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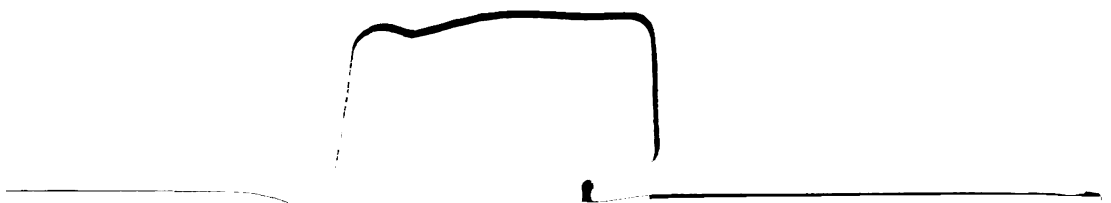
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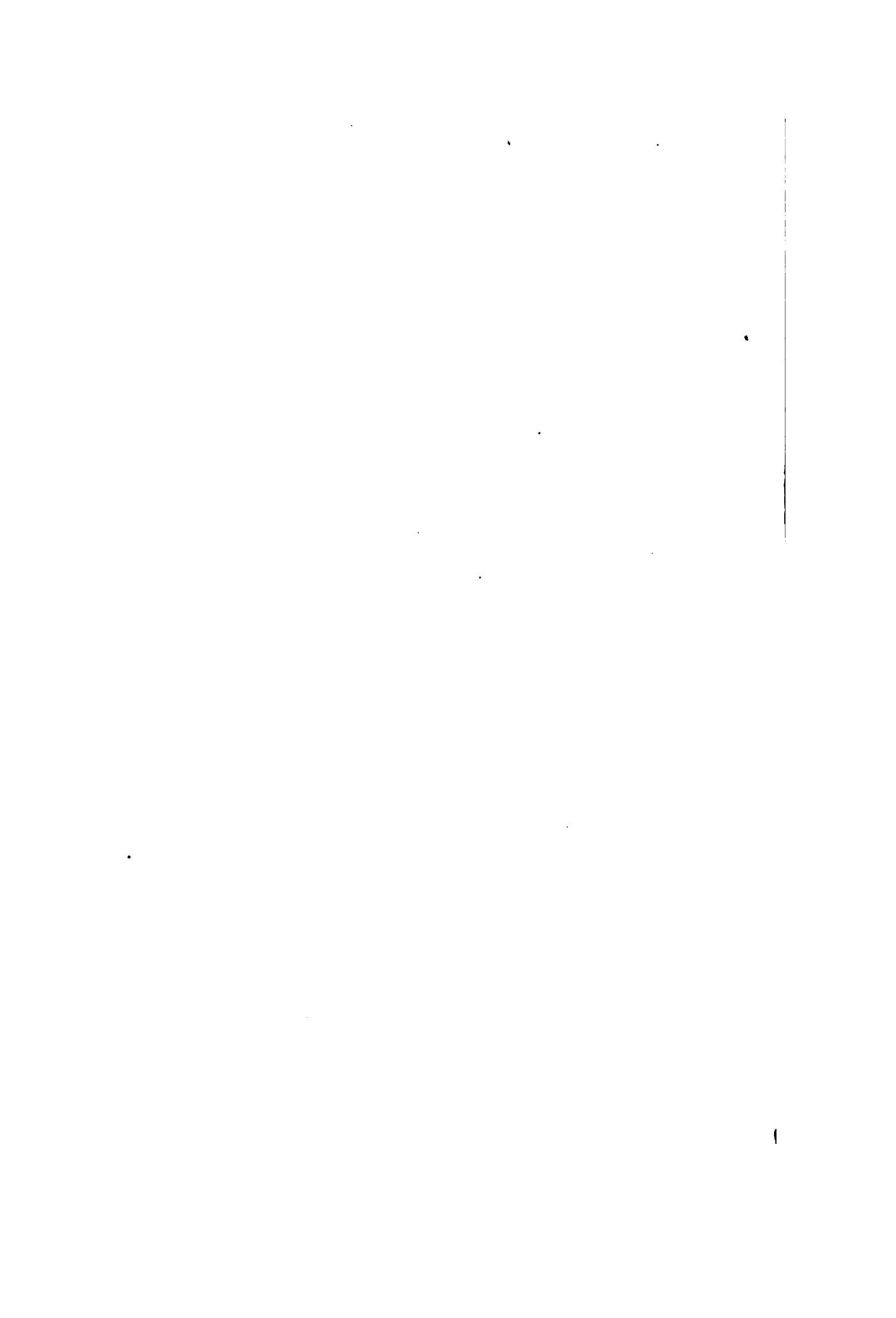
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A TREATISE
ON
THE LAW OF JUDGMENTS

INCLUDING THE DOCTRINE OF RES JUDICATA

By HENRY CAMPBELL BLACK, M. A.
Author of "Black's Law Dictionary" and of Treatises on "Tax Titles,"
"Constitutional Law," "Interpretation of Laws," "Bankruptcy," etc.

SECOND EDITION
IN TWO VOLUMES

VOLUME I

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PREFACE TO THE FIRST EDITION.

THE work now given to the public is one which has engaged the author's study and reflection, more or less constantly, for a considerable number of years. The magnitude and importance of the subject are such as to demand the most patient and exhaustive research, the most careful collation and weighing of authorities, and the most impartial and reasonable discussion of its disputed points, on the part of any one who attempts a comprehensive and systematic treatment of it. How far the author has fallen short of the fulfillment of these conditions, is for the judgment of those who shall use the book. But the fact that he has constantly kept this ideal in mind, and devoted his best energies to the realization of it, is his justification for the hope that the following pages may be found to possess some interest and value for his brethren of the bar.

The law of judgments, at the present day, aside from local variations in matters of practice, may be regarded as tolerably well settled. There are, however, certain branches of the law of estoppel by record which still present themselves to many a puzzled inquirer as a labyrinthine confusion of apparently irreconcilable decisions. This arises, not so much from any real contradiction or obscurity in the authorities, as from the infinite variety exhibited in the facts of the different cases and the necessity of making nice discriminations in the principles to be applied. At such places, the endeavor has been made to exhibit the result of the decisions in a clear and orderly form, by a methodical classification of the cases, and by a logical and systematic arrangement of topics. In illustration we refer to the discussion of the doctrine of merger as applied to inseverable claims founded in contract or tort, actions for continuing damages, for distinct trespasses, for causes of action distinct though founded on the same transaction, for permanent and recurring nuisances, for periodical liabilities, etc. (vol ii. §§ 731-753). Nor is our general subject wholly free from vexed

questions, upon which the authorities are hopelessly at war. In such cases it has been the author's task to weigh and balance the conflicting decisions,—not withholding criticism where he deemed it justified, nor refraining from the positive expression of individual opinion,—and to present what he considered the true rule, or the best rule, or the rule sustained by the preponderance of authorities, supporting his conclusions as well by the reasoning suggested by his own reflections on the subject, as by quotations from the opinions of the courts. Examples of such topics, so treated, may be seen in the discussion of "judgments as contracts" (vol. i. §§ 7-11), the definition of jurisdiction (§ 215), the question of the collateral impeachment of judgments for want of jurisdiction (§§ 270-276), the subject of the conclusiveness of foreign judgments in personam (vol. ii. §§ 825-834), and the matter of jurisdictional inquiries in actions on judgments from a sister state (§§ 894-915) and the plea of fraud (§§ 916-921).

Throughout the work an attempt has been made to preserve an orderly and scientific arrangement, both in the main divisions of the subject and in the sequence of parts and sections within each chapter. Such a plan, it is believed, if perfectly carried out, would greatly facilitate the use of a text-book so voluminous as the present. As to the method of using the authorities, it may be observed that quotations from the opinions of the courts have been quite freely introduced,—not, it is hoped, to the extent of incumbering the pages with needless repetitions, but for the purpose of illustrating and re-inforcing the legal propositions stated by the apt and convincing remarks of learned judges. For the rest, the citations will be found to cover the English and Canadian reports, as well as those of all the American states, with occasional illustrations from the Roman law and other foreign systems. The extent of the author's researches will be apparent from the fact that more than ten thousand cases are cited in these volumes. But he feels confident that to refer to a profusion of authorities is to err (if at all) on the side most easily pardonable by the profession.

In view of the wide circulation of the various periodicals constituting the National Reporter System, it was thought that convenience in the use of the book would be greatly promoted by introducing parallel references in the case of all decisions reported concurrently in an official series and in one of the Reporters. And this has accordingly

been done. Where a case is cited from one of the Reporters alone, it is because it was omitted from the official series of reports or has not yet been reached by that series. For reasons similar to the foregoing, parallel references to the American Decisions and the American Reports have been introduced. The citations have been brought down to the time the work goes to press.

H. C. B.

Washington, D. C., January 1, 1891.

PREFACE TO THE SECOND EDITION.

DURING the twelve years which have elapsed since the first publication of this treatise, the law of Judgments, as expounded by the courts and affected by statutory enactments, has undergone a great elaboration and development, though without much change in the cardinal principles upon which its most important rules are based. In the same period the case-law of the subject has enormously increased. It therefore seemed to the author that a new edition of this work would be acceptable to the profession, and would indeed be necessary to its continuance in that career of usefulness of which he has many gratifying testimonies. Accordingly, the book has been subjected to a careful and thorough revision, many parts of it have been wholly re-written, much new matter has been added, and the later decisions, to the number of about seven thousand, have been incorporated in the notes. It is hoped that the work, as thus enlarged and brought abreast of the current of judicial decisions, will be found a reliable guide to the rules and principles on which its subject rests, and a complete repertory of the precedents, both ancient and modern.

H. C. B.

Washington, D. C., October 1, 1902.

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†

THE LAW OF JUDGMENTS.

CHAPTER I.

THE NATURE AND CLASSIFICATION OF JUDGMENTS AND DECREES.

PART I. THE NATURE OF JUDGMENTS.

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PART I. THE NATURE OF JUDGMENTS.

§ 1. Definitions of Judgments, Decrees, and Orders.

As, in logic, judgment is an affirmation of a relation between a particular predicate and a particular subject, so, in law, it is the affirmation by the law of the legal consequences attending a proved or admitted state of facts. It is not, however, a mere assertion of

the rules of law as applied to given conditions, nor of the legal relations of the persons concerned. It is always a declaration that a liability, recognized as within the jural sphere, does or does not exist. An action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action, declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other. But as no right can exist without a correlative duty, nor any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms, or else denies, that such a duty or such a liability rests upon the person against whom the aid of the law is invoked. Further, a judgment is properly neither hortatory nor imperative. It does not advise or recommend, nor, on the other hand, does it prescribe any act or course of conduct. In respect to the latter particular the case is different, of course, with a decree in equity, but we are now using the term "judgment" in its narrowest sense. In general, therefore, it neither counsels nor commands, but simply asserts. Again, although it is the affirmation of the law, it is necessarily pronounced by the mouth of a court or judge. And the decision of any arbiter, self-constituted or chosen by the litigants, is no judgment. The law speaks only by its appointed organs. It is only when the deliverance comes from a true and competent court that it is entitled to be called a judgment. Finally it must be responsive to the state of facts laid before the tribunal. It is elementary law that no court can travel outside the controversy presented to it, to touch other rights or relations not involved. Hence the judgment must be an affirmation in regard to the matters submitted to the court for decision. We may therefore define a judgment as the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist.¹

¹ "A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it." *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220. "The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury." *Bouv. Law Dict. voc. "Judg-*

This is the definition of a judgment in its narrow and technical sense; that is, as it is understood at common law, as distinguished from the modified significance of the term as used in the codes of procedure, and also as distinguished from the definitive sentences of courts of equity, admiralty, arbitration, and others.² The term which, in equity practice, corresponds to judgment at common law is "decree." But there are important differences between judgments and decrees, such as to require a distinct definition of the latter; and these we now proceed to consider.

A decree, then, is the determination, sentence, or judgment of equity, pronounced by a competent court, upon the controversy submitted for its decision. Or more specifically, it is "a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties in the suit according to equity and good conscience."³ But a decree differs from a judgment both in the process which precedes and determines it and in its contents. Aside from the differences in the courts,—in their organization, process, remedial machinery, rules and methods of investigation, principles of decision, and the scope of their competence,—it is to be noted that while a judgment at law is usually, at least in contested cases, determined by the verdict, the conclusion of law following inevitably as soon as the facts are found, a judge in equity is called upon to decide upon the whole merits of the controversy as it addresses itself to his conscience and sense of fairness, of course within the established rules of equity. Hence while a decree is, equally with a judgment, the deliverance of the law,

ment." "The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit." 2 Tidd, Prac. 930. "A judgment is the determination of the law as the result of proceedings instituted in a court of justice. A final judgment is such as at once puts an end to the action, by determining that the plaintiff is or is not entitled to recover, and the amount in debt or damages to be recovered." Thompson, J., in *Mahoning Bank's Appeal*, 32 Pa. 160.

² A judicial sentence may be designated by a different term than judgment. In the case of *Cooper v. Metzger*, 74 Ind. 544, it was held that the words "final adjustment," as used in a statute, were equivalent in meaning to "final judgment."

³ 2 Daniell, Ch. Prac. 986. "A decree in chancery is the judgment of the

it is also, to a considerable degree, the decision of the man who frames it, as the interpreter of that moral standard which equity sets up. Another important particular in which they differ is that a decree is more pliable than a judgment. The latter proceeds upon the determination of a narrow issue, of law or fact, and merely decides upon the existence of an alleged liability as between two contending persons or groups of persons. A decree may be adjusted to meet all the exigencies of the litigation, and to settle all the conflicting rights and claims, however numerous and complicated may be the interests involved. Further, a judgment has in general nothing whatever to do with the means of enforcing the liability which it declares. Certain consequences do indeed flow from it,—as the right to issue execution, the attaching of a lien upon land,—but these are no part of the judgment, nor is it concerned with directions for making its sanction effective. It is, as already stated, a bare assertion. On the other hand, a decree may, and frequently does, contain more or less minute and specific directions for effectuating its object. Also it may prescribe or forbid a specific act or course of conduct, which a judgment never does. Hence it will be perceived that the orbit of a decree in chancery, so to speak, is much wider than that of a judgment at law.

This distinction between decrees and judgments has not always been strictly preserved in American practice. In some of the states there is a sort of border-land where equitable relief is administered through common law forms, the amalgamation having occurred through the lack of separate chancery courts. Thus in Pennsylvania, where an action of ejectment may be brought to enforce the specific performance of a contract for the sale of land, the sentence pronounced is not regarded as an ordinary judgment at law, but as containing the substance of a decree in equity, since it directs the payment of money by one party and the conveyance of the land by the other.⁴

In those states which have adopted codes of reformed procedure,

chancellor upon the facts ascertained and should be signed by him and entered on the minutes of the court." Code Ga. § 4212.

⁴ *Coughanour v. Bloodgood*, 27 Pa. 285.

all distinction between law and equity, so far as relates to pleading and practice, is abolished, and of course the difference between judgments and decrees is also swept away. There being but one form of civil action, the plaintiff may ask therein for any relief which either law or equity would accord him, and the decision in his favor may award him damages, specific performance, an injunction, foreclosure of a mortgage, or any other legal remedy. Hence the final determination of any suit, whether by the proceedings formerly known as equity, or at common law, is, under these codes, a judgment.⁵ The most usual definition is "the final determination of the rights of the parties in an action or proceeding."⁶ And the term "decree" is no longer used, except colloquially. It will be observed that the definition quoted, while it enlarges the scope of the word by making it include decisions which were not formerly called judgments but decrees, also restricts it by the exclusion of those determinations which are elsewhere known as interlocutory judgments.

It is also necessary to distinguish judgments and decrees from orders. An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings. It is defined by the supreme court of California as "a decision made during the progress of the cause either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect."⁷ It will be observed that orders,

⁵ *State v. McArthur*, 5 Kan. 280; *Hughes v. Shreve*, 3 Metc. (Ky.) 547; *Kramer v. Rebman*, 9 Iowa, 114.

⁶ Code Civ. Proc. Cal. § 577; Code Civ. Proc. N. Y. § 1200; Code Kan. § 386; Code Or. § 240. Miller's Code Iowa, § 2849, declares that "every final adjudication of the rights of the parties in an action is a judgment." See *Walker v. Walker*, 93 Iowa, 643, 61 N. W. 930. In Tennessee, the word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity; but the words are declared to be interchangeable as used in the Code. *Ward v. Kenner* (Tenn.) 37 S. W. 707.

⁷ *Loring v. Illsley*, 1 Cal. 27.

under the codes, thus include the judgments formerly called interlocutory. An order is granted upon an application to the court called a motion.⁸ The term seems to be practically synonymous (except for its including interlocutory judgments) with "rule." But the latter is more commonly used in those states adhering to the common law practice, while order is generally employed in those which have adopted codes.⁹

§ 2. The Language of a Judgment.

"A judgment, though pronounced or awarded by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judge, but the settled and invariable principles of justice, and is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it; and therefore the style of the judgment is not that 'it is ordered or resolved by the court,' for then the judgment might be their own, but 'it is considered'—'consideratum est per curiam,' which implies that the judgment is none of their own, but the act of the law, pronounced and declared by the court upon determination and inquiry."¹⁰ At the same time there is no magic in this formula; nor is it a conclusive criterion whether a definitive judgment has been rendered that the entry employs or omits the usual phrase, "it is considered." A judgment may be final and subject to review on writ of error, as well when entered without as with that clause.¹¹ The usual style of a

⁸ Code Civ. Proc. Cal. § 1003; Code Civ. Proc. N. Y. § 767.

⁹ The refusal of a court to issue the writ of mandamus is neither a judgment nor a decree. *Craddock v. Croghan*, 1 Sneed (Ky.) 100. Neither is a decision made by the court upon a matter addressed to its discretionary authority; as, an application to have a cause brought forward on the docket and to vacate a certain judgment therein rendered. *Claggett v. Simes*, 25 N. H. 402. But in Georgia, it is said that an order passed by a judge of the superior court, whether in term or at chambers, granting an application presented by a trustee for leave to sell the trust property, has all the sanctity of a formal judgment of a court of general jurisdiction, and will be supported by the same presumptions. *Reinhart v. Blackshear*, 105 Ga. 799, 31 S. E. 748.

¹⁰ *Baker v. State*, 3 Ark. 491. Dickinson, J.

¹¹ *Whitaker v. Bramson*, 2 Paine, 209, Fed. Cas. No. 17,526.

decree is "it is ordered, adjudged, and decreed;" and of an order or rule, "it is ordered," etc.

§ 3. Essentials of a Judgment.

We are not at present concerned with the tests by which the validity of a judgment is to be determined, such as the question of jurisdiction, the status of the parties, the time, place, and manner of its rendition. But the object of this section is to indicate the essential characteristics which must appear on the face of the decision in order to entitle it to be called a judgment for any purpose, even as a preliminary to investigating its validity. And first, it must appear to be the sentence of a court. As already stated, the award of arbitrators or of any self-constituted tribunal is not a judgment. The decision must purport to emanate from some court of justice known to and organized under the laws of the particular sovereignty. At the same time, it is usual to recognize the determinations of certain bodies invested with minor administrative powers, and acting in a judicial capacity in reference to their exercise,¹² as equivalent to judgments of the courts. But it is only by analogy that these decisions can be called judgments. And in general, a paper purporting to be a judgment, but not stating by what court rendered, nor when, nor for what cause of action, is a nullity.¹³ Again, unless in the case of purely ex parte proceedings, it must appear to have been rendered between adverse parties, or, in a certain class of actions, between a party plaintiff and some res which stands in place of a defendant.¹⁴ The case of a proceeding against "unknown owners" is

¹² Such as road commissioners, in adjudicating upon the necessity of a road, and in locating and making assessments for the same. *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525. Or a town council, in auditing and allowing a claim for a certain and ascertained amount. *Kelly v. Wimberly*, 61 Miss. 548. See, *infra*, § 532.

¹³ *Bevington v. Buck*, 18 Ind. 414.

¹⁴ The action of a county court incorporating a town, under the statute in Missouri, is not a judgment or order, within the meaning of the act allowing appeals. *Hall v. De Armond*, 46 Mo. App. 596. But a decree adjudging against certain persons certain amounts and ordering the same paid into court to the credit of an estate, and providing for the distribution of the fund to designated persons in fixed amounts, is such a final judgment as will

no real exception to this rule, for there is always a thing or right claimed, which may be personified as the plaintiff's adversary. And the judgment must of course appear to be in favor of one party and against the other. Again, the judgment must be definitive. It must purport to be the actual and absolute sentence of the law, as distinguished from a mere finding that one of the parties is entitled to a judgment, or from a direction to the effect that a judgment may be entered. "An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and qualities of a judgment record."¹⁵ It has been held that an order of court allowing the plaintiff's attorney to enter up judgment for the plaintiff is in itself a sufficient judgment for the plaintiff for the amount sued for.¹⁶ But it may well be doubted whether this would hold good for all the purposes of a judgment. Where an interlocutory judgment is rendered by default, upon a claim for unliquidated damages, its amount may be left for ascertainment by proper proceedings. But we may say in general that if a judgment purports to be final, and is given upon a money demand, the amount of the recovery must be stated in it with certainty and precision. If the amount remains to be determined by a future contingency, or ascertained by referees, or diminished by the allowance of an unliquidated credit, or is otherwise indefinite and uncertain, it is no proper judgment.¹⁷ It remains to be stated that, in case of ambiguity, a judgment should be construed with reference to the pleadings, and when it admits of two constructions, that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the

support a writ of error, though not in favor of any person acting individually or in a representative capacity. *Haines v. Christie*, 27 Colo. 288. 60 Pac. 567.

¹⁵ *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220. A written memorandum by the judge, of certain conclusions of fact, with a formal order for more evidence on certain points, is not a judgment. *Putnam v. Crombie*, 34 Barb. (N. Y.) 232. An entry: "I find for the plaintiff and assess his damages at," stating the amount, is not a final judgment, but simply a finding under the statute regulating the practice before referees. *Demens v. Poyntz*, 25 Fla. 654, 6 South. 261.

¹⁶ *Tift v. Keaton*, 78 Ga. 235, 2 S. E. 690.

¹⁷ *Battell v. Lowery*, 46 Iowa, 49; *Dunns v. Batchelor*, 20 N. C. 46; *Early v. Moore*, 4 Munf. (Va.) 262; *Mudd v. Rogers*, 10 La. Ann. 648; *Nichols v. Stewart*, 21 Ill. 106. See *infra*, § 118.

case.¹⁸ But where a court inadvertently determines two matters standing in such opposition as to be incapable of harmonious construction, as, for instance, that the same property belongs absolutely to each of two persons, the decision is of no effect.¹⁹

§ 4. Consequences of a Judgment.

The first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement. But this, it must be repeated, is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it. A decree may direct a particular act to be done; a judgment in rem may specify the property out of which satisfaction is to be made; a judgment in replevin may require a return of the goods; in certain cases a judgment may be entered for a sum payable in a particular kind of money.²⁰ But with these exceptions, the general principle holds good that the judgment, after performing its office of declaring the existence of a certain liability, leaves the party to pursue the remedies which the law provides.

Another important consequence of a judgment is that it creates a lien upon real estate owned by the debtor, which endures for a certain period, follows the land into the hands of purchasers or other lienors, and may be enforced by seizure and sale of the property subject to it. A separate chapter will be devoted to the consideration of this subject.

A further consequence of a judgment is that it creates an estoppel upon the litigants; so that a judgment rendered upon the merits will bar any further suit upon the same cause of action, between the same parties or their privies; and a point which was once actually

¹⁸ *Peniston v. Somers*, 15 La. Ann. 679. In detinue for several slaves, a judgment in favor of the plaintiff for all of them except one, as to whom the judgment-entry is entirely silent, is a judgment in favor of the defendant for that one. *Wittick v. Traun*, 25 Ala. 317.

¹⁹ *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635.

²⁰ See, *infra*, § 152.

and necessarily litigated and decided cannot again be drawn in question, by the same parties or their privies, in any future controversy upon the same or a different cause of action. These topics also will be discussed in later chapters of this work.

Another consequence flowing from the rendition of a judgment is that it may constitute either an evidence or a source of title. This may be illustrated by the result of a real action, by the case of a purchaser at execution-sale under a judgment, by a decree quieting title to lands or enforcing specific performance of a contract for their conveyance. Also in relation to chattels, it is held that satisfaction of a judgment recovered in an action of trespass for their conversion passes property in such chattels to the defendant, and that his title thus acquired takes effect by relation from the time of the conversion.²¹

It has also been said that a judgment constitutes a vested right of property in the creditor, which cannot lawfully be diminished or destroyed by the legislature.²² Within limits this is no doubt true. But it appears that the right to receive interest on the amount of a judgment, at the rate fixed by law at the time the judgment was rendered, is not such a vested right of property as to be beyond the control of the legislature; and consequently a statute reducing the rate of interest on judgments may validly apply to those in force at the date of its enactment, and interest on such existing judgments can be recovered only at the reduced rate from the time of the passage of the statute.²³ Again, although there was no law allowing an appeal from a particular judgment, at the time of its rendition, it cannot be said that the successful party has any vested right that his judgment shall not be made subject to review by subsequent legislation.²⁴

²¹ *Smith v. Smith*, 51 N. H. 571.

²² *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

²³ *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *Wyoming Nat. Bank v. Brown*, 9 Wyo. 153, 61 Pac. 465.

²⁴ *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041.

§ 5. Judgment is not an Assignment.

Thus far, in discussing the nature of judgments, we have spoken only of their essential characteristics. It now becomes necessary to distinguish them from certain other legal transactions to which they bear a resemblance. And first, since the result of a judgment may be to deprive the debtor of his property and transfer it (or its proceeds) to the creditor, it has been thought that the judgment, especially where it was confessed, might be construed as an assignment. There is, however, no validity in this position. As has been said: "A judgment is not an assignment. One is the act of the party, the other the act of the law; in the one case the debtor surrenders the dominion to another, in the other he submits without opposition to the course prescribed by law."²⁵

§ 6. Judgment is not a Specialty.

A judgment of a domestic court of record is not a specialty, within the meaning of a statute which provides for the limitation of "actions upon the case, covenant, and debt; founded upon a specialty, or any agreement, contract, or promise in writing, within fifteen years."²⁶

§ 7. Judgments sometimes called Contracts.

The notion that a judgment is to be considered as a contract appears to have originated with Blackstone.²⁷ At any rate, the present writer has been unable to discover any authority for such a prop-

²⁵ *Breading v. Boggs*, 20 Pa. 33, Lewis, J.

²⁶ *Tyler's Ex'rs v. Winslow*, 15 Ohio St. 364.

²⁷ 3 Bl. Comm. 160. In speaking of such contracts as are implied by law, he says: "Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge."

osition in the earlier reports or text-books. But the statement of the learned commentator, to that effect, has been accepted without question or demur by many of the succeeding text-writers, and put forward as a recognized principle of law in numerous American cases.²⁸ Thus in New York it is said: "A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions on contract. The cause or consideration of the judgment is of no possible importance; it is merged in the judgment. When recovered, the judgment stands as a conclusive declaration, that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto. This assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter any claim on the judgment is setting up a cause of action on contract."²⁹ So, in a Massachusetts decision, in holding that a judgment by default against a married woman, in the absence of an enabling statute, was void, the court said: "A judgment is in the nature of a contract; it is a specialty and creates a debt; and to have that effect, it must be taken against one capable of contracting a debt."³⁰ But in this country the question has chiefly arisen in the construction of statutory provisions requiring certain formalities, or prescribing limitations, in actions "founded on contract," and in the interpretation of that clause of the federal constitution which prohibits to the states any legislation impairing the obligation of contracts. In regard to the former class of cases, it has been held that a judgment is a contract within the meaning of a statute which provides that several causes of action may be united when they arise out of contract express or implied, and hence an action upon a judgment may be joined with an action for the breach

²⁸ *Sawyer v. Vilas*, 19 Vt. 43; *Morse v. Toppan*, 3 Gray (Mass.) 411; *McGuire v. Gallagher*, 2 Sandf. (N. Y.) 402; *Humphrey v. Persons*, 23 Barb. (N. Y.) 313; *Taylor v. Root*, *43 N. Y. 344; *Johnson v. Butler*, 2 Iowa, 535; *Farmers' Bank v. Mather*, 30 Iowa, 283; *Reed v. Eldredge*, 27 Cal. 348; *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538; *Childs v. Harris Manuf'g Co.*, 68 Wis. 231, 32 N. W. 43; *Weaver v. Lapsley*, 43 Ala. 224; 1 Pars. Cont. 7.

²⁹ *Taylor v. Root*, *43 N. Y. 335, Woodruff, J.

³⁰ *Morse v. Toppan*, 3 Gray, 411, Shaw, C. J.

of an express contract.³¹ In regard to the latter class of cases, there are decisions to be found that judgments are covered by the prohibition against laws impairing the obligation of contracts.³²

§ 8. The Opposite View.

On the other hand, a carefully considered English case, subsequent in date to Blackstone, holds that a judgment is not in any sense a contract; and this view is supported by numerous and respectable American authorities.³³ Thus a learned judge has remarked: "The obligation of a debt on a judgment does not arise from any express contract made by the party charged by it. 'Judicium redditur in invitum.' Upon a refined and artificial view of the obligations imposed by law upon every individual, they may be resolved into a contract which he makes with society to obey the laws by which he is protected. And the force of legal obligation has, by some elementary writers, been attempted to be strengthened upon

³¹ *Childs v. Harris Manuf'g Co.*, 68 Wis. 231, 32 N. W. 43. For other illustrations under this head, see *Sawyer v. Vilas*, 19 Vt. 43; *McGuire v. Gallagher*, 2 Sandf. (N. Y.) 402.

³² *Scarborough v. Dugan*, 10 Cal. 305; *Weaver v. Lapsley*, 43 Ala. 224. But in the latter case the question was upon the constitutionality of a certain statute entitled "an act to declare void certain judgments and to grant new trials in certain cases therein mentioned." And the original cause of action in this litigation (the judgment in which came under the act) was a contract. So that the true ground of the invalidity of the statute was, not that it impaired the obligation of the judgment obtained on such contract, but that, by vacating the judgment, it cancelled the remedy on the original contract itself, and so impaired its obligation. See *Black, Const. Prohib. § 197*. And see *Sprott v. Reid*, 3 Iowa, 489, 56 Am. Dec. 549.

³³ *Bidleson v. Whytel*, 3 Burrows, 1548; *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *Wadsworth v. Henderson* (C. C.) 16 Fed. 447; *Todd v. Crumb*, 5 McLean, 172, Fed. Cas. No. 14,073; *Jordan v. Robinson*, 15 Me. 168; *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *McDonald v. Dickson*, 87 N. C. 404; *Napier v. Gidiere, Speers, Eq.* (S. C.) 215, 40 Am. Dec. 613; *Keith v. Estill*, 9 Port. (Ala.) 669; *Smith v. Harrison*, 33 Ala. 706; *Masterson v. Gibson*, 56 Ala. 56; *Lovins v. Humphries*, 67 Ala. 437; *Wolfe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Williams v. Waldo*, 3 Scam. (Ill.) 269; *Rae v. Hulbert*, 17 Ill. 572; *Sprott v. Reid*, 3 Iowa, 489, 56 Am. Dec. 549; *Larrabee v. Baldwin*, 35 Cal. 156; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep. 855.

this principle. (3 Bl. Comm. 160.) But contracts of this description are not barred by this part of the statute [of limitations].”⁸⁴ So again: “A cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment whenever it becomes necessary to enforce the obligation by suit. The liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed.”⁸⁵ The last sentence is especially significant.

§ 9. Where the Cause of Action is in Tort.

Whatever may be said in regard to a judgment which is rendered upon the actual contract of the parties, it must be perfectly apparent that a judgment upon a cause of action sounding in tort cannot be considered as in any sense a contract. True, the judgment merges the cause of action. But that means that the plaintiff cannot afterwards sue upon the original claim or use it otherwise. It does not mean that it is metamorphosed into something diametrically opposite to what it was before. And it is held, upon the highest authority, that a judgment in an action for a tort is not a contract within the meaning of that provision of the federal constitution which forbids the states to pass any law impairing the obligation of contracts.⁸⁶ “A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the

⁸⁴ *Jordan v. Robinson*, 15 Me. 168.

⁸⁵ *McDonald v. Dickson*, 87 N. C. 404.

⁸⁶ *Garrison v. City of New York*, 21 Wall. 196, 22 L. Ed. 612; *McAfee v. Covington*, 71 Ga. 272, 51 Am. Rep. 263; *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; *City of Sherman v. Langham*, 92 Tex. 13, 42 S. W. 961.

federal constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."²⁷

§ 10. Judgments are not Contracts.

Upon the whole question, we are unable to concede that judgments can properly be considered contracts under any circumstances whatever. So far as concerns the authority of Blackstone, it is not difficult to perceive that in dividing contracts into three classes, beginning with "contracts by record," he was misled by that same love of a neat classification which more than once led him into error. The mistake lies in grouping under the same technical term things which properly belong there and things which belong there only by a remote analogy. Further, his whole argument upon this point rests upon the assumption of an original "social contract"—a theory long since exploded. Admit that society is a natural organism, not a compact, and we look in vain for the implied promises supposed to have been made by each person on entering into the social state.

Of the American decisions sharing this view (not very numerous or very well considered), some have been content to take the statement for granted, without probing the arguments advanced in its support. Others have followed the same specious reasoning which deceived the originator of the theory. And others, begging the question, have decided that a particular judgment could not be valid because it did not answer to the requirements of a contract, as in respect to the capacity of the person to make a contract or incur a debt.²⁸ But, as we have seen, there is a preponderance of authority in favor of the proposition that judgments are not contracts.

²⁷ Field, J., in *Louisiana v. Mayor of New Orleans*, 109 U. S. 235, 3 Sup. Ct. 211, 27 L. Ed. 836. See *State v. New Orleans*, 32 La. Ann. 700, holding that claims arising from a tort,—as a city's statutory obligation to make good damages done by a mob,—are not protected by this clause of the federal constitution, though reduced to judgment.

²⁸ As in *Morse v. Toppan*, 3 Gray (Mass.) 411, a decision which is probably wrong, and which certainly furnishes an illustration of looking at a legal question upside down.

But in point of fact, the most distinctive mark of a contract is wanting, viz.: the assent of both parties.³⁹ To this there are two apparent exceptions, the case of judgments by confession and judgments by default. But in the former instance, the agreement of the debtor is that the creditor may take a particular means of securing his claim. The judgment is not the agreement; it is the act of the law, invoked by the parties, in executing the agreement. In the latter case, the defendant merely submits to what would, presumably, be done with or without his assent. Nor will the theory of an implied assent fill the gap. If we admit the assumption which lies at the base of this doctrine, it is not difficult to transform any imaginable right of action into a contract. For instance, it is the duty of every good citizen to pay his taxes; yet no one thinks that the entry on the assessor's book is a contract which he has made. If the duty of every member of society to pay the debts which are charged against him as the result of legal proceedings can be construed into his agreement to pay them, it is illogical to stop at causes of action which are strictly and properly *ex contractu*. It is just as true that he impliedly undertakes to make reparation for any delict which he may commit, as it is that he impliedly promises to pay judgments against him. But it would be rash to conclude that a tort is a contract.⁴⁰ Some of the cases speak of this implied assent as a "reluctant assent." But this is practically a contradiction in terms. The submission which is wrung from a party who has made his best defense and can no longer help himself is not the movement of will which goes to the making of a contract.

Another indispensable requisite to a contract is that the parties should be legally capable of forming a binding agreement. And yet

³⁹ "The most important elements of a contract are wanting. There is *aggregatio mentium*. The defendant has not voluntarily assented." *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

⁴⁰ "A judgment is no more a contract than is a tort. In one sense it is true that every member of society impliedly agrees to pay all judgments which may be regularly rendered against him; and in the same sense does he impliedly agree to make amends for all torts which he may commit. No one will pretend that actions for torts are within the spirit and intent of the statute [in regard to actions upon 'any contract or agreement'], and yet they certainly are as much so as are actions upon judgments." *Rae v. Hulbert*, 17 Ill. 572, Caton, J.

the immense majority of the cases hold that judgments rendered against infants, lunatics, and other persons who are in law disabled from contracting, are valid and conclusively binding until vacated or reversed.⁴¹ To push this argument one step further: "It is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered. If a judgment is a contract, and can only be rendered against one who is then capable of contracting by the laws of the forum, there could not be a judgment on a contract made in another state [nor on a judgment rendered in another state], unless by the law of the forum that contract would be valid. This would destroy the rule of comity and international law which makes the validity of a contract and the capacity of the contractor depend on the place where the contract is made or is to be performed, or the domicile of the contractor, as the case may be, and not upon the law of the forum."⁴²

§ 11. The Question considered as one of Statutory Construction.

As already stated, the chief importance of this question arises in connection with the construction of constitutional and statutory provisions. And we are now prepared to formulate the rules which reason and principle seem to point out.

In the first place, a judgment is not a contract within the meaning of the prohibition against laws impairing the obligation of contracts. The cases which hold that it is,⁴³ proceed upon a misapprehension of the constitutional principle. It is true that statutes have been declared invalid, as obnoxious to this inhibition, which vacated judgments, granted new trials, enacted shorter statutes of limitation, exempted the debtor's property, gave stay of execution, and so on. But it was not because they attacked the judgment, but because they destroyed or desiccated the remedy on the original contract, which, on the authorities, is vital to the maintenance of its obligation.⁴⁴ If

⁴¹ *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

⁴² *Wadsworth v. Henderson* (C. C.) 16 Fed. 451, Barr, J.

⁴³ See *Weaver v. Lapsley*, 43 Ala. 224; *Scarborough v. Dugan*, 10 Cal. 305. But see *Sprott v. Reid*, 3 Iowa, 489, 56 Am. Dec. 549. Compare *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925.

⁴⁴ *Black, Const. Prohib.* §§ 152, 157, 163, 197, 199.

the cause of action was in tort, the constitutional clause does not apply.⁴⁵ But it is impossible to hold that view if every judgment is a contract.

In the next place, if a statute—for example, in prescribing limitations of actions—manifestly intends, on its face, to divide all causes of action into two classes, actions on “contract” and actions on “tort,” then a judgment must be considered as falling within the former class. Strictly it belongs to neither. But if the words are used in this extended sense, then “contract” must include “quasi-contract.” And a judgment may reasonably be called a quasi-contract; for although it lacks some or all of the elements of a true contract, it is more nearly assimilated thereto than it is to a delict.⁴⁶ It is the conclusive evidence of a fixed and ascertained debt, and that is sufficient to distinguish it from a claim in tort.

Finally, if the statute relates only to “contracts express or implied,” or intends to divide possible causes of action into a larger number of classes than those mentioned above, a judgment cannot be considered as coming under the denomination of a “contract.” In such a case, it must stand in a class by itself, and if not specifically mentioned, it is not within the purview of the act.

PART II. THE CLASSIFICATION OF JUDGMENTS.

§ 12. Methods of Classifying Judgments.

Several methods of classifying judgments have been proposed, none of which, perhaps, is strictly scientific or perfectly accurate. The difficulty is that so many complications arise in pleading and practice that an entirely regular classification cannot well be made without extending the number of groups beyond convenient limits. However, as the chief thing is to obtain an orderly arrangement and enumeration of the different varieties of judgments, the scientific nature of the method pursued is not of prime importance. Abandoning the division commonly acquiesced in, as being too unwieldy,

⁴⁵ *Garrison v. City of New York*, 21 Wall. 196, 22 L. Ed. 612; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 986; *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193.

⁴⁶ *Moore v. Nowell*, 94 N. C. 265; *Johnson v. Butler*, 2 Iowa, 545.

we propose to arrange judgments under the four following heads:
1. Judgments on an issue of law. 2. Judgments upon a verdict. 3.
Judgments without a verdict. 4. Judgments against a verdict.

§ 13. Judgments on an Issue of Law.

These judgments are given upon the decision of a demurrer. They are either for the plaintiff or defendant, as the case may be, and are of the following sorts:

1. For the plaintiff, when the issue raised by a demurrer to any of the pleadings is decided in his favor. This judgment is final and definitive and concludes the right of action. Its style is "quod recuperet," that is, "that the plaintiff do recover."⁴⁷

2. For the plaintiff, when the issue raised by his demurrer to a dilatory plea or plea in abatement is found in his favor. This is called judgment of "respondeat ouster," that is, that the defendant "do answer over" or further. It is not final, since the plea did not go to the merits, but requires the defendant, beaten on a preliminary point, to present a more substantial defense.⁴⁸

3. For the defendant, when the issue raised by a demurrer is determined in his favor. This is a final judgment, and disposes of the case, unless leave be granted to amend the pleading or withdraw the demurrer, as the case may be.⁴⁹

4. For the defendant, when the plaintiff's demurrer to a plea in abatement is overruled, and the plea consequently sustained. The language of this judgment is "quod cassetur breve," or "billam," that is, that the writ or declaration be quashed.

⁴⁷ *Hale v. Lawrence*, 22 N. J. Law, 72; *Silver v. Rhodes*, 2 Har. (Del.) 369; *Pettys v. Marsh*, 24 Fla. 44, 3 South. 577. But where defendant demurred for a variance between declaration and writ, and pending the demurrer leave was granted to amend, whereupon the demurrer was overruled, held, that the judgment should be respondeat ouster, and not quod recuperet. *Walker v. Walker*, 6 How. (Miss.) 500.

⁴⁸ *Trow v. Messer*, 32 N. H. 361; *Massey v. Walker*, 8 Ala. 167; *Heyfron v. Bank*, 7 Smedes & M. (Miss.) 434; *Randolph v. Singleton*, 20 Miss. 439; *Cooke v. Crawford*, 1 Tex. 9, 46 Am. Dec. 93.

⁴⁹ *Hale v. Lawrence*, 22 N. J. Law, 72; *Scharff v. Lisso*, 63 Miss. 213; *Ross v. Sims*, 27 Miss. 359; *Memphis & Charleston R. Co. v. Orr*, 52 Miss. 541; *Comstock v. Davis*, 51 Mo. 569; *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969; *White v. Levy*, 93 Ala. 484, 9 South. 104.

§ 14. Judgments upon Verdict.

We come next to such judgments as are rendered after the determination of an issue of fact by the verdict of a jury. They may be either for the plaintiff or defendant, and are in all cases final and conclusive, if entered according to the verdict.

1. For the plaintiff, the judgment is "quod recuperet."⁵⁰

2. For the defendant, if upon the merits, the judgment is "nil capiat per breve" or "per billam," that is, that the plaintiff "take nothing" by his writ or declaration. If the plea was in abatement, the judgment is "cassetur breve," as above.

§ 15. Judgments without Verdict.

This class of judgments includes numerous varieties. Those which may be rendered for the plaintiff are as follows:

1. Judgment by default. This is a judgment entered in consequence of the non-appearance of the defendant. Where the defendant omits to plead within the time required, the judgment taken against him for that cause is more properly called "nil dicit," but the term "default" is usually extended to cover this case also. And in the code states, the judgment entered upon the defendant's failure to serve or file an answer within the prescribed period is called a judgment by default.

2. Judgment by nil dicit, which is rendered against a defendant for his failure to plead to the declaration.

3. Judgment by "non sum informatus." This is a judgment which is rendered when, instead of pleading, the defendant's attorney declares that he "is not informed" of any answer or defense to be made.

4. Judgment by confession. This is a judgment which is entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations. This is called, in full,

⁵⁰ See *Texas, S. F. & N. R. Co. v. Saxton*, 3 N. M. 282 (Johns.) 6 Pac. 206. Where issue has been joined on a plea in abatement (the only plea in the case), and the issue submitted to a jury, resulting in a verdict for the plaintiff, the court should award a peremptory judgment quod recuperet, and not a default for want of a plea. *Bishop v. Camp*, 39 Fla. 517, 22 South. 735.

a judgment by confession "relicta verificatione." A more usual form of judgment by confession is that which is entered where the debtor, without suit brought, gives a written instrument confessing that he is indebted to the creditor in a certain sum, and authorizing an attorney to appear for him and enter judgment against him in a court of record.

5. Judgment on motion; a judgment authorized by statute in certain kinds of summary proceedings, rendered ex parte and without trial. This remedy, being in derogation of the common law, must be strictly pursued, and the judgment must show on its face all facts necessary to give jurisdiction.⁵¹

6. Judgment on the pleadings. This is a form of judgment not infrequently used in the practice of the code states. It is rendered, on motion of the plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint.⁵² It cannot be entered, in a suit for unliquidated damages, over an answer stating matters in mitigation.⁵³

Of this class of judgments, those which may be rendered for the defendant are as follows:—

1. Judgment of nonsuit. This judgment, given against the plaintiff, is either voluntary or involuntary. It is the former, when the plaintiff throws up his case and consents to a judgment for defendant for costs. It is the latter, when the plaintiff, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to appear. Also, where the court decides that the plaintiff has given no evidence on which the jury could find a

⁵¹ *Garner v. Carrol*, 7 Yerg. (Tenn.) 365; *Jones v. Read*, 1 Humph. (Tenn.) 335.

⁵² *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753; *Amador Co. v. Butterfield*, 51 Cal. 526; *Shattuc v. McArthur* (C. C.) 25 Fed. 133; *Felch v. Beaudry*, 40 Cal. 439; *Finley v. City of Tucson* (Ariz.) 60 Pac. 872. But where facts showing the illegality of a contract sued on are sufficiently alleged in the answer, the plaintiff cannot recover upon the pleadings, although such facts are not pleaded or insisted on as a defense. *Prost v. More*, 40 Cal. 347. And where an issue is distinctly raised by the answer, and submitted to the jury without objection, and a verdict given for defendant, it is then too late for plaintiff to move for judgment on the pleadings. *Lewis v. Foard*, 112 N. C. 402, 17 S. E. 9.

⁵³ *Shattuc v. McArthur* (C. C.) 25 Fed. 133.

verdict in his favor, an involuntary nonsuit is entered against him.⁵⁴

2. Judgment of *nolle prosequi*. This is a judgment entered against the plaintiff where, after appearance and before judgment, he declares that "he will not further prosecute his suit." It is used as a means of abandoning one or more counts in a declaration or parts of a cause of action, or releasing one or more of the joint defendants, while holding to the rest.

3. Judgment of non prosequitur, or "non pros." A judgment given against the plaintiff for his default or neglect to take any of those steps in the proceedings which he is required to take in due time; as, a failure to file a declaration or other pleading.⁵⁵

4. Judgment of retraxit. This is a judgment given against the plaintiff when, after appearance, he voluntarily goes into court and enters upon the record a statement that "he withdraws his suit." It is an open and voluntary renunciation of his claim in court; wherein it differs from a nonsuit, which is merely his neglect or default; and by a retraxit the plaintiff's cause of action is forever barred.⁵⁶

In this class of judgments there is one which may be entered for either party, viz.: judgment by consent. It is well known in practice. The attorneys of the respective parties to a suit, it is said, have undoubtedly the right to agree upon terms and what kind of judgment shall be entered; but the judgment must be one authorized by law.⁵⁷

⁵⁴ Where plaintiff's evidence is excluded from the jury, the proper judgment is one of nonsuit. *Wilson v. Breyfogle*, 11 C. C. A. 248, 63 Fed. 379. Also where the court holds that plaintiff cannot recover on his pleadings. *Murray v. Southerland*, 125 N. C. 175, 34 S. E. 270. But a nonsuit does not warrant a judgment dismissing the complaint on the merits. *Thiry v. Taylor Brewing & M. Co.*, 37 App. Div. 391, 56 N. Y. Supp. 85; *McCune v. Eaton*, 77 Minn. 404, 80 N. W. 355.

⁵⁵ A judgment of non pros. is in effect a judgment by default for laches. *Walton v. Lefever* (Pa.) 17 Lanc. Law Rev. 203; *People v. Reuter*, 88 Ill. App. 586. A plea being bad, so that demurrer thereto is improperly overruled, plaintiff is not in default for not replying, and therefore a judgment of non pros. for want of replication is error. *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

⁵⁶ *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; 3 Bl. Comm. 296; *Cunningham v. Schley*, 68 Ga. 105; *infra*, § 700.

⁵⁷ *Tuppery v. Hertung*, 46 Mo. 135. See *Jones v. Webb*, 8 S. C. 202; *Summar v. Owen*, 62 Tenn. 26.

§ 16. Judgment against the Verdict.

Where the plea to the declaration confesses a cause of action in the plaintiff and sets up matter in avoidance, and such matter, though found true by the verdict of the jury, is insufficient in law to constitute a bar or defense to the action, the court will enter a judgment for the plaintiff non obstante veredicto, that is, notwithstanding the verdict.⁵⁸ For, "the plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action."⁵⁹ For example, a plea of tender of rent after the day of its falling due is insufficient, and after a verdict on such plea in favor of the defendant, the plaintiff is entitled to judgment non obstante veredicto.⁶⁰ But in order that this judgment may be given, it is essential that the plea should distinctly imply an admission of the plaintiff's right or title.⁶¹

There are other cases beside the foregoing in which a judgment non obstante veredicto may be rendered, or an analogous species of judgment. Thus, in some of the states, in cases where the special findings of the jury are in direct conflict with the general verdict, it is the practice to grant a judgment notwithstanding the verdict.⁶²

⁵⁸ *Pim v. Grazebrook*, 2 C. B. 429; *Atkinson v. Davies*, 11 Mees. & W. 236; *Berwick v. Duncan*, 3 Exch. 644; *Roberts v. Dame*, 11 N. H. 226; *Fitch v. Scot*, 1 Root (Conn.) 351; *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *Moye v. Petway*, 76 N. C. 327; *Ward v. Phillips*, 89 N. C. 215; *State v. Commercial Bank*, 6 Smedes & M. (Miss.) 218, 45 Am. Dec. 280; *Garrett v. Beaumont*, 24 Miss. 377; *Sullenberger v. Gest*, 14 Ohio, 204; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Berry v. Borden*, 7 Blackf. (Ind.) 384; *Pomeroy v. Burnett*, 8 Blackf. (Ind.) 142; *Jones v. Fennimore*, 1 G. Greene, 134; *Oades v. Oades*, 6 Neb. 304; *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586; *O'Neal v. Rumley Co.* (Ky.) 53 S. W. 521; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 306. See *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 908.

⁵⁹ *Bouv. Law Dict.*, "Judgment."

⁶⁰ *Dewey v. Humphrey*, 5 Pick. (Mass.) 187.

⁶¹ *Pim v. Grazebrook*, 2 C. B. 429.

⁶² *Felton v. Chicago, R. I. & P. R. Co.*, 69 Iowa, 577, 29 N. W. 618; *Louis-*

But unless the special findings "are so irreconcilably in conflict with the general verdict as that both cannot stand, the motion must be overruled without regard to the evidence."⁶³ And the motion for this judgment can be made only by the party against whom the verdict goes; hence, if the general verdict is in his favor, but the special findings do not correspond with it, a motion in that behalf will not avail him.⁶⁴

Another instance in which this form of judgment may be rendered, is where the decision on a "point reserved" negatives the verdict of the jury. If a point of law is ruled provisionally at the trial, but subject to the further consideration of the court, and if its ultimate decision shows that the party in whose favor the verdict goes is not entitled to judgment, the court may enter judgment notwithstanding the verdict. But the record must show the point of law reserved and the specific facts on which it arises.⁶⁵ In Pennsylvania, when the court has reserved the question whether there is any evidence entitling the plaintiff to recover, and the evidence has been submitted to the jury, and a verdict has been returned for the plaintiff, the court

ville, N. A. & C. Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; School District No. 46 v. Lund, 51 Kan. 731, 33 Pac. 595; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 66 Fed. 471.

⁶³ Porter v. Waltz, 108 Ind. 40, 8 N. E. 705; Cox v. Ratchiffe, 105 Ind. 374, 5 N. E. 5; Pennsylvania Co. v. Smith, 98 Ind. 42; Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; McNabb v. Clipp, 5 Ind. App. 204, 31 N. E. 858; Vance v. City of Franklin, 4 Ind. App. 515, 30 N. E. 149; Todd v. Badger, 134 Ind. 204, 33 N. E. 963; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146; Stein v. Chicago & G. T. Ry. Co., 41 Ill. App. 38.

⁶⁴ Brown v. Searle, 104 Ind. 218, 3 N. E. 871.

⁶⁵ Wilde v. Trainor, 59 Pa. 442; Fayette City Borough v. Huggins, 112 Pa. 1, 4 Atl. 927; Buckley v. Duff, 111 Pa. 223, 3 Atl. 823; Keifer v. Eldred Township, 110 Pa. 1, 20 Atl. 592. Where, after reserving a point on certain facts, the court submits other evidence to the jury, a judgment non obstante cannot be entered if it is uncertain whether the jury found on the facts on which the reservation was made or on the other evidence. Keifer v. Eldred Township, supra. On a verdict in trespass awarding the plaintiff a specified amount of damages as compensation and a specified amount of punitive damages, the court, on appeal, may enter judgment for the amount of the compensatory damages and judgment non obstante for the defendant as to the punitive damages, although no point was reserved on the record. Gedusky v. Rublinsky, 8 Pa. Dist. R. 10.

may then, on the reservation, enter judgment for the defendant non obstante veredicto.⁶⁶

At the common law, a defendant is not entitled in any circumstances to move for judgment non obstante veredicto; if the verdict is for the plaintiff, and the state of the pleadings is such that the latter might have asked for this judgment had their positions been reversed, the only proper course for the defendant is to move that the judgment be arrested,⁶⁷ or, in case of conflict between the general verdict and the special findings, to move for judgment on such findings.⁶⁸ But in a number of the states, this rule has been relaxed, either by statute or by the decisions of the courts, so as to admit of the entry of judgment notwithstanding the verdict, in proper cases, in favor of the defendant.⁶⁹ Thus, in Nebraska, the code of procedure provides that "where, on the statements in pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party." This will entitle the defendant to a judgment notwithstanding a verdict for the plaintiff, if the plaintiff's own pleadings show that he ought

⁶⁶ *Fisher v. Scharadin*, 186 Pa. 565, 40 Atl. 1091. Compare *Butts v. Armor's Estate*, 164 Pa. 73, 30 Atl. 357, 28 L. R. A. 213; *Yerkes v. Richards*, 170 Pa. 346, 32 Atl. 1089; *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. 52.

⁶⁷ *German Ins. Co. v. Frederick*, 7 C. C. A. 122, 58 Fed. 144; *Smith v. Powers*, 15 N. H. 546; *Bradley Fertilizer Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956; *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652; *Tillinghast v. McLeod*, 17 R. I. 208, 21 Atl. 345; *Burnham v. New York, P. & B. R. Co.*, 17 R. I. 544, 23 Atl. 638; *Smith v. Smith*, 4 Wend. (N. Y.) 468; *Schermerhorn v. Schermerhorn*, 5 Wend. (N. Y.) 513; *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *Christian v. Yarrowborough*, 124 N. C. 72, 32 S. E. 383; *Bowdre v. Hampton*, 6 Rich. Law (S. C.) 208; *Barnes v. Rodgers*, 54 S. C. 115, 31 S. E. 885; *Buckingham v. McCracken*, 2 Ohio St. 287; *Bradshaw v. Hedge*, 10 Iowa, 402; *Lough v. Thornton*, 17 Minn. 253 (Gil. 230); *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295; *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462; *Floyd v. Colorado Fuel & Iron Co.*, 10 Colo. App. 54, 50 Pac. 864.

⁶⁸ *Teehan v. Union Bridge Co.*, 84 Ill. App. 532.

⁶⁹ *Martindale v. Price*, 14 Ind. 115; *Carl v. Granger Coal Co.*, 69 Iowa, 519, 23 N. W. 437; *Holland v. Kindregan*, 155 Pa. 156, 25 Atl. 1077. A judgment for defendant non obstante veredicto will not be granted where the defense is a general denial. *Virgin Cotton Mills v. Abernathy*, 115 N. C. 402, 20 S. E. 522. Nor where the pleadings and evidence raise questions of fact proper for the jury. *Slivitzki v. Town of Wien*, 93 Wis. 460, 67 N. W. 730. See *Templeman v. Gibbs* (Tex. Civ. App.) 25 S. W. 736.

not to recover; but not merely on the ground that the verdict is contrary to the weight of the evidence.⁷⁰ In Minnesota, the law allows an entry of judgment for the defendant, notwithstanding a verdict for the plaintiff, in cases where the facts stated in the plaintiff's pleadings are not sufficient, in point of substance, to constitute a legal cause of action; but not on the ground of such a failure of evidence, in weight or detail, as would warrant the court in ordering a new trial.⁷¹ A similar rule obtains in Oregon.⁷² In Pennsylvania, where the plaintiff's evidence is so weak as to amount but to a scintilla, judgment may be rendered for the defendant non obstante veredicto.⁷³ In Kentucky, in an action for damages caused by defendant's negligence, where a plea of contributory negligence is not controverted, defendant is entitled to judgment notwithstanding a verdict for the plaintiff.⁷⁴

A motion for judgment non obstante veredicto is founded on the record alone, and its determination cannot be influenced by affidavits or extrinsic evidence.⁷⁵ In some states, it is held that a party will not be entitled to have a judgment of this kind entered in his favor, unless he has moved to direct a verdict at the close of the testimony; and moreover, after judgment, he must specifically move for judgment non obstante veredicto, a mere motion for a new trial

⁷⁰ Code Civ. Proc. Neb. § 440; *Manning v. City of Orleans*, 42 Neb. 712, 60 N. W. 953; *Gibbon v. American Bldg. & Loan Ass'n*, 43 Neb. 132, 61 N. W. 126; *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461, 74 N. W. 865.

⁷¹ *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266, 77 N. W. 958; *Kreutz v. St. Cloud School Dist.*, 79 Minn. 14, 81 N. W. 533; *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617; *Bragg v. Chicago, M. & St. P. R. Co.*, 81 Minn. 130, 83 N. W. 511. Compare *Baxter v. Covenant Mut. Life Ass'n*, 81 Minn. 1, 83 N. W. 459.

⁷² *Benicia Agricultural Works v. Creighton*, 21 Or. 495, 28 Pac. 775.

⁷³ *Holland v. Kindregan*, 156 Pa. 156, 25 Atl. 1077.

⁷⁴ *Louisville & N. R. Co. v. Mayfield (Ky.)* 35 S. W. 924.

⁷⁵ *Snow v. Conant*, 8 Vt. 309; *Smith v. Smith*, 2 Wend. (N. Y.) 624; *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033; *Lichtstein v. Northwestern Nat. Ins. Co.*, 23 Pa. Co. Ct. R. 471. In Ohio, the statute confines the court to a consideration of the statements in the pleadings, and the record, outside of such statements, should not be considered in disposing of the motion. *McCoy v. Jones*, 61 Ohio St. 119, 55 N. E. 219; *Beetz v. Strobel*, 6 Ohio Dec. 143.

not being sufficient to authorize the judgment.⁷⁶ The motion, in the absence of an agreement by the parties that it may be filed and considered in vacation, cannot be considered by the court when so filed.⁷⁷ And where one judge presided at the trial of an action, another judge has no authority, on motion for judgment notwithstanding the verdict, to make findings of fact on evidence not heard by him.⁷⁸

There is one other form of judgment, entered in disregard of a verdict, which must be mentioned in this connection. It is the judgment "quod partes replacent" (that the parties replead), or judgment of repleader. This is entered in a case where issue has been taken upon a point so immaterial that, notwithstanding the verdict, the court is unable to decide which party should recover upon the merits. It requires the parties to frame their pleadings anew, from the fault which first occasioned the immaterial issue, taking issue upon a substantial ground. A repleader differs from a judgment non obstante veredicto in this, that the latter is granted in a case where the plea is good in form though the matter pleaded is not available as a defense, while the former is only proper where the pleadings do not bring the merits within the issue. Hence the latter kind of judgment is always upon the merits, and never granted but in a very clear case; a repleader is upon the form and manner of pleading.⁷⁹

§ 17. Names of Judgments in certain Special Actions.

Before completing our enumeration of the different kinds of judgments, it is necessary to mention the special names given to the judgments in certain actions. In the action for partition, the interlocutory judgment whereby it is directed that partition be made, is called judgment "quod partitio fiat;" while the style of the final judgment in the same action, confirming the partition made, upon the return of the writ, is "quod partitio facta firma et stabilis in perpetuum."⁸⁰

⁷⁶ *Netzer v. City of Crookston*, 66 Minn. 355, 68 N. W. 1099; *Hemstad v. Hall*, 64 Minn. 136, 66 N. W. 366; *Crane v. Knauf*, 65 Minn. 447, 68 N. W. 79.

⁷⁷ *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670.

⁷⁸ *Aultman & Taylor Co. v. O'Dowd*, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

⁷⁹ 2 Tidd, Prac. 922.

⁸⁰ 5 Bac. Abr. 202, cited Freem. Judgm. § 8.

The interlocutory judgment in an action of account, whereby it is directed that "the defendant do account," is called judgment "quod computet."

§ 18. Cross-Classifications of Judgments.

There are certain methods of classifying judgments and decrees, without regard to the mode of trial, stage of entry, or rendition of a verdict, and hence running across the division above adopted, which are important to be named. And first, they are either final or interlocutory. A final judgment or decree is one which puts an end to the whole action, leaving nothing further to be done or determined by the court. It is interlocutory, if it merely settles some preliminary or subordinate point, without reaching the merits, or if, though directed to the main controversy, it does not dispose of the whole case, but leaves something for the further action or consideration of the court before the rights of the parties are definitely fixed. This distinction will form the subject of the next chapter.

Judgments and decrees are also either domestic or foreign. A judgment is called domestic when it was rendered by a court organized by the same state or sovereignty within whose territory it is sought to be enforced or is invoked as a defense. It is called foreign when rendered by another or independent state or sovereignty.

In Louisiana, a judgment rendered by default is distinguished from a "contradictory judgment;" the latter being one which is given after the parties have been heard either in support of their claims or in their defense.

Judgments and orders may further be classed as absolute or nisi. At common law a judgment nisi was one entered on the return of the nisi prius record with the postea indorsed, which would become absolute according to the terms of the postea, unless the court out of which the nisi prius record proceeded should, within the first four days, otherwise order.⁸¹ It is otherwise defined as "one that is to be valid unless something else should be done within a given time to defeat it."⁸² A rule or order nisi is one which is to be confirmed or

⁸¹ Bouv. Law Dict. sub voce.

⁸² United States v. Winstead (D. C.) 12 Fed. 50. See Strickland v. Cox, 102 N. C. 411, 9 S. E. 414.

made absolute, unless cause be shown to the contrary, or something be done which has been required, within a specified time.

Adjudications are also classed as either in rem or in personam. This distinction is one of difficulty and importance, and the former kind of judgments will form the subject of a later chapter, to which the reader is referred for the definitions.

§ 19. Classification of Decrees.

In addition to the divisions indicated in the preceding section, decrees in equity are classed as "by default," "by consent," "on the hearing," and "pro confesso." The last named—a decree that the bill be taken as confessed—is entered where the defendant, by not appearing within the time prescribed, is understood to admit the case made by the bill. It is intended to prepare the case for final decree; and its effect is like that of a default at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration.⁸² A decree nisi is one entered upon the defendant's failure to appear when the case is called for hearing, granting the relief asked, but coupled with a condition that the defendant is to have a certain time within which to show cause against the decree.

⁸² *Russell v. Lathrop*, 122 Mass. 302.

CHAPTER II.**FINAL AND INTERLOCUTORY JUDGMENTS AND DECREES.**

- § 20. Reasons for the Distinction.
- 21. Definition of Final Judgments.
- 22. Interlocutory and Intermediate Orders.
- 23. Must be final as to all Parties.
- 24. Must settle all the Issues.
- 25. Uncertainty of the Amount.
- 26. Judgment of Nonsuit.
- 27. Dismissal of Suit.
- 28. Judgment by Default.
- 29. Judgment on Demurrer.
- 30. Judgment on Plea in Abatement.
- 31. Judgment for Costs.
- 31a. Allowance of Claims Against Fund.
- 32. Granting or Refusing Extraordinary Remedies.
- 33. On Motion for New Trial.
- 34. Vacating or Reversing former Judgment.
- 35. Orders as to Interpleader, Intervention, and Joinder of Parties.
- 36. Dissolving Attachments and Executions.
- 37. Order removing Cause.
- 38. Judgments and Orders of Probate Courts.
- 39. Judgment in Partition.
- 40. In Condemnation Proceedings.
- 41. Finality of Decrees.
- 42. Further Action necessary to settle the Equities.
- 43. Further Action necessary to execute the Decree.
- 44. Decree ordering a Reference.
- 45. Directing an Account.
- 46. Decree suspending Rights until further Orders.
- 47. Decree dissolving Partnership.
- 48. Foreclosure of Mortgage.
- 49. Sending Issue out of Chancery.

§ 20. Reasons for the Distinction.

The distinction between final judgments and decrees and such as are merely interlocutory, is one of considerable importance, both as a matter of practice and in respect to the consequences which follow the entry of a final adjudication. As a general rule, it is only a final judgment which has the effect of creating a lien upon the debtor's realty. So also, with certain minor exceptions, it is only a final judg-

ment or decree upon the merits which will sustain the plea of *res judicata*. At common law, a writ of error could not be brought until the last, or final, decision in the cause. In many of the states, it is provided by statute that appeals may be taken to their courts of last resort only from the final judgments of the trial courts or the final decrees of the courts of chancery.¹ By the federal judiciary act ² it is enacted that error may be brought to the final judgments at law or decrees in equity of the highest courts in the several states for the purpose of their re-examination by the supreme court of the United States in certain prescribed cases. Thus, for these various reasons, it is often necessary to distinguish final decisions from the interlocutory class of adjudications. The cases in which such a distinction is drawn are numerous, illustrating the wide range of instances in which the question may arise, and not always harmonious; for the practice, or the statute-law, in some jurisdictions, ascribes the character of finality to judgments or orders which elsewhere are considered as merely interlocutory.

§ 21. Definition of Final Judgments.

A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.³ It is sometimes said that it is the award of the judicial consequences which the law attaches to the facts, and which determines the subject-matter of the controversy between the parties.⁴ It is evident, however, that this description is too narrow. For a final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely of their rights with reference to the particular suit.⁵ In other words, it is not at all necessary that

¹ *Tunno v. International R. & S. Co.*, 34 Fla. 300, 16 South. 180; *Van Zandt v. Gormley*, 66 Ill. App. 588; *City of Bath v. Palmer*, 90 Me. 467, 38 Atl. 365.

² Rev. St. U. S. § 709.

³ 3Bl. Comm. 398.

⁴ *West v. Bagby*, 12 Tex. 34, 62 Am. Dec. 512, following *Hanks v. Thompson*, 5 Tex. 6. And see *Hobbs v. Staples*, 19 Me. 219.

⁵ *Belt v. Davis*, 1 Cal. 134; *Weston v. City of Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Klink v. The Cusseta*, 30 Ga. 504; *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768; *State v. Superior Court of Jefferson County*,

the judgment should be upon the merits, if it definitely puts the case out of court.⁶ A judgment of nonsuit or dismissal is final, though it does not reach the merits. It is the termination of the individual action which marks the finality of the judgment. But there must be an actual judgment. An order for judgment is not a final judgment; it is final only when it contains the decision or sentence of the law upon the matter contained in the record; the order must be followed by the sentence of the law declaring that the party may recover the sum adjudged.⁷ On the other hand, a judgment is as final when pronounced by the court as when entered and recorded by the clerk.⁸ Where a motion for new trial has been made and entertained by the court, the judgment in the case does not become final and effectual, for purposes of review, until the date of the overruling of such motion.⁹

A judgment which is not final is called "interlocutory." That is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court.

3 Wash. St. 696, 29 Pac. 202. A judgment in a contest to determine whether a homestead is subject to sale on execution is a final judgment from which an appeal will lie. *Wright v. Jones*, 103 Ala. 539, 15 South. 852. To constitute a final judgment for purpose of appeal, it is not essential that it should be a bar to another suit. *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 36 C. C. A. 263, 94 Fed. 312.

⁶ Where a verdict is returned in favor of plaintiff, and the court sustains a motion in arrest of judgment, and subsequently orders the cause stricken from the docket, the case has reached such an end that an appeal will lie. *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78, 53 N. E. 844. When a controversy between two parties is ended, so far as the court before which it is pending can end it, the judgment is then final, regardless of mere matter of form. *Heegaard v. Dakota Loan & Trust Co.*, 3 S. D. 569, 54 N. W. 656.

⁷ *Macnevin v. Macnevin*, 63 Cal. 186; *Eastham v. Sallis*, 60 Tex. 576; *Durant v. Comegys*, 2 Idaho, 809, 26 Pac. 755, 35 Am. St. Rep. 287.

⁸ *Kehoe v. Blethen*, 10 Nev. 445.

⁹ *Brown v. Evans* (C. C.) 18 Fed. 56; *Danielson v. Northwestern Fuel Co.* (C. C.) 55 Fed. 49; *New York, C. & St. L. R. Co. v. Doane*, 103 Ind. 92, 4 N. E. 419; *Stoll v. Dally Min. Co.*, 19 Utah. 271, 57 Pac. 295. So where judgment rendered against a party not personally served is liable, by statute, to be vacated within three years, it does not become final until after that time. *Martin v. Gilmore*, 72 Ill. 193.

Thus a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, though it may finally dispose of that particular matter.¹⁰

Under the common law system, an order, made in the progress of a suit and before judgment, will be considered final if it determines the action and prevents a judgment.¹¹ But an order which does not settle and conclude the rights involved in the action, and does not deny to the party the means of further prosecuting or defending the suit, is not so far final as to be a proper subject of appeal.¹²

§ 22. Interlocutory and Intermediate Orders.

The codes of procedure adopted in several of the states define a judgment as "the final determination of the rights of the parties in an action or proceeding." Under this system, therefore, there is no such thing as an interlocutory judgment in a cause, the only judgment authorized being one which finally disposes of the rights of the parties.¹³ And the office of an interlocutory judgment at common law is, under the code practice, filled by various orders. But as,

¹⁰ But it has been held that a decree allowing temporary alimony and counsel fees is, to all legal intents and purposes, a final judgment, from which an appeal may be taken. *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657. Conditional judgments may be final if they dispose of the case as to all parties before the court and as to the entire subject-matter of the litigation. Thus, a judgment for the sale of a certain tract of land to satisfy a sum adjudged to be a lien thereon, in the event that another tract ordered to be sold shall not be sufficient for that purpose, is a final order from which an appeal can be prosecuted. *Tabor v. Payne* (Ky.) 41 S. W. 557. Compare *Standard Steam Laundry v. Dole*, 20 Utah, 469, 58 Pac. 1109.

¹¹ *Hobbs v. Beckwith*, 6 Ohio St. 252; *Maysville & L. R. Co. v. Punnett*, 15 B. M. (Ky.) 47. An unconditional order for the payment of money within a certain time is a final order, from which an appeal lies. *Nevitt v. Woodburn*, 45 Ill. App. 417. In England, it is said that an order is final only where it is made upon an application or proceeding which must in any event, whether it succeeds or fails, finally determine the rights of the parties. *Salaman v. Warner* [1891] 1 Q. B. 734.

¹² *Hazlehurst v. Morris*, 28 Md. 67. An order refusing an application for judgment on the special findings of the jury, contrary to the general verdict, is not final or appealable. *Persons v. Simons*, 1 N. D. 243, 46 N. W. 969; *Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785, 48 Pac. 31.

¹³ *Sellers v. Union Lumbering Co.*, 36 Wis. 398. Under this definition, an order that a petition be treated as if it had not been filed is appealable. Har-

among the various orders which may be made in the progress of a cause, there may be some which, without finally adjudicating "the rights" of the parties, may determine some claim or contention which, from its independence and meritorious nature, ought to be the subject of an appeal, therefore in these states the statutes usually allow appeals from "an order affecting a substantial right" of one of the parties.¹⁴ The qualifying adjective is used to exclude rulings on merely formal or technical points. The code practice is, generally speaking, more liberal in allowing appeals than the common law. Thus in California, "an appeal may be taken * * * from an order granting or refusing a new trial, from an order granting or dissolving an injunction, from an order refusing to grant or dissolve an injunction, from an order dissolving or refusing to dissolve an attachment, from an order granting or refusing to grant a change of the place of trial."¹⁵

An order setting aside a sale of property made in disregard of an injunction issued in the same suit is a final order and appealable.¹⁶ So also is an order in an equity cause committing a witness, not a party to the suit, for contempt in refusing to testify;¹⁷ and an order confirming a sale;¹⁸ and an order vacating an arrest;¹⁹ and an order directing a sheriff who has possession of warrants, by virtue of

rison v. Lebanon Waterworks, 91 Ky. 255, 15 S. W. 522, 34 Am. St. Rep. 180. In South Carolina, the statute gives the supreme court appellate jurisdiction of "any intermediate judgment, order, or decree involving the merits." Code Civ. Proc. S. C. § 11. See *Du Pont v. Du Bos*, 33 S. C. 389, 11 S. E. 1073. An order void as an act in excess of the court's jurisdiction is final in its legal significance, so as to be appealable. *Therkelsen v. Therkelsen*, 35 Or. 75, 54 Pac. 885. In Pennsylvania, the act allowing appeals from interlocutory orders was intended to reach only clear cases of error in law, and thus prevent the delay of a trial. *Max Meadows Land & Imp. Co. v. Mendenhall*, 4 Pa. Super. Ct. 398.

¹⁴ For illustrations of orders affecting substantial rights, see *Gilbert v. Thayer*, 104 N. Y. 200, 10 N. E. 148; *State Bank of Nebraska v. Green*, 8 Neb. 297, 1 N. W. 210; *Starbuck v. Dunklee*, 10 Minn. 168 (Gil. 136), 88 Am. Dec. 68; *Kingsley v. Gilman*, 12 Minn. 515 (Gil. 425); *Vermilye v. Vermilye*, 32 Minn. 499, 18 N. W. 832.

¹⁵ Code Civ. Proc. Cal. § 939.

¹⁶ *Grant v. Lowe*, 32 C. C. A. 379, 89 Fed. 881.

¹⁷ *Butler v. Fayerweather*, 33 C. C. A. 625, 91 Fed. 458.

¹⁸ *Edwards v. Maupin*, 7 Mackey (D. C.) 39.

¹⁹ *Raisin Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597.

certain replevin proceedings, to deliver them to a certain person, made in another suit to which the sheriff is not a party.²⁰ An appeal will also lie from a judgment sustaining exceptions to a referee's report, and an order thereafter overruling a motion for a new trial;²¹ and from an order directing the receiver of an insolvent corporation to sue the stockholders.²² An order of the trial court, refusing to proceed with the trial of a case, is an interlocutory judgment.²³ And an order overruling a motion to correct the date of a judgment is a final order and appealable.²⁴

But an order quashing the service of process in a case is not considered final in such sense as to be appealable.²⁵ Nor can an appeal be taken from an order granting or refusing leave to amend the pleadings;²⁶ nor from a judgment allowing a garnishee to file an answer after default;²⁷ nor from an order granting a change of venue;²⁸ nor from a refusal to grant a continuance.²⁹ An order denying a motion to set aside an order contained in the judgment, that execution issue as well against the defendant's person as against his property, is not final nor appealable.³⁰ And the same is true of

²⁰ *Elwell v. Goodnow*, 71 Minn. 390, 73 N. W. 1095.

²¹ *Hart v. Hiatt*, 2 Ind. T. 245, 48 S. W. 1038.

²² *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328.

²³ *Kleiber v. McManus*, 66 Tex. 48, 17 S. W. 249.

²⁴ *Warrington v. Upham Manuf'g Co.*, 18 Ohio Cir. Ct. R. 311.

²⁵ *Winn v. Carter Dry-Goods Co.*, 102 Ky. 370, 43 S. W. 436; *Brown v. Rice*, 30 Neb. 236, 46 N. W. 489; *Persinger v. Tinkle*, 34 Neb. 5, 51 N. W. 299; *Standard Distilling Co. v. Freyhan*, 34 Neb. 434, 51 N. W. 976. But in Kansas, such an order is final and appealable. *Newberry v. Arkansas, K. & C. Ry. Co.*, 52 Kan. 613, 35 Pac. 210.

²⁶ *Sinclair v. Western N. C. R. Co.*, 111 N. C. 507, 16 S. E. 336; *State v. Caraleigh Phosphate & Fertilizer Works*, 123 N. C. 162, 31 S. E. 373; *Parker v. Harden*, 122 N. C. 111, 28 S. E. 902; *Gunn v. Donoghue*, 135 Ill. 479, 25 N. E. 750; *Lamon v. McKee*, 7 Mackey (D. C.) 446; *Troup v. Horbach*, 57 Neb. 644, 78 N. W. 286; *McElwain v. Huston*, 1 Wash. St. 359, 25 Pac. 465. But in Iowa, an order striking out a cross bill is appealable. *Mahaska County State Bank v. Christ*, 82 Iowa, 56, 47 N. W. 886.

²⁷ *Moore v. Hill*, 87 Ga. 91, 13 S. E. 259.

²⁸ *Edgerly v. Stewart*, 86 Iowa, 87, 52 N. W. 1121; *State v. Shaw*, 21 Nev. 222, 29 Pac. 321. Compare Code Civ. Proc. Cal. § 939.

²⁹ *Newman v. Wildenstein*, 42 La. Ann. 925, 8 South. 607.

³⁰ *Jennings v. Bartels*, 2 Wash. T. 306, 24 Pac. 678.

an order appointing an assignee in insolvency in place of the one named by the assignor in his deed.³¹ Nor will an appeal lie from an interlocutory judgment reassigning a homestead and appointing commissioners to admeasure the same;³² nor from an order in insolvency proceedings, provisionally passing upon the amount a creditor is entitled to pay on a purchase of the insolvent's assets.³³

§ 23. Must be final as to all Parties.

As a general rule, a judgment must possess the character of finality in disposing of the rights of all the parties concerned, before it can be considered final with respect to any of them.³⁴ Thus when suit is instituted against two or more defendants, and judgment is entered for or against all of them except one, who is not mentioned or referred to in the decision, there is no final judgment from which an appeal can be taken, no order appearing for the disposal of the cause as to the defendant omitted from the judgment.³⁵ For the same reason, a decree dismissing a bill in equity as to one of several de-

³¹ *State v. Parker*, 6 Wash. 411, 34 Pac. 149.

³² *Macke v. Byrd*, 109 Mo. 487, 19 S. W. 70.

³³ *Brown v. Minnesota Thresher Manuf'g Co.*, 44 Minn. 322, 46 N. W. 560.

³⁴ *Baker v. Old Nat. Bank*, 33 C. C. A. 570, 91 Fed. 449; *Deadwyler v. Bank of the University*, 110 Ga. 511, 35 S. E. 779; *Martin v. Crow*, 28 Tex. 614; *Whitaker v. Gee*, 61 Tex. 217; *Gulf City Street Ry. & Real-Estate Co. v. Becker* (Tex. Civ. App.) 23 S. W. 1015; *Reed v. Liston*, 8 Tex. Civ. App. 113, 27 S. W. 913; *Caldwell v. Bryan* (Tex. Civ. App.) 37 S. W. 335; *Burrows v. Cox* (Tex. Civ. App.) 38 S. W. 50; *Delap v. Hunter*, 1 Sneed (Tenn.) 101; *Champ v. Kendrick*, 130 Ind. 545, 30 N. E. 635; *Keller v. Jordan*, 147 Ind. 113, 46 N. E. 343; *Sater v. Hunt*, 1 Mo. App. Rep'r, 365, 61 Mo. App. 228; *Harman v. Blackstone*, 1 Mo. App. Rep'r, 391, 61 Mo. App. 254; *Peck v. Vandenberg*, 30 Cal. 11. But in Georgia, by statute, an order is final and appealable if it is "final as to some material party" to the action; and this allows an appeal by such a party when his rights are finally adjudged, though the action remains pending as to others. *United Underwriters' Ins. Co. v. Powell*, 94 Ga. 359, 21 S. E. 565; *Deadwyler v. Bank of the University*, 110 Ga. 511, 35 S. E. 779. And see *Connell v. Brumback*, 18 Ohio Cir. Ct. R. 502.

³⁵ *Whitaker v. Gee*, 61 Tex. 217; *Masterson v. Williams* (Tex.) 11 S. W. 531; *City of Texarkana v. Rodgers* (Tex. Civ. App.) 26 S. W. 447; *Maley v. Lake Erie & W. R. Co.*, 84 Ill. App. 55; *Case v. Ingle*, 2 Ind. T. 309, 51 S. W. 958; *Schultz v. McLean*, 76 Cal. 608, 18 Pac. 775. In Connecticut, the practice act, by authorizing one action against defendants with adverse interests, and authorizing the court in such cases to order separate trials, permits of the entry of a final and appealable judgment as to one defendant, although

defendants sought to be jointly charged is not a final decree from which an appeal may be taken.³⁶ But these rules do not apply where there are parties who are merely formal parties to the record, or as to whom there are separable controversies. For example, an order dismissing an interpleader,³⁷ or discharging a garnishee,³⁸ may be final and appealable. So, the right of appeal is not affected by the fact that there is no decree against one of the respondents, who was not served with process, and who, though a proper, was not a necessary, party to the suit.³⁹ And a judgment in an action by an infant for personal injuries may be final, though it does not in express terms dispose of his next friend.⁴⁰ The same is true of a judgment against one of the members of a firm separately sued on the firm indorsement of a note.⁴¹ And where several actions to enforce mechanics' liens against the same defendant are consolidated, a judgment against one of the plaintiffs is final as to him and may be appealed.⁴²

§ 24. Must settle all the Issues.

It is also requisite that a judgment, in order to be final, should determine all the issues involved in the cause. The decision on an issue of law which does not put the case out of court is not of this character. So if there are several issues of fact in the same controversy, the decision of one of them, leaving the others undetermined,

the action remains pending as to the other parties. *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24, 33 Atl. 533.

³⁶ *Hohorst v. Hamburg-American Packet Co.*, 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443; *National Bank of Rondout v. Smith*, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441; *Dreyer v. Goldy*, 171 Ill. 434, 49 N. E. 560; *Lang v. Ingalls Zinc Co.*, 89 Tenn. 476, 42 S. W. 198. In Illinois, it appears that an appeal may be allowed in such a case if it is shown that "peculiar hardship" would result from refusing to allow it. See *Pain v. Kinney*, 73 Ill. App. 115, affirmed, 175 Ill. 264, 51 N. E. 621. And see *Royall's Adm'rs v. Johnson*, 1 Rand. (Va.) 421; *Nichol v. Dunn*, 25 Ark. 129.

³⁷ *Standley v. Roberts*, 8 C. C. A. 305, 59 Fed. 836.

³⁸ *Steiner v. First Nat. Bank*, 115 Ala. 379, 22 South. 30.

³⁹ *Bradshaw v. Miners' Bank*, 26 C. C. A. 673, 81 Fed. 902. See *Harris v. Sanders* (Tex. Civ. App.) 45 S. W. 29; *Davis & Rankin Bldg. & Manuf'g Co. v. Hillsboro Creamery Co.*, 9 Ind. App. 553, 37 N. E. 294.

⁴⁰ *Texas Cent. Ry. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962.

⁴¹ *Jameson v. Smith*, 19 Tex. Civ. App. 90, 46 S. W. 864.

⁴² *Orman v. Crystal River Ry. Co.*, 5 Colo. App. 493, 39 Pac. 434.

is not a final adjudication. For there cannot be two final judgments in the same action.⁴³ But this rule does not apply where several distinct causes of action are united in the same suit,⁴⁴ or where subordinate or ancillary matters arise in the course of the action, each capable of final determination by itself and independently of the main controversy.⁴⁵

§ 25. Uncertainty of the Amount.

An uncertainty as to the amount of the recovery will often prevent a judgment from becoming final until such amount is liquidated and declared.⁴⁶ The test in these cases seems to be, whether the judicial action of the court is necessary to be directed to the question before the amount of the judgment can be settled, or whether, though at present uncertain, it can be determined or computed without the intervention of the court. Thus a judgment by default is interlocutory if the damages remain to be ascertained by writ of inquiry or other judicial proceeding. So a decree which settles the rights of the

⁴³ *Brown v. Cranberry Iron & Coal Co.*, 25 U. S. App. 107, 13 C. C. A. 66, 65 Fed. 636; *Frank v. Tatum* (Tex. Civ. App.) 20 S. W. 869; *Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633; *McKissack v. Voorhees*, 119 Ala. 101, 24 South. 523; *Potter v. Talkington* (Idaho) 49 Pac. 14; *Low v. Crown Point Min. Co.*, 2 Nev. 75. Compare *Hake v. Coach*, 105 Mich. 425, 63 N. W. 306. A judgment for plaintiff is not final unless it disposes of matters pleaded by way of cross-bill or counterclaim. *Gulf, C. & S. F. R. Co. v. Stephenson* (Tex. Civ. App.) 26 S. W. 236; *Clopton v. Herring* (Tex. Civ. App.) 26 S. W. 1104.

⁴⁴ *Klever v. Seawall*, 12 C. C. A. 653, 65 Fed. 373. In an action for the recovery of real estate, of personalty, and of moneys received, a judgment for the recovery of a certain sum is final and appealable, though no disposition of the real estate is made therein. *Davies v. Thomson*, 92 Tex. 391, 49 S. W. 215.

⁴⁵ A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final and appealable decree, although the residue of the fund may not have been finally disposed of. *Tuttle v. Claffin*, 31 C. C. A. 419, 88 Fed. 122. A judgment, in an action to establish plaintiff's right under a will, fixing an allowance for his support during the pendency of the suit, and ordering execution therefor, is final; and an appeal may be prosecuted during the pendency of the suit. *McCreary v. Robinson*, 92 Tex. 408, 49 S. W. 212.

⁴⁶ *Millard v. Parsell*, 57 Neb. 178, 77 N. W. 390; *Riott v. Blackstone*, 10 Pa. Super. Ct. 591.

parties, but does not find the amount to be paid, leaving that for future determination, is not final.⁴⁷ The same is true of a decree which, after finding the equities to be in one of the parties, sends the case to a referee or master to ascertain and report the sum which he is entitled to recover.⁴⁸ For the report must be examined and confirmed by the court, before there is a final judgment for such sum. On the other hand, where a judgment is entered against one of the parties, to be released on payment of such sum as a third person shall say is due, it is a final judgment; because, to make it absolute so far as regards the amount, no further action of the court is necessary, but only the certificate of the referee.⁴⁹ So a decree in chancery which adjudges a certain sum of money to be due from the defendant, and awards execution to collect it, is a final decree, notwithstanding it also allows as payment to be deducted from the amount therein adjudged any note held by the defendant against the complainant.⁵⁰ Also, a decree is final, although an order is added to it suspending the decree as to one item of the account, until the decision of another suit, in which that item is in litigation.⁵¹

§ 26. Judgment of Nonsuit.

This species of judgment is clearly final, since it completely disposes of the action, though without passing upon the merits. "By a final judgment is to be understood not a final determination of the rights of the parties, but merely of the particular suit. Thus, for instance, a judgment of nonsuit, other than where the plaintiff submits to a voluntary nonsuit, is a final judgment, even though no costs be awarded against the plaintiff, inasmuch as he is aggrieved by being defeated of his right of action in that suit and of his costs in prosecut-

⁴⁷ *Follansbee v. Ballard Pav. Co.*, 154 U. S. 651, 14 Sup. Ct. 1180, 25 L. Ed. 802; *Hunter v. Hunter*, 100 Ill. 519.

⁴⁸ *Belmont v. Ponvert*, 3 Rob. (N. Y.) 693; *Price v. Nesbit*, 1 Hill, Eq. (S. C.) 445; *Tuggle v. Gilbert*, 1 Duv. (Ky.) 340; *Deickhart v. Rutgers*, 45 Mo. 132. But see *Ayer v. Termatt*, 8 Minn. 96 (Gil. 71).

⁴⁹ *Turner v. Plowden*, 5 Gill & J. (Md.) 52, 23 Am. Dec. 596; *Young v. Mackall*, 3 Md. Ch. Dec. 398.

⁵⁰ *Stovall v. Banks*, 10 Wall. 583, 19 L. Ed. 1036.

⁵¹ *Fleming v. Bolling*, 8 Grat. (Va.) 292.

ing it."⁵² For similar reasons a judgment of non pros. is appealable, being final as to the plaintiff.⁵³ But no appeal is ordinarily allowed from the plaintiff's voluntary entry of a nonsuit,⁵⁴ nor, unless the statute specially grants it, from an order setting aside a nonsuit.⁵⁵

§ 27. Dismissal of Suit.

The dismissal of a bill in chancery or of a suit at law, since it fully disposes of that action, is a final judgment; it is a final decision of the case as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action.⁵⁶ Thus a judgment dismissing a

⁵² *Belt v. Davis*, 1 Cal. 134; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835; *Koons v. Bryson*, 16 C. C. A. 227, 69 Fed. 297; *Vicksburg, S. & P. R. Co. v. Scott*, 47 La. Ann. 706, 17 South. 249; *Holter Lumber Co. v. Fireman's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. 207; *De Graf v. Seattle & T. Nav. Co.*, 10 Wash. 468, 38 Pac. 1006. But in Pennsylvania, under Act March 11, 1875, providing for a review by the supreme court where a nonsuit has been entered and a motion to set aside the judgment of nonsuit has been denied, error does not lie to the entry of a judgment of nonsuit, but only to a refusal to set such judgment aside. *Scanlon v. Suter*, 158 Pa. 275, 27 Atl. 963.

⁵³ *Hartford Fire Ins. Co. v. Green*, 52 Miss. 332; *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020; *Purcell v. Payton*, 58 Mo. App. 442.

⁵⁴ *Mallory v. Taylor*, 90 Va. 348, 18 S. E. 438; *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667; *Ropes v. Eldridge*, 39 Fla. 47, 21 South. 570. An order refusing a party permission to dismiss his action is not final so as to be appealable. *Troup v. Horbach*, 57 Neb. 644, 78 N. W. 286.

⁵⁵ *Ready v. Smith*, 141 Mo. 305, 42 S. W. 727.

⁵⁶ *Dowling v. Polack*, 18 Cal. 625; *Zoller v. McDonald*, 23 Cal. 136; *Leese v. Sherwood*, 21 Cal. 151; *Stoppenbach v. Zohrlaut*, 21 Wis. 385; *Bowie v. Kansas City*, 51 Mo. 454; *Gill v. Jones*, 57 Miss. 367; *Scriven v. Hursh*, 39 Mich. 98; *Snell v. Dwight*, 121 Mass. 348; *Bowler v. Palmer*, 2 Gray (Mass.) 553; *Eddleman v. McGlathery*, 74 Tex. 280, 11 S. W. 1100; *Rogers v. Russell*, 11 Neb. 361, 9 N. W. 547; *Brush Electric Co. v. Electric Imp. Co.*, 7 U. S. App. 208, 2 C. C. A. 373, 51 Fed. 557; *Hodges v. Kimball*, 34 C. C. A. 103, 91 Fed. 845; *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 36 C. C. A. 263, 94 Fed. 312; *Hunstock v. Hunstock*, 43 La. Ann. 375, 8 South. 922; *Howeth v. Clark* (Tex.) 16 S. W. 175; *Fuerman v. Ruhle* (Tex.) 16 S. W. 536; *Heegnard v. Dakota Loan & T. Co.*, 3 S. D. 569, 54 N. W. 656; *Lawrence County v. Meade County*, 6 S. D. 626, 62 N. W. 957; *Byrne v. Hudson*, 127 Cal. 254, 59 Pac. 597; *Smith v. Mayor of Boston*, 1 Gray (Mass.) 72. Where one of several defendants pleads to the action and the plaintiff replies, and on motion of a co-defendant the original writ of summons is quashed, and

suit for want of prosecution, in which a temporary injunction had been granted, amounts to a determination by the court that the injunction was improperly granted, and is in effect a final judgment in favor of the defendant.⁵⁷ So a judgment discharging a garnishee is a final and complete disposition of the cause, and the court has thereafter no jurisdiction over it; so that a judgment against the garnishee for costs, at a subsequent term, is void.⁵⁸ But an appeal does not lie from an order directing the dismissal of the suit, but only from the judgment entered on such order.⁵⁹ Nor is a judgment appealable which dismisses the suit only as to some among the defendants,⁶⁰ nor one which dismisses it conditionally,⁶¹ nor an order dismissing a cross-bill in equity.⁶² Where a motion to dismiss is denied, this does not constitute such a final judgment as will be appealable.⁶³ Nor can plaintiff appeal from an order refusing to reinstate an action which he has himself dismissed.⁶⁴ It has also been held that the action of replevin is an extraordinary remedy, and that in such action a judgment dismissing the suit is not final, and error cannot be assigned upon such an order until after final judgment.⁶⁵

§ 28. Judgment by Default.

The rule in regard to a judgment by default is, that if such a judgment is rendered for a fixed and liquidated sum, or if the amount can be ascertained by mere calculation from the pleadings, it is final; but if the amount of the recovery or damages remains to be ascer-

judgment "that he go hence," that is no final judgment in favor of the defendant pleading. *State Bank v. Roddy*, 15 Ark. 401.

⁵⁷ *Dowling v. Polack*, 18 Cal. 625.

⁵⁸ *Jackson v. St. Louis & S. F. R. Co.*, 89 Mo. 104, 1 S. W. 224.

⁵⁹ *Metropolitan El. Ry. Co. v. Johnston*, 84 Hun, 83, 32 N. Y. Supp. 49.

⁶⁰ *Beck & Pauli Lith. Co. v. Wacker & Birk B. & M. Co.*, 22 C. C. A. 11, 76 Fed. 10.

⁶¹ *Rich v. Manhattan R. Co.*, 138 N. Y. 668, 34 N. E. 402.

⁶² *Lamon v. McKee*, 7 Mackey (D. C.) 446; *Fleece v. Russell*, 13 Ill. 31. See *State v. Judge of Civil District Court*, 35 La. Ann. 765.

⁶³ *Plemmons v. Southern Imp. Co.*, 108 N. C. 614, 13 S. E. 188; *Cameron v. Bennett*, 110 N. C. 277, 14 S. E. 779; *Bach v. Burke*, 141 Pa. 649, 21 Atl. 779. Compare *Henderson v. Henshall*, 4 C. C. A. 357, 54 Fed. 320.

⁶⁴ *Smith v. May*, 20 D. C. 97.

⁶⁵ *Branch v. Branch*, 5 Fla. 447.

tained by a writ of inquiry or other judicial method of computation, then the judgment is merely interlocutory, until such amount is settled and entered on the record.⁶⁶ "A judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, etc., it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final."⁶⁷ Where suit is brought against two defendants who are jointly and severally liable, and one suffers a default, and the other puts in a plea and goes to trial, the judgment entered against the former defendant, on his default, is merely interlocutory until the case is disposed of as to the other.⁶⁸

"An order that a bill be taken pro confesso is interlocutory and intended to prepare the case for a final decree. Its effect is similar to that of a default in an action at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration. The defendant has lost his standing in court, and is not entitled to notice of its further proceedings, but the matters set forth in the bill do not pass in *rem judicatam* until the final decree."⁶⁹

⁶⁶ *Sellers v. Burk*, 47 Pa. 344; *McClung v. Murphy*, 2 Miles (Pa.) 177; *Beitler v. Zeigler*, 1 Pen. & W. (Pa.) 135; *Martin v. Price*, Minor (Ala.) 68; *Maury v. Roberts*, 27 Miss. 225; *Hyde v. Pinkard*, 25 Ark. 163. See *Dorsey v. Thompson*, 37 Md. 25; *Daniel v. Cooper*, 2 Houst. (Del.) 506; *Phillips v. Helling*, 5 Watts & S. (Pa.) 44. In New York, no appeal can be taken from a judgment by default. Code Civ. Proc. N. Y. § 1294; *Oliver v. French*, 80 Hun, 175, 30 N. Y. Supp. 52; *Hawkins v. Smith*, 91 Hun, 290, 36 N. Y. Supp. 333. In Minnesota, no appeal lies from a judgment by default, until an application for relief has been made in the court below. *Gederholm v. Davies*, 59 Minn. 1, 60 N. W. 676. An order setting aside a default and allowing defendant to plead is not appealable. *Territory v. Las Vegas Grant*, 6 N. M. 87, 27 Pac. 414.

⁶⁷ *Clements v. Berry*, 11 How. 398, 13 L. Ed. 745, McLean, J.

⁶⁸ *Commonwealth v. McCleary*, 92 Pa. 188.

⁶⁹ *Russell v. Lathrop*, 122 Mass. 300.

§ 29. Judgment on Demurrer.

When the issue of law raised by a demurrer is decided in favor of the plaintiff, and judgment is entered quod recuperet, such judgment is of course final if the amount of the recovery is fixed. Similarly, where such an issue is found for the defendant, and judgment for his discharge is given, it is final;⁷⁰ for the decision has the effect of disposing of that particular suit. But all the authorities agree that a decision or order of the court sustaining or overruling a demurrer, but not entering judgment thereon so as to dispose of the case, is merely interlocutory.⁷¹ Hence no appeal will lie from an order sustaining a demurrer, where leave is granted to the party to amend his pleading, or to plead to the merits, as the case may be, unless he elects to stand upon his pleading as it is, or unless the time limited for amendment or new plea elapses without action on his part, and judgment is entered accordingly.⁷² Nor can an appeal be taken from

⁷⁰ *Peru Plow & Wheel Co. v. Sandwich Enterprise Co.*, 77 Ill. App. 653; *Nicholas v. Maddox*, 52 La. Ann. 496, 26 South. 994. A judgment for defendant on demurrer to part of the counts of a declaration is not reviewable on error before the case is determined as to the remaining counts. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

⁷¹ *Warner v. Tomlinson*, 1 Root (Conn.) 201; *Paddock v. Springfield Fire & Marine Ins. Co.*, 12 N. Y. 591; *Elwell v. Johnson*, 74 N. Y. 80; *Johnson v. Folk Co.*, 24 Fla. 28, 3 South. 414; *Rose v. Gibson*, 71 Ala. 35; *Shields v. Taylor*, 13 Smedes & M. (Miss.) 127; *State v. Falconer* (Ark.) 5 S. W. 193; *Slagle v. Bodmer*, 58 Ind. 465; *Hayes v. Caldwell*, 5 Gilman (Ill.) 33; *Knapp v. Marshall*, 25 Ill. 63; *Gage v. Eich*, 56 Ill. 297; *Palmer v. Crane*, 8 Mo. 619; *Robinson v. County Court*, 32 Mo. 428; *State v. Justices*, 58 Mo. 583; *Kirchner v. Wood*, 48 Mich. 189, 12 N. W. 44; *Moraga v. Emeric*, 4 Cal. 308; *Miller v. Burlington & M. R. R. Co.*, 7 Neb. 227; *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514; *Sheffield v. Murray*, 80 Hun, 555, 30 N. Y. Supp. 799; *Denslow v. Bush*, 9 Misc. Rep. 337, 29 N. Y. Supp. 705; *State v. Herod*, 21 Ind. App. 177, 51 N. E. 952; *Murphy v. Tilling*, 2 App. D. C. 130; *Gillespie v. Coleman*, 38 Va. 276, 36 S. E. 377; *State v. Trilling* (Tex. Civ. App.) 57 S. W. 311; *Olsen v. Newton*, 3 Wash. St. 429, 30 Pac. 450; *Potvin v. McCorvey*, 1 Wash. St. 389, 25 Pac. 330; *Smith v. Seattle & M. Ry. Co.*, 6 Wash. 295, 32 Pac. 1073. Compare *Willis v. Marks*, 29 Or. 493, 45 Pac. 293.

⁷² *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514; *Taylor v. MacLee*, 19 Civ. Proc. R. 429, 11 N. Y. Supp. 640; *Knickerbocker Co. v. Roskopf*, 19 N. Y. Supp. 391; *Mooney v. Byrne*, 1 App. Div. 316, 37 N. Y. Supp. 388; *Koch v. City of New York*, 5 App. Div. 276, 39 N. Y. Supp. 164; *Potts v. Potts*,

an order overruling a demurrer with leave to plead. There is no finality in such an order, though there would be in a judgment entered upon the demurrant's election to stand upon his demurrer or on his failure to plead, and finally disposing of the case.⁷³ It is to be noted that the general rule is subject to certain exceptions depending on the peculiar nature of the action or the local rules of practice. Thus, a final judgment, in an action to recover a penalty imposed by statute, to be recovered "on conviction," cannot be entered on demurrer, but only on a trial upon the merits.⁷⁴ So, in Mississippi, it is said that, under the statute, judgments on demurrers are not final

88 Md. 640, 42 Atl. 214; *Throne-Franklin Shoe Co. v. Gunn*, 123 Ala. 640, 26 South. 198; *Texas Land & Loan Co. v. Winter* (Tex. Sup.) 57 S. W. 39; *Ferguson v. Mason* (Ky.) 50 S. W. 15; *Gurley v. Newport News & M. V. R. Co.*, 91 Tenn. 486, 19 S. W. 571; *Thomas v. Chicago & E. Ry. Co.*, 139 Ind. 462, 39 N. E. 44; *Maguire v. Woods*, 33 Ill. App. 638; *Peru Plow & Wheel Co. v. Sandwich Enterprise Co.*, 77 Ill. App. 653; *Clark v. Village of North Muskegon*, 86 Mich. 29, 48 N. W. 647; *Perry v. Church*, 107 Mich. 480, 65 N. W. 273; *Mowbray v. Denver & R. G. R. Co.*, 2 Colo. App. 128, 29 Pac. 1016; *Yager v. Lemp*, 39 Neb. 93, 58 N. W. 285; *Mason County v. Dunbar*, 10 Wash. 163, 38 Pac. 1003; *Case v. Ingle*, 2 Ind. T. 309, 51 S. W. 958. See *Johnson v. Union Switch & Signal Co.*, 125 N. Y. 720, 26 N. E. 455. It has been held that an order sustaining a demurrer to a petition for the removal of an assignee is appealable, as it affects a substantial right of both the petitioners and the assignee. *Burt v. Barnes*, 87 Wis. 519, 58 N. W. 790.

⁷³ *Mengher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 12 Sup. Ct. 876, 36 L. Ed. 834; *Werner v. City Council of Charleston*, 151 U. S. 360, 14 Sup. Ct. 356, 38 L. Ed. 192; *Robinson v. Belt*, 5 C. C. A. 521, 56 Fed. 328; *Edehn v. Lyon*, 1 App. D. C. 87; *Richardson v. Richardson*, 193 Pa. 279, 44 Atl. 445; *Nealon v. Frisbie*, 9 Misc. Rep. 660, 20 N. Y. Supp. 551; *Ackerly v. Osborn*, 13 Misc. Rep. 323, 34 N. Y. Supp. 459; *Cameron v. Bennett*, 110 N. C. 277, 14 S. E. 779; *Festorazzi v. St. Joseph's Catholic Church*, 96 Ala. 178, 10 South. 521; *Krause v. Stichtenoth*, 15 Ohio Cir. Ct. R. 199; *Foster v. Lindley*, 20 Ind. App. 155, 50 N. E. 367; *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179; *Chicago & N. W. Ry. Co. v. Andrews*, 148 Ill. 27, 35 N. E. 617; *Goldsmith v. Wilson*, 82 Iowa, 720, 47 N. W. 1016; *Quinn v. Capital Ins. Co.*, 82 Iowa, 550, 48 N. W. 935; *Taylor v. Taylor*, 87 Mich. 64, 49 N. W. 519; *Fitzsimmons v. Milwaukee, L. S. & W. Ry. Co.*, 98 Mich. 257, 57 N. W. 127; *Nelson v. Donovan*, 14 Mont. 78, 35 Pac. 227; *Gaines v. Cyrus*, 23 Or. 403, 31 Pac. 833; *Smith v. McEvoy*, 8 Utah, 58, 29 Pac. 1030; *Jones v. Quayle* (Idaho) 32 Pac. 1134. See *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 104 Ala. 233, 16 South. 112.

⁷⁴ *Reagh v. Spann*, 3 Stew. (Ala.) 100.

until the end of the term, until which time, on proper showing, they may be set aside.⁷⁵

§ 30. Judgment on Plea in Abatement.

Where issue is joined upon a matter of a plea in abatement and found against the defendant, the judgment for the plaintiff is final.⁷⁶ It is different in regard to the decision of a preliminary question of jurisdiction. Thus, in a litigation respecting the distribution of a testator's property, a question arose as to his domicile, and after hearing testimony the court decided that "his domicile was in the city of W.," and "this court has original jurisdiction in the matter of his estate." It was held that this was not a final judgment.⁷⁷

§ 31. Judgment for Costs.

A judgment which merely awards costs to the defendant, without more, is not a final judgment.⁷⁸ In order to have that character, it must profess to terminate and completely dispose of the action. Hence, if for the defendant, the final judgment must state that he is dismissed without day, or that it is considered that the plaintiff take nothing by his suit, or otherwise refer to the disposition made of

⁷⁵ *Shields v. Taylor*, 13 Smedes & M. 127; *Jacobs v. New York Life Ins. Co.*, 71 Miss. 656, 658, 15 South. 639.

⁷⁶ *Jewett v. Davis*, 6 N. H. 518; *McCartee v. Chambers*, 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; *Haight v. Holley*, 3 Wend. (N. Y.) 258; *Guld v. Bonnemort*, 156 Mass. 522, 31 N. E. 645. Compare *Lee v. Harper*, 90 Ala. 548, 8 South. 685. For the rule in Missouri, see *Mackey v. Hyatt*, 42 Mo. App. 443; *D. M. Osborne & Co. v. Farmers' Mach. Co.*, 114 Mo. 579, 21 S. W. 837. No appeal lies from an order overruling a plea in abatement. *Bartels v. Sonnenschein*, 54 Neb. 68, 74 N. W. 417.

⁷⁷ *Benjamin v. Dubois*, 118 U. S. 46, 6 Sup. Ct. 925, 30 L. Ed. 52; *State v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861.

⁷⁸ *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782; *Green v. Banks*, 24 Tex. 522; *Whitney Iron Works Co. v. Reuss*, 40 La. Ann. 112, 3 South. 500; *Dusing v. Nelson*, 7 Colo. 184, 2 Pac. 922; *Higbee v. Bowers*, 9 Mo. 354; *Blick v. Seal*, 39 Mo. App. 567; *Kern v. Saul*, 14 Ind. App. 72, 42 N. E. 496. Compare *Nanborn v. Perry*, 86 Wis. 361, 56 N. W. 337; *Sprott v. Reid*, 3 G. Greene (Iowa) 489, 56 Am. Dec. 549. An order denying a motion for costs, on the ground that the cause had been withdrawn before the return day, and before it had been entered on the docket of the court, is a final and appealable judgment. *Wildman v. Munger*, 70 Conn. 380, 39 Atl. 599.

the subject-matter. "The form of the judgment," say the court in Texas, "is immaterial, but in substance it must show intrinsically and distinctly, and not inferentially, that the matters in the record had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated. The costs are regulated by statute, and are an incident or appendage of the judgment, and generally are recoverable by the victor in the contest. But, as an incident, they cannot be substituted for the principal; and a judgment for their recovery is not a decision of the matter at issue; and it is therefore no such final judgment as can, by law, come within the revisory power of this court."⁷⁹

§ 31a. Allowance of Claims against Fund.

An application for the allowance of a claim against a fund which is before the court, or for a distributive share of such fund, is generally so far separable from the main controversy as to constitute a distinct, though subordinate, proceeding. Where this is the case, the decision of the court on such an application is to be regarded as final, quoad hoc, and therefore appealable. This rule applies to a decree or order allowing attorneys' fees out of a fund in course of administration by the court,⁸⁰ to an order granting or denying alimony or an allowance pending the suit,⁸¹ to an order fixing the compensation of a receiver,⁸² or directing him to pay certain claims out of the proceeds of a sale of the property,⁸³ or to pay a certain rate of wages to his employes.⁸⁴ Again, an order of a court of bankruptcy allowing a claim in bankruptcy is a final decision and appealable,⁸⁵ and the same is true of an order of the probate court fixing

⁷⁹ *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782.

⁸⁰ *Jacksonville, T. & K. W. R. Co. v. American Const. Co.*, 6 C. C. A. 249, 57 Fed. 66; *Tuttle v. Claffin*, 31 C. C. A. 419, 88 Fed. 122; *Oyster v. Bank*, 107 Iowa, 39, 77 N. W. 523. Compare *Fraser v. District of Columbia*, 7 Mackey (D. C.) 150.

⁸¹ *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *White v. White*, 86 Cal. 212, 24 Pac. 1030; *Campbell v. Campbell* (Ky.) 50 S. W. 849.

⁸² *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536.

⁸³ *Rome & D. R. Co. v. Sibert*, 97 Ala. 393, 12 South. 69.

⁸⁴ *Guarantee Trust & Safe-Deposit Co. v. Philadelphia, R. & N. E. R. Co.*, 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.

⁸⁵ *Duff v. Carrier*, 5 C. C. A. 177, 55 Fed. 433.

and determining the rights and estate of a surviving husband or wife in the homestead.⁸⁶ But it seems that the refusal of a court to distribute a fund before it,⁸⁷ or to strike off a mechanic's lien,⁸⁸ is, at least in some states, not an appealable order.

§ 32. Granting or Refusing Extraordinary Remedies.

According to the general consensus of judicial opinion, an order or decree granting a provisional or temporary injunction, with a reference to ascertain facts, or directing a trial at law, or otherwise reserving the merits, or a decree refusing to grant, or dissolving, a temporary injunction which is merely an incident of the relief sought, is interlocutory only, not final.⁸⁹ But a decree in favor of the complainant for a perpetual injunction, with costs, is final; for that completely adjudicates the relief asked and speaks the last word in the case.⁹⁰ And so, generally, is a decree dissolving an injunction, or

⁸⁶ *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323, 47 N. W. 973.

⁸⁷ *In re Hopper's Estate*, 192 Pa. 287, 43 Atl. 1020.

⁸⁸ *Carter v. Caldwell*, 147 Pa. 370, 23 Atl. 575. And see *In re Schaifer's Estate*, 155 Pa. 250, 25 Atl. 607.

⁸⁹ *Gibbons v. Ogden*, 6 Wheat. 448, 5 L. Ed. 302; *Barnard v. Gibson*, 7 How. 650, 12 L. Ed. 837; *Verden v. Coleman*, 18 How. 86, 15 L. Ed. 272; *Norton v. Hood* (C. C.) 12 Fed. 763; *Humiston v. Stainthorp*, 2 Wall. 106, 17 L. Ed. 905; *Price v. Strange*, 2 Hen. & M. (Va.) 615; *Ewing v. Fuller*, 7 D. C. 3; *Dulaney v. Murphy* (Ky.) 15 S. W. 7; *Cottam v. Currie*, 42 La. Ann. 875, 8 South. 600; *Otto v. Half* (Tex. Civ. App.) 32 S. W. 1052; *Green v. Banks*, 24 Tex. 522; *Ex parte Hawley*, 24 Ark. 596; *Moss v. Ashbrooks*, 15 Ark. 169; *Pentecost v. Magahee*, 4 Scam. (Ill.) 326; *Lucan v. Cadwallader*, 114 Ill. 285, 7 N. E. 286; *Jefferson v. Bohemian Ass'n*, 5 Ill. App. 230; *Greve v. Goodson*, 142 Ill. 355, 31 N. E. 677; *School Directors v. Wright*, 43 Ill. App. 270; *Keenan v. Williams*, 45 Ill. App. 530; *Clabby v. Sheldon*, 47 Ill. App. 166; *Harrison v. Rush*, 15 Mo. 175; *Tanner v. Irwin*, 1 Mo. 65; *Wing v. Warner*, 2 Doug. (Mich.) 288; *Chouteau v. Rice*, 1 Minn. 24 (Gil. 8); *School Dist. v. Brown*, 10 Neb. 440, 6 N. W. 770; *Smith v. Sahler*, 1 Neb. 310; *Scofield v. State Nat. Bank*, 8 Neb. 16; *Clark v. Fitch*, 32 Neb. 511, 49 N. W. 374; *Mcng v. Coffee*, 52 Neb. 44, 71 N. W. 975; *Schuffert v. Grote*, 83 Mich. 263, 47 N. W. 254; *State v. First Judicial District Court*, 52 Minn. 283, 53 N. W. 1157; *North Point Irr. Co. v. Utah & S. L. Canal Co.*, 14 Utah, 155, 46 Pac. 824. But where the court not only refuses a preliminary injunction, but enters a decree settling the rights of the parties, an appeal lies. *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851.

⁹⁰ *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270; *Merchants' Bank v. Kent*, 43 Mich. 292, 5 N. W. 627; *Rickards v. Coon*, 13 Neb. 419, 14 N.

refusing to dissolve it, where that is the sole or the main object of the bill.⁹¹ It must be noted, however, that these rules may not apply in some of the states where the code practice obtains. In those jurisdictions, orders granting or dissolving an injunction, or overruling a motion to that effect, are frequently found in the enumerated classes of appealable orders;⁹² or they may be considered as orders "affecting a substantial right" and hence subject to the revisory power of the upper courts.

On analogous principles, it must be held that an order of the court granting or refusing the writ of mandamus in the alternative, is not a final judgment. But its action in allowing or denying a peremptory mandamus, or in making the interlocutory writ absolute, is final to all legal intents and purposes.⁹³ And so where the parties to a proceeding for this writ dispense, by agreement, with a return or answer and other formal pleadings authorized by statute, and submit the case upon the petition and an agreed statement of facts in lieu of such pleading, and the case is heard as an application for a peremptory mandamus, and a judgment is rendered thereon dismissing the petition, this is a final judgment reviewable on error.⁹⁴

W. 162; *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615; *Carondelet Canal Nav. Co. v. City of New Orleans*, 44 La. Ann. 394, 10 South. 871; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439; *Sprague v. Locke*, 1 Colo. App. 171, 28 Pac. 142. But see *Brown v. Swann*, 9 Pet. 1, 9 L. Ed. 29.

⁹¹ *Saloy v. Collins*, 30 La. Ann. 63; *Titus v. Mabee*, 25 Ill. 257; *Prout v. Lomer*, 79 Ill. 331; *Hedges v. Meyers*, 5 Ill. App. 347; *Oberkoetter v. Luebbering*, 4 Mo. App. 481; *McVickar v. Wolcott*, 4 Johns. (N. Y.) 510; *Cors v. Tompkins*, 46 Ill. App. 322; *Northwestern Brewing Co. v. Manion*, 67 Ill. App. 316; *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322. But see *Hiriart v. Ballou*, 9 Pet. 156, 9 L. Ed. 85.

⁹² See Code Civ. Proc. Cal. § 939; Code Civ. Proc. Kan. § 542; *Andrews v. Love*, 46 Kan. 264, 26 Pac. 746. The act of congress establishing the circuit courts of appeals (Act March 3, 1891, § 7) authorizes an appeal to those courts from an "interlocutory order or decree granting or continuing an injunction." On the construction of this clause, see *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615; *Robinson v. City of Wilmington*, 9 C. C. A. 84, 60 Fed. 469; *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 61 Fed. 782.

⁹³ *Holden v. Haserodt*, 2 S. D. 220, 49 N. W. 97; *Oliver v. Wilson*, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

⁹⁴ *State v. Ottinger*, 43 Ohio St. 457, 3 N. E. 298.

A judgment or decree appointing a receiver, to take charge of the property in litigation, or to administer the revenues of the defendant, subject to the direction of the court, during the pendency of the suit, is not considered a final judgment.⁹⁵ And an order removing a receiver is likewise interlocutory.⁹⁶ In a few states, nevertheless, it is held that orders appointing receivers are final and appealable.⁹⁷ This is a variance of local practice. But in the system of procedure under the codes, where proceedings of this character are classed as "special proceedings," and an order made in such proceedings which affects a substantial right is final and appealable, it seems reasonable that a decision granting or refusing a receiver should be considered as final for this purpose, since it does not turn upon a formal or technical point, but goes to the claim of the party to secure the property in litigation in the most efficacious manner.⁹⁸ An order confirming a sale of property made by a receiver is final and appealable,⁹⁹ and so is an order granting or denying an application for leave to sue the receiver,¹⁰⁰ an order authorizing receiver's certificates to issue for past and future expenses and making them a lien superior

⁹⁵ *Fuller v. Adams*, 12 Ind. 559; *Produce Bank v. Morton*, 40 N. Y. Super. Ct. 328; *Eaton & H. R. Co. v. Varnum*, 10 Ohio St. 622; *Hottenstein v. Conrad*, 5 Kan. 249; *Maysville & L. R. Co. v. Punnett*, 15 B. Mon. (Ky.) 47; *Kansas Rolling Mill Co. v. Atchison, T. & S. F. R. Co.*, 31 Kan. 90, 1 Pac. 274; *Lewis v. McCabe*, 16 Mo. App. 398; *Stebbins v. Savage*, 5 Mont. 253, 5 Pac. 278; *Bayor v. Ewart*, 37 Ill. App. 318; *Brachtendorf v. Kelm*, 72 Ill. App. 228; *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. 801.

⁹⁶ *Farson v. Gorham*, 117 Ill. 137, 7 N. E. 104; *Dufour v. Lang*, 4 C. C. A. 663, 54 Fed. 913.

⁹⁷ *Lewis v. Campau*, 14 Mich. 458, 90 Am. Dec. 245; *Taylor v. Sweet*, 40 Mich. 736; *In re Graeff*, 30 Minn. 358, 16 N. W. 395; *Clark v. Raymond*, 84 Iowa, 251, 50 N. W. 1068; *City of Ogden v. Bear Lake & River Water-Works & Irrigation Co.*, 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305. Compare *Brown v. Vandermeulen*, 41 Mich. 418, 49 N. W. 920. In Maryland, the statute allows an appeal from an order appointing a receiver, but not from an order refusing to rescind the appointment. *R. Frank Williams Co. v. United States Baking Co.*, 86 Md. 475, 38 Atl. 990.

⁹⁸ *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1; *McCord v. Well*, 33 Neb. 888, 51 N. W. 300; *Anderson v. Matthews*, 8 Wyo. 307, 57 Pac. 156.

⁹⁹ *City of New Orleans v. Peake*, 2 U. S. App. 408, 2 C. C. A. 626, 52 Fed. 74.

¹⁰⁰ *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628.

to the claims of interveners,¹⁰¹ and an order requiring payment of the receiver's compensation and other expenses out of funds in his hands.¹⁰² An order settling the accounts of the receiver, which embraces all the transactions of the receivership during the entire period of his appointment, is in the nature of a final judgment;¹⁰³ but not an order merely directing the receiver to make a partial distribution of the funds in his hands.¹⁰⁴

An order of a superior court granting a writ of certiorari is not appealable,¹⁰⁵ but if the court, on such writ, dismisses the case and orders execution and a writ of procedendo, this is a final and appealable judgment.¹⁰⁶ So, also, an appeal will lie from a judgment of a superior court dismissing an application for a writ of prohibition.¹⁰⁷ But an order denying an application for the writ of habeas corpus is not a final judgment from which an appeal may be taken.¹⁰⁸

§ 33. On Motion for New Trial.

It is generally held that a judgment or order granting a new trial in an action at law is not a final judgment, and an appeal cannot be taken until the judgment is rendered which terminates the suit.¹⁰⁹ So also, an order overruling a motion to set aside the ver-

¹⁰¹ *Standley v. Hendrie & Bolthoff Mfg. Co.*, 25 Colo. 376, 55 Pac. 723.

¹⁰² *Ogden City v. Bear Lake & River Waterworks & Irrigation Co.*, 18 Utah, 279, 55 Pac. 385.

¹⁰³ *Patterson v. Ward*, 6 N. D. 359, 71 N. W. 543.

¹⁰⁴ *Sykes v. Thornton*, 152 Pa. 94, 25 Atl. 174.

¹⁰⁵ *Bank v. Burns*, 107 N. C. 465, 12 S. E. 252.

¹⁰⁶ *Holman v. G. A. Stowers Furniture Co.* (Tex. Civ. App.) 30 S. W. 1120.

¹⁰⁷ *Fayerweather v. Monson*, 61 Conn. 431, 23 Atl. 878; *Overland Gold Min. Co. v. McMaster*, 19 Utah, 177, 56 Pac. 977.

¹⁰⁸ *Lambert v. Barrett*, 157 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865. See *Commonwealth v. Blatt*, 165 Pa. 213, 30 Atl. 674.

¹⁰⁹ *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; *Morning Journal Ass'n v. Rutherford*, 1 U. S. App. 296, 2 C. C. A. 354, 51 Fed. 513, 16 L. R. A. 803; *Baker v. Remington*, 45 N. Y. 323; *Lawson v. Moore*, 44 Ala. 274; *Fuller v. Boggs*, 49 Ala. 127; *Wheeler v. Maillot*, 15 La. Ann. 659; *Brown v. Carraway*, 47 Miss. 668; *Houston v. Starr*, 12 Tex. 424; *Stewart v. Jones*, 9 Tex. 469; *Wampler v. Walker*, 28 Tex. 598; *Schweitzer v. Irwin's Ex'x*, 101 Ky. 401, 41 S. W. 265; *Kennery's Adm'r v. Louisville & N. R. Co.*, 21 Ky. Law Rep. 532, 51 S. W. 804; *State v. Perry*, 4 Baxt. (Tenn.) 438; *Louisville & N. R. Co. v. Conley*, 10 Lea (Tenn.) 531; *Hoyt*

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dict of a jury and refusing to grant a new trial, is interlocutory only, and an appeal or writ of error must be addressed to the judgment entered on the verdict.¹¹⁰ The same remark is true of an order denying an application for a rehearing.¹¹¹ And in a case where the report of a referee appointed by the special term to take proofs and determine as to rival claims to surplus money in foreclosure had been confirmed at special term, and that adjudication was reversed at general term, the latter court ordering a new hearing before another referee to be appointed by the special term, it was held that such order of the general term was not a final order, and therefore not appealable to the court of appeals.¹¹² But in a few states, it is held that an appeal may be maintained from an order refusing a new trial, although no judgment has been entered on the verdict.¹¹³ And in some other states, it is provided by statute that an appeal may be taken from an order granting or refusing a new trial.¹¹⁴ But where an order refusing a new trial and dismissing the motion therefor is itself appeal-

Dry Goods Co. v. Thomas, 19 Ohio Cir. Ct. R. 638; *House v. Wright*, 22 Ind. 333; *White v. Harvey*, 23 Ind. 55; *Byers v. Butterfield*, 33 Mo. 376; *McDonough v. Nicholson*, 46 Mo. 35; *Burden v. Hornsby*, 50 Mo. 238; *People v. Judge of Circuit Court*, 41 Mich. 5, 2 N. W. 181; *Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363; *Bear River Valley Orchard Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611.

¹¹⁰ *Waterhouse v. Rock Island Alaska Min. Co.*, 38 C. C. A. 281, 97 Fed. 466; *Neidlinger v. Yoost*, 39 C. C. A. 494, 99 Fed. 240; *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. 23, 37 L. Ed. 996; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; *Sigafus v. Porter*, 51 U. S. App. 693, 28 C. C. A. 443, 84 Fed. 430; *Whittaker v. West Boylston*, 97 Mass. 273; *Holdsworth v. Tucker*, 147 Mass. 572, 18 N. E. 430; *Taylor v. Smith*, 24 App. Div. 519, 49 N. Y. Supp. 41; *Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. 39; *Roberts v. State*, 3 Tex. App. 47; *Conord v. Runnels*, 23 Ohio St. 601; *J. W. Reedy Elevator Manuf'g Co. v. Pitvowsky*, 35 Ill. App. 364; *Little v. Leighton*, 46 Minn. 201, 48 N. W. 778; *Smith v. Johnson*, 37 Neb. 675, 56 N. W. 323; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 300; *White v. Pease*, 15 Utah, 170, 49 Pac. 416; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. 153.

¹¹¹ *Mayor of New York v. Schermerhorn*, 1 N. Y. 423.

¹¹² *Mutual Life Ins. Co. v. Anthony*, 105 N. Y. 57, 11 N. E. 281.

¹¹³ *Baldwin v. Foss*, 71 Iowa, 389, 32 N. W. 389; *Atkinson v. Williams*, 151 Ind. 431, 51 N. E. 721. And see *Kernan v. St. Paul City Ry. Co.*, 64 Minn. 312, 67 N. W. 71.

¹¹⁴ Code Civ. Proc. Cal. § 939; Code Civ. Proc. Kan. § 542; *List v. Jockheck*, 45 Kan. 349, 748, 27 Pac. 184; *Ormiston v. Trumbo*, 77 Mo. App. 310.

able, no appeal will lie from an order refusing to revoke a prior order to that effect.¹¹⁵

§ 34. Vacating or Reversing former Judgment.

Where, under the code system of procedure, an independent action is brought for the purpose of vacating a former judgment between the same parties and procuring a new trial of the action, and the relief is granted as asked, it seems that the judgment to that effect must be considered as final and appealable. For the issues in the independent suit having been determined and the relief accorded, the decision puts an end to that controversy.¹¹⁶ But where the application comes in the form of a motion made in the same cause, and the court grants an order opening or vacating the judgment already entered, it is clear that such an order is no final judgment; on the contrary, it merely suspends the finality of the original judgment until the case has been heard and decided anew.¹¹⁷ Nor is the case otherwise where the court denies the application. A refusal to open a judgment is not a judgment, sentence, or decree; it concludes noth-

¹¹⁵ *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. 396; *Griess v. State Inv. & Ins. Co.*, 93 Cal. 411, 28 Pac. 1041.

¹¹⁶ *McCall v. Hitchcock*, 7 Bush (Ky.) 615; *Belt v. Davis*, 1 Cal. 134; *State v. Allen*, 92 Mo. 20, 4 S. W. 414. A judgment of a federal circuit court denying a petition of a receiver of a corporation against which judgment was entered, to have the judgment opened and for leave to answer, is reviewable on error. *Rust v. United Waterworks Co.*, 17 C. C. A. 16, 70 Fed. 129. And so is a decree taking from one party the right of redemption given to him by a former decree in the same suit, and conferring such right on another party. *Burgess v. Ruggles*, 146 Ill. 506, 34 N. E. 1036.

¹¹⁷ *McCulloch v. Dodge*, 8 Kan. 476; *Higgins v. Brown*, 5 Colo. 345; *Brown v. Edgerton*, 14 Neb. 453, 16 N. W. 474; *Dorsey v. Thompson*, 37 Md. 25; *Roh v. Vitera*, 38 Neb. 333, 56 N. W. 977; *Hirsh v. Welsberger*, 44 Mo. App. 506. In Pennsylvania, under the act of May 20, 1891, an appeal may be taken from an order of the court opening a judgment. *Pfaff v. Thomas*, 3 Pa. Super. Ct. 419; *Kelber v. Pittsburg Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335. But not from an order refusing to vacate a former order. *Lowenstein v. North Schuylkill Ins. Co.*, 132 Pa. 410, 20 Atl. 688. Nor from an order of the orphans' court opening a decree of confirmation of the sale of land and setting aside the sale, since that is a matter of judicial discretion. *Appeal of Montgomery Nat. Bank*, 140 Pa. 187, 21 Atl. 242.

ing, and is not assignable for error.¹¹⁸ "It is settled that when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside."¹¹⁹ A writ of error cannot be taken from the supreme court of the United States to the appellate court of a state on a judgment of the latter court which merely reverses that of the trial court and orders a new trial, such judgment not being final.¹²⁰ But a judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion in the latter as to further proceedings, is final.¹²¹

§ 35. Orders as to Interpleader, Intervention, and Joinder of Parties.

An order of court requiring parties to interplead is in general merely interlocutory, since it settles no rights, and merely serves to prepare the case for examination and decision.¹²² So an order directing the payment into court of a garnishee fund claimed by a third person, pending the determination of the right to it, is not a final judgment.¹²³ An order refusing leave to intervene in a pending suit, where such intervention is not essential to the preservation of the petitioner's rights, but such rights may be asserted in an inde-

¹¹⁸ *Evans' Adm'r v. Clover*, 1 Grant, Cas. (Pa.) 164; *Lowenstein v. North Schuylkill Ins. Co.*, 132 Pa. 410, 20 Atl. 688; *Lockwood v. Bock*, 46 Minn. 73, 48 N. W. 458; *Smith v. Shawano Co.*, 77 Wis. 672, 47 N. W. 95; *Travelers' Ins. Co. v. Weber*, 2 N. D. 239, 50 N. W. 703; *Kubil v. Hawsett*, 80 Cal. 638, 27 Pac. 57; *Welsh v. Lambert*, 18 Utah, 1, 54 Pac. 975. But compare *McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16; *Northern Pac. & P. S. R. Co. v. Black*, 3 Wash. St. 327, 28 Pac. 538; *Myers v. Landrum*, 4 Wash. St. 762, 31 Pac. 33; *In re Davis' Estate*, 11 Mont. 196, 28 Pac. 645; *Tucker v. Stone*, 92 Mich. 298, 52 N. W. 302. In Vermont, where an application to set aside a judgment is denied as a matter of law, the proceedings may be reviewed on appeal. *Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590.

¹¹⁹ *Goyhinech v. Goyhinech*, 80 Cal. 409, 410, 22 Pac. 175.

¹²⁰ *Houston v. Moore*, 3 Wheat. 433, 4 L. Ed. 428; *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895; *Rice v. Sanger*, 144 U. S. 197, 12 Sup. Ct. 664, 36 L. Ed. 403.

¹²¹ *Mower v. Fletcher*, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117.

¹²² *Barth v. Rosenfeld*, 36 Md. 604.

¹²³ *Louisiana Nat. Bank v. Whitney*, 121 U. S. 284, 7 Sup. Ct. 897, 30 L. Ed. 961.

pendent suit, is not a final order from which an appeal lies.¹²⁴ Nor is an order permitting a party to intervene,¹²⁵ nor an order striking out a petition of intervention because not filed in time.¹²⁶ Nor can an appeal be taken from an interlocutory order joining parties defendant in a cause.¹²⁷

§ 36. Dissolving Attachments and Executions.

It is held, by the almost universal agreement of the authorities, that judgments, orders, or decrees, quashing or dissolving attachments, or refusing to do so, are merely interlocutory.¹²⁸ For an attachment is, in general, only an incident of the suit, and a decision upon its validity or applicability is no more than the settlement of a preliminary and subordinate question, leaving untouched the ultimate rights of the parties and not disposing of the main controversy. Still, in one state at least, a contrary view is maintained, and it is thought that a judgment dismissing an attachment is in its nature final, and error will lie on it, notwithstanding the cause may still be pending below on the declaration to have a recovery on the merits, as if the suit had been brought by ordinary process.¹²⁹ There is something

¹²⁴ *Credits Commutation Co. v. United States*, 34 C. C. A. 12, 91 Fed. 570; *Lewis v. Baltimore & L. R. Co.*, 10 C. C. A. 446, 62 Fed. 218; *Jones & Laughlins v. Sands*, 25 C. C. A. 233, 79 Fed. 913; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826. Compare *Henry v. Travelers' Ins. Co.*, 16 Colo. 179, 26 Pac. 318.

¹²⁵ *Jones v. New York Life Ins. Co.*, 11 Utah, 401, 40 Pac. 702.

¹²⁶ *Whitney v. Spearman*, 50 Neb. 617, 70 N. W. 240.

¹²⁷ *Sneeden v. Harris*, 107 N. C. 311, 12 S. E. 205; *Lamon v. McKee*, 7 Mackey (D. C.) 446.

¹²⁸ *Hamner v. Scott*, 8 C. C. A. 655, 60 Fed. 343; *Atlantic Lumber Co. v. Buckl & Son Lumber Co.*, 35 C. C. A. 59, 92 Fed. 864; *Philadelphia & R. R. v. Snowdon*, 161 Pa. 201, 28 Atl. 1067; *Slingluff v. Sisler*, 193 Pa. 264, 44 Atl. 423; *Stanton v. Heard*, 100 Ala. 515, 14 South. 359; *Realty Inv. Co. v. Porter*, 58 Kan. 817, 50 Pac. 879; *Noyes v. Phipps*, 9 Kan. App. 887, 58 Pac. 1007; *Wirt v. Dinan*, 41 Mo. App. 236; *Root v. State Bank*, 30 Neb. 772, 47 N. W. 82; *Jacobi v. Schloss*, 7 Cold. (Tenn.) 385; *Cutter v. Gumberts*, 8 Ark. 449; *Butcher v. Taylor*, 18 Kan. 558; *Abbott v. Zeigler*, 9 Ind. 511; *Woodruff v. Rose*, 43 Ala. 382; *Bray v. Laird*, 44 Ala. 295; *Wearen v. Smith*, 80 Ky. 216; *Baldwin v. Wright*, 3 Gill (Md.) 241; *Talbot v. Pierce*, 14 B. Mon. (Ky.) 195; *Hanson v. Bowyer*, 4 Metc. (Ky.) 108; *Wickman v. Nalty*, 41 La. Ann. 284, 6 South. 123.

¹²⁹ *Bruce v. Couyers*, 54 Ga. 678. And see *Chappell v. Comins*, 44 Kan.

to be said for this position. For, as the court observed, the whole attachment element is disposed of by the order for its dismissal. Any judgment which may be thereafter recovered will have no aid from the levy of the attachment. Its lien will rank only from the date of the judgment, and the security of the replevy bond will be lost. "To maintain his attachment, it was the right of the plaintiff to have the judgment dismissing it reviewed by a separate writ of error."¹⁸⁰ Similarly it has been held that a decision of the court upon a rule or motion to quash an execution is merely interlocutory, not a final judgment.¹⁸¹ But this view also has been denied.¹⁸²

§ 37. Order removing Cause.

An order for the removal of a cause from a state court to the circuit court of the United States, for trial, under the various acts of congress in that behalf, is without question a final order.¹⁸³ "An order removing or refusing to remove a cause, civil or criminal, to another court for trial, finally adjudicates a constitutional right of the party affected by the order. And it is regarded as a judgment, from which, according to the nature of the case, an appeal or writ of error may be immediately prosecuted."¹⁸⁴ Conversely, the decision of the federal court upon a motion to remand the cause to the state court from which it came, on the ground of its irregular or improper removal, or for want of jurisdiction, is in its nature final and appealable. But the right of appeal in such cases was taken away by the act of congress of March 3, 1887, which provides that "whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately

743, 25 Pac. 216; *Williams v. Hutchinson*, 20 Fla. 513, 7 South. 852; Code Civ. Proc. Cal. § 939.

¹⁸⁰ *Bruce v. Conyers*, 54 Ga. 678.

¹⁸¹ *McCargo v. Chapman*, 20 How. 555, 15 L. Ed. 1021; *Terry v. Hughes*, 98 Ala. 432, 8 South. 686; *Bond v. Charleen*, 1 Dak. 224, 46 N. W. 585.

¹⁸² *Loomis v. Lane*, 29 Pa. 242, 72 Am. Dec. 625; *Packer v. Owens*, 164 Pa. 185, 30 Atl. 314.

¹⁸³ *Home Life Ins. Co. v. Dunn*, 20 Ohio St. 175, 5 Am. Rep. 642.

¹⁸⁴ *McMillan v. Stute*, 68 Md. 307, 12 Atl. 8.

carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."¹³⁵ Nor will any appeal lie when the circuit court denies the motion to remand, and decides to retain jurisdiction; for this, it is considered, is not a final judgment or decree, but merely an interlocutory decision.¹³⁶

§ 38. Judgments and Orders of Probate Courts.

Orders made by a surrogate or probate court, in the course of the administration or settlement of an estate before it, such as an order appointing or removing an executor, administrator, guardian, or trustee, are interlocutory in their nature and not generally appealable.¹³⁷ But when the final stage of the case is reached, and a decree is made for the distribution of the funds or estate under the control of the court, and the discharge of the executor or trustee, this is a final judgment, from which an appeal is generally allowed.¹³⁸ An

¹³⁵ 24 Stat. 553; Black, Dill. Rem. Causes, § 223; *Sherman v. Grinnell*, 123 U. S. 679, 8 Sup. Ct. 260, 31 L. Ed. 278; *Morey v. Lockhart*, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. Ed. 68; *Wilkinson v. Nebraska*, 123 U. S. 280, 8 Sup. Ct. 120, 31 L. Ed. 152; *Birdseye v. Schaeffer*, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. Ed. 402; *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536; *Illinois Cent. R. Co. v. Brown*, 156 U. S. 386, 15 Sup. Ct. 656, 39 L. Ed. 461. A later statute (25 Stat. 603) allowed an appeal from a "final judgment or decree" of a circuit court, involving the question of its jurisdiction. But it is held that an order of the circuit court remanding a cause to the state court on the ground of want of jurisdiction is not a "final judgment or decree," and hence this statute does not help the party objecting to the remand to procure a review of the order. *Texas Land & Cattle Co. v. Scott*, 137 U. S. 436, 11 Sup. Ct. 140, 34 L. Ed. 730; *Joy v. Adelbert College*, 146 U. S. 355, 13 Sup. Ct. 196, 36 L. Ed. 1003. The act creating the circuit courts of appeals does not give those courts jurisdiction to review, on appeal from a circuit court, an order of the latter court remanding a cause to a state court. *In re Coe*, 5 U. S. App. 6, 1 C. C. A. 326, 49 Fed. 481.

¹³⁶ *Bender v. Pennsylvania Co.*, 148 U. S. 502, 13 Sup. Ct. 640, 37 L. Ed. 537; *Patten v. Cilley*, 1 C. C. A. 522, 50 Fed. 337.

¹³⁷ *Monger v. Jeffries*, 62 Ohio St. 149, 56 N. E. 654; *Grimes v. Barratt*, 60 Kan. 259, 56 Pac. 472. Compare *Tome v. Stump*, 89 Md. 264, 42 Atl. 902. An order of the probate court amercing a sheriff is a final and appealable judgment. *Fenton v. White*, 4 Okl. 472, 47 Pac. 472.

¹³⁸ *Whitaker v. Sparkman*, 30 Fla. 347, 11 South. 542; *In re McFarland's Estate*, 10 Mont. 445, 26 Pac. 185.

order of such a court merely requiring a personal representative, guardian, or trustee to file an account, is not in its nature final,¹³⁹ nor is an order settling and allowing an annual or partial account of an executor or administrator.¹⁴⁰ But the case is otherwise when settlement is made of the final accounts of such fiduciaries, especially when distribution is ordered and the discharge of the trustee allowed. This is such a final decree as will be the proper subject of an appeal.¹⁴¹

§ 39. Judgment in Partition.

According to the usual practice in proceedings for partition of land, a preliminary judgment or decree is rendered, directing that partition be made, quod partitio fiat, and nominating certain persons to effect a division and report to the court. When the report is confirmed, or the method of apportionment otherwise fixed, and all the rights of the parties adjusted and settled, another judgment is entered declaring that the partition shall stand as approved. Now the first decree in these proceedings, establishing the existence of a co-tenancy, ordering that partition be made, and appointing commissioners, is generally interlocutory.¹⁴² But the first decree in partition may be final, and it will have that character, if it settles all the rights of the parties

¹³⁹ *In re Callahan's Estate*, 139 N. Y. 51, 34 N. E. 756; *Wilcox v. Wilcox*, 63 Vt. 137, 21 Atl. 423; *In re Palethorp's Estate*, 160 Pa. 316, 28 Atl. 689.

¹⁴⁰ *Baker v. Schoeneman*, 41 Mo. 392; *In re Barnes*, 43 Mo. App. 295. But if a partial distribution is ordered, it seems the decree may be considered final quoad hoc. *McDonald v. McDonald*, 68 Miss. 689, 9 South. 896.

¹⁴¹ *Moore's Appeal*, 10 Pa. 435; *Weinerth v. Trendley*, 39 Mo. App. 333; *In re Hill's Heirs*, 7 Wash. 421, 35 Pac. 131; *In re Bigge*, 52 Kan. 184, 34 Pac. 782.

¹⁴² *Green v. Fisk*, 103 U. S. 518, 26 L. Ed. 485; *Id.*, 154 U. S. 668, 14 Sup. Ct. 1193, 26 L. Ed. 486; *Elder v. McClaskey*, 17 C. C. A. 251, 70 Fed. 529; *Beebe v. Griffing*, 6 N. Y. 465; *Gesell's Appeal*, 84 Pa. 238; *Templeman v. Steptoe*, 1 Munf. (Va.) 339; *Young v. Skipwith*, 2 Wash. (Va.) 300; *Putman v. Lewis*, 1 Fla. 455; *Medford v. Harrell*, 10 N. C. 41; *Clester v. Gibson*, 15 Ind. 10; *Davis v. Davis*, 36 Ind. 100; *Kern v. Maginniss*, 41 Ind. 398; *Pipkin v. Allen*, 29 Mo. 229; *Durham v. Darby*, 34 Mo. 447; *Ivory v. Delore*, 26 Mo. 505; *Gates v. Salmon*, 28 Cal. 320; *Peck v. Vandenberg*, 30 Cal. 11; *Mills v. Miller*, 2 Neb. 299; *Murray v. Yates*, 73 Mo. 13. Compare *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711; *Skinner v. Carter*, 108 N. C. 106, 12 S. E. 908.

and leaves nothing for the future consideration or judicial action of the court.¹⁴³ Thus a decree declaring that the plaintiff is entitled to one undivided third of the land in question, and appointing commissioners to make partition, is held to be a final decree and appealable before the subsequent proceedings are had.¹⁴⁴ And so, where a judgment was passed for the partition of realty among the heirs who were entitled to it, and commissioners were appointed to make the division without further orders of the court, it was considered to be a final determination of the rights of the parties and therefore appealable.¹⁴⁵ But an unauthorized declaration, in the order for partition, that the plaintiff's share of the rents and profits received by defendant as tenant in possession shall constitute a special lien, and that a special execution shall issue therefor, cannot have the effect to convert an otherwise interlocutory order into a final and appealable judgment.¹⁴⁶

§ 40. In Condemnation Proceedings.

