 21 Gratt. (Va.) 96.

99. Carter *v.* Denman, 23 N. J. L. 260.

1. Hays *v.* Lasater, 3 Ark. 565; Winter *v.* Simonton, 30 Fed. Cas. No. 17,893, 3 Cranch C. C. 62.

heirs and devisees, without showing in particular how they were heirs, and without setting out the will, is not bad on general demurrer;[2] but where the action is against one as heir of the covenantor, the plaintiff must allege the special facts on which his right to recover depends.[3]

c. Performance of Condition Precedent. In an action for breach of covenant, the plaintiff must allege the performance on his part or a tender of performance, or excuse for non-performance, of a condition precedent, if any there be, at the the place and within the time required.[4] Where the condition precedent involves a question of law, the *quo modo* must be pointed out; but where it is a mere question of fact, a general averment of performance is proper.[5]

d. Averment of Sealing. It must be averred, in an action for breach of covenant, that it was sealed by the defendant, and the weight of authority is to the effect that this must be specifically stated.[6]

2. Day *v.* Chism, 10 Wheat. (U. S.) 449, 6 L. ed. 363.

3. Gere *v.* Clarke, 6 Hill (N. Y.) 350.

4. *Alabama.*— Bailey *v.* White, 3 Ala. 330; Jones *v.* Sommerville, 1 Port. 437; Thompson *v.* Gray, 2 Stew. & P. 60; Bassett *v.* Jordan, 1 Stew. 352.

Arkansas.— Childress *v.* Foster, 3 Ark. 252.

Connecticut.— Wright *v.* Tuttle, 4 Day 313.

Illinois.— Hoy *v.* Hoy, 44 Ill. 469; Dickhut *v.* Durrell, 11 Ill. 72; Davis *v.* Wiley, 4 Ill. 234.

Kentucky.— Hunter *v.* Miller, 6 B. Mon. 612; Wilhite *v.* Roberts, 7 Dana 26; Stainton *v.* Brown, 6 Dana 248; Breckenridge *v.* Lee, 3 Bibb 329.

Massachusetts.— Couch *v.* Ingersoll, 2 Pick. 292; Tileston *v.* Newell, 13 Mass. 406.

Missouri.— Keatly *v.* McLaugherty, 4 Mo. 221.

New Jersey.— Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636.

New York.— Frey *v.* Johnson, 22 How. Pr. 316; Glover *v.* Tuck, 24 Wend. 153; Dakin *v.* Williams, 11 Wend. 67.

United States.— Wilcox *v.* Cohn, 29 Fed. Cas. No. 17,640, 5 Blatchf. 346.

England.— Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228; Hotham *v.* East India Co., Dougl. (3d ed.) 272; St. Albans *v.* Shore, 1 H. Bl. 270; Grey *v.* Friar, 4 H. L. Cas. 565; Campbell *v.* Jones, 6 T. R. 570, 3 Rev. Rep. 263.

Canada.— Walker *v.* Kelly, 24 U. C. C. P. 174; Tanner *v.* D'Everado, 3 U. C. Q. B. 154; Chatham *v.* McCrea, 12 U. C. C. P. 352; Coatsworth *v.* Toronto, 10 U. C. C. P. 73.

See 14 Cent. Dig. tit. "Covenants," § 192.

An averment of readiness and willingness to perform a condition precedent is not sufficient. Frey *v.* Johnson, 22 How. Pr. (N. Y.) 316. But see Keatly *v.* McLaugherty, 4 Mo. 221.

Where a covenant only goes to part of the consideration, on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the same by the defendant without averring performance. Nelson *v.* Oren, 41 Ill. 18; Pepper *v.* Haight, 20 Barb. (N. Y.) 429.

Where the covenants of the parties are independent of each other, in an action for breach of covenant by either, the plaintiff need not allege performance on his own part. Payne *v.* Bettisworth, 2 A. K. Marsh. (Ky.) 427. See also Tisdale *v.* Dallas, 11 U. C. C. P. 238; Leonard *v.* Wall, 5 U. C. C. P. 9; Tate *v.* Port Hope, etc., R. Co., 17 U. C. Q. B. 354.

5. Sorell *v.* Sorell, 5 Ala. 576; Wright *v.* Tuttle, 4 Day (Conn.) 313. And see Thomas *v.* Van Ness, 4 Wend. (N. Y.) 549, to the effect that when it is necessary for a plaintiff to aver performance of a condition precedent, it must be set forth in the declaration with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled.

6. Hays *v.* Lasater, 3 Ark. 565 (to the effect that plaintiff must allege that the parties to the covenant sealed it, although it is set out *in hæc verba*, and contains the words "witness our hands and seals." Nor is it sufficient to allege that the parties made their covenant, the word "covenant" not importing a sealed instrument); Smith *v.* Emery, 12 N. J. L. 53 (to the effect that it is not sufficient to say "and for the faithful performance of the said covenant and agreement, the said parties did thereunto set their hands and affix their seals"); Holmes *v.* Northern Pac. R. Co., 65 N. Y. App. Div. 49, 72 N. Y. Suppl. 476 (as to necessity of averment); Macomb *v.* Thompson, 14 Johns. (N. Y.) 207; Van Santwood *v.* Sandford, 12 Johns. (N. Y.) 197 (the two latter to the effect that although the covenant is set forth *in hæc verba*, concluding with "sealed and delivered," and the name of the covenantor, with the letters "[L. S.]," the declaration is bad, if it is nowhere alleged that the defendant sealed it).

Contra.— Wineman *v.* Hughson, 44 Ill. App. 22 (to the effect that where the declaration avers that, by "indenture," defendant covenanted, etc., it is not necessary to allege a sealing); Jones *v.* Davis, 22 Wis. 421 (to the effect that in an action for breach of covenant an allegation that a party made a deed includes an averment that he signed, sealed, and stamped it).

e. Anticipating and Negativing Defenses. In an action for breach of covenant matters of defense need not be anticipated and negatived.[7]

f. Allegation of Demand of Performance. Where a special request is necessary to impose upon defendant the liability on his covenant, such request must be averred,[8] but not otherwise.[9]

g. Duplicity, Joinder, and Repugnance. Several breaches of the same covenant cannot be assigned in the same count,[10] but distinct breaches of several covenants may be.[11] On the other hand if two counts of a declaration be for the same cause of action, on the same covenant, and one count be good, the declaration is good on general demurrer;[12] but a count against covenantors in their own right cannot be joined with one against them in their representative capacity, and such a defect is not cured by verdict.[13]

h. Assignment of Breach — (i) *In General.* It is sufficient as a rule to assign a breach of a covenant according to its legal effect, or in words which contain its sense and substance;[14] but the assignment must conform to the covenant

7. *Alabama.*— Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Indiana.— McClure *v.* McClure, 65 Ind. 482; Mason *v.* Cooksey, 51 Ind. 519; Kent *v.* Cantrall, 44 Ind. 452; Harmon *v.* Dorman, 8 Ind. App. 461, 35 N. E. 1025.

Massachusetts.— Stearns *v.* Barrett, 1 Pick. 443, 11 Am. Dec. 223.

Wisconsin.— La Point *v.* Cady, 2 Pinn. 515, 2 Chandl. 202.

United States.— Wilcox *v.* Cohn, 29 Fed. Cas. No. 17,640, 5 Blatchf. 346.

England.— Hotham *v.* East India Co., 1 T. R. 638.

See 14 Cent. Dig. tit. "Covenants," § 194.

8. *Alabama.*— Huff *v.* Campbell, 1 Stew. 543.

Arkansas.— Humphries *v.* Goulding, 3 Ark. 581; Childress *v.* Foster, 3 Ark. 252; Taylor *v.* Patterson, 3 Ark. 238.

Kentucky.— Stainton *v.* Brown, 6 Dana 248; Miller *v.* Cook, 2 J. J. Marsh. 80.

New York.— Pearsoll *v.* Frazer, 14 Barb. 564; Bush *v.* Stevens, 24 Wend. 256.

Wisconsin.— See Divan *v.* Loomis, 68 Wis. 150, 31 N. W. 760, in which it was held that an allegation in a complaint, in a suit to set aside a deed, of a refusal to comply with the terms of the contract to support the grantor, which was the consideration for the deed, implies a previous demand, and is equivalent to a demand and refusal, and is a sufficient allegation of a breach of the agreement.

See 14 Cent. Dig. tit. "Covenants," § 195.

As to when demand must be made see *supra*, IV, A, 4, a.

9. *Arkansas.*— Newton *v.* More, 14 Ark. 166; Tarwater *v.* Davis, 7 Ark. 153, 44 Am. Dec. 534.

Kentucky.— Keys *v.* Powell, 2 A. K. Marsh. 253; Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655; Adams *v.* Macey, 1 Bibb 328.

New Jersey.— Smith *v.* Emery, 12 N. J. L. 53.

New York.— Clough *v.* Hoffman, 5 Wend. 499; Ernst *v.* Bartle, 1 Johns. Cas. 319.

Vermont.— Tarbell *v.* Tarbell, 60 Vt. 486, 15 Atl. 104.

United States.— Hartfield *v.* Patton, 11 Fed. Cas. No. 6,158*a*, Hempst. 268.

See 14 Cent. Dig. tit. "Covenants," § 195.

10. Patton *v.* Foote, 1 Wend. (N. Y.) 207.

Under Wis. Rev. Stat. (1898), § 2647, which provides that "plaintiff may unite in the same complaint several causes of action . . . where they arise out of the same transaction, or transactions connected with the same subject of action," an action against the vendor for breach of his covenant of seizin may be joined with an action against him for false representations in the sale of the property. Koepke *v.* Winterfield, 116 Wis. 44, 92 N. W. 437.

11. Sheetz *v.* Longlois, 69 Ind. 491; Wilcox *v.* Cohn, 29 Fed. Cas. No. 17,640, 5 Blatchf. 346. But see Swett *v.* Patrick, 11 Me. 179; Hacker *v.* Storer, 8 Me. 228, to the effect that an assignment, in the same count, of a breach of both the covenant of seizin and of warranty, is bad.

12. Wilson *v.* Ayres, 3 B. Mon. (Ky.) 467. See also Blanchard *v.* Hoxie, 34 Me. 376; Swett *v.* Patrick, 11 Me. 179.

13. Strohecker *v.* Grant, 16 Serg. & R. (Pa.) 237, in which a count against executors on their own covenant, in a deed executed by virtue of a power in a will and in execution of an agreement made by the testator, was joined with one against them on the covenants of the testator.

14. Chicago, etc., R. Co. *v.* Hoyt, 37 Ill. App. 64; Reagan *v.* Fox, 45 Ind. 8; Potter *v.* Bacon, 2 Wend. (N. Y.) 583; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Wilcox *v.* Cohn, 29 Fed Cas. No. 17,640, 5 Blatchf. 346.

In an action on a covenant to sell certain lands at the best price obtainable, a declaration charging a breach, that defendant did not sell at the best price obtainable, is bad, as not showing whether plaintiff means to say for not selling at all, or for selling at too low a price. Brown *v.* Stebbins, 4 Hill (N. Y.) 154.

Specifying breach.— The codes do not except an action for breach of covenant of seizin from other actions, as to the rule of pleading that the complaint must point out the defect complained of, and tender an issue of fact to be sustained and met by proof. Woolley *v.* Newcombe, 58 How. Pr. (N. Y.)

as set out, and the breach must not be for more than is covenanted to be performed.[15]

(II) *AVERMENT OF EVICTION.*[16] In an action for the breach of a covenant of warranty or for quiet enjoyment, an eviction, or something tantamount thereto, must be alleged.[17] In an action on a covenant of seizin, of good right to convey, or against encumbrances, an eviction need not be alleged.[18]

(III) *NEGATIVING LANGUAGE OF COVENANT.* As a general rule, and especially in actions for breach of the covenants of seizin and good right to convey, it is sufficient to negative the words of the covenant generally.[19] It is otherwise in the

480. See also Patton *v.* Foote, 1 Wend. (N. Y.) 207, to the effect that in an action of covenant to indemnify and save harmless a party from the payment of a bond, an allegation that he was forced and compelled to pay the bond, without stating how and in what manner he was compelled to pay, is bad on special demurrer.

15. Sorell *v.* Sorell, 5 Ala. 576. See also Vance *v.* Penn, 33 Cal. 631; Duvall *v.* Craig, 2 Wheat. (U. S.) 45, 4 L. ed. 180.

Statutory implied covenant.— To show a breach of the covenant in a deed implied by the words "grant, bargain, and sell," it is necessary to aver that the title has failed in consequence of some act of the grantor. Griffin *v.* Reynolds, 17 Ala. 198.

16. For forms of averments of eviction which have been held sufficient see the following cases:

Alabama.— Banks *v.* Whitehead, 7 Ala. 83.

Connecticut.— Booth *v.* Starr, 5 Day 275, 5 Am. Dec. 149.

Indiana.— Wright *v.* Nipple, 92 Ind. 310.

Nebraska.— Mills *v.* Rice, 3 Nebr. 76.

Ohio.— Stow *v.* Gilbert, 4 Ohio Dec. (Reprint) 528, 2 Clev. L. Rep. 321.

Oregon.— Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

Vermont.— Boyd *v.* Bartlett, 36 Vt. 9.

17. *Alabama.*— Griffin *v.* Reynolds, 17 Ala. 198; Banks *v.* Whitehead, 7 Ala. 83.

Connecticut.— Booth *v.* Starr, 5 Day 275, 5 Am. Dec. 149.

Georgia.— McDowell *v.* Hunter, Dudley 4.

Illinois.— Brady *v.* Spurck, 27 Ill. 478.

Indiana.— Wright *v.* Nipple, 92 Ind. 310; Reese *v.* McQuilkin, 7 Ind. 450; Hannah *v.* Henderson, 4 Ind. 174. But see Mason *v.* Cooksey, 51 Ind. 519.

Kentucky.— Pence *v.* Duvall, 9 B. Mon. 48; Patton *v.* Kennedy, 1 A. K. Marsh. 389, 10 Am. Dec. 744.

Minnesota.— Wagner *v.* Finnegan, 54 Minn. 251, 55 N. W. 1129; Burke *v.* Beveridge, 15 Minn. 205.

Missouri.— Campbell *v.* Russell, 3 Mo. 578; Mumford *v.* Keet, 65 Mo. App. 502.

Nebraska.— Merrill *v.* Suing, (1902) 92 N. W. 618; Sears *v.* Broady, (1902) 92 N. W. 214; Hampton *v.* Webster, 56 Nebr. 628, 77 N. W. 50; Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479; Mills *v.* Rice, 3 Nebr. 76.

New Jersey.— Carter *v.* Denman, 23 N. J. L. 260.

New York.— Kidder *v.* Bork, 12 Misc. 519, 33 N. Y. Suppl. 663; Rickert *v.* Snyder, 9 Wend. 416; Webb *v.* Alexander, 7 Wend. 281; Sedgwick *v.* Hollenback, 7 Johns. 376; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379.

Ohio.— Robinson *v.* Neil, 3 Ohio 525; Innes *v.* Agnew, 1 Ohio 386; Stow *v.* Gilbert, 4 Ohio Dec. (Reprint) 528, 2 Clev. L. Rep. 321.

Oregon.— Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

Tennessee.— Allison *v.* Allison, 1 Yerg. 16; Crutcher *v.* Stump, 5 Hayw. 100; Pigeon River Lumber, etc., Co. *v.* Mims, (Ch. App. 1897) 48 S. W. 385.

Texas.— White *v.* Holley, 3 Tex. Civ. App. 590, 24 S. W. 831. See also Raines *v.* Calloway, 27 Tex. 678, construing laws of Louisiana.

Vermont.— Boyd *v.* Bartlett, 36 Vt. 9.

Virginia.— Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909.

United States.— Day *v.* Chism, 10 Wheat. 449, 6 L. ed. 363.

England.— Fraunces' Case, 8 Coke 89*a*; Holder *v.* Taylor, Hob. 18; Foster *v.* Pierson, 4 T. R. 617.

See 14 Cent. Dig. tit. "Covenants," § 198.

As to what constitutes a sufficient eviction see *supra*, III, C, 5, h; III, C, 7, m.

No particular formality is required in averring an eviction (Day *v.* Chism, 10 Wheat. (U. S.) 449, 6 L. ed. 363); nor is it necessary to set out the facts attending the eviction, or particularly to describe the adverse title, but merely to allege in general terms an eviction under a title paramount to that of the covenantor (Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479), although a declaration setting out all the facts constituting an eviction is good (Rickert *v.* Snyder, 9 Wend. (N. Y.) 416).

18. Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338; Camp *v.* Douglas, 10 Iowa 586; Brandt *v.* Foster, 5 Iowa 287; Le Roy *v.* Beard, 6 How. (U. S.) 451, 12 L. ed. 1151. *Contra*, Mumford *v.* Keet, 65 Mo. App. 502; Robinson *v.* Neil, 3 Ohio 525, decided under a statute since repealed. And see Duvall *v.* Craig, 2 Wheat. (U. S.) 45, 61, 4 L. ed. 180, in which it is said that "assuming that an averment of an entry and eviction under an elder title be in general necessary to sustain an action on a covenant against incumbrances, (on which we give no opinion), it is clear that it cannot be always necessary."

19. *Alabama.*—Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136;

case of covenants against encumbrances, for quiet enjoyment, and of warranty, breaches of which must be specifically set forth.[20]

(IV) *ALLEGATION OF NOTICE TO DEFEND.* It is not necessary, in an action for breach of covenant, to aver that the covenantor had notice of the suit by which the covenantee was evicted.[21]

(V) *DESCRIPTION OF PARAMOUNT CLAIM.* As has been previously stated, it is unnecessary, in an action for breach of the covenants of seizin and of good right to convey, to do more than merely negative the words of the covenant.[22] An assignment of a breach of the covenant against encumbrances must, however, set out the particular encumbrance relied on,[23] and connect the title of the defendant therewith,[24] although it is not necessary to set it forth more than substantially.[25] The same is true in an action for breach of the covenant of warranty

Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Anderson *v.* Knox, 20 Ala. 156.

Arkansas.— Childress *v.* Foster, 3 Ark. 252; Gaster *v.* Ashley, 1 Ark. 325.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 151.

Indiana.— Van Nest *v.* Kellum, 15 Ind. 264; Floom *v.* Beard, 8 Blackf. 76; Martin *v.* Baker, 5 Blackf. 232.

Iowa.— Socum *v.* Haun, 36 Iowa 138; Camp *v.* Douglas, 10 Iowa 586; Brandt *v.* Foster, 5 Iowa 287.

Maine.— Montgomery *v.* Reed, 69 Me. 510; Blanchard *v.* Hoxie, 34 Me. 376.

Massachusetts.— Bacon *v.* Lincoln, 4 Cush. 210, 50 Am. Dec. 765; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Missouri.— Evans *v.* Fulton, 134 Mo. 653, 36 S. W. 230.

New Jersey.— Lot *v.* Thomas, 2 N. J. L. 407, 2 Am. Dec. 354.

New York.— Woolley *v.* Newcombe, 9 Daly 75 [*affirmed* in 87 N. Y. 605]; Brown *v.* Stebbins, 4 Hill 154; Rickert *v.* Snyder, 9 Wend. 416; Abbott *v.* Allen, 14 Johns. 248; Greenby *v.* Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Jones *v.* Hurbaugh, 5 N. Y. Leg. Obs. 19.

Pennsylvania.— Clarke *v.* McAnulty, 3 Serg. & R. 364; Bender *v.* Fromberger, 4 Dall. 436, 1 L. ed. 901.

South Carolina.— Mackey *v.* Collins, 2 Nott & M. 186, 10 Am. Dec. 586.

Vermont.— Mills *v.* Catlin, 22 Vt. 98.

Wisconsin.— Kopke *v.* Winterfield, 116 Wis. 44, 92 N. W. 437.

United States.— Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666.

England.— Bradshaw's Case, 9 Coke 60*a*; Muscot *v.* Ballet, Cro. Jac. 369; Lancashire *v.* Glover, 2 Show. 460; Glinister *v.* Audley, T Raym. 14.

See 14 Cent. Dig. tit. "Covenants," § 199.

Contra.— Wilford *v.* Rose, 2 Root (Conn.) 14 (where it was held that the declaration must show, not only that the defendant was not seized, but who was); Robinson *v.* Neil, 3 Ohio 525 (decided under the provisions of a statute since repealed).

General rule.— The breach should be assigned in the words of the covenant, either negatively or affirmatively, or in words coextensive with the import and effect, if in so doing a breach is shown. Childress *v.* Foster, 3 Ark. 252.

The breach may be as general as the covenant. Anderson *v.* Knox, 20 Ala. 156; Bender *v.* Fromberger, 4 Dall. (Pa.) 436, 1 L. ed. 898.

20. *Connecticut.*— Mitchell *v.* Warner, 5 Conn. 497.

Indiana.— Martin *v.* Baker, 5 Blackf. 232.

Maine.— Blanchard *v.* Hoxie, 34 Me. 376.

Massachusetts.— Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Pennsylvania.— Clarke *v.* McAnulty, 3 Serg. & R. 364.

Vermont.— Mills *v.* Catlin, 22 Vt. 98.

See 14 Cent. Dig. tit. "Covenants," § 199.

Special warranty.— A breach of covenants of special warranty in a deed is not well assigned by the allegation that the covenantor had "no right to sell and convey in manner and form," etc. Griffin *v.* Fairbrother, 10 Me. 91.

21. Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Rhode *v.* Green, 26 Ind. 83; Steele *v.* Steele, 4 T. B. Mon. (Ky.) 110; Chapman *v.* Holmes, 10 N. J. L. 20; King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

As to the necessity of notice to defend title see *supra*, III, B, 2.

22. See *supra*, IV, D, 1, h, (III).

23. Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Shelton *v.* Pease, 10 Mo. 473; De Forest *v.* Leete, 16 Johns. (N. Y.) 122. See also Haran *v.* Stratton, 120 Ala. 145, 27 So. 648.

Limited covenant.— In an action of covenant broken on a quitclaim deed, containing only a covenant against encumbrances arising from or under the grantors, the declaration must aver the encumbrances complained of to have so arisen, or it will be bad on demurrer. Mayo *v.* Babcock, 40 Me. 142.

24. Kellogg *v.* Robinson, 6 Vt. 276, 27 Am. Dec. 550, to the effect that a declaration on a covenant against encumbrances, setting forth an encumbrance created by an ancient deed, is bad on demurrer if it does not connect the defendant's title with such deed.

25. Young *v.* Raincock, 7 C. B. 310, 13 Jur. 539, 18 L. J. C. P. 193, 62 E. C. L. 310; Proctor *v.* Newton, 2 Lev. 37; Skinner *v.* Kilbys, 1 Show. 70; Hodgson *v.* East India Co., 8 T. R. 278; Foster *v.* Pierson, 4 T. R. 617.

or for quiet enjoyment, in which it is sufficient if an eviction under a lawful and paramount title is clearly alleged, without entering into a particular description of such title.[26]

i. Amendment. A declaration counting upon one or more covenants may be amended by adding a count on another covenant.[27] So too a petition in an action for breach of warranty of title to land, which claims as the measure of the plaintiff's damages the value of the property to which title has failed, is amendable so as to make the damages claimed the purchase-price of the property.[28]

2. Subsequent Pleadings — a. Plea or Answer — (i) *In General.* Pleas and answers in actions for breach of covenant are governed by the same rules that regulate pleadings in actions generally.[29] Where the declaration or complaint

If the facts alleged show an actual encumbrance on the property at the date of the deed the complaint is sufficient. Sheetz *v.* Longlois, 69 Ind. 491. See also Brenen *v.* Kelly, 30 Misc. (N. Y.) 46, 61 N. Y. Suppl. 695.

Illustration.— A declaration setting forth a deed containing a covenant against encumbrances, in the usual form, and averring the existence of rights of way over the land described is sufficient upon general demurrer, without an accurate description of the location of the ways. Blake *v.* Everett, 1 Allen (Mass.) 248.

26. *Alabama.*— Prestwood *v.* McGowin, (1900) 29 So. 386.

Connecticut.—Giddings *v.* Canfield, 4 Conn. 482.

Georgia.— State Bank *v.* O'Neal, 100 Ga. 673, 28 S. E. 973.

Indiana.— Wilson *v.* Peelle, 78 Ind. 384.

Kentucky.— Jones *v.* Jones, 87 Ky. 82, 7 S. W. 886, 9 Ky. L. Rep. 942; Woodward *v.* Allan, 3 Dana 164; Patton *v.* Kennedy, 1 A. K. Marsh. 389, 10 Am. Dec. 744; Stephens *v.* Pattie, 3 Bibb 117; Bland *v.* Thomas, 3 S. W. 595, 8 Ky. L. Rep. 866.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Massachusetts.— Chapel *v.* Bull, 17 Mass. 213; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249; Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Pennsylvania.— Swenk *v.* Stout, 2 Yeates 470.

Texas.— Boyd *v.* Leith, (Civ. App. 1899) 50 S. W. 618.

Vermont.— Williams *v.* Wetherbee, 1 Aik. 233.

England.— Campbell *v.* Lewis, 3 B. & Ald. 392, 21 Rev. Rep. 520, 5 E. C. L. 230; Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287; Noble *v.* King, 1 H. Bl. 34; Nash *v.* Palmer, 5 M. & S. 374, 17 Rev. Rep. 364; Dudley *v.* Folliott, 3 T. R. 584, 1 Rev. Rep. 772.

See 14 Cent. Dig. tit. "Covenants," § 201.

Plaintiff must state in his declaration that the person evicting him had a lawful title paramount to the grantor's before, or at the time of, the date of the grant to plaintiff. Giddings *v.* Canfield, 4 Conn. 482. See also McCampbell *v.* Vastine, 10 Iowa 538; Jones *v.* Jones, 87 Ky. 83, 7 S. W. 886, 9 Ky. L. Rep. 942; Stephens *v.* Pattie, 3 Bibb (Ky.) 117; Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480; Webb *v.* Alexander, 7 Wend. (N. Y.) 281.

An averment that the paramount title was in fee simple is sufficient. Wilson *v.* Peelle, 78 Ind. 384.

If the covenantor have notice of the eviction suit, the declaration need not state that the recovery was by an elder and a better title. Swenk *v.* Stout, 2 Yeates (Pa.) 470.

It is not indispensably necessary to aver that a recovery constituting a breach of the covenant of warranty was by elder and better title. It is sufficient if it be averred to be by an elder and independent title which has prevailed. Williams *v.* Wetherbee, 1 Aik. (Vt.) 233. See also Smith *v.* McCampbell, 1 Blackf. (Ind.) 100.

It is not necessary to aver that the title to the land has been tried. To aver an eviction by paramount title is sufficient, and the superiority of the title will be tried in the action on the covenant. Patton *v.* Kennedy, 1 A. K. Marsh. (Ky.) 389, 10 Am. Dec. 744.

The nature of the paramount claim, and that it was such an encumbrance as the grantor by reason of his covenant of warranty was bound to discharge must be alleged. Bland *v.* Thomas, 3 S. W. 595, 8 Ky. L. Rep. 866.

27. Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95, in which, after the hearing of the evidence by the referee, an amendment was allowed adding a count on the covenant of warranty to counts on the covenants of seizin and of right to convey.

28. St. John *v.* Leyden, 111 Ga. 152, 36 S. E. 610.

29. See, generally, Pleading.

Abandonment of joint plea.— To a declaration upon a covenant executed on the dissolution of a partnership between plaintiff and defendants, where the defendants joined issue upon a joint plea to the merits, a subsequent plea, *puis darrein continuance,* by one of the defendants, was an abandonment by him of the former joint plea to the merits which would afterward stand as the several plea of the other defendant, to the same effect as if he had pleaded alone. Wheelock *v.* Rice, 1 Dougl. (Mich.) 267.

Affidavit of defense.— An action on a covenant, whereby the plaintiff and defendant agreed to exchange certain properties, all the

sets out particularly the facts constituting the breach, and the assignment shows a breach sufficient in law, the defendant must either confess and avoid or traverse the breach thus set out;[30] but where several breaches are assigned in an action, the defendant may plead to a part and demur to a part.[31] Except in the case of an ill-assigned breach, which need not be answered,[32] the plea or answer must be responsive to, and coextensive with, the whole declaration.[33] And a plea to the whole action must be good as to each breach.[34] Conversely immaterial and irrelevant allegations will be stricken out;[35] and the same is true of frivolous pleas.[36]

(II) *Plea by Way of Traverse.* In covenant there never was strictly speaking any plea of general issue, for the plea of *non est factum* only put the deed in issue, every material averment besides that of execution being admitted;[37]

arrearages for taxes and water-rents to be paid up to a certain days, in which the breach assigned was the failure to pay certain water-rents, is not within the affidavit of defense law. Allen *v.* Patton, 1 Wkly. Notes Cas. (Pa.) 614.

Amendment.— In an action for breach of covenant, the defendant may amend his plea by filing a bill in equity to reform the deed containing the covenant. McShane *v.* Main, 62 N. H. 4.

Conclusion.— The same plea cannot conclude indifferently to the country or with a verification. If it is a plea by way of traverse, it must conclude to the country; if by way of confession and avoidance, it must conclude with a verification. Wolfe *v.* Norris, 2 Speers (S. C.) 322.

30. Kellogg *v.* Ingersoll, 2 Mass. 97; De Long *v.* Spring Lake Beach Imp. Co., 67 N. J. L. 379, 51 Atl. 481.

31. Angell *v.* Kelsey, 1 Barb. (N. Y.) 16.

But where both pleas and demurrers cover the whole declaration the defendant must elect to rely upon his pleas or his demurrers. Angell *v.* Kelsey, 1 Barb. (N. Y.) 16.

32. Wait *v.* Maxwell, 4 Pick. (Mass.) 87.

33. *Alabama.*—Nesbitt *v.* McGehee, 26 Ala. 748. A plea denying that the plaintiff has lost the possession of the land, and averring that he still retains it, is good in bar of the action on a covenant of warranty. Griffin *v.* Reynolds, 17 Ala. 198.

Kentucky.— Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

Maryland.— Keefer *v.* Zimmerman, 22 Md. 274.

New York.— Traver *v.* Halsted, 23 Wend. 66; Macomb *v.* Thompson, 14 Johns. 207.

South Carolina.— Wolfe *v.* Norris, 2 Speers 322.

United States.— Fletcher *v.* Peck, 6 Cranch 87, 3 L. ed. 162.

See 14 Cent. Dig. tit. "Covenants," § 203.

A plea in an action on a covenant in the alternative showing performance of one part will be sufficient without a plea affording an answer to the other. Harmon *v.* Crook, 2 Yerg. (Tenn.) 127.

In an action on mutual covenants, where the plaintiff avers tender of performance on his part, the defendant must take issue on such averment, and cannot plead plaintiff's non-performance in bar. Traver *v.* Halsted, 23 Wend. (N. Y.) 66. Similarly where a declaration alleges performance on the part of the plaintiff and a failure of performance on the part of the defendant, a plea that the plaintiff has not performed and carried out his covenant as he agreed to do, and did not perform the work therein mentioned in a faithful and workmanlike manner, is bad on demurrer, in that it does not allege the respects wherein the performance was insufficient. Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

34. Muldrow *v.* McCleland, 1 Litt. (Ky.) 1; Breckenridge *v.* Lee, 3 Bibb (Ky.) 329.

35. Rhea *v.* Swain, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; Beach *v.* Barons, 13 Barb. (N. Y.) 305.

36. Hogencamp *v.* Ackerman, 24 N. J. L. 133.

37. *Illinois.*— King *v.* Sea, 6 Ill. App. 189.

Massachusetts.— Dorr *v.* Fenno, 12 Pick. 521.

New York.— Laraway *v.* Perkins, 10 N. Y. 371; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Gove *v.* Wooster, Lalor 30; Hebberd *v.* Delaplaine, 3 Hill 187; Goulding *v.* Hewitt, 2 Hill 644; Norman *v.* Wells, 17 Wend. 136; Cooper *v.* Watson, 10 Wend. 202; Legg *v.* Robinson, 7 Wend. 194; Barney *v.* Keith, 6 Wend. 555; Dale *v.* Roosevelt, 9 Cow. 307; McNeish *v.* Stewart, 7 Cow. 474; Thomas *v.* Woods, 4 Cow. 173; Kane *v.* Sanger, 14 Johns. 89; Gardner *v.* Gardner, 10 Johns. 47; Denton *v.* Bours, Anth. N. P. 241.

Ohio.— Courcier *v.* Graham, 1 Ohio 330.

South Carolina.— Mitchell *v.* De Graffenreid, Harp. 450.

See 14 Cent. Dig. tit. "Covenants," § 204.

Abandonment or non-performance by plaintiff.— Under the plea of *non est factum,* neither a mutual abandonment of the covenant nor the non-performance by the plaintiff of conditions precedent can be proved. Laraway *v.* Perkins, 10 N. Y. 371.

Illegality of consideration may be shown under the plea of *non est factum.* Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307.

Mutual mistake.— That all parties executing a deed did so by mistake, in consequence of the scrivener's having so drawn it that the covenants were inverted, is a good defense under the plea of *non est factum.* Gove *v.* Wooster, Lalor (N. Y.) 30.

In Illinois *non est factum* may be inter-

and a plea of *non infregit conventionem* was bad on demurrer, although it would be aided after verdict.[38] As a consequence all matters of defense should be specially pleaded.[39]

(III) *Plea by Way of Confession and Avoidance*—(A) *In General.* Pleas by way of confession and avoidance must confess the truth of the allegations which they purport to answer, and must explicitly state all facts necessary to constitute a lawful avoidance coextensive with the confession.[40]

posed without verification. Longley *v.* Norwall, 2 Ill. 389.

In Ohio, by statute, *non est factum* is a plea of the general issue in covenant, to which a notice of set-off may be appended. Granger *v.* Granger, 6 Ohio 35.

Variance.— Under the plea of *non est factum*, the defendant may on the trial avail himself of a variance in the statement of the deed, either in respect of a misstatement, or of the omission of a covenant, qualifying the contract (Treat *v.* Brush, 11 Mo. 310; Tempany *v.* Burnand, 4 Campb. 20; Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287; Pitt *v.* Green, 9 East 188); and this although the defendant has admitted the due execution of the deed (Goldie *v.* Shuttleworth, 1 Camph. 70); and if the plaintiff omit to state a condition precedent, the defendant may crave oyer and set out the deed and demur (Snell *v.* Snell, 4 B. & C. 741, 7 D. & R. 294, 4 L. J. K. B. O. S. 44, 10 E. C. L. 782). But if instead of demurring he pleads *non est factum*, he cannot object that there is a variance (Dorr *v.* Fenno, 12 Pick. (Mass.) 521; Henry *v.* Cleland, 14 Johns. (N. Y.) 400).

38. Roosevelt *v.* Fulton, 7 Cow. (N. Y.) 71; Davis *v.* Clayton, 5 N. Y. Leg. Obs. 100; Bender *v.* Fromberger, 4 Dall (Pa.) 436, 1 L. ed. 898; Randolph *v.* Meek, Mart. & Y. (Tenn.) 58; Taylor *v.* Needham, 2 Taunt. 279, 11 Rev. Rep. 572; Hodgson *v.* East India Co., 8 T. R. 278.

How pleaded.— The plea of *non infregit conventionem* is not a general issue, but must be pleaded in bar. Phelps *v.* Sawyer, 1 Aik. (Vt.) 150.

In covenant upon a warranty, in which one of the breaches assigned is that the defendant was not seized of a good estate in fee, etc., the plea of *non infregit conventionem*, etc., although it presents an informal issue, is still sufficient for the court to enter judgment on. Bender *v.* Fromberger, 4 Dall. (Pa.) 436, 1 L. ed. 898.

The plea admits the deed, but denies the breaches, and puts in issue all such matters as show that the covenant is not broken or that defendant was never under any obligation to fulfil the covenant declared on. Roosevelt *v.* Fulton, 7 Cow. (N. Y.) 71.

Where a breach is assigned in the negative, *non infregit conventionem* is not an issuable plea. Boone *v.* Eyre, 2 W. Bl. 1312, 1 H. Bl. 273, note *a*. See also Hodgson *v.* East India Co., 8 T. R. 278.

39. 1 Chitty Pl. (10th Am. ed.) 487. And see, generally, Pleading.

40. See Pleading; and, generally, the following cases:

Arkansas.—Worthington *v.* Curd, 15 Ark. 491; Newton *v.* Mire, 14 Ark. 166.

Indiana.— Dowell *v.* Caffron, 68 Ind. 196.

Kentucky.— Brady *v.* Peck, 99 Ky. 42, 34 S. W. 906, 35 S. W. 623, 17 Ky. L. Rep. 1356; King *v.* McLean, 1 J. J. Marsh. 32.