A judgment rendered in proceedings for the condemnation of land under the power of eminent domain, where adversary proceedings have been had between the petitioner and the parties whose interests are to be affected, and the court has confirmed a report of commissioners appointed to assess the value of the land taken, and it is adjudged that the petitioner has complied with the statutory requirements, is a final judgment.¹⁴⁷ And so, it seems, is a judgment for condemnation, where the right to condemn is contested, although the amount of compensation remains still to be determined.¹⁴⁸ But an order in condemnation proceedings merely appointing commis-

¹⁴³ *Ansley v. Robinson*, 16 Ala. 793; *Banton v. Campbell's Heirs*, 2 Dana (Ky.) 421; *Damouth v. Klock*, 28 Mich. 163; *Ruthenberg v. Helberg*, 43 La. Ann. 410, 9 South. 99.

¹⁴⁴ *Williams v. Wells*, 62 Iowa, 740, 16 N. W. 513. See *Cannon v. Hempbill*, 7 Tex. 184; *Taylor v. Dawson*, 65 Ill. App. 232.

¹⁴⁵ *Beatty v. Beatty's Adm'r* (Ky.) 5 S. W. 771; *Ames v. Ames*, 148 Ill. 321, 36 N. E. 110.

¹⁴⁶ *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339.

¹⁴⁷ *Sacramento, P. & N. R. Co. v. Harlan*, 24 Cal. 337; *Hutchinson v. McLaughlin*, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287. See *City of Johnstown v. Wade*, 157 N. Y. 50, 51 N. E. 397.

¹⁴⁸ *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967.

sioners to assess the damages is not a final or appealable order.¹⁴⁹ On similar principles, a decree of confirmation of a report of viewers laying out a road is final until reversed on certiorari;¹⁵⁰ and so is a judgment setting aside the award of commissioners for the assessment of damages upon the opening of a highway.¹⁵¹

§ 41. Finality of Decrees.

In drawing the distinction between final and interlocutory adjudications, the greatest difficulty has been experienced in the case of decrees in equity, the confusion arising principally from the peculiar nature of these decisions and the wide range of means which chancery possesses both for informing the mind of the judge and for acting upon the parties concerned. Many tests of finality have been proposed, some proceeding upon opposite principles, some viewing the same principle in different aspects. Thus, several cases hold that a decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.¹⁵² This is perhaps a little too broad. For, as we shall see, it does not impair the finality of a decree that it has to pass through the hands of a master, for ministerial acts to be done in relation to it, before it is ready for execution. Other cases define a final decree as that which is made when all the material facts in the cause have been ascertained, so as to enable the court to understand and decide on the merits of the case.¹⁵³ According to another authority, any decree is final which renders the equities incapable of change in the further progress of the cause.¹⁵⁴ Or where nothing remains to be done which may be the

¹⁴⁹ *Southern R. Co. v. Postal Tel. Cable Co.*, 35 C. C. A. 366, 93 Fed. 393; *Lodlow v. City of Norfolk*, 87 Va. 319, 12 S. E. 612.

¹⁵⁰ *In re Hunter's Private Road*, 46 Pa. 250.

¹⁵¹ *Morris & E. R. Co. v. City of Orange*, 63 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363.

¹⁵² *Railroad Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; *Grant v. Phoenix Mut. Life Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237; *Cook's Heirs v. Bay*, 4 How. (Miss.) 485; *Vanmeter's Ex'rs v. Vanmeter*, 3 Grat. (Va.) 148.

¹⁵³ *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447.

¹⁵⁴ *Jones v. Wilson*, 54 Ala. 50.

subject of exception or appeal.¹⁵⁵ Or where the decree "completely and finally disposes of some branch or part of the cause which is separate and distinct from the other parts of the case."¹⁵⁶ Another case, coming much nearer to a satisfactory definition, holds that the final decree is not necessarily the last decree rendered, by which all proceedings in the case are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy,—all the equities of the case,—though there may remain a reference to be had, or the adjustment of some incidental or dependent matter.¹⁵⁷

The difficulty appears to arise in relation to those decrees which, while settling the general equities of the cause, leave something for future action or determination. And the true rule seems to be, that if that which remains to be done or decided will require the action or consideration of the court before the rights involved in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in execution of the decree as it stands.¹⁵⁸

§ 42. Further Action necessary to settle the Equities.

Adopting the rule set forth in the preceding section, it will now be desirable to give some illustrations of cases in which the decree has been held interlocutory merely, because some further act or decision was necessary before the equities could be completely settled and

¹⁵⁵ *Bellamy v. Bellamy*, 4 Fla. 242.

¹⁵⁶ *Evans v. Dunn*, 26 Ohio St. 439. See *Grant v. East & West R. Co.*, 1 C. C. A. 681, 50 Fed. 795. Where discovery by answer is the only relief prayed in the bill, a rule to answer is, in effect, a final decree, and is therefore appealable. *Grimes v. Hilliary*, 38 Ill. App. 246.

¹⁵⁷ *Walker v. Crawford*, 70 Ala. 567. See *Travis v. Waters*, 1 Johns. Ch. (N. Y.) 85; *Champlin v. Memphis & O. R. Co.*, 9 Heisk. (Tenn.) 683.

¹⁵⁸ *Kelley v. Stanbery*, 13 Ohio, 408; *Desvergers v. Parsons*, 8 C. C. A. 526, 60 Fed. 143; *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 730; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Wheelberger v. Knights*, 71 Ill. App. 331. The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done by the decree. *Potter v. Beal*, 2 C. C. A. 60, 50 Fed. 860.

disposed of. And first, when the further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree upon which the question arises is not to be regarded as final.¹⁵⁹ Thus, a judgment of foreclosure, directing the sale of the mortgaged premises, and the payment by the defendant of any deficiency which may arise on such sale, is not such a final judgment as that an action will lie upon it, because, on such a judgment, further proceedings, such as the confirmation of the referee's report, etc., must be had before a personal judgment can be entered.¹⁶⁰ So a judgment dissolving a partnership, ascertaining the sum of money due by the copartners to the plaintiff, ordering a sale of the copartnership property and effects, and decreeing payment therefrom of the amount due plaintiff, but providing that in case the amount realized from such sale is not sufficient to pay the judgment, that the plaintiff shall be entitled to a personal judgment against the individual members of the firm for the deficiency, is not a final judgment, but merely an interlocutory decree.¹⁶¹ So also, a reservation of the question of costs, in a decree which in other respects disposes of the subject-matter of the suit, renders such decree interlocutory.¹⁶² Again, a decree ordering an act to be done before the decree itself can be effectual is interlocutory.¹⁶³ And a decree which decides definitely in favor of the complainant in respect to one of the claims presented, but reserves the consideration of another claim, constituting an integral part of the case, is not final.¹⁶⁴ So if it directs an act to be

¹⁵⁹ *Miller's Adm'r v. Cook's Adm'rs*, 77 Va. 806; *Cocke's Adm'r v. Gllpin*, 1 Rob. (Va.) 20.

¹⁶⁰ *Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun (N. Y.) 630.

¹⁶¹ *White v. Conway*, 66 Cal. 383, 5 Pac. 672.

¹⁶² *Dickenson v. Codwise*, 11 Paige (N. Y.) 189; *Johnson v. Hoover*, 75 Md. 486, 23 Atl. 903. Compare *McFarland v. Hall's Heirs*, 17 Tex. 691. An order directing a receiver to turn over money collected by him, with leave to apply to the court for the payment of his charges, and to have the same taxed as costs against the complainant, is not a final determination of his rights, and is not appealable. *French v. Genoa Junction Ice Co.*, 82 Ill. App. 318.

¹⁶³ *Hays v. May's Heirs*, 1 J. J. Marsh. (Ky.) 497.

¹⁶⁴ *Bond v. Marx*, 53 Ala. 177; *Woman's College v. Horne* (Tenn. Ch.) 53 S. W. 980; *Marks v. Semple*, 111 Ala. 637, 20 South. 791. Compare *Wright v. Brusckke*, 62 Ill. App. 358.

done, but requires a report to be made of the manner of its performance; as where the decree authorizes an executor to sell the real estate of his testator for the payment of debts, and to report his proceedings in execution thereof to the court.¹⁶⁵ But it has been held, by a high authority, that when a decree passes for a certain sum of money, and the complainant is entitled to have it immediately carried into execution, it must be regarded as final to that extent, and appealable, although so much of the bill is retained in the court below as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.¹⁶⁶

§ 43. Further Action necessary to execute the Decree.

The second branch of the rule above stated is, that although further acts or directions may be necessary to carry the decree into effect, it is still final if it settles the equities. Thus, a decree that defendants should assign a certificate of lands to the plaintiff, provided he should, before a given day and after a tender of the assignment, pay a certain sum of money to them, is a final decree.¹⁶⁷ So where certain of the stockholders in a corporation filed their bill in equity, praying that the proceedings of a meeting of stockholders, and of the directors in accordance therewith, might be set aside as void for fraud, and for the appointment of a receiver, and the court granted the relief prayed in the bill, but added a clause to the decree reserving such further directions, as to costs, etc., as might be necessary to carry the decree into execution, it was held that this was a final decree.¹⁶⁸ Again, a decree which ascertains the sum in the

¹⁶⁵ *Goodwin v. Miller*, 2 *Munf. (Va.)* 42. And see *Donaldson v. Farmers' & Exchange Bank*, 4 *S. C.* 106.

¹⁶⁶ *Forgay v. Conrad*, 6 *How.* 201, 12 *L. Ed.* 404.

¹⁶⁷ *Turner v. Crebill*, 1 *Hammond (Ohio)* 368. And see *Harmon v. Bynum*, 40 *Tex.* 324. But the general rule appears to be that a decree which makes the relief granted conditional upon the performance of certain acts by the successful party is not final unless it is shown that the conditions have been complied with. See *Stratton v. Dewey*, 24 *C. C. A.* 435, 79 *Fed.* 32; *Ligon v. Ligon*, 105 *Ala.* 460, 17 *South.* 89; *McAnally v. Haynie*, 17 *Tex. Civ. App.* 521, 42 *S. W.* 1049. Compare *Dow v. Blake*, 148 *Ill.* 76, 35 *N. E.* 761, 39 *Am. St. Rep.* 156.

¹⁶⁸ *Winthrop Iron Co. v. Meeker*, 109 *U. S.* 180, 3 *Sup. Ct.* 111, 27 *L. Ed.* 898.

hands of a party to be accounted for, and those who are entitled to it, and orders it to be paid over to the parties entitled, and directs the costs of the suit to be paid first out of the fund, and makes no reference to a master, and seeks to ascertain no new fact, but assumes that the court is in full possession of all the facts, so as to adjudicate between the contestants according to equity and conscience, is a final decree, although it also requires the accountant to report to the court his distribution and dealing with the fund.¹⁶⁹ It is also held that a decree for specific performance, requiring a conveyance, is final, although it directs the submission of the conveyance to the judges for their approval.¹⁷⁰

§ 44. Decree ordering a Reference.

The most difficult cases in which to draw the line between final and interlocutory decrees, are those in which the decree, after finding the general equities, orders a reference to a master for some specific purpose. Yet there are not wanting principles upon which to base a reasonable and accurate distinction in these cases. As the condensed result of the numerous authorities on the subject, we may formulate the following specific rules. First, where a decree is made disposing of the general equities of the case, but ordering a reference to a master to ascertain damages, or to find certain facts, or to do anything else necessary to be done before a final adjustment of the rights of the parties can be had, if the functions of the master are to be judicial, and not merely ministerial, and the provisions depending on his report are not already incorporated in the decree, then the decree is interlocutory and not final.¹⁷¹ Second, where a decree ascer-

¹⁶⁹ *Ledyard v. Henderson*, 46 Miss. 260; *Bank of Lewisburg v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. 755, 35 L. Ed. 493; *Lohman v. Cox*, 9 N. M. 503, 56 Pac. 286.

¹⁷⁰ *Long v. Maxwell*, 8 C. C. A. 410, 59 Fed. 948.

¹⁷¹ *Chace v. Vasquez*, 11 Wheat. 429, 6 L. Ed. 511; *Perkins v. Fourniquet*, 6 How. 206, 12 L. Ed. 406; *Craighead v. Wilson*, 18 How. 199, 15 L. Ed. 332; *Humiston v. Stainthorp*, 2 Wall. 106, 17 L. Ed. 905; *Beebe v. Russell*, 19 How. 283, 15 L. Ed. 668; *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. Ed. 1122; *Talley v. Curtain*, 7 C. C. A. 1, 58 Fed. 4; *Gunn v. Black*, 8 C. C. A. 542, 60 Fed. 159; *Security Trust Co. v. Sullivan*, 23 C. U. A. 458, 77 Fed. 778; *Pickrell v. Thompson*, 12 App. D. C. 449; *Kane*

tains and fixes all the rights of the parties, but a reference is ordered to a master to do or ascertain something that is necessary to carry the decree into effect, if the functions of the master are to be merely ministerial and not judicial, or if all the consequential directions depending on the result of the proceedings before him are given in the decree itself, then the decree is final and not interlocutory.¹⁷²

v. Whittick, 8 Wend. (N. Y.) 219; Johnson v. Everett, 9 Paige (N. Y.) 636; Chittenden v. Missionary Society of Methodist Episcopal Church, 8 How. Prac. (N. Y.) 327; Cruger v. Douglass, 2 N. Y. 571; Tompkins v. Hyatt, 19 N. Y. 534; Moore v. Lincoln Park & Steamboat Consol. Co., 196 Pa. 519, 46 Atl. 857; Templeman v. Steptoe, 1 Munf. (Va.) 339; Ryan's Adm'r v. McLeod, 32 Grat. (Va.) 367; Mackey v. Bell, 2 Munf. (Va.) 523; Price v. Nesbit, 1 Hill, Eq. (S. C.) 445; McCrady v. Jones, 36 S. C. 136, 15 S. E. 430; Smith v. Thomason, 26 S. C. 607, 12 S. E. 96; Putman v. Lewis, 1 Fla. 455; Griffin v. Orman, 9 Fla. 22; Owens v. Love, 9 Fla. 325; Garrard v. Webb, 4 Port. (Ala.) 73; Garner v. Prewitt, 32 Ala. 13; Broughton v. Wimberly, 65 Ala. 549; Cook's Heirs v. Bay, 4 How. (Miss.) 485; Pryor v. Smith, 4 Bush (Ky.) 379; Berryhill v. McKee, 3 Yerg. (Tenn.) 157; Porter v. Burton, 10 Heisk. (Tenn.) 584; Gaines v. Patton, 8 Ark. 67; Morris v. Morris, 5 Mich. 171; Caswell v. Comstock, 6 Mich. 391; Enos v. Sutherland, 9 Mich. 148; Gates v. Salmon, 28 Cal. 320.

¹⁷² Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94; Mills v. Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Taylor v. Read, 4 Paige (N. Y.) 561; Dickenson v. Codwise, 11 Paige (N. Y.) 189; Coithe v. Crane, 1 Barb. Ch. (N. Y.) 21; Harvey v. Branson, 1 Leigh (Va.) 108; Rawlings' Ex'r v. Rawlings, 75 Va. 76; Fleming v. Bolling, 8 Grat. (Va.) 292; Weatherford v. James, 2 Ala. 170; Bank of Mobile v. Hall, 6 Ala. 141, 41 Am. Dec. 41; McKinley v. Irvine, 13 Ala. 681; Hastie v. Aiken, 67 Ala. 313; Bradford v. Bradley's Adm'rs, 37 Ala. 453; Cochran v. Miller, 74 Ala. 50; Ex parte Elyton Land Co., 104 Ala. 88, 15 South. 939; Garry v. Jenkins, 109 Ala. 471, 20 South. 8; Mattingly v. Elder (Ky.) 44 S. W. 215; McFarland v. Hall's Heirs, 17 Tex. 676; Merle v. Andrews, 4 Tex. 200; Meek v. Mathis, 1 Heisk. (Tenn.) 534; Ex parte Crittenden, 10 Ark. 333; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Guardian Savings Bank v. Reilly, 8 Mo. App. 544; Damouth v. Klock, 28 Mich. 163; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508. The distinction above formulated is well brought out in a decision of Chancellor Walworth, from which we quote as follows: "A decree never can be said to be final when it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved, upon the coming in and confirmation of the report of the master, to whom it is referred to ascertain certain facts which are absolutely necessary to be ascertained before the case is finally disposed of by the court, or which the chancellor thinks proper to have ascertained before he grants any relief what-

To take a single illustration,—the reference of a case to a master, to take an account upon evidence, and for the examination of the parties, and to make or refuse allowances affecting the rights of the parties, and to report his results to the court, is not a final decree. For his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the court's overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment.¹⁷³

§ 45. Directing an Account.

According to the rules just stated, a decree directing an account to be taken is generally interlocutory;¹⁷⁴ that is, unless all the steps

ever to the complainant. But if the decree not only settles the rights of the parties, but gives all the consequential directions which will be necessary to a final disposition of the cause, upon the mere confirmation of the report of the master by a common order in the register's office, it is a final decree and may be enrolled at the expiration of thirty days, although the amount to which the complainant may be entitled under such decree is still to be ascertained upon a reference to a master for that purpose. Thus, in the ordinary case of a bill for the foreclosure of a mortgage, if the decree merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and refers it to a master to compute and ascertain the amount due to him, reserving all further questions and directions until the coming in and confirmation of the master's report, it is an interlocutory decree merely, as the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reserved and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. But if the decree, in addition to the reference to the master to compute the amount due upon the bond and mortgage, proceeds further and gives the usual directions in such cases, that upon the coming in and confirmation of the report of the master, the premises shall be sold, and that the master who makes such sale shall pay the amount so reported due, together with the interest and costs, out of the proceeds of such sale, and directing the mortgagor to pay the deficiency reported due upon such sale, the decree is final, although the mortgagor may have the right to except to the master's report of the amount due. For the questions arising upon the exceptions to the master's report, in such a case, are merely incidental to the carrying of the final decree in the cause into full effect." *Johnson v. Everett*, 9 Paige (N. Y.) 636.

¹⁷³ *Beebe v. Russell*, 19 How. 283, 15 L. Ed. 668.

¹⁷⁴ *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169; *Hollander v. Fechheimer*, 162 U. S. 326, 16 Sup. Ct. 795, 40 L. Ed. 985; *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*,

to be taken after the account is ascertained are specifically prescribed in the decree, with no equities or questions reserved and no further directions needed.¹⁷⁵ Thus, where a judgment appointed a referee who was to take an account of rents and profits and improvements upon land, and ascertain the present value of dower, and upon payment by the plaintiff of a certain sum to be ascertained by the referee in the mode specified in the judgment, the referee was to admeasure her dower, and he was to report the evidence taken by him with his findings thereon to the court, and all other questions were reserved until the coming in of such report and the final hearing thereon, it was held that this was not a final but an interlocutory judgment.¹⁷⁶

§ 46. Decree suspending Rights until further Orders.

Another class of interlocutory decrees comprises those which prohibit a certain act to be done, or hold the rights of the parties in statu quo, until the court shall give further orders or directions.¹⁷⁷ Thus an order that a party is not to pay a sum adjudged against him "until further ordered" is not final.¹⁷⁸ So a decree rendered by the probate court, upon the application of an executor, by which a certain amount is ascertained to be in his hands, a portion of which he is ordered to pay over to those entitled to it, and to retain the balance until the further order of the court, is not a final decree.¹⁷⁹

173 U. S. 582, 19 Sup. Ct. 551, 43 L. Ed. 818; Pittsburg, C. & St. L. R. Co. v. Baltimore & O. R. Co., 10 C. C. A. 20, 61 Fed. 705; Merriman v. Chicago & E. I. R. Co., 12 C. C. A. 275, 64 Fed. 535; McKeown v. Officer, 127 N. Y. 687, 28 N. E. 401; C. & C. Electric Motor Co. v. Lewis, 47 Ill. App. 576; Kanawha Lodge No. 25 v. Swann, 37 W. Va. 176, 16 S. E. 462; Heffner v. Day, 54 Ark. 79, 14 S. W. 1060. Compare Sprague v. Bond, 113 N. C. 551, 18 S. E. 701.

¹⁷⁵ Webber v. Randall, 89 Mich. 531, 50 N. W. 877; Hake v. Coach, 105 Mich. 425, 63 N. W. 306; Decatur Land Co. v. Cook (Ala.) 27 South. 359; Allison v. Drake, 145 Ill. 500, 32 N. E. 537.

¹⁷⁶ Raynor v. Raynor, 94 N. Y. 248. And see Jackson County v. Gullatt, 84 Ala. 243, 3 South. 906; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Johnson v. Everett, 9 Paige (N. Y.) 636.

¹⁷⁷ In re Turner's Estate, 183 Pa. 543, 38 Atl. 1040; O'Meara v. First Nat. Bank (Ky.) 37 S. W. 266. See St. Louis Nat. Bank v. Bloch, 44 La. Ann. 393, 11 South. 466.

¹⁷⁸ Tinley v. Martin, 80 Ky. 463.

¹⁷⁹ Rhodes v. Turner, 21 Ala. 210.

§ 47. Decree dissolving Partnership.

Where a bill in equity is brought for an accounting between partners and for a termination of the partnership, the first decree, dissolving the partnership and directing accounts to be taken, is generally only interlocutory.¹⁸⁰ But a decree dissolving a partnership, which directs an accounting and a sale of the firm's assets, and specifically states the manner of their distribution, is final.¹⁸¹ Where, upon a bill for the settlement of partnership accounts, the decree leaves unsettled the equities as to two items of account, as to which a reference is ordered, it cannot be considered a final decree.¹⁸²

§ 48. Foreclosure of Mortgage.

Upon a bill for the foreclosure of a mortgage, if the decree ascertains the validity of the mortgage and the amount of the debt, orders a sale of the mortgaged premises, describing them, for satisfaction of such debt, directs that the sum due on the mortgage with interest and costs be paid over to the mortgagee out of the proceeds of the sale, and adjudges that the defendant make good any deficiency which may be found to exist after the sale, then the decree is final and complete; for it leaves nothing to be adjudicated or reviewed by the court.¹⁸³ But if the decree does not ascertain the amount due; or if it orders a sale but does not give any direction as to the disposition of the proceeds; or if it reserves the question of the distribution of the fund, in order to adjust conflicting claims or liens; or if, without ordering a sale, it directs the cause to stand continued for

¹⁸⁰ Gray v. Palmer, 9 Cal. 616; Kingsbury v. Kingsbury, 20 Mich. 212; Rhodes v. Williams, 12 Nev. 20; Huntington v. Moore, 1 N. M. 471; Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20.

¹⁸¹ Clark v. Dunnam, 46 Cal. 204; Evans v. Dunn, 26 Ohio St. 439; Arnold v. Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

¹⁸² Garner v. Prewitt, 32 Ala. 13.

¹⁸³ Myers v. Manny, 63 Ill. 211; Morris v. Morange, 38 N. Y. 172; Baker v. Lehman, Wright (Ohio) 522; Ray v. Law, 3 Cranch, 179, 2 L. Ed. 404; Whiting v. Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Bronson v. La Crosse & M. R. R. Co., 2 Black, 524, 17 L. Ed. 347; Johnson v. Everett, 9 Paige (N. Y.) 636; May v. Ball (Ky.) 56 S. W. 7. Compare Allen v. Reches, 2 Hen. & M. (Va.) 505; Malone v. Marriott, 64 Ala. 486.

further order and decree upon the coming in of a master's report, then, and in any such case, it is merely interlocutory.¹⁸⁴ It is to be observed that the judgment for the deficiency arising on a sale of the property, and directing that execution may issue therefor, is not final, so as to be appealable, until there has been a judicial determination of the amount of the deficiency after the sale.¹⁸⁵ But where a petition of intervention is filed, claiming priority over the mortgage or other rights in the property, a decree which settles the rights of the intervener, and directs provision to be made for their satisfaction in the sale or in the distribution of the proceeds, is final and appealable, although the main suit has not reached a final decree.¹⁸⁶

§ 49. *Sending Issue out of Chancery.*

An order in equity sending an issue of fact to be tried in the law court is of course interlocutory. In itself it determines nothing. It is merely preparatory to a final decree.¹⁸⁷ And the same is true of a judgment rendered on a feigned issue directed out of chancery.¹⁸⁸ And on similar principles, an order of a probate court adjudging that parties have the right to have issues to determine the validity of a will transmitted to a law court for trial by jury, and framing and transmitting such issues, is not a final order.¹⁸⁹

¹⁸⁴ *Burlington, C. R. & N. R. Co. v. Simmons*, 123 U. S. 52, 8 Sup. Ct. 58, 31 L. Ed. 73; *Johnson v. Everett*, 9 Paige (N. Y.) 636; *Williams v. Walker*, 107 N. C. 334, 12 S. E. 43; *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 99 Cal. 407, 33 Pac. 1132. An order denying an application for the appointment of a special master to sell mortgaged premises is not appealable before rendition of a final decree of foreclosure. *American Inv. Co. v. Nye*, 40 Neb. 720, 59 N. W. 355, 42 Am. St. Rep. 692. See *Riddle v. Hudgins*, 7 C. C. A. 335, 58 Fed. 490.

¹⁸⁵ *Eggleston v. Morrison*, 185 Ill. 577, 57 N. E. 775; *Parmelee v. Schroeder*, 59 Neb. 553, 81 N. W. 506.

¹⁸⁶ *Central Trust Co. v. Marietta & N. G. R. Co.*, 1 C. C. A. 116, 48 Fed. 850; *Central Trust Co. v. Madden*, 17 C. C. A. 236, 70 Fed. 451; *Moulton v. Cornish*, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

¹⁸⁷ *Dabbs v. Dabbs*, 27 Ala. 646; *Eames v. Eames*, 16 Pick. (Mass.) 141.

¹⁸⁸ *Woodside v. Woodside*, 21 Ill. 207.

¹⁸⁹ *Dugan v. Northcutt*, 7 App. D. C. 351.

CHAPTER III.**JUDGMENTS BY CONFESSION.**

- § 50. Confession of Judgment in Pending Suit.
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§ 50. Confession of Judgment in Pending Suit.

All judgments rendered upon the confession of the defendant may be divided into two classes: 1. Those entered in an action regularly commenced by the issuance and service of process; 2. Those entered upon the confession of the defendant, or his warrant of attorney, without the institution of an action. The former class of judgments are well known to the common law and must be tested and

sustained by rules and principles existing independently of statutes, while judgments of the latter class derive all their efficacy from positive law and must conform, in order to be valid, to all the requirements and formalities set up by the legislature. It is frequently a matter of importance to determine whether a particular judgment belongs to one class or the other, because, if not covered by the statute, it is not impeachable for lack of an affidavit, statement of indebtedness, or other support required by the act. This distinction is recognized by the authorities. Thus a statute which provides that any person may, without process, appear in person or by attorney and confess judgment for any bona fide debt, but in such case a petition shall be filed, and other acts be done, does not apply to cases where the party is regularly cited, but only to cases of voluntary appearance without process.¹ So where a defendant accepts service of process and afterwards confesses judgment, the plaintiff's affidavit of the justness of the claim, required in the case of confession without action, is held to be unnecessary.² Now judgments entered for the plaintiff upon the defendant's admission of the facts and law, as the same are known to the common law and exist independently of statutes, are of two varieties; first, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case the defendant, after service, instead of entering a plea, acknowledges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial.³ In order to sustain a judgment of either of these sorts, it is essential that process, regularly issued, should have been served upon the defendant (though he may accept service with the same effect as if the writ had been served as it usually is⁴); and an agreement in writing made out of court, authorizing the clerk to

¹ *Schroeder v. Fromme*, 31 Tex. 602. And see *Crouse v. Derbyshire*, 10 Mich. 479, 82 Am. Dec. 51; *Goodwill v. Elkins*, 51 La. Ann. 521, 25 South. 317.

² *Gerald v. Burthee*, 29 Tex. 202.

³ *Bouv. Law Dict. voc. Judgment*. As to judgments by consent, see *Edwards v. Turner* (Tenn.) 47 S. W. 144; *Goodrich v. Alfred*, 72 Conn. 257, 43 Atl. 1041.

⁴ *Gerald v. Burthee*, 29 Tex. 202; *Hart v. Sarvis*, 3 Ohio N. P. 316.

enter up such a judgment, will not sustain it, where there has been no appearance by the defendant.⁵ A judgment by *cognovit*, after process has been served, may be entered in vacation, without a judge's or commissioner's order, and without affidavits.⁶ The other species of judgment by confession, *relicta verificatione*, is also not unknown to modern practice. Thus, where a judgment recited that "the defendants, by leave of court, withdraw their pleas and say that they cannot deny the plaintiff's cause of action against them, for debt and interest in plaintiff's petition claimed," it was held that this was in effect a confession of judgment, and a jury was not required to ascertain the amount.⁷ It is also said that where a party confesses judgment against himself under a mistake of fact as to what the pleadings contain, he may, upon discovering his error, retract the confession, provided it has not been recorded.⁸

§ 51. Confession of Judgment without Action.

One method of confessing a judgment without action or process is by a warrant of attorney. This is an authority given by the debtor to a named attorney, or to any attorney of a given court or in a given jurisdiction, empowering him to appear for the defendant and con-

⁵ *Craig v. Glass*, Smith (Ind.) 27. See *O'Neal v. Clymer*, 21 Tex. Civ. App. 386, 52 S. W. 619; *Hudson v. McMahon* (Ky.) 50 S. W. 259. Compare *Shadrack's Adm'r v. Woolfolk*, 32 Grat. (Va.) 707.

⁶ *Stewart v. Walters*, 38 N. J. Law, 274. A judgment by agreement may be entered in open court by the judge on consent of the attorney, orally expressed, or may be entered on the record without express sanction of the court from the written agreement between counsel, duly filed, in which latter case the court's assent is presumed. *Belliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577. Where a judgment is confessed in open court, it must be presumed that the authority to confess was judicially passed upon by the court. *Chicago Twp & T. Co. v. Chicago Nat. Bank*, 74 Ill. App. 439. As to presumption of authority on the part of defendant's attorney to confess judgment, see *Harper v. Cunningham*, 5 App. D. C. 203.

⁷ *Burton v. Lawrence*, 4 Tex. 373. And see *Hicks v. Ayer*, 5 Ga. 298. The withdrawal of a plea in abatement on the day set for trial, and the filing of an answer admitting plaintiff's claim, and consenting to judgment, does not render the judgment entered one by confession. *Adler v. Anderson*, 42 Mo. App. 189.

⁸ *Smith v. Simms*, 9 Ga. 418. But see *New England Mortgage Security Co. v. Tarver*, 9 C. C. A. 190, 60 Fed. 660; *Little v. Dyer*, 35 Ill. App. 85.

ness judgment for a designated amount. This differs from a cognovit in that an action must be commenced before a cognovit can be given, but not before the execution of a warrant of attorney.⁹ In so far as this procedure may be regulated by statute in any jurisdiction, it must of course comply strictly with the requirements of the law. But in most of the states there are statutes which authorize a judgment to be entered upon the confession of the defendant, without action, upon the filing of a verified statement showing the facts out of which the indebtedness arose, and an affidavit that the debt is just and actual, and sometimes upon the observance of certain additional formalities. This is by far the most usual method of confessing judgments, and therefore will principally engage our attention in this chapter.

§ 52. Authorized by Statutes.

Inasmuch as the proceeding last adverted to depends entirely upon statute for its validity, it is evident that a strict construction must be applied to the statute and that its provisions must be strictly complied with in using the authority it grants.¹⁰ But on the other hand, the judgment must stand or fall by the statute alone, and formalities not therein required are not essential to its validity. For instance, it is not necessary to sustain such a judgment that a declaration should have been filed; the statement required by the statute is sufficient.¹¹ Again, neither a citation of the defendant nor a previous judgment of default is needed as a preliminary to the entry of judgment on his confession.¹² But in some states it is required that an office confession of judgment be confirmed by the court before it becomes a judgment; and under this rule its incidents as a judgment

⁹ Bouv. Law Dict., voc. "Judgment."

¹⁰ *Edgar v. Greer*, 7 Iowa, 136; *Chapin v. Thompson*, 20 Cal. 686; *McCrairy v. Ware*, 6 Kan. App. 155, 51 Pac. 293; *Burr v. Mathers*, 51 Mo. App. 470; *Harper v. Cunningham*, 5 App. D. C. 203. In Virginia, the statute providing for judgments by confession being merely declaratory of the common law, only substantial compliance therewith is required. *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450.

¹¹ *Johnston v. Glasgow*, 5 Ark. 311; *Choat v. Bennett*, 11 Ark. 313; *Gayle v. Foster*, Minor (Ala.) 125; *Matthews' Lessee v. Thompson*, 3 Ohio, 272.

¹² *Marbury v. Pace*, 29 La. Ann. 557. A power of attorney given with a note, authorizing judgment thereon by confession without process, is valid. *Whitton v. Whitton*, 64 Ill. App. 53.

do not attach until the date of such confirmation.¹³ So, again, a provision that the confession must be signed by the party and by witnesses does not admit of evasion.¹⁴ And the same is true of a requirement that the debtor shall appear in person and confess the judgment.¹⁵ Since a judgment upon confession is not in the nature of an adversary proceeding, it is theoretically immaterial whether it is entered during a session of the court or in vacation. And it may be stated as the rule, unless modified by the particular statute, that a judgment of this character may as well be entered in vacation as in term-time.¹⁶ So a warrant of attorney attached to a note authorizing confession of judgment thereon at any time after its date, will support a judgment entered in vacation before the note was due.¹⁷ And a judgment confessed in the clerk's office on the morning of the first day of the term of court, before the court was opened, is a valid judgment.¹⁸

§ 53. Court must have Jurisdiction.

Although a judgment by confession is to a certain extent founded on the agreement of the parties, instead of a direct adjudication by the court, it is none the less, on that account, a judicial act. And since their consent cannot create a jurisdiction in excess or contravention of that conferred by law, it is equally essential to the validity of a judgment of this character as to any other that it be entered in a court having jurisdiction of the subject-matter. As it is to have all

¹³ *Bass v. Estill*, 50 Miss. 300. Miller's Code Iowa, §§ 176, 177, providing that judgments by confession shall be signed by the judge, is merely directory, and a failure to sign does not vitiate the judgment. *Dullard v. Phelan*, 83 Iowa, 471, 50 N. W. 204.

¹⁴ *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 145.

¹⁵ *Rosebrough v. Ansley*, 35 Ohio St. 107. See *Reed v. Hamet*, 4 Watts (Pa.) 441.

¹⁶ *Pickett v. Thruston*, 7 Ark. 397; *Kellogg v. Keith*, 4 Ill. App. 386. Compare *Pond v. Simons*, 17 Ind. App. 84, 45 N. E. 48. A power of attorney authorizing confession of judgment "as of any term" does not authorize the entry of judgment in vacation. *Graves v. Whitney*, 49 Ill. App. 435; *Whitney v. Bohlen*, 157 Ill. 571, 42 N. E. 162.

¹⁷ *Towle v. Gonter*, 5 Ill. App. 409. But it is said that a judgment cannot be confessed on the day a warrant of attorney and note bear date, although the note is payable on demand. *Waterman v. Jones*, 28 Ill. 54.

¹⁸ *Brown v. Hume*, 16 Grat. (Va.) 456.

the incidents and consequences of any other judgment, and to have the sanction of the law and the authority of the court behind it, it will be invalid unless the court where it is entered might lawfully have rendered the same judgment in a contested action.¹⁹ And where the authority of an inferior court, as that of a justice of the peace, to enter judgments upon confession, is limited by law or hedged round with prescribed formalities, it must clearly appear upon the face of his record that the particular confession came within the limitations and that the requirements of the statute were distinctly met and complied with.²⁰ Yet after a confession of judgment without exception to the jurisdiction of the particular court (the subject-matter being within its general competence), the judgment rendered is valid.²¹ And a judgment entered in the district court, by virtue of a warrant of attorney authorizing the entry of such judgment in the court of common pleas, those courts having concurrent jurisdiction, cannot be set aside as erroneous at the instance of a subsequent judgment-creditor.²² Such authority, however, will not run into another state. Thus a warrant of attorney to confess a judgment, executed in one state between parties residing there and by its terms to be rendered there, will not support a judgment entered in another state.²³

¹⁹ *Lanning v. Carpenter*, 23 Barb. (N. Y.) 402. So where it is required by law that the execution of a power of attorney to confess judgment be proved before the judgment is confessed, such proof must affirmatively appear of record; otherwise the court would have no jurisdiction of the person of the maker, and the judgment would be invalid. *Rapley v. Price*, 9 Ark. 428. In some states it is held that a judgment by confession can be entered only in a court having jurisdiction of the county or district where the defendant resides, and where alone a personal judgment might be recovered against him in a contested action. *Ex parte Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9; *McClure v. Bowles*, 5 Ohio N. P. 327. But elsewhere the doctrine prevails that a confessed judgment is valid if entered in a court having jurisdiction of the subject-matter, and within the state where the note and warrant were made, without regard to the defendant's place of residence, and even though he may have removed from the state. *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282.

²⁰ *Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688; *Tenny v. Filer*, 8 Wend. (N. Y.) 569; *Camp v. Wood*, 10 Watts (Pa.) 118.

²¹ *Kelly v. Lyons*, 40 La. Ann. 498, 4 South. 480.

²² *Hauer's Appeal*, 5 Watts & S. (Pa.) 473.

²³ *Manufacturers' & Mechanics' Bank v. Boyd*, 3 Denio (N. Y.) 257. But a judgment upon the confession of the defendant which is valid in the state

Authority to confess judgment under a power of attorney is not exhausted by a confession of a judgment which is subsequently reversed, but another may be confessed under the same power. "The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act."²⁴ A more difficult question arises in the case where a judgment by confession is entered upon a bond and warrant of attorney in one county, and afterwards, such judgment remaining in force and unsatisfied, a second judgment upon the same bond and warrant is entered in another county. Here it would seem that the authority conferred by the warrant was fully satisfied by the first confession and nothing remained to sustain the second. But since this would not appear upon the face of the proceedings, the second judgment would not be absolutely void, but at most irregular. It would be vacated or set aside upon application to the court in which it was entered, but the want of authority to enter the second judgment could not be taken advantage of on a writ of error. In the meantime, if a sheriff's sale was had under the second judgment, the purchaser would no doubt take a good title; but in that case the attorney who entered the judgment, or the obligee of the bond, if it was entered by him, would be answerable.²⁵

§ 54. Who may confess Judgment.

As a general rule, any person may give a confession of judgment against whom the same judgment might lawfully have been pronounced by the court as the result of a suit regularly instituted and

where it is entered is equally valid in every other state. *Coleman v. Waters*, 13 W. Va. 278. And a warrant of attorney may be so drawn as to authorize a confession of judgment in a foreign state. *Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304. Thus, it is held that if the authority is to confess judgment "in any court of record," it may be executed in any state in the Union. *Pirle v. Stern*, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103; *First Nat. Bank v. McKinney*, 16 Ohio Cir. Ct. R. 80. See *First Nat. Bank v. Garland*, 109 Mich. 515, 67 N. W. 559, 33 L. R. A. 83, 63 Am. St. Rep. 597. Compare *Davis v. Packer*, 8 Ohio Cir. Ct. R. 107.

²⁴ *Huner v. Doolittle*, 3 G. Greene (Iowa) 76, 54 Am. Dec. 489.

²⁵ *Martin v. Rex*, 6 Serg. & R. (Pa.) 296; *Neff v. Barr*, 14 Serg. & R. (Pa.) 166; and see also *Lively v. Pennock*, 2 Browne (Pa.) 321.

contested. The only difficulty occurs in the case of persons who are under disabilities; and here it must be remarked that if the disability of infancy or coverture is merely a personal privilege which may be waived, then the confession of a judgment is as explicit a waiver as could well be imagined, but if, on the other hand, it is regarded as an absolute incapacity to contract debts, or certain kinds of debts, then a confession of judgment is merely a futile attempt to give validity to that which by law can have none. It has been said that a warrant of attorney to confess judgment executed by a minor is under all circumstances entirely void.²⁶ But this statement is probably too strong. The marked tendency of the authorities, as we shall see hereafter,²⁷ is to regard a judgment against an infant duly before the court as valid and effectual for all purposes, unless indeed time is given to him to show cause against it after his majority. And if his defense of infancy is taken away by his failure duly to plead it when sued, it is certain that it is equally waived by his voluntary confession of judgment. The case of confessions by married women we reserve for the succeeding section.

In regard to parties plaintiff in confessions of judgment the parallel rule applies.²⁸ In cases where the debtor is an officer of the court in which the confession is entered, no difficulty has been experienced in sustaining the judgment. Thus, under a statute providing that judgments may be confessed in the clerk's office, and when recorded by him shall be valid, the clerk, acting as a ministerial officer, may enter a judgment by confession against himself.²⁹ And it is even held that a judge, in a suit in his own court to which he is a party,

²⁶ *Knox v. Flack*, 22 Pa. 337. Compare *Ziegler v. Evans*, 8 Kulp (Pa.) 180.

²⁷ See *infra*, §§ 193, 196.

²⁸ A warrant of attorney in a note to confess judgment in favor of the payee is available to his administrator. *Drake v. Simpson* (Ohio) 30 Wkly. Law Bul. 236. If the warrant does not specify the person in whose favor judgment is to be entered, it may be in favor of the legal holder of the note at the time of entry. *Shepherd v. Wood*, 73 Ill. App. 486. As to confessions in favor of partners, see *Mahaffey v. Rogers*, 10 Ohio Cir. Ct. R. 24. A person may confess judgment for money due the state as well as to an individual. *State v. Love*, 23 N. C. 264.

²⁹ *Smith v. Mayo*, 83 Va. 910, 5 S. E. 276.

may confess a judgment against himself.³⁰ Of course any person who may himself give a valid confession of judgment may delegate his power to that intent to another. Such authorization of a third person is commonly seen in warrants of attorney, but may also be otherwise conferred. The authority of an attorney appearing in open court, it is said, will be presumed to be regular until the contrary is shown, but in vacation his authority to confess judgment must affirmatively appear and no presumption will be indulged in favor of it.³¹ On the same general principle, an agent, within the scope of his authority, may confess judgment against his principal.³² If the agent transcends his authority and confesses judgment for a sum greater than is actually due, it may be a question whether the principal is bound at all. But it has been held that in such a case, the judgment is valid for the real debt and void only as to the excess.³³ It is also held that a trustee cannot bind the trust estate by a confession of judgment.³⁴

§ 55. Confession by Married Woman.

In regard to the power of a married woman to bind herself by a confession of judgment, we find the greatest difference of opinion in the authorities. In fact it is impossible to formulate a general rule; the question must ultimately be referred to the statutes in the several states regulating her status and rights. In proportion as the feme covert is emancipated from the rigors of the common law, her power to confess judgment increases in respect to the variety of obligations upon which it may be exercised. The only safe generalization seems

³⁰ *Thornton v. Lane*, 11 Ga. 459.

³¹ *Martin v. Judd*, 60 Ill. 78. See *Jarrett v. Andrews*, 19 Ind. 403.

³² *Parker v. Poole*, 12 Tex. 86. A municipal officer, liable to suit on a contract made by him on behalf of the public, may confess judgment for the amount due. *Gere v. Cayuga County Sup'rs*, 7 How. Prac. 257; *Maneval v. Jackson Tp.*, 9 Pa. Co. Ct. R. 28. A judgment against a vessel as a substantive party and her owners, by confession of the master of the boat, is erroneous. *Wassell v. English*, 17 Ark. 480.

³³ *Davenport v. Wright*, 51 Pa. 292.

³⁴ *Mallory v. Clark*, 20 How. Prac. 418. As to confessions by executors, see *In re Claghorn's Estate*, 181 Pa. 600, 37 Atl. 918, 59 Am. St. Rep. 680. By assignees for benefit of creditors, see *Packer v. Roberts*, 140 Ill. 9, 671, 29 N. E. 668.

to be, that she cannot confess a judgment for any debt for which she could not be made liable by judgment rendered in invitum. In Pennsylvania, the bond of a married woman, though she join in it with her husband, is held to be absolutely void, and a judgment entered on such bond by virtue of a warrant of attorney annexed thereto, executed by the wife together with her husband, is also void as respects the wife and her estate.³⁵ According to the late authorities, there is but one exception to this rule, viz.: In the case where the note upon which the judgment is confessed is given for the purchase-money of land conveyed to her, and forms part of the transaction; the judgment will then be a valid lien against the land, though not a charge against the woman personally.³⁶ On the other hand, where a statute gives to married women the right to sue and be sued in the same manner as if sole, a married woman may confess a judgment to secure a debt contracted by her, and for her use and benefit, in carrying on her separate business.³⁷ In other jurisdictions, the stat-

³⁵ *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Graham v. Long*, 65 Pa. 383; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *Kelper v. Helfricker*, 42 Pa. 325; *Keen v. Coleman*, 39 Pa. 290, 80 Am. Dec. 524; *Brunner's Appeal*, 47 Pa. 67; *Finley's Appeal*, 67 Pa. 453; *Swayne v. Lyon*, 67 Pa. 436; *Steinman v. Ewing*, 43 Pa. 63; *Glyde v. Keister*, 32 Pa. 85; *Shallcross v. Smith*, 81 Pa. 132. But now in Pennsylvania by the Act of June 3, 1887, § 2 (P. L. p. 333), "a married woman shall be capable of entering into and rendering herself liable upon any contract relating to any trade or business in which she may engage, or for necessaries, and for the use, enjoyment, and improvement of her separate estate, and for suing and being sued, either upon such contracts or for torts done to or committed by her, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action, suit, or legal proceeding of any kind brought by or against her in her individual right." This statute is construed, with reference to confessions of judgment, in *Real-Estate Inv. Co. v. Roop*, 132 Pa. 496, 19 Atl. 278, 7 L. R. A. 211. And see *Harris v. Reinhard*, 165 Pa. 36, 30 Atl. 510.

³⁶ *Christner v. Hochstetler*, 109 Pa. 27; *Quinn's Appeal*, 86 Pa. 447; *Brunner's Appeal*, 47 Pa. 67. See also, *Thornhill v. State Nat. Bank*, 34 La. Ann. 1171.

³⁷ *First Nat. Bank v. Garlinghouse*, 53 Barb. (N. Y.) 615. See Code Civ. Proc. N. Y. § 1273. Compare *Watkins v. Abrahams*, 24 N. Y. 72. A judgment confessed by a married woman is not void but voidable merely, and her husband, if he assented to the sale of property under an execution thereon, is estopped from afterwards claiming it adversely. *Roraback v. Stebins*, 4 Abb. Dec. 100, 33 How. Prac. 278.

ute, while enabling a married woman to enter into certain classes of engagements, forbids her to make agreements or contract debts of other kinds. Under this system, "if the contract of the married woman be such as a married woman is still incapacitated from entering into, her warrant of attorney to enter judgment upon it is a nullity, because the obligation to which the warrant of attorney is annexed is invalid, and judgment entered in pursuance of it will be vacated."³⁸ But if the contract be one that the married woman is enabled to make, and on which she may be sued at law, I think a different result must be reached. With respect to such contracts, any action, suit, or proceeding which is adopted for the enforcement of the obligation is within the reason and spirit of the statutes which confer the capacity to contract and impose liability to actions at law thereon. The obligation being valid, the warrant of attorney is simply a part of the procedure to enforce it—as much so as a suit by summons or a cognovit."³⁹ A confession of judgment by a married woman, which condemns her to pay her husband's debt, is void. Such a confession is but the complement or consummation of a contract which the law prohibits, and which was consequently null.⁴⁰

It has been held that although a judgment entered upon the confession of a married woman may be invalid, yet it is too late to raise that objection to the judgment after the same has been duly revived by proper proceedings. For the defendant had an opportunity to show cause against the judgment at the time of its revival, and its validity was impliedly adjudicated in that proceeding; for there can be no judgment of revival until it is determined that there is a valid judgment.⁴¹ This proposition, however, has been denied.⁴² And indeed, if the particular judgment was one which the woman had ab-

³⁸ *Swing v. Woodruff*, 41 N. J. Law, 469.

³⁹ *Haywood v. Shreve*, 44 N. J. Law, 94. See further *Stevens v. Dubarry, Minor* (Ala.) 379; *Baines v. Burbridge*, 15 La. Ann. 628; *Dancy v. Martin*, 23 La. Ann. 323; *Henchman v. Roberts*, 2 Har. (Del.) 74; *Mendenhall's Ex'rs v. Springer*, 3 Har. (Del.) 87; *Patton v. Stewart*, 19 Ind. 233; *Harris v. Jenkins*, 72 N. C. 183; *Wallace v. Rippon*, 2 Bay (S. C.) 112.

⁴⁰ *Baines v. Burbridge*, 15 La. Ann. 628; *Edwards v. Edwards*, 29 La. Ann. 507.

⁴¹ *Crenshaw v. Julian*, 26 S. C. 283, 2 S. E. 133, 4 Am. St. Rep. 719.

⁴² *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509.

solutely no power to confess, so that it must be held to be a mere nullity, it is difficult to see how any vitality could be imparted to it by the mere fact of revival. No action will lie upon a void judgment. And a judgment of revival, passed upon a nugatory cause of action, is, equally with the judgment revived, merely void.

Another question not without difficulty, which arises in reference to this subject, is in relation to a judgment entered against both husband and wife upon a warrant of attorney executed by them jointly. It has been held that such a judgment, though void as to the wife, will stand valid as against the husband.⁴³ But there are numerous cases holding that a judgment is an entirety, and if void as to one defendant is void as to all;⁴⁴ and these decisions would seem to apply with equal weight whatever may be the ground of the invalidity. It seems certain, however, that a married woman may confess a judgment for a valid ante-nuptial debt, and such judgment will be conclusive and enforceable against her as if rendered by default or upon a verdict.⁴⁵ And a warrant of attorney to confess judgment, given by a feme sole, is not revoked by her subsequent marriage, and after such marriage judgment may be entered up on it against the husband and wife jointly, leave being obtained on motion.⁴⁶

§ 56. Married Woman as Creditor.

A married woman may take a confession of judgment, as sole plaintiff, in any case where she could sue for the debt alone, or jointly with her husband in a case where they have a joint right of action. Thus, where a bond and warrant of attorney was given to a woman *dum sola*, and she afterwards married, the court, upon affidavit of the fact, allowed judgment to be entered in favor of husband and wife together.⁴⁷ The indebtedness of a husband to his wife, by note or for money or property, is a sufficient consideration to support a

⁴³ *Shallcross v. Smith*, 81 Pa. 132; *Wallace v. Rippon*, 2 Bay (S. C.) 112.

⁴⁴ See *infra*, § 211. And see, as to judgments by confession, specifically, *Mendenhall's Ex'rs v. Springer*, 3 Har. (Del.) 87.

⁴⁵ *Travis v. Willis*, 55 Miss. 557.

⁴⁶ *Baker v. Lukens*, 35 Pa. 146; *Eneu v. Clark*, 2 Pa. 234, 44 Am. Dec. 191; *Bering v. Burnet*, 2 Clark (Pa.) 399.

⁴⁷ *Sheble v. Cummins*, 1 Browne (Pa.) 253.

judgment confessed by him in the wife's favor as against his other creditors, when not impeached for fraud.⁴⁸ And such a judgment, admitted to be honest, will not be treated as void in law or equity because of the legal unity of the parties; and the relation not appearing in the record, the court will not, at the instance of creditors, inquire into the fact of coverture, when no fraud is alleged.⁴⁹

§ 57. Confession by Partner.

A member of a firm has no authority, by virtue of his mere relation to the partnership or his general power to act as its agent, to confess a judgment against the firm; and if judgment be entered on such a confession, it will be void as against his co-partners, though binding as a personal charge upon himself.⁵⁰ And a confession of

⁴⁸ *Thomas v. Mueller*, 106 Ill. 36. Per contra, *Countz v. Markling*, 30 Ark. 17.

⁴⁹ *Williams' Appeal*, 47 Pa. 307.

⁵⁰ *Bitzer v. Shunk*, 1 Watts & S. (Pa.) 340, 37 Am. Dec. 469; *York Bank's Appeal*, 36 Pa. 458; *Myers v. Sprenkle*, 13 York Leg. Rec. 181; *Squiler v. Squier*, 1 Lack. Leg. N. 193; *Williams v. Jones*, 7 Kulp (Pa.) 386; *Lehman Mach. Co. v. Rood*, 8 Kulp (Pa.) 264; *Crane v. French*, 1 Wend. (N. Y.) 311; *Stoutenburgh v. Vandenburgh*, 7 How. Prac. (N. Y.) 229; *Harper v. Cunningham*, 8 App. D. C. 430; *Mills v. Dickson*, 6 Rich. Law (S. C.) 487; *Elliott v. Holbrook*, 33 Ala. 659; *Hopper v. Lucas*, 86 Ind. 43; *Davenport Mills Co. v. Chambers*, 146 Ind. 156, 44 N. E. 1109; *Chicago Trust & Sav. Bank v. Kinnare*, 67 Ill. App. 186; *Christy v. Sherman*, 10 Iowa, 535; *Risser v. Martin*, 86 Iowa, 392, 53 N. W. 270; *Fairbanks v. Kraft*, 43 Mo. App. 121; *Burr v. Mathers*, 51 Mo. App. 470; *Soper v. Fry*, 37 Mich. 236; *Richardson v. Fuller*, 2 Or. 179; *Buchanan v. Scandia Plow Co.*, 6 Colo. App. 34, 39 Pac. 899. In some states, however, the late decisions show a tendency to relax this rule. Thus, in Pennsylvania, while a judgment confessed against a firm by one partner without explicit authority from his copartners will not bind the other members of the firm personally, yet an execution issued under it may be levied on property of the partnership. *Adams v. James L. Leeds Co.*, 195 Pa. 70, 45 Atl. 666; *McIlvain v. James L. Leeds Co.*, 189 Pa. 638, 42 Atl. 307; *Budd v. Shock*, 11 Pa. Co. Ct. R. 480. And the debt for which a judgment is confessed by one of the partners in the name of the firm will be presumed to be that of the firm. *Evans v. Watts*, 192 Pa. 112, 43 Atl. 464. In Illinois and Ohio, a judgment against a firm confessed by one partner without authority can be impeached or questioned only by the other partners, not by creditors of the firm, unless, perhaps, where the judgment is fraudulent. *McCormick Harvesting Mach. Co. v. Coe*, 53 Ill. App. 488; *Browne v. Cassem*, 74 Ill. App. 305; *Berg v. Commercial Nat. Bank*, 84 Ill. App. 614; *George W. McAlpin Co. v. Finsterwald*,

judgment under seal, in the name of a partnership and of a member of the firm, is binding only upon such member.⁵¹ So a confession of judgment by a former partner against the firm, while good as against the partner confessing it, will not bind property assigned by the firm to a remaining partner under terms of agreement to pay firm debts.⁵²

§ 58. Joint Defendants.

In a pending action against two defendants, one of them cannot in the absence of the other, confess judgment against both; and a judgment rendered against both on the confession of one only, without evidence, will be set aside.⁵³ And where one of several joint defendants confesses judgment so far as concerns himself, such judgment is only interlocutory until the final decision of the cause as to the rest; and the confessing defendant must ultimately receive the same judgment as his co-defendants.⁵⁴ In the case of a confession of judgment without action, a question has sometimes arisen as to the effect of an authority for such judgment—whether a warrant of attorney or a statement of indebtedness—which is signed by only a part of the defendants against whom it directs the judgment to be entered. As against those not signing the authority, the judgment is certainly of no force whatever.⁵⁵ But whether it may stand as a

57 Ohio St. 524, 49 N. E. 784. When a warrant of attorney expressly authorizes any attorney of any court of record to appear for the maker of a note and confess judgment, the fact that one member of a firm signs the declaration, and the other the cognovit, does not render the judgment void. *Blanck v. Medley*, 63 Ill. App. 211.

⁵¹ *Appeal of Perth Amboy Terra-Cotta Co.*, 124 Pa. 367, 17 Atl. 4.

⁵² *Mair v. Beck* (Pa.) 2 Atl. 218; *McCleery v. Thompson*, 130 Pa. 443, 18 Atl. 735.

⁵³ *Wiggins v. Kllenhans*, 9 N. J. Law, 249; *Ballinger v. Sherron*, 14 N. J. Law, 144; *Hutchinson v. Brown*, 19 D. C. 136; *Rees v. Richmond*, 62 Law T. (N. S.) 427. Compare *Virginia & T. Coal & Iron Co. v. Fields*, 94 Va. 102, 26 S. E. 426.

⁵⁴ *Taylor v. Beck*, 3 Rand. (Va.) 316; *Strause v. Braunreuter*, 21 Pa. Co. Ct. R. 228. In New York, the Code of Civil Procedure (section 1278), provides that a judgment by confession against one joint debtor shall not bar an action against all the joint debtors upon the same demand. See *Harbeck v. Pupin*, 123 N. Y. 115, 25 N. E. 311.

⁵⁵ A joint judgment cannot be entered on a several warrant of attorney. *Weintraute v. Solomon*, 2 Marv. (Del.) 371, 43 Atl. 257; *Liberty Grotto v.*

valid obligation against those who did sign, is not so clear. In one state it is held, on the principle that a judgment is an entirety, that if the warrant authorizes the entry of judgment against a certain number, no judgment can be entered against a less number, and it is void as to all.⁵⁶ But other cases hold, and we think with better reason, that the judgment entered will bind those who subscribed the warrant, though nugatory as to the others.⁵⁷

§ 59. By Officers of a Corporation.

A private corporation has a right to confess judgment, as an incident to its power to sue and be sued.⁵⁸ But the trend of the modern decisions is to the effect that no officer of such a corporation—whether it be the president, secretary, treasurer, or manager—has authority, merely by virtue of his office, to confess a judgment against the company or sign a warrant of attorney for that purpose. To do this, he must receive authority from the board of directors, or, according to some of the cases, from a majority of the stockholders at a regular meeting.⁵⁹ But, in special circumstances, such authority may be inferred from the knowledge and acquiescence of

Meade. 11 Pa. Co. Ct. R. 340. And under a joint warrant of attorney annexed to a joint note, a judgment cannot be entered against one of the makers alone. *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739. See *Frank v. Thomas*, 35 Ill. App. 547.

⁵⁶ *Chapin v. Thompson*, 20 Cal. 681.

⁵⁷ *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441; *Knox v. Winsted Sav. Bank*, 57 Ill. 330; *York Bank's Appeal*, 36 Pa. 458. The statute in Pennsylvania, requiring the prothonotary to enter a judgment by confession on a warrant of attorney "against the person or persons who executed the same," does not restrict him to the names appearing in full on the face of the warrant, but he may inquire who are the legal makers of the instrument liable thereon, though they did not put their own hands to it, and their names do not appear on its face. *Miller v. Royal Flint Glass Works*, 172 Pa. 70, 33 Atl. 350.

⁵⁸ *Shute v. Keyser* (Ariz.) 20 Pac. 386; *Solomon v. C. M. Schneider & Co.*, 36 Neb. 680, 77 N. W. 65.

⁵⁹ *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237; *Raub v. Blairstown Creamery Ass'n*, 56 N. J. Law, 262, 28 Atl. 384; *McMurray v. St. Louis Oil Manuf'g Co.*, 33 Mo. 377; *Jackson v. Cartwright Lumber Co.*, 2 Pa. Dist. R. 680; *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 14 S. E. 622; *P. P. Mast Buggy Co. v. Litchfield Furniture, Hardware & Implement Co.*, 55 Ill. App. 98; *Bailey v. Snyder*, 61 Ill. App. 472; *Howell v. Gilt-Edge Manuf'g*

the directors,⁶⁰ or the action of the officer signing the confession may be ratified by a subsequent vote of the directors or stockholders.⁶¹ If a judgment note executed by an officer of a corporation is otherwise valid and binding on the company, it is not avoided by the fact that the corporate seal is not attached.⁶² Upon a confession of judgment by a corporation, the court in which the action is pending must judge of the authority of the person appearing for the corporation in that behalf; and its decision on the point is final and conclusive.⁶³

§ 60. Consent of Creditor is necessary.

A judgment based upon a confession made without any request on the part of the creditor, and without his knowledge and consent, or against his consent, and entered at the instance of the debtor alone, will have no effect in advance of the creditor's acceptance of it; it is voidable, it will not bar an action brought by the creditor, nor will it estop the debtor from denying the facts set forth.⁶⁴ This rule proceeds upon the very obvious consideration that if the assent of the creditor were not necessary to a confessed judgment, the debtor might, by confessing for only a part of the real debt, preclude his creditor from recovering the residue. For a judgment by confession is as conclusive as any other;⁶⁵ and if it include only a portion of an indivisible demand, no action will lie for the balance. A judgment so entered, unknown to the creditor or against his will, is therefore voidable at his option, and will be vacated on his motion.⁶⁶ But on the other hand, he may ratify the debtor's action and accept the judgment, and when he does this, it will have the effect to validate

Co. 32 Neb. 627, 49 N. W. 704. Compare *Miller v. Bank of British Columbia*, 2 Or. 291.

⁶⁰ *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; *Chicago Tip & T. Co. v. Chicago Nat. Bank*, 74 Ill. App. 439.

⁶¹ *Smead Foundry Co. v. Chesbrough*, 18 Ohio Cir. Ct. R. 783.

⁶² *Chicago Tip & T. Co. v. Chicago Nat. Bank*, 74 Ill. App. 439.

⁶³ *White v. Crow* (C. C.) 17 Fed. 98.

⁶⁴ *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66; *Farmers' & Mechanics' Bank v. Mather*, 30 Iowa, 283; *Ingersoll v. Dyott*, 1 Miles (Pa.) 245; *Chapin v. McLaren*, 105 Ind. 563, 5 N. E. 688.

⁶⁵ See *infra*, vol. 2, § 698.

⁶⁶ *Farmers' & Mechanics' Bank v. Mather*, 30 Iowa, 283.

the judgment and place it on the same footing in all respects with one sanctioned by his previous knowledge and consent. The validation of the judgment, however, dates only from its acceptance by the creditor, and it will not affect the priority of other creditors who came in between the entry of the judgment and its ratification.⁶⁷ The creditor's assent to the entry of judgment may also be constructive. Thus it is sufficient if done with the knowledge and consent of his attorney in whose hands he has placed the matter.⁶⁸ So also, if an action is already pending. Where the creditor has brought suit for a specified sum of money upon a certain claim, and the debtor appears in court and confesses judgment for the amount claimed and costs, the assent of the plaintiff will be presumed; and to entitle him to have the judgment set aside, he must make it appear to the court that he has been prejudiced by such confession.⁶⁹ It is held that the confession of a judgment by the defendant in a pending suit, after the death of the plaintiff and before substitution of his representatives, is void, both as regards the representatives of the plaintiff and any third person who may be collaterally interested in the payment of the same.⁷⁰

§ 61. Requisites of Warrant of Attorney.

As already stated, it is the practice in some states to enter confessed judgments upon a written authority, called a warrant or letter of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated sum. This warrant should contain the grant of authority clearly and distinctly given, and a designation of the person by whom it is to be exercised, either by name or description.⁷¹ It is usual, however, to confer the authority upon "any attorney" of

⁶⁷ *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66; *Buchanan v. Scandia Flow Co.*, 6 Colo. App. 34, 39 Pac. 899.

⁶⁸ *Chapin v. McLaren*, 105 Ind. 563, 5 N. E. 688.

⁶⁹ *Flanagan v. Continental Ins. Co.*, 22 Neb. 235, 34 N. W. 367; *McCalmont v. Peters*, 13 Serg. & R. (Pa.) 196.

⁷⁰ *Finney v. Ferguson*, 3 Watts & S. (Pa.) 413. Compare *Lewis v. Rapelyea*, 1 Barb. (N. Y.) 29.

⁷¹ *Rabe v. Heslip*, 4 Pa. 139. See *Grubbs v. Blum*, 62 Tex. 426. Authority to confess a judgment on a note, or waive the benefit of exemp-

a particular court or "any attorney of any court of record" in the particular state.⁷² Where the warrant authorizes A., or any other attorney of the court in which the judgment is to be confessed, to appear and make the confession, and A. and B., both attorneys of that court, appear together, the judgment will be valid.⁷³ The warrant should name or describe, with reasonable certainty, the person in whose favor judgment is to be entered,⁷⁴ and state the time of entry, though this is usually done by authorizing a confession "at any term" of court, or "at any time."⁷⁵ The warrant should specifically state its purpose. But the words used are not of the least importance, and it is held that a warrant to "enter" judgment will be considered as equivalent to a warrant to "confess" judgment.⁷⁶ And in a case where the warrant was written upon a printed form of a judgment-note, and the blanks in that part of the note which related to the entry of judgment were not filled out, but the note was otherwise regular, it was held that the warrant was not void.⁷⁷ It also appears that a warrant of attorney to confess judgment need not be under seal.⁷⁸ Of course if the warrant is annexed to or incorporated in a note or bond, the debt on which it is based will be

tion or inquisition laws, cannot be implied from authority to execute the note. *Payne v. Robinson*, 11 Pa. Co. Ct. R. 544.

⁷² See *McClure v. Bowles*, 5 Ohio N. P. 327.

⁷³ *Patton v. Stewart*, 19 Ind. 233; *Kuehne v. Golt*, 54 Ill. App. 596.

⁷⁴ See *Packer v. Roberts*, 140 Ill. 9, 671, 29 N. E. 668; *McClure v. Bowles*, 5 Ohio N. P. 327. Where a note and warrant of attorney are written together, over one signature, the warrant, though not stating in whose favor judgment may be confessed, is not void for uncertainty, but the instrument as a whole will be construed to authorize confession in favor of the payee. *Drake v. Simpson*, 30 Wkly. Law Bul. (Ohio) 236.

⁷⁵ Where a warrant of attorney authorizes a confession of judgment upon a note "at any time," judgment may be confessed at any time after the delivery of the note. *Elkins v. Wolfe*, 44 Ill. App. 376. This is true even though the note is postdated. *Volkenand v. Drum*, 143 Pa. 525, 22 Atl. 881.

⁷⁶ *Mason v. Smith*, 8 Ind. 72.

⁷⁷ *Sweezy v. Kitchen*, 80 Pa. 160. As to the effect of failure to fill out blanks in the warrant, see, further, *First Nat. Bank v. Trout*, 58 Ohio St. 347, 51 N. E. 27; *Packer v. Roberts*, 140 Ill. 9, 671, 29 N. E. 668. The caption of a cognovit upon which a judgment is confessed in vacation is not an essential part of the instrument, and, if defective, may be treated as surplusage. *Browne v. Cassem*, 74 Ill. App. 305.

⁷⁸ *Kneedler's Appeal*, 92 Pa. 428.

sufficiently disclosed. But in any other case the cause of action must be described either in a declaration, a sworn statement, or in the warrant of attorney itself.⁷⁹ This is required as an evidence of good faith and for the information of other creditors. A judgment so confessed is not necessarily void although the warrant of attorney be void; and such a judgment, it is held, after it has been revived against the debtor's administrator, cannot be set aside for that cause, although the defect in the warrant might have been pleaded in avoidance or given in evidence under a plea of nul tiel record.⁸⁰ The warrant of attorney, as the basis of the judgment, must also be placed on file in the clerk's office, and no judgment can be entered on it before it is actually so filed.⁸¹ In some of the states, it is necessary that proof should have been made of the execution of the warrant of attorney before the judgment is confessed, and in the case of a confession out of court, this must affirmatively appear of record, but where the confession is in open court, the evidence of that fact need not be presented in the record, but it will be presumed to have been done unless it appears to have been omitted.⁸²

§ 61a. Revocation or Expiration of Warrant.

A warrant of attorney to confess a judgment is not revocable at the pleasure of the principal; though he endeavors to revoke it, yet the court will grant leave to the plaintiff to enter up the judgment.⁸³ But no judgment can be entered on such a warrant after the death

⁷⁹ *Gambia v. Howe*, 8 Blackf. (Ind.) 133. Where several obligations or installments, all between the same parties and all due, are covered by separate warrants of attorney, or by one warrant authorizing confession of judgment "from time to time," a single judgment may be entered by confession for the gross amount then due. *Odell v. Reynolds*, 17 C. C. A. 317, 70 Fed. 656; *Fortune v. Bartolomei*, 164 Ill. 51, 45 N. E. 274.

⁸⁰ *Wood v. Ellis*, 10 Mo. 382.

⁸¹ *Chambers v. Denie*, 2 Pa. 421. But compare *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

⁸² *Iglehart v. Chicago Marine & Fire Ins. Co.*, 35 Ill. 514; *Anderson v. Field*, 6 Ill. App. 307; *Gambia v. Howe*, 8 Blackf. (Ind.) 133.

⁸³ *Odes v. Woodward*, 2 Ld. Raym. 849; *Wassell v. Reardon*, 11 Ark. 706, 44 Am. Dec. 245. But in *Evans v. Fearne*, 16 Ala. 689, 50 Am. Dec. 197, it is said that a simple power from a principal to his attorney to confess judgment in favor of a third person, which is not supported by a consideration and is not given as a security for a debt, or to render

of the defendant. While the latter event may not operate exactly as a revocation of the power, yet there can be no valid judgment rendered against a dead man.⁸⁴ Entry of the judgment, however, is not prevented by the supervening insanity of the defendant; for this disability does not revoke any power of attorney which the principal could not have revoked had he remained sane.⁸⁵

It was the settled practice under the common law, founded on a rule of the court of King's Bench (and still operative in this country except where changed by statute or a rule of court), that a judgment could not be confessed on a warrant of attorney executed more than a year and a day before, unless an affidavit was filed showing that the maker was alive, and that the debt or some portion of it was still due, and a rule of court, or order of a judge in vacation, must be obtained granting leave to enter judgment.⁸⁶ But entry of the judgment will not be prevented by the fact that the statute of limitations has run against the debt for which the confession was made, since the subject-matter of the power is not extinguished by the limitation.⁸⁷ But payment of the debt will cancel the power. A warrant

a security effectual, is not properly speaking a warrant of attorney, and is revocable at the pleasure of the maker, so long as it remains unexecuted.

⁸⁴ *Lanning v. Pawson*, 38 Pa. 480; *Sauerfield v. McNierney's Estate*, 30 Pittsb. Leg. J. (N. S.) 283. In New York, this rule is established by statute. Code Civ. Proc. N. Y. § 1275; *Maddock v. Stevens*, 15 Civ. Proc. R. 248, 3 N. Y. Supp. 528.

⁸⁵ *Spencer v. Reynolds*, 9 Pa. Co. Ct. R. 249.

⁸⁶ *Hinds v. Hopkins*, 28 Ill. 344; *Alldritt v. First Nat. Bank*, 22 Ill. App. 24; *Manufacturers' & Mechanics' Bank v. St. John*, 5 Hill (N. Y.) 497. In Pennsylvania, a rule of court provides that "if a warrant of attorney to confess judgment be above ten years [old] and under twenty, the court, or a judge thereof in vacation, must be moved for leave to enter judgment, which motion must be grounded on an affidavit that the warrant was duly executed and that the money is unpaid and the party living. When the warrant is above twenty years old, there must be a rule to show cause served on the defendant, if he can be found within the county." But the court may, in a proper case, after the entry of judgment, grant leave to file the required affidavit *nunc pro tunc*. *Woods v. Woods*, 126 Pa. 396, 17 Atl. 662.

⁸⁷ *Wassell v. Reardon*, 11 Ark. 705, 44 Am. Dec. 245; *Cross v. Moffat*, 11 Colo. 210, 17 Pac. 771. But a judgment on a judgment note not under seal, entered more than six years after the execution of the note, may be opened to allow a plea of the statute of limitations. *Bennett v. Allen*, 10 Pa. Co. Ct. R. 256. See, *infra*, § 69.

of attorney contained in a note to confess judgment thereon, for example, remains in force only so long as the note remains unpaid; and where the payee, after receiving satisfaction thereof, fraudulently conceals the fact, and procures an attorney to appear and confess judgment without the maker's knowledge or consent, such appearance confers no jurisdiction on the court, and the judgment is void.⁸⁸ It is held, however, that judgment may be entered on a note under a warrant of attorney duly executed, but lost or stolen.⁸⁹ Strictly speaking the authority of the warrant is exhausted by the entry of one judgment; yet if another judgment is entered on the same obligation under the same warrant, in another county, it will not be absolutely void, but merely irregular, inasmuch that a purchaser at a judicial sale under the second judgment may acquire a good title.⁹⁰

§ 62. Affidavit that Debt is due.

Under the various statutes regulating the practice in confessing judgments, it is almost invariably required that the debtor's confession be accompanied by an affidavit showing the bona fides of the transaction. In some jurisdictions this is directed to be incorporated in the statement which forms the basis of the judgment; in others it is to be a separate document. The statute usually prescribes the form of words, as that the debt is "justly due and owing," or is "justly due or to become due." A provision of this character, however, is satisfied by a substantial compliance with the meaning of the law, and if the affidavit details facts which show that the debt is really just and actually due, it is enough, though the words of the statute be not employed. Thus, the affidavit is sufficient in form in stating that the debt is "justly and honestly due," instead of "due and owing" in the words of the statute, when a present indebtedness is shown.⁹¹ Nor is it required that the affidavit go beyond the stat-

⁸⁸ *First Nat. Bank v. Cunningham* (C. C.) 48 Fed. 510; *Rea v. Forrest*, 88 Ill. 276.

⁸⁹ *Bauer v. Rihs*, 4 Pa. Dist. R. 583.

⁹⁰ *Martin v. Rex*, 6 Serg. & R. (Pa.) 296; *supra*, § 53.

⁹¹ *Mulford v. Stratton*, 41 N. J. Law, 466; *Reading v. Reading*, 24 N. J. Law, 358. The requirement of an affidavit that the debt is "justly and honestly due and owing" will prevent an accommodation indorser of notes,

ute. Hence it is not necessary for the debtor to deny, in specific terms, that the debt has been paid, released, barred, or discharged.⁹² A judgment entered upon confession without the affidavit required by statute is voidable only, not void, and it cannot on that ground be collaterally attacked by a stranger to the record.⁹³ Where the statute requires an affidavit to the justness of the debt only upon a confession of judgment without process, it does not apply where the defendant files an answer admitting the debt, and consents to the judgment.⁹⁴

§ 63. Statement of the Indebtedness.

In many of the states, statutes require a person confessing a judgment to file a written statement, signed and sworn to, designating the amount for which the judgment is to be entered, and "stating concisely the facts out of which the indebtedness arose." This requirement is imperative.⁹⁵ The designation of the amount of the debt, in particular, is a vital part of a valid confession; it must be set forth explicitly and not be left to inference; and the omission of it is a fatal defect.⁹⁶ The requirement that the facts be stated is

secured by bond and warrant of attorney, from entering up judgment before he has paid the notes, although he has assumed their payment, when the payee has not released the maker. *Sterling v. Fleming*, 53 N. J. Law, 652, 24 Atl. 1001.

⁹² *Lanning v. Carpenter*, 20 N. Y. 447. See *Oppenheimer v. Giershofer*, 54 Ill. App. 38.

⁹³ *Vanderveere v. Gaston*, 24 N. J. Law, 818; *Bible v. Voris*, 141 Ind. 569, 40 N. E. 670. Compare *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

⁹⁴ *Lanier v. Blount* (Tex. Civ. App.) 45 S. W. 202.

⁹⁵ *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Lanning v. Carpenter*, 20 N. Y. 447; *Smith v. Smith*, 117 N. C. 348, 23 S. E. 270. Compare *Hughes v. Helms* (Tenn.) 52 S. W. 460. A judgment confessed without such a statement is voidable at the instance of other creditors (*Puget Sound Nat. Bank v. Levy*, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803), and cannot be validated as to one not a party or privy by renewals of execution thereon, or by revival of the judgment. *Woods v. Bryan*, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688. A warrant of attorney reciting a bond which is on the same sheet of paper, may be detached from the bond, and entered up without any statement. *United Security Life Ins. & Trust Co. v. Vaughn*, 22 Pa. Co. Ct. R. 167.

⁹⁶ *Clements v. Gerow*, 30 Barb. (N. Y.) 325. A statement that no part of the note or interest has been paid, and that the full amount thereof, with

intended to enable other creditors to test the bona fides of the transaction by which a particular debt is preferred; and it is said that the statement is sufficient if it sets forth a consideration such as the law recognizes as valuable; and is definite enough to prevent the parties from shifting it, and to furnish other creditors with a basis for inquiry if they desire to attack it.⁹⁷ To come to specific illustrations, it is held that a recital in the statement that the indebtedness accrued for "borrowed money" or "money loaned," to the debtor, sufficiently states the facts out of which the indebtedness arose.⁹⁸ Another authority, drawing the line more strictly, holds that a statement that the indebtedness "is for a debt justly due from me to said plaintiff for moneys to that amount loaned and advanced to me by said plaintiff," is sufficient as between the parties, though it might be voidable at the instance of a junior judgment-creditor or bona fide purchaser.⁹⁹ Probably it is necessary to state the date of the loan. But if the whole sum is made up of various items advanced at different times, the cases rule that the statement is sufficiently explicit in describing the money as loaned to defendant at divers times after a specified day.¹⁰⁰ A confession of judgment for a certain sum for "goods, wares, and merchandises" of a specified value, is held by some of the authorities to be too indefinite; it should state

interest since the date of the note, is due and owing thereon, is sufficient to include interest. *Rothchild v. Mannesovitch*, 29 App. Div. 580, 51 N. Y. Supp. 253. See *Tilles v. Albright*, 63 Hun, 633, 18 N. Y. Supp. 493.

⁹⁷ *Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 326; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741; *McDowell v. Daniels*, 38 Barb. (N. Y.) 143; *Wight v. Mott*, Kirby (Conn.) 152.

⁹⁸ *Kern v. Chalfant*, 7 Minn. 487 (Gil. 393); *Kendig v. Marble*, 58 Iowa, 529, 12 N. W. 584, citing *Van Fleet v. Phillips*, 11 Iowa, 558; *Miller v. Clarke*, 37 Iowa, 325.

⁹⁹ *Terrett v. Brooklyn Imp. Co.*, 18 Hun, 6; *Miller v. Kosch*, 74 Hun, 50, 26 N. Y. Supp. 183. See *Wood v. Mitchell*, 117 N. Y. 439, 22 N. E. 1125.

¹⁰⁰ *Frost v. Koon*, 30 N. Y. 428; *Johnston v. McAusland*, 9 Abb. Prac. (N. Y.) 214. See *Davis v. Morris*, 21 Barb. (N. Y.) 152. A statement that plaintiff performed services for and loaned money to defendant, and that thereafter, at a certain time, there was an adjustment of accounts between them concerning said matters, and a certain sum was found due plaintiff, which defendant promised to pay, sufficiently shows an account stated, so as to sustain an entry of a judgment by confession. *Critten v. Vredenburg*, 4 App. Div. 216, 38 N. Y. Supp. 542.

the nature and quantity of the goods sold, the time of sale, and the aggregate price, if not even the price of the several items.¹⁰¹ But in New York a much looser rule obtains. It is there held to be well enough if the indebtedness is stated to be for goods, wares, and merchandise sold and delivered, with an approximate description of the period at or within which the sale took place.¹⁰² A statement is not sufficient if it merely states and sets out a promissory note executed by the defendant to the plaintiff as the consideration of the indebtedness; for the facts out of which the indebtedness evidenced by the note arose should be clearly stated.¹⁰³ But a statement which sets out the execution and delivery "for value" of a negotiable note for \$1500, "for money which" the creditor "then and there gave" the debtor "for said note, as a loan, which sum of \$1500 is justly due and owing according to the tenor and effect of said note herein described," is sufficient to satisfy the statute.¹⁰⁴ But a statement that the note was "given for goods sold and delivered and money had and received" is not sufficient.¹⁰⁵ And an allegation that the consideration of the judgment is a promissory note given by the debtor for value received, but not specifying the amount or consideration of the

¹⁰¹ *Nichols v. Kribs*, 10 Wis. 76, 78 Am. Dec. 294; *Lawless v. Hackett*, 16 Johns. (N. Y.) 149; *Bryan v. Miller*, 28 Mo. 32, 75 Am. Dec. 107. Compare *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

¹⁰² *Read v. French*, 28 N. Y. 285; *Neusbaum v. Keim*, 24 N. Y. 325; *Delaware v. Ensign*, 21 Barb. (N. Y.) 85; *Weil v. Hill*, 71 Hun, 133, 24 N. Y. Supp. 521.

¹⁰³ *Chappel v. Chappel*, 12 N. Y. 215, 64 Am. Dec. 496; *Davidson v. Alexander*, 84 N. C. 621; *Pond v. Davenport*, 44 Cal. 481; *McHenry v. Shephard*, 2 Mo. App. 378; *Woods v. Bryan*, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688. But a confession stating the amount of indebtedness, and authorizing entry of judgment therefor, with interest from a certain date, and further stating that it is for the amount due on a bond under seal executed by defendant on a given date, and that it is justly due for borrowed money, is sufficient. *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6.

¹⁰⁴ *Stern v. Mayer*, 19 Mo. App. 511.

¹⁰⁵ *Cordier v. Schloss*, 18 Cal. 576. But compare *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765. Where the statement sets out that the promissory note annexed was given "for value received in one Sweepstakes separator," the judgment is not invalid for want of a showing as to how the indebtedness arose. *Brown v. Barngrover*, 82 Iowa, 204, 47 N. W. 1082.

note, is defective.¹⁰⁶ So if it is merely stated that the note was for "money due," the judgment entered upon it is prima facie fraudulent as to the creditors of the defendant, though not so fatally defective as to be void.¹⁰⁷ On the other hand, a statement, in effect, that the defendant had purchased of the plaintiff a certain indebtedness (describing it), due to the plaintiff, for which he had given to the plaintiff the promissory notes (describing them) upon which and for the amount of which he confessed the judgment, is a sufficient statement.¹⁰⁸ So the statement is sufficient if it sets forth that the judgment is confessed to secure the plaintiff for a debt justly to become due upon his indorsement, as the surety of the defendant and for his benefit, of bills and notes which are fully described as to names, dates, amounts, and times of payment.¹⁰⁹

§ 64. Signature to Statement.

The statutes require the statement of indebtedness and confession of judgment to be "made and signed by the defendant." This is construed to mean a signature by the debtor in person. A signature by the defendant's attorney in the case is not sufficient; and where a judgment was entered upon a statement signed by two of the defendants in person and by the attorney of the third, it was held that the consent of those signing was only that judgment might be entered against all; and as there was no authority to enter judgment as to the third party, the judgment was unauthorized and void as to all.¹¹⁰ In another case, where the defendant had signed the verification, but not the statement, which was written upon the same page, this

¹⁰⁶ *Norris v. Denton*, 30 Barb. (N. Y.) 117.

¹⁰⁷ *Pond v. Davenport*, 44 Cal. 481. But see *Mather v. Mather*, 38 App. Div. 32, 55 N. Y. Supp. 973; *Claffin v. Dodson*, 111 Mo. 195, 19 S. W. 711.

¹⁰⁸ *Kirby v. Fitzgerald*, 31 N. Y. 417.

¹⁰⁹ *Dow v. Platner*, 16 N. Y. 562; *First Nat. Bank v. Carleton*, 43 App. Div. 6, 59 N. Y. Supp. 635; *Dullard v. Phelan*, 83 Iowa, 471, 50 N. W. 204. A statement which sets out a certificate of deposit and then states that on the back of the certificate is the following, "We hereby guaranty payment of the within," is sufficient to support a judgment against the guarantors. *Briggs v. Yetzer*, 103 Iowa, 342, 72 N. W. 647.

¹¹⁰ *French v. Edwards*, 5 Sawy. 266, Fed. Cas. No. 5,008.

was considered sufficient, as being a substantial compliance with the law.¹¹¹

§ 65. Verification of Statement.

The requirement of the statute, that the statement of facts accompanying a judgment by confession be properly verified by the oath of the party, intends that in so far as it relates to things within his own knowledge, he should affirm it to be true in unequivocal terms. In regard to other matters he may disclose his information and add a declaration of his belief in its truth. But where the party merely swears that he "believes the above statement of confession is true," the affidavit is insufficient, and the judgment, if entered thereon, will be vacated.¹¹² The jurat of the notary should also be in due form; but a formal defect in the jurat will not so far invalidate the judgment as to lay it open to collateral attack.¹¹³ The verification of the statement, if faulty but not wholly void, is susceptible of amendment.¹¹⁴

§ 66. Amendment of Statement.

A motion by plaintiff to amend the statement of a confession of judgment is addressed to the discretion of the trial court. It is not an amendment which he has a legal right to demand, but is one which the court may in its discretion refuse or grant upon such terms as to it may seem to be just.¹¹⁵ If the defect in the statement arose through mere inadvertence, an amendment may be permitted as against creditors who have not sought to vacate the judgment;¹¹⁶ but not against a creditor who has taken steps to have it set aside.¹¹⁷

§ 67. Judgment voidable for Failure to comply with Statute.

A judgment upon confession, though it does not conform exactly to the statutory requirements, is at most voidable, and not absolute-

¹¹¹ Purdy v. Upton, 10 How. Prac. (N. Y.) 494.

¹¹² Ingram v. Robbins, 33 N. Y. 409, 88 Am. Dec. 393.

¹¹³ Grattan v. Matteson, 54 Iowa, 229, 6 N. W. 298.

¹¹⁴ Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202.

¹¹⁵ Symson v. Selheimer, 105 N. Y. 660, 12 N. E. 31.

¹¹⁶ Bradley v. Glass, 20 App. Div. 200, 46 N. Y. Supp. 790.

¹¹⁷ Blackmer v. Greene, 4 N. Y. Ann. Cas. 395, 47 N. Y. Supp. 113.

ly void as against creditors.¹¹⁸ Thus, if it fails to set out all the facts required by the statute, it is for that reason irregular and prima facie fraudulent, but it is not a nullity; the presumption of fraud may be rebutted by proof that the judgment was fair and for a bona fide debt.¹¹⁹ It has also been held that such a judgment is not void because it does not appear that an affidavit, as required by the statute, had been made.¹²⁰ But the true rule appears to be, that if there has been an attempt to fulfil all the requirements of the law, the judgment is at most only voidable, although the execution of such attempt be informal or defective; but, on the other hand, the total omission of any of the steps prescribed by the statute (as where no statement at all is filed) will render the judgment entirely inoperative and void.¹²¹

¹¹⁸ *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116. But in some other decisions it is held that a judgment by confession which does not conform to the requirements of the statute is absolutely void and a mere nullity. *Edgar v. Greer*, 10 Iowa, 279; *Utah Nat. Bank v. Sears*, 13 Utah, 172, 44 Pac. 832. And see *Ainsworth v. Mobile Fruit & Trading Co.*, 102 Ga. 123, 29 S. E. 142.

¹¹⁹ *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521; *Crouse v. Johnson*, 65 Hun, 337, 20 N. Y. Supp. 177. That a judgment by confession fails to state the facts out of which the indebtedness arose, or to show that the sum confessed is justly due, is a defect of which a subsequent judgment creditor may avail himself. *Bradley v. Glass*, 20 App. Div. 200, 46 N. Y. Supp. 790.

¹²⁰ *Dean v. Thatcher*, 32 N. J. Law, 470.

¹²¹ Irregularities in a judgment by confession, which do not make it void, may be amended. *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765. In Illinois, it is said that, without proof of the execution of the power of attorney to enter judgment by confession, the clerk acquires no jurisdiction of the debtor, and therefore the judgment, being void, may be attacked collaterally. *Oppenheimer v. Giershofer*, 54 Ill. App. 38. In *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, *Boreman, J.*, observed: "The authorities go to the extent of holding that where there is an incomplete or insufficient statement of such facts [the facts out of which the indebtedness arose], the failure to make a complete statement will be only prima facie evidence of fraud as to creditors, and that it cannot be attacked collaterally. But no case has been called to our attention where a court has held that a confession of judgment is merely prima facie fraudulent as to creditors, and not liable to be attacked collaterally, where there was a total absence of the statement of any facts whatever. We know of no instance in which such a case has reached an appellate court. The statement of such facts is a prerequisite to the confession of judgment—it is not a confession of judgment without it." Compare *Utah Nat. Bank v. Sears*, 13 Utah, 172, 44 Pac. 832.

§ 68. Valid between Parties.

A judgment upon confession, founded on a statement of facts which is defective or insufficient to answer the requirements of the statute, will nevertheless be valid and effectual as between the parties to it, though voidable at the instance of other creditors.¹²² The judgment-debtor himself cannot avoid it, nor can one do so who claims rights of property under him, but whose interests are not prejudiced thereby.¹²³ And such a judgment, upon proof of its honesty and good faith, authorizes the creditor to impeach a fraudulent transfer made by the debtor, for the purpose of making the lien of the judgment effectual.¹²⁴ Where the property of the defendant has been sold under an execution upon a judgment confessed without a sufficient statement, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy.¹²⁵ At the same time, if another creditor attacks a confessed judgment founded upon a defective or insufficient statement, it devolves upon the plaintiff therein to negative the idea of fraud or collusion, and to show that the judgment is warranted by facts actually existing, although such facts were not included in the statement.¹²⁶ The same rule holds true of a judgment confessed without the affidavit to the justness of the debt required by statute; it is valid between the parties, though void or voidable as to other creditors.¹²⁷

¹²² *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Miller v. Earle*, 24 N. Y. 110; *Neusbaum v. Keim*, 24 N. Y. 325; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Bryan v. Miller*, 28 Mo. 32, 75 Am. Dec. 107; *How v. Dorscheimer*, 31 Mo. 349; *Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271; *Pond v. Davenport*, 44 Cal. 481; *Plummer v. Douglas*, 14 Iowa, 69, 81 Am. Dec. 456. See, also, *Shadrack's Adm'r v. Woolfolk*, 32 Grat. (Va.) 707.

¹²³ *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Boyles v. Chytraus*, 175 Ill. 370, 51 N. E. 563; *Krickow v. Pennsylvania Tar Manuf'g Co.*, 87 Ill. App. 653.

¹²⁴ *Neusbaum v. Keim*, 24 N. Y. 325.

¹²⁵ *Miller v. Earle*, 24 N. Y. 110.

¹²⁶ *Cordier v. Schloss*, 18 Cal. 576. See *Bacon v. Raybould*, 4 Utah. 357, 10 Pac. 481; *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521.

¹²⁷ *Mavly v. Eastridge*, 67 Ind. 211; *Chapin v. McLaren*, 105 Ind. 563, 5 N. E. 688; *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790; *Gardner v. Bunn* (Ill.) 21 N. E. 614; *Stone v. Williams*, 40 Barb. (N. Y.) 322.

§ 69. For what Judgment may be confessed.

The statutes commonly provide that the debtor confessing judgment shall make oath that the debt is "justly due or to become due." It follows of course that if the judgment is for a purely fictitious debt, or is in excess of the real debt so far as to interfere with the rights of other creditors, it is fraudulent and cannot stand. Thus, where a judgment is confessed and execution levied for such an amount that subsequent judgment creditors find nothing to levy on, a combination between the parties having been proved, fraud will be established.¹²⁶ It is also essential that the debt be a legal debt,—that is, one which would not be rejected by a court on account of its illegal consideration. Yet it appears that the defendant in the judgment and those claiming under him (for instance, a subsequent mortgagee of his land) are estopped from denying the validity of the judgment, although the demand might not have been recoverable at law.¹²⁷ The word "due," as used in these statutes, must not be taken in too narrow a sense. It does not necessarily import a debt which might be recovered in an action at law against any defenses which the debtor might set up. There are certain defenses which the debtor has the option of waiving if he chooses, and he does waive them by confessing judgment. For example, such a judgment is not invalidated by the fact that a part of the claim for which it is given would be barred by the statute of limitations, provided the

¹²⁶ *Nusbaum v. Louchheim* (Pa.) 1 Atl. 391. A judgment confessed on a note given as security for indorsements is not fraudulent because confessed for more than the amount of the notes indorsed, the party not having at hand at the time the means of determining their amount, and nothing more than was due ever having been claimed or received on the judgment. *Page v. Simpson*, 188 Pa. 303, 41 Atl. 638. It is error to render judgment on judgment notes authorizing entry of judgment on default in payment of the interest notes, in the absence of proof of such default, or production by the payee of the interest notes, as, in their absence, there would be no presumption of their nonpayment. *Croft v. Aldrich*, 54 Ill. App. 541. A judgment note may be legally given as security for a pre-existing debt, and, when so given, is not open to the objection of want of consideration. *Lane v. Union Nat. Bank*, 75 Ill. App. 290; *Union Nat. Bank v. Laue*, 177 Ill. 171, 52 N. E. 361, 60 Am. St. Rep. 216.

¹²⁷ *Shufelt v. Shufelt*, 9 Paige (N. Y.) 137, 37 Am. Dec. 381.

debt be an honest one.¹³⁰ So where a bankrupt, subsequent to his discharge, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge.¹³¹ It is further necessary that a confession of judgment be for a certain and specific sum. A judgment entered by a justice, on the confession of a defendant, for such sum as A. and B. shall award, before the award is declared, is invalid.¹³² Where several powers of attorney are given to confess judgment on several debts in favor of and against the same parties, it is proper and competent for the court to consolidate them and enter but one judgment.¹³³ A judgment cannot be confessed for a claim arising *ex delicto*. A statute which allows confession of judgment "for money due or to become due" should not be construed as authorizing the confession of a judgment for damages growing out of a tort.¹³⁴

§ 70. Debt not yet due.

Where the language of the statute is that judgment may be confessed for a debt "justly due and owing," it applies only to a debt payable at the time of the confession, for these terms import an immediate liability. But where it authorizes a confession "for money due or to become due," this may well include a claim founded upon an obligation now existing but not yet demandable. Thus the

¹³⁰ *Keen v. Kleckner*, 42 Pa. 529; *Wassell v. Reardon*, 11 Ark. 705, 44 Am. Dec. 245; *Cross v. Moffat*, 11 Colo. 210, 17 Pac. 771. Compare *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739; *Matzenbaugh v. Doyle*, 156 Ill. 331, 40 N. E. 935. In Pennsylvania, the court may, in its discretion, open a judgment entered by confession on a note not under seal, where it appears on the face of the note that the statute of limitations had run against the debt at the time the judgment was entered. *Bates v. Cullum*, 163 Pa. 234, 29 Atl. 870; *Bennett v. Allen*, 10 Pa. Co. Ct. R. 256. See, *supra*, § 61a.

¹³¹ *Dewey v. Moyer*, 72 N. Y. 70.

¹³² *Nichols v. Hewit*, 4 Johns. (N. Y.) 423. But a power of attorney to confess judgment "for an amount that may be found due" on the note therein described, and sufficient to give the court jurisdiction, is adequate. *Patterson v. Indiana*, 2 G. Greene (Iowa) 492. See *Little v. Dyer*, 138 Ill. 272, 27 N. E. 405, 32 Am. St. Rep. 140; *Scott v. Mantonya*, 104 Ill. 473, 45 N. E. 977.

¹³³ *Genestelle v. Waugh*, 11 Mo. 367. See *Odell v. Reynolds*, 17 C. C. A. 317, 70 Fed. 656; *Fortune v. Bartolomel*, 164 Ill. 51, 45 N. E. 274.

¹³⁴ *Burkham v. Van Saun*, 14 Abb. Prac. N. S. (N. Y.) 163; *Boutel v. Owens*, 2 Sandf. (N. Y.) 655.

fact that a note upon which a confession of judgment was taken was not due when the judgment was rendered does not deprive the court of jurisdiction, and the judgment will not be vacated on that account.¹³³ "The fact that a note may not be due at the time of a confession upon it, might be a suspicious circumstance in a contest with other creditors of the debtor, but it would not render the judgment void in the proper sense of that term."¹³⁶ So a judgment is not void as to creditors because the action is commenced before the maturity of the note which was the cause of action, and the defendant confesses judgment without service of process.¹³⁷ Authority may be given by a warrant of attorney to confess judgment for a debt not yet due, but it must be given in clear and precise terms.¹³⁸ Thus where the warrant, attached to a promissory note given in extension of others, authorized the attorney to appear for the maker at any time thereafter and confess judgment "for such amount as may appear to be unpaid thereon," it was held that the authority given was to confess judgment only for the amount actually due, not that accruing.¹³⁹ When a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note before it is due, the record must show that the specified contingency had happened, otherwise the judgment is unwarranted.¹⁴⁰

¹³³ *Black v. Pattison*, 61 Miss. 599; *Mechanics' Bank v. Mayer*, 93 Mo. 417, 6 S. W. 237; *McClish v. Manning*, 3 G. Greene (Iowa) 223; *Shepherd v. Wood*, 73 Ill. App. 486; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 41 N. E. 185, 31 L. R. A. 265, 47 Am. St. Rep. 245.

¹³⁶ *Calloway v. Byram*, 95 Ind. 423; *Farmers' & Mechanics' Bank v. Spear*, 49 Ill. App. 509. See *Forrester v. Strauss*, 21 Civ. Proc. R. 166, 18 N. Y. Supp. 41.

¹³⁷ *Pond v. Davenport*, 45 Cal. 225.

¹³⁸ *Title Ins., Trust & Safe Deposit Co. v. Rau*, 153 Pa. 488, 26 Atl. 220; *German-American Title & Trust Co. v. Campbell*, 184 Pa. 541, 39 Atl. 291; *Farwell v. Huston*, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237; *Cohen v. Burgess*, 44 Ill. App. 206; *Blanck v. Medley*, 63 Ill. App. 211.

¹³⁹ *Reid v. Southworth*, 71 Wis. 288, 36 N. W. 866. And see *Smith v. Pringle*, 100 Pa. 275.

¹⁴⁰ *Roundy v. Hunt*, 24 Ill. 508.

§ 71. For Future Advances.

A judgment by confession may be taken to secure future advances of notes or other commercial paper to be made by the creditor to the debtor;¹⁴¹ or to secure both existing and future indorsements for his accommodation.¹⁴² "A judgment or other security may be taken and held for future responsibilities and advances, to the extent of the amount of the judgment or security. But to enable a creditor to hold a judgment or other security for future responsibilities and advances, it must be a part of the original agreement that the judgment, or security, should be a security for such responsibilities and advances. It cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties."¹⁴³ And it seems that advances made or responsibilities incurred, after a subsequent judgment has intervened, will not be covered by the confessed judgment.¹⁴⁴

§ 72. For contingent Liabilities.

In those jurisdictions where the more liberal statute is in force, a judgment may be confessed to secure a future or contingent liability. Thus a judgment confessed as an indemnity for liabilities incurred by another is good at law against subsequent judgments, and may be enforced before the party assuming the liabilities has discharged them.¹⁴⁵ A judgment on confession may be enforced by execution, and is sustained by the same presumptions as other judgments, notwithstanding it was recovered on a contingent liability.¹⁴⁶ In those states, however, where a judgment can only be confessed for a debt

¹⁴¹ *Cook v. Whipple*, 55 N. Y. 150, 14 Am. Rep. 202.

¹⁴² *Lansing v. Woodworth*, 1 Sandf. Ch. (N. Y.) 43.

¹⁴³ *Averill v. Loucks*, 6 Barb. (N. Y.) 19; *Truscott v. King*, 6 Barb. (N. Y.) 346. See *Frye v. Jones*, 78 Ill. 627.

¹⁴⁴ *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320.

¹⁴⁵ *Ford v. Elkin*, 2 Speers (S. C.) 146. And see *Ely v. Parkhurst*, 25 N. J. Law, 188. Where two persons have exchanged accommodation notes, which have not been paid, there is a valid consideration for one of them to confess judgment to the other, though they are not due, and the liability is contingent. *Curtis v. Fox*, 191 Pa. 644, 43 Atl. 1093.

¹⁴⁶ *Allen v. Norton*, 6 Or. 344. A confession is valid though the judgment

that is "due and owing," the rule is different in this respect. Thus, in a New Jersey case the learned vice-chancellor said: "I think I am bound to consider the doctrine as settled, so far at least as this court is concerned, that a judgment on bond and warrant of attorney, under our statute, can only be entered for a debt actually existing at the time of its entry, and that a simple liability as indorser or surety does not constitute such a debt."¹⁴⁷

§ 73. Amount of the Judgment.

Where a judgment is entered on a warrant of attorney and includes a greater sum than was actually confessed, it is held to be void only as to the excess, not in toto, unless the excess was fraudulently included.¹⁴⁸ Upon a confession of judgment in a pending action, if the plaintiff's demand is in the nature of a debt which may be ascertained by calculation, it is sufficient to enter judgment generally. The judgment is supposed to be for the amount of damages laid in the declaration and execution may issue accordingly.¹⁴⁹ But if the plaintiff should indorse upon the declaration the actual amount of the debt, and if the defendant complains that injustice has been done, the court on motion, upon a proper case being made out, will grant immediate relief.¹⁵⁰ Where the confession of judgment does not determine the extent of the recovery, and it is not ascertainable

is not to be entered up except upon the happening of a contingency. *Keep v. Leckie*, 8 Rich. Law (S. C.) 164.

¹⁴⁷ *Sayre v. Hewes*, 32 N. J. Eq. 652. See *Clapp v. Ely*, 10 N. J. Eq. 178.

¹⁴⁸ *Davenport v. Wright*, 51 Pa. 292. Compare *Tucker v. Gill*, 61 Ill. 236. Where the power of attorney in a bond limits the sum for which judgment may be entered, the attorney has no authority to enter judgment for a sum exceeding such limit. *Mutual Guarantee Bldg. & Loan Ass'n v. Fallen*, 21 Pa. Co. Ct. R. 617. But judgment on a note is not vitiated because confessed for a greater rate of interest than the note bears (*Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765), nor because the prothonotary made an entry for interest from the date of the note, no claim for interest having been made by the plaintiff, and none ever received by him on the judgment. *Page v. Simpson*, 188 Pa. 393, 41 Atl. 638. As to inclusion of interest, see, further, *Cordray v. City of Galveston* (Tex. Civ. App.) 26 S. W. 245.

¹⁴⁹ See *Latrobe Bldg. & Loan Ass'n v. Fritz*, 152 Pa. 224, 25 Atl. 558.

¹⁵⁰ *Lewis v. Smith*, 2 Serg. & R. (Pa.) 142.

by mere calculation, it must be liquidated by the court and not by the clerk.¹⁵¹

§ 74. Liquidation of Amount by Clerk.

In the case of a confession of judgment without action, the statutes sometimes authorize the prothonotary or clerk of the court to enter up judgment on a warrant, without the actual intervention of an attorney appearing for the defendant. But such a statute, it is held, does not give him all the powers of an attorney. He can enter judgment only when the amount due appears on the face of the instrument, or is ascertainable by calculation from its face.¹⁵² Thus where judgment was confessed for the value of certain land at the rate of \$10 per acre, the quantity to be ascertained by survey, it was held that the prothonotary had no power to enter a judgment.¹⁵³ Such a power must also be exercised by the officer without unnecessary delay. Where a judgment was confessed "amount to be ascertained by the prothonotary," and no amount was ascertained for fourteen years, and the plaintiff and principal defendant were dead, the court refused to make an order for ascertaining the amount against the surety.¹⁵⁴

§ 75. Inclusion of Attorney's Fees.

A judgment entered by confession upon a warrant of attorney may include fees to the attorney appearing in the case (nominally for the debtor, really in behalf of the creditor), if that be authorized by the power.¹⁵⁵ And it is altogether usual to incorporate a stipulation for

¹⁵¹ *Bonta v. Clay*, 1 Litt. (Ky.) 27. Where a power of attorney authorizes a confession of judgment for any rent due by the terms of a lease which fixes the amount of rent, a judgment in accordance with such power may properly be entered, though the lease also binds the lessee to pay damages for waste of water and other items, thereby rendering the amount due, aside from rent, uncertain. *Scott v. Mantonya*, 60 Ill. App. 481.

¹⁵² *Hope v. Everhart*, 70 Pa. 231; *Connay v. Halstead*, 73 Pa. 354.

¹⁵³ *Connay v. Halstead*, 73 Pa. 354. The maker of a note authorizing judgment by confession and the payment of attorneys' fees cannot question the attorneys' fees on the ground that he was insolvent when he made the note. *Blanck v. Medley*, 63 Ill. App. 211.

¹⁵⁴ *Cook v. Cooper*, 4 Har. (Del.) 189.

¹⁵⁵ *Ball v. Miller*, 38 Ill. 110.

such fees in the warrant. Such a provision rests upon a valid consideration and is not fraudulent as to other creditors;¹⁵⁶ unless the amount designated as attorney's fees is grossly in excess of any reasonable amount, in which case the judgment, at least to the extent of such fees, is fraudulent and void as against the other creditors of the defendant.¹⁵⁷ And the attorney's commissions authorized in a judgment-note cannot be collected as part of the debt due when the debtor was ready to pay at the maturity of the note.¹⁵⁸ It is customary to specify in the warrant or note the sum which may be incorporated in the judgment as a fee for the attorney. But cases have sometimes come before the courts in which the provision, instead of being explicit, merely designated a "reasonable attorney's fee." This language, it is held, gives to the court in which the confession is made the right to determine what is a reasonable fee; it does not leave it to the option or the conscience of the attorney; it contemplates a judicial proceeding by the court for the purpose of ascertaining the amount which may reasonably be charged up. Hence if the attorney himself fixes the sum of his fees, under a power so worded, and confesses judgment for the whole, he acts in excess of his authority, and the judgment so entered, without the intervention of the court, is void.¹⁵⁹

§ 76. Recording the Judgment.

Under a statute relating to judgments by confession, which requires the plaintiff to file a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement and enter it in the judgment-book, the two entries should be deemed to have the force of duplicate copies, each having the effect of an original.¹⁶⁰ The power of attorney confessing the judgment should be filed as a part of the record.¹⁶¹ In Illinois, where judgment is confessed be-

¹⁵⁶ *Weigley v. Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335.

¹⁵⁷ *Hulse v. Mershon*, 125 Ill. 52, 17 N. E. 50. See *Sweeney v. Stroud*, 55 N. J. Law, 97, 25 Atl. 273.

¹⁵⁸ *Moore v. Kilgore*, 110 Pa. 433, 1 Atl. 593.

¹⁵⁹ *Campbell v. Goddard*, 123 Ill. 220, 14 N. E. 261.

¹⁶⁰ *King v. Higgins*, 3 Or. 406.

¹⁶¹ *Durham v. Brown*, 24 Ill. 93.

fore the clerk in vacation, the formal writing up of the judgment in the court records is held to be essential; and an execution issued before it is so written up is invalid.¹⁶² But in some other states, it appears that the statutory requirements as to the recording of such judgments are merely directory, the statement, affidavit, and other papers accompanying the confession constituting the judgment roll and serving as the basis for an execution.¹⁶³

§ 77. Reversing and Vacating Judgments by Confession.

In what circumstances a judgment entered upon the confession of the defendant may be reviewed in the appellate court, or opened or vacated in the court below, at the defendant's own instance, is a question involved in much doubt. The difficulty arises from the fact that the debtor, by his voluntary action in the matter, must be considered to have waived his strict technical rights to some extent, and yet he should be protected from injustice and from errors sufficient to vitiate the whole proceeding. In the first place, it is held in several states that a confession of judgment operates as a release of all errors in the record, and consequently it cannot be carried to the appellate court either by appeal or certiorari.¹⁶⁴ On the other hand, it is elsewhere held that a confession of judgment, although a waiver of formal errors, does not prevent the defendant from procuring the reversal of the judgment for errors of substance.¹⁶⁵ In regard to the jurisdiction of the court below, it seems to be conceded that it has power to give equitable relief in cases calling for its interposition.¹⁶⁶ "The power of the courts to open judgments entered by con-

¹⁶² *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358.

¹⁶³ *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450; *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

¹⁶⁴ *Garner v. Burleson*, 26 Tex. 348; *Mandeville v. Holey*, 1 Pet. 136, 7 L. Ed. 85; *Wilson v. Collins*, 9 Ala. 127. See *De Riemer v. Cantillon*, 4 Johns. Ch. (N. Y.) 85.

¹⁶⁵ *Battelle v. Bridgman*, 1 Morris (Iowa) 363; *Portage Canal Co. v. Crittenden*, 17 Ohio, 436. See *Montgomery v. Barnett*, 8 Tex. 143; *Kennedy v. Lowe*, 9 Iowa, 580; *Hopkins v. Howard*, 12 Tex. 7.

¹⁶⁶ *McAllister's Appeal*, 59 Pa. 204; *Walker v. Ensign*, 1 Ill. App. 113; *Wilson v. Cox*, 170 Pa. 331, 33 Atl. 79; *Seaver v. Stiegel*, 54 Ill. App. 632; *Jordan v. Huntington*, 58 Ill. App. 646; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569. Where, in a suit against a city

ession, or in default of an appearance or plea, is not denied; and it is the duty of the courts to exercise such power wherever it is satisfactorily shown that in equity the judgment ought not to be collected."¹⁶⁷ In order to prevent any question of this kind, the parties sometimes incorporate a release of errors in the confession or warrant of attorney, the effect being, of course, to waive any formal objections or irregularities. But where this is not done, it is proper to examine with care any irregularity in the proceeding, and to vacate the judgment if substantial injustice may have been done to the defendant.¹⁶⁸ The opening of such a judgment is therefore a matter of sound discretion, and whether such a sound discretion has been exercised by the court below depends upon the whole evidence, in which the burden of proof is to show a defense.¹⁶⁹ The judgment should not be opened and the defendant let in to defend, except upon evidence of such weight and clearness as would be sufficient to warrant a chancellor in decreeing that the instrument upon which the confession was founded was void, or should be reformed for fraud

to quiet title to land claimed as a street, a decree is entered by confession, the court may, in its discretion, in view of the public interests involved, open the case and allow an answer to be filed. *Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370.

¹⁶⁷ *Earnest v. Hoskins*, 100 Pa. 551.

¹⁶⁸ *McCabe v. Sumner*, 40 Wis. 386. Thus, a judgment by confession may be opened where it is alleged to be usurious (*McGuire v. Campbell*, 58 Ill. App. 188), or to let in a plea of the statute of limitations. *Bates v. Cullum*, 163 Pa. 234, 29 Atl. 870; *Bennett v. Allen*, 10 Pa. Co. Ct. R. 256. But there is no abuse of discretion in refusing to open the judgment where the only defense is a counterclaim, which is denied by the plaintiff. *Walter v. Fees*, 155 Pa. 55, 25 Atl. 829. And see *Evans v. Barclay*, 38 Ill. App. 496. Where it appears that a judgment purporting to have been entered by agreement was entered without authority, it may be set aside. *Foley's Ex'r v. Gatliff (Ky.)* 43 S. W. 100. But a judgment admitted to be just will not be set aside in equity for the mere reason that the attorney confessing it under a warrant was not formally admitted to practice in the court where the judgment was taken, nor for defective verification of the complaint. *Purcell v. Kleaver*, 98 Wis. 102, 73 N. W. 322. In Illinois, it is held that where the defendant in a confessed judgment asks for and obtains leave to plead, he thereby waives all technicalities and objections to the judgment. *Roby v. Updyke*, 61 Ill. App. 328.

¹⁶⁹ *Roenigk's Appeals (Pa.)* 3 Atl. 99; *Howie v. Lewis*, 196 Pa. 558, 46 Atl. 850.

or mistake.¹⁷⁰ Whether a judgment against two persons, entered by confession on a warrant of attorney, may be set aside as to one of them and stand good as to the other, is an unsettled point. It depends upon whether, in the particular state, a joint judgment is considered as an entirety or as severable.¹⁷¹ When the application to set aside the judgment proceeds from another creditor of the defendant, there is less doubt as to the power of the court. It may clearly vacate the judgment for fraud or collusion between the parties, or for a substantial failure to comply with the statutory requirements.¹⁷² Where an application to open a confessed judgment is based on grounds going to the merits, and is contested, the issues raised should ordinarily be tried by a jury; but in Pennsylvania, it is held that the court to which such an application is made, though there is a conflict of testimony, may pass on the weight of evidence and the credibility of the witnesses, without sending the case to a jury.¹⁷³ Terms may be imposed upon the defendant, on granting his application to open the judgment; but it is not proper to require that the money supposed to be due should be brought into court, though the judgment may be allowed to stand as security to abide the result.¹⁷⁴

¹⁷⁰ English's Appeal, 119 Pa. 533, 13 Atl. 479, 4 Am. St. Rep. 656. A court ought not to open a confessed judgment on the ground of fraud if, upon all the testimony, the evidence of fraud is not distinct. Sigle v. Seigley, 9 Kulp (Pa.) 471. Affidavits filed in support of a motion to open a judgment by confession are to be construed most strongly against the party making the motion. Chicago Fire-Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534.

¹⁷¹ See Reynolds v. Silvers, 17 N. J. Law, 275; York Bank's Appeal, 36 Pa. 458; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Chapin v. Thompson, 20 Cal. 681; supra, §§ 58, 64. As to opening the judgment for the benefit of one of two joint defendants, who alleges that his signature was forged, see Darragh v. Bigger, 172 Pa. 89, 33 Atl. 273.

¹⁷² Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Filson v. Greenspan, 194 Pa. 546, 45 Atl. 330. See Thompson v. Hintgen, 11 Wis. 112; Pirie v. Hughes, 43 Wis. 531. In the absence of fraud, judgments by confession will not be set aside simply because they were given by defendant after obtaining from plaintiff an extension of time to answer in an action then pending. Wood v. Mitchell, 63 Hun, 629, 17 N. Y. Supp. 782.

¹⁷³ Blauvelt v. Kemon, 196 Pa. 128, 46 Atl. 416. Compare Hughes v. Moody, 10 Pa. Co. Ct. R. 305.

¹⁷⁴ McGuire v. Campbell, 58 Ill. App. 188.

§ 78. Effects of Confessed Judgment.

"In contemplation of law, a judgment on a warrant of attorney is as much an act of the court as if it were formally pronounced on *nil dicit* or a *cognovit*, and till it is reversed or set aside, it has all the qualities and effects of a judgment on a verdict."¹⁷⁵ A judgment upon confession is therefore just as conclusive, between the parties and their privies, of the facts and points necessarily involved in and determined by it, and as final a bar to the maintenance by the creditor of another suit for the same demand, as any other judgment.¹⁷⁶

¹⁷⁵ *Braddee v. Brownfield*, 4 Watts (Pa.) 474. A judgment confessed upon terms, duly entered, is in effect a conditional judgment, and the court will take notice of the terms and enforce them. *Wood v. Bagley*, 34 N. C. 83.

¹⁷⁶ *Braddee v. Brownfield*, 4 Watts (Pa.) 474; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Neusbaum v. Keim*, 24 N. Y. 325; *Dean v. Thatcher*, 32 N. J. Law, 470; *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441; *Twogood v. Pence*, 22 Iowa, 543; *Sherman v. Christy*, 17 Iowa, 322; *Secrist v. Zimmerman*, 55 Pa. 446; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Weikel v. Long*, 55 Pa. 238; *Goff v. Dabbs*, 4 Baxt. (Tenn.) 300. See *Hoppock v. Cray* (N. J.) 21 Atl. 624. The confession of a judgment by the maker of a note, in favor of the holder, does not discharge sureties or indorsers who are not parties thereto. *First Nat. Bank v. Eureka Lumber Co.*, 123 N. C. 24, 31 S. E. 348.

CHAPTER IV.**JUDGMENTS BY DEFAULT.**

- 79. Judgment of Nil Dicit.
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§ 79. Judgment of Nil Dicit.

When a defendant puts himself in default by failing to plead or file an answer within a time prescribed, although he may have entered an appearance in the action, the judgment given against him is technically called judgment of nil dicit, that is, that he "says nothing" in opposition to the plaintiff's claim, and therefore the latter is entitled to recover.¹ But if the defendant has put in his plea, and issue has been joined, and he then fails to appear when the case is called for trial, this species of judgment cannot properly be entered, for he is not in default for want of an answer.² However, the distinction between this judgment and the other varieties of judgment

¹ *Stewart v. Goode*, 29 Ala. 476; *Summerlin v. Dowdle*, 24 Ala. 428. See supra, § 15.

² *Taylor v. McLaughlin*, 2 Colo. 375. In an action on two notes, each set out as a distinct cause of action, where defendant answers only as to one of the notes, judgment should be given, on motion, on the other note. *Carran v. Kerchner*, 117 N. C. 264, 23 S. E. 177.

against the defendant for failure to take a required step in the action is no longer strictly observed, and when the judgment is *nil dicit* when it should have been by default, it is merely informal and will not be reversed on that account.³ But in Texas it is said that while the proceeding to ascertain the amount of damages is the same on judgments by *nil dicit* as on judgments by default, "in other respects, a judgment by *nil dicit* is held by this court to possess a stronger implication in favor of the plaintiff's claim than an ordinary judgment by default; it is regarded as partaking of the nature of a judgment by confession as well as by default."⁴ The distinction, however, is not of practical value, nor is it generally recognized.

§ 79a. Judgment for Want of Affidavit of Defense.

According to the practice at common law in some of the states, where an action is brought upon an obligation for the payment of a sum certain in money, if the defendant means to contest it, he is required to file, within a limited time after notice of the plaintiff's statement, an affidavit setting forth the facts on which he means to rely as a defense; if he fails to do this, judgment may be taken against him "for want of an affidavit of defense."⁵ If such an affidavit is filed, but the plaintiff deems it inadequate in law to constitute a defense to the action, he may have a rule on the defendant "to show cause why judgment should not be entered against him for want of a sufficient affidavit of defense."⁶ A motion for judgment on this ground, being in the nature of a demurrer, admits the facts averred in the affidavit, and denies their sufficiency as an answer to

³ *Shields v. Barden*, 6 Ark. 459.

⁴ *Storey v. Nichols*, 22 Tex. 87.

⁵ *Tobyhanna & L. Lumber Co. v. Home Ins. Co.*, 167 Pa. 231, 31 Atl. 564; 2 *Bright. Purd. Dig. (Pa.)* 1356, 1357; *Laws Pa.* 1887, p. 271, § 5; *Act Pa.* May 31, 1883 (P. L. 185). Plaintiff's right to a default judgment for want of an affidavit of defense within the required time is not affected by an appearance of defendant by attorney within such time. *North v. Yorke*, 174 Pa. 349, 34 Atl. 620.

⁶ Such a judgment, it is said, is not a judgment by default or confession. *Abeles v. Powell*, 6 Pa. Super. Ct. 123. It is error to give judgment on account of the insufficiency of an affidavit of defense filed, when the case is not one in which such an affidavit can legally be required. *Bartoe v. Guckert*, 158 Pa. 124, 27 Atl. 845.

the claim.⁷ And if the court decides that the allegations of the affidavit are not adequate to constitute a defense to the action, judgment will be given for the plaintiff, unless, for special reasons, leave should be granted to file a new or supplemental affidavit of defense.⁸ If the defense alleged is good as to part of the claim, but insufficient as to the balance, the court may direct judgment for the part insufficiently denied, and allow the plaintiff to try the case as to the remainder.⁹ And a statute in Pennsylvania provides that, where an affidavit of defense is filed to a part of the claim sued for, the plaintiff may take judgment for the amount admitted to be due, and proceed to trial for the balance.¹⁰ This applies to any action in which a part of the claim is admitted to be due, irrespective of how the amount is ascertained or the balance computed,¹¹ but not to a case where the affidavit applies to the whole of the plaintiff's claim, though it may be insufficient in law as to a part of it.¹² In Connecticut, a statute provides that, in causes where an attorney appears for the defendant, the plaintiff may require him to state to the court whether he believes a bona fide defense exists to the action, whether such defense will be made, and whether there will be a trial, and that if such attorney refuses to disclose as required, or shall not satisfy the court that such defense will be made or such trial had, the court may order judgment for the plaintiff. Where this rule is complied with, the court has no authority to pass on the legal sufficiency of the de-

⁷ Hicks v. National Bank, 168 Pa. 638, 32 Atl. 63. On such a motion, the correctness of an averment in the affidavit as to the law of another state cannot be tested by reference to the statutes of that state. Wood Co. v. Berry Co., 4 Pa. Dist. R. 141.

⁸ Sykes v. Anderson, 14 Pa. Co. Ct. R. 329; Laird v. Campbell, 92 Pa. 475; Callan v. Lukens, 89 Pa. 134. Where leave has been given to file a supplemental affidavit, it must be filed within a reasonable time, or else the court may enter judgment without a new rule or further notice to the defendant. Close v. Hancock, 3 Pa. Super. Ct. 207.

⁹ Drake v. Irvine, 10 Pa. Co. Ct. R. 486.

¹⁰ Act Pa. May 31, 1893 (P. L. 185).

¹¹ Roberts v. Sharp, 14 Pa. Co. Ct. R. 186, affirmed 161 Pa. 185, 28 Atl. 1023.

¹² Reilly v. Daly, 159 Pa. 605, 28 Atl. 493; Myers v. Cochran, 3 Pa. Dist. R. 135, 33 Wkly. Notes Cas. 250.

fense, and render judgment because it deems such defense insufficient.¹³

§ 80. Judgment by Default.

Properly speaking, a judgment by default is one taken against a defendant when, having been duly summoned or cited in an action, he fails to enter an appearance. But the term is frequently (and indeed commonly) used in a much wider sense, in which it includes judgments given against the defendant for want of a plea, answer, affidavit of defense, etc., as well as for want of an appearance. The latter is the signification of the word as used in this chapter. The characteristic feature of a judgment by default is that it follows upon the negligence or omission of the defendant, passing over the steps that would otherwise be taken, trial and verdict, and adjudging against him immediately upon his failure to defend.¹⁴ In respect to its effects and consequences,—as the foundation of a suit, as a lien, as a bar or estoppel,—a judgment by default does not differ from one rendered upon a verdict.¹⁵ There are, however, certain distinctive rules, particularly in reference to its rendition and entry, which require separate treatment and which will form the subject-matter of the following pages. The rendition of a judgment by default, it is held, is no violation or abridgment of the constitutional right of trial by jury.¹⁶ The right is one which (at least in a civil action) may be

¹³ *Jennings v. Parsons*, 71 Conn. 413, 42 Atl. 76.

¹⁴ A judgment is by default where there has been no appearance by the defendant, even though he was not legally summoned. *Brown v. Chapman*, 90 Va. 174, 17 S. E. 855. But a judgment rendered by a justice of the peace when the defendant is present by attorney, who, however, takes no part in the trial, is not a judgment "by default." *Borgwald v. Fleming*, 69 Mo. 212.

¹⁵ Where judgment by default is entered against defendant, a final judgment cannot afterwards be rendered in his favor without first setting aside the default. *Bateman v. Pool*, 84 Tex. 406, 19 S. W. 552.

¹⁶ *Cureton v. Stokes*, 22 S. C. 583; *Lawrance v. Borm*, 86 Pa. 226; *Randall v. Weld*, 86 Pa. 357; *Hunt v. Lucas*, 99 Mass. 409; *Dortic v. Lockwood*, 61 Ga. 293. The right of trial by jury is not impaired by a law giving to the court the right to assess damages without a jury in case of default. *Hopkins v. Ladd*, 35 Ill. 178; *Seeley v. City of Bridgeport*, 53 Conn. 1, 22 Atl. 1017; *Raymond v. Danbury & N. R. Co.*, 43 Conn. 596, Fed. Cas. No. 11,593; *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529.

waived by the party, and the defendant cannot claim that the privilege is denied to him if he presents no defense to be tried by a jury.

§ 81. Against Whom may be taken.

As a general rule, a default may be taken against any natural person against whom the same judgment might have passed as the result of contested proceedings. But there are certain exceptions to this statement. Thus, in California, a person summoned as a garnishee may be punished for contempt for disobeying an order whereby he is required to disclose his indebtedness if any, but a judgment by default cannot be taken against him, and such judgment is without jurisdiction and void.¹⁷ In some other states, however, where the court has regularly obtained jurisdiction of the garnishee and there is no answer on his part, it is held that a judgment by default may be entered against him, and such judgment will be sufficient to protect the garnishee if no defense on the merits could have been made.¹⁸ Judgments by default may be entered against non-residents and against persons under disabilities; but the validity of such judgments must be tested by rules which belong to later sections of this book.¹⁹ A default judgment may also be rendered against a corporation; but in order to support it, it must appear of record that the person who, as shown by the return of the officer, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation.²⁰ Under statutes allowing such a course of procedure, a defendant may proceed with the case upon the failure of the plaintiff to appear, and judgment may be rendered on the merits.²¹ But one who is origi-

¹⁷ *Hibernia Savings & Loan Soc. v. Superior Court*, 56 Cal. 265.

¹⁸ *Scamahorn v. Scott*, 42 Iowa, 529; *Abell v. Simon*, 49 Md. 318; *Gracy v. Contes*, 2 McCord, 224; *Jones v. Tracy*, 75 Pa. 417; *Laughlin v. January*, 59 Mo. 383; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

¹⁹ See, *infra*, §§ 227-232, §§ 190, 196. Particularly as to the validity of default judgments against infants, lunatics, and married women, see *Jackson v. Brunor*, 17 Misc. Rep. 339, 39 N. Y. Supp. 1080; *Appel v. Brooks*, 4 Misc. Rep. 626, 24 N. Y. Supp. 100; *Kent v. West*, 22 Misc. Rep. 403, 50 N. Y. Supp. 339; *Marion v. Regensteln*, 98 Ala. 475, 13 South. 384.

²⁰ *Cloud v. Inhabitants of Town of Pierce City*, 86 Mo. 357.

²¹ *Clune v. Quitzow*, 125 Cal. 213, 57 Pac. 886.

nally a defendant, but afterwards, by leave of court, becomes a plaintiff and files a cross bill, is not entitled to a default judgment against his co-defendants, if they had no notice of his cross bill or that he had changed his status in the case.²²

§ 82. Joint Defendants.

The rule of the common law, in regard to actions in which several persons were joined as defendants, was that judgment must be given against all or none of them. The plaintiff could not recover against a part of the defendants and be defeated of his claim against the rest, except in the single case where one of them set up and succeeded in establishing a defense entirely personal to himself, as his release or discharge or his personal disability to contract. Consequently, except in so far as the rule is changed by statute, where several persons are summoned as defendants, and one of them pleads and the other suffers a default, final judgment cannot be entered upon the default until the issue as to the other defendant is disposed of, and not even then unless the plaintiff had a verdict on the issue or the defendant pleading had set up a merely personal defense.²³ But this has been changed, in several of the states, by the statutes, which provide that in actions regularly commenced against several joint defendants the court may, in its discretion, and whenever a several judgment would be proper, render judgment against one or more of

²² *Cole v. Grigsby* (Tex. Civ. App.) 35 S. W. 680.

²³ *Russell v. Hogan*, 1 Scam. (Ill.) 552; *Catlin v. Latson*, 4 Abb. Prac. (N. Y.) 248; *Taylor v. Beck*, 3 Rand. (Va.) 316; *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Hutchings v. Real Estate Bank*, 4 Ark. 517. See *Curry v. Roundtree*, 51 Cal. 184. If three defendants demur, and, after the demurrer is withdrawn, two of them plead, a judgment *nil dicit* should be entered against the party not pleading, and the jury should assess the damages against all. If but two plead and the other abide by his demurrer, he cannot be regarded as going to trial with the others. *Freeland v. Board of Sup'rs of Jasper County*, 27 Ill. 303. Where one of several defendants answers, he is not in default for failure to answer an amended petition which does not change the effect of the original as to him. *Bremen Bank v. Umrath*, 55 Mo. App. 43. In an action against several defendants on a joint demand, where one defendant, not served, appears and files and serves his plea, he is entitled to notice of trial; and until such notice is given the court cannot legally enter judgment by default against the remaining defendants. *Penfold v. Slyfield*, 110 Mich. 343, 68 N. W. 226.

them, leaving the action to proceed against the others. Under a law of this character, it would be proper to render a judgment by default against the defendant not pleading, where the cause of action was joint and several. But if the claim were upon a joint contract, such a judgment would necessarily remain interlocutory until the issues raised were finally disposed of, for in that case the defendants must stand or fall together. We shall recur to this subject at a later point.²⁴ It is also held that where process is served on only one of two defendants, judgment cannot be rendered against both by default.²⁵ But it seems to be otherwise under the "joint debtor acts," existing in several of the states, in actions upon a joint contract.²⁶

§ 83. Jurisdiction of the Defendant.

In order to the validity of a judgment by default, as in the case of any other judgment, it is essential that the court should have acquired jurisdiction of the person of the defendant.²⁷ A judgment entered by default against a party who has not been served with process and who has not appeared in the action, is irregular and void.²⁸

²⁴ See, *infra*, §§ 208, 209. Where a number of defendants are jointly sued on a joint liability, and a joint judgment is asked, it is error for the court to render a several judgment on default against one defendant, without first trying and determining the liability of all the defendants. *Osbun v. Bartram*, 15 Ohio Cir. Ct. R. 224. Compare *German-American Bank v. Stickle*, 59 Neb. 321, 80 N. W. 910. A grantor of realty by warranty deeds, sued with his grantees in an action to set aside the title which he assumed to convey, may defend in his own name for the defendants served but not answering. *Bausman v. Eads*, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201.

²⁵ *Rider v. Alleyne*, 2 Scam. (Ill.) 474; *Winslow v. Lambard*, 57 Me. 356. In an action against three defendants, service on one only does not authorize judgment by default against the others, where no facts are alleged making service on one valid as to all. *Tilman v. Johnson* (Tex.) 16 S. W. 788. See *Kellogg v. Window*, 100 Iowa, 552, 69 N. W. 875.

²⁶ See, *infra*, §§ 235, 236.

²⁷ On the general subject of jurisdiction as essential to the validity of a judgment, see, *infra*, §§ 215-244.

²⁸ *Warren Manuf'g Co. v. Aetna Ins. Co.*, 2 Paine, 501, Fed. Cas. No. 17,206; *Graham v. Graham*, 4 Munf. (Va.) 205; *Staunton Perpetual Bldg. & Loan Co. v. Haden*, 92 Va. 201, 23 S. E. 285; *Rorer v. People's Bldg. L. & S. Ass'n*, 47 W. Va. 1, 34 S. E. 758; *Stallings v. Gully*, 48 N. C. 344; *Winslow v. Anderson*, 20 N. C. 1, 32 Am. Dec. 651; *Duncan v. Gerdine*, 59 Miss. 550; *Prentiss v. Mellen*, 1 Smedes & M. (Miss.) 521; *State v. Billings*, 23

And due and proper service must appear upon the record before the court is authorized to render a judgment by default;²⁹ though here it is necessary to recollect the presumptions of jurisdiction by which any judgment of a superior court is sustained when assailed collaterally or made the basis of a new suit. It being necessary, therefore, that the court should have jurisdiction in the case, it is evident that a defect or failure in this respect may arise either from some peculiarity in the process itself or from the manner of its service. Now, to be duly served with a summons is said to imply that the defendant has been duly served with a summons notifying him to appear and answer in the court where the judgment is sought to be taken.³⁰ Assuming these to be the essentials of a proper notice, it follows that the writ, although properly served, may be so defective in itself as to confer no jurisdiction over the defendant. Such would be the case if it omitted to apprise him of the court in which the action had been commenced or the day on which he was required to appear.³¹ It is not true, however, that any irregularities in the process, short of this, may be entirely disregarded. The rule is, that if the notice is defective or irregular, but not to the extent of being substantially worthless, a judgment by default entered thereon will be irregular and liable to be corrected or set aside on motion, or reversed above, but not absolutely void, and hence not open to collateral attack.³² In the next place, the process, sufficient in

La. Ann. 798; *Townsend v. Townsend*, 21 Ill. 540; *Moore v. Watkins*, 1 Ark. 268; *Shepherd v. Marvel*, 16 Ind. App. 417, 45 N. E. 526; *Ditch v. People*, 31 Ill. App. 368; *Holt v. Skinner*, 99 Iowa, 360, 68 N. W. 788; *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47, 43 Pac. 315; *Johnson v. Delbridge*, 35 Mich. 436; *Bascom v. Young*, 7 Mo. 1; *Zimmerman v. Gerdes*, 106 Wis. 608, 82 N. W. 532; *D. M. Osborne & Co. v. Columbia County Farmers' Alliance Corp.*, 9 Wash. 666, 38 Pac. 160.

²⁹ *Wilkinson v. Bayley*, 71 Wis. 131, 36 N. W. 836; *Zimmerman v. Gerdes*, 106 Wis. 608, 82 N. W. 532; *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627, 56 N. W. 944; *Campbell v. Donovan*, 111 Mich. 247, 69 N. W. 514. A mere recital in a default judgment that process was served is not sufficient evidence of that fact. *Herman's Ex'x v. Martin* (Ky.) 55 S. W. 429.

³⁰ *Smith v. Ellendale Mill Co.*, 4 Or. 70.

³¹ *Kitsmiller v. Kitchen*, 24 Iowa, 163.

³² *Bishop v. Donnell*, 171 Mass. 563, 51 N. E. 170; *Dunn v. Hughes* (Tex. Civ. App.) 36 S. W. 1084; *Harboitt v. State*, 37 Tex. Cr. R. 639, 40 S. W. 128; *Day v. Mertlock*, 87 Wis. 577, 58 N. W. 1037; *De Tar v. Boone Co.*,

itself, must be duly served upon the party or upon some person authorized to receive service in his stead.³³ But here also, slight irregularities, not fatal in themselves, will not have the effect of depriving the court of jurisdiction. "If the court to which the process is returnable adjudges the service to be sufficient and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal."³⁴ A voluntary appearance by the defendant will of course be sufficient to confer jurisdiction, and will amount to a waiver of formal and technical defects in the process or its service.³⁵ But a default obtained without proper service and on an unauthorized appearance, is an absolute nullity.³⁶ The defendant may also acknowledge service of the writ, and thereby fore-

³³ Iowa, 488; *Betts v. Baxter*, 58 Miss. 334; *Christian v. O'Neal*, 46 Miss. 669; *Campbell v. Hays*, 41 Miss. 561; *Isaacs v. Price*, 2 Dill. 351, Fed. Cas. No. 7,097. A judgment by default against defendant is valid, notwithstanding a mistake in the summons in the Christian name of the plaintiff. *Bradley v. Sandilands*, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386. But a citation not authenticated by the seal of the court will not, on appeal, support a judgment by default. *Line v. Cranfill* (Tex. Civ. App.) 37 S. W. 184. And where the copy of the notice delivered to the defendant fails to show that the original notice was signed by the plaintiff or his attorney, as required by statute, the service is not sufficient to give the court jurisdiction to enter a default judgment. *Holt v. Skinner*, 99 Iowa, 360, 68 N. W. 788. In New York, plaintiff cannot take a judgment by default if a copy of the complaint is not served with the summons. See *Crouse v. Reichert*, 61 Hun, 46, 15 N. Y. Supp. 369.

³⁴ A judgment by default on service of a summons on the attorney of defendant, when the latter in no manner voluntarily submits himself to the jurisdiction of the court, is void. *Goldberg v. Fowler*, 29 Misc. Rep. 328, 60 N. Y. Supp. 475. As to service of papers by mail, see *Seifert v. Caverly*, 63 Hun, 604, 18 N. Y. Supp. 327.

³⁵ *Isaacs v. Price*, 2 Dill. 351, Fed. Cas. No. 7,097. Compare *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

³⁶ The entry of an order that the cause "is hereby continued by consent" does not show such an appearance and waiver of service as will support a judgment by default. *Flowers v. Jackson*, 66 Ark. 458, 51 S. W. 462.

³⁷ *Fleming v. Boulevard Highlands Imp. Co.*, 12 Colo. App. 187, 54 Pac. 859; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185; *Howell v. Campbell*, 53 Kan. 742, 37 Pac. 120. An affidavit for continuance filed by defendant is not such an appearance as will warrant judgment by default. *Hoyt v. Macon*, 2 Colo. 113. Nor is service of notice of a motion

go his objections to the manner of service or the person executing it. But it is held in some states that an indorsement upon the process, of a written acknowledgment of service, purporting to be signed by the party, is not sufficient, without proof of the authenticity of such indorsement and signature, to authorize the entry of default for want of an appearance.³⁷ This rule, however, is probably too severe to find general acceptance. On similar principles, in a state where the law is that a judgment by default cannot be entered except upon proof of the personal service of the summons and complaint, an admission of "service," not stating the mode in which the service was made, is not sufficient.³⁸ To warrant entering a judgment against one who has been made a defendant upon his own motion, there must be notice and proof of no answer, the same as in the ordinary case of a defendant who has been served and has appeared.³⁹ In fact, the cardinal principle is that a defendant cannot be put in default without due notice of everything which requires him to take affirmative action. Thus in a case where judgment by default was rendered on a substituted petition, the substitution having been made without notice to the defendant or any one authorized to represent him, the judgment was held to be erroneous.⁴⁰

to dissolve an attachment on account of irregularity, made by defendant's attorney. *Gildden v. Packard*, 28 Cal. 649. So where, in foreign attachment, defendant appears merely to move for a rule on plaintiff to show his cause of action, for the purpose of securing a release of the property, it is a special appearance, and not sufficient to authorize a judgment by default. *Warren Sav. Bank v. Silverstein*, 15 Pa. Co. Ct. R. 584. On the withdrawal of his appearance for defendant by the attorney entering the same, though without leave of court, a valid judgment by default may be entered against the defendant. *Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U. S. 693, 19 Sup. Ct. 761, 43 L. Ed. 1103. But if the defendant was personally served, it is immaterial, as affecting a judgment by default against him, whether or not an attorney who appeared for him was authorized to do so, since in either event the judgment is proper. *Hunter v. Bryant*, 98 Cal. 252, 33 Pac. 55.

³⁷ *Johnson v. Delbridge*, 35 Mich. 436; *Davis v. Jordon*, 5 How. (Miss.) 295. Where a judgment by default recited that service of the writ in the case was acknowledged by the defendant, it was held sufficient to sustain the judgment. *Winston v. Miller*, 20 Miss. 530.

³⁸ *Read v. French*, 28 N. Y. 285.

³⁹ *Fagan v. Barnes*, 14 Fla. 53.

⁴⁰ *Watson v. Miller Bros.*, 69 Tex. 175, 5 S. W. 680. But a judgment

Thus far we have not spoken of judgments by default rendered upon constructive service of process. This proceeding is authorized by statute in many of the states, in actions against non-resident defendants, and cases involving the validity of such judgments are by no means infrequent. The subject properly belongs to another part of this work, and in this connection it is only necessary to remark that the statutes authorizing the entry of such judgments are strictly construed and the prescribed procedure must be strictly followed, and that such judgments have no extraterritorial validity and are not binding on the defendant out of the state where rendered, except in actions in rem and quasi in rem (as in divorce), and in cases where the jurisdiction is based on attachment of the defendant's property found within the state, in which latter instance the judgment is universally valid in so far as it affects to dispose of such property.⁴¹

§ 84. Must be founded on good Declaration.

A judgment entered by default will be irregular and erroneous unless it rests upon a good and sufficient declaration or complaint duly filed in the action.⁴² Hence if the plaintiff's pleading sets out

by default is not void where it appears that summons upon the petition as amended was duly served on the defendant. *Little v. Ferguson* (Ky.) 55 S. W. 554.

⁴¹ See *Gary v. Northwestern Masonic Aid Ass'n* (Iowa) 50 N. W. 27; *Taylor v. Rossiter*, 6 Houst. (Del.) 485. And see, *infra*, §§ 227-232. A judgment by default on constructive service by publication, there being no personal service and no appearance by defendant, is void, where, at the commencement of such action, and at the time of the making of such publication, the defendant was a resident within the jurisdiction, and, by due diligence, service could have been made upon him personally. *Hockaday v. Jones*, 8 Okl. 156, 56 Pac. 1054.

⁴² *Amason v. Nash*, 19 Ala. 104; *Wellborn v. Sheppard*, 5 Ala. 674; *Merritt v. White*, 37 Miss. 438; *Glenn v. Shelburne*, 29 Tex. 125; *Stahl v. Chicago, St. P., M. & O. R. Co.*, 94 Wis. 315, 68 N. W. 954. Compare *Hibernia Sav. & Loan Soc. v. Matthai*, 116 Cal. 424, 48 Pac. 370. Plaintiff cannot take a default where there is no declaration or complaint on file. *Woodruff v. Matheney*, 55 Ill. App. 350; *Press v. Ridgway Refrigerator Manufg Co.*, 37 Ill. App. 269; *Haygood v. Tait*, 126 Ala. 264, 27 South. 842. But a judgment by default is not invalidated by reason of the fact that the defendant's attorney had taken the papers from the files before judgment was rendered, and then had them in his possession. *Schultz v. Meiselbar*, 144 Ill. 26, 32 N. E. 550.

no cause of action, a judgment by default thereon cannot stand.⁴³ "A default is an admission of the cause of action stated in the petition, and that something is due to the plaintiff. But where no cause of action is stated in the petition a default can have no such effect. It is true that a defendant may be concluded by a default where the facts stated in the petition do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer.⁴⁴ But where the petition omits the necessary averment to show liability against the defendant, the court may and should, even upon default, refuse to enter judgment."⁴⁵ A view opposite to that here stated has been taken in some of the New York cases,⁴⁶ on the ground that, if the complaint is defective in this particular, the remedy by demurrer is open to the defendant, and if he neglects to avail himself of it, he waives any objections which he might thus present, and cannot ask to have the judgment set aside or reversed. But the very obvious answer to this is, that an objection to the complaint, on the score of its failure to state a cause of action, like an exception to the jurisdiction of the court, is never waived; that a default admits nothing more than the plaintiff has chosen to allege, and the silence of the defendant should not be made to help him out; and that if the plaintiff has not stated a case sufficient to justify the intervention of the law in his behalf, he is not entitled to

⁴³ *Thigpen v. Mundine*, 24 Tex. 282; *Abbe v. Marr*, 14 Cal. 210; *Barron v. Frink*, 30 Cal. 486; *Hallock v. Jaudin*, 34 Cal. 167; *Andrews v. Union Cent. Life Ins. Co.*, 92 Tex. 584, 50 S. W. 572; *Ide v. Booth*, 8 Pa. Co. Ct. R. 499.

⁴⁴ But some of the cases hold that, in order to support a judgment by default, the declaration or complaint must be sufficient to withstand a general demurrer. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947; *Ishmel v. Potts* (Tex. Civ. App.) 44 S. W. 615.

⁴⁵ *Bosch v. Kassing*, 64 Iowa, 312, 20 N. W. 454. See *Walker v. Massey*, 10 Ala. 30. In an action to protect a water right, if the complaint states a good title, it will support a decree taken by default. *Balley v. Malheur & H. L. Irr. Co.*, 36 Or. 54, 57 Pac. 910.

⁴⁶ *Adams v. Oaks*, 20 Johns. 282; *Dorr v. Birge*, 8 Barb. 351; *Pope v. Dinsmore*, 8 Abb. Prac. 429; *Reeder v. Lockwood*, 30 Misc. Rep. 531, 62 N. Y. Supp. 713. See, also, *Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. 682; *Askren v. Squire*, 29 Or. 228, 45 Pac. 779; *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476.

any judgment, whether the defendant answers or not.⁴⁷ A petition, for instance, which does not allege an assignment of the claim sued on, when it is not in the plaintiff's name and no assignment is proved, will not sustain a judgment by default.⁴⁸ The question is different where the judgment is rendered on a declaration containing both good and bad counts. Here it is said that the insufficiency of one count to sustain a judgment will not impair the plaintiff's right to recover on the other, and hence the judgment will be allowed to rest on the cause of action well pleaded and will not be reversed.⁴⁹ There are cases, however, holding that the damages being general, and nothing appearing to show that they were in fact assessed upon the good count only, there is no authority to presume that they were so assessed, and hence (just as in the case of a verdict and general damages, upon a declaration containing a count bad in substance) the judgment will be erroneous.⁵⁰

§ 85. Premature Entry of Default.

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A judgment rendered by default against a defendant before the expiration of the time allowed to him for filing a plea or answer, is irregular and voidable at his instance.⁵¹ He has the whole of the last day in which to plead, and cannot be said to be in default until

⁴⁷ The failure of defendant to appear or answer is an admission only as to the facts which are properly pleaded by the plaintiff. *Doud Sons & Co. v. Duluth Milling Co.*, 55 Minn. 53, 56 N. W. 463.

⁴⁸ *Thompson v. Stetson*, 15 Neb. 112, 17 N. W. 368. So, a default judgment for fraudulent representations cannot stand, unless the intent to defraud was alleged in the complaint. *Shields v. Clement*, 12 Misc. Rep. 506, 33 N. Y. Supp. 676. But it is said that a default judgment is not void merely because the complaint fails to show whether the plaintiff (described as a "company") is a corporation or a partnership. *Moore v. Martin & Hoyt Co.*, 124 Ala. 291, 27 South. 252.

⁴⁹ *Hunt v. City of San Francisco*, 11 Cal. 250.

⁵⁰ *Henmenway v. Hickes*, 4 Pick. (Mass.) 497; *Dryden v. Dryden*, 9 Pick. (Mass.) 546.

⁵¹ *Parker v. Linden*, 59 Hun, 623, 13 N. Y. Supp. 787; *Lash v. Warren* (Tex.) 14 S. W. 694; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123; *Forbes v. Muxlow*, 18 Civ. Proc. R. 239, 13 N. Y. Supp. 797; *Gillette-Herzog Manufg Co. v. Ashton*, 55 Minn. 75, 56 N. W. 576. As to judgment by default in a justice's court, rendered, in the absence of defendant and his counsel, prior to the hour set in the citation, see *Yentzer v. Thayer*, 10 Colo. 63, 14 Pac.

that day has fully expired;⁵² and if the last day falls upon a Sunday or a holiday, he is entitled to the whole of the next succeeding day.⁵³ But a judgment thus prematurely entered is not absolutely void; if the defendant takes no steps to correct the error, he is presumed to have waived it.⁵⁴ The time limited is given for the benefit of the defendant, and he may waive it and consent that a judgment be entered against him before its expiration.⁵⁵ So if, after due service of summons, judgment by default is entered one day sooner than the statute allows, but the defendant is informed of the date of the entry, both by an attachment served on him shortly thereafter and by a scire facias, duly served, to revive the judgment, several years later, but takes no action until after the judgment has been revived, the irregularity will be regarded as waived, and a motion to strike off the judgment will be denied.⁵⁶ A decree *pro confesso*, signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day with the signing of the decree.⁵⁷ In case of a default, judg-

53. 3 Am. St. Rep. 563. And see *Dow v. March*, 80 Me. 408, 15 Atl. 26. Where a municipal court orders an answer to be filed, and adjourns to a subsequent day, it cannot in the interim render a legal judgment by default on failure to file an answer. *Whitman & Barnes Manuf'g Co. v. Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

⁵² *Porter v. Hower*, 9 Pa. Co. Ct. R. 283; *Lohman v. Cox*, 9 N. M. 503, 56 Pac. 286.

⁵³ *Rothchild v. Link*, 29 App. Div. 580, 51 N. Y. Supp. 253. But where the time to plead is limited to a certain number of days, Sundays and holidays are to be counted, except where the last day is *dies non*. *Balley v. Edmundson*, 168 Mass. 297, 46 N. E. 1064.

⁵⁴ *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; *Burt v. Scrantom*, 1 Cal. 416; *Mitchell v. Aten*, 37 Kan. 33, 14 Pac. 497, 1 Am. St. Rep. 231; *West v. Williamson*, 1 Swan (Tenn.) 277; *Glover v. Holman*, 3 Heisk. (Tenn.) 519.

⁵⁵ *Hoguet v. Wallace*, 28 N. J. Law, 523; *Beebe v. George H. Beebe Co.*, 64 N. J. Law, 497, 46 Atl. 168; *Wiggins v. Mayer*, 91 Ga. 778, 18 S. E. 430; *McDonald v. Tutty*, 99 Ga. 184, 27 S. E. 157. But an acceptance of service and waiver of citation will not authorize judgment by default before the expiration of the time allowed for pleading. *Anheuser-Busch Brewing Ass'n v. McGowan*, 49 La. Ann. 630, 21 South. 766.

⁵⁶ *Harper v. Biles*, 115 Pa. 594, 8 Atl. 446.

⁵⁷ *Emery v. Downing*, 13 N. J. Eq. 59.

ment may be entered before the case is reached in its regular order on the docket.⁵⁸

§ 86. Default, when proper.

When an answer or other pleading of a defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default can be entered against him; to authorize a default, the answer or other pleading must be disposed of by motion, demurrer, or in some other manner.⁵⁹ The authorities do not go to the extent

⁵⁸ *Brenner v. Gundershiemer*, 14 Iowa, 82. Where an answer is due after the commencement of a term of court, and no pleading is filed nor appearance made by the defendant, the case may be docketed, and judgment by default rendered at any time thereafter during such term. *Leonard v. Hargis*, 58 Kan. 40, 48 Pac. 586. See *Kessler v. Vera*, 25 Misc. Rep. 763, 54 N. Y. Supp. 142.

⁵⁹ *Phonoharp Co. v. Stobbe*, 20 Misc. Rep. 608, 46 N. Y. Supp. 678; *Com. v. Krause*, 23 Pa. Co. Ct. R. 511; *Carolina Inv. Co. v. Kelly*, 123 N. C. 388, 31 S. E. 671; *Green v. Jones*, 102 Ala. 303, 14 South. 630; *Taylor v. McNairy*, 42 Miss. 276; *Beard v. Orr & Lindsey Shoe Co.* (Miss.) 8 South. 512; *Hambrick v. Dent*, 70 Miss. 59, 11 South. 608; *Biloxi Lumber & Export Co. v. New Orleans Railway & Mill Supply Co.* (Miss.) 28 South. 21; *Bedwell v. Thompson*, 25 Tex. Supp. 245; *Sevier v. Turner* (Tex. Civ. App.) 33 S. W. 294; *Hepburn v. Danville Nat. Bank* (Tex. Civ. App.) 34 S. W. 988; *Hicks v. Vann*, 4 Ark. 526; *Boyer v. Robinson*, 6 Ark. 532; *Alexander v. Stewart*, 23 Ark. 18; *White v. Reagan*, 25 Ark. 622; *Harris v. Muskingum Manufg Co.*, 4 Blackf. 267, 29 Am. Dec. 372; *Young v. State Bank*, 4 Ind. 304; *Terrell v. State*, 68 Ind. 155; *Wall v. Galvin*, 80 Ind. 447; *Lyon v. Barney*, 1 Scam. (Ill.) 387; *Faurot v. Park Nat. Bank*, 37 Ill. App. 322; *City of Pana v. Humphreys*, 39 Ill. App. 641; *Wells v. Mathews*, 70 Ill. App. 504; *Keck v. McEldowney*, 73 Ill. App. 159; *Miller v. Hardacre*, 1 G. Greene (Iowa) 154; *Levi v. Monroe*, 11 Iowa, 453; *Ruch v. Jones*, 33 Mo. 393; *Norman v. Hooker*, 35 Mo. 366; *McMurtry v. State*, 19 Neb. 147, 26 N. W. 915; *Strong v. Comer*, 48 Minn. 66, 50 N. W. 936; *Porter v. Bichard*, 1 Ariz. 87, 25 Pac. 530. Under a statute providing that either party to a civil action may propound interrogatories to the other, which must be answered fully, and that if the answers are not full and clear, the court may, on motion, compel them to be made so, or default or nonsuit the answering party, the court cannot, without further proceedings, default the answering party because the answers are deemed insufficient or evasive. *Fels v. Raymond*, 139 Mass. 98, 28 N. E. 691. In some states, the mere filing of an answer will not prevent a judgment by default, but there must also be a subsequent appearance by defendant to protect his rights. *Lytle v. Custead*, 4 Tex. Civ. App. 490, 23 S. W. 451. And see *Schwarz v. Oppenheimer*, 90 Ala. 462, 8 South. 36.

of holding that such a judgment would be absolutely void, but it would be set aside on motion of the defendant or reversed on appeal. There appears to be some doubt as to whether the plea should be actually on file, in order to prevent a default, or whether it is sufficient if duly brought to the notice of the plaintiff or his attorney.⁶⁰ The question will be governed to some extent by the local practice, and in those jurisdictions where the defendant's answer is to be served on the plaintiff's attorney within a specified time, an entry of default would probably be regarded as erroneous if made after such service, although the pleading were not filed in court. In a case where judgment by default was entered against a defendant, who filed an answer on the same day the judgment was rendered, but it did not appear affirmatively that the answer was filed before the judgment, or that the attention of the court was called to the answer before giving judgment, it was held to be the legal presumption that the judgment was first given.⁶¹ Even though the plea filed by the defendant be bad in form or substance, yet, if it does not admit the plaintiff's case, the latter cannot have judgment for want of a plea; the proper practice is either to move to strike out the plea, or to answer it by demurrer or otherwise.⁶² And especially after replying to a plea filed in proper time the plaintiff cannot take judgment by nil dicit; if the plea is bad, he should withdraw his replication and demur.⁶³

⁶⁰ In an early New York case, where a plea was delivered to the plaintiff's attorney, who searched the clerk's office, and, finding no plea on file, entered a default for want of a plea, the court considered the default as a nullity; the party is to be governed by the pleadings delivered to him, and not search the office to see whether the originals are filed. *Smith v. Wells*, 6 Johns. 286. But compare *Wall v. Galvin*, 80 Ind. 447.

⁶¹ *Wooldridge v. Brown*, 1 Tex. 478. See, per contra, *Lyon v. Barney*, 1 Scam. (Ill.) 387.

⁶² *Briggs v. Sholes*, 14 N. H. 262. Where the admissions in an answer negative its general denials, the latter may be disregarded, and if the complaint be verified, judgment may be asked on the former. *Fremont v. Seals*, 18 Cal. 433. In Texas, to defeat a judgment by default for want of an answer, defendant must file an answer consisting of a written pleading; it is not sufficient for him to request orally, on the appearance day, that the action be dismissed because of its being brought in the wrong county. *State v. Patterson* (Tex. Civ. App.) 40 S. W. 224.

⁶³ *Cox v. Capron*, 10 Mo. 691.

On similar principles, it is erroneous to render a judgment by default against a defendant who has filed a demurrer to the declaration, when the same remains unanswered and not disposed of in any way, and he has not taken any subsequent step in the cause amounting to a waiver of the demurrer.⁶⁴ And a judgment by default, entered while exceptions are pending and undetermined, is erroneous and irregular.⁶⁵ So, pending the question whether a suit can be maintained in the court where it is brought, by reason of the alleged non-residence of the defendant, there can be no judgment against him for want of a plea.⁶⁶ When a demurrer to the answer is sustained, in the absence of defendant and his counsel, an opportunity must be accorded to the defendant to elect whether he will plead over or stand on the demurrer.⁶⁷ But of course, after the defendant's demurrer is overruled and judgment of "respondeat ouster" given, he may be put in default for failure to answer further within the proper time.⁶⁸

For the same reasons, a default cannot be entered while a motion is pending.⁶⁹ Thus, while an application for the removal of a cause from the state court to a federal court remains undetermined, it is irregular to enter a default against the party making the application, and a motion to set aside the default in such case should be allowed.⁷⁰ So of a motion to dismiss, for want of security for costs by a non-resident plaintiff, made in due time.⁷¹ A motion to quash the return or the summons is no waiver of the right to plead, and in such

⁶⁴ *Steelman v. Watson*, 5 Gilman (Ill.) 249; *McKinney v. M^ov.* 1 Scam. (Ill.) 534; *Key v. Hayden*, 13 Iowa, 602; *Willamette Falls Transportation & Milling Co. v. Smith*, 1 Or. 181; *Hirsh v. Clawson*, 106 Ind. 329, 6 N. E. 919; *Fish v. Wheeler*, 31 Ill. App. 596; *Race v. Irving Park Hall Ass'n*, 50 Ill. App. 131.

⁶⁵ *Francis v. Steamer Black Hawk*, 18 La. Ann. 629.

⁶⁶ *State v. Gittings*, 35 Md. 169.

⁶⁷ *Thwing v. Doye*, 2 Okl. 608, 44 Pac. 381.

⁶⁸ *Jordan v. John Ryan Co.*, 35 Fla. 259, 17 South. 73.

⁶⁹ *Atchison, T. & S. F. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Ridgway v. Horner*, 55 N. J. Law, 84, 25 Atl. 386; *Hosmer v. Hoitt*, 161 Mass. 173, 36 N. E. 835.

⁷⁰ *Mattoon v. Hinkley*, 33 Ill. 208. As to the effect of the pendency of an application for a change of venue, as preventing a default, see *Anderson v. Perkins*, 52 Mo. App. 527; *Pennie v. Visser*, 94 Cal. 323, 29 Pac. 711.

⁷¹ *The Osprey v. Jenkins*, 9 Mo. 643.

case a refusal to allow the defendant to plead, and an entry of judgment as upon default, is error.⁷² If the defendant's plea is withdrawn, the case then stands precisely as if no plea had been filed. An appearance is entered and a want or defect of service is waived by filing a plea in bar in the action, and if the plea is subsequently withdrawn, that does not operate as a withdrawal of the appearance, and the plaintiff is entitled to judgment of nil dicit at any time before another plea is filed.⁷³ And in general, if the defendant abandons, or fails to establish, any preliminary motion or plea, he must seasonably avail himself of the opportunity accorded to answer to the merits, or he will be liable to be defaulted.⁷⁴ Thus, where a defendant filed a motion to quash a summons, which was overruled, and refused to appear further in the action, it was held that a judgment against him, without showing an entry of default, would not be disturbed.⁷⁵ Leave to the plaintiff to amend his declaration, and to the defendant for time to plead, is an abandonment of all existing issues, and if the plaintiff amends his declaration, and no plea is filed to such amended declaration, the plaintiff is entitled to judgment by default.⁷⁶ Still it is irregular to enter judgment as for want of an answer, where the complaint is amended after answer but no amended answer filed, if the original answer states a defense to the

⁷² *Story v. Ware*, 35 Miss. 399, 72 Am. Dec. 125; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. Compare *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895.

⁷³ *Dart v. Hercules*, 34 Ill. 395; *Grigg v. Gilmer*, 54 Ala. 425. When defendant has withdrawn his appearance, he is not entitled to notice of an application for judgment by default. *Day v. Mertlock*, 87 Wis. 577, 58 N. W. 1037.

⁷⁴ Such is the case where defendant's answer is stricken out as sham and frivolous, and he unwarrantably neglects to file an amended pleading. *McMurrin v. Meek*, 47 Minn. 245, 49 N. W. 983.

⁷⁵ *McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707. And see *McKellar v. Lamkin*, 22 Tex. 244; *London Assur. Corp. v. Lee*, 66 Tex. 247, 18 S. W. 508.

⁷⁶ *Robinson v. Keys*, 9 Humph. (Tenn.) 144; *La Barre v. City of Waterbury*, 69 Conn. 554, 37 Atl. 1068. Compare *Mullins v. Johnson* (Ky.) 52 S. W. 843. In California, the rule is that an amendment of the complaint in matter of substance opens a default. *Witter v. Bachman*, 117 Cal. 318, 49 Pac. 202. As to the effect of the death of the plaintiff and the substitution of his executor, extending the time to answer, when the defendant is already in default, see *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55.

cause of action shown by the amended complaint.⁷⁷ Judgment by default, without a rule to answer, should not be entered against a defendant where a motion to strike out a portion of the complaint has been allowed. "We think the defendant should be regarded as standing in the same position as though he had successfully attacked the complaint by demurrer. Even if the order of the court and the circumstances of the case required no formal amendment of the complaint, the necessity for a rule to answer would remain the same."⁷⁸ When a default has actually been entered against the defendant, he cannot escape its consequences by filing a plea or answer, unless by consent of the plaintiff or leave of court.⁷⁹ But a default may be waived; and it will be considered that this is done, if the plaintiff subsequently permits the defendant, without objection, to participate in the proceedings, as, by filing an answer or a demurrer.⁸⁰

§ 87. Conclusiveness of Judgment by Default.

A judgment taken by default is conclusive, by way of estoppel, in respect to all such matters and facts as were well pleaded and properly raised and material to the case made by the declaration, or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties or their privies.⁸¹ But while a de-

⁷⁷ *First Nat. Bank v. Prescott*, 27 Wis. 616. Where, in an action of assumpsit, the general issue has been pleaded, and an amendment to the declaration is allowed, it is error to enter judgment by default against the defendant for failure to answer the amended declaration. *Ridgely Nat. Bank v. Fairbank*, 54 Ill. App. 296.

⁷⁸ *Mullen v. Wine*, 9 Colo. 167, 11 Pac. 54.

⁷⁹ *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506; *Camp v. Phillips*, 88 Ga. 415, 14 S. E. 580. As to the discretion of the trial court in granting defendant leave to answer after the time, see *Lichtenberger v. Worm*, 41 Neb. 856, 60 N. W. 93. And see *Crane v. Crane*, 121 Cal. 90, 53 Pac. 433.

⁸⁰ *Cornell University v. Denny Hotel Co.*, 15 Wash. 433, 46 Pac. 654; *Sawtelle v. Muncy*, 116 Cal. 435, 48 Pac. 387.

⁸¹ *Leonard v. Simpson*, 2 Bing. N. C. 176; *Oregon Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.)* 28 Fed. 505; *Derby v. Jacques*, 1 Cliff. 425, Fed. Cas. No. 3,817; *Thatcher v. Gammon*, 12 Mass. 268; *Briggs v. Richmond*, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; *Minor v. Walter*, 17 Mass. 237; *Gaskill v. Dudley*, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; *Newton v. Hook*, 48 N. Y. 676; *Brown v. Mayor, etc., of City of New York*, 66 N. Y. 385; *McCalley v. Wilburn*, 77 Ala. 549; *Ellis v. Mills*, 28 Tex. 384; *Dunn v. Pipes*, 20 La. Ann.

fault is conclusive of all that is properly alleged in the complaint, it is conclusive of nothing more, and as a general rule it binds the defendant only in the character in which he is sued.⁸² "As applicable, however, to a suit to foreclose a mortgage, or other kindred suits in the nature of a proceeding in rem, where a party is made a defendant to answer as to his supposed or possible, but unknown or undefined, interest in the property, we think that, as against him, a default ought to be construed as an admission that, at the time he failed to appear as required, he had no interest in the property in question, and hence as conclusive of any prior claim of interest or title adverse to the plaintiff."⁸³ Further, a judgment by default, regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court in declaring the plaintiff's right to recover, although the amount of the recovery, in some cases, may remain to be ascertained by the assessment of damages.⁸⁴ A judgment by default will also operate as a merger of the cause of action

276; *Ligon v. Triplett*, 12 B. Mon. (Ky.) 283; *Marks v. Sigler*, 3 Ohio St. 358; *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93; *Fletcher v. Holmes*, 25 Ind. 458; *Van Valkenburgh v. City of Milwaukee*, 43 Wis. 574; *Doyle v. Hal- lam*, 21 Minn. 515; *Kittridge v. Stevens*, 16 Cal. 381. *Infra*, § 697.

⁸² *Unfried v. Heberer*, 63 Ind. 67. Such a judgment, in an action to enforce stockholders' liability, is conclusive that a defendant, duly summoned and failing to answer, was a stockholder. *Ueland v. Johnson*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 608. But it is said that a judgment by default against defendants in an action wherein they were alleged to be partners, does not establish the existence of the partnership. *Baker v. Baer*, 59 Ark. 503, 28 S. W. 28. Where a default is taken in a suit on a contract entered into with a foreign corporation, its capacity to make the contract is admitted. *Starr Cash & Package Car Co. v. Starr*, 69 Conn. 440, 37 Atl. 1057. Judgment by default in an action for assessments upon property for public improvements is conclusive that such property was subject to assessment, and after the lapse of 20 years will be binding even where the defendant was a municipal corporation. *City of New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96. So also, the allegation that money sought to be recovered was received by defendant in a fiduciary capacity is admitted by a default and need not be proved. *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 236, 52 N. Y. Supp. 985. In fact, as stated in an Illinois decision, the entire cause of action, except the amount of damages as stated in the declaration, is admitted by a default. *Phoenix Ins. Co. v. Hedrick*, 73 Ill. App. 601.

⁸³ *Barton v. Anderson*, 104 Ind. 578, 4 N. E. 420.

⁸⁴ *Mallhouse v. Inloes*, 18 Md. 328; *Green v. Hamilton*, 16 Md. 317, 77 Am. Dec. 295; *Loney v. Bailey*, 43 Md. 10; *Clark v. Compton*, 15 Tex. 32; *Missis-*

or bar to another suit for the same demand. Thus, where the defendant offers to be defaulted for a given sum, and judgment is accordingly entered for the plaintiff for that amount, such judgment is a bar to a subsequent action between the same parties for the same claim.⁸⁵ But this effect is attributable only to the final judgment in the action. A judgment by default merely admits a cause of action; but while the precise character of the cause of action, and the extent of the defendant's liability, remains to be determined by a hearing in damages and final judgment thereon, the cause of action is not merged in the judgment, and the rights of the parties, beyond the mere admission of a cause of action, are neither strengthened nor impaired thereby.⁸⁶

§ 88. Entry by the Clerk.

Where the defendant makes default, and the nature of the action and of the plaintiff's demand is such that there is no necessity for judicial action in determining the relief to be granted or the amount of the recovery, the statutes generally provide that a judgment may be entered by the clerk of the court, without application to the judge.⁸⁷ But in so entering judgment by default the clerk acts merely in a ministerial capacity, no intendment can be made in support of the validity of his acts, and unless he conforms strictly to the provisions of the statute, his proceedings will be irregular and

Mississippi & T. R. Co. v. Green, 9 Heisk. (Tenn.) 588; Parker v. House, 66 N. C. 374.

⁸⁵ *Hanscom v. Hewes*, 12 Gray (Mass.) 334.

⁸⁶ *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239.

⁸⁷ See *Bullard v. Sherwood*, 85 N. Y. 253; *Skillman v. Greenwood*, 15 Minn. 102 (G.U. 77); *Balley v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Wall v. Heald*, 95 Cal. 364, 30 Pac. 551; *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55. On failure of a defendant properly served to appear within the time allowed, the court may enter judgment against him without a prior formal entry of default by the clerk. *Hibernia Sav. & Loan Soc. v. Matthai*, 116 Cal. 424, 48 Pac. 370. Where the statute provides that, if there is an allegation of fraud, the plaintiff cannot recover unless he proves the fraud at the trial, judgment by default cannot be entered by the clerk without the intervention of the court when the action is predicated on certain acts of defendant which are alleged to have been done with a fraudulent intent. *Fayerweather v. Tucker*, 25 Abb. N. C. 395, 11 N. Y. Supp. 39.

not binding.⁸⁸ For instance, under a statute providing that the clerk may enter in vacation a judgment by default upon proof of personal service of a summons on the defendant, a judgment entered out of term by the clerk, unless there is such proof, is void.⁸⁹ But where the jurisdiction of the clerk to enter the judgment is not denied, it may be made a question how far his mistakes, misprisions, or irregular actions will impair the validity of the judgment. The authorities would not warrant the statement that the judgment in such case would be entirely void. On the contrary, they hold that it would be merely erroneous, and that the error could be cured by motion in the court below or corrected on appeal. This is the position taken with reference to cases in which the clerk, by mistake, has entered judgment for an amount in excess of the real recovery.⁹⁰

§ 89. *Interlocutory Judgment, when necessary.*

It is important to be noted that the entry of a default is not necessarily, or not always, the final judgment in the action. In the language of the supreme court of Vermont, "the mere entry of a default does not involve and amount to the rendering of a final judgment. The default is an incident, which entitles the plaintiff to a judgment, but does not determine either the kind or amount of such judgment. The rendering of the judgment is to supervene upon and succeed the entry of the default, and may require intervening proceedings in the case, in order to enable the court to render such a judgment as to law appertains."⁹¹ And the general rule is that if the action is brought on a contract or promise for a liquidated sum of money, or if the amount to be recovered can be ascertained by a

⁸⁸ *Kelly v. Van Austin*, 17 Cal. 564; *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598; *Curry v. Roundtree*, 51 Cal. 184; *Filles v. Robinson*, 30 Ark. 487; *Taylor v. Smith* (Tenn. Ch.) 36 S. W. 970. Where the statute empowers the clerk to enter judgment in actions on contracts to recover money or damages, if defendant fails to answer, this does not authorize him to enter judgment by default in an action for trespass. *Shay v. Chicago Clock Co.*, 111 Cal. 549, 44 Pac. 237.

⁸⁹ *McConkey v. McCraney*, 71 Wis. 576, 37 N. W. 822; *Elder v. Grunsky*, 127 Cal. 67, 59 Pac. 300.

⁹⁰ *Lenoir v. Broadhead's Adm'r*, 50 Ala. 58; *Bond v. Pacheco*, 30 Cal. 530.

⁹¹ *Sheldon v. Sheldon*, 37 Vt. 152.

mere matter of calculation, then a final judgment may be at once entered for such amount; but if the action sounds in tort,⁹² or claims specific relief, or if the damages must be computed or liquidated otherwise than by simple calculation,⁹³ or depend upon evidence, then an interlocutory judgment will first be entered, and the case proceed to the assessment of damages in some method known to the law, after which a final judgment will be rendered for the amount so assessed. In a case of the latter kind, the prior entry of an interlocutory judgment is important to the regularity of the proceedings, though its omission would probably not be absolutely fatal. In a case where the record disclosed the fact that the court referred the matter to the clerk for the assessment of damages without first rendering an interlocutory judgment against the defendants for want of a plea, as the law required, the appellate court said: "In this we think there is manifest error."⁹⁴ An action upon an open account for goods sold and delivered, for services rendered, or the like, is not upon a liquidated demand such that final judgment may be entered for the amount claimed, upon failure to answer.⁹⁵ Nor can a final judgment by default be rendered in an action of detinue.⁹⁶ Nor is such judgment proper upon a note payable in Confederate money. "A jury should have assessed the value of the contract [note], upon

⁹² *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18; *Studdert v. Hassell*, 6 *Humph.* (Tenn.) 137; *Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461.

⁹³ *Holmes v. Lewis*, 2 *Wis.* 83; *Kenum v. Henderson*, 6 *Ala.* 132; *Cooley v. Tybee Beach Co.*, 99 *Ga.* 290, 25 S. E. 691; *Faucette v. Ludden*, 117 N. C. 170, 23 S. E. 173; *In re Scharmann*, 49 *App. Div.* 278, 63 N. Y. *Supp.* 267; *City of Guthrie v. T. W. Harvey Lumber Co.*, 5 *Okl.* 774, 50 *Pac.* 84.

⁹⁴ *Wilcox v. Field*, 1 *Colo.* 3. But in a later case it is said that a default may be recited and entered against a defendant who does not plead, as well at the time of the rendition of the final judgment as before. *Manville v. Parks*, 7 *Colo.* 128, 2 *Pac.* 212. In Illinois, where no plea is filed in an action of assumpsit, and the defendant is absent, it is error to impanel a jury and assess damages without default first taken and entered. *Lehr v. Vandever*, 48 *Ill. App.* 511.

⁹⁵ *Wolf v. Hamberg*, 8 *S. C.* 82; *Rogers v. Moore*, 86 N. C. 85; *Jenkins v. Wilkerson*, 76 *Miss.* 368, 24 *South.* 700. Where the cause of action is for services rendered as an attorney, but no fixed sum is alleged to have been agreed on, an inquiry of damages must be had upon defendant's default. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

⁹⁶ *Studdert v. Hassell*, 6 *Humph.* (Tenn.) 137.

a writ of inquiry, before the judgment was made final."⁹⁷ On the other hand, a demand founded upon a simple promissory note for a sum certain, not expressed to be payable otherwise than in lawful money, will warrant a final judgment upon defendant's default.⁹⁸ And the same is true of a claim for sums alleged to have been expended by a mortgagee to protect his security, as, for taxes,⁹⁹ and of a claim by a municipal corporation against a tax collector and his sureties upon the official bond.¹⁰⁰

In some of the states, under statutes authorizing constructive service of process by publication in certain cases, it is provided that an interlocutory judgment by default shall be entered upon the defendant's failure to appear, which can only be made final at the succeeding term of court.¹⁰¹ There is one other instance in which an interlocutory judgment should precede the entry of final judgment by default in an action, viz: upon the overruling of defendant's demurrer (in certain cases) or dilatory plea. Here the practice is to give judgment that he "answer over," after which, and on his failure to plead to the merits, he may be defaulted. But if the record shows that the defendant had an opportunity to answer over and refused to do so, judgment by *nil dicit* is good, without an entry of a formal judgment of *respondeat oster*.¹⁰²

§ 90. Assessment of Damages.

After the interlocutory judgment by default has been entered in an action for unliquidated damages or an unascertained sum, the next step is to assess the plaintiff's damages. This process, as followed at common law, consisted of the execution of a writ of in-

⁹⁷ *Williams v. Rockwell*, 64 N. C. 325.

⁹⁸ *Georgia Railroad & Banking Co. v. Pendleton*, 87 Ga. 751, 13 S. E. 822. Compare *Kaiser v. Brown*, 98 Ga. 19, 25 S. E. 925; *Thomas v. American Freehold Land & M. Co.* (C. C.) 47 Fed. 550, 12 L. R. A. 681. A note containing a stipulation for attorney's fees will support a judgment by default which includes such fees, without a writ of inquiry. *Ledbetter & Co. Land & Loan Ass'n v. Vinton*, 108 Ala. 644, 18 South. 692.

⁹⁹ *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476.

¹⁰⁰ *Combs v. Breathitt County* (Ky.) 38 S. W. 138.

¹⁰¹ *Lombard v. Clark*, 33 Mo. 308.

¹⁰² *Haldeman v. Starrett*, 23 Ill. 393.

quiry, whereby the sheriff was directed to summon a jury of twelve men, over which he should himself preside, and proceed to assess the amount of damages sustained by the plaintiff. The verdict being given, the sheriff returned the inquisition, which was entered on the roll in the manner of a *postea*, and thereupon judgment was rendered that the plaintiff should recover the exact sum of damages so assessed.¹⁰³ This common-law method is greatly modified, in the different states, by variations of local practice. In few, if any, is the writ of inquiry still executed by the sheriff; in some, no such writ issues, but the order for assessing damages is executed in court, by the judge, with or without the aid of a jury, or by a referee or auditor.¹⁰⁴ The important question is as to the constitutional right of trial by jury. Under the clause found in many of the state constitutions, providing that in suits at common law, where the value in controversy exceeds a certain sum, the right of trial by jury shall be preserved, it has been held that the defendant has an absolute and indefeasible right, guaranteed by the constitution, to demand that the question of damages be tried by a jury.¹⁰⁵ There is, however, reasonable ground for the theory that the defendant, by suffering a default in the first instance, has voluntarily renounced his right to have a jury called in any of the proceedings in the action.¹⁰⁶

¹⁰³ See *Hickman v. Baltimore & O. R. Co.*, 30 W. Va. 206, 4 S. E. 654.

¹⁰⁴ For the practice in the several states, and particularly as to the assessment being made by the court or by a jury, see *Rowen v. New York, N. H. & H. R. Co.*, 59 Conn. 364, 21 Atl. 1073; *Falken v. Housatonic R. Co.*, 63 Conn. 258, 27 Atl. 1117; *Thompson v. Fox*, 21 Misc. Rep. 208, 47 N. Y. Supp. 176; *Commercial Union Assur. Co. v. Everhart's Adm'r*, 88 Va. 952, 14 S. E. 836; *McLeod v. Nimocks*, 122 N. C. 437, 29 S. E. 577; *Allen v. Lathrop-Hatton Lumber Co.*, 90 Ala. 490, 8 South. 129; *Decatur & N. Imp. Co. v. Crass*, 97 Ala. 524, 12 South. 41; *Ross v. Noble*, 6 Kan. App. 361, 51 Pac. 792; *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75; *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. Where defendant is dissatisfied with the assessment of damages on a default, his remedy is by motion to correct the assessment. *Riely v. Barton*, 32 Ill. App. 524.

¹⁰⁵ *Hickman v. Baltimore & O. R. Co.*, 30 W. Va. 206, 4 S. E. 654.

¹⁰⁶ *Hopkins v. Ladd*, 35 Ill. 178; *Seeley v. City of Bridgeport*, 53 Conn. 1, 22 Atl. 1017; *Raymond v. Danbury & N. R. Co.*, 43 Conn. 596, Fed. Cas. No. 11,593.

§ 91. Evidence on Assessment of Damages.

A default admits the cause of action and the material and traversable averments of the declaration, although not the amount of damages; and upon the proceeding for their assessment, the amount of damages is all that the plaintiff is required to prove or the defendant is permitted to controvert.¹⁰⁷ The former must produce whatever evidence is necessary to fix the amount of his claim with precision. Thus a judgment by default in assumpsit, where an account is filed in the declaration, is an admission of indebtedness for the articles charged, but the value of the articles and the amount of the items require to be proved.¹⁰⁸ As for the defendant, he may offer any evidence which is confined to the question of damages solely or which goes in mitigation or reduction of damages; but evidence tending to deny the cause of action, or to show that a right of action does not exist, or to avoid the alleged contract, is irrelevant and inadmissible.¹⁰⁹

¹⁰⁷ Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Russ v. Gilbert, 19 Fla. 54; Maund v. Loeb, 87 Ala. 374, 6 South. 376; Union Cent. Life Ins. Co. v. Lipscomb (Tex. Civ. App.) 27 S. W. 307; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Martin v. New York & N. E. R. Co., 62 Conn. 331, 25 Atl. 239. But in Florida, it is said that it is error to render final judgment after a default entered in a suit on a bond without production of the bond or proper evidence of it. West v. Fleming, 36 Fla. 298, 18 South. 587.

¹⁰⁸ Patrick v. Ridgaway, 4 Har. & J. (Md.) 312; Durden v. Carhart, 41 Ga. 76.

¹⁰⁹ The defendant has the right to cross-examine the plaintiff's witnesses and interpose objections to evidence. St. Louis S. W. R. Co. v. Denson (Tex. Civ. App.) 26 S. W. 265; Davis v. Wimberly, 86 Ga. 46, 12 S. E. 208. He may also offer any evidence which goes in mitigation or reduction of damages, but cannot have the benefit of a set-off or counterclaim, or other ground for the reduction of damages, unless it necessarily arises from the facts pleaded by the plaintiff. Regan v. New York & N. E. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306. And he cannot introduce evidence controverting the plaintiff's entire cause of action, or tending to avoid it, or to show that no right of action existed. Phillips v. Bachelder, 47 Mo. App. 52; Garrard v. Dollar, 49 N. C. 175, 67 Am. Dec. 271; Foster v. Smith, 10 Wend. (N. Y.) 377; Lambert v. Sanford, 55 Conn. 437, 12 Atl. 519; Lee v. Knapp, 90 N. C. 171. Thus, he cannot defend on the ground that the contract was within the statute of frauds. Williams v. Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800. But in Connecticut, a statute permits the defendant to notify the plaintiff of any

§ 92. Amount of the Recovery.

A judgment by default for a sum greater than that prayed for in the complaint is irregular and erroneous.¹¹⁰ And, generally speaking, where the prayer is for specific relief, the plaintiff is confined to a recovery in strict accordance with what he has asked for.¹¹¹ If a plea admits a part of the debt sued for, without a tender, the plaintiff may take judgment by nil dicit for such amount.¹¹² A judgment by default on a note, upon which is an indorsement of a credit by the plaintiff, ought to be entered subject to such credit.¹¹³ In an action against joint defendants, where one suffers default, but the other proceeds to trial and secures a general verdict against the plaintiff, this is equivalent to a finding that nothing is due from the defaulted defendant, and no judgment can be entered against him.¹¹⁴

spécial defense to be set up on a hearing in damages on default; and this enables him to avail himself of the defense of res judicata. *Brennan v. Berlin Iron-Bridge Co.*, 71 Conn. 479, 42 Atl. 625. See, also, *Ockershausen v. New York, N. H. & H. R. Co.*, 71 Conn. 617, 42 Atl. 650; *Gardner v. City of New London*, 63 Conn. 267, 28 Atl. 42.

¹¹⁰ *Gage v. Rogers*, 20 Cal. 91; *White v. Snow*, 71 N. C. 232; *Johnson v. Mantz*, 69 Iowa, 710, 27 N. W. 467; *Northern Trust Co. v. Albert Lea College*, 68 Minn. 112, 71 N. W. 9; *Reidy v. Bleistift*, 31 Misc. Rep. 181, 63 N. Y. Supp. 974; *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997. Where the complaint demands judgment for the principal of a debt and the costs, a judgment which includes interest, as well as the debt and costs, is erroneous. *Pickett v. Handy*, 9 Colo. App. 357, 48 Pac. 820. But the clerk has authority to add to the amount due on a note the sum therein stipulated to be paid for attorneys' fees, if within the amount demanded in the summons. *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24.

¹¹¹ *Burling v. Goodman*, 1 Nev. 314; *Northern Trust Co. v. Albert Lea College*, 68 Minn. 112, 71 N. W. 9; *Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027. Where the complaint only seeks subrogation of plaintiff to the right of another defendant in a judgment, plaintiff is not entitled, on default of the defendant, to a personal judgment against him. *Heins v. Wicke*, 102 Iowa, 396, 71 N. W. 345. But it has been held that, where the action is on a note and mortgage, the court may, on default, give judgment for foreclosure of the mortgage, though plaintiff has only asked for a personal judgment for the amount due. *Weaver v. Gardner*, 14 Kan. 347.

¹¹² *Williams v. Harris*, 2 How. (Miss.) 627. See *Allen v. Watt*, 69 Ill. 655.

¹¹³ *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326, 16 Am. Dec. 735.

¹¹⁴ *Hayden Saddlery Hardware Co. v. Ramsay*, 14 Tex. Civ. App. 185, 36 S. W. 595.

§ 93. Judgment by Default not aided by Presumptions.

In several states it is held that on appeal from a judgment by default, nothing will be presumed in its favor; the record must show affirmatively the existence of every material fact to give the court jurisdiction, and that all the proceedings were in accordance with law.¹¹⁵ "It is a well settled rule of practice that where a judgment is taken by default against a defendant in an action, the record must affirmatively show that process had been duly served the required length of time before the default was taken."¹¹⁶

§ 94. Opening and Vacating Judgments by Default.

A judgment taken against a defendant by default will be opened or set aside, on his motion, in the court wherein it was entered, for a failure of jurisdiction or for certain classes of errors and irregularities; and also, by statute in some of the states, when it was given in consequence of his "mistake, inadvertence, surprise, or excusable neglect." But in respect to the exercise of this power, judgments by default are not differentiated from any other species of judgment, except in so far as certain special statutes are applicable to them, and except that practically they constitute by far the largest class of cases in which applications for such relief are made. And for this reason it is not proposed to examine the subject in detail in this connection, but the reader is referred to the later chapters of this work in which the vacating and opening of judgments in general will be fully discussed.¹¹⁷

¹¹⁵ *Hudson v. Breeding*, 7 Ark. 445; *Elligood v. Cannon*, 4 Har. (Del.) 176; *Connolly v. Alabama & T. R. R. Co.*, 29 Ala. 373; *Schloss v. White*, 16 Cal. 65. But in *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067, it is said that the ordinary presumption of regularity in the proceedings of a court of general jurisdiction applies in the case of a judgment by default. And in Florida, it appears that, where a final judgment entered by the clerk on a default is not void on its face, but voidable only, because of matters dehors the judgment, it becomes an absolute verity after the lapse of 60 days from the entry of the default, unless set aside or reversed by an appellate court. *Einstein v. Davidson*, 35 Fla. 342, 17 South. 563.

¹¹⁶ *Eltzroth v. Voris*, 74 Ind. 459.

¹¹⁷ See *infra*, §§ 297-355.

§ 95. Review of Judgments by Default.

An appeal will lie from a judgment entered upon the default of the defendant, in a proper case, as well as from any other judgment. "There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury, and in the former, as well as in the latter case, the error may be corrected on appeal."¹¹⁸ We have already seen that such a judgment will be reversed when founded upon a pleading which does not state a cause of action.¹¹⁹ And it remains to be stated that the appellate court has power to deal with it and to correct or reverse it on account of a failure to comply with the statutory directions, or mistakes of the court or clerk, or any errors or irregularities which would vitiate a judgment otherwise rendered.

¹¹⁸ *Stevens v. Ross*, 1 Cal. 94; *Gerhart v. Fout*, 72 Mo. App. 138. But in New York, the statute restricts the right of appeal to parties not in default; and consequently the remedy of one aggrieved by an invalid judgment by default is by motion to have it corrected. *Park v. Park*, 24 Misc. Rep. 372, 53 N. Y. Supp. 677.

¹¹⁹ *Supra*, § 84.

CHAPTER V.

ARREST OF JUDGMENT.

- § 96. Arrest of Judgment at Common Law.
- 97. When the Motion should be made.
- 98. Grounds for Arrest of Judgment.
- 99. Defect of Parties.
- 100. Insufficient or Faulty Pleadings.
- 101. Joinder of Good and Bad Counts.
- 102. Misjoinder of Causes of Action.
- 103. Objections to the Jury.
- 104. Irregular or Defective Verdict.
- 105. Grounds held insufficient.

§ 96. Arrest of Judgment at Common Law.

The arrest of judgment is defined as the withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record which vitiates the proceedings.¹ But the errors which will justify a motion in this behalf must be errors of substance, and not merely clerical or formal mistakes. If they belong to the latter class, they will be cured by the statutes of amendments and jeofails, which have introduced a much more liberal practice in this respect than had formerly obtained. According to Blackstone, "arrests of judgment arise from intrinsic causes, appearing upon the face of the record." And he enumerates the grounds which will be sufficient to prompt this action of the court, as follows:—where the declaration varies totally from the original writ; where the verdict materially differs from the pleadings and issue thereon; and where the case laid in the declaration is not sufficient in point of law to found an action upon.² In this country, motions in arrest of judgment, at least in civil cases, are not especially favored. The liberality of the statutes and the indulgence

¹ Bouv. Law Dict.; Brown. Law Dict., citing Steph. Pl. 106; Roscarla v. Thomas, 6 Jur. 929.

² 3 Bl. Comm. 393. Also, the objection that the judgment is not in conformity with the verdict may be made by motion in arrest. Lee v. Wilkins, 79 Mo. App. 159.

of the courts, in permitting amendments, and in taking defects as cured by the verdict if not duly objected to, have taken away most of the grounds on which a motion of this character could be predicated, and this reduction is still further promoted by the facility of obtaining new trials.³ Indeed, a motion in arrest of judgment is now usually coupled with a motion for a new trial, the latter being the real and important object of the application. And in some of the states the practice of arresting judgments is entirely abolished. In Maine, for example, it is provided by law that no motion in arrest of judgment in any civil action shall be sustained in the courts of that state.⁴ It is of course only the defendant who can move in arrest of judgment. If the defendant has obtained a verdict upon a plea which confesses the cause of action and does not sufficiently avoid it, the proper course for the plaintiff, as we have already seen, is to move for judgment non obstante veredicto.⁵ A joint motion by several defendants in arrest of judgment cannot be sustained as to a part only.⁶ A motion in arrest of judgment need not be in writing, nor point out the grounds therefor, nor need it be brought into the record by bill of exceptions.⁷

§ 97. When the Motion should be made.

By the English practice, a motion in arrest of judgment may be made at any time before judgment is actually entered up. In the absence of statutes, it is probable that a similar rule would be applied in our own courts. But at all events it seems clear that a motion of this kind cannot be granted after the rendition and entry of a final judgment in the cause; at that stage the only remedy is by motion to vacate or set aside the judgment.⁸ But where the law provides

³ See *Virginia & T. Coal & Iron Co. v. Fields*, 94 Va. 102, 26 S. E. 426.

⁴ *Inhabitants of Stetson v. Inhabitants of Corrina*, 44 Me. 29; *Rev. St. Me. c. 82, § 31*. In Illinois, a statute provides that judgments shall not be arrested because of any mispleading, discontinuance, or misjoining of the issue, or any default or negligence by which neither party has been prejudiced. *Rev. St. Ill. c. 7, § 6*. See *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.

⁵ *Supra*, § 16.

⁶ *Van Gundy v. Carrigan*, 4 Ind. App. 333, 30 N. E. 933.

⁷ *Chicago & S. E. Ry. Co. v. Wheeler*, 14 Ind. App. 62, 12 N. E. 489.

⁸ *State v. Kibling*, 63 Vt. 636, 22 Atl. 613; *Keller v. Stevens*, 66 Md. 132.

that the motion may be made at any time before the adjournment of the term at which the case is finally disposed of, it is held that the defendant's right to so move will not be defeated by the entering up of a judgment by the plaintiff on the record before the adjournment of such term.⁹ In some states it is provided that a motion in arrest shall be made within four days of the rendition of the judgment; and when this is the case, the motion is too late if filed after the final adjournment of the term at which the judgment is entered.¹⁰ It is held to be the correct rule of practice not to entertain a motion in arrest of judgment after the overruling of a demurrer to the declaration, at least where the motion is based on any exceptions which might have been considered on the demurrer;¹¹ and clearly, matter which was objected to by demurrer and decided upon cannot afterwards be urged in arrest of judgment.¹² But a motion of this character may be received after a decision on a motion for a new trial.¹³

§ 98. Grounds for Arrest of Judgment.

As a general rule, a judgment can be arrested only for some matter appearing, or the omission of some matter which ought to appear, on the face of the record itself.¹⁴ And for the purpose of such

6 Atl. 533; *Colchen v. Ninde*, 120 Ind. 88, 22 N. E. 94; *Potter v. McCormack*, 127 Ind. 439, 26 N. E. 883; *Bayless v. Jones*, 10 Ind. App. 102, 37 N. E. 421; *Smith v. State*, 140 Ind. 343, 39 N. E. 1060; *Barnhart v. Edwards* (Cal.) 57 Pac. 1004.

⁹ *Hartridge v. Wesson*, 4 Ga. 101.

¹⁰ *State v. Leathers*, 61 Mo. 381.

¹¹ *Rouse v. Peoria County*, 2 Gilman (Ill.) 99; *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625, 14 N. E. 42; *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 761, 23 N. E. 1021, 22 Am. St. Rep. 515; *Indiana & I. S. R. Co. v. Sampson*, 31 Ill. App. 513; *Crown Coal & Tow Co. v. Yoch Coal Min. Co.*, 57 Ill. App. 666; *Mayer v. Lawrence*, 58 Ill. App. 194; *Story & Clark Organ Co. v. Rendleman*, 63 Ill. App. 123; *Miller v. McCormick Harvesting Mach. Co.*, 84 Ill. App. 571.

¹² *Freeman v. Camden*, 7 Mo. 298; *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Cleveland, C., C. & St. L. Ry. Co. v. Jenkins*, 70 Ill. App. 415; *Chicago & A. R. Co. v. Pearson*, 82 Ill. App. 605.

¹³ *Wilkinson v. Daniel, Wright* (Ohio) 368.

¹⁴ *Burrows v. Niblack*, 28 C. C. A. 130, 84 Fed. 111; *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12; *Ward v. Lakeside Ry. Co.*, 20 Pa. Co. Ct. R. 494; *Burnett v. Eslund*, 2 Nott & McC. (S. C.) 435; *Watt's Case*, 4 Leigh (Va.) 672; *Gerling*

a motion, the evidence does not constitute a part of the record.¹⁵ "A motion in arrest of judgment reaches only such defects as are apparent on the face of the record, and as are not cured by the verdict or some statute of amendments, or waived by failing to demur."¹⁶ This motion, in other words, "does not perform the office of calling the attention of the court to rulings which constitute matters of exception. It can not, therefore, be used as a substitute for a motion for a new trial. It reaches only those defects which are apparent on the face of the record proper, and does not reach such as require to be brought to the notice of the court by proof aliunde."¹⁷ Much less, of course, can such a motion be supported by matter which becomes part of the record after the motion has been overruled.¹⁸ It is stated to be an invariable rule, with regard to the arrest of judgment, that whatever is alleged for this purpose must be such matter as would, upon demurrer, have been sufficient to overturn the action

v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691; State v. George, 30 N. C. 324, 49 Am. Dec. 392; State v. Douglass, 63 N. C. 500; Brown v. Lee, 21 Ga. 159; Garner v. State, 42 Ga. 203; Frank v. State, 39 Miss. 705; State v. Addison, 15 La. Ann. 185; State v. Green, 43 La. Ann. 402, 9 South. 42; Case v. State, 5 Ind. 1; McGill v. Rothgeb, 45 Ill. App. 511; McCarty v. O'Bryan, 77 Mo. 584, 38 S. W. 456; Elsenrath v. Kallmeyer, 61 Mo. App. 430; Floyd v. Colorado Fuel & Iron Co., 10 Colo. App. 54, 50 Pac. 864.

¹⁵ Burrows v. Niblack, 28 C. C. A. 130, 84 Fed. 111; Clary v. Hardeeville Brick Co. (C. C.) 100 Fed. 915; Ward v. Lakeside Ry. Co., 20 Pa. Co. Ct. R. 494; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652. After verdict, on a motion in arrest of judgment, the court will presume that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial. Herman Berghoff Brewing Co. v. Przbylski, 82 Ill. App. 361.

¹⁶ Balliett v. Humphreys, 78 Ind. 388. See Sanner v. Sayne, 78 Ga. 467, 3 S. E. 651; Court of Probate v. Sprague, 3 R. I. 205.

¹⁷ White v. Caldwell, 17 Mo. App. 691. In passing upon a motion in arrest, it is not allowable for the judge to invoke his recollection as to what occurred at the trial. City of Washington v. Calhoun, 103 Ga. 675, 30 S. E. 434. Nor can a motion in arrest be aided by statements of the adverse party's counsel. Taylor v. Corley, 113 Ala. 580, 21 South. 404. In an action to rescind a deed for fraudulent representations as to incumbrances, the fact that the incumbrance has been paid off before trial cannot be considered on motion in arrest of judgment. Moore v. Cross, 87 Tex. 557, 29 S. W. 1051.

¹⁸ Heward v. State, 21 Miss. 261; Bull v. Mathews, 20 R. I. 100, 37 Atl. 536.

or plea.¹⁹ That is, motions in arrest are governed in general by the principles applicable to demurrers, and no greater indulgence is shown to the defendant, in respect to his objections thus urged, than if they had taken the shape of a demurrer. In fact, as a consequence of the statutes of amendments and the doctrine of cure by verdict, much greater severity is shown to motions in arrest. So that it is by no means true that any thing which would have supported a demurrer will be good ground for arresting the judgment. "Exceptions that are moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer, or, in other words, many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings."²⁰

§ 99. Defect of Parties.

The objection that there is a defect of parties cannot be raised by motion in arrest of judgment, but only by demurrer or answer, and it is waived by going to trial without exception.²¹ So a misjoinder of parties as plaintiffs is no ground for arresting the judgment.²² Neither is an objection that some of the defendants are non-residents.²³ And where an action was pending in the name of a firm, as plaintiffs, in the style of L. & Co., and L. died before the trial, and the names of the other partners did not appear of record, it was

¹⁹ *Washington & B. Turnpike Road v. State*, 19 Md. 239; *State v. James*, 2 Bay (S. C.) 215; *Sedgwick v. Dawkins*, 18 Fla. 335.

²⁰ 3 Bl. Comm. 394.

²¹ *Reugger v. Lindenberger*, 53 Mo. 304; *Yonley v. Thompson*, 30 Ark. 330; *Thompson v. Kimbrough*, 23 Tex. Civ. App. 350, 57 S. W. 328; *Crouch v. Hance*, 62 Mo. App. 25; *Chandler & Taylor Co. v. Norwood*, 14 App. D. C. 357.

²² *Little Rock & Ft. Smith R. Co. v. Dyer*, 35 Ark. 300; *Demeritt v. Mills*, 59 N. H. 18. But in an early Massachusetts case, in case by husband and wife against defendant for driving his horse and chaise against the plaintiff's chaise, by which the wife was thrown out and injured, it was alleged that the husband had lost the labor and comfort of his wife, and had been put to great expense in her cure, etc., and after verdict for the plaintiff, judgment was arrested, because injuries were charged in the action for which husband and wife could not be joined. *Barnes v. Hurd*, 11 Mass. 59.

²³ *Washington & N. O. Tel. Co. v. Hobson*, 15 Grat. (Va.) 122.

considered that this furnished no ground for a motion in arrest of judgment, the death itself not being shown by the record.²⁴ Nor will judgment be arrested because of an ordinary mis-spelling of a party's name.²⁵ On the other hand, where an objection of this character is supported by the face of the record, it may in some instances be adequate ground for arresting the judgment. Thus, where the law requires that suits shall be brought in the name of the real party in interest, a motion to arrest a judgment in favor of the assignor of a note "to the use of" the assignee should prevail.²⁶

§ 100. Insufficient or Faulty Pleadings.

A motion in arrest of judgment must be founded on matter of record; and if the declaration or complaint contains a substantial cause of action, the judgment will not be arrested on account of an irregularity or defect which is amendable, or which has been waived by appearance or going to trial.²⁷ In other words, if the plaintiff's manner of stating his title or setting out his cause of action be objectionable and defective, though the title itself appears to be good in law, advantage must be taken of the defect before a verdict is rendered. But if, giving him the benefit of all intendment and inferences, the title or cause of action itself appears from the declaration to be defective and bad in law, so that his averments do not make out a substantial ground of suit, then judgment will be arrested on the defendant's motion; because such a defect cannot be cured by verdict, and the court cannot presume that a cause of action was proved where none was stated.²⁸ An admirable illustration of this rule is

²⁴ *Rountree v. Lathrop*, 69 Ga. 539.

²⁵ *Toledo, W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309.

²⁶ *Hutchings v. Weems*, 35 Mo. 285.

²⁷ *Parker's Adm'r v. Abrams*, 50 Ala. 35; *Lester v. Piedmont & Arlington Life Ins. Co.*, 55 Ga. 475; *Spahr v. Nicklaus*, 51 Ind. 221; *Merritt v. Dearth*, 48 Vt. 65; *Louisville & N. R. Co. v. Ward*, 10 C. C. A. 166, 61 Fed. 927.

²⁸ *Bedell v. Stevens*, 28 N. H. 118; *Gould v. Kelley*, 16 N. H. 551; *Jaccard v. Anderson*, 32 Mo. 188; *Smith v. Curry*, 16 Ill. 147; *Philson v. Bampfield's Adm'r*, 1 Brev. (S. C.) 202; *Seelye v. People*, 40 Ill. App. 449; *Illinois Live-Stock Ins. Co. v. Kirkpatrick*, 61 Ill. App. 74; *Pierson v. Independent School Dist.*, 106 Iowa, 695, 77 N. W. 494; *Johnson v. Miller*, 82 Iowa, 693, 48 N. W. 1081, 31 Am. St. Rep. 514; *Consolidated Canal Co. v. Peters (Ariz.)* 46 Pac. 74. In *Town of Walpole v. Marlow*, 2 N. H. 385, the rule is thus

furnished by a recent decision in Indiana, where an action was brought under a statute which provided that the personal representative of one killed by the wrongful act of another might maintain an action therefor in his own name for the benefit of the widow and children, or next of kin, of the deceased. The petition in this case failed to allege the existence of any widow, children, or next of kin, and it was held that a motion in arrest of judgment was properly sustained, because the existence of persons beneficially interested was essential to the plaintiff's suit, and without that allegation his petition did not disclose a cause of action.²⁹ But in stating that a judgment will be arrested if the petition fails to disclose a cause of action, reference is of course made to substantial and not formal omissions. The latter are supplied by intendment, and will be presumed after verdict to have been proved. If the defects are merely of omission, and if, when supplied, a complete case would be made out, the omission being of facts which the jury must have found, then the judgment is a legitimate sentence of the law.³⁰ Thus judgment will not be arrested,

stated by Chief Justice Richardson: If the title stated in the declaration be defective, the judgment must be arrested; but if the title be defectively stated, the defect is cured by verdict. The true distinction between the two is this: When any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated in the declaration, nor necessarily implied from the facts which are stated, the title must be considered as defective and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the title must be considered as only defectively stated, and the defect is cured by verdict.

²⁹ *Stewart v. Terre Haute & L. R. Co.*, 103 Ind. 44, 2 N. E. 208. So also, in an action against a railroad company for killing a horse, the jurisdictional defect of failing to allege that it was killed in the county where the action is brought may be reached by motion in arrest of judgment. *Louisville, N. A. & C. Ry. Co. v. Johnson*, 11 Ind. App. 328, 36 N. E. 786; *Chicago & S. E. Ry. Co. v. Wheeler*, 14 Ind. App. 62, 42 N. E. 489.

³⁰ *Saulsbury v. Alexander*, 50 Mo. 142; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Hugues v. Frum*, 41 W. Va. 445, 23 S. E. 604. A motion in arrest of judgment will not extend to such defects in the complaint as are cured by verdict or the finding of the court. *Powell v. Bennett*, 131 Ind. 465, 30 N. E. 518; *Bayless v. Jones*, 10 Ind. App. 102, 37 N. E. 421. An omission of the formal concluding words of a pleading cannot be taken advantage of by a motion in arrest of judgment. *Stearns v. Stearns' Adm'r*, 32 Vt. 678; *District of Columbia v. Eaton*, 13 App. D. C. 182.

after verdict, for any defect in pleading which would not have been fatal on general demurrer; nor then, if the court can presume the defect to have been supplied by proof before the jury.³¹ Further, upon a motion of this kind, the plaintiff is entitled to the benefit of any legitimate inference or intendment that can be brought to bear upon the allegations of his declaration. Hence the rule that judgment will not be arrested for lack of an essential averment in the declaration which is contained by implication in the averments used, or which may be considered to have been proved as a part of what is alleged.³² On a motion in arrest the whole record is before the court, and where a defect in the petition is waived of record by the defendant, the motion will not be granted on account of such defect.³³ Aside from the question of omissions, the general rule also prescribes that irregularities or informalities in the manner of setting out the cause of action are not open to exception after verdict. As an illustration of this, it is held that an objection that the complaint, in an action for damages for breach of contract, treats each breach as a separate and independent cause of action, and sets forth the same in a distinct count, is not available upon a motion in arrest of judgment.³⁴ Nor need the plaintiff anticipate defenses; it is no cause for arresting judgment that the declaration on its face shows the cause of action to have been barred.³⁵ Nor that the complaint only warrants a recovery of nominal damages.³⁶ So again, a traverse by one party of matter not alleged by the other, in addition to the matter properly in issue, is mere surplusage and not a ground of arrest.³⁷

³¹ *Higgins v. Bogan*, 4 Har. (Del.) 330; *Woods v. State*, 10 Mo. 698; *Machon v. Randle*, 66 Tex. 282, 17 S. W. 477.

³² *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 457, 56 Am. Rep. 561 (citing *Morey v. Homan*, 10 Vt. 565; *Curtis v. Burdick*, 48 Vt. 166); *Bedell v. Stevens*, 28 N. H. 118; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

³³ *Auld v. Butcher*, 2 Kan. 135.

³⁴ *Pickering v. Mississippi Val. Nat. Tel. Co.*, 47 Mo. 457. And see *Baden v. Clarke*, 1 Gill (Md.) 165. So the fact that the præcipe is in trespass and the declaration in case is no ground for arrest of judgment. *Homan v. Fleming*, 51 Ill. App. 572.

³⁵ *Allen v. Word*, 6 Humph. (Tenn.) 284.

³⁶ *Reagan v. Fox*, 45 Ind. 8.

³⁷ *Robbins v. Wolcott*, 19 Conn. 356.

Nor can the question of the propriety of allowing an amendment to be made in the pleadings be reached on motion in arrest.³⁸

§ 101. Joinder of Good and Bad Counts.

In regard to the misjoinder of counts in a declaration, or the joinder of good and bad counts, the English rule is stated to be as follows: Where general damages are found on a declaration consisting of several counts, which are good but cannot be joined, the proper course is to arrest the judgment; where some of the counts are good and others bad, a venire de novo issues; but in the case of a single count containing good and bad causes of action, the court will neither arrest the judgment nor grant a venire de novo, inasmuch as it will be intended that the damages were given in respect of the good cause of action only.³⁹ And a similar rule obtains in some of the American states, viz., that if a general verdict for the plaintiff be taken upon several counts in a declaration, and one of the counts is fatally defective, judgment will be arrested on motion, though other counts, not liable to objection, were covered by the verdict.⁴⁰ As we have already seen, some of the American authorities manifest a decided reluctance (though this disposition is not universal) to presume in favor of the validity of a judgment which may, for aught that appears on the record, be composed in part of damages given in respect of a bad count.⁴¹ Still, in several of the states, it is apparently settled law that where a general verdict is returned, the judgment will not be arrested unless all the counts of the declaration, or paragraphs of the complaint, are so defective as not to have been cured by the verdict or finding.⁴² Thus in New Hampshire, judg-

³⁸ *Le Strange v. State*, 58 Md. 26. And see *Hatfield v. Cummings*, 152 Ind. 537, 53 N. E. 761.

³⁹ *Kitchenman v. Skeel*, 3 Exch. 49.

⁴⁰ *Sylvester v. Downer*, 18 Vt. 32; *Needham v. McAuley*, 13 Vt. 68; *Bank of Carlisle v. Hopkins*, 1 T. B. Mon. (Ky.) 245, 15 Am. Dec. 113.

⁴¹ *Supra*, § 84.

⁴² *Hoag v. Hatch*, 23 Conn. 585; *Sims v. Dame*, 113 Ind. 127, 15 N. E. 217; *Gilmore v. Ward*, 22 Ind. App. 106, 52 N. E. 810; *Burrows v. Niblack*, 28 C. C. A. 130, 84 Fed. 111; *Swift & Co. v. Fue*, 167 Ill. 443, 47 N. E. 761; *Baltimore & O. S. W. Ry. Co. v. Alsop*, 176 Ill. 471, 52 N. E. 253; *Hayes v. Solomon*, 80 Ala. 520, 7 South. 921.

ment will not be arrested because the declaration may contain some claims that are illegal, if it also contains others upon which the plaintiff may properly recover.⁴³

§ 102. Misjoinder of Causes of Action.

A misjoinder of counts and causes of action, apparent upon the declaration, with damages assessed entire, is good cause for arresting the judgment on motion after verdict, or for reversing the judgment by writ of error.⁴⁴ Thus a motion in arrest will be granted when the petition contains matters of equitable jurisdiction mixed and blended with matters of legal cognizance, in the states where the distinction is still observed.⁴⁵ And in Missouri, where several causes of action are united in the same petition, the verdict, if found for the plaintiff, must be rendered and the damages assessed upon each cause of action separately, otherwise judgment will be arrested.⁴⁶

§ 103. Objections to the Jury.

An objection to the mode of drawing and impaneling the grand jury cannot be made the ground of a motion in arrest of judgment.⁴⁷ Nor will any objection to an individual juror, which would not be sufficient ground for a principal challenge, be good cause for arresting the judgment.⁴⁸ It appears, however, that when a cause is tried in a court of record before a less number of jurors than a party is entitled to, and his consent to such a trial does not expressly appear of record, he may take advantage of the objection by motion in arrest; and in such case no exceptions to the panel need be saved at the trial.⁴⁹ It is generally held—in accordance with the rule that judg-

⁴³ Conway v. Town of Jefferson, 46 N. H. 521.

⁴⁴ Haskell v. Bowen, 44 Vt. 579. Objection to the joinder of a count in tort with one on contract may be taken in arrest of judgment. Joy v. Hill, 36 Vt. 333; Bull v. Mathews, 20 R. I. 100, 37 Atl. 536.

⁴⁵ Meyers v. Field, 37 Mo. 434.

⁴⁶ Pitts v. Fugate, 41 Mo. 405.

⁴⁷ State v. Swift, 14 La. Ann. 827.

⁴⁸ Chapman v. Welles, Kirby (Conn.) 133.

⁴⁹ Cox v. Moss, 53 Mo. 432; Brown v. Hannibal & St. J. R. Co., 37 Mo. 298; Brown v. St. Louis & S. F. Ry. Co., 69 Mo. App. 418.

ment will be arrested only for matter of record—that misconduct of the jury, or improper influence brought to bear upon them, after they have retired to make up a verdict, is no ground for a motion in arrest, although it may furnish cause for granting a new trial.⁵⁰ So the fact that the jury, when out, were under the charge of an unsworn officer, is not technically ground for a motion in arrest of judgment, though it may be for a new trial.⁵¹

§ 104. Irregular or Defective Verdict.

At common law, one of the principal grounds for arresting a judgment is the objection that the verdict is not responsive to the issues, or that it differs in a material respect from the pleadings and the issue formed thereon.⁵² So if the verdict is upon an insufficient count, or finds a fact which disaffirms the plaintiff's right to recover, or omits to find a material issue joined in the cause, the judgment will be arrested.⁵³

§ 105. Grounds held insufficient.

A motion in arrest of judgment on a verdict, based solely upon the ground that the evidence adduced at the trial was not sufficient to

⁵⁰ *Brister v. State*, 26 Ala. 107. Connecticut apparently stands alone in permitting a different practice. It is there held that on a motion in arrest of judgment for misconduct of a juror,—as, conversing with one not of the jury upon the merits of the cause,—it must be averred that the party making the motion was ignorant of such misconduct until after the verdict was rendered, otherwise the motion will not prevail. *Woodruff v. Richardson*, 20 Conn. 238. And in another case, where the jury took with them a paper which had been used on the trial to refresh the memory of a witness, but which was not read or offered in evidence, nor were its contents communicated to the other side, and had the same before them in all their deliberations, and the paper was calculated to affect the verdict, it was held that this was a sufficient ground for arresting the judgment. *Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337.

⁵¹ *McCann v. State*, 17 Miss. 465.

⁵² *Young v. Wickliffe*, 7 Dana (Ky.) 447; 3 Bl. Comm. 393. But in some states, a motion in arrest of judgment will not reach a defective verdict. *Potter v. McCormack*, 127 Ind. 439, 26 N. E. 883; *Westfield Gas & Milling Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399. Inconsistency between a special finding and the general verdict cannot be taken advantage of by motion in arrest. *Moffitt v. Albert*, 97 Iowa, 213, 66 N. W. 162.

⁵³ *Keirie v. Shriver*, 11 Gill & J. (Md.) 405.

make out the plaintiff's case, will not be sustained; ⁵⁴ nor, in general, a motion based on any matters which took place on the trial. ⁵⁵ Nor can a motion in arrest of judgment reach a defect in the form of the judgment, for the obvious reason that the motion must precede the rendition of the judgment. ⁵⁶ And the failure to serve the defendants in an action with copies of the declaration, as required by the rules and practice of the court, constitutes no ground for arresting the judgment. ⁵⁷

⁵⁴ Lovell v. Sabin, 15 N. H. 29; Bright v. State, 90 Ind. 343; Powe v. State, 48 N. J. Law, 34, 2 Atl. 662. But in Allen v. Word, 6 Humph. (Tenn.) 284, it is held that a judgment will be arrested on the ground of a variance between the pleadings and the proof.

⁵⁵ Walker v. Sargeant, 11 Vt. 327.

⁵⁶ Smith v. Dodds, 35 Ind. 452.

⁵⁷ Loney v. Balley, 43 Md. 10.

CHAPTER VI.**THE RENDITION AND ENTRY OF JUDGMENTS.**

- § 106. Distinction between Rendition and Entry.
- 107. Power and Duty of the Court to render Judgment.
- 108. Application and Order for Judgment.
- 109. Signature of Judge.
- 110. Entry by the Clerk.
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- 116. Designation of the Parties.
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- 120. Joint Defendants.
- 121. Time of entering Judgment.
- 122. Date of the Judgment.
- 123. Construction of Ambiguous Judgments.
- 124. The Judgment-Roll, or Record.
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- 125a. Entry of Judgments in Federal Courts.

§ 106. Distinction between Rendition and Entry.

The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict.¹ The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial

¹ "The whole question, then, appears to resolve itself into this—whether the rendition of judgment is a judicial act, to which the direct agency of the court is indispensable, and to which the mind of the court is to be judicially applied, or whether, after verdict has been rendered, it is a ministerial act, which may be performed by the clerk without an order by the court. When presented in this elementary form, the question appears to me exceed-

of its action.² It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. And not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. The entry may be supplied, perhaps after the lapse of years, by an order nunc pro tunc. But it must not be supposed that this proceeding is required to give existence and force, by retrospection, to that which before had none. As is said by the supreme court of California: "The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, or of limiting the time within which the right may be exercised, or in which the judgment may be enforced; and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. But neither is necessary for the issuance of an execution upon a judgment which has been duly rendered. Without docketing or entry, execution may be issued on the judgment and land levied upon and sold, and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it."³ And it follows, a fortiori, that if the entry, though attempted to be made in due form, does not correctly record the sentence of the court, or is defective or ambiguous or otherwise exceptionable, still this will not weaken the force of the judgment as a judgment.

ingly clear and free from doubt. If there be any one thing done in the progress of a cause, from its commencement to its conclusion, that is peculiarly and emphatically a judicial act, it is the rendition of judgment." Ware, Dist. J., in *Goddard v. Coffin*, 2 Ware (Dav. 381) 382, Fed. Cas. No. 5,490. And see *Matthews v. Houghton*, 11 Me. 377.

² *Miller v. Albright*, 12 Ohio Cir. Ct. R. 533.

³ *Los Angeles County Bank v. Raynor*, 61 Cal. 145. A judgment ordered by the judge to be entered for a certain amount, though not yet entered or signed, is a debt to the judgment creditor capable of being attached. *Holtby v. Hodgson*, 24 Q. B. Div. 103. Where counsel on both sides have treated the verdict as serving the office of a judgment as well as of a verdict, objections on account of the failure to enter judgment are waived. *Webster v. Dundee Mortg. & Trust Co.*, 83 Ga. 278, 20 S. E. 310.

There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal. And so a judgment must commonly be docketed before it can create a lien upon land, and in some of the states (though not all) the priority among different liens is determined by their respective dates of docketing.⁴ And again, the record entry of a judgment is indispensable to furnish the evidence of it, when it is made the basis of a claim or defense in another court.⁵ But with these exceptions, a judgment is independent of the fact of its entry. And in all cases, the distinction between rendition and entry is substantial and important.

§ 107. Power and Duty of the Court to render Judgment.

It is the duty of the court, when the necessary facts have been lawfully determined by regular proceedings, to render the proper judgment, and to refrain from any re-opening of the issues.⁶ The performance of this duty by the court may be enforced by the writ of mandamus. But to make this remedy available it must appear that the court had jurisdiction in the premises, that regular and sufficient proceedings were had, that the case is ripe for judgment, and that the complainant has an absolute right to the judgment sought, no constraint upon the judicial discretion of the court being permissible.⁷

⁴ See *infra*, § 443.

⁵ The claim of *res judicata* cannot be made on the showing of a minute on the clerk's docket, this not being a judgment. *Young v. People*, 171 Ill. 220, 49 N. E. 503.

⁶ *Isler v. Brown*, 67 N. O. 175. There is no judgment in fact upon a verdict until the motion for a new trial is decided. *City of Louisville v. Muldoon (Ky.)* 43 S. W. 867.

⁷ *People v. Murray*, 2 Misc. Rep. 152, 23 N. Y. Supp. 160; *Fairbanks v. Amookeag Nat. Bank (C. C.)* 32 Fed. 572; *Smith v. Moore*, 38 Conn. 105; *State v. Klein*, 140 Mo. 502, 41 S. W. 895; *Broder v. Superior Court*, 103 Cal. 121, 37 Pac. 143; *Elder v. Grunsky*, 127 Cal. 67, 59 Pac. 300; *State v. Dickinson*, 59 Neb. 753, 82 N. W. 16; *People v. Graham*, 16 Colo. 347, 26 Pac. 336; *People v. Downer*, 18 Colo. 500, 33 Pac. 162; *Corthell v. Mead*, 19 Colo. 386, 35 Pac. 741; *State v. Hunter*, 4 Wash. St. 651, 30 Pac. 642.

The failure of the trial court to enter judgment for the plaintiff for an amount admitted by the defendant to be due and tendered in court, is error for which the judgment will be reversed.⁸ And a second final judgment or decree cannot be rendered between the same parties upon the same pleadings and subject-matter, until the first has been reversed, or opened and vacated.⁹ The authority of the court to render a judgment does not always depend upon the fact that regular proceedings have taken place and culminated in a verdict; it may, in some cases, rest upon the consent or agreement of the parties. Thus a stipulation by the parties that when judgment is entered in a certain cause pending in another county, and a transcript thereof forwarded to the district court of defendant's county, where other causes involving the same question are pending, the judge of the latter court may order similar judgments in the other causes, is valid, and the judgments may be entered in vacation.¹⁰ Where issues are sent from one court to another to be tried, it belongs to the court in which the main litigation is pending to enter any judgment that may be necessary in the case. Thus, where issues are sent by the probate court to a court of law, a judgment for costs should be entered by the former court upon receiving the certificate of the verdict, and not by the court in which the issues were tried.¹¹

⁸ *Mace v. Gaddis*, 3 Wash. T. 125, 13 Pac. 545.

⁹ *State v. Jacksonville, P. & M. R. Co.*, 16 Fla. 708; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172. See, also, *Shepherd v. Harvey's Adm'r* (Ky.) 43 S. W. 456; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717.

¹⁰ *Western Land Co. v. English*, 75 Iowa, 507, 39 N. W. 719. So of an agreement of parties that a case shall be heard before a judge at chambers in the same manner and with the same effect as though it were tried by him in court without a jury. *Beach v. Beckwith*, 13 Wis. 21. So of an agreement to refer a pending suit to an arbitrator, and that a judgment in the cause shall be entered according to his decision. *Bank of Monroe v. Widner*. 11 Paige (N. Y.) 529, 43 Am. Dec. 768. It is no ground for the reversal of a judgment that the decree is prepared by the attorneys of the successful party, where the decision as prepared is adopted by the trial judge. *Stapp v. National Life & Maturity Ass'n*, 37 S. C. 417, 16 S. E. 134.

¹¹ *Levy v. Levy*, 28 Md. 25; *Browne v. Browne*, 22 Md. 103.

§ 108. Application and Order for Judgment.

Where judgment follows as the result of contested proceedings and the finding of a verdict, it is usually not necessary for the successful party, in modern practice, to take active measures to secure the rendition of judgment.¹² But an application for judgment is in some instances required by statute, and is probably always necessary in case of default. In California, a statute provides that an action may be dismissed, or judgment of nonsuit entered, "when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."¹³ But this does not cause the party to lose his judgment when the lapse of the time mentioned was caused by the delay of the court or the negligence of the clerk.¹⁴ It is held that a judgment which has been entered, and to which the judgment creditor was clearly entitled upon the pleadings, will not be disturbed for failure to give notice of the application for the judgment, or for failure of the clerk to enter in his minutes, as required by the court rules, a statement of the application.¹⁵ When the court gives to the clerk an order for a judgment, that is his authority for entering the same, and by that alone he must be guided. Hence a judgment entered by the clerk in pursuance of an express order of the court, will not be void and a mere nullity, although the court, by a subsequent order not noticed by the clerk, have directed the case to be continued, although such a judgment would be irregular and voidable, and liable to be set aside upon seasonable application to the court.¹⁶

¹² A formal motion for judgment on a special verdict is not necessary. *Carthage Turnpike Co. v. Overman*, 19 Ind. App. 309, 48 N. E. 874. See *Voris v. Star City Bldg. & Loan Ass'n*, 20 Ind. App. 630, 50 N. E. 779.

¹³ Code Civ. Proc. Cal. § 581.

¹⁴ *Jones v. Chalfant* (Cal.) 31 Pac. 257; *San Jose Ranch Co. v. San Jose Land & Water Co.*, 126 Cal. 322, 58 Pac. 824.

¹⁵ *Pormann v. Frede*, 72 Wis. 226, 39 N. W. 385. See, as to defective notice of a motion for a judgment, *White v. Sydenstricker*, 6 W. Va. 46. Application for an order directing the entry of a judgment may be made ex parte; and no notice is necessary unless a stay exists, or the court, for some special reason, directs that notice be given. *Gould v. Duluth & D. Elevator Co.*, 3 N. D. 96, 54 N. W. 316.

¹⁶ *Claggett v. Simes*, 31 N. H. 56.

§ 109. Signature of Judge.

The impression not uncommonly prevails that at common law a judgment required the signature of the court in order to be valid. This notion—arising probably from an ambiguous use of the phrase “signing judgment”—is erroneous; and the ancient practice furnishes but slight aid in determining the same question in modern law.¹⁷ Now in some of the states the statutes require that the judgment itself, or the record in which it is entered up, shall be signed by the judge; and in these states some of the decisions hold that unless this direction is complied with, the judgment will be entirely invalid and of no force or effect.¹⁸ Still, these statutes require the signature only of final and definite judgments which pass upon the merits of a controversy and may constitute *res judicata*; interlocutory orders, made in the progress of a cause, have their effect without being signed by the judge.¹⁹ And some of the authorities show a tendency to construe such statutes in a liberal manner, instead of requiring an exact compliance with their terms. Thus a judgment which the court was competent to render without the verdict of a jury will be upheld if found entered on the minutes of the day’s proceedings, the minutes of the day being regularly signed by the judge, though the judgment itself bears only the signature of counsel. Such a judgment, it is said, is irregular but not void, and can be amended.²⁰ So the signature of the judge affixed by consent

¹⁷ French v. Pease, 10 Kan. 51.

¹⁸ Succession of Asbridge, 1 La. Ann. 206; Hatch v. Arnault, 3 La. Ann. 482; Saloy v. Collins, 30 La. Ann. 63; State v. Jumel, 30 La. Ann. 421; Sloan v. Cooper, 54 Ga. 486; Raymond v. Smith, 1 Metc. (Ky.) 65, 71 Am. Dec. 458; Galbraith v. Sidener, 28 Ind. 142. Until a judgment is signed by the judge, it cannot acquire a lien, although recorded. Marchal v. Hooker, 27 La. Ann. 454. In Louisiana, a statute requires judgments to be read in open court. It is held that this requirement is jurisdictional, and that a judgment not so read, or which is signed in chambers, is invalid. Woodlief v. Logan, 50 La. Ann. 438, 23 South. 716; State v. Judges of Fourth Circuit Court of Appeals, 48 La. Ann. 905, 19 South. 932; Richardson v. Turner, 52 La. Ann. 1613, 28 South. 158.

¹⁹ Wickmam v. Nalty, 41 La. Ann. 284, 6 South. 123; State v. Judge of Fifth District, 12 La. Ann. 455.

²⁰ Tharpe v. Crumpler, 63 Ga. 273; Huckaby v. Sasser, 69 Ga. 603. A

in vacation is a sufficient authentication of a decree in an ordinary action to authorize an execution.²¹ Another group of cases goes much further than this, and holds that the requirement that a judge shall sign all judgments rendered in his court is merely directory, and consequently that his omission to do so will not avoid the judgment as to strangers, although it might, in connection with other evidence, be a proof that the judgment was fraudulent or had not been in fact rendered by him.²² In harmony with these decisions it is also held that an irregularity in the signature of the judge—as, in his placing it in the body of the decree instead of at the foot,²³ or his signing it while he is in another county,²⁴—is immaterial. And where the court is composed of several judges, its orders are sufficiently authenticated by the signature of either.²⁵

In several of the other states, there being no statutory requirement of this character, it is held to be entirely unnecessary to the validity of a judgment that it be signed by the judge; the presumption is, that if it is entered by the clerk, it was so directed and authorized by the court.²⁶ And a valid judgment will support an exe-

judgment signed "by the court, H., plaintiff's attorney," which was put on the minutes, signed by the judge, was held valid in *Jones v. Word*, 61 Ga. 26.

²¹ *Rust v. Faust*, 15 La. Ann. 477.

²² *Hollins v. Henry*, 78 N. C. 342; *Keener v. Goodson*, 89 N. C. 273; *Bartlett v. Lang's Adm'rs*, 2 Ala. 161; *Cannon v. Hemphill*, 7 Tex. 184; *Cathcart v. Peck*, 11 Minn. 45 (Gil. 24); *Childs v. McChesney*, 20 Iowa, 431, 89 Am. Dec. 545. The omission of the judge to sign the record at the close of the term will not invalidate judgments or decrees of the term, although such omission would be gross neglect. *Ex parte Slocomb*, 9 Ark. 375.

²³ *Hurley v. Hewett*, 89 Me. 100, 35 Atl. 1026.

²⁴ *National Bank of Greensboro v. Gilmer*, 118 N. C. 668, 24 S. E. 423.

²⁵ *In re Millcreek Road*, 9 Pa. Co. Ct. R. 592.

²⁶ *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; *Cathcart v. Peck*, 11 Minn. 45 (Gil. 24); *Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515; *Platte County v. Marshall*, 10 Mo. 345; *Fulton v. State*, 103 Wis. 238, 79 N. W. 234; *Lockhart v. State*, 32 Tex. Cr. R. 149, 22 S. W. 413; *Scott v. Rohman*, 43 Neb. 618, 62 N. W. 46; *Gordon v. Bodwell*, 55 Kan. 131, 39 Pac. 1044. Judgments are not invalidated by the failure of the judge to sign the minutes of the term. *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780. Nor is it necessary to the validity of orders entered at a special term of court that the minutes of said term be signed by the judge. *Wright v. State*, 37 Tex. Cr. R. 3, 38 S. W. 811.

cution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time execution issued.²⁷ In New York it is said: "There is no provision of the present law requiring such signing. The judge is to make his 'decision in writing,' and this, it is presumed, he must sign by way of authentication."²⁸ The judgment itself is to be entered in the judgment-book, and is in theory entered by the clerk."²⁹ The practice in Kansas is thus described:—the clerk by order or permission of the court enters the judgment in all cases in full upon the journal, and this judgment (as well as every other proceeding) is valid, and has force and effect, as soon as it is entered on the journal, whether it is ever signed by the judge or not, and whether it is ever transcribed into the complete record or not.³⁰ And it is believed that a practice more or less closely analogous to this is in vogue in a majority of the states; so that only in a few jurisdictions can the judge's signature be regarded as an indispensable requisite to the validity of the judgment.

§ 110. Entry by the Clerk.

When a judgment has been rendered in a cause,³¹ it becomes the duty of the clerk, according to the usual practice, to make a record entry of it in an official book kept for that purpose.³² In some

²⁷ *Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515. And see *Los Angeles County Bank v. Raynor*, 61 Cal. 145.

²⁸ Where a "decision in writing" is required, an entry by the clerk at the end of the trial of the amount for which plaintiff is entitled to recover does not constitute a judgment. *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491. If the court does not file the written decision, and a judgment is rendered and entered without it, the remedy is by motion in the court below to set the judgment aside. *Garr, Scott & Co. v. Spalding*, 2 N. D. 414, 51 N. W. 867.

²⁹ *De Laney v. Blizzard*, 7 Hun, 66.

³⁰ *French v. Pease*, 10 Kan. 51.

³¹ In New York, when an action is referred to a referee to hear and determine, and his report directs a judgment to be entered, it stands as a decision of the court, and the clerk must enter judgment upon it when its form has been settled by the referee. *Paget v. Melcher*, 26 App. Div. 12, 49 N. Y. Supp. 922. And see *Bentley v. Gardner*, 27 Misc. Rep. 674, 58 N. Y. Supp. 824.

³² The clerk must enter the judgment in accordance with the verdict, or finding of the court, and the order for judgment; he has no authority to in-

states, he is required, at this stage, to make up a complete record of the case from its inception to its close, or a "judgment-roll;" in others, he merely adds an entry of the judgment to the brief history of the case contained in his docket and which consists of consecutive statements of the steps taken in the cause from the issue of the writ on. The object of this entry is to furnish an enduring memorial and incontestable evidence of the judgment, and to fix its date for purposes of appeal or creating a lien. But, as was stated in the beginning of this chapter, this proceeding is ministerial only, and is not essential to the validity of the judgment itself. It is none the less the judgment of the court because not entered by the clerk.³³ And, except for certain special purposes, it does not remain inchoate or unfinished until so entered. Hence the neglect or failure of the clerk to make a proper entry of record of the judgment, or his defective or inaccurate entry of it, will not, as between the parties, operate to invalidate the judgment.³⁴ "The fact that the clerk did not perform his entire duty in making up the record cannot deprive parties of their rights. Even although he should entirely fail to make up a record, such neglect would not affect those interested in the matter decided, if sufficient could be found upon the files and books of the court to show what had been done. What we call the complete record of a case is nothing but the history of what has

sert any additional clauses, as, that the case was dismissed on the merits, when the court did not so state. *Card v. Meineke*, 70 Hun, 382, 24 N. Y. Supp. 375; *Ramaley v. Ramaley*, 69 Minn. 491, 72 N. W. 694. A judgment entered by a clerk of court who has no authority to enter the same is void. *Lacoste v. Eastland*, 117 Cal. 673, 49 Pac. 1046.

³³ But in California, a judgment does not become effective until filed with the clerk, and is of no effect if filed after the expiration of the judge's term, no matter when prepared and signed. *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211. And see *Danielson v. Northwestern Fuel Co.* (C. C.) 55 Fed. 49.

³⁴ *Craig v. Alcorn*, 46 Iowa, 560; *Bridges v. Thomas*, 50 Ga. 378; *Bird v. McClelland, Stumpf & Pelzer Brick Manuf'g Co.* (C. C.) 45 Fed. 458; *Risk v. Uffelman*, 7 Misc. Rep. 133, 27 N. Y. Supp. 392; *New York City Baptist Mission Soc. v. Tabernacle Baptist Church*, 10 App. Div. 288, 41 N. Y. Supp. 976. See *Helvete v. Rapp*, 7 Serg. & R. (Pa.) 306. Omission properly to record the verdict is a mere irregularity which does not destroy the validity of the judgment, at least until it be set aside. *Gunn v. Plant*, 94 U. S. 664, 24 L. Ed. 304.

been done in the case, copied by the clerk into a book - called the 'book of records.' It is not the writing of those things in this book that gives them validity. It is the previous action of the court upon the subject-matter. The record is but evidence of this action, and if, in copying, the clerk makes a mistake, that mistake will be corrected by entries made from time to time of the action of the court, and which entries, made in other books of the court, lay the foundation for the complete records."³⁵ The docket of a judgment, it is held in New York, is no part of the record of the court; the entries upon the docket are directed to be made by the clerk, who, in making them, acts in a ministerial capacity, and his erroneous or false entries cannot conclude the parties, whatever might be the effect of an entry which he was authorized by law to make.³⁶ In some of the states it is required by law that, before a docket entry is made of a judgment, there shall be filed a "judgment-roll" containing all the papers necessary to be attached according to the provisions of the statute. It appears that unless this provision is complied with, the docketing of the judgment is an unauthorized and illegal act.³⁷ But it is also held that an order denying a motion to set aside a judgment because of the failure to file a proper judgment-roll is not reviewable in the appellate court. If what was done amounts to a legal nullity, no substantial rights of the defendant are impaired by the denial; and if the roll is not in due form, or the filing for any reason is irregular, the granting or refusing the application is discretionary.³⁸ According to the law and practice obtaining in other states, to constitute a judgment for the purpose of docketing, it must first be entered in the "judgment-book." And a

³⁵ *Newnam's Lessee v. City of Cincinnati*, 18 Ohio, 323, 331, *Hitchcock, C. J.*

³⁶ *Booth v. Farmers' & Mechanic's Nat. Bank*, 4 Lans. 301. If the mistakes or defects in docketing the judgment do not impair the substantial accuracy and fulness of the record required, as notice to persons interested, they will not prevent the judgment from becoming a lien. *Hesse v. Mann*, 40 Wis. 560.

³⁷ *Townshend v. Wesson*, 4 Duer, 342. But compare *Ward v. White*, 66 Ill. App. 155.

³⁸ *Whitney v. Townsend*, 67 N. Y. 40. And see *Hardin v. Melton*, 28 S. C. 38, 4 S. E. 805.

docketing without such entry is of no avail, even though a judgment-roll be filed with what purports to be a copy of a judgment in it.³⁹

The general principle pointed out in this chapter—that an unrecorded judgment is valid between the parties, though it may not be notice to strangers—is illustrated by an Alabama decision, in which it is held that a statute which requires decrees of the chancery court vesting the title to property in either of the parties to a suit, to be recorded in the office of the clerk of the county in which the land is situated, does not make the vesting of the title dependent on the recording of the decree, but the decree is affected by a failure to have it so recorded just as a deed would be under the registration laws.⁴⁰ That a judgment duly entered in the judgment-book was not signed by the clerk is an irregularity and a deviation from the ordinary practice, but it does not vitiate the judgment as to third persons in collateral proceedings.⁴¹

§ 111. Entry in wrong Book.

When the clerk is directed by law to keep certain books for the entry of judgments, or to record judgments in a book specially designated by statute for that purpose, and deviates from the course prescribed, then in either case, for reasons sufficiently stated in the preceding section, the validity of the judgment is not thereby impaired as between the parties.⁴² As concerns third persons the case

³⁹ *Rockwood v. Davenport*, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872; *Maurin v. Carnes*, 71 Minn. 309, 74 N. W. 139. See *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588.

⁴⁰ *Witter v. Dudley*, 42 Ala. 616. There are some cases which seem to indicate that confessed judgments are regarded as an exception to the general principle above stated. But this is too much a matter of statutory regulation to be here discussed in detail. See *King v. French*, 2 Sawyer, 441, Fed. Cas. No. 7,793; *Johns v. Fritchey*, 39 Md. 258.

⁴¹ *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Hotchkiss v. Cutting*, 14 Minn. 542 (Gil. 408); *Jorgensen v. Griffin*, 14 Minn. 466 (Gil. 346); *Lythgoe v. Lythgoe*, 75 Hun, 147, 26 N. Y. Supp. 1063.

⁴² *Wolf v. Great Falls Water-Power Co.*, 15 Mont. 49, 38 Pac. 115; *West v. Keeton*, 17 Tex. Civ. App. 139, 42 S. W. 1034. In Minnesota, notwithstanding the adoption of a code of procedure merging legal and equitable forms in one form of action and providing only for a "judgment" as the determination of issues, the clerk of a certain court kept two books, one labelled "judgment-

might be different. Probably one would not be bound by notice of a judgment which did not appear in the book designated by law as the proper quarter in which to direct his inquiries, although it might be recorded in a book regularly kept by the clerk but not recognized by law.⁴³ Still, this would not impair the right to issue execution. So, under the laws of Maryland, the entry of judgment in the "permanent judgment-record" in the first instance, and without any previous entry thereof in the "trial-docket," as required by the ordinary practice of the trial courts, does not render the judgment illegal or so irregular as to require it to be stricken out.⁴⁴

§ 112. Indexing the Judgment.

In some of the states, the index to the record of judgments is made, by the effect of the statute, a part of the record; and a judgment is not a lien on real property until properly indexed, as against a purchaser who has searched the index with due care; and third persons cannot be charged with constructive notice of a judgment unless the same is correctly indexed.⁴⁵ In Virginia, however, an exactly opposite doctrine prevails; the index is no part of the record and is not essential to the creation of a valid lien.⁴⁶ We shall return to this subject in a later chapter.⁴⁷

§ 113. Remedy against Clerk for improper Entry.

There is no question that the owner of a judgment may maintain an action for damages against the clerk of the court for neglecting

book," the other "decree-book," and was accustomed to enter causes of legal cognizance in the former, and equity causes in the latter. Held, that a judgment of foreclosure was not impaired by the fact that it was entered in the "decree-book" only. The error in the label was a mere irregularity, which could not affect the rights of parties. *Thompson v. Bickford*, 19 Minn. 17 (Ill. 1). See *Lentillon v. City of New York*, 3 Sandf. 721.

⁴³ See *Hesse v. Mann*, 40 Wis. 560. See *infra*, §§ 404-406.

⁴⁴ *Bond v. Citizens' Nat. Bank*, 65 Md. 498, 4 Atl. 893.

⁴⁵ *Metz v. State Bank*, 7 Neb. 165; *Sterling Manuf'g Co. v. Early*, 69 Iowa, 94, 28 N. W. 458. See *Hahn v. Mosely*, 119 N. C. 73, 25 S. E. 713; *New England Loan & Trust Co. v. Avery* (Tex. Civ. App.) 41 S. W. 673.

⁴⁶ *Old Dominion Granite Co. v. Clarke*, 28 Grat. 617.

⁴⁷ See *infra*, § 405.

to make a proper entry of it, provided he shows an absolute loss of his judgment in consequence of such neglect.⁴⁸ And the rule that it is the duty of the creditor to see that his judgment is properly entered applies only as between the parties and those affected by the want of constructive notice, but has no reference to the question of the liability of the clerk to the plaintiff whose judgment was wrongly entered.⁴⁹

§ 114. Contents of the Judgment.

No particular form of words is usually considered necessary to show the rendition of a judgment. The record of the judgment is sufficient if the time, place, parties, matter in dispute, and the result, with the relief granted, are clearly stated.⁵⁰ So, under the ordinary practice, it is not required to set out in the judgment itself the facts on which it is founded; it is sufficient if they are stated in the pleadings and ascertained by the judgment.⁵¹ And under those systems of practice which assimilate the legal and equitable jurisdiction, it is not necessary that the facts on which a decree in equity is based should be recited therein. The case is preserved in the same manner as in an action at law, and all the material evidence must be incorporated in the bill of exceptions.⁵² But it is

⁴⁸ *Blossom v. Barry*, 1 Lans. 190. If the entry is incorrect, the party affected should first avail himself of his remedy by application to the court to correct it. *State v. Currie*, 72 Minn. 403, 75 N. W. 742.

⁴⁹ *Saylor v. Com.* (Pa.) 5 Atl. 227; *Coyne v. Souther*, 61 Pa. 455.

⁵⁰ *Barrett v. Garragan*, 16 Iowa, 47; *Church v. Crossman*, 41 Iowa, 373; *Ordinary v. McClure*, 1 Bailey (S. C.) 7, 19 Am. Dec. 648. For judgment entries held sufficient, though irregular in form, see *Simmons v. Craig*, 137 N. Y. 550, 33 N. E. 76; *Cameron v. Great Northern Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Whiteside v. Noyac Cottage Ass'n*, 68 Hun, 565, 23 N. Y. Supp. 63. For entries held not sufficient to constitute a judgment, see *Emig v. Medley*, 63 Ill. App. 199; *Carter v. Elmore*, 119 N. C. 296, 26 S. E. 35.

⁵¹ *Hamilton v. Ward*, 4 Tex. 356. But in New York, the code requires that the decision shall state concisely the grounds on which the issues have been decided; and a decision merely directing judgment, without any statement of the grounds, will not support a judgment. *Newman v. Mayer*, 7 N. Y. Ann. Cas. 497, 65 N. Y. Supp. 204.

⁵² *Judge v. Booge*, 47 Mo. 544. But in Illinois it is considered the proper practice to preserve the evidence by recitals in the decree. *Walker v. Carey*, 53 Ill. 470.

held that a judgment of conviction should contain the facts judicially ascertained, together with the manner of ascertaining them, and the recorded declaration of the court pronouncing the legal consequences of those facts.⁵³

§ 115. Form of the Judgment.

"The judgment is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own, but 'it is considered,' 'consideratum est per curiam,' that the plaintiff do recover his debt, his damages, his possession, and the like; which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court, after due deliberation and inquiry."⁵⁴ This being the theory and practice of the common law, there was at one time a disposition on the part of some of our courts to be very strict in requiring the use of this exact formula, and to hold that nothing could be substituted for the word "considered" without fatal consequences.⁵⁵ But a more liberal view now obtains, and the cases hold that the terms "decreed," "resolved," "ordered," "judgment rendered," etc., are fully equivalent to the original technical term, provided the entry shows an actual giving of judgment and exhibits what it is required to specify with clearness and precision.⁵⁶ It may therefore be stated as the modern rule that the

⁵³ *Mayfield v. State*, 40 Tex. 289.

⁵⁴ 3 Bl. Comm. 396.

⁵⁵ *Baker v. State*, 3 Ark. 491.

⁵⁶ *Johnson v. Gillett*, 52 Ill. 360; *Minkhart v. Hankler*, 19 Ill. 47; *Johnson v. Miller*, 50 Ill. App. 60; *Coats v. Barrett*, 49 Ill. App. 275; *Deadrick v. Harrington*, *Hempst.* 50, Fed. Cas. No. 3,694b; *Taylor v. Runyan*, 3 Clarke (Iowa) 474; *City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342; *Thornton v. Perry*, 101 Ga. 608, 29 S. E. 24; *Marsh v. Synder*, 14 Neb. 8, 14 N. W. 804. In Pennsylvania, the entry "judgment on verdict" may, in a *scire facias* upon it, be considered as the judgment which the plaintiff was entitled to have. *Shirtz v. Shirtz*, 5 Watts, 255. To constitute a sufficient judgment on a demurrer, there should be a formal entry of the submission on demurrer to a specified pleading, a recital of consideration thereof by the court, and a

form of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated.⁵⁷ In other words, the sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form.⁵⁸ But while this is so, there are certain requisites of a judgment which cannot be dispensed with. In the first place, the entry must purport to be an actual judgment, conveying the sentence of the law, as distinguished from a mere memorandum, note, or recital that a judgment had been or would be rendered.⁵⁹ In a case where the record stated as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court, after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant and against the plaintiff for the costs of this action taxed at \$11.20," it was held that this was no judgment, but a mere recital that one had been rendered for costs.⁶⁰ In the next place, a true judgment must be

formal adjudication, such as, "It is therefore considered and adjudged by the court that the demurrer be, and it is hereby, overruled" or sustained, as the case may be. *Jasper Mercantile Co. v. O'Rear*, 112 Ala. 247, 20 South. 583; *Alabama Nat. Bank v. Hunt*, 125 Ala. 512, 28 South. 488. A record in the following language, "It is therefore ordered by the court that judgment enter herein on the verdict of the jury, formerly entered in this cause," is not a judgment. *Fitzsimmons v. Munch*, 74 Ill. App. 259.

⁵⁷ *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782; *Hamman v. Lewis*, 34 Tex. 474.

⁵⁸ *Humboldt Mill & Min. Co. v. Terry*, 11 Nev. 237.

⁵⁹ *Robinson v. Govers*, 67 Hun, 317, 22 N. Y. Supp. 249; *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220; *Putnam v. Crombie*, 34 Barb. (N. Y.) 232. A finding of facts, together with conclusions of law filed by a trial judge with the clerk, is not a judgment until actually spread on the court records. *Christie v. Iowa Life Ins. Co.*, 111 Iowa, 177, 82 N. W. 499. So, a memorandum on the minute book of the judge, to the effect that an award of arbitrators in a certain sum is approved and accepted, does not constitute a judgment. *Gage v. Judson* (D. C.) 92 Fed. 545. An orally expressed opinion or finding of a judge in a case not tried to a jury does not, according to the practice of the federal courts, constitute a judgment. *Judson v. Gage*, 39 C. C. A. 156, 98 Fed. 540. So also, in Ohio, under Rev. St. § 5310, the decision of the court must be in writing and entered on the minutes, to constitute a judgment. *Wiley v. Lewis*, 6 Ohio Dec. 242.

⁶⁰ *Miller v. Burlington & M. R. Co.*, 7 Neb. 227. An entry thus:—"Judg-

distinguished from a mere order, or direction, or permission to the clerk to enter a judgment. A document of the latter kind has not the force or the characteristics of a judgment, and will not support an execution.⁶¹ It is further to be noted, in connection with matters of form in judgments, that a much less degree of technicality and formality is required in the judgments of justices of the peace and other inferior courts, than is exacted in respect to the judgments of courts of record. In the case of judgments of the former order, it is generally held sufficient if the books and papers disclose with reasonable certainty that a judgment was in fact rendered for one of the parties, and for what amount, or even that a verdict was returned on which no judgment was actually entered.⁶² It is also to be remarked that irregularities and defects of form, in judicial proceedings, can be taken advantage of by parties and privies only; third persons have no right to interfere.⁶³

ment accordingly taxing all costs against def't," is not a judgment. *Roberts v. State*, 3 Tex. App. 47. And see *Birdsell Manuf'g Co. v. Independent Fire-Sprinkler Co.*, 87 Ill. App. 443. An entry of judgment as follows: "Whereupon the court enters judgment upon the finding," is insufficient. *Faulk v. Kellums*, 54 Ill. 188.

⁶¹ *Morgan v. Flexner*, 105 Ala. 356, 16 South. 716. An order for judgment entered in the judgment book does not constitute a judgment unless the wording is such that it expresses the final sentence of the court on the matters contained in the record, and at once ends the case, and contemplates no further judicial action. *McTavish v. Great Northern R. Co.*, 8 N. D. 333, 79 N. W. 443. The following entry in the minutes of a court, "verdict for plaintiff, let writ issue," is not a judgment, and execution thereon is void. *Stark v. Billings*, 15 Fla. 318. But where the record in a cause, after reciting the trial and verdict, proceeded: "Therefore it is considered and adjudged by the court that the plaintiff in this action have judgment" etc., held, that this was a judgment and not merely an order for judgment, and the court did not err in refusing to set aside the docketing thereof, and subsequent proceedings thereon, on the ground that there was no judgment. *Potter v. Eaton*, 26 Wis. 382.

⁶² *Elliott v. Jordan*, 7 Baxt. (Tenn.) 376; *Gaines v. Betts*, 2 Doug. (Mich.) 98; *Overall v. Pero*, 7 Mich. 315; *Lynch v. Kelly*, 41 Cal. 232; *Felter v. Mulliner*, 2 Johns. (N. Y.) 181.

⁶³ *Breading v. Boggs*, 20 Pa. 33.

§ 116. Designation of the Parties.

"To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue an execution by inspection of the entry, without reference to other entries." In the case from which this quotation is taken, the judgment was against "the Captain and Master of the Steamboat Mollie Hamilton," and there was nothing in the record to disclose the name of the captain or master. It was accordingly held that the judgment was void.⁶⁴ The decision was undoubtedly correct on the facts of the case, but the general rule announced must not be understood as declaring that the judgment itself cannot be aided in this respect by reference to other parts of the same record. For numerous authorities hold that a judgment expressed to be merely for or against the "plaintiff" or the "defendant" will be sufficient, if the names of the parties thus designated can be ascertained without ambiguity from other parts of the record.⁶⁵ And in a suit against two defendants, a judgment against "the defendant," instead of "the defendants," is not so defective as to be void for uncertainty, where the record clearly shows that it is in fact a judgment against both of the parties defendant.⁶⁶ So in a case where, although the complaint states no cause of action against any but the defendant, a third person is permitted on his own petition to appear and answer, and a verdict is found against "the defendant," the use of the plural

⁶⁴ *Captain of The Mollie Hamilton v. Paachal*, 9 Helsk. (Tenn.) 203. A judgment that "it is considered by this court have and recover of said defendant" a sum stated is void for uncertainty as to the plaintiff. *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428.

⁶⁵ *Aldrich v. Maltland*, 4 Mich. 205; *Smith v. Chenault*, 48 Tex. 455; *Little v. Birdwell*, 27 Tex. 688; *Collins v. Hyslop*, 11 Ala. 508; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Holling v. Speller*, 96 Ala. 269, 11 South. 300; *Hendry v. Crandall*, 131 Ind. 42, 30 N. E. 789. But a judgment ordered for "plaintiff," after overruling a motion for a new trial, without specifying which of the two plaintiffs, where the verdict was rendered for "plaintiffs," is fatally defective. *C. Aultman & Co. v. Wirth*, 45 Ill. App. 614.

⁶⁶ *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228; *McMahon v. Perkins*, 22 R. I. 116, 46 Atl. 405; *New Mexico & S. P. R. Co. v. Madden*, 7 N. M. 215, 34 Pac. 50; *Turner v. City of Houston* (Tex. Civ. App.) 43 S. W. 69. See *Misouri Pac. Ry. Co. v. Smith* (Tex.) 16 S. W. 803.

"defendants" in the judgment will be treated as a merely clerical error, and the judgment be held as one against the original defendant only.⁶⁷ So a judgment for a definite amount should not be set aside because it fails to state that it is for the plaintiff against the defendant, where the declaration sets forth a cause of action and the parties thereto.⁶⁸ Nevertheless, a patent ambiguity on the face of the judgment cannot be thus cured or aided. In an Ohio decision the court said: "The order of the court was that these instalments should be paid by the parties in partition 'or their representatives or assigns,' and in default that execution should issue therefor. This order is void for uncertainty. A judgment against A. or B. is no valid judgment against either A. or B., and is simply void."⁶⁹ On the other hand, in a suit to enforce a resulting trust on payment of money due the holders of the legal title, a decree requiring such holders to convey to "the heirs at law of W. B." is proper, without requiring that the persons intended be individually named.⁷⁰ So a judgment rendered against a defendant omitting his Christian name cannot be considered void, but an action may be maintained against him on such judgment, averring his identity, and the plaintiff may prove by parol that he is the person against whom the judgment was rendered.⁷¹ It is sufficient if the memorandum of the style of a cause, made by the clerk, indicate with reasonable certainty to what suit it relates. The description of the parties by the name of their firm is sufficient, and a judgment in favor of the

⁶⁷ Taylor v. Taylor, 64 Ind. 356. And see Holcomb v. Tift, 54 Mich. 647, 20 N. W. 627; Finnagan v. Manchester, 12 Iowa, 521; Haynes v. Backman (Cal.) 31 Pac. 746.

⁶⁸ Adams v. Walker, 59 Ga. 506.

⁶⁹ Miller v. Peters, 25 Ohio St. 270.

⁷⁰ Low v. Graff, 80 Ill. 360. And see Dietrich v. Dietrich, 154 Pa. 92, 25 Atl. 1080.

⁷¹ Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Root v. Fellowes, 6 Cush. (Mass.) 29. See Preston v. Wright, 60 Iowa, 351, 14 N. W. 352. Where a defendant is in the habit of signing checks, and doing business at banks and other places, by the initials of his Christian name, these initials will be treated as his business name, and a judgment recovered against him by that name is not subject to collateral attack. Oakley v. Pegler, 30 Neb. 628, 46 N. W. 920. And where a debtor is equally well known by two names, a judgment against him in either name is good as to him and as to his receiver. Isaacs v. Mintz, 11 N. Y. Supp. 423.

plaintiffs against the defendants is sufficient, as the pleadings show who they are.⁷² In Ohio it is required by statute that the judgment shall certify which of the defendants is principal and which surety; but this, it is held, only applies where they are sued jointly, and if judgment is recovered in an action against the suréty alone, it is not necessary to its validity that it should specify the fact of his suretyship.⁷³ The title of a case is matter of form only, and a clerical error therein will not vitiate.⁷⁴

§ 117. Designation of the Property.

When a judgment has to do with specific property, it is essential that the property be designated in the judgment with such a degree of certainty that it can be identified without reasonable opportunity for mistake.⁷⁵ Thus a decree for the distribution of an estate should set out specifically the property to be distributed.⁷⁶ So a judgment of recovery in trespass to try title is void if it does not describe the land with sufficient certainty to identify it.⁷⁷ But because there is a want of certainty in the description of land ordered to be sold to satisfy a judgment, it does not follow that the judgment is otherwise bad. Though such want of certainty renders void what it refers to, unless the plaintiff in the execution be dissatisfied no other person has cause of complaint.⁷⁸ But here also, as in respect to the designation of the parties, the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the

⁷² *Collins v. Hyslop*, 11 Ala. 508. But if the judgment entry does not set forth the individual names of the members of a firm, those names must be disclosed by other parts of the record. If the action was brought by several persons as partners, but without setting forth their individual names anywhere in the cause, a judgment rendered in the firm name is fatally defective. *Hitch v. Gray*, 1 Marv. (Del.) 400, 41 Atl. 91; *Simmons v. Titcher*, 102 Ala. 317, 14 South. 786.

⁷³ *Wilkins v. Ohio Nat. Bank*, 31 Ohio St. 565.

⁷⁴ *Ewing v. Hatfield*, 17 Ind. 513.

⁷⁵ Whether the description of land in a judgment is sufficiently definite to identify the land is a question for the jury. *Birdseye v. Rogers* (Tex. Civ. App.) 26 S. W. 841.

⁷⁶ *Jones v. Minogue*, 29 Ark. 637.

⁷⁷ *Hearne v. Erhard*, 33 Tex. 60.

⁷⁸ *Gear v. Hart*, 31 Tex. 135.

record. Thus a decree is not void, nor incompetent as evidence, because it contains no description of the land thereby decreed to be conveyed, if it refers to the petition in the action, or other pleadings or documents, for such description, in apt and sufficient words.⁷⁹ Indeed the authorities go even further than this. For it has been held that a judgment that plaintiff recover "the property in controversy," or in default thereof a sum fixed as its value, will not be reversed for uncertainty in the recovery, where, although the petition claims several articles, the record shows that the controversy was reduced to two of them.⁸⁰

§ 118. Designation of Amount of Recovery.

The amount of a judgment must be stated in it with certainty and precision. All judgments must be specific and certain; they must determine the rights recovered or the penalties imposed, and be such as the defendant may readily understand and be capable of performing.⁸¹ A judgment, it is said, must be so certain that the clerk can issue an execution by inspection of it, without reference to other entries.⁸² Hence a judgment which is uncertain as to the amount which it awards is invalid.⁸³ For example, a judgment against a garnishee "for the amount of his answer or so much there-

⁷⁹ *Foster v. Bowman*, 55 Iowa, 237, 7 N. W. 513; *Jones v. Belt*, 2 Gill (Md.) 106; *Martin v. Teal* (Tex. Civ. App.) 29 S. W. 691; *Sanger v. Roberts*, 92 Tex. 312, 48 S. W. 1. A decree describing the property to be sold as "a lot with a livery stable thereon" situated on a certain street, and naming the person who conveyed it to defendant, is sufficient. *McCue v. Sharp* (Ky.) 45 S. W. 770. It will be presumed that the land described in the judgment is the same as that in the petition, there being no contradiction in the description, though that in the judgment is fuller. *Leavell v. Seale* (Tex. Civ. App.) 45 S. W. 171. But in Kentucky, it is said that a judgment should be certain as to the description of real property ordered to be sold; and it is not sufficient that the property may be identified by a reference to the pleadings. *Neff v. Covington Stone Co.* (Ky.) 56 S. W. 723; *Harrison's Ex'x v. Taylor* (Ky.) 43 S. W. 723.

⁸⁰ *Coleman v. Reel*, 75 Iowa, 304, 39 N. W. 510, 9 Am. St. Rep. 484.

⁸¹ *People v. Pirfenbrink*, 96 Ill. 68; *Etheridge v. Middleton*, 1 Marv. (Del.) 130, 40 Atl. 714.

⁸² *Boyken v. State*, 3 Yerg. (Tenn.) 426.

⁸³ *Jones v. Acre*, Minor (Ala.) 5. A judgment for the recovery of money, not stating the amount for which it was rendered, is void, where nothing ap-

of as will satisfy the plaintiff's debt and costs" has been held void for uncertainty.⁸⁴ And a finding that a garnishee was liable for one of two amounts, which are to be determined by a future contingency, was not considered a judgment at all.⁸⁵

Nevertheless, "id certum est quod certum reddi potest;" and we are unable to discover any good reason why this maxim should not apply to the amount of a judgment as well as in any other case. An obscure or ambiguous designation of the parties or the subject-matter involved may be construed, as we have seen, with reference to the other parts of the record. And if the pleadings, or the verdict, show the actual amount of the recovery, without any doubt or room for mistake, it would seem that the judgment should not be considered invalid, at least as between the parties, for its failure to specify the sum awarded with precision. It must be admitted that the authorities hardly go to the length of sanctioning the rule here suggested, although the general principle of construing a judgment by the record is not disputed. But the cases certainly justify the statement that if the judgment-entry itself, without naming the amount of recovery, contains data which permit its calculation, a sufficient degree of certainty is attained. Thus a judgment for interest from a day mentioned is sufficiently certain without fixing the amount.⁸⁶ So also, if a verdict be found for a fixed and definite amount, and the judgment refers to the verdict in explicit terms (as if it is expressed to be "for the said sum assessed as aforesaid"), it is considered to be sufficiently precise.⁸⁷ But it is error to render

pears in the record to supply the defect. *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717; *Board of Com'rs of Custer County v. Moon*, 8 Okl. 205, 57 Pac. 161.

⁸⁴ *Berry v. Anderson*, 2 How. (Miss.) 649.

⁸⁵ *Battell v. Lowery*, 46 Iowa, 49. See *Early v. Moore*, 4 Munf. 262. An entry, upon the rendition of a verdict for plaintiff, that "defendant is entitled to a credit to be ascertained by A. and B., and the clerk is then authorized to enter a remittitur, judgment of the court accordingly and for costs," is not a judgment then rendered, but an agreement for a judgment to be rendered subsequently, upon the ascertainment by the referees of the credit to which the defendant is entitled. *Dunns v. Batchelor*, 20 N. C. 46.

⁸⁶ *Dinsmore v. Austill*, Minor (Ala.) 89.

⁸⁷ *Ellis v. Dunn*, 3 Ala. 632. A justice's judgment "that the plaintiff recover the sum as claimed in the above case," will be sustained, notwithstanding

judgment on a verdict for the plaintiff which fails to state how much he should recover, when all debt is denied by the defendant. In such case the jury should have been requested to retire and find how much the plaintiff ought to recover.⁸⁸

If there are blanks in the judgment, instead of a statement of its amount, this will destroy its force and effect for most purposes, or at least leave it incomplete until the blanks are filled. For instance, a judgment that the party recover "costs of suit taxed at —," the amount of costs not being inserted in the record, will not support a declaration upon the judgment as for a fixed sum, nor can the defect in the record be supplied by resorting to an entry upon the clerk's docket.⁸⁹ So a confession of judgment for "—— dollars," and so entered, creates no lien on the property of the judgment debtor while it remains in that condition.⁹⁰ In Pennsylvania, however, it appears to be the rule that a judgment entered for an unliquidated sum will sustain an execution and a sheriff's sale thereon, if the actual amount of the judgment-debt be indorsed on the execution.⁹¹ When the clerk enters a judgment, leaving blanks for the amount of damages and costs, the case being one where such amount can be ascertained by mere calculation, the court has power to order the blanks to be filled up at the next term, the clerk having died during the session;⁹² or if the clerk himself fills up the blanks, after the lapse of more than a year from the judgment, his

ing its informality, when the record shows that the action was assumpsit for \$81, and defendant appeared and contested the claim. *Ladnier v. Ladnier*, 64 Miss. 368, 1 South. 492. On overruling a frivolous demurrer to a complaint for a specific sum for goods sold and delivered, and no answer over, judgment for the sum claimed is proper, without taking proof of the amount of damages. *Adrian v. Jackson*, 75 N. C. 536.

⁸⁸ *Bartle v. Plane*, 68 Iowa, 227, 26 N. W. 88.

⁸⁹ *Noyes v. Newmarch*, 1 Allen (Mass.) 51.

⁹⁰ *Lea v. Yates*, 40 Ga. 56. So, a judgment for "—— dollars," based upon a verdict expressed in the same way, is a nullity, and will not bar a subsequent suit upon the same cause of action. *School Directors v. Newman*, 47 Ill. App. 364. The judgment record in a case left the amount of the judgment blank, except as to \$4.95 costs. In the docket it was entered as \$265 damages and \$16.95 costs with 10 per cent. interest. Held, good as a judgment for \$4.95 only. *Case v. Plato*, 54 Iowa, 64, 6 N. W. 128.

⁹¹ See *Ulshafer v. Stewart*, 71 Pa. 170; *Gray's Heirs v. Coulter*, 4 Pa. 188.

⁹² *Hagler v. Mercer*, 6 Fla. 721.

doing so will not invalidate the judgment so far as to expose it to collateral impeachment, although it may be ground for a writ of error.⁹³ Another question arises in the case of a judgment where a blank is left for the costs alone. Undoubtedly the judgment is not perfect until this blank is filled. But it is held that the record of a judgment which is regular in all respects, except that the costs are left blank until they are taxed by the court, and then inserted, is admissible in evidence in an action of debt on that judgment.⁹⁴ A distinction is taken, in one of the recent cases, which we believe to be well founded. It is held that as respects the lien or the validity of a judgment informally entered and docketed without the taxation and insertion of costs therein, the omission is to be treated as a mere irregularity; but for the purposes of an appeal, the prevailing party, seeking to limit the rights of his adversary, is to be held to strict practice, and the judgment is not to be deemed perfected until the costs to which he is entitled are duly taxed and inserted in the judgment.⁹⁵

All judgments rendered in this country should be expressed in the American denominations of money. A judgment given by the court for a certain amount in francs is therefore erroneous, and will be amended on appeal so as to express the amount in dollars and cents.⁹⁶ It has sometimes been made a question whether the statement of the amount of a judgment in figures merely, instead of the sum being written out, would impair its validity. There are cases which hold a judgment so expressed to be defective to the point of invalidity.⁹⁷ Other authorities seem reluctant to admit that this alone would absolutely avoid the judgment so as to render it open

⁹³ *Lind v. Adams*, 10 Iowa, 398, 77 Am. Dec. 123.

⁹⁴ *Calhoun v. Terry Porter Co.*, 21 Conn. 526. See, also, *Big Goose & Beaver Ditch Co. v. Morrow*, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955; *Young v. Connelly*, 112 N. C. 646, 17 S. E. 424. In California, the clerk has no right to insert costs after the judgment is entered and the record completed. The remedy in such case is by a motion to the court for amendment. *Chapin v. Broder*, 16 Cal. 403.

⁹⁵ *Richardson v. Rogers*, 37 Minn. 461, 35 N. W. 270.

⁹⁶ *Erlanger v. Avegno*, 24 La. Ann. 77.

⁹⁷ *Smith v. Miller*, 8 N. J. Law, 175, 14 Am. Dec. 418; *Linder v. Monroe's Ex'rs*, 33 Ill. 390.

to collateral attack.⁹⁸ While the practice is undoubtedly loose and irregular, it is difficult to see in it any sufficient ground for considering the judgment entirely void. If the amount of recovery stated in figures in a judgment differs from that stated in writing, but the recitals in the judgment itself show the former to be the true amount, the error is not sufficient cause for the reversal of the judgment.⁹⁹ If the amount of the judgment is written out, the designation "dollars" (or "cents," or both, as the case may be) must be appended to it. Thus a judgment for "four hundred and sixty-one and 53-100 damages" is not for any sum of money and is therefore a nullity.¹⁰⁰ But it has also been held, and by a very high authority, that the omission of the word "dollars" in a verdict for the plaintiff in an action of assumpsit does not affect the validity of a judgment entered thereon according to the manifest intent of the jury.¹⁰¹ If the amount of the judgment is expressed in figures, the dollar-mark, or some other appropriate sign must be used to show the sum intended. The necessity for a statement of this kind arises from the loose manner of keeping the records of tax-judgments which formerly prevailed in some of the states, and was often brought to the notice of the courts. The rule is that a judgment for taxes is fatally defective if it does not show the amount of the tax for which it was rendered; and the use of numerals simply, without any words, marks, or signs to indicate that they stand for money, and for what denominations of money, is not sufficient.¹⁰²

⁹⁸ Fullerton v. Kelliher, 48 Mo. 542; Kopperl v. Nagy, 37 Ill. App. 23; Davis v. McCary, 100 Ala. 545, 13 South. 665.

⁹⁹ Cave v. City of Houston, 65 Tex. 819.

¹⁰⁰ Carpenter v. Sherfy, 71 Ill. 427. The court said: "We have no right to indulge in presumptions as to what was found by the court; we must take the record as it reads. A judgment should be for a certain and definite sum of money."

¹⁰¹ Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523.

¹⁰² Woods v. Freeman, 1 Wall. 398, 17 L. Ed. 543; Lawrence v. Fast, 20 Ill. 338, 71 Am. Dec. 274; Lane v. Bonnmelmann, 21 Ill. 143; Gibson v. City of Chicago, 22 Ill. 572; Eppinger v. Kirby, 23 Ill. 521, 76 Am. Dec. 700; Dukes v. Rowley, 24 Ill. 210; Baily v. Doolittle, 24 Ill. 577; Potwin v. Oades, 45 Ill. 367; People v. San Francisco Savings Union, 31 Cal. 135; Randolph v. Metcalf, 6 Cold. (Tenn.) 400; Tidd v. Rines, 26 Minn. 201, 2 N. W. 497; Black, Tax Titles (2d Ed.) § 180.

This rule governs also in case of a judgment for a special assessment.¹⁰³ It may be conceded, however, that the use of the dollar-mark is not indispensable, if the amount can be indicated with certainty by any other device or contrivance.¹⁰⁴

An entry of judgment for the right sum, but inaccurately named "damages" instead of "debt,"—or so much debt and so much damages,—is not reversible error.¹⁰⁵ And where the record of a judgment does not show of what the judgment was made up, it is competent to show that fact by extraneous evidence.¹⁰⁶

§ 119. Conditions in Judgment.

In an ordinary action at law, the court cannot render a conditional judgment.¹⁰⁷ But "when a judgment is recovered according to the terms and conditions of a written obligation for the payment of money, and those terms and conditions expressly either limit the lien of any judgment which may be recovered upon it, or waive

¹⁰³ *Pittsburgh, F. W. & C. R. Co. v. City of Chicago*, 53 Ill. 80.

¹⁰⁴ In the case of *Gutzwiller v. Crowe*, 32 Minn. 70, 19 N. W. 344, it appeared that, in the entry of a tax-judgment on the official books, there was a column headed "Total amount of judgment," and in this column appeared three Arabic numerals, the first separated from the others by a short perpendicular line; it was held that, in reasonable intendment, this must denote money, and that it was a sufficient designation of the amount of the judgment. This decision was declared to be consistent with *Tidd v. Rines*, 20 Minn. 201, 2 N. W. 497; because one of the grounds on which that case was ruled was that the figures were not separated by any line or decimal mark. And see *New England Loan & Trust Co. v. Avery* (Tex. Civ. App.) 41 S. W. 673; *Dyke v. Bank of Orange*, 90 Cal. 397, 27 Pac. 304; *Therme v. Bethenold*, 106 Iowa, 697, 77 N. W. 497. A clerical mistake made in writing a judgment with an additional cipher is rendered immaterial by a remittitur. *Lowdon v. Fisk* (Tex. Civ. App.) 27 S. W. 180.

¹⁰⁵ *Carver v. Adams*, 40 Vt. 552. In a suit for the recovery of land and damages for detention, the judgments for the land and for the rents are as distinct as if separate judgments were rendered in different suits. *Shean v. Cunningham*, 6 Bush (Ky.) 123.

¹⁰⁶ *Gilbert v. Earl*, 47 Vt. 9. Where judgment is recovered for compensatory and punitive damages, the court is not required to specify how much is for the one and how much for the other. *Hambly v. Hayden*, 20 R. I. 558, 40 Atl. 417.

¹⁰⁷ *Johnson v. Carver*, 175 Pa. 200, 34 Atl. 627; *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1; *Coh v. Bright*, 2 Mo. App. Rep'r, 1191, 65 Mo. App. 417.

the benefit of all laws exempting property from levy and sale on any execution, or waive the right of inquisition upon the delinquent's real estate, and in the entry of the judgment this is set forth upon the docket, it must be held to be a part of the record of the judgment," and therefore will affect subsequent purchasers.¹⁰⁸ But a judgment on an ordinary promissory note, though given for the purchase-money of real estate, should not contain provisions declaring it a lien on such real estate and ordering that the same be sold to satisfy it. It should be an ordinary personal judgment against the defendant, authorizing an ordinary execution to be issued against the property in general of the debtor.¹⁰⁹ In an action of replevin, where the plaintiff obtains possession of the property and retains the same, and is in possession of the property at the time the judgment is rendered, it is neither necessary nor proper to render a judgment in favor of the plaintiff for the value of the property in case a return thereof cannot be had.¹¹⁰ As a general rule, a judgment has properly nothing to do with the means of its enforcement; it merely pronounces the sentence of the law upon the facts ascertained in the case.

§ 120. Joint Defendants.

At the common law, it was an inflexible rule that if an action was brought against two or more defendants jointly, the plaintiff could have judgment only against all of them or none of them; the single exception being in the case where one of the defendants succeeded in establishing a defense, such as his personal disability, peculiar to himself. If one defendant suffered default, no final judgment could be given against him, as we have already stated,¹¹¹ until the case was disposed of as to the others, and not even then unless the verdict was in the plaintiff's favor. Under this practice, therefore, it was error to give judgment against one of the defendants sued with-

¹⁰⁸ *Hageman v. Salisbury*, 74 Pa. 280. And see *Little v. White*, 3 Ind. 544.

¹⁰⁹ *Greeno v. Barnard*, 18 Kan. 518.

¹¹⁰ *Mills v. Kansas Lumber Co.*, 26 Kan. 574.

¹¹¹ *Supra*, § 82. In an action of trover against two, one of whom is defaulted and the other found guilty by the jury, there is but one assessment of damages and a joint judgment. *Gerrish v. Cummings*, 4 Cush. (Mass.) 391.

out disposing of the suit as to the other defendant; a final conclusion must be reached as to all of them, one way or the other, at the same time.¹¹² But now it is provided by statute in some of the states that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."¹¹³ In a case where this law was to be applied, the court said: "As no order was made as to the other defendant, the action is still pending against him, and the court had a right to render a judgment against one, and continue the action as to the other; although no order of continuance seems to have been entered, yet the action stood continued by operation of law."¹¹⁴

§ 121. Time of entering Judgment.

By the rule of the common law, if a judgment was not stayed by a motion in arrest, or for a new trial, or other appropriate proceeding, within the first four days of the next term after the trial, it was then to be entered upon the roll or record. Statutes fixing the time of entering a judgment upon verdict exist in some of the states, and require notice in this connection. Thus the New York Code prescribes the lapse of four days after the verdict before the rendition of judgment; but it is held that judgment may be entered upon the verdict immediately, and relief may be had against the verdict within four days afterward, if there be ground for it, notwithstanding the judgment.¹¹⁵ But the case is different under a statute which declares that judgments on the decision of the court may be entered "after the expiration of four days from the filing of the decision and the service upon the attorney of the adverse party of a copy thereof, but not before." Here, it is held, four full calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered; and here the rule of interpretation

¹¹² *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217. See *Creigh v. Hedrick*, 5 W. Va. 140.

¹¹³ Code N. Y. § 274; Code Wis. § 184; Code Civ. Prac. Ky. § 370; Code Civ. Proc. Cal. § 578.

¹¹⁴ *Patton v. Shanklin*, 14 B. Mon. (Ky.) 15.

¹¹⁵ *Dros v. Lakey*, 2 Sandf. (N. Y.) 681.

which, in computing time, excludes the first and includes the last day, has no application, the provision being clear and explicit.¹¹⁶ In Pennsylvania, a law requires¹¹⁷ that judgment shall not be entered on the report of a referee until after the expiration of thirty days. But in a case where the prothonotary entered a judgment on the same day on which the report was filed, it was considered that this should not, on error, be treated as material, where it appeared that exceptions to the report were subsequently filed and acted upon, and no attention paid to the mistake.¹¹⁸ On the other hand, the California Code provides that "when trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."¹¹⁹ But the failure of the clerk to enter judgment within the prescribed time does not, according to the authorities, affect the validity of the judgment afterwards entered; for the injunction of the statute is merely directory and not mandatory.¹²⁰ And reading this statute in connection with another law, which provides, as a penalty, that the action shall be dismissed when the judgment is not entered within six months after verdict, it is held that the court does not lose jurisdiction of the cause if judgment is entered within six months after the verdict is rendered.¹²¹ In other states it appears to be required

¹¹⁶ *Marvin v. Marvin*, 75 N. Y. 240, construing Code Civ. Proc. N. Y. § 1228. And see *Hutchinson v. Brown*, 8 App. D. C. 157. Where a justice of the peace decided a cause before him, and made upon the papers in the suit a memorandum of his judgment within four days after the final submission to him, held, that the judgment was regular and valid, although no entry thereof was made in his docket until after the lapse of four days. *Walrod v. Shuler*, 2 N. Y. 134.

¹¹⁷ Act Pa. May 14, 1874.

¹¹⁸ *Pittsburgh & C. R. Co. v. Shaw* (Pa.) 14 Atl. 323.

¹¹⁹ Code Civil Proc. Cal. § 604. A similar statute is in force in Ohio (Rev. St. § 5326); and it is held that the clerk may enter judgment immediately on rendition of the verdict, and before the expiration of the time for moving for a new trial. *Young v. Shallenberger*, 53 Ohio St. 291, 41 N. E. 518.

¹²⁰ *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551; *Bundy v. Magness*, 76 Cal. 532, 18 Pac. 668; *Helmén v. Phillips*, 88 Cal. 557, 26 Pac. 306; *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218.

¹²¹ *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685.

that the judgment be entered at the same term at which the verdict is returned. But the cases rule that if this is omitted, it is competent for the court to enter the judgment at a subsequent term, both parties appearing and being heard.¹²²

Rules of the former class—those requiring a certain time to intervene between verdict and judgment—probably obtain in a majority of the states, either by statute or as the settled practice of the courts. Their design is to afford the parties an opportunity of proceeding against the verdict, either by a motion for judgment non obstante veredicto, motion in arrest, or motion for new trial, as the case may be. But since the right of a party so to move will not be prejudiced by a premature entry of judgment,¹²³ and since the judgment itself can be stayed or set aside as well as the verdict, while, on the other hand, it is the right of the prevailing party to have his rights fixed by a judgment as soon as he is entitled to it, it is conducive to justice not to regard a judgment entered in advance of the time as entirely invalid, but to consider the rule as merely directory.

In some jurisdictions, while judgment may be entered immediately upon the verdict, the court may stay the proceedings for a certain number of days, for the purpose of giving time for a motion for new trial. Where this is done, and judgment is entered up before the expiration of the stay, still it is not void. The judgment is only provisional, and it does not deprive the losing party of the right so to move.¹²⁴ And even where it appeared that judgment was entered up while a motion for a new trial was actually on file, which

¹²² *Shephard v. Brenton*, 20 Iowa, 41. And see *Murdock v. Ganahl*, 47 Mo. 135; *Prudential Ins. Co. v. Taylor*, 59 N. J. Law, 352, 35 Atl. 798; *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931. A judgment not entered within the time provided by law is not for that reason void. *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105. But in New York, it is held that a judgment rendered by a justice of the district court will be reversed where it was rendered after the time limited by law. *Orvis v. Curtiss*, 8 Misc. Rep. 681, 28 N. Y. Supp. 728. And in Iowa, under a statutory provision that, where a verdict is rendered by a jury in a justice's court, the justice shall enter judgment thereon "forthwith," it is held that a judgment entered more than 90 days after the return of the verdict is void for want of jurisdiction. *Tomlinson v. Litze*, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458.

¹²³ *Hartridge v. Wesson*, 4 Ga. 101.

¹²⁴ *Harvey v. McAdams*, 32 Mich. 472.

motion was afterwards overruled, and all the proceedings occurred at the same term of court, it was held that the fact that judgment was so entered was no ground for reversing the decision on the motion.¹²⁵

§ 122. Date of the Judgment.

The rule of the common law was, that all judgments were presumed to have been rendered on the first day of the term, unless the contrary appeared. And it is also a part of the English practice to consider all judicial proceedings as taking place at the earliest period of the day on which they are done.¹²⁶ It is still the rule, in some of the American states, that all judgments docketed during the term shall be deemed to be docketed on the first day of the term; and this, it is held, makes them relate to the first day even where the judge fails to open court on that day.¹²⁷ But in some other states, principally in New England, an exactly opposite rule is in force, and a judgment is regarded as rendered on the last day of the term, unless the contrary is shown.¹²⁸ But in a majority of the states, a judgment takes effect from the day it is actually rendered or entered.¹²⁹ "The term of the court is not with us regarded

¹²⁵ *Hasted v. Dodge* (Iowa) 35 N. W. 462.

¹²⁶ *Wright v. Mills*, 4 Hurl. & N. 488. In this case, judgment was signed at the opening of the office at its usual hour, eleven a. m., and the defendant died at half past nine a. m. on the same morning. It was held that the judgment was regular. For a similar case, see *Peetsch v. Quinn*, 6 Misc. Rep. 50, 26 N. Y. Supp. 728.

¹²⁷ *Norwood v. Thorp*, 64 N. C. 682. See *Coe v. Erb*, 59 Ohio St. 250, 52 N. E. 640, 69 Am. St. Rep. 704. But if a case was not ready for trial, so that no judgment could be given on the first day of the term, the judgment does not relate back to that date. *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66.

¹²⁸ *Bradish v. State*, 35 Vt. 452; *Herring v. Polley*, 8 Mass. 113; *Chase v. Gilman*, 15 Me. 64; *Goodall v. Harris*, 20 N. H. 363. Accordingly, the time within which a motion for new trial must be made (which is limited to two years) must be computed from the last day of the term. *Bradish v. State*, 35 Vt. 452. Taxation of additional costs incident to a suit, with award of execution therefor, at a term subsequent to that of the recording of the judgment, cannot be considered as making the judgment a judgment of the later term. *Rider v. Alexander*, 1 D. Chip. (Vt.) 274.

¹²⁹ A judgment is not void merely because it is not dated. *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380.

as one day, and though until the term expires the orders made and judgments rendered are largely under the control of the court, and may be altered, modified, or vacated, yet they have been generally regarded as taking effect from the day on which they were made or rendered, subject to the power of the court, and not from the day the term closes."¹³⁰ And the date of a judgment may be fixed by reference to the record of the proceedings in the case.¹³¹ We shall have occasion to discuss this topic more fully in connection with the subject of priority among judgment-liens.¹³²

§ 123. Construction of Ambiguous Judgments.

The rule for the construction of ambiguous judgments is clearly stated by the supreme court of Kansas in the following language: "Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms."¹³³ This rule also applies to decrees in equity. The meaning and effect of a decree may, in case of doubt, be ascertained by reference to the bill and other proceedings, particularly when these are referred to in the decree itself.¹³⁴ And for this purpose, recourse may be had to duly attested stipulations between the parties.¹³⁵ But where a judgment refers to the findings for certain data, and the findings do not

¹³⁰ *Ex parte Dillard*, 68 Ala. 594; *Alabama C. & N. Co. v. State*, 54 Ala. 36; *Quinn v. Wiswall*, 7 Ala. 645; *Powe v. McLeod*, 76 Ala. 418; *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Dyson v. Simmons*, 48 Md. 207; *Stannis v. Nicholson*, 2 Or. 332.

¹³¹ *Cooper v. Cooper*, 14 La. Ann. 665.

¹³² See *infra*, §§ 441-444.

¹³³ *Clay v. Hildebrand*, 34 Kan. 604, 9 Pac. 466, *Valentine, J.* See, to the same effect, *Fleenor v. Driskill*, 97 Ind. 27; *Hofferbert v. Klinkhardt*, 58 Ill. 450; *Succession of Durnford*, 1 La. Ann. 92; *Fowler v. Doyle*, 16 Iowa, 534; *Four-Mile Land Co. v. Slusher* (Ky.) 55 S. W. 555.

¹³⁴ *Walker's Ex'r v. Page*, 21 Grat. (Va.) 636.

¹³⁵ *Thayer v. McGee*, 20 Mich. 195.

contain the data, but refer again to the pleadings, which are also uncertain, the judgment will be reversed for uncertainty.¹³⁵ A mistake apparent on the face of a judgment, amounting to an impossibility, will not destroy the judgment, if enough remains, after it is corrected or eliminated, to disclose the actual judgment rendered. Thus, where a judgment entry recites a demurrer (sustained) as having been interposed by the defendant to his own plea, the appellate court will intend the recital to have been a clerical mistake and that it was the plaintiff who demurred.¹³⁷ But a judgment must follow the verdict; and in a case where the jury returned two verdicts, as follows: "We the jury find for the plaintiff and assess his damages in the sum of \$800," and, "We the jury find for the defendant on the counterclaim and set-off and assess the damages in the sum of \$300," it was held to be error in the court to overrule a motion for a venire de novo, and render judgment for the plaintiff for \$500.¹³⁸ The presumption in support of the judgment extends to inferring the presence of the plaintiff in court, for the purpose of an act which he only could perform, although the entry only recites the presence of his attorney.¹³⁹

§ 124. The Judgment-Roll, or Record.

It seems appropriate, in this connection, to give some account of the judgment-roll or record of the judgment. At common law the judgment-roll was a roll of parchment upon which all the proceedings in the cause, up to the issue, and the award of venire inclusive, together with the judgment which the court awarded in the cause, were entered. It included as well the pleadings and process as the signing of judgment.¹⁴⁰ In our modern practice, the proceedings

¹³⁵ *Kelley v. McKibben*, 53 Cal. 13.

¹³⁷ *Evans v. McMahan*, 1 Ala. 45.

¹³⁸ *Baughn v. Baughn*, 114 Ind. 73, 17 N. E. 181. See *Jarboe v. Brown*, 39 Ind. 549.

¹³⁹ *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159.