New Hampshire.— Foster *v.* Foster, 62 N. H. 532.

New York.— Gelston *v.* Burr, 11 Johns. 482.

Tennessee.— Whitesides *v.* Caldwell, 9 Yerg. 421.

Texas.— Simpson *v.* Belvin, 37 Tex. 674.

United States.— Montgomery *v.* Northern Pac. R. Co., 67 Fed. 445.

See 14 Cent. Dig. tit. "Covenants," § 205.

Accord and satisfaction is a good plea to an action for a breach of covenant against encumbrances (Jenkins *v.* Hopkins, 9 Pick. (Mass.) 543); but a plea that the defendant was surety in the covenant sued on, and that judgment had been rendered against his principal, and execution issued and levied on property, without any allegation of satisfaction, is not a good plea (Botts *v.* Fitzpatrick, 5 B. Mon. (Ky.) 397).

De son tort.— A plea setting forth that if plaintiff had been damnified it was of his own wrong, and through his own act, means, and default, without specifying what act or wrong, is bad on demurrer. Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

Failure of consideration.— In an action on a covenant of warranty in a deed, an answer alleging failure of consideration is sufficient. Thomas *v.* Hamilton, 71 Ind. 277.

Fraudulent misrepresentations.— A special plea alleging that the deed on which plaintiff relies was procured by fraudulent misrepresentations should set forth the facts or special circumstances of the fraud with sufficient precision and certainty to apprise the plaintiff of the character of the defense intended to be maintained, and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief. Burtners *v.* Keran, 24 Gratt. (Va.) 42.

Non-performance of condition by plaintiff. — Defendant cannot plead generally that there is in the covenant a condition precedent to be performed by plaintiff before he can maintain his action, but he must set out specially the condition, with the time and manner at and in which it was to be performed, and aver that he is ready and willing to perform his part of the covenant. McLaughlin *v.* Hutchins, 3 Ark. 207.

Pleading proviso or exception.— Where a contract is subject to a proviso or exception, the defendant must plead the proviso or exception in order to avail himself thereof, if

(B) *Covenants Performed.* Where all the covenants are in the affirmative, covenants performed, or a tender of performance, may be pleaded.[41] If, however, the covenantor does not stipulate to do anything, but only warrants a fact to exist at the time of making the warranty, covenants performed is not an issuable plea.[42] So too where the plaintiff assigns particular breaches, the defendant should not plead general performance, but should plead separately to each breach.[43] The plea admits the covenant as set out in the declaration,[44] and that the adverse party

it is not contained in the body of the covenant itself, but in a separate clause of the contract. Consolidated Coal Co. *v.* Mexico Fire-Brick Co., 66 Mo. App. 296.

When a covenant is in the alternative, it is no answer, in an action thereon, to render an excuse for not performing one part of the alternative. Harmon *v.* Crook, 2 Yerg. (Tenn.) 127.

41. Bailey *v.* Rogers, 1 Me. 186; Taylor *v.* Browder, 1 Ohio St. 225; Johnson *v.* Clay, 1 Moore C. P. 200, 7 Taunt. 486, 2 E. C. L. 459.

How pleaded.— Performance pleaded otherwise than in the terms of the covenant is bad, even on general demurrer. Scudamore *v.* Stratton, 1 B. & P. 455.

Negative covenant.— General performance, without averring how performed, cannot be pleaded to a negative covenant (Hogencamp *v.* Ackerman, 24 N. J. L. 133); but the mere occurrence of negative words does not make the covenant negative, if they are in affirmance of a preceding affirmative; or if the whole clause taken together is essentially affirmative (Bailey *v.* Rogers, 1 Me. 186).

Performance of conditions.— "The general rule as to the mode of pleading the performance of conditions of covenants is that the party must not plead generally that he performed a covenant or condition, but must show specially the time, place, and manner of performance, and even though the subject to be performed should consist of several different acts, yet he must show the performance of each." Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 437, 23 S. E. 737 [*quoting* 4 Minor Inst. (3d ed.) 1202]. See also Dickinson *v.* Burr, 7 Ark. 34.

Tender.— Buckmaster *v.* Grundy, 2 Ill. 310 (to the effect that a plea of readiness to perform, without averring an offer of performance, is bad); Harris *v.* Campbell, 4 Dana (Ky.) 586 (to the effect that in an action on a covenant that another person will fulfil his agreement to pay, etc., a plea that such person did tender according to his agreement is good, without repeating the tender). *Compare* McCormick *v.* Crall, 6 Watts (Pa.) 207, to the effect that under the plea of covenants performed a tender before suit brought may be given in evidence.

Conclusion.—When, in an action on a covenant, a material breach is averred in the declaration, a plea denying the charge and alleging general performance should conclude to the country. Star Brick Co. *v.* Ridsdale, 34 N. J. L. 428. See also Overton *v.* Crabb, 4 Hayw. (Tenn.) 109.

Defect cured by verdict.— See McCoy *v.* Martin, 4 Dana (Ky.) 580.

Double and inconsistent plea.— A plea alleging performance on the part of the defendant and non-performance by the plaintiff of any part of his covenants, although his covenants were conditions precedent, is both double and inconsistent. Witter *v.* McNiel, 4 Ill. 433.

Leave to withdraw.— The court will give the defendant leave to withdraw the plea of covenants performed, and to file a special plea, if it appear to be a plea to the merits and not decidedly bad, leaving the plaintiff to his demurrer. Gill *v.* Patten, 10 Fed. Cas. No. 5,427, 1 Cranch C. C. 114.

42. Bird *v.* Smith, 8 Ark. 368; Champ *v.* Ardery, 2 A. K. Marsh. (Ky.) 246.

In an action for breach of covenant of seizin, the defendant should in his plea regularly maintain his seizin, and the plaintiff in his replication should aver who in fact was seized. Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61. See also Wilford *v.* Rose, 2 Root (Conn.) 14.

43. *Kentucky.*—Com. *v.* Gower, 4 Litt. 279.

Maryland.— Marshall *v.* Haney, 9 Gill 251.

New York.— Beach *v.* Barons, 13 Barb. 305; Bradley *v.* Osterhoudt, 13 Johns. 404.

Rhode Island.— Snow *v.* Horgan, 18 R. I. 289, 27 Atl. 338; Almy *v.* Greene, 13 R. I. 350.

United States.— Simonton *v.* Winter, 5 Pet. 141, 8 L. ed. 75.

"Issue cannot be taken on a general plea of performance; and the plaintiff, if driven to reply, would be obliged to repeat his declaration. When a particular breach is assigned, the defendant has an affirmative offered upon which he may take issue." Simonton *v.* Winter, 5 Pet. (U. S.) 141, 149, 8 L. ed. 75.

44. *Alabama.*— Batre *v.* Simpson, 4 Ala. 305; Bryant *v.* Simpson, 3 Stew. 339; Wainright *v.* Townsley, 1 Stew. 29.

Pennsylvania.— Zents *v.* Legnard, 70 Pa. St. 192; Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303.

Tennessee.— Kincaid *v.* Brittain, 5 Sneed 119; Steele *v.* McKinnie, 5 Yerg. 449.

West Virginia.— Riddle *v.* Core, 21 W. Va. 530.

United States.—Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. ed. 200.

Covenants performed, "with leave," etc.— In Pennsylvania, under the plea of "covenants performed," with leave to give in evidence everything that amounts to a legal defense, the defendant may prove any matter that he

has performed his agreement.[45] It can only be supported by evidence which shows that the defendant has performed his covenant, and not by evidence excusing his non-performance thereof.[46] But where it appears on the face of the covenant as set out in the declaration that the defendant is not personally bound, he may take advantage of it after verdict on a plea of covenants performed.[47]

b. Demurrer. The general rules of pleading governing demurrers in actions generally are applicable in actions for breach of covenant.[48]

c. Replication. When the plea has introduced new matter, and the plaintiff does not demur, the replication must then either insist that the defendant could not so plead by showing matter of estoppel,[49] or traverse or deny the truth of the matter alleged in the plea, either in whole or in part;[50] or confess and avoid the plea;[51] or in case of an evasive plea newly assign the cause of action.[52] The replication must in all cases conform to the declaration,[53] but if a replication is good as to either of the breaches assigned in the declaration and answered by the plea, it will be upheld on demurrer.[54]

might have pleaded, without giving notice of such matter, unless called for. Webster *v.* Warren, 29 Fed. Cas. No. 17,339, 2 Wash. 456.

Notice of special matter.— Under a plea of covenants performed, with notice of special matter, an equitable defense may be given in evidence. Beadle *v.* Hopkins, 3 Cai. (N. Y.) 150, Col. & C. (N. Y.) 485.

45. Batre *v.* Simpson, 4 Ala. 305; Bryant *v.* Simpson, 3 Stew. (Ala.) 339; Zents *v.* Legnard, 70 Pa. St. 192; Ellmaker *v.* Franklin F. Ins. Co., 5 Pa. St. 183. *Contra,* Barnett *v.* Crutcher, 3 Bibb (Ky.) 202; Roth *v.* Miller, 15 Serg. & R. (Pa.) 100; Neave *v.* Jenkins, 2 Yeates (Pa.) 107; Fenwick *v.* McMurdo, 2 Munf. (Va.) 244.

The addition of "absque hoc," etc., to the plea of "covenants performed," in an action upon mutual covenants, will put the plaintiff to proof of performance on his part. Morton *v.* Hammon, 8 Pa. St. 270. Such a plea is a negative plea, at least, the words "*absque hoc,*" or "without this," introducing a negative after an affirmative inducement (Smith *v.* Frazer, 53 Pa. St. 226); but it does not put in issue the execution of the instrument declared on (Farmers', etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303).

Where a declaration alleges full performance by plaintiff, evidence is admissible that plaintiff was prevented from performing by defendants, as an excuse for non-performance tantamount to performance. Huntingdon, etc., R. Co. *v.* McGovern, 29 Pa. St. 78.

46. Stone *v.* Dennis, 3 Port. (Ala.) 231; Aldridge *v.* Warner, 2 Port. (Ala.) 92; Rangler *v.* Morton, 4 Watts (Pa.) 265; Chewning *v.* Wilkinson, 95 Va. 667, 29 S. E. 680; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185.

47. Jordan *v.* Trice, 6 Yerg. (Tenn.) 479.

48. See PLEADING; and, generally, the following cases:

Alabama.— Fitzpatrick *v.* Hanrick, 11 Ala. 783.

Illinois.— Reeves *v.* Forman, 26 Ill. 313.

Iowa.— McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093.

New Jersey.— De Long *v.* Spring Lake Beach Imp. Co., 67 N. J. L. 379, 51 Atl. 481.

South Carolina.— Rantin *v.* Robertson, 2 Strobh. 366.

Tennessee.— Harmon *v.* Crook, 2 Yerg. 127.

See 14 Cent. Dig. tit. "Covenants," § 207.

If one breach is well assigned, in a declaration for breach of covenant, a general demurrer will not be sustained. Taylor *v.* Pope, 3 Ala. 190; Brown *v.* Tomlinson, 2 Greene (Iowa) 525; Kellar *v.* Beeler, 4 J. J. Marsh. (Ky.) 655; McCoy *v.* Hill, 2 Litt. (Ky.) 372; Gill *v.* Stebbins, 10 Fed. Cas. No. 5,431, 2 Paine 417.

If the breach is not well assigned the defendant is entitled to judgment, although his plea is bad. Kellogg *v.* Ingersoll, 2 Mass. 97.

49. See, generally, ESTOPPEL.

50. Traverse.— Gelston *v.* Burr, 11 Johns. (N. Y.) 482.

A general replication de injuria is admissible in an action for breach of covenant. Thus to a plea of leave and license to a count for breach of covenant *de injuria* may be pleaded. Douglass *v.* Hoppaugh, 46 N. J. L. 114.

Where plaintiff alleges that defendant was not seized, and defendant pleads that he was seized, and plaintiff replies that he was not seized because one B was seized of part of the premises, it is a good assignment of a breach. Sedgwick *v.* Hollenback, 7 Johns. (N. Y.) 376. See also Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

51. Somerville *v.* Jones, 1 Stew. (Ala.) 345; Wolcott *v.* Dwight, 2 Day (Conn.) 405; Gelston *v.* Burr, 11 Johns. (N. Y.) 482.

Pleading conditions.— The defendant need not plead more of a deed than makes for him. If the plaintiff relies on conditions, he must plead them by way of replication. Denton *v.* Bours, Anth. N. P. (N. Y.) 241.

52. See, generally, PLEADING.

53. Departure.— Where the declaration on a covenant alleges an agreement by plaintiff to give defendant good title on a certain day, and averred performance, and the replication alleges reasons why title was not given, there is a departure. Burk *v.* Bear, 3 Pa. L. J. Rep. 355, 5 Pa. L. J. 304.

54. Beach *v.* Barons, 13 Barb. (N. Y.) 305.

d. Rejoinder. The rules of pleading applicable to the plea in actions for breach of covenant are applicable, except in respect to singleness of issue, to the rejoinder. It must, however, support and not depart from the plea.[55]

3. Issues, Proof, and Variance — a. Issues and Proof. As in other actions the proof in actions for breach of covenant must be confined to the issues made by the pleadings.[56] Under the general issue, so called, that is, a general denial of liability on the covenant, the defendant may introduce in evidence special facts showing that he is not liable,[57] and whatever may be shown under such issue should not be pleaded specially.[58] Where the facts alleged in a declaration may constitute a breach of either of several covenants, the plaintiff is not, upon such a case being shown, required to elect upon which covenant he will seek a recovery.[59] But on the other hand, where two counts of a declaration are contradictory, a recovery cannot be had under both, since the cause of action set out in one would constitute a complete defense to that set out in the other.[60]

b. Variance. A material variance between the allegations and the proof in actions for breach of covenant is fatal.[61]

55. 1 Chitty Pl. (10th Am. ed.) 651. See also Church *v.* Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82.

56. Miles *v.* Ringo, 13 Ark. 229; Hacker *v.* Storer, 8 Me. 228; Clark *v.* Post, 113 N. Y. 17, 20 N. E. 573; Gleason *v.* McVickar, 7 Cow. (N. Y.) 42.

As to issues and proof under non est factum see *supra*, IV, D, 2, a, (II).

As to issues and proof under non infregit conventionem see *supra*, IV, D, 2, a, (II).

As to issues and proof under covenants performed see *supra*, IV, D, 2, a, (III), (B).

Fraud in the covenantor's failure to convey may be proved under a general averment of non-performance of a covenant to convey land. Goff *v.* Hawks, 5 J. J. Marsh. (Ky.) 341.

In an action on the covenant of warranty it is not necessary to prove a technical eviction, but the action may be maintained, if the plaintiff proves that the premises were in the actual possession of another under paramount title at the date of conveyance. Nor will the recital in the deed that "immediate possession is delivered," and the failure to allege an eviction, estop the covenantee from denying that he got possession. Sheffey *v.* Gardiner, 79 Va. 313. See also Shell *v.* Evans, 7 Ohio S. & C. Pl. Dec. 501, 6 Ohio N. P. 230. And see Burton *v.* Reeds, 20 Ind. 87.

Production of deed.— In an action for a breach of the covenants in a deed of conveyance, any plea in bar negativing the breach assigned admits the conveyance and the covenants declared on, and the deed need not be produced in evidence. Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Proof of execution.— In an action on a covenant of warranty contained in a deed not recorded, it is not necessary to prove the execution of the deed unless the defendant puts the execution of the deed in issue. Patton *v.* Kennedy, 1 A. K. Marsh. (Ky.) 389, 10 Am. Dec. 744.

Proof of measures to complete title.— Where the issue joined is on the title of the defendant, the plaintiff need not show that he took any measures to complete the title that he purchased of the defendant. Clarke *v.* McAnulty, 3 Serg. & R. (Pa.) 364.

Proof of title.— After alleging that defendant took title to land in trust for a partnership of which plaintiff was a member, an allegation that plaintiff had acquired title and is now owner is sufficient to admit proof of his title from the firm. Rogers *v.* Golson, (Tex. Civ. App. 1895) 31 S. W. 200.

To sustain an action for breach of a covenant for quiet enjoyment it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title existing before or at the time of the defendant's covenant, as the covenant for quiet enjoyment applies only to the acts of those claiming title and to rights existing at the time it is entered into. Knapp *v.* Marlboro, 34 Vt. 235.

57. Briggs *v.* Morse, 42 Conn. 258.

But illegality of consideration must be specially pleaded, and cannot be proved under the general issue. Stannard *v.* McCarty, Morr. (Iowa) 124.

58. Patrick *v.* Leach, 2 Fed. 120, 1 McCrary 250.

59. Bruns *v.* Schreiber, 48 Minn. 366, 51 N. W. 120.

60. Capen *v.* Stevens, 29 Mich. 496.

61. For instances of material variances see the following cases:

Alabama.—Horan *v.* Stratton, 120 Ala. 145, 27 So. 648.

Connecticut.—Bishop *v.* Quintard, 18 Conn. 395.

Illinois.— Dugger *v.* Oglesby, 3 Ill. App. 94.

Kansas.— Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. 596.

Michigan.— Shafer *v.* Wiseman, 47 Mich. 63, 10 N. W. 104; Long *v.* Sinclair, 38 Mich. 90.

Missouri.— Treat *v.* Brush, 11 Mo. 310.

New York.— Glover *v.* Tuck, 1 Hill 66.

Pennsylvania.—Clarke *v.* McAnulty, 3 Serg. & R. 364.

England.— Whyte *v.* Burnby, 16 L. J. Q. B. 156.

E. Evidence[62] — **1. Presumptions and Burden of Proof — a. Presumptions.** From long-continued possession of the premises in controversy,[63] from long-continued, peaceable, notorious, adverse, and uninterrupted enjoyment of an easement,[64] or from the purchase of a paramount title by the plaintiff,[65] there are certain presumptions which may arise. So also as to the consideration for a covenant,[66] as to the surrender of the premises,[67] as to notice of entry,[68] and as to the possession of uncultivated land[69] the law may raise certain presumptions.

b. Burden of Proof. As in other actions, so in actions for breach of covenant, the burden of proof rests upon the party holding the affirmative of the issue,[70] who is in most instances the plaintiff.[71] The form of the pleadings may, how-

See 14 Cent. Dig. tit. "Covenants," § 210.

For instances in which there was held to be no variance see the following cases:

Connecticut.— Bishop *v.* Quintard, 18 Conn. 395.

Georgia.— Water Lot Co. *v.* Leonard, 30 Ga. 560.

Illinois.— Stark *v.* Ratcliff, 111 Ill. 75.

Michigan.— Hovey *v.* Smith, 22 Mich. 170.

Mississippi.— Wise *v.* Hyatt, 68 Miss. 714, 10 So. 37.

New Hampshire.— Nutting *v.* Herbert, 35 N. H. 120.

See 14 Cent. Dig. tit. "Covenants," § 210.

Immaterial variances.— If a declaration alleges a covenant to have been made by the defendant, his heirs, executors, and administrators, the variance is not material, although the covenant does not mention heirs. Jordan *v.* Cooper, 3 Serg. & R. (Pa.) 564. So too in an action on a covenant against encumbrances, where the breach assigned is an outstanding tax, and a sale therefor, a variance between the description of the premises contained in the deed and that contained in the assessment roll is immaterial, provided the land is accurately described in each, although by different words. Mitchell *v.* Pillsbury, 5 Wis. 407.

The special breach assigned in an action for breach of covenant of warranty must be proved. Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. 596.

Words of agreement.— If the consideration of a covenant is set forth in the declaration in the words of the agreement containing the covenant there can be no variance. Smith *v.* Edmunds, 16 Vt. 687.

62. See, generally, Evidence.

63. Arising from long-continued possession. — Where the plaintiff and his grantors have been in possession of the premises in controversy for a long period of time, and he is then evicted by a third person, such long-continued possession raises a conclusive presumption that he was not evicted by title paramount. Knapp *v.* Marlboro, 34 Vt. 235.

64. After long-continued, peaceable, notorious, adverse, continuous, and uninterrupted enjoyment of an easement, the law will presume such a contract as to constitute a covenant running with the land. Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

65. Arising from purchase of paramount title.—Where, in a suit brought for breach of warranty, it appears that the plaintiff had been in possession for five years under a deed containing a warranty of title, and was then evicted by the holder of a paramount title, and that within a year after such eviction he bought in such paramount title, it will be presumed that the mesne profits accruing during such five years were a part of the consideration for the purchase. Harding *v.* Larkin, 41 Ill. 413.

66. As to consideration.— Where, in a suit for breach of covenant, it appears that the grantor first executed a quitclaim deed, and afterward, at the request of the grantee, who had taken possession under the quitclaim deed, the grantor gave a warranty deed, it will not be presumed that the covenant was without consideration. Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336.

67. As to surrender.— Where there is a judgment of eviction, and the premises are unoccupied by the plaintiff or his tenant, and are vacant, the jury are authorized to presume that he has surrendered them to the rightful owner. Burton *v.* Reeds, 20 Ind. 87 [*citing* Fowler *v.* Poling, 6 Barb. (N. Y.) 165; Greenvault *v.* Davis, 4 Hill (N. Y.) 643; Williams *v.* Wetherbee, 1 Aik. (Vt.) 233; Drury *v.* Shumway, 1 D. Chipm. (Vt.) 110, 1 Am. Dec. 729].

68. As to notice of entry.— Where the plaintiff in an action has averred and proved that an entry was made to evict him under paramount title, it is unnecessary to prove that notice of the entry was given by the one entering to the plaintiff, since it will be presumed that he had knowledge of such entry before action brought. Burrage *v.* Smith, 16 Pick. (Mass.) 56.

69. As to possession of uncultivated land. —Although there may be no evidence that the possession of uncultivated land was in the vendor, who sells by courses and distances, in an action by the vendee on his warranty, it will be presumed that the same possession was given which usually follows a conveyance of such land. Steiner *v.* Baughman, 12 Pa. St. 106.

70. Right to open and close.— In covenant upon an issue, the party who holds the affirmative of the issue has the right to open and close the argument to the jury. Beall *v.* Newton, 2 Fed. Cas. No. 1,164, 1 Cranch C. C. 404.

71. *Alabama.*—Bryant *v.* Simpson, 3 Stew. 339.

ever, cast the burden upon the defendant.[72] Thus, by pleading title in himself at the execution of a deed containing a covenant of seizin, or probably of good right to convey, the defendant, under the common-law system of pleading, assumes the burden of proving such title.[73] But in some of the code states the reasons that gave rise to the common-law rule are held to be inapplicable, and the burden is on the plaintiff to show wherein the defendant's title was defective.[74] And in all cases where the plaintiff has voluntarily yielded without suit to an outstanding title or claim, the burden is upon him to show that such outstanding title or claim was in fact paramount;[75] and the same is true where the plaintiff

Iowa.— Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511; Fawcett *v.* Woods, 5 Iowa 400.

Maine.— Sawtelle *v.* Sawtelle, 34 Me. 228.

Massachusetts.— Lathrop *v.* Grosvenor, 10 Gray 52.

New Jersey.— Hartshorn *v.* Cleveland, 52 N. J. L. 473, 19 Atl. 974 [*affirmed* in 54 N. J. L. 391, 25 Atl. 963]; Hemsley *v.* Marlborough Hotel Co., 62 N. J. Eq. 164, 50 Atl. 14.

Pennsylvania.— Stewart *v.* Bedell, 79 Pa. St. 336; Smith *v.* Frazier, 53 Pa. St. 226; Martin *v.* Hammon, 8 Pa. St. 270.

Texas.— Hynes *v.* Packard, (Sup. 1898) 45 S. W. 562 [*reversing* (Civ. App. 1897) 44 S. W. 548].

See 14 Cent. Dig. tit. "Covenants," § 212.

In Pennsylvania the usual mode of putting a plaintiff to proof of performance [of mutual covenants] is by the addition of *absque hoc*, etc., to the plea of covenants performed. Martin *v.* Hammon, 8 Pa. St. 270. This is a negative plea in part at least. It is what is usually denominated a special technical traverse, the words "*absque hoc*," or "without this," introducing a negation after an affirmative inducement. Smith *v.* Frazier, 53 Pa. St. 226. The affirmative plea under such circumstances is pregnant with a negative and casts the proof of the breach on the plaintiff. Stewart *v.* Bedell, 79 Pa. St. 336.

72. See Kane *v.* Sanger, 14 Johns. (N. Y.) 89, where it was held that where *non est factum* is the only plea in an action for breach of covenant for quiet enjoyment, no question arises as to the eviction, and that if notice is given with such plea, the defendant, upon denying the eviction, must prove that there was none.

73. *Illinois.*— Baker *v.* Hunt, 40 Ill. 264, 89 Am. Dec. 346. See also Owen *v.* Thomas, 33 Ill. 320.

Iowa.— Boon *v.* McHenry, 55 Iowa 202, 7 N. W. 503; Barker *v.* Kuhn, 38 Iowa 392; Blackshire *v.* Iowa Homestead Co., 39 Iowa 624; Schofield *v.* Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 197; Swafford *v.* Whipple, 3 Greene 261, 54 Am. Dec. 248.

Massachusetts.— Bacon *v.* Lincoln, 4 Cush. 210, 50 Am. Dec. 765; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Michigan.— Ingalls *v.* Eaton, 25 Mich. 32.

Missouri.— Evans *v.* Fulton, 134 Mo. 653, 36 S. W. 230; Cockrell *v.* Proctor, 65 Mo. 41; Bircher *v.* Watkins, 13 Mo. 521.

New York.—Abbott *v.* Allen, 14 Johns. 248 [*overruled* in Woolley *v.* Newcombe, 87 N. Y. 605].

Wisconsin.— Beckmann *v.* Henn, 17 Wis. 412; Mecklem *v.* Blake, 16 Wis. 102, 82 Am. Dec. 707.

United States.— Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666.

England.— See Hancock *v.* Field, Cro. Jac. 170.

See 14 Cent. Dig. tit. "Covenants," § 214.

Contra.— See Wilford *v.* Rose, 2 Root (Conn.) 14, where it was held that the plaintiff must show not only that the defendant was not seized, but who was. This seems, however, to have been due to the form in which the declaration was drawn.

The reason of the rule is fairly enough pointed out in Mecklen *v.* Blake, 16 Wis. 102, 103, in which the court says: "The general rule is familiar to every lawyer that the burden of proving any fact lies upon the party who substantially asserts the affirmative of the issue." See also Woolley *v.* Newcombe, 87 N. Y. 605.

Negative plea.— Where the plea, instead of averring performance of the covenant of seizin, avers that the defendant "has not broken his covenants," and the plaintiff by his joinder avers that he has, the plaintiff assumes the burden of proving the breach. Montgomery *v.* Reed, 69 Me. 510 [*citing* Boothby *v.* Hathaway, 20 Me. 251]; Bacon *v.* Lincoln, 4 Cush. (Mass.) 210, 50 Am. Dec. 705. And see Swafford *v.* Whipple, 3 Greene (Iowa) 261, 54 Am. Dec. 498.

74. *Colorado.*— Tierney *v.* Whiting, 2 Colo. 620; Landt *v.* Major, 2 Colo. App. 551, 31 Pac. 524.

Georgia.— Osburn *v.* Pritchard, 104 Ga. 145, 30 S. E. 656.

Indiana.— Wine *v.* Woods, 158 Ind. 388, 63 N. E. 759; Hamilton *v.* Shoaff, 99 Ind. 63.

Michigan.— Peck *v.* Houghtaling, 35 Mich. 127; Ingalls *v.* Eaton, 25 Mich. 32.

New York.— Woolley *v.* Newcombe, 87 N. Y. 605 [*overruling* Potter *v.* Kitchen, 5 Bosw. 566]; Zarkowski *v.* Schroeder, 71 N. Y. App. Div. 526, 75 N. Y. Suppl. 1021; Stearn *v.* Hesdorfer, 9 Misc. 134, 29 N. Y. Suppl. 281; Abbott *v.* Allen, 14 Johns. 248.

South Dakota.— Zerfing *v.* Seelig, 14 S. D. 303, 85 N. W. 585 [*affirming* 12 S. D. 85, 80 N. W. 140].

See 14 Cent. Dig. tit. "Covenants," § 212 *et seq.*

75. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Davenport *v.* Bartlett, 9 Ala. 179; Dupuy *v.* Roebuck, 7 Ala. 484.

Georgia.— Taylor *v.* Stewart, 54 Ga. 81.

Illinois.— Moore *v.* Vail, 17 Ill. 185.

fails to notify his covenantor of the assertion of an adverse action under title paramount.[76]

2. ADMISSIBILITY IN GENERAL — a. Relevant and Material Facts. Evidence which has a legitimate tendency to satisfy the jury that the covenant was or was not broken, or which may be material upon the question of damages, is admissible, and its exclusion is error.[77] Evidence that is immaterial or irrelevant as to either of these questions is of course inadmissible.[78]

b. Res Gestæ. All the circumstances surrounding and explanatory of the transaction between the parties may be given in evidence as part of the *res gestæ*.[79]

c. Documentary Evidence. Unless admitted by the pleadings,[80] the instrument containing the covenant alleged to have been broken is always admissible in evidence;[81] and it is immaterial that it may in its terms vary in some measure from

Indiana.— Kirkpatrick *v.* Pearce, 107 Ind. 520, 8 N. E. 573; Morgan *v.* Muldoon, 82 Ind. 347; Sheetz *v.* Longlois, 69 Ind. 491; Crance *v.* Collenbaugh, 47 Ind. 256; Barker *v.* Hobbs, 6 Ind. 385.

Iowa.— Thomas *v.* Stickle, 32 Iowa 71; Brandt *v.* Foster, 5 Iowa 287.

Kansas.— Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. 596.

Louisiana.— Kemp *v.* Kemp, 2 La. 240.

Massachusetts.—Hamilton *v.* Cutts, 4 Mass. 349, 3 Am. Dec. 222.

Missouri.— Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284; Morgan *v.* Hannibal, etc., Ore Co., 63 Mo. 129; Duffy *v.* Sharp, 73 Mo. App. 316.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479; Snyder *v.* Jennings, 15 Nebr. 372, 14 N. W. 501.

New York.— Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212; Greenvault *v.* Davis, 4 Hill 643; Stone *v.* Hooker, 9 Cow. 154.

Oregon.— Brown *v.* Corson, 16 Oreg. 388, 19 Pac. 66, 21 Pac. 47.

Tennessee.— Robinson *v.* Bierce, 102 Tenn. 428, 52 S. W. 992, 47 L. R. A. 275; Callis *v.* Cogbill, 9 Lea 137; Greenlaw *v.* Williams, 2 Lea 533.

Texas.— Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623; Clark *v.* Mumford, 62 Tex. 531; Westrope *v.* Chambers, 51 Tex. 178; Peck *v.* Hensley, 20 Tex. 673; Witte *v.* Pigott, (Civ. App. 1900) 55 S. W. 753; Parker *v.* Lindsay, (Civ. App. 1896) 37 S. W. 482.

Vermont.— Turner *v.* Goodrich, 26 Vt. 707.

See 14 Cent. Dig. tit. "Covenants," § 215.

76. Sisk *v.* Woodruff, 15 Ill. 15; Walton *v.* Cox, 67 Ind. 164; Ryerson *v.* Chapman, 66 Me. 557.

77. *Alabama.*—Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136.

Arkansas.—Alexander *v.* Bridgford, 59 Ark. 195, 27 S. W. 69.

Connecticut.— Cooke *v.* Barr, 39 Conn. 296.

Indiana.— Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645; Toledo, etc., R. Co. *v.* Cosand, 6 Ind. App. 222, 33 N. E. 251.

Kentucky.— Younger *v.* Givens, 6 Dana 1; Louisville Public Warehouse Co. *v.* James, 70 S. W. 1046, 24 Ky. L. Rep. 1266.

New York.— Charman *v.* Hibbler, 31 N. Y. App. Div. 477, 52 N. Y. Suppl. 212; Lytle *v.* Erwin, 26 How. Pr. 491.

Pennsylvania.— Collingwood *v.* Irwin, 3 Watts 306; Hough *v.* Trouts, 2 Penr. & W. 198; Leather *v.* Poultney, 4 Binn. 352.

South Dakota.— Zerfing *v.* Seelig, 14 S. D. 303, 85 N. W. 585 [*affirming* 12 S. D. 25, 80 N. W. 140].

Tennessee.— Fonville *v.* Simms, Cooke 273.

Vermont.— Beardsley *v.* Knight, 4 Vt. 471.

See 14 Cent. Dig. tit. "Covenants," § 216.

Evidence of the value of real estate, in an action for breach of a covenant of warranty on the sale thereof, is confined to its value at the time of the conveyance, and evidence of its value at the time of trial is inadmissible. Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645. *Compare* Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136.

Opinion evidence.— See Rowland *v.* Carmichael, 77 Ga. 350; Stambaugh *v.* Smith, 23 Ohio St. 584.

In an action on a special warranty by the grantor against himself and his heirs and all persons claiming by, from, and under him or them, the covenantee, as evidence of his eviction by one claiming through the covenantor, may show by the trial judge what was given in evidence in the ejectment suit, which resulted in his eviction. Leather *v.* Poultney, 4 Binn. (Pa.) 352.

78. *Illinois.*— Cleveland, etc., R. Co. *v.* Mitchell, 74 Ill. App. 602.

Kentucky.— James *v.* Louisville Public Warehouse Co., 64 S. W. 966, 23 Ky. L. Rep. 1216.

Missouri.— Henderson *v.* Henderson, 13 Mo. 151.

New York.— Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17.

Wisconsin.— Kyle *v.* Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866.

See 14 Cent. Dig. tit. "Covenants," § 216.

79. Clark *v.* Whitehead, 47 Ga. 516; Morehouse *v.* Heath, 99 Ind. 509; Bellows *v.* Litchfield, 83 Iowa 36, 48 N. W. 1062; Smith *v.* Lloyd, 29 Mich. 382.

80. If the pleas acknowledge the execution of the covenant or allege excuse for non-performance, it is not error to exclude the covenant itself from the jury. Curl *v.* Mann, 4 Mo. 272.

81. White *v.* Presly, 54 Miss. 313; Williams *v.* Wetherbee, 2 Aik. (Vt.) 329. But

the allegations of the declaration.[82] So too the papers showing the creation of the encumbrance or adverse title alleged as a breach of the covenant are admissible.[83]

d. Parol or Extrinsic Evidence. Parol or extrinsic evidence is not admissible to contradict, vary, or materially affect a covenant,[84] although it may be received to show fraud or mutual mistake in the original execution of the instrument,[85] or to explain a patent ambiguity.[86] So too performance[87] or eviction[88] may be shown by parol, as may any collateral or incidental matters;[89] and in some jurisdictions it is held permissible to show by parol evidence that land was taken subject to a known encumbrance,[90] or that the covenantee agreed, as part of the

see Prestwood *v.* McGowin, 128 Ala. 277, 29 So. 386, 86 Am. St. Rep. 136, where it was held that in an action for breach of covenants of seizin and of warranty, a deed containing such covenants is not admissible in evidence when a part of the plaintiffs in the case are not entitled to sue on the covenants, and are not grantees or parties in the deed.

The chain of title must, however, be proved. Blodgett *v.* McMurtry, 54 Nebr. 69, 74 N. W. 392.

Option agreement.— A deed having been executed pursuant to an agreement by the landowner, by which he gave a railroad company the option of buying the privilege of diverting the channel of a stream, the option agreement reciting that it was given with the understanding that the passage under the bridge in question should not be interfered with, in an action by the landowner against the railroad company for the breach of the covenant of the deed to keep the passage open, the option agreement is admissible to show the consideration for the deed, since the provision of the option agreement as to the maintenance in the passageway was not merged in the deed. Mills *v.* Chicago, etc., R. Co., 103 Wis. 192, 79 N. W. 245.

82. Hovey *v.* Smith, 22 Mich. 170, where it was held that it is no objection to the admission of a deed in evidence that the description of the premises therein is not in the same words as alleged in the declaration, as the identity of the premises may be shown by other evidence.

83. McGowen *v.* Myers, 60 Iowa 256, 14 N. W. 788; Boothby *v.* Hathaway, 20 Me. 251. See also Smith *v.* Perry, 26 Vt. 279, where the deed, although defectively acknowledged, was admitted for the purpose of showing the covenantor's claim of title, and the defect therein that lost the land to the covenantee.

84. *Connecticut.*—Broadway *v.* Buxtun, 43 Conn. 282.

Illinois.— Koerper *v.* Jung, 33 Ill. App. 144.

Indiana.— Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.

Massachusetts.— Raymond *v.* Raymond, 10 Cush. 134.

New Hampshire.— Cook *v.* Combs, 39 N. H. 592, 75 Am. Dec. 241.

North Carolina.—Lindsay *v.* King, 23 N. C. 401.

Pennsylvania.— Collingwood *v.* Irwin, 3 Watts 306; McKennan *v.* Doughman, 1 Penr. & W. 417.

South Carolina.— Easterby *v.* Heilbron, 1 McMull. 462.

Texas.— Bigham *v.* Bigham, 57 Tex. 238; Wells *v.* Groesbeck, 22 Tex. 429.

England.— May *v.* Platt, [1900] 1 Ch. 616, 69 L. J. Ch. 357, 83 L. T. Rep. N. S. 123, 48 Wkly. Rep. 617.

See 14 Cent. Dig. tit. "Covenants," § 219.

Evidence in support of covenant.— In an action for breach of warranty, it appeared that on the sale of land by defendant to plaintiff defendant gave plaintiff a separate instrument, agreeing that if the land was not worth a consideration equal to the sum stated in the deed he would make it worth such sum. Defendant claimed and testified that such instrument was executed and made after the completion of the sale, and not as a part of it. It was held that evidence was admissible to show defendant's declarations made to plaintiff, prior to the sale, as to the value of the land conveyed by him, and of his intention to execute such a warranty. Whitehall *v.* Conner, 55 Ind. 354.

85. *Kentucky.*—Cardwell *v.* Strother, Litt. Sel. Cas. 429, 12 Am. Dec. 326.

Massachusetts.— Leland *v.* Stone, 10 Mass. 459.

New Hampshire.— Nutting *v.* Herbert, 35 N. H. 120; Barns *v.* Learned, 5 N. H. 264.

New York.— Haire *v.* Baker, 5 N. Y. 357.

Pennsylvania.— Parker *v.* Chadwick, 8 Watts & S. 96.

South Carolina.— See Porter *v.* Jefferies, 40 S. C. 92, 18 S. E. 229.

See 14 Cent. Dig. tit. "Covenants," § 219.

Under non est factum.— A fraudulent misrepresentation of the legal effect of a deed, by which the party is induced to execute it, cannot be given in evidence under *non est factum.* Edwards *v.* Brown, 1 C. & J. 307, 9 L. J. Exch. O. S. 84, 1 Tyrw. 182, 3 Y. & J. 423.

86. Foster *v.* Woods, 16 Mass. 116.

87. Morril *v.* Chadwick, 9 N. H. 84.

88. Randolph *v.* Meek, Mart. & Y. (Tenn.) 58.

89. Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17. See also Bridgmans *v.* Wells, 13 Ohio 43.

90. Skinner *v.* Moye, 69 Ga. 476; Allen *v.* Lee, 1 Ind. 58, 48 Am. Dec. 352; Maris *v.* Iles, 3 Ind. App. 579, 30 N. E. 152.

consideration, to assume and pay off certain encumbrances.[91] It has also been held that the deed of a former owner is admissible to show the manner in which an encumbrance or easement originated.[92]

3. JUDGMENT AS EVIDENCE OF EVICTION OR PARAMOUNT TITLE — a. Admissibility. A judgment adverse to the covenantee or one claiming under him in favor of the owner of the paramount title or right is admissible in an action by him against the covenantor for breach of his covenant to show the fact of eviction, and it is immaterial upon the question of admissibility whether the covenantor had notice of such suit or not.[93]

b. Conclusiveness — (i) *IN GENERAL.* A judgment against the covenantee, or one claiming under him, whether the suit be by or against him,[94] is *prima facie* evidence, in an action against the covenantor for breach of his covenant, of a paramount title or right in another.[95]

Contra.— *Connecticut.*— Hubbard *v.* Norton, 10 Conn. 422.

Iowa.— Johnson *v.* Walter, 60 Iowa 315, 14 N. W. 325.

Massachusetts.— Spurr *v.* Andrew, 6 Allen 420; Harlow *v.* Thomas, 15 Pick. 66; Townsend *v.* Weld, 8 Mass. 146.

Michigan.— Edwards *v.* Clark, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659.

Ohio.— Long *v.* Moler, 5 Ohio St. 271.

South Carolina.— Grice *v.* Scarborough, 2 Speers 649, 42 Am. Dec. 391.

Vermont.— Butler *v.* Gale, 27 Vt. 739.

See 14 Cent. Dig. tit. "Covenants," § 219.

91. Hays *v.* Peck, 107 Ind. 389, 8 N. E. 274; Carver *v.* Louthain, 38 Ind. 530; Robinius *v.* Lister, 30 Ind. 142, 95 Am. Dec. 674; Fitzer *v.* Fitzer, 29 Ind. 468; Pitman *v.* Conner, 27 Ind. 337; Dearborn *v.* Morse, 59 Me. 210; Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161; Laudman *v.* Ingram, 49 Mo. 212.

Contra.— Simanovich *v.* Wood, 145 Mass. 180, 15 N. E. 391; Flynn *v.* Bourneuf, 143 Mass. 277, 9 N. E. 650, 58 Am. Rep. 135; Suydam *v.* Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552.

To show contemporaneous equitable discharge.— Where parties make a parol contract for the exchange of lands, with covenants against encumbrances, it is competent, in an action for breach of the covenant, to show by parol that property was placed in the hands of the party complaining sufficient to discharge the encumbrance. Wachendorf *v.* Lancaster, 66 Iowa 458, 23 N. W. 922 [*following* Blood *v.* Wilkins, 43 Iowa 565].

92. O'Neil *v.* Holbrook, 121 Mass. 102.

93. *Connecticut.*— Belden *v.* Seymour, 8 Conn. 304, 21 Am. Dec. 661.

Illinois.— Walsh *v.* Dunn, 34 Ill. App. 146.

Indiana.— Wilson *v.* Peelle, 78 Ind. 384 [*citing* Rhode *v.* Green, 26 Ind. 83].

Kentucky.— Radcliff *v.* Ship, Hard. 292.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Massachusetts.— Merritt *v.* Morse, 108 Mass. 270. *Compare* Twambley *v.* Henley, 4 Mass. 441, to the effect that a judgment rendered in an action by a grantee against one not claiming under his grantor cannot be given in evidence in an action by such grantee against his grantor for the breach of the covenant that he had good title to convey.

Michigan.— Hovey *v.* Smith, 22 Mich. 170.

Texas.— McGregor *v.* Tabor, (Civ. App. 1894) 26 S. W. 443.

See 14 Cent. Dig. tit. "Covenants," § 221.

How proved.— The judgment by which plaintiff's grantee was evicted may be proved by the journal entries and files in that suit. Hovey *v.* Smith, 22 Mich. 170.

Evidence on previous trial.— It is inadmissible to offer to prove the evidence given on a previous trial of ejectment in order to show the ground of the recovery. This cannot be done without producing the *nisi prius* record to show what the pleadings and issues were. Cooper *v.* Watson, 10 Wend. (N. Y.) 202.

94. Cummins *v.* Kennedy, 3 Litt. (Ky.) 118, 14 Am. Dec. 45. See also Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618; Pitkin *v.* Leavitt, 13 Vt. 379. And see Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347.

Contra.— Ferrel *v.* Alder, 8 Humphr. (Tenn.) 44.

95. *California.*— Hills *v.* Sherwood, 33 Cal. 474.

Georgia.— Clark *v.* Whitehead, 47 Ga. 516; Harbin *v.* Roberts, 33 Ga. 45; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Indiana.— Wright *v.* Nipple, 92 Ind. 310; Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41.

Kentucky.— In Kentucky the record of the covenantee's ejectment is evidence of his eviction, but not of paramount title, and the fact of defense being made is immaterial. Booker *v.* Bell, 3 Bibb 173, 6 Am. Dec. 641. See also Baltzel *v.* Samuel, 3 J. J. Marsh. 198, in which it was held that where the vendee has not been in possession for two years, judgment of restitution in favor of a stranger on a writ of forcible entry and detainer is not sufficient evidence of want of title in the vendor to enable the vendee to recover on a covenant of general warranty.

Massachusetts.— Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49.

Michigan.— Mason *v.* Kellogg, 38 Mich. 132. See also Peck *v.* Houghtaling, 35 Mich. 127.

Mississippi.— Enos *v.* Smith, 7 Sm. & M. 85.

New York.— Hymes *v.* Esty, 116 N. Y. 501, 22 N. E. 1087, 15 Am. St. Rep. 421.

North Carolina.— Williams *v.* Shaw, 4 N. C.

(II) *AS AFFECTED BY NOTICE.* Except in North Carolina,[96] and in an early case in South Carolina,[97] it seems to be universally held in the United States that the covenantor is, in the absence of fraud or collusion, concluded by a judgment against the covenantee's title, where he has had due notice of, and an opportunity to defend, the suit in which the judgment was rendered.[98] Unless notified, he is

630, 7 Am. Dec. 706; Pearse *v.* Templeton, 3 N. C. 379.

Tennessee.— Ferriss *v.* Harshea, Mart. & Y. 48, 17 Am. Dec. 782.

Texas.— Hall *v.* Pierson, 1 Tex. App. Civ. Cas. § 1210.

United States.— See Somerville *v.* Hamilton, 4 Wheat. 430, 4 L. ed. 558.

See 14 Cent. Dig. tit. "Covenants," § 222.

Agreed judgment.— In an action for breach of warranty on the ground of eviction, a judgment, in an action against plaintiff for the recovery of a part of the land, does not warrant a recovery where such judgment was agreed to by plaintiff without defendant's consent. Maverick *v.* Routh, 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008.

Judgment in claim case.— The rule that in an action of covenant on a warranty of title the judgment previously recovered against the warrantee in an action of ejectment upon a paramount title is sufficient evidence of eviction applies to a judgment in a claim case under the statute finding a lot of land subject to a fieri facias against the vendor and warrantor. Harbin *v.* Roberts, 33 Ga. 45.

Interlocutory order in partition suit.— In an action for breach of covenant of warranty, where the adverse title was determined in a partition suit, it was proper to refuse a charge which in effect instructed the jury that the interlocutory judgment in partition settled nothing in regard to plaintiff's title. Wright *v.* Nipple, 92 Ind. 310.

Trespass quare clausum fregit.— A judgment in trespass *quare clausum fregit* is evidence to show an eviction, but is not conclusive as to the title of the land. Williams *v.* Shaw, 4 N. C. 630, 7 Am. Dec. 706.

In Missouri ejectment is a mere possessory action, and a judgment therein confers no title upon the successful party. And it is no defense to an action in the United States circuit court in New York, by the grantee of land in Missouri to recover damages for breach of covenant of seizin, that the covenantor has succeeded to the rights of the prevailing party in ejectment, and has duly conveyed them to the plaintiff in the absence of other proof of title in such prevailing party. Schnelle, etc., Lumber Co. *v.* Barlow, 34 Fed. 853.

96. In Martin *v.* Cowles, 19 N. C. 101 [*approving* Shober *v.* Robinson, 6 N. C. 33; Williams *v.* Shaw, 4 N. C. 630, 7 Am. Dec. 706; Sanders *v.* Hamilton, 3 N. C. 282, 21 Fed. Cas. No. 12,294], the court said: "The only question on this appeal is, whether in an action brought by a vendee, against his vendor, for a breach of the covenant for quiet enjoyment, a recovery in ejectment by a third person against the vendee, effected after notice to the vendor of the pendency of the ejectment, is conclusive evidence of the title of the lessor of the plaintiff. We have no hesitation in answering this question in the negative. In our opinion, the record of the judgment is not only not conclusive evidence, but is not any evidence of title, against the vendor."

97. Buckels *v.* Mouzon, 1 Strobh. (S. C.) 448. But see *infra*, note 98.

98. *Arkansas.*— Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; Boyd *v.* Whitfield, 19 Ark. 447.

Connecticut.—Hinds *v.* Allen, 34 Conn. 185.

Georgia.— Wimberly *v.* Collier, 32 Ga. 13. See also Haines *v.* Fort, 93 Ga. 24, 18 S. E. 994.

Illinois.— McConnell *v.* Downs, 48 Ill. 271; Harding *v.* Larkin, 41 Ill. 413; Walsh *v.* Dunn, 34 Ill. App. 146.

Indiana.— Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Morgan *v.* Muldoon, 82 Ind. 347.

Kentucky.— Elliott *v.* Saufley, 89 Ky. 52, 11 S. W. 200, 10 Ky. L. Rep. 958; Woodward *v.* Allan, 3 Dana 164; Davenport *v.* Muir, 3 J. J. Marsh. 310, 20 Am. Dec. 143; Graham *v.* Dyer, 29 S. W. 346, 16 Ky. L. Rep. 541.

Louisiana.— Kling *v.* Sejour, 4 La. Ann. 128; Rivas *v.* Hunstock, 2 Rob. 187.

Maine.— Hardy *v.* Nelson, 27 Me. 525.

Massachusetts.— Chamberlain *v.* Preble, 11 Allen 370; Hamilton *v.* Cutts, 4 Mass. 349, 3 Am. Dec. 222. See also Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671.

Mississippi.— Cummings *v.* Harrison, 57 Miss. 275.

Missouri.— Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640; Leet *v.* Gratz, 92 Mo. App. 422.

New Hampshire.— Chandler *v.* Brown, 59 N. H. 370; Andrews *v.* Denison, 16 N. H. 469, 43 Am. Dec. 565.

New York.— Adams *v.* Conover, 87 N. Y. 422, 41 Am. Rep. 381 [*affirming* 22 Hun 424].

Ohio.— Smith *v.* Dixon, 27 Ohio St. 471.

Pennsylvania.— Terry *v.* Drabenstadt, 68 Pa. St. 400; Paul *v.* Whitman, 3 Watts & S. 407; Ives *v.* Niles, 5 Watts 323; Bender *v.* Fromberger, 4 Dall. 436, 1 L. ed. 898. And see Morris *v.* Buckley, 11 Serg. & R. 168.

South Carolina.— Middleton *v.* Thompson, 1 Speers 67; Davis *v.* Wilbourne, 1 Hill 27, 26 Am. Dec. 154.

Tennessee.— Williams *v.* Burg, 9 Lea 455; Greenlaw *v.* Williams, 2 Lea 533. *Compare* Ferrel *v.* Alder, 8 Humphr. 44.

Texas.— Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623; Simpson *v.* Belvin, 37 Tex. 674; Thiele *v.* Axell, 5 Tex. Civ. App. 548, 24 S. W. 552, 803. *Compare* McGregor *v.* Tabor, (Civ. App. 1894) 26 S. W. 443.

Vermont.— Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618; Pitkin *v.* Leavitt, 13 Vt. 379.

Wisconsin.— Wendel *v.* North, 24 Wis. 223.

not concluded.[99] But where a grantee has been evicted by a subordinate title, which he precluded himself from contesting by his own declarations and acts, his grantor, when sued on his covenant, may show title paramount in himself, although he had notice to defend.[1]

4. WEIGHT AND SUFFICIENCY. The weight and sufficiency of the evidence[2] in a suit for breach of covenant is a question dependent upon the facts and circumstances of the particular case, and is one wholly for the determination of the jury.

F. Damages — 1. PRINCIPLES RELATING TO THE MEASURE OF DAMAGES — a. In General. The damages for the breach of a covenant or covenants are to be measured by the actual loss to the covenantee,[3] and where the breach is in fact

United States.— Gaines *v.* New Orleans, 17 Fed. 16, 4 Woods 213.

See 14 Cent. Dig. tit. "Covenants," § 223.

Collusion or fraud.— Wilson *v.* McElwee, 1 Strobh. (S. C.) 65; Greenlaw *v.* Williams, 2 Lea (Tenn.) 533.

An award of arbitrators, chosen by the vendee and claimant without the knowledge of the vendor, is no evidence of paramount right against the vendor. Prewit *v.* Kenton, 3 Bibb (Ky.) 280.

Right of covenantor to take new trial.—A grantor of land with covenants is not bound by a judgment in ejectment against his grantee, even when duly requested to defend the action, if not allowed after an adverse judgment to pay the cost and take a statutory new trial. Eaton *v.* Lyman, 26 Wis. 61, 33 Wis. 34.

Suit by covenantee.— Judgment against a warrantee in a suit against one in possession at the time of the sale, and of which suit he has given the warrantor notice, is at least *prima facie* evidence of a breach of the warranty. Gragg *v.* Richardson, 25 Ga. 566, 71 Am. Dec. 190; Hovey *v.* Smith, 22 Mich. 170.

99. *Alabama.*— Graham *v.* Tankersley, 15 Ala. 634.

Illinois.— Harding *v.* Larkin, 41 Ill. 413.

Indiana.— Walton *v.* Cox, 67 Ind. 164; Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Kentucky.— Gaither *v.* Brooks, 1 A. K. Marsh. 409; Cox *v.* Strode, 4 Bibb 4.

Massachusetts.— Perkins *v.* Pitts, 11 Mass. 125.

Michigan.— Hines *v.* Jenkins, 64 Mich. 469, 31 N. W. 432.

Missouri.— Fields *v.* Hunter, 8 Mo. 128; Holladay *v.* Menifee, 30 Mo. App. 207; Collins *v.* Baker, 6 Mo. App. 588.

Oregon.—See Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

Pennsylvania.— Collingwood *v.* Irwin, 3 Watts 306.

Texas.— Groesbeck *v.* Harris, 82 Tex. 411, 19 S. W. 850; Clark *v.* Mumford, 62 Tex. 531; Peck *v.* Hensley, 20 Tex. 673; Maverick *v.* Routh, 7 Tex. Civ. App. 669, 23 S. W. 596, 26 S. W. 1008.

Vermont.— Castleton *v.* Miner, 8 Vt. 209.

Wisconsin.— Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Rep. 191.

United States.— Waples *v.* U. S., 16 Ct. Cl. 126.

See 14 Cent. Dig. tit. "Covenants," § 223.

1. Kelly *v.* Schenectady Dutch Church, 2 Hill (N. Y.) 105.

2. *Colorado.*— Tierney *v.* Whiting, 2 Colo. 620.

Georgia.— Lowery *v.* Yawn, 111 Ga. 61, 36 S. E. 294.

Indiana.— Hamilton *v.* Shoaff, 99 Ind. 63 (which was an action for breach of covenant of seizin, in which plaintiff showed a chain of deeds beginning with one K, in 1868, and extending to defendant, and then title in the state granted by the United States in 1850, patent for which issued to the state in 1869. It was held that the patent of 1869 only confirmed the state's title of 1850, which was not inconsistent with title in defendant in 1868, and hence no breach was shown); Black *v.* Duncan, 60 Ind. 522 (evidence that a grantee was turned out of possession by a stranger having a paramount title, or was compelled by circumstances to yield up possession to, or purchase the premises from such stranger to avoid expulsion, is sufficient to sustain an allegation that he was evicted); Ferguson *v.* Rhoades, 7 Blackf. 262.

Iowa.— Norris *v.* Kipp, 74 Iowa 444, 38 N. W. 152.

Kansas.— Craven *v.* Clary, 8 Kan. App. 295, 55 Pac. 679.

Kentucky.— Lockwood *v.* Brush, 6 Dana 433; Booker *v.* Meriwether, 4 Litt. 212.

Louisiana.— Hale *v.* New Orleans, 13 La. Ann. 499.

Massachusetts.— Richmond *v.* Ames, 167 Mass. 265, 45 N. E. 919.

Michigan.— Mason *v.* Kellogg, 38 Mich. 132.

New York.— Kennedy *v.* Newman, 1 Sandf. 187; Hastings *v.* Hastings, 27 Misc. 244, 58 N. Y. Suppl. 416.

Pennsylvania.— McGrew *v.* Harmon, 164 Pa. St. 115, 30 Atl. 265, 268.

Texas.— Hall *v.* Pierson, 1 Tex. App. Civ. Cas. § 1210.

Wisconsin.— Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 898, 53 L. R. A. 644; Eaton *v.* Lyman, 33 Wis. 34.

See 14 Cent. Dig. tit. "Covenants," § 234.

3. Thomas *v.* Clement, 11 Rob. (La.) 397. See also Platt *v.* Grand Trunk R. Co., 19 Ont. App. 403.

Difference in value.— The measure of damages for the breach of a covenant or condition subsequent, containing a restriction as to building lines, or the character and cost of buildings to be erected on the granted premises, is the difference in the value of plain-

absolute,[4] or where the performance of the covenant has become impossible by reason of the total destruction of the subject-matter of the contract, damages should be given as for a total breach.[5] In cases of breach of real covenants, however, it has been held that the value of the land at the time of the covenant broken,[6] or at the date of the deed,[7] is to be taken as the measure of damage. The vendor, if guilty of no fraud, can be compelled to refund only the amount paid by the vendee for a better title;[8] but the right to damages extends to the whole subject-matter injured.[9]

b. Aggravation and Mitigation of Damages. In an action on a covenant, plaintiff's damages may be reduced by showing that defendant has been injured, and to what extent, by plaintiff's omission to perform his stipulations contained in the same covenant.[10] And where the grantor acquires title, even after the grantee has commenced his action for the breach of covenant, if before the damages are assessed, it can be shown, not in bar of the action, but in mitigation of damages.[11]

c. Nominal Damages. While plaintiff is, upon showing a breach, entitled to at least nominal damages,[12] yet these are all that he may recover, except upon proof of actual injury or expense.[13]

d. Recovery of Purchase-Money With Interest and Costs. In actions for breach of covenants real, the usual measure of damages, in the absence of fraud, is the purchase-money paid, with interest, and costs of suit.[14]

e. Loss of Part of Tract or Right. Various rules have been laid down

tiff's land with and without the encumbrance. Streeper *v.* Abeln, 59 Mo. App. 485.

Enhanced value.— The measure of damages for breach of covenants entered into by a grantee of a right of way is the difference between the value of the grantor's land, without performance and its value in case the covenants had been performed. Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Loss of profits.—The lessor of a hotel covenanted that an adjoining building owned by him should not be used "for a hotel or any similar business." In an action for breach of the covenant the measure of damages was held to be plaintiff's loss of profits on the customers who left him in consequence of the breach. Smith *v.* Thielen, 17 La. Ann. 239.

4. Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. 741, 28 Am. St. Rep. 584 [*modifying* 58 N. Y. Super. Ct. 582, 15 N. Y. Suppl. 327].

Permanent injury.— When a covenant is of such a nature that there can be but one breach and one recovery, the jury are not limited, in assessing the damages in an action on the breach, to the time when the suit was instituted, but may award damages for such permanent injury as they may find plaintiff has sustained. Jacobs *v.* Davis, 34 Md. 204.

Where the breach is a continuing one, the damages recovered will not be presumed to have been given as compensation for non-performance of the covenant during all future time, so as to bar all future suits. Crain *v.* Beech, 2 Barb. (N. Y.) 120.

5. Fish *v.* Folley, 6 Hill (N. Y.) 54 [*explained* and *limited* in Crain *v.* Beech, 2 Barb. 120].

6. Durnford's Succession, 8 Rob. (La.) 488; Keith *v.* Day, 15 Vt. 660; Estill *v.* Blakemore, 8 Fed. Cas. No. 4,538, Brunn. Col. Cas. 100.

7. Davis *v.* Hall, 2 Bibb (Ky.) 590.

8. Thomas *v.* Clement, 11 Rob. (La.) 397; Sanders *v.* Wagner, 32 N. J. Eq. 506.

9. Peden *v.* Chicago, etc., R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 401.

10. Hill *v.* Bishop, 2 Ala. 320; Greene *v.* Linton, 7 Port. (Ala.) 133, 31 Am. Dec. 707.

In assessing damages to plaintiff in an action on a covenant against defendant for failing to prove title to part of the land sold, the jury may consider, not only the buildings upon the premises, but the value of the land with a view to erecting other buildings, but not the possibility of the opening of other streets adjoining the land. Kleemons *v.* Voetter, 35 Pittsb. Leg. J. 420.

11. King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269.

12. Coppinger *v.* Armstrong, 8 Ill. App. 210.

13. *Illinois.*— King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Lloyd *v.* Sandusky, 95 Ill. App. 593.

Indiana.— Holman *v.* Creagmiles, 14 Ind. 177.

Missouri.— Eagan *v.* Martin, 81 Mo. App. 676.

Ohio.— Hill *v.* Butler, 6 Ohio St. 207.

Virginia.— Building, etc., Co. *v.* Fray, 56 Va. 559, 32 S. E. 58.

See 14 Cent. Dig. tit. "Covenants," § 227.

14. *Indiana.*— Phillips *v.* Reichert, 17 Ind. 120, 79 Am. Dec. 463.

Kentucky.— Barbour *v.* Pate, 2 T. B. Mon. 5.

Louisiana.— Bach *v.* Miller, 16 La. Ann. 44; Laizer *v.* Generes, 10 Rob. 178; Volant *v.* Lambert, 6 Mart. N. S. 555.

Pennsylvania.— Crunkleton *v.* Wilson, 1 Browne 361.

South Carolina.— Wallace *v.* Talbot, 1 McCord 466.

for the proper measure of damages in case of a partial eviction. Thus it has been stated that the damages should bear the same proportion to the whole purchase-money that the value of the part to which the title has failed bears to the price of the whole premises.[15] Again the value of the land from the date of sale with interest has been held the measure.[16] So too it has been held that when a deed passes an estate of value, although not that covenanted for, it is to be considered in measuring damages.[17]

f. On Agreement of Purchase to Assume Indebtedness. Where a purchaser of property agrees to assume and save the vendor harmless from certain outstanding indebtedness against him, the measure of damages, in an action by the vendor upon a breach of such covenant, will be the full amount of the debt, the payment of which the covenantor assumed.[18]

g. Where Grantor Purchases Outstanding Title. Where land is sold on credit, and the grantee is ejected by one holding a paramount title, which is subsequently purchased by the grantor for the benefit of such grantee, the grantee is entitled to recover for the time he was deprived of the land, and the rate of interest agreed to be paid is presumptively a fair equivalent for the use of the land.[19]

h. In Successive Actions. The measure of damages against successive covenantors, in actions for the same breach of the same covenant, is the same in all.[20]

i. Conflict of Laws. In an action for a breach of covenant of seizin, the

Texas.— Anding *v.* Perkins, 29 Tex. 348.

See 14 Cent. Dig. tit. "Covenants," § 228.

As to conclusiveness of recital of consideration see *infra*, IV, F, 9, b, (II).

15. Hoot *v.* Spade, 20 Ind. 326 (holding that the rule is not affected by the fact that the lot was, with the vendor's knowledge, purchased for a particular purpose, and that the failure of title to a portion of it renders it useless for this purpose); Doyle *v.* Brundred, 189 Pa. St. 113, 41 Atl. 1107.

Enhancement disregarded.— Where a strip thirty feet wide was taken from the front of the lot purchased in opening a street, the jury should be instructed, in an action by the purchaser on the vendor's covenant of warranty, that they should consider the entire tract, including the strip taken, to be of the value of four thousand five hundred dollars, the consideration paid, and disregarding all enhancement of the property from the widening of the street, should determine from the evidence how much less the remainder of the tract, after the strip taken had been opened as a street, was worth, than the whole tract was worth, including the strip, and without the street being opened, this difference, with interest from the time the city took possession, being the proper measure of recovery. Louisville Public Warehouse Co. *v.* James, 56 S. W. 19, 21 Ky. L. Rep. 1726.

Upon a sale of a patent right for two counties, to one of which the vendor has no title, the vendee's damages are such proportion of the whole price paid as the value of the county to which title fails bears to the price of both. Moorehead *v.* Davis, 92 Ind. 303.

In Texas the rule is stated to be the proportion which the value of the premises from which plaintiff has been evicted bears to the whole premises, and cost and expenses, subject to the same qualifications and conditions applicable in cases of total eviction. Webb *v.* Brown, 2 Tex. Unrep. Cas. 36. *Compare* Chestnut *v.* Chism, 20 Tex. Civ. App. 23, 48 S. W. 549, in which it was held that an instruction as to the measure of damages for a failure of title to a portion of the land conveyed, as "such sum as the value of the land lost bears to the whole land described in the deed," was properly refused for its omission to refer to the price as a standard to which the ratio should be applied.

16. Bonta *v.* Miller, 1 Litt. (Ky.) 250, holding that on a contract to pay whatever may appear to be just, and the value of as much of the land sold as may be recovered by an adversary suit, the value of the land at the date of the contract with interest is the measure of damages.

17. Huntsman *v.* Hendricks, 44 Minn. 423, 46 N. W. 910 [*citing* Ogden *v.* Ball, 38 Minn. 237, 36 N. W. 344]; Kimball *v.* Bryant, 25 Minn. 496.

18. Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138. *Compare* Young *v.* Stone, 4 Watts & S. (Pa.) 45, in which it was held that if a vendee of land covenant to pay an encumbrance upon it out of the amount of the purchase-money, which he fails to do, by reason of which the land is sold for the payment of the encumbrance, and sells for a price exceeding it, he is liable to the vendor for damages, the measure of which is the difference between the amount for which the land sold and the price which he agreed to pay for it.

19. Huff *v.* Riley, 26 Tex. Civ. App. 101, 64 S. W. 387.

20. Wilson *v.* Taylor, 9 Ohio St. 595, 75 Am. Dec. 488.

rule of damages in the state in which the action is brought will govern, although the land lies in another state.[21]

j. Personal Covenants. On the breach of a personal covenant, the damages recoverable are a sum sufficient to put plaintiff in the position in which he would have stood if the covenant had been kept,[22] a distinction being drawn between cases of mere contracts of indemnity on the one side, and cases resting upon the express agreement of defendant with plaintiff to pay a debt for which plaintiff or his property is bound, on the other.[23]

2. Covenant of Seizin — a. General Rule. The value of the land at the time of sale is almost universally held to be the criterion by which damages are to be adjudged.[24]

b. Aggravation and Mitigation of Damages. The measure of damages for breach of a covenant of seizin is the consideration paid and interest thereon, less any benefit, direct or indirect, taken under the deed;[25] and the subsequent acquirement of title by the grantor may be considered in mitigation.[26] So too a perfection of title by a decree of court may be shown in mitigation.[27]

c. Nominal Damages. A covenantee who has never been disturbed in his possession is entitled only to nominal damages for a technical breach of the covenant of seizin in his deed.[28]

21. Nichols *v.* Walter, 8 Mass. 243. See also Looney *v.* Reeves, 5 Kan. App. 279, 48 Pac. 606, holding that in an action in one state on the covenants of warranty in a deed executed therein, for a failure of title to real estate situated in another, the measure of recovery is governed by the laws of the former.

22. *Illinois.*— Robbins *v.* Arnold, 11 Ill. App. 434.

New Jersey.— Sparkman *v.* Gove, 44 N. J. L. 252.

New York.— Bennett *v.* Buchan, 61 N. Y. 222; Trinity Church *v.* Higgins, 48 N. Y. 532.

Tennessee.— Hixon *v.* Hixon, 7 Humphr. 33.

England.— Lethbridge *v.* Mytton, 2 B. & Ad. 772, 9 L. J. K. B. O. S. 330, 22 E. C. L. 323.

See 14 Cent. Dig. tit. "Covenants," § 230.

23. Sparkman *v.* Gove, 44 N. J. L. 252; Shepherd *v.* Ryers, 15 Johns. (N. Y.) 497.

24. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545.

Connecticut.— Gilbert *v.* Bulkley, 5 Conn. 262, 13 Am. Dec. 57.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70. *Compare* Hill *v.* Golden, 16 B. Mon. 551; Davis *v.* Logan, 5 B. Mon. 341, holding that the value of the interest recovered is the proper measure of damages.

Massachusetts.— Hodges *v.* Thayer, 110 Mass. 286; Byrnes *v.* Rich, 5 Gray 518. See also Staples *v.* Dean, 114 Mass. 125.

Missouri.— Evans *v.* Fulton, 134 Mo. 653, 36 S. W. 230.

New Hampshire.— Parker *v.* Brown, 15 N. H. 176. But see Dickey *v.* Weston, 61 N. H. 23, in which it was held that the damages are determined upon the facts appearing when the damages are assessed.

Tennessee.— *Compare* Curtis *v.* Brannon, 98 Tenn. 153, 38 S. W. 1073, holding that the rental value of the premises, from the inception of the grantee's possession, may be recovered.

Wisconsin.— Hall *v.* Gale, 20 Wis. 292.

See 14 Cent. Dig. tit. "Covenants," § 231.

The true consideration may be shown by parol, notwithstanding a different consideration is expressed in the deed, and although it contains an acknowledgment on the part of the grantor that it has been paid at the time of or before the execution of the deed. Bingham *v.* Weiderwax, 1 N. Y. 509.

25. Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112; Lockwood *v.* Sturdevant, 6 Conn. 373; Huntsman *v.* Hendricks, 44 Minn. 423, 46 N. W. 910; Ogden *v.* Ball, 38 Minn. 237, 36 N. W. 344; Kimball *v.* Bryant, 25 Minn. 496; Tanner *v.* Livingston, 12 Wend. (N. Y.) 83; Guthrie *v.* Pugsley, 12 Johns. (N. Y.) 125; Recohs *v.* Younglove, 8 Baxt. (Tenn.) 385.

26. *Connecticut.*— Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112.

Massachusetts.— Cornell *v.* Jackson, 3 Cush. 506.

Minnesota.— Burke *v.* Beveridge, 15 Minn. 205.

Tennessee.— Curtis *v.* Brannon, 98 Tenn. 153, 38 S. W. 1073.

Wisconsin.— McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764.

See 14 Cent. Dig. tit. "Covenants," § 232.

27. Westbrook *v.* McMillan, 1 Hill (S. C.) 317, 26 Am. Dec. 187.

28. *Indiana.*—Hacker *v.* Blake, 17 Ind. 97; Overhiser *v.* McCollister, 10 Ind. 41.

Iowa.— Norman *v.* Winch, 65 Iowa 263, 21 N. W. 598; Hencke *v.* Johnson, 62 Iowa 555, 17 N. W. 766; Boon *v.* McHenry, 55 Iowa 202, 7 N. W. 503; Nosler *v.* Hunt, 18 Iowa 212.

Kansas.— O'Meara *v.* McDaniel, 49 Kan. 685, 31 Pac. 303; Hammerslough *v.* Hackett, 48 Kan. 700, 29 Pac. 1079.

Maine.— Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49.

d. Purchase of Outstanding Title. Where a covenantee buys in an outstanding paramount title, the measure of damages, in an action for breach of the covenant of seizin in his deed, is the reasonable price which he has fairly and necessarily paid for such title, not to exceed the original consideration paid by him.[29]

e. Recovery of Purchase-Money, With Interest. The measure of damages for the breach of the covenant of seizin, where the grantee has never obtained possession, or where there is an entire failure of title, is the recovery of the purchase-money, and interest thereon;[30] or if the land be given by way of exchange

Minnesota.— Ogden *v.* Ball, 38 Minn. 237, 36 N. W. 344.

Missouri.— Conklin *v.* Hannibal, etc., R. Co., 65 Mo. 533; Lawless *v.* Collier, 19 Mo. 480; Mosely *v.* Hunter, 15 Mo. 322; Reese *v.* Smith, 12 Mo. 344; Collier *v.* Gamble, 10 Mo. 467; Mumford *v.* Keet, 65 Mo. App. 502. See also Bircher *v.* Watkins, 13 Mo. 521.

New Hampshire.— Morrison *v.* Underwood, 20 N. H. 369.

North Carolina.— Cowan *v.* Silliman, 15 N. C. 46; Wilson *v.* Forbes, 13 N. C. 30.

North Dakota.— See Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336.

Vermont.— Garfield *v.* Williams, 2 Vt. 327.

Wisconsin.— Bardeen *v.* Markstrum, 64 Wis. 613, 25 N. W. 565; Smith *v.* Hughes, 50 Wis. 620, 7 N. W. 653; Mecklem *v.* Blake, 22 Wis. 495, 99 Am. Dec. 68; Noonan *v.* Ilsley, 22 Wis. 27.

See 14 Cent. Dig. tit. "Covenants," § 233.

A grantee who has abandoned possession of the premises before hostile assertion of paramount title can recover only nominal damages for breach of the grantor's covenant of seizin. Cockrell *v.* Proctor, 65 Mo. 41.

Mutual mistake.—Where the covenantor by mistake included in his deed a parcel of land which he did not own, and the parties to the deed did not understand it to be conveyed at the time of executing the deed, it was held that the covenantee, in an action of covenant, assigning as a breach that the covenantor was not seized of such parcel, was entitled only to nominal damages. Barns *v.* Learned, 5 N. H. 264. See also Nutting *v.* Herbert, 35 N. H. 120, 37 N. H. 346.

Onus on grantee.— Although the grantee in a deed containing a covenant of seizin, which was broken at the time of delivery by reason of an outstanding title, may purchase in such title and recover from the grantor the reasonable value thereof, yet the onus is on the grantee to show what the outstanding title was worth, or he will recover only nominal damages. Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114.