¹⁴⁰ *Brown*, Law Dict.; *Vail v. Iglehart*, 69 Ill. 332. *Brown* says that in modern English practice "the making up and depositing the judgment-roll is generally neglected, unless in cases where it becomes absolutely necessary to do so, as when, for instance, it is required to give the proceedings in the cause in evidence in some other action, for in such case the judgment-roll

are not thus transcribed, although in some states they are required to be copied with more or less detail into books kept for that purpose, and in others a "judgment-roll," consisting of the writ, pleadings, and other papers in the cause, must be on file when the clerk enters judgment. And for the purpose of an appeal, or other similar use, the "record" comprises a full copy of all the papers and proceedings in the cause. The following account of the practice obtaining in Illinois will be found applicable in many of the states. "Under our practice, while the pleadings, process, etc., are not, as at common law, required to be copied on a parchment roll, nor in the record book in which final judgment is entered, they are required to be filed in the office of the clerk; and when a copy of the record of the judgment is required, for the purpose of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as evidence under an issue of nul tiel record, or to establish a former adjudication of the same subject-matter between the same parties, and indeed in all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it. And the general rule is, that where the copy of a record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part."¹⁴¹ In Massachusetts, the clerk's docket is the record of the court, until the record is fully extended, and every entry upon it is the statement of an act of the court, which is presumed to be made by its direction, in pursuance either of an order for the particular entry, or of a general order, or of a general usage pre-supposing such an order.¹⁴² A record, it will be remembered, imports absolute verity, must be tried by itself, and cannot be contradicted.¹⁴³

or an examined copy thereof, is the only evidence of them that will be admitted." And see Steph. Pl. 24.

¹⁴¹ *Vall v. Iglehart*, 69 Ill. 332; *Stevison v. Earnest*, 80 Ill. 513. And see *Burge v. Gandy*, 41 Neb. 149, 59 N. W. 359; *Boe v. Irish*, 69 Minn. 493, 72 N. W. 842.

¹⁴² *Read v. Sutton*, 2 Cush. 115. A judgment recovered before a magistrate may be proved by his memoranda upon his docket and upon the original writ,

¹⁴³ See note 143 on following page.

§ 125. Supplying Lost Records.

The power of supplying a new record, where the original has been lost or destroyed, is one which pertains to courts of general jurisdiction independent of legislation, and if the statute also confers a power, and prescribes a practice, in that behalf, it does not merge the inherent authority of the courts.¹⁴⁴ Hence if, for example, the notice of a motion for leave to substitute a new record is explicit in describing a judgment and papers alleged to be lost, it is sufficient, although it does not conform to a statute which provides for such a proceeding.¹⁴⁵ The destruction of the record book in which judgments are written, does not destroy the judgment-debts, and though the judgments are wrongfully restored by the court without notice to the debtors, yet when the judgments are revived by scire facias with notice to the debtors, they should make their objection by plea of nul tiel record.¹⁴⁶ On a motion to supply a lost record, the proper practice is as follows. The notice of the motion must specify when the motion will be made, and must contain a copy of that which the plaintiff will move the court to enroll as the substance of the lost record, and the defendant must have reasonable personal service of the notice, and also of the affidavits by which it will be supported, which affidavits may be controverted by counter-affidavits. If the court, on hearing the affidavits, is fully satisfied of the loss or destruction of the original record and of the correctness of

and by the production of the original papers in the case, verified by the testimony of the magistrate, if these, taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made. *McGrath v. Seagrave*, 2 Allen, 443, 79 Am. Dec. 797.

¹⁴³ *Adams v. Betz*, 1 Watts (Pa.) 425, 26 Am. Dec. 79; *Ellis v. Ellis*, 55 Minn. 401, 56 N. W. 1056. Where a judgment roll offered in evidence contains two judgments, the last in point of time will be treated as the true and final judgment, and the other disregarded. *Colton Land & Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878.

¹⁴⁴ *Doswell v. Stewart*, 11 Ala. 629; *Gammon v. Knudson*, 46 Iowa. 455; *George v. Middough*, 62 Mo. 549; *Keen v. Jordan*, 13 Fla. 327; *Garibaldi v. Carroll*, 33 Ark. 568.

¹⁴⁵ *Doswell v. Stewart*, 11 Ala. 629.

¹⁴⁶ *George v. Middough*, 62 Mo. 549. And see *Gibson v. Vaughan*, 61 Mo. 418.

the proposed substitute, it will order the substitute to stand enrolled as and for the original.¹⁴⁷ The application must be made to the court in which the record originally remained. The courts of chancery will not entertain jurisdiction of a bill to restore to the judgment-creditor the benefit of his judgment, for the reason that there is an adequate remedy at law, by motion in the court in which the judgment was rendered.¹⁴⁸ "The inherent power of courts to control their own records, and to supply losses therein, is antagonistic to the power of any other court to interfere and make records for them. By this proceeding, one court of special jurisdiction is invoked to take cognizance of, and to supply to another court of general jurisdiction, a record, in lieu of one which has been destroyed. This power, once admitted, will place the records of the courts of common law at the mercy of the court of chancery, and might lead to absurd conflict between the law and equity side of the court over the records of the common law. * * * There is nothing here requiring the exercise of the conscience of the court which may not be attained by a simple proceeding, according to the course of the common law, and therefore chancery has no office to perform."¹⁴⁹

§ 125a. Entry of Judgments in Federal Courts.

An act of congress provides that "the practice, pleadings, and forms and modes of proceeding in civil cases, other than equity and admiralty causes, in the circuit and district courts [of the United States], shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."¹⁵⁰ This law, it is held, extends to the mode of entering and recording judgments, and requires the judgments of the federal

¹⁴⁷ *Adkinson v. Keel*, 25 Ala. 551.

¹⁴⁸ *Fisher v. Sievres*, 65 Ill. 90.

¹⁴⁹ *Keen v. Jordan*, 13 Fla. 327. On a motion to substitute the record of a destroyed judgment, the defendant cannot contest the truth of the recitals of the proposed record, though he may show that the lost record contained no such recitals. *Peddy v. Street*, 87 Ala. 290, 6 South. 3.

¹⁵⁰ Rev. St. U. S. § 914.

circuit and district courts, in actions at law, to be entered and recorded in the same manner as those of the courts of the state wherein such United States courts sit.¹⁵¹ Thus, if the state practice authorizes the entry of a judgment upon the report of a referee, without any application to the court, no application will be considered necessary in an action in a federal court in such state.¹⁵² But a state law requiring a judge to give his decision in writing upon every issue made by the pleadings is not binding on the federal courts.¹⁵³

¹⁵¹ *Morrison v. Bernards Township* (C. C.) 35 Fed. 400; *Sawin v. Kenay*, 93 U. S. 260, 23 L. Ed. 928.

¹⁵² *Fourth Nat. Bank v. Neyhardt*, 13 Blatchf. 393, Fed. Cas. No. 4,991.

¹⁵³ *Martindale v. Waas* (C. C.) 11 Fed. 551.

CHAPTER VII.

THE ENTRY OF JUDGMENTS NUNC PRO TUNC.

- § 126. Origin and Nature of the Power.
- 127. Delay by Act of the Court.
- 128. Delay by Motions or Appeal.
- 129. Laches of Party.
- 130. Supplying Entry of Judgment.
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- 132. Not a proper Means of changing or revising the Judgment.
- 133. Only proper when Final Judgment could be entered.
- 134. Notice of Application.
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- 136. Relation back of Order.
- 137. Effect upon Third Persons.

§ 126. Origin and Nature of the Power.

The phrase "nunc pro tunc," "now for then," is used to indicate that something which was omitted to be done at the proper time is afterwards performed with a retroactive effect; that is, it is to have the same force and virtue, and be attended by the same consequences as if it had been regularly done. In relation to judicial proceedings, the performance of acts nunc pro tunc may take place in the various stages of the progress of a suit, and instances are not uncommon of affidavits or other papers filed in this manner. But in this connection we are only concerned with the entry and the amendment of judgments nunc pro tunc, and in this chapter only with the former. The power of the courts, whether of law or equity, to make entries of judgments or decrees nunc pro tunc, in proper cases and in furtherance of the interests of justice, is one which has been recognized and exercised from ancient times, and as a part of their common law jurisdiction.¹ This power therefore does not depend upon statute;

¹ Lord Mohun's Case, 6 Mod. 59; Hodges v. Templer, 6 Mod. 191; Mayor of Norwick v. Berry, 4 Burrows, 2277; Evans v. Rees, 12 Adol. & E. 167, 175; Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369; Wood v. Keyes, 6 Paige (N. Y.) 478; Hess v. Cole, 23 N. J. Law, 116; Dial v. Holter, 6 Ohio St. 228; Swain v. Naglee, 19 Cal. 127; Reid v. Morton, 119 Ill. 118, 6 N. E. 414; Shep-

it is inherent.² It rests partly upon the right and duty of the courts to do entire justice to every suitor, and partly upon their control over their own records and authority to make them speak the truth. When a judgment is allowed to be thus entered in order that the party may not suffer for what has transpired during a delay caused by the court, it exhibits a practical application of the maxim "Actus curiæ neminem gravabit." But the authority is much wider than this, and the power must not be confounded with the illustration of it. The cases calling for the exercise of this power of the courts are chiefly of two kinds; first, where no judgment was actually rendered, although one might or ought to have been; second, where a judgment was actually rendered, but never entered or put upon the records. We shall first consider the former class of cases.

§ 127. Delay by Act of the Court.

In any instance where a party has brought his case to trial and proceeded to present it on the merits and submit the decision, and before any judgment is rendered one of the parties dies, the court, in order that the time consumed by it in deliberation, without laches of the party who was successful in the suit, may not operate to his disadvantage, will not allow the action to abate, but instead will enter judgment nunc pro tunc, as of the time of the submission.³ Or,

hard v. Brenton, 20 Iowa. 41. Statutory provisions requiring a proceeding to vacate or modify a judgment to be brought within a certain time after the judgment is pronounced do not apply to a motion for an entry of judgment nunc pro tunc. Hyde v. Michelsen, 52 Neb. 680, 72 N. W. 1035, 66 Am. St. Rep. 533. And see Risser v. Martin, 86 Iowa, 392, 53 N. W. 270.

² Chissom v. Barbour, 100 Ind. 1.

³ Mayor of Norwick v. Berry, 4 Burrows. 2277; Toulmin v. Anderson, 1 Taunt. 385; Bridges v. Smyth, 8 Bing. 29; Blewett v. Tregonning, 4 Adol. & E. 1002; Green v. Cobden, 4 Scott's Cas. 486; Key v. Goodwin, 1 Moore & S. 620; Harrison v. Heathorn, 1 Dowl. & L. 529; Evans v. Rees, 12 Adol. & E. 167; Moor v. Roberts, 3 C. B. (N. S.) 844; Seymour v. Greenwood, 30 Law J. Exch. 189; Abington v. Lipscomb, 11 Law J. Q. B. 15; Davies v. Davies, 9 Ves. 461; Nell v. McMillan, 27 U. C. Q. B. 257; Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369; City of New Orleans v. Warner, 176 U. S. 92, 21 Sup. Ct. 280, 44 L. Ed. 385; Griswold v. Hill, 1 Palne, 483, Fed. Cas. No. 5,834; Goddard v. Bolster, 6 Me. 427, 20 Am. Dec. 320; Blaisdell v. Harris, 52 N. H. 191; Collins v. Prentice, 15 Conn. 423; Brown v. Wheeler, 18 Conn. 199; Perry v. Wilson, 7 Mass. 393; Tapley v. Goodsell, 122 Mass. 176; Ryght-

if justice so require, the judgment may be entered as of the day in the term when the last of the evidence was submitted.⁴ And a judgment may be entered nunc pro tunc against one of several defendants, as well as against a sole defendant, when death takes place after verdict and before judgment.⁵ The same practice obtains, under the same conditions, in chancery. Thus, a party in interest having died since the argument and before the signing of a decree, the decree and orders in the cause should be signed and filed as of the date of the argument.⁶ The case may also be put in an irregular position by reason of the death of the plaintiff after a verdict. And here also the salutary power of giving judgment retrospectively may be invoked. By the common law practice, since the delay of the court must not be allowed to prejudice the parties, if the plaintiff die during the time the case is under advisement, judgment will be entered for him nunc pro tunc as of the time of the return of the postea.⁷ But in English practice (and probably the rule is general) the power so to enter judgment does not extend to suits in tort.⁸ But it is not only the death of a party that will justify the exercise of this power. It may be employed to overreach any event happening while the case is in the hands of the court, and which would otherwise

myer v. Durham, 12 Wend. (N. Y.) 245; Spalding v. Congdon, 18 Wend. (N. Y.) 543; Holmes v. Honle, 8 How. Prac. (N. Y.) 383; De Agreda v. Mantel, 1 Abb. Prac. (N. Y.) 130; Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; Wood v. Keyes, 6 Paige (N. Y.) 478; Klissam v. Hamilton, 20 How. Prac. (N. Y.) 369; Fulton v. Fulton, 8 Abb. N. C. (N. Y.) 210; Long v. Stafford, 103 N. Y. 275, 8 N. E. 522; Arthur v. Schriever, 60 N. Y. Super. Ct. 59, 16 N. Y. Supp. 610; Hess v. Cole, 23 N. J. Law, 116; Wilson v. Myers, 11 N. C. 73, 15 Am. Dec. 510; Isler v. Brown, 66 N. C. 556; Beard v. Hall, 79 N. C. 506; Allston v. Sing, Riley (S. C.) 199; Powe v. McLeod, 76 Ala. 418; McLean v. State, 8 Helsk. (Tenn.) 22; Pool v. Loomis, 5 Ark. 110; Dlal v. Holter, 6 Ohio St. 228; In re Jarrett's Estate, 42 Ohio St. 199; In re Page's Estate, 60 Cal. 40. The same rule applies where the defendant is a corporation, and is dissolved after the action has been tried and the case taken under advisement by the court. Shakman v. United States Credit System Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

⁴ Citizens' Bank v. Brooks (C. C.) 23 Fed. 21.

⁵ Harrison v. Heathorn, 1 Dowl. & L. 529.

⁶ Burnham v. Dalling, 16 N. J. Eq. 310.

⁷ Jackson v. Mayor of Berwick, 1 Mod. 36.

⁸ Ireland v. Champneys, 4 Taunt. 884. But see Brown v. Wheeler, 18 Conn. 199.

rob the successful suitor of his judgment.⁹ Thus, in a case in Massachusetts, where the action was upon a statute which was afterwards repealed, but before the repealing statute went into operation the action was tried and verdict rendered for the plaintiff, and questions of law were reserved, which, after the repeal took effect, were decided in favor of the plaintiff, the court ordered judgment to be entered on the verdict as of a day previous to the going into operation of the repealing act.¹⁰

§ 128. Delay by Motions or Appeal.

The principle that a party shall not be prejudiced by the act of the court, or the delay incident to legal proceedings, applies equally where the successful litigant finds his progress obstructed, after verdict, by the pendency of a motion or appeal, during which his adversary dies. Hence, where the defendant, after a verdict is given against him, moves for a new trial, and dies before the decision of the motion, and the motion is subsequently overruled, the judgment may be entered up for the plaintiff, nunc pro tunc, as of the term when the verdict was returned.¹¹ And conversely, if a verdict be found for the plaintiff, and a motion is made in arrest of judgment, during the pendency of which the plaintiff dies, the judgment will be entered, the motion being denied, as of the day of the verdict, or as of a term after the verdict when the plaintiff was still alive; and in such a case, it is held, it makes no difference whether the cause of action would or would not survive.¹² So also if the plaintiff dies during the pendency of a motion, and the motion is subsequently decided

⁹ The general principle is that, whenever delay in entering a judgment is caused by the action of the court, judgment nunc pro tunc will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it. *McNamara v. New York, L. E. & W. R. Co.*, 56 N. J. Law, 56, 28 Atl. 313; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821; *Todd v. Todd*, 7 S. D. 174, 63 N. W. 777. Compare *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634; *Littlejohn v. Arbogast*, 86 Ill. App. 506.

¹⁰ *Inhabitants of Springfield v. Inhabitants of Worcester*, 2 Cush. (Mass.) 52.

¹¹ *Den v. Tomlin*, 18 N. J. Law, 14, 35 Am. Dec. 525; *McNamara v. New York, L. E. & W. R. Co.*, 56 N. J. Law, 56, 28 Atl. 313; *Terry v. Briggs*, 12 Cush. (Mass.) 319; *Dial v. Holter*, 6 Ohio St. 228; *Fitzgerald v. Stewart*, 52 Pa. 343; *Brown v. Wheeler*, 18 Conn. 199; *Collins v. Prentice*, 15 Conn. 423.

¹² *Griffith v. Ogle*, 1 Bin. (Pa.) 172; *Brown v. Wheeler*, 18 Conn. 199.

in favor of the defendant, the latter may enter up his judgment as of a term before the decease of the plaintiff.¹³ Where an appeal has been taken, and one of the parties dies before hearing in the appellate court, the proper practice is to affirm or reverse the judgment below nunc pro tunc.¹⁴ So in a case where the cause was transferred for consideration by the court in banc, upon exceptions taken by the defendant, and while it was there pending the defendant died, and afterwards the exceptions were overruled, it was held that the plaintiff should have judgment as of the term when the verdict was rendered.¹⁵ Where an appeal is taken and final judgment not entered, and the appeal is afterwards withdrawn or set aside for irregularity, the judgment may be entered nunc pro tunc on the verdict.¹⁶ And in a case in the supreme court of the United States, where the appellee died after the argument of a motion to dismiss the appeal, the order on the motion was entered nunc pro tunc as of the day of the argument.¹⁷

§ 129. Laches of Party.

If a delay in the entering of a judgment, after verdict or submission, is not attributable to the act of the court in holding the case under advisement, or the pendency of a motion or other interruption, but is caused by the laches of the party entitled to judgment, and during the interval a party dies, judgment nunc pro tunc will not be allowed.¹⁸ There is, of course, no room here for the application of the maxim above quoted, and the ends of justice do not require that the law should restore to a party an advantage which he may have lost through his own negligence or hesitation.

¹³ *Spalding v. Congdon*, 18 Wend. (N. Y.) 543.

¹⁴ *Snow v. Carpenter*, 54 Vt. 17.

¹⁵ *Blaisdell v. Harris*, 52 N. H. 191. Where the defendant in a criminal cause has been found guilty by the verdict of a jury, and appeals before an entry of final judgment against him, the district court may enter final judgment nunc pro tunc after a term has intervened since the verdict. *Ex parte Beard*, 41 Tex. 234.

¹⁶ *Kane v. Hills*, R. M. Charl. (Ga.) 103; *Hardee v. Stovall*, 1 Ga. 92; *Van Gunden v. Kane*, 88 Va. 591, 14 S. E. 334.

¹⁷ *Richardson v. Green*, 130 U. S. 104, 9 Sup. Ct. 443, 32 L. Ed. 872.

¹⁸ *Fishmongers' Co. v. Robertson*, 3 C. B. 970; *Wilkes v. Perks*, 5 Man. & G. 376.

§ 130. Supplying Entry of Judgment.

We come now to the second class of cases mentioned above—those where a judgment was actually rendered by the court, but was never put upon the records. And the rule is, that in any case where the court did actually render a formal judgment, but the same has not been entered on the record, in consequence of any accident or mistake, or through the neglect or misprision of the clerk, the court has power to order that the judgment once pronounced be entered nunc pro tunc, upon the production of proper evidence to establish the fact of the judgment and to show its terms and character and the relief granted; and this may be done after the expiration of the term at which the judgment was originally given.¹⁹ Thus, where, on a plea of nul tiel record, the court decided that there was such a record, but in consequence of the mistake of the prothonotary judgment was omitted to be entered, after which the defendant died, it was held that the court might, in order to do justice, enter judgment as of the time when it ought to have been entered, although nearly eight years had elapsed, provided third persons were not injured thereby.²⁰ The rule applies equally to cases of judgment by confession,²¹ and to judgments by default.²² It may be invoked in proceedings in a

¹⁹ *Chichester v. Cande*, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238; *Hagler v. Mercer*, 6 Fla. 721; *Wilkerson v. Goldthwaite*, 1 Stew. & P (Ala.) 159; *Whorley v. Memphis & C. R. Co.*, 72 Ala. 20; *Cotten v. McGehee*, 54 Miss. 621; *Forbes v. Navra*, 63 Miss. 1; *Hammer v. McCannel*, 2 Ohio, 31; *Howell v. Morlan*, 78 Ill. 162; *Ives v. Hulce*, 17 Ill. App. 30; *Shephard v. Brenton*, 20 Iowa. 41; *Hibson v. Chouteau's Heirs*, 45 Mo. 171, 100 Am. Dec. 366; *Groner v. Smith*, 49 Mo. 318; *Belkin v. Rhodes*, 76 Mo. 643; *Swain v. Naglee*, 19 Cal. 127; *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. 732; *St. Louis, I. M. & S. Ry. Co. v. Winfrey* (Ark.) 16 S. W. 572; *Fitzsimmons v. Munch*, 79 Ill. App. 538; *Day v. Goodwin*, 104 Iowa, 374, 73 N. W. 864, 65 Am. St. Rep. 465; *Van Etten v. Test*, 49 Neb. 725, 68 N. W. 1023; *Hamer v. McKinley-Lanning L. & T. Co.*, 51 Neb. 496, 71 N. W. 51; *Hyde v. Michelson*, 52 Neb. 680, 72 N. W. 1035, 66 Am. St. Rep. 533; *Gund v. Horrigan*, 53 Neb. 794, 74 N. W. 257; *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515; *Parrott v. McDevitt*, 14 Mont. 203, 36 Pac. 193.

²⁰ *Murray v. Cooper*, 6 Serg. & R. (Pa.) 126.

²¹ *Davis v. Barker*, 1 Ga. 559; *Doughty v. Meek*, 105 Iowa. 16, 74 N. W. 744, 67 Am. St. Rep. 282. See, also, *Mountain v. Rowland*, 30 Ga. 929.

²² *Monarch v. Brey* (Ky.) 51 S. W. 191.

probate court,²³ and in actions for divorce,²⁴ as well as in other cases. And its application is not confined to final judgments, but extends also to orders of the court. Entry of an order sustaining a demurrer to the petition may be thus supplied;²⁵ and, generally speaking, if it shall be made to appear to the satisfaction of the court that any given order was actually made at a former term and omitted to be entered by the clerk, it may, at any term, direct such order to be entered on the record as of the term when it was made.²⁶

§ 131. Correction of Clerical Errors.

"That a court has a right, at a term subsequent to one at which a judgment is rendered, to correct, by an order nunc pro tunc, a clerical error or omission in the original entry, is indisputable. The error, whether of commission or omission, must appear from the record of the proceedings in which the entry of judgment is made."²⁷ Thus a judgment is not rendered void by an omission to sign it, but may be amended, even after the lapse of ten years, by an order to supply the proper signature nunc pro tunc.²⁸ And even during the pendency of an appeal a judgment may be amended nunc pro tunc, in respect, for example, to proof of acknowledgment of service of process and to the waiver of exemptions, at a subsequent term of the trial court, and when properly certified to the appellate court, the amendment is before such court for consideration, and will relate back and sustain the judgment.²⁹ When the clerk is ordered by the court at a subsequent term to supply a clerical omission in the record of a judgment by an entry nunc pro tunc, the proper course for him to pursue would be to enter anew in the proceedings of that term the entire judgment as corrected; and the action of the clerk in sup-

²³ *Brooks v. Brooks*, 52 Kan. 562, 35 Pac. 215.

²⁴ *Rush v. Rush*, 97 Tenn. 279, 37 S. W. 13.

²⁵ *Texas Land & Loan Co. v. Winter*, 93 Tex. 560, 57 S. W. 39.

²⁶ *Burnett v. State*, 14 Tex. 455, 65 Am. Dec. 131; *Ferguson v. Millaudon*, 12 La. Ann. 348; *Huber Manuf'g Co. v. Sweny*, 57 Ohio St. 169, 48 N. E. 879.

²⁷ *Allen v. Sales*, 56 Mo. 28.

²⁸ *Pollard v. King*, 62 Ga. 103. As to the necessity of signing a judgment, see § 109 supra.

²⁹ *Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 South. 45.

plying the omitted part of the judgment, by an interlineation in the record of the preceding term, is considered as loose, irregular, and reprehensible. Nevertheless such improprieties of the clerk would probably not have the effect of rendering the judgment a nullity.³⁰

§ 132. Not a proper Means of changing or revising the Judgment.

The power of courts to order the entry of judgments *nunc pro tunc* is not to be used for the purpose of correcting errors, omissions, or mistakes of the court; it cannot direct a proper judgment to be thus entered when the fault is that the first judgment is one which should not have been entered in the case, or is imperfect or improper.³¹ The object and effect of an amendment *nunc pro tunc* of a judgment is to furnish proper evidence of acts properly done by the court, but not properly exhibited by its record; and such evidence is furnished in this manner, for the purpose of supporting those acts which, although the proper consequences of a judgment, would seem to be irregular and void because there was no proper evidence of a judgment.³² Hence the court cannot at a subsequent term change its judgment to one which it neither rendered nor intended to render;³³ nor supply an order which it might or ought to have

³⁰ *Allen v. Sales*, 56 Mo. 28.

³¹ *Brignardello v. Gray*, 1 Wall. 627, 17 L. Ed. 692; *In re Inhabitants of Limerick*, 18 Me. 183; *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692; *Perkins v. Dunlavy*, 61 Tex. 241; *Hyde v. Curling*, 10 Mo. 359; *Gibson v. Chouteau's Heirs*, 45 Mo. 171, 100 Am. Dec. 366; *Evans v. Fisher*, 26 Mo. App. 541; *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220.

³² *Adams v. Higgins*, 23 Fla. 13, 1 South. 321. "The entire purpose of entering orders or judgments as of some prior date, is to supply matters of evidence. The failure of a court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defect as a clerical error. But when it is clear that an order or judgment was in fact rendered, but was not entered upon the journal through the inadvertence or negligence of the clerk, the court has authority to order it to be supplied. In such a case, the record is merely amended by inserting in the memorial of the proceedings of the court that which has been omitted therefrom." Maxwell, J., in *Garrison v. People*, 6 Neb. 274, 281.

³³ *Ross v. Ross*, 83 Mo. 100; *Cleveland Leader Printing Co. v. Green*, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725; *Page v. Chapin*, 80 Mo. App. 159.

made, but wholly omitted to make.⁸⁴ Nor can such an entry be made by the court for the purpose of reversing its action in respect to what it formerly refused to do or assent to.⁸⁵ Yet the cases hold that if, in an action by two or more plaintiffs, or against two or more defendants, judgment has been mistakenly entered for one plaintiff only, or against one defendant only, as the case may be, a proper judgment nunc pro tunc may be subsequently entered, without notice, if the record furnishes sufficient ground.⁸⁶

§ 133. Only proper when Final Judgment could be entered.

The rule that a judgment may be entered nunc pro tunc, when such action is necessary in order to save a party from being unjustly prejudiced by a delay caused by the act of the court or the course of legal procedure, must be taken with an important restriction, viz., that such an entry is not proper unless the case was in such a condition, at the date to which the judgment is to relate back, that a final judgment could then have been entered immediately. If it were otherwise, the death of one's adversary, for example, might operate to one's positive advantage. But this is not the object of the practice. It is intended merely to secure that one shall not suffer for an event which he could not avoid. As it has been said, "a judgment nunc pro tunc in case of death is proper only when a party dies after hearing, while the case is under advisement, or after the case has proceeded so far that judgment can be entered, if not as a merely formal act, at least without the need of further inquiry or evidence into matters of fact involved in the controversy."⁸⁷ Hence if there is no verdict in the record, the court cannot at a subsequent term order a verdict and judgment to be entered nunc pro tunc; if

⁸⁴ *Hyde v. Curling*, 10 Mo. 359.

⁸⁵ *Moore v. State*, 63 Ga. 165.

⁸⁶ *Allen v. Bradford*, 3 Ala. 281, 37 Am. Dec. 689. It is held in Arkansas that if, on appeal from a justice of the peace, judgment is recovered against the appellant and his sureties in the appeal bond, and the clerk omits to include the sureties in the entry of judgment, a nunc pro tunc judgment may be entered against them at a subsequent term without notice to them. *Freeman v. Mears*, 35 Ark. 278; *Shaul v. Duprey*, 48 Ark. 331, 3 S. W. 360.

⁸⁷ *Hazard v. Durant*, 14 R. I. 25. And see *Birdsell Manuf'g Co. v. Independent Fire-Sprinkler Co.*, 87 Ill. App. 443.

the record does not show that a verdict was rendered, it cannot be supplied at a subsequent term of the court.³⁸

§ 134. Notice of Application.

In Alabama it is the settled practice of the courts that a judgment nunc pro tunc may be entered at a subsequent term without notice to the opposite party, if there is any order or memorandum of record to warrant the entry.³⁹ In New York, also, it is held that an entry of judgment nunc pro tunc may be ordered without notice, and an improper notice is a mere irregularity, not a fatal defect.⁴⁰ But in some other states the view holds, that although a judgment may be entered on a verdict without notice, yet an application to amend a judgment after the term at which it was rendered, must be made upon notice to the adverse party.⁴¹ In general, we may say that the necessity of notice of such an application must depend upon the sources which are to furnish the evidence of the judgment to be entered. If the examination is to be confined to the records, the presence of the defendant could not affect the result, nor would he have room to contest it. But if it is to be based on extraneous proof, it is but just that he should have the opportunity to prepare counter-vailing testimony.

§ 135. Evidence.

It is held in several of the states that the evidence which will justify the court in entering a judgment nunc pro tunc must be record evidence; that is, that such entry can only be made upon the production of some note, entry, or memorandum from the records or

³⁸ Gray v. Thomas, 12 Smedes & M. (Miss.) 111; Jennings v. Ashley, 5 Ark. 128. And see North v. Pepper, 20 Wend. (N. Y.) 677; Klissam v. Hamilton, 20 How. Prac. (N. Y.) 375.

³⁹ Mays v. Hassell, 4 Stew. & P. 222, 24 Am. Dec. 750; Bentley v. Wright, 3 Ala. 607; Allen v. Bradford, 3 Ala. 281, 37 Am. Dec. 689; Glass v. Glass, 24 Ala. 468; Nabers' Adm'r v. Meredith, 67 Ala. 333. Compare Womack v. Sanford, 37 Ala. 445.

⁴⁰ Long v. Stafford, 103 N. Y. 274, 8 N. E. 522.

⁴¹ Berthold v. Fox, 21 Minn. 51; Hill v. Hoover, 5 Wis. 388, 68 Am. Dec. 70; Weed v. Weed, 25 Conn. 337; King v. Burnham, 129 Mass. 598. See *infra*, § 164.

quasi records of the court, which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered, and what were its character and terms.⁴² "We think," said the court in Alabama, "that no judgment can be amended, or one rendered nunc pro tunc, unless such amendment or rendition of judgment be authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law."⁴³ It is somewhat difficult to ascertain from the authorities what will be considered record evidence for this purpose. But it is held that the entry may be based on the judge's minutes or the clerk's entries, or some paper on file in the case, but cannot be made upon the judge's recollection of what took place at the trial or upon outside evidence.⁴⁴ So entries on the court and bar docket, which are quasi records, are admissible evidence; and a recital in the amending judgment that the court "is of

⁴² *Adams v. Re Qua*, 22 Fla. 250, 1 Am. St. Rep. 191; *Draughan v. Tombeckee Bank*, 1 Stew. (Ala.) 66, 18 Am. Dec. 38; *Andrews' Adm'r v. Branch Bank*, 10 Ala. 375; *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200; *Metcalf v. Metcalf*, 19 Ala. 319, 54 Am. Dec. 188; *Yonge v. Broxson*, 23 Ala. 684; *Ex parte Jones*, 61 Ala. 399; *Ex parte Gilmer*, 64 Ala. 234; *Lilly v. Larkin*, 66 Ala. 122; *Herring v. Cherry*, 75 Ala. 376; *Kemp v. Lyon*, 76 Ala. 212; *Shackelford v. Levy*, 63 Miss. 125; *Raymond v. Smith*, 1 Metc. (Ky.) 65, 71 Am. Dec. 458; *Ludlow's Heirs v. Johnston*, 3 Ohio, 553, 17 Am. Dec. 609; *Coughran v. Gutcheus*, 18 Ill. 390; *Cairo & St. L. R. Co. v. Holbrook*, 72 Ill. 419; *Hyde v. Curling*, 10 Mo. 359; *Gibson v. Chouteau's Heirs*, 45 Mo. 171, 100 Am. Dec. 396; *Fletcher v. Coombs*, 58 Mo. 430; *Atkinson v. Atchison, T. & S. F. R. Co.*, 81 Mo. 50; *Blize v. Castlio*, 8 Mo. App. 290; *Swain v. Naglee*, 19 Cal. 127; *Hegeler v. Henckell*, 27 Cal. 491; *Ware v. Kent*, 123 Ala. 427, 26 South. 298, 32 Am. St. Rep. 132; *Montgomery County v. Auchley*, 103 Mo. 492, 15 S. W. 626; *Boyd v. Schott (Ind.)* 50 N. E. 379; *Tynan v. Weinhard*, 153 Ill. 598, 38 N. E. 1014. An oral announcement of the court's decision is not a sufficient basis for an entry of judgment nunc pro tunc. *Boyd v. Schott*, 152 Ind. 161, 52 N. E. 752.

⁴³ *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200.

⁴⁴ *Belkin v. Rhodes*, 76 Mo. 643; *Graham v. Lynn*, 4 B. Mon. (Ky.) 17, 39 Am. Dec. 493; *Short v. Kellogg*, 10 Ga. 180; *Chicago, B. & Q. R. Co. v. Winkler*, 165 Ill. 634, 46 N. E. 712. The presumption of the verity of the record will control where the evidence afforded by the papers and files in the case is in conflict with that furnished by the minute book and the judge's docket. *Missouri, K. & E. Ry. Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417. But in Kansas, it is said that the minutes on the court's docket

opinion" from an inspection of said docket, etc., is equivalent to an averment that the court deemed the evidence satisfactory, and is sufficient to sustain the amendment, unless the entries themselves are shown to be insufficient.⁴⁵ And where an order approving the report of commissioners in partition, although informal, taken in connection with the report itself, affords sufficient data, there is no error in the entry at a subsequent term of a judgment nunc pro tunc ratifying and giving effect to the report.⁴⁶ So a memorandum written by the presiding judge across a motion entered on the motion-docket will authorize a nunc pro tunc order.⁴⁷

On the other hand there are numerous cases which hold that an entry nunc pro tunc may be ordered on any evidence that is sufficient and satisfactory, whether it be parol or otherwise.⁴⁸ But the general balance of authority seems to be with the cases holding that so far as concerns the question whether a judgment was ever rendered, that fact must be established by record evidence and cannot be proved by parol,—a rule which, if conservative, is also entirely safe. Thus, when a case stands on the docket as not disposed of, and no entry on the papers or elsewhere is produced indicating any disposition of it, a final judgment cannot be entered nunc pro tunc on parol testimony alone, unaided by the judge's recollection, especially where counsel for one of the parties denies on oath all knowledge of the alleged judgment, and there is no positive affirmative evidence but that of the adverse counsel.⁴⁹ But when the fact that a judgment

and the testimony of the presiding judge are ordinarily controlling. *Shockey v. Akey*, 6 Kan. App. 920, 49 Pac. 694. An entry in the clerk's minutes, giving the style of the case and the case number, followed by the abbreviation "Judgt.," is a sufficient basis for the entry of a judgment nunc pro tunc. *Monarch v. Brey* (Ky.) 51 S. W. 191.

⁴⁵ *Farmer v. Willson*, 34 Ala. 75.

⁴⁶ *Mead v. Brown*, 65 Mo. 552. And see *Wade v. Bryant* (Ky.) 7 S. W. 397.

⁴⁷ *Harris v. Bradford*, 4 Ala. 214. Where the files of the court, the motion, the entry of its filing, its purpose, and the entry of similar orders in the same cause, show that the order was made, a nunc pro tunc entry may be made. *Hansbrough v. Fudge*, 80 Mo. 307.

⁴⁸ *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; *Rugg v. Parker*, 7 Gray (Mass.) 172; *Weed v. Weed*, 25 Conn. 337; *Jacobs v. Burgwyn*, 63 N. C. 193; *Aydelotte v. Brittain*, 29 Kan. 98; *Bobo v. State*, 40 Ark. 224; *Brownlee v. Board of Com'rs of Grant Co.*, 101 Ind. 401.

⁴⁹ *Robertson v. Pharr*, 56 Ga. 245; *Cadwell v. Dullaghan*, 74 Iowa, 239, 37

was formerly rendered is established by record evidence, it seems entirely reasonable to admit parol proof for the purpose of showing its date, character, and terms, and the relief granted. And it is so held by many respectable authorities.⁵⁰ In order to entitle a party to have a judgment entered on the minutes nunc pro tunc, he must show when it was rendered; certainly at what term of the court, if not on what day of the term.⁵¹

§ 136. Relation back of Order.

A nunc pro tunc entry of judgment is made as of the time the proceedings of the court actually took place, and becomes a part of the entry of that date the same as if entered then.⁵² Hence the entry, by its relation back, will cure any variance between the judgment as originally (defectively) entered and the execution issued thereon.⁵³ "There can be no doubt that such an entry may operate so as to save proceedings which have been had before it is made. For instance, a judgment is actually made at one term, but through mistake or negligence is not entered of record. Subsequent to the term, the plaintiff, under the impression that the business had all been correctly transacted, prays out execution. The property of the judgment-debtor is levied upon and sold to a bona fide purchaser, who parts with his money in good faith. In such case the court may with propriety enter a judgment, to be considered of the term in which it was actually rendered and should have been entered. Such proceedings should be for the furtherance of justice. It would do no injury to the parties concerned, and would secure the rights of an innocent

N. W. 178. Such entry should not be ordered by a judge other than the one who is claimed to have made the original order, upon the mere statement of counsel, excepted to by opposing counsel, that such order was made. *Carter v. McBroom*, 85 Tenn. 377, 2 S. W. 803.

⁵⁰ *Camoron v. Thurmond*, 56 Tex. 22; *Burnett v. State*, 14 Tex. 455, 65 Am. Dec. 131; *Johnson v. Wright*, 27 Ga. 555; *Weed v. Weed*, 25 Conn. 337; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; *Rugg v. Parker*, 7 Gray (Mass.) 172; *Clark v. Lamb*, 8 Pick. (Mass.) 415, 19 Am. Dec. 332; *Davis v. Shaver*, 61 N. C. 18, 91 Am. Dec. 92.

⁵¹ *Robertson v. Pharr*, 56 Ga. 245.

⁵² *Bush v. Bush*, 46 Ind. 70.

⁵³ *Jordan v. Petty*, 5 Fla. 326.

purchaser."⁵⁴ But it is held that for the purpose of a statute of limitations, the date of the entry of a judgment nunc pro tunc is the date of the order of such entry, and not the day as of which the judgment is ordered to take effect.⁵⁵

§ 137. Effect upon Third Persons.

When a judgment is entered nunc pro tunc, its effect, so far as it operates by relation back to the earlier date, must be confined to the rights and interests of the original parties; at least it will not be allowed to work detriment to the rights of innocent third persons acquiring interests without notice of the rendition of any judgment.⁵⁶ Thus a purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the land of a third person by the rendition of a nunc pro tunc judgment against his grantor.⁵⁷ So an entry nunc pro tunc of a probate decree of insolvency of the estate of a decedent takes effect, as against claims filed by creditors thereof, from the date of actual entry.⁵⁸ In order that such an entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal

⁵⁴ *Ludlow's Heirs v. Johnston*, 3 Ohio, 558, 575, 17 Am. Dec. 609. Entering a decree nunc pro tunc, and thereby restricting the time for appeal, is not prejudicial error, where the defeated party succeeds in perfecting his appeal. *Monson v. Kill*, 144 Ill. 248, 33 N. E. 43.

⁵⁵ *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532.

⁵⁶ *Bank of Newburgh v. Seymour*, 14 Johns. (N. Y.) 219; *Vroom v. Ditmas*, 5 Paige (N. Y.) 528; *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692; *Galpin v. Fishburne*, 3 McCord (S. C.) 22, 15 Am. Dec. 614; *Acklen v. Acklen*, 45 Ala. 609; *Graham v. Lynn*, 4 B. Mon. (Ky.) 18, 39 Am. Dec. 493; *Small v. Douthitt*, 1 Kan. 335; *Shirley v. Phillips*, 17 Ill. 471; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Koch v. Atlantic & P. R. Co.*, 77 Mo. 354; *Hays v. Miller*, 1 Wash. T. 143. But on motion to enter nunc pro tunc a judgment already rendered, a stranger cannot intervene and question the judgment. *Hillens v. Brinsfield*, 113 Ala. 304, 21 South. 208.

⁵⁷ *Miller v. Wolf*, 63 Iowa, 233, 18 N. W. 889. But a party to an action cannot prevent the court from entering nunc pro tunc the judgment pronounced by it, by showing that some third person, not a party to the suit, has acquired an interest in the property involved since the rendition of the original judgment. *Hyde v. Michelsen*, 52 Neb. 680, 72 N. W. 1035, 66 Am. St. Rep. 533.

⁵⁸ *Acklen v. Acklen*, 45 Ala. 609.

from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the nunc pro tunc entry made and an opportunity to appeal therefrom.**

** Koch v. Atlantic & P. R. Co., 77 Mo. 354.

CHAPTER VIII.**AMOUNT AND CHARACTER OF RELIEF GRANTED.**

- § 138. Amount greater than Plaintiff's Demand.
- 139. Assessment of Damages on Default.
- 140. Amount indorsed on Summons.
- 141. Prayer for Relief as Measure of Recovery.
- 142. Judgment must follow the Verdict.
- 143. Allowance of Credits.
- 144. Tender, Counterclaim, Offer of Compromise.
- 145. Joint Parties.
- 146. Affirmative Relief to Defendant.
- 147. Interest.
- 148. Conditions as to Payment.
- 149. Statutory Damages.
- 150. Designation of Amount.
- 151. Judgment designating Medium of Payment.
- 152. Judgment for Coined Money.

§ 138. Amount greater than Plaintiff's Demand.

Since judgments are usually rendered for a definite sum of money, and are intended either to enforce the payment of a legal debt, or to establish the existence of a legal right and give compensation for its infraction by an award of damages, it becomes important in this connection to consider the amount and character of the relief which may be granted, the mode of its ascertainment, and the question of designating the medium of payment. These matters will constitute the subject of the present chapter. And first, it is an undisputed rule that if a judgment be rendered for a greater sum, whether by way of debt or damages, than is laid in the *ad damnum* clause, or claimed in the declaration, petition, or complaint, or notified to the defendant by the demand in the summons, then the judgment will be erroneous and liable to reversal.¹ Thus, where a complaint con-

¹ *Chaffee v. Hooper*, 54 Vt. 513; *Andrews v. Monllaws*, 8 Hun, 65; *Dennison v. Leech*, 9 Pa. 164; *Johnson v. Van Doren*, 2 N. J. Law, 374; *Lester v. Cloud*, 67 Ga. 770; *Hillebrant v. Barton*, 39 Tex. 599; *Janson v. Bank of the Republic*, 48 Tex. 599; *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137;

tains two paragraphs, and there is a special finding of facts by the court, and the facts found support all the material allegations of one of the paragraphs, but not of the other, judgment must be rendered as upon the paragraph that is supported by the findings, and it cannot be for an amount greater than is claimed therein to be due.² Nor is the application of this rule confined to contested actions. It is equally true, in cases where the defendant suffers a default, that a judgment for more than the plaintiff has claimed is erroneous, and may be set aside, modified on motion, or reversed on appeal.³ And a judgment for a greater sum than that laid in the declaration cannot stand, even though the defendant confesses judgment for the larger amount.⁴ Nor will the defendant's withdrawal of his pleas authorize or sustain a judgment for a sum in excess of that warranted by the cause of action stated in the petition.⁵ But it must be

Oakes v. Ward, 19 Ill. 46; *Taylor v. Richman*, 87 Ill. App. 419; *Stiles v. Brown*, 3 G. Greene (Iowa) 589; *Hayton v. Hope*, 3 Mo. 53; *Beckwith v. Boyce*, 12 Mo. 440; *Cauthorn v. Berry*, 69 Mo. App. 404; *Wheeler v. Mayher*, (Colo. App.) 61 Pac. 623; *Lamping v. Hyatt*, 27 Cal. 99; *Bond v. Pacheco*, 30 Cal. 530; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; *Gentry v. United States*, 41 C. C. A. 185, 101 Fed. 51; *Morrison v. L'Homme-dieu*, 15 App. Div. 623, 44 N. Y. Supp. 79; *Denison v. Lewis*, 5 App. D. C. 328; *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 39 Fla. 25, 21 South. 570; *Wilkins v. Burns* (Tex. Civ. App.) 25 S. W. 431; *Warren v. Prewett* (Tex. Civ. App.) 25 S. W. 647; *Chaney v. Ramey* (Ky.) 43 S. W. 235. It is immaterial that the evidence may prove a greater debt, or a greater amount of damage, than was alleged by the plaintiff in his declaration. *Denison v. Lewis*, 5 App. D. C. 328; *Cauthorn v. Berry*, 69 Mo. App. 404; *Lister v. Vowell*, 122 Ala. 264, 25 South. 564. And where the declaration specially alleges the items of damage, in precise and definite sums, there can be no greater recovery than their aggregate, notwithstanding that the ad damnum clause claims a greater amount in a lump sum. *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65. But in *Indiana*, it appears that, where the complaint demands a money judgment in a specified sum, and defendant has answered, judgment may be rendered for a greater sum than that demanded, should the case justify it. *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397. And see Code Civ. Proc. Cal. § 580.

² *Helms v. Kearns*, 40 Ind. 124.

³ *Andrews v. Monllaws*, 8 Hun, 65; *Bond v. Pacheco*, 30 Cal. 530. See *Thompson v. Turner*, 22 Ill. 389.

⁴ *Lester v. Cloud*, 67 Ga. 770.

⁵ *Janson v. Bank of the Republic*, 48 Tex. 599.

observed that a judgment so rendered for an excessive amount is not void.⁶ Relief may be had against it, or it may be corrected or set aside, in any appropriate mode; nevertheless it is not a mere nullity. Consequently it will stand as a valid adjudication until the proper steps are taken against it, and will be binding upon the parties and not open to collateral attack. And where this is the only error in the judgment, it may be rectified without the necessity of entirely vacating it. For if a judgment is entered for too great an amount, it may be reformed by remitting the excess.⁷ Again, if the plaintiff amends his petition, and issue is joined thereon, his recovery will not be limited to the amount claimed in the original petition.⁸ Or, in proper cases, the complaint will be deemed to have been amended so as to demand judgment for the amount actually recovered.⁹ It also appears that it is not error to render judgment for an amount of damages exceeding the ad damnum in the writ, after the action, together with other claims of the plaintiff against the defendant, has been referred to arbitrators under a rule of court.¹⁰ It should also be remarked that the rule prohibiting a judgment for a greater sum than that demanded by the plaintiff does not apply to the addition of costs to the amount of the recovery, though the total may exceed the ad damnum,¹¹ but it does prevent the addition of attorneys' fees in excess of the sum claimed in the complaint.¹²

§ 139. Assessment of Damages on Default.

We have already seen, in the chapter on judgments by default, that if the amount which the plaintiff is entitled to recover is defi-

⁶ *Chaffee v. Hooper*, 54 Vt. 513; *Bond v. Pacheco*, 30 Cal. 530; *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700.

⁷ *Anthony v. Estes*, 101 N. C. 541, 8 S. E. 347; *Lister v. Vowell*, 122 Ala. 264, 25 South. 564. In case of remittitur, the judgment previously entered should first be set aside, and a remittitur entered, and this should then be followed by judgment for the amount remaining. *Bartling v. Thielman*, 183 Ill. 88, 55 N. E. 677.

⁸ *Kohn v. Johnson* (Iowa) 80 N. W. 543.

⁹ *Carpenter v. Sheldon*, 22 Ind. 259.

¹⁰ *Day v. Berkshire Woolen Co.*, 1 Gray (Mass.) 420.

¹¹ *French v. Goodnow*, 175 Mass. 451, 56 N. E. 719. And the same is true of interest. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

¹² *Skym v. Weske Consolidated Co.* (Cal.) 47 Pac. 116.

nately fixed by the contract or other instrument on which he sues, a final judgment may at once be entered, upon the defendant's default, for such amount; and that the same is true if the amount can be ascertained by a matter of simple calculation. But in other cases, an interlocutory judgment must first be entered, fixing the plaintiff's right to recover, and then the damages assessed by a writ of inquiry or some other proper method.¹³ It is therefore erroneous for the court, in an action on an unliquidated claim, to proceed to render final judgment for a specific sum, without the preliminary assessment of damages.¹⁴ And in an action on an open account, in which the defendant was defaulted, the judgment will be set aside if the record does not disclose in what manner and upon what proofs the amount of the judgment was ascertained.¹⁵

§ 140. Amount indorsed on Summons.

In some of the states, where the code practice is established, it is required by law that in all civil actions for the recovery of money only, the amount for which judgment will be taken, if the defendant fails to appear, shall be indorsed on the summons. When such indorsement is made, the defendant has a right to rely upon it as fixing a limit beyond which the court cannot go in rendering judgment, in case he chooses to make no appearance in the action, and it is error to exceed it.¹⁶

§ 141. Prayer for Relief as Measure of Recovery.

According to the settled practice in equity, the rule in regard to decrees is similar to that just stated as governing judgments at law,

¹³ *Supra*, § 89.

¹⁴ *Beam v. Hayden*, 5 Bush (Ky.) 426; *Evans v. Parks*, 10 Ark. 306; *Warren v. Kennedy*, 1 Helsk. (Tenn.) 437.

¹⁵ *Snell v. Irvine*, 17 Fla. 234.

¹⁶ *Cleveland Co-op. Stove Co. v. Grimes*, 9 Neb. 123, 2 N. W. 345; *Basset v. Mitchell* (Kan.) 19 Pac. 671. But a recovery for an amount greater than the sum indorsed on the summons is lawful where the excess is for interest accrued since the commencement of the suit. *Elliott v. Knight*, 64 Ill. App. 87. And the fact that the judgment exceeds the sum indorsed on the summons is unimportant where the defendant appears and answers to the merits. *Erick v. Omaha Nat. Bank*, 43 Neb. 613, 62 N. W. 67.

viz., that it is error to decree relief not sought in the bill. In other words, if the complainant has prayed for specific relief in the premises, or relief as to a specific subject-matter, no more extensive relief can properly be accorded to him.¹⁷ But it is usual to join with the demand for specific relief a prayer for general relief also, and where this is done, the court is not limited, in its dealing with the matters in litigation, to the orders or decrees particularly asked for, but may take such other action as may be necessary to fully adjust the equities, provided it be not inconsistent with the allegations of the bill and the facts in evidence.¹⁸ So where there are prayers for both specific and general relief, the court, if it refuses the specific relief asked, may still grant any other appropriate relief under the general prayer.¹⁹ But it is the settled rule in equity that a party must recover according to the case made by his bill or not at all,—*secundum allegata* as well as *secundum probata*. Hence, even under a prayer for general relief, the court cannot go outside the case made by the pleadings, and decree in favor of the plaintiff on grounds not stated in his complaint, or grant relief for matters not charged, although they may appear from other parts of the pleadings and be improperly in evidence.²⁰ But the fact that more extensive relief, of the same general nature, is prayed in the bill than is warranted by the

¹⁷ *Dodge v. Wright*, 48 Ill. 382; *Smith v. So Rill* (Tex. Civ. App.) 54 S. W. 38.

¹⁸ *Laverty v. Sexton*, 41 Iowa, 435; *Galloway v. Galloway*, 61 Tenn. 328; *Colton v. Ross*, 2 Paige (N. Y.) 396, 22 Am. Dec. 648; *Wilkin v. Wilkin*, 1 Johns. Ch. (N. Y.) 111; *Kelly v. Payne*, 18 Ala. 371; *Stone v. Anderson*, 26 N. H. 506; *Allen v. Coffman*, 1 Bibb (Ky.) 469; *Barr v. Haseldon*, 10 Rich. Eq. (S. C.) 53.

¹⁹ *Rogers v. Brooks*, 30 Ark. 612.

²⁰ *Rome Exchange Bank v. Eames*, 4 Abb. Dec. (N. Y.) 83; *Rogers v. Brooks*, 30 Ark. 612; *Carpentier v. Brenham*, 50 Cal. 549; *Miller v. Allen*, 104 Ky. 114, 46 S. W. 523. For example, where plaintiff seeks to recover for a conversion, a judgment for foreclosure of an alleged lien on the same property cannot be granted under his prayer for general relief. *Behrens Drug Co. v. Hamilton* (Tex. Civ. App.) 45 S. W. 622. So, where plaintiff's pleadings asked for a lien only on personal property of defendant, a judgment giving him in addition a lien on defendant's realty, is erroneous. *Conlin v. Lamont Iron Co.*, 116 Mich. 626, 74 N. W. 1004. In an action to enforce a contract for the sale of land, where both parties allege a sale, but differ as to the consideration, a decree cancelling the contract as inequitable is erroneous. *Hoover v. Binkley*, 66 Ark. 645, 51 S. W. 73.

proofs does not preclude giving so much as the evidence will sustain. Thus if the bill asks relief on an allegation of an abandonment of twenty-six acres of land, and the proof is that sixteen acres only were abandoned, the complainant may be relieved as to the sixteen.²¹

Under the code practice, where the forms of action are abolished, and either a legal or an equitable remedy, or both, may be prosecuted under the same method of procedure, the rules already stated will still hold good, though modified by certain statutory provisions, which we now proceed to notice. The codes generally provide that if there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint.²² A recent decision in California, construing the phrase "cannot exceed," holds that, in case of default, it is improper to grant the plaintiff any other relief than that prayed for.²³ Whence it would appear that if the plaintiff has mistaken his remedy, or otherwise failed to demand the relief appropriate to his case, it would be beyond the power of the court to enter the proper judgment. But this view runs counter to that held in New York, where, the language of the statute being the same, the courts say: "The relief demanded by no means necessarily characterizes the action or limits the plaintiff in respect to the remedy which he may have. If there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint. But the fact that after the allegation of the facts relied upon the plaintiff has demanded judgment for a sum of money by way of damages does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may, even when no answer is put in, have any relief to which the facts entitled him consistent with that demanded in the complaint."²⁴ But under this clause, where a complaint contains no prayer for damages, a judgment on default awarding damages is erro-

²¹ *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200.

²² Code N. Y. § 275; Code Civ. Proc. Cal. § 580.

²³ *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

²⁴ *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Hagar v. Townsend* (C. C.) 67 Fed. 433. Compare *Gall v. Gall*, 17 App. Div. 312, 45 N. Y. Supp. 248.

neous, although the complaint states facts sufficient to sustain such a judgment.²⁵ However, under the codes, the extent of the relief to be granted by a judgment is restricted to that prayed for in the complaint only in cases where there is no answer; in all other cases any relief may be granted which is consistent with the case made by the pleadings.²⁶ Thus, for example, where the complaint in an action relating to land contains proper averments to entitle the plaintiffs to possession, and a general prayer for relief, and there are an appearance, trial, and finding that the plaintiffs are owners and entitled to possession, and defendant is in unlawful possession, judgment for possession is proper, though there is no specific prayer therefor.²⁷ So, in a case where the plaintiff, in an action to recover a street assessment, asked for a judgment against the defendant's lot but not for a personal judgment, and the court rendered judgment against the lot and also ordered that if the lot should not sell for the full amount of the plaintiff's claim, then a personal judgment for the balance should be docketed against the defendant, it was held that the action of the court was proper, it having jurisdiction of both the subject-matter and the person of the defendant.²⁸ Again, where the plaintiff alleges facts entitling him to both legal and equitable relief, and demands both, the court may award either that is appropriate to

²⁵ *Pittsburgh Coal Min. Co. v. Greenwood*, 39 Cal. 71. See *Miner v. Pearson*, 16 Kan. 27; *Olcott v. Kohlsaat*, 55 Hun, 607, 8 N. Y. Supp. 117.

²⁶ *Marder v. Wright*, 70 Iowa, 42, 29 N. W. 799; *Humphrey v. Thorn*, 63 Ind. 296; *Bank of Russellville v. Coke* (Ky.) 45 S. W. 867; *Poladori v. Newman*, 116 Cal. 375, 48 Pac. 325; *Ellis v. Rademacher*, 125 Cal. 556, 58 Pac. 178. The filing of a demurrer is not the making of a defense within the meaning of these statutes. *Board of Sinking Fund Com'rs v. Mason & Foard Co.* (Ky.) 41 S. W. 548. In Missouri, it is said that, where a petition contains a plain statement of the cause of action, it is immaterial what the prayer is; and the trial court may direct such judgment as the averments and facts of the case will warrant. *Gunnell v. Emerson*, 80 Mo. App. 322. And in North Carolina, there is a ruling that, where a judgment is justified by the pleadings and proof, it is immaterial that it is not in conformity with the prayer of the complaint. *Reade v. Street*, 122 N. C. 301, 30 S. E. 124.

²⁷ *Evans v. Schafer*, 119 Ind. 49, 21 N. E. 448. And see *Eldridge v. Adams*, 54 Barb. 417.

²⁸ *Chase v. Christianson*, 41 Cal. 253. See *Conlin v. Lamont Iron Co.* 116 Mich. 626, 74 N. W. 1004. Compare *Childress v. Smith* (Tex. Civ. App.) 37 S. W. 1076.

the case made by the proof.²⁹ Nevertheless this equitable power in the courts will not justify them in awarding to the plaintiff, upon a replication, an entirely different judgment from that prayed for in his petition.³⁰

§ 142. Judgment must follow the Verdict.

The judgment must follow the verdict, and if the jury have found a verdict for a specified sum of money, the court cannot render judgment for any greater amount; if the verdict is wrong, the remedy is by a new trial.³¹ Or a judgment entered for a sum in excess of what the verdict authorized may be reformed so as to bring it within the verdict.³² If, on the other hand, the verdict is excessive, being for a greater amount of damages than are laid in the declaration, it is said that judgment may be given only for the amount so laid.³³ But this would appear to be adequate ground for a motion in arrest and for new trial; although it would undoubtedly be good practice to enter a remittitur for the excess and take judgment for the balance.³⁴ According to the practice of the United States courts, the clerk has no

²⁹ *Johnson v. Hathorn*, 2 Abb. Dec. 465.

³⁰ *Marder v. Wright*, 70 Iowa, 42, 29 N. W. 799; *Eastlick v. Wright*, 121 Cal. 309, 53 Pac. 654; *Hibernia Savings & Loan Soc. v. Thornton*, 123 Cal. 62, 55 Pac. 702; *Lazarus v. Barrett*, 5 Tex. Civ. App. 5, 23 S. W. 822. But in Iowa, under Miller's Code, § 2514, which provides for a change into the proper proceedings in case a wrong proceeding is adopted, a proper judgment at law for the amount of the claim will be given, though the proceeding was erroneously commenced in equity to establish a mechanic's lien. *Swift v. Calnan*, 102 Iowa, 206, 71 N. W. 233, 37 L. R. A. 462, 63 Am. St. Rep. 443.

³¹ *Buck v. Little*, 24 Miss. 463; *Reid v. Dunklin*, 5 Ala. 205; *Mitchell v. Geisendorff*, 44 Ind. 358; *John A. Tolman Co. v. Savage*, 5 S. D. 496, 59 N. W. 882; *Clark v. Gallaher*, 3 Tex. Civ. App. 541, 22 S. W. 1047. But the judgment may include interest accrued since the verdict. *Hallberg v. Brosseau*, 64 Ill. App. 520. And it is said that a trifling excess in the judgment (such as ten cents) will not invalidate it, especially where the decree orders a sale in the exact amount of the verdict. *Brown v. Montgomery* (Tex. Civ. App.) 31 S. W. 1079. The fact that the court, in entering final judgment in ejectment, did not award to the plaintiff all the premises to which he was entitled under the verdict, affords no ground of complaint to defendant. *Colorado Central Consolidated Min. Co. v. Turck*, 2 O. C. A. 67, 50 Fed. 888.

³² *Stevens' Ex'rs v. Lee*, 70 Tex. 279, 8 S. W. 40.

³³ *Baltzell v. Hickman*, 4 Litt. (Ky.) 265.

³⁴ *Walker v. Fuller*, 29 Ark. 448.

authority to enter judgment for any other sum than the verdict and statute (the action being statutory) call for; hence where the statute requires interest to be added to the verdict, the clerk cannot enter a judgment for the amount of the verdict without interest, even though the plaintiff waives the interest.⁸⁵

§ 143. Allowance of Credits.

In an action on an obligation for the payment of money, on which credits are indorsed, the judgment should be rendered for the real balance due, deducting the indorsements.⁸⁶ But where the judgment on a promissory note, on which there was a payment indorsed, was, by mistake, rendered for the amount of the note apparent on its face, without deducting the payment indorsed, it was held that this did not invalidate the judgment and render void the proceedings under an execution issued thereon, but relief must be afforded to the party injured in some other mode.⁸⁷ It is also held that payments made pending the suit are to be deducted in making up the judgment.⁸⁸ But where the plaintiff is entitled to the entire amount sued for or nothing at all, a judgment in his favor for part of such amount cannot stand.⁸⁹

§ 144. Tender, Counterclaim, Offer of Compromise.

If a verdict is returned for a sum less than the amount tendered in court, it would be erroneous to render judgment on the verdict

⁸⁵ *Robostelli v. New York, N. H. & H. R. Co.* (C. C.) 34 Fed. 507.

⁸⁶ *Gray v. Hines*, 4 Munf. (Va.) 437. Attorney's commissions stipulated for by a judgment note will be computed on the balance due on the note, for which judgment is entered, unless it is shown that previous payments credited on the note were secured by the services of the attorney. *George P. Steel Iron Co. v. Jacobs*, 9 Pa. Super. Ct. 122.

⁸⁷ *Hathaway v. Hemingway*, 20 Conn. 191. The court, in this case, was inclined to think the remedy was by application to a court of chancery. But a mistake of this kind could probably be cured by amendment in the court rendering the judgment; and it has been held that failure to credit such a partial payment in the entry of the judgment will be cured by crediting it on the execution. *Wolford v. Bowen*, 57 Minn. 267, 59 N. W. 195.

⁸⁸ *Joy v. Hull*, 4 Vt. 455, 24 Am. Dec. 625.

⁸⁹ *Pionier v. Alexander*, 7 Misc. Rep. 709, 28 N. Y. Supp. 157; *Owens v. Flynn*, 7 Misc. Rep. 171, 27 N. Y. Supp. 336.

and order the residue to be refunded, inasmuch as the tender admits the whole to be due.⁴⁰ The proper practice in such a case would be to set aside the verdict and enter judgment for the amount tendered, the plaintiff being entitled to that much on the pleadings.⁴¹ If the defendant succeeds in establishing a counterclaim, judgment should of course be given in his favor, either for the whole amount or for its excess over the claims proved by the plaintiff, according as the case may be.⁴² So a claim for damages for a breach of warranty, interposed by answer to a petition to recover the price of the goods, is in effect a counterclaim, and the court can render judgment for the undisputed portion of the price, and allow the action to proceed as to the sum in dispute.⁴³ An offer of settlement made by the plaintiff before the commencement of the action, will not preclude him from recovering a larger sum than that contemplated by his offer.⁴⁴

§ 145. Joint Parties.

Embarrassing questions sometimes arise in regard to the amount and character of the judgment in cases where there are numerous

⁴⁰ *Sweetland v. Tuthill*, 54 Ill. 215. It is equally error to render judgment for the plaintiff upon the pleadings, without evidence, for a larger sum than the answer admits to be due to him. *Van Etten v. Kusters*, 48 Neb. 152, 68 N. W. 1106. If defendant becomes entitled to costs, because of plaintiff's failure to recover a more favorable judgment than defendant has offered, a single judgment should be entered for the plaintiff for the amount recovered, less defendant's costs. *Coatsworth v. Ray*, 52 N. Y. Supp. 498.

⁴¹ *Coffman v. Brown*, 7 Colo. 147, 2 Pac. 905.

⁴² But defendant is not entitled to recoupment for an amount larger than that claimed in his plea. *Paragon Refining Co. v. Lee*, 98 Tenn. 643, 41 S. W. 362. A judgment for plaintiff in an action in which a set-off is pleaded need not specifically show what disposition was made of the set-off. *Coats v. Barrett*, 49 Ill. App. 275. Where a counterclaim is well pleaded and the plaintiff interposes no reply, he cannot recover more than the sum claimed in his petition, less the amount of the counterclaim; and a verdict in his favor for more than this should be set aside. *Ashland Land & Live-Stock Co. v. Woodford*, 50 Neb. 118, 69 N. W. 769.

⁴³ *Moore v. Woodside*, 26 Ohio St. 537. And see *Clarkson v. Manson*, 60 How. Prac. 48.

⁴⁴ *Brush v. S. A. & D. R. Co.*, 43 Iowa, 554. An agreement between the parties as to the amount of the recovery will support a judgment for such amount, although the pleadings were not amended to correspond with the agreement. *Wilson v. Panne*, 1 Kan. App. 721, 41 Pac. 984.

parties on one side or the other. And first, in regard to joint plaintiffs, it is the rule that several persons having distinct claims against the same defendant cannot make one suit the vehicle for carrying all their demands into judgment. Their recovery is limited to what concerns them jointly. For instance, all persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may unite in an action to abate the nuisance; but in such action they cannot have judgment for the damages done to the property of each, but only such relief as is common to all the plaintiffs, e. g., an injunction against the nuisance.⁴⁵ Conversely, one of a class of plaintiffs cannot, in suing alone, procure an adjudication which will be binding upon all, unless the others come in as joint plaintiffs or otherwise connect themselves with the action. Thus, where only one of ten distributees sued the administrator in the probate court, it was held irregular for that court in its judgment, without making the other persons interested parties, to do more than adjudicate the rights of the plaintiff and the administrator.⁴⁶ Where proceedings are taken concurrently by several persons against the same fund, it seems they stand on an equal footing. Thus, in a Massachusetts case, where two trustee processes were served at the same time, and judgment was recovered in each for an amount greater than the sum held by the garnishee, it was considered that each of the creditors was entitled to one-half of the fund, though their claims were unequal.⁴⁷ Where several defendants are sued jointly in an action on contract, the rule at common law was that the plaintiff could only recover judgment against all or none of them. But this has been changed by statute in many of the states, so that now, in such an action, a judgment may be rendered in favor of one of the defendants and against the other, if the facts warrant it.⁴⁸ In equity, a decree between co-defendants, grounded on the pleadings and proofs between the plaintiff and defendants, is regular, and in fact the court is bound to make such a decree in order to avoid a

⁴⁵ *Grant v. Schmidt*, 22 Minn. 1. See *Helmuth v. Bell*, 150 Ill. 263, 37 N. E. 230.

⁴⁶ *Williams v. Williams*, 74 N. C. 1.

⁴⁷ *Davis v. Davis*, 2 Cush. (Mass.) 111.

⁴⁸ *Supra*, §§ 82, 120; *Moffett v. Bickle*, 21 Grat. 230.

multiplicity of suits.⁴⁹ But at law one defendant to a suit cannot ordinarily recover a judgment against a co-defendant without a cross-pleading and service of process or an appearance to the cross-pleading by the defendant thereto.⁵⁰ In New Hampshire, damages may be apportioned among several defendants by separate judgments, if justice will be promoted by such procedure.⁵¹

§ 146. Affirmative Relief to Defendant.

In some of the states the code provides that "if a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly."⁵² And aside from statutes of this character, courts possessing equitable powers are disposed to complete the adjudication of controversies brought before them by awarding to defendants any relief justified by the facts. In equity, a decree may be rendered in favor of a defendant where he proves to be the creditor and the plaintiff the debtor.⁵³ So on the foreclosure of a deed of trust, the decree directing the surplus remaining after paying the plaintiff to be paid to the co-defendant, there being no cross-bill, need not find the precise amount due such co-defendant, but only that there is due him more than the surplus.⁵⁴

§ 147. Interest.

Accrued interest on the demand in suit is of course a legal part of the plaintiff's claim and should be included in the judgment. But a

⁴⁹ *Chamley v. Dunsany*, 2 Schoales & L. 690, 718. See *Jones v. Sander*, 2 Wash. St. 329, 26 Pac. 224.

⁵⁰ *Cavin v. Williams*, 8 Bush (Ky.) 343.

⁵¹ *City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645.

⁵² Code Civil Proc. Cal. § 666. See *Gaff v. Hutchinson*, 38 Ind. 341; *James v. Daniels* (Tex. Civ. App.) 43 S. W. 26; *National Foundry & Pipe Works v. Okonto City Water Supply Co.*, 105 Wis. 48, 81 N. W. 125; *Nichols & Shepard Co. v. Wiedmann*, 72 Minn. 344, 75 N. W. 208. As to the propriety of adjudging affirmatively for defendant, where he has not asked for affirmative relief, see *Gilreath v. Gilliland*, 95 Tenn. 383, 32 S. W. 250.

⁵³ *Kraker v. Shields*, 20 Grat. (Va.) 377.

⁵⁴ *Walker v. Abt*, 83 Ill. 226.

judgment for the gross sum of principal and interest made up to a certain day, with interest on such gross sum, is erroneous.⁵⁵ The statutes sometimes require that the debt and the interest shall be separately specified. This being the case, it is erroneous to enter the judgment, in an action of debt, for an aggregate sum, including the debt, interest, and damages, without distinguishing the amount of either.⁵⁶ Where, in rendering judgment by default on a demand ascertained by writing, too much interest is calculated and included in the judgment, the error will be corrected on motion, or it may be amended in the appellate court at the cost of the plaintiff in error.⁵⁷ It is immaterial that the judgment recites that the money recoverable bears interest from an erroneous date, where it appears that the amount, with interest, for which judgment is rendered does not exceed the amount for which the party complaining is legally liable.⁵⁸ In some states, the statutes provide that, when judgment is rendered upon a verdict, interest shall be computed from the date of the verdict to the time of rendering the judgment on the same, and made a part of the judgment. But a judgment is not void for uncertainty because the interest is not so computed.⁵⁹ It also appears that where the verdict, in an action on an implied contract, does not mention interest, the court cannot allow interest in entering the judgment.⁶⁰

⁵⁵ *Boarman v. Patterson*, 1 Gill (Md.) 372.

⁵⁶ *Wilman v. Bank of Illinois*, 1 Gilman (Ill.) 667.

⁵⁷ *Spence v. Rutledge*, 11 Ala. 590. But it is held by the United States supreme court that the objection that too large an amount of interest has been included in a judgment cannot be raised for the first time in that court. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184.

⁵⁸ *Dean v. Blount*, 71 Tex. 270, 9 S. W. 168; *Washington Park Club v. Baldwin*, 59 Ill. App. 61.

⁵⁹ *Blumke v. Dalley*, 67 Ill. App. 381. It is error to compute interest on the amount of a verdict for a period prior to the date of its rendition, and render judgment therefor, when the verdict neither includes such interest nor affords data for its computation. *Southern Kansas Ry. Co. v. Showalter*, 57 Kan. 681, 47 Pac. 831.

⁶⁰ *Carter v. Christie*, 1 Kan. App. 604, 42 Pac. 256. See *Goggan v. Evans*, 12 Tex. Civ. App. 256, 33 S. W. 891.

§ 148. Conditions as to Payment.

In certain classes of cases it is customary for the judgment to contain conditions or directions as to the time or manner of payment. Thus a judgment, directed by the court, in an action upon a contract for the sale and purchase of lands, which ascertains the amounts which will become due to the plaintiff, for principal and interest, at the several times stipulated in the contract, may further direct that, in case the same should at those periods remain unpaid, the plaintiff shall have judgments for their recovery and executions for their collection.⁶¹ So a judgment on a bond for the payment of a debt by instalments should be for the debt in the declaration mentioned, to be discharged by payment of the sum due at the time of suit brought, reserving liberty to the plaintiff to resort to scire facias to recover such other damages as might thereafter arise upon the condition of the bond.⁶² Again, in an action of covenant upon a guaranty by which the covenantor became surety for the punctual payment of the bond of another, and undertook that if the obligor made default, he would pay the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plaintiff the amount due, but that he should pay or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay the amount to the plaintiff.⁶³

§ 149. Statutory Damages.

Where a statute imposes a penalty for the commission or omission of a certain act, the judgment, if for the plaintiff, must be for the full amount of the penalty; the courts have no power to mitigate it, for in so doing they would contravene the expressed legislative will.⁶⁴

⁶¹ *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202. Upon proof of a claim against an estate for money payable in installments, some of which are not yet due, judgment may be rendered for its payment at different times as the installments fall due. *Wolfe v. Wilsey*, 2 Ind. App. 549, 28 N. E. 1004.

⁶² *Thatcher v. Taylor*, 3 Munf. (Va.) 249.

⁶³ *Farnham v. Mallory*, 2 Abb. Dec. (N. Y.) 100.

⁶⁴ *Powell v. Redfield*, 4 Blatchf. 47, Fed. Cas. No. 11,859; *United States v.*

In cases where the statutes give double or treble damages for a certain kind of injury, the jury, if they find for the plaintiff, should increase the damages which they find by the statutory multiple; but if the verdict in terms finds only single damages, the court will perform the multiplication and direct judgment to be entered for the increased amount.⁶⁵ Under a declaration containing a count for a common law trespass and a count for the statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute, and proceed to render judgment for treble the damages returned.⁶⁶

§ 150. Designation of Amount.

The amount of a judgment must be stated in it with certainty and precision; an incurable ambiguity in this respect will be sufficient to invalidate the judgment. But the judgment is to be construed with reference to the pleadings and other parts of the record, and if these furnish data from which the amount of the recovery can be ascertained with certainty, it is probably sufficient. All judgments rendered in this country should also be expressed in the American denominations of money; and the amount should be written out, or at least, if expressed in figures, should be accompanied by some appropriate mark or sign to indicate what denominations of money are meant.⁶⁷

§ 151. Judgment designating Medium of Payment.

As a general rule, a judgment, being merely the sentence of the law upon the facts shown by the pleadings and proof, has nothing to do with the means or the medium of satisfying the debt which it establishes. Hence, where a suit is for a money demand, the court has no power (with exceptions to be noted in the next section), after

Montell, Taney, 47, Fed. Cas. No. 15,798; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780.

⁶⁵ *Palmer v. York Bank*, 18 Me. 166, 36 Am. Dec. 710; *Royse v. May*, 33 Pa. 454; *Shrewsbury v. Bawtlitz*, 57 Mo. 414; *Osborn v. Lovell*, 36 Mich. 246; *Chipman v. Emerick*, 5 Cal. 239; *Sedg. Dam.* 588.

⁶⁶ *Osborn v. Lovell*, 36 Mich. 246.

⁶⁷ *Supra*, § 118.

giving judgment for the amount claimed, to specify in what kind of money it shall be paid; when the plaintiff is entitled to a judgment, the law determines how it shall be satisfied.⁶⁸ But where a promissory note was made payable "in the currency of the country but not in Confederate notes," it was held that the recovery should be for such notes as were actually in circulation at the maturity of the note, although greatly depreciated in value.⁶⁹

§ 152. Judgment for Coined Money.

When the "legal tender act" (Act Cong. Feb. 25, 1862) first came before the supreme federal tribunal for interpretation, it was held to be unconstitutional.⁷⁰ But this decision was afterwards overruled, and the act was held to be constitutional and valid, both as applied to contracts made before its passage and as to those entered into since; and it was further decided that the treasury notes were equally a legal tender when reissued by authority as upon their original issue.⁷¹ At the same time, the court held that the legal tender act applied only to debts which were payable in money generally, not to obligations solvable in commodities, nor to debts or contracts as to which the parties had agreed that they should be payable only in a specified kind of money. Hence, where a contract for the payment of money is by its terms made payable "in specie," "in coin," "in coined money," or "in gold coin," it cannot be satisfied by a tender in treasury notes; and when a contract so worded is put in suit, the judgment rendered upon it should specify "coined dollars" or "gold coin," or otherwise as the case may be, as the medium of its satisfaction.⁷² Notwithstanding these decisions, some of the cases, refusing to accept this construction of the act, or preferring to abide by the rule that the courts have nothing to do with the manner in which a judgment or execution shall be satisfied, held that it would be

⁶⁸ *Swain v. Smith*, 65 N. C. 211; *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

⁶⁹ *Coffin v. Hill*, 1 Heisk. (Tenn.) 385.

⁷⁰ *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513.

⁷¹ *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; *Julliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

⁷² *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. Ed. 460; *Bronson v. Rodes*, 7 Wall. 229, 19 L. Ed. 141; *Butler v. Horwitz*, 7 Wall. 258, 19 L. Ed. 149.

entirely erroneous to enter judgment for a particular kind of money.⁷² But in a majority of the states the courts have followed the lead of the federal decisions, and maintained the rule that if the contract specified gold or silver as its medium of payment, the judgment upon it must do likewise.⁷⁴ It is also held that if the contract was only solvable in coin it would be improper to render judgment for the market value of that amount of coin calculated in terms of the treasury notes; the judgment must simply be for so much gold or silver.⁷³ Also it is considered that interest on the debt can only be paid in coined money.⁷⁶ But the costs of the action may be paid in legal tender notes.⁷⁷ However, it is only in respect to contracts expressly stipulating for payment in coin that judgments for coin can be entered. In suits for unliquidated damages, such judgments are not permissible.⁷⁸ Nor can they be rendered in actions of tort.⁷⁹ So

⁷² *Davis v. Field*, 43 Vt. 221; *Munter v. Rogers*, 50 Ala. 283; *Windisch v. Gussett*, 30 Tex. 744; *Flournoy v. Healy*, 31 Tex. 590; *Olanyer v. Blanchard*, 18 La. Ann. 616; *Whetstone v. Colley*, 36 Ill. 328; *Burling v. Goodman*, 1 Nev. 314; *Buchegger v. Shultz*, 13 Mich. 420; *Wood v. Bullens*, 6 Allen (Mass.) 518; *Killough v. Alford*, 32 Tex. 457, 5 Am. Rep. 249; *Reed v. Eldredge*, 27 Cal. 346.

⁷⁴ *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Chrysler v. Renois*, 43 N. Y. 209; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333; *Ransford v. Marvin*, 8 Abb. Prac. (N. S.) 432; *McCalla v. Ely*, 64 Pa. 254; *Chesapeake Bank v. Swain*, 29 Md. 483; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66; *Foster v. Atlantic & P. R. Co.*, 1 Mo. App. 390; *Harding v. Cowing*, 28 Cal. 212; *Reese v. Stearns*, 29 Cal. 273; *Winans v. Hassey*, 48 Cal. 634; *McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122; *Hittson v. Davenport*, 4 Colo. 169; *Smith v. Wood*, 37 Tex. 620.

⁷⁵ *Dewing v. Sears*, 11 Wall. 379, 20 L. Ed. 189; *Davis v. Mason*, 3 Or. 154; *Foster v. Atlantic & P. R. Co.*, 1 Mo. App. 390; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66. In an action on a promissory note made payable in gold, a judgment was rendered for the face of the note and interest thereon, together with 40 per cent. on account of the depreciation of the currency. It was held that this was error, whether the act making treasury notes a legal tender is constitutional or not. In the first case, the currency and gold are of equal value before the law. In the second case, the plaintiff has the right to refuse the notes, no matter in what quantity offered, and to demand payment of his debt in gold. *Henderson v. McPike*, 35 Mo. 255.

⁷⁶ *Chesapeake Bank v. Swain*, 29 Md. 483; *Chrysler v. Renois*, 43 N. Y. 209.

⁷⁷ *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66; *Chrysler v. Renois*, 43 N. Y. 209.

⁷⁸ *Calhoun v. Pace*, 37 Tex. 454.

⁷⁹ *Livingston v. Morgan*, 53 Cal. 23; *Chamberlin v. Vance*, 51 Cal. 75. Where there is no allegation in the complaint that there was an agreement to

a person who deposited gold with a banker is only entitled to recover the amount in dollars and cents in the circulating medium of the country.⁸⁰ But a judgment on a promissory note expressed to be payable "in gold coin or its equivalent in United States legal tender notes," rendered simply for gold coin, would be erroneous. The judgment should follow the contract, fixing the amount to be paid if paid in gold, and the amount to be paid if paid in legal tender notes.⁸¹ A condition in a note expressed to be payable in gold coin, that "if it is paid at maturity or before suit brought, it shall be payable in lawful money," does not impair the right, in case it is necessary to bring suit, to recover judgment in gold coin.⁸²

In California, and perhaps some other states, the statutes provide that judgments in suits on contracts or obligations in writing for the direct payment of money may be made payable in the kind of money specified therein; and under such a law, a judgment expressed to be payable in "U. S. gold coin" is not erroneous where the note on which it is rendered is worded in the same manner.⁸³

pay in gold coin, the court cannot render a judgment payable in gold coin, even if the verdict of the jury is for gold. The verdict cannot go beyond the issues in the case. *Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 523.

⁸⁰ *Gumbel v. Abrams*, 20 La. Ann. 568, 96 Am. Dec. 426.

⁸¹ *Wells, Fargo & Co. v. Van Sickle*, 6 Nev. 45.

⁸² *Churchman v. Martin*, 54 Ind. 380.

⁸³ *Sheehy v. Chalmers* (Cal.) 36 Pac. 514; Code Civ. Proc. Cal. § 667.

CHAPTER IX.**THE AMENDMENT OF JUDGMENTS.**

- § 153. Amendment during the Term.
- 154. Amendment after the Term.
- 155. Correction of Clerical Errors.
- 156. Supplying Omissions.
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- 158. Judicial Errors not to be thus Corrected.
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- 162. Time of making Application.
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§ 153. Amendment during the Term.

A judgment may be incorrect, imperfect, or erroneous, and therefore stand in need of revision or amendment, from either of two causes; that is, either because the entry fails to correspond with the judgment actually intended to be given, in consequence of some omission, mistake, or inadvertence; or because the judgment actually rendered was one that ought not to have been given, the error being due to misinformation or a wrong apprehension of the law. The principles of justice obviously require that what has been done amiss should be set right. But in order to secure stability to the formal and solemn records of the courts, the rules of practice have established important limitations upon the power of a court to correct or revise its own sentences. These limitations rest mainly upon a distinction which originated in the common law, and was there considered of the greatest consequence. During the whole of the term in which any judicial act was done the proceedings were considered to continue in fieri, and even after a judgment was rendered, the

record was said to remain "in the breast of the judges of the court and in their remembrance," and therefore the judgment was subject to such amendment or alteration as they might direct. But after the term had passed, the record no longer remained in this nebulous condition. It was then spread at large upon the judgment-roll, and thereupon acquired an inalterable and indisputable character, passed beyond the control of the court, and admitted of no alteration, modification, or contradiction.¹ The distinction between power to act during the term and power to act after the term has survived in many points of modern practice. And in regard to the first part of the common law rule, as above stated, there can be no doubt that it still stands as sound law. The authorities all hold that a court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause appearing, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary.² Thus an order of record setting aside a verdict may be corrected by the court at any time during the term at which it was rendered.³ And the court may allow a judgment to be amended as to the name of a member of a firm, so as correctly to describe the firm against which the judgment is given.⁴ Nor is it

¹ Co. Litt. 260a; 3 Bl. Comm. 407.

² *Barrell v. Tilton*, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. Ed. 511; *Alabama Gold Life Ins. Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. 120, 27 L. Ed. 915; *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244; *Tilton v. Barrell* (C. C.) 17 Fed. 59; *Burch v. Scott*, 1 Bland (Md.) 112; *Lemacks v. Glover*, 1 Rich. Eq. (S. C.) 141; *Worthington v. Campbell* (Ky.) 1 S. W. 714; *Lane v. Ellinger*, 32 Tex. 369; *Richardson v. Howk*, 45 Ind. 451; *Stahl v. Webster*, 11 Ill. 511; *Becker v. Sauter*, 89 Ill. 596; *Harris v. State*, 24 Neb. 803, 40 N. W. 317; *De Castro v. Richardson*, 25 Cal. 49; *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901; *Conklin v. New York El. R. Co.*, 18 Civ. Proc. R. 366, 13 N. Y. Supp. 782; *Culbreth v. Smith*, 124 N. C. 289, 32 S. E. 714; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223, 29 S. W. 210; *Texas Savings Loan Ass'n v. Smith* (Tex. Civ. App.) 32 S. W. 380; *McGurry v. Wall*, 122 Mo. 614, 27 S. W. 327; *Stitt v. Kurtenbach*, 85 Ill. App. 38. But while the court has control of its judgments during the entire term at which they are rendered, this rule will not be applied so as to enable a party to take advantage of his own negligence or misconduct, to the injury of other parties. *Cornell University v. Parkinson*, 59 Kan. 365, 53 Pac. 138.

³ *Dawson v. Wisner*, 11 Iowa, 6.

⁴ *Sugg v. Thornton*, 73 Tex. 666, 9 S. W. 145.

only in respect to clerical misprisions or omissions that this power of amendment during the term may be exercised; it also extends to the errors of the court. Thus, where a court makes an erroneous order under a mistaken view of the law, it may, during the term, of its own motion, correct the mistake by expunging such order and entering an order in accordance with the law of the case.⁵ Thus, where an action was tried by the court without a jury, the judge has power, during the same term, to reduce the amount of the judgment if satisfied that it is too great.⁶ So a final decree which is incorrect in regard to an item of costs, which error was caused by the court's not being correctly informed, will be corrected in that particular on motion made during the term.⁷ Again, where a receiver has been ordered, by mistake, before a final settlement, to pay out more money than is liable to come into his hands as such receiver, the order may be amended and modified, either upon direct and summary proceedings, or by the court upon its own motion.⁸ It is even held that the court, in a criminal action, may set aside a judgment made in regular course, imposing on the defendant a fine and the costs of the proceedings, during the same term in which the judgment was rendered, and before any part of it has been performed, and may impose a greater fine than was imposed by the first judgment.⁹

§ 154. Amendment after the Term.

That part of the common law rule which declares that no judgment can be amended after the term at which it was rendered, can scarcely be said to survive, in this country, in all its original inflexibility. Divided between the policy of administering justice liberally and equitably and the habit of ascribing the utmost sanctity to a record once completed, the courts have suffered exceptions to be introduced which are of such importance as to require the rule to be

⁵ *Wolmerstadt v. Jacobs*, 61 Iowa, 372, 16 N. W. 217; *Carothers v. Lange* (Tex. Civ. App.) 55 S. W. 580.

⁶ *Fleekinger v. Omaha Bridge & Terminal Ry. Co.*, 98 Iowa, 358, 67 N. W. 372.

⁷ *Bishop v. Aborn*, 16 R. I. 568, 18 Atl. 203.

⁸ *Ryon v. Thomas*, 104 Ind. 59, 3 N. E. 653.

⁹ *State v. Daugherty*, 70 Iowa, 439, 30 N. W. 685.

much modified before it will apply to contemporary practice. A conservative statement of the rule as at present observed, and one fully supported by the authorities, would be as follows: After the expiration of the term at which a judgment or decree was rendered, it is out of the power of the court to amend it in any matter of substance or in any matter affecting the merits.¹⁰ It is said by the supreme court of Illinois, "The general rule is that courts, while a cause is pending and the parties before them, have control over the record and proceedings in the cause, and that they have jurisdiction over their judgments and final orders of a pending term, and may, during the term or while the cause is depending, and the parties in court, for cause appearing, amend or set them aside. But after the expiration of the term, unless the cause is still depending and the parties are in court, their power over the record is confined to errors and mistakes of their officers; and these may at any time, upon notice to the parties in interest, and saving such rights as in the interval of time may have accrued to third persons, be corrected so as to make the record conform to the action or judgment of the court."¹¹ In the following sections we shall endeavor to show that, beside the correction of clerical errors, the courts have power, after the

¹⁰ *Harrison v. State*, 10 Mo. 686; *Botkin v. Pickaway County Com'rs*, 1 Ohio, 375, 13 Am. Dec. 630; *Bramblet's Heirs v. Pickett's Heirs*, 2 A. K. Marsh. (Ky.) 10, 12 Am. Dec. 350; *Becker v. Sauter*, 89 Ill. 596; *Humphreyville v. Culver*, 73 Ill. 485; *Smith v. Armstrong*, 25 Wis. 517; *Clark v. Lary*, 3 Sneed (Tenn.) 77; *Cook v. Wood*, 24 Ill. 295; *Ballo v. Wilson*, 12 Mart. O. S. (La.) 358, 13 Am. Dec. 376; *McLean v. Stewart*, 14 Hun, 472; *Davless County Court v. Howard*, 13 Bush (Ky.) 101; *Ocoee Bank v. Hughes*, 2 Cold. (Tenn.) 52; *Killpatrick v. Rose*, 9 Johns. (N. Y.) 78; *Coughran v. Gutcheus*, 18 Ill. 390; *Gould's Estate v. Watson*, 80 Ill. App. 242; *Schmelzer v. Chicago Ave. Sash & Door Manuf'g Co.*, 85 Ill. App. 596; *Schmidt v. Rehwinkel*, 86 Ill. App. 267; *Hook v. Mercantile Trust Co.*, 32 C. C. A. 238, 89 Fed. 410; *Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588; *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862; *Ivey v. Gilder*, 119 Ala. 493, 24 South. 715; *McLain v. Duncan*, 57 Ark. 49, 20 S. W. 597; *Nixon v. Nichols*, 10 Ind. App. 1, 37 N. E. 421; *State v. Harper*, 56 Mo. App. 611; *Anderson v. McCloud-Love Live-Stock Commission Co.*, 58 Neb. 670, 79 N. W. 613. An amendment of a decree from one on the merits, final in its character, to one dismissing the bill for want of jurisdiction, and leaving the merits for determination in an action at law, is substantial and material, and cannot be made after the term at which it was rendered. *Horner v. Horner*, 37 Ill. App. 199.

¹¹ *Coughran v. Gutcheus*, 18 Ill. 390.

term, to supply omissions in a judgment, and to reform and perfect it, so as to make it conform exactly to the judgment intended to be given in the case; but that they cannot use the power of amendment to correct judicial errors or to enter a judgment which was neither in fact rendered nor intended to be rendered. Taken with these corollaries, the rule as above stated will be found to express the common opinion of the authorities on this point at the present time.

In illustration of the rule, the proposition may be cited that, after the term, the power of the court to amend its own record is limited to such corrections or changes as are in affirmance of the judgment originally rendered; it has no authority to strike out the judgment, to enlarge or diminish it, to change its whole nature, or to render another and different judgment upon the same record.¹² So, after a judgment was rendered and the court had adjourned, it was considered that an error therein could not be cured by the entry of a remittitur of an excess of damages.¹³ A decision in Virginia holds that a decree for alimony, affirmed on appeal as to the date at which payments should commence, is final, and when, in subsequent proceedings in the trial court to ascertain its amount, payment is fixed as beginning at a different date, such action is erroneous and will be reversed.¹⁴ In California, the court has no power to amend an order made at a previous term, unless a motion was made or some proceedings instituted at such term to procure the amendment to be made and the motions or proceedings were continued, or unless the record discloses that the order as entered was not the one made by the court.¹⁵ It follows also that a judgment cannot be expunged at

¹² *Gould's Estate v. Watson*, 80 Ill. App. 242; *Bethel v. Bethel*, 6 Bush (Ky.) 65, 99 Am. Dec. 655. After the term, the court cannot enlarge its judgment so as to include a recovery against bondsmen not originally included therein. *Barber v. City of Biloxi*, 76 Miss. 578, 25 South. 298. Again, after the term at which a final judgment in replevin was rendered, the court cannot amend that judgment by entering a further judgment for damages and a *retorno habendo*. *Peterson v. Metropolitan Nat. Bank*, 88 Ill. App. 190. Mistake of counsel in entering a decree which does not conform to the opinion of the court cannot be corrected after the term expires. *Doe v. Waterloo Min. Co.* (C. C.) 60 Fed. 643.

¹³ *Buckles v. Northern Bank of Kentucky*, 63 Ill. 268.

¹⁴ *Cralle v. Cralle*, 84 Va. 198, 6 S. E. 12.

¹⁵ *De Castro v. Richardson*, 25 Cal. 49.

a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition thereof. In such case the record of the judgment imports absolute verity and cannot be assailed for the lack of such vouchers.¹⁶ But the rule that the court has no power over its judgments after the expiration of the term, applies only to final judgments, not to judgments which are still in fieri, as an order for a partition.¹⁷ And it appears that the rule which prevents the court from interfering with its judgments after the term does not apply to such action as may be taken in that behalf with the consent of the parties concerned, or at their request.¹⁸ And further, a judgment may be carried over the term by motion; that is to say, if a motion to amend or correct it, or a petition for a rehearing, is filed during the term at which the judgment was rendered, its operation will be so far suspended that the matter may be heard and determined at the ensuing term.¹⁹

§ 155. Correction of Clerical Errors.

As regards mere clerical errors, mistakes arising from inadvertence, or formal misprisions of clerks or other officers, it is always in the power of the court, even after the adjournment of the term, to make such corrections or amendments as truth requires.²⁰ Hence a mis-

¹⁶ *Jones v. Hart*, 60 Mo. 351.

¹⁷ *Hastings v. Cunningham*, 35 Cal. 549; *Aull v. Day*, 133 Mo. 337, 34 S. W. 578. A court has jurisdiction to set aside a judgment rendered at a previous term, requiring a party to pay the costs of the term. *Tanton v. Keller*, 78 Ill. App. 31.

¹⁸ *Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898; *Hewetson v. City of Chicago*, 172 Ill. 112, 49 N. E. 992.

¹⁹ *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525; *Watson v. Le Grand Roller Skating Rink Co.*, 177 Ill. 203, 52 N. E. 317. Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the later term, and remains subject to the control of the court until the close of such term. *Judson v. Gage*, 39 U. C. A. 156, 98 Fed. 540.

²⁰ *Balch v. Shaw*, 7 Cush. (Mass.) 282; *Fay v. Wenzell*, 8 Cush. (Mass.) 315; *Wilson v. Myers*, 11 N. C. 73, 15 Am. Dec. 510; *Speed's Ex'rs v. Hann*, 1 T. B. Mon. (Ky.) 16, 15 Am. Dec. 78; *Smith v. Mullins*, 3 Metc. (Ky.) 182; *Brady v. Beason*, 28 N. C. 425; *Portis v. Talbot*, 33 Ark. 218; *Russell v. Erwin's Adm'r*, 41 Ala. 292; *Johnson v. Bank of Kentucky*, 2 Duv. 521; *Hammer v. McConnel*, 2 Ohio, 31; *Ohio v. Beam*, 3 Ohio St. 508; *Silner v. But-*

take in entering a decree, which is manifestly a clerical error, which cannot mislead, and which does not prejudice the appellant, is no ground for reversal.²¹ A court may, upon motion of one party and due notice to the other, amend a docket entry by inserting the true date of the rendition of the judgment, where a wrong date appears of record.²² So a misnomer of the term of the court in the entry of a judgment is a clerical error and amendable.²³ And the same is true of a misnomer of one of the parties,²⁴ or a misdescription of the property involved.²⁵ So also, a judgment entered against a party in a representative capacity, when it should have been against him individually, or vice versa, or a personal judgment against an executor which should have been against the goods of the estate, may be amended by other parts of the record, on motion, when the mistake is plainly that of the clerk.²⁶ Again, where a judgment in attachment gives the right of execution to the defendant, instead of to the plaintiff, this is manifestly a clerical error and may be corrected at a subsequent term.²⁷ And so also where there have been two trials

terfield, 2 Ind. 24; *Sherman v. Nixon*, 37 Ind. 153; *Jenkins v. Long*, 23 Ind. 460; *Smith v. Wilson*, 26 Ill. 186; *Hickman v. Barnes*, 1 Mo. 156; *State v. Primm*, 61 Mo. 166; *Swain v. Naglee*, 19 Cal. 127; *Will v. Sinkwitz*, 41 Cal. 588; *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. 732; *Granite State Provident Ass'n v. McHugh*, 88 Hun. 617, 34 N. Y. Supp. 341; *Knox v. Moore*, 41 S. C. 355, 19 S. E. 683; *Birmingham v. Leonhardt*, 2 Kan. App. 513, 43 Pac. 996; *Brittenham v. Robinson*, 22 Ind. App. 536, 54 N. E. 133; *Cauthorn v. Berry*, 69 Mo. App. 404; *Farley v. Cammann*, 43 Mo. App. 168; *People v. County Court of Arapahoe County*, 9 Colo. App. 41, 47 Pac. 469.

²¹ *Eau Claire Lumber Co. v. Anderson*, 13 Mo. App. 429.

²² *Grimes v. Grosjean*, 24 Neb. 700, 40 N. W. 137; *Carlton v. Patterson*, 29 N. H. 580; *Clark v. Clark*, 138 N. Y. 653, 34 N. E. 513; *Day v. Argus Printing Co.*, 47 N. J. Eq. 594, 22 Atl. 1056.

²³ *Burnham v. Chicago*, 24 Ill. 496.

²⁴ *Southern Kansas Ry. Co. v. Brown*, 44 Kan. 681, 24 Pac. 1100; *Brown v. Barnes*, 93 Ala. 58, 9 South. 455; *First Nat. Bank v. Kowalsky* (Cal.) 31 Pac. 1133.

²⁵ *Wilcox v. Wells* (Idaho) 51 Pac. 985.

²⁶ *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Yarborough's Ex'r v. Scott's Ex'r*, 5 Ala. 221; *Speed's Ex'rs v. Hann*, 1 T. B. Mon. (Ky.) 16, 15 Am. Dec. 78; *Wyman v. Buckstaff*, 24 Wis. 477. But compare *Sass v. Hirschfeld*, 23 Tex. Civ. App. 1, 56 S. W. 602; *Leonis v. Leffingwell*, 126 Cal. 369, 58 Pac. 940.

²⁷ *Hogue v. Corbit*, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

of a case, and the record shows that judgment was rendered on the second verdict, but the clerk entered it for the amount of the first verdict.²⁸ So again, where it is shown, on motion to correct the entry of a judgment of dismissal of an action as to a party thereto, that the order was not intended or understood by either party to include a dismissal of the cause of action against such party, the error may be corrected.²⁹ In some states, the courts have authority, by statute to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by.³⁰ And in others, the judge in vacation may correct any miscalculation or misrecital of any sum of money in a judgment.³¹

§ 156. Supplying Omissions.

In regard to the power of amending judgments by supplying omissions, it is necessary not to lose sight of the principle that amendments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. Hence if anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then the omission may be supplied by an amendment after the term.³² If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intend-

²⁸ *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324.

²⁹ *Stuart v. City of Logansport*, 87 Ind. 584.

³⁰ *Lee v. Houston*, 20 Ala. 301; Code Ala. 1886, § 2836.

³¹ *Morris v. Coleman County* (Tex. Civ. App.) 35 S. W. 29; *Sayles' Civ. St. Tex. art. 1355*.

³² *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49; *State v. Moran*, 24 Neb. 103, 38 N. W. 29; *Galloway v. McKeithen*, 27 N. C. 12, 42 Am. Dec. 153; *Gaines v. Wedgeworth*, 19 Ga. 31; *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414; *Thorp v. Platt*, 34 Iowa, 314; *Trammell v. Trammell*, 25 Tex. Supp. 261; *Rogers v. Rogers*, 1 Paige (N. Y.) 188; *Newburgh Bank v. Seymour*, 14 Johns. (N. Y.) 219; *Gardner v. Dering*, 2 Edw. Ch. (N. Y.) 131; *Ray v. Connor*, 3 Edw. Ch. (N. Y.) 478; *Nye v. Stillwell, Bierce, Smith & Valie Co.*, 12 Ohio Cir. Ct. R. 40; *Kendall v. O'Neal*, 16 Mont. 303, 40 Pac. 599.

ed and pronounced, it cannot be brought in by way of amendment. For example, in the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and the amount of the original judgment against the defendant, but his failure to do so is a clerical error which may be corrected nunc pro tunc at a subsequent term.⁸³ So a judgment in favor of A. "administrator" may be amended so as to show that it was recovered by A. as administrator of B., deceased.⁸⁴ The omission of the clerk's signature to a judgment filed and docketed, where that is required, may be supplied in like manner.⁸⁵ Where a decree orally announced as dismissing a bill without prejudice, is drawn and enrolled, omitting the phrase "without prejudice," these words may be afterwards supplied by amendment.⁸⁶ And in like manner, where a decree in foreclosure proceedings, by inadvertence or mistake, omits a fractional part of the land described in the mortgage and the findings, the court may amend the decree by including such land.⁸⁷ And the power of ordering amendments of this character extends as well to other parts of the record as to the judgment itself. Thus, when the court had in fact jurisdiction of the defendant, but the return of the constable failed to show that fact, the record may be amended after judgment so as to show jurisdiction, if there are no intervening rights to be affected.⁸⁸ So where the Christian name of an appraiser was omitted in drawing up a decree for the appraisal and sale of trust property, the court directed it to be inserted in the original decree in the register's minutes, it being a merely formal matter.⁸⁹ Again, where a guardian ad litem was appointed at the proper term, but no

⁸³ *Whorley v. Memphis & C. R. Co.*, 72 Ala. 20.

⁸⁴ *Crane v. Crane*, 51 Ark. 287, 11 S. W. 1.

⁸⁵ *Seaman v. Drake*, 1 Caines (N. Y.) 9.

⁸⁶ *Township of Hiawatha v. Schoolcraft County Circuit Judge*, 90 Mich. 270, 51 N. W. 282.

⁸⁷ *Dickey v. Gibson*, 118 Cal. 28, 45 Pac. 15, 54 Am. St. Rep. 321. But compare *Ruff v. Elkin*, 40 S. C. 69, 18 S. E. 220. See, also, *Young's Guardian v. Sadler* (Ky.) 24 S. W. 877.

⁸⁸ *Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89; *Fawcett v. Vary*, 59 N. Y. 597; *Hibernia Savings & Loan Soc. v. Matthal*, 116 Cal. 424, 48 Pac. 370; *Cunningham v. Spokane Hydraulic Min. Co.*, 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

⁸⁹ *De Caters v. Le Ray De Chaumont*, 3 Paige (N. Y.) 178.

entry made on the docket, the entry may be subsequently supplied.⁴⁰ And in another case, where the omission occurred through the inadvertence of the plaintiff's attorney, and it was necessary that it should be supplied in order to perfect the record, although it would not vary the judgment, the learned judge, in allowing the amendment, said: "I cannot discover any difference, as to the allowing of an amendment, whether the mistake has happened through the omission of an attorney or by that of the clerk. Both are equally officers of the court."⁴¹ But on the other hand, as already stated, the power of amendment cannot be made the means of adding to a judgment or decree something not originally contemplated by it or which is foreign to its intended scope and purpose. Thus, in an Illinois case, it appeared that a decree had been drawn up by the plaintiff's solicitor and accepted and signed by the judge as the decree of the court; afterwards it was discovered that the solicitor had omitted from the decree a clause which he had intended to make a part of it, and application was made to have it added. But it was considered to be no proper case for an amendment, inasmuch as it did not appear that the court had intended to insert the clause in question, and consequently to add it by amendment would be to change the sentence pronounced and revise its own decree.⁴² On the same principle, plaintiff is not entitled to an amendment of a judgment in his favor, so as to include the sureties on an appeal bond, where the judgment, as entered, followed the minutes of the court and was properly rendered against defendant alone, and where any judgment against the sureties would necessarily have been for a different amount.⁴³

§ 157. Reforming and Perfecting the Judgment.

A judgment entry may be amended at any time to make it correspond with the judgment actually rendered.⁴⁴ And for this pur-

⁴⁰ *Johnson v. Wright*, 27 Ga. 555.

⁴¹ *Close v. Gillespey*, 3 Johns. (N. Y.) 526.

⁴² *Forquer v. Forquer*, 19 Ill. 68.

⁴³ *Robertson v. King*, 120 Ala. 459, 24 South. 929.

⁴⁴ *Gilmer v. City of Grand Rapids* (C. C.) 16 Fed. 708; *Tucker v. New Brunswick Trading Co.*, 44 Ch. Div. 249; *Capen v. Inhabitants of Stoughton*, 16

pose either additions or elisions may be made. In a case where the judgment pronounced by the court upon motion of the defendant was "that the complaint be dismissed with costs," and the judgment entered by the clerk was that the complaint be dismissed "upon the merits" with costs to the defendant, it was held that the insertion of the words quoted was a material addition to the judgment which the clerk had no authority to make, and was properly stricken out on motion.⁴⁵ So an amendment may be made where a judgment of dismissal failed to include a judgment for costs properly chargeable to the plaintiff,⁴⁶ or where a judgment is confessed in open court, and the clerk improperly enters it as a judgment by default,⁴⁷ or where, on a nonsuit for failure of proof, at the close of plaintiff's case, the judgment is erroneously made to recite a dismissal on the merits,⁴⁸ or where, by the terms of a judgment confessed, it purports to be for the benefit of the "several creditors" of the debtor, but there is un-

Gray, 364; *Robertson v. Hay*, 12 Misc. Rep. 7, 33 N. Y. Supp. 31; *Sexton v. Bennett*, 63 Hun, 624, 17 N. Y. Supp. 437; *Gough v. McFall*, 52 N. Y. Supp. 221; *Portis v. Talbot*, 33 Ark. 218; *Sharpe v. Fowler* (Ky.) Litt. Sel. Cas. 446; *Beam v. Bridgers*, 111 N. C. 269, 16 S. E. 391; *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1081; *State v. White*, 75 Mo. App. 257; *Hoagland v. Way*, 35 Neb. 387, 53 N. W. 207; *Hall v. Merrill*, 47 Minn. 260, 49 N. W. 980; *Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981; *Bostwick v. Van Vleck*, 106 Wis. 387, 82 N. W. 302; *San Joaquin Land & Water Co. v. West*, 99 Cal. 345, 33 Pac. 928. Where a party moves for and obtains an amendment of a judgment against him, he thereby waives all erroneous rulings of the court preceding the judgment. *Pittsburg, C., C. & St. L. R. Co. v. Beck* (Ind.) 52 N. E. 399. And after an order entered, as dictated by the judge, has been construed and affirmed by the supreme court, an amendment cannot be allowed on the ground that the construction placed on it was not what the judge intended. *Harrison v. Harrison*, 114 N. C. 219, 19 S. E. 232. Under the statute law of Louisiana, a strict rule prevails; and the judge, after having by mistake signed a judgment in favor of defendant, cannot of his own accord substitute therefor a judgment for the plaintiff, although the latter was the judgment orally given by him. *State v. Judge of Civil District Court*, 43 La. Ann. 1169, 10 South. 294.

⁴⁵ *Williams v. Hayes*, 68 Wis. 248, 32 N. W. 44. Further as to striking out words improperly inserted by the clerk, see *Brustle v. Peck Bros. & Co.*, 62 Hun, 248, 16 N. Y. Supp. 645.

⁴⁶ *Marine Bank Co. v. Mallers*, 58 Ill. App. 232.

⁴⁷ *Grand Rapids Sav. Bank v. Widdcomb*, 114 Mich. 639, 72 N. W. 615.

⁴⁸ *Mannion v. Broadway & S. A. R. Co.*, 18 Civ. Proc. R. 40, 13 N. Y. Supp. 759.

disputed evidence that it was intended only for his unsecured "business creditors,"⁴⁹ or where a cognovit was filed by an attorney at law as such, but the judgment erroneously recites that it was filed by defendant's "attorney in fact."⁵⁰ And where a judgment is erroneous on its face by reason of not conforming to the verdict, no other objection being made, it may be corrected on motion.⁵¹ This power of amendment may also be used to clear up ambiguities. Thus it is held that the court has power to amend a judgment for a specified quantity of water, "miners' measurement," so as to relieve it of the uncertainty of that term, the amendment being made on the uncontradicted testimony in the case, made a part of the motion papers. The court remarked: "We do not doubt the soundness of the rule that the trial court cannot at a subsequent time so modify a judgment that the modification is in effect a reversal. That is the province of the appellate court. But the trial court has the power to modify or correct the judgment or record to such an extent that the relief granted may be such as was intended to be granted."⁵² On similar principles, the court may amend its record by transferring the proceedings to the proper suit when by mistake they have been filed in a suit to which they do not belong.⁵³ In this connection, the following observations of the court in North Carolina will be found instructive. "As a general rule, it is unquestionably true that no act of the court, as contradistinguished from the act of its officers or of the parties, can be allowed to be amended, but during the term at which it was done. During the term the record is said to be in the breast of the judge; after it is over it is upon the roll. But this rule applies to such amendments as call into action the judgment or discretion of the court, and not to such as are a matter of

⁴⁹ *Jenkins v. Davis*, 141 Pa. 266, 21 Atl. 592.

⁵⁰ *Odell v. Reynolds*, 17 C. C. A. 317, 70 Fed. 656.

⁵¹ *Seattle & M. Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567. But where the court has lost jurisdiction by entering a final decree in divorce, the subsequent appearance of defendant to contest a motion for alimony does not give the court jurisdiction to amend the decree by adding an order reserving the question of alimony for further consideration. *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225.

⁵² *Welch v. Keene*, 8 Mont. 305, 21 Pac. 25.

⁵³ *Sweeny v. Delany*, 1 Pa. 320, 44 Am. Dec. 136.

course. In such cases, the reasons of the rule no longer operate; for, as much as the law confides in the integrity of the court, it admits a possibility of its being corrupt, and therefore guards it from temptation."⁵⁴ It is held that a judgment by consent cannot be corrected by the court without the consent of all parties to it. It is not the judgment of the court except in the sense that it is recorded and has the effect of a judgment. In such case, the court can only correct its own errors in making the entries, as, for instance, the misprision of its clerk.⁵⁵

§ 158. Judicial Errors not to be thus Corrected.

The allowance of an amendment should never be used by the court as a means of reviewing its judgments on the merits, or correcting its own judicial mistakes, or substituting a judgment which it neither in fact rendered nor intended to render.⁵⁶ "The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced by the court, and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record, or by striking out a statement of a fact improperly introduced, and when the record affords sufficient evidence. But when the defect consists in the failure of the court to render the proper judgment, or arises from a want of judicial action, the record cannot be corrected after the term has closed, the cause being no longer sub judice. The purpose of amendment is to make

⁵⁴ *Wilson v. Myers*, 11 N. C. 73, 15 Am. Dec. 510.

⁵⁵ *McEachern v. Kerchner*, 90 N. C. 177. And see *Knox v. Moser*, 72 Iowa, 154, 33 N. W. 617. A judgment entered by consent of defendant, but which was broader than the consent authorized, will not be vacated where plaintiff agrees to its modification to conform to the real intention of the parties. *McManus v. Ennis*, 1 App. Div. 30, 36 N. Y. Supp. 1049.

⁵⁶ *Elder v. Richmond Gold & Silver Min. Co.*, 7 C. C. A. 354, 58 Fed. 536; *Duffey v. Houtz*, 105 Pa. 96; *Gannon v. Riel*, 3 Lack. Leg. N. 68; *Heert v. Cruger*, 14 Misc. Rep. 508, 35 N. Y. Supp. 1063; *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458; *Milam Co. v. Robertson*, 47 Tex. 222; *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Horner v. Horner*, 37 Ill. App. 199; *Webb v. Elliott*, 75 Mo. App. 557; *Turner v. Christy*, 50 Mo. 145; *Durning v. Burkhardt*, 34 Wis. 585; *Pinger v. Vanelick*, 36 Wis. 141; *Dillon v. Chicago, K. & N. R. Co.*, 58 Neb. 472, 78 N. W. 927.

the judgment conform to what the court intended it should be, to set right the record and make it speak the truth, so that omissions or clerical error shall not prejudice parties litigant. The power to amend nunc pro tunc is not revisory in its nature, and is not intended to correct judicial errors. Such amendments 'ought never to be the means of modifying or enlarging the judgment, or the judgment record, so that it shall express something which the court did not pronounce, even although the proposed amendment embraces matter which ought clearly to have been pronounced.' However erroneous, the express judgment of the court cannot be corrected at a subsequent term."⁵⁷

A judgment, therefore, cannot be amended so as to vary the rights of the parties as fixed by the original decision of the court and the judgment entered thereon.⁵⁸ Thus, it is error to amend a judgment by reducing its amount, where the reason for the alteration is that the court has changed its mind; such action may be taken as the means of correcting a miscalculation or other clerical error, but not to set right a judicial mistake.⁵⁹ Again, the power of amendment cannot be used as a means of enlarging the judgment originally given, by decreeing additional relief to the successful party,⁶⁰ or by adding judgments against parties not originally included in the judgment, or giving a personal judgment in addition to the decree of fore-

⁵⁷ *Browder v. Faulkner*, 82 Ala. 257, 3 South. 30, citing *Whorley v. Memphis & C. R. Co.*, 72 Ala. 20; *Emerson v. Head*, 81 Ala. 443, 1 South. 197.

⁵⁸ *Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122; *Stilwell v. Stilwell*, 81 Hun, 332, 30 N. Y. Supp. 961.

⁵⁹ *Griffith v. Maxwell*, 19 Wash. 614, 54 Pac. 35; *Heath v. New York Building Loan Banking Co.*, 84 Hun, 302, 32 N. Y. Supp. 454.

⁶⁰ *First Nat. Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476. In foreclosure on default in payment of the first of several instalments of interest contracted to be paid, a decree directing a sale to satisfy said instalment alone, which was duly signed and entered, cannot be amended so as to provide for further sales on subsequent defaults. *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775. No, where the question of alimony is raised by the pleadings in a divorce case, the failure to find on that issue is a judicial error, and not a clerical mistake; and hence the judgment cannot be amended by adding an order reserving the question of alimony for further consideration. *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225. And see *Thompson v. Thompson*, 73 Wis. 84, 40 N. W. 671.

closure originally pronounced,⁶¹ or releasing from the operation of the judgment parties or property originally affected by it.⁶² Nor has the court power or jurisdiction to correct a valid and final judgment, after the term, by readjudging the question of costs and taxing them in a different amount, or distributing them in a different manner, from that originally fixed.⁶³ So also, a judgment dismissing the complaint, entered after trial, cannot be amended by appointing a referee to pass on plaintiff's claim, unless the dismissal is vacated.⁶⁴

§ 159. Amendment as to Amount of Judgment.

If there has been obvious clerical error on the part of the clerk or the court in the entry of the amount recovered by a judgment, the entry may be amended to conform to the truth.⁶⁵ Thus if, through an error of the clerk, a judgment by default has been entered for a

⁶¹ *Kenyon v. Baker*, 82 Iowa, 724, 47 N. W. 977; *Barnes v. Hale*, 44 Neb. 353, 62 N. W. 1063; *Smith v. Fox* (Tex.) 15 S. W. 196.

⁶² *Johnson v. Foreman*, 24 Ind. App. 93, 56 N. E. 254. But where, in an action to set aside a sale on foreclosure, the court, by mere inadvertence, goes further than the relief asked and also adjudges the mortgage to be void, this mistake can be corrected by an amendment striking out the provision as to the mortgage. *Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84.

⁶³ *Hedgecoxe v. Conner* (Tex. Civ. App.) 43 S. W. 322; *People v. Common Council of Buffalo*, 9 Misc. Rep. 403, 29 N. Y. Supp. 1071; *Manning v. Nelson*, 107 Iowa, 34, 77 N. W. 503; *Genet v. Delaware & H. Canal Co.*, 136 N. Y. 217, 32 N. E. 851.

⁶⁴ *Duryea v. Fuechsel*, 76 Hun, 404, 27 N. Y. Supp. 1037.

⁶⁵ *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692; *Wall v. Covington*, 83 N. C. 144; *Sherry v. Priest*, 57 Ala. 410; *Modawell v. Hudson*, Id. 75; *Arrington v. Courey*, 17 Ark. 100; *Emison v. Walker* (Ky.) 31 S. W. 461; *De Hymel v. Scottish-American Mortgage Co.*, 80 Tex. 493, 16 S. W. 311; *Miller v. Royce*, 60 Ind. 189; *Daniels v. McGinnis*, 97 Ind. 549; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533. But an amendment cannot be used to correct a judicial mistake, as distinguished from a mere clerical error. *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. And see section 158, supra. And so, when the error complained of in a consent decree is the insertion of a particular amount as the result of a calculation by one of the parties upon a basis which the other parties do not regard as in accordance with the agreement, it is not a clerical error, but a mistake of parties, and it can be corrected only by original bill. *Morris' Adm'r v. Peyton's Adm'r*, 29 W. Va. 201, 11 S. E. 954.

sum too small, as appears on the face of the papers, the judgment may be corrected on motion at a subsequent term, even although the amount for which it was erroneously entered has been paid.⁶⁶ So also, a clerical error in the calculation of interest, or in fixing the date from which interest shall run, may be corrected by an amendment.⁶⁷ Again, if the clerk, by mistake or inadvertence, enters up a judgment for a sum in excess of that found by the verdict or ordered by the court, the entry may be corrected so as to correspond with the verdict or findings.⁶⁸ On the same principle, a court rendering a judgment in excess of the amount which its jurisdiction allows may reduce it to such limit.⁶⁹ And where a judgment by default is too large, and the plaintiff remits the excess, the court may correct the judgment to conform to the remittitur.⁷⁰ But the fact that the evidence fails to support the full amount of the judgment is properly ground for a new trial, rather than a motion to modify the judgment.⁷¹ If a judgment is erroneously rendered for a sum greater than the amount of the plaintiff's claim, it may be corrected on

⁶⁶ *Sherman v. Nixon*, 37 Ind. 153; *Mechanics' Bank v. Minthorne*, 19 Johns. (N. Y.) 244. But where judgment by default has been properly entered, the court cannot, on mere motion, vacate the judgment at a subsequent term, allow an amendment increasing the ad damnum, and enter a new judgment for a larger sum. *Radclyffe v. Barton*, 154 Mass. 157, 28 N. E. 148.

⁶⁷ *Fidelity Ins., Trust & Safe-Deposit Co. v. Roanoke Iron Co.* (U. C.) 84 Fed. 744; *West Chester & W. Plank-Road Co. v. Chester County*, 21 Pa. Co. Ct. R. 86; *Hastings v. Alabama State Land Co.*, 124 Ala. 608, 26 South. 861; *Triplett v. Lake*, 43 W. Va. 428, 27 S. E. 363.

⁶⁸ *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708; *Kindel v. Beck & Pauli Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Ellis H. Roberts & Co. v. Buckley*, 145 N. Y. 215, 39 N. E. 966; *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. 741. Where a petition claimed "part" of certain lands, and the finding gave plaintiff the lands "sued for and described in the petition," but the clerk inadvertently entered judgment for the whole of the lands mentioned, it was held an amendable mistake. *Elliott v. Buffington*, 149 Mo. 663, 51 S. W. 408. An error of the clerk in inserting in a decree the amount of the costs claimed by the plaintiff, before they had been ascertained or taxed, did not render it void, and was cured by the subsequent taxing by the court, and collection by the sheriff, of only the actual costs in the case. *Janes v. Bullard*, 107 Cal. 130, 40 Pac. 108.

⁶⁹ *Stinerville & B. Stone Co. v. White*, 25 Misc. Rep. 314, 54 N. Y. Supp. 577.

⁷⁰ *Pennsylvania Fire Ins. Co. v. Wagley* (Tex. Civ. App.) 36 S. W. 997.

⁷¹ *Boos v. State*, 11 Ind. App. 257, 39 N. E. 197.

motion.⁷² The same rule applies also if there is a manifest fault in the verdict itself. Thus if the jury bring in a verdict for a sum which is less than that admitted to be due on the face of the pleadings, the judgment, if entered according to the verdict, may afterwards be reformed.⁷³ Again, in an action of debt, where the judgment was erroneously entered for damages alone, it was held that the defendant in error might, on application to the court in which the judgment was rendered, amend the entry so as to make it a judgment for the debt in the declaration mentioned, to be discharged on payment of the damages found by the jury.⁷⁴ And in an English case, the record in a penal action, where the jury by mistake gave damages, being carried by writ of error to the King's Bench, it was held that the plaintiff might enter a remittitur of the damages on the record, and the transcript might be made conformable thereto.⁷⁵

§ 160. Amendment in Respect of Parties.

If the entry of a judgment is open to objection because the parties are incorrectly named or erroneously described in it, it may be amended on motion so as to conform to the other parts of the record.⁷⁶ This is also true if the entry, in this respect, is not sufficiently definite or precise. Thus, where a judgment as first entered was defective in not designating the defendants who were personally liable for the debt, but the record showed who they were, it was held that the court had power to amend the judgment at any time by adding a clause specifying the defendants so liable.⁷⁷ Also, if the

⁷² *Dunn v. Tillotson*, 9 Port. (Ala.) 272; *Smith v. Robinson*, 11 Ala. 270; *Nelson v. Cottingham*, 152 Ind. 135, 52 N. E. 702; *McLellan Dry-Dock Co. v. Farmers' Alliance Steam-Boat Line*, 43 La. Ann. 258, 9 South. 630.

⁷³ *Brown v. Lawler*, 21 Minn. 327.

⁷⁴ *O'Conner v. Mullen*, 11 Ill. 57.

⁷⁵ *Hardy v. Cathcart*, 1 Marsh. C. P. 180.

⁷⁶ *Wright v. McBride*, 42 Ga. 234; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Shelly v. Dobbins*, 31 La. Ann. 530; *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. 304. But a judgment against a party sued by a wrong name, and not appearing in the action, is a nullity and incapable of amendment. *Schoellkopf v. Ohmels*, 11 Misc. Rep. 253, 32 N. Y. Supp. 738.

⁷⁷ *Leviston v. Swan*, 33 Cal. 480. But a judgment rendered against several defendants cannot be amended so as to stand as a personal judgment against

judgment is irregular, as embracing more parties than the record justifies, it is proper practice to correct the judgment in the trial court.⁷⁸ Thus if process issues against two defendants, and one only is served, and the pleadings are against that one, but verdict and judgment against both, the entry may be amended at a subsequent term by striking out the name of the defendant not served.⁷⁹ So where a firm consisting of three partners was sued, and one accepted service and appeared for all, and judgment went against the three individually, and the two defendants not served then moved for a new trial on the ground that the other had no authority to appear or plead for them, it was held to be in the discretion of the court to reform the judgment, so as to award execution against the firm and against the individual property of the partner served, instead of granting a new trial.⁸⁰ Again, where a judgment is rendered against several defendants, one of whom dies previous to its rendition, it may be amended, on motion, by vacating it as to the deceased defendant and continuing its vitality as against the others.⁸¹ If a judgment may be corrected by striking out the name of a party improperly inserted in it, so also may it be amended, after the term, by inserting the name of one of the parties, omitted through mistake, when there is sufficient record evidence by which to make the correction.⁸² But if a suit is brought in the name of A. "and others,"

one as principal, and against the others as sureties, if no such issue was raised on the trial. *Levi v. Drudge*, 139 Ind. 458, 39 N. E. 45.

⁷⁸ *Mulliken v. Hull*, 5 Cal. 245; *Robinson v. Moore*, 1 Tex. Civ. App. 93, 20 S. W. 404.

⁷⁹ *Hammer v. McConnel*, 2 Ohio, 32; *Lemen v. Young*, 14 Ind. 3; *People's Nat. Bank v. McArthur*, 82 N. C. 107; *Heintz v. Pratt*, 54 Ill. App. 616; *City of California v. Harlan*, 75 Mo. App. 506. A judgment is not such an entirety as not to be amendable in respect to one of the parties alone, unless the substantial rights of the others would be injuriously affected thereby. *Neenan v. City of St. Joseph*, 126 Mo. 89, 28 S. W. 963.

⁸⁰ *Henderson v. Banks*, 70 Tex. 398, 7 S. W. 815; *Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193.

⁸¹ *Hood v. Branch Bank of State*, 9 Ala. 335; *State v. Tate*, 109 Mo. 265, 18 S. W. 1068, 32 Am. St. Rep. 664. The rule is the same where there are several plaintiffs, one of whom dies. *Billingslea v. Smith*, 77 Md. 504, 20 Atl. 1077; *Mingay v. Lackey*, 142 N. Y. 449, 37 N. E. 471.

⁸² *Whittaker v. Gee*, 63 Tex. 435; *Russell v. Erwin's Adm'r*, 41 Ala. 292; *Doty v. Caldwell* (Tex. Civ. App.) 38 S. W. 1025. But it seems the court

it is held that the record cannot be amended by striking out the word "others" and inserting the name of another party, more especially when the cause had previously been referred to arbitrators, from whose award there had been an appeal.⁸³ Nor has the court power to modify its own judgment, rendered at a former term, by changing it from a judgment against the plaintiff (who brought the suit, in his official capacity, upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought.⁸⁴ But in another case, where, by mistake, a judgment had been entered up in favor of a former administratrix, whose letters had abated by marriage, it was considered proper for the court to amend the judgment so as to make it read in favor of the administrator de bonis non, if he had been duly made a party and was the real plaintiff when the judgment to be corrected was entered.⁸⁵

§ 161. What Courts have Power of Amendment.

All courts, from the highest to the lowest, whose proceedings are preserved in any species of record or memorial, have the power and authority to make such corrections therein as truth and justice require and the rules of law permit; and this power, being inherent, belongs to a court merely as such, and does not depend upon a statutory grant of jurisdiction. An appellate court may modify and change its orders and decrees before they become final, and may, even at a subsequent term, amend its records in respect of clerical errors and mistakes.⁸⁶ And its power extends even further than this. For if, on an appeal, the only error assigned is a clerical misprision in regard to the amount of the judgment, such mistake, being

cannot allow an amendment of a judgment confessed severally on a joint bond, by adding the name of the co-obligor. *Brown v. Smyth*, 4 Har. (Del.) 204. And see *Sprague v. Jones*, 9 Paige, 395.

⁸³ *Carskadden v. McGhee*, 7 Watts & S. 140.

⁸⁴ *Boland v. Benson*, 54 Wis. 387, 11 N. W. 911. But where a judgment is entered in the name of the next friend of an infant, without showing the capacity in which he sues, it may be amended by inserting the infant's name. *Kees v. Maxim*, 99 Mich. 493, 58 N. W. 473.

⁸⁵ *Gay v. Cheney*, 58 Ga. 304.

⁸⁶ *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70; *McCoy v. Porter*, 17 Serg. & R. 59; *Hopkins v. Flynn*, 7 Cow. (N. Y.) 526.

amendable on motion in the court below, will be amended by the appellate court at the cost of the appellant, and the amended judgment affirmed.⁸⁷ A court of probate jurisdiction may amend its proceedings in a proper case;⁸⁸ e. g., after a sale by an administrator under its order, by adding to the administrator's account exhibited his affidavit that the same was just and true, formerly taken in court but not filed.⁸⁹ So also a justice of the peace may correct a judgment rendered by his predecessor in office, by a nunc pro tunc order, to make it conform to the truth.⁹⁰ And an arbitrator, it is held, after the delivery of his award, may correct a mere clerical error not affecting the merits.⁹¹ But there are decisions to the effect that a motion to amend or correct a judgment cannot be made before a judge other than the one whose judgment is sought to be modified.⁹² And the clerk of the court has no ex officio right, without an express order of the court to that effect, to complete, alter, or amend the record kept by a predecessor in that office whose term has expired.⁹³

§ 162. Time of making Application.

An application for the amendment of a judgment should be made, by the party in whose interest the correction is required, within a reasonable time after he has discovered the error. If he suffers an undue period to elapse, the court may refuse, on account of his laches, to accord the relief asked, and especially if rights have become vested under the judgment which would be disturbed by its alteration.⁹⁴ At the same time, the inherent power of a court to correct or amend its own records in the interests of justice is not lost by the mere lapse of time,⁹⁵ unless, as is the case in some states, the

⁸⁷ *Smith v. Kennedy*, 63 Ala. 334.

⁸⁸ *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289; *In re Robertson*, 51 App. Div. 117, 64 N. Y. Supp. 385.

⁸⁹ *Kennedy v. Wachsmuth*, 12 Serg. & R. 171, 14 Am. Dec. 676.

⁹⁰ *Gates v. Bennett*, 33 Ark. 475.

⁹¹ *Goodell v. Raymond*, 1 Williams (Vt.) 241.

⁹² *New York Security & Trust Co. v. Lipman*, 83 Hun, 569, 32 N. Y. Supp. 65; *Wells v. Vanderwerker*, 45 App. Div. 155, 60 N. Y. Supp. 1089; *Hughes v. Edisto Cypress Shingle Co.*, 51 S. C. 1, 28 S. E. 2.

⁹³ *Rockland Water Co. v. Pillsbury*, 60 Me. 425.

⁹⁴ *Rogers v. Rogers*, 1 Paige, 188; *Bonar v. Gosney* (Ky.) 30 S. W. 602.

⁹⁵ *Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193. A judgment which,

time within which such action may be taken is limited by statute.⁹⁶ The amendment is generally discretionary with the court, but the circumstances are sometimes such that justice and right rather demand the refusal of the correction than its allowance. Thus, after money has been paid under an erroneous decree, it cannot be so altered or amended as to make a party to it liable to pay the money a second time;⁹⁷ although if, in satisfying the face of the judgment, he has paid only a part of that which was really awarded against him, the judgment may afterwards be amended so as to make him liable for the true balance.⁹⁸

So long as the record remains with the court which rendered the judgment, it is of course under its control for proper purposes and in proper cases. But it may be otherwise when the record has been removed to an appellate court. "Although there is some conflict of opinion as to whether an inferior court can amend the record whilst a case is pending upon writ of error in a higher court, we are inclined to think that the weight of authority is in favor of the proposition that the pending of such writ does not prove an impediment to the action of the court below."⁹⁹ And in California it is held that the amendment may be made even after the judgment has been

though dormant, still survives as a debt of record, enforceable by suit, may be so amended as to cure a mere irregularity therein. *Williams v. Merritt*, 109 Ga. 217, 34 S. E. 1012. Plaintiff's delay for two years to apply to correct a clerical omission in a judgment is not ground for denying the application, where it was made upon the discovery of the omission. *Brittenham v. Robinson*, 22 Ind. App. 536, 54 N. E. 133.

⁹⁶ See Code Civ. Proc. Cal. § 473; *Dyerville Manuf'g Co. v. Heller*, 102 Cal. 615, 36 Pac. 928; *Scamman v. Bonslett*, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Code Civ. Proc. Colo. § 75; *Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579; *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. 601; *Miller's Code Iowa*, §§ 2837, 3154; *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 390. In Rhode Island, a decree cannot be amended after a year has lapsed since the entry thereof on simple motion to amend, or petition, or even petition for a rehearing. *Fitch v. Richard*, 18 R. I. 617, 29 Atl. 689.

⁹⁷ *Hassler's Appeal*, 5 Watts, 176.

⁹⁸ *Mechanics' Bank v. Minthorne*, 19 Johns. 244. See *Harrison v. Union Trust Co.*, 80 Hun, 463, 30 N. Y. Supp. 443.

⁹⁹ *Sparrow v. Strong*, 2 Nev. 362; *Richardson v. Mellish*, 3 Bing. 346; *Freel v. State*, 21 Ark. 226; *Exchange Nat. Bank v. Allen*, 68 Mo. 474; *Dow v. Whitman*, 36 Ala. 604. But compare *Haydel v. Roussel*, 1 La. Ann. 35.

affirmed on appeal.¹⁰⁰ But in Alabama, on the other hand, it is considered that when a judgment or decree is affirmed on appeal, the decree or judgment of the court below is merged in the judgment of affirmance, and that court cannot afterwards make any order modifying or altering it.¹⁰¹ And this seems the more reasonable view, unless in cases where the error was not discovered until after the appellate proceedings were had.

§ 163. Method of Applying for Amendment.

A judgment once entered must be corrected, if irregular or erroneous, by some proper proceeding for that purpose; it cannot be merely disregarded and the proper judgment entered anew.¹⁰² During the term at which the judgment was rendered, the correction may be made by an order of the court upon a mere suggestion of the error.¹⁰³ But after the term is ended, according to the practice in many of the states, the amendment can only be made upon the presentation of a formal petition and motion, setting forth the mistake and the alteration prayed for, and after proper notice to the adverse party to appear and show reasons why the correction should not be made.¹⁰⁴ In Indiana, an application to correct a mistake in a judgment should be made by motion, and though made in the form of a complaint it will be treated as a mere motion and not demurrable.¹⁰⁵ It is also to be observed that a motion to amend a judgment cannot be allowed in an action of scire facias upon the judgment, but must be made in the original cause.¹⁰⁶ If a judgment is

¹⁰⁰ *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. 732; *Rousset v. Boyle*, 45 Cal. 64.

¹⁰¹ *Werborn v. Pinney*, 76 Ala. 291.

¹⁰² *Nuckolls v. Irwin*, 2 Neb. 60.

¹⁰³ *Weed v. Weed*, 25 Conn. 337.

¹⁰⁴ *In re Inhabitants of Limerick*, 18 Me. 183; *Rugg v. Parker*, 7 Gray (Mass.) 172; *Weed v. Weed*, 25 Conn. 337; *State v. King*, 27 N. C. 203; *Forquer v. Forquer*, 19 Ill. 68; *Stockdale v. Johnson*, 14 Iowa, 178; *Arington v. Conrey*, 17 Ark. 100; *Morrow v. Geeting*, 23 Ind. App. 494, 55 N. E. 787. The proper remedy to correct a judgment which contains an unauthorized provision is a motion to strike out. *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958.

¹⁰⁵ *Latta v. Griffith*, 57 Ind. 329; *Goodwine v. Hedrick*, 29 Ind. 383.

¹⁰⁶ *Clark v. Digges*, 5 Gill (Md.) 109.

other than that resulting from the conclusions of law arrived at by the court, it cannot be corrected by an appeal from an order granting or denying a new trial, but must be reached by an appeal from the judgment.¹⁰⁷

If the judgment is objectionable in form, the remedy is by motion to correct it in the court below, and an appeal may be taken from a denial of the motion; but an appeal without making such motion is not proper.¹⁰⁸ A defendant in a foreclosure proceeding, who desires the correction of a mistake in the record entry of the decree, does not waive his right to apply therefor by taking a stay of the order of sale.¹⁰⁹ If the motion for correction or amendment is denied, the remedy is by appeal, and not by renewing the motion,¹¹⁰ nor by applying for a new trial or rehearing of the motion.¹¹¹ When the application is granted, the costs of the motion are properly taxed against the party who resisted the application.¹¹² Mandamus will not lie to control the judicial action of an inferior court to correct a decree which it had full authority and jurisdiction to render, where the petitioner has a full and adequate remedy to correct it on appeal on the final determination of the cause.¹¹³

§ 164. Notice of Application.

The general rule is well established that a judgment cannot be amended, after the term at which it was rendered, upon an *ex parte* application. Due and proper notice must be given to the opposite party of the application and the relief asked, that he may have an opportunity to appear and show cause against the proposed correction.¹¹⁴ Nevertheless if the amendment is to be based upon matter

¹⁰⁷ *Martin v. Mattfield*, 49 Cal. 43.

¹⁰⁸ *Simmons v. Craig*, 137 N. Y. 550, 33 N. E. 76.

¹⁰⁹ *Hoagland v. Way*, 35 Neb. 387, 53 N. W. 207.

¹¹⁰ *Bonar v. Gosney* (Ky.) 30 S. W. 602.

¹¹¹ *Morrow v. Geeting*, 23 Ind. App. 494, 55 N. E. 787.

¹¹² *Morris v. Coleman County* (Tex. Civ. App.) 35 S. W. 29.

¹¹³ *Ex parte Woodruff*, 123 Ala. 99, 26 South. 509.

¹¹⁴ *Wallis v. Thomas*, 7 Ves. 292; *Rockland Water Co. v. Pillsbury*, 60 Me. 427; *Weed v. Weed*, 25 Conn. 337; *Wooster v. Glover*, 37 Conn. 315; *Poole v. McLeod*, 1 Smedes & M. (Miss.) 391; *McNairy v. Castleberry*, 6 Tex. 286; *Wheeler v. Goffe*, 24 Tex. 600; *Martin v. Bank of State*, 20 Ark.

of record only, the necessity of giving notice to the adverse party is not so evident. In that case, any evidence against the amendment which he might produce, if drawn from extraneous sources, would be inadmissible and unavailing; and it is not at once apparent how his rights could be prejudiced by his ignorance of the proceedings. It seems that the same rule should here obtain as in the case of *nunc pro tunc* entries,—that notice is requisite only when evidence dehors the record will be consulted.¹¹⁵ And indeed it has been held that if the amendment relates only to a matter of form, the notice may be dispensed with.¹¹⁶ And the court in Michigan considered the omission of notice as immaterial, in a case where the amendment was not calculated to change the effect of the judgment, but merely to bring its terms into more perfect expression of the meaning which would have been ascribed to it by a proper construction of its language before the amendment.¹¹⁷ For, as the court observed, any person who was interested in the judgment, or acted on the faith of it, was chargeable with knowledge of all that a proper construction of it would have taught him, and the amendment did not change its meaning.

§ 165. Evidence.

In the matter of amending records, the rule of English practice forbids the correction of any judgment or decree unless there is sufficient record evidence, or evidence quasi of record, to amend by, and strictly excludes all parol testimony offered for that purpose.

636: *Alexander v. Stewart*, 23 Ark. 18; *Cook v. Wood*, 24 Ill. 295; *Means v. Means*, 42 Ill. 50; *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155; *Hinton v. Life Ins. Co. of Virginia*, 116 N. C. 22, 21 S. E. 201; *Case v. Mannis*, 57 Hun, 594, 11 N. Y. Supp. 243; *Berthold v. Fox*, 21 Minn. 51; *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70. Where a final decree dismissing a bill in equity was at a subsequent term amended so as to purport to be a dismissal without prejudice, but the amendment was made upon a verbal notice to the solicitor of one defendant only and a notice posted upon the court-house door, held, that as there was no sufficient notice, the amendment was absolutely void for want of jurisdiction, and could be assailed in a collateral proceeding. *Swift v. Allen*, 55 Ill. 303.

¹¹⁵ *Supra*, § 134. And see *Ware v. Kent*, 123 Ala. 427, 26 South. 208, 82 Am. St. Rep. 132.

¹¹⁶ *Balch v. Shaw*, 7 Cush. (Mass.) 282.

¹¹⁷ *Emery v. Whitwell*, 6 Mich. 491.

And this rule has been adopted, either expressly or tacitly, in many of the United States, and has become too firmly settled in their jurisprudence to admit of contradiction.¹¹⁸ It has been concisely stated in the following language: "We think that no judgment can be amended, or one rendered nunc pro tunc, unless such amendment or rendition of judgment be authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law."¹¹⁹ Where this rule obtains it is held that a judgment cannot be amended by the notes or minutes of the judge made upon the docket; they are not considered a part of the record nor evidence for any purpose.¹²⁰ Nor can the amendment be made from the judge's memory or knowledge of the fact omitted.¹²¹ Nor by his affidavit in regard to the error to be corrected.¹²² And certainly amendments cannot be made from the recollections of witnesses testifying *ex parte*.¹²³ It is also the rule, in the states mentioned, that

¹¹⁸ *Pitman v. Lowe*, 24 Ga. 429; *Gay v. Cheney*, 58 Ga. 304; *Armstrong v. Robertson*, 2 Ala. 164; *Brown v. Bartlett*, 2 Ala. 29; *Rains v. Ware*, 10 Ala. 623; *Metcalf v. Metcalf*, 19 Ala. 319, 54 Am. Dec. 188; *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200; *West v. Galloway's Adm'r.* 33 Ala. 306; *Harris v. Martin*, 39 Ala. 556; *Summersett v. Summersett's Adm'r.* 40 Ala. 596, 91 Am. Dec. 494; *Pettus v. McClannahan*, 52 Ala. 55; *Lilly v. Larkin*, 66 Ala. 122; *Guise v. Middleton, Smedes & M. Ch. (Miss.)* 89; *Moody v. Grant*, 41 Miss. 565; *Russell v. McDougall*, 3 Smedes & M. (Miss.) 234; *Shackelford v. Levy*, 63 Miss. 125; *Hendrix's Heirs v. Clay*, 2 A. K. Marsh. (Ky.) 462; *Norton v. Sanders*, 7 J. J. Marsh. (Ky.) 12; *Stephens v. Wilson*, 14 B. Mon. (Ky.) 88; *Finnell v. Jones' Ex'x*, 7 Bush (Ky.) 359; *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263; *Hansen v. Schlesinger*, 125 Ill. 230, 17 N. E. 718; *State v. Clark*, 18 Mo. 432; *Saxton v. Smith*, 50 Mo. 490; *Bohn v. Stivers*, 75 Mo. App. 291; *Leinkauff v. Tuscaloosa Sale & Advancing Co.*, 105 Ala. 328, 16 South. 891; *De Castro v. Richardson*, 25 Cal. 49; *Morrison v. Dapman*, 3 Cal. 255; *Swain v. Naglee*, 19 Cal. 127; *Solomon v. Fuller*, 14 Nev. 63.

¹¹⁹ *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200.

¹²⁰ *Dickson v. Hoff's Adm'r.* 3 How. (Miss.) 165; *Boon v. Boon*, 8 Smedes & M. (Miss.) 318; *Shackelford v. Levy*, 63 Miss. 125.

¹²¹ *State v. Smith*, 1 Nott & McC. 16; *Stony Island Hotel Co. v. Johnson*, 57 Ill. App. 608.

¹²² *Smith v. Brannan*, 13 Cal. 107.

¹²³ *Coughran v. Gutcheus*, 18 Ill. 390.

a decree in chancery, equally as a judgment at law, cannot be amended at a subsequent term upon parol testimony, but only upon evidence which is matter of record or quasi record.¹²⁴ Further, it is held that where the judgment is sought to be amended, after the term, for clerical errors or formal defects, it is necessary that the error or defect should be apparent on the record; it cannot be pointed out by affidavit.¹²⁵

On the other hand, in contravention of the rule that a judgment can only be amended by matter of record, in several of the states it is decisively held that it may be amended on any evidence, properly admissible, and satisfactory in its weight and character, showing it to differ from the judgment really rendered by the court.¹²⁶ In the language of the supreme court of New Hampshire: "We think it clear upon the authorities that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it, what was the proper entry to be made on the docket, and how the record should be extended. * * * Where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution."¹²⁷ In a recent Indiana decision it was held that parol evidence was sufficient as a foundation for the correction of a clerical error in the amount of a judgment, the court observing that this was a different matter from making a nunc pro tunc entry of something that had been entirely

¹²⁴ *Kemp v. Lyon*, 76 Ala. 212.

¹²⁵ *Bramblet's Heirs v. Pickett's Heirs*, 2 A. K. Marsh. (Ky.) 10, 12 Am. Dec. 350; *Solomon v. Fuller*, 14 Nev. 63; *State v. Primm*, 61 Mo. 166; *Portis v. Talbot*, 33 Ark. 218.

¹²⁶ *Matheson's Adm'r's v. Grant's Adm'r*, 2 How. 263, 11 L. Ed. 261; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; *Clark v. Lamb*, 8 Pick. (Mass.) 415, 19 Am. Dec. 332; *Rugg v. Parker*, 7 Gray (Mass.) 172; *Weed v. Weed*, 25 Conn. 337; *Arrington v. Conrey*, 17 Ark. 100; *Hollister v. Judges of Lucas County District Court*, 8 Ohio St. 201, 70 Am. Dec. 100; *Forquer v. Forquer*, 19 Ill. 68; *Stockdale v. Johnson*, 14 Iowa, 178; *Doane v. Glenn*, 1 Colo. 454; *Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193; *People v. Arapahoe County Court*, 9 Colo. App. 41, 47 Pac. 469. See, also, *In re Wight*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865.

¹²⁷ *Frink v. Frink*, 43 N. H. 508.

omitted, in which case it might well be that parol evidence would not be admissible, but only the record itself.¹²⁸ The distinction, however, does not appear to rest upon any plausible basis; and the decision cited is a departure from the earlier rulings in the same state.¹²⁹ If parol evidence is to be admitted, the notes and minutes made by the judge upon the trial docket will of course be proper sources from which to obtain information as to the action really taken by the court.¹³⁰ And indeed they will naturally be consulted in the first instance. But since such memoranda are not a part of the record, and therefore not of controlling authority, it will be possible that they may be overborne by other evidence; and the court cannot be compelled to correct its journal from such minutes.¹³¹

In Illinois, the present rule appears to be that the court, upon notice to the parties in interest, may amend its record at a subsequent term, if evidence to support the amendment can be drawn from the record, or from some minute or memorial paper, or notes taken by a stenographer, or other document in the nature of a record, made in connection with the case or upon the trial or hearing; but that an amendment cannot be based on oral evidence alone.¹³²

The rule that "a record can only be amended by matter of record" seems to rest, in the last analysis, upon the rule that "a record imports absolute verity." Without losing sight of the extreme importance of securing stability and authority to the solemn memorials of the courts, we may still conceive that this rule, if applied with full rigor and severity, might in many cases produce the greatest hardship and injustice. But it is evident to a student of American caselaw, that we are gradually working away from the old standards in this respect. The courts are more and more disposed to a liberal practice and to look to the full and perfect administration of justice, rather than to buttress up the sanctity of records by forbidding in-

¹²⁸ *Mitchell v. Lincoln*, 78 Ind. 531.

¹²⁹ See *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263; *Boyd v. Blaisdell*, 15 Ind. 73.

¹³⁰ *Gillett v. Booth*, 95 Ill. 183; *Nicklin v. Robertson*, 28 Or. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

¹³¹ *Sullivan's Sav. Inst. v. Clark*, 12 Neb. 578, 12 N. W. 103.

¹³² *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Gillett v. Booth*, 95 Ill. 183.

quiry into their truth. Hence it is not improbable that the policy of permitting judgments to be amended upon cause shown by any proper and satisfactory evidence, will ultimately prevail. Certainly it is a policy that is commended by reason and justice, and still more by the loose way in which the records of our courts are but too frequently made up. To shut out any light which could help to make the records accurate, complete, and right in themselves, appears to show a too superstitious reverence for the *litera scripta*.

§ 166. Method of making Corrections.

“An amendment should not be made by simply noting the order to amend, but it should be actually made by turning back to the minutes of the former term, and making the proper correction and entry there, so that the entry will stand and be read as if no amendment or correction had ever been necessary.”¹³³ If the correction consists merely in adding a word or phrase, or adding or substituting a name or date, or altering an amount, or the like, it may be well enough simply to make the change upon the face of the original entry. But in general, interlineations are to be avoided; and the more regular mode of making amendments, after the term, is by an order of court reversing the defective entry, followed by a new order *nunc pro tunc*.¹³⁴ Where a decree already made in a cause is tacitly revoked, during the same term, and a second decree is made on the same subject-matter, it would be more orderly and convenient, in making the second decree, to refer to the first one, and state in what particulars the later is intended to modify, supplement, or supersede the former; but this is not essential if a comparison of the two decrees discloses the changes or modifications made. On the contrary, it is to be presumed that a second decree made within the term is in-

¹³³ *McDowell v. McDowell*, 92 N. C. 227, 229. The court has power at any time to amend its records *nunc pro tunc*, and the clerk is bound not only to record the amendment, but also actually to alter the original record. *Jones v. Lewis*, 30 N. C. 70, 47 Am. Dec. 338.

¹³⁴ *King v. State Bank*, 9 Ark. 185, 47 Am. Dec. 739. See *Mansel v. Castles*, 63 Tex. 414, 55 S. W. 559. Interlineal corrections of clerical omissions in a record, although irregular and reprehensible, do not necessarily invalidate the judgment. *Allen v. Sales*, 56 Mo. 28.

tended to modify a former one just so far as it differs from it, either in length or breadth.¹³⁵

§ 167. Allowance of Amendment is discretionary.

An application to amend a judgment or decree is addressed to the discretion of the court, and its denial is not the subject of exception or review.¹³⁶ Hence an appellate court will not issue its writ of mandamus to compel an amendment of the record of an inferior court. The question of amending is wholly a matter for the judicial discretion of the court having the custody of the record. And while mandamus is a proper means of compelling a judge to proceed to his duty, yet it cannot be used as a means of deciding for him what that duty is.¹³⁷ It is also true that the regularity of an amendment made by a court of competent jurisdiction cannot be inquired into collaterally.¹³⁸

§ 168. Jurisdiction of Equity.

It is held in some of the states that the judgments of courts of record are of such high verity that their existence cannot be impeached, nor their contents contradicted, falsified, or corrected by parol proof, and consequently that a bill will not lie in equity to correct a judgment, purporting to be rendered upon the verdict of a jury, by showing by parol that the judgment was in reality by *nil dicit* without a jury, and should have been rendered for a larger sum than that specified on its face.¹³⁹ On the other hand, in Iowa¹⁴⁰ and Missouri,¹⁴¹ it is held that if judgment is by mistake entered for a sum less than the amount actually recovered, so that the creditor,

¹³⁵ *Barrell v. Tilton*, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. Ed. 511; *Eddie v. Eddie*, 138 Mo. 599, 39 S. W. 451.

¹³⁶ *Brown v. McCune*, 5 Sandf. (N. Y.) 224; *Austin v. Jordan*, 5 Tex. 130.

¹³⁷ *Commonwealth v. Hultz*, 6 Pa. 469; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. Ed. 135.

¹³⁸ *Hamilton v. Seitz*, 25 Pa. 226, 64 Am. Dec. 634.

¹³⁹ *Bank of Tennessee v. Patterson*, 8 Humph. (Tenn.) 362, 47 Am. Dec. 618; *Smith v. Bowes*, 38 Md. 463.

¹⁴⁰ *Partridge v. Harrow*, 27 Iowa, 96, 99 Am. Dec. 643.

¹⁴¹ *Wilson v. Boughton*, 50 Mo. 17. And see *Pelzer Manuf'g Co. v. Hamburg-Bremen Fire Ins. Co.* (C. C.) 71 Fed. 826; *Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991; *Tyler v. Shea*, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 600.

without fault, loses a part of his judgment, equity will assist him, if he cannot obtain relief otherwise. But since the cases must be of very infrequent occurrence in which the law court could not correct a mistake of this kind on motion, there will seldom be an opportunity for chancery to exercise this power. Besides, its well known reluctance to interfere with the records of other courts will preclude action of this kind, unless in a case of very palpable hardship and entire inadequacy of any remedy at law.

§ 169. Effect of Amendments on Third Persons.

An amendment of a judgment or decree will never be allowed to prejudice the rights of third persons—such as subsequent judgment-creditors, purchasers, or mortgagees—who have acquired interests for value and without notice.¹⁴² It is proper to insert, in the order allowing an amendment, a saving of the intervening rights of third persons, but the law will make the reservation whether it is expressed or not.¹⁴³ During the term, however, at which the judgment was rendered, or decree made, the court has power to amend or correct it, and a person who acquires an interest in property involved, on the faith of the judgment or decree, but with notice of the proceedings, takes it subject to the possibility that the judgment or decree may be corrected or vacated.¹⁴⁴

¹⁴² *Crutcher v. Commonwealth*, 6 Whart. (Pa.) 340; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Colman v. Watson*, 54 Ind. 65; *Ligon's Adm'rs v. Rogers*, 12 Ga. 281; *Perdue v. Bradshaw*, 18 Ga. 287; *Calef v. Parsons*, 48 Ill. App. 253; *Homan v. Hellman*, 35 Neb. 414, 53 N. W. 369; *Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981.

¹⁴³ *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388.

¹⁴⁴ *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; *Studebaker Bros. Manuf'g Co. v. Hunt* (Tex. Civ. App.) 38 S. W. 1134.

CHAPTER X.**THE VALIDITY OF JUDGMENTS.**

- § 170. Voidable and Void Judgments.
- 171. Jurisdiction.
- 172. Character and Status of Parties.
- 173. Constitution of the Court.
- 174. Disqualified Judge.
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- 181. Premature Entry of Judgment.
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- 183. Judgment must be supported by the Pleadings.
- 184. Judgment in Action not at Issue.
- 185. Findings necessary to support the Judgment.
- 186. Judgment must follow Verdict.

§ 170. Voidable and Void Judgments.

Before proceeding to a detailed examination of the questions which may affect the validity of judgments, it is necessary to point out the important distinction between judgments which are void and such as are merely voidable. The differences, though real and fundamental, are not always marked with sufficient sharpness in juristic writing, and courts have been known to speak of a judgment as "void" when they meant no more than that it was liable to be overturned if properly attacked. Now a "void" judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source

of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. On the other hand, a "voidable" judgment is one which, though not a mere nullity, is liable to be made void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared. It always contains some defect which may become fatal. It carries within it the means of its own overthrow. But unless and until it is duly annulled, it is attended with all the ordinary consequences of a legal judgment. The party against whom it is given may escape its effect as a bar or an obligation, but only by a proper application to have it vacated or reversed. Until that is done, it will be efficacious as a claim, an estoppel, or a source of title. If no proceedings are ever taken against it, it will continue throughout its life to all intents a valid sentence. If emanating from a court of general jurisdiction, it will be sustained by the ordinary presumptions of regularity, and it is not open to impeachment in any collateral action. When is a judgment void and when merely voidable? The answer to this question will form the subject of this and the two following chapters. It may be here stated, however, that it is very doubtful whether a judgment can ever be considered entirely void except in the single case where there was a total want of jurisdiction to render it. And even then, in the case of a domestic judgment, it is a serious question whether the lack of jurisdiction must not appear on the face of the record in order to entitle the courts to treat it as a nullity.¹ But there are many possible defects and irregularities which will render a judgment voidable.

Before leaving the subject it is necessary to advert to two words, often used in this connection, and which must be distinguished from those already explained. These are "irregular" and "erroneous." An irregular judgment is one which is rendered contrary to the

¹ See *infra*, § 218. The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269.

course of law and the practice of the courts. The meaning of the term is therefore not exactly coextensive with that of "voidable," although the two are often used interchangeably. For while every irregular judgment is also, and for that reason, voidable, there may be other causes besides irregularity sufficient to avoid it. An erroneous judgment is one which, though regularly rendered, is contrary to law, and therefore liable to be reversed by an appellate tribunal. Irregular and erroneous judgments cannot be attacked collaterally. But the former can be vacated by the court which rendered them or by a court of review, according to the nature of the irregularity; the latter only by an appellate court. These distinctions are noted in an opinion of the supreme court of New York, from which we quote as follows: "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle, I apprehend, has never been applied to a judgment merely erroneous and reversed for error by a court of review. An irregular judgment is called voidable, and when set aside is treated as though void from the beginning, for the party himself is held chargeable with the irregularity; while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of the distinction between the two, and it is manifestly a just and proper distinction. While it may well be held that a party is not justified by a judgment which is subsequently set aside for an irregularity in entering it up, which is his own act, it would seem unjust to hold that a judgment duly rendered by the court shall fail to protect a party acting under it before reversal, because reversed for error committed by the court."²

² *Simpson v. Hornbeck*, 3 Lans. 53. See, also, *Gray v. Stuart*, 33 Grat. (Va.) 358; *Bogges v. Howard*, 40 Tex. 153; *Ex parte Lange*, 18 Wall. 175, 21 L. Ed. 872; *Wolfe v. Davis*, 74 N. C. 599.

§ 171. Jurisdiction.

The first and fundamental requisite to the validity of a judgment is that it should have been rendered by a court having jurisdiction. Without jurisdiction the courts can do nothing, and a judgment given forth without jurisdiction is a mere nullity. The jurisdiction required is of three sorts: (1) jurisdiction of the parties; (2) jurisdiction of the general subject-matter; (3) jurisdiction of the particular matter which the judgment professes to decide. But the subject of jurisdiction is of such importance and intricacy as to require treatment in a separate chapter, and is mentioned here only for the sake of logical completeness.

§ 172. Character and Status of Parties.

The validity of a judgment may also depend in many instances on the character or status of the party against whom it is rendered. And in the case of persons who are under legal disabilities, judgments may be irregular and voidable for the failure to comply with statutory formalities, or to protect the defendants in the ways prescribed by law, or may even be considered void for the want of power of the courts over them. This subject will be examined in detail in the next chapter.

§ 173. Constitution of the Court.

In order that a judgment should be recognized as valid, it is of course necessary that it should have been rendered by a lawful and duly constituted court; otherwise it is not "the sentence of the law" and is not entitled to carry its sanction.³ But on principles of public policy and for the security of rights, it is held that the regular judgments of a de facto court, whose existence has afterwards been pronounced unconstitutional and void, are nevertheless valid and conclusive.⁴ Thus, in a case before the supreme federal tribunal, it was

³ *Rogers v. Wood*, 2 Barn. & Adol. 245.

⁴ *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285; *State v. Anone*, 2 Nott & McC. (S. C.) 27; *Gilliam v. Reddick*, 26 N. C. 368; *State v. Porter*, 1 Ala. 688; *Mayo v.*

held that an adjudication made by a Spanish court in Louisiana was not void because made after the cession of that territory to the United States. "For we know historically," said Thompson, J., "that the actual possession of the territory was not surrendered until some time after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was *de facto* in the possession of Spain and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid." ⁵

In regard to the validity of judgments rendered by the courts of the states which attempted to secede from the Union in 1861, there has been a great fluctuation of opinion, and it is only of late that the authorities have come to a substantial agreement. At first, and particularly in some of the reconstructed states, there was a strong disposition to treat all such judgments as mere nullities. This view was based on the theory that, the government of a state organized under the Confederacy being an usurpation and being erected in hostility to the lawful government of the country, all its acts were void; and the same objections which might be urged against its laws would be sufficient to overturn its judgments, both being parts of one whole.⁶ But after a time, impressed with the idea that some sort of government existed in those states during the war, and that the courts created or recognized by it were at least considered lawful tribunals by that government, real or pretended, and that respect was paid to their adjudications by the persons who acknowledged that government as rightful, the authorities were inclined to put such judgments upon the footing of quasi foreign judgments. That is, they were not to receive the full faith and credit due to a domestic judgment, but neither were they to be treated as entirely void. They were considered as *prima facie* evidence, but cause might be shown against their

Stoneum, 2 Ala. 390; Masterson v. Matthews, 60 Ala. 260; State v. Alling, 12 Ohio, 16.

⁵ Keene v. McDonough, 8 Pet. 308, 8 L. Ed. 955.

⁶ Penn v. Tollison, 26 Ark. 545; Thompson v. Mankin, 26 Ark. 536, 7 Am. Rep. 628; Ray v. Thompson, 43 Ala. 454, 94 Am. Dec. 696.

being carried into effect.⁷ The position was anomalous in the extreme, and the theory itself quite untenable. For, as pointed out by Dr. Wharton,⁸ in suing upon such a judgment it would be necessary to declare as upon a judgment in a state not belonging to the United States, and therefore virtually foreign. But a foreign judgment, rendered in the courts of a state whose independence our own government has never acknowledged, cannot be recognized as a judgment on which suit can be brought. At a still later period, a view came to be recognized which was the exact opposite of that first adopted, viz., that the judgments rendered by the Confederate courts during the war were in all respects legal and conclusive. It was held that the state government, as organized and existing in all its departments in one of those states during the continuance of hostilities, was its rightful *de jure* government; and accordingly that judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the constitution and laws of the United States, nor infringing upon the state constitution, were valid and binding.⁹ In the meantime the supreme court of the United States had been called upon to consider these questions, and had ruled that an act of the "Confederate Congress" creating a court was void, and that the court itself was a mere nullity and could exercise no rightful jurisdiction.¹⁰ There is no difficulty in accepting this position if we deny to that body the rights and powers of a government. For of course a mere assemblage of private persons, acting in rebellion against the law of the land, cannot create a court of law, and the acts of such pretended court would be destitute of any authority. But on the other hand, if the insurrectionary authorities had no power to create, they had no power to destroy. By no act or proceeding

⁷ *Pepin v. Lachenmeyer*, 45 N. Y. 27; *Martin v. Hewitt*, 44 Ala. 418; *Moseley v. Tuthill*, 45 Ala. 621, 6 Am. Rep. 710; *Shaw v. Lindsay*, 46 Ala. 290; *Bush v. Glover*, 47 Ala. 167; *Barclay v. Plant*, 50 Ala. 509; *Bibb v. Avery*, 45 Ala. 691.

⁸ 1 Whart. Ev. § 807.

⁹ *Parks v. Coffey*, 52 Ala. 32; *Hill v. Huckabee*, 52 Ala. 155; *McQueen v. McQueen*, 55 Ala. 433; *Steere v. Tenney*, 50 N. H. 461; *Hill v. Armistead*, 56 Ala. 118; *Hendry v. Cline*, 29 Ark. 414. See *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749.

¹⁰ *Hickman v. Jones*, 9 Wall. 197, 19 L. Ed. 551.

could they strip a lawful pre-existing tribunal of its power and jurisdiction or terminate its existence. Their laws, being altogether void, had no effect whatever upon the courts which had been duly organized before the rebellion began. And still less could any change in the judicial system be effected by the mere declaration of secession. "The objection that the judgment of the supreme court of Louisiana is to be treated as void because rendered some days after the passage of the ordinance of secession of that state, is not tenable. That ordinance was an absolute nullity, and of itself alone neither affected the jurisdiction of that court or its relation to the appellate power of this court."¹¹ These two decisions outline the view which has prevailed in the supreme federal court and which must now be regarded as the accepted doctrine. Courts organized by the Confederate authorities for distinctively national purposes, and as a part of what was intended to be a national judicial system, had no legal existence, and all their acts were mere nullities. But the courts of the several states, in their individual capacities, had a lawful existence, notwithstanding the usurpation of the state governments by the insurrectionary authorities, and even though they professed to derive their powers from those who, de facto, had possession of the state government. Accordingly, their judgments, so far as they did not tend to impair the supremacy of the federal authority or the just rights of citizens under the constitution, are to be treated as valid and binding.¹² But this is subject to an important qualification, viz., that such judgments could have no effect as against defendants who were residents of other states not sharing in the rebellion. This exception is established by a noteworthy decision in Ohio, where it was held that as between

¹¹ *White v. Cannon*, 6 Wall. 443, 18 L. Ed. 923.

¹² *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657. In this case the court said: "The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crimes prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in times of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile, in their purpose or mode of enforcement, to the authority of the national government, and did not impair the rights of citizens under the constitution."

parties residing in the state of Arkansas and within the rebel lines, and a citizen of Ohio, resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in a Confederate court in Arkansas by which the rights of non-residents could be injuriously affected. Neither could such jurisdiction be acquired by the consent or waiver of an attorney practicing in said court, who was employed and appeared for the non-resident defendants before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients, did not authorize him to waive any of their rights, nor could such consent or waiver confer on the court jurisdiction over the case or over the defendants.¹³ Questions have arisen as to the validity of judgments rendered by a tribunal created by a military commander in a district of insurrectionary territory held by him in belligerent occupation. But as these questions chiefly relate to the effect of such judgments as *res judicata*, the consideration of them is postponed to another place.¹⁴

§ 174. Disqualified Judge.

The validity of a judgment may often depend upon considerations personal to the judge who rendered it. He may be disqualified from acting in the particular case by reason of his being concerned as a party, or otherwise interested in the event of the suit, or on account of his relationship or affinity to one of the litigants, or because he is not qualified for the office in accordance with the statutory requirements. And first, in regard to his interest in the suit; it is a maxim of the common law that "*nemo potest esse judex in propria causa.*"¹⁵ And indeed natural justice, as well as a regard for the integrity and impartiality of the judiciary, sanction the same rule. Accordingly it is held, under statutes forbidding a judge to act in a cause in which he is interested, that if he should assume to decide a case where his personal interest might come in conflict with his judicial indifference,

¹³ *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340. See, also, *Botts v. Crenshaw*, Chase, 227, Fed. Cas. No. 1,690; *Livingston v. Jordan*, Chase, 454, Fed. Cas. No. 8,415; *Brooke v. Filler*, 35 Ind. 402; *French v. Tumlín*, Fed. Cas. No. 5,104.

¹⁴ See *infra*, vol. 2, § 525.

¹⁵ 12 Co. 113.

the judgment so rendered would be entirely null and void.¹⁶ So a judgment pronounced by a judge who was disqualified on account of his having been of counsel in the case, is void and not conclusive on the parties.¹⁷ It does not appear that this would have been so at common law, for the doctrine seems rather to have been that the acts of a disqualified judge were not merely nullities, but were liable to be avoided or reversed on a proper application, although the parties might admit their binding force by acquiescence.¹⁸ In the next place, the relationship of the judge to any of the parties in the cause is made a ground of his disqualification, by statute in many of the states; and there are cases holding that a judgment attempted to be rendered by one who was disqualified by reason of his consanguinity with a litigant, is utterly void and incapable of being made good by any waiver or consent.¹⁹ But the rule obtaining in a majority of the states is that such a judgment is voidable and liable to be set aside on proper proceedings for that purpose, but is not absolutely void; it is a sufficient protection to persons lawfully acting under it while it stands, and it cannot be attacked collaterally.²⁰ Some of these de-

¹⁶ *In re Cottle*, 5 Pick. (Mass.) 483; *Coffin v. Cottle*, 9 Pick. (Mass.) 287; *Stgourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; *Gay v. Minot*, 3 Cush. (Mass.) 352; *Washington Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1; *Place v. Butternuts Woolen & Cotton Manuf'g Co.*, 28 Barb. (N. Y.) 503; *State v. Castleberry*, 23 Ala. 85. But in Texas, it is said that an alleged disqualification of the trial judge can be reviewed by appeal, and is no ground for enjoining proceedings on the judgment. *Dunson v. Spradley* (Tex. Civ. App.) 40 S. W. 327.

¹⁷ *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Jouett v. Gunn*, 13 Tex. Civ. App. 84, 35 S. W. 104. Compare *Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013.

¹⁸ *Dimes v. Grand Junction Canal Co.*, 17 Jur. 73; *Gorrill v. Whittier*, 3 N. H. 208.

¹⁹ *Chambers v. Clearwater*, *40 N. Y. 310; *Oakley v. Aspinwall*, 3 N. Y. 547; *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513. See *Reams v. Kearns*, 5 Cold. (Tenn.) 217; *Horton v. Howard*, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198; *In re Depuy's Estate*, 56 Hun, 639, 9 N. Y. Supp. 121.

²⁰ *Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425 (citing *Phillips v. Eyre*, L. R. 6 Q. B. 1, 22); *Trawick's Heirs v. Trawick's Adm'rs*, 67 Ala. 271 (citing *Hine v. Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726; *Plowman v. Henderson*, 59 Ala. 559; *Heydenfeldt v. Towns*, 27 Ala. 423); *Rogers v. Felker*, 77 Ga. 46; *Matthews v. Noble*, 25 Misc. Rep. 674, 53 N. Y. Supp. 190.

isions were rendered under statutes providing that the parties interested might waive the disqualification by consenting to the action of the judge. And when this is the case, it is entirely reasonable to hold that, if no express objection appears, the judgment will be voidable at most, not void. "These disqualifications may be unknown, or so obscure as to require a judicial decision to determine their existence. It is a serious thing to annul the judgments of the courts, and it ought not to be done where the consent of the parties alone is requisite to their validity, and its entry on the record is the only admissible evidence that it was given."²¹ The disqualification may also arise from omission of statutory requirements on the part of the person assuming to act as judge. Thus, a judgment rendered by an attorney orally appointed judge and acting by consent of parties, but without having taken the prescribed oath, is void for want of jurisdiction.²²

§ 175. Acts of Judge de Facto.

This brings us to the consideration of acts done by a judge de facto. A person may be entitled to this designation who, although he is not a true and rightful incumbent of the office, yet is no mere usurper, but holds it under color of lawful authority. And there can be no question that judgments rendered and other acts performed by such a person are valid and binding. If a contested election, for example, should result in the ouster of the person who, being entitled on the face of the returns, was commissioned and qualified as judge, this would not retrospectively invalidate the judgments he may have rendered while in actual possession of the office. So judges elected and duly qualified, and who exercise the functions of their office, are de facto officers, although the act under which they were elected was unconstitutional.²³ And a person who is ineligible to a judgeship,

²¹ *Hine v. Hussey*, 45 Ala. 496, 513. A judgment is not void because the judge rendering it is related in equal degree to both the parties litigant, especially when no objection was made at the hearing on this ground. *Beall v. Siquefield*, 73 Ga. 48.

²² *Herbster v. State*, 80 Ind. 484. The fact that one judge presided when the cause was heard, and another when judgment was rendered, does not invalidate the judgment. *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380.

²³ *Campbell v. Commonwealth*, 96 Pa. 344; *Burt v. Winona & St. P. R. Co.*, 81 Minn. 472, 18 N. W. 285; *In re Ah Lee (D. C.)* 6 Sawy. 410, 5 Fed.

but who has nevertheless been duly appointed, and who exercises the powers and duties of the office, is a de facto judge, and his acts are valid until he is properly removed.²⁴ Again, one duly elected to a judgeship, and commissioned a judge by the governor, and discharging the functions of the office, is a judge de facto, although the supreme court afterwards decides that the term of his predecessor had not expired.²⁵ So also the acts of a de facto judge cannot be attacked collaterally, by showing that he has taken no oath of office, or that he has taken an oath to support a power in insurrectionary hostility to the federal government.²⁶ These rules are founded upon sound principles of public policy and justice, and are generally wholesome in their practical operation.

§ 176. Judge out of Office.

It is generally held that a judgment or decree rendered, or order made, by a judge whose term of office has expired, but who continues in possession and exercise of the functions of the office, is valid and binding as the act of a de facto officer.²⁷ Thus, in a recent case, the action was tried on November 30th and a decree rendered December 6th, the term of court having begun on November 8th and continued till December 6th, on which day the decree was dated and filed. It transpired that the term of office of the judge who signed the

899; *Carland v. Custer County*, 5 Mont. 579, 6 Pac. 24; *Taylor v. Skrine*, 3 Brev. (S. C.) 516; *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89; *Clark v. Commonwealth*, 29 Pa. 129; *People v. Bangs*, 24 Ill. 184. And see *Griffin's Case*, Chase, 364, Fed. Cas. No. 5,815.

²⁴ *Ostrander v. People*, 29 Hun (N. Y.) 513; *Blackburn v. State*, 3 Head (Tenn.) 690; *Gregg v. Jamison*, 55 Pa. 468.

²⁵ *McCraw v. Williams*, 33 Grat. (Va.) 510.

²⁶ *Pepin v. Lachenmeyer*, 45 N. Y. 27.

²⁷ *Read v. City of Buffalo*, 4 Abb. Dec. (N. Y.) 22; *Carll v. Rhener*, 27 Minn. 292, 7 N. W. 139; *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65; *Cary v. State*, 76 Ala. 78; *Threadgill v. Carolina Cent. Ry. Co.*, 73 N. C. 178; *Woodside v. Wagg*, 71 Me. 207; *Deutermann v. Pollock*, 30 App. Div. 378, 51 N. Y. Supp. 928. Where the term of office of the judge who tried the case has expired, judgment may be rendered by his successor. *Rauh v. Scholl*, 19 Wash. 30, 52 Pac. 332. But where the docket of a justice of the peace shows that a judgment was entered on a day on which he was not within the state, such judgment is void for want of jurisdiction. *Tolliver v. Brownell*, 94 Mich. 577, 54 N. W. 302.

decree expired on December 2d. But it was held that the judge was an officer de facto and his decree valid as a decree of the court.²⁸ So in another case, a judge whose office was vacated by his taking a seat in the legislature, but who continued to exercise the functions of a judge, was considered to be a de facto officer and his acts consequently valid.²⁹ If a judgment or decree was actually rendered before the judge's term expired, it is of course immaterial that it was not docketed or filed until afterwards. Thus, where a cause was submitted to a judge to be determined in vacation, and he made his decision and deposited it, with the papers, in the express office the day before his term of office expired, directed to the clerk of the proper county, it was held that the decision was then complete and it was not invalidated because it was not filed in the clerk's office before the expiration of the judge's term.³⁰

§ 177. Time and Place of holding Court.

It is held in several of the cases, that it is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law.³¹ And the holding of a court at a time or place other than that ordained or authorized by law, and all proceedings thereunder, are coram non iudice and void.³² Perhaps the rule is too broadly stated in these decisions. But it may be admitted that the fact that a term of court was not held at the time prescribed by law will constitute a ground for the reversal of a judgment rendered in such term.³³ But if there was reasonable mistake in regard to the time fixed by law, and color of authority for the time actually selected, there is authority for the view that a judgment so rendered is

²⁸ *Cromer v. Holnest*, 27 S. C. 436, 3 S. E. 849. But compare *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721.

²⁹ *Woodside v. Wagg*, 71 Me. 207.

³⁰ *Babcock v. Wolf*, 70 Iowa, 676, 28 N. W. 490; *Shenandoah Nat. Bank v. Read*, 86 Iowa, 136, 53 N. W. 96; *McDowell v. McDowell*, 92 N. C. 227.

³¹ *State v. Roberts*, 8 Nev. 239; *Dalton v. Libby*, 9 Nev. 192; *Cooper v. American Central Ins. Co.*, 3 Colo. 318; *Wicks v. Ludwig*, 9 Cal. 173.

³² *Grimmett v. Askew*, 48 Ark. 151, 2 S. W. 707.

³³ *Smithson v. Dillon*, 16 Ind. 169. See *Coffinberry v. Horrill*, 5 Cal. 493; *Bowden v. Hatcher*, 83 Ga. 77, 9 S. E. 724.

perfectly valid. Thus, in a case in Tennessee, it appeared that an act of the legislature had changed the times for the sitting of the circuit court for a certain county. This change was not known to the officers of the court, the act having been passed but a short time before a term was to be held. The court was held by the presiding judge at the time before fixed by law, but at a different time from that required by the law then in force. A judgment was rendered by the court thus sitting, the justice of which was not controverted. And it was held that the judgment was valid; that the acts of a judge regularly in office are valid, if he hold his court under color of law, although the law may be repealed or invalid.³⁴ On similar principles, and by an even stronger reason, a judgment is valid when rendered at a term which was commenced at the day fixed by law, although, in the middle of the term and before the judgment, a new statute changes the time for holding the court, because the later act will not affect a term already lawfully commenced.³⁵ And where, in the absence of the judge, the sheriff adjourned the court without authority, the adjournment was held to be a nullity, and a judgment entered by the court two days afterwards was held valid.³⁶ In regard to the place of holding a court, compliance with the law is of course important, and perhaps essential to the perfect validity of the judgments rendered. But it does not appear, from the authorities, to be so indispensable that deviation from the law in this respect will of itself be sufficient to render such judgments absolutely void.³⁷ If it appears by the record of a judgment that the court which pronounced it had jurisdiction of the person of the defendant and of the subject-matter of the suit, such judgment will not, in a collateral proceeding, be held void upon proof being made that it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, before the rendition of the judgment, been destroyed by fire, and that the

³⁴ *Venable v. Curd*, 2 Head, 582.

³⁵ *Clare v. Clare*, 4 Greene (Iowa) 411.

³⁶ *Thomas v. Fogarty*, 19 Cal. 644.

³⁷ *Le Grange's Lessee v. Ward*, 11 Ohio, 257; *Smith v. State*, 9 Humph. (Tenn.) 10.

county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered.³⁸

§ 178. Place of Trial.

That a judgment was rendered in a county other than that in which the venue was laid is a mere irregularity, and does not avoid the judgment.³⁹ And the same is true of the fact that the judge made and signed a decree in a county other than that where the trial was had.⁴⁰ So also, the jurisdiction of the court is not affected by the fact that the action was tried in a county which was not the one declared by statute to be the proper county for its trial.⁴¹ Thus, in California it is held that where a cause is transferred, because of the disqualification of the judge, to an adjoining judicial district, under authority of statute, the judgment therein is not void or subject to collateral attack because the county to which the cause was transferred was not the nearest one, as required by the statute. "We cannot see," said the court, "how it can be law that a judgment can be impeached collaterally and held void, because a judge has made an inconsiderable mistake in computing distances, or had selected a county-seat more readily accessible than the other in coming from L., and holding it to be really the nearer on that account. The judge had jurisdiction to make this order under the statute then in force. He must determine what is the nearest court in administering the law. This determination was undoubtedly within his power, and if he sent it to a county some distance further than another, by error of a miscalculation of distances, it would be nothing more than an error, and should not render the judgment void. Conceding that this judgment might have been reversed on appeal, still it would not be void on collateral attack."⁴² This decision illustrates the difference between void judgments and such as are merely erroneous. In gen-

³⁸ *Herndon v. Hawkins*, 65 Mo. 265.

³⁹ *Splehler v. Asiel*, 83 Hun, 223, 31 N. Y. Supp. 584.

⁴⁰ *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 59 Pac. 136.

⁴¹ *Ellis v. Ellis*, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

⁴² *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527.

eral, as already stated, a judgment is not void except for a total failure of jurisdiction.

§ 179. Judgment rendered in Vacation.

When the law provides for the holding of regular terms of a court, it is only during term-time that the judges are invested with their full judicial character. Necessary rules and orders, ministerial acts, and some matters which go as of course, may fall within the powers of the court in vacation. But in general all judicial functions are suspended during that interval. Hence, unless under statutory authority, a judgment cannot be pronounced in vacation. The rendition of judgment, in a court of record, is essentially a judicial act, and if performed when the court is not in session, that is, out of term, it is open to a fatal jurisdictional objection; the judgment is absolutely void, creates or affects no rights, and will even be disregarded on appeal.⁴³ "The judge of the court below had no power to render any judgment or decree in vacation. The statute provides for regular terms of the court to be held for the trial of causes, and it does not provide for the rendering of judgments or decrees at any time except during the term."⁴⁴ And again: "With a few exceptions, all matters of a judicial character must be heard and determined by the court at a term fixed by and held in accordance with law. The motion under consideration [to discharge a garnishee] does not constitute one of the exceptions."⁴⁵ While this is the case, it is also held in several of the states that the parties may consent to the rendition of a judgment during the vacation of the court, which judgment is

⁴³ *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. 85; *State v. Judge of Fifth District Court*, 26 La. Ann. 119; *Culver v. Leovy*, 21 La. Ann. 306; *Dodge v. Coffin*, 15 Kan. 277; *Bruce v. Doolittle*, 81 Ill. 103; *Sheppard v. Wilson*, 1 Morris (Iowa) 448; *Peabody v. Phelps*, 7 Cal. 53; *Filley v. Cody*, 4 Colo. 109; *Champion v. Sessions*, 1 Nev. 478; *Backer v. Eble*, 144 Ind. 287, 43 N. E. 233; *Gamble v. Buffalo County*, 57 Neb. 163, 77 N. W. 341. But a judgment entered in vacation as of the last day of the previous term has the same effect when signed by the judge at the next term, as if entered in term-time. *Louisville & N. R. Co. v. Trustees of Elizabethtown Dist. Public Schools (Ky.)* 49 S. W. 34.

⁴⁴ *Earls v. Earls*, 27 Kan. 538.

⁴⁵ *Laughlin v. Peckham*, 66 Iowa, 121, 23 N. W. 294.

then to be entered as of the preceding term,⁴⁶ or the ensuing term,⁴⁷ and will be perfectly valid as between the parties,⁴⁸ and even against third persons in the absence of fraud or collusion.⁴⁹ Nor is the main rule of quite universal application. In some states, either in accordance with the established practice of the courts,⁵⁰ or by express statutory authority,⁵¹ the courts are empowered to make decrees or orders or render judgments in vacation. And when this power is given, it of course includes the jurisdiction necessary to make a decision in vacation upon a cause proved and submitted in term-time. In this connection we must notice a certain class of statutes authorizing cases to be "taken under advisement" by the court. In Mississippi it is considered that a statute of this character does not authorize the rendition of a judgment in vacation, but the judgment must be given by the court upon the delivery of the judge's opinion in writing at the next term after the submission of the case.⁵² In Illinois, however, under a similar statute, it is held that a decree may be rendered in vacation, but that it will remain in fieri and subject to modification, and not become final, until after the expiration of the succeeding term, and then only as approved at that term.⁵³

The rendition of a judgment, it will be remembered, is an entirely distinct thing from the entry of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act. A judgment is none the less a sentence of the law because it is erroneously entered or not entered at all. Hence it

⁴⁶ *King v. Green*, 2 Stew. (Ala.) 133, 19 Am. Dec. 46.

⁴⁷ *Hervey v. Edmunds*, 68 N. C. 243.

⁴⁸ *City of New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Green v. Reagan*, 32 La. Ann. 974; *Hervey v. Edmunds*, 68 N. C. 243; *King v. Green*, 2 Stew. (Ala.) 133, 19 Am. Dec. 46; *Hattenback v. Hoskins*, 12 Iowa, 109; *O'Hagen v. O'Hagen*, 14 Iowa, 264.

⁴⁹ *City of New Orleans v. Gauthreaux*, 32 La. Ann. 1126.

⁵⁰ *Beyerle v. Hain*, 61 Pa. 226.

⁵¹ *Ex parte Bennett*, 44 Cal. 85. And see *Harris v. Jones*, 96 Va. 658, 32 S. E. 455; *Russell v. Hank*, 9 Utah, 309, 34 Pac. 245.

⁵² *Wilson v. Rodewald*, 61 Miss. 228. And see *Abraham v. Levy*, 18 C. C. A. 469, 72 Fed. 124.

⁵³ *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98.

follows that if a judgment is duly rendered during term-time, it is then complete, and its validity is in no wise affected by the fact that the clerk does not enter it until the vacation.⁵⁴ It is also to be here noted that the meaning of the word "vacation," as used, for example, in a statute which authorizes the confession of judgments during vacation, may not be the same as that known to the common law, viz., "all the time between the end of one term and the beginning of another,"⁵⁵ but it may cover a recess caused by the adjournment over of the court for a number of days.⁵⁶

§ 180. After Expiration of Term.

As a corollary of the rule stated in the preceding section, it is held that a judgment of a court holding regular terms, if rendered after the time fixed by law for its adjournment, is invalid and will be reversed on appeal.⁵⁷ But where the trial of a cause is commenced in a term with the bona fide expectation and belief that it will be concluded before the day shall arrive when the judge is directed, but not imperatively required, to hold court in another county, he may remain, conclude the trial of that case, receive the verdict, and pass judgment, even though this may happen to be done on a day, or at a time, when regularly he would be holding court in another county.⁵⁸ And if a judgment be ordered and its terms prescribed by the court during a term, it is a judgment rendered in term-time although the entry thereof be not in fact prepared and transcribed on the journal until after the close of the term.⁵⁹ On principles analogous to those obtaining in the case of courts of record, it is held that if a justice of

⁵⁴ *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Earls v. Earls*, 27 Kan. 538. *Supervisors of Manitowoc Co. v. Sullivan*, 51 Wis. 115, 8 N. W. 12. But in Indiana it is held that a judgment duly pronounced in term, but entered in vacation, and the entry never seen by the judge nor signed by him, though his name was signed by an attorney, is invalid, and its execution will be enjoined. *Mitchell v. St. John*, 98 Ind. 598. And see, also, *First Nat. Bank of McGregor v. Hostetter*, 61 Iowa, 395, 16 N. W. 289.

⁵⁵ *Jacobs*, Law Dict.; *Bouv. Law Dict.*

⁵⁶ *Conkling v. Ridgely*, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204.

⁵⁷ *Smith v. Chichester*, 1 Cal. 409; *Passwater v. Edwards*, 44 Ind. 343; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821.

⁵⁸ *State v. Knight*, 19 Iowa, 94.

⁵⁹ *Hiff v. Arnott*, 31 Kan. 672, 3 Pac. 525.

the peace adjourns a cause without specifying the hour of the day or the place to which it is adjourned, he loses jurisdiction and his subsequent judgment is void.⁶⁰ But in several of the states it is held that while judgments should be signed and entered during the term, yet if the parties consent that the cause be taken under consideration by the judge, and a judgment rendered and signed after the term shall have expired, and entered as of the term, it will not be irregular.⁶¹ And a party to the action who fails to interpose an objection to this procedure, at the proper time, waives his right, which amounts to an implied consent and concludes him.⁶² The decision of a cause may be carried over the vacation by a proper entry; but if a judgment be continued by "curia advisari vult," and be not given until the term succeeding that at which the verdict was rendered, the judgment must be entered and signed as of such succeeding term, not of the former term.⁶³

§ 181. Premature Entry of Judgment.

The rendition of judgment at a term before that fixed by statute is considered not as a mere formal defect which may be remedied by an amendment in the court below, but as a radical error.⁶⁴ Thus, the entry of final judgment at the same term with a default, when the statute provides that the former shall be entered at the next term

⁶⁰ *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451. But in Nebraska, where a justice of the peace has jurisdiction of the subject-matter and of the parties, a judgment rendered by him after the expiration of the time fixed by statute must be corrected by a direct proceeding for that purpose, and will not be enjoined upon that ground alone. *Gould v. Loughran*, 19 Neb. 392, 27 N. W. 397.

⁶¹ *Shackelford v. Miller*, 91 N. C. 181; *Hardin v. Ray*, 89 N. C. 364; *Morrison v. Citizens' Bank*, 27 La. Ann. 401. Where motions and demurrers are submitted for decision during the term or in vacation, the court, by failure to determine the questions until the next term, does not lose jurisdiction so as to require a resubmission. *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380.

⁶² *Molyneux v. Huey*, 81 N. C. 106.

⁶³ *Thorpe v. Corwin*, 20 N. J. Law, 311.

⁶⁴ *Teat v. Cocks*, 42 Ala. 336. But while such a premature entry constitutes an irregularity, the later cases hold that it does not go to the jurisdiction of the court, and does not render the judgment entirely void. *Marshall & Ilsley Bank v. Hyman*, 84 Wis. 23, 53 N. W. 1126; *Tobar v. Losano*, 6 Tex. Civ. App. 698, 25 S. W. 973; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67.

after the default, is an irregularity, although, in this instance, it appears that the error may be corrected on motion at a subsequent term.⁶⁵ So also an order of court which bears date as of a day not yet arrived is absolutely without effect, at least until that day shall arrive.⁶⁶ In this connection also must be mentioned the rule that final judgment cannot properly be rendered in any case while there are issues of law or fact remaining undisposed of or undetermined,⁶⁷ or while an order staying all proceedings in the case remains still in force.⁶⁸

§ 182. Sundays and Holidays.

It is a maxim of the common law that "dies dominicus non est juridicus." Accordingly no valid judgment can be rendered upon Sunday. "That courts have no right to pronounce a judgment or do any other act strictly judicial on Sunday, unless expressly authorized by statute, seems to be too well settled to admit of a doubt by the decisions in England and in this country. The cases all show that a judgment entered of record on Sunday is not only erroneous, but is absolutely void."⁶⁹ But in some of the states, by the operation of statutes authorizing or requiring the rendition of a judgment im-

⁶⁵ *Nave v. Todd*, 83 Mo. 601. A judgment rendered by a justice of the peace before the return day of the warrant is erroneous but not void. *Glover v. Holman*, 3 Helsk. (Tenn.) 519.

⁶⁶ *Smith v. Coe*, 7 Rob. (N. Y.) 477.

⁶⁷ *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447; *Aymar v. Chace*, 12 Barb. (N. Y.) 301; *Barret v. Thompson*, 5 Ind. 457; *Miller v. Hoc*, 1 Fla. 189; *Clark v. People*, 15 Ill. 213; *Benson v. Arnold*, 75 Ill. App. 610; *Hammond v. Freeman*, 9 Ark. 62; *Davison v. Brown*, 93 Wis. 85, 67 N. W. 42.

⁶⁸ *Uhe v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 563, 54 N. W. 601; *id.*, 4 S. D. 505, 57 N. W. 484.

⁶⁹ *Baxter v. People*, 3 Gilman (Ill.) 368, 384; *Mackalley's Case*, 5 Coke, 66; *Swann v. Broome*, 3 Burrows, 1595; *Pearce v. Atwood*, 13 Mass. 347; *Chapman v. State*, 5 Blackf. (Ind.) 111; *Nabors v. State*, 6 Ala. 200; *Frost v. Hull*, 4 N. H. 158; *Arthur v. Mosby*, 2 Bibb (Ky.) 589; *Story v. Elliot*, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; *Davis v. Fish*, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387; *Blood v. Bates*, 31 Vt. 147; *City of Parsons v. Lindsay*, 41 Kan. 336, 21 Pac. 227, 3 L. R. A. 658, 13 Am. St. Rep. 290; *Allen v. Godfrey*, 44 N. Y. 433; *Coleman v. Henderson*, Litt. Sel. Cas. (Ky.) 171, 12 Am. Dec. 290; *Hoghtaling v. Osborn*, 15 Johns. (N. Y.) 119; *Ex parte White*, 15 Nev. 146, 37 Am. Rep. 466; *Hemmens v. Bentley*, 32 Mich. 89; *Ex parte Juneman*, 28 Tex. App. 486, 13 S. W. 783; *Shearman v. State*, 1 Tex. App. 215, 28 Am. Rep. 402; *Styles v. Harrison*, 99 Tenn. 128, 41 S. W. 333, 63 Am. St. Rep. 824.

mediately upon the reception of a verdict, it is held that if a verdict is returned on Sunday, a judgment entered upon it the same day will be valid.⁷⁰ Since the entry of a judgment, as distinguished from its rendition, is a merely ministerial act, there can be no doubt that it will not be invalidated by the fact that it was put upon the record or the docket by the clerk on a Sunday. But in that case it should not appear to have been rendered on Sunday.⁷¹ However, the court is not bound to accept as true a docket-entry that a judgment was rendered on that day when there is extraneous evidence that in fact it was not.⁷²

In regard to other legal holidays, the general rule is that unless the statutes recognizing or creating them expressly prohibit the exercise of judicial functions upon them, the courts may validly render judgments and transact their other usual business.⁷³ And even if they are declared non-judicial days, this will not hinder the performance of ministerial acts. Thus the statute in Georgia, declaring the fourth of July a holiday, does not inhibit the courts from sitting on that day, or make a judgment rendered on that day void, except when the day falls on Sunday.⁷⁴ So it is held that a judgment rendered by a justice of the peace on Thanksgiving Day is not void.⁷⁵ And in another case it was considered that in the absence of an express statute, the ministerial act of a clerk in filing a transcript of

⁷⁰ *Thompson v. Church*, 13 Neb. 287, 13 N. W. 626; *Hurford v. City of Omaha*, 4 Neb. 336; *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875. See, also, *Perkins v. Jones*, 28 Wis. 243; *Wearne v. Smith*, 32 Wis. 412.

⁷¹ Where a confession of judgment and order for execution were handed by the plaintiff to the prothonotary on Sunday, and the next day the latter entered judgment and issued execution, it was held that the judgment was valid. The prothonotary was not bound to receive the papers on Sunday; his acceptance of them was not an official act, but he received them merely as agent of the plaintiff. *Kauffman's Appeal*, 70 Pa. 261.

⁷² *Ecker v. First Nat. Bank*, 64 Md. 292, 1 Atl. 849; *In re Worthington*, 7 Biss. 455, Fed. Cas. No. 18,051. To avoid a judgment, regular on its face, on the ground that it was rendered after midnight on Saturday, the evidence should establish, beyond the doubt naturally arising from the difficulty of determining the precise time of a particular transaction, that it was thus rendered. *Bishop v. Carter*, 29 Iowa, 165.

⁷³ See *Spiedel Grocery Co. v. Armstrong*, 8 Ohio Cir. Ct. R. 489.

⁷⁴ *Hamer v. Sears*, 81 Ga. 288, 6 S. E. 810.

⁷⁵ *Bear v. Youngman*, 19 Mo. App. 41.

a judgment is not void because done on Christmas Day, but is a valid docketing of the judgment and will confer a valid lien upon the real estate of the debtor in the county where it is filed.⁷⁶

§ 183. Judgment must be supported by the Pleadings.

A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. A judgment not supported by the pleadings is as fatally defective as one not sustained by the verdict or finding.⁷⁷ Hence the code, although it abolishes the forms of actions as they existed at common law, does not authorize a recovery, where the complaint alleges facts showing a cause of action in tort, by proving upon the trial a cause of action in contract.⁷⁸ Again, under the common count for goods sold and delivered, no recovery can be had for money advanced, or personal services rendered for defendant.⁷⁹ In an action for money obtained from plaintiff by fraud, it is error, on finding no fraud shown, to give judgment as for money loaned.⁸⁰ Where the complaint alleges that the fall of plaintiff's wall, for which he claims damages, was caused by defendant's negligent excavation of land "adjacent" to plaintiff's land, but the evidence shows that the excavation was "beneath" the plaintiff's building, the latter cannot recover.⁸¹ So also, where the petition alleges that two defendants are jointly indebted to plaintiff as a banking firm, he is not entitled to recover a judgment against

⁷⁶ *In re Worthington*, 7 Blss. 455, Fed. Cas. No. 18,051. In Illinois, a judgment by confession entered on the 25th of December is not void. *Bradley v. Claudon*, 45 Ill. App. 326.

⁷⁷ *Bachman v. Sepulveda*, 39 Cal. 688; *Marshman v. Conklin*, 21 N. J. Eq. 546; *Parsley v. Nicholson*, 65 N. C. 207; *Frevort v. Henry*, 14 Nev. 191; *Lee v. British & American Mortg. Co.*, 16 Tex. Civ. App. 671, 40 S. W. 1041; *Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337; *Wheeler v. Foster*, 82 Ill. App. 153; *Clemons v. Heelan*, 52 Neb. 287, 72 N. W. 270; *Selberling v. Mortinson*, 10 S. D. 644, 75 N. W. 202.

⁷⁸ *Degraw v. Elmore*, 50 N. Y. 1.

⁷⁹ *Rand, McNally & Co. v. Hornbarger*, 82 Ill. App. 341. But defendant cannot complain of a judgment based on a contract as it is alleged in his answer, though it differs from that alleged by plaintiff. *Ach v. Carter*, 21 Wash. 140, 57 Pac. 344.

⁸⁰ *Kress v. Woehrie*, 23 Misc. Rep. 472, 52 N. Y. Supp. 628.

⁸¹ *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749.

one of them as a city treasurer.⁸² Where an action is brought to foreclose a mechanic's lien, and the lien is shown to have been discharged by the giving of a bond, the court has no power to render a personal judgment against the defendant.⁸³ On the same principle, where the theory of the complaint and of the trial, as well as of the entire evidence, was that a deed was not intended as a mortgage, but as a conveyance, a judgment based on the theory that the deed was a mortgage cannot be upheld.⁸⁴ And although, under modern systems, courts of law may enforce equitable rights, the proof must agree with the pleadings, and the relief granted must be within the prayer for relief and the grounds relied on.⁸⁵ So where the declaration is defective in substance to the extent of failing to show a cause of action, no judgment can be entered upon it.⁸⁶ This would be good ground for a motion in arrest, but if a judgment were nevertheless entered, it would be reversed for error. And if the complaint does not state facts sufficient to constitute a cause of action, a finding "that the allegations of the complaint are true," is not sufficient to support a judgment for the plaintiff.⁸⁷ But where a verdict is returned for the plaintiff on two counts in a declaration, one of which contains no cause of action, the court will render judgment upon the other, if legally sufficient.⁸⁸ But the fact that the defendant, at the trial, makes no objection to the form of action (as that one joint action is improperly brought instead of two several suits), cannot enable the court to enter a judgment which the law

⁸² *City of Syracuse v. Reed*, 5 Kan. App. 806, 49 Pac. 259.

⁸³ *Mertz v. Mapes-Reeve Const. Co.*, 30 Misc. Rep. 343, 63 N. Y. Supp. 455.

⁸⁴ *Bullenkamp v. Bullenkamp*, 43 App. Div. 510, 60 N. Y. Supp. 84.

⁸⁵ *Eddy & Bissell Live-Stock Co. v. Blackburn*, 17 C. C. A. 532, 70 Fed. 949.

⁸⁶ *Harris v. Harris*, 10 Wis. 467.

⁸⁷ *Knudson v. Curley*, 30 Minn. 433, 15 N. W. 873. A judgment is not void or erroneous because the name of plaintiff's attorney attached to the complaint is printed instead of being written. *Hancock v. Bowman*, 49 Cal. 413.

⁸⁸ *Gordon v. Downey*, 1 Gill (Md.) 41. In California, it is said that if any material issue is raised by the pleadings, a verdict in favor of a party supports a judgment in his favor. *Orton v. Brown*, 117 Cal. 501, 49 Pac. 583. But in Wisconsin, the court declares that a judgment which is based on only one of two issues raised by the pleadings, and which leaves the other undisposed of, is erroneous. *Gage v. Allen*, 84 Wis. 323, 54 N. W. 627. And if there is no count in the declaration on the cause of action shown by the evidence, there can be no recovery. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

does not warrant.⁸⁹ In any action, process and pleadings are generally necessary, but where the parties are voluntarily before the court, and by agreement, consent, or confession (which are the same in substance) a judgment is rendered, such judgment is valid, although not granted according to the regular course of procedure.⁹⁰ So a judgment rendered without any complaint having been filed, is valid if entered by agreement or if ratified by subsequent consent.⁹¹ A judgment or decree based upon incompetent evidence is never, for that reason alone, void.⁹² And in general, mere error in a judgment, though it may be ground for its reversal, will not have the effect to make it absolutely void, or lay it open to collateral impeachment, or impair its efficacy while it stands.

§ 184. Judgment in Action not at Issue.

It has been held, in several cases in Mississippi, that judgments rendered without issues to be determined by them are nullities.⁹³ And in some other states there are expressions to the effect that, before a cause is at issue, either expressly or tacitly, no final judgment can be validly rendered.⁹⁴ Undoubtedly a judgment so pronounced would be irregular and erroneous, as being contrary to the course of law and the usual practice of the courts, and would therefore be liable to reversal. But whether it should be regarded as entirely void, a mere nullity, is a question involved in more difficulty. That no such result could properly follow is contended by Mr. Freeman, on the general principle that "when jurisdiction over both the parties and subject-matter is once obtained, no error committed in

⁸⁹ *Ellison v. New Bedford Five Cent. Sav. Bank*, 130 Mass. 48; *Leonard v. Robbins*, 13 Allen (Mass.) 217.

⁹⁰ *Peoples v. Norwood*, 94 N. C. 167. And see *Mengis v. Fifth Ave. Ry. Co.*, 81 Hun, 480, 30 N. Y. Supp. 999.

⁹¹ *Gay v. Grant*, 101 N. C. 206, 8 S. E. 90. But without such consent a judgment recovered in a court of record will be set aside where no complaint or written statement of the cause of action was filed therein. *Beckett v. Cuenin*, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399.

⁹² *Mann v. Martin*, 14 Bush (Ky.) 763.

⁹³ *Steele v. Palmer*, 41 Miss. 88; *Armstrong v. Barton*, 42 Miss. 506; *Porterfield v. Butler*, 47 Miss. 170, 12 Am. Rep. 329.

⁹⁴ *Braunsdorff v. Fay*, 18 La. Ann. 187; *Du Bay v. Uline*, 6 Wis. 588; *Baltimore & O. R. Co. v. Faulkner*, 4 W. Va. 180.

the exercise of that jurisdiction can make the proceedings or judgment of the court void." ⁹⁵ This may readily be conceded. And yet, in no proper sense can a court of law be said to have jurisdiction if there is no specific question or controversy submitted for its determination. It is not enough that the parties are properly in court. That does not give the tribunal power to adjudicate any and all matters of difference between them. When we speak of "jurisdiction of the subject-matter," we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle. And how can a court acquire jurisdiction of the particular contention, except it be clearly marked out and precisely defined by the pleadings of the parties? And how can that be done, in any mode known to the law, save by the formation of a regular issue? There is therefore plausible ground for holding that if the record fails to show an issue to be determined, the judgment will be void on its face.

§ 185. Findings necessary to support the Judgment.

In some of the states there are statutes requiring a finding of facts and conclusions of law to be filed in the action, to serve as a basis for the judgment. But the disposition is to regard this requirement as not vitally necessary to the validity of the judgment. As to parties before the court, and respecting a matter within its jurisdiction, the cases hold that a judgment without a finding of facts to support it is not void, but at most merely erroneous and subject to reversal by a suitable proceeding in a tribunal having authority to review it. ⁹⁶ So where a court of record, having jurisdiction, ren-

⁹⁵ *Freem. Judgm.* § 135a. And in *Doyle v. Smith*, 1 Cold. (Tenn.) 15, it is held that the want of a plea or issue constitutes at most but an error in the judgment, but does not make it void, or affect the authority of the sheriff to execute writs which may be issued upon it.

⁹⁶ *Connolly v. Edgerton*, 22 Neb. 82, 34 N. W. 76; *Lubker v. Grand Detour Plow Co.*, 53 Neb. 111, 73 N. W. 457; *Springfield F. & M. Ins. Co. v. Hamby*, 65 Ark. 14, 45 S. W. 472; *McCreary v. Robinson* (Tex. Civ. App.) 57 S. W. 682. But in Michigan it is considered that such a judgment has no greater validity than a judgment rendered upon a jury trial without a verdict. *Stansell v. Corning*, 21 Mich. 242. And see *Texas Brewing Co. v. Meyer* (Tex. Civ. App.)

ders a judgment upon a petition filed before it against a defendant upon default of answer, and the statute requires the court in the particular proceeding to take evidence and make special findings, and the court fails to comply with the statutory requirement, the judgment may be erroneous but is not void.⁹⁷ And where a court, at the conclusion of a trial, has ordered judgment, but omits to make and file findings of fact and conclusions of law, as prescribed by statute, such findings and conclusions may be made and filed by the court after judgment *nunc pro tunc*.⁹⁸ But in Michigan it is held that a judgment entered up before the findings are finally completed and filed is premature, and is to be regarded as provisional action merely, which only becomes perfected when the findings are completed and filed.⁹⁹ If the findings are required to be specific, a general finding for the plaintiff will not support a judgment in his favor.¹⁰⁰

§ 186. Judgment must follow Verdict.

If the defendant in an action has recovered a verdict upon a plea which confesses the plaintiff's cause of action and does not sufficiently avoid it, judgment should be entered for the plaintiff notwithstanding the verdict.¹⁰¹ Again, if the verdict is clearly wrong, this may furnish ground for arresting the judgment or granting a new trial.¹⁰² But if no such reasons exist for disregarding or setting aside the verdict, the judgment, to be valid, must follow it and accord with it. We have already seen that this is an established rule in respect to the amount of the judgment.¹⁰³ And it may also be stated as a general principle that the judgment must conform to the verdict, not only as to the amount, but also as to the measure

38 S. W. 263; *Maynard v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 14 Utah, 458, 47 Pac. 1030; *Williams v. Williams*, 104 Cal. 85, 37 Pac. 784; *National Horse-Importing Co. v. Novak*, 95 Iowa, 596, 64 N. W. 616.

⁹⁷ *Garner v. State*, 28 Kan. 790.

⁹⁸ *Swanstrom v. Marvin*, 38 Minn. 359, 37 N. W. 455.

⁹⁹ *People v. Judge of Circuit Court*, 34 Mich. 62.

¹⁰⁰ *Ladd v. Tully*, 51 Cal. 277.

¹⁰¹ *Supra*, § 16.

¹⁰² *Supra*, § 104.

¹⁰³ *Supra*, § 142.

of relief and as to the parties against whom the finding is made.¹⁰⁴ Moreover the judgment cannot go beyond the verdict in settling the rights of the parties, or admeasuring the recovery, or declaring or foreclosing liens.¹⁰⁵ In cases where the statutes provide for the returning of special verdicts, and enact that "if a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter," it is held that a judgment should be rendered pursuant to the general verdict in all cases where the facts constituting the special finding are not inconsistent with the general verdict.¹⁰⁶ Where the court has permitted the jury to amend its verdict, it is error to enter judgment on the original verdict, rejecting the amendment.¹⁰⁷ It is also error to render a judgment upon a verdict which finds upon a part only of the issues.¹⁰⁸ Finally, where the verdict is for the plaintiff, subject to a question of law reserved, a subsequent judgment for him should be entered, not on the point reserved, but on the verdict.¹⁰⁹

¹⁰⁴ *Morsch v. Besack*, 52 Neb. 502, 72 N. W. 953; *Bell v. Otts*, 101 Ala. 186, 13 South. 43, 46 Am. St. Rep. 117; *Hellman v. Schwartz*, 44 Ill. App. 84. In an action against two defendants, who seek no affirmative relief, a verdict for "the defendant" will support a judgment that plaintiff take nothing, and that defendants, (by name) recover their costs. *Butler v. Estrella Raisin Vineyard Co.*, 124 Cal. 230, 56 Pac. 1040. So where, in an action against principal and surety, the latter alone defends, and the verdict is against the principal only, the legal effect is a finding in favor of the surety, and a judgment accordingly is not erroneous. *Howard v. Johnson*, 91 Ga. 319, 18 S. E. 132.

¹⁰⁵ *Freiberg v. Brunswick-Balke-Collender Co.* (Tex.) 16 S. W. 784; *Boyd v. Ernst*, 36 Ill. App. 583. But where the evidence authorizes the court to direct a verdict, the court may, in rendering judgment, go further than the verdict in adjusting the equities of the parties. *Smith v. Smith*, 23 Tex. Civ. App. 304, 55 S. W. 541.

¹⁰⁶ *Quaid v. Cornwall*, 13 Bush (Ky.) 601.

¹⁰⁷ *George v. Belk*, 101 Tenn. 625, 49 S. W. 748.

¹⁰⁸ *Hackett v. Jones*, 34 Ill. App. 562. When the jury fail to pass upon an issue, the court has no right to render a judgment thereon, however clear and undisputed the evidence may be. *First Nat. Bank v. Vander Stucken* (Tex. Civ. App.) 37 S. W. 170.

¹⁰⁹ *Ringle v. Pennsylvania R. R.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628.

CHAPTER XI.**THE VALIDITY OF JUDGMENTS AS AFFECTED BY THE CHARACTER OR STATUS OF THE PARTIES.**

- § 187. Against what Parties Judgments may be Rendered.
- 188. Judgments against Married Women at Common Law.
- 189. For Debt contracted Dum Sola.
- 190. Effect of Omission to plead Coverture.
- 191. Under partially enabling Statutes.
- 192. Statutes removing Disability of Coverture.
- 193. Judgments against Infants.
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§ 187. Against what Parties Judgments may be Rendered.

Normally, all persons, natural or artificial, may be made defendants in a judgment. In theory of law, all persons who live under the protection of a particular sovereignty are subject to its laws and are within the power and authority of its courts, so far as their actions come within the jural sphere. But the theory is modified to a certain extent by the technical rules relating to abnormal conditions of status. Persons who are under the various legal disabilities, though

not exempt from the jurisdiction of the courts, are protected by special provisions as to the cases and the manner in which proceedings may be had against them. Their full and free personality, and therefore their accountability, is thus abridged by the peculiarity of their condition. The same is true, in even greater degree, of those whose personality is suspended, for juristic purposes, by natural or civil death. In respect to the latter, it no longer occupies a prominent place in the law, though there are still circumstances in which a man may be considered, strictly or by analogy, as *civiliter mortuus*. And where this doctrine still survives, it will always incapacitate the man from suing or being sued, and of course from being a debtor by judgment. Thus a judgment obtained against a man after the filing of his petition in bankruptcy could not create a lien upon his estate. "The court will inquire whether in fact the judgment was not entered after the petition was filed, and if so, will treat the judgment as of no more validity than if entered against a deceased person. So far as regards the disposition of his property, or the control of suits pending against him, the bankrupt, from the time his petition is filed, may be considered as *civiliter mortuus*."¹ In some of the states, the same suspension of personality, or civil death, is predicated of a felon confined in the penitentiary. Being dead in law, he cannot be sued, and if his conviction takes place and his sentence begins while an action is pending against him, a judgment afterwards rendered therein is null.² And during the existence of slavery, the law denied any juristic personality to the beings so held in bondage. Consequently, a judgment entered against a slave was considered as entirely destitute of any legal efficacy or validity.³

¹ *McLean v. Rockey*, 3 McLean, 235, Fed. Cas. No. 8,891. And see *International Bank v. Sherman*, 101 U. S. 406, 25 L. Ed. 866.

² *Rice County Com'rs v. Lawrence*, 29 Kan. 158; *Neale v. Utz*, 75 Va. 480. But see *Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

³ *Wood v. Ward*, 2 Flipp. 336, Fed. Cas. No. 17,966.

§ 188. Judgments against Married Women at Common Law.

At common law, on account of the merger of the wife's personality in that of the husband, she was incapacitated for almost every species of juristic action; and therefore, being unable to bind herself by engagements, the breach of which would give rise to a cause of action, she could not, at law, be prosecuted to judgment. It is true that husband and wife might be sued jointly for the wife's tort. But this does not in reality change the rule, because the addition of the wife was (at common law) a matter of form only, the husband being the party who would be looked to for satisfaction of the judgment. Accordingly it is held, on common law principles, that a personal judgment against a married woman is void and a mere nullity.⁴ A promissory note, for example, signed by a feme covert cannot be enforced against her by any proceeding at law, and a judgment by default against her on such note is a nullity, and equity will enjoin the enforcement of it against her separate estate.⁵ The doctrine is stated, in its most strict and uncompromising form, in a West Virginia decision, as follows: A judgment rendered by a court of common law against a married woman, either in her own name or in the name of a company, under which she does business, upon a contract made during her coverture, is absolutely void, and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose, and the judgment may be attacked in any collateral proceeding.⁶ It was otherwise in equity. For there the wife was considered to have a separate personality for some purposes, and consequently she might be sued in chancery in respect to her separate estate. But even in those courts she could not walk with perfectly free foot, and safeguards were provided for her analogous to those obtaining at common law.⁷

⁴ *Morse v. Toppan*, 3 Gray (Mass.) 411; *Higgins v. Peltzer*, 49 Mo. 152; *Weil v. Simmons*, 66 Mo. 617; *Griffith v. Clarke*, 18 Md. 457; *Rubel v. Bushnell*, 91 Ky. 251, 15 S. W. 520. See *Smith v. Borden*, 17 R. I. 220, 21 Atl. 351, 11 L. R. A. 585, 33 Am. St. Rep. 867.

⁵ *Griffith v. Clarke*, 18 Md. 457; *Hoffman v. Shupp*, 80 Md. 611, 31 Atl. 505.

⁶ *White v. Foote Lumber & Manuf'g Co.*, 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650.

⁷ See *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840.

§ 189. For Debt contracted *Dum Solo*.

If a suit is begun against a woman while she is sole, she cannot deprive the plaintiff of his remedy or abate the action, even at common law, by marrying; but the suit will proceed without any regard to her coverture, and a personal judgment may be rendered against her.⁸ The same is true if the suit, though not instituted until after marriage, is upon her debt contracted while single. That is, if the declaration shows that the contract was made while the defendant was a widow or sole, her coverture at the time of the suit is no obstacle to the recovery of such a judgment against her as might be rendered against any other defendant.⁹ This case is also specifically covered, in several of the states, by statutes which provide for and authorize a personal judgment against a married woman upon her contract made before marriage, to be enforced, however, only against her separate property.¹⁰ And in some others, the law provides that an action upon the wife's debt, contracted before the marriage, must be brought against the husband and wife jointly.¹¹ Dissolution of the marriage of course restores both parties to their former status. A judgment against a divorced wife for her debt, and also against the husband as to any property received by the marriage, if void as to him, cannot prejudice her and is not void as to her.¹²

⁸ *Doyle v. White*, Cro. Jac. 323; *King v. Jones*, 2 Ld. Raym. 1525; *Evans v. Chester*, 2 Mees. & W. 847; *Cooper v. Hunchin*, 4 East, 521; *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581; *Phillips v. Stewart*, 27 Ga. 402; *Evans v. Lipscomb*, 28 Ga. 71; *Sackett v. Wilson*, 2 Blackf. (Ind.) 85; *Parker v. Steed*, 1 Lea (Tenn.) 206.

⁹ *Travis v. Willis*, 55 Miss. 557.

¹⁰ Rev. St. Me. 1883, c. 61, § 4; Acts N. Y. 1853, c. 576, § 1; Acts Md. 1880, p. 253; Acts Va. 1875, c. 359, § 3; Rev. St. W. Va. 1878, c. 122, § 10; Code N. C. § 1823; Gen. St. Colo. § 2275; Comp. Laws Wyo. c. 82, § 7; 2 Rev. St. Ind. § 5127, construed in *Smith v. Beard*, 73 Ind. 159.

¹¹ Pub. St. R. I. c. 166, § 16; 2 Rev. St. Ind. § 5127; Acts Md. 1880, p. 253; Acts Va. 1875, c. 359, § 3; Rev. St. W. Va. 1878, c. 122, § 10; Gen. St. Colo. § 2275; Comp. Laws Wyo. c. 82, § 7.

¹² *Joyes v. Hamilton*, 10 Bush (Ky.) 544.

§ 190. Effect of Omission to plead Coverture.

The most difficult question which has arisen in connection with this subject, and the one which has chiefly engaged the attention of the courts, is this: What effect is to be given to a personal judgment rendered against a married woman, by default, in an action to which her coverture, if pleaded, would have been a complete defense? Is it a mere nullity, or is it voidable on motion, or is it merely erroneous? In some of the states, the doctrine is firmly held that such a judgment is absolutely void and may be so treated whenever it is brought in question.¹³ These decisions proceed upon the ground of the total disability of a feme covert to contract the species of debt assumed by the hypothesis, her incapacity to retain an attorney to appear and plead for her, and the consequent want of jurisdiction in the court for lack of a juristic person to act upon. Some of the decisions cited are ably considered and well reasoned.

On the other hand, it is held by a long line of authorities (including some English cases) that such a judgment against a married woman is not void, and even though erroneous or voidable, by reason of the absence of enabling statutes, is still valid and binding upon her in any collateral proceeding and until set aside or reversed in some proper manner.¹⁴ The practical importance of the question,

¹³ *Morse v. Toppan*, 3 Gray (Mass.) 411; *Norton v. Meader*, 4 Sawy. 603. Fed. Cas. No. 10,351; *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679; *Graham v. Long*, 65 Pa. 383; *Swayne v. Lyon*, 67 Pa. 439; *Vandyke v. Wells*, 103 Pa. 49; *Griffith v. Clarke*, 18 Md. 457; *Davis v. Foy*, 15 Miss. 64; *Cary v. Dixon*, 51 Miss. 593; *Mallett v. Parham*, 52 Miss. 921; *White v. Bird*, 20 La. Ann. 281; *Parsons v. Spencer*, 83 Ky. 305; *Stevens v. Deering* (Ky.) 9 S. W. 292; *Higgins v. Peltzer*, 49 Mo. 152; *Well v. Simmons*, 66 Mo. 617; *Corrigan v. Bell*, 73 Mo. 53.

¹⁴ *Dick v. Tolhausen*, 4 Hurl. & N. 695; *Moses v. Richardson*, 8 Barn. & C. 421; *Frazier v. Felton*, 8 N. C. 231; *Green v. Branton*, 16 N. C. 504; *Vick v. Pope*, 81 N. C. 22; *Glover v. Moore*, 60 Ga. 189; *Mashburn v. Gouge*, 61 Ga. 512; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Phelps v. Brackett*, 24 Tex. 236; *Spalding v. Wathen*, 7 Bush (Ky.) 659; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Howell v. Hale*, 5 Lea (Tenn.) 405; *Sheppard v. Kendle*, 3 Humph. (Tenn.) 81; *Keith v. Keith*, 26 Kan. 26; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93; *Burk v. Hill*, 55 Ind. 419; *Wilson v. Coolidge*, 42 Mich. 112, 3

it will be observed, comes to light when we inquire whether such a judgment may be impeached collaterally, and what is its effect upon third persons. For this will depend entirely upon whether it is void or voidable. And the decisions which hold it to be merely voidable generally support their conclusion by a species of argument *ab inconvenienti*, namely, the harm that might accrue to innocent strangers if such judgments were to be treated as mere nullities. Thus the supreme court of California says: "There would be no safety in purchasing at judicial sales, under judgments rendered after due service of process on female defendants, if the title of the purchaser could be defeated by proof, in a collateral action, that the defendant in the judgment was a married woman at the time of the institution of the suit, or that she was incapable in law of contracting the debt for which the judgment was rendered."¹⁵ In order to reach this result it is necessary to agree that, no matter what the status of the woman may have been, if she was duly served with process, she was fully within the jurisdiction of the court, so that the judgment, though upon a contract which she had no power to make, would be at most erroneous as a matter of law. And this is the ground of the decision in the recent important case of *McCurdy v. Baughman*,¹⁶ where the court, after a critical and exhaustive review of the authorities, announced the doctrine stated at the beginning of this paragraph, and added: "Indeed, this is but to reassert the doctrine constantly maintained in this court, that 'the judgment or final order of a court having jurisdiction of the subject-matter and parties, however erroneous, irregular, or informal such judgment or order may be, is valid until reversed or set aside.'" In Alabama it is held that in the absence of fraud in its procurement, or other special cause shown, a consent decree is as binding on a married woman as on a person who is *sui juris*.¹⁷ In another state it is considered that as a judgment against a married woman may be valid (for it may be for her tort or for a debt contracted before marriage), in a proceeding

N. W. 285; *Vantilburg v. Black*, 3 Mont. 459; *Gambette v. Brock*, 41 Cal. 78; *Guthrie v. Howard*, 32 Iowa, 54; *Farris v. Hayes*, 9 Or. 81.

¹⁵ *Gambette v. Brock*, 41 Cal. 78.

¹⁶ 43 Ohio St. 78, 1 N. E. 93.

¹⁷ *Winter v. City Council of Montgomery*, 79 Ala. 481.

to enforce such a judgment it should not be held conclusively to be void, but neither should the defendant be estopped from showing that it is void.¹⁸ And in Pennsylvania the court has lately held—though without departing from its earlier rulings—that a judgment by default against a married woman, in an action to which she might have pleaded coverture, is impervious to collateral attack, and voidable at most, when the proceeding was in rem, as, for the enforcement of a mechanic's lien.¹⁹

The solution of this vexed question must depend upon the view which we are to take of the common law status of a married woman. If it is merely a protection,—a barrier which she may raise in the path of one who pursues her at law, and which the courts are bound to erect in her behalf,—then it may readily be conceded that she may be brought within the jurisdiction by a proper service of process, so that the subsequent proceedings will at any rate not be void, although the court, to save itself from error, should not give a personal judgment against her on a debt she could defend against by coverture. This theory, however, is far from satisfactory as an account of the common law notion. The doctrine seems rather to have been that marriage, except for certain special purposes, put the personality of the wife entirely in abeyance. And therefore, in the generality of cases, her contracts and business transactions could have no validity whatever; for it is only a juristic person whose acts can have the effect of creating or transferring rights. For the same reason she would be beyond the authority of the courts,—as much so as the sovereign himself,—and no court could acquire jurisdiction of her (in the cases falling within our hypothesis), because process cannot issue except against a person known to the law as an individual. If, then, a suit was instituted against her, and she suffered a default, still no valid judgment could be given. The whole proceeding would be void ab initio and could result in nothing effectual. It seems to us that the vital point is clearly indicated in the following remark of the court of appeals of Kentucky: "If, as is unquestionably true, a judgment is void if the court rendering it had no jurisdiction for want of service of process, then it seems to us that it should be

¹⁸ *Parsons v. Spencer*, 83 Ky. 305.

¹⁹ *Shryock v. Buckman*, 121 Pa. 248, 15 Atl. 480, 1 L. R. A. 533.

equally so if the one served with process is incapacitated by law from retaining an attorney, or has no such legal existence as authorizes a personal liability. In the one case the court has no jurisdiction, and in the other there is nothing within its jurisdiction which has a legal existence."²⁰

§ 191. Under Partially enabling Statutes.

Thus far we have considered the validity of judgments against married women at common law. It is now necessary to consider the enabling statutes which, both in England and in most of the states, have introduced the most important changes in their legal powers and relations. These statutes may be broadly divided into two

²⁰ *Parsons v. Spencer*, 83 Ky. 305. On another appeal in the same case (*Spencer v. Parsons*, 89 Ky. 577, 13 S. W. 72, 25 Am. St. Rep. 555), the court sustained its ruling by the following convincing line of argument: "Generally, a feme covert has no personality in law. She is not recognized by it save in a few excepted cases, so that a personal judgment can be taken against her. The contracts of an infant are in general voidable only, while those of a married woman are void. True, she may, under certain circumstances, bind her separate estate, but not herself personally; the reason being that she has no personal identity in law. It does not follow because, as an exceptional case, a personal judgment may go against her for tort, or upon a contract made by her when single, the reason being that her status at the making of it is regarded as following it to its completion, that therefore all personal judgments against her are merely erroneous, and not void. If she has no legal status in court, certainly it should have no jurisdiction to render a judgment binding her personally. Her existence is merged in that of the husband, and she can make no contract binding herself personally, or subjecting her to a judgment in personam. Her contract is void in law. In equity, it may be enforced against her separate estate, if she so intended; but she incurs no personal liability by it, because she has, legally speaking, no personal existence, and it must be satisfied out of her estate by in rem proceedings. She is by law incapacitated from retaining an attorney, and no personal liability arises, because she has no legal existence. There is, therefore, so far as she is concerned, no person within the court's jurisdiction. If a personal judgment be rendered upon a claim, the alleged liability is merely placed upon an advanced footing, and if originally it was void as to her, then the unauthorized judgment should not estop her from resisting it, from the fact that she was not *sui juris*, and had no such legal existence as authorized a personal judgment. We are aware there is a conflict of authority in this country upon this question; but the views above advanced seem to us not only supported by reason, but we know they are sustained by such high authority as the supreme courts of Pennsylvania, Missouri, and other states."

classes, those which fully emancipate the wife, and those which release her only partially from the common law disabilities. Statutes of the latter class usually give the married woman power to make contracts with respect to her separate estate, to incur debts for its repair and improvement, to make herself liable for supplies for the maintenance of the family, and to sue and be sued in respect to such contracts and debts. It is generally held, under an enabling statute allowing a married woman to charge her separate estate by certain kinds of contracts beneficial to herself or the estate, that a judgment against her, founded on such a contract, will be erroneous (or void, according to the doctrine prevailing in the particular state), unless the record itself shows that the debt is one for which her separate estate is liable.²¹ Thus, under a law in Pennsylvania, that a judgment against a wife in a joint action, so as to bind her separate estate, shall not be rendered unless it shall be proved that the debt sued for was contracted by the wife for necessaries for the family, a default judgment which does not show that any testimony was taken is void.²² And in any case no general judgment can be given; it must be limited to the separate property of the wife in reference to which the contract was made.²³ In Alabama, the judgment must specify the property to be bound. "A general judgment, or a judgment which pretermits the ascertainment of the estate of the wife condemned to its satisfaction cannot be rendered. * * * There can be no personal judgment against the wife; the only judgment that

²¹ Lewis v. Perkins, 36 N. J. Law, 133; Swayne v. Lyon, 67 Pa. 436; Hecker v. Haak, 88 Pa. 238; Magruder v. Buck, 56 Miss. 314; Cary v. Dixon, 51 Miss. 593; Albree v. Johnson, 1 Flip. 341, Fed. Cas. No. 146; White v. Ballio, 12 La. Ann. 663; Robson v. Shelton, 14 La. Ann. 712; Trimble v. Miller, 24 Tex. 214; Menard v. Sydnor, 29 Tex. 257; McGlaughlin v. O'Rourke, 12 Iowa, 459; March v. McCardle, 1 Pa. Dist. R. 677; Green v. Ballard, 116 N. C. 144, 21 S. E. 192. Compare Weldy v. Young, 21 Pa. Co. Ct. R. 15.

²² Gould v. McFall, 111 Pa. 66, 2 Atl. 403; Brown v. McKinney, 130 Pa. 365, 18 Atl. 642; Rauch v. Young, 9 Pa. Co. Ct. R. 416.

²³ Crockett v. Derlot, 85 Va. 240, 3 S. E. 128; Foertsch v. Germuller, 9 App. D. C. 351; Holtby v. Hodgson, 24 Q. B. Div. 103. In an action on an English judgment against a married woman, containing a provision limiting its execution to her separate estate, it is erroneous to enter a general personal judgment against the defendant, without adding thereto the limitation imposed by the English judgment. Sanguinetti v. Roche, 60 Hun, 584, 15 N. Y. Supp. 185.

can be rendered is a judgment in rem, a judgment of condemnation of the statutory estate described in the complaint."²⁴ So where an enabling statute allows her to bind her separate real estate, a judgment against the land is valid, but not a personal judgment against the woman.²⁵ And in an action against a married woman to dispossess her of lands, no personal judgment, either for damages or costs, can be rendered against her.²⁶ But her coverture does not prevent the rendition of a decree against lands descended to her, for contribution to the other heirs on account of a debt of the ancestor which they have paid.²⁷ Where a married woman is allowed to mortgage her separate estate, but there is no statute allowing her to sue and be sued as a feme sole, the remedy is by charging the property in equity; but a personal judgment against her on the mortgage note is erroneous.²⁸ According to the law in Louisiana, a judgment against a married woman is void and of no effect when her husband has not been cited with her, and she is not authorized by him or by the judge to defend the suit.²⁹ As to confessions of judgment by married women, under these enabling statutes, the reader is referred to section 55 of this volume.

§ 192. Statutes removing Disability of Coverture.

In many of the states there are statutes which abolish all disabilities from coverture and allow a wife to sue and be sued in like manner as if she were sole.³⁰ In these states it is universally held

²⁴ *Lee v. Ryall*, 68 Ala. 354.

²⁵ *Sweeney v. Smith*, 15 B. Mon. (Ky.) 325, 61 Am. Dec. 188.

²⁶ *Steed v. Knowles*, 84 Ala. 205, 3 South. 897.

²⁷ *Winston v. McAlpine*, 65 Ala. 377.

²⁸ *Johnson County v. Rugg*, 18 Iowa, 137; *Wolff v. Van Metre*, 19 Iowa, 134; *Reed v. King*, 23 Iowa, 500; *Patton v. Stewart*, 19 Ind. 233; *Kirby v. Childs*, 10 Kan. 639; *Pemberton v. Johnson*, 46 Mo. 342; *Keating v. Korfhage*, 88 Mo. 524. The same is true of actions on mechanics' liens. *Burgwald v. Weippert*, 49 Mo. 60; *Seeman v. Weippert*, 49 Mo. 61.

²⁹ *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132; *Washington v. Hackett*, 19 La. Ann. 146.

³⁰ Pub. St. Mass. c. 147, § 7; Gen. Laws N. H. c. 183, § 12; Acts Vt. 1884, No. 140, § 1; Code Civ. Proc. N. Y. § 450; Rev. St. N. J. "Married Women," 10, 11; Act Pa. June 3, 1887, § 2 (P. L. 333); Rev. St. Ohio, § 4996; Rev. St. Ill. c. 68, § 1; Rev. Code Iowa, § 2562; Gen. St. Minn. c. 66, § 29; Comp.

that a personal judgment against a married woman, if otherwise regular, is as valid and binding as any other.³¹ Thus, where the property of a married woman is levied upon by her husband's creditors as his property, and she interposes a claim, she is bound, just as any other suitor would be, by the judgment in the claim case.³² So where she prefers a suit against her trustee to enforce the trust, or to charge the trustee with maladministration, she is concluded by a judgment against her.³³

§ 193. Judgments against Infants.

In respect to their legal disabilities, infants occupy a position analogous to that of married women. But the courts have shown a much stronger disposition to sustain judgments given against the former than those rendered against the latter. Assuming that an infant defendant has been brought before the court by a proper service of process, it is regular and orderly to appoint a guardian ad litem for him, who then assumes the defense of the action and protects the interests of the minor. But if a judgment is rendered by a court having jurisdiction of the parties and subject, it is held, by the great preponderance of authorities, that it will not be void because the defendant was an infant and no guardian ad litem was appointed, although it will be irregular and liable to reversal, or voidable on a

Laws Kan. c. 62, § 3; Comp. St. Neb. pt. 1, c. 52, § 3; Acts Md. 1882, c. 265; Laws Or. 1878, p. 93, § 7; Gen. St. Colo. § 2279; Code Wash. § 2396; Code Civ. Proc. Dak. § 77; Comp. Laws Wyo. 1882, c. 68; Code Miss. § 1167; Comp. Laws Utah, § 1021.

³¹ Labaree v. Colby, 99 Mass. 559; Goodnow v. Hill, 125 Mass. 587; Vosburgh v. Brown, 66 Barb. 421; Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437; First Nat. Bank v. Garlinghouse, 53 Barb. 615; Wilson v. Herbert, 41 N. J. Law, 454, 32 Am. Rep. 243; Huff v. Wright, 39 Ga. 41; Glover v. Moore, 60 Ga. 189; Hart v. Grigsby, 14 Bush (Ky.) 542; McCue v. Sharp (Ky.) 45 S. W. 770; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Patrick v. Littell, 36 Ohio St. 79, 38 Am. Rep. 552; Van Metre v. Wolf, 27 Iowa, 341; Jones v. Glass, 48 Iowa, 345; Davis v. First Nat. Bank of Cheyenne, 5 Neb. 242, 25 Am. Rep. 484; Rogers v. Weil, 12 Wis. 664; Platner v. Patchin, 19 Wis. 333; Leonard v. Townsend, 26 Cal. 435; Marlow v. Barlew, 53 Cal. 456; Alexander v. Bouton, 55 Cal. 15.

³² Lewis v. Gunn, 63 Ga. 542.

³³ Rammelsberg v. Mitchell, 29 Ohio St. 22.

proper proceeding for that purpose.³⁴ The theory is, that the appointment of a guardian is not a prerequisite to the jurisdiction of the court; it attaches upon due service of the process being made. Consequently, the omission to appoint a guardian does not impair the authority of the court to proceed in the case, but is at most an irregularity in the exercise of its lawful jurisdiction, which, on settled principles of law, may impregnate its judgment with error, but cannot render it absolutely null. Very important results follow from the placing of such sentences in the category of voidable judgments, as distinguished from those which are entirely void. For, first, the judgment will stand as a valid adjudication, against the infant and all others who may be interested, until it is set aside or reversed.³⁵ Again, the omission to appoint a guardian ad litem will not vitiate the judgment on a collateral attack; it is only voidable by a direct proceeding.³⁶ And if it is set aside, the interest of a bona fide purchaser under the judgment without notice will not be affected.³⁷

³⁴ *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840; *Tucker v. Bean*, 65 Me. 352; *Barber v. Graves*, 18 Vt. 292; *Crockett v. Drew*, 5 Gray (Mass.) 339; *Austin v. Charleston Fem. Sem.*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497; *Swan v. Horton*, 14 Gray (Mass.) 179; *Hill v. Keyes*, 10 Allen (Mass.) 258; *Sims v. New York College of Dentistry*, 35 Hun (N. Y.) 344; *Moore v. McEwen*, 5 Serg. & R. (Pa.) 373; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Roberts v. Stanton*, 2 Munf. (Va.) 129, 5 Am. Dec. 463; *Larkins v. Bullard*, 88 N. C. 35; *Stancill v. Gay*, 92 N. C. 462; *England v. Garner*, 90 N. C. 197; *Finley v. Robertson*, 17 S. C. 435; *Cook v. Rogers*, 64 Ala. 406; *Taylor v. Rowland*, 28 Tex. 293; *Montgomery v. Carlton*, 56 Tex. 361; *Martin v. Weyman*, 28 Tex. 460; *Wallis v. Stuart*, 92 Tex. 568, 50 S. W. 567; *Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323; *Simmons v. McKay*, 5 Bush (Ky.) 25; *Allison v. Taylor*, 6 Dana (Ky.) 87, 32 Am. Dec. 68; *Walkenhorst v. Lewis*, 24 Kan. 420; *Trapnall's Adm'x v. State Bank*, 18 Ark. 53; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *St. Clair v. Smith*, 3 Ohio, 355; *Blake v. Douglass*, 27 Ind. 416; *Carver v. Carver*, 64 Ind. 195; *Peak v. Shasted*, 21 Ill. 137, 74 Am. Dec. 83; *Quigley v. Roberts*, 44 Ill. 503; *Bonnell v. Holt*, 89 Ill. 71; *Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468; *Webster v. Page*, 54 Iowa. 461, 6 N. W. 716; *Drake v. Hanshaw*, 47 Iowa, 291; *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Stupp v. Holmes*, 48 Mo. 89; *Balley v. McGinniss*, 57 Mo. 362; *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424.

³⁵ *England v. Garner*, 90 N. C. 197; *Bernecker v. Miller*, 44 Mo. 102; *Simmons v. McKay*, 5 Bush (Ky.) 25; *Frierson v. Travis*, 39 Ala. 150.

³⁶ *Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468; *Manson v. Duncanson*, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105.

³⁷ *England v. Garner*, 90 N. C. 197.

And further, the avoidance of the judgment is at the election of the defendant; upon attaining his majority, he may execute a written release of errors, which will have the effect to confirm the judgment.³⁸ And while the courts will always be careful of the rights of infants, they will not in all cases set aside irregular judgments against them as of course; they will refuse to do so where it appears from the record or otherwise that the infant suffered no substantial injustice.³⁹ As respects proceedings to probate a will, no appointment of a guardian ad litem for any minor interested in the testator's estate is necessary, and the probate is valid, notwithstanding the omission of such appointment.⁴⁰

§ 194. Service of Process on Infants.

It is indispensable to the validity of a judgment against an infant that the record should show that he was made a party in some legal and effectual mode.⁴¹ Ordinarily the statute requires that personal service be made upon the infant, if over the age of fourteen years (and sometimes upon the guardian also), and upon a parent, guardian, or person having charge of the minor, if under that age. This requirement is jurisdictional; the law must be strictly followed; and neither the infant nor his guardian can accept service, or waive the due service of process.⁴² The service, as stated, should be personal.

³⁸ Hill v. Keyes, 10 Allen (Mass.) 258.

³⁹ Syme v. Trice, 96 N. C. 243, 1 S. E. 480; McCrosky v. Parks, 13 S. C. 90; Phillips v. Dusenberry, 8 Hun (N. Y.) 348; Bickel v. Erskine, 43 Iowa, 213; Fuller v. Smith, 49 Vt. 253; Rankin v. Kemp, 21 Ohio St. 651; Kemp v. Cook, 18 Md. 130. 79 Am. Dec. 681; Krickow v. Pennsylvania Tar Manuf'g Co., 87 Ill. App. 653.

⁴⁰ In re Mousseau's Will, 30 Minn. 202, 14 N. W. 887.

⁴¹ Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Abdil v. Abdil, 26 Ind. 287; Winston v. McLendon, 43 Miss. 254.

⁴² Lenox v. Notrebe, 1 Hemp. 251, Fed. Cas. No. 8,240c; Genobles v. West, 23 S. C. 154; Young v. Young, 91 N. C. 359; Winston v. McLendon, 43 Miss. 254; Taylor v. Walker, 1 Heisk. (Tenn.) 734; Armstrong v. Wyandotte Bridge Co., 1 McCahon, 166; Abdil v. Abdil, 26 Ind. 287; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Good v. Norley, 28 Iowa, 188; Kansas City, St. J. & C. B. R. Co. v. Campbell, 62 Mo. 585. "The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall be strictly followed. An infant is incapable

But it is held in Kentucky, that a judgment against an infant constructively served, without the appointment of a guardian ad litem, is not void, but will stand good until set aside or reversed.⁴³ And where the statute provides for service on non-resident defendants by publication, service may be made in that manner upon non-resident infants.⁴⁴ It is clearly irregular to appoint a guardian ad litem until after the defendant has been duly brought before the court. Yet numerous cases hold that, although the infant was never personally served, or although the service was not in compliance with the statute, or was otherwise defective, still, if a guardian ad litem was appointed and an answer filed and the action defended, the judgment will not be void, though the defendant may have it reversed or set aside.⁴⁵ But some other authorities maintain the rule that where infant defendants are not served with process and do not appear, the court has no authority whatever to appoint a guardian ad litem for them, and no jurisdiction as to them, and a judgment against them is utterly void.⁴⁶ There is something to be said in favor of this position, but both the preponderance of the cases and the drift of judicial thinking appear to be against it. In Illinois, it is held that if service is made upon the infant personally, instead of upon his guardian, as required by the statute, and no guardian ad litem appointed, the court is without jurisdiction.⁴⁷ Similarly, when the infant is under the age of fourteen years, and the summons is not

of making himself or herself a party to an action by accepting service, so as to be bound by a judgment therein. All the formalities prescribed by statute must be complied with." *Finley v. Robertson*, 17 S. C. 435.

⁴³ *Simmons v. McKay*, 5 Bush (Ky.) 25.

⁴⁴ *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; *Walkenhorst v. Lewis*, 24 Kan. 420.

⁴⁵ *Heroman v. Louisiana Institute of Deaf and Dumb*, 34 La. Ann. 805; *Robb v. Irwin's Lessee*, 15 Ohio, 689; *Preston v. Dunn*, 25 Ala. 507; *Nelson v. Moon*, 3 McLean, 319, Fed. Cas. No. 10,111; *Larkins v. Bullard*, 88 N. C. 35; *Grontier v. Puymirol*, 19 Cal. 629; *Cox v. Story*, 80 Ky. 64; *Gibson v. Chouteau*, 39 Mo. 536; *Kremer v. Haynie*, 67 Tex. 450, 3 S. W. 676.

⁴⁶ *Roy v. Rowe*, 90 Ind. 54; *New York Life Ins. Co. v. Bangs*, 103 U. S. 435, 26 L. Ed. 580; *Whitney v. Porter*, 23 Ill. 445. See *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Sprague v. Haines*, 68 Tex. 215, 4 S. W. 371; *McCloskey v. Sweeney*, 66 Cal. 53, 4 Pac. 943; *Ingersoll v. Mangam*, 84 N. Y. 622.

⁴⁷ *Whitney v. Porter*, 23 Ill. 445.

served on his father, mother, guardian, or other person having charge of him, as the statute prescribes, it has been held that a judgment against him is void, and a sale of his land thereunder should be set aside.⁴⁸

Summarizing the conclusions reached in this and the preceding sections as sustained by the majority of the decisions, we may say that, in order that a judgment against an infant may be entirely regular and valid, both due service of process and the appointment of a guardian for the suit are necessary. But if (1) no service is had upon the defendant, but a guardian is appointed and defends, or if (2) the infant is within the jurisdiction of the court by personal citation, but no guardian is appointed for him,—in either of these cases, the judgment will be irregular and voidable, but not a mere nullity. If neither of these requisites is complied with, the judgment will ordinarily be utterly void. To the last statement, however, there may be exceptions in peculiar circumstances. In a case in North Carolina, where it appeared that there was no service of process upon infant defendants, and no guardian appointed to protect their rights, but they were brought in by an order directing them to be made parties with leave to answer, it was held that a judgment taken against them was irregular and might be set aside at any time, but it was not treated as a nullity.⁴⁹ But here we approach the great principle, applicable to all persons alike, that jurisdiction over them is only acquired by service of process in some regular and recognized mode.

§ 195. Appearance by Attorney or Guardian.

Although the law does not regularly permit an infant to defend his case in person or by attorney, yet a judgment against an infant for whom no guardian was appointed, but who appeared by attorney, is voidable only and not void; it may be set aside on motion after he

⁴⁸ *Wornock v. Loar* (Ky.) 11 S. W. 438; Civ. Code Ky. § 52.

⁴⁹ *Larkins v. Bullard*, 88 N. C. 35; *Stancill v. Gay*, 92 N. C. 462. The Code, § 387, making valid judgments against infants and certain other persons, in cases where being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. *Id.*; *Perry v. Adams*, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326.

attains majority, or may be reversed on error.⁵⁰ In a case in California, where, in a suit against infants, there was no personal service upon them, but their general guardian appeared and defended for them, it was held that such appearance gave the court jurisdiction of their persons.⁵¹ And in many of the states a general guardian, already appointed, may appear for the minor,⁵² though in others a guardian ad litem must in all cases be appointed.⁵³

§ 196. Effect of Failure to plead Infancy.

The general disposition of the authorities is to regard the plea of infancy as a personal privilege, which may be waived, and if it is not pleaded, a judgment against the infant is binding upon him.⁵⁴ Still there are some cases which hold,—on analogy to the rule obtaining in equity,—that a judgment by default cannot properly be rendered in any case against an infant.⁵⁵ But the better doctrine is that a

⁵⁰ *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh (Ky.) 280, 13 Am. Dec. 161; *Porter's Heirs v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; *Bourne v. Simpson*, 9 B. Mon. (Ky.) 454; *Austin v. Charleston Fem. Sem.*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Barber v. Graves*, 18 Vt. 290; *Martin v. Weyman*, 26 Tex. 460; *Fulbright v. Cannefox*, 30 Mo. 425; *Marshall v. Fisher*, 46 N. C. 111; *Whitney v. Porter*, 23 Ill. 445. Infants are not estopped, as against their submission of their rights to the protection of the court, by the consent of a solicitor to the entry of a decree, when it does not appear by formal entry, or by proofs, that such solicitor was in fact employed to represent them. *White v. Miller*, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. Ed. 921.

⁵¹ *Smith v. McDonald*, 42 Cal. 484.

⁵² *Wells v. Smith*, 44 Miss. 296; *Mansur v. Pratt*, 101 Mass. 60; *Pierson v. Hitchner*, 25 N. J. Eq. 130; *Pucket v. Johnson*, 45 Tex. 550; *Groufier v. Puymirol*, 19 Cal. 629; *Hinton v. Bland's Adm'r*, 81 Va. 588.

⁵³ *Roach v. Hix*, 57 Ala. 576; *Stammers v. McNaughten*, 57 Ala. 277; *Fitch v. Cornell*, 1 Sawy. 157, Fed. Cas. No. 4,834.

⁵⁴ *Blake v. Douglass*, 27 Ind. 416. One against whom, when of full age, a default judgment was rendered on debts incurred while an infant, cannot, in a proceeding on such judgment, set up his infancy. *Cauthorn v. Berry*, 69 Mo. App. 404.

⁵⁵ *Rhoads v. Rhoads*, 43 Ill. 239; *Peak v. Pricer*, 21 Ill. 164; *Lieserowitz v. West Chicago St. R. Co.*, 80 Ill. App. 248; *Chalfant v. Monroe*, 3 Dana (Ky.) 35; *Massie's Heirs v. Donaldson*, 8 Ohio, 377; *Metcalf v. Alter*, 31 La. Ann. 389. A counterclaim to the suit of an infant prosecuted by next friend cannot be taken as confessed for want of a reply. A guardian ad

judgment rendered upon default against an infant, after due and proper service of a summons upon him, though without the appointment of a guardian ad litem, is erroneous and voidable, but not void. And it is incumbent upon the infant, within a reasonable time after he attains his majority, having knowledge of the judgment, to take steps to avoid it, or he will be bound by his own acquiescence.⁵⁶

§ 197. Decrees in Equity against Infants.

In the courts of equity the rights and privileges of an infant are generally governed by the same rules as at law, except that chancery possesses, and will employ, larger and more diversified means of ascertaining and protecting his interests. In order to make a decree against a minor, the court must acquire jurisdiction of his person in some legal and regular manner. Thus where a decree was rendered against an infant whose guardian was an individual party to the bill, but not in his capacity as guardian, it was considered that the infant was not bound by the decree.⁵⁷ So also, a guardian ad litem should be appointed, just as at law. But though infant defendants may not have a guardian to protect their interests, yet a decree made against them is not for that reason void, but it will stand as valid until reversed.⁵⁸ However, if the decree, under such circumstances, is in favor of the infants, it is valid and cannot be attacked collaterally.⁵⁹ An important and invariable rule, which must be here noticed, is that equity will require an investigation of the merits in every case where infants are concerned; it will not rest satisfied with the fact that no defense is set up; neither will it suffer a guardian to admit away the

litem must be appointed for him and a reply filed, denying every material allegation in the counterclaim, and the circuit court should see that this is done. *Morris v. Edmonds*, 43 Ark. 427.

⁵⁶ *Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493; *Beckley v. Newcomb*, 24 N. H. 359; *Childs v. Lanterman*, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121; *Jackson v. Brunor*, 16 Misc. Rep. 294, 38 N. Y. Supp. 110; *In re Becker*, 28 Hun (N. Y.) 207.

⁵⁷ *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

⁵⁸ *Porter's Heirs v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161.

⁵⁹ *Hanna v. Spotts' Heirs*, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132.

rights of the ward. Hence a decree cannot pass *pro confesso* against an infant.⁶⁰ A similar rule governs the case of consent decrees. "Where infants are concerned, the court will not make a decree by consent, without first referring it to the master to ascertain whether it is for their benefit. But when once a decree has been pronounced without that previous step, it is considered as of the same authority as if it had been referred to the master, and he had made a report thereupon that it would be for their benefit."⁶¹ According to the practice followed in many jurisdictions, a decree against an infant is first entered *nisi*; and a day is given him, after he shall attain full age, to come in and show cause against making the decree absolute. If he omits to do so, the decree becomes final and he is conclusively bound by it.⁶² But whether the omission of the court to secure this privilege to the infant will invalidate the decree, wholly or in part, is not so clear upon the authorities. The cases seem to agree that a decree made absolute in the first instance would not be void, although it might be voidable.⁶³ And there are decisions to the effect that

⁶⁰ *Lane v. Hardwicke*, 9 Beav. 148; *Bank of U. S. v. Ritchie*, 8 Pet. 128, 8 L. Ed. 890; *Walton v. Coulson*, 1 McLean, 120, Fed. Cas. No. 17,132; *Tucker v. Bean*, 65 Me. 352; *Dow v. Jewell*, 21 N. H. 470; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438; *Thompson v. McDermott*, 19 Fla. 852; *Jones v. Jones*, 56 Ala. 612; *Dally's Adm'r v. Reid*, 74 Ala. 415; *Hooper v. Hardie*, 80 Ala. 114; *Wells v. Smith*, 44 Miss. 236; *Mellvoy v. Alsop*, 45 Miss. 365; *Johnson v. McCabe*, 42 Miss. 255; *Greenwood v. City of New Orleans*, 12 La. Ann. 426; *Massie's Heirs v. Donaldson*, 8 Ohio, 377; *Chaffin v. Kimball's Heirs*, 23 Ill. 36; *Reddick v. State Bank*, 27 Ill. 145; *Enos v. Capps*, 12 Ill. 255; *Hamilton v. Gilman*, 12 Ill. 260; *Turner v. Jenkins*, 79 Ill. 228; *Quigley v. Roberts*, 44 Ill. 503; *Rhoads v. Rhoads*, 43 Ill. 239; *Hanna v. Spotts' Heirs*, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; *Cowan v. Anderson*, 7 Cold. (Tenn.) 284; *Heath's Adm'r v. Ashley's Adm'r*, 15 Mo. 393; *English v. Savage*, 5 Or. 518; *Burt v. McBain*, 29 Mich. 260; *Barker v. Hamilton*, 3 Colo. 291.

⁶¹ *Dow v. Jewell*, 21 N. H. 470, 487.

⁶² *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103, 59 Am. Dec. 447; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Long v. Mulford*, 17 Ohio St. 484, 33 Am. Dec. 638; *Cox v. Story*, 80 Ky. 64; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Seward v. Clark*, 67 Ind. 289; *Simpson v. Alexander*, 6 Cold. (Tenn.) 619; *Coffin v. Heath*, 6 Metc. (Mass.) 76; *Dow v. Jewell*, 21 N. H. 470; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

⁶³ *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Anderson's Adm'r v. Irvine*, 11 B. Mon. (Ky.) 341; *Creath v. Smith*, 20 Mo. 113; *Hanna*

such a decree would be set aside on the application of the infant, after his majority, as by bill of review; on the ground that the infant defendant has an absolute and indefeasible right to show cause against the decree.⁶⁴ But the weight of the authorities is against this contention. The general disposition is to regard such a decree as valid and conclusive. "An infant defendant is as much bound by a decree in equity against her as a person of full age; and therefore if there be an absolute decree against a defendant who is under age, she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it, as fraud, collusion, or error."⁶⁵

§ 198. Infant Plaintiffs.

Regularly an infant can sue only by his guardian or by next friend. But it is held that a minor who has commenced and prosecuted an action to judgment is bound by the result.⁶⁶ And as a general rule infant plaintiffs are as much bound by a decree as persons of full age. But they are not so bound in a proceeding by an official plaintiff, though they are styled relators, without the intervention of a *prochein ami*.⁶⁷

v. Spotts' Heirs, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172; Field v. Williamson, 4 Sandf. Ch. (N. Y.) 613.

⁶⁴ Beeler v. Bullitt, 4 Bibb (Ky.) 11; Wright v. Miller, 4 Barb. (N. Y.) 600; Harris v. Youman, 1 Hoff. Ch. (N. Y.) 178; Townsend v. Cox, 45 Mo. 401; Coffin v. Heath, 6 Metc. (Mass.) 76; Loyd v. Malone, 23 Ill. 43, 76 Am. Dec. 179.

⁶⁵ Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; English v. Savage, 5 Or. 518; In re Hogton, L. R. 18 Eq. 573; In re Livingston, 34 N. Y. 355; Rivers v. Durr, 46 Ala. 418; McLemore v. Chicago, St. L. & N. O. R. Co., 58 Miss. 514; Marshall v. Fisher, 46 N. C. 111; Smith v. McDonald, 42 Cal. 484; Wills v. Spraggins, 3 Grat. (Va.) 567; Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Martin v. Weyman, 26 Tex. 490; Allman v. Taylor, 101 Ill. 185; Lloyd v. Kirkwood, 112 Ill. 329; Simmons v. Goodell, 63 N. H. 458, 2 Atl. 897; Ashton v. Ashton, 35 Md. 496.

⁶⁶ Gray v. Winder, 77 Cal. 525, 20 Pac. 47. An infant who sues by his next friend is as much bound by the judgment (the court having jurisdiction as if of full age. Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429.

⁶⁷ Becton v. Becton, 56 N. C. 419.

§ 199. Judgments against Deceased Parties.

At the common law an action was abated by the death of a sole plaintiff or defendant. And in some of the states the doctrine appears to be irrevocably settled that a judgment against a person who was dead at the time of its rendition is absolutely null and void.⁶⁸ It is said in a recent case in Illinois: "A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained, or the suit commenced, before the death of the party, makes no difference in this respect."⁶⁹ So in the practice of the appellate courts; an order or judgment rescinding an order of appeal previously obtained by a party to a suit will be annulled and set aside, as void, if it appears that the rescinding order was rendered after the death of the party who had obtained the appeal.⁷⁰ Nor is the judgment saved by the fact that the defendant's sole executor was also a defendant in the same action, if he was joined in his individual capacity.⁷¹ In Pennsylvania the courts have not committed themselves to this extreme view. Still they hold that a judgment against a defendant who was dead at the time of its entry,—this fact appearing of record,—will be stricken off.⁷² And so a judgment entered on a warrant of attorney after the death of the

⁶⁸ *New Orleans & C. R. Co. v. Bosworth*, 8 La. Ann. 80; *Norton v. Jamison*, 23 La. Ann. 102; *Edwards v. Whited*, 29 La. Ann. 647; *Lee v. Gardiner*, 28 Miss. 521; *Parker v. Horne*, 38 Miss. 215; *Tarleton v. Cox*, 45 Miss. 430; *Colson's Ex'rs v. Wade's Ex'rs*, 5 N. C. 43; *Burke v. Stokely*, 65 N. C. 569; *Carter v. Carriger's Adm'rs*, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342; *Collins v. Knight*, 3 Tenn. Ch. 187; *McCreery v. Everding*, 44 Cal. 284; *Lynch's Ex'x v. Tunnell*, 4 Har. (Del.) 284; *Meyer v. Hearst*, 75 Ala. 390; *Guyer's Adm'r v. Guyer*, 6 *Houst. (Del.)* 430; *Greenstreet v. Thornton*, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; *Weis v. Aaron*, 75 Miss. 138, 21 South. 763, 65 Am. St. Rep. 594; *Watson v. Adams*, 103 Ga. 733, 30 S. E. 577; *Kager v. Vickery*, 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 153, 78 Am. St. Rep. 318.

⁶⁹ *Life Association v. Fassett*, 102 Ill. 315, 325.

⁷⁰ *Succession of Hoggatt*, 36 La. Ann. 337. See *Green v. Taney*, 16 Colo. 398, 27 Pac. 249.

⁷¹ *Bragg v. Thompson*, 19 S. C. 572.

⁷² *Tobias v. Dorsey*, 2 *Wkly. Notes Cas.* 15.

defendant should be stricken off.⁷³ The consequences of holding the doctrine of the absolute nullity of the judgment, in these circumstances, are most important. For in the first place, no one would be imperilled by entirely disregarding it. It would be unnecessary for the representatives of the decedent, or his creditors, or any other persons interested, to take any measures to have the judgment vacated or reversed. Whenever it came in question, directly or collaterally, for whatever purpose presented, it might be attacked and overturned by proof of the defendant's death before its rendition. Neither could it operate as a source or support of any title or right, nor as the means of divesting any interest. Neither would it be binding as an adjudication of rights. No person could be estopped or concluded by its findings. And this is logically the state of the law in those jurisdictions where this view is adopted. But, as will appear from the following section, it is by no means universal.

§ 200. Judgment against Decedent Voidable only.

The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons, during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack.⁷⁴ A late important case de-

⁷³ Lanning v. Pawson, 38 Pa. 480.

⁷⁴ City of New Orleans v. Whitney, 138 U. S. 595, 11 Sup. Ct. 423, 34 L. Ed. 1102; Loring v. Folger, 7 Gray (Mass.) 505; Reid v. Holmes, 127 Mass. 326; West v. Jordan, 62 Me. 484; Holt v. Thacher, 52 Vt. 592; Yable v. Titus, 41 Pa. 195, 80 Am. Dec. 604; Carr v. Townsend's Ex'rs, 63 Pa. 202; Livingston v. Rendall, 59 Barb. (N. Y.) 493; Hooe v. Barber, 4 Hen. & M. (Va.) 439; Neale v. Utz, 75 Va. 480; Collins v. Mitchell, 5 Fla. 364; Powell v. Washington, 15 Ala. 803; Wood v. Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541; Wilson v. Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Ledbetter v. Higbee, 13 Tex. Civ. App. 267, 35 S. W. 801; Milam Co. v. Robertson, 47 Tex. 222; McClelland v. Moore, 48 Tex. 355; Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336; Fleming v. Seelgson, 57 Tex. 524; Spalding v. Wathen, 7 Bush (Ky.) 659; Case v. Ribelin, 1 J. J. Marsh. (Ky.) 30; Swasey v. Antram, 24 Ohio St. 87; Stoetzell v. Fullerton, 44 Ill. 108; Claffin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263; Davies v. Coryell, 37 Ill. App. 505; Coleman v. McAnulty, 16 Mo. 173, 57 Am. Dec. 229; Webber v. Stanton, 1 Mich. N. P. 97; Jennings v. Simpson, 12 Neb. 558, 11 N. W. 880; Hayes v. Shaw, 20 Minn. 405 (Gil. 355); Berkey v. Judd.

clares that "the decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding, it is valid."⁷⁵ So in Minnesota: "While the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment rendered after the party's death, though erroneous, is not on that account to be attacked in a collateral action. In other words the judgment is voidable when properly assailed, but not void."⁷⁶ For illustration, where the accounts of an administrator are settled and filed in the proper court in his lifetime, showing a balance due the estate, the court thereby acquires personal jurisdiction, and a judgment rendered after his death, confirming the report and directing payment of the sum in his hands, is not void when attacked collaterally in a suit against the surety on his bond, though the judgment might have been reversed on appeal.⁷⁷ So a judgment rendered when both the plaintiff and defendant are dead is erroneous; but relief can only be had by petition in the nature of a bill of review, or for a new trial, or by motion to set aside the judgment.⁷⁸ A judgment may be entered up, after the defendant's death, on an agreement for judgment made by him in his lifetime, but execution cannot issue without a scire facias to his executors.⁷⁹ On similar principles, a judgment rendered against a corporation after its dissolution by an act of the legislature is erroneous but not void.⁸⁰ The English statute provides that judgment may be entered up on a verdict within two terms after the death of the party against whom the verdict was given. But it

⁷⁵ 27 Minn. 475, 8 N. W. 383; *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713; *Mosley v. Southern Manuf'g Co.*, 4 Okl. 492, 46 Pac. 508.

⁷⁶ *Mitchell v. Schoonover*, 16 Or. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

⁷⁷ *Stocking v. Hanson*, 22 Minn. 542; *Hayes v. Shaw*, 20 Minn. 405 (Gil. 355).

⁷⁸ *Beard v. Roth* (C. C.) 35 Fed. 397.

⁷⁹ *McClelland v. Moore*, 48 Tex. 355.

⁸⁰ *Webb v. Wiltbank*, 1 Clark (Pa.) 324.

⁸¹ *Merrill v. Suffolk Bank*, 31 Me. 57, 1 Am. Rep. 649.

is held that a judgment is valid, although not entered within that time, if the verdict was returned during the life of the party, and the delay was occasioned by a motion touching an award.⁸¹

The object of setting aside a judgment rendered against a party who died before the verdict, is to give his representatives an opportunity to resist a recovery. For otherwise the plaintiff might profit by the accidental circumstance, and the consequent cessation of opposition, to secure a judgment to which he was not entitled.⁸² The method of avoiding the effect of the judgment will depend somewhat upon the state of the record, and will also vary in the different jurisdictions. The rule established by the supreme court of Nebraska, however, commends itself as both reasonable and practical. There a judgment rendered against a person (and equally so of one rendered in his favor) after his death, is reversible if the fact and time of death appear on the record, or in error coram nobis; if the fact must be shown aliunde, it is voidable and not void and cannot be impeached collaterally.⁸³ The writ of error coram nobis has fallen into desuetude in most of the states. But probably a motion in the court where the record remains, with due notice, and supported by affidavits, would be everywhere recognized as a proper proceeding to procure the vacating of a judgment objectionable on this ground but not disclosing the fact of death.

It is also to be observed that the validity of judgments, in these circumstances, will sometimes be helped by the fiction of relation. In an English case, where a judgment was signed at the opening of the office at its usual hour, 11 A. M., and the defendant died at 9:30 on the same morning, the judgment was held regular, on the principle that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done.⁸⁴ And in an early Massachusetts decision it was said: "By the common law, all proceedings in a suit at law are stopped by the death of one of the parties. If either of them die before judgment, no judgment can be

⁸¹ *Bridges v. Smyth*, 8 Bing. 29.

⁸² *Lynn v. Lowe*, 88 N. C. 478.

⁸³ *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 580; *McCormick v. Pad-dock*, 20 Neb. 486, 30 N. W. 602.

⁸⁴ *Wright v. Mills*, 4 Hurl. & N. 488.

entered; if after judgment, no execution can issue. But to avoid the inconvenience of this principle, the doctrine of relation has been resorted to; so that if judgment be not actually entered in court, or signed in vacation, as is the practice in England, and either party die, the judgment shall be considered as entered on the first day of the term, and an execution may issue bearing teste of that day, so as to save the fruits of a judgment to the party entitled to it. But this practice proves the general principle as first stated, and that it was necessary to resort to fiction in order to avoid the effect of that principle."⁸⁵ It must be added that if the personal representatives of a deceased defendant were duly made parties to the proceeding previous to the judgment, it is not enough to vitiate the judgment that it is entered against the dead man by name, instead of against the representatives, for the error is merely clerical.⁸⁶

§ 201. Death of One of Several Defendants.

By an extension of the principles stated in the preceding section, it is held that where, in a joint action, one defendant dies before judgment, and his death is not suggested on the record, and judgment is rendered against all the defendants, the judgment is voidable only, not void, and is not open to collateral attack, although it may be vacated on motion.⁸⁷ However, in some of the states, where the strict rule prevails in the case of a sole defendant, it is also held that a judgment against several, one of whom was dead at its rendition, is void and a nullity.⁸⁸ Whether the judgment is void or merely voidable in respect to the deceased defendant, an important and difficult question arises as to its effect upon the surviving defendants. If void as to one, is it void as to all? If voidable as to one, must it be

⁸⁵ *Hildreth v. Thompson*, 16 Mass. 191.

⁸⁶ *Stackhouse v. Zuntz*, 41 La. Ann. 415, 6 South. 666.

⁸⁷ *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687; *Boor v. Lowrey*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Burke v. Stokely*, 65 N. C. 569; *Holman v. G. A. Stowers Furniture Co.* (Tex. Civ. App.) 30 S. W. 1120. A judgment which passes by operation of law upon the return of a forfeited forthcoming bond is not vitiated by the fact that one of the obligors is dead and incapable of suffering a judgment, but is valid as to the surviving obligors. *Moody v. Harper*, 38 Miss. 509.

⁸⁸ *McCloskey v. Wingfield*, 29 La. Ann. 141.

vacated as to all? Some of the cases hold that although a judgment or decree taken against a person by name, then dead, jointly with others, may be void as to the decedent, it would prima facie be good as to the other defendants.⁸⁹ But there are also decisions to the effect that such a judgment cannot be permitted to stand even against the survivors.⁹⁰ The solution of this question must ultimately depend upon whether a joint judgment is to be considered an entirety or not,—a point which will be discussed in a subsequent section.⁹¹ For obviously, if the judgment is an entire thing and not susceptible of division, the fact that one of the defendants is dead is error which must cause it to be entirely set aside.

§ 202. **Entry of Judgment against Decedent Nunc pro Tunc.**

There is one case in which a judgment against a dead man is of unquestionable validity, namely, where it is entered nunc pro tunc as of a time when he was alive. The power to make such entries is within the common law authority of the courts, and it may be exercised in cases where the defendant dies in the interval between the finding of a verdict and the entry of judgment upon it, provided that the delay was not caused by the laches of the other party, but was attributable to the act of the court, in advising or deliberating upon the case after its submission, or to its being tied up by a motion for a new trial or similar proceeding. Under these circumstances, in furtherance of justice, and to prevent the successful party from being deprived of the fruits of the judgment to which he is entitled, the court will order it to be entered as of the time when the verdict was returned or the cause submitted.⁹² So where a garnishee has answered, and the cause is continued, and he dies before the entry of judgment, judgment may be rendered against him as of the

⁸⁹ *Collins v. Knight*, 3 Tenn. Ch. 183. And see *Aldrich v. Housh*, 71 Ill. App. 607.

⁹⁰ *Lewis v. Ash*, 2 Miles (Pa.) 110. Compare *Hartman v. Hesserich*, 8 Wkly. Notes Cas. 483.

⁹¹ *Infra*, § 211.

⁹² *Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397. Where the death of either party is suggested after verdict, judgment may be entered as of the term when the verdict was rendered. *Lewis v. Soper*, 44 Me. 72.

term when he made his disclosure.⁹³ This subject has already been considered in detail.⁹⁴

§ 203. Jurisdiction must be acquired before Party's Death.

If the court has jurisdiction of the parties and the subject-matter, and the defendant, after having appeared and pleaded, dies, the judgment subsequently entered against him will at most be voidable, and may in some cases be made entirely valid by retroactive entry. But it is essential that jurisdiction should have attached during the defendant's life; and if the action is commenced against one already dead, the judgment will be absolutely void for want of jurisdiction.⁹⁵

§ 204. Judgment for Deceased Plaintiff.

In regard to the validity of a judgment rendered in favor of a plaintiff, after his death, the books contain contradictory expressions. Some cases hold that such a judgment is not void, but voidable at most, cannot be collaterally impeached, and is valid until reversed or vacated.⁹⁶ Other decisions regard it as a mere nullity, invalid for every purpose, and liable to be overturned whenever and wherever brought in question.⁹⁷ In order to arrive at just conclusions on this point, it is necessary to take into account the time or stage of the cause at which the decease of the plaintiff occurs. And first, if an

⁹³ *Hall v. Harvey*, 3 N. H. 61.

⁹⁴ *Supra*, §§ 126-130.

⁹⁵ *Reid v. Holmes*, 127 Mass. 326; *M. T. Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. App. 665, 41 S. W. 102; *Loring v. Folger*, 7 Gray (Mass.) 505; *Griswold v. Stewart*, 4 Cow. (N. Y.) 457; *Crosley v. Hutton*, 98 Mo. 196, 11 S. W. 613; *Claffin v. Dunne*, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

⁹⁶ *Hayes v. Shaw*, 20 Minn. 405 (Gil. 355); *Walter v. Erdman*, 4 Pa. Super. Ct. 348; *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130; *Kennedy v. Pickering, Minor* (Ala.) 137; *Webber v. Stanton*, 1 Mich. N. P. 97.

⁹⁷ *Young v. Pickens*, 45 Miss. 553; *Tarleton v. Cox*, 45 Miss. 430. Where a sole plaintiff dies during the pendency of the suit, a judgment rendered in his name is a nullity, and the court in which it was rendered may set it aside at a subsequent term and re-instate the cause on the docket. *Moore v. Easley*, 18 Ala. 619. An order of revivor upon the plaintiff's death must be served upon the defendant like an original summons, or the subsequent judgment will be void. *Amyx v. Smith's Adm'x*, 1 Metc. (Ky.) 529.

action is commenced in the name of a person already dead (as where the decedent is the nominal plaintiff, and the one for whose benefit the suit is prosecuted is the real party in interest), or if one of several joint claimants is dead before action brought, it is held that the defendant must take advantage of the fact by plea in abatement, at the peril of being estopped by his silence, and the judgment for plaintiff will not be disturbed.⁹⁸ But it may also happen that the plaintiff dies during the pendency of the suit and before verdict. In this case, supposing the cause of action to be one which survives, the regular practice is to revive the action in favor of his personal representatives. But if this is omitted, and the suit proceeds to judgment in the name of the decedent, it is more reasonable to hold it voidable only than to consider it entirely null. For the case cannot be distinguished in principle from that of a defendant dying while the action is pending, where, as already shown (section 200), the great preponderance of authority sustains the rule that the judgment is at least impervious to collateral attack and must be vacated or reversed by proper proceedings. Both cases are equally governed by the principle that when once the jurisdiction of the court has attached, no subsequent error or irregularity in the exercise of that jurisdiction can make its judgment void. Yet it would be too much to predicate entire validity of the judgment in the case supposed. Undoubtedly it would be irregular, and the court would vacate it on a proper application.⁹⁹ If the plaintiff dies after a verdict, or after trial and submission to the court, it is proper to enter judgment *nunc pro tunc* as of the date of the verdict or submission. But if the judgment is entered as of the actual date when rendered, it is not void, and suit may be brought upon it by the personal representative

⁹⁸ *Baragwanath v. Wilson*, 4 Ill. App. 80; *Powell v. Washington*, 15 Ala. 803. In West Virginia, it is held that a judgment so rendered will be erroneous, but not void. *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227.

⁹⁹ *Wentz v. Bealor*, 14 Pa. Co. Ct. R. 337. In *Broas v. Mersereau*, 18 Wend. (N. Y.) 653, it was held that a verdict may be taken after the death of a sole plaintiff, where the death happens on the first day of the circuit. This on the theory that "the whole time of the circuit relates to the first day, so that if the party die on any day during the circuit, though before the trial, this is regarded as a death after verdict."

of the deceased plaintiff.¹⁰⁰ "As to rendering judgment on a verdict found before the death of the plaintiff," says the court in Missouri, "our statute expressly authorizes it, notwithstanding his subsequent death, and the statute is merely a codification of the common law, which never allows a delay occasioned by the court to change the condition of a suit."¹⁰¹ Still, the better practice clearly is to enter the judgment as of the term in which the verdict was returned.¹⁰² It is also to be remarked that a judgment may be amended so as to show that, instead of being rendered in favor of the deceased plaintiff, it was really rendered in favor of his personal representatives, and this may be done without notice to the defendant, or after his death.¹⁰³ Finally, if the court renders judgment during the lifetime of the plaintiff, the clerk may perform the ministerial act of entering and recording it after his death.¹⁰⁴

¹⁰⁰ *Webber v. Stanton*, 1 Mich. N. P. 97; *Wood v. Boyle*, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747. See *Gilman v. Donovan*, 53 Iowa, 362, 5 N. W. 560. After a verdict was found for the plaintiff in an action, certain questions of law were reserved, but upon a hearing judgment was rendered on the verdict. In the meantime the plaintiff had died, but this fact being unknown to his counsel, the execution was issued in his favor. The court, upon the execution being returned unexecuted and cancelled, vacated the judgment and permitted the administrator to come in and prosecute the action, it appearing that the rights of third persons would not be affected thereby. *Stickney v. Davis*, 17 Pick. (Mass.) 169.

¹⁰¹ *Horner v. Nicholson*, 56 Mo. 226, citing *Wag. St. p. 1050*, § 7. But this view does not go uncontradicted. In the case of *West v. Jordan*, 62 Me. 484, it appeared that plaintiff and her husband brought case for personal injuries to her, there was a verdict for plaintiff, the defendant moved to set aside the verdict, then the plaintiff died. The motion was overruled, and the clerk entered up judgment as of the then current term. Afterwards the husband took out administration on the plaintiff's estate, and moved the court to bring forward the action "that the proper judgment may be made up." The court then made an entry reciting the death of the plaintiff, withdrawal and discontinuance as to the husband, his appearance as administrator, and judgment on the verdict. The defendant objected that there was already one judgment standing against him, and he might be doubly liable. But it was held that the first judgment was absolutely invalid, and at any rate the old record was effectually vacated by the allowance of the motion to bring forward.

¹⁰² *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320.

¹⁰³ *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Dawson v. Hardy*, 33 Tex. 198.

¹⁰⁴ *Franklin v. Merida*, 50 Cal. 289.

§ 205. Judgments against Insane Persons.

An insane person may be sued and jurisdiction over him acquired by the like process as if he were of sound mind. But when it is made to appear to the court that a party to the suit is insane, it is the duty of the court to appoint a guardian ad litem for him, or to have his committee or conservator made a party. "And no doubt it is the duty of a plaintiff who sues an insane person, if he has knowledge of the insanity, to inform the court thereof. But the failure to perform any of these duties does not affect the jurisdiction of the court, but only the regularity of the proceedings. Therefore it is, that the judgment of a court having jurisdiction of the subject-matter of the suit, and of the person of such a party, notwithstanding such irregularity, is not absolutely void."¹⁰⁵ On this principle, it is held by all the courts that a judgment against a person who was non compos mentis at the time of its rendition, though without joining his legal guardian, is binding and conclusive upon him, is not to be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose.¹⁰⁶ "The only question presented in this case is, whether a judgment by default against a lunatic, upon service of process on him alone, be void because his committee was not a party; and it is our opinion that, though evidently erroneous, the judgment is not

¹⁰⁵ *Johnson v. Pomeroy*, 31 Ohio St. 247.

¹⁰⁶ *Beverley's Case*, 4 Coke, 123; *Mansfield's Case*, 12 Coke, 124; *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614; *Lainprey v. Nudd*, 29 N. H. 290; *Sternbergh v. Schoolcraft*, 2 Barb. (N. Y.) 153; *Wood v. Bayard*, 63 Pa. 320; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382; *Foster v. Jones*, 23 Ga. 168; *Newell v. Smith*, 23 Ga. 170; *Walker v. Clay*, 21 Ala. 807; *Ewing v. Wilson*, 63 Tex. 88; *Johnson v. Pomeroy*, 31 Ohio St. 247; *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145; *Malloney v. Dewey*, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; *Heard v. Sack*, 81 Mo. 610; *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737; *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762; *Spurlock v. Noe* (Ky.) 43 S. W. 231, 39 L. R. A. 775; *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66; *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. But compare *Ex parte Kibler*, 53 S. C. 461, 31 S. E. 274; *In re Wing*, 83 Hun, 284, 31 N. Y. Supp. 941; *Helf v. Cox*, 5 Ohio N. P. 413.

void.”¹⁰⁷ So in New Hampshire: “The fact that a person against whom a suit is commenced is, at the service of the process upon him, a person of insane mind, and that he so continued until judgment rendered, and that he appeared in person or by attorney, or not at all, is good cause to reverse the judgment upon a writ of error; though for reasons which we think inapplicable and without force here, and perhaps little creditable to the jurisprudence of an enlightened country, it seems not to have been so held in England. But in such case the defect in the proceedings renders them only voidable and not void.”¹⁰⁸ That a person of unsound mind should be irrevocably bound by proceedings of which he could have no intelligent consciousness seems a legal anomaly. It is true a court may acquire jurisdiction of his person, but only in the sense that it obtains jurisdiction of a chattel, for example, by its attachment. And the unfortunate defendant lacks those means of defending himself and of challenging the claims asserted against him which justice dictates as the inviolable right of every person. We should therefore expect that a judgment against him would be regarded at least as voidable by the court which pronounced it. And this is undoubtedly the better doctrine, and the one prevailing in most of the states,¹⁰⁹ although there are some cases which hold that such a judgment is not even voidable, and that no relief can be had against it except by an application to chancery for an injunction against its enforcement.¹¹⁰ And it will be remembered that a court of equity would in such a case inquire into the merits of the judgment, and would not enjoin it on account of the defendant’s lunacy, but only because its execution should appear to be against conscience and inequitable. If the fact of lunacy appeared anywhere in the record, we are much inclined to

¹⁰⁷ *Allison v. Taylor*, 6 Dana (Ky.) 87, 32 Am. Dec. 68. An insane defendant should not be defaulted for want of appearance and answer. *Taylor v. Lovering*, 171 Mass. 303, 50 N. E. 612.

¹⁰⁸ *Lamprey v. Nudd*, 29 N. H. 299.

¹⁰⁹ *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145.

¹¹⁰ *Clarke v. Dunham*, 4 Denio (N. Y.) 262; *Sternbergh v. Schoolcraft*, 2 Barb. (N. Y.) 153; *Robertson v. Lain*, 19 Wend. (N. Y.) 650. Though a judgment confessed by a lunatic may be set aside, the rights of a third person, buying at execution sale thereunder, without notice, before proceedings to set it aside, cannot be disturbed. *Crawford v. Thomson*, 161 Ill. 161, 43 N. E. 617.

think that it would be within the province of an appellate court to reverse the judgment on error.

§ 206. *Joint Parties at Common Law.*

At common law, if several defendants were joined in an action *ex contractu*, and all were brought before the court by service or appearance, it was absolutely essential to the plaintiff's recovery that he should establish a joint liability; in other words, he must recover against all or none; it was not competent to enter a judgment in favor of one defendant and against another.¹¹¹ And this rule still obtains in many of the states which have not departed widely from the common law practice. The rule, however, is subject to one important exception. Though the obligation in suit is joint, or joint and several, yet if one defendant pleads matter which goes to his personal discharge, such as bankruptcy, or to his personal disability to contract, such as infancy, or any other matter which does not go to the nature of the writ, or pleads or gives in evidence matter which is a bar to the action as against himself only, and of which the others could not take advantage, judgment may be rendered for such defendant against the rest.¹¹² "That rule was always adopted," says the court in Massachusetts, "with this exception,—that when one defendant pleaded in his discharge some matter personal to himself, as a discharge under a bankrupt act or insolvent law, and upon such plea had a verdict, the other defendants were still liable. The reason of the distinction is obvious, and it is this; that such a special personal defense does not falsify the averment of an original joint promise, but,

¹¹¹ *Metropolitan Washing Mach. Co. v. Morris*, 39 Vt. 393; *Platner v. Johnson*, 3 Hill (N. Y.) 476; *Barker v. Ayers*, 5 Md. 202; *Rohr v. Davis*, 9 Leigh (Va.) 30; *Park v. Edge*, 42 Ala. 631; *Helm v. Van Vleet*, 1 Blackf. (Ind.) 342. 12 Am. Dec. 248; *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Griffith v. Furry*, 30 Ill. 251, 83 Am. Dec. 186; *Flake v. Carson*, 33 Ill. 518; *Goodale v. Cooper*, 6 Ill. App. 81; *Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Schmelzer v. Chicago Ave. Sash & Door Manuf'g Co.*, Id. 596; *Bedwell v. Ashton*, 87 Ill. App. 272; *Finance Co. v. Hanlon*, 75 Ill. App. 188; *Brady v. Madden*, 67 Ill. App. 637; *Anderson v. Chilson*, 8 S. D. 64, 65 N. W. 435; *Rupe v. New Mexico Lumber Ass'n*, 3 N. M. (Johns.) 261, 5 Pac. 730.

¹¹² *Snyder v. Snyder*, 9 W. Va. 415; *Coe v. Hamilton*, 1 Morris (Iowa) 319; *Robinson v. Brown*, 82 Ill. 279.

admitting it, avoids it by the averment of matter subsequent."¹¹³ But, supposing the exception not to arise in the particular case, so strictly was the rule enforced that not even the most conclusive proof or unqualified admission of the liability of one defendant would entitle the plaintiff to a verdict against him alone.¹¹⁴ It has been held, however, that the rule has no proper application to an action against administrators as such.¹¹⁵ And it should be observed that the rule applies only where all the defendants are brought before the court or named as parties in the writ. A judgment against one of several makers of a note, without process against the others, releases those who are not sued.¹¹⁶ And in some of the states, in derogation of the common law rule, a distinction is taken between joint contracts and such as are joint and several, the courts holding that in an action upon the latter species of obligation the plaintiff may enter a nol. pros. against one of the defendants and proceed to judgment against the others.¹¹⁷ But where the plaintiff insists that he is entitled to judgment against all the defendants or none, and it proves that he is not entitled to judgment against some of them, he waives his right to the determination of the question as to whether he is entitled to judgment against any.¹¹⁸ A judgment otherwise joint in form is not rendered several by a finding as to which of the defendants is the principal debtor, and which are the sureties.¹¹⁹ And though one of two defendants sued as individuals on a note to which their names were signed as such did not in fact sign the note, judgment should go against both on proof of their liability as partners.¹²⁰ Under the main rule here considered it is plainly erroneous to render a final

¹¹³ *Hathaway v. Crocker*, 7 Metc. 262.

¹¹⁴ *Barker v. Ayers*, 5 Md. 202.

¹¹⁵ *Gray's Adm'rs v. White*, 5 Ala. 490.

¹¹⁶ *Mitchell v. Brewster*, 28 Ill. 163; *Bell v. State*, 7 Blackf. (Ind.) 33.

¹¹⁷ *Peyton v. Scott*, 2 How. (Miss.) 870. Where all the defendants are brought into court, judgment rendered by agreement against one is tantamount to a dismissal as to the others. *Henry v. Gibson*, 55 Mo. 570.

¹¹⁸ *Valentine v. Duff* (Ind. App.) 33 N. E. 520.

¹¹⁹ *Farney v. Hamilton County*, 54 Neb. 797, 75 N. W. 44. Where the surety on an appeal bond is dead, judgment in an action on the bond is not void because it is entered against the principal alone. *Lewis v. Maulden*, 93 Ga. 758, 21 S. E. 147.

¹²⁰ *Johnson v. Bonfield* (Ky.) 40 S. W. 697.

judgment against a part of several defendants while the cause remains undisposed of as to the others.¹²¹ Hence if one of the defendants suffers a default, and an interlocutory judgment is entered up against him, it cannot be made final until the case is finally concluded as to the other defendants; and even then, if they should succeed in maintaining a defense which went to the whole right of action, the verdict in their favor will enure to the benefit of the defaulted party, and judgment must be given for him, equally with the rest, notwithstanding the default.¹²² And in a case in Texas, where the court declined to enter judgment against one defendant, and continued the case as to him, this was held to make the judgment entered against the other defendant void.¹²³

At common law, there is also a rule (converse to that above stated) that, in a joint action by several plaintiffs, there can be no recovery by any of them unless all are entitled to a judgment.¹²⁴ But this is applicable only where the cause of action is joint, and does not apply to an action in which a number of creditors unite to set aside a fraudulent conveyance or attachment of their debtor's property.¹²⁵ And this rule also has been changed or modified by statute in some of the states. Thus, in Indiana, under a law authorizing the court to determine the ultimate rights of the parties on each side, or between themselves, where justice requires it, the court may order judgment in favor of the one plaintiff who shows himself entitled to recover, though the cause of action is joint and breaks down as to the other plaintiffs.¹²⁶

¹²¹ Davidson v. Bond, 12 Ill. 84; Barbour v. White, 37 Ill. 164; Prewett v. Caruthers, 7 How. (Miss.) 304; Godding v. Decker, 3 Colo. App. 198, 32 Pac. 832.

¹²² Taylor v. Beck, 3 Rand. (Va.) 316; Rohr v. Davis, 9 Leigh (Va.) 30; Woodward v. Newhall, 1 Pick. (Mass.) 500; supra, § 82.

¹²³ Wootters v. Kauffman, 67 Tex. 488, 3 S. W. 465.

¹²⁴ Walker v. Pope, 101 Ga. 665, 29 S. E. 8; McLaran v. Wilhelm, 50 Mo. App. 658; Dempster Mill Manuf'g Co. v. Fitzwater, 6 Kan. App. 24, 49 Pac. 624.

¹²⁵ Henderson v. J. B. Brown Co., 125 Ala. 566, 28 South. 79.

¹²⁶ Mississinewa Min. Co. v. Andrews, 22 Ind. App. 523, 54 N. E. 146.

§ 207. In Actions of Tort.

The rule stated in the preceding section must be restricted in its application to actions *ex contractu*; it does not govern in the case of actions *ex delicto*. In a suit founded upon tort, against several defendants, the plaintiff may recover against as many and only such defendants as he proves to be guilty, and any defendant, as against whom the proof fails, is entitled to a verdict.¹²⁷ In Maryland, in an action of this kind, if, at the conclusion of the plaintiff's case, there is no evidence against one of the defendants, he is considered entitled to be acquitted; and this practice is necessary, as the court observes, for otherwise the plaintiff could deprive the defendant of material and competent witnesses by joining them as parties to the action.¹²⁸ So if a verdict is returned against all the defendants sued jointly in tort, but in respect to one of the defendants it is not sustained by the evidence, it will be set aside, as against that defendant, upon his proper application, and the judgment be permitted to stand as against the party proven guilty of the injury complained of.¹²⁹ If the jury find a verdict against one of the joint defendants, without mentioning the other, this will justify the entry of a judgment against the former and in favor of the latter.¹³⁰ In Tennessee, it is said that joint tortfeasors sued jointly are not entitled to have the damages assessed against them severally.¹³¹ But in other states, it appears to be no ground of complaint that judgments are rendered separately against the defendants for separate and different amounts.¹³² And if one of the defendants obtains a new trial, a judgment for a less amount may

¹²⁷ *Albright v. McTighe* (C. C.) 49 Fed. 817; *Winslow v. Newlan*, 45 Ill. 145; *Harris v. Preston*, 10 Ark. 201; *Jansen v. Varnum*, 89 Ill. 100; *Howard v. Dayton Coal & Iron Co.*, 94 Ga. 416, 20 S. E. 336; *Emerson, Talcott & Co. v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671; *Williams v. Goff* (Tex. Civ. App.) 54 S. W. 428; *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943.