29. *Alabama.*— Anderson *v.* Knox, 20 Ala. 156.

Illinois.— Weber *v.* Anderson, 73 Ill. 439; Clapp *v.* Herdman, 25 Ill. App. 509.

Iowa.— Richards *v.* Iowa Homestead Co., 44 Iowa 304, 24 Am. Rep. 745. *Compare* Harwood *v.* Lee, 85 Iowa 622, 52 N. W. 521, in which it was held that a purchaser of land, who buys and holds as assignee a prior mortgage covering that and other land, cannot recover, in an action on his grantor's covenants, taxes secured by the purchased mortgage which were paid on other land than the tract purchased by him.

Kansas.— McKee *v.* Bain, 11 Kan. 569; Dale *v.* Shively, 8 Kan. 276.

Maine.— Spring *v.* Chase, 22 Me. 505, 39 Am. Dec. 505.

Michigan.— See Long *v.* Sinclair, 40 Mich. 569.

Minnesota.— Kimball *v.* Bryant, 25 Minn. 496.

Missouri.— Hall *v.* Bray, 51 Mo. 288; Lawless *v.* Collier, 19 Mo. 480.

North Carolina.— Price *v.* Deal, 90 N. C. 290; Farmers' Bank *v.* Gleen, 68 N. C. 35.

Ohio.— Wetzell *v.* Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

United States.— Schnelle, etc., Lumber Co. *v.* Barlow, 34 Fed. 853.

See 14 Cent. Dig. tit. "Covenants," § 234.

30. *Alabama.*— Bibb *v.* Freeman, 59 Ala. 612.

Arkansas.— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

Connecticut.— Sterling *v.* Peet, 14 Conn. 245; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Castle *v.* Peirce, 2 Root 294; Horsford *v.* Wright, Kirby 3, 1 Am. Dec. 8.

Illinois.— Weber *v.* Anderson, 73 Ill. 439; King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269. See also Clapp *v.* Herdman, 25 Ill. App. 509, to the effect that the consideration money, with interest, is the extent to which damages can in any event be recovered for a breach of the covenant of seizin.

Indiana.— Wilson *v.* Peelle, 78 Ind. 384; Sheets *v.* Andrews, 2 Blackf. 274.

Iowa.— Snell *v.* Iowa Homestead Co., 59 Iowa 701, 13 N. W. 848; Brandt *v.* Foster, 5 Iowa 287. See also Morse *v.* Beale, 68 Iowa 463, 27 N. W. 461.

Kansas.— Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950.

Kentucky.— Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45.

Maine.— Montgomery *v.* Reid, 69 Me. 510; Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49.

Massachusetts.— Smith *v.* Strong, 14 Pick. 128; Leland *v.* Stone, 10 Mass. 459; Nichols *v.* Walter, 8 Mass. 243; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Caswell *v.* Wendell, 4 Mass. 108; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Minnesota.— Kimpbell *v.* Bryant, 25 Minn. 496.

the value of that land.[31] The fact that the grantee has been compelled to pay his own grantee a larger sum on a covenant of warranty will not enlarge his claim for damages.[32] The rule of damages as stated does not apply where a vendor has sold lands to which he has not a perfect title, he undertaking to complete and make perfect the title.[33]

f. Loss of Part of Tract. Where the breach is only as to an aliquot and undivided part of the land attempted to be conveyed, the damages are in proportion to the whole consideration paid as that aliquot part of the land is to the whole thereof.[34]

g. Fraudulent Representations as to Title to Land. The measure of damages for breach of the usual covenants of a deed is the purchase-money and interest; but where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty. The action in such case is upon the fraud, not upon the covenants of the deed, and the rule of damages for breach of the covenant does not apply.[35]

Missouri.— Murphy *v.* Price, 48 Mo. 247; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661; Reese *v.* Smith, 12 Mo. 344; Martin *v.* Long, 3 Mo. 391; Tapley *v.* Labeaume, 1 Mo. 550; Egan *v.* Martin, 71 Mo. App. 60; Walker *v.* Deaver, 5 Mo. App. 139.

New Hampshire.— Nutting *v.* Herbert, 35 N. H. 120, 37 N. H. 346; Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320. See also Parker *v.* Brown, 15 N. H. 176.

New York.— Bennet *v.* Jenkins, 13 Johns. 50; Staats *v.* Ten Eyck, 3 Cai. 111, 2 Am. Dec. 254. See also Pitcher *v.* Livingston, 4 Johns. 1, 4 Am. Dec. 229.

North Carolina.— Price *v.* Deal, 90 N. C. 290; Wilson *v.* Forbes, 13 N. C. 30.

Ohio.— Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518; Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585; Vail *v.* Junction R. Co., 1 Cinc. Super. Ct. 571.

Pennsylvania.— Bender *v.* Fromberger, 4 Dall. 436, 1 L. ed. 898.

South Carolina.— Henning *v.* Withers, 3 Brev. 458, 6 Am. Dec. 589.

Tennessee.— Park *v.* Cheek, 4 Coldw. 20; Kincaid *v.* Brittain, 5 Sneed 119.

Vermont.— Flint *v.* Steadman, 36 Vt. 210; Blake *v.* Burnham, 29 Vt. 437; Catlin *v.* Hurlburt, 3 Vt. 403.

Wisconsin.— Daggett *v.* Reas, 79 Wis. 60, 48 N. W. 127; McLennan *v.* Prentice, 77 Wis. 124, 45 N. W. 943; Conrad *v.* Grand Grove U. A. O. D., 64 Wis. 258, 25 N. W. 24; Blossom *v.* Knox, 3 Pinn. 262, 3 Chandl. 295; Rich *v.* Johnson, 2 Pinn. 88, 52 Am. Dec. 144.

See 14 Cent. Dig. tit. "Covenants," § 235.

A subsequent grantee's damages for the original grantor's breach of covenant of seizin will be limited to his actual loss, not exceeding the consideration paid by the first grantee. Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661; Bowne *v.* Wolcott, 1 N. D. 497, 48 N. W. 426; Vail *v.* Junction R. Co., 1 Cinc. Super. Ct. 571. *Compare* Shorthill *v.* Ferguson, 44 Iowa 249, where it was held that in an action by the vendee of the original grantee against the latter's grantor, the measure of damages is the sum named in the deed of the latter, with interest from the date of the conveyance to the vendee.

31. Lacey *v.* Marnan, 37 Ind. 168; Burke *v.* Beveridge, 15 Minn. 205.

32. Nichols *v.* Walter, 8 Mass. 243.

33. Taylor *v.* Barnes, 69 N. Y. 430.

34. *Alabama.*— Bibb *v.* Freeman, 59 Ala. 612.

Connecticut.— Hubbard *v.* Norton, 10 Conn. 422.

Illinois.— Tone *v.* Wilson, 81 Ill. 529; Weber *v.* Anderson, 73 Ill. 439; Wadhams *v.* Innes, 4 Ill. App. 642.

Indiana.— Wright *v.* Nipple, 92 Ind. 310.

Kansas.— Bolinger *v.* Brake, 57 Kan. 663, 47 Pac. 537 [*affirming* 4 Kan. App. 180, 45 Pac. 950]; Scantlin *v.* Allison, 12 Kan. 85.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70.

Maine.— Blanchard *v.* Hoxie, 34 Me. 376; Wheeler *v.* Hatch, 12 Me. 389; Cushman *v.* Blanchard, 2 Me. 266, 11 Am. Dec. 76.

Maryland.— Bryan *v.* Smallwood, 4 Harr. & M. 483.

Massachusetts.—Cornell *v.* Jackson, 3 Cush. 506.

Missouri.— Adkins *v.* Tomlinson, 121 Mo. 487, 26 S. W. 573.

New Hampshire.— Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171; Partridge *v.* Hatch, 18 N. H. 494; Ela *v.* Card, 2 N. H. 175, 9 Am. Dec. 46.

New York.— Guthrie *v.* Pugsley, 12 Johns. 126; Morris *v.* Phelps, 5 Johns. 49, 4 Am. Dec. 323; Staats *v.* Ten Eyck, 3 Cai. 111, 2 Am. Dec. 254.

Ohio.— Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518; Vail *v.* Junction R. Co., 1 Cinc. Super. Ct. 571.

Pennsylvania.— Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Lee *v.* Dean, 3 Whart. 316.

Wisconsin.— McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764; Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869; Messer *v.* Oestreich, 52 Wis. 684, 10 N. W. 6.

England.— See Mace *v.* Bickerton, 3 De G. & Sm. 751, 14 Jur. 784, 19 L. J. Ch. 254; Gray *v.* Briscoe, Noy 142.

See 14 Cent. Dig. tit. "Covenants," § 236.

35. *Indiana.*— Love *v.* Oldham, 22 Ind. 51.

3. Covenant of Right to Convey. In an action for breach of the covenant of right to convey, the general rule as to the measure of damages is the consideration paid by the grantee and the interest thereon.[36] If no consideration was actually paid by the grantee to the grantor, the measure has been held to be the value of the land, with interest from the date of the deed.[37] Upon a merely technical breach the damages are nominal;[38] and where the breach is only as to an undivided part of the lands, the damages are such part of the whole consideration as the undivided part is to the whole land attempted to be conveyed.[39]

4. Covenant Against Encumbrances — a. General Rule. Being a covenant of indemnity, the general rule for the measure of damages in an action for its breach by reason of an encumbrance existing upon the property sold, at the time of the sale, is the loss actually sustained by the covenantee with interest.[40] Damages, costs, and expenses, when given as a penalty for breach of covenant, mean the necessary, natural, and proximate damages resulting from such non-performance,

Kentucky.—Shackelford *v.* Handley, 1 A. K. Marsh. 496, 10 Am. Dec. 753.

New York.— White *v.* Seaver, 25 Barb. 235.

Pennsylvania.— Pearsoll *v.* Chapin, 44 Pa. St. 9.

England.— Pilmore *v.* Hood, Arn. 390, 5 Bing. N. Cas. 97, 7 Dowl. P. C. 136, 8 L. J. C. P. 11, 6 Scott 827, 35 E. C. L. 62; Gerhard *v.* Bates, 1 C. L. R. 868, 2 E. & B. 476, 17 Jur. 1097, 22 L. J. Q. B. 364, 1 Wkly. Rep. 383, 75 E. C. L. 476.

36. Lockwood *v.* Sturdevant, 6 Conn. 373; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Bickford *v.* Page, 2 Mass. 455; Collins *v.* Clamorgan, 6 Mo. 169; Nutting *v.* Herbert, 35 N. H. 120, 37 N. H. 346; Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320. But see Dickey *v.* Weston, 61 N. H. 23; Parker *v.* Brown, 15 N. H. 176.

37. Byrnes *v.* Rich, 5 Gray (Mass.) 518. See also Staples *v.* Dean, 114 Mass. 125; Hodges *v.* Thayer, 110 Mass. 286.

38. Overhiser *v.* McCollister, 10 Ind. 41; Nutting *v.* Herbert, 35 N. H. 120, 37 N. H. 346.

39. Scantlin *v.* Allison, 12 Kan. 85; McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764; Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869; Messer *v.* Oestreich, 52 Wis. 684, 10 N. W. 6; Turner *v.* Moon, [1901] 2 Ch. 825, 70 L. J. Ch. 822, 85 L. T. Rep. N. S. 90.

40. *Illinois.*— Christy *v.* Ogle, 33 Ill. 295.

Maine.— Harrington *v.* Bean, 89 Me. 470, 36 Atl. 986. See also Elder *v.* True, 32 Me. 104; Gardner *v.* Niles, 16 Me. 279.

Massachusetts.—Wetmore *v.* Green, 11 Pick. 462.

Missouri.— Kellogg *v.* Malin, 62 Mo. 429.

Nebraska.— Downie *v.* Ladd, 22 Nebr. 531, 35 N. W. 388.

New Hampshire.— Foster *v.* Foster, 62 N. H. 46.

New York.— Lockwood *v.* Nichols, 14 Daly 182, 6 N. Y. St. 220.

Ohio.— Manahan *v.* Smith, 19 Ohio St. 384.

Pennsylvania.— Cathcart *v.* Bowman, 5 Pa. St. 317.

South Dakota.— Loiseau *v.* Threlstad, 14 S. D. 257, 85 N. W. 189.

Texas.—See Seibert *v.* Bergman, (Civ. App. 1898) 44 S. W. 872.

Vermont.— Cole *v.* Kimball, 52 Vt. 639.

England.— See Lethbridge *v.* Mytton, 2 B. & Ad. 772, 9 L. J. K. B. O. S. 330, 22 E. C. L. 323, to the effect that where a party, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off encumbrances on the estates, on his failing to do so the trustees were entitled to recover the whole value of the encumbrances, although no special damage was laid or proved.

Canada.— See Connell *v.* Boulton, 2 U. C. L. J. N. S. 240, in which it was held that plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase-money and interest, and the mortgage included other lands sufficient in value to satisfy it.

See 14 Cent. Dig. tit. "Covenants," § 238.

Levy of execution.— The measure of damages, where the levy of an execution is the encumbrance, is the sum at which the land was appraised, with interest from the time of the eviction. Barrett *v.* Porter, 14 Mass. 143.

Outstanding lease.— Where a tenant holds a lease upon the property conveyed, the grantee of such property is entitled to damages to the full rental value for the time he was kept out of possession, without deduction of the value of the crops turned over by the tenant under the terms of the lease. Edwards *v.* Clark, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659. See also Clark *v.* Fisher, 54 Kan. 403, 38 Pac. 493; Porter *v.* Bradley, 7 R. I. 538. *Compare* Fritz *v.* Pusey, 31 Minn. 368, 18 N. W. 94, in which it was held that in the absence of any special circumstances the value of the use of the premises for the time during which the grantee has been deprived of such use is the measure.

Resale by grantee.— A grantee of land cannot recover, as damages for the breach of the grantor's covenant against encumbrances consisting of the existence of an inchoate right of dower in the premises, a sum paid by himself to an auctioneer for selling them to a person who refused to complete the purchase on discovering the encumbrance. Harrington *v.* Murphy, 109 Mass. 299.

and not some remote, accidental, or special injury to the party to whom the right of action accrues.[41] Merely speculative damages will not be given;[42] and the diminished value of an estate, in consequence of an encumbrance upon it, is not the measure of damages unless the estate was purchased by the grantee for the purpose of making a resale, and that fact was communicated to or known by the grantor.[43]

b. Nominal Damages. In an action for breach of a covenant against encumbrances, if the encumbrance has inflicted no actual injury on plaintiff and he has paid nothing toward removing or extinguishing it he can only recover nominal damages.[44] Where the encumbrance is removed by the grantor, without expense or trouble to the grantee, the latter can recover only nominal damages.[45]

c. Purchase or Extinguishment of Encumbrance. In an action for breach of the covenant against encumbrances, if plaintiff has purchased or extinguished the outstanding encumbrance, he is entitled to recover with interest[46] the reasonable price which he has fairly and necessarily paid for it,[47] provided it does not exceed

41. Low *v.* Archer, 12 N. Y. 277; Stambaugh *v.* Smith, 23 Ohio St. 584.

42. Egan *v.* Yeaman, (Tenn. Ch. App. 1897) 46 S. W. 1012.

43. Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201.

44. *Connecticut.*— Ensign *v.* Colt, (1902) 52 Atl. 829, 946; Briggs *v.* Morse, 42 Conn. 258; Davis *v.* Lyman, 6 Conn. 249.

Illinois.— Willets *v.* Burgess, 34 Ill. 494; Brady *v.* Spurck, 27 Ill. 478; Kirkendall *v.* Keogh, 2 Ill. App. 492.

Indiana.— Bundy *v.* Ridenour, 63 Ind. 406; Black *v.* Coan, 48 Ind. 385; Reasoner *v.* Edmundson, 5 Ind. 393; Pomeroy *v.* Burnett, 8 Blackf. 142.

Maine.— Reed *v.* Pierce, 36 Me. 455, 58 Am. Dec. 761; Stowell *v.* Bennett, 34 Me. 422; Copeland *v.* Copeland, 30 Me. 446; Randell *v.* Mallett, 14 Me. 51; Bean *v.* Mayo, 5 Me. 94.

Massachusetts.— Newcomb *v.* Wallace, 112 Mass. 25; Harlow *v.* Thomas, 15 Pick. 66; Tufts *v.* Adams, 8 Pick. 547; Wyman *v.* Ballard, 12 Mass. 304; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249.

Michigan.— Norton *v.* Colgrove, 41 Mich. 544, 3 N. W. 159; Wilcox *v.* Musche, 39 Mich. 101.

Missouri.— Kellogg *v.* Malin, 62 Mo. 429; Buren *v.* Hubbell, 54 Mo. App. 617. See also Bircher *v.* Watkins, 13 Mo. 521.

New Hampshire.— Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320; Morrison *v.* Underwood, 20 N. H. 369; Andrews *v.* Davison, 17 N. H. 413, 43 Am. Dec. 606.

New Jersey.— Stewart *v.* Drake, 9 N. J. L. 139.

New York.— McGuckin *v.* Milbank, 152 N. Y. 297, 46 N. E. 490 [*affirming* 83 Hun 473, 31 N. Y. Suppl. 1049]; Seventy-Third St. Bldg. Co. *v.* Jencks, 19 N. Y. App. Div. 314, 46 N. Y. Suppl. 2; Reading *v.* Gray, 37 N. Y. Super. Ct. 79; Hastings *v.* Hastings, 27 Misc. 244, 58 N. Y. Suppl. 416; Stearn *v.* Hesdorfer, 9 Misc. 134, 29 N. Y. Suppl. 281; Stanard *v.* Eldridge, 16 Johns. 254; De Forest *v.* Leete, 16 Johns. 122; Hall *v.* Dean, 13 Johns. 105; Delavergne *v.* Norris, 7 Johns. 358, 5 Am. Dec. 281.

North Carolina.— Lane *v.* Richardson, 104 N. C. 642, 10 S. E. 189.

Pennsylvania.— Funk *v.* Voneida, 11 Serg. & R. 109, 14 Am. Dec. 617.

Tennessee.— Egan *v.* Yeaman, (Ch. App. 1897) 46 S. W. 1012.

Vermont.— Richardson *v.* Dorr, 5 Vt. 9.

Wisconsin.— Eaton *v.* Lyman, 30 Wis. 41; Noonan *v.* Ilsley, 21 Wis. 138; Pillsbury *v.* Mitchell, 5 Wis. 17.

See 14 Cent. Dig. tit. "Covenants," § 239.

A right of dower, which, although consummate, has not been enforced, is ground for nominal damages only. Smith *v.* Ackerman, 5 Blackf. (Ind.) 541; Runnells *v.* Webber, 59 Me. 488; Walker *v.* Deaver, 79 Mo. 664. So too an inchoate right of dower in the premises can be the foundation of nominal damages only. Whisler *v.* Hicks, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; Harrington *v.* Murphy, 109 Mass. 299.

45. Morrison *v.* Underwood, 20 N. H. 369. See also Smith *v.* Jefts, 44 N. H. 482.

46. *Arkansas.*— Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107.

Illinois.— Clapp *v.* Herdman, 25 Ill. App. 509.

New York.—Andrews *v.* Appel, 22 Hun 429.

Ohio.— Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90.

Pennsylvania.— Myers *v.* Brodbeck, 110 Pa. St. 198, 5 Atl. 662.

See 14 Cent. Dig. tit. "Covenants," § 240.

47. *Alabama.*— Anderson *v.* Knox, 20 Ala. 156.

Arkansas.— William Farrell Lumber Co. *v.* Deshon, (1898) 44 S. W. 1036.

Connecticut.— Davis *v.* Lyman, 6 Conn. 249; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169.

Georgia.—Amos *v.* Cosby, 74 Ga. 793.

Illinois.— McDowell *v.* Milroy, 69 Ill. 498.

Indiana.—Morehouse *v.* Heath, 99 Ind. 509; Burk *v.* Clements, 16 Ind. 132.

Iowa.— Guthrie *v.* Russell, 46 Iowa 269, 26 Am. Rep. 135; Knadler *v.* Sharp, 36 Iowa 232.

Kansas.— Gilbert *v.* Rushmer, 49 Kan. 632, 31 Pac. 123.

the amount paid by him to the covenantor [48] or the value of the estate.[49] Such purchase may be made after the commencement of the action.[50] A covenantee is not, however, bound to buy in an outstanding title or encumbrance, even where it is offered him on moderate terms.[51]

d. Recovery of Purchase-Price, With Interest. Where by reason of the encumbrance the covenantee's title is wholly defeated, he is entitled to recover the purchase-price of the land with interest,[52] and no more.[53]

e. Easement on Land Conveyed. The diminution in the value of the premises

Maine.— Reed *v.* Pierce, 36 Me. 455, 58 Am. Dec. 761.

Massachusetts.— Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671; Coburn *v.* Litchfield, 132 Mass. 449; Smith *v.* Carney, 127 Mass. 179; Comings *v.* Little, 24 Pick. 266; Thayer *v.* Clemence, 22 Pick. 490; Harlow *v.* Thomas, 15 Pick. 66; Chapel *v.* Bull, 17 Mass. 213; Prescott *v.* Trueman, 4 Mass. 627, 3 Am. Dec. 249.

Missouri.— Walker *v.* Deaver, 79 Mo. 664 [*affirming* 5 Mo. App. 139]; Ward *v.* Ashbrook, 78 Mo. 515; Kellogg *v.* Malin, 62 Mo. 429; Edington *v.* Nix, 49 Mo. 134; St. Louis *v.* Bissell, 46 Mo. 157; Henderson *v.* Henderson, 13 Mo. 151. See also Bohlcke *v.* Buchanan, 94 Mo. App. 320, 68 S. W. 92.

New Hampshire.— The measure of damages is the sum paid by the grantee to remove the encumbrance, with compensation for trouble and expenses. Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320; Morrison *v.* Underwood, 20 N. H. 369; Loomis *v.* Bedel, 11 N. H. 74.

New York.— Stanard *v.* Eldridge, 16 Johns. 254; Hall *v.* Dean, 13 Johns. 105; Delavergne *v.* Norris, 7 Johns. 358, 5 Am. Dec. 281.

Ohio.— Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193.

Oregon.— Corbett *v.* Wrenn, 25 Oreg. 305, 35 Pac. 658.

Pennsylvania.— Myers *v.* Brodbeck, 110 Pa. St. 198, 5 Atl. 662.

South Dakota.— See Loiseau *v.* Threlstad, 14 S. D. 257, 85 N. W. 189, to the effect that S. D. Comp. Laws, § 4585, declaring the detriment for breach of covenant against an encumbrance to be the amount expended by the covenantee in extinguishing it has no application where he has not extinguished it or expended anything toward it.

Texas.— McClelland *v.* Moore, 48 Tex. 355.

Vermont.— Cole *v.* Kimball, 52 Vt. 639.

Wisconsin.— Eaton *v.* Lyman, 30 Wis. 41; Pillsbury *v.* Mitchell, 5 Wis. 17.

See 14 Cent. Dig. tit. "Covenants," § 240.

The fairness and necessity of the payment, and not the sum actually paid, is the true measure of damages. Gilbert *v.* Rushner, 49 Kan. 632, 31 Pac. 123. See also Anderson *v.* Knox, 20 Ala. 156; Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Guthrie *v.* Russell, 46 Iowa 269, 26 Am. Rep. 135.

Procuring and recording discharge.—Where before suit brought the covenantor has discharged a mortgage encumbrance upon the property conveyed, the plaintiff can recover only for money expended in procuring and recording a discharge of the mortgage, but not for an assignment of the mortgage, lost time, legal expenses, or car-fares. Bradshaw *v.* Crosby, 151 Mass. 237, 24 N. E. 47, construing Mass. Pub. Stat. c. 126, § 18.

48. Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; Andrews *v.* Appel, 22 Hun (N. Y.) 429; Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90.

49. Kelsey *v.* Remer, 43 Conn. 129, 21 Am. Rep. 638; Norton *v.* Babcock, 2 Metc. (Mass.) 510; Hartshorn *v.* Cleveland, 52 N. J. L. 473, 19 Atl. 974; Utica, etc., R. Co. *v.* Gates, 8 N. Y. App. Div. 181, 40 N. Y. Suppl. 316.

50. Johnson *v.* Collins, 116 Mass. 392; Brooks *v.* Moody, 20 Pick. (Mass.) 474; Leffingwell *v.* Elliott, 10 Pick. (Mass.) 204; Potter *v.* Taylor, 6 Vt. 676.

51. Miller *v.* Halsey, 14 N. J. L. 48.

52. *Arkansas.*— Alexander *v.* Bridgford, 59 Ark. 195, 27 S. W. 69.

Illinois.— Willets *v.* Burgess, 34 Ill. 494.

Massachusetts.—Jenkins *v.* Hopkins, 8 Pick. 346; Chapel *v.* Bull, 17 Mass. 213.

Minnesota.— Dana *v.* Goodfellow, 51 Minn. 375, 53 N. W. 656; Hawthorne *v.* Minneapolis City Bank, 34 Minn. 382, 26 N. W. 4, construing Minn. Gen. Stat. (1878), c. 40, § 35.

New Hampshire.— Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320.

New Jersey.—De Long *v.* Spring Lake, etc., Co., 65 N. J. L. 1, 47 Atl. 491; Stewart *v.* Drake, 9 N. J. L. 139.

Pennsylvania.— Patterson *v.* Stewart, 6 Watts & S. 527, 40 Am. Dec. 586.

Wisconsin.— Daggett *v.* Reas, 79 Wis. 60, 48 N. W. 127; Nichol *v.* Alexander, 28 Wis. 118.

See 14 Cent. Dig. tit. "Covenants," § 241.

53. Grant *v.* Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Andrews *v.* Appel, 22 Hun (N. Y.) 429; Dimmick *v.* Lockwood, 10 Wend. (N. Y.) 142; Foote *v.* Burnet, 10 Ohio 317, 36 Am. Dec. 90.

Where land is deeded for a nominal consideration, with a view to its improvement by the grantee, and the consequent benefit to the grantor's adjoining property, the measure of damages for breach of a covenant against encumbrances is not the nominal consideration named in the deed, but the amount actually paid by the grantee to protect himself against the encumbrance, not to exceed the then value of the premises. Utica, etc., R. Co. *v.* Gates, 21 Misc. (N. Y.) 205, 47 N. Y. Suppl. 231 [*distinguishing* Grant *v.* Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Andrews *v.* Appel, 22 Hun 429; Dimmick *v.* Lockwood, 10 Wend. 142].

resulting from the existence of an easement thereon is as a rule the measure of damages in an action for the breach of the covenant against encumbrances.[54] Where the easement has been extinguished, the measure of damages is the injury sustained between the date of the deed and the removal of the encumbrance, together with the expenses incident to such removal.[55] On the other hand the fact that an easement is perpetual may properly be taken into consideration in assessing the damages.[56]

5. Covenant For Further Assurance. The damages for the refusal to execute a further assurance are only nominal, unless plaintiff prove actual damages sustained by reason of such refusal.[57] Where actual injury is shown the covenantee is entitled to full compensatory damages.[58]

6. Covenants of Warranty and For Quiet Enjoyment — a. In General. Being covenants of indemnity compensation is the usual measure of damages upon the breach of a covenant of warranty or for quiet enjoyment.[59] Upon a partial breach the diminished value of the tract[60] and the value of the estate or interest lost[61] has each been held the measure; and where the eviction is by a mortgagee,

54. *Connecticut.*— Mitchell *v.* Stanley, 44 Conn. 312; Hubbard *v.* Norton, 10 Conn. 422; Gilbert *v.* Bulkley, 5 Conn. 262, 13 Am. Dec. 57.

Illinois.— Morgan *v.* Smith, 11 Ill. 194.

Iowa.— Kostendader *v.* Pierce, 37 Iowa 645.

Massachusetts.— Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671; Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335; Wetherbee *v.* Bennett, 2 Allen 428; Harlow *v.* Thomas, 15 Pick. 66.

Minnesota.— Mackey *v.* Harmon, 34 Minn. 168, 24 N. W. 702.

Missouri.— Williamson *v.* Hall, 62 Mo. 405.

New York.— Herb *v.* Metropolitan Hospital, etc., 80 N. Y. App. Div. 145, 80 N. Y. Suppl. 552.

See 14 Cent. Dig. tit. "Covenants," § 242.

Actual damage.—Where a covenant against encumbrances is broken by an easement over the land for a railroad right of way, the damage arising from its breach ought to be the actual damage sustained by the purchaser. Whiteside *v.* Magruder, 75 Mo. App. 364.

Nominal damages.— The existence of an easement created by a covenant between lot owners that they will not build nearer than eight feet from the street is so slight an injury, if any, to the premises, that only nominal damages will be given on account of it in an action for a breach of the covenant against encumbrances. Greene *v.* Creighton, 7 R. I. 1.

Costs and expenses.— If a grantee of land, under a deed containing covenants of warranty against encumbrances, is defeated in a suit against him for interfering with an easement which a third party claims on the land, he may recover of his warrantor not only the damage he has sustained in consequence of the breach of the covenant, but also such costs and expenses as he has fairly and in good faith incurred in attempting to maintain and defend the title. Smith *v.* Sprague, 40 Vt. 43.

55. Wilcox *v.* Danforth, 5 Ill. App. 378. But see Herrick *v.* Moore, 19 Me. 313, in which land conveyed by a deed containing covenants against encumbrances was in fact encumbered, in that a road was located across it. Subsequent to the conveyance there was a discontinuance of part of the road and a new location, and it was held that the grantee could recover damages upon the covenant only as to the remaining portion of the road.

56. Kellogg *v.* Malin, 62 Mo. 429. See also Whiteside *v.* Magruder, 75 Mo. App. 364.

57. Zabriskie *v.* Baudendistel, (N. J. Ch. 1890) 20 Atl. 163; Burr *v.* Todd, 41 Pa. St. 206.

Removal of cloud on title.— In Luther *v.* Brown, 66 Mo. App. 227, it was held that since the covenant for further assurance relates only to defects which can be supplied by the vendor himself, the expenses the vendee has incurred to remove a cloud are not recoverable in an action for a breach of that covenant.

58. King *v.* Jones, 1 Marsh. 107, 5 Taunt. 418, 15 Rev. Rep. 533, 1 E. C. L. 219.

59. McAlester *v.* Landers, 70 Cal. 79, 11 Pac. 505; Jackson *v.* Hanna, 53 N. C. 188; Knowles *v.* Kennedy, 82 Pa. St. 445; Singleton *v.* Allen, 2 Strobh. Eq. (S. C.) 166.

Personal injuries.— A warranty for quiet enjoyment extends only to the damages involved in an eviction. Personal injuries from an assault and battery, committed to eject the tenant, are not recoverable as due by the covenant. Jones *v.* Worley, 21 La. Ann. 404.

Where title to fixtures fails the damages are, not their value for removal, but for use to the tenant as situated. Koerper *v.* Jung, 33 Ill. App. 144 [*citing* Grose *v.* Hennessey, 13 Allen (Mass.) 389].

60. Clark *v.* Zeigler, 79 Ala. 346; Hymes *v.* Esty, 133 N. Y. 342, 31 N. E. 105 [*reversing* 15 N. Y. Suppl. 341].

61. *Colorado.*—Tierney *v.* Whiting, 2 Colo. 620.

Kentucky.— Davis *v.* Logan, 5 B. Mon. 341.

Maine.— Blanchard *v.* Blanchard, 48 Me. 174.

Minnesota.— Fritz *v.* Pusey, 31 Minn. 368, 18 N. W. 94.

New York.— Wager *v.* Schuyler, 1 Wend. 553.

South Carolina.— Welsh *v.* Kibler, 5 S. C. 405.

See 14 Cent. Dig. tit. "Covenants," § 245.

the amount of the mortgage debt and interest, if that do not exceed the full value of the estate, should be taken.[62] The value of the tract is to be taken as of the date of the covenant.[63] In all cases the law in force at the date of the contract governs in the determination of the measure of damages.[64]

b. Aggravation and Mitigation of Damages. It may be shown in mitigation of damages that before trial the vendor perfected the title;[65] that the vendee, holding under a tax-title, has received from the holder of the paramount title all the taxes paid by himself and his vendor;[66] that a mortgage made by the grantee is outstanding at the time of suit;[67] or that by reason of a subsequent suit the premises have been restored to the grantee.[68] On the other hand incorporeal rights pertaining to the land may be taken into consideration in assessing the damages upon an eviction.[69]

c. Nominal Damages. Where a grantee has undisturbed possession and has been subject to no inconvenience or expense by reason of a defect in the title conveyed, he is entitled to recover only nominal damages in an action for a breach of the covenant of warranty or for quiet enjoyment.[70] So too where the

For a breach by the recovery of dower, the damages are the value of the dower estate. Tierney *v.* Whiting, 2 Colo. 620; Davis *v.* Logan, 5 B. Mon. (Ky.) 341. See also Welsh *v.* Kibler, 5 S. C. 405. And see Wager *v.* Schuyler, 1 Wend. (N. Y.) 553.

62. Curtis *v.* Deering, 12 Me. 499; Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341; Winslow *v.* McCall, 32 Barb. (N. Y.) 241. *Compare* White *v.* Whitney, 3 Metc. (Mass.) 81, in which it was held that where land, subject to a mortgage, is conveyed with a covenant of warranty, and the grantee is ousted by the mortgagee, the rule of damages is the value of the estate at the time of the ouster, unless that value exceeds the amount due on the mortgage; but if it exceeds that amount then that amount is the measure of damages.

63. Bonta *v.* Miller, 1 Litt. (Ky.) 250; Harland *v.* Eastland, Hard. (Ky.) 590; King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777. And see *infra*, IV, F, 6, f.

On suit by assignee.— In Mette *v.* Dow, 9 Lea (Tenn.) 93, A, by deed containing a covenant of general warranty of title, conveyed to B, his cotenant, an undivided half of a lot of land. B subsequently conveyed the entire lot to C, who was afterward evicted, and sued A on his covenant, and it was held that he could recover one-half the amount paid by him to B, with interest from the date of eviction.

In Massachusetts the rule is to take it as of the date of eviction, including therein the value of all improvements which have been placed on the land. Cecconi *v.* Rodden, 147 Mass. 164, 16 N. E. 749; White *v.* Whitney, 3 Metc. 81.

64. Garrett *v.* Gaines, 6 Tex. 435.

65. Looney *v.* Reeves, 5 Kan. App. 279, 48 Pac. 606.

66. Stebbins *v.* Wolf, 33 Kan. 765, 7 Pac. 542. See also Danforth *v.* Smith, 41 Kan. 146, 21 Pac. 168, in which the taxes received from the holder of the paramount title were in excess of the consideration paid by the vendee to the vendor, and it was held that in view of this fact the vendee could recover no damages on the covenant of warranty by his vendor.

67. Tufts *v.* Adams, 8 Pick. (Mass.) 547.

68. Baxter *v.* Ryerss, 13 Barb. (N. Y.) 267.

Where life-estate passes.— Where a deed, purporting to convey a fee with covenant of warranty, conveyed only a life-estate, the grantee, who sued on the covenant without an offer to rescind the conveyance, can recover only the difference between the value of the fee and the life-estate. Recohs *v.* Younglove, 8 Baxt. (Tenn.) 385. See also Aiken *v.* McDonald, 43 S. C. 29, 20 S. E. 796, 49 Am. St. Rep. 817.

69. In Boyle *v.* Edwards, 114 Mass. 373, it was held that a grantee under a deed of warranty, who has been evicted by title paramount from an undivided part of the premises, pertaining to which is a right to build upon a division wall, can recover the market value of that undivided part of the land with the building right.

70. *Alabama.*— Sayre *v.* Sheffield Land, etc., Co., 106 Ala. 440, 18 So. 101.

Georgia.— Hampton *v.* Poole, 28 Ga. 514.

Illinois.— Brady *v.* Spurck, 27 Ill. 478.

Indiana.— Sebrell *v.* Hughes, 72 Ind. 186; Mason *v.* Cooksey, 51 Ind. 519; Black *v.* Coan, 48 Ind. 385; Strain *v.* Huff, 45 Ind. 222; Small *v.* Reeves, 14 Ind. 163.

Iowa.— Hencke *v.* Johnson, 62 Iowa 555, 17 N. W. 766.

Kansas.— O'Meara *v.* McDaniel, 49 Kan. 685, 31 Pac. 303.

Kentucky.— Patrick *v.* Swinney, 5 Bush 421.

Minnesota.— Sable *v.* Brockmeier, 45 Minn. 248, 47 N. W. 794.

Missouri.— Pence *v.* Gabbert, 63 Mo. 302.

North Carolina.— Britton *v.* Ruffin, 120 N. C. 87, 26 S. E. 642.

Ohio.— Hill *v.* Butler, 6 Ohio St. 207.

Texas.— Lawless *v.* Evans, (App. 1889) 14 S. W. 1019.

See 14 Cent. Dig. tit. "Covenants," § 247.

Although the inchoate right of dower is an encumbrance which will amount to a breach of a covenant of warranty, yet because of its contingent nature it is not susceptible of computation, and nominal damages only can be recovered in an action thereon. Blevins *v.*

loss has resulted either from the covenantee's laches or from breach of his contract substantial damages cannot be recovered;[71] and where nothing has been paid as the price of the land only nominal damages can be recovered.[72]

d. Purchase of Outstanding Title. Where the covenantee has purchased the outstanding title, his damages for the breach of his vendor's covenant of warranty or for quiet enjoyment will be limited to the amount necessarily paid by him for that purpose, with interest from the date of eviction, including the incidental expenses and reasonable compensation for his trouble, not exceeding in all the purchase-price and interest.[73] Where the grantee extinguishes the paramount title for a nominal consideration, he can recover on the warranty only the amount of such consideration, with a reasonable compensation for expenses to which he may have been put in extinguishing it.[74]

e. Recovery of Purchase-Money, With Interest — (i) *In General.* The almost universally accepted rule as to the measure of damages recoverable in an action for a total breach of the covenant of warranty or for quiet enjoyment is that the covenantee shall recover the purchase-money with interest[75] and

Smith, 104 Mo. 583, 6 S. W. 213, 13 L. R. A. 441.

Where the land has been sold by the covenantee, and his vendee has never been disturbed in his possession, such covenantee can recover only nominal damages for a breach of the covenant of warranty. Patrick *v.* Swinney, 5 Bush (Ky.) 421.

71. Beecher *v.* Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57.

72. West *v.* West, 76 N. C. 45; Glenn *v.* Mathews, 44 Tex. 400. But see Comstock *v.* Son, 154 Mass. 389, 28 N. E. 296, in which it was held that where a grantee under a voluntary deed is evicted by the owner of the superior title, he may recover substantial damages in an action upon his covenant of warranty.

73. *Arkansas.*— Dillahunty *v.* Little Rock, etc., R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107.

Illinois.— Weber *v.* Anderson, 73 Ill. 439; Claycomb *v.* Munger, 51 Ill. 373; Watson *v.* Woolverton, 41 Ill. 241; Brady *v.* Spurck, 27 Ill. 478; Clapp *v.* Herdman, 25 Ill. App. 509.

Indiana.— Mooney *v.* Burchard, 84 Ind. 285; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Iowa.— Hooper *v.* Sac County Bank, 72 Iowa 280, 33 N. W. 681; Royer *v.* Foster, 62 Iowa 321, 17 N. W. 516; Snell *v.* Iowa Homestead Co., 59 Iowa 701, 13 N. W. 848; Fawcett *v.* Woods, 5 Iowa 400.

Kentucky.— Vanmetre *v.* Griffith, 4 Dana 89.

Louisiana.— Under La. Rev. Code, art. 2506, an evicted purchaser has the right to claim the restitution of the price, although he has since purchased of his evictor for a less sum. Boyer *v.* Amet, 41 La. Ann. 721, 6 So. 734. *Compare* Coxe's Succession, 15 La. Ann. 514.

Maine.— Kelly *v.* Low, 18 Me. 244.

Massachusetts.— Leffingwell *v.* Elliott, 10 Pick. 204; Wyman *v.* Brigden, 4 Mass. 150.

Mississippi.— White *v.* Presly, 54 Miss. 313.

Missouri.— Hall *v.* Bray, 51 Mo. 288; Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661; Lect *v.* Gratz, 92 Mo. App. 422.

New York.— Petrie *v.* Folz, 54 N. Y. Super. Ct. 223.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Oregon.— Arrigoni *v.* Johnson, 6 Oreg. 167.

Pennsylvania.— Cox *v.* Henry, 32 Pa. St. 18; Brown *v.* Dickerson, 12 Pa. St. 372; Hauck *v.* Single, 10 Phila. 551.

Texas.— McClelland *v.* Moore, 48 Tex. 355; James *v.* Lamb, 2 Tex. Civ. App. 185, 21 S. W. 172; Daugherty *v.* Belew, 3 Tex. App. Civ. Cas. § 395; Hubbard *v.* Coker, 1 Tex. App. Civ. Cas. § 657. But see Thiele *v.* Axell, 5 Tex. Civ. App. 548, 24 S. W. 552, 803.

Virginia.— Haffey *v.* Birchetts, 11 Leigh 83; Hull *v.* Cunningham, 1 Munf. 330.

Wisconsin.— Bailey *v.* Scott, 13 Wis. 618.

United States.— Barlow *v.* Delaney, 40 Fed. 97.

See 14 Cent. Dig. tit. "Covenants," § 248.

But see Martin *v.* Atkinson, 7 Ga. 228, 50 Am. Dec. 403, where it was held that a vendee who is legally evicted and who repurchases the property from the evictor, is in under a new title, and the price last paid is no criterion of the damages sustained by the failure of the vendor's title.

Price must be reasonable.— Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661.

Purchase of invalid title.—A grantee is not entitled to recover the cost of buying in an outstanding title which has no validity. Nattinger *v.* Ware, 41 Ill. 245.

74. Leffingwell *v.* Elliott, 8 Pick. (Mass.) 455, 10 Am. Dec. 343; Loomis *v.* Bedel, 11 N. H. 74; Denson *v.* Love, 58 Tex. 468; Turner *v.* Goodrich, 26 Vt. 707.

75. *Arkansas.*— Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

California.— McGary *v.* Hastings, 39 Cal. 360, 2 Am. Rep. 456.

Georgia.— Fernander *v.* Dunn, 19 Ga. 497,

the damages should also embrace the expenses of litigation including legal costs expended in defense of the title.[76]

(11) *On Suit by Subsequent Purchaser.* The authorities are in direct conflict as to the proper measure of damages in an action by a subsequent purchaser against a remote covenantor for breach of the covenant of warranty or for quiet enjoyment. On the one hand it is held that the damages are to be measured by the amount paid by the plaintiff for the land with interest, not exceeding the

65 Am. Dec. 607; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Illinois.— Weber *v.* Anderson, 73 Ill. 439; Wood *v.* Kingston Coal Co., 48 Ill. 356, 95 Am. Dec. 554.

Indiana.— Rhea *v.* Swain, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; Wood *v.* Bibbins, 58 Ind. 392; Burton *v.* Reeds, 20 Ind. 87; Reese *v.* McQuilkin, 7 Ind. 450.

Iowa.— Bellows *v.* Litchfield, 83 Iowa 36, 48 N. W. 1062; Bloom *v.* Wolfe, 50 Iowa 286; Beard *v.* Delaney, 35 Iowa 16; Swafford *v.* Whipple, 3 Greene 261, 54 Am. Dec. 498.

Kansas.— Herington *v.* Clark, 60 Kan. 855, 55 Pac. 462.

Kentucky.— Wood *v.* Wood, 1 Metc. 512; Hanson *v.* Buckner, 4 Dana 251, 29 Am. Dec. 401; Durbin *v.* Garrard, 5 T. B. Mon. 317; McKinny *v.* Watts, 3 A. K. Marsh. 268; Booker *v.* Bell, 3 Bibb 173, 6 Am. Dec. 641; Blackwell *v.* McBride, 14 Ky. L. Rep. 760.

Massachusetts.— Harris *v.* Newell, 8 Mass. 262.

Michigan.— Parkinson *v.* Woulds, 125 Mich. 325, 84 N. W. 292.

Minnesota.— Devine *v.* Lewis, 38 Minn. 24, 35 N. W. 711.

Mississippi.— Gridley *v.* Tucker, Freem. 209.

Missouri.— Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284; Murphy *v.* Price, 48 Mo. 247; Tong *v.* Matthews, 23 Mo. 437; Coffman *v.* Huck, 19 Mo. 435; Leeb *v.* Gratz, 92 Mo. App. 422; Pence *v.* Gabbert, 70 Mo. App. 201.

New Hampshire.— Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320.

New York.— Kelly *v.* Schenectady Dutch Church, 2 Hill 105.

North Carolina.— Grist *v.* Hodges, 14 N. C. 198.

Ohio.— Wade *v.* Comstock, 11 Ohio St. 71; Lloyd *v.* Quimby, 5 Ohio St. 262; Clark *v.* Parr, 14 Ohio 118, 45 Am. Dec. 529.

Pennsylvania.— McClure *v.* Gamble, 27 Pa. St. 288.

South Carolina.— Earle *v.* Middleton, Cheves 127; Henning *v.* Withers, 2 Treadw. 584.

Tennessee.— McGuffey *v.* Humes, 85 Tenn. 26, 1 S. W. 506; Elliott *v.* Thompson, 4 Humphr. 99, 40 Am. Dec. 630; Talbot *v.* Bedford, Cooke 447.

Texas.— Brown *v.* Hearon, 66 Tex. 63, 17 S. W. 395; Turner *v.* Miller, 42 Tex. 418, 19 Am. Rep. 47; Kempner *v.* Beaumont Lumber Co., 20 Tex Civ. App. 307, 49 S. W. 412; Hall *v.* Pierson, 1 Tex. App. Civ. Cas. § 1210.

Virginia.— Sheffey *v.* Gardiner, 79 Va. 313; Click *v.* Green, 77 Va. 827.

West Virginia.— Butcher *v.* Peterson, 26 W. Va. 447, 53 Am. Rep. 89.

Wisconsin.— Blossom *v.* Knox, 3 Pinn. 262, 2 Chandl. 295.

United States.— Northern Pac. R. Co. *v.* Montgomery, 86 Fed. 251, 30 C. C. A. 17.

See 14 Cent. Dig. tit. "Covenants," § 249.

Consequential damages cannot be recovered. Henning *v.* Withers, 2 Treadw. (S. C.) 584.

Conveyance by trustee.— See Barnett *v.* Hughey, 54 Ark. 195, 15 S. W. 464.

On exchange.— When the title to real estate fails, the measure of the vendee's recovery on the covenants of warranty is the purchase-price, and where there is an exchange of lands the agreed value, or, if none, the market value of the lands given in exchange. Looney *v.* Reeves, 5 Kan. App. 279, 48 Pac. 606.

Where an administrator deeds land of the intestate subject to a mortgage, the deed containing covenants of seizin and warranty, in an action by the grantee against the administrator for breach of the covenants, he is entitled to recover the consideration money with interest and the costs of defending the suit in which he was evicted, but not the money he paid for an assignment of the mortgage and release of dower by the intestate's widow. Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

As to the allowance of interest generally see *infra*, IV, F, 7, a.

76. *Alabama.*— Kingsbury *v.* Milner, 69 Ala. 502.

Illinois.— Harding *v.* Larkin, 41 Ill. 413.

Kentucky.— Robertson *v.* Lannon, 2 Bush 301; Marshall *v.* McConnell, 1 Litt. 419; Cox *v.* Strode, 2 Bibb 273, 5 Am. Dec. 603.

Missouri.— Matheny *v.* Stewart, 108 Mo. 73, 17 S. W. 1014; Dryden *v.* Kellogg, 2 Mo. App. 87.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

Nevada.— Hoffman *v.* Bosch, 18 Nev. 360, 4 Pac. 703.

New Hampshire.— Foster *v.* Thompson, 41 N. H. 373; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey.— Morris *v.* Rowan, 17 N. J. L. 304.

New York.— Bennet *v.* Jenkins, 13 Johns. 50; Staats *v.* Ten Eyck, 3 Cai. 111, 2 Am. Dec. 254.

Pennsylvania.— Anderson *v.* Washabaugh, 43 Pa. St. 115.

South Carolina.— Lowrance *v.* Robertson, 10 S. C. 8.

Virginia.— Threlkeld *v.* Fitzhugh, 2 Leigh 451; Lowther *v.* Com., 1 Hen. & M. 202.

amount paid the defendant by his immediate grantee.[77] On the other hand the measure of damages is held to be the amount paid the defendant by his immediate grantee with interest, irrespective of what the plaintiff may himself have paid.[78]

f. Recovery of Value of Tract. In a few jurisdictions the value of the land at the time of eviction is held to be the proper measure of damages in an action for breach of the covenant of warranty or for quiet enjoyment;[79] and this was the rule of the civil law,[80] and would seem to be that in force in England.[81] On the other hand the value of the land at the time of the conveyance — of which the actual consideration paid is evidence — has been held in some cases to be the correct measure.[82] Where the eviction of the covenantee has been caused by the

Further as to costs and expenses of litigation see *infra*, IV, F, 8.

77. *Colorado.*— Taylor *v.* Wallace, 20 Colo. 211, 37 Pac. 963.

Georgia.— Martin *v.* Gordon, 24 Ga. 533.

Indiana.—McClure *v.* McClure, 65 Ind. 482.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Minnesota.— Moore *v.* Frankenfield, 25 Minn. 540.

New York.—Baxter *v.* Ryerss, 13 Barb. 267.

North Carolina.— Williams *v.* Beeman, 13 N. C. 483.

See 14 Cent. Dig. tit. "Covenants," § 250.

Recovery limited by original price.— The measure of damages cannot exceed the price originally paid for the land. Martin *v.* Gordon, 24 Ga. 533.

78. *Michigan.*— Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692.

Mississippi.—Brooks *v.* Black, 68 Miss. 161, 8 So. 332, 24 Am. St. Rep. 259, 11 L. R. A. 176.

Oregon.— Rash *v.* Jenne, 26 Oreg. 169, 37 Pac. 538.

South Carolina.— Lowrance *v.* Robertson, 10 S. C. 8.

Texas.— Lewis *v.* Ross, 95 Tex. 358, 67 S. W. 405 [*modifying* (Civ. App. 1901) 65 S. W. 504]; Hollingsworth *v.* Mexia, 14 Tex. Civ. App. 363, 37 S. W. 455; Rogers *v.* Golson, (Civ. App. 1895) 31 S. W. 200.

Virginia.— Jackson *v.* Turner, 5 Leigh 119.

Wisconsin.— Eaton *v.* Lyman, 24 Wis. 438.

See 14 Cent. Dig. tit. "Covenants," § 250.

In Missouri the value of the land at the time of eviction is taken as the measure. Dickson *v.* Desire, 23 Mo. 151, 66 Am. Dec. 661.

79. *Connecticut.*— Butler *v.* Barnes, 61 Conn. 399, 24 Atl. 328; Sterling *v.* Peet, 14 Conn. 245; Horsford *v.* Wright, Kirby 3, 1 Am. Dec. 8.

Maine.— Williamson *v.* Williamson, 71 Me. 442; Elder *v.* True, 32 Me. 104; Hardy *v.* Nelson, 27 Me. 525; Swett *v.* Patrick, 12 Me. 9; Cushman *v.* Blanchard, 2 Me. 266, 11 Am. Dec. 76.

Massachusetts.— Cecconi *v.* Rodden, 147 Mass. 164, 16 N. E. 749; Donahoe *v.* Emery, 9 Metc. 63; Wyman *v.* Ballard, 12 Mass. 304; Bigelow *v.* Jones, 4 Mass. 512; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182.

South Carolina.— Guerard *v.* Rivers, 1 Bay 265; Eveleigh *v.* Stitt, 1 Bay 92; Liber *v.* Parsons, 1 Bay 19. But see *supra*, note 75.

Tennessee.— May *v.* Wright, 1 Overt. 385. But see *supra*, note 75.

Vermont.— Keeler *v.* Wood, 30 Vt. 242; Pitkin *v.* Leavitt, 13 Vt. 379; Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347; Williams *v.* Wetherbee, 2 Aik. 329; Drury *v.* Shumway, 1 D. Chipm. 110, 1 Am. Dec. 704.

See 14 Cent. Dig. tit. "Covenants," § 251.

Contra.— *Indiana.*— Thomas *v.* Hamilton, 71 Ind. 277.

Kentucky.— Robertson *v.* Lemon, 2 Bush 301.

Louisiana.— Boyer *v.* Amet, 41 La. Ann. 721, 6 So. 734.

Mississippi.— Phipps *v.* Tarpley, 31 Miss. 433.

Texas.— Garrett *v.* Gaines, 6 Tex. 435.

Virginia.— Lowther *v.* Com., 1 Hen. & M. 202. But see Mills *v.* Bell, 3 Call 320.

See 14 Cent. Dig. tit. "Covenants," § 251; and see *supra*, IV, F, 6, e, (I).

80. Hale *v.* New Orleans, 18 La. Ann. 321; Bissell *v.* Erwin, 13 La. 143; Dupuy *v.* Ducondu, 6 Can. Supreme Ct. 425. But see Boyer *v.* Amet, 41 La. Ann. 721, 6 So. 734.

Limitation of civil-law rule.—Although the general rule of the Roman Digest is that the purchaser must be indemnified to the extent of the interest which he had in not being evicted, there was a reasonable limitation to this rule, to wit, that where the agreement had for its object a certain amount, as in sales, leases, etc., the damage should not exceed the subject-matter of the contract. The vendor in good faith, however, was alone entitled to this restriction, which, it seems, was adopted by the Spanish law. Edwards *v.* Martin, 19 La. 284.

81. See Bunny *v.* Hopkinson, 27 Beav. 565, 6 Jur. N. S. 187, 29 L. J. Ch. 93, 1 L. T. Rep. N. S. 53.

82. *Iowa.*— Fawcett *v.* Woods, 5 Iowa 400.

Kentucky.— Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45; Marshall *v.* McConnell, 1 Litt. 419; Davis *v.* Hall, 2 Bibb 590. *Compare* Harland *v.* Eastland, Hard. 590.

Michigan.—Mason *v.* Kellogg, 38 Mich. 132.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

Nevada.— Dalton *v.* Bowker, 8 Nev. 190.

New York.— Jenks *v.* Quinn, 137 N. Y. 223, 33 N. E. 376 [*affirming* 61 Hun 427, 16 N. Y. Suppl. 240].

Pennsylvania.— Cox *v.* Henry, 32 Pa. St. 18.

Virginia.— Stout *v.* Jackson, 2 Rand. 132. See also Threlkeld *v.* Fitzhugh, 2 Leigh 451.

West Virginia.— Moreland *v.* Metz, 24 W. Va. 119, 49 Am. Rep. 246.

See 14 Cent. Dig. tit. "Covenants," § 25. And see *supra*, IV, F, 6, e, (I).

fraud of the covenantor, it has been held that he is entitled to recover the highest value of the land at any time between his purchase and the commencement of his suit.[83] In either case interest and necessary costs and expenses are recoverable.[84]

g. Recovery of Consideration Expressed or Agreed Upon. Where the parties have mutually agreed upon the value of the land, or upon the value of the consideration given and received, such valuation is to be taken as correct, and is the proper measure of damages in an action for breach of the covenant of warranty or for quiet enjoyment.[85] Similarly it has been held that where a vendee is delayed in obtaining possession by reason of an outstanding lease, the measure of damages is the fair rental value for the lost time, of which the rent agreed to be paid by the tenant is *prima facie* evidence.[86]

h. Loss of Part of Tract. The rule as to the measure of damages upon the loss of part of the land conveyed, as most usually expressed, is that the measure of damages is such proportional part of the consideration money paid as the value of the land to which the title fails bears to the whole land with interest[87] and

83. Burdick *v.* Seymour, 39 Iowa 452.

84. See *infra*, IV, F, 7, 8.

85. Koestenbader *v.* Peirce, 41 Iowa 204; Williamson *v.* Test, 24 Iowa 138; Stebbins *v.* Wolf, 33 Kan. 765, 7 Pac. 542; Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401; McMillan *v.* Ritchie, 3 T. B. Mon. (Ky.) 348, 16 Am. Dec. 107; Haynie *v.* American Trust Invest. Co., (Tenn. Ch. App. 1896) 39 S. W. 860.

Fictitious valuation.— Where the original purchaser of land conveyed it under a general covenant of warranty, and the grantee covenanted specially to pay the first vendor the purchase-price, the consideration being certain shares of stock put in at a fictitious valuation, the measure of damages, in an action by the second vendee for breach of warranty, is the agreed value of the stock, with interest from the date of eviction. McGuffey *v.* Humes, 85 Tenn. 26, 1 S. W. 506.

Liquidated damages.—Where the consideration expressed in the deed is £20 per hundred acres, but by covenant between the parties it is stipulated that £10 per hundred should be refunded in case the land should be lost, the latter figure is the measure of damages. Handley *v.* Chambers, 4 Bibb (Ky.) 7.

Penalty.—A covenant, in case of eviction, to pay double the purchase-money and all damages entitles the covenantee to his purchase-money and interest only, the agreement to restore double the consideration being looked upon as a penalty merely. Nesbit *v.* Brown, 16 N. C. 30.

Where natural affection was in fact the inducement, but a money consideration was stated in the deed, the latter should be taken as the grantor's valuation and determine the sum to be recovered. Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401.

86. Moreland *v.* Metz, 24 W. Va. 119, 49 Am. Rep. 246.

87. *California.*— Hoffman *v.* Kirby, 136 Cal. 26, 68 Pac. 321.

Illinois.— Weber *v.* Anderson, 73 Ill. 439; Major *v.* Dunnavant, 25 Ill. 262.

Indiana.— Wright *v.* Nipple, 92 Ind. 310. See also Cambridge First Nat. Bank *v.* Colter, 61 Ind. 153.

Iowa.— Mischke *v.* Baughn, 52 Iowa 528, 3 N. W. 543.

Kentucky.— Hunt *v.* Orwig, 17 B. Mon. 73, 66 Am. Dec. 144; Dougherty *v.* Duvall, 9 B. Mon. 57.

Louisiana.— Southern Wood Mfg., etc., Co. *v.* Davenport, 50 La. Ann. 505, 23 So. 448.

Nevada.— Dalton *v.* Bowker, 8 Nev. 190.

New Hampshire.—Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171.

New York.— Hunt *v.* Raplee, 44 Hun 149; Adams *v.* Conover, 22 Hun 424.

North Carolina.— Dickens *v.* Shepperd, 7 N. C. 526.

Pennsylvania.— Hood's Appeal, (1886) 7 Atl. 137; Wacker *v.* Straub, 88 Pa. St. 32; Terry *v.* Drabenstadt, 68 Pa. St. 400; Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115.

South Carolina.— Pearson *v.* Davis, 1 McMull. 37; Wallace *v.* Talbot, 1 McCord 466. See also Hunt *v.* Nolen, 46 S. C. 551, 24 S. E. 543.

Tennessee.— Whitzman *v.* Hirsh, 87 Tenn. 513, 11 S. W. 421.

Texas.— Hynes *v.* Packard, 92 Tex. 44, 45 S. W. 562 [*reversing* (Civ. App. 1897) 44 S. W. 548]; Mann *v.* Mathews, 82 Tex. 98, 17 S. W. 927; Raines *v.* Calloway, 27 Tex. 678; Weeks *v.* Barton, (Civ. App. 1895) 31 S. W. 1071.

Vermont.— Downer *v.* Smith, 38 Vt. 464.

Virginia.— Conrad *v.* Effinger, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646.

See 14 Cent. Dig. tit. "Covenants," § 253.

Loss of undivided moiety.— Where the grantor executed a warranty deed of a certain piece of land, of which he owned only one equal, undivided moiety, it was held, in an action by the grantee for breach of covenant, that the measure of damages should be one half of the consideration paid for the land, with interest. Downer *v.* Smith, 38 Vt. 464.

On recovery of dower.— The liability of the estate of a grantor upon a covenant of warranty in a deed, where a claim of dower has been established by the widow of the grantor against his grantee, is that proportion of one third of the amount paid which the value of the widow's life-estate in the assignment

costs.[88] The value of the part lost with interest has also been said to be the proper measure of damages,[89] as has the actual damage resulting from the eviction — not exceeding the consideration paid — interest, and expenses of suit.[90] Where land is sold by the acre or front foot, the purchase-price per acre or front foot of the part lost is the measure of damages.[91]

7. Interest, Rent, Improvements, Taxes, and Enhancement — a. Interest. The general rule, in actions for breach of covenants, is, upon a recovery by the covenantee, to allow interest upon the consideration paid,[92] or upon the value of the property to which the title has failed.[93] But where the covenantee has had possession of the property and derived benefit therefrom, he is entitled to interest on the purchase-money only for such period before eviction as he is liable to pay, or has paid the true owner for mesne profits.[94] In such a case, however, he is

made bears to the value of a fee simple. Hill *v.* Golden, 16 B. Mon. (Ky.) 551. See also Terry *v.* Drabenstadt, 68 Pa. St. 400.

The relative value of the part lost compared with the value of the whole tract, and not the average price, is the measure of damages. Wallace *v.* Talbot, 1 McCord (S. C.) 466.

Where a remote grantee loses his portion of a tract originally conveyed with covenants, his damages are the value of his land, estimated with reference to the value of the whole tract when originally sold, of which the evidence is the purchase-money actually paid therefor. Dougherty *v.* Duvall, 9 B. Mon. (Ky.) 57. See also Whitzman *v.* Hirsh, 87 Tex. 513, 11 S. W. 421.

88. McDunn *v.* Des Moines, 39 Iowa 286; Grantier *v.* Austin, 66 Hun (N. Y.) 157, 20 N. Y. Suppl. 968; Dimmick *v.* Lockwood, 10 Wend. (N. Y.) 142; Earle *v.* Middleton, Cheves (S. C.) 127; Saunders *v.* Flaniken, 77 Tex. 662, 14 S. W. 236; Gass *v.* Sanger, (Tex. Civ. App. 1893) 30 S. W. 502. And see *infra*, IV, F, 8.

89. Hunt *v.* Nolen, 46 S. C. 356, 24 S. E. 310 [rehearing *denied*, 46 S. C. 551, 24 S. E. 543]; Grant *v.* Hill, (Tex. Civ. App. 1894) 30 S. W. 952; Ferris *v.* Mosher, 27 Vt. 218, 65 Am. Dec. 192; Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618; Humphreys *v.* McClenachan, 1 Munf. (Va.) 493; Nelson *v.* Matthews, 2 Hen. & M. (Va.) 164, 3 Am. Dec. 620.

As to the time at which this value is to be assessed see *supra*, IV, F, 6, f.

90. Griffin *v.* Reynolds, 17 How. (U. S.) 609, 15 L. ed. 229.

Diminution in value of portion retained.— In James *v.* Louisville Public Warehouse Co., 64 S. W. 966, 23 Ky. L. Rep. 1216, it was held that for breach of warranty of title to a city lot on account of the taking, by the city, of a part of the lot to widen the street, under a right thereto acquired prior to the purchase, the measure of damages is not merely the value of the strip taken, but the diminution in value of the entire lot by the taking, and by the grading of the street in a reasonable manner, disregarding all enhancement in value by the widening of the street, and also damages resulting from the negligent manner of constructing the street. But see Haynie *v.* American Trust Invest. Co., (Tenn. Ch. App. 1896) 39 S. W. 860, in which it was held that the plaintiff could recover nothing for the diminution in value of the remaining portions of the lots conveyed to him, occasioned hy a deficiency in the frontage.

While it is competent to consider peculiar advantages and disadvantages of the part lost, the expense of erecting improvements on an adjoining tract should not he considered. Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115.

91. Flynn *v.* White Breast Coal, etc., Co., 72 Iowa 738, 32 N. W. 471; Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518 (seizin); Haynie *v.* American Trust Invest. Co., (Tenn. Ch. App. 1896) 39 S. W. 860; Hynes *v.* Packard, (Tex. Civ. App. 1897) 44 S. W. 548.

92. Smith *v.* Pitkin, 2 Root (Conn.) 46. But see and *compare* Castle *v.* Peirce, 2 Root (Conn.) 294, where it was held that in an action on a covenant of seizin, where the covenantee was ejected from the land, the measure of damages was the amount of the consideration paid, with interest as to the part not improved, and without interest as to the part improved.

On partial failure of title.— In estimating damages upon breach of covenant of warranty, when the title fails as to a part only of the premises, interest should be computed upon the relative proportion of the purchase-price. Stark *v.* Olney, 3 Oreg. 88.

Rests are not allowable in the computation of interest on the purchase-money. Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309 [*citing* Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320].

93. McNear *v.* McComber, 18 Iowa 12. See also Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

94. *Arkansas.*— Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; Logan *v.* Moulder, 1 Ark. 313, 33 Am. Dec. 338.

Georgia.— Whitlock *v.* Crew, 28 Ga. 289; Fernander *v.* Dunn, 19 Ga. 497, 65 Am. Dec. 607; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Illinois.— Wead *v.* Larkin, 49 Ill. 99; Wood *v.* Kingston Coal Co., 48 Ill. 356, 95 Am. Dec. 554; Harding *v.* Larkin, 41 Ill. 413.

Kansas.— Danforth *v.* Smith, 41 Kan. 146, 21 Pac. 168; Stebbins *v.* Wolf, 33 Kan. 765, 7 Pac. 542; Bolinger *v.* Brake, 4 Kan. App. 180, 45 Pac. 950.

Kentucky.—Thompson *v.* Jones, 11 B. Mon.

entitled to interest from the time of eviction,[95] irrespective of whether the rents and profits which he has enjoyed are more or less than the interest on the purchase-money.[96] On the other hand if he has received no benefit from the land the interest is to be computed from the date of the conveyance;[97] and in a few cases this has been held to be the rule under all circumstances;[98] while in others it is held that the interest should be computed from the date of the grantee's final payment.[99] Payments of interest on deferred payments of the consideration are recoverable as part of the consideration,[1] but interest on the costs in the eviction suit is not recoverable.[2]

b. Rents and Profits. As a general rule rents and profits cannot be considered in mitigation of damages, in an action by the covenantee for breach of covenant,[3] unless the covenantor has paid them to the rightful owner of the premises.[4] Where, however, the grantee reconveys, or tenders a reconveyance,

365; Kyle *v.* Fauntleroy, 9 B. Mon. 620; Cogwell *v.* Lyon, 3 J. J. Marsh. 38.

Louisiana.— If the sum to be reimbursed be certain, interest is due from the time the warrantor is put *in mora*; if unliquidated, from the judgment fixing the amount to be reimbursed. Melancon *v.* Robichaud, 19 La. 357; Nerault *v.* L'Enclos, 8 Mart. N. S. 185. See also Miles *v.* His Creditors, 16 La. 35; Conolly *v.* Bertrand, 12 La. 313; Elliott *v.* Labarre, 3 La. 541; Daquin *v.* Coiron, 3 La. 387.

Mississippi.— White *v.* Tucker, 52 Miss. 145.

Missouri.— Hutchins *v.* Roundtree, 77 Mo. 500; Lawless *v.* Collier, 19 Mo. 480.

New Hampshire.— Foster *v.* Thompson, 41 N. H. 373.

New York.— Bennet *v.* Jenkins, 13 Johns. 50; Caulkins *v.* Harris, 9 Johns. 324; Staats *v.* Ten Eyck, 3 Cai. 111, 2 Am. Dec. 254.

Ohio.— Clark *v.* Parr, 14 Ohio 118, 45 Am. Dec. 529; King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Pennsylvania.— Cox *v.* Henry, 32 Pa. St. 18; Patterson *v.* Stewart, 6 Watts & S. 527, 40 Am. Dec. 586. But see Wacker *v.* Straub, 88 Pa. St. 32.

Rhode Island.— Point St. Iron Works *v.* Turner, 14 R. I. 122.

South Carolina.—Interest is allowable from the date of eviction in cases where the loss is only partial, and the plaintiff recovers the proportionate value of the tract lost, instead of the average price per acre. Wallace *v.* Talbot, 1 McCord 466.

Tennessee.— McGuffey *v.* Humes, 85 Tenn. 26, 1 S. W. 506; Mette *v.* Dow, 9 Lea 93.

Texas.— Groesbeck *v.* Harris, 82 Tex. 411, 19 S. W. 850; Mann *v.* Mathews, 82 Tex. 98, 17 S. W. 927; Boone *v.* Knox, 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767; Brown *v.* Hearon, 66 Tex. 63, 17 S. W. 395.

Vermont.— Flint *v.* Steadman, 36 Vt. 210.

Wisconsin.—McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764; Daggett *v.* Reas, 79 Wis. 60, 48 N. W. 127; Conrad *v.* Grand Grove U. A. O. D., 64 Wis. 258, 25 N. W. 24; Messer *v.* Oestreich, 52 Wis. 684, 10 N. W. 6; Rich *v.* Johnson, 2 Pinn. 88, 52 Am. Dec. 144.

See 14 Cent. Dig. tit. "Covenants," § 254.

95. *Illinois.*— Ohling *v.* Luitjens, 32 Ill. 23.

Louisiana.— Hale *v.* New Orleans, 13 La. Ann. 499.

Massachusetts.—Hovey *v.* Newton, 11 Pick. 421.

Nebraska.— Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737.

Texas.— Huff *v.* Riley, 26 Tex. Civ. App. 101, 64 S. W. 387.

See 14 Cent. Dig. tit. "Covenants," § 254.

96. Spring *v.* Chase, 22 Me. 505, 39 Am. Dec. 505.

97. Graham *v.* Dyer, 29 S. W. 346, 16 Ky. L. Rep. 541; Hunt *v.* Nolen, 46 S. C. 551, 24 S. E. 543; Noonan *v.* Ilsley, 21 Wis. 138.

98. Combs *v.* Tarlton, 2 Dana (Ky.) 464; McMillan *v.* Ritchie, 3 T. B. Mon. (Ky.) 348, 16 Am. Dec. 107; Booker *v.* Bell, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; Simpson *v.* Belvin, 37 Tex. 674. *Compare* Graham *v.* Dyer, 29 S. W. 346, 16 Ky. L. Rep. 541, where it was held that in an action on a covenant of warranty, plaintiff may recover interest on the price paid for the land from the time it was paid, if he has not used or occupied the land. The payment, however, was made at the time of the conveyance.

99. Haynie *v.* American Trust Invest. Co., (Tenn. Ch. App. 1896) 39 S. W. 860; Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623.

1. Bellows *v.* Litchfield, 83 Iowa 36, 48 N. W. 1062; Devine *v.* Lewis, 38 Minn. 24, 35 N. W. 711. *Compare* Blake *v.* Burnham, 29 Vt. 437, where it was held that in an action on a covenant of seizin the fact that the covenantee gave securities for the purchase-money, on which he paid a higher interest than legal, does not entitle him to recover more than the legal rate on the purchase-money paid.

2. Morris *v.* Rowan, 17 N. J. L. 304.

3. Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Rhea *v.* Swain, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; Wright *v.* Nipple, 92 Ind. 310; Bradshaw *v.* Craycraft, 3 J. J. Marsh. (Ky.) 77; Hulse *v.* White, 1 N. J. L. 173. *Contra,* Whiting *v.* Dewey, 15 Pick. (Mass.) 428. And see Wyche *v.* Ross, 119 N. C. 174, 25 S. E. 878, to the effect that the defendant is not entitled to a credit for rent where plaintiff does not claim interest on the purchase-money.

4. Burton *v.* Reeds, 20 Ind. 87.

and sues for the purchase-money and interest, he must account to the grantee for the rents and profits.[5] On the other hand it has been held that a covenantee may recover for the depreciation in the rental value of his land by reason of the failure of the covenantor to perform a collateral covenant;[6] and in Louisiana he can recover the value of the fruits and revenues which he has been compelled to return to the true owner.[7]

c. Improvements. In a large majority of the United States the value of improvements made by the grantee is not considered as an element of damage,[8] but upon a loss of a part of the land, upon which there were improvements at the time of conveyance, the damages cannot be confined to the land lost alone, without reference to such improvements.[9] Conversely the covenantor is entitled to an allowance for his improvements from the successful claimant,[10] and where the covenantee has recovered from the paramount owner the value of such improvements, the covenantor is entitled to credit to that extent in an action for breach of his covenant.[11] So too the covenantor can set off the damage sustained by the

5. Park *v.* Cheek, 4 Coldw. (Tenn.) 20.

6. Lake Erie, etc., R. Co. *v.* Griffin, (Ind. App. 1899) 53 N. E. 1042, to the effect that the depreciation in the rental value of land, because of a breach of a covenant by a railroad company to build a stock fence, may be recovered, whether or not the lands were actually rented or offered for rent.

7. Pharr *v.* Gall, 104 La. 700, 29 So. 306; Bissell *v.* Erwin, 13 La. 143; Morris *v.* Abat, 9 La. 552.

8. *Alabama.*— Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545.

Connecticut.— Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169.

Kentucky.— Cosby *v.* West, 2 Bibb 568.

Missouri.— Coffman *v.* Huck, 19 Mo. 435.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

New Hampshire.—Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320.