¹²⁸ *Hambleton v. McGee*, 19 Md. 43.

¹²⁹ *Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345. And see *Cauthorn v. King*, 8 Or. 138.

¹³⁰ *Kinkler v. Junica*, 84 Tex. 116, 19 S. W. 359. A judgment against a portion of the defendants in an action of tort amounts to a dismissal of the cause as against the other defendants. *Davis v. Taylor*, 41 Ill. 405.

¹³¹ *Nashville, C. & St. L. Ry. v. Jones*, 100 Tenn. 512, 45 S. W. 681.

¹³² *Rowan v. Daniel*, 20 Tex. Civ. App. 321, 49 S. W. 686.

be rendered against him, while the original judgment remains in force against the other.¹³³

§ 208. Joint Debtor Acts.

In many of the states, the common law rule in respect to the recovery in actions against several defendants has been changed by statutes. These statutes—commonly called “joint debtor acts”—provide that judgment may be given “for or against one or more of several plaintiffs, and for or against one or more of several defendants,” and usually contain a further provision that “in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.”¹³⁴ Under these statutes, if a plaintiff commences an action against two or more defendants upon a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable.¹³⁵ Thus, when two defendants are sued jointly on a contract which, on its face, is the joint contract of both, but which in legal effect was at all times the contract of one only, a judgment may be rendered against the party liable and in favor of the

¹³³ Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

¹³⁴ Rev. St. Me. c. 82, § 84; Gen. St. Conn. § 1108; Code Civ. Proc. N. Y. § 1204; Code Md. art. 50, § 12; Code Va. 1887, § 3395; Code S. C. § 296; Code Ark. §§ 4701, 4704; Code Civ. Proc. Ohio, § 371; Burns' Rev. St. Ind. 1894, § 579; Code Iowa, § 1815; Wag. St. Mo. p. 1019, § 32; Code Wis. § 194; Code Civ. Proc. Cal. §§ 578, 579; Hill's Code Or. §§ 244, 245; Comp. Laws S. D. § 4901. By virtue of Rev. St. U. S. § 914, where the law of the state contains a provision of this sort, the same practice will be adopted by the federal courts sitting within that state. Witters v. Sowles (C. C.) 34 Fed. 119.

¹³⁵ Gleason v. Sanitary Milk-Supply Co., 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370; Owen v. Conner, 11 N. Y. Supp. 352; Stimson v. Van Pelt, 66 Barb. (N. Y.) 151; Westheimer v. Craig, 76 Md. 399, 25 Atl. 419; Longstreet v. Rea, 52 Ala. 195; Kuykendall v. Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748; Lampkin v. Chisom, 10 Ohio St. 450; Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79; Murray v. Ebright, 50 Ind. 362; Stafford v. Nutt, 51 Ind. 535; Richardson v. Jones, 58 Ind. 240; Eyre v. Cook, 9 Iowa, 185; Roggenkamp v. Hargreaves, 39 Neb. 540, 58 N. W. 162; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Hamm v. Basche, 22 Or. 513, 30 Pac. 501; Ah Lep v. Gong Choy, 13 Or. 205, 9 Pac. 483; Ross v. Wait, 4 S. D. 584, 57 N. W. 497.

other.¹³⁶ So where several persons are sued as partners on a note signed by one, and the evidence shows that there was no partnership, judgment may be rendered against the one who signed, and a nonsuit may be ordered as to the others.¹³⁷ Or a plaintiff, suing several as partners for a breach of a contract, may recover against such as he can prove to be parties to the contract, without proof of the partnership.¹³⁸ And where an action is brought against two or more upon a joint contract, an equitable defense peculiar to one defendant being set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff.¹³⁹ And a recovery may be had against one defendant alone, in a proper case, notwithstanding another of the debtors has been released by the plaintiff upon a compromise.¹⁴⁰ And it is held that a statute of the character above described is a provision as applicable to suits by attachment as to suits in any other form; and hence, where an attachment is sued out against two persons jointly, it may be sustained as against the separate property of one alone.¹⁴¹ It is a further consequence of acts of this nature, that where the verdict is in favor of a part of the defendants and against the others, the judgment thereon, if entered against "the defendants" generally, will not be erroneous; for the judgment will be construed with reference to the verdict, and will be held to be against only those defendants against whom the verdict was given.¹⁴² But if the verdict, or the finding of the court, is against all the defendants jointly, it would be

¹³⁶ *Clafin v. Butterly*, 5 Duer (N. Y.) 327.

¹³⁷ *Stoddart v. Van Dyke*, 12 Cal. 437; *Willis v. Morrison*, 44 Tex. 27; *Felden v. Lahens*, 2 Abb. Dec. (N. Y.) 111.

¹³⁸ *Crews v. Lackland*, 67 Mo. 619; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716; *Morgan v. Righetti* (Cal.) 45 Pac. 260; *Shafer v. Hewitt*, 6 Colo. App. 374, 41 Pac. 509.

¹³⁹ *Barker v. Cocks*, 50 N. Y. 689. But a statute allowing judgment to be had against one or more defendants in an action on contract, according to the rights of the case, has no application where the defendants file a joint plea of non-assumpsit, and there is nothing to indicate that the defense is merely personal as to one defendant. *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785.

¹⁴⁰ *Moss v. Jerome*, 10 Bosw. (N. Y.) 220.

¹⁴¹ *Allen v. Clayton* (C. C.) 11 Fed. 73.

¹⁴² *Lamar v. Williams*, 39 Miss. 342.

error to render a judgment thereon against a part only, dismissing the action as to the others.¹⁴³ Under that clause of the joint debtor acts which provides that the court may render judgment against one of the defendants, leaving the action to proceed as to the others, whenever a several judgment would be proper, the cases hold that the true test, as to whether a separate judgment may be had, is whether a separate action could have been maintained.¹⁴⁴ As these statutes are framed in some of the states they permit a plaintiff, suing upon a joint cause of action against two defendants, to recover a separate judgment against each for one-half of the claim.¹⁴⁵ And where the statute also permits the court to grant affirmative relief to defendant, it may give judgment for one of the defendants as against another, if that can be done without injury to the plaintiff.¹⁴⁶ But a judgment against a garnishee, when there has been no judgment against the defendant in the suit to which the garnishment is ancillary, is void.¹⁴⁷ And the fact that persons have been improperly joined as parties defendant does not warrant the entry of a judgment in their favor, but the action should be dismissed as to them.¹⁴⁸

§ 209. One Defendant suffering Default.

In an action of contract against several defendants, if one of them suffers default, and another, under the general issue, sets up and maintains a defense which negatives the plaintiff's right to recover against either of the defendants and shows that he had no cause of action, the plaintiff will not be entitled to judgment against the one who was defaulted, but on the contrary the successful defense will enure to the latter's benefit, and judgment must be rendered for both the defendants.¹⁴⁹ So if one defendant interposes an objection by

¹⁴³ Kellogg, Johnson & Co. v. Gilman, 3 N. D. 538, 58 N. W. 339; Boys v. Shawhan, 88 Cal. 111, 25 Pac. 1063. The verdict having been rendered jointly against both plaintiffs, and the judgment against one of them alone, he is entitled to a reversal. Frisbie v. McFarlane, 196 Pa. 110, 46 Atl. 359.

¹⁴⁴ Van Ness v. Corkins, 12 Wis. 186; Parke v. Meyer, 28 Ark. 281.

¹⁴⁵ Hassler v. Hefele, 151 Ind. 391, 50 N. E. 361.

¹⁴⁶ Beattie v. Latimer, 42 S. C. 313, 20 S. E. 53.

¹⁴⁷ Shoemaker v. Pace (Tex. Civ. App.) 41 S. W. 498.

¹⁴⁸ Gillum v. St. Louis, A. & T. Ry. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

¹⁴⁹ Bowman v. Noyes, 12 N. H. 302; Adderton v. Collier, 32 Mo. 507; State

way of demurrer, going to the plaintiff's right to recover, and not merely a personal matter of discharge, which is sustained, and judgment rendered on it in his favor, it will enure to the benefit of his co-defendant.¹⁵⁰ But this rule also is modified by the joint debtor acts. Thus, under a provision that judgment may be given for or against one or more of several defendants, it is held that, where three persons are sued as partners, and two of them suffer default, but the other answers, denying that he was a member of the firm, judgment may be entered against those in default, though it is rendered in favor of the answering defendant.¹⁵¹ So an action on a joint and several obligation against two defendants, only one of whom appeared and answered, can be tried, and verdict and judgment rendered for or against the party answering, without regard to the proceedings against his co-defendant.¹⁵²

On the other hand, if one of the defendants makes default and the other goes to trial, the effect is to suspend the judgment against the defaulting defendant until the result of the trial is ascertained, and if the plaintiff obtains a verdict, he is then entitled to a joint judgment against all the defendants.¹⁵³ Nor is there any necessity, in such a case, of having previously taken an interlocutory judgment by default against the party failing to answer.¹⁵⁴ Where, in a joint

v. Gibson, 21 Ark. 140; *Rich v. Husson*, 4 Sandf. (N. Y.) 115; *Miller v. Longacre*, 26 Ohio St. 291; *Champlin v. Tilley*, 3 Day (Conn.) 303, Fed. Cas. No. 2586; *Campbell v. McHarg*, 9 Iowa, 354. Compare *Town of Storm Lake v. Iowa Falls & S. C. Ry. Co.*, 62 Iowa, 218, 17 N. W. 480.

¹⁵⁰ *State v. Williams*, 17 Ark. 371.

¹⁵¹ *Bailey Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962. And see *Kingsland & Douglass Manuf'g Co. v. Mitchell* (Tex. Civ. App.) 36 S. W. 757.

¹⁵² *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071. In Illinois, it is said that where, in an action against two defendants, of whom only one has been served, judgment is entered by default against the defendant served, and the action continued as to the other, such judgment, though erroneous, is not void. *Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696.

¹⁵³ *Town of Fletcher v. Blair*, 20 Vt. 124.

¹⁵⁴ *Peters v. Crittenden*, 8 Tex. 131. But in an action on a joint debt, plaintiff, after joining all the debtors as defendants, so as to avoid a plea of nonjoinder, cannot, by neglecting to take judgment against some of them who are in default, throw the burden of the common debt on one of them, against whom alone he enters judgment. *Robinson v. Floyd*, 153 Pa. 98, 25 Atl. 1040; *Murland v. Floyd*, 153 Pa. 99, 25 Atl. 1038.

action *ex contractu* against two defendants, one of them is defaulted, and the other appears, and separate judgments are rendered against both of them, if the defendant who appeared enters a review, the effect is to vacate the judgment as to both defendants and to carry the whole case to the next succeeding term, notwithstanding a separate judgment may have been entered on the record against the defendant who was defaulted.¹⁵⁵

§ 210. Judgment, when Several, when Joint.

In general, where an action is brought upon a joint contract or obligation against several defendants who plead and defend jointly, the judgment must be joint, and it is error to render several judgments against them for several damages.¹⁵⁶ But where, for example in an action against partners on a partnership obligation, separate judgments are entered against each of the defendants, instead of a joint judgment against all, this is considered merely an irregularity, which may be corrected on motion within the statutory time.¹⁵⁷ But where there are several defendants, and the items of damages are distinct, a joint judgment cannot be entered unless each defendant is liable to the full extent of the verdict.¹⁵⁸ And where the action is upon a joint and several contract, a several judgment would be proper, as the defendants might have been sued alone in such case; hence a judgment may be rendered against one or more without waiting the final trial.¹⁵⁹ So where, of two defendants, one is liable individually, and the other in his representative character, the judg-

¹⁵⁵ *Downer v. Dana*, 22 Vt. 22.

¹⁵⁶ *Holmes' Heirs v. Gay's Heirs*, 6 Bush (Ky.) 47; *Rochester v. Anderson*, 1 Bibb (Ky.) 439; *Starry v. Johnson*, 32 Ind. 438; *Howell v. Barrett*, 3 Gilman (Ill.) 433. A joint judgment in favor of defendants for costs is proper where they are sued jointly, though they answered separately. *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686.

¹⁵⁷ *Judd Linseed Sperm Oil Co. v. Hubbell*, 76 N. Y. 543. See, also, *Murphy v. Gage* (Tex. Civ. App.) 21 S. W. 396.

¹⁵⁸ *Chambers v. Upton* (C. C.) 34 Fed. 473. Judgment may be entered for different sums against several defendants, where plaintiff is entitled to recover more costs as against some of them than against the others. *Fox v. Muller*, 31 Misc. Rep. 470, 64 N. Y. Supp. 388.

¹⁵⁹ *Sears v. McGrew*, 10 Or. 48. See, also, *Croasdell v. Tallant*, 83 Pa. 193; *First Nat. Bank v. Burkhardt*, 71 Minn. 185, 73 N. W. 858.

ment against them should be several.¹⁶⁰ And in an action to subject assets descended to several heirs to a debt of their ancestor, the judgment, if for the plaintiff, should be several against each of the heirs for the amount received by him from the ancestor, not to exceed, however, the amount to which the plaintiff is entitled.¹⁶¹ But although a judgment be rendered against two parties jointly, yet it must be remarked that the judgment itself is a joint and several obligation, and consequently an action can be maintained upon it against either of the judgment-debtors separately, and it can in like manner be used as a set-off against either.¹⁶²

§ 211. Joint Judgment as an Entirety.

There are numerous expressions in the books to the effect that a judgment is an entirety, and that if it is rendered against several defendants jointly, it is not susceptible of division or apportionment, so as to be purged of the error or irregularity it may contain as to one of them, while standing good against the rest. Accordingly it is held in a number of the states, that if the judgment is void as against one defendant, for want of jurisdiction over him, it must be considered as void as to all the defendants, and therefore a mere nullity.¹⁶³ This question might arise, for example, in a case where two persons were named as defendants, but only one was served with process, the other being a non-resident or not found, and where after a contest by the

¹⁶⁰ *Gray's Adm'r v. McDowell*, 5 T. B. Mon. (Ky.) 501.

¹⁶¹ *Ransdell v. Threlkeld's Adm'r*, 4 Bush (Ky.) 347.

¹⁶² *Read v. Jeffries*, 16 Kan. 534. And see *Stout v. Baker*, 32 Kan. 113, 4 Pac. 141.

¹⁶³ *Shuford v. Cain*, 1 Abb. U. S. 302, Fed. Cas. No. 12,823; *Hall v. Williams*, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; *Richards v. Walton*, 12 Johns. (N. Y.) 434; *Holbrook v. Murray*, 5 Wend. (N. Y.) 161; *Rangely v. Webster*, 11 N. H. 299; *Knapp v. Abell*, 10 Allen (Mass.) 485; *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589; *Dickerson v. Chrisman*, 28 Mo. 134; *Hulme v. James*, 6 Tex. 242, 55 Am. Dec. 774; *Long v. Garnett*, 45 Tex. 400; *Thomas v. Lowry*, 60 Ill. 512; *Brockman v. McDonald*, 16 Ill. 112; *Williams v. Chalfant*, 82 Ill. 218; *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913; *Grace v. Casey-Grimshaw Marble Co.*, 62 Ill. App. 149; *West Chicago St. Ry. Co. v. Annis*, Id. 180; *Meyer v. Kuhn*, 13 C. C. A. 298, 65 Fed. 705; *Van Renselaer v. Whiting*, 12 Mich. 449; *Hughes v. Lindsey*, 10 Ark. 555; *Smith's Adm'r v. Rollins*, 25 Mo. 408; *Winslow v. Lambert*, 57 Me. 356; *Burt v. Stevens*, 22 N. H. 229; *Donnelly v. Graham*, 77 Pa. 274; *City of St. Louis v. Gleason*, 15 Mo. App. 25.

defendant served, judgment should be rendered against both. According, then, to the foregoing rule, the judgment could have no more effect against the defendant who was served than against the other. Hence, to carry the supposition a step further, if the judgment were made the basis of an action, whether in a domestic or foreign tribunal, against the defendant served, he might show the irregularity of the proceedings in respect of his co-defendant, and that would be sufficient to defeat a recovery against himself. The result seems scarcely consonant to reason and justice. Yet some of the decisions, arguing from the entirety of the judgment, have felt obliged to hold precisely that position.¹⁶⁴ But there are many other authorities which hold that although a judgment may be void as against one of the defendants, for lack of jurisdiction, still it may be valid and binding upon the others, or at most voidable, but not void in toto.¹⁶⁵ And if this view is adopted, it is evident that the judgment will be attended by its usual incidents, as against the defendant over whom jurisdiction attached, until it is regularly reversed or vacated. Until that time an action will lie upon the judgment against him, and he will not be permitted to attack it collaterally. There are other grounds on which the judgment may be void as to one of several defendants, such as legal disability or his previous decease. But the same principle is understood to govern these cases also, and there

¹⁶⁴ *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554; *Holbrook v. Murray*, 5 Wend. (N. Y.) 161.

¹⁶⁵ *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769; *Douglass Lessee v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375; *Ash v. McCabe*, 21 Ohio St. 181; *Jamleson v. Pomeroy*, 9 Pa. 230; *Shallcross v. Smith*, 81 Pa. 132; *Kitchens v. Hutchins*, 44 Ga. 620; *Green v. Beals*, 2 Caines (N. Y.) 254; *Crane v. French*, 1 Wend. (N. Y.) 311; *Brittin v. Wilder*, 6 Hill (N. Y.) 242; *St. John v. Holmes*, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; *York Bank's Appeal*, 36 Pa. 460; *North v. Mudge*, 13 Iowa, 498, 81 Am. Dec. 441; *Winchester v. Beardin*, 10 Humph. (Tenn.) 247, 51 Am. Dec. 702; *Collins v. Knight*, 3 Tenn. Ch. 183; *Mercer v. James*, 6 Neb. 406; *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376; *Keith Bros. & Co. v. Stiles*, 92 Wis. 15, 65 N. W. 860; *Wise v. Hyatt*, 68 Miss. 714, 10 South. 37; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Remington v. Cummings*, 5 Wis. 138; *Balley v. McGinniss*, 57 Mo. 362; *Cheek v. Pugh*, 19 Ark. 574; *Murphy v. Orr*, 32 Ill. 489; *Valentine v. Cooley*, Meigs (Tenn.) 618, 33 Am. Dec. 166; *Crank v. Flowers*, 4 Heisk. (Tenn.) 629; *Smith v. Tupper*, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483.

exists the same diversity of opinion in regard to them. Some of the cases hold that if a joint judgment is void as to one defendant, because that defendant was a slave, an infant, a married woman, or was dead before its rendition, it is void as to all; or, if an incapacity of that kind is conceived as rendering the judgment voidable only as against the person affected, these cases hold it to be equally voidable as against the co-defendants.¹⁶⁶ But other decisions take the ground that a judgment rendered jointly against a married woman (for instance) and others who are sui juris is not, as to the latter, void and collaterally assailable, although as to the married woman it is a nullity, and although, also, it is an entirety for the purposes of review on appeal or error, and would be reversed as to all the defendants if thus directly assailed.¹⁶⁷ When we inquire as to the proper disposition to be made of a joint judgment against several defendants, which is void as to one of them, when it is brought before a court of review by writ of error or appeal, we find the authorities more nearly harmonious. In general, they agree that it cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety.¹⁶⁸ And conversely, if in favor of the defendants, invalidity as to one will vitiate it as to all. "The judgment, being joint in favor of all the defendants and erroneous as to one, will have to be reversed as to all. A judgment jointly entered in favor of several defendants, whether in an action upon contract or for tort, cannot be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together."¹⁶⁹ The acceptance

¹⁶⁶ *Stenhouse v. Bonum*, 12 Rich. Law (S. C.) 620; *Tedlie v. Dill*, 3 Ga. 104; *Randalls v. Wilson*, 24 Mo. 76.

¹⁶⁷ *Holton v. Towner*, 81 Mo. 360; *Shallcross v. Smith*, 81 Pa. 132.

¹⁶⁸ *Sargeant v. French*, 10 N. H. 444; *Sheldon v. Quinlen*, 5 Hill (N. Y.) 441; *Hickman v. Branson*, 1 Houst. (Del.) 429; *Murphy v. O'Relley*, 78 Ky. 353; *Draper v. State*, 1 Head (Tenn.) 262; *Ellison v. State*, 8 Ala. 273; *Wood v. Smith*, 11 Tex. 367; *Dickson v. Burke*, 28 Tex. 117; *Frazier v. Williams*, 24 Ohio St. 625; *Cavender v. Smith's Heirs*, 5 Iowa, 157; *Fuller v. Robb*, 26 Ill. 246; *Kimball v. Tanner*, 63 Ill. 519; *Covenant Mut. Life Ins. Co. v. Clover*, 36 Mo. 392; *Powers v. Irish*, 23 Mich. 429.

¹⁶⁹ *McDonald v. Wilkie*, 13 Hl. 22, 54 Am. Dec. 423, citing *Harman v. Brotherson*, 1 Denio (N. Y.) 537; *Cruikshank v. Gardner*, 2 Hill (N. Y.) 333; *Sheldon v. Quinlen*, 5 Hill (N. Y.) 441; *Gaylord v. Payne*, 4 Conn. 190; *Bac. Abr.*, tit. "Error," M.

of this rule, however, is not quite universal. It is said to have no application under the statutes and system of practice in Nevada.¹⁷⁰ And in California, if one of several defendants appeals from a judgment which is erroneous as to him, on account of insufficient service, the court will not reverse the judgment as to the other defendants, but will only reverse it as against the appellant.¹⁷¹ In Virginia it is held that although at common law a joint judgment which is erroneous as to one defendant must be reversed as to all, yet if the alleged judgment against one is not merely erroneous but absolutely void and a mere nullity, this rule does not apply.¹⁷² Before leaving the subject, it is necessary to remark that if the judgment is several as to the parties, there may well be cases in which it will be good as to one though invalid as against another, and in which an appellate court would reverse it in part and affirm it in part.¹⁷³ Further, the rule that a judgment void as to one defendant is void as to all is considered to apply only to judgments at law and not to decrees in equity.¹⁷⁴

It will be obvious from the foregoing review of the authorities that the cases on this topic cannot be reconciled. But it will also appear that some of the courts holding the entire invalidity of a joint judgment, which is void as to one defendant, have been forced to an extreme length in the matter by the highly technical conception of such a judgment as an ideal entirety. Sound legal reason appears to suggest that while such a judgment is undoubtedly erroneous and liable to be reversed on appeal, yet, while unreversed, it ought not to be open to impeachment, by the debtor as to whom no irregularity exists, in any collateral proceeding. It also seems consonant to justice that judgments of this character should not be vacated or set aside on the application of the party legally bound, because, presumably, it is the other only who has been deprived of his rights or injured by an irregular or erroneous practice. As to the former,

¹⁷⁰ *Wood v. Olney*, 7 Nev. 109.

¹⁷¹ *Ricketson v. Richardson*, 26 Cal. 149. And see *Saffold v. Navarro*, 15 Tex. 76.

¹⁷² *Gray v. Stuart*, 33 Grat. 351.

¹⁷³ *Powers v. Irish*, 23 Mich. 429, 438; *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589.

¹⁷⁴ *Voorhis v. Gamble*, 6 Mo. App. 1; *Dickerson v. Chrisman*, 23 Mo. 134.

the judgment should not be shorn of its usual consequences, and there seems to be no adequate reason why it should not constitute a good cause of action against him. Finally, it is too much to say that the judgment supposed would be absolutely void as to both or all the defendants. For a void judgment is a mere nullity and binds no one, and no one can acquire any rights under it; whereas many of the cases (even those which use the expression "void" in application to such judgments) hold that a purchaser under such a judgment will be protected, that the record may be amended, that such a judgment merges the cause of action, that execution may be directed against one defendant and restrained as to the other, and so on, none of which consequences could follow if the judgment were merely null and void.

§ 212. Confession of Judgment by Joint Defendants.

A judgment cannot be confessed by one of several joint debtors so as to bind those not joining in the confession.¹⁷⁵ But a more difficult question arises in regard to the validity of a judgment by confession entered upon a warrant or statement signed by a part only of those who are named in the judgment. Clearly it is nugatory as to any defendant not signing. But will it stand, notwithstanding this, as a good and valid judgment against those who did sign or execute the authority? Some of the decisions answer this question in the affirmative.¹⁷⁶ And their position seems to be supported by sound reason and justice. In California, however, on the principle of the entirety of a judgment, it is held that if the warrant authorizes the entry of judgment against a certain number, no judgment can be entered against a less number, and it will be void as to all.¹⁷⁷

¹⁷⁵ *Tripp v. Saunders*, 59 How. Prac. (N. Y.) 379.

¹⁷⁶ *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441; *Mercer v. James*, 6 Neb. 406; *York Bank's Appeal*, 36 Pa. 458; *Knox v. Winsted Sav. Bank*, 57 Ill. 330.

¹⁷⁷ *Chapin v. Thompson*, 20 Cal. 681.

§ 213. **Misnomer of Parties.**

It is a well established rule that if process in an action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be connected with the suit or judgment by proper averments.¹⁷⁸ "The point of the objection to the judgment of the lower court is, that the defendant having been sued and served with process by a wrong name, the court acquired no jurisdiction of him, and could render no valid judgment against him. The objection gives the name quite too much importance. A name is a means of identity, but the change of the name or the application of a wrong name does not change the thing identified. It is not the name that is sued but the person to whom it is applied. Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fails to appear, or, appearing, fails to object that he is sued by the wrong name, and the judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name."¹⁷⁹ Exactly the same rule applies in the case of a corporation; though sued by a wrong name, it is bound, if duly served.¹⁸⁰ But in California, and probably in other states having similar statutory provisions, a judgment against a defendant served by a fictitious name, who appears and answers in his real name, cannot be supported unless the complaint is amended by inserting the true

¹⁷⁸ *Oakley v. Giles*, 3 East, 168; *Lafayette Ins. Co. v. French*, 18 How. 409, 15 L. Ed. 451; *Smith v. Bowker*, 1 Mass. 76; *Fitzgerald v. Salentine*, 10 Metc. (Mass.) 436; *First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53; *Althouse v. Hunsberger*, 6 Pa. Super. Ct. 160; *Waldrop v. Leonard*, 22 S. C. 118; *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Kingen v. Stroh*, 136 Ind. 610, 36 N. E. 519; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51; *Welsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85; *Sutter v. Cox*, 6 Cal. 415; *Guinard v. Heysinger*, 15 Ill. 288.

¹⁷⁹ *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51.

¹⁸⁰ *Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216.

name, as required by the code.¹⁸¹ Moreover, it is essential to the plaintiff's recovery that it should be proved, not only that the real person was sued, but that he was duly served with process though under a mistaken name.¹⁸² In a case where the complaint was against "— Doyle" and others, and a summons was issued but there was no evidence that it was served, and John Doyle answered, and judgment was rendered against James Doyle, it was held to be void, because the party against whom it was given did not appear to be a party to the suit.¹⁸³

Similar principles apply to the case of a misnomer in the judgment itself, where the defendant was correctly named in the writ or the pleadings. The judgment will not be avoided by such misnomer, if the record contains data by which the judgment can be amended, or if the record and the judgment together point out the persons to be bound by the judgment, with unmistakable certainty.¹⁸⁴ Further, a misnomer in a judgment may be cured, in a proper case, by the principle of "idem sonans." Thus, where a bill is filed to set aside a decree on the ground that the complainants were sued by a wrong name and therefore were not before the court, if the names given are idem sonantes, the bill will be dismissed.¹⁸⁵ So where a judgment is rendered and execution issued against "Rosina Coons," it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of the defendant is shown to be "Rosina Kuhn."¹⁸⁶ It may also happen that the process will contain a misnomer of the plaintiff. And some of the cases, having a regard

¹⁸¹ *McKinlay v. Tuttle*, 42 Cal. 571; *City and County of San Francisco v. Burr* (Cal.) 38 Pac. 771; *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766.

¹⁸² *Fitzgerald v. Salentine*, 10 Metc. (Mass.) 436.

¹⁸³ *Ford v. Doyle*, 37 Cal. 346.

¹⁸⁴ *Chicago Clock Co. v. Tobin*, 123 Cal. 377, 55 Pac. 1007; *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928. A misrecital in a decree, to the effect that an intervener, who resisted plaintiff's claim, was a defendant, is not fatal. *Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379.

¹⁸⁵ *Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781. Where a judgment on a forfeited bond signed with the Christian name "Noberto" was entered against "Norberto," it was held not to be a fatal variance. *Salinas v. State*, 39 Tex. Cr. R. 319, 45 S. W. 900.

¹⁸⁶ *Kuhn v. Kilmer*, 16 Neb. 699, 21 N. W. 443.

to the defendant's right to be fully informed as to the person whose demand he is required to answer, have held that if the process misnames the plaintiff it does not give sufficient notice of the suit to the defendant, the court acquires no jurisdiction, and a judgment against the defendant by default is null and void. It was so ruled in a case where one Cunningham, plaintiff in the action, was described as "Cunnington."¹⁸⁷ But the better reason is with the cases which hold that service of process in favor of the right party by a wrong name is good, and a judgment in favor of the right party by his proper name will after trial cure a misnomer in the complaint, the summons, or the other proceedings.¹⁸⁸ So a judgment and execution in the name of the treasurer of a township, instead of the trustees as directed by law, cannot be held void, but voidable only.¹⁸⁹ A judgment for or against a partnership is not rendered invalid by the fact that it incorrectly names the partnership, if it also gives correctly the names of the individuals composing the firm.¹⁹⁰ The omission of the initial letter of the middle name of a defendant, in the entry and docketing of a judgment recovered against him, does not render it invalid or prevent its becoming a lien upon his real estate as against subsequent purchasers from him in good faith. As observed by Daniels, J.: "It was enough that one Christian name was properly added to the surname of the defendant, for in legal proceedings the law recognizes but one Christian name, and where a party is sued by that alone, the proceedings taken may regularly be

¹⁸⁷ *Ex parte Cheatham*, 6 Ark. 531, 44 Am. Dec. 525.

¹⁸⁸ *Kronski v. Missouri Pac. Ry. Co.*, 77 Mo. 362; *McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7; *Terry v. French*, 5 Tex. Civ. App. 120, 23 S. W. 911. A judgment in favor of "The United States National Bank" is sufficient to support an action thereon by "The United States National Bank of New York, N. Y." *United States Nat. Bank v. Venner*, 172 Mass. 449, 52 N. E. 543. But where an amended petition states the plaintiff's name differently from the original petition, a judgment in favor of the plaintiff by the name given in the original petition is not a final judgment to which a writ of error will lie. *Green v. Brown* (Tex.) 15 S. W. 37.

¹⁸⁹ *Hart's Lessee v. Johnson*, 6 Ohio, 87.

¹⁹⁰ *Balley v. Crittenden* (Tex. Civ. App.) 44 S. W. 404. See, also, *Ellis v. Jones*, 51 Mo. 180. Where a person does business individually under a firm name, and as such firm becomes a joint lessee, a judgment against him individually for rent is proper. *Ding v. Kennedy*, 7 Colo. App. 72, 41 Pac. 1112.

continued to judgment in that name, and the fact that he may have one or more other names between his first Christian name and his surname will in no way affect their validity. This is an old and well established rule of the common law that has in no manner been changed, either by legislation or the rulings of the courts, in this state."¹⁹¹ So there is no material variance where a judgment is entered in favor of "Laura Wilcox, guardian of W. L. Wilcox," when the correct name of the infant is W. B. Wilcox.¹⁹²

§ 214. Descriptio Personæ.

The fact that a descriptive word or phrase is added to a party's name in a judgment neither affects the validity of the judgment nor changes the legal rights and relations which it engenders. Thus the addition of the word "executor" to a defendant's name in a decree, without more, does not prevent the decree from binding his own property; the addition is mere surplusage.¹⁹³ So a judgment against "D., treasurer," is a personal judgment, the word "treasurer" being merely descriptio personæ.¹⁹⁴

¹⁹¹ Clute v. Emmerich, 26 Hun (N. Y.) 10.

¹⁹² Crawford v. Wilcox, 68 Tex. 109, 3 S. W. 695; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771.

¹⁹³ Tinsley v. Lee, 51 Ga. 482; Hall v. Craige, 68 N. C. 305. In determining whether a judgment against one as executor was obtained against him in his representative capacity, or individually, the pleadings in the action in which it was rendered may be considered. Croom v. Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072. In an action against one as agent for an estate, on a bill accepted by him as such agent, a judgment against him as agent is proper, as execution thereon will not go against his individual property, but be levied on assets in his hands as agent. Rudd v. Deposit Bank (Ky.) 49 S. W. 207.

¹⁹⁴ Dougherty v. McManus, 36 Iowa, 657; Rockwell v. Tupper, 7 Pa. Super. Ct. 174; Sass v. Hirschfeld, 23 Tex. Civ. App. 396, 56 S. W. 941. Where a defendant, sued for a tort as an individual, defended in a representative capacity as assignee of an insolvent, the effect of a judgment against him in terms both as an individual and as assignee is simply to hold him liable individually. O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130. So, a personal judgment against a tax collector is not vitiated by the addition of the words "tax collector" to defendant's name. Stewart v. Atlanta Beef Co., 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119. See, also, Rutan v. Wolters, 116 Cal. 403, 48 Pac. 385.

CHAPTER XII.**THE VALIDITY OF JUDGMENTS AS DEPENDENT UPON JURISDICTION.**

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§ 215. Jurisdiction defined.

Etymologically the word "jurisdiction" signifies the power or duty of "declaring right," that is, of declaring, in the official character of a judge, what is the law applicable to a given state of facts, or what are the respective rights of parties, as determined by the application of law to the facts before the tribunal. Technically, it may be defined as the power and authority constitutionally conferred upon

(or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.¹ If this definition appears complicated, it is because of the necessity of grouping three very different elements. For jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceeding. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination. These several elements of jurisdiction will be taken up and considered in their order.

§ 216. Sources of Jurisdiction.

Since the administration of justice is a part of the business of government, and since judicial tribunals are the agencies devised for effecting this purpose, their jurisdiction must ultimately depend upon their institution by the sovereignty of the particular state or country. Hence the validity of their judgments may sometimes require to be tested on public or political grounds. We have elsewhere seen that the courts of a de facto government, or the de facto courts of a lawful government, are generally recognized as having jurisdiction.² But jurisdiction cannot be predicated of any voluntary or self-consti-

¹ See *Windsor v. McVeigh*, 93 U. S. 277, 23 L. Ed. 914; *United States v. Arredondo*, 6 Pet. 700, 8 L. Ed. 547; *Rhode Island v. Massachusetts*, 12 Pet. 718, 9 L. Ed. 1233; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Ex parte Bennett*, 44 Cal. 84.

² *Supra*, § 173.

tuted tribunal, lacking the color of governmental authority. Its proceedings must at least appear to be had under the authority and sanction of the sovereign.³ But supposing a legally constituted court, we are told that "by jurisdiction over the 'subject-matter' is meant the nature of the cause of action or relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in the authority specially conferred. Jurisdiction of the 'person' is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the 'res' is obtained by seizure under the process of the court, whereby it is held to abide such order as the court may make concerning it."⁴ By way of supplement to the above description we may add that the jurisdiction of a particular court, in respect to the matters of which it may take cognizance, may be defined in the constitutional or statutory enactment which creates it, or may be left to be inferred from the general nature of the court or the absence of specific limitations upon its powers, or may be enlarged or abridged by subsequent legislation. But where the constitution establishes a particular court and fixes its jurisdiction, it is not competent for the legislature to pass any statute abolishing the court, or either enlarging or abridging its jurisdiction.⁵ And conversely if the constitution organizes a court and

³ *Rogers v. Wood*, 2 Barn. & Adol. 245.

⁴ *Cooper v. Reynolds*, 10 Wall. 316, 19 L. Ed. 931; *Fithian v. Monks*, 43 Mo. 515.

⁵ *Commonwealth v. Allegheny County Com'rs*, 37 Pa. 237; *Gibson v. Templeton*, 62 Tex. 555; *State v. Bank of East Tennessee*, 5 Sneed (Tenn.) 573; *Ward v. Thomas*, 2 Cold. (Tenn.) 565; *Gibson v. Emerson*, 7 Ark. 172; *State v. Jones*, 22 Ark. 331; *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323; *Deck's Estate v. Gherke*, 6 Cal. 686; *Zander v. Coe*, 5 Cal. 230. See 2 Story, Const. §§ 1773, 1774; *Durousseau v. United States*, 6 Cranch, 307, 3 L. Ed. 232; *United States v. More*, 3 Cranch. 159, 2 L. Ed. 397; *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264; *United States v. Peters*, 5 Cranch, 115, 3 L. Ed. 53; *Ex parte Knowles*, 5 Cal. 300; *Ferris v. Coover*, 11 Cal. 175; *Greely v. Townsend*, 25 Cal. 604. Thus, where the constitutional jurisdiction of the supreme court is appellate only, the legislature cannot confer upon it original jurisdiction in any case. *Ward v. Thomas*, 2 Cold. (Tenn.) 565; *State v. Bank of East Tennessee*, 5 Sneed (Tenn.) 573. The legislature cannot confer upon courts created by statute jurisdiction exclusive of that which the constitution gives to courts established by the constitution itself. *Montross v. State*, 61 Miss. 429. See *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457.

confers powers upon it, it does not require the aid of legislation to enable it to exercise those powers.⁶ But if the alleged jurisdiction of a court to take any particular action is derived from a statute, and that statute is shown to be unconstitutional, the proceedings of the court must be considered void; for as the stream cannot rise higher than its source, no jurisdiction can be derived from a void act.⁷ The question of the validity of a judgment, if depending on jurisdiction, must be determined by the jurisdiction of the court as existing at the time when the judgment was rendered.⁸

§ 217. Consent cannot confer Jurisdiction.

As jurisdiction is given by the law, the consent of the parties cannot confer the right to adjudicate upon any cause which the law has withheld from the cognizance of the particular court.⁹ This rule may apply to cases where the territorial jurisdiction of the court is limited. Thus, under a constitutional provision that all civil suits shall be tried in the county wherein the defendant resides, a judgment obtained in a county other than that of the defendant's residence, by an agreement between the plaintiff and defendant, the latter agreeing to acknowledge the jurisdiction, is considered to be void as against the rights of subsequent judgment-creditors who obtain their judgments in the manner and place prescribed by law.¹⁰ But

⁶ *State v. Gleason*, 12 Fla. 190.

⁷ *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Reed v. Wright*, 2 C. Greene (Iowa) 15. Compare *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 609.

⁸ *Champlin v. Bakewell*, 21 La. Ann. 353.

⁹ *Home Ins. Co. v. Morse*, 20 Wall. 451, 22 L. Ed. 365; *Santom v. Ballard*, 133 Mass. 465; *State v. Fosdick*, 21 La. Ann. 258; *Mora v. Kuzac*, 21 La. Ann. 754; *Richardson v. Hunter*, 23 La. Ann. 255; *Fleischman v. Walker*, 91 Ill. 318; *Dicks v. Hatch*, 10 Iowa, 380; *Moore v. Ellis*, 18 Mich. 77; *Damp v. Town of Dane*, 29 Wis. 419; *Peabody v. Thatcher*, 3 Colo. 275.

¹⁰ *Georgia R. & B. Co. v. Harris*, 5 Ga. 527. But under the act of congress of March 3, 1887, § 1 (25 Stat. 433), providing that "no civil suit shall be brought before either of said courts [United States circuit or district courts] against any person * * * in any other district than that whereof he is an inhabitant," it is held that the right to be sued only in the district of his residence is a personal privilege, which the defendant may waive; and he does waive it by pleading to the merits. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Texas & P. R. Co. v. Cox*, 145

a more familiar application of the rule is in the case of an attempt to bring within the cognizance of the court a subject-matter of which by law it has no jurisdiction. Indeed we are told that it is only when a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed.¹¹ And there is certainly good ground for doubting the applicability of the rule to the matter of jurisdiction of the person. For a defendant may cure a defective service of process, or waive the want of it, by appearing without exception. And this he appears also to do in confessing a judgment without action.¹² So there are many cases holding that a person under legal disabilities may consent to the jurisdiction of the court, or waive an objection to it, by suffering a default, at least so far that the judgment will not be entirely void, though it may be erroneous or voidable.¹³ And it has even been held that a judgment in a state court against a consul of a foreign nation, taken upon default, is valid; on the ground that his not appearing and pleading to the jurisdiction of the court is a waiver of the want of jurisdiction over him.¹⁴

§ 218. Judgment without Jurisdiction is Void.

It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction, of either the parties or the subject-matter, is void and a mere nullity, and will be so held and treated whenever and wherever and for whatever purpose it is sought to be used

U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98.

¹¹ *Hobart v. Frost*, 5 Duer (N. Y.) 672.

¹² A decree purporting to be rendered by consent of parties is not void on its face because it declares the title to the premises in controversy to be in a person other than one of the parties to the record, when it appears that such person was a purchaser pendente lite from one of the parties. *Beardsley v. Hilson*, 94 Ga. 50, 20 S. E. 272.

¹³ *Supra*, §§ 190, 196.

¹⁴ *Hall v. Young*, 3 Pick. (Mass.) 80, 15 Am. Dec. 180.

or relied on as a valid judgment.¹⁵ The effect of a want of jurisdiction is clearly stated in an early decision of the United States supreme court in the following language: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."¹⁶ Hence, for example, if a judgment is merely erroneous, the title acquired by a sale under it is valid and cannot be impeached collaterally; but if it is void for want of jurisdiction, the vendee takes no title whatever, and the sheriff's deed does not even create a cloud on the title which a court of equity can remove.¹⁷ So, although a judgment upon a note rendered by a court having no jurisdiction of the case is void, the note is still a valid security; it is not merged in the judgment.¹⁸ But in connection with this rule it is necessary to remember the legal presumptions in favor of the judgments and proceedings of courts of general jurisdiction and the rule against collateral attacks upon such judgments. The result deducible from a majority

¹⁵ *Fisher v. Harnden*, 1 Paine, 55, Fed. Cas. No. 4,819; *Towns v. Springer*, 9 Ga. 130; *Mobley v. Mobley*, Id. 247; *Beverly v. Burke*, Id. 440, 54 Am. Dec. 351; *Central Bank v. Gibson*, 11 Ga. 453; *Johnson v. Johnson*, 30 Ill. 215; *St. Louis & S. Coal Co. v. Sandoval Coal & Mining Co.*, 111 Ill. 32; *Swiggart v. Harber*, 4 Scam. (Ill.) 364, 39 Am. Dec. 418; *Miller v. Snyder*, 6 Ind. 1; *Seely v. Reid*, 3 G. Greene (Iowa) 374; *Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417; *Dowell v. Applegate*, 24 Or. 440, 33 Pac. 937; *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570. Some of the cases discriminate in favor of judgments for the defendant, where there was jurisdiction of the subject-matter, though not of defendant's person. See *City of Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370.

¹⁶ *Elliott v. Peirsol*, 1 Pet. 328, 340, 7 L. Ed. 164, Trimble, J. See, also, *Latham v. Edgerton*, 9 Cow. (N. Y.) 227. A person against whom judgment has been rendered without service of process is not precluded by any lapse of time from contesting its validity; he can wait until it is sought to be enforced against him. *Harper v. Cunningham*, 8 App. D. C. 430.

¹⁷ *Bowers v. Chaney*, 21 Tex. 363; *Holland v. Johnson*, 80 Mo. 34.

¹⁸ *Linn v. Carson's Adm'r*, 32 Grat. (Va.) 170.

of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes. This will be shown more fully in the succeeding chapters.

It has been held that a void judgment may be accepted as valid by the consent of the parties, so the rights of third persons be not prejudiced. "All the parties interested may lawfully agree to confirm an invalid transcript, or nugatory judgment, provided the confirmation is to be efficacious, and give a lien, only from the time of the agreement properly appearing."¹⁹ But other authorities maintain that proceedings void for want of jurisdiction cannot be cured by ratification or waiver.²⁰ And it is clear that a void judgment cannot be validated by citing the party against whom it was entered to show cause why it should not be declared valid,²¹ nor by the court's approval of a sale on execution under it,²² nor by the subsequent taking and dismissing of an appeal from such judgment.²³ And a void judgment does not fall within the class of subjects upon which a legislature may operate retroactively by a curative or confirmatory statute. An act of the legislature undertaking to validate a judgment of a court which was void for want of jurisdiction, would be an attempted exercise of judicial power by the legislature, since, the proceedings in court having been void, it would be the statute alone which should constitute an adjudication upon the rights of the parties; and it would also be objectionable as contravening the constitutional provision which secures to every man the enjoyment of his property except as the same may be taken from him by "due process of law," for this last phrase includes the attaching of jurisdiction, due notice, and an opportunity to be heard.²⁴ So when property has been attempted to

¹⁹ *Ramsey v. Linn*, 2 Rawle (Pa.) 220.

²⁰ *Laughton v. Nadeau* (C. C.) 75 Fed. 789.

²¹ *Jewett v. Iowa Land Co.*, 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555.

²² *Willamette Real-Estate Co. v. Hendrix*, 28 Or. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

²³ *Jones v. Pharis*, 59 Mo. App. 254.

²⁴ *Richards v. Rote*, 68 Pa. 248; *Lane v. Nelson*, 79 Pa. 407; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Griffin's Ex'r v. Cunningham*, 20 Gratt. (Va.) 109; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Denny v. Mattoon*,

be taken by a judicial proceeding which is void for want of jurisdiction, the legislature, for similar reasons, cannot validate it.²⁵ But if the judgment is merely defective, erroneous, or irregular, in consequence of the non-observance of some formality which the legislature might have dispensed with in advance, but is not objectionable on jurisdictional grounds, then it may be confirmed or validated by a retroactive statute.²⁶

§ 219. Judgment against One not a Party.

A judgment rendered against one who was not made a party to the suit, or who does not appear from the record to have been proceeded against in the action or to have had his day in court, cannot be regarded as in any sense a valid judgment.²⁷ So a judgment against a defendant named in the writ, but not made a party, is merely void.²⁸ A judgment cannot pass against a person who is not mentioned in the proceedings and who has not joined issue or made himself a party; and a mere citation served on such person does not compel his appearance or justify a judgment by default.²⁹ Thus, in a suit on the bond given by the defendant in an attachment, to obtain a return of the property attached, it appeared that the judgment in the original action was rendered against the sureties in the bond, who were not parties, as well as against the attachment-defendant;

2 Allen (Mass.) 361, 79 Am. Dec. 784; *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438; *In re Christensen's Estate*, 17 Utah, 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794; *Board of Com'rs of Wells Co. v. Fahlor*, 132 Ind. 426, 31 N. E. 1112.

²⁵ *Richards v. Rote*, 68 Pa. 248.

²⁶ *Lane v. Nelson*, 79 Pa. 407; *State v. Town of Union*, 33 N. J. Law, 350; *Black. Const. Law* (2d Ed.) 632.

²⁷ *Ford v. Doyle*, 37 Cal. 346; *Overstreet v. Davis*, 24 Miss. 393; *Moseley v. Cocke*, 7 Leigh (Va.) 225; *Deming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; *McKinney v. Frankfort & State Line R. Co.*, 140 Ind. 95, 38 N. E. 170; *Missouri, K. & T. Ry. Co. v. Fulmore* (Tex. Civ. App.) 26 S. W. 238; *Johnson v. Block* (Tex. Civ. App.) 46 S. W. 85; *Houser v. Smith*, 19 Utah, 150, 56 Pac. 683. A decree rendered by default against the unknown heirs of a person supposed to be dead is void where such person is in fact alive and is not a party to the suit. *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60.

²⁸ *Armstrong v. Harshaw*, 12 N. C. 187.

²⁹ *Bracey v. Calderwood*, 36 La. Ann. 796.

and it was held that the judgment was a mere nullity as to the surties, although it was not void as to the defendant.³⁰

§ 220. Notice to Defendant.

It is an unquestioned principle of natural justice that a man should have notice of any legal proceeding that may be taken against him, and a full and fair opportunity to make his defense. The law never acts by stealth; it condemns no one unheard. It is true that in proceedings in rem the notice may be constructive only, but here the action is directed against the thing itself, and there is no attempt to fasten a personal liability upon the parties concerned.³¹ It is true also that constructive service of process is authorized in some other cases, but not for the purpose of a personal judgment. A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void.³² "We think it may be regarded as settled, that a judgment of

³⁰ Cheek v. Pugh, 19 Ark. 574.

³¹ A late case holds that notice and an opportunity to be heard are essential to the jurisdiction of all courts, even in proceedings in rem. Dorr's Adm'r v. Rohr, 82 Va. 350, 3 Am. St. Rep. 106. Where a suit was commenced by attachment, but no property was attached or garnished, and there was no personal service on the defendant, held, that a judgment recovered in such suit was a nullity. Judah v. Stephenson, 10 Iowa, 493. See Dernburg v. Tefft, 63 Ill. App. 33.

³² Hollingsworth v. Barbour, 4 Pet. 466, 7 L. Ed. 922; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Windsor v. McVeigh, 93 U. S. 277, 23 L. Ed. 914; Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565; St. Clair v. Cox, 106 U. S. 353, 1 Sup. Ct. 354, 27 L. Ed. 222; Freeman v. Alderson, 119 U. S. 188, 7 Sup. Ct. 165, 30 L. Ed. 372; Ward v. Boyce, 80 Hun, 499, 30 N. Y. Supp. 491; Berkowitz v. Brown, 3 Misc. Rep. 1, 23 N. Y. Supp. 792; McGavock v. Clark, 93 Va. 810, 22 S. E. 864; Cogger v. Cogger, 48 W. Va. 135, 35 S. E. 823; Gunn v. Miller (Tex. Civ. App.) 26 S. W. 278; Luse v. Rankin, 57 Neb. 632, 78 N. W. 258; Elliot v. McCormick, 144 Mass. 11, 10 N. E. 705; Steen v. Steen, 25 Miss. 513; Smith v. State, 13 Smedes & M. (Miss.) 140; Enos v. Smith, 7 Smedes & M. (Miss.) 85; Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178; Madden v. Fielding, 19 La. Ann. 505; Wilson v. Johnson, 30 Tex. 499; Capehart v. Cunningham, 12 W. Va. 750; Hawley v. Heyman, 28 La. Ann. 347; Roberts v. Stowers, 7 Bush (Ky.) 295; North v. Moore, 8 Kan. 143; Ex parte Woods, 3 Ark. 532; Anderson v. Miller, 4 Blackf. (Ind.) 417; Smith v. Myers, 5 Blackf. (Ind.) 223; Wort v. Finley, 8 Blackf. (Ind.) 333; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Anderson v. Brown, 9 Mo. 646; Tyler v. Peatt, 30 Mich. 63. But it is not essential to the validity of a decree

any court, in a suit requiring ordinary adversary proceedings, that appears upon its face or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired, by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be treated as being so when it comes in question collaterally."³³ Nor is this rule confined to judgments at law. A decree in chancery against a defendant who was never served with process and did not appear, is void and may be set aside although not appealed from.³⁴ And if the court has not acquired jurisdiction of the person of the defendant, as in the case that no sufficient process has been served upon him, no judgment, even of abatement, can be rendered against the plaintiff; for the defendant must become a party before the court before he can have a judgment.³⁵

§ 221. Statutes dispensing with Citation.

It may be made a question whether the legislature of a state can entirely dispense with notice or citation to the defendant in an action. That this would be within its competence, is strongly intimated in an early decision of the supreme court of Georgia. "It is contended," said Lumpkin, J., "that the defendant must have notice, actual or constructive, otherwise no valid judgment could be rendered against him. We are not inclined to controvert this general rule. On the contrary we believe it to be well established by the authorities. There are several suggestions to make, however, as regards this principle. First, that it only obtains in the absence of positive law. The legislature may unquestionably authorize a judgment to be ren-

or judgment that it should be served upon any party to the cause after it is filed. *Western Security Co. v. Lafleur*, 17 Wash. 406, 49 Pac. 1061.

³³ *Horner v. State Bank*, 1 Ind. 130, 48 Am. Dec. 353, citing *Bliss v. Wilson*, 4 Blackf. (Ind.) 169; *Smith v. Myers*, 5 Blackf. (Ind.) 223; *Wort v. Finley*, 8 Blackf. (Ind.) 335; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Buchanan v. Rucker*, 9 East, 192; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; *Shriver v. Lynn*, 2 How. 43, 11 L. Ed. 172; *Westerwelt v. Lewis*, 2 McLean, 511, Fed. Cas. No. 17,446; *Lincoln v. Tower*, 2 McLean, 473, Fed. Cas. No. 8,355; *Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. Ed. 922; *Campbell v. Brown*, 6 How. (Miss.) 106; *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387.

³⁴ *Outhwite v. Porter*, 13 Mich. 533.

³⁵ *King v. Poole*, 36 Barb. (N. Y.) 242.

dered against a party without notice. If the expression used in the statute will admit of a doubt, it will not then be presumed that a construction dispensing with notice can be agreeable to the intention of the legislature, the consequences of which are so unreasonable. But where the signification is manifest, there is no power of dispensation in the courts."³⁶ It may be strongly doubted, however, whether this is not ascribing an excessive power to the legislature. All our constitutions guarantee the rights and property of the individual against invasion except by "due process of law," which, according to an eminent writer, means, "in each particular case, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."³⁷ We are unable to discover any possibility of bringing a judgment, rendered without any species of notice to the defendant, within the terms of this definition. The question is different in regard to the constructive service of process. For this, as will appear hereafter, can in general only be used in a proceeding in rem, or one analogous to a proceeding in rem, and is not usually recognized as giving jurisdiction for a personal judgment, against the defendant, but only for an adjudication upon the res or status involved or for a decree which avails only against the property attached or found within the territorial jurisdiction.

§ 222. Statutes regulating Mode of Citation.

"It is competent for each state to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its own citizens. For in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pur-

³⁶ Flint River Steamboat Co. v. Foster, 5 Ga. 202, 48 Am. Dec. 248.

³⁷ Cooley, Const. Lim. 356. And see Stuart v. Palmer, 74 N. Y. 190, 30 Am. Rep. 289; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 560, 27 L. Ed. 552; Hagar v. Reclamation Dist. No. 108, 111 U. S. 707, 4 Sup. Ct. 663, 28 L. Ed. 560.

suance of such notice.”³⁸ Hence a judgment rendered in accordance with the requirements of the statute, though without actual notice to the defendant of the pendency of the suit, but upon such citation as the law authorizes (e. g., leaving a copy of the summons at his last usual place of abode, though he is then out of the state), is conclusive upon the parties until set aside by some direct proceeding for that purpose.³⁹ But statutes allowing other than personal service of process must be strictly complied with to give the court jurisdiction, and it is held that this compliance must appear affirmatively in the proceedings.⁴⁰

§ 223. Defects in the Process.

If the defendant is to be notified of the pendency of an action against him, it is obvious that the notice must be in itself sufficient to bring him properly before the court. Jurisdiction is dependent on the form and nature of the process to the extent that it can only arise from a proper service of a notice substantially sufficient to apprise the party of everything which he is then entitled to know. If this requirement is met, although there may be a defect in the notice such as to render the subsequent judgment irregular, there will not be such a want of jurisdiction as to make it void. Mere cognizance of the existence of the action is not a notice in the legal sense, upon which a valid judgment can be rendered. To be available, the notice must inform the party whose rights are to be affected of what is required of him and the consequences which may follow if he neglects to defend the action.⁴¹ Hence a judgment rendered upon service of a notice which does not state the time or place at which the defendant is required to appear and defend, is void.⁴² But where it appears that there was notice, though defective, and service, though imperfect, a decision of the court to which the process

³⁸ *Thouvenin v. Rodrigues*, 24 Tex. 468.

³⁹ *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43.

⁴⁰ *Zecharie v. Bowers*, 1 Smedes & M. (Miss.) 584, 40 Am. Dec. 111. A judgment rendered against lands for delinquent taxes, without the statutory notice, is invalid. *Fortman v. Ruggles*, 58 Ill. 207.

⁴¹ *Peabody v. Phelps*, 9 Cal. 213.

⁴² *Kitsmiller v. Kitchen*, 24 Iowa, 163. Acceptance of service is no waiver of defects in a summons which gave no notice of any time of appearance. *Falkner v. Gullid*, 10 Wis. 563.

was returnable that such notice and service were sufficient, will not be held void in a collateral proceeding.⁴³ Thus if a judgment is obtained on unsealed process, and is afterwards revived without objection, the want of the seal does not impair the validity of the judgment.⁴⁴ So where the officer's return upon mesne process is not signed.⁴⁵ And a judgment is not invalidated by the fact of an unnecessary indorsement of the amount upon the summons.⁴⁶ Again, a judgment in an action in which the required number of days' notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding.⁴⁷ So a long summons issued by a justice's court against a non-resident of the county is not a nullity, though the statute declares that in such case the justice shall have no jurisdiction; the defendant waives the irregularity, and gives jurisdiction as to his person, if he appears and pleads to the complaint without objection to the process.⁴⁸

§ 224. Defects in the Service.

Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all, that there can be said to be a want of jurisdiction. In any other case, there may be error in the subsequent proceedings, but they will be sustained against a collateral attack.⁴⁹ But a judgment recovered by

⁴³ *Shawhan v. Loffer*, 24 Iowa, 217.

⁴⁴ *Heighway v. Pendleton*, 15 Ohio, 735.

⁴⁵ *McElrath v. Butler*, 29 N. C. 398.

⁴⁶ *Larimer v. Clemmer*, 31 Ohio St. 499.

⁴⁷ *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527. See *Glover v. Holman*, 3 Heisk. (Tenn.) 519; *West v. Williamson*, 1 Swan (Tenn.) 277. Compare *Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293.

⁴⁸ *Clapp v. Graves*, 26 N. Y. 418.

⁴⁹ *Campbell v. Hays*, 41 Miss. 561; *Christian v. O'Neal*, 46 Miss. 669; *Stewart v. Bodley*, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105; *W. W. Kimball Co. v. Brown*, 73 Minn. 167, 75 N. W. 1043; *Ford v. Delta & Pine Land Co. (C. C.)* 43 Fed. 181. Where the writ is directed to an officer of another county than that where the action is brought, in violation of a

default, upon service of the summons by delivery of a copy to a third person who is not a resident at the "house of defendant's usual abode," is void for want of jurisdiction.⁵⁰ And so a citation addressed to and served upon a stranger, although he is the authorized agent of the defendant, is not binding upon the latter and will not authorize a judgment against him.⁵¹ So a judgment by default is void, when the service had upon the defendant consisted only of the handing to him by plaintiff's attorney of a copy of the declaration on the day before the original declaration was filed.⁵² And the same consequences were held to result in a case where the return to the summons was made in the name of a deputy-sheriff instead of in the name of the sheriff himself.⁵³ And it is said that where the sheriff who serves the writ is himself the plaintiff, the judgment in the suit so begun is a nullity, and the defendant may restrain it by injunction.⁵⁴

§ 225. Appearance as a Waiver of Citation.

A defendant who voluntarily enters a general appearance in an action thereby cures a want of citation, or waives any objections which he may have to defects or irregularities in the notice, process, or service, so that the court acquires full jurisdiction over his person.⁵⁵

statute, the judgment, though erroneous, is not void. *Brown v. Chapman*, 90 Va. 174, 17 S. E. 855. "A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case, the court acquires no jurisdiction and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal." *Isaacs v. Price*, 2 Dill. 351, Fed. Cas. No. 7,097. See *Cole v. Butler*, 43 Me. 401; *Hendrick v. Whittemore*, 105 Mass. 23.

⁵⁰ *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342.

⁵¹ *Waddill v. Payne*, 23 La. Ann. 773. In an action against a firm, the error of rendering judgment against the members, upon mere service at their place of business, is not waived by a motion for a new trial made in the firm name, but subsequently withdrawn. *Marienthal v. Amburgh*, 2 Disney (Ohio) 586.

⁵² *South Bend Chilled Plow Co. v. Manahan*, 62 Mich. 143, 28 N. W. 768.

⁵³ *Rowley v. Howard*, 23 Cal. 401.

⁵⁴ *Knott v. Jarboe*, 1 Metc. (Ky.) 504.

⁵⁵ *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *Toland v. Sprague*, 12

"While it is true that a judgment without personal service has no extra-territorial force, it is equally true that an appearance, either in person or by attorney, has the same force and effect as personal service, and a judgment rendered against a party who appears by attorney would have the same validity in any state of the Union as where it was rendered."⁵⁶ And it is held that a defendant who voluntarily appears and answers, although the answer in terms reserves the right to object to the jurisdiction of the court, is precluded thereby from objecting that the court has not acquired jurisdiction of his person; for a voluntary appearance is equivalent to personal service of the summons.⁵⁷ But it is necessary that he should actually enter an appearance to the action or do some act equivalent thereto. A recital in the record, by the clerk, at the time of rendering judgment, that the defendant had appeared at a previous term, is not sufficient evidence of an appearance to warrant a judgment as by default.⁵⁸ And a general entry that the parties appeared means only that those who were served appeared.⁵⁹ It is also to be remarked that, in order to have this effect, the appearance must be general. In the nature of things, a special appearance, entered for the sole purpose of taking advantage of defects or irregularities in the process or service, cannot be construed as a waiver of those objections.⁶⁰ So an appearance by motion to set aside a default, entered against several defendants served, is not such an appearance as will cure a want of service

Pet. 300, 9 L. Ed. 1093; *Segee v. Thomas*, 3 Blatchf. 11, Fed. Cas. No. 12,633; *Payne v. Farmers' & Citizens' Bank*, 29 Conn. 415; *Christal v. Kelly*, 83 N. Y. 285; *Fox v. Reed*, 3 Grant, Cas. (Pa.) 81; *Reynolds v. Lyon*, 20 Ga. 225; *Tipton v. Wright*, 7 Bush (Ky.) 448; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Miles v. Goodwin*, 35 Ill. 53; *Baker v. Kerr*, 13 Iowa. 384; *Jenners v. Spraker*, 2 Ind. App. 100, 27 N. E. 117; *Adams Exp. Co. v. Hill*, 43 Ind. 157; *Louisville, N. A. & C. Ry. Co. v. Nicholson*, 60 Ind. 158; *Fulbright v. Cannefox*, 30 Mo. 425; *Suydam v. Pitcher*, 4 Cal. 280; *Harris v. Gwin*, 18 Miss. 563; *Choteau v. Rice*, 1 Minn. 192 (Gil. 166); *Anderson v. Morris*, 12 Wis. 689; *Lane v. Leech*, 44 Mich. 163, 6 N. W. 228.

⁵⁶ *Wilson v. Zeigler*, 44 Tex. 657.

⁵⁷ *Mahaney v. Penman*, 4 Duer (N. Y.) 603.

⁵⁸ *Kimball v. Merrick*, 20 Ark. 12.

⁵⁹ *Chester v. Miller*, 13 Cal. 558. ¹See *Barker v. Shepard*, 42 Miss. 277.

⁶⁰ *Ames v. Winsor*, 19 Pick. (Tenn.) 207; *Allen v. Lee*, 6 Wis. 478; *Campbell v. Swasey*, 12 Ind. 70; *Nye v. Liscombe*, 21 Pick. (Tenn.) 263; *Standley v. Arnou*, 13 Fla. 361; *Michels v. Stork*, 44 Mich. 2, 5 N. W. 1034.

upon others, and it is error to render a final judgment pending such a motion.⁶¹ But where a defendant, after appearing specially and obtaining an order setting aside the service of an original process, submits the cause for decision on a demurrer to the bill, such submission constitutes a voluntary appearance and gives the court jurisdiction of the person.⁶² The defendant may also appear by his authorized attorney, and this is equally efficacious, in waiving irregularities and conferring jurisdiction, as an appearance in person. Questions may sometimes arise as to the right of an attorney to appear for the defendant, but usually such an appearance will be presumed to have been entered with authority.⁶³ And the record showing that complainants appeared by attorneys, it will be presumed that the attorneys had authority to appear for all the complainants.⁶⁴ There are also cases holding that a judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared without authority, cannot be attacked for want of jurisdiction in any collateral proceeding and is binding upon the defendant.⁶⁵ We shall consider this point in a later section, in connection with the rule against the collateral impeachment of judgments.⁶⁶ But however it may be in regard to domestic judgments, it is very well settled that when the record comes from another state, a recital in it that the defendant appeared by attorney is conclusive of the fact of such appearance, but not that the attorney was authorized to appear, and the latter allegation may be controverted by the defendant.⁶⁷ It is scarcely necessary to add that if the court has not jurisdiction of the subject-matter, that ob-

⁶¹ *Klemm v. Dewes*, 28 Ill. 317.

⁶² *Lente v. Clarke*, 22 Fla. 515, 1 South. 149. And where a defendant, after the entry of a decree against him in a contested action, files a bill of review, alleging want of jurisdiction over him personally, he thereby submits to the court the question of the binding force of the decree, and its decision thereon is conclusive. *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130.

⁶³ *Martin v. Judd*, 60 Ill. 78; *Leslie v. Fischer*, 62 Ill. 118.

⁶⁴ *Potter v. Parsons*, 14 Iowa, 286.

⁶⁵ *Brown v. Nichols*, 42 N. Y. 26; *England v. Garner*, 90 N. C. 197.

⁶⁶ *Infra*, § 272.

⁶⁷ *Infra*, vol. 2, § 903.

jection is not waived by appearing to the action. For here the rule applies that "consent cannot confer jurisdiction."

§ 226. Defendant's Right to be heard.

It has been declared by the supreme court of the United States that "a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." In the case at bar, the trial court had caused the appearance of the defendant to be stricken out, but had nevertheless proceeded with the case and passed a judgment affecting his rights. This, in the opinion of a majority of the court, was equivalent to denying him the benefit of the citation. For jurisdiction, it was said, was the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore there could be no exercise of jurisdiction. By the action of the court the defendant was excluded from its jurisdiction.⁶⁸ And this doctrine derives some support from the cases holding that opportunity to be heard is absolutely essential to the guarantee of "due process of law."⁶⁹ Nevertheless, for the reasons stated in the beginning of this chapter, in defining jurisdiction, we are not convinced that irregularities in the action of the court, even so gross as those mentioned, can properly be said to deprive it of all jurisdiction and make its decision a mere nullity.

§ 227. Judgments against Non-Residents.

It is a principle of law, too well settled to require the citation of authorities in its support, that the sovereignty of a state or country, for judicial as well as other purposes, extends only to its own citizens, or resident aliens, or persons temporarily within its borders, and to property within its territory, but not to absent non-residents. In many of our states, however, there are statutes authorizing the

⁶⁸ *Windsor v. McVeigh*, 98 U. S. 274, 23 L. Ed. 914; *Hovey v. Elliott*, 169 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.

⁶⁹ *Stuart v. Palmer*, 74 N. Y. 190, 30 Am. Rep. 289.

commencement of certain classes of actions by a merely constructive service of process, and these acts apply almost exclusively to proceedings against non-residents. The validity of judgments rendered under them has been much in question before the courts, and principally in cases where a judgment so given in one state has been sought to be enforced in another. This aspect of the subject will be fully considered in the chapter on judgments of a sister state, to which the reader is referred. But there are certain divisions of the topic which must be treated in this connection. And first, a distinction must be carefully noted between the jurisdiction over the state's own citizens and that over aliens. Every sovereignty has plenary control over its own subjects, and it may authorize a judgment to be rendered against one of its citizens, upon a constructive notice only, and although he is temporarily absent from its dominions, and such a judgment must be everywhere recognized as valid and of binding force and effect.⁷⁰ This much being premised, the contrary rule may be stated, viz.: that a personal judgment (as distinguished from an adjudication upon status or an adjudication which is substantially in rem) rendered against a non-resident upon a species of constructive service only, in an action to which he did not appear, is limited in its effects to the state or country where rendered, and elsewhere is a mere nullity.⁷¹ For example, while tax assessments may be enforced

⁷⁰ *Beard v. Beard*, 21 Ind. 321; *Douglas v. Forrest*, 4 Bing. 686; *Becquet v. McCarthy*, 2 Barn. & Adol. 951; *McRae v. Mattoon*, 13 Pick. (Mass.) 53; *Henderson v. Staniford*, 105 Mass. 504, 7 Am. Rep. 551; *Orcutt v. Ranney*, 10 Cush. (Mass.) 183; *Welch v. Sykes*, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; *Price v. Hickok*, 39 Vt. 292; *Spencer v. Brockway*, 1 Ohio, 259, 13 Am. Dec. 615; *Rangely v. Webster*, 11 N. H. 299; *Hinton v. Townes*, 1 Hill (S. C.) 439; *Hunt v. Lyle*, 8 Yerg. (Tenn.) 142; *Gilman v. Lewis*, 24 N. J. Law, 246, note.

⁷¹ *Schilbsby v. Westenholz*, L. R. 6 Q. B. 155; *Buchanan v. Rucker*, 9 East, 192; *Pennyroy v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Bischoff v. Weathered*, 9 Wall. 812, 19 L. Ed. 829; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Knowles v. Logansport Gaslight & Coke Co.*, 19 Wall. 58, 22 L. Ed. 70; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Phelps v. Brewer*, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; *Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340; *Carleton v. Bickford*, 13 Gray (Mass.) 591, 74 Am. Dec. 652; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Zepp v. Hager*, 70 Ill. 223; *Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151; *Reber v. Wright*, 68 Pa. 471; *Pagett v. Curtis*, 15 La. Ann. 451;

against the property liable, without regard to the residence of the owner, yet a statute attempting to make a nonresident property owner personally liable for assessments for local improvements is an attempt to take property without due process of law, and a personal judgment against such owner would be void.⁷² Again, in a suit to foreclose a mortgage or vendor's lien, where the defendant is a non-resident and is cited by publication only and does not enter an appearance, the court has no jurisdiction to render a personal judgment against him.⁷³ And where, in an action for the specific performance of a contract for the conveyance of lands, defendant is served only by publication, the plaintiff cannot recover damages for breach of the contract.⁷⁴ Nor can a personal judgment for costs be rendered in an action for partition, as against non-residents who were not served with process, except constructively, and who did not voluntarily appear.⁷⁵

But if a non-resident defendant, being within the state, is there personally served with process,⁷⁶ or if he appears in the action by a duly authorized attorney,⁷⁷ in either case the court has jurisdiction over him and the subsequent judgment is universally to be regarded as valid. And error in rendering a personal judgment on default against a defendant who is a non-resident, and had notice only by publica-

Park v. Park, 24 Misc. Rep. 372, 53 N. Y. Supp. 677; *Belcher v. Sheehan*, 171 Mass. 513, 51 N. E. 19; *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; *Bradley v. Burnett* (Tex. Civ. App.) 40 S. W. 170; *Fowler v. Brown*, 51 Neb. 414, 71 N. W. 54.

⁷² *Dewey v. City of Des Moines*, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665.

⁷³ *Ward v. Green* (Tex. Civ. App.) 28 S. W. 574; *Spence v. Morris* (Tex. Civ. App.) 28 S. W. 405.

⁷⁴ *Tempel v. Dodge*, 11 Tex. Civ. App. 42, 31 S. W. 686. See *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

⁷⁵ *Freeman v. Preston* (Tex. Civ. App.) 29 S. W. 495.

⁷⁶ *Mowry v. Chase*, 100 Mass. 79; *Downer v. Shaw*, 22 N. H. 277; *Murphy v. Winter*, 18 Ga. 690.

⁷⁷ *Holt v. Alloway*, 2 Blackf. (Ind.) 108; *Walker v. Lathrop*, 6 Iowa, 516; *Davis v. Davis*, 96 Ga. 136, 21 S. E. 1002. A court has jurisdiction to render a valid judgment against a corporation of a foreign state, whenever the corporation appears generally by attorney, or when legal service has been made upon it according to the laws of the state where the court sits. *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

tion, is not available on behalf of a co-defendant who appeared.⁷⁸ In some of the states there are also statutory provisions that an action can be commenced and judgment rendered only in the county in which the defendant resides. And it has been held that this requisite is so jurisdictional in its character that a judgment rendered in another county is void and incapable of ratification.⁷⁹ But the better view appears to be that the defendant may waive this objection.⁸⁰

§ 228. **Extra-Territorial Service of Process.**

It is a recognized rule of international law that "no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."⁸¹ And this principle is fully adopted by the American cases. "Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability."⁸² Therefore if a summons is sent by mail to a non-resident defendant and comes to his hands, or is served upon him at his own domicile by an officer of the law, although it does actually apprise him of the suit against him, yet it has no greater or other effect than a purely constructive or fictitious service. It fails for lack of authority in the sovereignty whence it emanated. It does not bind him to appear, and no judgment can be rendered on it which will be recognized as valid beyond the limits of the state which rendered it.⁸³ In some of the states,

⁷⁸ *Pattison v. Smith*, 93 Ind. 447.

⁷⁹ *Richardson v. Hunter*, 23 La. Ann. 255; *Georgia Railroad & Banking Co. v. Harris*, 5 Ga. 527.

⁸⁰ *Leach v. Kohn*, 36 Iowa, 144.

⁸¹ *Story, Conf. Laws*, § 539.

⁸² *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. Ed. 565.

⁸³ *Wilson v. Graham*, 4 Wash. C. C. 53, Fed. Cas. No. 17,804; *Hall v. Williams*, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; *Folger v. Columbian Ins. Co.*, 99

however, an attempt is made to discriminate between the two species of service, and to attach a slightly higher value to actual service, though extra-territorial, than to service by published advertisement, probably in view of the fact that, by the former method, it is certain that the defendant will at least be informed of the proceedings against him. Thus in Iowa, under a statute providing that "when a judgment has been rendered against a defendant or defendants, served by publication only, and who do not appear," such defendant may appear within two years and move the court for a retrial, it is held that this provision does not apply to the case of a defendant who was personally served outside the state and did not appear in the action.⁸⁴

§ 229. Jurisdiction by Attachment of Non-Resident's Property.

Although a person may not reside in a particular state, it frequently happens that he may have property there, either real or personal. And this, it is said, will give the courts of that state jurisdiction of actions against him. Accordingly, there are statutes in most of the states providing for the institution of suits against non-residents by the attachment of their property within the territory. But it must be carefully noted that the jurisdiction is in realty over the property, not the person. The existence of property within a state gives its courts power and authority to adjudicate upon that

Mass. 267, 96 *Am. Dec.* 747; *Price v. Hickok*, 39 *Vt.* 292; *Steel v. Smith*, 7 *Watts & S. (Pa.)* 447; *Holmes v. Holmes*, 4 *Lans. (N. Y.)* 388; *Dunn v. Dunn*, 4 *Paige (N. Y.)* 425; *Lutz v. Kelly*, 47 *Iowa*, 307; *Irby v. Wilson*, 18 *N. C.* 568; *Weil v. Lowenthal*, 10 *Iowa*, 575; *Ætna Life Ins. Co. v. Lyon County (O. C.)* 95 *Fed.* 325; *In re James' Estate*, 78 *Hun.* 121, 28 *N. Y. Supp.* 992; *Hinton v. Penn Mut. Life Ins. Co.*, 126 *N. C.* 18, 35 *S. E.* 182, 78 *Am. St. Rep.* 636; *Perry v. Bassett*, 16 *Tex. Civ. App.* 288, 41 *S. W.* 523; *Higgins v. Beckwith*, 102 *Mo.* 456, 14 *S. W.* 981. The rule applies also as between one of the United States and any foreign country. The judgment of a Canadian or any foreign court, upon service of its process made in Michigan, is not binding on a defendant who refused to recognize its jurisdiction, and it will not support an action in the courts of Michigan. *McEwan v. Zimmer*, 38 *Mich.* 765, 31 *Am. Rep.* 332. But jurisdiction over one outside the territorial jurisdiction of the court is conferred by his acceptance of "due personal service" of the writ. *Jones v. Merrill*, 113 *Mich.* 433, 71 *N. W.* 838, 67 *Am. St. Rep.* 475.

⁸⁴ *McBride v. Harn*, 52 *Iowa*, 79, 2 *N. W.* 962.

property and to cause it to be applied in satisfaction of the debts of its owner, whoever and wherever he may be. But if they assume to investigate the owner's duties and determine his obligations, their authority to do so is merely incidental to their jurisdiction over his property, and because such an inquiry is a necessary preliminary to a right disposition of the property, but not because they have any control over his person. Consequently, "when the person is not within the jurisdiction of the court, and his property is within its jurisdiction, a judgment against him will be effectual only as a judgment in rem acting upon that property."⁸⁵ Hence, also, if the defendant was beyond the jurisdiction and was only constructively notified of the action, though his property was attached within the state, there is no warrant for a personal judgment against him; and if the judgment is expressed in general language, it cannot be considered or treated as a judgment in personam, but only as a judgment in rem.⁸⁶ Further, a judgment founded upon this species of jurisdiction will have no force or effect, beyond the state where it was rendered, further than to bind the property attached and disposed of.⁸⁷ For the further elucidation of this subject we quote the following from an opinion of the supreme court of Minnesota. "Such a judgment, though in form a judgment in personam, is in effect only a judgment in rem. It is a judgment for no other purpose than to

⁸⁵ *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662; *Du Pont v. Abel* (C. C.) 81 Fed. 534; *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475; *Exchange Nat. Bank v. Clement*, 100 Ala. 270, 19 South. 814.

⁸⁶ *Johnson v. Dodge*, 19 Iowa, 106; *Payne v. Witherspoon*, 14 B. Mon. (Ky.) 270; *Mickey v. Stratton*, 5 Sawy. 475, Fed. Cas. No. 9,530; *Packard v. Mathews*, 9 Gray (Mass.) 311. See *Brown v. Tucker*, 7 Colo. 30, 1 Pac. 221. The fact that the court rendered a personal, and therefore void, judgment against a non-resident defendant, not served, will not vitiate so much of the judgment as finds the amount due to the plaintiff and orders the sale of attached property. *Barelli v. Wagner*, 5 Tex. Civ. App. 445, 27 S. W. 17.

⁸⁷ *Phelps v. Holker*, 1 Dall. (Pa.) 261, 1 L. Ed. 128; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Penoyer v. Neff*, 95 U. S. 725, 24 L. Ed. 565; *Pawling v. Willson*, 13 Johns. (N. Y.) 192; *McDermott v. Clary*, 107 Mass. 501; *Arndt v. Arndt*, 15 Ohio, 33; *Woodruff v. Taylor*, 20 Vt. 65; *McVicker v. Beedy*, 31 Me. 314, 1 Am. Rep. 666; *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; *Story, Conf. Laws*, § 549. See *infra*, vol. 2, § 904.

reach the property which a non-resident may have in the state, but who is not personally served with process therein. It is confined exclusively to such property, and is of no further force when that is exhausted. Beyond this it is evidence of nothing; nor does it bind or conclude the defendant in anything. An action could not be maintained on it in any other court here or elsewhere; nor, in my opinion, would the party in whose favor it was rendered be precluded thereby from still bringing another action on the original consideration, for any balance that might be due to him after exhausting the property which was in the state at the time jurisdiction attached. To hold that a judgment thus rendered has any vitality after exhausting the only thing over which the court rendering it had jurisdiction, is violative of a principle inherent in all free governments and which constitutes an inflexible rule at common law, viz., that no one can be condemned unheard."⁸⁸ Very important consequences follow from considering a judgment of this character as one in rem only. Thus it cannot be made the basis of an action of debt.⁸⁹ Nor can proceedings be taken against the defendant to compel him to submit to an examination concerning his property; nor can the plaintiff have a warrant for his arrest, as prescribed by the code, on account of his refusal to apply property in satisfaction of such judgment.⁹⁰ So again, the power of a court to render a personal judgment against the mortgagor for a deficiency, in an action for the foreclosure of the mortgage, does not extend to a case where the mortgagor is a non-resident and has neither appeared in the action nor been served with process within the state. The remedy of the plaintiff in such case is limited to the foreclosure and sale of the equity of redemption in the mortgaged premises.⁹¹ In a case,

⁸⁸ *Stone v. Myers*, 9 Minn. 303 (Gil. 287), 86 Am. Dec. 104.

⁸⁹ *Easterly v. Goodwin*, 35 Conn. 273. Where a judgment is rendered in rem, and the property attached is exhausted, service of a summons to renew the execution, and an order of court granting a renewal, do not make the judgment one in personam. *Stanley v. Stanley*, 35 S. O. 94, 14 S. E. 675.

⁹⁰ *Bartlett v. McNeil*, 60 N. Y. 53.

⁹¹ *Schwinger v. Hickok*, 53 N. Y. 280; *Heady v. Bexar Bldg. & Loan Ass'n* (Tex. Civ. App.) 26 S. W. 468; *Ward v. Green* (Tex. Civ. App.) 28 S. W. 574. Where a plaintiff in possession of land obtained a judgment against a defendant, a non-resident of the state, upon service by publication only, and without his appearance in court, and afterwards the defendant in such action brought

where, after attachment of property and publication of a citation, the plaintiff filed an amended petition, setting up an entirely new cause of action, on which judgment by default was rendered without any further citation being published or service had, it was held that the court acquired no jurisdiction and the judgment was entirely void.⁹³ But after an appearance and plea by the defendant in a suit commenced by attachment, in which there has been only constructive service by publication, the suit becomes one in personam, and a personal judgment may properly be rendered against him.⁹³ So where the non-resident defendant acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants.⁹⁴

§ 230. What Property bound.

There are numerous intimations in the books (though perhaps no direct decision) to the effect that a judgment against a non-resident, founded upon constructive service and attachment of property, will be valid and enforceable, not only against the property actually seized, but also against any other property of his within the state. In other words, that any property of the defendant found within the territorial jurisdiction may be subjected to execution under the judgment, although it is not a personal obligation against him. And a case in New York holds that such a judgment is effectual against any property within the jurisdiction during the pendency of the action and which was or might have been seized under attachment therein.⁹⁵ That these views are entirely untenable will be at once apparent if we consider the real nature of such a proceeding. It

another action, as plaintiff, against the former plaintiff, as defendant, in the courts of another state, held, that in the trial of such subsequent action, the judgment in the first action was conclusive of the rights of said parties to the land in dispute. *Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

⁹³ *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295.

⁹³ *Kerr v. Swallow*, 33 Ill. 379; *Darrah v. Watson*, 36 Iowa, 116.

⁹⁴ *Richardson v. Smith*, 11 Allen (Mass.) 134.

⁹⁵ *Fiske v. Anderson*, 33 Barb. (N. Y.) 71. And in Vermont it is held that a judgment against a non-resident defendant, rendered without notice, will not be adjudged invalid as a matter of law, because the property returned as attached was of merely nominal value. *Stevens v. Fisher*, 30 Vt. 200.

was shown in the preceding section to be substantially a proceeding in rem. But in a proceeding in rem jurisdiction is acquired only by seizure of the res, and the judgment is enforceable only against the res. It is therefore contrary to fundamental principles to attempt to extend its operation against property which was not seized, although, being within the territorial limits of the state, it might have been attached. And many well considered cases are explicit in declaring that such a judgment has no other force or validity whatever than to justify the disposition made of the property which was actually attached upon mesne process in the action.⁹⁶

§ 231. Service by Publication without Attachment.

Some of the decisions hold that constructive service by publication, without attachment of property, will give the court such jurisdiction over a non-resident that its judgment, though not enforceable beyond the state, may be satisfied out of any property of the defendant found within the borders of the state;⁹⁷ or any property which was within the state at the time the order for publication was made, and which is not removed or sold to a bona fide purchaser before the judgment.⁹⁸ But this position was successfully controverted in the important and leading case of *Pennoyer v. Neff*,⁹⁹ and the rule established that such a judgment (except in an action for divorce, which is governed by special rules, to be considered hereafter¹⁰⁰) is simply and entirely void for all purposes. The correct view is so clearly and ably stated in this decision that we quote at some length from the opinion. "The want of authority," said Field,

⁹⁶ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Graham v. Spencer* (C. C.) 14 Fed. 603; *Eastman v. Wadleigh*, 65 Me. 251, 20 Am. Rep. 695; *Coleman's Appeal*, 75 Pa. 441; *Tabler v. Mitchell*, 62 Miss. 437; *Johnson v. Holley*, 27 Mo. 594.

⁹⁷ *Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

⁹⁸ *Jarvis v. Barrett*, 14 Wis. 591.

⁹⁹ 95 U. S. 714, 24 L. Ed. 565.

¹⁰⁰ *Infra*, vol. 2, §§ 924-933. In an action for maintenance without divorce against a non-resident husband, who is served by publication and does not appear, a provision of the judgment requiring him to give bond to comply with a condition of the judgment as to alimony is invalid. *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97.

J., "of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what will occur subsequently."¹⁰¹

¹⁰¹ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. And see *Mitchell's Adm'r v. Gray*, 18 Ind. 123; *Smith v. McCutchen*, 38 Mo. 415; *Remer v. McKay* (C. C.) 54 Fed. 432; *Southern Bldg. & Loan Ass'n v. Brackett* (Tex. Civ. App.) 39 S. W. 619; *Evans v. Breneman* (Tex. Civ. App.) 46 S. W. 80; *McMahon v. Turney*, 45 Mo. App. 103; *Plummer v. Hatton*, 51 Minn. 181, 53 N. W. 460; *Willamette Real-Estate Co. v. Hendrix*, 28 Or. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

§ 232. Statutes authorizing Constructive Service to be strictly construed.

All exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by the statute.¹⁰² Hence the statutory provisions for acquiring jurisdiction of a defendant by publication of the summons, in the stead of a personal service, must be strictly and exactly pursued.¹⁰³ As it has been well said, "no principle is more vital to the administration of justice than that no man should be condemned in his person or property without notice and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding in rem, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of law, prescribed by the legislature for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill? If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void."¹⁰⁴ Thus, defendants cannot be summoned by publication unless shown to be non-resi-

¹⁰² *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

¹⁰³ *People v. Huber*, 20 Cal. 81; *Pinkney v. Pinkney*, 4 G. Greene (Iowa) 324; *Hodges v. Brett*, Id. 345; *Edrington v. Allsbrooms*, 21 Tex. 183; *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438; *Myer v. Kuhn*, 25 U. S. App. 174, 13 C. C. A. 298, 65 Fed. 705; *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116. Thus, it is essential that the published notice shall correctly state the parties to the suit and their names. *Myer v. Kuhn*, supra; *City of Detroit v. Detroit City R. Co.* (C. C.) 54 Fed. 1; *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520; *Entrekin v. Chambers*, 11 Kan. 368; *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44. As to trifling misnomers and minor mistakes which do not necessarily vitiate, see *Hirsh v. Weisberger*, 44 Mo. App. 506; *White v. McClellan*, 62 Md. 347; *Fanning v. Krapf*, 61 Iowa, 417, 14 N. W. 727; *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4.

¹⁰⁴ *Boswell v. Otis*, 9 How. 336, 350, 13 L. Ed. 164.

dents.¹⁰⁵ And where, under the statute, a summons and return are necessary to give the court jurisdiction, an indorsement on the writ acknowledging service is not sufficient.¹⁰⁶ So a judgment following a service of summons purporting to be by publication, but which was made without affidavit and order, is void.¹⁰⁷ And so if the affidavit upon which the order for publication issued was substantially defective, there is no jurisdiction of the defendant.¹⁰⁸ Again, a judgment which is invalid because, service being made by publication, it was not shown that a copy of the petition and notice was mailed to the defendant, or that his residence was unknown (that being required by the usual wording of the statute), cannot be cured by giving such proof afterwards.¹⁰⁹ In case of notice by publication, the court acquires no jurisdiction until proper proof of a compliance with the statute requisitions is made to appear of record.¹¹⁰ And an order of the court directing non-resident defendants to be notified by publication, will not authorize a judgment against resident defendants who have not been duly served with process.¹¹¹

Before leaving the subject of constructive service of process, it must be remarked that a non-resident may be brought within the jurisdiction of an appellate court by mere publication of the notice, when it appears that he was personally cited or duly appeared in the action in the trial court. This is not a real exception to the rule of jurisdiction, but is based upon the consideration that the whole controversy, from its inception in the court below to its final determination by the court above, is but one suit. "Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the juris-

¹⁰⁵ *Johnson v. Patterson*, 12 Ind. 471.

¹⁰⁶ *Chickering v. Falles*, 26 Ill. 507.

¹⁰⁷ *People v. Mullan*, 65 Cal. 306, 4 Pac. 348.

¹⁰⁸ *Braly v. Seaman*, 30 Cal. 610.

¹⁰⁹ *Hodson v. Tibbetts*, 16 Iowa, 97.

¹¹⁰ *Tunis v. Withrow*, 10 Iowa, 305, 77 Am. Dec. 117; *Byram v. McDowell*, 15 Lea (Tenn.) 581. Parol evidence tending to show defendant's knowledge of the suit will not validate a judgment which must rest on proof of a strict compliance with the statute in regard to service by publication. *Roberts v. Roberts*, 3 Colo. App. 6, 31 Pac. 941.

¹¹¹ *Pomeroy v. Betts*, 31 Mo. 419.

diction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared and litigated the merits of the controversy."¹¹²

§ 233. Joint Defendants.

By the common law, where process issued against two, on a joint cause of action, and only one appeared, the other must be outlawed before there could be any further proceedings.¹¹³ And in this country,—independently of statutes,—where a suit is instituted against several defendants jointly, and one is not served with process, and the court assumes jurisdiction and proceeds to render judgment against them all, such judgment is absolutely void, so far, at least, as concerns the defendant not served.¹¹⁴ Thus, where suit is brought against three and process issued to all, but it appears to have been served upon two only, there being no return as to the third, and none of the three answer, judgment should not be entered by default generally, without amendment, discontinuance, or some other action taken in regard to the defendant not served.¹¹⁵ So where there are several defendants, and part are served in time

¹¹² *Nations v. Johnson*, 24 How. 105, 16 L. Ed. 628.

¹¹³ *Edwards v. Carter*, 1 Strange, 473.

¹¹⁴ *Wilbur v. Abbot*, 60 N. H. 40; *Odom v. Denny*, 16 Gray (Mass.) 114; *McDoel v. Cook*, 2 N. Y. 110; *Jones v. Reed*, 1 Johns. Cas. (N. Y.) 20; *Boaz v. Heister*, 6 Serg. & R. (Pa.) 18; *Vandiver v. Roberts*, 4 W. Va. 493; *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Moody v. Lyles*, 44 Miss. 121; *Ayer v. Bailey*, 5 How. (Miss.) 688; *Faver v. Briggs*, 18 Ala. 478; *Houston v. Ward*, 8 Tex. 124; *Bayless v. Daniels*, Id. 140; *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217; *Hickey v. Smith*, 6 Ark. 456; *Dunn v. Hall*, 8 Blackf. (Ind.) 32; *Allen v. Chadsey*, 1 Ind. 399; *Brockman v. McDonald*, 16 Ill. 112; *Swift v. Green*, 20 Ill. 173; *Treat v. McCall*, 10 Cal. 511; *Proctor v. Lewis*, 50 Mich. 329, 15 N. W. 495. In Ohio, it is said that a judgment against all of several defendants, where only a part are served with process, is erroneous but not void. *Douglass' Lessee v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375. And see *Forbes v. Bringe*, 32 Neb. 757, 49 N. W. 720; *Ward v. Stanley*, 41 Ill. App. 417; *Blyth & Fargo Co. v. Swenson*, 15 Utah, 345, 49 Pac. 1027; *Boyd v. Ellis*, 107 Mo. 304, 18 S. W. 29.

¹¹⁵ *Rogers v. Harrison*, 44 Tex. 169.

and others are not, judgment cannot be entered against any at the return term, but the case must be continued.¹¹⁶

§ 234. Joint Judgment as an Entirety.

Supposing a judgment to be entered in violation of the common law rule just stated—that is, a joint judgment where some of the defendants were not served—it becomes important to determine whether it must be regarded as void for all purposes and in respect to all parties, or merely voidable as against those who were not notified. This question has been considered in a preceding section; and it was there shown that, notwithstanding a great conflict of authorities, the better opinion was that such a judgment is at most voidable as to the defendant not served, while it ought to stand as a perfectly valid adjudication against the other until reversed, but that, if carried up by appeal or writ of error, it must be reversed as to both the defendants.¹¹⁷ In case of a purely joint liability there may be justice in adhering to the stricter view; but otherwise the conception of a judgment as an entirety appears to be highly technical and ill adapted to the purposes of justice.

§ 235. Joint Judgment authorized by Statute.

In order to escape the rigor of the common law rule above stated, several of the states have passed statutes which provide that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and if he recovers, may have judgment against all the defendants whom he shows to be jointly liable, but it must be so entered as to be enforceable only against the joint property of all and the separate property of those served.¹¹⁸ But this statute must be strictly followed; the

¹¹⁶ *Evans v. Gill*, 25 Ill. 116.

¹¹⁷ *Supra*, § 211.

¹¹⁸ Code N. Y. § 136; Code Civ. Proc. Cal. § 413; Code S. C. § 157; Laws Ill. 1896 (Act June 4th) § 5; Rev. St. Wis. § 2884. On the construction and application of these statutes, see *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913;

judgment must be in form against both; and a judgment against the one served alone is erroneous in substance.¹¹⁹ Nor can the clerk, upon the application of the plaintiff, enter judgment upon default against the party served only; a judgment so entered is void.¹²⁰ And if it should appear upon the trial that the contract in suit was not joint, but was made with one of the defendants only, then of course the statute does not apply, and the plaintiff should be nonsuited.¹²¹ Further, if the defendant who was not served was a non-resident of the state, and did not appear in the action, the judgment, so far as concerns him, can have no extra-territorial validity nor be enforced against him in the state of his domicile. And it is held that even in the courts of the state which rendered the judgment he would be allowed to show, in avoidance of the judgment, that he was not a joint contractor, as it is that fact alone that makes such judgment binding upon him.¹²²

§ 236. Statutory Several Judgment.

In a number of the states, according to the statute law, or the practice prevailing in the courts, and in derogation of the common law, if two or more persons are sued in a joint action, the plaintiff may proceed against any one or more of them upon service of process on them, notwithstanding there may be others not served, and if his contention is successful, he may have judgment against those served, excluding the others.¹²³ In Vermont, in a case where pro-

Neal v. Pennington, 65 Ill. App. 68; Brawley v. Mitchell, 92 Wis. 671, 66 N. W. 799. A statute of Minnesota (Gen. St. 1894, § 5436) provides that, when a judgment is rendered against one of several persons jointly indebted, those who are not originally summoned to answer the complaint may be summoned to show why they should not be bound by the judgment; but the clerk cannot enter judgment against parties so sought to be held on default, or without express authority from the court. Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579.

¹¹⁹ Nelson v. Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310; Stehr v. Oilbermann, 49 N. J. Law, 633, 10 Atl. 547.

¹²⁰ Kelly v. Van Austin, 17 Cal. 564.

¹²¹ Fleming v. Freese, 26 N. J. Law, 263.

¹²² Harker v. Brink, 24 N. J. Law, 333.

¹²³ Ingraham v. Gildemeester, 2 Cal. 88; Hirschfield v. Franklin, 6 Cal. 607; Kelly v. Bandini, 50 Cal. 530; Simpson v. Prather, 5 Or. 86; Loney v. Bailey,

cess was sued against two persons, who were declared against as joint promisors, and service was made upon one only, the other not becoming a party in court, and evidence was given showing that the person served alone made the promise declared on, it was held, under the law of that state relating to such cases, that a judgment might be recovered against the person so making the promise.¹²⁴

§ 237. Judgment against Partners.

At the common law, where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court by due citation. Hence where an action is instituted against several persons constituting a partnership, either before or after its dissolution, and one partner is not served with process, and judgment is rendered against them all, such judgment will be voidable so far as concerns the partner who was not served.¹²⁵ On similar principles, and since one partner cannot bind his co-partner by a forthcoming bond to which he has signed the latter's name without authority, a statutory judgment on such bond is void as to the partner not signing, for want of jurisdiction.¹²⁶ In those states, however, where the "joint debtor acts" are in force, if not all the partners are served with process, still a judgment may be rendered against the firm, to be

43 Md. 10; *Hunt v. Anderson*, 33 Miss. 559; *Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 680; *Moore v. Estes*, 79 Ky. 282; *Caldwell v. Harp*, 2 McCord (S. C.) 275; *Merchants' & Mechanics' Bank v. Evans*, 9 W. Va. 373; *Norfolk & W. R. Co. v. Shippers' Compress Co.*, 83 Va. 272, 2 S. E. 139; *Fender v. Styles*, 31 Ill. 460; *Dillon v. Porter*, 36 Minn. 341, 31 N. W. 56; *Bennett v. Townsend*, 1 Neb. 460; *Cunningham v. Dixon*, 1 Marv. (Del.) 163, 41 Atl. 519; *Waldner v. Pauly*, 141 Ill. 442, 30 N. E. 1025; *Green v. Shaw*, 66 Ill. App. 74; *Bacon v. Green*, 36 Fla. 325, 18 South. 870; *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218; *Dillard v. Turner's Adm'r*, 87 Va. 669, 14 S. E. 123.

¹²⁴ *Hodges v. Eastman*, 12 Vt. 358.

¹²⁵ *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271; *Ingraham v. Gildemeester*, 2 Cal. 88; *Schloss v. White*, 16 Cal. 68; *Inos v. Winspear*, 18 Cal. 897; *St. John v. Holmes*, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; *Mitchell v. Greenwald*, 43 Miss. 167; *Dresser v. Wood*, 15 Kan. 344; *Harford v. Street*, 46 Iowa, 504; *Bowler v. Huston*, 30 Grat. (Va.) 266, 32 Am. Rep. 673; *Faver v. Briggs*, 18 Ala. 478; *Anderson v. Arnette*, 27 La. Ann. 237; *Galennie v. Akin's Ex'r*, 17 La. 42, 36 Am. Dec. 604; *Dessauer v. Koppin*, 8 Colo. App. 115, 32 Pac. 182.

¹²⁶ *Smith v. Tupper*, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483.

enforced against the partnership property and the individual property of the partners served.¹²⁷ But such a judgment will have no extra-territorial validity against any partner who was not served and did not appear,¹²⁸ the case being governed by the same rules which apply in any other action against joint defendants. And in California it is held that, where, in an action against a partnership on a joint liability, the complaint and summons designate the defendants individually, with a description that they are partners doing business under a firm name, the judgment can only be against the parties served, and not against a defendant not served with summons or who does not appear, though he be a member of the partnership.¹²⁹

§ 238. Appearance for Defendant not Served.

In an action upon contract against several defendants, where only a part are served with process, but others voluntarily appear, a judgment for the plaintiff must be against all the defendants appearing.¹³⁰ But where an attorney appears specially for one defendant in an action against two, and afterwards, as attorney for "the defendant," acknowledges judgment in favor of the plaintiff, it is a good judgment only as to the defendant for whom such attorney appeared, and a joint execution is erroneous.¹³¹

¹²⁷ *Newlon v. Heaton*, 42 Iowa, 598; *Patten v. Cunningham*, 63 Tex. 668. A judgment to the effect that plaintiff do recover of the member served a certain sum "for which let execution issue, to be levied upon the goods and chattels of the firm and upon the individual property of the defendant served with citation," is a valid judgment against the partnership, under which the partnership property, real as well as personal, may be seized and sold. *Alexander v. Stern*, 41 Tex. 193.

¹²⁸ *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271; *Scott v. Bogart*, 14 La. Ann. 261.

¹²⁹ *Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413.

¹³⁰ *Mosher v. Small*, 5 Pa. 221; *Heaton v. Collins*, 7 Blackf. (Ind.) 414; *Hall v. Law*, 2 Watts & S. (Pa.) 121. But a judgment entered against one who has not been served, on an appearance by an unauthorized attorney, which has not been ratified or confirmed, is absolutely void as against such defendant. *First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56.

¹³¹ *Kimmel v. Kimmel*, 5 Serg. & R. (Pa.) 294.

§ 239. Construction of Judgment against "Defendants" generally.

Where process is served only on a part of the defendants named in the writ, and judgment is taken against "the defendants," without naming them, and without any appearance of those not served, the judgment will be understood to be only against those who were duly served.¹³² In some of the states, the rendition of a judgment against a defendant who was not served and who did not appear is considered to be a mere clerical mistake which may be amended on motion in the trial court.¹³³

§ 240. Jurisdiction of the Subject-Matter.

Thus far we have been considering the questions connected with the acquisition of jurisdiction over the defendant's person. We turn now to the equally important subject of the validity of judgments as dependent upon jurisdiction of the subject-matter. And first, it is an inflexible rule that any judgment rendered by a court upon a matter not within its jurisdiction is null and void, incapable of ratification, and subject to collateral impeachment.¹³⁴ The principles which govern this point have been well stated in the following language: "1. Where the judicial tribunal has general jurisdiction of the subject-matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted, upon notice to all proper parties, juris-

¹³² *Morgan v. Morgan*, 2 Bibb (Ky.) 388; *Clark v. Finnell*, 16 B. Mon. (Ky.) 329; *Boyd v. Baynham*, 5 Humph. (Tenn.) 386, 42 Am. Dec. 438; *Winchester v. Beardin*, 10 Humph. (Tenn.) 247, 51 Am. Dec. 702; *Neal v. Singleton*, 26 Ark. 491. Per contra, *Langley v. Grill*, 1 Colo. 71.

¹³³ *Savage v. Walshe*, 26 Ala. 619; *Bergen v. Bolton*, 10 Mo. 658.

¹³⁴ *Smith v. Knowlton*, 11 N. H. 191; *Morse v. Presby*, 25 N. H. 299; *Eaton v. Badger*, 33 N. H. 228; *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414; *Lyles v. Bolles*, 8 S. C. 258; *Ponce v. Underwood*, 55 Ga. 601; *Wamsley v. Robinson*, 28 La. Ann. 793; *Gilliland v. Seller*, 2 Ohio St. 223; *Webb v. Carr*, 78 Ind. 455. Where a complaint alleges two causes of action, the fact that the court had jurisdiction of one of them will not support a judgment upon both, where it had no jurisdiction of the other. *Chicago & S. E. Ry. Co. v. Spencer*, 23 Ind. App. 606, 55 N. E. 882. Compare *Stovall v. Hibbs* (Ky.) 32 S. W. 1067.

diction is acquired and cannot be assailed in any collateral proceeding. 2. Where the judicial tribunal has not general jurisdiction of the subject-matter under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction. 3. Where the judicial tribunal has not general jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding."¹³⁵ If we inquire more particularly into the meaning of the terms here employed, the answer is, that "by jurisdiction over the subject-matter is meant the nature of the cause of action or of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."¹³⁶ Now the powers to be exercised by a court may be prescribed and defined in several different ways, though always emanating from the sovereign authority of the state. First, the constitution or statute which creates the court may specifically enumerate the classes of actions or subjects of controversy to which its jurisdiction shall extend. This is usually the case in respect to the original jurisdiction of the supreme courts, and in respect to probate and similar courts. Or else the power may be conferred in general language; as where a court of record is invested with "general original jurisdiction in all cases, civil or criminal, at law or in equity," or where a separate chancery court is given general equity powers. And here no subject will be intended to be out of the jurisdiction of the court, unless clearly shown to be so by law. Or the power to hear and determine a particular class of actions or proceedings may be granted to a tribunal specially organized for that purpose or to one of the usual courts in addition to its common law powers. Or finally, the limitations of the jurisdiction may be introduced by way of exception or reservation from the general powers granted. And this may be either by withdrawing certain classes of actions from the cognizance of the court, as where a justice of the peace is forbidden to try any suit

¹³⁵ *Bumstead v. Read*, 31 Barb. (N. Y.) 669.

¹³⁶ *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

involving the title to real estate; or by fixing a money limit below which the jurisdiction shall not attach, as is the case in respect to most controversies before the circuit courts of the United States; or by designating the amount above which the jurisdiction shall terminate, as is usual in regard to justices' and other inferior courts.¹⁸⁷ But in every case, where jurisdiction of the subject-matter is challenged, recourse must be had to the sources of jurisdiction, whether constitution or statute, and if they show a want of authority in the court to adjudicate upon the particular controversy, its judgment must be considered incurably void. And an unconstitutional statute, it will be remembered, can have no avail as a source of jurisdiction; a judgment rendered under it is entirely without validity.¹⁸⁸

§ 241. Sufficiency of Declaration.

In one of the early cases before the supreme court of the United States it was said, "if the petitioner states such a case in his petition that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction."¹⁸⁹ But probably this was not meant as equivalent to saying that if the petition were demurrable there would be no jurisdiction. Indeed it would be impossible, on any rational theory, to make the jurisdiction depend upon the validity of the case stated by the plaintiff. For the court

¹⁸⁷ Where the plaintiff's demand exceeds the jurisdiction of the inferior court in which his suit is brought, it should dismiss the cause and transfer it to a court of competent jurisdiction; no other judgment or order can validly be made. *Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312. But the fact that a justice of the peace erroneously allows interest, which makes the total amount exceed his jurisdiction, does not deprive him of original jurisdiction, so as to render the judgment void. *McCormick Harvesting Mach. Co. v. Marchant*, 11 Utah, 68, 39 Pac. 483. In *Jones v. Jones*, 14 N. C. 300, it was held that a judgment of a magistrate for a sum above his jurisdiction being void, no action could be maintained on it. But some other cases hold that a judgment of a court of record, founded upon a judgment of a justice of the peace which is in excess of his jurisdiction and consequently void, is erroneous but not void, and will stand good against collateral attacks. *Moore v. Martin*, 38 Cal. 428; *Hinds v. Wallis*, 13 Serg. & R. (Pa.) 213. But it is difficult to see how a nullity can be made the basis of an action.

¹⁸⁸ *Supra*, § 216.

¹⁸⁹ *United States v. Arredondo*, 6 Pet. 709, 8 L. Ed. 547.

must pass upon the sufficiency of the declaration, and jurisdiction to proceed at least so far must be acquired by the mere filing of the pleading and service of process. But it is equally certain that a court cannot, in ordinary cases, initiate a proceeding *sua sponte*. Its jurisdiction and power remain at rest until called into activity by the application of a suitor. Jurisdiction of the subject-matter, therefore, dynamically considered, depends upon the act of the parties in invoking the aid of the law, in some regular manner, for the determination of their controversy. A court has no more power, until its action is called into exercise by some sort of pleading, to render a judgment in favor of a party, than it has to enter a judgment against him until he has been brought within its jurisdiction by some method known to the law.¹⁴⁰

§ 242. Jurisdiction of Question decided.

Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words a judgment which passes upon matters entirely outside the issue raised in the record is so far invalid. "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is

¹⁴⁰ *Dunlap v. Southerlin*, 63 Tex. 38. And see *Humphries v. Barte*, 18 Miss. 282.

impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels."¹⁴¹

On this principle, where a widow brought suit for the sole purpose of having dower assigned her in her deceased husband's lands, the heirs at law, who were infants, being made defendants, and the court not only directed an assignment of dower, but of its own accord decreed a sale of the residue of the land belonging to the heirs,

¹⁴¹ *Munday v. Vall*, 34 N. J. Law, 418. To the same effect see *Reynolds v. Stockton*, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305; *Husted v. Van Ness*, 158 N. Y. 104, 52 N. E. 645; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; *Wright v. Durrett* (Tenn. Ch. App.) 52 S. W. 710; *Maddox v. Summerlin*, 92 Tex. 483, 50 S. W. 567; *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 55 N. W. 218, 88 Am. St. Rep. 747; *Carter v. Gibson*, 47 Neb. 655, 66 N. W. 631; *Barnes v. Chicago, M. & St. P. R. Co.*, 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128.

it was held that, the court having exceeded its jurisdiction, the decree of sale was void and open to collateral impeachment.¹⁴² Again, where the issues in a suit in chancery are so framed as to present a controversy between the complainant on the one side and the defendants on the other, the court should not go beyond the pleadings and decree relief as between the co-defendants; and though the language of the decree may be broad enough to embrace the decision of questions disputed by the defendants inter sese, yet it will be construed in the light of the pleadings, and restricted to the issues raised thereby.¹⁴³ So again, in an action to foreclose a mortgage on premises described in the complaint, a decree directing the sale of lands not mentioned in the pleadings is void, though the owner of such other lands was made a party.¹⁴⁴ And in an action between a mortgagor and certain mortgagees of chattels, the court has no power to declare void a mortgage not attacked by the pleadings, and of which the holder was not a party to the action.¹⁴⁵ A judgment foreclosing a trust deed on church property cannot be entered in a suit between different factions of the church for the possession of the property, where neither party sought a foreclosure or sale of the property.¹⁴⁶ Again, upon a motion to discharge an attachment, the court has no power, besides allowing such discharge, to order the undertaking to be cancelled, that question not being submitted.¹⁴⁷ And where a ground of liability not suggested by the pleadings is submitted to the jury, and they render a general verdict for the plaintiff, the judgment thereon cannot be sustained unless the other ground of liability is so clearly established that a verdict might have been directed.¹⁴⁸

In these cases the court lacked jurisdiction of the subject or question which it assumed to pass upon because such matter was not submitted to it by the parties. But the same result will follow if, being invested with jurisdiction for a single purpose in a special statutory

¹⁴² *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262.

¹⁴³ *Graham v. La Crosse & M. R. Co.*, 3 Wall. 704, 18 L. Ed. 247.

¹⁴⁴ *Clapp v. McCabe*, 84 Hun, 379, 32 N. Y. Supp. 425.

¹⁴⁵ *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236.

¹⁴⁶ *First Baptist Church v. Fort*, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 617.

¹⁴⁷ *Wyman v. Hallock*, 4 S. D. 469, 57 N. W. 197.

¹⁴⁸ *Springer v. Westcott*, 87 Hun, 190, 33 N. Y. Supp. 805.

proceeding, it transcends the limit and attempts to exercise its powers for other purposes also. Thus where a statute provides for an action to foreclose a mortgage against a non-resident defendant, upon publication of summons, and authorizes a decree to be made for the sale of the mortgaged premises to satisfy the debt secured thereby, the court exhausts its jurisdiction in making the decree contemplated, and if, in addition thereto, it proceeds to award a personal judgment for a sum of money against the defendant, such judgment, being beyond its power, is void.¹⁴⁹

§ 243. Loss of Jurisdiction.

In general, when jurisdiction has once fully attached in a cause, it will continue until the final disposition of the controversy. But this is not invariably the case, and a court may lose the jurisdiction which it has once rightfully acquired, after which it can make no further order or judgment. Such is the case when the cause has been taken up on appeal or error, and especially after the court of review has pronounced its judgment.¹⁵⁰ So where a pending litigation is removed from the state court to a federal court under the act of Congress in that behalf. Upon the filing of a proper petition, in a removable cause, the rightful jurisdiction of the state court ceases instantly, and every subsequent exercise of jurisdiction by it, including its judgment if one is rendered, is erroneous, if not absolutely void.¹⁵¹ The same result would follow, we apprehend, if a statute should deprive a court in which an action was pending of jurisdiction over that class of suits and transfer it to another tribunal, provided the law were explicitly made applicable to pending cases. And sometimes it may happen that jurisdiction is lost by the expiration of the term, without judgment rendered and without a proper continuance.¹⁵²

¹⁴⁹ Wood v. Stanberry, 21 Ohio St. 142; Fithian v. Monks, 43 Mo. 502; Boswell v. Dickerson, 4 McLean, 262, Fed. Cas. No. 1,683.

¹⁵⁰ Boynton v. Foster, 7 Metc. (Mass.) 415. See Lininger v. Glenn, 33 Neb. 204, 49 N. W. 1128.

¹⁵¹ Black, Dill. Rem. Causes, § 192; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478.

¹⁵² See supra, §§ 179, 180. In Wisconsin, the failure of a justice to enter
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§ 244. Jurisdiction attacking, Error does not vitiate.

In any case where the court has jurisdiction of the subject-matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers, and the judgment in the case, though it may be marked by error which will cause its reversal by a higher court, is not for that reason void.¹⁸³

in his docket the place, as well as the time, to which a cause pending before him is adjourned, defeats his jurisdiction (unless the parties voluntarily appear in the action subsequently) and renders all subsequent proceedings therein void. *Witt v. Henge*, 58 Wis. 244, 18 N. W. 609.

¹⁸³ *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; *Ex parte Kellogg*, 6 Vt. 509; *Moore v. Robison*, 6 Ohio St. 302; *Buckmaster v. Carlin*, 3 Scam. (Ill.) 104; *Georgia R. & Banking Co. v. Pendleton*, 87 Ga. 751, 13 S. E. 822.

CHAPTER XIII.**COLLATERAL IMPEACHMENT OF JUDGMENTS.****PART I. THE GENERAL RULE.**

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PART I. THE GENERAL RULE.

§ 245. Judgments not to be Attacked Collaterally.

Where the court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment, by parties or privies, in any collateral action or proceeding whatever.¹ "The doctrine of this court, and of all the courts of this

¹ *Elliott v. Piersol*, 1 Pet. 340, 7 L. Ed. 164; *Gray v. Brignardello*, 1 Wall. 627, 17 L. Ed. 692; *Secrist v. Green*, 3 Wall. 744, 18 L. Ed. 153; *Gunn v. Plant*, 94 U. S. 664, 24 L. Ed. 304; *Bank of United States v. Voorhees*, 1 McLean, 221, Fed. Cas. No. 939; *Dunham v. Jones*, 159 U. S. 584, 16 Sup. Ct. 108, 40 L. Ed. 267; *Woodman v. Smith*, 37 Me. 21; *Gorrill v. Whittier*, 3 N. H. 265; *Porter v. Gile*, 47 Vt. 620; *Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976; *Hendrick v. Whittemore*, 105 Mass. 23; *Smith v. Shaw*, 12 Johns. (N. Y.) 256; *People v. Downing*, 4 Sandf. (N. Y.) 189; *Kean v. McKinsey*, 2 Pa. 30; *Billings v. Russell*, 23 Pa. 189, 62 Am. Dec. 330; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604; *Wood v. Bayard*, 63 Pa. 320; *Fridge v. State*, 8 Gill & J. (Md.) 103, 20 Am. Dec. 463; *McNeel's Ex'rs v. Auldridge*, 34 W. Va. 748, 12 S. E. 851; *Lancaster v. Wilson*, 27 Grat. (Va.) 624; *Howison v.*

country, is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such errors be considered when the judgment is brought collaterally into question."² This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. "It is one," says the court in Virginia, "which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right

Weeden, 77 Va. 704; Fox v. Cottage Building Ass'n, 81 Va. 677; Skinner v. Moore, 19 N. C. 138, 30 Am. Dec. 155; Morris v. Gentry, 89 N. C. 248; Reese v. Meetze, 51 S. C. 333, 29 S. E. 73; Bridges v. Nicholson, 20 Ga. 90; Vickery v. Scott, 20 Ga. 798; Archer v. Guill, 67 Ga. 195; Moore v. Ware, 51 Miss. 206; Factors' & Traders' Ins. Co. v. De Blanc, 31 La. Ann. 100; Kent v. Brown, 38 La. Ann. 802; Lee v. Patten, 34 Fla. 149, 15 South. 775; Brown v. Hearon, 66 Tex. 63, 17 S. W. 395; Brooks v. Powell (Tex. Civ. App.) 29 S. W. 809; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Willis v. Ferguson, 46 Tex. 496; Paul v. Smith, 82 Ky. 451; Thacker v. Chambers, 5 Humph. (Tenn.) 313, 42 Am. Dec. 431; Hall v. Hefley, 6 Humph. (Tenn.) 444; Lewis v. Simonton, 8 Humph. (Tenn.) 185; Bigelow v. Bigelow, 4 Ohio, 138, 19 Am. Dec. 591; Cochran v. Loring, 17 Ohio, 409; Newnam v. City of Cincinnati, 18 Ohio, 323; Sauer v. Twinling, 81 Ind. 366; Keesling v. Doyle, 8 Ind. App. 43, 35 N. E. 126; First Nat. Bank v. Hanna, 12 Ind. App. 240, 39 N. E. 1054; Cody v. Hough, 20 Ill. 43; Kern v. Strausberger, 71 Ill. 303; Harris v. Lester, 80 Ill. 307; Wright v. Marsh, 2 Greene (Iowa) 94; Hampson v. Weare, 4 Iowa, 13, 66 Am. Dec. 116; Callahan v. Griswold, 9 Mo. 775; Martin v. McLean, 49 Mo. 361; Yeoman v. Younger, 83 Mo. 424; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497.

² McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545, Miller, J.

established by a judgment would be insecure and uncertain; and a cloud would rest upon every title." ³ If the sentence last quoted seems somewhat extravagant, at least it will serve to show the substantial reasons upon which the rule rests and the inflexibility with which it is held by the courts. According to the supreme court of Massachusetts, the rule obtains "not because of an apparent authority in the court to render the judgment, but because the remedy by review or writ of error is held to be more appropriate." ⁴ This may be sufficient as a technical reason, but it cannot be doubted that the motives which have led to the establishment of the rule rather spring from the considerations of public policy, and the necessary finality of judicial decisions, indicated in the opinions previously quoted.

§ 246. To what Judgments the Rule applies.

The rule against collateral impeachment applies to every judgment, order, decree, or judicial proceeding, of whatever species, that is not absolutely void. If the judgment is void on its face it is of course a mere nullity and of no avail for any purpose, and this may be urged against it whenever it is brought in question. ⁵ But otherwise, whether it be regular or irregular, correct or erroneous, valid or voidable, it is not subject to collateral attack. This rule has been held applicable to a judgment in rem, where the court had jurisdiction of the res; ⁶ to a judgment condemning property in confiscation proceedings; ⁷ to decrees of divorce rendered by courts of competent jurisdiction; ⁸ to an order of naturalization; ⁹ to decrees rendered by a court of equity, when sought to be assailed in the same or another court; ¹⁰ to a judgment in attachment; ¹¹ to orders and

³ *Lancaster v. Wilson*, 27 Grat. (Va.) 624, 629.

⁴ *Hendrick v. Whittemore*, 105 Mass. 23.

⁵ See *supra*, § 170; *infra*, § 278.

⁶ *Otis v. The Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613; *Shearer v. City Nat. Bank*, 115 Ala. 352, 22 South. 151.

⁷ *Bragg v. Lorlo*, 1 Woods, 209, Fed. Cas. No. 1,800.

⁸ *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

⁹ *State v. Brandhorst*, 156 Mo. 457, 56 S. W. 1094, 79 Am. St. Rep. 538.

¹⁰ *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; *Estep*

¹¹ *Harrison v. Pender*, 44 N. C. 78, 57 Am. Dec. 573; *Needham v. Wilson* (C. C.) 47 Fed. 97.

judgments in eminent domain proceedings;¹² to judgments of foreclosure;¹³ to orders of courts calling special elections, under statutory authority for that purpose;¹⁴ to a decree confirming an auditor's report on the distribution of the estate of an assignor for the benefit of creditors;¹⁵ to a judgment forfeiting a recognizance, that being within the competence of the court;¹⁶ to an order allowing a certain sum to the clerk for costs in insolvent criminal cases;¹⁷ to an order of court approving the act of an administrator in allowing a claim against the estate;¹⁸ to an order granting an allowance for the support of the widow and children;¹⁹ to a decree authorizing the receiver of an insolvent corporation to levy an assessment on the stockholders to pay the debts;²⁰ to an order setting aside a judgment by default;²¹ and to a decree vacating a former decree upon a petition to be let in to a defense.²² Moreover, the rule against collateral impeachment applies not only to judgments in contested actions, but also to judgments by default, provided the court had jurisdiction,²³ and to judgments dismissing the action,²⁴ as also to judgments by confession,²⁵ and compromise and consent

v. *Watkins*, 1 Bland (Md.) 486; *Covington v. Ingram*, 64 N. C. 123; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249; *Gomez v. Gomez*, 81 Hun, 566, 81 N. Y. Supp. 206; *Sauer v. Cincinnati St. Ry. Co.*, 5 Ohio N. P. 108.

¹² *Farrington v. City of New York*, 88 Hun, 124, 31 N. Y. Supp. 371; *Lovitt v. Russell*, 138 Mo. 474, 40 S. W. 123; *Hopkins v. Cravey*, 85 Tex. 189, 19 S. W. 1067.

¹³ *Toothaker v. Greer*, 92 Me. 546, 43 Atl. 498; *Kopp v. Blessing*, 121 Mo. 391, 25 S. W. 757; *Martina v. Muhlke*, 88 Ill. App. 12.

¹⁴ *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *State v. Mackin*, 51 Mo. App. 239.

¹⁵ *Com. v. Steacy*, 100 Pa. 613.

¹⁶ *Rubush v. State*, 112 Ind. 107, 13 N. E. 877.

¹⁷ *Duer v. Thweatt*, 39 Ga. 578. See *State v. Board of Com'rs of Lander County*, 22 Nev. 71, 35 Pac. 300.

¹⁸ *Pitner v. Flanagan*, 17 Tex. 7.

¹⁹ *Leaverton v. Leaverton*, 40 Tex. 218.

²⁰ *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229.

²¹ *Bender v. Askew*, 14 N. C. 150, 22 Am. Dec. 714.

²² *Southern Bank v. Humphreys*, 47 Ill. 227.

²³ *Pendexter v. Cole*, 66 N. H. 270, 20 Atl. 331.

²⁴ *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800; *Haug v. Great Northern Ry. Co.*, 42 C. C. A. 167, 102 Fed. 74.

²⁵ *F. Mayer Boot & Shoe Co. v. Falk*, 89 Wis. 216, 61 N. W. 562; *United*

judgments.²⁶ Also it is said that if an execution sale is merely voidable, none but parties to the proceeding can question it, and then only in the same action or by appeal or writ of error.²⁷

The entry of a judgment in the judgment-book, it is said, including the date of the judgment and the date of the docketing in the judgment-docket, while standing as a part of the court's record, cannot be impeached collaterally.²⁸ And while affidavits may be read or proof heard, to show that words have been improperly stricken from a judgment, they cannot be received to falsify a record by showing that an alteration, correcting it, was improperly made.²⁹

§ 247. Tax Judgments.

The principle that a record cannot be impeached collaterally for mere errors or irregularities is equally applicable to a statutory judgment against land for taxes as to any other decree. "It is no objection," said the supreme court of Alabama in a recent case, "to the application of this principle that the present proceeding is to enforce the collection of delinquent taxes. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the tax payer, this principle forbidding the collateral assailment of judgments has often been invoked successfully in actions of this nature. It has accordingly been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempted from its influence."³⁰ And it is no reason for departing

States Electric Lighting Co. v. Leiter, 19 D. C. 575; *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Perisho v. Perisho*, 71 Ill. App. 222; *Chase v. Tuckwood*, 86 Ill. App. 70; *City of Helena v. United States*, 43 C. C. A. 429, 104 Fed. 113; *Wright v. Wright (C. C.)* 103 Fed. 580.

²⁶ *Biddle v. Pierce*, 13 Ind. App. 239, 41 N. E. 475.

²⁷ *Magnusson v. Cronholm*, 51 Ill. App. 473.

²⁸ *Ferguson v. Kumler*, 25 Minn. 183.

²⁹ *Walker v. Armour*, 22 Ill. 658.

³⁰ *Driggers v. Cassady*, 71 Ala. 529; *United States Trust Co. v. Mercantile Trust Co.*, 31 C. C. A. 427, 88 Fed. 140; *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053; *People v. Weber*, 164 Ill. 412, 45 N. E. 723; *Young v. Lorain*, 11 Ill. 637, 52 Am. Dec. 463; *Job v. Tebbetts*, 5 Gilman (Ill.) 376; *Chesnut v. Marsh*, 12 Ill. 173; *Reinhardt v. Nealis*, 101 Tenn. 169, 46 S. W. 446; *McCarter v. Neil*, 50 Ark. 188, 6 S. W. 731; *Burcham v. Terry*, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42; *Scott v. Pleasants*, 31

from this rule that the property owner was a non-resident, if the court had jurisdiction of the subject-matter and the usual constructive notice to the owner was given.³¹ Nor can the judgment be impeached because it embraces also a personal judgment against the owner of the land beside the proper judgment against the land itself; for that part of the judgment which is directed against the owner will be regarded as mere surplusage.³² The cases even go to the length of holding that it cannot be shown against such a judgment, collaterally, that the taxes on the particular land had been in fact paid before the suit,³³ or that no assessment was made for the year in question,³⁴ although delinquency is the very fact upon which the jurisdiction of the court must be based. And it is not even permitted to show, in any collateral proceeding, that the assessment on which the taxes were based was illegal and void, or that the statute or ordinance authorizing the assessment was unconstitutional or invalid.³⁵ In Illinois, it was at one time the settled rule that a judgment by default, in a proceeding under the statutes of that state for the condemnation and sale of land for taxes, was not conclusive upon the tax payer, and might be collaterally impeached.³⁶ But this rule has been very much narrowed by an amendment to the revenue law providing that the tax judgment shall estop all parties from raising objections which existed at or before the rendition of the judgment and could have been presented in defense thereto, and

Ark. 364; *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12; *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713; *Wellshear v. Kelley*, 69 Mo. 343; *Hennessy v. City of St. Paul*, 54 Minn. 219, 55 N. W. 1123; *Eitel v. Foote*, 39 Cal. 439; *Branson v. Caruthers*, 49 Cal. 375; *Mayo v. Foley*, 40 Cal. 281; *Town of Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785; *Cadmus v. Jackson*, 52 Pa. 295; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407; *Black*, Tax Titles (2d Ed.) § 177.

³¹ *Neely v. Buchanan* (Tenn. Ch.) 54 S. W. 905; *Charley v. Kelley*, 120 Mo. 134, 25 S. W. 571; *Clark v. Kern*, 146 Ill. 348, 35 N. E. 60.

³² *Chesnut v. Marsh*, 12 Ill. 173.

³³ *Chauncey v. Wass*, 35 Minn. 1, 30 N. W. 826; *Cadmus v. Jackson*, 52 Pa. 295; *Black*, Tax Titles (2d Ed.) § 169.

³⁴ *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713.

³⁵ *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595; *Mayo v. Foley*, 40 Cal. 281; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10. And see *Higgins v. Bordages* (Tex. Civ. App.) 28 S. W. 350.

³⁶ *Gage v. Pumpelly*, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449.

making the judgment conclusive evidence of its own regularity and validity in all collateral proceedings, except where the tax had been paid or the land was not liable for it.³⁷

§ 248. Adjudications in Bankruptcy.

An adjudication of bankruptcy, made by a court having jurisdiction of the subject-matter and of the person of the defendant, is conclusive of the fact decreed, and cannot be attacked collaterally, for any error or irregularity, in controversies between the trustee in bankruptcy and persons claiming an adverse interest in the property of the bankrupt, or otherwise.³⁸ On the same principle, a discharge in bankruptcy remains valid and binding until set aside or annulled in a suit brought for that purpose in the court where it was granted; it cannot be impeached collaterally for fraud, irregularity, or want of notice in the proceedings in which it was obtained.³⁹ A state court, for example, can neither annul nor disregard a dis-

³⁷ *Drake v. Ogden*, 128 Ill. 608, 21 N. E. 511; *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320; *Black, Tax Titles* (2d Ed.) § 177.

³⁸ *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832; *Graham v. Boston, H. & E. R. Co. (C. C.)* 14 Fed. 753; *In re Columbia Real Estate Co. (D. C.)* 101 Fed. 965; *Hobson v. Markson*, 1 Dill. 421, Fed. Cas. No. 6,555; *In re Getchell*, 8 Ben. 256, Fed. Cas. No. 5,371; *In re Ives*, 5 Dill. 146, Fed. Cas. No. 7,115; *Mount v. Manhattan Co.* 41 N. J. Eq. 211, 3 Atl. 726. As to questioning the jurisdiction of the court, the foregoing cases show that this cannot be done, if the objection to the jurisdiction concerns the character or number of creditors joining in the petition, the sufficient allegation of an act of bankruptcy, or the amount of debts owed by the bankrupt. But there are authorities to the effect that a total want of jurisdiction over the person of the bankrupt may be shown, even collaterally. *In re Goodfellow*, 1 Low. 510, Fed. Cas. No. 5,536; *Fellows v. Hall*, 3 McLean, 487, Fed. Cas. No. 4723; *Stuart v. Aumiller*, 37 Iowa, 102, 8 N. B. R. 541.

³⁹ *United States v. Griswold (C. C.)* 7 Sawy. 311, 8 Fed. 556. The prescribed notice to creditors is so far essential to the jurisdiction of the court to grant a discharge in bankruptcy that the want of it will be ground for setting the discharge aside in a direct proceeding for that purpose; though, in any collateral proceeding, the certificate of discharge is itself conclusive evidence of jurisdiction to grant it. *Allen v. Thompson (D. C.)* 10 Fed. 116.

charge duly granted by a court of bankruptcy having jurisdiction, nor allow it to be impeached in any collateral proceeding for any cause which would authorize the bankruptcy court to revoke or set it aside; it can be impeached only in a direct proceeding for that purpose in the bankruptcy court itself.⁴⁰

§ 249. Awards.

An award of arbitrators, like a judgment at law, concludes the parties, and cannot be impeached in a collateral proceeding, even although erroneous, if it was fairly made.⁴¹ If it appears to be good on its face, none of the various grounds which might be urged against its justice or legality in a direct proceeding to set it aside will avail collaterally. Thus, it was said in an early case: "An award good upon the face of it cannot be impeached but upon objections which go to the misbehavior of arbitrators. If the reception of illegal evidence appear upon the award, it may be set aside, or if a mistake of fact appear upon the face, or by confession of the referees, it should be recommitted; but the court cannot inquire by extrinsic testimony into the justice of the award, for that would be to try the matters in dispute de novo."⁴²

⁴⁰ *Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19; *Stetson v. City of Bangor*, 56 Me. 286; *Parker v. Atwood*, 52 N. H. 181; *Fuller v. Pease*, 144 Mass. 380, 11 N. E. 604; *Way v. Howe*, 108 Mass. 502, 11 Am. Rep. 386; *Sheets v. Hawk*, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Talbot v. Suit*, 68 Md. 443, 13 Atl. 356; *Brady v. Brady*, 71 Ga. 71; *Oates v. Parish*, 47 Ala. 157; *Milhous v. Alcardi*, 51 Ala. 594; *Stevens v. Brown*, 49 Miss. 597; *Alston v. Robinett*, 37 Tex. 56; *Brown v. Causey*, 56 Tex. 340; *Ewell v. Pitman* (Ky.) 27 S. W. 870; *Morris v. Creed*, 11 Heisk. (Tenn.) 155; *Hennessee v. Mills*, 1 Baxt. (Tenn.) 38; *Thurmond v. Andrews*, 10 Bush (Ky.) 400; *Smith v. Ramsey*, 27 Ohio St. 339; *Howland v. Carson*, 28 Ohio St. 625; *Wiley v. Pavey*, 61 Ind. 457, 28 Am. Rep. 677; *Brown v. Covenant Mut. Life Ins. Co.*, 86 Mo. 51; *Thornton v. Hogan*, 63 Mo. 143; *Seymour v. Street*, 5 Neb. 85; *Thomas v. Jones*, 39 Wis. 124.

⁴¹ *Morse v. Bishop*, 55 Vt. 231.

⁴² *Jocelyn v. Donnel, Peck* (Tenn.) 274, 14 Am. Dec. 753.

§ 250. *Judgments of Inferior Courts.*

We shall have occasion, in a later part of this chapter, to discuss the important distinction between superior and inferior courts, in respect to the presumptions by which the judgments of the former are sustained against collateral attacks upon their jurisdiction, and the requirement that judgments of the latter must show jurisdiction on their face. But it belongs to the present connection to advert to the well recognized rule that the judgments and decisions of an inferior court can in no case be assailed indirectly on account of errors or irregularities not affecting the jurisdiction.⁴³ Thus the regularity or legality of a judgment rendered by a justice of the peace, in a case falling within his competence and in which he had jurisdiction of the parties, so long as it is not reversed or annulled in some proper proceeding, is not open to collateral attack or impeachment.⁴⁴ On similar principles, an order or decree of a surrogate, or probate or orphans' court, jurisdiction having attached, is not examinable in any collateral proceeding.⁴⁵ In fact, the orders and judgments of probate courts concerning matters over which they have

⁴³ *Comstock v. Crawford*, 3 Wall. 396, 18 L. Ed. 34; *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Bell v. Raymond*, 18 Conn. 100; *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 40; *Roosevelt v. Kellogg*, 20 Johns. (N. Y.) 208; *Bernal v. Lynch*, 36 Cal. 135; *Thompson v. Multnomah Co.*, 2 Or. 34; *Shoemaker v. Brown*, 10 Kan. 383.

⁴⁴ *Tarbox v. Hays*, 6 Watts (Pa.) 398, 31 Am. Dec. 478; *Billings v. Russell*, 23 Pa. 189, 62 Am. Dec. 330; *McDonald v. Simcox*, 98 Pa. 619; *Cumberland Co. v. Boyd*, 113 Pa. 52, 4 Atl. 346; *Allen v. Martin*, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; *Wesson v. Chamberlain*, 3 N. Y. 331; *Lightsey v. Harris*, 20 Ala. 409; *Reid v. Spoon*, 66 N. C. 415; *Allen v. Mills*, 26 Mich. 123; *Nevada Nickel Syndicate v. National Nickel Co. (C. C.)* 103 Fed. 391; *Livingston v. Allen*, 83 Mo. App. 294. Compare *Jones v. Pharis*, 59 Mo. App. 254.

⁴⁵ *Welty v. Ruffner*, 9 Pa. 224; *Gilmore v. Rodgers*, 41 Pa. 120; *Leedom v. Lombaert*, 80 Pa. 381; *City of Boston v. Robbins*, 126 Mass. 384; *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Ward v. Hudspeth*, 44 Ala. 215; *Grant v. Spann*, 34 Miss. 294; *Currle v. Franklin*, 51 Ark. 338, 11 S. W. 477; *Barney v. Chittenden*, 2 G. Greene (Iowa) 165; *Halleck v. Moss*, 22 Cal. 266; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. Error of judgment by a surrogate, however palpable, does not render proceedings under it void, and advantage can be taken of it only on appeal; it cannot be passed upon in a collateral suit or action. *Woodruff v. Cook*, 2 Edw. Ch. (N. Y.) 259.

jurisdiction are no more open to collateral attack than are the orders and judgment of other courts of general jurisdiction; they must have accorded to them the same intendments and favorable presumptions which attend the judgments of courts of general common-law jurisdiction.⁴⁶ This rule applies to an order admitting a will to probate;⁴⁷ to orders appointing or removing executors, administrators, or guardians;⁴⁸ to orders allowing claims against the estate of a decedent;⁴⁹ to orders authorizing the sale of land to pay debts of the estate, or confirming sales made by the executor;⁵⁰ and to decrees of partition made by a probate court having jurisdiction.⁵¹

The rule is by no means confined to the two species of inferior courts already mentioned. It extends equally to many varieties of judicial bodies and special tribunals, all being protected, as to their judgments, in collateral inquiries, except as to jurisdiction, and, in some cases, fraud. For example, where a court-martial has cognizance of the charges made, and has jurisdiction of the person of the accused, its sentence is valid and not impeachable collaterally, although irregularities or errors are alleged to have occurred in its

⁴⁶ *Bensen v. Manhattan Ry. Co.*, 164 N. Y. 559, 58 N. E. 1085; *Murzynowski v. Delaware, L. & W. R. Co.*, 15 N. Y. Supp. 841; *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1088; *Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 360; *Gallup v. Smith*, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353.

⁴⁷ *In re Warfield's Will*, 22 Cal. 51, 83 Am. Dec. 49; *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001, 18 L. R. A. 242; *Varner v. Johnston*, 112 N. C. 570, 17 S. E. 483; *Belton v. Summer*, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372; *Halbert v. De Bode* (Tex. Civ. App.) 28 S. W. 58.

⁴⁸ *Steen v. Bennett*, 24 Vt. 303; *Loyd v. Waller*, 20 C. C. A. 548, 74 Fed. 601; *Winter v. London*, 99 Ala. 263, 12 South. 438; *Gillespie v. Hauenstein*, 72 Miss. 838, 17 South. 602.

⁴⁹ *Yeatman v. Yeatman*, 35 Neb. 422, 53 N. W. 385; *Shelton v. Hadlock*, 62 Conn. 143, 25 Atl. 483; *Munday v. Leeper*, 120 Mo. 417, 25 S. W. 381; *Murphy v. De France*, 105 Mo. 53, 16 S. W. 861.

⁵⁰ *Williams v. Sharp*, 2 Ind. 101; *Sturdy v. Jacoway*, 19 Ark. 499; *Tyson v. Belcher*, 102 N. C. 112, 9 S. E. 634; *Brown v. Lanman*, 1 Conn. 467; *Lebroke v. Damou*, 89 Me. 113, 35 Atl. 1028; *Watkins v. Lewis*, 153 Ind. 648, 55 N. E. 83; *Cobb v. Garner*, 105 Ala. 467, 17 South. 47, 53 Am. St. Rep. 136; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325.

⁵¹ *Snevily v. Wagner*, 8 Pa. 396; *Fowler v. Succession of Gordon*, 24 La. Ann. 270.

proceedings.⁵² So, where a board of land commissioners has once acquired jurisdiction of a matter, its subsequent proceedings therein cannot be collaterally questioned.⁵³ The same rule applies to the proceedings of a board of county officers exercising their statutory authority in proceedings for the laying out of a public highway or the location of a private way.⁵⁴ Again, as a state board of equalization acts judicially in determining what property is to be assessed for taxation, and in fixing the amount of the assessment, its judgment therein cannot be collaterally impeached.⁵⁵

§ 251. Co-Ordinate Courts.

A judgment at law cannot be impeached collaterally in equity.⁵⁶ And conversely, the validity of a decree rendered by a court of equity cannot be impeached in a collateral action at law.⁵⁷ A judgment of a state court, no question as to its jurisdiction being involved, cannot be overhauled or corrected in a collateral proceeding in a federal court.⁵⁸ The courts of the United States cannot law-

⁵² *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213; *Keyes v. United States*, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. Ed. 954; *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838; *Swalm v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; *United States v. Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

⁵³ *Bernal v. Lynch*, 36 Cal. 135.

⁵⁴ *San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78; *Helms v. Bell*, 155 Ind. 502, 58 N. E. 707; *Thomas v. Churchill*, 84 Me. 446, 24 Atl. 899.

⁵⁵ *McLeod v. Receveur*, 13 C. C. A. 188, 71 Fed. 455.

⁵⁶ *Redwine v. Brown*, 10 Ga. 311.

⁵⁷ *Watson v. Williams*, 43 N. C. 232; *Alexander v. Nelson*, 42 Ala. 462.

⁵⁸ *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 27 L. Ed. 636; *Central Trust Co. v. Seasongood*, 130 U. S. 482, 9 Sup. Ct. 575, 32 L. Ed. 985; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 360, 34 L. Ed. 1054; *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678; *Lytle v. Town of Lansing*, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78. Federal courts can determine whether or not a state court had jurisdiction of the parties to or subject-matter of a cause in which it has rendered judgment, and for this purpose they may look beyond the record and hear other evidence; but it cannot be shown by parol or extrinsic evidence that the subject-matter in the record was not that which was adjudicated. *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 76 Fed. 429. A decree of a state court can be collaterally attacked in a federal court only when it is entirely void, either for want of legal organization of the court, or want of jurisdiction over the par-

fully treat as nullities the judgments of the courts of the several states, rendered in suits where the latter have jurisdiction of the cause and the parties, even if they are founded upon an erroneous construction of the bankrupt act or any other statute of the United States; the remedy for the correction of the error is by a writ of error in the supreme court of the United States.⁵⁹ And it is equally clear that the reverse of this rule must hold good. That is, that the judgments and decrees of the federal courts, in cases where their jurisdiction is not disputed, must be impervious to collateral assaillment in the courts of the states, although, for example, they may proceed upon an erroneous construction of a state constitution or statute.⁶⁰

§ 252. What constitutes a Collateral Attack.

We are next to inquire what constitutes a collateral attempt to impeach a judgment within the meaning of the rule prohibiting such endeavors. And here we shall find that the word "collateral" is always used as the antithesis of "direct," and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose.⁶¹ If an appeal is taken from a judgment, or a writ of error,⁶² or if a motion is made to va-

ties or the subject-matter. But the fact that such decree is void on its face, because uncertain and incomplete, does not render it subject to collateral attack; the remedy must be sought in the court which rendered it, by proceedings for its vacation, or by appeal. *Wood v. City of Mobile* (C. C.) 99 Fed. 615.

⁵⁹ *Kittredge v. Emerson*, 15 N. H. 227.