New York.— Hunt *v.* Raplee, 44 Hun 149; Dimmick *v.* Lockwood, 10 Wend. 142; Pitcher *v.* Livingston, 4 Johns. 1, 4 Am. Dec. 229.

North Carolina.— Phillips *v.* Smith, 4 N. C. 87, 6 Am. Dec. 542.

Ohio.— Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585.

Pennsylvania.— Weiting *v.* Nissley, 13 Pa. St. 650; Bender *v.* Fromberger, 4 Dall. 436, 1 L. ed. 898.

South Carolina.— Pearson *v.* Davis, 1 McMull. 37.

Wisconsin.— Conrad *v.* Grand Grove U. A. O. D., 64 Wis. 258, 25 N. W. 24.

See 14 Cent. Dig. tit. "Covenants," § 257.

Contra.— Babin *v.* Winchester, 7 La. 460; Elder *v.* True, 32 Me. 104; Cecconi *v.* Rodden, 147 Mass. 164, 16 N. E. 749; Hulse *v.* White, 1 N. J. L. 173. See also Curtis *v.* Brannon, 98 Tenn. 153, 38 S. W. 1073, to the effect that where possession is surrendered complainant is entitled to recover the value of improvements put on the land by him, only so far as they have enhanced the rental or usable value of the life-estate.

Improvements after commencement of eviction suit.— In an action of warranty, the vendor will not be held liable for improvements, by the vendee, of the land after the commencement of a suit to evict him, when it is not shown that the improvements increased the value of the land or benefited the warrantor. Coleman *v.* Ballard, 13 La. Ann. 512.

The cost of ordinary repairs necessary for the enjoyment and cultivation of the property cannot be claimed by the vendee, who is entitled only to the increased value from the improvements. So a vendee, with notice of the encumbrance by which he is evicted, and who has paid but a small portion of the price, cannot recover for a gin-house, outhouses, fences, and repairs to a dwelling-house. Such expenses are but necessary to the cultivation of the land, and no portion of them can be recovered from the vendor who has not shared in the revenues. Williams *v.* Booker, 12 Rob. (La.) 253; Pearce *v.* Frantum, 16 La. 414; Daquin *v.* Coiron, 3 La. 387.

9. Kleemans *v.* Voetter, 35 Pittsb. Leg. J. 420. See also Semple *v.* Wharton, 68 Wis. 626, 32 N. W. 690, where several tracts were sold by warranty deed for an entire price per acre, and the title to one of the tracts, which had valuable improvements on it, was not in the grantor at the time of the sale, and neither of the parties had knowledge of the existence of the improvements. In an action for breach of covenant of seizin and right to convey, the measure of damages was held to be the value of the tract to which the title had failed at the time of purchase, including the improvements thereon. But see McDunn *v.* Des Moines, 39 Iowa 286, where after a purchase of real estate with covenants of warranty, a part was adjudged to belong to the city at the time of the sale, for use as a street. The city offered to permit the grantee to remove the improvements thereon, and it was held that he could not recover from his grantor the value of such improvements.

10. Bradshaw *v.* Craycraft, 3 J. J. Marsh. (Ky.) 77.

11. Booker *v.* Bell, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; Ingram *v.* Walker, 7 Tex. Civ. App. 74, 26 S. W. 477; Drury *v.* Shumway, 1

covenantee's appropriation or removal of permanent improvements erected by the covenantor.[12]

d. Taxes. Taxes paid by a covenantee or his grantee are not recoverable in an action against the covenantor for breach of his covenant;[13] nor can a covenantor deduct the amount of taxes paid by him out of the sum recoverable by the covenantee or those claiming under him,[14] unless the covenantee has upon eviction recovered such taxes from the paramount owner.[15]

e. Enhancement. The enhanced value of the property cannot be taken into consideration in assessing damages for a breach of covenant.[16]

8. Costs and Expenses of Litigation — a. In General. The decided weight of authority is to the effect that costs and expenses of litigation incurred by a covenantee in defending or asserting his title are recoverable by him in an action for breach of covenant.[17] If, however, it is plain that the defense is useless, and the

D. Chipm. (Vt.) 110, 1 Am. Dec. 704. See also McKinny *v.* Watts, 3 A. K. Marsh. (Ky.) 268, where the covenantee had received a bond from the successful claimant covering the value of the improvements.

A grantee owes no duty to the grantor to remain in possession of the land for the purpose of litigating a question of the increased value of the estate while in possession of himself and those under whom he claims, but may at once surrender the possession to any one having a paramount title, and no deduction will be made from the damages to which he would otherwise be entitled by reason of any such claim of betterments of which he might have availed himself. Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

12. Park *v.* Cheek, 4 Coldw. (Tenn.) 20.

13. Hale *v.* New Orleans, 13 La. Ann. 499; Blake *v.* Burnham, 29 Vt. 437; Daggett *v.* Reas, 79 Wis. 60, 48 N. W. 127.

14. Pierce *v.* Early, 79 Iowa 199, 44 N. W. 890; Pierce *v.* Herrold, 75 Iowa 504, 39 N. W. 815; Hooper *v.* Sac County Bank, 72 Iowa 280, 33 N. W. 681. See also Home Sav. Bank *v.* Boston, 131 Mass. 277, to the effect that in a suit under Mass. Stat. (1862), c. 183, § 6, by the purchaser of land sold for non-payment of taxes, against a city, for breach of the special warranty in the collector's deed, the defendant cannot set off its claim for the taxes, although the plaintiff, being a mortgagee in possession, is liable to pay the same.

15. Danforth *v.* Smith, 41 Kan. 146, 21 Pac. 168; Stebbins *v.* Wolf, 33 Kan. 765, 7 Pac. 542.

16. *Georgia.*— Davis *v.* Smith, 5 Ga. 274, 48 Am. Dec. 279.

Kentucky.— Cosby *v.* West, 2 Bibb 568; Allen *v.* Anderson, 2 Bibb 415; Cox *v.* Strode, 2 Bibb 273, 5 Am. Dec. 603.

New Hampshire.—Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320.

New York.— Hunt *v.* Raplee, 44 Hun 149; Staats *v.* Ten Eyck, 3 Cai. 111, 2 Am. Dec. 254.

North Carolina.—Phillips *v.* Smith, 4 N. C. 87, 6 Am. Dec. 542.

Ohio.— Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585.

See 14 Cent. Dig. tit. "Covenants," § 259.

In Louisiana the cases are in irreconcilable conflict. Thus it has been held that the party evicted from real estate cannot recover the difference between the cost of the improvements made by him and the enhanced value of the soil (Sarpy *v.* New Orleans, 14 La. Ann. 311); that the purchaser in case of eviction can recover from his vendor only such increase in the value of the property as the parties had in contemplation at the time of the sale (Weber *v.* Coussy, 12 La. Ann. 534; Bissell *v.* Erwin, 13 La. 143, 15 La. 94); that the purchaser is not entitled to recover on eviction the increased value of the land at the time of eviction (Quillin *v.* Yair, 10 La. Ann. 259); that where a slave, sold before the new code, evicted the vendee in an action of freedom, the vendor in good faith was liable only for the price, and not the value of the slave's children born after the sale and also declared free. (Edwards *v.* Martin, 19 La. 284); that under the old code, the vendee could recover the increased value at the eviction, although he had not contributed thereto (Durnford's Succession, 11 Roh. (La.) 183); that the increased value at the time of eviction as compared with the value at the time of sale is not necessarily the standard of damages, the new code having repealed the old code, which seemed to carry the warrantor's responsibility to that length (Webb *v.* Gorman, 14 La. 38); that under La. Civ. Code, p. 354, art. 57, the increased value at the time of eviction above the price was recoverable, although the buyer had not contributed thereto (Fletcher *v.* Cavelier, 10 La. 116; Morris *v.* Abat, 9 La. 552); that the vendee recovers the loss by eviction, namely, the value of the property at that time, and any sums paid for fruit, revenues, and costs (Elliott *v.* Labarre, 3 La. 541, construing La. Civ. Code, p. 2485).

17. *California.*— Levitzky *v.* Canning, 33 Cal. 299.

Connecticut. — See Butler *v.* Barnes, 61 Conn. 399, 24 Atl. 328.

Illinois.— Harding *v.* Larkin, 41 Ill. 413.

Iowa.—Alexander *v.* Staley, 110 Iowa 607, 81 N. W. 803; Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470.

Kansas.— Stebbins *v.* Wolf, 33 Kan. 765, 7 Pac. 542; McKee *v.* Bain, 11 Kan. 569; Dale *v.* Shively, 8 Kan. 276; Jewett *v.* Fisher, 9

covenantee has been notified not to defend by his immediate grantor, who acknowledges liability on his covenants, costs and expenses cannot be recovered by the covenantee in an action against a remote grantor.[18] Costs of an unsuccessful appeal, unless taken at the vendor's request, are not recoverable;[19] nor can a plaintiff recover the costs paid by him in a suit brought against him by his grantee on his covenant.[20]

b. Attorney's Fees. In some jurisdictions attorney's fees, in good faith expended in defending or asserting his title, are recoverable by the covenantee from the covenantor in an action on the covenant.[21] In others fees beyond those

Kan. App. 630, 58 Pac. 1023. *Compare* Doom *v.* Curran, 52 Kan. 360, 34 Pac. 1118.

Kentucky.— Robertson *v.* Lemon, 2 Bush 301; Louisville Public Warehouse Co. *v.* James, 56 S. W. 19, 21 Ky. L. Rep. 1726. But see Bradshaw *v.* Craycraft, 3 J. J. Marsh. 77. And see Barnett *v.* Montgomery, 6 T. B. Mon. 327.

Massachusetts. — Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Michigan.—Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637.

Minnesota.— Allis *v.* Nininger, 25 Minn. 525.

Mississippi.— Brooks *v.* Black, 68 Miss. 161, 8 So. 332, 24 Am. St. Rep. 259, 11 L. R. A. 176.

Missouri.— Hazelett *v.* Woodruff, 150 Mo. 534, 51 S. W. 1048. See also Long *v.* Wheeler, 84 Mo. App. 101.

Nebraska.—Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737.

New Hampshire.— A distinction is made between the covenant against encumbrances and the covenants of seizin, good right to convey, for quiet enjoyment, and of general warranty. In case of an action on the former, the costs of the action should be considered, in assessing damages in a subsequent suit for breach of covenant (Andrews *v.* Davison, 17 N. H. 413, 43 Am. Dec. 606; Haynes *v.* Stevens, 11 N. H. 28); in case of an action on the latter the costs of the suit attending the eviction are not recoverable (Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320).

New York.— Charman *v.* Tatum, 166 N. Y. 605, 59 N. E. 1120 [*affirming* 54 N. Y. App. Div. 61, 66 N. Y. Suppl. 275]; Waldo *v.* Long, 7 Johns. 173; Staats *v.* Ten Eyck, 3 Cai. 111, 2 Am. Dec. 254.

Ohio.— Lane *v.* Fury, 31 Ohio St. 574.

Vermont.— Tarbell *v.* Tarbell, 60 Vt. 486, 15 Atl. 104; Pitkin *v.* Leavitt, 13 Vt. 379.

See 14 Cent. Dig. tit. "Covenants," § 260.

Contra.— Gibbs *v.* Ely, 13 Ind. App. 130, 41 N. E. 351; Stubbs *v.* Page, 2 Me. 378; Cushman *v.* Blanchard, 2 Me. 266, 11 Am. Dec. 76; Clark *v.* Mumford, 62 Tex. 531 [*citing* McClelland *v.* Moore, 48 Tex. 355]; Barlow *v.* Delaney, 40 Fed. 97.

Interest on costs.— While in an action for breach of covenants of warranty costs and reasonable attorney's fees incurred in defending the title may be recovered, no interest will be allowed thereon where it is not shown that they have been paid. Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737.

18. Matheny *v.* Stewart, 108 Mo. 73, 17 S. W. 1014. But see Morris *v.* Rowan, 17 N. J. L. 304.

19. Louisville Public Warehouse Co. *v.* James, 56 S. W. 19, 21 Ky. L. Rep. 1726.

20. Stark *v.* Olney, 3 Oreg. 88.

21. *Illinois.*— Walsh *v.* Dunn, 34 Ill. App. 146.

Iowa.— Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470.

Kansas.— McKee *v.* Bain, 11 Kan. 569.

Kentucky.— Robertson *v.* Lemon, 2 Bush 301.

Louisiana.— Tear *v.* Williams, 2 La. Ann. 868.

Maine.— Ryerson *v.* Chapman, 66 Me. 557; Swett *v.* Patrick, 12 Me. 9.

Missouri.— Long *v.* Wheeler, 84 Mo. App. 101; Coleman *v.* Clark, 80 Mo. App. 339. *Compare* Matheny *v.* Stewart, 108 Mo. 73, 17 S. W. 1014, decided under the law of Mississippi, where the covenant was executed.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

Nebraska.—Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 337.

New Hampshire.— See Kennison *v.* Taylor, 18 N. H. 220.

New York.— Charman *v.* Tatum, 54 N. Y. App. Div. 61, 66 N. Y. Suppl. 275.

Pennsylvania.— Anderson *v.* Washabaugh, 43 Pa. St. 115; Robinson *v.* Bakewell, 25 Pa. St. 424.

Vermont.— Keeler *v.* Wood, 30 Vt. 242.

Washington.— Cullity *v.* Dorffel, 18 Wash. 122, 50 Pac. 932.

England.— Smith *v.* Compton, 3 B. & Ad. 189, 407, 1 L. J. K. B. 43, 23 E. C. L. 91, 184. See also Howard *v.* Lovegrove, L. R. 6 Exch. 43, 40 L. J. Exch. 13, 23 L. T. Rep. N. S. 396, 19 Wkly. Rep. 188; Rolph *v.* Crouch, L. R. 3 Exch. 44, 37 L. J. Exch. 8, 17 L. T. Rep. N. S. 249, 16 Wkly. Rep. 252; Pomery *v.* Partington, 3 T. R. 665; Duffield *v.* Scott, 3 T. R. 374. *Compare* Gillett *v.* Rippon, M. & M. 406, 22 E. C. L. 551.

Canada.— Upper Canada Trust, etc., Co. *v.* Covert, 39 U. C. Q. B. 327.

See 14 Cent. Dig. tit. "Covenants," § 261.

Counsel fees should be estimated upon the basis of the amount which the attorney could have recovered, and not the actual amount paid to him by the plaintiff, nor the amount testified to by experts. Charman *v.* Tatum, 54 N. Y. App. Div. 61, 66 N. Y. Suppl. 275. But see Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470, to the effect that before plaintiff can recover his counsel fees, he must

included in the taxed costs are not allowed,[22] and in those jurisdictions in which the general expenses and costs of litigation are denied, attorney's fees are of course not recoverable.[23] Where allowed the attorney's fees must have been incurred in a proceeding directly and necessarily affecting the title of the covenantor,[24] and concerning land included in the covenant;[25] nor can a covenantee against whom a judgment has been rendered in favor of his grantee on his covenants recover his attorney's fees in such suit, in an action against his own covenantor for the same breach.[26] So too counsel fees in the action against the covenantor are not recoverable.[27]

c. Effect on Liability of Notice to Defend. In many cases the liability of the covenantor for the costs and expenses of litigation incurred by the covenantee in defending or asserting his title is made to depend upon whether the covenantor has been notified of the pendency of the action. If he has been notified he is held liable;[28] if he has not he is not liable,[29] unless in case of the absence of the warrantor or of fraud.[30] On the other hand it has been held that he is not liable, although notice has been given;[31] and also that he is liable, although no notice has been given.[32] Counsel fees incurred by the covenantee, after notice to the covenantor and the assumption of the defense by him, are not recoverable in an action on the covenants;[33] and the same is true where the covenantor, although

show that he has paid, or is under obligation to pay, some specific amount. He cannot recover on proof as to what would be a reasonable fee for such services. And see Cullity *v.* Dorffel, 18 Wash. 122, 50 Pac. 932, to the effect that to entitle plaintiff, as damages, to recover fees for his attorneys in the action in which he was ousted it must be shown that the fees have been paid.

22. *Louisiana.*— Late *v.* Armorer, 14 La. Ann. 826; Williams *v.* Lehlanc, 14 La. Ann. 757; Sarpy *v.* New Orleans, 14 La. Ann. 311; Hale *v.* New Orleans, 13 La. Ann. 499; Melancon *v.* Robichaud, 19 La. 357.

Mississippi.—Brooks *v.* Blake, 68 Miss. 161, 8 So. 332, 24 Am. St. Rep. 259, 11 L. R. A. 176. See also Matheny *v.* Stewart, 108 Mo. 73, 17 S. W. 1014, decided under the rule as laid down in Mississippi, where the deed in suit was made.

New Jersey.— Holmes *v.* Sinnickson, 15 N. J. L. 313.

South Carolina.— *Ex p.* Lynch, 25 S. C. 193; Jeter *v.* Glenn, 9 Rich. 374.

Texas.— Turner *v.* Miller, 42 Tex. 418, 19 Am. Rep. 47 [*distinguishing* Rowe *v.* Heath, 23 Tex. 614].

See 14 Cent. Dig. tit. "Covenants," § 261.

23. Gragg *v.* Richardson, 25 Ga. 566, 71 Am. Dec. 190.

24. Harding *v.* Larkin, 41 Ill. 413.

25. Butler *v.* Barnes, 61 Conn. 399, 24 Atl. 328.

26. Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759.

27. Haverstick *v.* Erie Gas Co., 29 Pa. St. 254.

28. *Connecticut.*— Sterling *v.* Peet, 14 Conn. 245.

Illinois.— Walsh *v.* Dunn, 34 Ill. App. 146.

Indiana.— Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Iowa.— Meservey *v.* Snell, 94 Iowa 222, 62 N. W. 767, 58 Am. St. Rep. 391.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559.

Missouri.— Hutchins *v.* Roundtree, 77 Mo. 500.

New Hampshire.—Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171.

Rhode Island.— Point St. Iron Works *v.* Turner, 14 R. I. 122.

Tennessee.— Williams *v.* Burg, 9 Lea 455.

See 14 Cent. Dig. tit. "Covenants," § 262.

29. *Iowa.*— Yokum *v.* Thomas, 15 Iowa 67.

Louisiana.— Delacroix *v.* Cenas, 8 Mart. N. S. 356. See also Bach *v.* Miller, 16 La. Ann. 44.

Maine.— Eldridge *v.* Wadleigh, 12 Me. 371.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

New Hampshire.—Winnipiseogee Paper Co. *v.* Marsh, 64 N. H. 531, 15 Atl. 19.

New York.— Finton *v.* Egelston, 61 Hun 246, 16 N. Y. Suppl. 721.

Pennsylvania.— Hood's Appeal, (1886) 7 Atl. 137.

United States.— Barlow *v.* Delaney, 40 Fed. 97.

See 14 Cent. Dig. tit. "Covenants," § 262.

30. Fulweiler *v.* Baugher, 15 Serg. & R. (Pa.) 45.

31. Terry *v.* Drabenstadt, 68 Pa. St. 400, to the effect that when a covenantor has been notified to appear and defend, and fails to do so, and the covenantee proceeds and incurs costs, he does so on his own responsibility.

32. Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671.

The intent of notice to the warrantor is not to make him liable for costs, but to conclude him in respect to the title. Morris *v.* Rowan, 17 N. J. L. 304.

33. Kennison *v.* Taylor, 18 N. H. 220. See also Conrad *v.* Effinger, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646, to the effect that where

not notified, becomes aware of the adversary action, and at once employs competent counsel to defend it.[34]

9. Pleading and Evidence — a. Pleading — (I) *Declaration, Petition, or Complaint.* In an action for breach of covenant, special or consequential, damages must be pleaded to be recoverable;[35] but where more damages are claimed than plaintiff is entitled to, his claim should be reduced to what he may lawfully claim, and his entire demand should not be dismissed.[36] In case of the assignment of two or more distinct breaches, for one of which plaintiff has no cause of action, it is error to assess entire damages.[37]

(II) *Plea or Answer* — (A) *In General.* In an action for damages for breach of covenant, the amount of the damages laid is not traversable matter, and defendant need not deny it.[38]

(B) *Covenants Performed.* Payments made by the covenantor to the covenantee, on account of the breach, may be given in evidence in mitigation of damages under the plea of covenants performed, although if relied on in bar they should be specially pleaded.[39]

b. Evidence — (I) *Admissibility* — (A) *In General.* As has been previously stated[40] any evidence which is relevant and material upon the question of damages is admissible;[41] but where the evidence offered does not directly tend to show the damages under the established rules as to their measure, or raises collateral and irrelevant questions, it should be rejected.[42]

a grantor is called upon to defend the title and immediately employs competent counsel to do so, the grantee cannot, when evicted, recover from him counsel fees, as well as the value of the land.

34. Long *v.* Wheeler, 84 Mo. App. 101.

35. Jones *v.* Shay, 72 Iowa 237, 33 N. W. 650; De Forest *v.* Leete, 16 Johns. (N. Y.) 122; Funk *v.* Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

Negative limitation of damages.— Where plaintiff alleges that the damage occasioned by a breach of covenant cannot be less than a certain sum, without suggesting that it is no more, a verdict for a greater amount is good. Moore *v.* Simpson, 5 Litt. (Ky.) 49.

Negativing words of covenant.— Where, in a suit for breach of covenant, it is sufficient to aver the breach negatively in the words of the covenant, such averment does not necessarily involve the right to recover more than nominal damages. Van Nest *v.* Kellum, 15 Ind. 264.

Prayer for general relief.—In an action for damages for breach of covenants in a deed, the court, under the prayer for general relief, wil give such relief as the justice of the case demands. Price *v.* Deal, 90 N. C. 290.

36. Pharr *v.* Gall, 104 La. 700, 29 So. 306. See also Lucas *v.* Wilcox, 135 Mass. 77, to the effect that where a plaintiff, whose action for breach of a covenant of title, wherein he claimed to be entitled to recover for two undivided thirds of the value of the land, was enjoined in a suit in which it was decided that he was estopped to claim for more than one sixth of the value of the land, is entitled to one sixth of the entire value, if this does not exceed the *ad damnum*, although the *ad damnum* named in the writ was less than two thirds of the value of the land.

37. Morrow *v.* Governor, Hard. (Ky.) 489.

38. Hackett *v.* Richards, 3 E. D. Smith (N. Y.) 13.

39. Ferris *v.* Mosher, 27 Vt. 218, 65 Am. Dec. 192.

Such a plea, if not sustained, admits nothing more than plaintiff's right to recover nominal damages. Reed *v.* Hobbs, 3 Ill. 297.

40. See *supra*, IV, E, 2.

41. *Alabama.*— Clark *v.* Zeigler, 85 Ala. 154, 4 So. 669.

Indiana.— Lake Erie, etc., R. Co. *v.* Lee, 14 Ind. App. 328, 41 N. E. 1058.

Iowa.— Peden *v.* Chicago, etc., R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 401; McGowen *v.* Myers, 60 Iowa 256, 14 N. W. 788.

Louisiana.— Bissell *v.* Erwin, 13 La. 143.

Massachusetts.— Sturtevant *v.* Phelps, 16 Gray 50.

Michigan.— Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692.

Missouri.— Mosely *v.* Hunter, 15 Mo. 322.

New Hampshire.— Foster *v.* Foster, 62 N. H. 532; Morrison *v.* Underwood, 20 N. H. 369.

New York.— Doctor *v.* Darling, 68 Hun 70, 22 N. Y. Suppl. 594.

North Carolina.— Farmers' Bank *v.* Gleen, 68 N. C. 35.

Vermont.— Mills *v.* Catlin, 22 Vt. 98.

United States.— Thomas *v.* Perry, 23 Fed. Cas. No. 13,908, Pet. C. C. 49.

See 14 Cent. Dig. tit. "Covenants," § 264.

42. Evidence of plaintiff's object in purchasing is inadmissible, in a suit for damages on the covenant against encumbrances (Kellogg *v.* Malin, 62 Mo. 429), unless it formed part of the consideration (Foster *v.* Foster, 62 N. H. 46).

Enhanced value by reason of encumbrance. — In a suit for breach of covenant against encumbrances by reason of a right of way by a railroad, evidence of the enhanced value of

(B) *Value of Part of Tract Lost.* In an action for breach of covenant by reason of the loss of part of the land conveyed, defendant may prove the proportionate value of the part lost;[43] and also in mitigation of damages that nothing was in fact paid for such part, that it was included in the deed by mistake, and that it was understood at the time by both parties not to belong to the grantor.[44] On the other hand it is competent for plaintiff to show that the part lost had a peculiar value for certain purposes.[45]

(C) *Cost of Outstanding Title or Encumbrance.* Upon the assessment of damages, in an action for breach of covenant, it is competent to prove the price paid by plaintiff for an outstanding title, or to remove an encumbrance,[46] although it has been held that such evidence is inadmissible for the purpose of reducing plaintiff's recovery.[47] Where the grantee has, as a part of the consideration, agreed to pay a certain sum toward the removal of an encumbrance not excepted from the covenant, and subsequently pays off the encumbrance, before its maturity, for a greater sum, he is entitled to recover the amount so paid less the amount assumed by him.[48]

(D) *Value of Land Subject to Restriction Upon Power of Alienation.* In an action for breach of covenant of title in a deed containing a condition restricting the power of alienation, evidence as to the value of the land subject to such restrictions is admissible on the question of damage.[49]

(II) *Conclusiveness of Recital of Consideration.* In an action by a covenantee against his covenantor for breach of covenant, the consideration expressed in the deed is only *prima facie* evidence of the true consideration,

the land by reason of the railroad, or of privileges accorded by the railroad, is inadmissible. Kellogg *v.* Malin, 62 Mo. 429.

Judgment against intermediate covenantor. — In case of successive conveyances with a covenant against encumbrances, and a breach of covenant by reason of a permanent easement, the record of a judgment against an intermediate covenantor is inadmissible on the question of damages in an action by him against his covenantor for the same breach. Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759.

Loss of sale by reason of encumbrance. — In an action for breach of covenant of seizin by virtue of an alleged encroachment of the buildings on the adjoining premises, evidence that plaintiff had made a contract to sell the premises, and that the purchaser refused to accept on account of such encroachment, is not admissible, as plaintiff's damages, if anything, are the difference in value between the buildings with and without the encroachment. Stearn *v.* Hesdorfer, 9 Misc. (N. Y.) 134, 29 N. Y. Suppl. 281.

The value of other lands in the neighborhood is inadmissible in evidence, as it raises a collateral inquiry. Clark *v.* Zeigler, 85 Ala. 154, 4 So. 669.

43. Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869.

Where a deed of several parcels of land expressed a gross consideration, and there was a failure of title to a portion of the lands, a memorandum made by the grantors, showing the area of the different tracts and the price per acre, which was handed to the conveyancer as showing the land sold and the price paid per acre therefor, was held admissible to show the damage sustained by the grantee. Guinotte *v.* Chouteau, 34 Mo. 154.

44. Nutting *v.* Herbert, 35 N. H. 120; Barns *v.* Learned, 5 N. H. 264.

45. Louisville Public Warehouse Co. *v.* James, 70 S. W. 1046, 24 Ky. L. Rep. 1266.

46. Clark *v.* Whitehead, 47 Ga. 516 (in which the cost of the outstanding title was held admissible to rebut proof that the use of the land was more than a full offset to the interest on the purchase-money); Lee *v.* Breezley, 54 Iowa 660, 7 N. W. 117 (tax certificates of redemption from sale for nonpayment of taxes held admissible); St. Louis *v.* Bissell, 46 Mo. 157 (judgment in condemnation proceedings fixing value of encumbrances held admissible); Henderson *v.* Henderson, 13 Mo. 151 (to the effect that the amount of damages depends upon the sum paid to extinguish the encumbrance, and that evidence as to the real consideration is irrelevant).

47. Cosby *v.* West, 2 Bibb (Ky.) 568.

48. Corbett *v.* Wrenn, 25 Oreg. 305, 35 Pac. 658, in which plaintiff purchased with knowledge of a building association mortgage on the land, and agreed to pay one thousand dollars to discharge it as part of the purchase-price, and the issue was whether under the agreement such payment was to be made on completion of the sale, or on the maturity of the mortgage, and it was held that evidence was not admissible to show that one thousand dollars would have been sufficient to extinguish the mortgage at its maturity, instead of one thousand nine hundred dollars, which plaintiff paid on completion of the sale, the covenant being then broken.

49. Egan *v.* Martin, 97 Mo. App. 535, 77 S. W. 468.

which may be shown by parol or extrinsic evidence, where the true consideration paid is the measure of damages.[50] Where, however, the action is by a grantee of the covenantee against the covenantor, the latter cannot show that the consideration actually paid for the land was less than the sum expressed in the deed,[51] and where the actual consideration is such that it cannot be estimated in money, the consideration expressed in the deed is conclusive.[52] The consideration in the deed from the covenantee to his grantee is not even *prima facie* evidence, in an action by the latter against the covenantor.[53]

G. Trial, Judgment, and Review — 1. Questions For Court and Jury. Questions of construction are for the court;[54] questions of fact for the jury.[55]

2. Verdict and Findings. In an action for breach of covenant, the verdict and findings, while coextensive with the issues,[56] must be confined to the evidence in the case,[57] and where the action is against the heirs of a covenantor should be *in solido*.[58] A general verdict cannot be sustained where any one of the breaches assigned in the declaration or complaint is substantially defective,[59] and is unsupported by proof of a partial breach.[60] Similarly a judgment for general damages

50. *Alabama.*—Saunders *v.* Hendrix, 5 Ala. 224; Mead *v.* Steger, 5 Port. 498.
Arkansas.— Barnett *v.* Hughey, 54 Ark. 195, 15 S. W. 464.
Connecticut.— Belden *v.* Seymour, 8 Conn. 304, 21 Am. Dec. 661.
Georgia.— Martin *v.* Gordon, 24 Ga. 533; Harwell *v.* Fitts, 20 Ga. 723.
Illinois.— Howell *v.* Moores, 127 Ill. 67, 19 N. E. 863.
Indiana.—Allen *v.* Lee, 1 Ind. 58, Smith 12, 48 Am. Dec. 352.
Iowa.— Harper *v.* Perry, 28 Iowa 57; Lawton *v.* Buckingham, 15 Iowa 22; Swafford *v.* Whipple, 3 Greene 261, 54 Am. Dec. 498.
Kentucky.— Hutchinson *v.* Sinclair, 7 T. B. Mon. 291.
Massachusetts.— Blanchard *v.* Ellis, 1 Gray 195, 61 Am. Dec. 417; Bullard *v.* Briggs, 7 Pick. 533, 19 Am. Dec. 292. *Compare* Estabrook *v.* Smith, 6 Gray 572, 66 Am. Dec. 445.
Minnesota.— Devine *v.* Lewis, 38 Minn. 24, 35 N. W. 711; Dayton *v.* Warren, 10 Minn. 233.
Mississippi.— Moore *v.* McKie, 5 Sm. & M. 238.
Missouri.— Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284; Miller *v.* McCoy, 50 Mo. 214; Henderson *v.* Henderson, 13 Mo. 151. But see Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142.
New Hampshire.— Nutting *v.* Herbert, 35 N. H. 120; Morse *v.* Shattuck, 4 N. H. 229, 17 Am. Dec. 419.
New York.— Bingham *v.* Weiderwax, 1 N. Y. 509.
Ohio.— Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518; Vail *v.* Junction R. Co., 1 Cinc. Super. Ct. 571.
Pennsylvania.— Cox *v.* Henry, 32 Pa. St. 18.
Texas.— Glenn *v.* Mathews, 44 Tex. 400.
Wisconsin.—Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869.
United States.— Montgomery *v.* Northern Pac. R. Co., 67 Fed. 445; Patrick *v.* Leach, 2 Fed. 120, 1 McCrary 250.
See 14 Cent. Dig. tit. "Covenants," § 267.

51. Illinois Land, etc., Co. *v.* Bonner, 91 Ill. 114; Hunt *v.* Orwig, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144; Greenvault *v.* Davis, 4 Hill (N. Y.) 643. *Contra,* Gavin *v.* Buckles, 41 Ind. 528.
52. Randall *v.* Randall, 37 Mich. 563.
53. Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142.
54. Hutchinson *v.* Ulrich, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391.
Where upon the undisputed testimony plaintiff fails to make out a case the court should direct a verdict for the defendant. Dondero *v.* Frumveller, 61 Mich. 440, 28 N. W. 712.
Whether the covenantor was given notice to defend an action brought against the covenantee, and what the notice consisted of, is a question of fact to be determined by the court, in an action by the latter, against the former, to recover the damages suffered thereby. Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41.
55. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349, allowance of interest on unliquidated damages.
Missouri.— Whether the amount paid to extinguish an encumbrance was reasonable is a question for the jury. Walker *v.* Deaver, 78 Mo. 664 [*modifying* 5 Mo. App. 139]; St. Louis *v.* Bissell, 46 Mo. 157.
New Jersey.— Kellog *v.* Platt, 33 N. J. L. 328, effect of purchase of paramount title.
Pennsylvania.— Stafford *v.* Giles, 135 Pa. St. 411, 19 Atl. 1028, sufficiency of evidence to justify reformation.
Texas.— Chisum *v.* Chesnutt, (Civ. App. 1896) 36 S. W. 758.
See 14 Cent. Dig. tit. "Covenants," § 268.
56. Holzheier *v.* Hayes, (Cal. 1898) 52 Pac. 838.
57. Anderson *v.* Knox, 20 Ala. 156.
58. Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.
59. Talbot *v.* Herndon, 4 J. J. Marsh. (Ky.) 553; Wilson *v.* Bowens, 2 T. B. Mon. (Ky.) 86.
60. Parker *v.* Brown, 15 N. H. 176.

must be supported by a finding of the amount of such damages.[61] A finding which necessarily includes another upon an essential issue is good.[62]

3. JUDGMENT[63] — a. In General. Where an action is brought on the covenant of seizin, and also that of warranty, the plaintiff will at his election be allowed to take judgment on either;[64] and where a defendant tenders nominal damages, the plaintiff does not waive his right to a judgment by going to the jury on the defense of title in the defendant by adverse possession, where he has demurred to the defendant's case on the evidence;[65] nor does the defendant waive his right to appear and tender evidence at the assessment of damages by suffering a judgment by default.[66]

b. Upon Establishment of Mistake in Deed. Where the defendant proves that the land to which title has failed was included in the deed by mistake, and that the plaintiff knew that the defendant did not own the land nor intend to convey it, the deed should either be corrected on application of the defendant,[67] or a judgment entered for him which should give the plaintiff the option to keep the land actually purchased, on condition of abandoning his claim for damages, or to reconvey with special warranty only against encumbrances by himself or others claiming under him.[68]

c. Where Covenantor Is Sued Jointly With, or Impleaded By, Covenantee. Where both the covenantor and covenantee are joined in an action to try title to the land conveyed, and judgment is recovered against them, the covenantee is entitled to judgment in the same action against the covenantor.[69] So too it has been held that where, upon eviction under a paramount title, the grantee of a covenantee sues him for breach of his covenant of warranty, and the latter causes his covenantor to be impleaded, he is entitled to judgment for the consideration paid by him with interest, although no judgment is recovered against him.[70]

d. In Action Against Estate of Deceased Covenantor. In an action against the administrator, widow, and heirs of a covenantor, the judgment should be against them *in solido*, with an order as to the administrator *quando acciderint*.[71] Where it does not appear in what capacity the defendant holds the decedent's estate, whether as executor or devisee, it is error to award judgment against him in both capacities.[72]

4. EXECUTION.[73] In case of a recovery on a covenant of seizin in a deed in which there are other covenants which run with the land, the plaintiff should be required to give a release of those covenants before he is allowed to take out execution;[74] and where the plaintiff has conveyed the land, the court will order a stay of execution until he shall have lodged a discharge or quitclaim deed from his grantee.[75] In the absence of fraud a capias ad satisfaciendum will not issue on a judgment for breach of covenant in those jurisdictions in which arrest has been abolished in actions *ex contractu*.[76]

5. APPEAL AND ERROR.[77] The principles of law governing appeals and writs of

61. National Horse-Importing Co. *v.* Novak, 95 Iowa 596, 64 N. W. 616.

62. Chisum *v.* Chesnutt, (Tex. Civ. App. 1896) 36 S. W. 758, where it was held that in an action for breach of warranty where the jury were instructed that certain defendants were liable if the land in suit was included in the deed to plaintiff, a finding that such defendants were not liable necessarily included a finding that the land was not so included.

63. See, generally, JUDGMENTS.

64. Sterling *v.* Peet, 14 Conn. 245.

65. Eagan *v.* Martin, 81 Mo. App. 676.

66. Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869.