⁶⁰ *Kent v. Lake Superior Ship Canal Ry. & Iron Co.*, 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 352; *Anderson v. Elliott*, 41 C. C. A. 521, 101 Fed. 609; *Town of Ontario v. First Nat. Bank*, 59 Hun, 29, 12 N. Y. Supp. 434; *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938; *Mead v. Weaver*, 42 Neb. 149, 60 N. W. 385.

⁶¹ *Nichols v. Wimmer* (Tex. Sup.) 19 Reporter, 475.

⁶² An appeal or writ of error by infants after attaining their majority, to reverse a judgment irregularly rendered against them, is a direct attack on the judgment, not collateral. *Moore v. Prince*, 5 Tex. Civ. App. 352, 23 S. W. 1113; *Warren v. Union Bank of Rochester*, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 258, 68 Am. St. Rep. 777. So of an appeal from a judgment by a third person, legally entitled to appeal because aggrieved by the judgment. *Succession of Fortier*, 51 La. Ann. 1562, 26 South. 554.

cate or set it aside on account of some alleged irregularity,⁶³ the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule. Thus, whether a judgment is irregular or erroneous is not a legitimate inquiry in a suit brought for its enforcement.⁶⁴ So in the distribution of a fund, the court cannot inquire into the validity of a judgment regular on its face, or into the consideration on which it was founded.⁶⁵ Again, in an action of trespass to try title, any attack upon a judgment which forms the basis of the title of one of the parties, or enters into his title, will be considered a collateral impeachment of such judgment.⁶⁶ And in a suit on an appeal bond,

⁶³ An action or motion to vacate a judgment for want of service of process on the defendant is not a collateral attack, but direct. *Vaule v. Miller*, 60 Minn. 440, 72 N. W. 452; *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1069, 21 Am. St. Rep. 52. The same is true of a bill to set a judgment aside on the ground that it was procured by fraud. *Mosby v. Gisborn*, 17 Utah, 257, 54 Pac. 121; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 43 Am. St. Rep. 334. Or because it was rendered against a minor plaintiff who was not represented by a guardian. *Stephens v. Hewett*, 22 Tex. Civ. App. 304, 54 S. W. 301.

⁶⁴ *Rogers v. Rogers*, 15 B. Mon. (Ky.) 364; *Pearse v. Hill*, 163 Mass. 493, 40 N. E. 765. Nor in an action on a promissory note given in satisfaction of the judgment. *Mitchell v. State Bank*, 1 Scam. (Ill.) 526. A proceeding to revive a judgment is collateral, and cannot be made the means of impeaching the original judgment for error. *Foster v. Crawford* (C. C.) 80 Fed. 991. And the same is true of a suit in equity to enforce the lien of a judgment against real estate of the debtor. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878; *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117. Unless a judgment is void on its face, it cannot be collaterally attacked in proceedings after execution on exemplification filed in another county. *Toomey v. Rosansky*, 11 Pa. Super. Ct. 506. Nor can the correctness of a decree giving a party a lien on property be inquired into on a motion to vacate a sale made in conformity with such decree. *Dryden v. Parrotte*, 61 Neb. 339, 85 N. W. 287.

⁶⁵ *Second Nat. Bank's Appeal*, 85 Pa. 528; *Safe-Deposit & Trust Co. v. Wright*, 44 C. C. A. 421, 105 Fed. 155.

⁶⁶ *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Bouldin v. Miller* (Tex. Civ. App.) 26 S. W. 133. Compare *Fayssoux v. Kendall County* (Tex. Civ. App.) 55 S. W. 583; *Graham v. East Texas Land & Imp. Co.* (Tex. Civ. App.) 50 S. W. 579; *Scanlan v.*

the validity of the judgment appealed from and affirmed cannot be drawn in question.⁶⁷ The same is true of a suit on a recognizance entered in an attachment suit; no allegations can be heard against the regularity of the judgment in attachment.⁶⁸ Nor can a judgment be attacked in a proceeding to punish defendant for contempt in disobeying it,⁶⁹ nor when it is offered in evidence collaterally in another suit,⁷⁰ nor when an action is brought to recover land sold under an execution on the judgment.⁷¹ Similarly, where a receiver of an insolvent sues to recover assets of his estate, defendant cannot assail the validity of the judgment under which the receiver was appointed.⁷² And in an action by a guardian on the bond of a former guardian who had been removed, an objection by defendants that the court had no jurisdiction to remove such former guardian, and appoint the plaintiff, cannot be sustained, being a collateral attack on the judgment.⁷³ So where a sheriff is sued for failure to return an execution, he cannot impeach the judgment on which the writ issued.⁷⁴

On the other hand, a complaint alleging that a judgment is absolutely void on its face, and yet is apparently a lien on plaintiff's land, and asking a decree annulling and avoiding such judgment, is not a collateral attack upon it.⁷⁵ And it has been held that no improper impeaching of a judgment collaterally is involved in a creditor intervening, in a suit brought by heirs against their mother to enforce payment for their interest in the deceased father's estate,

Campbell, 22 Tex. Civ. App. 505, 55 S. W. 501. A cross bill attacking the validity of a decree of a probate court in ordering sale of land of an insolvent decedent to pay debts, in a suit to quiet title to the land, is a collateral attack. Friedman v. Shamblin, 117 Ala. 454, 23 South. 821.

⁶⁷ Sturgis v. Rogers, 26 Ind. 1; Bostic v. Love, 16 Cal. 69; Trogdon v. Cleveland Stone Co., 53 Ill. App. 206.

⁶⁸ Elmer v. Richards, 25 Ill. 289. See Tarbox v. Hays, 6 Watts (Pa.) 398, 31 Am. Dec. 478.

⁶⁹ Ketchum v. Edwards, 6 App. Div. 160, 39 N. Y. Supp. 1012.

⁷⁰ Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

⁷¹ Brooks v. Powell (Tex. Civ. App.) 29 S. W. 809.

⁷² Jones v. Blun, 145 N. Y. 333, 39 N. E. 954.

⁷³ Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

⁷⁴ Vicksburg Grocery Co. v. Brennan (Miss.) 20 South. 845.

⁷⁵ Penrose v. McKenzle, 116 Ind. 35, 18 N. E. 384. See McCampbell v. Durst, 73 Tex. 410, 11 S. W. 380.

which she has purchased, for the purpose of opposing the claims of the heirs, although their claims are founded on a probate decree confirming the sale, agreed on by the parties.⁷⁶ And an action by heirs to quiet the title of property of the decedent, fraudulently sold to pay his debts, is not a collateral attack on the decree confirming the sale.⁷⁷ In Texas, under a statute allowing persons interested in the estate of a decedent to have the proceedings in the county court corrected on certiorari from the district court, where the cause shall be tried *de novo*, the proceeding is direct, and not collateral.⁷⁸

§ 253. Proceedings to prevent Execution of the Judgment.

A bill in equity seeking to enjoin the enforcement of a judgment at law, by execution or otherwise, constitutes a collateral attack upon the judgment, and cannot be maintained on account of any mere errors or irregularities, but only upon a showing that the judgment is void.⁷⁹ There are cases, however, holding that a suit to enjoin the enforcement of a judgment on the ground of a total want of jurisdiction over the person of the defendant,—as, where no process was ever served on him,—is a direct attack on the judgment, and not collateral.⁸⁰ And the same is said to be true where the ground set up for enjoining the judgment is that it has been satisfied and released.⁸¹ The validity of a judgment cannot be impeached

⁷⁶ *Bedell v. Hayes*, 21 La. Ann. 643. See *Slidell v. Germania Nat. Bank*, 27 La. Ann. 354.

⁷⁷ *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760. Compare *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 585.

⁷⁸ *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118; *Kalteyer v. Wipff* (Tex. Civ. App.) 49 S. W. 1055.

⁷⁹ *Davis v. D. M. Osborn & Co.*, 156 Ind. 86, 59 N. E. 279; *Krug v. Davis*, 85 Ind. 309; *A. B. Smith Co. v. Bank of Holmes County* (Miss.) 18 South. 847; *Kirk v. Duren*, 45 S. C. 597, 23 S. E. 954; *Hudson v. Yost*, 98 Va. 347, 13 S. E. 436.

⁸⁰ *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824; *Waite v. Ellis*, 5 Ohio N. P. 415. But a suit to enjoin a judgment on the ground merely that the summons which was served was insufficient is a collateral attack. *Missouri, K. & T. Ry. Co. v. Warden*, 73 Mo. App. 117.

⁸¹ *Smith v. Morrill*, 11 Colo. App. 284, 52 Pac. 1110; *Brakke v. Hoskins*, 96 Iowa, 233, 67 N. W. 235.

on a motion to quash an execution issued on it. Such a motion cannot be based on the ground of mere error or irregularity in the judgment. The jurisdiction not being questioned, and the judgment not having been reversed, vacated, or set aside, such a motion would constitute a collateral attack upon it.⁸³

§ 253a. Proceeding to Enforce Judgment by Mandamus.

When a judgment has been recovered against a municipal corporation, and application is made for a writ of mandamus to compel the proper municipal officers to provide funds for its payment by the levy and collection of a tax, it is not permissible for the respondents, in opposition to the motion for mandamus, or in answer to the alternative writ, to set up any matters impeaching the correctness of the judgment; as against any such collateral attack, the judgment is impregnable, and it is conclusive of all defenses which were, or might have been, urged in the original action.⁸³ For example, if the suit was upon bonds of the municipality, it is no defense to the proceeding for mandamus that such bonds were illegally issued, or were invalid for any other reason.⁸⁴ Nor can the municipality contend that the indebtedness on which the judgment

⁸³ *Jones v. George*, 80 Md. 294, 30 Atl. 635; *Merrick v. Merrick*, 5 Mo. App. 123, citing *Swinney v. Watkins*, 22 Ga. 570; *Shorter v. Mims*, 18 Ala. 658; *Skidmore v. Bradford*, 4 Pa. 296.

⁸³ *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Harshman v. Knox County Court*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; *Mayor of New Orleans v. United States*, 2 U. S. App. 125, 1 C. C. A. 148, 49 Fed. 40; *Fleming v. Trowsdale*, 29 C. C. A. 106, 85 Fed. 189; *Olews v. Lee County*, 2 Woods, 474, Fed. Cas. No. 2,892; *Hill v. Scotland County Court (C. C.)* 32 Fed. 716; *Loague v. Taxing District of Brownsville (C. C.)* 36 Fed. 149; *People v. Common Council of Buffalo*, 21 N. Y. Supp. 598; *Bear v. Board of Com'rs of Brunswick County*, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; *Harkness v. Hutcherson*, 90 Tex. 383, 38 S. W. 1120; *City of Sherman v. Langham*, 92 Tex. 13, 42 S. W. 961; *Stevens v. Miller*, 3 Kan. App. 192, 43 Pac. 439; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190; *People v. Board of Com'rs of Rio Grande County*, 7 Colo. App. 229, 42 Pac. 1032; *Id.*, 11 Colo. App. 124, 52 Pac. 748; *State v. Moss*, 13 Wash. 42, 42 Pac. 622.

⁸⁴ *Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704; *Fleming v. Trowsdale*, 29 C. C. A. 106, 85 Fed. 189; *Board of Com'rs of Rio Grande County v. Burpee*, 24 Colo. 57, 48 Pac. 539; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190.

was based was in excess of the amount fixed by the constitution as the limit of the debt which it might lawfully incur.⁸⁵ Neither can it be alleged in the proceedings for mandamus that the judgment was entered by consent of the officers of the city, notwithstanding there was a valid defense to the action, the judgment not being void on its face.⁸⁶ But it has been declared by the supreme court of the United States that when application is made to collect judgments by process not contained in themselves,—as, by mandamus,—and requiring, in order to be sustained, reference to the alleged cause of action on which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever.⁸⁷ And it is competent for the respondents to the writ of mandamus to show that the original judgment was entirely void for want of jurisdiction.⁸⁸ The same principles apply in an action to enjoin the collection of a tax levied to pay a judgment against a municipal corporation. The validity of the claim on which the judgment rests cannot be questioned; the judgment being conclusive against collateral attack by the municipality or by any individual taxpayer.⁸⁹

§ 254. Habeas Corpus Proceedings.

The writ of habeas corpus is very frequently sued out to obtain the release of a person held in custody under the judgment or sen-

⁸⁵ *Harshman v. Knox County Court*, 122 U. S. 306, 7 Sup. Ct. 1171, 25 L. Ed. 225; *Board of Com'rs of Lake County v. Platt*, 25 C. C. A. 87, 79 Fed. 367; *Holt County v. National Life Ins. Co.*, 25 C. C. A. 469, 80 Fed. 686; *Geer v. Board of Com'rs of Ouray County*, 38 C. C. A. 250, 97 Fed. 435; *City of Helena v. United States*, 43 C. C. A. 429, 104 Fed. 113; *Edmundson v. Independent School District*, 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224; *Howard v. City of Huron*, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

⁸⁶ *City of Helena v. United States*, 43 C. C. A. 429, 104 Fed. 113. And see *United States Trust Co. v. Territory (N. M.)* 62 Pac. 987.

⁸⁷ *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780.

⁸⁸ *Moore v. Town Council of Edgefield (C. C.)* 32 Fed. 498. Compare *Boasen v. State*, 47 Neb. 245, 66 N. W. 303.

⁸⁹ *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 309, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. Rep. 926.

tence of a court, and in a great many instances the attempt has been made to impeach such judgment on grounds going to its legality or regularity, or even upon objections to the anterior proceedings. But the courts have resolutely set their faces against this practice, refusing to look beyond the judgment itself, except in the single case where a want of jurisdiction is alleged. A proceeding of this nature is undoubtedly a collateral attack upon the judgment; and exceptional as the remedy is, and beneficent as is the purpose it subserves, there is no good reason for permitting it to be made the vehicle for objections to the judgment or sentence which could not be urged against it in any other collateral proceeding.⁹⁰ Accordingly the authorities declare that the writ will not be issued when it appears on the face of the petition that the petitioner is detained by virtue of the final judgment of a court of competent jurisdiction;⁹¹ and that such a judgment, valid on its face, is an unanswerable return to a writ of habeas corpus.⁹² But while errors or irregularities will not be thus inquired into, the subject of jurisdiction is legitimately open to investigation, including both jurisdiction of the person and subject-matter and of the particular order or sentence assumed to be passed, as well as the sources of jurisdiction when founded on statute or ordinance. The several points will be discussed in detail in the next following sections.

§ 255. Errors and Irregularities not Reviewable.

If the question is upon the judgment of a court of competent jurisdiction, the petitioner in habeas corpus cannot impeach it on the ground of any error or irregularity in the proceedings or sentence of the court which does not go to the extent of impairing or taking away its power or jurisdiction to act in the case.⁹³ The rea-

⁹⁰ *People v. District Court*, 22 Colo. 422, 45 Pac. 402.

⁹¹ *In re Brittain*, 93 N. C. 587.

⁹² *Smith v. Hess*, 91 Ind. 424.

⁹³ *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391; *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 196; *Ex parte Yerger*, 8 Wall. 85, 19 L. Ed. 332; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Ex parte Yar-*

son is this. If any such erroneous or irregular action has occurred, he has his remedy by appeal, error, or certiorari. And although, on a review by an appellate court, the objections presented might be amply sufficient to procure a reversal of the judgment, yet he cannot make the proceeding by habeas corpus a short cut to the same result, because that would be twisting the extraordinary remedy away from its proper object to make it subserve an entirely different purpose.⁹⁴ The importance of this rule justifies its illustration by a number of examples. Thus the investigation on habeas corpus will not be allowed so wide a range as to include the nature,

brough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; *Stevens v. Fuller*, 136 U. S. 468, 10 Sup. Ct. 911, 34 L. Ed. 461; *Ex parte Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *In re Eckart*, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. Ed. 1085; *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *In re Boyd*, 4 U. S. App. 73, 1 C. C. A. 156, 49 Fed. 48; *In re King* (O. C.) 51 Fed. 434; *Ex parte Shaffenburg*, 4 Dill. 271, Fed. Cas. No. 12,696; *Ex parte Parks*, 1 Hughes, 604, Fed. Cas. No. 10,764; *Ex parte Williams*, 1 Wash. T. 240; *In re Phinney*, 32 Me. 440; *O'Malla v. Wentworth*, 65 Me. 129; *In re Dougherty*, 27 Vt. 325; *Walbridge v. Hall*, 3 Vt. 114; *Olmsted v. Hoyt*, 4 Day (Conn.) 436; *Herrick v. Smith*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; *Baker's Case*, 11 How. Prac. (N. Y.) 418; *Commonwealth v. Keeper of Jail*, 26 Pa. 279; *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374; *Ex parte Rollins*, 80 Va. 314; *In re Schenck*, 74 N. C. 607; *Dover v. State*, 75 Ala. 40; *Kirby v. State*, 62 Ala. 51; *Ex parte Simmons*, 62 Ala. 416; *Ex parte Sam*, 51 Ala. 34; *Keene v. McDonough*, 8 La. 185; *State v. Fenderson*, 28 La. Ann. 82; *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Boland*, 11 Tex. App. 159; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Patterson v. Pressey*, 70 Ind. 94; *People v. Foster*, 104 Ill. 156; *In re Truman*, 44 Mo. 181; *Ex parte Toney*, 11 Mo. 661; *Rolfs v. Shallcross*, 30 Kan. 758, 1 Pac. 523; *In re Petty*, 22 Kan. 477; *In re Eaton*, 27 Mich. 1; *In re Semler*, 41 Wis. 517; *In re Blair*, 4 Wis. 522; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *Ex parte Hartman*, 44 Cal. 32; *Ex parte Granice*, 51 Cal. 375; *Ex parte McCullough*, 35 Cal. 98; *Ex parte Lehmkuhl*, 72 Cal. 53, 13 Pac. 148; *Ex parte Farnham*, 3 Colo. 545; *Ex parte Smith*, 2 Nev. 338; *Ex parte Twobig*, 13 Nev. 302; *Rex v. Carlile*, 4 Oar. & P. 415.

⁹⁴ "We reiterate what has so often been said before, that the writ of habeas corpus cannot be used to perform the office of a writ of error or appeal: but when no writ of error or appeal will lie. If a petitioner is imprisoned under a judgment of the circuit court which had no jurisdiction of the person or of

weight, or sufficiency of the evidence on which the judgment was rendered, or the reasons on which it was based.⁹⁵ Nor can advantage be taken in this manner of a defect in the verdict, although it would be sufficient to cause the reversal of the judgment on appeal or writ of error;⁹⁶ nor of any errors made by the court in granting, modifying, or setting aside orders in criminal cases;⁹⁷ nor of any errors alleged to have been committed in the determination of questions arising on a motion in arrest of judgment, these not being jurisdictional defects, although the question determined was whether an act charged in an indictment was or was not a crime.⁹⁸ It is the same of irregularities in the proceedings. On habeas corpus there can be no inquiry into a defective or irregular selection of the grand jury;⁹⁹ nor whether the indictment upon which the judgment was given, being regular on its face, was ever in fact found by a grand jury.¹⁰⁰ Neither can advantage be taken of the fact that the judgment does not specifically describe the offense of which the petitioner was convicted;¹⁰¹ nor of the fact that only one officer was present at the returning of the verdict, instead of two as required by law;¹⁰² nor of the fact that the court pronounced judgment upon a verdict on a charge of felony during the enforced absence of the petitioner in jail;¹⁰³ nor of the fact that the record

the subject-matter, or authority to render the judgment complained of, then relief may be accorded." In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; In re Chapman, 156 U. S. 211, 15 Sup. Ct. 331, 39 L. Ed. 401; Andrews v. Swartz, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.

⁹⁵ Macke v. Ryan, 31 Kan. 54, 1 Pac. 785; In re Gilson, 34 Kan. 641, 9 Pac. 763; In re Watson, 30 Kan. 753, 1 Pac. 775; Ex parte Jackson, 45 Ark. 158; Starr v. Barton, 34 Ga. 99; State v. Bloom, 17 Wis. 521; Griffin v. State, 5 Tex. App. 457; In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596; Ex parte Phillips, 57 Miss. 357.

⁹⁶ Dover v. State, 75 Ala. 40.

⁹⁷ Ex parte Hartman, 44 Cal. 34.

⁹⁸ Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Shaffenburg, 4 Dill. 271, Fed. Cas. No. 12,696.

⁹⁹ State v. Fenderson, 28 La. Ann. 82.

¹⁰⁰ Ex parte Twohig, 13 Nev. 302.

¹⁰¹ Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; Ex parte Smith, 2 Nev. 338.

¹⁰² Rex v. Carlile, 4 Car. & P. 415.

¹⁰³ Ex parte Farnham, 3 Colo. 545.

shows affirmatively that there was no interval of time between the plea of guilty and the sentence, although the statute requires an interval of at least two days.¹⁰⁴

§ 256. Jurisdiction may be examined.

In order that a judgment may be valid, it is necessary that the court should have had jurisdiction both of the person and the subject-matter; the want of such jurisdiction may be shown on habeas corpus; and if either element is proved to be wanting, the judgment is void and an imprisonment under it is illegal.¹⁰⁵ But it is to be observed that in criminal cases the question of jurisdiction of the subject-matter may frequently become a fact in issue, and in that event its determination by the verdict will preclude a fresh investigation of the subject on proceedings by habeas corpus. This is the case where the jurisdiction of the court over the place where the alleged offense was committed is traversed by the defendant, and the jury find that the locus in quo is within the limits of the court's territorial jurisdiction. After such a finding, the petitioner cannot impeach the judgment by showing that the place was without such limits.¹⁰⁶ It must also be remarked in this connection that there is

¹⁰⁴ *Ex parte Smith*, 2 Nev. 338.

¹⁰⁵ *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Ex parte Buskirk*, 18 C. C. A. 410, 72 Fed. 14; *United States v. Patterson* (C. C.) 29 Fed. 775; *Ex parte Perkins*, Id. 900; *Ex parte Farley* (C. C.) 40 Fed. 66; *Ex parte Bridges*, 2 Woods, 423, Fed. Cas. No. 1,862; *Johnson v. United States*, 3 McLean, 89, Fed. Cas. No. 7,418; *Miller v. Snyder*, 6 Ind. 1; *Reynolds v. Orvis*, 7 Cow. (N. Y.) 260; *Cropper's Case*, 2 Rob. (Va.) 842. On habeas corpus, a court has the power to review its own former judgment, so far as to determine whether it exceeded its power in passing a judgment claimed to be illegal. *Ex parte Joyce*, 25 Pittsb. Leg. J. 17, Fed. Cas. No. 7,556. As regards the nature and effect of a judgment void for want of jurisdiction, and the right of every court to treat such judgment as a nullity, when drawn collaterally in question, there is no substantial difference between the case of an imprisonment under such a judgment, and one of any other illegal imprisonment under pretense of authority from the United States, in respect to the right of a state court to inquire in the first instance by habeas corpus into its legality. *In re Tarble*, 25 Wis 390, 3 Am. Rep. 85.

¹⁰⁶ *In re Newton*, 16 C. B. 97; *People v. Liscomb*, 60 N. Y. 571, 19 Am. Rep. 211; *Deckard v. State*, 38 Md. 186.

a material difference in the authorities, as to the circumstances in which a judgment may be impeached for want of jurisdiction, when it is not void on its face. This topic will be treated in the third part of the present chapter. In the meantime, we call the reader's notice to the fact that the collateral investigation of a judgment on habeas corpus is only a special application of the general rule. And if a majority of the states refuse to allow parties or privies to attack a judgment, in general, for want of jurisdiction, unless the record itself shows where the jurisdiction failed, there is nothing in the nature of this special case to take it out of the rule. A word must be added in regard to a particular class of courts whose sentences have sometimes been thought to be open to revision on habeas corpus, viz., courts-martial. It is now well settled that while the jurisdiction of such a court may be challenged and examined in such a proceeding, its judgment cannot be disregarded or annulled, or the prisoner discharged, unless it is absolutely void. "The question of the jurisdiction of a general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, and so may that of every other judicial tribunal; but the range and scope of the inquiry is controlled by the same rules and limitations in both cases. There must be jurisdiction to hear and to determine, and to render the particular judgment or sentence imposed. If this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally upon habeas corpus. It would be as indecorous and as wanton a stretch of judicial power to assume in advance that a general court-martial will erroneously convict an accused person of a military offense, as it would be to indulge such a presumption concerning a common-law court."¹⁰⁷ Finally, the writ of habeas corpus

¹⁰⁷ *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Dynes v. Hoover*, 20 How. 78, 15 L. Ed. 838; *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457; *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; *In re Davison* (C. C.) 21 Fed. 620; *Barrett v. Hopkins* (C. C.) 7 Fed. 312; *In re White* (C. C.) 17 Fed. 723, 9 Sawy. 49; *In re Grimley* (C. C.) 38 Fed. 84; *In re Bird*, 2 Sawy. 33, Fed. Cas. No. 1,428; *In re Corbett*, 9 Ben. 274, Fed. Cas. No. 3,219; *In re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1,596; *Ex parte Henderson*, Fed. Cas. No. 6,349; *People v. Warden of County Jail*, 100 N. Y. 20, 2 N. E. 870.

cannot be used as substitute for quo warranto. "One convicted by a jury and sentenced in court by a judge de facto, acting colore officii, though not de jure, and detained in custody in pursuance of his sentence, cannot properly be discharged on habeas corpus. The validity of the appointment or election of an officer de facto, before whom a prisoner has been convicted of crime, will not be inquired into on habeas corpus."¹⁰⁸

§ 257. Constitutionality of Statutes.

Applications for release on habeas corpus are not infrequently made on the ground that the law under which the prosecution and conviction were had was unconstitutional, and there is much conflict of authority upon the question whether an inquiry into the validity of such law is proper in a proceeding of this nature. In several of the states it is apparently the accepted rule that the constitutionality of a statute or ordinance cannot be examined on habeas corpus, and if no other ground is presented for the petitioner's discharge, the court will refuse to interfere.¹⁰⁹ It may be urged in support of this view that the trial court has always the right to pass upon the question of its own jurisdiction, and that if it assumes to act in the matter and to proceed to judgment, it necessarily affirms the validity of the statute under which its action is taken, which finding should be respected in every other court. This argument is not without weight. But on the other hand, it cannot be too strongly insisted that an unconstitutional law is no law at all. It cannot make that a crime which was not so before. It cannot confer jurisdiction. A proceeding taken under it is void, not merely erroneous. A person convicted under it is innocent, and is held in custody illegally. Hence if the validity of the law could not be tested on habeas corpus, we should have, sup-

¹⁰⁸ 9 Am. & Eng. Enc. Law, p. 236 (a source from which I have derived much assistance in preparing these sections); *Griffin's Case*, 1 Chase, 34. Fed. Cas. No. 5,815; *State v. Bloom*, 17 Wis. 521; *People v. Stevens*, 5 Hill (N. Y.) 630; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89.

¹⁰⁹ *Ex parte Boenninghausen*, 91 Mo. 301, 1 S. W. 761; *Ex parte Bowler*, 16 Mo. App. 14; *In re Harris*, 47 Mo. 164; *Platt v. Harrison*, 6 Iowa. 79. 71 Am. Dec. 389; *In re Underwood*, 30 Mich. 502; *Ex parte Fisher*, 6 Neb. 309; *Ex parte Winston*, 9 Nev. 71; *In re Callicot*, 8 Blatchf. 89, Fed. Cas. No. 2,323; *Ex parte Booth*, 3 Wis. 145.

posing it to be in fact unconstitutional, a most anomalous case, viz., a person unlawfully restrained of his liberty, and that too in the most unwarrantable circumstances, whose relief is the sole object of this writ, and yet to whom relief must be denied. We are decidedly inclined to agree with the numerous cases which hold that the alleged unconstitutionality of the act or ordinance under which the petitioner is held is always a proper subject of inquiry on habeas corpus, and that if the court finds it to be invalid, it is justified in releasing the prisoner.¹¹⁰ The federal courts uniformly hold that the imprisonment of a person under an invalid ordinance of a municipal corporation is such a case of unlawful restraint as will justify their releasing him on habeas corpus, because, being without "due process of law," it is in violation of the fourteenth amendment to the constitution of the United States.¹¹¹ But the circuit court will not overrule the solemn judgment of the supreme court of the state upon the question of the validity of such ordinance, where there is reasonable ground for doubt; in such cases the ultimate decision should be referred to the supreme court of the United States.¹¹² And there is authority to the point that the federal courts have no jurisdiction to discharge a prisoner held under a state statute, on the ground that such statute is in violation of the constitution of the state, or in excess of the powers

¹¹⁰ *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Ex parte Clarke*, 100 U. S. 399, 25 L. Ed. 715; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; *In re Brosnahan* (C. C.) 4 McCrary, 1, 18 Fed. 62; *In re Lee Tong* (D. C.) 9 Sawy. 335, 18 Fed. 253; *Stockton Laundry Case* (C. C.) 26 Fed. 611; *In re Ziebold* (C. C.) 23 Fed. 791; *Ex parte McCready*, 1 Hughes, 598, Fed. Cas. No. 8,732; *In re Wong Yung Quy* (C. C.) 6 Sawy. 237, 2 Fed. 624; *Ex parte Davis* (C. C.) 21 Fed. 396; *Ex parte Yung Jon* (D. C.) 28 Fed. 308; *In re Barber* (C. C.) 39 Fed. 641; *In re Belne* (C. C.) 42 Fed. 545; *In re Wong Yung Quy* (C. C.) 47 Fed. 717; *In re Nichols* (C. C.) 48 Fed. 164; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; *Brown v. Duffus*, 66 Iowa, 193, 23 N. W. 396; *Ex parte Burnett*, 30 Ala. 461; *In re Payson*, 23 Kan. 757; *Ex parte Delaney*, 43 Cal. 478; *Ex parte Rollins*, 80 Va. 314; *Ex parte Mato*, 19 Tex. App. 112.

¹¹¹ *In re Lee Tong* (D. C.) 9 Sawy. 335, 18 Fed. 253; *Stockton Laundry Case* (C. C.) 26 Fed. 611; *In re Ah Jow* (C. C.) 29 Fed. 181; *Laundry License Case* (C. C.) 22 Fed. 705; *Ex parte Yung Jon* (D. C.) 28 Fed. 308.

¹¹² *In re Wo Lee* (C. C.) 26 Fed. 471.

which the people of the state have conferred on their legislature; if it does not violate the federal constitution, the question is for the state courts.¹¹³

§ 258. *Jurisdiction to render the Particular Sentence.*

In the case of *Ex parte Shaw*,¹¹⁴ the supreme court of Ohio expressed the following views. "The question presented in this case is, whether, conceding that the sentence is for horse-stealing, and that, by statute, the sentence must be for a period not less than three years, the commitment is lawful. The courts are required by statute, upon conviction, to sentence for a period not less than three years. The sentence in this case is for one year. Does this render the sentence void and the commitment of the relator unlawful? The question is one simply of jurisdiction. The court had jurisdiction over the offense and its punishment. It had authority to pronounce sentence; and while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous." And accordingly the court refused to release the prisoner on habeas corpus. And a number of other cases agree with this doctrine.¹¹⁵ But the argument is far from satisfactory. It involves the error of overlooking the fact that jurisdiction to render the particular sentence imposed is equally as essential to its validity as jurisdiction of the person or the subject-matter. If either of these three elements is wanting, the judgment is a nullity. Now in respect to the sentence, the court has precisely the jurisdiction which the statute gives it, no more and no less. And if the statute prescribes that the sentence shall be for not less than three years, the court is utterly without power to sentence for one year. This seems too plain for argument. And indeed the great preponderance of authority sus-

¹¹³ *In re Brosnahan* (C. C.) 4 McCrary, 1, 18 Fed. 62; *Duncan v. McCall*, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219; *Andrews v. Swartz*, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.

¹¹⁴ 7 Ohio St. 81, 70 Am. Dec. 55.

¹¹⁵ *Ex parte Van Hagan*, 25 Ohio St. 432; *People v. Cavanagh*, 2 Abb. Prac. (N. Y.) 89; *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20; *Ex parte Crandall*, 34 Wis. 177.

tains the proposition that if the court had not jurisdiction to render the particular sentence,—if the sentence is different from that prescribed by the law, or is below the minimum or above the maximum,—that is good ground for releasing the prisoner on habeas corpus.¹¹⁶

§ 259. Sufficiency of Process or Pleadings.

A person tried and convicted on a criminal charge, and sentenced to imprisonment, without any indictment or presentment by a grand jury, is entitled to be discharged on habeas corpus.¹¹⁷ But upon proceedings by habeas corpus, the court from which the writ issues has no power to inquire into the sufficiency of the indictment or information on which the trial was had that resulted in the judgment under which the prisoner is detained; nor can it undertake to decide whether such pleadings state an indictable offense. And although the indictment be defective or irregular, or fail to disclose any

¹¹⁶ *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Ex parte Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; *In re Johnson* (C. C.) 46 Fed. 477; *Ex parte Bernert*, 7 Pac. Coast Law J. 460; *Ex parte Page*, 49 Mo. 291; *People v. Walters*, 15 Abb. N. C. (N. Y.) 461; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Ex parte Kearny*, 55 Cal. 212; *In re Petty*, 22 Kan. 477; *Ex parte Bulger*, 60 Cal. 438; *Miller v. Snyder*, 6 Ind. 1; *Ex parte Smith*, 2 Nev. 338. The point is illustrated in the following clear and forcible manner, in *Ex parte Lange*, supra: "If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attainder, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and by the constitution." But a sentence for an offense punishable by imprisonment cannot be held void on habeas corpus because it imposes hard labor during the imprisonment. *United States v. Fridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

¹¹⁷ *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; *Ex parte McCluskey* (C. C.) 40 Fed. 71.

crime known to the law, yet that is no reason for discharging the petitioner, and he must be remanded.¹¹⁸ The rule rests upon the fact that such a defect is not jurisdictional. If the court has general jurisdiction of the subject-matter, and the party is properly before it, its judgment is conclusive and binding and cannot be attacked collaterally, and if error or irregularity supervenes, such as in the case supposed, it is error or irregularity in the exercise of the court's jurisdiction, and does not make its sentence a nullity. Further, if there is any power which a court possesses beyond question or cavil, it is the power to judge of the sufficiency of the indictment or complaint and to determine whether or not the offense charged is legally punishable. If it should come to a mistaken conclusion in regard to these matters, there would undoubtedly be error in the technical sense. But it must be remembered that habeas corpus cannot be made to discharge the functions of a writ of error or of an appeal. A view contrary to that here expressed is held by the supreme court of California.¹¹⁹

§ 260. To what Parties the Rule applies.

The rule prohibiting the collateral impeachment of a judgment applies only to the parties to the action, and those in privity with them, and who are entitled to take proceedings to have the judgment opened, vacated, or reversed;¹²⁰ it does not extend to stran-

¹¹⁸ *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *Ex parte Parks*, 93 U. S. 20, 23 L. Ed. 787; *In re Lancaster*, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; *Ex parte Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. Ed. 845; *Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; *Ex parte Peters (C. C.)* 12 Fed. 461; *In re Johnson (C. C.)* 46 Fed. 477; *In re Hacker (D. C.)* 73 Fed. 464; *In re Krug (C. C.)* 79 Fed. 308; *Petition of Semler*, 41 Wis. 517; *Davis' Case*, 122 Mass. 324; *Matter of Eaton*, 27 Mich. 1; *Emanuel v. State*, 36 Miss. 627; *Parker v. State*, 5 Tex. App. 579; *In re Truman*, 44 Mo. 181; *Ex parte Whitaker*, 43 Ala. 323; *Ex parte Twohig*, 13 Nev. 302.

¹¹⁹ *Matter of Coryell*, 22 Cal. 178; *Ex parte Kearney*, 55 Cal. 212.

¹²⁰ *Vose v. Morton*, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; *Griswold v. Stewart*, 4 Cow. (N. Y.) 457; *Davoue v. Fanning*, 4 Johns. Ch. (N. Y.) 199; *Coffin v. Freeman*, 84 Me. 535, 24 Atl. 986; *Ashton v. City of Rochester*, 133 N. Y. 187, 30 N. E. 965, 28 Am. St. Rep. 619; *Harvey v. Foster*, 64 Cal. 206, 30 Pac. 849.

gers.¹²¹ For instance, a stockholder in a corporation against which a judgment has been recovered, who may be made liable for its payment, is so far a privy in law that he may bring error to reverse the judgment; but for that very reason he cannot attack the judgment collaterally.¹²² So, persons claiming land under an assignee for creditors cannot collaterally assail a judgment rendered against the assignee subjecting the land to the payment of a creditor's claim.¹²³ A judgment against an executor is prima facie evidence of the debt, as against the heirs of the decedent, and cannot be attacked by them collaterally save on the ground of fraud.¹²⁴ Even in the case of strangers to the litigation, it is not every one who may impeach the judgment in a collateral proceeding. The law does not permit wanton or unnecessary attacks upon its judgments, and they will stand as valid against any third person who fails to show that he has a real and substantial interest in avoiding the judgment, and one which the law is bound to protect. As the cases express it, the rule against collateral attacks upon judgments does not apply to such third persons or strangers to the record as would be prejudiced in regard to some pre-existing right if the judgment were given full effect.¹²⁵ In regard to garnishees, the rule approved by the best authorities is that a garnishee may impeach the validity of the judgment against the principal debtor on the ground of a want of jurisdiction over such

¹²¹ *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361; *Eureka Iron Works v. Bresnahan*, 66 Mich. 489, 33 N. W. 834; *Caswell v. Caswell*, 28 Me. 232, *Succession of Quinn*, 30 La. Ann. 947; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 43 Am. St. Rep. 334; *Shamlin v. Hall*, 123 Ala. 541, 26 South. 285.

¹²² *Came v. Brigham*, 39 Me. 35.

¹²³ *Gonzales v. Batts*, 20 Tex. Civ. App. 421, 50 S. W. 403.

¹²⁴ *In re Schmidt's Estate*, 4 Pa. Dist. R. 161.

¹²⁵ *Eureka Iron Works v. Bresnahan*, 66 Mich. 489, 33 N. W. 834; *Staunton Perpetual Building & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285; *Russell v. Grant*, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563; *Wolf v. Youbert*, 45 La. Ann. 1100, 13 South. 806, 21 L. R. A. 772. The validity of a judgment foreclosing a mortgage cannot be questioned by one not connected with the mortgagor's title, as grantee, mortgagee, judgment creditor, etc. *Glass v. Gilbert*, 58 Pa. 266. But a judgment under which land has been sold, if void for want of due service of process, may be collaterally attacked by one who has purchased under a junior judgment. *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402; *Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

debtor, but will not be permitted to assail it on the ground of any mere errors or irregularities.¹²⁶ Again, admitting that the particular individual has the right to allege cause against the judgment in a collateral proceeding, it must not be supposed that every possible objection is open to him for this purpose. It is stated, in Maine, that a stranger whose rights are affected may impeach a judgment collaterally on three grounds only, viz., that the court rendering it had no jurisdiction of the case; that the judgment was obtained by fraud or collusion; or that the judgment was irregularly or unlawfully rendered, to his prejudice.¹²⁷ But this rule,—in respect to the third ground stated,—is probably too liberal to be everywhere accepted as sound. The Pennsylvania courts hold that a stranger has no right to interfere with a judgment, however irregular, except where it is founded in collusion.¹²⁸ And it is said that only a defendant can avoid a judgment for irregularity (that is, by writ of error or motion to vacate), and as long as he is content to waive the irregularity, strangers cannot avail themselves of it collaterally.¹²⁹

PART II. FOR ERRORS AND IRREGULARITIES.

§ 261. Erroneous and Irregular Judgments.

No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction.¹³⁰ Thus defective findings, or the absence of any findings

¹²⁶ *Pierce v. Carleton*, 12 Ill. 358, 54 Am. St. Rep. 405; *Whitehead v. Henderson*, 4 Smedes & M. (Miss.) 704; *Matheney v. Galloway*, 12 Smedes & M. (Miss.) 475; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421; *Schoppenhast v. Bollman*, 21 Ind. 285; *Nevatt v. Springfield Normal School*, 79 Mo. App. 198; *Debbs v. Dalton* (Ind. Sup.) 32 N. E. 570.

¹²⁷ *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527. See *Lyles v. Bolles*, 8 S. C. 258; *Boisse v. Dickson*, 31 La. Ann. 741.

¹²⁸ *Drexel's Appeal*, 6 Pa. 272. And see *Lowber and Wilmer's Appeal*, 8 Watts & S. 387, 42 Am. Dec. 302; *In re Hanika's Estate*, 138 Pa. 330, 22 Atl. 90, 21 Am. St. Rep. 907.

¹²⁹ *Rollins v. Henry*, 78 N. C. 342.

¹³⁰ *Huff v. Hutchinson*, 14 How. 586, 14 L. Ed. 553; *Parker v. Kane*, 22 How. 1, 16 L. Ed. 286; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. Ed. 381;

of fact in a trial by consent by the court, do not render the judgment a nullity, and it cannot be attacked collaterally therefor.¹³¹ So obvious clerical errors in the judgment-roll which could not deceive a person accustomed to such documents are no ground for impeaching the judgment collaterally.¹³² And generally, a judgment cannot be attacked collaterally for any defect which, in a direct proceeding, might be cured by amendment.¹³³ Nor will a judgment be open to this kind of impeachment merely because it was prematurely rendered,—as, before the expiration of the defendant's time

Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Com'rs of Lake County v. Platt*, 25 C. C. A. 87, 79 Fed. 567; *Pullman's Palace Car Co. v. Washburn* (C. C.) 66 Fed. 790; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Dauberman v. Hain*, 196 Pa. 435, 46 Atl. 442; *Trowbridge v. Hays*, 21 Misc. Rep. 234, 45 N. Y. Supp. 635; *Brooks v. City of New York*, 57 Hun, 104, 10 N. Y. Supp. 773; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717; *Thorp v. Gordon* (Tex. Civ. App.) 43 S. W. 323; *Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69; *Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320; *Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820; *State v. Tow*, 5 Ind. App. 261, 31 N. E. 1120; *Chrisman v. Divinia*, 141 Mo. 122, 41 S. W. 920; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099; *Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540; *Bannister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134; *Davidson v. Thornton*, 7 Pa. 128; *Miltimore v. Miltimore*, 40 Pa. 151; *Clark v. Bryan*, 16 Md. 171; *Howison v. Weeden*, 77 Va. 704; *Fox v. Cottage Building Ass'n*, 81 Va. 677; *State v. Conoly*, 28 N. C. 243; *Den dem. White v. Albertson*, 14 N. C. 241, 22 Am. Dec. 719; *Upson v. Horn*, 3 Strobb. 108, 49 Am. Dec. 633; *James v. Smith*, 2 S. C. 183; *Mobley v. Mobley*, 9 Ga. 247; *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199; *Doe ex dem. Saltonstall v. Riley*, 28 Ala. 161, 65 Am. Dec. 334; *Wall v. Wall*, 28 Miss. 409; *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Driggers v. Cassady*, 71 Ala. 529; *Moore v. Tanner*, 5 T. B. Mon. (Ky.) 42, 27 Am. Dec. 35; *Dorsey v. Kendall*, 8 Bush (Ky.) 294; *Derr v. Wilson*, 84 Ky. 14; *Sheldon v. Newton*, 3 Ohio St. 494; *Horner v. State Bank*, 1 Ind. 130, 48 Am. Dec. 355; *Evans v. Ashby*, 22 Ind. 15; *Wiley v. Pavey*, 61 Ind. 457, 28 Am. Rep. 677; *Lane v. Bommelmann*, 17 Ill. 95; *Swiggart v. Harber*, 4 Scam. (Ill.) 364, 39 Am. Dec. 418; *Wales v. Bogue*, 31 Ill. 464; *McBane v. People*, 50 Ill. 503; *Cameron v. Boyle*, 2 G. Greene (Iowa) 154; *Burton v. District of Warren Tp.*, 11 Iowa, 166; *Perryman v. State*, 8 Mo. 208; *State v. St. Gemme*, 31 Mo. 230; *Lucas v. Todd*, 28 Cal. 182.

¹³¹ *Breeze v. Doyle*, 19 Cal. 101; *Maryott v. Gardner*, 50 Neb. 320, 69 N. W. 837; *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829; *Root v. Davis*, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445.

¹³² *Morrison v. Austin*, 14 Wis. 601.

¹³³ *Holland v. Laconia Building & Loan Ass'n*, 68 N. H. 490, 41 Atl. 178.

to plead, or pending a stay of proceedings, or before the hearing on a demurrer,—such an irregularity not making the judgment absolutely void.¹³⁴ It may also be stated that the judgment of a court having jurisdiction is not rendered void, or open to a collateral attack, because it is wrong in law, being based upon an erroneous application of legal principles or upon insufficient evidence,¹³⁵ nor because the form of action or remedy selected was one not properly admitting of the specific relief which the judgment grants,¹³⁶ nor because of the failure to file a bond in an injunction suit,¹³⁷ or an affidavit in a proceeding by attachment,¹³⁸ nor because the relief granted by the judgment was not wholly within the authority of the court, if the judgment may stand as valid for so much as was within the competence of the court,¹³⁹ nor because it gives costs in a replevin suit where costs are not granted by the statute.¹⁴⁰ A sale under order of the orphans' court is not subject to collateral attack because made on application of the administrator on behalf of creditors, instead of being made on the application of the creditors themselves,¹⁴¹ nor because not made at the time required by law, if it is afterwards confirmed by the court.¹⁴² Again, it is no ground for collateral impeachment of a judgment that the claim in suit was directly passed

¹³⁴ *Alderson v. Bell*, 9 Cal. 315; *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *Reed v. Nicholson*, 158 Mo. 624, 59 S. W. 977; *Davis v. Wade*, 58 Mo. App. 641; *Wells v. Atkins*, 68 Vt. 191, 34 Atl. 694, 54 Am. St. Rep. 880; *Anheuser-Busch Brewing Ass'n v. McGowan*, 49 La. Ann. 630, 21 South. 766; *Altman v. School District*, 35 Or. 85, 56 Pac. 291, 76 Am. St. Rep. 468.

¹³⁵ *Stevenson v. Bonesteel*, 30 Iowa, 286; *Bordages v. Higgins*, 1 Tex. Civ. App. 43, 19 S. W. 446; *State v. Rogers*, 131 Ind. 458, 31 N. E. 190; *Vail v. Arkell*, 146 Ill. 363, 34 N. E. 937; *Rogers v. Johnson*, 125 Mo. 202, 28 S. W. 635; *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213.

¹³⁶ *Insley v. United States*, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; *Brundred v. Egbert*, 164 Pa. 615, 30 Atl. 503; *Johnson v. Miller*, 55 Ill. App. 168.

¹³⁷ *Lewis v. Rowland*, 131 Ind. 103, 29 N. E. 922.

¹³⁸ *Barelli v. Wagner*, 5 Tex. Civ. App. 445, 27 S. W. 17; *Slade v. Le Page*, 8 Tex. Civ. App. 403, 27 S. W. 952. Compare *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

¹³⁹ *Johnson v. Iron Belt Min. Co.*, 78 Wis. 159, 47 N. W. 363.

¹⁴⁰ *Lutes v. Alpaugh*, 23 N. J. Law, 165.

¹⁴¹ *Simpson v. Bailey*, 80 Md. 421, 30 Atl. 622.

¹⁴² *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607.

on by the court, instead of being referred to a master in chancery, or that a receiver appointed by a court in another state was allowed to intervene.¹⁴³ Nor can a person affected by a judgment dispute its validity collaterally on the ground of a want of authority in the attorney on the other side to prosecute the action,¹⁴⁴ or of his own attorney to consent to the entry of a judgment.¹⁴⁵ Again, in a case admitting of doubt as to whether there should be a verdict, or whether judgment should be entered without a verdict, a judgment rendered upon a verdict is not, after the expiration of the term, open to collateral attack.¹⁴⁶ So, an order requiring a garnishee to pay money into court cannot be attacked by the judgment-debtor in a collateral proceeding, although the property in controversy may be exempt.¹⁴⁷ And where a decree in chancery erroneously authorizes execution to issue on the foot of the decree, the error may be corrected by an appeal or other direct proceeding, but the decree cannot be impeached collaterally.¹⁴⁸

§ 262. Mistakes in the Judgment.

Closely allied to the principle just discussed is the rule that a mistake in the rendition or entry of a judgment can be taken advantage of only in a direct proceeding. A final judgment cannot be collaterally impeached because the opinion of the court shows that a different judgment should have been entered.¹⁴⁹ So a judgment ordering the delivery of all the property of an intestate to his widow, instead of to her in trust for his minor children, as provided by the statute, though palpably erroneous, is proof against collateral attack.¹⁵⁰ So, again, in an action to recover from a purchaser part of certain lands sold under a decree of court, the plaintiff, if a party

¹⁴³ *Youngstown Bridge Co. v. North Galveston, H. & K. C. R. Co.* (Tex. Civ. App.) 31 S. W. 420.

¹⁴⁴ *Gullano v. Whitenack*, 30 N. Y. Supp. 415, 24 Civ. Proc. R. 55.

¹⁴⁵ *Young v. Watson*, 155 Mass. 77, 28 N. E. 1135.

¹⁴⁶ *Griffin v. Smyly*, 105 Ga. 475, 30 S. E. 416.

¹⁴⁷ *Day v. First Nat. Bank*, 6 Kan. App. 821, 49 Pac. 601.

¹⁴⁸ *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561.

¹⁴⁹ *Cooley v. Smith*, 17 Iowa. 99; *Huyck v. Graham*, 82 Mich. 353, 46 N. W. 781; *Anderson v. Carr*, 65 Hun, 179, 19 N. Y. Supp. 992.

¹⁵⁰ *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. 266.

to the suit in which the decree of sale was made, cannot, in answer to the defense of *res judicata*, attack the decree of sale collaterally by showing that that part of the lands was included in the decree by inadvertence and mistake.¹⁵¹ Nor is a judgment subject to collateral attack because, though it purports to be by default, the defendant had in fact duly answered and tendered material issues.¹⁵² Nor can a vendee collaterally assail a decree foreclosing the vendor's lien as containing an irregular description.¹⁵³

§ 263. Irregular or Defective Service.

We have already seen that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction.¹⁵⁴ It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective.¹⁵⁵ The rule as stated by the court in Nebraska is that where there is an attempt at service reaching the defendant, a defect in the manner of the service or form of the return is a mere irregularity, and is not ground for collateral attack on the judgment; but where the attempted service does not reach the defendant at all, a judgment

¹⁵¹ *Jones v. Coffey*, 97 N. C. 347, 2 S. E. 165. And see *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. 1000. The fact that a decree for the sale of several pieces of property, to satisfy liens against them, permits a lien which only attached to one piece to share pro rata in the proceeds of all, does not render the decree void, but only reversible for error. *Ryan v. Staples*, 23 C. C. A. 541, 76 Fed. 721.

¹⁵² *Dreyfuss v. Charles Seale & Co.*, 41 N. Y. Supp. 875, 18 Misc. Rep. 551.

¹⁵³ *Sanger v. Roberts*, 92 Tex. 312, 48 S. W. 1.

¹⁵⁴ *Supra*, §§ 223, 224.

¹⁵⁵ *McCormick v. Webster*, 89 Ind. 105; *Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781; *Allison v. Rankin*, 7 Serg. & R. (Pa.) 269; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *Treacy v. Ellis*, 45 App. Div. 492, 61 N. Y. Supp. 600; *Kelly v. Harrison*, 69 Miss. 856, 12 South. 261; *Moore v. Perry*, 13 Tex. Civ. App. 204, 35 S. W. 838; *Howard v. Lock* (Ky.) 22 S. W. 332; *Gandy v. Jolly*, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460; *Griffin v. McGavin*, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564.

founded thereon is absolutely void.¹⁵⁶ Thus, a judgment cannot be impeached in a collateral proceeding on the ground that the return of service of process was not made in a formal manner,¹⁵⁷ nor because the service of the writ did not conform to the requirements of the statute,¹⁵⁸ nor because service of the summons was made upon the return day,¹⁵⁹ nor because service was made by reading the summons to the defendant, instead of serving him with a copy,¹⁶⁰ nor because the writ was not served the requisite number of days before the hearing or judgment,¹⁶¹ nor because service was made on the defendant as an adult while he was an infant, if the records do not show the latter fact,¹⁶² nor because the summons was issued to and served by the coroner, when the statutes authorize him to act in certain cases in the place of the sheriff,¹⁶³ nor because the citation lacked a seal.¹⁶⁴ So a judgment against a corporation, where process was served on individuals who are not called officers, is erroneous, and would probably be reversed on error; nevertheless it cannot be impeached by a stranger, in a suit in equity to which the corporation, the stockholders, and the persons so served are parties, when they make no objection, and no fraud or collusion is charged.¹⁶⁵ It is held that a recital in a judgment that the defendant was legally served with process cuts off all inquiry in a collateral proceeding as to the legality of the service.¹⁶⁶ But on the other hand, where the affidavits of service in an action were wholly insufficient to authorize the court to enter judgment, and such defect appeared upon the face of the judgment-roll, it was held that the judg-

¹⁵⁶ *Campbell Printing Press & Manufacturing Co. v. Marder, Luse & Co.*, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573.

¹⁵⁷ *Campbell v. Hays*, 41 Miss. 561.

¹⁵⁸ *Cole v. Butler*, 43 Me. 401.

¹⁵⁹ *Dutton v. Hobson*, 7 Kan. 196.

¹⁶⁰ *Gandy v. Jolly*, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460.

¹⁶¹ *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; *Righter v. Thornton*, 30 Wkly. Law Bul. (Ohio) 32.

¹⁶² *Kennedy v. Baker*, 159 Pa. 146, 28 Atl. 252.

¹⁶³ *Russell v. Durham* (Ky.) 29 S. W. 16.

¹⁶⁴ *Moore v. Perry*, 13 Tex. Civ. App. 204, 35 S. W. 838.

¹⁶⁵ *Fahs v. Taylor*, 10 Ohio, 104.

¹⁶⁶ *Dunham v. Willfong*, 69 Mo. 355.

ment might be impeached collaterally.¹⁶⁷ Where the court has jurisdiction of the subject-matter and the parties, and no fraud is shown, if judgment is confessed before the time for answering expires, this will not overthrow the judgment on a collateral attack, but all necessary presumptions will be entertained to support it.¹⁶⁸

§ 264. Objections as to Parties.

As a general rule, any irregularity in regard to the number, character, or joinder of the parties to an action must be objected to at a proper time and manner in the progress of the suit, and will not justify a collateral impeachment of the judgment. For instance, where jurisdiction is not disputed, a misjoinder of parties is a mere error of practice, and cannot be taken advantage of, in an action of ejectment, to defeat the title of a purchaser at a sheriff's sale under the judgment.¹⁶⁹ So, "multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant except by demurrer, plea, or answer to the bill, although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed. A fortiori it does not render a decree void, so that it can be treated as a nullity in a collateral action."¹⁷⁰ A judgment entered in favor of a plaintiff, against himself and others, and revived to the use of one to whom it has been assigned, is valid as against a creditor of the plaintiff whose judgment is rendered after the revival.¹⁷¹ On similar principles, a judgment in an action for delinquent taxes, being apparently regular, cannot be attacked collaterally on the ground that the suit should have been brought in the name of a different official plaintiff.¹⁷² Nor is it any ground for the collateral impeachment of a judgment that the plaintiff was not the real party in interest,¹⁷³

¹⁶⁷ *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380.

¹⁶⁸ *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113.

¹⁶⁹ *Levan v. Millholland*, 114 Pa. 49, 7 Atl. 194; *Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654.

¹⁷⁰ *Hefner v. Northwestern Mut. Life Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309.

¹⁷¹ *Sponsler's Appeal*, 127 Pa. 410, 17 Atl. 1097.

¹⁷² *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188.

¹⁷³ *Cates v. Riley* (Tex. Civ. App.) 55 S. W. 979.

or was a foreign administrator who had not filed copies of his letters in the clerk's office before bringing suit,¹⁷⁴ or that the plaintiff, being a corporation, had failed to allege the fact of its incorporation.¹⁷⁵ So again, it is no ground for collateral attack upon a judgment rendered in an action against a partnership that the judgment was entered against one partner only,¹⁷⁶ or was rendered on the confession of only one of the partners.¹⁷⁷

§ 265. Legal Disability of Parties.

In an earlier chapter, we discussed at some length the validity of judgments against married women, infants, lunatics, and deceased persons. In regard to the former class of persons, it appeared to be the settled doctrine in many of the states that, in the absence of enabling statutes, a judgment against a feme covert is absolutely void.¹⁷⁸ If this position is taken, it inevitably follows that such a judgment may be, on that ground, impeached and avoided in any collateral proceeding. But it was shown in the same connection that numerous courts prefer to consider such judgments as voidable only, especially where the defense of coverture is not set up, but the defendant suffers a default.¹⁷⁹ It is unnecessary to repeat the discussion in this place. But the reader, in considering the sections cited, should keep in mind the rule that it is only when a judgment is absolutely void that it can be impeached collaterally, not when it

¹⁷⁴ *Marshall v. Charland*, 109 Ga. 306, 34 S. E. 671.

¹⁷⁵ *McFall v. Buckeye Grangers' Warehouse Ass'n*, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

¹⁷⁶ *Hough v. Stover*, 46 Neb. 588, 65 N. W. 189.

¹⁷⁷ *Belcher v. Curtis*, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376.

¹⁷⁸ *Supra*, §§ 188-192.

¹⁷⁹ In Pennsylvania, while it is true that the mortgage of a married woman is invalid unless separately acknowledged by her, and the absence of such acknowledgment may be set up as a defense to a recovery on the mortgage, yet if judgment be recovered on a scire facias issued on such mortgage, the judgment is conclusive that the mortgage was properly executed, and the validity thereof cannot be questioned in a collateral action of ejectment. *Michaelis v. Brawley*, 109 Pa. 7. And see *Benson v. Cahill* (Tex. Civ. App.) 37 S. W. 1088; *Carson v. Taylor*, 19 Tex. Civ. App. 177, 47 S. W. 395; *Truesdall v. McCormick*, 126 Mo. 39, 28 S. W. 885; *Equitable Securities Co. v. Block*, 51 La. Ann. 478, 25 South. 271.

is merely voidable.¹⁸⁰ And a further suggestion may be added,—that the real question is one of jurisdiction; for if the court may take jurisdiction of a married woman, a judgment rendered against her may be erroneous on account of her abnormal status, but will not be null. What is here said of married women will apply, with some modifications, to the case of infants.¹⁸¹ But, by the general consensus of authority, a judgment against a lunatic is not to be considered as entirely void, and therefore it will be protected from collateral attacks.¹⁸² It is a different question in regard to the validity of judgments against joint defendants, a part of whom were persons under legal disabilities or were not served with process. Whatever may be thought of the effect of such judgment upon the defendant who was incapacitated or not within the jurisdiction, it seems but reasonable to hold it binding upon the other, supposing no similar objection to exist in his case. It might, as to him, be erroneous or voidable, but it should not be open to him, or to any other person in respect to him, to impeach it collaterally. This view was shown, in a preceding section, to be consonant to sound legal reason and supported by many weighty decisions.¹⁸³

§ 266. Disqualification of Judge.

Notwithstanding some difference of opinion, it seems to be the more generally accepted doctrine that a decision rendered by a judge who was disqualified by reason of his interest in the subject-matter of the controversy is null and void, and that this may be shown against it in a collateral proceeding;¹⁸⁴ but that if the objection goes

¹⁸⁰ For the difference between voidable and void judgments, see § 170.

¹⁸¹ *Supra*, §§ 193-198. As to collateral attacks upon judgments because one of the parties was an infant, see *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. Ed. 520; *id.* (C. C.) 48 Fed. 385; *Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200. Compare *Hatch v. Ferguson*, 15 C. C. A. 201, 68 Fed. 43, 33 L. R. A. 759.

¹⁸² *Supra*, § 205. And see *Weaver v. Brenner*, 145 Pa. 299, 21 Atl. 1010; *Thomas v. Hunsucker*, 108 N. C. 720, 13 S. E. 221. Loss of jurisdiction to render a particular judgment because of the death of a party does not make it subject to collateral attack as being wholly void, unless the fact appears of record. *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027.

¹⁸³ *Supra*, § 211. See *Bailey v. McGinniss*, 57 Mo. 362.

¹⁸⁴ *Supra*, § 174.

to the competence of the judge, on account of his relationship to one of the parties litigant, it will have no greater effect than to make the judgment erroneous or voidable, not laying it open to indirect impeachment.¹⁸⁵ Especially is this the case where the statutes authorize the parties to waive an objection of this character. The judgments and orders of a de facto judge, as we have already seen, are everywhere recognized as valid and binding, and of course they cannot be attacked collaterally on any allegation against the title of the person acting as judge.¹⁸⁶

§ 267. Judgment for Excessive Amount.

If judgment is rendered for a sum exceeding the amount laid in the ad damnum clause of the writ, or claimed in the declaration or complaint, or notified to the defendant by the indorsement on the summons, it is irregular and erroneous and is liable to reversal, but it is not void, and it cannot be impeached collaterally.¹⁸⁷

§ 268. Insufficiency of Evidence.

When a judgment is rendered in a cause by a court whose jurisdiction over the subject-matter and the person of the defendant is not questioned, it cannot be attacked in any collateral proceeding by a showing that the evidence on which it was based was illegal, improperly received, or insufficient to sustain the judgment.¹⁸⁸ This

¹⁸⁵ *Supra*, § 174. And see *Wilson v. Smith* (Ky.) 38 S. W. 870; *State v. Ross*, 118 Mo. 23, 23 S. W. 196; *Jeffersonian Pub. Co. v. Hilliard*, 106 Ala. 576, 17 South. 112; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211. Compare *Pierce v. Bowers*, 8 Baxt. (Tenn.) 353.

¹⁸⁶ *Supra*, § 175. When a judgment has been rendered by a court of general jurisdiction against a person over whom it had acquired jurisdiction, it cannot be attacked, in a proceeding to enjoin its collection, by a party to the judgment, on the ground that the special judge appointed by agreement was not regularly appointed and qualified. *Littleton v. Smith*, 119 Ind. 230, 21 N. E. 886.

¹⁸⁷ *Smith v. Keen*, 26 Me. 411; *Chaffee v. Hooper*, 54 Vt. 513; *Bond v. Pacheco*, 30 Cal. 530; *Savage v. Hussey*, 48 N. C. 149; *Kansas City v. Winner*, 58 Mo. App. 299; *Mott v. State*, 145 Ind. 353, 44 N. E. 548; *Dornan v. Benham Furniture Co.*, 102 Tenn. 303, 52 S. W. 38; *Botkin v. Kleinschmidt*, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641; *supra*, § 138.

¹⁸⁸ *Odle v. Frost*, 59 Tex. 684; *Martin v. Porter*, 4 Heisk. (Tenn.) 407;

very clear and sensible rule rests on several principles. In the first place, an objection of that sort does not go to the jurisdiction, and consequently the judgment cannot be void, although it may be erroneous. Again, the legality and sufficiency of the evidence is a question for the court to determine, and its decision should be accepted as final and conclusive, unless in an appellate court. Finally, if such re-opening of the cause were allowed, the doctrine of res judicata would be despoiled of its very salutary effect.

§ 269. *Illegal or Insufficient Cause of Action.*

A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which the suit is brought; these are matters which must be set up in defense to the action, and which are concluded by the judgment.¹⁸⁹ Thus, where a judgment-creditor seeks to enforce his judgment against equities, the judgment-debtor cannot show that the contract upon which the judgment was rendered was infected with usury or other illegality.¹⁹⁰ Nor will a judgment be considered open to collateral impeachment because the petition or complaint, in the action in which it was rendered, did not state a cause of action,¹⁹¹ nor because the remedy was at law, while the suit was in equity, or vice versa,¹⁹² nor because the action, when commenced, appears to have been barred by some statute of limitations,¹⁹³ nor because the claim in suit had been satisfied

Pollock v. Bute, 43 Miss. 140; *Bartlett v. Russell*, 41 Ga. 190; *Parker v. Albee*, 86 Iowa, 46, 52 N. W. 533; *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291; *MacLachlan v. Pease*, 68 Ill. App. 634; *Benjamin v. Early*, 123 Mich. 93, 81 N. W. 973; *Austin v. Austin*, 43 Ill. App. 488; *State v. Thompson*, 28 Or. 296, 42 Pac. 1002.

¹⁸⁹ *State v. Supervisors of Town of Beloit*, 20 Wis. 79; *Lewis v. Armstrong*, 45 Ga. 131; *Bushee v. Surles*, 77 N. C. 62; *Figge v. Rowlen*, 84 Ill. App. 238.

¹⁹⁰ *Bank of Wooster v. Stevens*, 1 Ohio St. 233, 59 Am. Dec. 619.

¹⁹¹ *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 390; *Altman v. School District*, 35 Or. 85, 56 Pac. 291, 76 Am. St. Rep. 468; *North Pacific Cycle Co. v. Thomas*, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

¹⁹² *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249; *Weaver v. Toney* (Ky.), 54 S. W. 732, 50 L. R. A. 105.

¹⁹³ *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264.

prior to the rendition of the judgment,¹⁹⁴ nor because the note on which the judgment was recovered was without consideration,¹⁹⁵ nor because the claim on which the judgment was rendered was based on a wager or a gambling transaction.¹⁹⁶ A judgment rendered in a suit founded on an obligation before its maturity, is not subject to collateral attack.¹⁹⁷ And a judgment in an attachment suit cannot be impeached indirectly by showing that the creditor had no such demand against the defendant in attachment as would sustain that species of process.¹⁹⁸ Again, where a judgment is entered on a mortgage, the judgment will conclusively establish the due execution of the mortgage, although the latter may have been in fact void; the mortgage is merged in the judgment, which cannot be collaterally impeached except for fraud.¹⁹⁹

PART III. FOR WANT OF JURISDICTION.

§ 270. Jurisdiction of Superior Courts presumed.

Before proceeding to consider in detail the permissibility of collaterally attacking judgments and decrees on an allegation of want of jurisdiction, it is necessary to advert to the presumption of law by which the acts and proceedings of courts of record are supported. It is a maxim, "omnia præsumuntur rite et solemniter esse acta."²⁰⁰

¹⁹⁴ *Hyder v. Smith* (Tenn. Ch.) 52 S. W. 884.

¹⁹⁵ *Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426.

¹⁹⁶ *Chicago Driving Park v. West*, 35 Ill. App. 496; *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211. But in Mississippi, under a statute which renders void a judgment on a wager, it is a good plea to an action on a judgment that it was rendered on a note made in settlement of a wager. *Campbell v. New Orleans Nat. Bank*, 74 Miss. 526, 21 South. 400. And in Kentucky, under a statute providing that neither party to a champertous contract shall have any right of action thereon, it is held that a judgment may be attacked, because of champerty, in a collateral proceeding. *Roberts v. Yancey*, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. Rep. 357.

¹⁹⁷ *Mikeska v. Blum*, 63 Tex. 44; *Robertson v. Huffman*, 92 Ind. 247.

¹⁹⁸ *Harrison v. Pender*, 44 N. C. 79, 57 Am. Dec. 573; *Brantingham v. Brantingham*, 12 N. J. Eq. 160.

¹⁹⁹ *Butterfield's Appeal*, 77 Pa. 197; *Michaells v. Brawley*, 109 Pa. 7; *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679; *Woolery v. Grayson*, 110 Ind. 149, 10 N. E. 935.

²⁰⁰ *Co. Litt.* 232; *Broom, Leg. Max.* 942.

And this maxim, while often applied to transactions between private persons, has a special and peculiar applicability to the proceedings of public officers, and, more than in any other case, to the acts of the courts.²⁰¹ It is presumed that the doings of a court of record are regular and proper, that its jurisdiction was properly acquired, that its proceedings are legal and valid, and that its decisions are well-founded and free from error. "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."²⁰² Hence, jurisdiction having been once acquired over the parties and the subject-matter, every presumption is in favor of the legality of the judgment.²⁰³

Coming now to the matter in more immediate contemplation, it is a part of this principle that the jurisdiction of the court cannot be collaterally denied. And the rule in this connection rests partly upon the maxim already quoted, and partly upon the peculiar doctrine which attaches the utmost conclusiveness to judicial records, and partly upon considerations of public policy which will be adverted to hereafter. But the rule must be taken with certain very important modifications. For first, it applies in its fullness only to the acts and judgments of courts of general jurisdiction or courts of record.

²⁰¹ Reed v. Jackson, 1 East. 355; Lyttleton v. Cross, 3 Barn. & C. 327.

²⁰² Voorhees v. Jackson, 10 Pet. 449, 472, 9 L. Ed. 490, Baldwin, J.; Hughes v. Cummings, 7 Colo. 138, 2 Pac. 289. All presumptions are in favor of the regularity of the proceedings of courts of record when collaterally assailed, and where a decree contains the finding of a fact specially which is pleaded in the petition, it must be presumed that sufficient evidence was submitted to the court to justify such finding. Hilton v. Bachman, 24 Neb. 490, 39 N. W. 419.

²⁰³ Blake v. Lyon & Fellows Manuf'g Co., 77 N. Y. 626; Jordan v. John Ryan Co., 35 Fla. 259, 17 South. 73. The test of jurisdiction is whether the court had power to enter upon the inquiry; not whether its conclusion was right or wrong. Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567.

We are told that nothing is intended to be out of the jurisdiction of a superior court but what specially appears to be so, and nothing is intended to be within the jurisdiction of an inferior court but what is specially alleged.²⁰⁴ This point will be discussed in a later section. Again, in the case of foreign judgments, the presumption, though recognized, is not of great weight, and is always liable to be rebutted by evidence to the contrary. Finally, the presumption is not absolutely conclusive. For it may be contradicted by the face of the record. Whether it may be rebutted by extraneous evidence is a moot question, which we reserve for discussion in a subsequent connection. But there is no question that want of jurisdiction, if shown by the record itself, may be urged against the judgment at any time and in any proceeding. Thus guarded against undue breadth of statement, we are prepared to formulate the rule which is recognized and accepted by all the authorities, viz., the judgment of a domestic court, having general and superior jurisdiction, is always to be presumed regular and valid and founded upon jurisdiction properly and duly acquired, until the contrary is definitely made to appear in some permissible manner.²⁰⁵ Hence, when a court of general jurisdiction

²⁰⁴ Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439.

²⁰⁵ Vocrees v. Jackson, 10 Pet. 449, 9 L. Ed. 490; Kennedy v. Georgia State Bank, 8 How. 586, 12 L. Ed. 1209; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Bump v. Butler County (C. C.) 93 Fed. 290; Blaisdell v. Pray, 68 Me. 269; Penobscot R. Co. v. Weeks, 52 Me. 456; Morse v. Presby, 25 N. H. 299; Carleton v. Washington Ins. Co., 35 N. H. 162; Wingate v. Haywood, 40 N. H. 437; Mercler v. Chace, 9 Allen (Mass.) 242; Hendrick v. Whittemore, 105 Mass. 23; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Ray v. Rowley, 4 Thomp. & C. 43; O'Connor v. Felix, 87 Hun, 179, 33 N. Y. Supp. 1074; Hering v. Chambers, 103 Pa. 175; National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71; Clark v. Bryan, 16 Md. 171; Woodhouse v. Fillbates, 77 Va. 317; Hill v. Woodward, 78 Va. 765; Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402; Martin v. Bowie, 37 S. C. 102, 15 S. E. 736; Wilson's Heirs v. Wilson's Adm'r, 18 Ala. 176; Pender v. Felts, 2 Smedes & M. (Miss.) 535; Hardy v. Gholson, 26 Miss. 70; Briggs v. Clark, 7 How. (Miss.) 457; Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Hambel v. Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; Woolley v. Sullivan, 92 Tex. 28, 46 S. W. 629; McCleskey v. State, 4 Tex. Civ. App. 322, 23 S. W. 518; Higgins v. Bordages (Tex. Civ. App.) 28 S. W. 350; Venable v. McDonald, 4 Dana (Ky.) 336; Sorrell v. Samuels (Ky.) 49 S. W. 762; Newcomb's Ex'r v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222;

pronounces judgment, the presumption is in favor of its jurisdiction, and it is not incumbent upon one who bases a right upon such judgment to aver facts essential to the existence of jurisdiction.²⁰⁶ And whatever is upon the records of such a court is presumed to be rightfully there.²⁰⁷ It is therefore important to consider the various conditions which the record may present in a given case,—as, whether it be complete or deficient, and whether it contain recitals as to jurisdiction or not,—and ascertain how the presumption will apply in the various circumstances. And this will now engage our attention.

§ 271. **Silence or Incompleteness of the Record.**

The presumption in favor of the jurisdiction of superior courts is most frequently invoked in aid of their judgments in cases where the record is silent on the subject of jurisdiction. It may be defective or incomplete in consequence of the loss or absence of parts of the record or from the omission of proper recitals. Or the record, though apparently complete and regular, may say nothing on the subject of jurisdiction. Or its deliverances may be obscure and ambiguous. For any of these reasons the record may fail to show

Adams' Lessee v. Jeffries, 12 Ohio, 253, 40 Am. Dec. 477; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Wiley v. Pratt*, 23 Ind. 628; *First Nat. Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054; *Pardon v. Dwire*, 23 Ill. 572; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Law v. Grommes*, 55 Ill. App. 312; *Calhoun v. Ross*, 60 Ill. App. 309; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Spurgin v. Bowers*, 82 Iowa, 187, 47 N. W. 1029; *Coleman v. McKnight*, 4 Mo. 83; *McGirk v. Chauvin*, 3 Mo. 237; *Gemmell v. Rice*, 13 Minn. 400 (Gil. 371); *Reinig v. Hecht*, 58 Wis. 212, 16 N. W. 548; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60; *Stoddard Manufg Co. v. Mattice*, 10 S. D. 253, 72 N. W. 891; *Gillilan v. Murphy*, 49 Neb. 779, 69 N. W. 98.

²⁰⁶ *Jackson v. Dyer*, 104 Ind. 516, 3 N. E. 863. For example, a state court of general jurisdiction, in the absence of a showing in the record to the contrary, will be presumed to have had jurisdiction of an action involving conflicting claims to letters patent, when its judgment is collaterally attacked; since, where a cause of action in relation to letters patent depends primarily on some contract of the parties, jurisdiction exists in the state courts, though the validity of the patent may incidentally arise. *Shoemaker v. South Bend Spark-Arrester Co.*, 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

²⁰⁷ *Drake v. Duvenick*, 45 Cal. 455.

affirmatively that the court had jurisdiction of the subject and persons, while yet it does not distinctly show a want of jurisdiction. In any of these cases the weight of authority sustains the rule that the judgment, if rendered by a superior domestic court, will sustain itself against any collateral attack by parties or privies on account of any alleged want of jurisdiction.²⁰⁸ The rule is equally applicable in cases where there are numerous parties; the fact that the record is silent upon some matter touching the jurisdiction over some of the defendants does not affect the presumption in its favor.²⁰⁹ So where two defendants are sued *ex contractu* and one confesses judgment for both, the authority to do so need not appear in the record, nor can the judgment of the court be collaterally impeached for this supposed defect.²¹⁰ Where the record does not show that a default was not properly entered, the presumption arises that the required notice was given.²¹¹ And in general, a judgment is not open to collateral impeachment merely because the record fails to show the service of the process by which the court acquired jurisdiction of the defendant; if the record is silent on this point, it will be presumed that lawful and sufficient process was duly served.²¹² Similarly, when the judgment is against a non-resident, and jurisdiction was acquired by publication of notice, the judgment is not impeachable collaterally be-

²⁰⁸ *Travelers' Protective Ass'n v. Gilbert*, 41 C. C. A. 180, 101 Fed. 46; *Gulickson v. Bodkin*, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636; *Hams v. Root*, 22 Tex. Civ. App. 413, 55 S. W. 411; *Scaman v. Galligan*, 8 S. D. 277, 66 N. W. 458; *Axman v. Dueker*, 45 Kan. 179, 25 Pac. 582; *Horner v. State Bank*, 1 Ind. 130, 48 Am. Dec. 355; *Coit v. Haven*, 30 Conn. 190, 79 Am. Dec. 244; *Lawler's Heirs v. White*, 27 Tex. 250; *Mitchell v. Meuley*, 32 Tex. 460; *Messinger v. Kintner*, 4 Binn. 97; *Swearingen v. Gulick*, 67 Ill. 208; *Goar v. Maranda*, 57 Ind. 339; *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Sharp v. Brunnings*, 35 Cal. 528.

²⁰⁹ *Kramer v. Breedlove* (Tex.) 3 S. W. 561; *Stearns v. Wright*, 13 S. D. 544, 83 N. W. 587.

²¹⁰ *Jackson v. Tift*, 15 Ga. 557.

²¹¹ *Evans v. Young*, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583.

²¹² *Sommermeier v. Sommermeier*, 89 Wis. 66, 61 N. W. 311; *Elder v. Richmond Gold & Silver Min. Co.*, 7 C. C. A. 354, 58 Fed. 536; *Galloway v. State Nat. Bank* (Tex. Civ. App.) 56 S. W. 236; *Hamer v. Cook*, 118 Mo. 476, 24 S. W. 180; *Eichhoff v. Eichhoff*, 101 Cal. 600, 36 Pac. 11; *Bank of Colfax v. Richardson*, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

cause the record does not show compliance with all the requirements of the statute authorizing that manner of citation, or directing the mode of its execution; a full compliance will be presumed.²¹³ Therefore when a party seeks, in any collateral action, to impeach the judgment or decree of a court of superior jurisdiction, on the ground that he had no legal notice of the pendency of the action, it is necessary that his pleading should set forth what, if anything, is shown by the record in relation to the issue and service of process, because, unless the record itself shows that the court never acquired jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach.²¹⁴ Nor is it enough to overcome this presumption that the judgment-roll is defective, or that some of the papers which should properly constitute a part of it are wanting.²¹⁵ Thus, where the papers in a case are all lost, and the record states that the judgment was taken by default without a jury, the court will presume that it was a case where such would have been the proper proceeding.²¹⁶ So where only part of the record is given in evidence, that part of it which relates to process and appearance being by agreement of parties withheld, it will be presumed that all parties who are named as such in the pleadings and judgment were properly before the court.²¹⁷ Again, where the docket showed a summons "returned on oath," but not that it had been served, it was held that the judgment was merely irregular and could not be impeached collaterally.²¹⁸ Where the record fails to state that the judgment was rendered at a regular term of the court, but states that it was entered on May 6, 1885, it will be presumed, in the absence of contrary

²¹³ *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195; *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072; *Meade v. Bartlett*, 1 Tex. Civ. App. 342, 23 S. W. 186; *Hoagland v. Hoagland*, 19 Utah, 103, 57 Pac. 20; *Amy v. Amy*, 12 Utah, 278, 42 Pac. 1121.

²¹⁴ *Exchange Bank v. Ault*, 102 Ind. 322, 1 N. E. 562.

²¹⁵ *Herrick v. Butler*, 30 Minn. 156, 14 N. W. 794; *Gulickson v. Bodkin*, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; *Berry v. Foster*, 22 Ky. Law Rep. 745, 58 S. W. 709.

²¹⁶ *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464.

²¹⁷ *Welsh v. Childs*, 17 Ohio St. 319. And see *Cosby v. Powers*, 137 Ind. 694, 37 N. E. 321; *Holt County Bank v. Holt County*, 53 Neb. 827, 74 N. W. 259; *Crank v. Flowers*, 4 Heisk. (Tenn.) 629.

²¹⁸ *Sloan v. McKinstry*, 18 Pa. 120.

evidence in the record, that the judgment was rendered at a regular term duly fixed by law.²¹⁹ "Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that the evidence was before the court and that it fully justified the conclusion reached. If a party rely upon the fact that there was no evidence in a case, where evidence was necessary, he must establish it by a proper bill of exceptions, or he will fail."²²⁰ So also, if the record in a case does not show the situation of land affected by the decree, it will be presumed, in a collateral attack upon the judgment, that the land was within the territorial jurisdiction of the court.²²¹

The same rule governs the case of an ambiguity or obscurity in the record. Thus, where two demurrers to a declaration were on file, and the judgment of the court refers to the "said demurrer," without specifying which of them, it will be presumed that the court passed upon both.²²² So where, by reason of the loss of the record or any part of it, there is difficulty in discovering the ground upon which jurisdiction was taken in the particular case, if there be any ground upon which the court could rightfully have taken cognizance of the case, it will be presumed that it assumed jurisdiction on that ground, unless it be made to appear affirmatively by the record that it was taken on some other ground.²²³ It is also a rule that the fact that the record of a cause in a federal court fails to show affirmatively a ground of federal jurisdiction will not make its judgment a nullity, or render it subject to collateral attack; and this is true when the court assumes jurisdiction because it holds that the suit involves a federal question, such as the construction of an act of congress, even if it is mistaken in so holding.²²⁴

²¹⁹ *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565.

²²⁰ *Credit Foncier of America v. Rogers*, 10 Neb. 184, 4 N. W. 1012.

²²¹ *Foster v. Givens*, 14 C. C. A. 625, 67 Fed. 684.

²²² *Watson v. Hahn*, 1 Colo. 385.

²²³ *Woodhouse v. Fillbates*, 77 Va. 317.

²²⁴ *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

§ 272. Appearance by Attorney.

It has been made a question whether the presumption in favor of jurisdiction should be extended to the case where the record shows an appearance by attorney, which is apparently regular but was in fact unauthorized. Many of the cases lay down the rule, in the most uncompromising terms, that a judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared, although without authority, can by no means be attacked for want of jurisdiction in any collateral proceeding, and is binding upon the defendant.²²⁵ But on the other hand, there is not wanting authority for the view that the authority of the attorney may always be controverted.²²⁶ The best and safest rule, in our judgment, is that formulated in a recent case in Kansas, where it is said that while a judgment resting upon the unauthorized appearance of an attorney is void, yet an attorney's appearance, for a defendant whom he professes to represent, is presumed to be authorized until the contrary is shown; and it devolves upon the defendant impeaching this authority to show by positive proof that such appearance is invalid; and all the presumptions are in favor of

²²⁵ *Brown v. Nichols*, 42 N. Y. 26; *Hamilton v. Wright*, 37 N. Y. 502; *Reed v. Pratt*, 2 Hill (N. Y.) 64; *Hoffmire v. Hoffmire*, 3 Edw. Ch. (N. Y.) 174; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665; *Lowe v. Stringham*, 14 Wis. 222; *Baker v. Stonebraker*, 34 Mo. 175; *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6; *Carpentier v. City of Oakland*, 30 Cal. 439; *Field v. Gibbs*, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; *Brigot's Heirs v. Brigot*, 47 La. Ann. 1304, 17 South. 825; *Deegan v. Deegan*, 22 Nev. 202, 37 Pac. 360; *Williams v. Johnson*, 112 N. C. 424, 17 S. E. 496, 21 L. R. A. 848, 34 Am. St. Rep. 513. Certain other cases hold that, while a judgment is voidable if obtained by an attorney acting without authority, yet it cannot be attacked collaterally. Its validity may be assailed in a direct proceeding; but it remains valid until set aside or vacated in a proper proceeding for that purpose. *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731; *Corbitt v. Timmerman*, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

²²⁶ *Wiley v. Pratt*, 23 Ind. 628; *Hess v. Cole*, 23 N. J. Law, 125; *Shumway v. Stillman*, 6 Wend. (N. Y.) 453; *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387; *Wright v. Andrews*, 130 Mass. 149; *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97; *Dormitzer v. German Savings & Loan Soc.*, 23 Wash. 132, 62 Pac. 862.

a finding of the trial court that the appearance of the attorney is binding upon the defendant.²²⁷ If the case is that of a judgment rendered in another state, a recital in the record that the defendant appeared by attorney is conclusive of the fact that the attorney did appear, but not that he had authority to appear.²²⁸

§ 273. Jurisdictional Recitals.

It commonly happens that the record itself will furnish evidence on the question of the jurisdiction of the court. And notwithstanding some vigorous dissent, the great majority of the decisions hold (in the case of a domestic as distinguished from a foreign judgment) that if the record shows the facts necessary to confer jurisdiction, or recites that jurisdiction did in fact attach, its averments are final and conclusive in every collateral proceeding, and cannot be contradicted by any extraneous evidence.²²⁹ This is in consequence of the great sanctity attached to judicial records by the common law and their "uncontrollable verity." It is said: "If upon inspection of the record it appears that no notice has been given, the judgment or decree is void. On the other hand, if it be a judgment or decree of a domestic court of general jurisdiction, and the record declares that notice has been given, such declaration cannot be contradicted by extrinsic proof. In such cases the judgment or decree is sustained, not be-

²²⁷ *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

²²⁸ *Infra*, vol. 2, § 903.

²²⁹ *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Walker v. Cronkite* (C. C.) 40 Fed. 133; *Granger v. Clark*, 22 Me. 128; *Morse v. Presby*, 25 N. H. 299; *Cook v. Darling*, 18 Pick. (Mass.) 393; *Colt v. Haven*, 30 Conn. 190, 79 Am. Dec. 244; *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679; *Maples v. Mackey*, 89 N. Y. 146; *Clark v. Bryan*, 16 Md. 171; *Miller v. Ewing*, 8 Smedes & M. (Miss.) 421; *Dufour v. Camfranc*, 11 Mart. O. S. (La.) 607, 13 Am. Dec. 360; *Smith v. Wood*, 37 Tex. 616; *Simmons v. McKay*, 5 Bush (Ky.) 25; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Rogers v. Beauchamp*, 102 Ind. 33, 1 N. E. 185; *Moffitt v. Moffitt*, 69 Ill. 641; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *McCauley v. Fulton*, 44 Cal. 355; *Bigelow v. Chatterton*, 10 U. S. App. 267, 2 C. C. A. 402, 51 Fed. 614; *United States v. Gayle* (D. C.) 45 Fed. 107; *Letney v. Marshall*, 79 Tex. 513, 15 S. W. 586; *Perry v. Klug*, 117 Ala. 533, 23 South. 783; *Ward v. White*, 66 Ill. App. 155; *Hoagland v. Hoagland*, 19 Utah, 108, 57 Pac. 20; *Phillips v. Phillips*, 13 S. D. 231, 83 N. W. 94.

cause a judgment rendered without notice is good, but because the law does not permit the introduction of evidence to overthrow that which for reasons of public policy it treats as absolute verity. The record is conclusively presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment, unless obtained by fraud or collusion, is binding, until reversed, on every other court."²³⁰ Hence a recital in a judgment that the original process was served on the defendant, or that publication (when allowed in lieu of service of process) was made, or that the party appeared by attorney or by answer, is conclusive when the record is collaterally put in issue, unless the recital is positively contradicted by the record itself.²³¹ We proceed to illustrate the rule here stated by an account of certain typical cases. In *Reily v. Lancaster*,²³² the validity of a tax judgment was collaterally involved. It contained a recital that "all the owners and claimants of the property above described have been duly summoned to answer the complaint herein and have made default in that behalf." It appeared, however, that the name of one of the owners was omitted from the printed summons, which was served by publication. Yet the judgment was sustained, the court indulging the presumption that there was adequate proof of service on that defendant although it did not appear in the record. In an important Ohio decision the record of a judgment declared that "the defendants, by C., their attor-

²³⁰ *Wilcher v. Robertson*, 78 Va. 602.

²³¹ *Foster v. Givens*, 14 C. C. A. 625, 67 Fed. 684; *Steinhardt v. Baker*, 20 Misc. Rep. 470, 46 N. Y. Supp. 707; *Isley v. Boon*, 113 N. C. 249, 18 S. E. 174; *Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *Gillon v. Wear*, 9 Tex. Civ. App. 44, 28 S. W. 1014; *Lyle v. Horstman* (Tex. Civ. App.) 25 S. W. 802; *Moore v. Perry*, 13 Tex. Civ. App. 204, 35 S. W. 838; *Mills v. Terry*, 22 Tex. Civ. App. 277, 54 S. W. 780; *Cooper v. Mayfield*, 94 Tex. 107, 58 S. W. 827; *Harris v. McClanahan*, 11 Lea (Tenn.) 181; *Law v. Grommes*, 55 Ill. App. 312; *Casey v. People*, 165 Ill. 49, 46 N. E. 7; *Allured v. Voller*, 112 Mich. 357, 70 N. W. 1037; *Klizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064.

²³² 39 Cal. 354. And see *Sharp v. Brunnings*, 35 Cal. 528; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Branson v. Caruthers*, 49 Cal. 375; *Bateman v. Miller*, 118 Ind. 345, 21 N. E. 292.

ney, came into court, and by virtue of his power of attorney filed in this case, confessed judgment," etc. It was sought in a collateral proceeding to show that the only power of attorney among the papers in the case, and which was marked with the proper number of the case, did not appear to be signed by some of the defendants, and that such defendants were at the time married women, and thereby to show that the judgment was rendered without jurisdiction and was void. But it was held that evidence of such facts could not be received to impeach the validity and effect of the judgment.²³³

But while it is inadmissible to contradict the record by extrinsic evidence, it is always open to the party to show that one part of the record contradicts another part. Thus the recital of service in a judgment may be contradicted by producing the original summons and return.²³⁴ But the contradiction must be explicit and irreconcilable. It is not enough that the recital seems to be contradicted by inferences drawn from other parts of the record. For example, where the service of a summons to the September term of court was defective, and the cause was continued without any steps being taken, and at the ensuing term a decree was rendered which recited that the defendants "were duly served ten days before the first day of the October term," and the record contained only the summons to the September term, it was held that there was nothing appearing in the record to rebut the presumption in favor of the jurisdiction of the court as indicated by its finding in the decree.²³⁵ So in an action against two defendants jointly, on a promissory note, personal service was had on one of them and the other was served by publication; the record did not show that the latter had filed any pleadings in the case, but the judgment of the court recited that "both parties waived a jury, and submitted the cause to the court upon the law and facts;"

²³³ Callen v. Ellison, 13 Ohio St. 416, 82 Am. Dec. 448.

²³⁴ Pardon v. Dwire, 23 Ill. 572; Harris v. Sargeant, 37 Or. 41, 60 Pac. 606.

²³⁵ Turner v. Jenkins, 79 Ill. 228. So, where the return set out in a docket shows that the citation was served before its issuance, and the original citation and return have been destroyed, the date shown in the record being an impossible one, it will be presumed, on collateral attack, that service was had on a date which would render the judgment valid. Stephens v. Turner, 9 Tex. Civ. App. 623, 29 S. W. 937.

and it was held that the record disclosed a personal appearance of both defendants, and the recitals of the judgment were conclusive.²³⁶ A very strong application of this rule of ascribing absolute verity to the record was made in a recent case in Texas. It was a collateral attack upon the judgment of a domestic court of general jurisdiction, and the nullity of the judgment for want of jurisdiction over the person of the defendant was insisted on, because the return upon the writ of citation showed that the alleged publication, as therein recited, could not have been made. The judgment, however, recited that the defendant failed to appear and answer "but wholly made default, although duly cited with process." It was held that, to determine whether the record shows affirmatively that there was proper service, the whole of it must be considered together, and that the recital in the judgment, which was the last act of the court in the case, that the defendant was "duly cited," imported absolute verity.²³⁷

§ 274. Decision of the Court upon its own Jurisdiction.

The fact of its own jurisdiction may become a matter in issue before the court, or a question which it must determine before proceeding with the case, and then its decision that it has jurisdiction is generally considered final and conclusive in all collateral inquiries. When the jurisdiction of a court depends upon a fact which it is required to ascertain in its decision, such decision is binding until reversed in a direct proceeding.²³⁸ Where a statute confers general jurisdiction over a class of cases upon a particular tribunal, its decision upon the facts essential to the existence of jurisdiction in a particular case belonging to the class will be conclusive as against collateral attack.²³⁹ So when a notice which is defective, or the

²³⁶ *Smith v. Wood*, 37 Tex. 616.

²³⁷ *Treadway v. Eastburn*, 57 Tex. 209.

²³⁸ *Otis v. The Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613; *Reinach v. Atlantic & G. W. R. Co.* (C. C.) 58 Fed. 33; *Merritt's Lessee v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298; *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650; *Bruce v. Osgood*, 154 Ind. 375, 56 N. E. 25; *Swift v. Yanaway*, 153 Ill. 197, 38 N. E. 589; *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813; *International & G. N. R. Co. v. Moore* (Tex. Civ. App.) 32 S. W. 379.

²³⁹ *City of Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *Dequindre v.*

service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding.²⁴⁰ And in case of an insufficient service of notice, if the court decides the question of jurisdiction erroneously, the judgment will be voidable but binding until reversed on appeal.²⁴¹ The determination of the question of the sufficiency of the affidavits presented to the court as proof of the service of a summons and the failure of the defendant to answer, is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed.²⁴² But in California, the decision of the probate court upon jurisdictional facts in a particular case is not conclusive upon parties not actually before the court, and can be questioned in a direct suit in the same court.²⁴³ And it is said that when the record discloses the evidence of jurisdiction on which the court acted, its finding that it had jurisdiction is not conclusive unless the facts shown support it.²⁴⁴

Williams, 31 Ind. 444; *Flannery v. Baldwin Fertilizer Co.*, 94 Ga. 696, 21 S. E. 587. Thus, the decision of a federal judge that the interests of the only defendant who is a citizen of the same state with the plaintiff are identical with those of the plaintiff, and that, therefore, the suit is removable as one between citizens of different states, is not reviewable collaterally. *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520.

²⁴⁰ *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 330; *Shawhan v. Loffer*, 24 Iowa, 217; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122; *Lyon v. Vanatta*, 35 Iowa, 525; *Woodbury v. Maguire*, 42 Iowa, 339; *Cincinnati, S. & C. R. Co. v. Village of Belle Centre*, 48 Ohio St. 273, 27 N. E. 464; *Goodell v. Starr*, 127 Ind. 198, 26 N. E. 793; *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; *Rotch v. Humboldt College*, 89 Iowa, 480, 56 N. W. 658.

²⁴¹ *Bonsall v. Isett*, 14 Iowa, 309. Thus, a judgment by a state court, sustaining the validity of personal service made while the defendant (a non-resident) was within the jurisdiction of the court solely for the purpose of trying another suit in such court, to which he was a party, cannot be collaterally attacked in a federal court on the ground that such service was void. *Slpe v. Copwell*, 8 C. C. A. 419, 59 Fed. 970.

²⁴² *Hotchkiss v. Cutting*, 14 Minn. 537 (Gil. 408).

²⁴³ *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237.

²⁴⁴ *Senichka v. Lowe*, 74 Ill. 274. *Goudy v. Hall*, 30 Ill. 109, holds that, on the question of jurisdiction, the findings of the court are not conclusive. If the necessary notice has not been given, or if process has not been served, the court has no authority to act, and all its proceedings are absolutely void. The finding of the court as to proper notice having been given, or process served, is *prima facie* sufficient to establish the fact, and would not be disre-

§ 275. Cases denying Conclusiveness of Record.

The preceding sections show the immense preponderance of authority to be in favor of the rule that a judgment of a superior court can never be impeached collaterally for want of jurisdiction not appearing on its face. This rule, as we stated, is limited to domestic judgments. For in the case of a judgment coming from a sister state or a foreign country, it is agreed on all hands that want of jurisdiction may always be shown against it. But this is a special and peculiar question, and must be carefully separated from the point now under consideration. That being done, we still find a certain number of cases squarely denying the generally accepted rule. It is held in Texas that the doctrine of the absolute verity of a record does not apply when the want of jurisdiction is made a question. "This may always be set up when a judgment is sought to be enforced or any benefit is claimed under it; and this is not inconsistent with the principle which ordinarily forbids the impeachment or contradiction of a record."²⁴⁵ So in New York. "The want of jurisdiction in a court rendering a judgment may be shown collaterally whenever any benefit or protection is sought under the judgment."²⁴⁶ And the same rule is approved in several other states.²⁴⁷ In a recent Massachusetts decision it was held that a domestic judgment may be impeached, in an action thereon, by evidence that, at the time the suit

garded without very clear and satisfactory proof to the contrary. But see the later cases of *Swift v. Yanaway*, 153 Ill. 197, 38 N. E. 580, and *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813.

²⁴⁵ *Fitzhugh v. Custer*, 4 Tex. 391, 51 Am. Dec. 728; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Smith v. Tupper*, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483; *Brown v. Balde*, 3 Lans. (N. Y.) 283.

²⁴⁶ *Putnam v. Man*, 3 Wend. 202, 20 Am. Dec. 686; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Bonnet v. Lachman*, 65 Hun, 554, 20 N. Y. Supp. 514; *Dutton v. Smith*, 10 App. Div. 566, 42 N. Y. Supp. 80. But a judgment cannot be collaterally attacked by showing that there is a doubt about the jurisdiction; the want of jurisdiction must be made to appear clearly by a fair preponderance of the evidence. *Hayes v. Kerr*, 19 App. Div. 91, 45 N. Y. Supp. 1050.

²⁴⁷ *Tenney v. Taylor*, 1 App. D. C. 223; *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108; *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257; *Kingsborough v. Tousley*, 56 Ohio St. 450, 47 N. E. 541; *Davis v. Hamilton*, 53 Ill. App. 94.

was brought, the defendant therein was a non-resident of the state and had no notice of its commencement or pendency.²⁴⁸ So in Kansas it is held permissible to attack a judgment collaterally by proof that the sheriff's return of personal service is false and that defendant in reality never had notice of the action.²⁴⁹ In another state, a recital in an order that a party appeared does not prevent him from showing at all times that he neither was served nor appeared.²⁵⁰

But the most important decision on this side of the question is that of *Ferguson v. Crawford*.²⁵¹ In this case the well-considered and well-reasoned opinion, by Judge Rapallo, contains such a discriminating review of the authorities, and such pertinent observations on the merits of the issue, that we find it necessary to quote from it at some length. "After considerable research," says the learned judge, "I have been unable to find a single authoritative adjudication, in this or any other state, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring states holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice." He then proceeds to review and comment upon the principal cases holding this rule, and continues: "It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and the views of some of our most distinguished jurists, are directly opposed to it. As has been already

²⁴⁸ *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. And see *Stanley v. Stanley*, 35 S. C. 94, 584, 14 S. E. 675.

²⁴⁹ *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149.

²⁵⁰ *Dozier v. Richardson*, 25 Ga. 90.

²⁵¹ 70 N. Y. 253, 26 Am. Rep. 589.

stated, our courts have settled by adjudication in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, and have further decided (in opposition to the holding of courts of some of the other states) that this may be done even if it involves the contradiction of a recital in the judgment-record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and save in one case,²⁵² have in their opinions made no discrimination between them.²⁵³ When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question, for under the provisions of the constitution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, it is now well settled that when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there, it is equally conclusive in all the states of the Union; and whatever pleas would be good to a suit thereon in the state where rendered, and none others, can be pleaded in any court in the United States.²⁵⁴ In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such was the law of this state and the common law, and consequently that in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other states of the Union between the effect of domestic judgments and judgments of sister

²⁵² *Kerr v. Kerr*, 41 N. Y. 272.

²⁵³ Citing *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Noyes v. Butler*, 6 Barb. (N. Y.) 613, and cases cited.

²⁵⁴ Citing *Hampton v. McConnel*, 3 Wheat. 234, 4 L. Ed. 378; *Story, Comm. Const.* § 183; *Mills v. Duryee*, 7 Cranch, 481, 3 L. Ed. 411.

states, in regard to the conclusiveness of the presumption of jurisdiction over the person, is sought to be explained by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another state he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation, however, does not remove the difficulty in making the distinction; for if there is a conclusive presumption that there was jurisdiction, that presumption must exist as well in one case as in the other. The question whether or not the party is estopped cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another. But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments." The learned judge here proceeds to examine the New York authorities at some length, citing and quoting from those mentioned in the margin.²⁵⁵ The pith of the argument extracted from them (and which is truly as applicable to one class of judgments as to the other) is that, to say that the paper relied on is a record because it recites the defendant's appearance, and that he cannot deny the jurisdiction over him because the paper is a record, is reasoning in a vicious circle; and that unless a court has jurisdiction, it can never make a record, such as to import absolute verity, and the party ought not to be estopped, by any allegation in a supposed record, from proving any fact which goes to establish the truth of a plea alleging want of jurisdiction. The conclusion of the learned judge's investigation is

²⁵⁵ *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Bigelow v. Stearns*, 19 Johns. 41, 10 Am. Dec. 189; *Latham v. Edgerton*, 9 Cow. 227; *Davis v. Packard*, 6 Wend. 327; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *People v. Cassels*, 5 Hill, 164; *Harrington v. People*, 6 Barb. 607; *Noyes v. Butler*, 6 Barb. 613; *Hard v. Shipman*, 6 Barb. 621; *Wright v. Douglass*, 10 Barb. 97; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 328; *Pendleton v. Weed*, 17 N. Y. 75; *Porter v. Bronson*, 29 How. Prac. 202.

as follows: "In *Bolton v. Jacks*, 6 Rob. (N. Y.) 198, Jones, J., says that it is now conceded, at least in this state, that want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only prima facie evidence of the truth of the fact recited, and a party against whom a judgment is offered is not by the bare fact of such recitals estopped from showing by affirmative proof that they were untrue and thus rendering the judgment void for want of jurisdiction. It thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Rob. (N. Y.) 198, and if adopted here is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity. The technical difficulty arising from the conclusiveness of the record is thus obviated." A recent case in California, without going so far as to admit that it is regular or proper practice to permit the collateral impeachment of a judgment for want of jurisdiction, yet holds that if the party does in fact so assail the judgment, and the result of the investigation is the discovery that it was not actually founded upon proper jurisdiction, then the nullity of the judgment must be declared, and its conclusive effects done away with, just as if it were void upon its face.²⁵⁶

²⁵⁶ *Hill v. City Cab & Transfer Co.*, 79 Cal. 188, 21 Pac. 728.
(420)

§ 276. Arguments on the Conclusiveness of Records.

From an examination of the authorities cited in the preceding sections, it will be discovered that many of them have been chiefly influenced, in refusing to hear extraneous evidence on a plea of want of jurisdiction, by the traditional regard which has always been shown to judicial records. From the earliest times, the written memorials of courts have been held to import the most absolute and "uncontrollable verity." That records "always speak the truth," and cannot be contradicted, that they can be tried only by inspection, and are evidence of the highest nature, are legal commonplaces of almost legendary antiquity. Yet if we consider the present methods of perpetuating the accounts of legal proceedings,—the loose, careless, and irregular manner in which records are but too often made up,—it is difficult to find satisfactory reasons, in the thing itself, for attributing such sanctity to a judgment-roll. In so far then as this rule rests only upon the inviolable character of the record, it seems to evince a too superstitious reverence for the notions of the early English law. But there is a broad and very serious consideration of public policy underlying the rule, upon which the best considered cases ultimately base their position. The stability of judicial records is requisite for the peace and comfort of society, and for the protection of all persons who may deal with rights or property in reliance upon their conclusiveness. As it has been said by a certain high court, if judgments were always open to collateral attacks, they would "no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title."²⁵⁷ Now while it may be conceded that the considerations here adduced are amply sufficient to sustain the rule against impeaching judgments collaterally for errors or irregularities, it is still a question whether they apply with equal force where the objection goes to the very jurisdiction of the court. But it must

²⁵⁷ *Lancaster v. Wilson*, 27 Grat. (Va.) 629.

be admitted that the necessity of protecting innocent third persons, who may acquire rights or alter their legal relations on the faith of judicial records, is of grave importance.

On the other hand, the arguments for permitting want of jurisdiction to be shown collaterally, may be divided into two heads. First, there is the question of natural justice to the individual. To suffer a man to be condemned unheard, to permit him to be deprived of his property or his rights by proceedings of which he had no notice or in which he had no opportunity to be heard, is repugnant to every sentiment of fairness and right dealing, as well as wholly alien to the spirit of our jurisprudence. To sacrifice the individual to the welfare of the community is no doubt a very high principle of political ethics, but it is scarcely at home in the body of our law, except in matters of police. On the contrary, it is the guarantee which the law gives of the inviolability of every man's rights and estate that constitutes its best title to the respect and confidence of the people. True, it is said that a defendant who is injured by the rendition of a judgment against him without jurisdiction of his person, may procure its reversal in an appellate court, or move to vacate it in the court which rendered it, or go to equity with an application for an injunction. But this is no adequate safeguard. These remedies are often illusory. For it is very possible that he may remain entirely ignorant of the adjudication against him until long after his rights are irrevocably lost. In the second place, if the court had no jurisdiction, its proceedings are void; and if the action of the court was void, its memorial of that action is no record. This argument is put in a very clear light in an early New York case, where the learned judge, speaking of an alleged record, used the following language: "It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record;

but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging want of jurisdiction.”²⁵⁸

On the whole, therefore, we must conclude that, as a matter of strict law and logic, the authorities which permit the collateral impeachment of judgments for want of jurisdiction have the better of the argument; but that the considerations of public policy which demand the conclusiveness of the record are of such importance and gravity that they will be likely always to overbalance the claims of strict legal consistency.

§ 277. No Presumption against the Record.

The general rule, as stated, is that every presumption will be indulged in favor of the records of superior courts. An important corollary to this rule is that there can be no presumption against the record. For if the record imports absolute verity, its recitals must be equally as conclusive when they make against the jurisdiction as when for it. If the record is silent as to jurisdictional facts, it will be aided by presumptions. But if it recites such facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete.²⁵⁹ “Where the

²⁵⁸ *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172.

²⁵⁹ *Galpin v. Page*, 18 Wall. 350, 366, 21 L. Ed. 959; *Messinger v. Kintner*,

existence of any jurisdictional fact is not affirmed upon the record in a court of superior jurisdiction, it will be presumed upon a collateral attack that the court acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. But no presumptions in support of a judgment are allowed in opposition to any statement made in the record. If it appear that process was served in a particular mode, no other and different service can be presumed, for such presumption would contradict the record, which imports verity."²⁰⁰ But the record must be taken as a whole. And if separate recitals of jurisdictional facts are found in different parts of it, which may reasonably stand together, they must all be considered together. And if the aggregate of information thus obtained shows jurisdiction rightly attaching, the judgment will not be void, though any one of the recitals, taken alone, would not be sufficient.²⁰¹ One other possible case remains; viz., where recitals in different parts of the record flatly contradict each other, and one would show jurisdiction and the other not. Here, since one recital must be false, it seems reasonable to assume the truth of that one which would support the jurisdiction. Thus in a case in Iowa, the record stated in one place that the answer was filed April 8th, and in another place that it was filed April 16th; and it was presumed, in favor of the validity of the judgment, that the former statement was the true one.²⁰²

4 Bln. (Pa.) 97; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. 329; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124; *Pollard v. Wegener*, 13 Wis. 569; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

²⁰⁰ *Hering v. Chambers*, 103 Pa. 175; *Ely v. Tallman*, 14 Wis. 28. And see *Newman v. Crows*, 8 C. C. A. 577, 60 Fed. 220; *Ritchie v. Sayers* (C. C.) 100 Fed. 520; *Bowler v. Ennis*, 48 App. Div. 309, 61 N. Y. Supp. 686; *Stuyvesant v. Well*, 41 App. Div. 551, 58 N. Y. Supp. 697; *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; *Laney v. Garbee*, 105 Mo. 353, 16 S. W. 831, 24 Am. St. Rep. 391.

²⁰¹ *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

²⁰² *Conrad v. Baldwin*, 3 Iowa, 207.

§ 278. Judgment Void on its Face may be Attacked collaterally.

When the record itself discloses the fact that the court had no jurisdiction of the controversy, or that jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity, and may be collaterally impeached, by any person interested, whenever and wherever it is brought in question.²⁶³ Thus when the defendant against whom a judgment was entered had no notice, and that appears from the proceedings, the judgment is void on its face.²⁶⁴ It is equally true of want of jurisdiction of the subject-matter. Orders and judgments which the court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding where

²⁶³ *Briscoe v. Stephens*, 2 Bing. 213; *Rogers v. Wood*, 2 Barn. & Adol. 245; *Whyte v. Rose*, 3 Q. B. 493; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Lincoln v. Tower*, 2 McLean, 473, Fed. Cas. No. 8,355; *Moore v. Town Council of Edgefield (C. C.)* 32 Fed. 498; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Gay v. Smith*, 38 N. H. 171; *Mercler v. Chace*, 9 Allen (Mass.) 242; *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; *Latham v. Edgerton*, 9 Cow. (N. Y.) 227; *Gage v. Hill*, 43 Barb. (N. Y.) 44; *Fisher v. Longnecker*, 8 Pa. 410; *James v. Smith*, 2 S. C. 183; *Towns v. Springer*, 9 Ga. 130; *Central Bank v. Gibson*, 11 Ga. 453; *Parish v. Parish*, 32 Ga. 653; *Campbell v. Brown*, 6 How. (Miss.) 106; *Enos v. Smith*, 7 Smedes & M. (Miss.) 85; *McComb v. Ellett*, 8 Smedes & M. (Miss.) 505; *Richardson v. Hunter*, 23 La. Ann. 255; *Edwards v. Whited*, 29 La. Ann. 647; *Dorsey v. Kendall*, 8 Bush (Ky.) 294; *Summar v. Jarrett*, 62 Tenn. 23; *North v. Moore*, 8 Kan. 143; *Evans v. Percifull*, 5 Ark. 424; *Oavanaugh v. Smith*, 84 Ind. 380; *Bannon v. People*, 1 Ill. App. 496; *Dicks v. Hatch*, 10 Iowa, 390; *Bonsall v. Isett*, 14 Iowa, 309; *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595; *McMinn v. Whelan*, 27 Cal. 300; *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328; *Furgeson v. Jones*, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; *Horner v. Doe, Smith (Ind.)* 10; *Frankel v. Satterfield*, 9 Houst. (Del.) 201, 19 Atl. 898; *Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164; *Hinton v. Penn Mut. Life Ins. Co.*, 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 836; *Woods v. Bryan*, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688; *McGehee v. Wilkins*, 31 Fla. 83, 12 South. 228; *Jewett v. Iowa Land Co.*, 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555; *Duxbury v. Dahle*, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408; *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Junkans v. Bergin*, 64 Cal. 203, 30 Pac. 627; *Smith v. Los Angeles & P. R. Co. (Cal.)* 34 Pac. 242; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.

²⁶⁴ *Farmers' Loan & T. Co. v. McKinney*, 6 McLean, 1, Fed. Cas. No. 4,667; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111.

they are relied on in support of a claim of right.²⁶⁵ But it must be remarked that a want of jurisdiction seldom, if ever, appears on the face of a judgment except in the insufficiency of the jurisdictional recitals. "What do the cases mean," asks the supreme court of California, "when they speak of a want of jurisdiction appearing upon the face of the record? Do they mean a positive and direct statement to the effect that something which must have been done, in order to give the court jurisdiction, was not done? Or do they mean that a want of jurisdiction appears whenever what was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction? If the former, they are a delusion. For we venture to say that no case can be found, or will arise hereafter, where the conditions contemplated by such a rule will be found to exist. No court has ever yet so far stultified itself as to render a judgment against a defendant, and at the same time deliberately state that it had not acquired jurisdiction over his person."²⁶⁶ In the generality of cases, therefore, a judgment will be void on its face only where the record recites the jurisdictional facts (for if it is silent jurisdiction will be presumed), and the facts as so recited are plainly insufficient to have conferred jurisdiction.

It is also to be remarked that there is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those quasi jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. In the absence of the former, the judgment of the court is void and may be attacked in collateral proceedings, while, in respect to the latter, it is conclusive, and cannot be questioned except on a direct proceeding.²⁶⁷

²⁶⁵ *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *J. B. Watkins Land Mortg. Co. v. Mullen*, 8 Kan. App. 705, 54 Pac. 921; *Beaudrot v. Murphy*, 53 S. C. 118, 30 S. E. 825.

²⁶⁶ *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

²⁶⁷ *Reinach v. Atlantic & G. W. R. Co.* (C. C.) 58 Fed. 33.

§ 279. Superior Courts exercising Special Statutory Powers.

So far we have confined our attention to the presumptions of jurisdiction in the case of a superior court exercising its ordinary common law powers. It remains to speak of the exercise of peculiar statutory powers, and then of the judgments of inferior tribunals. And first, it is an established rule that when a court of general jurisdiction has special and statutory powers conferred upon it, which are wholly derived from statute, and not exercised according to the course of the common law, or are not part of its general jurisdiction, it is to be regarded as quoad hoc an inferior or limited court, and its judgments to be treated accordingly, that is, its jurisdiction must appear on the record and cannot be presumed.²⁶⁸ It is said, in a New Hampshire decision, that whenever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be impeached collaterally by showing that the court or magistrates have acted in a case where they have no jurisdiction, or by modes of procedure which they are not authorized to adopt.²⁶⁹ The same principle, under a slightly different aspect, is stated in a Connecticut case as follows: Where a statute confers upon a tri-

²⁶⁸ *Thatcher v. Powell*, 6 Wheat. 110, 5 L. Ed. 221; *Secombe v. Milwaukee & St. P. R. Co.*, 23 Wall. 108, 23 L. Ed. 67; *Murray v. American Surety Co.*, 17 C. C. A. 138, 70 Fed. 341; *Warren v. Union Bank*, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777; *Morse v. Presby*, 25 N. H. 299; *Carleton v. Washington Ins. Co.*, 35 N. H. 162; *Town of Huntington v. Town of Charlotte*, 15 Vt. 46; *Striker v. Kelly*, 7 Hill (N. Y.) 24; *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Smith v. Fowle*, 12 Wend. (N. Y.) 9; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Shivers v. Wilson*, 5 Har. & J. (Md.) 130, 9 Am. Dec. 497; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785; *Foster v. Glazener*, 27 Ala. 301; *Mitchell v. Runkle*, 25 Tex. Supp. 132; *Earthman's Admr's v. Jones*, 2 Yerg. (Tenn.) 493; *Barry v. Patterson*, 3 Humph. (Tenn.) 313; *Edmiston v. Edmiston*, 2 Ohio, 251; *Ludlow's Heirs v. Johnston*, 3 Ohio, 553, 17 Am. Dec. 609; *Adams' Lessee v. Jeffries*, 12 Ohio, 253, 40 Am. Dec. 477; *Cone v. Cotton*, 2 Blackf. (Ind.) 82; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Wight v. Warner*, 1 Doug. (Mich.) 384; *Northcut v. Lemery*, 8 Or. 317; *Furgeson v. Jones*, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808.

²⁶⁹ *Sanborn v. Fellows*, 22 N. H. 473, 489.

bunal of limited and statutory jurisdiction a special power, to be exercised under particular circumstances and in a particular manner, it is indispensable to the valid exercise of the power that such circumstances exist at the time and that the court proceed in the exact manner prescribed; and where the record of such court finds the existence of those circumstances, and that such manner of proceeding was adopted, the finding is only prima facie proof of those facts and they may be disproved by parol evidence.²⁷⁰ But the most satisfactory and reasonable statement of the rule that we have encountered in the books is expressed by the court of appeals of Virginia, in the following language: "When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally. But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record."²⁷¹ But we must guard against the supposition that everything beside an ordinary adversary proceeding is of this special and statutory character. For example, a warrant of attorney to confess judgment is a familiar common-law security, and the fact that the mode of procedure, in entering judgment thereon, is regulated by a statute does not convert the proceeding into one of such a special character that the same presumptions do not obtain as in the case of any ordinary judgment.²⁷² So the proceeding by writ of ad quod damnum to as-

²⁷⁰ *Sears v. Terry*, 26 Conn. 273.

²⁷¹ *Pulaski Co. v. Stuart*, 28 Grat. 872. And see *Harvey v. Tyler*, 2 Wall. 342, 17 L. Ed. 871; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

²⁷² *Bush v. Hanson*, 70 Ill. 480. The same is true of proceedings commenced by attachment. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac.

sess damages for land taken under its charter by a turnpike company is not in derogation of the common law.²⁷³ Where the action is one for the collection of delinquent taxes, there is much difference of opinion as to whether or not the court exercises its jurisdiction in a special or summary manner, the majority of the cases inclining to the opinion that judgments in tax cases are not entitled to the same presumptions which attend ordinary judgments at law, but that all the facts essential to the jurisdiction must appear on the face of the record.²⁷⁴

§ 280. Summary Proceedings.

It is well settled that a judgment in a summary proceeding must show upon its face everything that is necessary to sustain the jurisdiction of the court rendering it.²⁷⁵ Thus, in a judgment on motion against a tax-collector and his sureties, rendered by *nil dicit*, the judgment entry must show the liability of the defendants for the debt or penalty sought to be recovered, and that the facts were proved necessary to give the court jurisdiction.²⁷⁶

§ 281. Constructive Service of Process.

Whether a proceeding in which service of process is made upon a non-resident defendant by publication of the summons, or attachment of his property, without an appearance by him, is entitled to be supported by the ordinary presumptions of the rightful acquisition of jurisdiction by superior courts, is a question of much importance, but upon which the authorities are by no means agreed. A

638. Compare *Mentzer v. Ellison*, 7 Colo. App. 315, 43 Pac. 464; *Star Brewery v. Otto*, 63 Ill. App. 40. And of an action in partition. *Nickrans v. Wilk*, 161 Ill. 76, 43 N. E. 741. Probate courts, though their authority to appoint guardians for insane persons, to confirm the adoption of a child, and the like, is derived from statute, yet exercise a general jurisdiction in such matters, and their orders and judgments therein are upheld by the usual presumptions of validity. *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Crocker v. Balch*, 104 Tenn. 6, 55 S. W. 307.

²⁷³ *Nolensville Turnpike Co. v. Quimby*, 8 Humph. (Tenn.) 476.

²⁷⁴ See *Black, Tax Titles* (2d Ed.) § 178, and the cases there cited.

²⁷⁵ *Crockett v. Parkison*, 3 Cold. (Tenn.) 219; *Haynes v. Gates*, 2 Head, (Tenn.) 598.

²⁷⁶ *Graham v. Reynolds*, 45 Ala. 578.

majority of the earlier cases hold that such proceedings are contrary to the course of the common law, are wholly dependent for their validity upon an exact compliance with the statutes authorizing them, are to be strictly scrutinized, and therefore, within the rule just stated, are not favored with any presumption unless the record does affirmatively show that everything necessary to the jurisdiction was actually and rightly done.²⁷⁷ A very eminent judge has said that whenever "it appears from an inspection of the record of a court of general jurisdiction that the defendant, against whom a personal decree or judgment is rendered, was, at the time of the alleged seizure, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."²⁷⁸ But on the other hand, most of the later decisions contend,—and with much show of reason,—that such a rule is arbitrary and illogical. For, say they, the court is none the less a court of general jurisdiction because in this instance the legislature prescribes a special mode for the exercise of its powers. The process is special and statutory, but the jurisdiction of the court depends upon the constitution or general laws. And the presumption in favor of the validity of judgments rests upon considerations of public policy, and upon the high character of the courts of record, and the fact that the judges are men learned and skilled in the law,—reasons which are not affected by the circumstance that in the cases supposed a peculiar method of executing their process is adopted. According to this view, in cases of constructive service, the record, if silent or incomplete, should be aided by the same presumptions which obtain in the case of ordinary judgments founded upon personal service.²⁷⁹ Thus, it is not necessary,

²⁷⁷ *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Neff v. Pennoyer*, 3 Sawy. 298, Fed. Cas. No. 10,083; *Gray v. Larrimore*, 2 Abb. U. S. 542, Fed. Cas. No. 5,721; *Brownfield v. Dyer*, 7 Bush (Ky.) 505; *Hallett v. Righters*, 13 How. Prac. (N. Y.) 43; *Boylard v. Boyland*, 18 Ill. 552. And see *Schissel v. Dickson*, 129 Ind. 139, 28 N. E. 540; *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399; *Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 14 S. E. 447.

²⁷⁸ *Galpin v. Page*, 18 Wall. 364, 21 L. Ed. 959, per Field, J.

²⁷⁹ *Lawler's Heirs v. White*, 27 Tex. 250; *Stewart v. Anderson*, 70 Tex.

in order to support a judgment on service by publication, to show that an affidavit for publication was made, since the law will presume that much in aid of the judgment.²⁸⁰ Nor will the judgment be open to collateral impeachment although the affidavit was defective, insufficient, or false.²⁸¹

§ 282. Judgments of Inferior Courts not aided by Presumptions.

In respect to the subject now under discussion, there is a fundamental distinction between superior and inferior courts. In the case of judgments rendered by the latter, the rules already stated as applying to the former are directly reversed.²⁸² Courts of inferior or limited powers must not only act within the scope of their jurisdiction, but it must appear on the face of their proceedings that they so acted; the record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular cause; otherwise the judgment may be impeached collaterally, no presumptions are indulged in its support, and want of jurisdiction may be shown by evidence aliunde.²⁸³ "Where one seeks

588, 8 S. W. 295; *Buse v. Bartlett*, 1 Tex. Civ. App. 335, 21 S. W. 52; *Hams v. Root*, 22 Tex. Civ. App. 413, 55 S. W. 411; *Gemmell v. Rice*, 13 Minn. 400 (Gil. 371); *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Nash v. Church*, 10 Wis. 312, 78 Am. Dec. 678; *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983; *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907; *Bank of Colfax v. Richardson*, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664; *Co-operative Savings & Loan Ass'n v. McIntosh*, 105 Iowa, 697, 75 N. W. 520; *Hoagland v. Hoagland*, 19 Utah, 103, 57 Pac. 20.

²⁸⁰ *Hams v. Root*, 22 Tex. Civ. App. 413, 55 S. W. 411; *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

²⁸¹ *Stevens v. Reynolds*, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; *Laughlin v. Vogelsong*, 5 Ohio Cir. Ct. 407; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264.

²⁸² See, *supra*, §§ 270-273.

²⁸³ *Harris v. Willis*, 15 C. B. 710; *Turner v. Bank of North America*, 4 Dall. 11, 1 L. Ed. 718; *Kempe v. Kennedy*, 5 Cranch, 173, 3 L. Ed. 70; *Crawford v. Howard*, 30 Me. 422; *Walbridge v. Hall*, 3 Vt. 114; *Nye v. Kellam*, 18 Vt. 594; *Smith v. Rice*, 11 Mass. 513; *Sayles v. Briggs*, 4 Metc. (Mass.) 421; *Wells v. Stevens*, 2 Gray (Mass.) 115; *Hendrick v. Whittemore*, 105 Mass. 23; *Henry v. Estes*, 127 Mass. 474; *Hall v. Howd*, 10 Conn. 514, 27 Am. Dec. 696; *Powers v. People*, 4 Johns. (N. Y.) 292; *Simons v. De Bare*, 4 Bosw. (N. Y.) 547; *Wickes' Lessee v. Caulk*, 5 Har. & J. (Md.) 36; *Clark v. Bryan*, 16 Md. 171; *Harvey v. Huggins*, 2 Balley (S. C.) 267; *Gray v. Mc-*

to enforce the judgment of a court of limited and special jurisdiction, its organization is open to inquiry, and its jurisdiction must be established." ²⁸⁴ There are general expressions in the books which seem to indicate that, unless the jurisdiction of an inferior court appears fully and affirmatively on the record of its proceedings, the judgment will be absolutely void. And in that case there could be no question of introducing extraneous evidence either to support or contradict it. It has been held, in fact, that evidence extrinsic to the record cannot supply facts requisite to the jurisdiction. ²⁸⁵ But while it is undoubtedly the rule that, the record of such a court being silent on the subject or defective in its showings, there is no presumption to aid it,—while we may even concede that under such circumstances it would be presumptively invalid,—there seems to be no good reason for refusing to hear proper evidence tending to show actual jurisdiction. And in some of the states the decisions are positive to the effect that jurisdictional requisites may be shown by outside evidence, except in the case of those facts which the law expressly directs the court to spread upon its records. ²⁸⁶ It is further to be remarked that although a court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same liberal presumptions as to jurisdiction which obtain in the case of the superior courts. ²⁸⁷

Neal, 12 Ga. 424; Rutherford v. Crawford, 53 Ga. 138; State v. Ely, 43 Ala. 563; Steen v. Steen, 25 Miss. 513; Horau v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Adams v. Tiernan, 5 Dana (Ky.) 394; Hamilton v. Burum, 3 Yerg. (Tenn.) 355; State v. Gachenhelmer, 30 Ind. 63; Newman v. Manning, 89 Ind. 422; State v. Berry, 12 Iowa, 58; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Bersch v. Schneider, 27 Mo. 101; State v. Metzger, 28 Mo. 65; Chandler v. Nash, 5 Mich. 409; Beaudrias v. Hogan, 16 App. Div. 33, 44 N. Y. Supp. 785; Cockley v. Rehr, 12 Pa. Co. Ct. R. 343; McGehee v. Wilkins, 31 Fla. 83, 12 South. 228; Williams v. Whitaker, 110 N. C. 393, 14 S. E. 924; Wilkerson v. Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Chaddock v. Barry, 93 Mich. 542, 53 N. W. 785.

²⁸⁴ Crawford v. Howard, 30 Me. 422.

²⁸⁵ Anderson v. Blnford, 61 Tenn. 310.

²⁸⁶ Jolley v. Foltz, 34 Cal. 321; Van Deusen v. Sweet, 51 N. Y. 331; Beaudrias v. Hogan, 23 App. Div. 83, 48 N. Y. Supp. 468.

²⁸⁷ Moffitt v. Moffitt, 69 Ill. 641.

§ 283. Superior and Inferior Courts distinguished.

To draw a clear line of demarcation between superior and inferior courts is rendered almost impossible by the great differences in the judicial systems of the several states, as also by the fact that courts possessing similar powers are very differently regarded in different states. Practically, the question, in regard to any specific court, must be determined by the laws and decisions of the jurisdiction where it exists. But it has several times been attempted to formulate a distinction in general terms, and such expressions, though necessarily vague, may be of some assistance in prosecuting the inquiry. The United States supreme court, at an early day, observed that "the true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this,—a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities."²⁸⁸ But this, it will be perceived, does not so much answer the question as

²⁸⁸ *Grignon v. Astor*, 2 How. 319, 341, 11 L. Ed. 283, per Baldwin, J. See, also, *Kempe v. Kennedy*, 5 Cranch, 185, 3 L. Ed. 70; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. "What tests are to be applied in determining the question of inferiority? It may be solved by showing that the court is either placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the act in question does not place the court which it creates under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the supreme court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also

state it in new terms. We must conclude that the difference between superior and inferior courts is one of relative rank and authority and not of intrinsic quality. Nor will the common distinction between "courts of record" and "courts not of record" aid us in framing a general rule, because a particular tribunal may be regarded in one state as a record court while an exactly similar court in another state will not possess that character. In all the states there are courts having original jurisdiction of every (or nearly every) species of action or proceeding known to the common law, unlimited in respect to the amount or the character of the controversy. And these are unquestionably "superior" courts within the meaning of the rule. And the same is true of courts possessing general equity powers. In most of the states there are certain tribunals whose authority is wholly derived from statute, who are authorized to take cognizance only of a particular class of actions or proceedings, or to act only in certain specified circumstances, whose course of procedure is precisely marked out, and whose minutes or memorials are not dignified with the character of a record. And these are undoubtedly "inferior" courts within the meaning of the rule. But between these two classes lie a considerable number of courts, whose jurisdiction has a maximum money-limit, or which have general jurisdiction of a special class of cases, or are otherwise differentiated from both the foregoing types. And as to these it is useless to attempt a universal classification. We

called specific and inferior, is that which extends only to certain specified causes." *State v. Daniels*, 66 Mo. 200.

A court of record which has, by statute, all the power that any court could have over a certain subject of jurisdiction, especially if it be a subject of jurisdiction under the general rules of law or equity, is to be regarded (as to cases within that class) as a court of superior jurisdiction, within the rule which presumes the jurisdiction of such courts to render a particular judgment. *Stahl v. Mitchell*, 41 Minn. 325, 43 N. W. 385. And see *Gridley v. College of St. Francis Xavier*, 137 N. Y. 327, 33 N. E. 321.

"A tribunal which is not a common law court, which does not proceed according to the course of the common law, a newly created, limited, and special jurisdiction from which no appeal is allowed by statute, nor writ of error by the common law, yet determining in a summary way the most important rights and franchises, both as respects the people and private persons, is and cannot be otherwise than an inferior tribunal in the strictest sense of the word." *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770.

shall proceed to ascertain how these courts are regarded in the several states.

§ 284. Probate Courts.

In Pennsylvania, the orphans' court is a court of record of equal dignity with the common law tribunals, and its decrees, as to matters within its jurisdiction, are conclusive on parties and privies against all collateral attack and impeachment except for fraud.²⁸⁹ In Ohio, the probate courts are in the fullest sense courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered.²⁹⁰ In Missouri also, the judgments and orders of probate courts, in matters within their jurisdiction, have the same import of verity as those of courts of general jurisdiction, and, like them, are not to be impeached in collateral proceedings.²⁹¹ And the same rule obtains in Illinois,²⁹² in Louisiana,²⁹³ in South Dakota,²⁹⁴ in Vermont,²⁹⁵ in Alabama,²⁹⁶ in Arkansas,²⁹⁷ in Minnesota,²⁹⁸ and in California.²⁹⁹ In Texas, it seems to have been held at one time that the proceedings of a probate court must show every fact necessary to give jurisdiction, and could not be sustained by any presumption

²⁸⁹ *McPherson v. Cunliff*, 11 Serg. & R. 422, 14 Am. Dec. 642; *Mussleman's Appeal*, 65 Pa. 485; *Lex's Appeal*, 97 Pa. 289; *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517.

²⁹⁰ *Shroyer v. Richmond*, 16 Ohio St. 455; *Woodward v. Curtis*, 19 Ohio Cir. Ct. R. 15; *State Nat. Bank v. Ellison* (C. C.) 75 Fed. 354.

²⁹¹ *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276.

²⁹² *People v. Medart*, 166 Ill. 348, 46 N. E. 1095; *Paullissen v. Loock*, 38 Ill. App. 510.

²⁹³ *Grevemberg v. Bradford*, 44 La. Ann. 400, 10 South. 786.

²⁹⁴ *Matson v. Swenson*, 5 S. D. 191, 58 N. W. 570.

²⁹⁵ *Doolittle v. Holton*, 28 Vt. 819, 67 Am. Dec. 745.

²⁹⁶ *Key v. Vaughn*, 15 Ala. 497; *Arnett's Ex'r v. Arnett*, 33 Ala. 273; *Duckworth v. Duckworth's Adm'r*, 35 Ala. 70.

²⁹⁷ *Osborne v. Graham*, 30 Ark. 67.

²⁹⁸ *Dayton v. Mintzer*, 22 Minn. 393; *Kurtz v. St. Paul & D. R. Co.*, 61 Minn. 18, 63 N. W. 1.

²⁹⁹ *Luco v. Commercial Bank*, 70 Cal. 339, 11 Pac. 650; *McCauley v. Harvey*, 49 Cal. 497; *Kingsley v. Miller*, 45 Cal. 95; *Reynolds v. Brumagin*, 54 Cal. 254.

of validity.³⁰⁰ But the latest decisions are to the effect that if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, its judgment must be held conclusive in any other court of the same sovereignty when called in question collaterally.³⁰¹ On the other hand, in Mississippi, it is held that a decree of a probate court for the sale of real estate by an executor or administrator is invalid unless the record shows affirmatively a compliance with all the requirements of the statute under which the land was decreed to be sold.³⁰² And in Massachusetts, if a probate court exceeds its jurisdiction and makes a decree in a matter over which it has no power, the want of jurisdiction may be shown against such decree in any collateral proceeding, and it will then be treated as utterly void.³⁰³ In New York, if a surrogate's decree shows jurisdiction on its face, its recitals are presumptive evidence of its validity when the question arises in a collateral proceeding.³⁰⁴

§ 285. Federal Courts.

The circuit, district, and territorial courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term; their judgments and decrees stand on the same footing as those rendered by state courts of general jurisdiction, and their authority and jurisdiction are always to be presumed.³⁰⁵ It is

³⁰⁰ *Easley v. McClinton*, 33 Tex. 288.

³⁰¹ *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940; *McSpadden v. Farmer* (Tex. Civ. App.) 23 S. W. 814; *Corley v. Anderson*, 5 Tex. Civ. App. 213, 23 S. W. 839; *Grant v. Hill* (Tex. Civ. App.) 30 S. W. 952; *Stone v. Ellis* (Tex. Civ. App.) 40 S. W. 1077; *Hill v. Grant* (Tex. Civ. App.) 44 S. W. 1016.

³⁰² *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456.

³⁰³ *Mercler v. Chace*, 9 Allen, 242; *Peters v. Peters*, 8 Cush. 529.

³⁰⁴ *Rowe v. Parsons*, 6 Hun, 338. And see *Seymour v. Seymour*, 4 Johns. Ch. 409; *Chipman v. Montgomery*, 63 N. Y. 236; *In re Stillwell's Estate*, 139 N. Y. 337, 34 N. E. 777; *Bensen v. Manhattan Ry. Co.*, 14 App. Div. 442, 43 N. Y. Supp. 914; *Taylor v. Syme*, 17 App. Div. 517, 45 N. Y. Supp. 707.

³⁰⁵ *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *Kennedy v. Georgia State Bank*, 8 How. 611, 12 L. Ed. 1209; *Page v. United States*, 11 Wall. 268, 20 L. Ed. 135; *Evers v.*

said: "The courts of the United States, though possessing a limited jurisdiction, yet, in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. In pleading a judgment or decree of one of those courts, there is no more necessity for showing the facts which confer jurisdiction than in a plea of a judgment of the highest tribunal known to the law. Their judgments cannot be impeached for irregularity or error in a collateral proceeding; they can only be vacated on motion, in the courts in which they are rendered, or reversed for error in an appellate jurisdiction."³⁰⁶ Thus, a judgment obtained in a federal circuit court cannot be treated as a nullity or as being open to collateral impeachment, although the record fails to show a ground of federal jurisdiction, such as diverse citizenship of the parties.³⁰⁷ So, a judgment rendered in a federal court, in an action removed thereto from a state court, cannot be collaterally attacked for want of proper jurisdictional allegations in the petition for removal.³⁰⁸

§ 286. Justices of the Peace.

It is not universally true that the courts of justices of the peace are inferior tribunals, within the rule in regard to presuming jurisdiction. In Texas, for example, such courts are created by the constitution, and exercise, within the limits therein defined, general exclusive jurisdiction; and accordingly their judgments, though not showing all the facts necessary to give jurisdiction, cannot be at-

Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; *Skirving v. National Life Ins. Co.*, 8 C. C. A. 241, 59 Fed. 742; *Livingston v. Van Ingen*, 1 Paine, 48. Fed. Cas. No. 8,420; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *Ruckman v. Cowell*, 1 N. Y. 505; *Matson v. Burt*, 9 Hun, 470; *Byers v. Fowler*, 12 Ark. 218, 44 Am. Dec. 271; *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133; *Turrell v. Warren*, 25 Minn. 9; *Pierro v. St. Paul & N. P. R. Co.*, 37 Minn. 314, 34 N. W. 38.

³⁰⁶ *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133.

³⁰⁷ *Cutler v. Huston*, 158 U. S. 423, 15 Sup. Ct. 868, 39 L. Ed. 1040; *Rice v. Adler-Goldman Commission Co.*, 18 C. C. A. 15, 71 Fed. 151.

³⁰⁸ *Washburn v. Pullman Palace-Car Co.*, 21 C. C. A. 598, 76 Fed. 1005; *Haug v. Great Northern Ry. Co.*, 42 C. C. A. 167, 102 Fed. 74.

tacked collaterally as void therefor.³⁰⁹ And in several other states, the judgments of such magistrates are considered as entitled to all the presumptions of validity. This is the case in Connecticut,³¹⁰ Vermont,³¹¹ Pennsylvania,³¹² Mississippi,³¹³ Tennessee,³¹⁴ and Alabama.³¹⁵ And in Massachusetts it is said that "the rule which makes the judgment of a court of record binding upon the parties, until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a justice of the peace as to one of a court of general jurisdiction."³¹⁶ But on the other hand, in Maryland and some other states, judgments rendered by justices will not be allowed to stand where the record fails to show affirmatively that a summons had been issued and served upon the defendant; such defect in the proceedings is fatal to the validity of the judgment and may be called in question in a collateral action.³¹⁷ And in Michigan a judgment entered by a justice by virtue of a statutory authority must show that the requirements of the statute have been complied with, and if it fails in this it is void.³¹⁸

³⁰⁹ *Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 730; *Watkins v. Davis*, 61 Tex. 414; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 432; *Hambel v. Davis* (Tex. Civ. App.) 33 S. W. 251.

³¹⁰ *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 700.

³¹¹ *Wright v. Hazen*, 24 Vt. 143; *Farr v. Ladd*, 37 Vt. 158.

³¹² *Billings v. Russell*, 23 Pa. 189, 62 Am. Dec. 330; *Clark v. McComman*, 7 Watts & S. (Pa.) 469; *Tarbox v. Hays*, 6 Watts (Pa.) 398, 31 Am. Dec. 478.

³¹³ *Stevens v. Mangum*, 27 Miss. 481.

³¹⁴ *Turner v. Ireland*, 11 Humph. (Tenn.) 447.

³¹⁵ *Lightsey v. Harris*, 20 Ala. 411.

³¹⁶ *Hendrick v. Whittemore*, 105 Mass. 28.

³¹⁷ *Fahey v. Mottu*, 67 Md. 250, 10 Atl. 68. In Missouri, while there is no presumption that a justice of the peace had jurisdiction of an action, yet if it has been appealed to a court of superior jurisdiction, there is a presumption that the latter court had jurisdiction, though such court would have none if the justice had none. *Kellogg v. Linger*, 1 Mo. App. Rep'r. 235, 60 Mo. App. 571. It is sufficient to the validity of a judgment of a justice if the jurisdictional facts appear anywhere on the face of the proceedings: they need not appear in his docket entries. *Collins v. Kammann*, 55 Mo. App. 464. In Kentucky, a judgment of a justice of the peace, relied on as a defense, must be shown to have been within his jurisdiction. *Stewart v. Thomson*, 97 Ky. 575, 31 S. W. 133. In Arkansas, a judgment rendered by a justice of the peace cannot be attacked collaterally for mere irregularities in process. *Webster v. Dangle*, 47 Ark. 131, 14 S. W. 550.

³¹⁸ *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 145.

§ 287. Record of Inferior Court, showing Jurisdiction, is Conclusive.

It is important to be observed, in considering the effect of judgments rendered by inferior courts, that if the record does affirmatively show the facts necessary to confer jurisdiction, then the same presumptions are indulged in favor of the regularity and validity of its proceedings as are extended to the superior courts, and they cannot be collaterally impeached for errors or irregularities.³¹⁹ "Once it appears that it had jurisdiction to proceed, and did proceed, the same presumptions prevail in favor of the action and record of the inferior as of the superior court, and the verity of its record, and the presumptions which support it, are alike indisputable in any collateral way."³²⁰ Whether evidence would be heard in contradiction of the record of an inferior court on the subject of jurisdiction, where that record shows fully and affirmatively all that is necessary on the point, is a different question. Some of the authorities indicate that the jurisdiction could not be inquired into, in direct opposition to the face of the record, at least in the courts of the same state where the judgment was rendered.³²¹ But in New York such recitals are considered to be only prima facie evidence and subject to be contradicted, though sufficient to uphold the proceeding if not disproved.³²² In that state, however, it will be remembered, want of jurisdiction may be shown collaterally against the judgment of any court.³²³ But it appears to be undisputed that if the jurisdiction of an inferior court, in any case, depends upon the existence of a certain fact or state of facts, and it is shown by the record that there was evidence tending to prove such facts, and that such evidence was ad-

³¹⁹ *Comstock v. Crawford*, 3 Wall. 396, 18 L. Ed. 34; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Reeves v. Townsend*, 22 N. J. Law, 396; *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176; *Paul v. Hussey*, 35 Me. 97; *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760; *Gray v. McNeal*, 12 Ga. 424; *Vincent v. Davidson*, 1 Kan. App. 606, 42 Pac. 390; *Alexander v. Gill*, 130 Ind. 485, 30 N. E. 525; *Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20.

³²⁰ *Featherston v. Small*, 77 Ind. 143.

³²¹ *Gregory v. Bovier*, 77 Cal. 121, 19 Pac. 232; *Secombe v. Milwaukee & St. P. R. Co.*, 23 Wall. 108, 23 L. Ed. 67.

³²² *Belden v. Meeker*, 2 Lans. 470.

³²³ *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589. See *supra*, § 275.

judged sufficient, and the court judicially determined that such facts existed, then the judgment cannot be collaterally impeached or contradicted.³²⁴

§ 288. No Presumption of Validity on Direct Attack.