67. Johnson *v.* Taber, 10 N. Y. 319.

68. Chitwood *v.* Russell, 36 Mo. App. 245.

69. Branch *v.* Weiss, 23 Tex. Civ. App. 84, 57 S. W. 901.

70. Johnson *v.* Blum, (Tex. Civ. App. 1902) 66 S. W. 461, where no judgment was recovered against the covenantee because she was a married woman.

71. Dugger *v.* Oglesby, 3 Ill. App. 94.

72. Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623.

73. See, generally, EXECUTIONS.

74. Blake *v.* Burnham, 29 Vt. 437.

75. Catlin *v.* Hurlburt, 3 Vt. 403.

76. Howard *v.* McKee, 82 Pa. St. 409.

77. See, generally, APPEAL AND ERROR.

error in civil cases generally obtain in actions for breach of covenant. As in other cases error must be affirmatively shown by the record;[78] an objection not interposed below will not be considered by the higher court;[79] harmless error is no ground for reversal;[80] and a verdict which does substantial justice between the parties,[81] or a finding of fact which is sustained by the evidence,[82] will not be disturbed.

6. Effect of Recovery on Title to Property. While it is clear that the covenantee should not be allowed to retain the land and also recover back his consideration with interest,[83] there is a considerable conflict of opinion as to just what effect a recovery, in an action at law for a total breach of covenant, will have upon the title. Thus it has been held that the title revests in the covenantor;[84] that the recovery operates as an estoppel of the covenantee afterward to set up the deed as a conveyance of land against the grantor;[85] and that the covenantor is entitled to a reconveyance free from any encumbrances created by the covenantee or those claiming under him.[86] Similarly where permanent damages are awarded for breach of a covenant restricting the use of property, it is proper to require the delivery to the defendant of a release from such covenant.[87] In case of a partial breach, if the covenantee sues without an offer to rescind, he can only recover to the extent of the breach, the sale and conveyance remaining in force as to the part to which there is no failure of title.[88]

78. Eaton *v.* Lyman, 33 Wis. 34.

Where the covenant is not made a part of the record by the pleadings, and the question on appeal is whether the declaration states a cause of action, the court can look only at the covenant as pleaded in the declaration, although it is set out in a bill of exceptions taken on another point. Carthrae *v.* Brown, 3 Leigh (Va.) 98, 23 Am. Dec. 255.

79. Tear *v.* Chambers, 2 La. Ann. 870; Donaldson *v.* Maurin, 1 La. 29; Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692; White *v.* Stevens, 13 Mo. App. 240; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307.

80. Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637, where it was held that where plaintiff in an action for breach of warranty was limited in his recovery to the amount of money paid for the premises, with interest and costs, admission of evidence as to improvements made was not prejudicial.

81. Reagan *v.* Galloway, 49 Ga. 452, where the failure of title, set up as a breach of warranty in defense to a suit for the purchase-money of land, was the result of the act of the defendants, and it was held that a verdict for the plaintiff should not be interfered with, as it did substantial justice between the parties.

82. Long *v.* Howard, 51 Minn. 571, 53 N. W. 1014.

Conversely where there is a judgment, as upon a total failure of title, and the testimony shows a partial failure, and there is no testimony to the value of that part lost as proportional to the entire tract, the judgment below will be reversed and the cause remanded. White *v.* Holley, 3 Tex. Civ. App. 590, 24 S. W. 831.

83. Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49.

84. Noonan *v.* Ilsley, 21 Wis. 138. See also Blanchard *v.* Ellis, 1 Gray (Mass.) 195, 61 Am. Dec. 417; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22, to the effect that where the warrantee has judgment and satisfaction on the warranty he cannot afterward recover of the warrantor the lands warranted. *Compare* Foss *v.* Stickney, 5 Me. 390, where it was held that a recovery on the covenant against encumbrances will not divest the covenantee of title; and that it is questionable whether a recovery on the covenant of seizin will, unless the judgment is shown to be satisfied.

85. Parker *v.* Brown, 15 N. H. 176 [*citing* Hamilton *v.* Elliot, 4 N. H. 182, 17 Am. Dec. 408]; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189. See also Johnson *v.* Simpson, 36 N. H. 91.

Where there is no allegation that no interest passed by the deed, and where in fact an equitable title did pass, a recovery by the grantee on the covenants of seizin would not estop him from afterward claiming the premises. Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336.

86. Shorthill *v.* Ferguson, 47 Iowa 284; McKinny *v.* Watts, 3 A. K. Marsh. (Ky.) 268; Park *v.* Cheek, 4 Coldw. (Tenn.) 20; Kincaid *v.* Brittain, 5 Sneed (Tenn.) 119.

Contra.— Ives *v.* Niles, 5 Watts (Pa.) 323; Lawrence *v.* Vick, 10 Humphr. (Tenn.) 285.

As to requiring the release of other covenants in case of recovery on the covenant of seizin see *supra*, IV, G, 4.

As to stay of execution until covenantee shall have lodged a quitclaim deed from his grantee see *supra*, IV, G, 4.

Relief in equity.— If the reconveyance is refused a court of equity will compel it. Park *v.* Cheek, 4 Coldw. (Tenn.) 20.

87. Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. 741, 28 Am. St. Rep. 584.

88. Recohs *v.* Younglove, 8 Baxt. (Tenn.) 385. See also Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336.

COVENANTS PERFORMED. A plea in an action of covenant, under the Pennsylvania practice.[1] (See, generally, COVENANT, ACTION OF; COVENANTS.)

COVENT. See CONVENT.

COVENTRY ACT. So called from the circumstance of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in parliament.[2] (See, generally, CRIMINAL LAW; MAYHEM.)

COVER. As a noun, anything which is laid, set or spread upon, about, or above another; an envelope; a lid; anything which veils or conceals; a screen; disguise; cloak;[3] that which is laid over something else; a covering;[4] also, according to one of its usually accepted meanings, a deposit made with a broker to secure him from being out of pocket in the event of the stocks falling against his client and the client not paying the difference.[5] As a verb, to overspread, envelope the surface or whole body; to lay or set over; to enwrap; to enfold;[6] to lay or place one thing on or over another so as to protect or screen it; to overspread with something;[7] to be equal to, be of the same extent or amount, be co-extensive with, be equivalent;[8] to counterbalance; compensate for.[9]

COVERT. Covered; protected; sheltered;[10] also implied, inferred;[11] under the disability of marriage; married.[12] (See COVERTURE.)

COVERT BARON or **COVERT DE BARON.** The status of a woman under the protection and influence of her husband, her baron, or lord.[13] (See BARON; COVERT; COVERTURE.)

1. Rapalje & L. L. Dict. See also English L. Dict. And see Zents *v.* Legnard, 70 Pa. St. 192, 194; Farmers,' etc., Turnpike Co. *v.* McCullough, 25 Pa. St. 303, 304; Wilkinson *v.* Pittsburg Farmers', etc., Turnpike Co., 6 Pa. St. 398; Ellmaker *v.* Franklin F. Ins. Co., 5 Pa. St. 183, 189; Neave *v.* Jenkins, 2 Yeates (Pa.) 107, 108; Bender *v.* Fromberger, 4 Dall. (Pa.) 436, 1 L. ed. 898.

2. 1 East P. C. 394.

History of the act.— In State *v.* Cody, 18 Oreg. 506, 513, 23 Pac. 891, 24 Pac. 895 [*quoting* State *v.* Vowels, 4 Oreg. 324, 326], the court said: "It may not be amiss to state that this section [referring to a statute against mayhem] is based upon the English statute of 22 and 23 Car. II, ch. 1, commonly known as the Coventry Act, the circumstances which led to the passage of which are recounted by Lord Macaulay's Hist. Eng., vol. 1, p. 77. The 'Coventry Act,' to which the learned judge referred, . . . enacted 'that if any person shall . . . cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member . . . with intent to maim or disfigure him, such person, etc., shall be guilty of felony,' etc."

The Coventry Act was repealed by 9 Geo. IV, c. 31. Stroud Jud. Dict.

3. Webster Unabr. Dict. [*quoted* in U. S. *v.* Burnell, 75 Fed. 824, 829].

4. Worcester Dict. [*quoted* in U. S. *v.* Burnell, 75 Fed. 824, 829].

5. Per Smith, L. J., in *In re* Cronmire, 67 L. J. Q. B. 620, 623.

6. Webster Unabr. Dict. [*quoted* in U. S. *v.* Burnell, 75 Fed. 824, 829].

7. Worcester Dict. [*quoted* in U. S. *v.* Burnell, 75 Fed. 824, 829, where it is said: "If we adopt the underlying idea of Webster and Worcester with reference to the noun 'cover' as above given, it is that of overspreading, overlaying"].

8. As "the receipts do not cover the expenses." Century Dict. [*quoted* in Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105, 109].

9. As "to cover one's loss." Century Dict. [*quoted* in Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105, 109].

"Covered by" a prior mortgage see Butts *v.* Broughton, 72 Ala. 294, 298.

"Covered by" insurance see Johnson *v.* Campbell, 120 Mass. 449, 453.

"Covered into the treasury" is a term used to denote the deposit of funds in the United States treasury department. U. S. *v.* Johnson, 124 U. S. 236, 255, 8 S. Ct. 446, 31 L. ed. 389 [*quoting* Rice *v.* U. S., 21 Ct. Cl. 413, 419].

"Covered swimming bath," as defined by statute, is a swimming bath protected by a roof or other covering from the weather. 41 & 42 Vict. c. 14, § 1.

"Covering," as defined by a statute relative to merchandise, includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper. 50 & 51 Vict. c. 28, § 5, subs. 2.

"Covering the same property" see North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. D. 569, 585, 46 L. J. Ch. 537, 36 L. T. Rep. N. S. 629.

10. Burrill L. Dict.

In the old colony laws of New Plymouth children were said to be "under the covert" of their parents. Burrill L. Dict. [*citing* Laws Colo. N. Plymouth, Nov. 15, 1636].

11. As "a covert condition." Anderson L. Dict.

12. Anderson L. Dict.

13. 1 Bl. Comm. 442.

COVERTURE. In general, a covering; state of being covered or protected; or according to Lord Coke, a state of subjection or dependence.[14] In domestic affairs, a personal disability, springing from the conjugal relation;[15] the condition or state of a woman while under the protection of her husband.[16] (Coverture: As Affecting — Admission of Woman as Attorney, see ATTORNEY AND CLIENT; Right of Curtesy, see CURTESY; Right of Dower, see DOWER; Running of Statute of Limitations, see LIMITATION OF ACTIONS. See also, generally, HUSBAND AND WIFE; MARRIAGE.)

COVIN.[17] A contrivance between two to defraud or cheat a third;[18] a secret contrivance between two or more persons to defraud and prejudice another of his rights;[19] a secret agreement determined in the hearts of two or more men to the prejudice of another;[20] the defrauding and prejudice of another.[21] (See CHEAT; COMMON-LAW CHEAT; CONCEAL; CONCEALMENT; COLLUSION; COSEN; DECEIT; GAMING; and, generally, CONSPIRACY; FALSE PRETENSES; FRAUD.)

COVINOUS. Deceitful, fraudulent.[22] (See COVIN; and, generally, FRAUD.)

COW. The female of the bovine genus of animals.[23] The term may include a "heifer,"[24] and by statute it is sometimes in terms so provided that the

14. Burrill L. Dict. [*citing* Coke Litt. 112*a*].

15. Roberts *v.* Lund, 45 Vt. 82, 87.

16. Osborn *v.* Horine, 19 Ill. 124, 125. And see Hoker *v.* Boggs, 63 Ill. 161, 162 [*quoting* 1 Bl. Comm. 442], where it is said: "By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything, and is therefore called in our law French, a *feme covert*."

17. "Covina commeth of the French word *covine*." Coke Litt. 257*a*, *b*.

"Covin is always abhorred in our Law, and Statutes made in Suppression thereof are for the public Good, and therefore shall be extended by Equity." Per Montague, C. J., in Wimbish *v.* Talbois, Plowd. 38*a*, 59*a*. And see Fermor's case, 3 Coke 77*a*, 78 [*quoted* in Hyslop *v.* Clarke, 14 Johns. (N. Y.) 458, 465].

18. Mix *v.* Muzzy, 28 Conn. 186, 191. In Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, 114, 48 L. J. Exch. 373, 40 L. T. Rep. N. S. 473, 27 Wkly. Rep. 523, Thesiger, L. J., said: "Although the word 'covin' is sometimes, especially by old writers, used in the sense of a trick or contrivance devised by one person alone, I think that in a case like the present, and where it is used in conjunction with the word 'collusion,' it imports a trick or contrivance planned by both parties to the transaction which is alleged to be tainted by it."

19. Bouvier L. Dict. [*quoted* in Anderson *v.* Oscamp, (Ind. 1893) 35 N. E. 707, 708].

20. Per Montague, C. J., in Wimbish *v.* Tailbois, Plowd. 38*a*, 54; Coke Litt. 357*a*, *b*; Termes de la Ley (ed. 1708) [*quoted* in Girdlestone *v.* Brighton Aquarium Co., 3 Ex. D. 137, 142].

21. Coke Litt. 357*a*, *b* [*quoted* in Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, 114, 48 L. J. Exch. 373, 40 L. T. Rep. N. S. 473, 27 Wkly. Rep. 523, per Thesiger, L. J.].

Used in a statute against gaming.— Where a statute in relation to gaming provided that if the person losing did not within three months next after losing "really and truly, without covin or collusion, sue and with effect prosecute for the money or other thing" lost, any person might sue for and recover treble the value of the money, etc., lost, for himself and the town, etc., the court said: "This review of the statutes convinces us that the 'covin or collusion' intended is covin or collusion between the person who lost and the person who won. The intention was to provide against a covinous or collusive suit by the loser against the winner. If within three months the loser really and *bona fide*, without covin or collusion, sues for what had been lost, and thereafter prosecutes that suit with effect, no cause of action accrues to any other person; but it must be a real, *bona fide* suit, to be prosecuted with effect, or not a covinous or collusive one." Cole *v.* Appelbury, 136 Mass. 525, 529.

22. Black L. Dict. And see Anderson *v.* Oscamp, (Ind. 1893) 35 N. E. 707, 708.

23. Webster Dict. [*quoted* in State *v.* McMinn, 34 Ark. 160, 162].

"Cow" may be included in the term "beast" (Taylor *v.* State, 6 Humphr. (Tenn.) 284, 286); "cattle" (7 & 8 Vict. c. 87, § 10; 57 & 58 Vict. c. 57, § 59, (1)); and "other cattle" (14 Geo. II, c. 6; 15 Geo. II, c. 34; 2 East P. C. 616).

"Cow" includes a calf in a statute which exempted from execution "two cows and calves." Stirman *v.* Smith, 10 S. W. 131, 132, 10 Ky. L. Rep. 665. And see Mitchell *v.* Joyce, 69 Iowa 121, 122, 23 N. W. 473, where it was held that a yearling heifer was not embraced within a statute which exempted from execution "two cows and a calf."

24. Stirman *v.* Smith, 10 S. W. 131, 132, 10 Ky. L. Rep. 665. See also the following cases:

Alabama.— Parker *v.* State, 39 Ala. 365, 366.

Connecticut.—Daggett *v.* State, 4 Conn. 60, 64, 10 Am. Dec. 100.

Massachusetts.— Pomeroy *v.* Trimper, 8 Allen, 398, 403, 85 Am. Dec. 714; Carruth *v.* Grassie, 11 Gray 211, 212, 71 Am. Dec. 707.

word shall include "heifer."[25] (See BEEF; BULL; CALF; CATTLE; and, generally, ANIMALS.)

COWARDICE. Want of courage to face danger; dread of exposure to harm or pain of any kind; fear of consequences; dishonorable fear;[26] pusillanimity; misbehavior through fear in relation to some duty to be performed before an enemy.[27] (See COURAGE; TEMPER; and, generally, ARMY AND NAVY.[28])

COWHOUSES. As defined by statute, every house, building, shed, yard, or other enclosed place or premises in which bulls, cows, heifers, oxen or calves are kept or intended to be kept.[29]

COW-KEEPER. One whose business is to keep cows; a dairyman; a herdsman.[30]

CR. An abbreviation of CRIMINAL, *q. v.*; also of CROWN, *q. v.*, and of CREDIT, *q. v.*[31] In chemistry the symbol of chromium.[32]

C. R. An abbreviation of the Latin Custos Rotulorum, keeper of the Rolls; of the Latin *Carolus Rex*, Charles the King, or of *Carolina Regina*, Caroline the Queen.[33]

CRACK-LOO. A game played by two or more persons tossing up a coin and letting it fall upon the floor; the one whose coin falls and remains nearest a crack in the floor being the winner.[34] (See, generally, CRIMINAL LAW; GAMING.)

CRAFT. Manual occupation; some mechanic art in which the person practicing may acquire and exhibit dexterity and skill;[35] the occupation or employment itself; manual art; a trade[36] a guild;[37] also cunning, ART, *q. v.*, skill, or dexterity applied to bad purposes; ARTIFICE, *q. v.*, guile; subtlety.[38] As used in navigation, a vessel;[39] generally small vessels, though it is sometimes used to embrace vessels of all sizes;[40] all kinds of sailing vessels;[41] and in some cases a steam-tug.[42] (See, generally, SHIPPING.)

Mississippi.—Garvin *v.* State, 52 Miss. 207, 209.

Vermont.—Freeman *v.* Carpenter, 10 Vt. 433, 435, 33 Am. Dec. 210; Dow *v.* Smith, 7 Vt. 465, 470, 29 Am. Dec. 202.

England.—Rex *v.* Cook, 1 Leach 123, 124.

"Cow or other animal of the cow kind" as used in a statute relative to grand larceny includes a "steer"; also a "heifer." Watson *v.* State, 55 Ala. 150 [*citing* Parker *v.* State, 39 Ala. 365].

25. Ky. Stat. (1903) § 456.

26. Coil *v.* State, 62 Nebr. 15, 25, 86 N. W. 925, where the court says that "'cowardice' is an antonym of 'courage.'"

27. Bouvier L. Dict. [citing O'Brien, Court M. 142].

By both the army and the navy regulations of the United States cowardice is an offense punishable in officers or privates with death, or such other punishment as may be inflicted by court-martial. Bouvier L. Dict.

28. **The terms "cowardice" and "fraud"** as used in articles of war see 3 Cyc. 858, note 68.

29. In an act relative to the inspection of cattle sheds. 28 & 29 Vict. c. 17, § 2.

30. Century Dict.

"Cow-keeper" does not include farmer who sells surplus milk.—Where a farmer kept cows for the purpose of consuming the produce of the land, and sold the surplus milk not consumed on the premises, it was held that he was not a cow-keeper within the meaning of the bankrupt laws. Bell *v.* Young, 15 C. B. 524, 531, 1 Jur. N. S. 167, 24 L. J. C. P. 66, 80 E. C. L. 524, where Jervis, C. J., said: "The act was intended to apply to persons who keep cows for the purpose of carrying on the trade of dealers in milk, and not to farmers who merely keep a few cows for the purposes of their farms." And see *Ex, p.* Dering, 16 L. J. Bankr. 3, 4.

31. English L. Dict.

32. Century Dict.

33. Century Dict.

34. Donathan *v.* State, 43 Tex. Crim. 427, 428, 66 S. W. 781, where it is said: "This is not played with either dice or dominoes, though one of the witnesses states that it could be played by tossing up dice or dominoes instead of a coin; but this is not the mode of playing the game."

35. So defined under the Georgia act of 1843, which provided that the books of all persons in the practice of any regular craft are allowed to go to the jury, in proof of open accounts. Ganahl *v.* Shore, 24 Ga. 17, 23.

36. Bouvier L. Dict. [*citing* Webster Dict.].

37. Rapalje & L. L. Dict.

38. Century Dict.

39. Blanford *v.* Morrison, 15 C. B. N. S. 724, 731, 69 E. C. L. 724.

40. The Wenonah, 21 Gratt. (Va.) 685, 697.

41. "Though 'formerly restricted to the smaller vessels.'" Worcester Dict. [*quoted* in The Wenonah, 21 Gratt. (Va.) 685, 693].

42. Per Lord Campbell, C. J., and Erle, J., in Reg. *v.* Reed, 28 Eng. L. & Eq. 133, 135.

CRAMP.[43] A painful affection of the muscles, and frequently associated with an acute disease of the stomach or bowels;[44] a sudden, involuntary, and highly painful contraction of a muscle or muscles;[45] a term applied to a painful tonic muscular contraction, of some moments' or minutes' duration;[46] an involuntary and painful contraction of a muscle; a variety of tonic spasm.[47]

CRAMP OF STOMACH. A sudden, violent, and most painful affection of the stomach, with sense of constriction in the *epigastrium*.[48]

CRANK. Some strange action, caused by a twist of judgment; a caprice; a whim; a crotchet; a vagary. Violent of temper; subject to sudden cranks.[49]

CRANK HANGER. An appliance pertaining to a bicycle.[50]

CRAPE VEILS. Veils manufactured of silk.[51] (See, generally, CUSTOMS DUTIES.)

CRAPS. A game which is played by one man taking two dice in his hand and throwing them on the table, and the man who throws bets on seven and eleven to win, and the other party bets against him; first one and then another will throw the dice.[52] (See, generally, CRIMINAL LAW; GAMING.)

CRASSA IGNORANTIA. Gross ignorance.[53]

CRASSA NEGLIGENTIA. Gross negligence.[54]

CRASSUS or **CRASSA.** Large; gross; excessive; extreme.[55]

CRASTINO. In old English practice, on the morrow.[56] (See, generally, PROCESS.)

CRAVE. To ask; to demand.[57] (See, generally, PLEADING.)

And see Tisdell *v.* Combe, 7 A. & E. 788, 794, 2 Jur. 32, 7 L. J. M. C. 48, 3 N. & P. 29, W. W. & H. 5, 34 E. C. L. 412.

43. A common term well understood.— L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, 626.

44. L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, 626.

45. Dunglison Med. Dict. [*quoted* in L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, 626], where it is said: "It is most frequently experienced in the lower extremities, and is a common symptom of certain affections, as of *colica pictonum* and *cholera morbis*."

46. Reference Handb. Med. Sc. [*quoted* in L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, 626], where it is said: "As several of these painful contractions generally occur successively, the term 'cramps' is used to designate the disease."

47. Century Dict. [*quoted* in L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, 626], where it is said: "Cramp is often associated with constriction and griping pains of the stomach or intestines."

48. Dunglison Med. Dict. [*quoted* in L. H. Harris Drug Co. *v.* Stucky, 46 Fed. 624, 626].

49. Ogilvie Imp. Dict. [*quoted* in Walker *v.* Tribune Co., 29 Fed. 827, 829].

50. It is composed of a sleeve, cones, cups, cranks, sprocket, etc. Rogers *v.* Beckrich, 46 N. Y. App. Div. 429, 430, 61 N. Y. Suppl. 725.

51. Arthur *v.* Morrison, 96 U. S. 108, 112, 24 L. ed. 764.

52. Cummings *v.* State, (Tex. Crim. 1903) 72 S. W. 395, 396; Chappell *v.* State, 27 Tex. App. 310, 314, 11 S. W. 411, where it is said: "Is the game of 'craps,' as described above, one which in common language is said to be played, dealt, kept or exhibited by a dealer or keeper? We think clearly not. There is no dealer or exhibitor in it. The game is played by the parties throwing the dice, the participants in the game, without the intervention of any third or outside party." And see Com. *v.* Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777 [*citing* Chappell *v.* State, 27 Tex. App. 310, 312, 11 S. W. 411], where it is said: "The game played was that commonly known as 'craps' or 'oontz,' in which no machinery or implements are used, save two ordinary dice. They are shaken up in the hand, and then rolled or thrown from it. The player wins if he throws the number 7 or 11; otherwise he loses. It can be played with any four-cornered thing or cube, with numbers on it, that can be thrown or rolled, and upon any surface, as the floor, the ground, a box, a hat, etc."

53. Per Lord Ellenborough in Seare *v.* Prentice, 8 East 348, 352.

54. Hun *v.* Cary, 82 N. Y. 65, 72, 37 Am. Rep. 546, where it is said that the term "literally means gross negligence; but that phrase [*crassa negligentia*] has been defined to mean the absence of ordinary care and diligence adequate to the particular case." And see Foster *v.* Essex Bank, 17 Mass. 478, 500, 9 Am. Dec. 168; Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

"**Lata culpa et crassa negligentia,** both by the civil and our own, approximate to, and in many instances cannot be distinguished from, *dolus malus*, or misconduct." *In re* Hall, 10 L. J. C. P. 210, 212, 2 M. & G. 847, 852, 3 Scott N. R. 250, 40 E. C. L. 886.

55. Burrill L. Dict.

56. Burrill L. Dict.

A title formerly given to the return-days of writs, days in bank, or appearance days in the courts at Westminster. Burrill L. Dict. [*citing* 3 Bl. Comm. 227; 2 Reeves Hist. Eng. L. 56, 57].

57. Bouvier L. Dict.

The word is frequently used in pleading:

CRAZY. In its popular sense the term imports a broken, shattered, or deranged mind, rather than one enfeebled by age or disease.[58] (See, generally, INSANE PERSONS.)

CREAM. The best part of a thing; the choice part; the quintessence.[59]

CREAMERY. A place where butter is made.[60]

CREAM OF TARTAR. Pure tartar.[61]

CREAMUS. We create.[62] (See, generally, CORPORATIONS.)

CREATE.[63] To bring into being; to cause to exist; to produce; to make;[64] to bring into existence something that does not exist;[65] to make what did not exist before.[66]

CREATURE. A living created being; an animal or animate being.[67]

CREDIBILITY. Worthiness of belief.[68] (Credibility: Of Newly Discovered

as, to crave oyer of a bond on which the suit is brought; and in the settlement of accounts the accountant-general craves a credit or an allowance. Bouvier L. Dict. [*citing* 1 Chitty Pr. 520].

"Craves leave to refer to the deeds" as used in a pleading see Barnard *v.* Wieland, 30 Wkly. Rep. 947. And see Smith *v.* Buchan, 36 Wkly. Rep. 631.

58. Shaver *v.* McCarthy, 110 Pa. St. 339, 345, 5 Atl. 614 [*quoted* in *In re* Heft, 8 Pa. Dist. 99, 101].

59. Century Dict. In Price Baking-Powder Co. *v.* Fyfe, 45 Fed. 799, 800, it is said: "It is true the word 'cream' is often used to designate the best part of a particular thing, but not the thing itself, as, for instance, the cream of a story; but only in that relation has the word any such signification."

60. Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127, 134, 40 N. E. 616.

61. Price Baking-Powder Co. *v.* Fyfe, 45 Fed. 799, 800.

62. One of the words by which a corporation in England was formerly created by the king. Burrill L. Dict. [*citing* 1 Bl. Comm. 473].

63. The word has a clear, well-settled, and well-understood signification. Roth *v.* State, 158 Ind. 242, 266, 63 N. E. 460; Indianapolis *v.* Navin, 151 Ind. 139, 150, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 473.

Compared with "renew" and "extend."— Where the constitution provided that "no corporate body shall be hereafter created, renewed, or extended," etc., the court said: "To create a charter, is to make one which never existed before. To renew a charter, is to give a new existence to one which has been forfeited, or which has lost its vitality by lapse of time. To extend a charter, is to give one which now exists greater or longer time to operate in than that to which it was originally limited. I do not say that these words have no other meaning in the English language. They are not entirely free from ambiguity. Their signification, like that of other words, must depend much on the context. But the definitions here given are consistent with the sense in which they are, if not always, at least very often used, both in popular and legal phraseology; and to understand them so here is no violation of the '*jus et norma loquendi.*' The language is, 'No corporate body shall be hereafter created, renewed, or extended.' Though an increase of privileges might be, in some sense, extending a charter, it can hardly be said that a corporate body is extended in any other way than by prolonging its entire existence." Moers *v.* Reading, 21 Pa. St. 188, 201.

For significance of the word "created" see the following cases:

Alabama.— Edwards *v.* Bibb, 54 Ala. 475, 481.

Maine.— McClellan *v.* McClellan, 65 Me. 500, 505, used in the expression "created and manifested by some writing signed."

Massachusetts.— Safford *v.* Rantoul, 12 Pick. 233, 240.

Minnesota.— State *v.* Sioux City, etc., R. Co., 43 Minn. 17, 20, 44 N. W. 1032, "created and organized under the laws of this state."

New York.— Syracuse City Bank *v.* Davis, 16 Barb. 188, 193.

Vermont.— Palmer *v.* Preston, 45 Vt. 154, 156, 12 Am. Rep. 191, "a debt created by fraud."

England.— Ambrose *v.* Ambrose, 1 P. Wms. 321, 24 Eng. Reprint 407; Forster *v.* Hale, 3 Ves. Jr. 696, 707, 30 Eng. Reprint 1226.

"Creation of debenture stock" under a statute and when the conditions of the statute are fulfilled see *In re* Burry Port, etc., R. Co., 54 L. J. Ch. 710, 714.

64. Indianapolis *v.* Navin, 151 Ind. 139, 150, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Southern Pac. Co. *v.* Orton, 32 Fed. 457, 473.

An instrument may "create" a trust without conveying the *corpus* of the estate to the trustee. Stroud Jud. Dict. [*citing* Reg. *v.* Fletcher, 9 Cox C. C. 189, 197, 8 Jur. N. S. 649, 31 L. J. M. C. 206, 6 L. T. Rep. N. S. 545, L. & C. 180, 10 Wkly. Rep. 753].

65. Roth *v.* State, 158 Ind. 242, 266, 63 N. E. 460. See also McDonald *v.* State, 80 Wis. 407, 413, 50 N. W. 185.

66. Reading *v.* Shepp, 2 Pa. Dist. 137, 141 [*citing* Moers *v.* Reading, 21 Pa. St. 188, 201].

67. Century Dict.

Cattle may be included within the meaning of the term "creatures." Whitlock *v.* West, 26 Conn. 406, 415.

68. Bouvier L. Dict. And see Wyndham *v.* Chetwynd, 1 Burr. 414, 417.

Evidence, see CRIMINAL LAW; NEW TRIAL. Of Witnesses, see ADMIRALTY; CRIMINAL LAW; EVIDENCE; TRIAL; WITNESSES.)

CREDIBLE.[69] Worthy of credit.[70] In the law of evidence, to be believed; entitled to credit; worthy of belief.[71] (See, generally, CRIMINAL LAW; EVIDENCE; WITNESSES.)

CREDIBLE PERSON. A person worthy of belief.[72] (See, generally, CRIMINAL LAW; EVIDENCE; WITNESSES.)

CREDIBLE WITNESS. See WITNESSES.

CREDIT.[73] In a commercial sense, a good reputation and the confidence of the

69. "The epithet 'credible' has a clear precise meaning. It is not a term of art appropriated only to legal notions; but has a signification universally received." Per Lord Mansfield, in Wyndham *v.* Chetwynd, 1 Burr. 414, 417.

70. Hindson *v.* Kersey, 1 Day (Conn.) 41 note [*quoted* in Freleigh *v.* State, 8 Mo. 606, 611].

71. Burrill L. Dict.

72. Webster Dict. [*quoted* in Peck *v.* Chambers, 44 W. Va. 270, 275, 28 S. E. 706].

As used in a statute.— In Thomas *v.* State, 14 Tex. App. 70, 72, the court said: "We construe the words 'credible person,' as used in the article quoted, to mean 'a competent as well as a credible witness.' Such has been the construction of the word 'credible' by our Supreme Court in the case of attesting witnesses to a will, and the reasons given for so holding in that case apply with equal force here. Nixon *v.* Armstrong, 38 Tex. 296."

"Credible disinterested person," etc.— Where a statute required that the truth of the allegations contained in a petition for a change of venue were to be supported by the affidavit of some "credible disinterested person," and a subsequent act required "two respectable witnesses," the court said: "The term 'respectable,' used in this last act, we understand to be equivalent to the phrase, 'credible disinterested,' as used in the act of 1835, and they are each synonymous with the word 'competent.' To this last epithet, the law has affixed a definite idea, and a respectable or disinterested witness, means a competent witness." Freleigh *v.* State, 8 Mo. 606. 611.

Distinguished from "truthful man."— In considering the character of affidavits necessary to support a change of venue it was said: "A person may be a truthful man in the ordinary acceptation of the term, and still not be a credible person in matters of this nature, involving information, feelings, prejudice, and the like." Dunn *v.* State, 7 Tex. App. 600, 606 [*citing* Tex. Rev. Code Crim. Proc. art. 583].

73. The word is derived from the Latin *credere*, to trust. Lucas *v.* People, 75 Ill. App. 662, 663. And it is perfectly understood in commercial circles. Ainis *v.* Ayres, 62 Hun (N. Y.) 376, 380, 16 N. Y. Suppl. 905.

As defined by statute see:

Alabama.— Civ. Code (1896), § 3906.

Idaho.— Pol. Code (1901), § 1313.

Illinois.— Hurd Rev. Stat. (1899), pp. 1393, 1394 [*quoted* in Sellars *v.* Barrett, 185 Ill. 466, 471, 57 N. E. 422; Griffin *v.* Board of Review, 184 Ill. 275, 278, 56 N. E. 397].

Indian Territory.— Stat. (1899), § 4900.

Iowa.— Code (1897), § 1309 [*quoted* in Albia First Nat. Bank *v.* Albia, 86 Iowa 28, 34, 52 N. W. 334; Perrine *v.* Jacobs, 64 Iowa 79, 80, 19 N. W. 861].

Kansas.— Gen. Stat. (1889), par. 6847 [*quoted* in Dutton *v.* Citizens' Nat. Bank, 53 Kan. 440, 36 Pac. 719, 720]; Comp. Laws (1885), p. 945 [*quoted* in Brown *v.* Thomas, 37 Kan. 282, 15 Pac. 211].

Louisiana.— Acts (1898), No. 170, § 91.

Michigan.— Comp. Laws (1897), § 3831 [*quoted* in Marquette *v.* Michigan Iron, etc., Co., (1903) 92 N. W. 934, 935].

Minnesota.— Gen. Laws (1860), c. 1, § 2 [*quoted* in State *v.* Moffett, 64 Minn. 292, 293, 67 N. W. 68]; Gen. Stat. (1878), c. 11, § 4 [*quoted* in State *v.* Rand, 39 Minn. 502, 40 N. W. 835, 836]. And see Gen. Stat. (1894), § 1511.

Nebraska.— See Jones *v.* Seward County, 10 Nebr. 154, 161, 4 N. W. 946.

North Carolina.— Acts (1891), c. 326, § 85 [*quoted* in State *v.* Georgia Co., 112 N. C. 34, 38, 17 S. E. 10, 19 L. R. A. 485].

Ohio.— Bates Anno. Stat. (1900), § 2730 [*quoted* in Hubbard *v.* Brush, 61 Ohio St. 252, 265, 55 N. E. 829]; 53 Ohio Laws (1856), p. 52 [*quoted* in Treasurer *v.* People's, etc., Bank, 47 Ohio St. 503, 521, 25 N. E. 697; Insurance Co. *v.* Cappellar, 38 Ohio St. 560, 569; Payne *v.* Watterson, 37 Ohio St. 121, 123].

South Carolina.— Civ. Code (1902), § 265.

Utah.— Rev. Stat. (1898), § 2505.

Wyoming.— Rev. Stat. (1899), § 1775.

Implies a present fact.— In People *v.* Wasservogle, 77 Cal. 173, 175, 19 Pac. 270, the court said: "The claim that 'credit' implies only a future, and not a present fact, cannot be supported."

By "money, rights or credits" as used in a statute in relation to trustees is meant cash in the hands of the trustee, or debts due from him, belonging to the principal debtor. Sargeant *v.* Leland, 2 Vt. 277, 279.

"Credit" and "mutual credit" may be synonymous. Atkinson *v.* Carter, 2 Chit. 403, 18 E. C. L. 707. And see Catlin *v.* Foster, 5 Fed. Cas. No. 2,519, 1 Sawy. 37.

"Credit" as set-off see Hulme *v.* Muggleston, 6 Dowl. P. C. 112, 121, 7 L. J. Exch. 20, M. & H. 344, 3 M. & W. 30.

"Credit or effect" as used in a statute see Shultz *v.* Christman, 6 Mo. App. 338, 341.

business community, in the borrower;[74] confidence or trust reposed in one's ability to pay what he may promise;[75] the ability to borrow, on the opinion conceived by the lender that he will be repaid;[76] trust;[77] the capacity of being trusted;[78] the confidence reposed in the ability and intention of a purchaser or borrower to make payment at some future time, either specified or indefinite;[79] the transfer of goods in confidence of future payment;[80] the means by which a person can secure money with which to pay his debts or carry on his business;[81] security for the meeting of his obligations by the holder of the credit;[82] something belonging to a person, but of an intangible nature;[83] a sum of money due to any person; anything valuable standing on the creditor side of an account;[84] what is owing to a person, over and above his legal, *bona fide* debts;[85] property;[86] ASSETS,[87] *q. v.*; a term attaching to the

"Credits" and "credits entrusted" see Barker *v.* Esty, 19 Vt. 131, 135.

"Credits" in general see Equitable L. Ins. Co. *v.* Board of Equalization, 74 Iowa 178, 37 N. W. 141.

"Debts" and "credits" are separate and distinct things, within the meaning of the Code of Civil Procedure relating to attachments. Gow *v.* Marshall, 90 Cal. 565, 27 Pac. 422.

"Rights and credits" as used in a statute see Burnham *v.* Doolittle, 14 Nebr. 214, 218, 15 N. W. 606.

"Standing to the credit of each member" of a building society under a statute see Durham, etc., Working Men's Permanent Bldg. Soc. *v.* Davidson, 56 J. P. 660, 61 L. J. Q. B. 467, 476, 67 L. T. Rep. N. S. 269.

The word "effects," or the word "credits," must be construed as including legacies. Cummings *v.* Garvin, 65 Me. 301, 302.

74. *In re* Boyce, 19 N. Y. Civ. Proc. 23, 25.

75. Abbott L. Dict. [*quoted* in People *v.* Wasservogle, 77 Cal. 173, 175, 19 Pac. 270]. And see Simpson *v.* Manley, 2 C. & J. 12, 14, 1 L. J. Exch. 3, 1 Price 130, 2 Tyrw. 86.

76. Bouvier L. Dict. [*quoted* in People *v.* Wasservogle, 77 Cal. 173, 175, 19 Pac. 270].

77. Catlin *v.* Foster, 5 Fed. Cas. No. 2,519, 1 Sawy. 37; Simpson *v.* Manley, 2 C. & J. 12, 14, 1 L. J. Exch. 3, 1 Price 130, 2 Tyrw. 86; Webster Dict. [*quoted* in Reg. *v.* Peters, 16 Q. B. D. 636, 641, 16 Cox C. C. 36, 50 J. P. 631, 55 L. J. M. C. 173, 54 L. T. Rep. N. S. 545, 34 Wkly. Rep. 399, per Lord Coleridge, C. J.]. But see Libby *v.* Hopkins, 104 U. S. 303, 20 L. ed. 769, where it is said that "'credit' and 'trust' are not synonymous."

78. People *v.* Wasservogle, 77 Cal. 173, 175, 19 Pac. 270; Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463, 472; Dry Dock Bank *v.* American L. Ins., etc., Co., 3 N. Y. 344, 356.

79. Lucas *v.* People, 75 Ill. App. 662, 665.

80. Webster Dict. [*quoted* in Reg. *v.* Peters, 16 Q. B. D. 636, 16 Cox C. C. 36, 50 J. P. 631, 55 L. J. M. C. 173, 175, 54 L. T. Rep. N. S. 545, 34 Wkly. Rep. 399, where Coleridge, C. J., said: "That is this case, where the horse was delivered by the vendor, who trusted to the honesty of the purchaser for payment"].

81. *In re* Boyce, 19 N. Y. Civ. Proc. 23, 25.

Performs some of the functions of money. Property in credits, in regard to its nature and character, is somewhat similar to money. Many of the forms of credits are passing daily from hand to hand, and in the exchange of property, performing some of the functions of money. Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1, 20.

82. Ainis *v.* Ayres, 62 Hun (N. Y.) 376, 381, 16 N. Y. Suppl. 905, where it is said: "And it is not intended, ordinarily, as a substitute for these obligations."

83. Brandon *v.* Yeakle, 66 Ark. 377, 380, 50 S. W. 1004.

May include an interest in an insurance business.— Brandon *v.* Yeakle, 66 Ark. 377, 50 S. W. 1004.

84. Webster Dict. [*quoted* in Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1, 59].

85. Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 321, 47 N. E. 54, where it is said: "But in making up what is owing to him he cannot include moneys, bonds, stocks, nor deposits subject to withdrawal on demand." And see Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1, 40 [*quoted* in Treasurer *v.* People's, etc., Bank, 47 Ohio St. 503, 520, 25 N. E. 697, 10 L. R. A. 196], where it is said: "Nor is it true that . . . 'credits' means what is due to a man after deducting his liabilities . . . to another; and even in the case of mutual credits, there may be no right of set-off, for one may be due at one time, and the other at another."

86. People *v.* Hibernia Sav., etc., Soc., 51 Cal. 243, 246, 21 Am. Rep. 704; Jones *v.* Seward County, 10 Nebr. 154, 161, 4 N. W. 946; Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1, 24. But see Dry Dock Bank *v.* American L. Ins., etc., Co., 3 N. Y. 344, 356; *In re* Boyce, 19 N. Y. Civ. Proc. 23, 25.

Credits are personal property, within the meaning of the Revenue Act (3 Starr. & C. Anno. Stat. p. 3516, § 276). Sellars *v.* Barrett, 185 Ill. 466, 471, 57 N. E. 423.

"Personal property," in legal signification, includes moneys and credits. Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1, 39.

The words "all property" include any kind of property, whether real property, or credits, or personal property not embracing credits. Sellars *v.* Barrett, 185 Ill. 466, 472, 57 N. E. 423.

87. Brandon *v.* Yeakle, 66 Ark. 377, 380, 50 S. W. 1004. But *compare* Pelican Bd. of School Directors *v.* Rock Falls Bd. of School Directors, 81 Wis. 428, 436, 51 N. W. 871, 52 N. W. 1049, per Pinney, J., in dissenting

creditor and designating property possessed by him in contra-distinction to the correlative word "debt" which has reference to the debtor and a personal obligation resting upon him;[88] the correlative of debt;[89] the opposite of debits, that which is due to any person as contradistinguished from what he owes;[90] a term which is nearly synonymous with "payments."[91] In legal parlance, and in the sense in which the term is used in the constitution, choses in action — things incorporeal, consisting in the right of one person to demand and recover from another, a sum of money or other things in possession.[92] In bookkeeping, as a noun, the side of the account on which payment is entered; opposed to debit;[93] that side of a personal account on which everything is entered that answers to an offset to a debt;[94] that which is entered in an account as an offset to a debt, or for which the party in whose favor the entry is made becomes the creditor of another;[95] as a verb, to

opinion, to the effect that the term "does not include lands, tenements, and hereditaments, or goods and chattels."

The word "credit" may include shares of corporate stock within the Iowa code, section 814 (Albia First Nat. Bank *v.* Albia, 86 Iowa 28, 40, 52 N. W. 334); bank stocks under the words of a statute, "credits other than bank stock" (Pullman State Bank *v.* Manring, 18 Wash. 250, 254, 51 Pac. 464); notes and accounts (Sellars *v.* Barrett, 185 Ill. 466, 471, 57 N. E. 423).

The word "credit" does not include stock in an incorporated company in Louisiana (New Orleans Nat. Banking Assoc. *v.* Wiltz, 10 Fed. 330, 332, 4 Woods 43); notes, securities, accounts due, or other credits which are the assets of any bank, banker, broker, or stock-jobber (Bressler *v.* Wayne County, 32 Nebr. 834, 842, 49 N. W. 787, 13 L. R. A. 614); a contract of membership in an associated press (Arapahoe County *v.* Rocky Mountain News Printing Co., 15 Colo. App. 189, 61 Pac. 494); "stocks" within Utah Const. art. 13, § 3 (Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346); "stock" (Bridgman *v.* Keokuk, 72 Iowa 42, 44, 33 N. W. 355 [*quoted* in Albia First Nat. Bank *v.* Albia, 86 Iowa 28, 35, 52 N. W. 334]); money, in any authorized definition of the word "credit" (Pullman State Bank *v.* Manring, 18 Wash. 250, 254, 51 Pac. 464); shares of stock in banking and other corporations (Dutton *v.* Citizens' Nat. Bank, 53 Kan. 440, 444, 36 Pac. 719); national bank shares (Chapman *v.* Wellington First Nat. Bank, 56 Ohio 310, 318, 47 N. E. 54).

88. North Carolina R. Co. *v.* Alamance, 91 N. C. 454, 456.

89. *Massachusetts.*— Wentworth *v.* Wittemore, 1 Mass. 471, 473.

New Hampshire.— Isabelle *v.* LeBlanc, 68 N. H. 409, 39 Atl. 436.

North Carolina.— North Carolina R. Co. *v.* Alamance, 91 N. C. 454.

United States.— Libby *v.* Hopkins, 104 U. S. 303, 20 L. ed. 769.

England.— Lord Coleridge, C. J., in Reg. *v.* Peters, 16 Q. B. D. 636, 641, 16 Cox C. C. 36, 50 J. P. 631, 55 L. J. M. C. 173, 54 L. T. Rep. N. S. 545, 34 Wkly. Rep. 399.

90. Pelican Bd. of School Directors *v.* Rock Falls Bd. of School Directors, 81 Wis. 428, 436, 51 N. W. 871, 52 N. W. 1049, per Pinney, J., in dissenting opinion. And see Walters *v.* Prestige, 30 Tex. 65, 73.

91. Walters *v.* Prestige, 30 Tex. 65, 73, where it is said: "The term 'credits,' in its most comprehensive signification, as contradistinguished from 'debit,' might possibly be held to embrace all that is necessary; but it has another and more restricted meaning, which would narrow it down to a signification nearly synonymous with 'payments,' which clearly would not fill the requirements of the statute, as in this sense it certainly does not include 'offsets.'"

"Payments and offsets" equivalent to "credits and offsets."— Under a mechanic's lien law a claimant was required to place upon record "a true statement of his demand, after deducting all just credits and offsets." He complied except that instead of the words, "credits and offsets," he used the words "payments and offsets." The court said: "We think that the words "payments and offsets" are substantially equivalent to the words "credits and offsets" in meaning, and that he ought not to be deprived of his lien upon a philological criticism of so flimsy a character." Preston *v.* Sonora Lodge No. 10, I. O. O. F., 39 Cal. 116, 119.

92. Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1, 24. And see Pelican Bd. of School Directors *v.* Rock Falls Bd. of School Directors, 81 Wis. 428, 432, 51 N. W. 871, 52 N. W. 1049, where it is said: "As ordinarily used in trade and business, the word 'credit' suggests nothing more than a chose in action." But see Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463, 473 [*citing* Dry Dock Bank *v.* American L. Ins., etc., Co., 3 N. Y. 344, 356], where it is said that "credit is neither money, goods, nor a chose in action."

93. As, "this article is carried to one's credit and that to one's debit." Century Dict.; Imperial Dict [*quoted* in Pelican Bd. of School Directors *v.* Rock Falls Bd. of School Directors, 81 Wis. 428, 432, 51 N. W. 871, 52 N. W. 1049].

94. As, "to carry money, goods, or notes to the credit of A. B." Webster Dict.; Worcester Dict. [*quoted* in Pelican Bd. of School Directors *v.* Rock Falls Bd. of School Directors, 81 Wis. 428, 432, 51 N. W. 871, 52 N. W. 1049].

95. As "the credits exceed the debts." Webster Dict.; Worcester Dict. [*quoted* in Pelican Bd. of School Directors *v.* Rock Falls Bd. of School Directors, 81 Wis. 428, 432, 51 N. W. 871, 52 N. W. 1049].

enter upon the credit side of an account; give credit for.[96] As applied to an individual, reputation;[97] reputation and confidence;[98] a person's standing as a citizen in the community in which he lives;[99] that influence connected with social positions.[1] (Credit: Attachment of, see ATTACHMENT; GARNISHMENT. Averments as to in Affidavit For Attachment, see ATTACHMENT. Bills of, see BANKS AND BANKING; STATES; UNITED STATES. Guaranty of, see FRAUDS, STATUTE OF; GUARANTY. In Accounts of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. In Action on Account, Allegation in Pleading, see ACCOUNTS AND ACCOUNTING. In Cash, see CREDIT IN CASH. Insurance, see CREDIT INSURANCE. Letters of, see BILLS AND NOTES. Levy on, see EXECUTION. Man, see CREDIT MAN. Of Executor and Administrator, see EXECUTORS AND ADMINISTRATORS. Of Government, see CREDIT OF GOVERNMENT. Of Individual, see CREDIT OF INDIVIDUAL. Of Guardian, see GUARDIAN AND WARD; INSANE PERSONS. Of Trustee, see TRUSTS. On Accounting, see ACCOUNTS AND ACCOUNTING. Representations as to, see FRAUDS, STATUTE OF. Sales on, see SALES. Set Off to, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Taxation of, see TAXATION. To Judgments and Decrees of Another State, see JUDGMENTS. See BELIEF; BELIEVE; CERTAIN; CERTAINTY; CHARACTER; COMPETENCY; COMPETENT; CONFIRM; CONFIRMED; COUNTENANCE; DISCREDIT.)

CREDITABLE WITNESSES. Witnesses competent to testify.[2] (See, generally, WITNESSES.)

CREDIT IN CASH. An order by one person on another, to hold to the use, or at the command, of a third party, a certain sum;[3] pay;[4] pay over the money;[5] pay the money to the person in whose favor the order is given.[6] (See CREDIT.)

CREDIT INSURANCE.[7] A contract of insurance which provides for an indemnity, wholly or in part, to merchants or traders against the insolvency of customers to whom they extend credit;[8] a contract of insurance or indemnity with

96. Century Dict.

"Credit the drawer" as used in a negotiable note see Temple *v.* Baker, 125 Pa. St. 634, 642, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709; Steckel *v.* Steckel, 28 Pa. St. 233, 235.

The words "credit my account" implies an open account, which is to be credited. Lee *v.* Chillicothe Branch Ohio State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325. And see Lee *v.* Chillicothe Branch Bank, 15 Fed. Cas. No. 8,186, 1 Bond 387.

97. Curlee *v.* Rose, 27 Tex. Civ. App. 259, 261, 65 S. W. 197.

98. Rindge *v.* Judson, 24 N. Y. 64, 71.

99. Curlee *v.* Rose, 27 Tex. Civ. App. 259, 261, 65 S. W. 197.

1. Black L. Dict. [*citing* 20 Toullier, note 19].

2. Kennedy *v.* Upshaw, 66 Tex. 442, 455, 1 S. W. 308.

3. Per Wilde, C. J., in Ellison *v.* Collingridge, 9 C. B. 570, 573, 67 E. C. L. 570.

4. Per Wilde, C. J., in Allen *v.* Sea, etc., Assur. Co., 9 C. B. 574, 575, 14 Jur. 870 note, 67 E. C. L. 574; per Williams, J., in Ellison *v.* Collingridge, 9 C. B. 570, 573, 67 E. C. L. 570.

5. Per Cresswell, J., in Ellison *v.* Collingridge, 9 C. B. 570, 573, 67 E. C. L. 570.

6. Per Wilde, C. J., in Ellison *v.* Collingridge, 9 C. B. 570, 573, 67 E. C. L. 570.

7. "Guarantee" or "surety" contracts are policies of insurance. In Tebbets *v.* New York Mercantile Credit Guarantee Co., 73 Fed. 95, 97, 19 C. C. A. 281, the court said: "Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

"Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, having naturally tended to make the forms of policy crude and difficult of interpretation." Tebbets *v.* New York Mercantile Credit Guarantee Co., 73 Fed. 95, 96, 19 C. C. A. 281.

8. Shakeman *v.* U. S. Credit System Co., 92 Wis. 366, 374, 66 N. W. 528, 53 Am. St. Rep. 920, 32 L. R. A. 383, where it is said: "The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado,

traders and others to protect them from loss in their business by reason of the failure or insolvency of their customers;[9] a contract which for a stipulated premium guarantees a creditor, to a specified amount, against losses resulting from the insolvency of his debtors.[10] (See, generally, INSURANCE.)

CREDIT MAN. An employee of a commercial house whose special business it is to inquire in reference to the merit of all persons applying to purchase on credit, and who determines to whom credit shall be given, and the amount.[11]

CREDIT OF GOVERNMENT. Confidence founded on a belief of its ability to comply with its engagements, and a confidence in its honor, that it will do that voluntarily, which it cannot be compelled to do.[12]

CREDIT OF INDIVIDUAL. The trust reposed in him by those who deal with him; that he is of ability to meet his engagements.[13]

CREDITOR.[14] One who has a right to require of another the fulfilment of a con-

and is, in fact, much more frequent." And see Lauer *v.* Gray, 55 N. J. Eq. 544, 37 Atl. 53.

Purpose of indemnity.— In People *v.* Mercantile Credit Guarantee Co., 166 N. Y. 416, 420, 60 N. E. 24, the court, in speaking of the character of a policy of credit insurance, said: "The purpose was to indemnify the claimants from loss by insolvency of such debtors as had made a general assignment for the benefit of creditors."

"The scheme of indemnity includes two classes of losses. The one, an initial loss, which must be borne by the indemnified; the other, a loss in excess of the initial loss, which must be borne by the indemnitor. Both kinds of losses are such as result from the insolvency of the debtors who owe the indemnified." Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 259, 46 Atl. 328, 1063.

9. People *v.* Mercantile Credit Guarantee Co., 166 N. Y. 416, 418, 60 N. E. 24.

"The term 'loss sustained by the insolvency of debtors' is agreed to mean losses upon sales made by the insured to debtors who have made a general assignment for the benefit of their creditors." People *v.* Mercantile Credit Guarantee Co., 166 N. Y. 416, 419, 60 N. E. 24.

10. Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 258, 46 Atl. 328, 1063.

The insolvency designated is the usual, legally defined insolvency — which is an inability of the debtor to pay his debts as they fall due in the ordinary course of business, and this is dependent neither upon a formal adjudication nor on an actual insufficiency of assets to meet liabilities. Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 260, 46 Atl. 328, 1063 [*citing* Castleberg *v.* Wheeler, 68 Md. 266, 277, 12 Atl. 3]. And see People *v.* Mercantile Credit Co., 166 N. Y. 416, 423, 60 N. E. 24, where it is said: "A general assignment within the meaning of the policy may be for the benefit of a single creditor or all. It may be in the form prescribed by state statutes or an assignment at the common law. The form of the transaction is not so material as the result when it operates to divest the debtor of sustantially his entire property and closes out his business. Such a transfer means insolvency within the fair scope of the indemnity."

11. Erber *v.* Dun, 12 Fed. 526, 535, 4 McCrary 160, where it is said: "The credit man of a house may or may not be a principal. It frequently occurs that he is a mere clerk or agent."

12. Owen *v.* Mobile Branch Bank, 3 Ala. 258, 267.

13. Owen *v.* Mobile Branch Bank, 3 Ala. 258, 267.

And he is trusted, because through the tribunals of the country, he may be compelled to pay. Owen *v.* Mobile Branch Bank, 3 Ala. 258, 267.

14. Distinguished from "assigns" in Buchanan *v.* Reid, 43 Minn. 172, 176, 45 N. W. 11.

Distinguished from "debtor" in New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103, 107.

Distinguished from "encumbrance" in Shaeffer *v.* Weed, 8 Ill. 511, 517.

Distinguished from "heir" in Graves *v.* Graves, 58 N. H. 24.

"Creditors or other persons."— In Twell *v.* Twell, 6 Mont. 19, 28, 9 Pac. 537, the court said: "Our statute, by the use of the words 'creditors or other persons,' embraces others than those who are strictly creditors. Even the word 'creditors' does not receive a strict definition, for a party who is not, strictly speaking, a creditor, may stand in the equity of a creditor, and have an interest that may be defrauded."

"In the use of the terms 'indebtedness' and 'creditor,' as used in this deed, we must presume that the parties used them in their broadest sense, as intending to embrace such obligations as might be legally imposed upon the obligee by the law, without reference to their more restricted meaning." Louisville, etc., R. Co. *v.* Biddell, 66 S. W. 34, 35, 23 Ky. L. Rep. 1702.

The context may show that the word "creditors" should be construed to include only "subsequent creditors." Defiance Mach. Works *v.* Trisler, 21 Mo. App. 69, 71 [*overruled* in Collins *v.* Wilhoit, 108 Mo. 451, 18 S. W. 839].

The phrase "to the creditors," means "all the creditors." Woolverton *v.* Taylor, 132 Ill. 197, 210, 23 N. E. 1007, 22 Am. St. Rep. 521; Harper *v.* Union Mfg. Co., 100 Ill. 225, 231; Low *v.* Buchanan, 94 Ill. 76, 80.

tract or obligation ;[15] one to whom another owes the performance of an obligation ;[16] one who has the right by law to demand and recover of another a sum of money on any account whatever ;[17] one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money ;[18] every party who has a demand, an account, an interest, or a cause of action for which he might recover any debt, damages, penalty, or forfeiture ;[19] the correlative of "debtor" ;[20] in the ordinary and almost universal definition of the word, a person to whom a debt is owing by another person, called a "debtor" ;[21] one to whom a debt is owing[22] by another person ;[23] the person to whom the debt is owed, who has the absolute control of it ;[24] in its strict sense, one to whom money is due ;[25] one to whom a sum of money is due for any cause ;[26] a person to whom a sum of money or other thing is due by obligation, promise, or in law ;[27] in the strict technical sense of the term, any one who has a right to require the fulfilment of an obligation or contract for the payment of money,— any one who has a debt or demand against another upon contract, express or implied, for the payment of money ;[28] in a more liberal sense, he who has a legal demand upon another, for money or other property which has got into the hands of another, without his consent, by mistake or accident, which he is entitled to have, or to a compensation in damages for, upon the ground of an implied promise ;[29] in a strict literal sense,

15. *Illinois.*—Dunnigan *v.* Stevens, 122 Ill. 396, 404, 13 N. E. 651, 3 Am. St. Rep. 496 [*quoting* Bouvier L. Dict.] ; Wilson's Estate, 80 Ill. App. 217, 219 [*quoting* Bouvier L. Dict.].

Iowa.— Matter of Rea, 82 Iowa 231, 238, 48 N. W. 78 [*quoting* Bouvier L. Dict.].

Minnesota.— Kalkhoff *v.* Nelson, 60 Minn. 284, 290, 62 N. W. 332 ; Mohr *v.* Minnesota Elevator Co., 40 Minn. 343, 348, 41 N. W. 1074 [*quoting* Bouvier L. Dict.].

New Hampshire.— Foss *v.* Lord, 59 N. H. 529 [*quoting* Bouvier L. Dict.].

New Jersey.— New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282, 300 [*quoting* Bouvier L. Dict.].

North Carolina.— State *v.* Georgia Co., 112 N. C. 34, 38, 17 S. E. 10, 19 L. R. A. 485 [*quoting* Bouvier L. Dict.].

Ohio.— Walsh *v.* Miller, 51 Ohio St. 462, 486, 38 N. E. 381 [*quoting* Bouvier L. Dict.].

Texas.— El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 201, 34 S. W. 206 [*citing* Drake Attach. § 12].

16. Okla. Stat. (1893), par. 2673, § 8.

17. *Connecticut.*— Stanly *v.* Ogden, 2 Root 259, 261.

Indiana.— De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100 [*quoting* Anderson L. Dict.].

Ohio.— Walsh *v.* Miller, 51 Ohio St. 462, 486, 38 N. E. 881.

Utah.— Deseret Nat. Bank *v.* Kidman, 25 Utah 379, 71 Pac. 873, 878 [*citing* Anderson L. Dict.; Wapple Debt. & Cr. § 8; Winfield Words & Phrases 162].

United States.— New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 317, 46 C. C. A. 305.

18. Cal. Civ. Code (1899), § 3430 [*quoted* in Melvin *v.* State, 121 Cal. 16, 25, 53 Pac. 416] ; Mont. Code (1895), § 4481 ; S. D. Comp. Laws, § 4652 [*quoted* in Pierson *v.* Hickey, (S. D. 1902) 91 N. W. 339, 340].

19. Bongard *v.* Block, 81 Ill. 186, 187, 25 Am. Rep. 276 ; Walradt *v.* Brown, 6 Ill. 397, 399, 41 Am. Dec. 190.

20. Thomason *v.* Scales, 12 Ala. 309, 312 (where it is said that the term "can only be applied to one who has a just claim for money") ; per Paterson and Iredell, JJ., in Ware *v.* Hylton, 3 Dall. (U. S.) 199, 249, 278, 1 L. ed. 568 ; Grant *v.* West, 23 Ont. App. 533, 538 ; Imperial Dict. [*quoted* in Reg. *v.* Henry, 21 Ont. 113, 115] ; Wharton L. Lex. [*quoted* in Reg. *v.* Henry, 21 Ont. 113, 115].

21. *In re* Nicolin, 55 Minn. 130, 133, 56 N. W. 587 ; Black L. Dict. [*quoted* in Cardenas *v.* Miller, 108 Cal. 250, 258, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84].

22. Grant *v.* West, 23 Ont. App. 533, 538. And see Spader *v.* Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 19, 20 Atl. 378.

23. Woolverton *v.* George H. Taylor Co., 43 Ill. App. 424, 426 ; Black L. Dict. [*quoted* in New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 317, 46 C. C. A. 305].

24. Davis *v.* Snead, 33 Gratt. (Va.) 705, 709.

25. New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 317, 46 C. C. A. 305 ; Webster Dict. [*quoted* in State *v.* Parsons, 115 N. C. 730, 733, 20 S. E. 511].

26. Century Dict. [*quoted* in Wilson's Estate, 80 Ill. App. 217, 219].

27. Webster Dict. [*quoted* in New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282, 300 ; El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 201, 34 S. W. 206].

28. Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 346, 48 N. W. 187, 12 L. R. A. 741.

"Creditor" includes a landlord while the lease is existent within the purview of the statutes. Berkey, etc., Furniture Co. *v.* Sherman Hotel Co., 81 Tex. 135, 143, 16 S. W. 807.

29. Stanly *v.* Ogden, 2 Root (Conn.) 259, 261.

he who voluntarily trusts or gives credit to another, for a sum of money or other property, upon bond, bill, note, book, or simple contract;[30] one who trusts or gives credit;[31] one who gives credit in business matters;[32] he that trusts another with any debt, be it in money or wares;[33] properly, one who gives credit in commerce; but in a general sense, one who has a just claim for money;[34] one who gives "credit" to another, by giving him money, or some other value, on the "credit" of, or the faith in, his honesty and his ostensible means of paying;[35] in its strict legal sense, one who voluntarily trusts or gives credit to another for money or other property, but in its more general and extensive sense one who has a right by law to demand and recover of another a sum of money on any account whatever;[36] a CLAIMANT,[37] *q. v.*; in a larger sense of the word, any one who has a legal claim against another;[38] the party having a lien by contract made under the law;[39] one who has entered into contract with a party as indorser, guarantor, or surety.[40] And the term is frequently used as signifying a judgment creditor;[41] a judgment creditor having a lien;[42] one who has a judgment or a lien;[43] one who has recovered judgment;[44] a judgment, execution, or attachment creditor;[45] one who has a judgment and has sued out execution before notice of an unrecorded mortgage;[46] one who has obtained judgment by default, as well as one who has no judgment;[47] one having a legal right to damages, capable of enforce-

30. Stanly *v.* Ogden, 2 Root (Conn.) 259, 261.

31. Wharton L. Lex. [*quoted* in Reg. *v.* Henry, 21 Ont. 113, 115].

32. Webster Dict. [*quoted* in Matter of Rea, 82 Iowa 231, 238, 48 N. W. 78].

33. Abbott L. Dict. [*quoted* in Reg. *v.* Henry, 21 Ont. 113, 115].

34. Imperial Dict. [*quoted* in Reg. *v.* Henry, 21 Ont. 113, 115].

35. "Or, in other words, it means those who popularly, commercially, and legally are known as 'general creditors'— creditors who have given 'credit,' but have neither originally given, nor subsequently obtained, any lien or security for the payment of their debts." King *v.* Fraser, 23 S. C. 543, 548.

36. Keith *v.* Hiner, 63 Ark. 244, 247, 38 S. W. 13.

37. Gray *v.* Palmer, 9 Cal. 616, 636; Toulouse *v.* Burkett, 2 Ida. (Hasb.) 184, 190, 10 Pac. 26, 28.

"Creditor" will not include a receiver appointed by the court to collect the purchase-money for lands sold by him. Davis *v.* Snead, 33 Gratt. (Va.) 705, 711.

Under the Joint Stock Companies Arrangement Act (1870) any person having any pecuniary claims against the company is a creditor. *In re* Midland Coal, etc., Co., [1895] 1 Ch. 267, 277, 64 L. J. Ch. 279, 71 L. T. Rep. N. S. 705, 12 Reports 62, 43 Wkly. Rep. 244.

38. Abbott L. Dict. [*quoted* in Reg. *v.* Henry, 21 Ont. 113, 115].

"Creditor" includes the holder of a wheat ticket or receipt issued by a warehouseman who has become insolvent within the meaning of the insolvency law. Daniels *v.* Palmer, 41 Minn. 116, 122, 42 N. W. 855.

39. Shaeffer *v.* Weed, 8 Ill. 511, 517.

All persons whose claims are, upon certain conditions, charged by law as specific liens upon certain property are creditors. Such as holders of attachment, execution, judgment, landlord, and mechanic's liens. Oak Cliff Young Ladies College *v.* Armstrong, (Tex. Civ. App. 1899) 50 S. W. 610, 613 [*quoting* Bowen *v.* Lansing Wagon Works, 91 Tex. 385, 43 S. W. 872].

The claimant of specific property, and not of a debt, cannot properly be called a creditor, within the meaning of the probate law. Gunter *v.* Janes, 9 Cal. 643, 659.

40. Cutler *v.* Steele, 85 Mich. 627, 632, 48 N. W. 631.

"Creditor" will include the guarantor of a note prior to the time of default under its terms. Jackson *v.* Seward, 5 Cow. (N. Y.) 67, 73 [*quoted* in Karst *v.* Gane, 61 Hun (N. Y.) 533, 537, 16 N. Y. Suppl. 385].

41. Milton *v.* Boyd, 49 N. J. Eq. 142, 154, 22 Atl. 1078; Belknap *v.* North America L. Ins. Co., 11 Hun (N. Y.) 282, 285; *In re* Faithfull, 54 L. J. Q. B. 190, 191.

"Creditor" does not include one having a judgment and execution under a statute rendering a chattel mortgage void as against creditors for omission to file, etc. Jones *v.* Graham, 77 N. Y. 628.

42. Carter *v.* Challen, 83 Ala. 135, 138, 3 So. 313; Dickerson *v.* Carroll, 76 Ala. 377, 380; Walker *v.* Elledge, 65 Ala. 51, 57; Preston *v.* McMillan, 58 Ala. 84, 94; Noe *v.* Montray, 170 Ill. 169, 174, 48 N. E. 709. And see Follanshee *v.* Bird, 8 Cush. (Mass.) 289, 291.

43. Pickett *v.* Banks, 11 Sm. & M. (Miss.) 445, 452; Dixon *v.* Doe, 1 Sm. & M. (Miss.) 70, 106.

44. Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606.

45. That is, a creditor who is using the courts of law and their processes for the collection of his debt. Farmers', etc., Bank *v.* Anthony, 39 Nebr. 343, 348, 57 N. W. 1029.

46. Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606.

47. Mills *v.* Thursby, 12 How. Pr. (N. Y.) 385, 392.

ment by judicial process;[48] a person having claims that are recognized and admitted, or such as have been ascertained and established by the judgment of a competent court, and not those that have been disputed or rejected.[49] Again the term has been applied to one whose claim accrued from a contract in existence at the time a fraudulent and voluntary conveyance is made, within the meaning of the statute of frauds.[50] (Creditor:[51] Account Stated, see Account Stated. Composition With, see Compositions With Creditors. Conveyances and Transfers to Hinder or Delay, see Fraudulent Conveyances. Of Devisees and Legatees, see Wills. Of Heirs and Distributees, see Descent and Distribution. Of Intestate, see Descent and Distribution; Executors and Administrators. Of Testator, see Wills. Remedy Against Surety, see Principal and Surety. Subrogation to Rights of, see Subrogation. See also, generally, Assignments For Benefit of Creditors;[52] Bankruptcy;[53] Creditors' Suits; Executors and Administrators; Fraudulent Conveyances; Insolvency; Marshalling Assets and Securities; Novation.)

CREDITOR AT LARGE. A Simple Contract Creditor,[54] *q. v.* (See Creditor.)

CREDITOR HAVING SECURITY. A person who has levied upon goods or chattels by seizure.[55] (See, generally, Attachment; Execution.)

CREDITOR OF MORTGAGOR. A creditor armed with some legal process which authorizes him to seize the property, such as an execution issued upon a judgment or an attachment.[56] (See, generally, Attachments; Executions; Judgments; Mortgages.)

48. Bishop *v.* Redmond, 83 Ind. 157, 158 [*quoted* in De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107], where it is said: "The word 'creditor,' as used by law writers, judges and legislators, has a broader meaning than that ascribed to it by the appellants. The word means more than the holder of a debt; it means one having a legal right to damages, capable of enforcement by judicial process. Thus, one against whom slanderous words are uttered is, in legal contemplation, a creditor from the time of their utterance. So, a breach of a promise to marry, constitutes the person to whom the promise is made a creditor from the time of the breach. So, too, a right to maintain a prosecution for the support of a bastard child invests the person in whose favor the right exists, with the character of a creditor." But see Champion *v.* Buckingham, 165 Mass. 76, 79, 42 N. E. 498, where it is said: "We are not aware of any case which holds that the word 'creditor' means under all circumstances a person having an obligation against another which is capable of legal enforcement."

"Creditor" does not include a party who has an action pending for injuries to the person "in the legal definition of that word" (Grafton *v.* Union Ferry Co., 19 N. Y. Suppl. 966, 968); or a person claiming damages, for a conversion of his property, within the meaning of a statute (Hutchinson *v.* Lamb, Brayt. (Vt.) 234, 235).

49. Wilson *v.* Baptist Education Soc., 10 Barb (N. Y.) 308, 319.

"Creditor" does not include a claimant under contract with the executors of a will (Fowler *v.* Walter, 1 Dem. Surr. (N. Y.) 240, 243), or a person whose claim has been disallowed upon an unauthorized presentation (Whitcomb *v.* Davenport, 63 Vt. 656, 659, 22 Atl. 723).

The holder of a claim for funeral expenses is not a "creditor" of the estate. Matter of Flint, 15 Misc. (N. Y.) 598, 602, 38 N. Y. Suppl. 188.

50. Keel *v.* Larkin, 72 Ala. 493, 500; Fearn *v.* Ward, 65 Ala. 33, 38.

A covenantee in a deed with general warranty is a creditor, within the meaning of the statute of frauds, at the date of the deed, whenever there is then existing an outstanding paramount title to that of his covenantor. Gannard *v.* Eslava, 20 Ala. 732, 743.

51. Creditor of defendant when cannot appeal or sue out a writ of error see 2 Cyc. 635.

"Creditor or other person entitled to sue" see 4 Cyc. 405, note 35.

Preference of creditors: In respect to annuities see 2 Cyc. 466. When not sufficient to warrant attachment see 4 Cyc. 424.

52. Existing creditors privy to fraud see 4 Cyc. 147, note 2.

When a bad assignment may be good as to creditor see 4 Cyc. 146.

53. Creditor as defined by bankruptcy act see 5 Cyc. 288, note 3; 306, note 21; 321, note 24.

Creditor of an infant under a bankruptcy act see 5 Cyc. 302, note 96.

Creditor of a corporation who happens also to be a stock-holder and director of the company see 5 Cyc. 302, note 96.

Creditor of partnership as creditor of each member of the firm see 5 Cyc. 302, note 96.

Creditor secured by mortgage under bankruptcy proceedings see 5 Cyc. 303, note 98.

54. U. S. *v.* Ingate, 48 Fed. 251, 253.

55. Wymer *v.* Kemble, 6 B. & C. 479, 483, 13 E. C. L. 220, where it is said: "He has a security by his right to have the goods sold."

56. Button *v.* Rathbone, 126 N. Y. 187, 191, 27 N. E. 266; Bullard *v.* Kenyon, 21 N. Y. Suppl. 32.

CREDITOR QUI PERMITTIT REM VENIRE PIGNUS DIMITTIT. A maxim meaning "The creditor who allows property to be sold gives up the pledge."[57]

CREDITORS' BILL. See CREDITORS' SUITS.

CREDIT WITH BANKER. A term which does not imply payment, but a means of payment, more or less secure according to the solidity of the depositary.[58] (See CREDIT; and, generally, BANKS AND BANKING.)

57. Morgan Leg. Max.
58. Bell *v.* Moss, 5 Whart. (Pa.) 189, 203 [*quoted* in Ainis *v.* Ayres, 62 Hun (N. Y.) 376, 381, 16 N. Y. Suppl. 905].