"The rule that a record is conclusive evidence of its own verity is not applicable in a direct proceeding instituted for the purpose of showing its falsity as to a matter which, if false, shows that the court pronouncing it as a judgment had no jurisdiction of the person of the defendant, and consequently, that what purports to be a record is in fact no record at all."³²⁵ Thus, although a judgment recites that the defendant was "duly and legally served with notice," yet, in a direct proceeding in the same court to set the judgment aside, the contrary may be shown.³²⁶ So an officer's return of service of process may be impeached in a direct proceeding after judgment, where the return states facts which do not come within the personal knowledge of the officer.³²⁷ But while jurisdiction is not presumed on a direct attack, and there is likewise no conclusive presumption that the record is free from irregularities or errors, yet, on appeal, error, or bill of review, it is incumbent on the party to overcome the prima facie correctness of the judgment. The judgment of a court

³²⁴ *Sheldon v. Wright*, 5 N. Y. 497; *Dyckman v. City of New York*, 5 N. Y. 434; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 233; *Bolton v. Brewster*, 32 Barb. (N. Y.) 389; *Agry v. Betts*, 12 Me. 415; *Waterhouse v. Cousins*, 40 Me. 333; *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Angell v. Robbins*, 4 R. I. 493; *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688; *Evansville, S. & O. Straight Line R. Co. v. City of Evansville*, 15 Ind. 421; *Shawhan v. Loffer*, 24 Iowa, 217; *Bonsall v. Isett*, 14 Iowa, 300; *Hungerford v. Cushing*, 8 Wis. 324; *Kipp v. Fullerton*, 4 Minn. 473 (Gil. 366); *People v. Hagar*, 52 Cal. 182.

³²⁵ *Duncan v. Gerdine*, 59 Miss. 550. "The distinction between cases where the validity of the record of a court of general jurisdiction is drawn in question collaterally, and those in which such record is directly impeached by writ of error or bill of review, is broad and well defined. In the one case jurisdiction is presumed prima facie unless the record disproves it, while in the other, if it is denied, its existence must be proved by the record itself." *Trimble v. Longworth*, 13 Ohio St. 431, 439.

³²⁶ *Newcomb v. Dewey*, 27 Iowa, 381.

³²⁷ *McNeill v. Edie*, 24 Kan. 108; *Bond v. Wilson*, 8 Kan. 229, 12 Am. Rep. 466; *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270; *Hauson v. Wolcott*, 19 Kan. 207.

of competent jurisdiction, it is said, is always presumed to be right, and a party in the appellate court alleging error in the court below must show it in the regular way in the record, or the presumption in favor of the correctness of the judgment will prevail.³²⁸ Thus the findings and judgment of a court of record will always be presumed to rest upon sufficient evidence unless the contrary be clearly shown from the record.³²⁹ In regard to the rule that the record imports absolute verity, an important observation is made by the New Hampshire court, to the following effect: "It is to be borne in mind that the record may be true, while the matters recorded are false, and may even be shown to be so by the record itself. Thus the record may recite that a particular plea was filed; it is conclusive evidence of that fact, but the record furnishes no evidence that the facts stated in the plea are true, for they may even in the same record be found to be false by the verdict of a jury. The allegations of parties derive no credit from their forming part of the record of a court. So far as this point is concerned, the record imports the truth of what occurred in the court and was there recorded."³³⁰

§ 289. Foreign Judgments.

In respect to the collateral impeachment of judgments for want of jurisdiction, there is, as we have already intimated, a radical difference between foreign judgments and such as are rendered by the courts of the state where the collateral inquiry is prosecuted. The discussion of the effect of foreign judgments belongs to another part of this work. But it may be here briefly stated that if a judgment or decree, coming from a foreign country, is regular on its face, its jurisdiction will be taken for granted unless denied, but it may always be shown by evidence that in fact the foreign court had no jurisdiction.³³¹ A similar rule obtains in the case of judgments

³²⁸ *Harman v. City of Lynchburg*, 33 Grat. (Va.) 37; *Wright v. Smith*, 81 Va. 777; *Wynn v. Heninger*, 82 Va. 172; *Jencks v. Smith*, 1 N. Y. 90; *McGirk v. Chauvin*, 3 Mo. 237.

³²⁹ *Singleton v. Boyle*, 4 Neb. 414.

³³⁰ *Tebbetts v. Tilton*, 31 N. H. 273, 286.

³³¹ *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Carleton v. Bickford*, 13 Gray (Mass.) 591, 74 Am. Dec. 652. And see *infra* vol. 2, §§ 818, 835-838.

of one of the American states when called in question in the courts of another. If the judgment proceeds from a court of general powers, the jurisdiction will be presumed (so far as that the party relying on the adjudication need not plead the jurisdiction or set out the facts), but the party against whom it is offered may always deny and disprove the jurisdiction of the court rendering the judgment.³³²

PART IV. FOR FRAUD.

§ 290. Whether Parties can Impeach Judgment for Fraud.

It is an unsettled question whether a judgment may be collaterally impeached for fraud by parties or privies. There are numerous expressions in the books which have more or less relation to this point, but we shall not, in this discussion, attempt to cite all the dicta bearing upon the subject or attach particular weight to any but direct adjudications of the question. In a majority of the states the rule is well settled that it is not permissible for a party or privy to attack a judgment in a collateral proceeding on account of fraud.³³³ The

³³² *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 950. And see *infra* vol. 2, §§ 897-901.

³³³ *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Kent v. Lake Superior Shp Canal, Ry. & Iron Co.*, 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 332; *Rhino v. Emery* (C. C.) 65 Fed. 826; *Granger v. Clark*, 22 Me. 128; *Hammond v. Wilder*, 25 Vt. 342; *McRae v. Mattoon*, 13 Pick. 53; *Boston & W. R. Corp. v. Sparhawk*, 1 Allen, 448, 79 Am. Dec. 750; *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Taylor v. State*, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852; *James Clark Co. v. Colton*, 91 Md. 195, 46 Atl. 380, 49 L. R. A. 698; *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731; *Williams v. Martin*, 7 Ga. 378; *Porter v. Rountree*, 111 Ga. 369, 36 S. E. 761; *Smith v. Henderson*, 23 La. Ann. 649; *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940; *Gains v. Johnston* (Ky.) 15 S. W. 246; *Kelley v. Mize*, 3 Sneed. 59; *Anderson v. Anderson*, 8 Ohio. 109; *Shultz v. Shultz*, 136 Ind. 323, 36 N. E. 126, 43 Am. St. Rep. 320; *Webster v. Reid*, 1 Morris (Iowa) 467, *Mason v. Messenger*, 17 Iowa. 261; *Smith v. Smith*, 22 Iowa, 516; *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224; *Fleld v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124; *Cooper v. Duncan*, 58 Mo. App. 5; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Cody v. Cody*, 98 Wis. 445, 74 N. W. 217; *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514. Thus, stockholders cannot set up as a defense to an action by a judgment creditor of the corporation for unpaid subscriptions that the judgment was obtained in a federal court by one to whom the claim was collusively assigned for the

decisions are based upon the ground of the general conclusiveness of records, and the policy of the law which forbids their indirect contradiction or impeachment, and on the consideration that it is the business of a litigant to be on his guard against fraud and trickery, and that if his rights are nevertheless infringed, he has his proper remedy by action or motion to procure the annulment of the judgment or by application to equity for relief. In Pennsylvania and South Carolina, however, it is allowed to a party to show fraud against a judgment collaterally,³³⁴ and the same doctrine is apparently held in New Hampshire.³³⁵ This is also true in New York, although the rule in the latter state is founded rather upon the peculiarities of the code system of pleading and practice than upon general principles of law.³³⁶ There are also decisions to the effect that where one party is allowed to offer a judgment in evidence without having pleaded it, the other ought to be allowed to impeach it by evidence of fraud, without being put to a direct suit to annul it, and notwithstanding it is regular upon its face.³³⁷

§ 291. Fraud in Procuring the Judgment.

In the preceding section we considered fraud in general as a ground for impeaching judgments. It is convenient, for the purposes of our further inquiry, to distinguish between fraud practised in the procuring of the judgment and fraud as affecting the original cause of action. The former topic is illustrated by several important cases, to be now considered, as well as by many of those already cited. "The parties to an action," it is said, "cannot impeach the judgment rendered therein, in any collateral proceeding, on the ground that it was

purpose of giving jurisdiction to that court. *Tuthill Spring Co. v. Smith*, 90 Iowa, 331, 57 N. W. 853.

³³⁴ *Hall v. Hamlin*, 2 Watts, 354; *Verner v. Carson*, 66 Pa. 440; *Phelps v. Benson*, 161 Pa. 418, 29 Atl. 86; *Sullivan v. Ball*, 55 S. C. 343, 33 S. E. 486. Compare *Otterson v. Middleton*, 102 Pa. 78; *City of Philadelphia v. Dobson*, 10 Pa. Co. Ct. R. 84. See, also, *Kirby v. Kirby*, 142 Ind. 419, 41 N. E. 819.

³³⁵ *State v. Little*, 1 N. H. 257.

³³⁶ *Mandeville v. Reynolds*, 68 N. Y. 528.

³³⁷ *Murray v. Murray*, 6 Or. 17. And see *Glover v. Flowers*, 101 N. C. 134, 7 S. E. 579.

obtained through their fraud or collusion. It is their business to see that it is not so obtained. Even if, without any fault or neglect of one party, his adversary succeeded by fraud in obtaining an unjust or unauthorized judgment, he must through some prescribed mode reverse or annul the judgment before he can claim to treat it as invalid."³³⁸ But it is necessary to distinguish between judgments entered by the collusion or fraud of both parties and such as are obtained by the fraud of the plaintiff. The former are void as to creditors only, not against the defendant, and may be attacked in any collateral proceeding by them, whilst the latter can be attacked by the defendant alone, directly, and in the proper court.³³⁹ Thus, where a party by some act or declaration out of the record lulls his opponent into a false security, or by any other means deceives him, and thereby obtains a judgment or decree to his prejudice, it is fraudulent and may be impeached upon that ground.³⁴⁰ A person against whom judgments have been obtained cannot maintain an action for damages against the parties who obtained them, the attorney who prosecuted and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed, for such action would constitute a collateral attack upon them.³⁴¹ But on the other hand an action to recover damages for the breach of a special contract, to discontinue an action by the defendant against the plaintiff, in conse-

³³⁸ *Davis v. Davis*, 61 Me. 398. See *Boston & W. R. Corp. v. Sparhawk*, 1 Allen (Mass.) 448, 79 Am. Dec. 750; *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, 76 Fed. 429; *Board of Com'rs of Lake County v. Platt*, 25 C. C. A. 87, 79 Fed. 567; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557. Compare *Carr v. Miner*, 42 Ill. 179.

³³⁹ *Meckley's Appeal*, 102 Pa. 536; *In re Dougherty's Estate*, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; *Thompson's Appeal*, 57 Pa. 178; *Clark v. Douglass*, 62 Pa. 415; *McCambridge v. Walraven*, 88 Md. 378, 41 Atl. 928; *Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

³⁴⁰ *Ellis v. Kelly*, 8 Bush (Ky.) 621; *First Nat. Bank v. Cunningham* (C. C.) 48 Fed. 510; *Daniels v. Benedict* (C. C.) 50 Fed. 347; *Wheeler v. Sweet*, 16 N. Y. Supp. 836. See *Thomas v. Ireland* (Ky.) 11 S. W. 653.

³⁴¹ *Smith v. Abbott*, 40 Me. 442; *White v. Merritt*, 7 N. Y. 352, 57 Am. Dec. 527.

quence of which the defendant had judgment in his favor and the plaintiff was compelled to satisfy an execution issued thereon, is not liable to the objection that it seeks to impeach the judgment collaterally.³⁴² A composition in bankruptcy, under the federal statutes on the subject, cannot be impeached collaterally in an action at law in a state court, by a creditor who was a party to the proceedings, by showing that the composition was obtained by the fraudulent acts of the bankrupt.³⁴³ On principles analogous to the foregoing, it is held that, after judgment in an election contest, rendered by agreement between the claimants and giving possession to the relator, the defendant, in his answer to the relator's alternative writ of mandate demanding possession, cannot assail the judgment on the ground that, being rendered by agreement and in consideration of a sum paid to defendant, it was corrupt and fraudulent and therefore void.³⁴⁴

§ 292. Fraud in the Cause of Action.

As a general rule, fraud in the contract recovered on should be set up as a defense in the action, and therefore is no ground for subsequently impeaching the judgment.³⁴⁵ And a judgment is not generally open to collateral attack because based on a fraudulent instrument or on perjured testimony.³⁴⁶ But in a Pennsylvania decision it was held that where actual fraud has been practised by a party in obtaining a deed, and the deed is used as a means of obtaining a judgment, the judgment will be void to the extent of the fraud, as to the party defrauded, although it may be valid as to other interests not involved in the fraud; and hence a collateral attack upon it, as to such fraud, is perfectly permissible; because the question

³⁴² *Smith v. Palmer*, 6 Cush. (Mass.) 513.

³⁴³ *Farwell v. Raddin*, 129 Mass. 7; *Home Nat. Bank v. Carpenter*, Id. 1.

³⁴⁴ *Mannix v. State*, 115 Ind. 245, 17 N. E. 565.

³⁴⁵ *Hatch v. Garza's Ex'r*, 22 Tex. 176; *Nevitt v. First Nat. Bank*, 91 Hun, 43, 36 N. Y. Supp. 204; *Turney v. Van Gelder*, 63 Hun, 634, 18 N. Y. Supp. 547; *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814; *Bowman v. Wilson*, 64 Ill. App. 73.

³⁴⁶ *United States v. Chung Shee* (D. C.) 71 Fed. 277; *Finley v. Houser*, 22 Or. 562, 30 Pac. 494.

of the fraudulent character of the deed had never been legally before the court and never adjudicated.³⁴⁷

§ 293. Creditor may show Fraud in a Judgment.

However the rule may be in regard to parties and privies, it is very well settled that any third person, a stranger to the judgment, whose rights would be injuriously affected if it were allowed to stand as against him, may show, in a collateral proceeding, that it was procured through the fraudulent contrivance of the debtor or the collusion of both parties, with a design to hinder or defraud him, and so have it considered and treated as void as to him.³⁴⁸ "A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not a thing that can stand, even when robed in a judgment."³⁴⁹ Or, as the rule is sometimes more broadly stated, a judgment which is not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against the creditors of the judgment-debtor.³⁵⁰ Hence a judgment confessed without any consideration and with fraudulent intent, may be

³⁴⁷ *Jackson v. Summerville*, 13 Pa. 350. And see *Pray v. Jenkins*, 47 Kan. 509, 28 Pac. 716.

³⁴⁸ *Duchess of Kingston's Case*, 20 How. St. Tr. 544; *Perry v. Meddowcroft*, 10 Beay. 122; *Phillipson v. Egremont*, 6 Q. B. 605; *Crosby v. Lang*, 12 East, 409; *Bandon v. Becher*, 3 Clark & F. 479; *Gaines v. Relf*, 12 How. 472; 13 L. Ed. 1071; *Pierce v. Strickland*, 26 Me. 277; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Great Falls Manufg Co. v. Worster*, 45 N. H. 110; *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361; *Alexander v. Gould*, 1 Mass. 165; *Smith v. Saxton*, 6 Pick. (Mass.) 483; *Leonard v. Bryant*, 11 Metc. (Mass.) 370; *Downs v. Fuller*, 2 Metc. (Mass.) 125, 35 Am. Dec. 393; *Vose v. Morton*, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; *Cook v. Town of Morris*, 66 Conn. 137, 33 Atl. 594; *Baker v. Byrn*, 89 Hun, 115, 35 N. Y. Supp. 55; *Bridgeport Fire & Marine Ins. Co. v. Wilson*, 34 N. Y. 281; *Hall v. Hamlin*, 2 Watts (Pa.) 354; *Mitchell v. Kintzer*, 5 Pa. 216, 47 Am. Dec. 408; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *Thompson's Appeal*, 57 Pa. 175; *Second Nat. Bank's Appeal*, 85 Pa. 528; *Sager v. Mead*, 164 Pa. 125, 30 Atl. 284; *Norton v. Wallace*, 2 Rich. Law (S. C.) 460; *Hammock v. McBride*, 6 Ga. 178; *Farris v. Durham*, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77; *De Armond v. Adams*, 25 Ind. 455; *Callahan v. Griswold*, 9 Mo. 775; *Myers v. Miller*, 55 Mo. App. 338; *Hackett v. Manlove*, 14 Cal. 85.

³⁴⁹ *Smith v. Ouyler*, 78 Ga. 654, 3 S. E. 406.

³⁵⁰ *Palmer v. Martindell*, 43 N. J. Eq. 90, 10 Atl. 802.

questioned by other judgment and execution-creditors of the defendant, and, as to them, the judgment and execution thereon will be vacated and set aside.³⁵¹ But a confession of judgment for the express purpose of enabling the creditor to redeem from a sale under a prior judgment is not fraudulent as against the purchaser; for the policy of the law is to encourage redemptions, in order that the property of the debtor may discharge as many of his liabilities as possible.³⁵² For another example, in an action by a creditor to set aside a deed as fraudulent, the grantee therein may show, although his deed is fraudulent as to creditors, that the complainant's judgment was obtained by fraud and artifice practised by him upon the grantor.³⁵³ But inasmuch as the law always favors the stability and finality of judgments, it is held that a stranger who thus seeks to impeach a judgment as a fraud upon his rights must show the fraud by clear and satisfactory proof.³⁵⁴

§ 294. Fraud must affect the Creditors.

A very important element in the rule just stated is that the fraud alleged must be such as directly affects the party seeking to impeach the judgment. It is no ground for the intervention of third persons that fraud has been practised upon the debtor; it must be fraud practised by the debtor, either alone, or, as is more commonly the case, in collusion with the plaintiff in the judgment. For instance, upon the distribution of the proceeds of a sheriff's sale, a subsisting judgment can be attacked by other creditors collaterally only on the ground of collusion, not because it is a fraud on the debtor.³⁵⁵ "The

³⁵¹ *Shallcross v. Deats*, 43 N. J. Law, 177; *Bryant v. Harding*, 29 Mo. 347; *Atlas Nat. Bank v. More*, 40 Ill. App. 336; *Chase v. Tuckwood*, 86 Ill. App. 70.

³⁵² *Karnes v. Lloyd*, 52 Ill. 113.

³⁵³ *Faris v. Durham*, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77.

³⁵⁴ *Clark v. Bailey*, 2 Strob. Eq. 143; *Hulverson v. Hutchinson*, 39 Iowa, 316.

³⁵⁵ *Sheetz v. Hambest's Ex'rs*, 81 Pa. 100; *Miners' Trust Co. Bank v. Roseberry*, 81 Pa. 309; *In re Dougherty's Estate*, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; *Lewis v. Rogers*, 16 Pa. 18; *Thompson's Appeal*, 57 Pa. 175. So, while the holder of a junior judgment may collaterally impeach a senior judgment for fraud against himself, to the extent of defeating the priority of lien, he cannot do so on the ground merely that the judgment was fraud-

fraud which will authorize a creditor to impeach a judgment obtained by another against his debtor must be a fraud against the creditor, not a mere overreaching of the debtor in his litigation. There must be collusion."³⁵⁶ Nor can creditors thus set up any matter of defense original or subsequent.³⁵⁷ Fraudulent judgments, it is said, like fraudulent deeds, are good against all but the interests intended to be defrauded. Hence those parties whose interests are affected cannot require the court to vacate the judgment on the record, for that would have the effect to annul it as against the whole world.³⁵⁸

§ 295. What Creditors allowed to allege Fraud.

The privilege of impeaching a judgment collaterally for fraud is extended only to those third persons whose rights would be impaired or prejudiced if it were allowed full force and effect as against them.³⁵⁹ In New York it was formerly held that none but a judgment-creditor could impeach the bona fides of a judgment confessed by the debtor to a third person; an attaching creditor, whose attachment was levied after such confession, could not do so.³⁶⁰ But later rulings in the same state have modified this doctrine so far that now, if the attaching creditor's process has been levied upon tangible property (i. e., property capable of manual delivery), he is permitted to assail the good faith of a prior confessed judgment which stands in his way.³⁶¹ At any rate, it seems clear that the party's claim must have been in existence at the date of the judgment, otherwise it could not properly be called a fraud upon his rights. Thus a judgment of separation of property, duly rendered in favor of a wife

ulent as against the defendant. *Safe-Deposit & Trust Co. v. Wright*, 44 C. C. A. 421, 105 Fed. 155.

³⁵⁶ *McAlpine v. Sweetser*, 76 Ind. 78.

³⁵⁷ *Lewis v. Rogers*, 16 Pa. 18; *Johns v. Pattee*, 55 Iowa, 665, 8 N. W. 667.

³⁵⁸ *Thompson's Appeal*, 57 Pa. 175. And see *Clark v. Douglass*, 62 Pa. 408.

³⁵⁹ *Spicer v. Waters*, 65 Barb. (N. Y.) 227; *De Armond v. Adams*, 25 Ind. 455; *Hackett v. Manlove*, 14 Cal. 85; *Grant v. Hill* (Tex. Civ. App.) 30 S. W. 952.

³⁶⁰ *Bentley v. Goodwin*, 38 Barb. 633. In Indiana, by statute, subsequent as well as existing creditors can collaterally impeach for fraud a judgment entered on confession. *Feaster v. Woodfill*, 23 Ind. 493.

³⁶¹ See *Bates v. Plonsky*, 28 Hun, 112; *Bowe v. Arnold*, 31 Hun, 256; *Tannenbaum v. Rosswog*, 22 Abb. N. C. 346, 6 N. Y. Supp. 578.

against her husband, cannot be inquired into or attacked collaterally by a creditor of the husband whose claim had not yet arisen when the judgment was rendered.³⁶² Privies, as well as parties to the judgment, are precluded, according to the majority of the decisions, from the collateral impeachment of it for fraud. But it is held that a judgment against a sheriff for his default is not so far conclusive on the sureties on his official bond but that they may attack it for fraud and collusion when it is made the basis of a suit against them.³⁶³

§ 296. False Testimony.

It is the unquestioned doctrine of the cases that a party to a judgment cannot impeach it collaterally on the ground that false testimony was given at the trial, on which testimony the judgment was rendered.³⁶⁴ Neither will any action lie against a witness for committing perjury, whereby the plaintiff lost a former action, because its trial would necessarily involve a re-examination of the matters controverted and determined in the former action, and would constitute an attack upon the correctness of the former adjudication.³⁶⁵ Thus, where, in a process of foreign attachment, judgment has been rendered discharging the trustee on his disclosure, the plaintiff in that process cannot maintain an action on the case against the trustee for obtaining his discharge by falsehood and fraud in his disclosure and by fraudulent collusion with the principal defendant.³⁶⁶ In an early New York case it was held that an action would not lie against a person in that state for suborning a witness to swear falsely in a cause then pending in the courts of another state, in consequence whereof a judgment was given against the defendant in such cause,

³⁶² *Lewis v. Peterkin*, 39 La. Ann. 780, 2 South. 577.

³⁶³ *Dane v. Gilmore*, 51 Me. 544; *City of Lowell v. Parker*, 10 Metc. (Mass.) 315, 43 Am. Dec. 436.

³⁶⁴ *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Fisk v. Miller*, 20 Tex. 579; *The Acorn*, 2 Abb. U. S. 434, Fed. Cas. No. 29; *Greene v. Greene*, 2 Gray (Mass.) 361, 61 Am. Dec. 454; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033.

³⁶⁵ *Cunningham v. Brown*, 18 Vt. 123, 46 Am. Dec. 140; *Smith v. Lewis*, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; *Dampport v. Sympson*, Cro. Eliz. 520; *Eyres v. Sedgewicke*, Cro. Jac. 601.

³⁶⁶ *Lyford v. Demerritt*, 32 N. H. 234.

contrary to the truth and justice of the case; the decision being rested by Chancellor Kent on the ground that the merits of the original cause could not be thus overhauled in a collateral proceeding.³⁸⁷ It is also held that an award, like a judgment, cannot be collaterally impeached by evidence that one party introduced false testimony.³⁸⁸ Where judgments are recovered in a court of competent jurisdiction, and the defendant appeared and had an opportunity to defend, which judgments are still in full force and unreversed, he cannot maintain an action against a defendant for fraud and conspiracy in procuring such judgments against him.³⁸⁹

³⁸⁷ *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469.

³⁸⁸ *Woodrow v. O'Conner*, 28 Vt. 776.

³⁸⁹ *Engstrom v. Sherburne*, 137 Mass. 153.

CHAPTER XIV.

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PART I. THE POWER TO VACATE JUDGMENTS.

§ 297. What Courts possess the Power.

The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made.¹ As between courts of co-ordinate jurisdiction, such as two county courts or circuit courts of the same state, the rule is that neither has power to vacate or set aside a judgment rendered by the other which is not void upon its face; relief must be sought in the court where the judgment was entered.² The power to vacate or open a judgment, or to set it aside, is a common law power possessed by the court as a part of its necessary machinery for the administration of justice, and hence might be exercised without the grant of special statutory authority. In many of the states, however, this power is regulated by law, either in respect to the grounds upon which it may be put in operation, the time within which it may be invoked, the manner of calling it into play, or the practice upon an occasion for its exercise. And such regulations may either enlarge or abridge its common law scope, or otherwise transform it. But

¹ Grattan v. Matteson, 51 Iowa. 622, 2 N. W. 432.

² Dixon v. Baxter, 106 Ga. 180, 32 S. E. 24; Odom v. Burch, 52 S. C. 305, 29 S. E. 726; Wilsie v. Rooney, 62 Hun, 618, 16 N. Y. Supp. 471; Smithson v. Smithson, 37 Neb. 535, 56 N. W. 300, 40 Am. St. Rep. 504; Black v. Plunkett, 132 Ind. 599, 31 N. E. 567; Skinner v. Terry, 107 N. C. 103, 12 S. E. 118. In New York, it is said that a court exercising jurisdiction concurrent with that of another, by which an order has been made, is not without power to modify it or set it aside on new papers, or relieve from an order which has proved oppressive, where leave has been given to renew. The question is not one of power, but of practice and orderly procedure. Cruikshank v. Cruikshank, 30 App. Div. 381, 51 N. Y. Supp. 926. A change in the constitution of a court does not preclude a consideration of the question whether a judgment entered by the court before the change should be vacated. State v. Superior Court, 18 Wash. 277, 51 Pac. 365. And where a court has two or more judges, an application to vacate a judgment may be heard by whichever judge is sitting at the time the application is made. Dolen v. Buchanan, 43 Neb. 854, 62 N. W. 233. But a judge at chambers has no jurisdiction to vacate or modify orders or judgments of the district court. Kime v. Fenner, 54 Neb. 476, 74 N. W. 869.

still the power remains essentially inherent in the nature and constitution of the court, not derivative. The power to vacate judgments is said to be incident to all courts of record, and to be usually exercised under restraints imposed by their own rules.³ It is not commonly possessed by the inferior tribunals—courts not of record—such as the courts of magistrates or justices of the peace, though in some of the states it may be.⁴ But it is generally considered that probate courts have the power, upon a proper showing, to vacate an order or decree irregularly or improvidently entered.⁵ An auditor, appointed to make distribution of a fund, has no power to go behind the record and declare a particular judgment to be void and no lien, on account of any irregularity; for that would be assuming the power of the court to review its own judgments.⁶

³ *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Donnelly v. McArdle*, 14 App. Div. 217, 43 N. Y. Supp. 560; *In re Board of Directors of Broadway Ins. Co.*, 23 App. Div. 282, 48 N. Y. Supp. 299. This power belongs inherently to the courts of the United States, as well as to those of the states. *United States v. Williams*, 14 C. C. A. 440, 67 Fed. 384; *Fisher v. Simon*, 14 C. C. A. 443, 67 Fed. 387; *United States v. Wallace* (D. C.) 46 Fed. 569.

⁴ See *Frazier v. Griffler*, 8 Md. 50; *Rhodes v. De Bow*, 5 Iowa. 260; *Gallop v. Allen*, 113 N. C. 24, 18 S. E. 55; *State v. Duncan*, 37 Neb. 631, 56 N. W. 214. In Pennsylvania, the court of common pleas has no power to open a judgment entered on a transcript of a judgment by a justice of the peace, filed in the court for purposes of lien, and let the defendant in to a defense. For all purposes except lien, the judgment still remains before the justice, and there only can it be attacked. *Boyd v. Miller*, 52 Pa. 431; *Lacock v. White*, 19 Pa. 495; *Littster v. Littster*, 151 Pa. 474, 25 Atl. 117. As to the power of the court to strike the judgment from the record if void upon its face, see *Weldy v. Young*, 21 Pa. Co. Ct. R. 15; *Ward v. Fannon*, 7 Kulp. 488. A similar rule obtains in North Carolina and South Dakota. See *Whitehurst v. Merchants' & Farmers' Transp. Co.*, 109 N. C. 342, 13 S. E. 937; *Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393. As to the practice in New York, see *Daniels v. Southard*, 23 Misc. Rep. 235, 51 N. Y. Supp. 1136.

⁵ *Hamberlin v. Terry*, 1 Smedes & M. Ch. (Miss.) 589; *In re Marquis*, 85 Mo. 615; *In re Coogan*, 27 Misc. Rep. 563, 59 N. Y. Supp. 111; *Hirschfeld v. Brown* (Tex. Civ. App.) 30 S. W. 962;

⁶ *Edward's Appeal*, 66 Pa. 89.

§ 297a. As Between Federal and State Courts.

The federal courts have no jurisdiction of an action or proceeding to vacate or set aside a judgment rendered by a state court, on the ground that the same is void for want of jurisdiction, or is erroneous or irregular; for, in such case, the proper and sufficient remedy is by motion, appeal, or bill of review in the courts of the state.⁷ But a federal court (where the jurisdictional requirements as to diverse citizenship and the amount involved are met) has power to entertain a suit and enter a decree which, as between the parties, shall set aside and vacate a judgment of a state court, and any proceedings taken or rights acquired thereunder, when the ground of objection is that the judgment was procured by fraud.⁸ But the federal court should not act in such cases where the party injured has, or had, an opportunity to apply for relief to the state courts.⁹ Similar rules govern an application to a state court for relief against a judgment of a federal court; it may be attacked as fraudulent, but cannot be reviewed as to any alleged errors or irregularities, or annulled for an alleged want of jurisdiction.¹⁰

§ 298. Legislature cannot interfere.

The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or

⁷ *Little Rock Junction Ry. v. Burke*, 13 C. C. A. 341, 66 Fed. 83; *Elder v. Richmond Gold & Silver Min. Co.*, 7 C. C. A. 354, 58 Fed. 536; *Smith v. Schwed* (C. C.) 9 Fed. 483; *Blythe v. Hinckley* (C. C.) 84 Fed. 246.

⁸ *Davenport v. Moore* (C. C.) 74 Fed. 945; *Hatch v. Ferguson* (C. C.) 52 Fed. 833; *Young v. Sigler* (C. C.) 48 Fed. 182; *De Forest v. Thompson* (C. C.) 40 Fed. 375; *Bertha Zinc & Mineral Co. v. Vaughan* (C. C.) 88 Fed. 566; *Little Rock Junction Ry. v. Burke*, 13 C. C. A. 341, 66 Fed. 83; *Hunt v. Fisher* (C. C.) 29 Fed. 801.

⁹ *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Nougue v. Clapp*, 101 U. S. 551, 25 L. Ed. 1026; *Randall v. Howard*, 2 Black (U. S.) 585, 17 L. Ed. 269.

¹⁰ See *Kurtz v. Philadelphia & R. R. Co.*, 187 Pa. 59, 40 Atl. 988.

when or how or for what causes, it cannot apply retrospectively to a judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and second, because it would be an unwarranted invasion of the province of the judicial department. It is therefore held by a majority of the decisions that a statute vacating, or directing the courts to vacate, a particular judgment or class of judgments, already rendered and become final before the enactment of the statute, and granting new trials in such actions, is unconstitutional and invalid.¹¹ A contrary rule obtains, however, in the state of Alabama.¹² And in Georgia, it is said that the power of the legislature to pass acts allowing the opening of existing judgments, and new trials thereunder, should be confined to allowing cross-actions, equitable defenses, and rights which have accrued since the judgment, to be set up; and that it does not extend to matters which were or by law should have been heard before the court by which the judgment was rendered.¹³ At an early period, the supreme court of Pennsylvania ruled that a statute directing a particular judgment to be opened, and the defendant let in to a defense upon the plea of payment, was remedial in its character, and though the power thus exercised was partly

¹¹ *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Lewis v. Webb*, 3 Me. 326; *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *State v. New York*, N. H. & H. R. Co., 71 Conn. 43, 40 Atl. 925; *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570; *Taylor v. Place*, 4 R. I. 324; *Miller v. State*, 8 Gill (Md.) 145; *Ratcliffe v. Anderson*, 31 Grat. (Va.) 105, 31 Am. Rep. 716; *Griffin's Ex'r v. Cunningham*, 20 Grat. (Va.) 31; *Weaver v. Lapsley*, 43 Ala. 224; *Lanier v. Gallatas*, 13 La. Ann. 175; *Beebe v. State*, 6 Ind. 515, 63 Am. Dec. 391; *Davis v. Village of Menasha*, 21 Wis. 491; *Arnold v. Kelley*, 5 W. Va. 446; *Burch v. Newbury*, 10 N. Y. 374; *Hill v. Town of Sunderland*, 3 Vt. 507. An adjudication in bankruptcy, being a decree of the court, is beyond legislative control; so that congress could not invalidate or set aside an adjudication once made, by any retroactive legislation establishing new or different requisites to its validity. *In re Raffauf*, 6 Biss. 150, Fed. Cas. No. 11,525; *In re Comstock*, 3 Sawy. 128, Fed. Cas. No. 3,077; *In re Obear*, 3 Dill. 37, Fed. Cas. No. 10,395.

¹² *Ex parte Bibb*, 44 Ala. 140.

¹³ *White v. Herndon*, 40 Ga. 493; *Bonner v. Martin*, Id. 501; *Kite v. Lumpkin*, Id. 506.

judicial, it was not in violation of the constitution.¹⁴ But this doctrine, so inconsistent with the rights and independence of the judiciary, and so subversive of the fundamentals of constitutional law, was afterwards vigorously repudiated by the same court, when it felt itself better able to withstand the encroachments of the legislative body.¹⁵ As remarked by Chief Justice Gibson: "It is not more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest."¹⁶

PART II. THE METHOD OF SEEKING RELIEF.

§ 299. By *Audita Querela*.

"*Audita querela*" is the name of a writ constituting the initial process in an action brought by a judgment-defendant to obtain relief against the consequences of the judgment, on account of some matter of defense or discharge arising since its rendition, and which could not be taken advantage of otherwise.¹⁷ It is a regular suit with its usual incidents, pleadings, issues of law and fact, trial, judgment, and error.¹⁸ The writ must be directed to the court which rendered the judgment and retains the record,¹⁹ and all the parties to the judgment against which relief is sought must join in the writ or be duly and regularly served.²⁰ Upon the inquiry under the writ of *audita querela*, the record of the judgment is not conclusive by way of estoppel (the attack upon it being direct and not collateral), and hence the truth and justice of the whole matter is open to ex-

¹⁴ *Braddee v. Brownfield*, 2 Watts & S. (Pa.) 271.

¹⁵ For the history of this change of attitude, see remarks of Sharswood, J., in *Grim v. Weissenberg School District*, 57 Pa. 436, 98 Am. Dec. 237.

¹⁶ *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

¹⁷ 1 Am. & Eng. Enc. Law, 1005.

¹⁸ *Brooks v. Hunt*, 17 Johns. (N. Y.) 484.

¹⁹ *Harper v. Kean*, 11 Serg. & R. (Pa.) 299; *Town of Poultney v. Treasurer of State*, 25 Vt. 168; *Warner v. Crane*, 16 Vt. 79.

²⁰ *Melton v. Howard*, 7 How. (Miss.) 103; *Herrick v. Orange County Bank*, 1 Williams (Vt.) 584; *Gleason v. Peck*, 12 Vt. 56, 36 Am. Dec. 329; *Tittemore v. Wainwright*, 16 Vt. 173; *Starbird v. Moore*, 21 Vt. 529.

amination.²¹ The judgment in this action cannot properly include affirmative relief to the defendant.²² An appeal or writ of error will lie from it.²³ In regard to the grounds on which *audita querela* may be brought, it must be observed that this is a remedial process which bears solely upon the wrongful acts of the opposite party, and not upon the erroneous judgments or acts of the court; it is a writ in which the plaint sounds in tort.²⁴ Hence injury, actual or apprehended, is essential to the right to bring this writ. If the matter complained of is simply nugatory and void, the party can have no need of this process.²⁵ It will lie to vacate a judgment rendered against a non-resident defendant on constructive service of process, where the statutory prerequisites were omitted.²⁶ But not where an attorney, although without authority, has entered an appearance for such defendant.²⁷ It will also lie to procure the setting aside of a judgment which was irregularly entered after a discontinuance, or taken in violation of an agreement for a continuance;²⁸ or which was given against an infant who was not represented by his guardian;²⁹ or against a lunatic under similar circumstances.³⁰ So when a foreign judgment against the defendant has been reversed by the foreign appellate tribunal, but in the meantime he has been sued here on that judgment, he may have relief by *audita querela*.³¹ This

²¹ *Folsom v. Connor*, 49 Vt. 4; *Paddleford v. Bancroft*, 22 Vt. 529; *Hill v. Warren*, 54 Vt. 73.

²² *Foss v. Witham*, 9 Allen (Mass.) 572.

²³ *Fitch v. Scovel*, 1 Root (Conn.) 56; *White v. Clapp*, 8 Allen (Mass.) 283; *Gordonier v. Billings*, 77 Pa. 498.

²⁴ *Little v. Cook*, 1 Aikens (Vt.) 363, 15 Am. Dec. 698; *Lovejoy v. Webber*, 10 Mass. 103; *Brackett v. Winslow*, 17 Mass. 159.

²⁵ *Bryant v. Johnson*, 24 Me. 304.

²⁶ *Folan v. Folan*, 59 Me. 566; *Dingman v. Myers*, 13 Gray (Mass.) 1; *Marvin v. Wilkins*, 1 Aikens (Vt.) 107; *Alexander v. Abbott*, 21 Vt. 476; *Whitney v. Silver*, 22 Vt. 634; *Eastman v. Waterman*, 26 Vt. 494. *Harmon v. Martin*, 52 Vt. 255.

²⁷ *Spaulding v. Swift*, 18 Vt. 214.

²⁸ *Crawford v. Cheney*, 12 Vt. 567; *Pike v. Hill*, 15 Vt. 183; *Paddleford v. Bancroft*, 22 Vt. 529; *Hawley v. Mead*, 52 Vt. 343; *Kimball v. Randall*, 56 Vt. 558.

²⁹ *Judd v. Downing*, *Brayt*. (Vt.) 27; *Starbird v. Moore*, 21 Vt. 529. See *Barber v. Graves*, 18 Vt. 290.

³⁰ *Lincoln v. Flint*, 18 Vt. 247.

³¹ *Merchants' Ins. Co. v. De Wolf*, 33 Pa. 45, 75 Am. Dec. 577.

writ may also be brought when the debtor has been discharged in bankruptcy subsequent to the judgment;³² or to set aside a judgment from which an appeal was wrongfully denied by the inferior court.³³ So where two suits are brought at the same time for the same cause of action, and proceed *pari passu* to judgment and execution, a satisfaction of either judgment may be shown, upon *audita querela*, in discharge of the other.³⁴ But on the other hand, the writ of *audita querela* will not lie in any case where the defendant had a legal opportunity to avail himself, before judgment, of the same matters which he now sets up, or where his own negligence has brought about the injury complained of.³⁵ Nor can it be brought where the matter alleged would be a proper subject for a writ of error;³⁶ nor in respect to matters which constitute an equitable defense, not cognizable at law;³⁷ nor for irregularities which do not affect the substantial validity of the process in the action or the merits of the controversy;³⁸ nor on account of an erroneous taxation of costs or allowance of excessive interest.³⁹ In a majority of the states, the proceeding by *audita querela* has fallen into complete disuse, being superseded by the more summary method of applying for relief by motion, upon notice.⁴⁰ For, as a general rule,

³² *Petit v. Seaman*, 2 Root (Conn.) 178; *Williams v. Butcher*, 1 Wkly. Notes Cas. (Pa.) 304; *Baker v. Judges of Ulster Common Pleas*, 4 Johns. (N. Y.) 191.

³³ *Edwards v. Osgood*, 33 Vt. 224; *Harriman v. Swift*, 31 Vt. 385.

³⁴ *Browne v. Joy*, 9 Johns. (N. Y.) 221.

³⁵ *Avery v. U. S.*, 12 Wall. 304, 20 L. Ed. 405; *Lovejoy v. Webber*, 10 Mass. 101; *Barker v. Walsh*, 14 Allen (Mass.) 175; *Faxon v. Baxter*, 11 Cush. (Mass.) 35; *Barrett v. Vaughan*, 6 Vt. 243; *Griswold v. Rutland*, 23 Vt. 324.

³⁶ *Weeks v. Lawrence*, 1 Vt. 433; *Dodge v. Hubbell*, Id. 491; *Eleventh School Dist. in Alburgh v. Rood*, 1 Williams (Vt.) 214; *Sutton v. Tyrrell*, 10 Vt. 87. Nor does it change the rule that the writ of error is taken away by statute. *Tuttle v. Town of Burlington*, *Brayt.* (Vt.) 27; *Dodge v. Hubbell*, 1 Vt. 491; *Spear v. Flint*, 17 Vt. 497.

³⁷ *Schott v. McFarland*, 1 Phila. (Pa.) 58; *Garfield v. Vermont University*, 10 Vt. 536.

³⁸ *Sawyer v. Doane*, 19 Vt. 598; *Lampson v. Bradley*, 42 Vt. 165; *Ball v. Sleeper*, 23 Vt. 573.

³⁹ *Johnson v. Roberts*, 58 Vt. 599, 2 Atl. 482; *Goodrich v. Willard*, 11 Gray, 380; *Clough v. Brown*, 38 Vt. 179. See *Rickard v. Fisk*, 66 Vt. 675, 30 Atl. 93.

⁴⁰ *Job v. Walker*, 3 Md. 129; *Huston v. Ditto*, 20 Md. 305; *Smock v.*

wherever this writ would lie at common law, the courts may now relieve on motion.⁴¹ In two states, however,—Vermont and Massachusetts,—the writ of *audita querela* is still in use, and is applied to a great variety of purposes, as will appear from the cases cited in this section.

§ 300. By Error Coram Nobis.

Another common law method of obtaining relief against a judgment in the court which rendered it was by writ of error coram nobis. This writ was so called from the technical words, which recited that error was alleged to exist in a certain record remaining “before us,” that is, before the court which had pronounced the judgment. It lay for the correction of an error of fact (not an error of law) in respect to a matter affecting the validity and regularity of the proceedings, such as the death of one of the parties at the beginning of the suit, or the infancy, insanity, or coverture of the defendant, and which was not brought into the issue.⁴² But if the court was fully informed of and rightly apprehended the facts in the case, its error in applying the law to such facts is not such an error as could be rectified in this proceeding. Nor will this writ

Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Longworth v. Screven*, 2 Hill (S. C.) 298, 27 Am. Dec. 381; *Dunlap v. Clements*, 18 Ala. 778; *Chambers v. Neal*, 13 B. Mon. (Ky.) 256; *Marsh v. Haywood*, 6 Humph. (Tenn.) 210; *McMillan v. Baker*, 20 Kan. 50; *McDonald v. Falvey*, 18 Wis. 571.

⁴¹ *Share v. Becker*, 8 Serg. & R. (Pa.) 239; *Witherow v. Keller*, 11 Serg. & R. (Pa.) 274; *Baker v. Judges of Ulster Common Pleas*, 4 Johns. (N. Y.) 191.

⁴² *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Mississippi & T. R. Co. v. Wynne*, 42 Miss. 315; *Milam Co. v. Robertson*, 47 Tex. 222; *Hurst v. Fisher*, 1 Watts & S. (Pa.) 438; *Beall v. Powell*, 4 Ga. 525; *Day v. Hamburgh*, 1 Browne (Pa.) 75; *McLemore v. Durivage*, 92 Tenn. 482, 22 S. W. 207; *Brady v. Washington Ins. Co.*, 82 Ill. App. 390; *Holden v. Dunn*, 144 Ill. 413, 33 N. E. 413, 19 L. R. A. 481; *Castledine v. Mundy*, 4 Barn. & Adol. 90; *Beven v. Cheshire*, 3 Dowl. 70; *King v. Jones*, 2 Ld. Raym. 1525; *Evans v. Chester*, 2 Mees. & W. 847. In West Virginia, it is said that a writ of error coram nobis is not a proper process to reverse a judgment because of defendant's insanity at the time of its rendition, as the judgment can be attacked for such cause only in equity. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762. Entering an order of default without first passing upon a pending demurrer is an error of law, which cannot be revised on a writ of error coram nobis. *Utley v. Cameron*, 87 Ill. App. 71.

lie to contradict or put in issue any fact that has been already adjudicated in the action.⁴³ Thus, if the record states that the defendant appeared and confessed judgment, he cannot controvert that fact after the expiration of the term for the purpose of setting aside the judgment.⁴⁴ The writ of error coram nobis, like the proceeding by audita querela, has now fallen into practical desuetude, being almost entirely superseded by the more speedy and efficacious remedy by motion in the same court.⁴⁵ In any case, the writ will not lie after affirmance of the judgment in the appellate court.⁴⁶

§ 301. By Bill of Review.

In those jurisdictions where the ancient forms of chancery pleading and practice remain in force, unmodified by statutes, the only proper method of obtaining the vacation or annulment of a decree in equity, after the term, is by bill of review. And this species of bill lies in cases of error apparent on the face of the record, for fraud, and on account of matters subsequent to the decree and which could not have been urged in defense.⁴⁷ But the rule that a decree once enrolled cannot be opened except by a bill of review, or by an original bill for fraud, "is subject to well founded exceptions, arising in cases not heard upon the merits, and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as

⁴³ *Gould's Estate v. Watson*, 80 Ill. App. 242.

⁴⁴ *Richardson's Ex'x v. Jones*, 12 Grat. (Va.) 53. But in Missouri, if a court commits an error of fact vital to its jurisdiction, such as finding defendant a nonresident, and making an order of publication against him, when in fact he is a resident, it will, on error coram nobis, set aside the judgment rendered on such publication. *State v. White*, 75 Mo. App. 257.

⁴⁵ *Pickett's Heirs v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638; *Sloo v. State Bank*, 1 Scam. (Ill.) 428; *McKindley v. Buck*, 43 Ill. 488; *Life Association v. Fassett*, 102 Ill. 315; *Beaubien v. Hamilton*, 3 Scam. (Ill.) 213; *Billups v. Freeman* (Ariz.) 52 Pac. 367. In Illinois, this writ has been abolished, and a remedy by motion substituted; but the latter can reach only such mistakes of fact as might have been corrected by error coram nobis before it was abrogated. *McPherson v. Wood*, 52 Ill. App. 170.

⁴⁶ *Lambell v. Pretty John*, 1 Strange, 690.

⁴⁷ See *Fries v. Fries*, 1 MacArthur (D. C.) 291; *Durant v. Duchesse D'Auxy*, 107 Ga. 456, 33 S. E. 478; *Kizer Lumber Co. v. Mosely*, 56 Ark. 544, 20 S. W. 409; *Carolina Nat. Bank v. Homestead Building & Loan Ass'n*, 56 S. C. 12, 33 S. E. 781.

shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside."⁴⁸ To a bill to vacate a decree the plaintiff in such decree is a necessary party defendant. The omission of him as a party is a fatal defect.⁴⁹

§ 302. By Direct Action.

In some of the states, instead of the somewhat summary method of vacating judgments on notice and motion, a practice prevails by which it is necessary to bring a direct action for this purpose, in the form of a regular suit, with plenary proceedings, in which the relief demanded is the annulment of the judgment complained of.⁵⁰ And in some, after the expiration of the statutory time for moving to vacate a judgment, the defendant may still proceed by an independent action, the ground of objection to the judgment being want of jurisdiction or fraud in obtaining it.⁵¹ In other respects, the law and practice in these states, on the topic under consideration, does not differ materially from the rest. It must be remarked that all the

⁴⁸ *Cawley v. Leonard*, 28 N. J. Eq. 467; *Smith v. Alton*, 22 N. J. Eq. 572; *Beekman v. Peck*, 3 Johns. Ch. (N. Y.) 415; *Bennett v. Winter*, 2 Johns. Ch. (N. Y.) 205; *Millsbaugh v. McBride*, 7 Paige (N. Y.) 509, 34 Am. Dec. 360; *Herbert v. Rowles*, 30 Md. 271; *Erwin v. Vint*, 6 Munf. (Va.) 267; *Carter v. Torrance*, 11 Ga. 654.

⁴⁹ *Harwood v. Cincinnati & C. Airline R. R. Co.*, 17 Wall. 78, 21 L. Ed. 558.

⁵⁰ See Hill's Code Wash. §§ 1393-1397; *Whidby Land & Development Co. v. Nye*, 5 Wash. St. 301, 31 Pac. 752; *State v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427, 58 Pac. 576. In North Carolina, a judgment sought to be vacated on the ground of fraud cannot be attacked by motion in the cause, but only by an independent action. *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6. And in Indiana, where a final judgment is assailed for want of jurisdiction, it is proper to attack the proceedings by a complaint. *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221. An application for the vacation of a judgment, though in the form of a motion, may properly be treated as by petition, where it contains averments, statements, and demands proper in a petition. *Council Bluffs L. & T. Co. v. Jennings*, 81 Iowa, 470, 46 N. W. 1006; *Callanan v. Aetna Nat. Bank*, 84 Iowa, 8, 50 N. W. 69.

⁵¹ *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

parties to the former suit must be made parties to an action to annul the judgment.⁵²

§ 303. By Motion.

The method of procuring the vacation of judgments which is by far the most commonly used, at the present day, is the proceeding by application to the court which rendered the judgment, in the form of a motion, with notice to the adverse party.⁵³ This practice, being simple, speedy, and effective, is well calculated to promote the interests of justice with the least cost and trouble to suitors. The time within which such applications must be made, the parties who may apply, the grounds upon which an application may be based, and the practice in proceedings of this character, are the subjects which will engage our attention in the remaining part of this chapter.

§ 304. Indirect Vacation of Judgment.

It has been held that the entry of a second judgment, in the same action, is not a vacation of the first judgment, if there is nothing further to show that such former judgment was regularly cancelled or set aside. "When a judgment is once entered of record, it must stand as the judgment, until it is vacated, modified, or disposed of by some means provided by law; entering additional judgment entries is not one of them."⁵⁴ But on the other hand, it is said that

⁵² See *Haggerty v. Phillips*, 21 La. Ann. 729; *Green v. Grant*, 108 Ga. 751, 32 S. E. 846.

⁵³ As to the circumstances under which an application for the vacation of a judgment should be made by motion, rather than by an independent action, or any other form of proceeding, see *Frazier v. Williams*, 18 Ind. 416; *Grant v. Harrell*, 109 N. C. 78, 13 S. E. 718; *Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233; *Drake v. Steadman*, 46 S. C. 474, 24 S. E. 458; *Silberman v. Shuklansky*, 172 Pa. 77, 33 Atl. 272; *Pollock v. Boyd*, 36 Neb. 369, 54 N. W. 560; *Iba v. Central Ass'n of Wyoming*, 5 Wyo. 355, 40 Pac. 527. An application by a wife to set aside, as rendered in fraud of her rights, a judgment by confession entered against her husband, pending her suit for divorce and alimony, is a suit for equitable relief, which cannot be granted on motion. *Dullard v. Phehan*, 83 Iowa, 471, 50 N. W. 204. Statutes authorizing the vacation of judgments on motion intend that the motion shall be in writing, and not made orally. *Indianapolis, D. & W. Ry. Co. v. Crockett*, 2 Ind. App. 136, 28 N. E. 222.

⁵⁴ *Nuckolls v. Irwin*, 2 Neb. 60. A decree declaring the rights of certain

although after a judgment has been entered up on a verdict, such judgment, strictly, should be set aside before a new trial is had, yet if, on motion, the verdict is set aside and a new trial granted and had, the judgment will be deemed to have been set aside.⁵⁵

§ 304a. Other Remedies Available.

A motion to vacate or set aside a judgment will not be entertained by the court when the proper remedy of the party aggrieved is by an appeal,⁵⁶ or by a motion for a new trial in the court rendering the judgment,⁵⁷ or by mandamus requiring the court to take some action which would give the party what he seeks,⁵⁸ or by an independent action for damages.⁵⁹ Sometimes also, the case is such that chancery is the only forum competent to afford adequate relief; and then the party must seek his redress there, and not by motion to set aside the judgment.⁶⁰ And pending a suit in equity to restrain proceedings on a judgment, and have it declared void, the court in which it was rendered has no jurisdiction of a rule to set it aside.⁶¹ Again, a defendant cannot move to set aside a judgment at the same time an action by him for the same purpose is pending in another court.⁶²

persons in an action is not vacated by a subsequent decree declaring the rights of such persons to be as stated in the former decree, except as to a person who has since intervened; and hence, the subsequent decree being itself afterwards vacated, the former is revived. *Mason v. McLean*, 6 Wash. 31, 32 Pac. 1006.

⁵⁵ *Lane v. Kingsberry*, 11 Mo. 402.

⁵⁶ *Landry v. Bertrand*, 48 La. Ann. 48, 19 South. 128; *Philadelphia & R. R. Co. v. Snowden*, 161 Pa. 201, 28 Atl. 1067.

⁵⁷ *Folsom v. Ballard*, 16 C. C. A. 583, 70 Fed. 12; *Clark's Cove Guano Co. v. Steed*, 92 Ga. 440, 17 S. E. 967.

⁵⁸ *Chappell v. Real-Estate Pooling Co.*, 91 Md. 754, 46 Atl. 982.

⁵⁹ *Chappell v. Real-Estate Pooling Co.*, 91 Md. 754, 46 Atl. 982.

⁶⁰ *Woodward v. Arlington Mills Manuf'g Co.*, 2 Pennewill (Del.) 189, 44 Atl. 620.

⁶¹ *First Nat. Bank v. Lieberman*, 1 Marv. (Del.) 367, 41 Atl. 90.

⁶² *Hay v. Cole*, 90 Hun, 258, 35 N. Y. Supp. 950.

PART III. THE TIME OF APPLYING.

§ 305. During the Term.

It is universally held that judgments are under the plenary control of the court which pronounces them during the entire term at which they are rendered or entered of record, and they may, during such term, be set aside, vacated, modified, or annulled by that court for cause shown.⁶³ It is commonly said that judgments and decrees remain in the breast of the court during the term of their rendition; and, for the purpose of modifying or vacating them, the whole term may be considered as one day.⁶⁴ This power may be exercised during the term on the court's own proper motion, as well as on application by a party, when there is a manifest error or inadvertence to be corrected, and even, in proper cases, without notice to the parties.⁶⁵ Its exercise is not prevented by the fact that a bill of exceptions has been taken or an appeal bond filed.⁶⁶ It is a power inherent in all courts of general jurisdiction, and is not dependent upon, or

⁶³ *Aetna Life Ins. Co. v. Com'rs of Hamilton County*, 25 C. C. A. 94, 79 Fed. 575; *Wylar v. Union Pac. Ry. Co.* (C. C.) 89 Fed. 4; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 101 Fed. 146; *Fraley v. Feather*, 46 N. J. Law, 429; *Robinson v. Harford County Com'rs*, 12 Md. 132; *Rutherford v. Pope*, 15 Md. 579; *Townshend v. Chew*, 31 Md. 247; *Green v. Pittsburgh, W. & K. R. Co.*, 11 W. Va. 685; *Kelty v. High*, 29 W. Va. 381, 1 S. E. 561; *Gwinn v. Parker*, 119 N. C. 19, 25 S. E. 705; *Cooley v. Tybee Beach Co.*, 99 Ga. 290, 25 S. E. 691; *Blackburn v. Knight*, 81 Tex. 326, 16 S. W. 1075; *Manguno & Tomfocarco Co. v. Clymonts*, 19 Ohio Cir. Ct. R. 237; *Sagory v. Bayless*, 13 Smedes & M. (Miss.) 153; *Barker v. Justice*, 41 Miss. 240; *Pattison v. Josselyn*, 43 Miss. 373; *Ashley v. Hyde*, 5 Ark. 100; *McKnight v. Strong*, 25 Ark. 212; *Underwood v. Sledge*, 27 Ark. 295; *Ralston v. Lothain*, 18 Ind. 303; *Gingrich v. Gingrich*, 146 Ind. 227, 45 N. E. 101; *Taylor v. Lusk*, 9 Iowa, 444; *State v. Callaway County Treasurer*, 43 Mo. 228; *Rankin v. Lawton*, 17 Mo. App. 574; *Smith v. Perkins*, 124 Mo. 50, 27 S. W. 574; *Volland v. Wilcox*, 17 Neb. 46, 22 N. W. 71; *Taylor v. Trumbull*, 32 Neb. 508, 49 N. W. 375; *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1060; *Ballard v. Purcell*, 1 Nev. 342; *Martin v. Skehan*, 2 Colo. 614; *State v. Sowders*, 42 Kan. 312, 22 Pac. 425.

⁶⁴ *Jordan v. Tarver*, 92 Ga. 379, 17 S. E. 351; *Woodward v. Woodward*, 84 Mo. App. 328.

⁶⁵ *Ray v. Moore*, 19 Ind. App. 690, 49 N. E. 1063.

⁶⁶ *Blackburn v. Knight*, 81 Tex. 326, 16 S. W. 1075; *Huber Manuf'g Co. v. Sweny*, 57 Ohio St. 169, 48 N. E. 879.

derived from statutes.⁶⁷ Thus, a statute requiring applications for a new trial to be made within three days after the verdict or decision has no application to a motion to set aside a default, made at the same term.⁶⁸

§ 306. *After the Term.*

It was the rule of the common law,—and it is still adhered to with more or less consistency in most of the states,—that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court has no longer the power to vacate or modify them or to set them aside.⁶⁹ The supreme

⁶⁷ *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069; *Manguno & Tomfocaro Co. v. Clymonts*, 19 Ohio Cir. Ct. R. 237.

⁶⁸ *Hall v. Houghton & Upp Mercantile Co.*, 8 C. C. A. 661, 60 Fed. 350; *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069; *Riglesberger v. Bailey* (Ky.), 44 S. W. 118. The sustaining of an application to open a default judgment, though in the form of an ordinary motion for a new trial, where made after the time for granting a new trial, will be presumed to have been done in pursuance of the inherent jurisdiction of the court, and not as a demandable statutory right. *Bradley v. Slater*, *supra*.

⁶⁹ *Bronson v. Shulten*, 104 U. S. 410, 26 L. Ed. 907; *Brush v. Robbins*, 3 McLean, 486, Fed. Cas. No. 2,059; *Bank v. Labitut*, 1 Woods, 11, Fed. Cas. No. 842; *Grames v. Hawley* (C. C.) 50 Fed. 319; *Loney v. Bailey*, 43 Md. 10; *Green v. Pittsburgh, W. & K. R. Co.*, 11 W. Va. 695; *Barbour County Court v. O'Neal*, 42 W. Va. 295, 26 S. E. 182; *Ramsour v. Raper*, 29 N. C. 346; *Moore v. Hinnant*, 90 N. C. 163; *Trustees of Internal Imp. Fund v. Bailey*, 10 Fla. 238; *Ex parte Sims*, 44 Ala. 248; *Buchanan v. Thomason*, 70 Ala. 401; *Orothers v. Ross' Distributees*, 15 Ala. 800; *Cotten v. McGehee*, 54 Miss. 621; *Alabama & V. Ry. Co. v. Bolding*, 69 Miss. 253, 13 South. 844, 30 Am. St. Rep. 541; *Brewster v. Norfleet*, 3 Tex. Civ. App. 103, 22 S. W. 226; *Merle v. Andrews*, 4 Tex. 200; *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *Ragsdale v. Green*, 36 Tex. 193; *Anderson v. Anderson*, 18 B. Mon. (Ky.) 95; *McManama v. Garnett*, 3 Metc. (Ky.) 517; *Lovelace v. Lovell* (Ky.) 55 S. W. 549; *Johnson v. Jones*, 58 Kan. 745, 51 Pac. 224; *Rawdon v. Rapley*, 14 Ark. 203, 58 Am. Dec. 370; *Ashley v. Hyde*, 6 Ark. 92, 42 Am. Dec. 685; *Exposition Building & Loan Co. v. Spiegel*, 12 Ohio Cir. Ct. R. 761; *Blair v. Russell*, 1 Smith (Ind.) 287; *Bland v. State*, 2 Ind. 608; *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306; *Cook v. Wood*, 24 Ill. 295; *Cox v. Brackett*, 41 Ill. 222; *Smith v. Wilson*, 26 Ill. 186; *Schmidt v. Thomas*, 33 Ill. App. 109; *Davies v. Coryell*, 37 Ill. App. 505; *Baldwin v. McClelland*, 152 Ill. 42, 38 N. E. 143; *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. 702; *Stettauer v. Chicago Title & Trust Co.*, 62 Ill. App. 31; *Kelley v. Heath & Milligan Manuf'g Co.*, 66 Ill. App. 228; *Bristol v. Ross*, 79 Ill. App. 261; *Fish Furniture Co. v. Jenkins*, 82 Ill. App. 551; *Utley v. Cameron*, 87 Ill. App. 71; *Ashby v. Glasgow*, 7 Mo. 320; *Orvis*

court of the United States has stated the rule concisely in the following language: "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision."⁷⁰ And the federal circuit courts agree that they have no power to vacate or reverse their judgments or decrees, after the term, except in the cases specified in the decision of the supreme court just quoted.⁷¹ In California, after the adjournment of the term, the court loses all control over its decisions, unless its jurisdiction is saved by some motion or proceeding at the time, except when the summons has not been served, in which case a party may, within six months, move to set aside the judgment.⁷² In Massachusetts, a court which by statute holds weekly terms, has no authority, on motion at one of such terms, to vacate a final judgment duly entered

v. Elliott, 65 Mo. App. 96; McBrien v. Riley, 38 Neb. 561, 57 N. W. 385; Fisk v. Thorp, 51 Neb. 1, 70 N. W. 498; Spafford v. City of Janesville, 15 Wis. 474; Gray v. Gates, 37 Wis. 614; Salter v. Hilgen, 40 Wis. 363; Suydam v. Pitcher, 4 Cal. 280; Bell v. Thompson, 19 Cal. 706; Lattimer v. Ryan, 20 Cal. 628; William Deering & Co. v. Orelghton, 26 Or. 556, 38 Pac. 710; Exchange Bank v. Ford, 7 Colo. 449, 3 Pac. 449; Jones v. New York Life Ins. Co., 14 Utah, 215, 47 Pac. 74; Benson v. Anderson, 14 Utah, 334, 47 Pac. 142.

⁷⁰ Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 997.

⁷¹ Klever v. Seawall, 12 C. C. A. 653, 65 Fed. 373; Austin v. Riley (C. C.) 55 Fed. 833; Allen v. Wilson (C. C.) 21 Fed. 881. The practice of a state court in opening judgments or decrees by default after the term at which they became absolute will not be observed in a suit in equity in a federal court in that state, under Rev. St. U. S. § 914, which requires the practice of the federal courts to conform to that of the state courts only in "civil cases other than equity and admiralty causes." Austin v. Riley (C. C.) 55 Fed. 833.

⁷² Shaw v. McGregor, 8 Cal. 521; Robb v. Robb, 6 Cal. 21; Bell v. Thompson, 19 Cal. 706.

at a previous term.⁷³ In Alabama and some other states, while the general rule is followed, it is considered that if, by agreement of the parties, the court sets aside a judgment after the term and again tries the cause, the judgment afterwards entered is not void for want of jurisdiction, though the court is not bound to retry a cause even if the parties consent.⁷⁴ But in some other states it is held that, notwithstanding the agreement of parties, all the proceedings subsequent to the first judgment are *coram non iudice* and void.⁷⁵ And this indeed seems the more logical position. In Wisconsin, where a judgment entered is not void but simply irregular, the court has no power to vacate it after the term at which it was entered, or if entered by the clerk in vacation, after the term next succeeding its entry.⁷⁶ The rule stated applies to decrees in equity as well as judgments at law. In general, chancery cannot open a final decree after the end of the term at which it was made, unless upon a bill of review, or bill in that nature, or bill or petition impeaching the decree for fraud.⁷⁷ But here, as we have already said,⁷⁸ an exception must be made in the case of equity causes not heard upon the merits and in which the decree was entered by fraud, mistake, surprise, or other exceptional circumstances. If the rule applies to any courts it applies to all. The court of last resort in a state cannot set aside a judgment or decree rendered by it, after the expiration of the term at which it was rendered, unless the same is void on its face.⁷⁹

Thus it will be seen that in many of the states there is a strong disposition not to depart widely from the common law rule on this point. The reasons of the rule are obvious and weighty. The interests of the individual as well as of the community demand that there should be a definitive end of every litigation; and nothing could be

⁷³ Wood v. Payea, 138 Mass. 61.

⁷⁴ Kidd v. McMillan, 21 Ala. 325; Hair v. Moody, 9 Ala. 399; Gage v. City of Chicago, 141 Ill. 642, 31 N. E. 163; Royal Trust Co. v. Exchange Bank, 55 Neb. 663, 76 N. W. 425.

⁷⁵ City of Little Rock v. Bullock, 6 Ark. 232; Anderson v. Thompson, 7 Lea (Tenn.) 259.

⁷⁶ Egan v. Sengpiel, 46 Wis. 703, 1 N. W. 467.

⁷⁷ Brooks' Adm'r v. Love, 3 Dana (Ky.) 7; Bobb v. Bobb, 2 A. K. Marsh. (Ky.) 240; McMicken v. Perin, 18 How. 507, 15 L. Ed. 504.

⁷⁸ Supra, § 301.

⁷⁹ Donnell v. Hamilton, 77 Ala. 610.

more impolitic than to leave it in the discretion of every court to revise and review and reconsider its judgments without limit. Yet it is very necessary to observe that this rule does not by any means obtain in all its rigor in every state and jurisdiction. The practice varies so much from state to state that it is most difficult to formulate general principles. But we shall find, in the first place, that the rule is almost everywhere subject to certain well-recognized exceptions; as where the judgment in question is entirely void, or was entered without the authority of the court, or is vitiated by some substantial irregularity. These instances will be discussed in succeeding sections under their appropriate titles. In the second place, it will be discovered that in some few states the rule is not observed at all, the courts exercising the power to vacate or open judgments in proper cases, without any limitation as to time.⁸⁰ Finally, in a considerable number of states, the statutes both prescribe the grounds on which judgments may be vacated and fix an arbitrary limit, usually six months or a year, within which the application may be made.

§ 307. Void Judgments.

It was intimated in the last section that a judgment which is entirely void may always be set aside at a subsequent term. And this is the general doctrine of the cases. Every court possesses inherent power to vacate entries in its record of judgments, decrees, or orders rendered or made without jurisdiction, either during the term at which the entries are made or after its expiration.⁸¹ This rule ap-

⁸⁰ See *Breden v. Gilliland*, 67 Pa. 36; *Capen v. Inhabitants of Stoughton*, 16 Gray (Mass.) 365.

⁸¹ *Thomas v. American Freehold Land & Mortg. Co.* (C. C.) 47 Fed. 550, 12 L. R. A. 681; *Couch v. Heffron*, 15 Pa. Co. Ct. R. 636; *In re College Street*, 11 R. I. 472; *Ladd v. Mason*, 10 Or. 308; *Bruce's Ex'x v. Strickland's Adm'r*, 47 Ala. 192; *Baker v. Barclift*, 76 Ala. 414; *Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312; *First Nat. Bank v. Wm. B. Grimes Dry-Goods Co.*, 45 Kan. 510, 26 Pac. 56; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559. But a judgment which is merely voidable, for errors or irregularities, must be attacked in due time, by motion to vacate or by appeal. *Einstein v. Davidson*, 35 Fla. 342, 17 South. 503. And where jurisdiction is duly acquired by service of process, a judgment erroneously entered by default is not void, and the court cannot set it aside at a subsequent term. *Maple v. Havenhill*, 37 Ill. App. 311.

plies not only where there is a want of jurisdiction over the parties, but also where jurisdiction of the subject-matter is lacking. A judgment which is outside of the issues, and on a matter not submitted for determination, is a nullity, and may be set aside at any time.⁸² It is also said that the trial court has inherent power to vacate, after the term, a judgment obtained by fraud, or which is not in accord with that intended to be entered,⁸³ or one entered by the clerk without authority and in violation of law,⁸⁴ or one which has been rendered contrary to the course of law and practice.⁸⁵ But in some states it is held that, to authorize the setting aside of a void judgment after the expiration of the term, the invalidity of the judgment must appear on the face of the record, and not from matter outside of it, except in cases of fraud, and where the judgment was rendered after the death of a party.⁸⁶

§ 308. Interlocutory Judgments.

An interlocutory judgment or decree, made in the progress of a cause, is always under the control of the court until the final decision of the suit, and it may be modified or rescinded, upon sufficient grounds shown, at any time before final judgment, though it be after the term in which the interlocutory sentence was given.⁸⁷ And in

⁸² *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609. But in Wisconsin, a final judgment in the court of last resort cannot be vacated after a year from its rendition on the ground that the court had no jurisdiction of the subject-matter. *State v. Waupaca County Bank*, 20 Wis. 640.

⁸³ *Harper v. Barnett* (Miss.) 16 South. 533; *Ruenbuhl v. Heffron* (Tex. Civ. App.) 38 S. W. 1028.

⁸⁴ *Mickler v. Reddick*, 38 Fla. 341, 21 South. 286.

⁸⁵ *Orvis v. Elliott*, 65 Mo. App. 96.

⁸⁶ *Pettus v. McClannahan*, 52 Ala. 55; *Kohn v. Haas*, 95 Ala. 478, 12 South. 577; *People v. Dodge*, 104 Cal. 487, 38 Pac. 203.

⁸⁷ *Blythe v. Hinckley* (C. C.) 84 Fed. 228; *Miller v. Justice*, 86 N. C. 26; *Davis v. Roberts*, Smedes & M. Ch. (Miss.) 543; *State v. King*, 46 La. Ann. 163, 15 South. 233; *Patterson v. Hare*, 74 Hun, 269, 26 N. Y. Supp. 626; *Bent v. Miranda*, 8 N. M. 78, 42 Pac. 91. This is the case, for example, with an order merely sustaining a demurrer, or striking out a count. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696. Or an order appointing a receiver to take charge of mortgaged property pending foreclosure. *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wash. 579, 56 Pac. 370. Compare *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Woffenden v. Woffenden*, 1 Ariz. 328, 25 Pac. 666; *Windes v. Earp*, 150 Mo. 600, 51 S. W. 1044.

some states it is held that mere office judgments (such as are entered of course) are under the control of the court in succeeding terms and can be modified or set aside on cause shown, even after judgment has been perfected; but it is within the discretion of the courts and their decision cannot be appealed from.⁸⁸ And it seems that a mere naked default, on which no judgment or decree has ever been entered, may be set aside at any time on proper grounds; in this case the discretion of the court is not limited as to time.⁸⁹ In California, a motion to vacate a default entered by the clerk may be made at any time before final judgment is entered, although the court may have adjourned for the term at which the default was entered before the motion is made.⁹⁰

§ 309. Pennsylvania Practice.

In the state of Pennsylvania the practice in regard to opening judgments has been developed by a long line of cases, and has settled in a form different from that found in most other jurisdictions. In the language of Judge Sharswood: "Every court has power to open a judgment in order to give the parties a hearing or trial. In the case of judgments by confession or default, there is no limit of time to the exercise of this power, but in the case of judgments entered adversely after a hearing or trial, it is settled that it must be done before the end of the term at which they are entered."⁹¹ And

⁸⁸ *Powell v. Jopling*, 47 N. C. 400; *Wilson v. Torbert*, 3 Stew. (Ala.) 296, 21 Am. Dec. 632.

⁸⁹ *Ordway v. Suchard*, 31 Iowa, 487; *Simmons v. Church*, Id. 284; *Harper v. Drake*, 14 Iowa, 533.

⁹⁰ *Willson v. Cleaveland*, 30 Cal. 192.

⁹¹ *King v. Brooks*, 72 Pa. 364. And see *Bradley v. Towanda Tp.*, 133 Pa. 371, 20 Atl. 1060; *Hill v. Egan*, 2 Pa. Super. Ct. 596. A judgment may be set aside for fraud, after the term at which it was rendered, but the petition must set forth the essential facts of the fraud alleged, so that the jurisdiction of the court may appear. *Fisher v. Hestonville, M. & F. Pass. Ry. Co.*, 185 Pa. 402, 40 Atl. 97. The power to open or set aside judgments is an equitable power, and should be based upon the exercise of a sound legal discretion by the court, not a mere arbitrary exercise of power. *Fisher v. Hestonville, M. & F. Pass. Ry. Co.*, supra; *Sullivan v. Sweeney*, 189 Pa. 474, 42 Atl. 45. The petitioner must show adequate grounds for such action on the part of the court, and mere denial of the indebtedness charged against him will not generally be sufficient. *Ware v. Baldwin*, 7 Kulp, 278. It has been remarked

a judgment may be opened, for proper cause, notwithstanding it may have been several times revived by scire facias. "If the original judgment was obtained by fraud and misrepresentation, and the subsequent revivals were but a continuation of such fraud and misrepresentation, it is difficult to see how such revivals could add anything to the validity of the original judgment."⁹²

§ 310. Judgment carried over the Term by Motion.

Whatever abridges or suspends the final character of a judgment will save it from the operation of the rule under consideration. A motion to vacate a judgment, made at the same term at which the judgment was rendered and continued to a subsequent term, may be allowed at such subsequent term.⁹³ But it is held that leave granted at the term in which the judgment is entered, to move in the next term to set it aside, is irregular and void.⁹⁴ Where a motion for a new trial is continued over the term, the proceedings are still in the breast of the judge, and he has jurisdiction to set aside the judgment for informality, and let the verdict stand.⁹⁵ So where a judgment is entered by default against two joint defendants, and at the same time

that the practice of opening a judgment to let the defendant in to a defense is not peculiar to Pennsylvania, although it is unknown to the common law. It is an appeal to the equitable powers of the court to allow a hearing on the merits from which the defendant, by adherence to the strict forms of law, would otherwise be precluded. *McAnulty v. National Life Ass'n*, 6 Lack. Leg. N. 128. A somewhat similar practice obtains in Illinois, in regard to judgments entered by confession. See *Hall v. Jones*, 32 Ill. 38. A judgment by default, regular and valid in fact, cannot be stricken from the record; the remedy is by motion to open the judgment and let the defendant in to a defense. *North v. Yorke*, 174 Pa. 349, 34 Atl. 620.

⁹² *Monroe v. Monroe*, 93 Pa. 520. See *Citizens' Trust & Surety Co. v. Goodchild*, 195 Pa. 80, 45 Atl. 662.

⁹³ *Windett v. Hamilton*, 52 Ill. 180; *Green v. Pittsburgh, W. & K. R. Co.*, 11 W. Va. 685; *Niles v. Parks*, 40 Ohio St. 370, 34 N. E. 735; *Childs v. Kansas City, St. J. & C. B. R. Co.*, 117 Mo. 414, 23 S. W. 373; *Babcock Hardware Co. v. Farmers' & Drovers' Bank*, 50 Kan. 648, 32 Pac. 377. Compare *Ashley v. Hyde*, 6 Ark. 92, 42 Am. Dec. 685. In Kentucky, a court of continuous session cannot, by continuing from time to time a motion to set aside a judgment, retain control over such judgment beyond 60 days after its rendition. *Williams v. Williams (Ky.)* 54 S. W. 716.

⁹⁴ *Hill v. City of St. Louis*, 20 Mo. 584.

⁹⁵ *Suddarth v. Empire Lime Co.*, 79 Mo. App. 585.

the cause is removed to the federal court on motion of a third defendant, after it is determined that the removal was erroneous and the cause is sent back to the state court, the latter court has the power at the first term thereafter, on plaintiff's motion, to strike off the judgment, although a term had intervened after it was entered; the rule (in Illinois) that a judgment may be set aside or amended only at the same or the next term after its entry not applying while the cause is pending in the federal court.⁹⁶

§ 311. Under Statutes.

In many of the states, statutes have been enacted which provide that the court may, in its discretion, relieve a party from a judgment taken against him, on certain enumerated grounds, within a prescribed time from the rendition of the judgment, usually six months or a year, or in some jurisdictions two years, or within a similar period from notice of the judgment.⁹⁷ Our chief interest in these statutes is in connection with the causes which they specify as sufficient to warrant the vacation of the judgment, and in this regard they will be fully considered hereafter. But there are certain observations to be made on the time limit which they establish. In the first place, it is generally considered that the control of the court over the judgment absolutely ceases upon the expiration of the time limited. Thereafter it is no longer within the discretion, or even the jurisdiction, of the court to vacate or modify the judgment; the right to apply for such relief is lost, and any order of the court setting the judgment aside or rendering a new judgment will be null and void.⁹⁸ In the next place, the common-law power

⁹⁶ *Jansen v. Grimshaw*, 125 Ill. 468, 17 N. E. 850.

⁹⁷ For citations to these statutes, see, *infra*, section 334. And see *Carlisle v. Wilkinson*, 12 Ind. 91; *Hunt v. Stevens*, 26 Iowa, 399; *Kenedy v. Jarvis* (Tex.) 1 S. W. 191; *People v. Lafarge*, 3 Cal. 130.

⁹⁸ *Elder v. Richmond Gold & Silver Min. Co.*, 7 C. C. A. 354, 58 Fed. 536; *Beardsley v. Hilson*, 94 Ga. 50, 20 S. E. 272; *Schwarz v. Oppenheimer*, 90 Ala. 462, 8 South. 36; *Thomas v. Neel* (Tex. App.) 18 S. W. 138; *Wingfield v. Cotton* (Ky.) 56 S. W. 813; *Gresham v. Ellis*, 92 Tenn. 471, 22 S. W. 1; *Priestman v. Priestman*, 103 Iowa, 320, 72 N. W. 535; *Manning v. Nelson*, 107 Iowa, 34, 77 N. W. 503; *Petley v. Carpenter*, 124 Mich. 14, 82 N. W. 666;

of a court of record to set aside its judgments at the same term at which they were rendered is not abrogated by these statutes. During the term, the court may vacate a judgment for any cause which would be sufficient at common law, without regard to the grounds specified in the statute;⁹⁹ but after the close of the term, the remedy of a party aggrieved by the judgment must be sought under the statute, and is confined to the grounds therein enumerated.¹⁰⁰ In some states, however, the courts exercise authority to set aside judgments for causes (such as fraud) not specified in the statutes, and without regard to the lapse of the term in which the judgment was rendered. Where this practice obtains, it may be remarked that the two elements of the statute, the specified causes and the time limit, are mutually dependent; that is, if the application is based upon a ground not enumerated in the statute, but otherwise recognized as sufficient, it is not necessary that it be made within the statutory time.¹⁰¹ Again, while unexcused delay will generally tell against an application of this sort, it is considered that laches cannot be imputed to a party who takes all the time which the statute allows him to bring his motion or application.¹⁰² Where the statutory time begins to run from "notice" of the judgment, this is

Whitbeck v. Montana Cent. Ry. Co., 21 Mont. 102, 52 Pac. 1098; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22; *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344; *Bunnell & Eno Inv. Co. v. Curtis (Idaho)* 51 Pac. 767. But in Georgia, it is held that Code, § 2914a, declaring that all proceedings to set aside judgments must be had within three years from the rendition of the judgment, is merely a statute of limitations, which must be raised at the trial to be available. *Stewart v. Golden*, 98 Ga. 479, 25 S. E. 528.

⁹⁹ *Arlington Manuf'g Co. v. Mears*, 65 Vt. 414, 26 Atl. 587.

¹⁰⁰ *Milwaukee Mutual Loan & Bldg. Soc. v. Jagodzinski*, 84 Wis. 35, 54 N. W. 102; *Hampton Lumber Co. v. Van Ness*, 54 Neb. 185, 74 N. W. 387; *State v. Tate*, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; *Turner v. Ottawa Circuit Judge*, 123 Mich. 617, 82 N. W. 247; *Yerkes v. McHenry*, 6 Dak. 5, 50 N. W. 485.

¹⁰¹ *Cowles v. Hayes*, 69 N. C. 406; *McCloud v. Meehan*, 30 Misc. Rep. 67, 62 N. Y. Supp. 852.

¹⁰² *Independent School Dist. v. Schreiner*, 46 Iowa, 172; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042; *Wm. Wolff & Co. v. Canadian Pac. Ry. Co.*, 89 Cal. 332, 26 Pac. 825. Where the time is limited to a certain number of days, and the last day is Sunday, the party must present his application or motion on the day previous. *Ex parte James*, 125 Ala. 119, 28 South. 69.

construed to mean knowledge of the rendition of such judgment, and the notice thereof need not be in writing.¹⁰³ And where the time is limited to one year, it is held that it is not enough that a motion for relief against the judgment be made within the year, but it must be brought to a hearing within that time.¹⁰⁴

§ 312. Judgments against Non-Residents.

The statutes in some of the states provide that a non-resident defendant who has been constructively served by publication of summons, and against whom a judgment is given, may appear and have the judgment vacated and be admitted to defend the action, at any time within a limited period after the rendition of the judgment, which period varies, in the different states, from six months to five years.¹⁰⁵ And the right thus given entitles the defendant, if he comes in within the prescribed time, to assert his rights as fully in every respect as he could have done if personally served before judgment, saving the intervening rights of third persons.¹⁰⁶ And the right of a defendant, under these statutes, to be let in to a defense

¹⁰³ *Butler v. Mitchell*, 17 Wis. 52; *Turner v. Leathem*, 84 Wis. 633, 54 N. W. 1001. Notice to the defendant's attorney of the entry of judgment against such defendant is notice to the defendant, within the meaning of such a statute. *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826. A plaintiff will be charged with notice of judgment in his action, entered at a regular term of the court, as of the time of the entry. *Sluder v. Graham*, 118 N. C. 835, 23 S. E. 924.

¹⁰⁴ *Knox v. Clifford*, 41 Wis. 458; *Nicklin v. Robertson*, 28 Or. 278, 42 Pac. 903, 52 Am. St. Rep. 790; *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826.

¹⁰⁵ See *Kinney v. O'Bannon's Ex'x*, 6 Bush (Ky.) 692; *Blanchard v. Hatch*, 32 Mo. 261; *Hirsh v. Welsberger*, 44 Mo. App. 506; *Albright v. Warkentin*, 31 Kan. 442, 2 Pac. 614; *Davis v. Davis*, 24 Tex. 187; *Snow v. Hawpe*, 22 Tex. 168; *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490; *Waldo v. Thweatt*, 64 Ark. 126, 40 S. W. 782; *Scarborough v. Myrick*, 47 Neb. 794, 66 N. W. 867; *Norton v. Atchison, T. & S. F. R. Co.*, 97 Cal. 388, 32 Pac. 452, 33 Am. St. Rep. 198; *Blyth & Fargo Co. v. Swenson*, 15 Utah, 345, 49 Pac. 1027. But in some states, it must be shown, by a preponderance of evidence, that the defendant had no actual notice of the pendency of the action in time to appear therein and make his defense. *Stover v. Hough*, 47 Neb. 789, 66 N. W. 825; *Roller v. Ried* (Tex. Civ. App.) 24 S. W. 655.

¹⁰⁶ *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271.

is an absolute right if he brings himself within the statute; the court has no discretion in the matter, but must grant his application.¹⁰⁷

§ 313. *Laches of Party.*

Aside from cases in which the time of applying for relief from the judgment is regulated by statute, and aside from cases in which the motion can only be made at the same term, we are now to inquire how the party's application will be affected by his delay or want of diligence. And first, delay in moving to have a judgment vacated, so long as the party has no notice of the judgment or of the action, will not bar his right, even though innocent strangers may have taken titles in reliance on the judgment.¹⁰⁸ Again, lapse of time will not affect the right to vacate a judgment on the ground that the court never had jurisdiction to enter it.¹⁰⁹ But if the party actually knows that a judgment has been rendered against him, and the judgment is not simply and merely void, it is the undoubted rule that he must exercise reasonable diligence in procuring its vacation, and that his unexcused laches or delay, unduly protracted, will preclude him from obtaining the relief sought.¹¹⁰ "In deciding

¹⁰⁷ *Albright v. Warkentin*, 31 Kan. 442, 2 Pac. 614; *Francovis v. Ireland*, 35 Minn. 278, 28 N. W. 508; *Boeing v. McKinley*, 44 Minn. 392, 46 N. W. 766. But later cases in Minnesota hold that, while it is presumed that the defendant has been diligent after receiving actual notice of the pendency of the action, still this presumption may be rebutted; and that an unexplained delay of several months in making the application for leave to defend the action after judgment will justify the court in refusing the same, though the application is made within the year. *Mueller v. McCulloch*, 59 Minn. 409, 61 N. W. 455; *Cutler v. Button*, 51 Minn. 550, 53 N. W. 872. On the other hand, the court has a discretion to set aside the judgment and allow a defense to be made, good cause being shown, although more than a year may have elapsed since the rendition of the judgment. *Waite v. Coaracy*, 45 Minn. 159, 47 N. W. 537.

¹⁰⁸ *Stocking v. Hanson*, 35 Minn. 207, 29 N. W. 507; *Maury's Trustee v. Fitzwater* (C. C.) 88 Fed. 768; *Stoutenborough v. Board of Education*, 104 Cal. 664, 38 Pac. 449; *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750.

¹⁰⁹ *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 585.

¹¹⁰ *Cagger v. Gardner*, 1 How. Prac. (N. Y.) 142; *Nichols v. Nichols*, 10 Wend. (N. Y.) 560; *Bliss v. Treadway*, 1 How. Prac. (N. Y.) 245; *De Wandelaer v. Hager*, Id. 63; *McQuillan v. Hunter*, 1 Phila. 49; *Le Duc v. Slo-*

upon an application to strike out a judgment after the term is past, for fraud, irregularity, deceit, or surprise, the court acts in the exercise of its quasi-equitable powers, and in every such case requires the party making the application to act in good faith and with ordinary diligence. Relief will not be granted if he has knowingly acquiesced in the judgment complained of, or has been guilty of laches or unreasonable delay in seeking his remedy."¹¹¹ So far the law is clear. But the moment we endeavor to ascertain what laches or delay will bar this right, we are involved in a sea of difficulties which invariably overflows the attempt to define "diligence" or "reasonable time." It is impossible to lay down general rules. Every case must be governed by its own facts and the decisions in the particular state. It may be profitable, however, to mention some of the principal cases in which the question has actually been decided. And to begin with the clearest,—“after the lapse of twenty years no judicial proceeding whatever ought to be set aside for irregularity.”¹¹² In another case in the same state, where fourteen years had elapsed since the entry of judgment, and no satisfactory excuse or reason for the delay was shown, the motion was held properly denied on the ground of laches.¹¹³ It is also held that an unexplained delay

comb, 124 N. C. 347, 32 S. E. 726; *Camp v. Phillips*, 88 Ga. 415, 14 S. E. 580; *Knauber v. Watson*, 50 Kan. 702, 32 Pac. 349; *Ammerman v. State*, 96 Ind. 165; *Ryder v. Twiss*, 3 Scam. (Ill.) 4; *Fischer v. Stiefel*, 179 Ill. 59, 53 N. E. 407; *Barrett v. Queen City Cycle Co.*, 179 Ill. 68, 53 N. E. 550; *Altmann v. Gabriel*, 28 Minn. 132, 9 N. W. 633; *Seibert v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 72, 59 N. W. 828; *Sanderson v. Dox*, 6 Wis. 164; *Welch v. May*, 14 Wis. 200; *Ætna Ins. Co. v. McCormick*, 20 Wis. 205; *Landon v. Burke*, 33 Wis. 452; *Reese v. Mahoney*, 21 Cal. 305; *Wm. Wolff & Co. v. Canadian Pac. Ry. Co.*, 123 Cal. 535, 56 Pac. 453; *Clark v. Perry*, 17 Col. 56, 28 Pac. 329. Mere delay in moving to have a judgment vacated will not preclude relief as against a party who knew of defendant's equities, and who, being obliged to pay the judgment, took an assignment of it. *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771. The rule of diligence in making application to set aside a default does not control the subsequent proceedings. If the motion is filed in due time, it may be heard at such time as the court may direct. *Wm. Wolff & Co. v. Canadian Pac. Ry. Co.*, 123 Cal. 535, 56 Pac. 453.

¹¹¹ *McCormick v. Hogan*, 48 Md. 404.

¹¹² *Thompson v. Skinner*, 7 Johns. (N. Y.) 556.

¹¹³ *Wade v. De Leyer*, 40 N. Y. Super. Ct. 541.

of seven years,¹¹⁴ or five years,¹¹⁵ or two years,¹¹⁶ or seventeen months,¹¹⁷ or one year,¹¹⁸ or eleven months,¹¹⁹ will be sufficient to justify the court in refusing the relief asked. Where an application to have a decree of divorce set aside was not made until the lapse of more than four years after the plaintiff had been fully informed of the alleged fraudulent decree, and no excuse was shown for the delay other than that proceedings to review the decree had been instituted, and an action brought to set it aside in another court, it was held that the plaintiff's right was barred.¹²⁰ On the other hand, it is held in Pennsylvania that a nonsuit may properly be taken off even three years after its entry, where cause for its removal appears; such action lies within the sound discretion of the court, and is not reviewable by writ of error.¹²¹ The case is slightly different where a judgment has been irregularly entered against an infant. The question here is, what time should reasonably be al-

¹¹⁴ *Reese v. Mahoney*, 21 Cal. 305. Or six years. *De Camp v. Bates* (Tex. Civ. App.) 37 S. W. 644; *Tooker v. Booth*, 7 Misc. Rep. 421, 27 N. Y. Supp. 974.

¹¹⁵ *Bostwick v. Perkins*, 4 Ga. 47; *In re Markle's Estate*, 187 Pa. 639, 41 Atl. 304; *Van Arsdale v. King*, 87 Hun, 617, 33 N. Y. Supp. 858; *Drummond v. Matthews* (N. Y.) 17 N. Y. Supp. 726. Or four years. *Case v. Case*, 137 Ind. 526, 37 N. E. 337; *Bowling v. Blum* (Tex. Civ. App.) 52 S. W. 97.

¹¹⁶ *People v. Judges*, 1 Doug. (Mich.) 417; *Wygant v. Brown*, 7 N. Y. Supp. 490; *In re Gilman's Estate* (N. Y.) 17 N. Y. Supp. 494.

¹¹⁷ *Ammerman v. State*, 98 Ind. 165. And see, for cases in which a delay of 14 or 15 months was held too long, *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117; *Denton v. Merchants' Nat. Bank*, 18 Wash. 387, 51 Pac. 473; *Jones v. Jones*, 71 Hun, 519, 24 N. Y. Supp. 1031.

¹¹⁸ *Sanderson v. Dox*, 6 Wis. 164; *In re Mutual Benefit Co.*, 190 Pa. 355, 42 Atl. 706.

¹¹⁹ *Altmann v. Gabriel*, 28 Minn. 132, 9 N. W. 633.

¹²⁰ *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223.

¹²¹ *Zebley v. Storey*, 8 Wkly. Notes Cas. 212. And see *Lyons v. Green*, 68 Ark. 205, 56 S. W. 1075. An application to open a default, made in good faith, and showing a meritorious defense, should not be denied for laches where made within two months of the entry of judgment. *Lorzing v. Eisenberg*, 5 Misc. Rep. 358, 25 N. Y. Supp. 750. But, on the other hand, a motion to open a default, made 19 days after the denial of two former motions, was held properly denied where no excuse or reason was given why the ground therefor was not sooner presented to the court. *Ellis v. Bonner*, 7 Tex. Civ. App. 539, 27 S. W. 687.

lowed to him, after he comes of age, in which to take proceedings against the judgment. It has been held that six years is an undue delay.¹²² And in a New York case it was said that there must be a limitation to the time when such a motion could be made, and the old limitation of two years, after attaining his majority, was sufficiently liberal and would prevail.¹²³ In California, it is considered that ten days after a judgment is entered in the superior court, which has no terms, is a reasonable time within which to move to set aside such judgment.¹²⁴

PART IV. THE PARTIES WHO MAY APPLY.

§ 314. Successful Party may Apply.

The courts have power, in a proper case, to set aside a judgment at the instance of the party in whose favor it is rendered.¹²⁵ The propriety and necessity of this rule are obvious. For the plaintiff's rights may be compromised, or not adequately recognized or protected, by the judgment as it stands, and without his own fault. If there are such irregularities in the judgment that he would be prevented from reaping its fruits, or if an excusable mistake has put him upon a wrong course of proceedings, or if the fraud or trickery of the defendant has prevented him from getting the full measure of relief to which he is entitled, it is but right to vacate the judgment

¹²² *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

¹²³ *Barnes v. Gill*, 13 Abb. Prac. (N. S.) 169.

¹²⁴ *In re Langan's Estate*, 74 Cal. 353, 16 Pac. 188.

¹²⁵ *Herdic v. Woodward*, 75 Pa. 479; *Downing v. Still*, 43 Mo. 309; *Graef v. Bernard*, 7 Misc. Rep. 246, 27 N. Y. Supp. 263; *McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656. See *Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7. Where a plaintiff has suffered a default, in consequence of accident, mistake, or excusable neglect, or by reason of the negligence or misunderstanding of his counsel, and thereupon a judgment for affirmative relief has been rendered in favor of the defendant, it may be set aside on plaintiff's motion and a new trial granted, for the plaintiff's situation should be governed by the same rules which are applicable to defaults of defendants. *Trueheart v. Simpson* (Tex. Civ. App.) 24 S. W. 842. But where defendant is satisfied with an interlocutory judgment rendered against him in an action, the judgment will not be vacated on plaintiff's motion, based merely on the ground that defendant's time to answer had not expired. *Havemeyer v. Brooklyn Sugar Refining Co.*, 26 Abb. N. C. 157, 13 N. Y. Supp. 873.

on his motion, and afford him the opportunity to proceed anew with a more just and satisfactory result.

§ 315. Joint Defendants.

Where a judgment is rendered against several defendants jointly, but is irregular or void as to one of them,—as for want of authority or want of jurisdiction over him,—it will be vacated on the application of that defendant.¹²⁶ So where an attorney confesses judgment against several partners, under an authority derived from only one, it is the duty of the others to make prompt application to the court to open the judgment.¹²⁷ Whether, in such a case, it would be deemed necessary to vacate the judgment as to all the defendants, or only as to the moving defendant, would depend somewhat upon the nature of the cause of action, but principally upon whether or not, in the particular jurisdiction, a joint judgment is considered as an entirety,—a question which will be found fully treated in another connection.¹²⁸

§ 316. Legal Representatives of Party.

Some of the statutes on this subject provide that when a judgment by default is taken on constructive service by publication, the defendant "or any person legally representing him" (or "his legal representatives"), may apply, within a limited time, to have it opened and the case retried; and others give the courts power to relieve a party, or his "legal representatives" from a judgment taken against

¹²⁶ *St. John v. Holmes*, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; *Franks v. Lockey*, 45 Vt. 395; *Fall v. Evans*, 20 Ind. 210; *Droham v. Norton*, 1 Misc. Rep. 486, 21 N. Y. Supp. 579; *First Nat. Bank v. Williams*, 126 Ind. 423, 26 N. E. 75; *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511; *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635.

¹²⁷ *Cyphert v. McClune*, 22 Pa. 195.

¹²⁸ *Supra*, § 211. And see *Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; *Calvert v. Ash*, 47 W. Va. 480, 35 S. E. 887; *Reynolds v. Barnard*, 36 Ill. App. 218; *Gould v. Sternburg*, 69 Ill. 531; *Clay v. Hildebrand*, 44 Kan. 481, 24 Pac. 962; *Steele v. Duncan*, 47 Kan. 511, 28 Pac. 206; *Martin v. Baugh*, 1 Ind. App. 20, 27 N. E. 110; *Neenan v. City of St. Joseph*, 126 Mo. 89, 28 S. W. 963; *Boyd v. Munson*, 56 Neb. 269, 76 N. W. 532.

him through his mistake, inadvertence, surprise, or excusable neglect. Under this clause it is held that one who was not a party to the proceeding in which the judgment was rendered, and who appears in his own right, is not entitled to have the judgment set aside.¹²⁹ But parties who have acquired the entire interest of a defendant in the subject-matter of an action are his "legal representatives" within the meaning of such clause, and the court may, upon such terms as may be just, relieve them from a default taken against him through their mistake, inadvertence, surprise, or excusable neglect.¹³⁰ And if a motion is made by persons other than the plaintiff, claiming to be his legal representatives, to set aside a judgment and to be substituted as plaintiffs, the parties making such motion must show a state of facts which would have supported such an application by the plaintiff in the judgment.¹³¹ Without doubt the phrase above used is broad enough to include the executor or administrator of a deceased party if a proper case for his intervention should arise.¹³²

§ 317. Strangers.

As a general rule, a judgment will not be vacated or set aside at the motion of a third person, not a party to the action.¹³³ It will

¹²⁹ *Parsons v. Johnson*, 66 Iowa, 455, 23 N. W. 921.

¹³⁰ *Plummer v. Brown*, 64 Cal. 420, 1 Pac. 703; *Malone v. Big Flat Gravel Min. Co.*, 98 Cal. 384, 28 Pac. 1063; *Thomas v. Morris*, 8 Utah, 284, 31 Pac. 446. Compare *Mueller v. Reimer*, 46 Minn. 314, 48 N. W. 1120. The grantee in a deed purporting to convey land then in possession of defendant, under a judgment in favor of defendant against the grantor, rendered in an action to which such grantee was not a party, cannot sue to set aside the judgment. *Whitney v. Kelley*, 94 Cal. 146, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106. And one purchasing land subject to the lien of a judgment cannot, in Pennsylvania, have the judgment vacated for mere irregularities. *Milleisen v. Senseman*, 4 Pa. Super. Ct. 455.

¹³¹ *Corwin v. Bensley*, 43 Cal. 253.

¹³² The administrator of one against whom judgment on an unsealed judgment note has been entered may have the judgment opened and interpose the defense of the statute of limitations. *Dick v. Mahoney*, 21 Pa. Co. Ct. R. 241. As to the right of heirs to move for the vacation of a judgment taken by default against their ancestor after his death, see *Nichols v. City of Chicago*, 184 Ill. 43, 56 N. E. 351.

¹³³ *Cosgrove v. United States*, 33 Ct. Cl. 167; *Drexel's Appeal*, 6 Pa. 272; *In re Rowland's Estate*, 4 Clarke (Pa.) 199; *Gaehring v. Haedrich*, 8 Pa.

be remembered that such persons have the right to impeach a judgment collaterally, whenever and wherever it comes in conflict with their rights, if it was founded in fraud and collusion.¹³⁴ And this will generally be an adequate protection to them. But there may be cases in which right and equity require that other persons should have the privilege of proceeding directly for the annulment of a judgment which fraudulently abridges their own rights or remedies. Accordingly the rule is stated that persons who were strangers to the record will have a standing to apply for the vacation of the judgment when the same was obtained by fraud or collusion, and they bear such a relation thereto, or to the subject-matter of the case, that their rights may be affected.¹³⁵ An invalid judgment by confession may be set aside at the instance of a junior judgment-creditor after notice to the plaintiff.¹³⁶ And if the purpose of a creditor in obtaining a judgment is not to collect his debt, but to help the debtor cover up his property, his judgment will be set aside, though it be

Super. Ct. 507; *Robinson v. Stevens' Adm'r*, 63 Vt. 555, 22 Atl. 80; *Smith v. City of Newbern*, 73 N. C. 303; *Hinsdale v. Hawley*, 89 N. C. 87; *Walton v. Walton*, 80 N. C. 26; *Jacobs v. Burgwyn*, 63 N. C. 196; *Uzzle v. Vinson*, 111 N. C. 138, 18 S. E. 6; *McGhee v. Romatka*, 18 Tex. Civ. App. 436, 44 S. W. 700; s. c., 47 S. W. 282; *Indianapolis, D. & W. Ry. Co. v. Crockett*, 2 Ind. App. 136, 28 N. E. 222; *Ex parte McKenzie*, 162 Ill. 48, 44 N. E. 413; *Packard v. Smith*, 9 Wis. 184.

¹³⁴ See supra, §§ 293-295.

¹³⁵ *Covey v. Wheeler*, 23 Pa. Co. Ct. R. 467; *Brettell v. Deffebach*, 6 S. D. 21, 60 N. W. 167. Thus, where judgment in an action against a municipal corporation is entered by collusion between plaintiff and one of defendant's officers, the court may, on the proper application of another officer, set the judgment aside and allow an answer on the merits to be interposed. *Sturm v. School District*, 45 Minn. 88, 47 N. W. 462; *Lowber v. Mayor of New York*, 26 Barb. (N. Y.) 262. Or the judgment in such a case may be set aside at the suit of tax-payers of the municipality. *Kane & Co. v. Independent School District*, 82 Iowa, 5, 47 N. W. 1076. Again, bondholders secured by a railroad mortgage, who were not parties to an action by other bondholders to foreclose the mortgage, may sue to set aside the proceedings in such action on the ground that it was not a representative action, but was fraudulently brought. *Stevens v. Central Nat. Bank*, 144 N. Y. 50, 39 N. E. 68. Where a sheriff, indemnified as to property levied on, makes wilful default in replevin, so that judgment is taken against him, the default may be set aside on motion of the indemnitor. *Jakobi v. Gorman*, 2 Misc. Rep. 190, 21 N. Y. Supp. 762.

¹³⁶ *Bernard v. Douglas*, 10 Iowa, 370.

shown that this debt was genuine.¹³⁷ So where a husband gives a mortgage, and suffers judgment on it, purposely, to defeat the wife of her dower, and the mortgagee has constructive notice of her rights, she may intervene and have a rule to open the judgment and let her in to defend to the extent of her dower.¹³⁸ It is also proper to vacate a judgment against an administrator, at the instance of the heirs, when the former's conduct has been so negligent as to leave the latter no other remedy and there is a good defense not presented by the defendant.¹³⁹ And the proper financial officer of a municipal corporation may move to vacate a judgment against it procured by the fraud or collusion of the other officers.¹⁴⁰ In New York, when a judgment-creditor seeks by motion to set aside a prior judgment on the ground of fraud, it is within the discretion of the trial-court whether to determine the matter on motion, or to require the creditor to bring an action, and its determination is not appealable.¹⁴¹

PART V. WHAT JUDGMENTS MAY BE VACATED.

§ 318. General Rule.

In general, the equitable power of the courts now under consideration is unlimited in respect to the judgments, rules, orders, and decrees upon which it may be exercised. At first sight, it might appear inconsistent to speak of setting aside a judgment which is a mere nullity. Yet the courts hold that even though the judgment be entirely void, the party against whom it exists has the right to have it vacated, and thus clear away any cloud that it may cast upon his right to alienate his property so long as it remains of record against him.¹⁴² The power is most commonly exercised in cases

¹³⁷ *Smith v. Schwed* (C. C.) 9 Fed. 483. See *Moore v. Dunn*, 147 Pa. 359, 23 Atl. 506.

¹³⁸ *McClurg v. Schwartz*, 87 Pa. 521.

¹³⁹ *McWillie v. Martin*, 25 Ark. 556. See *Pierce v. Probate Court*, 19 R. I. 472, 34 Atl. 902.

¹⁴⁰ *Lowber v. Mayor of New York*, 26 Barb. (N. Y.) 262.

¹⁴¹ *Beards v. Wheeler*, 76 N. Y. 213.

¹⁴² *Crane v. Barry*, 47 Ga. 476; *Mills v. Dickson*, 6 Rich. Law (S. C.) 487; *Foreman v. Carter*, 9 Kan. 674; *Hervey v. Edmunds*, 68 N. C. 243; *City of Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *Phoenix Bridge Co. v. Street*, 9 Okl. 422, 60 Pac. 221.

of judgments entered by default,¹⁴³ but it is equally applicable, proper grounds being shown, to such as are rendered upon trial and verdict.¹⁴⁴ Relief may be granted in this manner against judgments by confession,¹⁴⁵ and against probate orders and decrees,¹⁴⁶ and final settlements of administrators and trustees.¹⁴⁷ Under the code practice, on a motion to vacate a judgment in an equitable action, the same rules should be applied as in case of other judgments.¹⁴⁸ A rule absolute against a sheriff is not final and conclusive like a judgment between parties litigant; it may be vacated on motion at the same or a subsequent term.¹⁴⁹

§ 319. Consent Judgments.

A court has power to vacate and set aside a consent judgment on the ground of fraud, mutual mistake, or surprise, but it cannot alter or correct it, except with the consent of all the parties affected by it.¹⁵⁰ And where, in compromise of a claim, judgment has been

¹⁴³ It is said that the laws relating to the opening of judgments by default should be liberally construed, in order that cases may be disposed of on their merits. *Turner v. Coughran*, 8 S. D. 419, 66 N. W. 810. In Pennsylvania, there is no authority for a rule to open a judgment of nonsuit, such a judgment not being within the meaning of the statutes; but the proper and only practice is to apply to the court to take off the nonsuit. *Harvey v. Pollock*, 148 Pa. 534, 23 Atl. 1127.

¹⁴⁴ But in North Carolina, it is said that the statute authorizing the courts to relieve a party from a judgment taken against him through his mistake, surprise, inadvertence, or excusable neglect, has no application where the judgment is entered on a verdict, as the verdict would stand even if the judgment were set aside, and the relief would therefore be worthless if granted. *Flowers v. Alford*, 111 N. C. 248, 16 S. E. 319; *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840.

¹⁴⁵ *Hutchinson v. Ledlie*, 36 Pa. 112; *Goergen v. Schmidt*, 69 Ill. App. 338.

¹⁴⁶ *Whitaker v. Smith*, 33 Ga. 237; *Hirshfeld v. Brown* (Tex. Civ. App.) 30 S. W. 962; *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63.

¹⁴⁷ *Sheetz v. Kirtley*, 62 Mo. 417.

¹⁴⁸ *Ætna Life Ins. Co. v. McCormick*, 20 Wis. 265.

¹⁴⁹ *Wakefield v. Moore*, 65 Ga. 268.

¹⁵⁰ *Kerchner v. McEachern*, 93 N. C. 447; *Stump v. Long*, 84 N. C. 616; *Deaver v. Jones*, 114 N. C. 649, 19 S. E. 637; *Morris' Adm'r v. Peyton's Adm'r*, 29 W. Va. 201, 11 S. E. 954; *Colwell v. Wehrly*, 150 Pa. 523, 24 Atl. 737; *Spiehler v. Astel*, 83 Hun, 223, 31 N. Y. Supp. 584; *Atchison, T. & S. F. R. Co. v. Elder*, 149 Ill. 173, 36 N. E. 565; *Stites v. McGee*, 37 Or. 574, 61 Pac. 1129.

rendered against the defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel.¹⁵¹ So, a judgment regularly entered pursuant to an agreement of the attorneys, filed in the case, cannot be opened, after final adjournment of the term, on the ground that the agreement was not authorized.¹⁵²

§ 320. Judgments in Divorce.

It was the doctrine and rule of the ecclesiastical courts in England that "sententia contra matrimonium nunquam transit in rem judicatam."¹⁵³ That is to say that a sentence or judgment against the validity of a marriage,—either annulling a merely voidable marriage, or declaring that a pretended marriage was absolutely void,—was never final, but was forever open to revision and reversal.¹⁵⁴ Nevertheless this maxim was not universally assented to, for we find occasional expressions of a contrary opinion on the part of eminent ecclesiastical judges.¹⁵⁵ Now in this country, there are several cases holding that the statutes which authorize courts to open judgments or decrees within a certain time after their rendition, on proper application, where there was no other service than that by publication, or on other specified grounds, do not include decrees of divorce; proceeding generally on the theory that policy requires judgments of this character to be regarded as more stable and unassailable than any other species.¹⁵⁶ There are undoubtedly excellent reasons for

¹⁵¹ *Anderson v. Carr*, 54 Hun, 634, 7 N. Y. Supp. 281. A voluntary settlement of a usurious loan by a debtor, and a confession of judgment by him for the amount, will not bar him from subsequently having the judgment opened so as to enable him to set up the defense of usury. *Marr v. Marr*, 110 Pa. 60, 20 Atl. 592.

¹⁵² *Craven v. Canadian Pacific R. Co.* (C. C.) 62 Fed. 170; *Jacobs v. Kastholm*, 33 Ill. App. 164. See *Smith v. Wilson*, 87 Wis. 14, 57 N. W. 1115.

¹⁵³ *Kenn's Case*, 7 Coke, 43b.

¹⁵⁴ *Bowzer v. Ricketts*, 1 Hagg. Consist. 213; *Morris v. Webber*, 2 Leon. 169; *Meadows v. Duchess of Kingston*, Amb. 756; *Poynt. Mar. & Div.* 157; *Shelf. Mar. & Div.* 474; 2 *Bish. Mar. & Div.* §§ 748 et seq., where all the learning on this point is collected.

¹⁵⁵ *Norton v. Seaton*, 3 Phillim. Ecc. Judgm. 162; *Meadowcroft v. Huguenin*, 3 Curt. 403; *Prudam v. Phillips*, 2 Amb. 703.

¹⁵⁶ *Parlsh v. Parlsh*, 9 Ohio St. 534, 75 Am. Dec. 482; *Cox v. Cox*, 19 Ohio

this distinction.¹⁵⁷ And it has at times seemed so important to legislative bodies as to cause the enactment of clauses explicitly excepting adjudications in divorce from the operation of such statutes, as will appear from the cases just cited. But unless such decrees are thus specifically withdrawn from the general class, it is difficult to see how they can be considered as an exception to the terms of a statute plainly extending to all judgments, on any right principles of interpretation.¹⁵⁸ And aside from legislation, the courts will generally hear motions to vacate divorce judgments on the same grounds and conditions as any other judgments, except, perhaps, that they proceed with greater caution and with more anxious care for the intervening rights of strangers. Thus, where a decree of divorce has been obtained by fraud or deceit,—as where the complainant has practised fraud or trickery to prevent the defendant from having notice of the suit, or from appearing in the action, or from answering and defending the same,—the innocent party, thus deceived, may undoubtedly obtain the opening or vacating of the decree, by mak-

St. 502, 2 Am. Rep. 415; *Owens v. Sims*, 3 Cold. (Tenn.) 544; *McJunkin v. McJunkin*, 3 Ind. 30; *Woolley v. Woolley*, 12 Ind. 663; *Lewis v. Lewis*, 15 Kan. 181; *O'Connell v. O'Connell*, 10 Neb. 390, 6 N. W. 467; *Gilruth v. Gilruth*, 20 Iowa, 225; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Moster v. Moster*, 53 Mo. 326; *Tappan v. Tappan*, 6 Ohio St. 64.

¹⁵⁷ "There are excellent reasons why judgments in matrimonial causes, whether of nullity or divorce, should be even more stable, certainly not less, than in others. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons, that uncertainty and fluctuation in it must be greatly detrimental to the public interests. And especially to an innocent person who has contracted a marriage on faith of the decree of the court, the calamity of having the decree reversed and the marriage made void is past estimation." 2 Bish. Mar. & Div. § 750. "The statutory provision is nothing more than a legislative recognition of the principle of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully perhaps, procured its promulgation." *Parish v. Parish*, 9 Ohio St. 537.

¹⁵⁸ *Lawrence v. Lawrence*, 73 Ill. 577; *Smith v. Smith*, 20 Mo. 166; *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001; *Walrad v. Walrad*, 55 Ill. App. 688.

ing a timely and proper application and showing good cause.¹⁵⁹ And this is especially the case where both parties to be affected by the vacation of the judgment have been parties to the fraud.¹⁶⁰ So also it is well settled that a decree of divorce may be vacated which is void for want of jurisdiction in the court which rendered it.¹⁶¹ But a decree will not be vacated because, since the decree, the petitioner has been made, by a change in the law, an admissible witness to testify to his own innocence.¹⁶²

§ 320a. Adjudications in Bankruptcy.

An adjudication in bankruptcy, like other judgments, may be vacated or set aside by the court which rendered it, upon a motion made in due season by a competent party and based upon adequate cause. As to the parties who may move in this behalf, it is of course the right of an involuntary bankrupt to ask for the vacation of an adjudication against him. But where the adjudication passed by default, it will not be opened to allow the bankrupt to file an answer and contest the petition, where the answer proposed does not deny the act of bankruptcy charged, but merely denies that the petitioners are creditors, or denies that they are sufficient in number or amount.¹⁶³ Again, any creditor, whether he has proved his debt in bankruptcy or not, may move to set aside an adjudication of his debtor as a bankrupt, whenever such adjudication injuriously affects

¹⁵⁹ *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Carley v. Carley*, 7 Gray (Mass.) 545; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Gechter v. Gechter*, 51 Md. 187; *Rawlins v. Rawlins*, 18 Fla. 345; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, 46 Iowa, 649, 26 Am. Rep. 179; *Mansfield v. Mansfield*, 26 Mo. 163; *Johnson v. Coleman*, 23 Wis. 452, 90 Am. Dec. 193; *Crouch v. Crouch*, 30 Wis. 667; *True v. True*, 6 Minn. 458 (Gil. 315); *Young v. Young*, 17 Minn. 181 (Gil. 153); *Singer v. Singer*, 41 Barb. (N. Y.) 139; *Klaes v. Klaes*, 103 Iowa, 689, 72 N. W. 777; *Magowan v. Magowan*, 57 N. J. Eq. 195, 39 Atl. 364.

¹⁶⁰ *Denton v. Denton*, 41 How. Prac. (N. Y.) 221.

¹⁶¹ *Holmes v. Holmes*, 63 Me. 420; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *True v. True*, 6 Minn. 458 (Gil. 315); *Wortman v. Wortman*, 17 Abb. Prac. (N. Y.) 66; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Crouch v. Crouch*, 30 Wis. 667; *Weatherbee v. Weatherbee*, 20 Wis. 499.

¹⁶² *Holbrook v. Holbrook*, 114 Mass. 568.

¹⁶³ *In re Le Favour*, 8 Ben. 43, Fed. Cas. No. 8,208.

his interests.¹⁶⁴ Such a motion, for example, may be made by an attaching creditor whose lien will be dissolved by the adjudication,¹⁶⁵ or by the receiver of a bankrupt corporation, appointed under the laws of the state.¹⁶⁶

Any person seeking to have an adjudication in bankruptcy vacated or set aside must make his application therefor with due diligence and promptness upon being informed of the facts; if he delays for so long a time as to be chargeable with laches, his motion will not prevail, more especially where the rights of others have meanwhile become fixed.¹⁶⁷ Notice must be given to the bankrupt of an application to annul the adjudication in an involuntary proceeding, as the bankrupt has an interest in the continuance of the proceeding which may result in his discharge.¹⁶⁸ As to the grounds which will justify the court in revoking the order of adjudication, it may be stated that such a course is warranted by proof of fraud and collusion between the bankrupt and the petitioning creditors,¹⁶⁹ or where the adjudication was made upon a waiver by the attorney of the alleged bankrupt of important rights of his client,¹⁷⁰ or even upon proof of the assent of all known creditors that the adjudication may be vacated and publication of the notice of the application for the annulment.¹⁷¹ It is also held that the court of bankruptcy may open its order of adjudi-

¹⁶⁴ *In re Derby*, 6 Ben. 232, Fed. Cas. No. 3,815. But, to be entitled to move for the vacation of the adjudication, the creditor must own a provable debt or claim against the bankrupt. *In re Columbia Real Estate Co.* (D. C.) 101 Fed. 965. But it is said that when such a motion is based on a want of jurisdiction, it may be made by a stranger to the proceedings, appearing as *amicus curiæ*. *Id.*

¹⁶⁵ *In re Donnelly* (D. C.) 5 Fed. 783; *In re Bergeron*, 12 N. B. R. 335, Fed. Cas. No. 1,342.

¹⁶⁶ *In re Atlantic Mutual Life Ins. Co.*, 9 Ben. 270, Fed. Cas. No. 628.

¹⁶⁷ *In re Meade*, 19 N. B. R. 335, Fed. Cas. No. 9,370; *In re Republic Ins. Co.*, 8 N. B. R. 317, Fed. Cas. No. 11,706; *In re Nellson*, 7 N. B. R. 505, Fed. Cas. No. 10,090; *In re Court*, 17 N. B. R. 555, Fed. Cas. No. 3,284; *In re Thomas*, 11 N. B. R. 330, Fed. Cas. No. 13,891; *In re Lalor*, 19 N. B. R. 253, Fed. Cas. No. 8,001; *In re Groome* (D. C.) 1 Fed. 464; *In re Penn*, 4 Ben. 99, Fed. Cas. No. 10,926; *In re Baltimore County Dairy Ass'n*, 2 Hughes, 250, Fed. Cas. No. 828.

¹⁶⁸ *In re Bush*, 6 N. B. R. 179, Fed. Cas. No. 2,222.

¹⁶⁹ *In re Lalor*, 19 N. B. R. 253, Fed. Cas. No. 8,001.

¹⁷⁰ *In re Republic Ins. Co.*, 8 N. B. R. 317, Fed. Cas. No. 11,706.

¹⁷¹ *In re Magee*, Fed. Cas. No. 8,941.

cation and grant a re-hearing in case of newly discovered evidence.¹⁷² But, generally speaking, an adjudication in bankruptcy made upon due service of process, is final and will not be set aside on motion of the bankrupt, or of creditors, or of both, disputing the allegations of the petition, when no fraud or collusion is shown and they merely desire to retry the case.¹⁷³ The earlier cases held that the question of jurisdiction could not be raised on a motion to vacate the adjudication, creditors having an opportunity to dispute the jurisdiction when an application for discharge should be made.¹⁷⁴ But the later authorities favor the rule that an alleged want of jurisdiction is a question which the court should consider whenever and however it is raised.¹⁷⁵

A discharge in bankruptcy may be revoked or vacated when it is made to appear that it was procured by the fraud of the bankrupt.¹⁷⁶ This action can be taken only by the court which granted the discharge; the authority conferred by the bankruptcy law upon the federal courts, in that behalf, is incompatible with the exercise of a like power by any state court.¹⁷⁷

PART VI. GROUNDS FOR VACATING JUDGMENTS.

§ 321. Fraud and Collusion.

The power to set aside judgments for fraud or collusion, though expressly granted by statute in many of the states, is not dependent upon legislative recognition. It is a common law power, inherent in all courts of record, and may be exercised after the expiration of the term at which the judgment was rendered, on the application of the party injured.¹⁷⁸ It is specifically regulated in some of the states,

¹⁷² *In re Great Western Tel. Co.*, 5 Blss. 359, Fed. Cas. No. 5,739.

¹⁷³ *In re McKinley*, 7 Ben. 562, Fed. Cas. No. 8,864.

¹⁷⁴ *In re Penn*, 4 Ben. 99, Fed. Cas. No. 10,926; *In re Harris*, 6 Ben. 375, Fed. Cas. No. 6,111.

¹⁷⁵ *In re Columbia Real Estate Co. (D. C.)* 101 Fed. 965. See *In re Kindt (D. C.)* 98 Fed. 867.

¹⁷⁶ Bankruptcy Act 1808, § 15; *In re Dietz (D. C.)* 97 Fed. 563; *In re Augenstein*, 2 MacArthur (D. C.) 322; *Coates v. Blush*, 1 Cush. (Mass.) 564.

¹⁷⁷ *Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19.

¹⁷⁸ *Taylor v. Sindall*, 34 Md. 38; *Humphreys v. Rawn*, 8 Watts (Pa.) 78;

by laws which give the courts power to vacate judgments on the ground of "fraud practised by the successful party."¹⁷⁹ In some jurisdictions, it is thought that, when a judgment is attacked and sought to be set aside on the ground of fraud, it must appear that the fraud was practised in the very act of obtaining the judgment; for any fraud anterior to that is a defense available at law and therefore concluded by the judgment.¹⁸⁰ But this rule should not be taken without qualifications. For there may well be cases of fraud in the cause of action, or in the manner of procuring the instrument in suit, where the courts would not withhold relief on motion; as, where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defense and could not have discovered it by due diligence, or where he was fraudulently prevented from setting it up at the proper time.¹⁸¹ One of the strongest grounds on which to base an application for the vacation of a judgment is fraud practised upon the court in its procurement; as, where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which

Mayberry v. McClurg, 51 Mo. 256; *Melick v. First Nat. Bank*, 52 Iowa, 94, 2 N. W. 1021; *Conn's Lessee v. Whiteside*, 6 Humph. (Tenn.) 47; *In re Fisher*, 15 Wis. 511; *Farrow v. Dial*, 1 McMul. (S. C.) 292, 36 Am. Dec. 267.

¹⁷⁹ Code Iowa, § 3154; *Manning v. Nelson*, 107 Iowa, 34, 77 N. W. 503; 2 Ballinger's Ann. Codes & St. Wash. § 5153, subd. 4; *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; *Mansf. Dig. Ark. § 3909*, subd. 4. In some states, a judgment may be vacated for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by decree in chancery, or in a court of law by an independent action, with appropriate pleadings, but cannot be set aside on either of these grounds on motion. *Dugan v. McGlann*, 60 Ga. 353; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480.

¹⁸⁰ *Zellerbach v. Allenberg*, 67 Cal. 296, 7 Pac. 908; *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836.

¹⁸¹ See *Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; *Schweinfurter v. Schmahl*, 69 Minn. 418, 72 N. W. 702. In *Tennessee*, it is said that when a judgment is to be set aside because of fraud, complainant must aver facts showing an intentional contrivance by one or more of the parties to the suit to keep complainant and the court in ignorance of the real facts touching the matter in litigation, whereby a wrong conclusion was reached, and positive injury done to complainant's rights. *Smith v. Miller* (Tenn. Ch. App.) 42 S. W. 182.

would not have been given if the whole conduct of the case had been fair.¹⁸² But fraud, sufficient to taint the judgment, may also be practised by one of the parties upon the other. Thus, a judgment should be annulled or vacated if it is shown that the instrument or the claim on which it is founded had been paid or satisfied before the institution of the suit and the fact of payment concealed.¹⁸³ So also, where the defendant was tricked into signing a judgment note, supposing it to be a simple promissory note, or was secretly made to assume obligations towards third persons which he had no intention of incurring, and thereupon judgment was entered up against him.¹⁸⁴ Again, where judgment is recovered upon an instrument to which the defendant's name was forged, it will be vacated on his motion, provided he is not chargeable with lack of diligence in failing to allege the forgery in defense to the action.¹⁸⁵ Again, fraud practised by one of the parties upon the other, and sufficient to warrant the vacation of the judgment, may consist in deceit as to the cause of action sued on, or as to the nature of the relief sought, or as to defendant's rights in the subject-matter of the litigation, whereby he is lulled into a fancied security and wronged by the judgment which is obtained against him.¹⁸⁶ And the same principle applies where the successful

¹⁸² *Rivers v. West*, 103 Ga. 582, 30 S. E. 555. A false allegation by the plaintiff as to his residence is not ground for setting aside the judgment. *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836. The joining of a defendant merely for jurisdictional purposes may or may not be a fraud on the court. *Id.* Taking a judgment while a motion for security for costs was pending is not a fraud on the court so as to authorize the setting aside of the judgment, since the court takes judicial notice of the status of a case as shown by its own records. *Id.* Bringing a defendant to a county under a criminal warrant, in order to have him there served with civil process, is not a fraud on the court, in this sense. *Id.*

¹⁸³ *Noyes v. Loeb*, 24 La. Ann. 48; *Halladay v. Underwood*, 75 Ill. App. 96. See *Mitchell v. Kinnaird* (Ky.) 52 S. W. 830.

¹⁸⁴ *Anderson v. Field*, 6 Ill. App. 307; *United Security Life Ins. & Trust Co. v. Ott* (N. J. Eq.) 26 Atl. 923.

¹⁸⁵ *State v. Richardson*, 1 Marv. (Del.) 372, 41 Atl. 75; *Reeser v. Brenne-man*, 4 Pa. Dist. R. 143; *Lindsley v. Sparks*, 20 Tex. Civ. App. 56, 48 S. W. 204; *Fox v. Lima Nat. Bank*, 25 Wkly. Law Bul. (Ohio) 28.

¹⁸⁶ *In re O'Neill's Estate*, 90 Wis. 480, 63 N. W. 1042; *Guild v. Phillips* (C. C.) 44 Fed. 461; *Smallwood v. Trenwith*, 110 N. C. 91, 14 S. E. 505. Where a decree of foreclosure, obtained by default, fraudulently included the mortgagor's homestead, the decree will be vacated as to the homestead.

party has taken means to prevent proper service being made upon the other, or has procured the service of false or misleading papers, or a false return of service, or has made false representations as to the status of the case or the time of its trial.¹⁸⁷

Collusion between some of the parties, working injury to the just rights of the others, will also be ground for setting aside the judgment. Thus, where suit is brought against a corporation, and the director or officer upon whom process is served covinously agrees with the plaintiff for the rendition of a judgment, it is a fraud upon the corporation which will warrant the vacation of the judgment, if it is shown that there was a good defense, or otherwise that injustice has been done.¹⁸⁸ So, where attorneys for one of the parties are induced to withdraw their appearance and suffer a judgment, without authorization from their client,¹⁸⁹ or where there was collusion between the counsel on the two sides of the case, and a wrongful judgment is consequently entered.¹⁹⁰ But there is no fraud in a judgment authorizing its annulment merely because the defendant fa-

where the mortgagor was not culpably negligent. *Williams v. Lumpkin* (Tex. Civ. App.) 26 S. W. 103. So, where a decree declaring that certain heirs have no interest in the property, and enjoining them from setting up title thereto, was procured by the fraudulent practices and misrepresentations of the widow, it will be set aside in equity, and the rights of the heirs established, even against purchasers, if they had notice. *Hayden v. Hayden*, 46 Cal. 332. But mere failure by defendant voluntarily to disclose evidence which would tend to defeat his defense does not constitute such fraud as would authorize the vacation of a judgment. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

¹⁸⁷ *Stillwell v. Stillwell*, 47 N. J. Eq. 275, 20 Atl. 900, 24 Am. St. Rep. 408; *Miller v. Neidzielska*, 176 Pa. 409, 35 Atl. 225; *Pattison v. Hughes*, 80 Md. 559, 31 Atl. 320; *Rodríguez v. Espinosa* (Tex. Civ. App.) 25 S. W. 669; *Wolf v. Butler*, 81 Tex. 86, 16 S. W. 794. Where A. brought ejectment against B., the tenant of C., and B. reported to C., whose counsel put in a demurrer and began to prepare a defense; but pending this preparation, and before argument on the demurrer, B. fraudulently, and collusively with A., withdrew the demurrer, it was held proper to set aside a judgment taken by default by A., and to admit C. to a defense. *Barrett v. Graham*, 19 Cal. 632.

¹⁸⁸ *Farrar v. Consolidated Apex Min. Co.*, 12 S. D. 237, 80 N. W. 1079; *Willis v. Rapid Valley Horse-Ranch Co.*, 7 S. D. 114, 63 N. W. 546; *Nelson v. Blaisdell*, 23 Or. 507, 32 Pac. 391.

¹⁸⁹ *Crescent Brewing Co. v. Cullins*, 125 Ind. 110, 25 N. E. 159.

¹⁹⁰ *Smith v. Miller* (Tenn. Ch. App.) 42 S. W. 182.

vored other creditors, whereby it proved worthless.¹⁹¹ A judgment by default, entered by fraud and collusion, may be opened after the death of the judgment-debtor, so as to allow his administrator to defend.¹⁹²

But a judgment or decree will not be declared void for fraud because there may be suspicious circumstances connected with its rendition. Fraud will not be presumed; it must be satisfactorily shown.¹⁹³ It has been said that it would require a strong case to authorize the setting aside of a judgment taken by default on the ground that the same was procured through false representations.¹⁹⁴ And the fact that there was usury in the original mortgage debt, on which a judgment is founded, is not alone sufficient to establish fraud which will give another creditor the right to have the judgment set aside.¹⁹⁵

In this connection it must be remarked that, in an action to set aside a judgment on the ground of fraud, neither the judgment thus sought to be vacated, nor an order refusing to set aside a default and permit an answer in that case, can be set up as a bar to the action.¹⁹⁶ The right to have a judgment set aside on the ground of fraud is one that admits of being waived, and the defendant, by his subsequent conduct, may be estopped to avail himself of it.¹⁹⁷ In a case where one of several defendants had a good defense, and by the fraudulent device of the plaintiff was prevented from making it, and was also prevented from making his motion within the time limited by law to set aside the judgment, it was held that, as against such defendant, the plaintiff was estopped to enforce the judgment.¹⁹⁸

¹⁹¹ *Gray v. Richmond Bicycle Co.*, 26 Misc. Rep. 165, 55 N. Y. Supp. 787.

¹⁹² *Hartigan v. Nagle*, 11 Misc. Rep. 449, 32 N. Y. Supp. 220.

¹⁹³ *Tacoma Lumber & Manuf'g Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115; *Jones v. Brittan*, 1 Woods, 667, Fed. Cas. No. 7,455; *Caldwell v. Fifield*, 24 N. J. Law, 150.

¹⁹⁴ *Obermeyer v. Einstein*, 62 Mo. 341.

¹⁹⁵ *Mahan v. Cavender*, 77 Ga. 118.

¹⁹⁶ *States v. Cromwell* (N. Y.) 14 N. E. 448.

¹⁹⁷ *Schenck's Appeal*, 94 Pa. 37.

¹⁹⁸ *Johnson's Adm'rs v. Unversaw*, 30 Ind. 435.

§ 322. Judgment taken contrary to Agreement.

Where a plaintiff or his counsel prevents an appearance and defense in an action by representations and promises, he is guilty of a species of fraud if, in violation of such promises or representations, he takes a default in a case where he knows there is a defense.¹⁹⁹ Consequently, where it is shown that there was an honest agreement between the parties that the case should be continued, or that defendant's time to answer should be extended, or that the action should be dismissed, as the result of a compromise, and yet the plaintiff, without notice to the defendant and in violation of the agreement, enters up a default, or proceeds to trial and procures a judgment against the defendant in his absence, this is good ground for setting aside the judgment.²⁰⁰ So where the plaintiff has previously filed a bill in equity concerning the same matter in litigation at law, and has obtained the defendant's consent for the case at law to stand continued until the bill has been heard, but afterwards takes judgment by default while the bill is still pending.²⁰¹ But the court will not on this ground set aside a judgment unless the alleged agreement was definite and specific, or unless the promises or representations of the plaintiff were such that the defendant could rely upon them and remain inactive, without being chargeable with any lack of diligence or vigilance in guarding his own interests.²⁰² And in some of the

¹⁹⁹ *Douthit v. Douthit*, 133 Ind. 26, 32 N. E. 715.

²⁰⁰ *Binsse v. Barker*, 13 N. J. Law. 263, 23 Am. Dec. 720; *McIntosh v. Crawford County Com'rs*, 13 Kan. 171; *Perry v. Fisher* (Ky.) 44 S. W. 378; *Mitchell v. Knight*, 7 Ohio Cir. Ct. R. 204; *Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496; *Milwaukee Harvester Co. v. Schroeder*, 72 Minn. 393, 75 N. W. 606; *Heinemann v. Le Clair*, 82 Wis. 135, 51 N. W. 1101; *Stafford v. McMillan*, 25 Wis. 508; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761; *McGowan v. Kreling*, 117 Cal. 31, 48 Pac. 980; *Merchants' Ad-Sign Co. v. Los Angeles Bill-Posting Co.*, 128 Cal. 619, 61 Pac. 277. Such a case is within the statutes authorizing the vacation of a judgment taken against the defendant through his "surprise or excusable neglect." *Thompson v. Connell*, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818.

²⁰¹ *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218.

²⁰² *Jenkins v. Gamewell Fire Alarm Tel. Co.* (Cal.) 31 Pac. 570; *Huntington v. Emery*, 74 Md. 67, 21 Atl. 495; *Funk v. Kansas Manuf'g Co.*, 53 Neb. 450.

states it is the rule that a mere oral agreement between the parties to postpone the trial of a cause beyond the day set for trial, or to dismiss the action, which is not reduced to writing and filed, or not communicated to the court whose action it is to govern, will not be sufficient to justify the vacation of the judgment.²⁰³

§ 323. Perjury.

Another species of fraud which the plaintiff may practise in procuring a judgment, and which will be sufficient to cause its vacation, is his own wilful perjury. "A defendant failing to defend cannot have the judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or other witness, nor even on account of the perjury of the other witnesses, provided the plaintiff himself is wholly guiltless.²⁰⁴ Nor can he have the judgment vacated on account of any mistake or error on the part of the court or jury, unless the record affirmatively shows such mistake or error. All such mistakes or errors each party is bound to anticipate, and to prepare for by extraordinary diligence. But no party is bound to anticipate or to suppose that the other party will commit wilful and corrupt perjury, and no party is bound to exercise extraordinary diligence in preparing to meet such perjury."²⁰⁵ In Minnesota, a stat-

73 N. W. 931; *Holland Bank v. Lieuallen* (Idaho) 53 Pac. 398. A judgment entered upon a cognovit will not be opened because of a verbal promise, alleged to have been made at the time of giving the cognovit, that the judgment would never be enforced. *Heckscher v. Middleton*, 54 N. J. Law, 312, 23 Atl. 943.

²⁰³ *Dixon v. Brophey*, 29 Iowa, 460; *Le Duc v. Slocomb*, 124 N. C. 347, 32 S. E. 726; *Mathews v. Bishop*, 106 Ga. 564, 32 S. E. 631. See *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540.

²⁰⁴ A decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely. *Pico v. Cohn*, 91 Cal. 129, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077. But in New York, a judgment may be vacated if shown to be based on perjured testimony inspired and manufactured by an attorney for the successful party, who conspired with the witnesses to obtain the judgment. *Nugent v. Metropolitan St. Ry. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476.

²⁰⁵ *Laithe v. McDonald*, 12 Kan. 340; *Humphreys v. Rawn*, 8 Watts (Pa.) 78; *Rowe v. Chicago Lumber & Coal Co.*, 50 La. Ann. 1258, 24 South. 235. Compare *Baker v. Wadsworth*, 67 Law J. Q. B. 301. The courts of the United

ute provides an action to set aside a judgment obtained by means of the "perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party."²⁰⁶ But it is held that an action cannot be maintained, under this section, upon the bare allegation that, upon an issue of fact squarely made, so that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was false or perjured testimony by the successful party or his witnesses.²⁰⁷

§ 324. Want of Notice.

It is in general good ground for setting aside a judgment that there was no service of process on the defendant, or that the service was materially irregular or defective, provided there has been no waiver of such defects by appearance or otherwise.²⁰⁸ Thus where

States will not entertain a suit to vacate or annul a judgment of a court having jurisdiction to render it, solely on the ground that it was procured by means of the perjured testimony of the party whom it benefits. *United States v. Throckmorton*, 98 U. S. 66, 25 L. Ed. 93; *United States v. Gleason*, 33 C. C. A. 272, 90 Fed. 778.

²⁰⁶ Gen. St. Minn. 1878, c. 66, § 285.

²⁰⁷ *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797; *Wilkins v. Sherwood*, 55 Minn. 154, 56 N. W. 591. In Washington, perjury does not constitute such fraud as will authorize the vacation of a judgment, except under circumstances which deceive the opposite party as to the nature of the testimony, and relieve him of the implication of want of diligence in discovering its falsity. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 609, 75 Am. St. Rep. 849.

²⁰⁸ *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Shuford v. Cain*, 1 Abb. U. S. 302, Fed. Cas. No. 12,823; *Duhaime v. Monast*, 20 R. I. 524, 40 Atl. 377; *Kunes v. McCloskey*, 10 Pa. Co. Ct. R. 542; *Szerlip v. Baier*, 21 Misc. Rep. 331, 47 N. Y. Supp. 133; *People v. Dunn*, 54 N. Y. Supp. 194; *Florsheim Bros. Dry-Goods Co. v. Williams*, 45 La. Ann. 1196, 14 South. 120; *Simcock v. First Nat. Bank*, 14 Kan. 529; *Hanson v. Wolcott*, 19 Kan. 207; *Hunton v. Euper*, 63 Ark. 323, 38 S. W. 517; *Brady v. Washington Ins. Co.*, 67 Ill. App. 159; *Davis v. Burt*, 7 Iowa, 56; *Allen v. Rogers*, 27 Iowa, 106; *Jamison v. Weaver*, 84 Iowa, 611, 51 N. W. 65; *In re Behrens' Estate*, 104 Iowa, 29, 73 N. W. 351; *Hurlburt v. Reed*, 5 Mich. 30; *Carr v. Commercial Bank*, 16 Wis. 50; *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342; *Smith's Adm'r v. Rollins*, 25 Mo. 408; *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; *Norton v. Atchison, T. & S. F. R. Co.*, 97 Cal. 388, 32 Pac. 452, 33 Am. St. Rep. 198; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Lomax v. Besley*, 1 Colo. App. 21, 27 Pac. 167.

the return of the sheriff showed a service of the summons on Monday, but the proofs on a motion to set aside a default showed that the service was in fact made on Sunday, it was held that, although the return could not be impeached for the purpose of showing that the default was irregular, yet the fact might be proved for the purpose of excusing the default as a condition to obtaining relief.²⁰⁹ So a judgment may be set aside at the instance of a defendant who shows that, although the summons was left at his residence, he was, at the time, absent or sick, and had no actual knowledge of the suit, or that it was forwarded to him by mail but never reached his hands.²¹⁰ A joint verdict and judgment against several defendants, some of whom were never served and have not waived service by appearance, may be set aside on motion.²¹¹ So, in the case of a corporation, it will be good ground for vacating a judgment against it that the person upon whom service was made was not an officer of the corporation, or not authorized to accept service, or that he failed, through negligence or forgetfulness, or with a sinister motive, to give notice of the action to those charged with the duty of defending the action in behalf of the corporation.²¹² It should be observed that the rule as to the presumptions in favor of the validity and regularity of proceedings had before judgment is applicable only in cases of collateral attack, and cannot be invoked to cure defects in the service of process, upon an application to set aside a default and permit a defense on the merits.²¹³ But it has been held that the appearance of a party against whom a judgment has been rendered, to move that it be opened and for leave to answer, is a general appearance to the merits and waives all defects in the service of process and other pro-

²⁰⁹ *Smith v. Noe*, 30 Ind. 117.

²¹⁰ *Kolb v. Raisor*, 17 Ind. App. 551, 47 N. E. 177; *Burkhard v. Smith*, 19 Misc. Rep. 31, 42 N. Y. Supp. 638; *Osman v. Wisted*, 78 Minn. 295, 80 N. W. 1127; *Malone v. Big Flat Gravel Min. Co.*, 93 Cal. 384, 28 Pac. 1063.

²¹¹ *Harralson v. McArthur*, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; *Carter v. Kaiser* (Tenn. Ch.) 48 S. W. 265.

²¹² *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053; *Board of Education v. National Bank of Commerce*, 4 Kan. App. 438, 46 Pac. 36; *Glaeser v. City of St. Paul*, 67 Minn. 368, 69 N. W. 1101. Compare *Davis v. Steuben School Tp.*, 19 Ind. App. 694, 50 N. E. 1.

²¹³ *Blythe v. Hinckley* (C. C.) 84 Fed. 228.

ceedings preliminary to the judgment.²¹⁴ A judgment based on a false return of service may be attacked by motion in the same proceeding.²¹⁵ And where the return of process is defective in not showing a due and legal service, this will also be ground for setting aside the judgment, though the court may, in a proper case, allow the return to be amended and dismiss the motion to vacate.²¹⁶

But want of notice, as a ground for vacating a judgment, means want of notice of the institution of the action,—want of that notice which is essential to give the court jurisdiction over the person of the defendant. When a defendant has been legally served with proper process, he is in court for every purpose connected with the action. It is then his duty to follow up his case, and take notice of the filing of subsequent papers in the action, such as demurrers, cross-petitions, and motions of various sorts; and he must ascertain for himself when the case is put on the calendar or docket for trial, or set down for hearing, and when it is likely to be reached. If he fails, through his own carelessness or lack of vigilant attention, to obtain notice of the various steps in the action, or of the time of trial, and consequently suffers a judgment, it will not be vacated merely on that ground.²¹⁷

²¹⁴ Gray v. Gates, 37 Wis. 614.

²¹⁵ Du Bols v. Clark, 12 Colo. App. 220, 55 Pac. 750.

²¹⁶ Stotz v. Collins, 83 Va. 423, 2 S. E. 737. But a judgment will not be vacated years after its rendition because the record shows that the affidavit of service of summons therein was not sworn to, where it is not shown that the summons was not in fact served, as such a defect will not affect the jurisdiction of the court to render a judgment. State v. Superior Court of Pierce County, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724.

²¹⁷ Curry v. Janicke, 48 Kan. 168, 29 Pac. 319; Kamman v. Otto (Ky.) 34 S. W. 1070; Culver v. Brinkerhoff, 180 Ill. 548, 54 N. E. 585; Blaine v. Brisc e. 16 Mont. 582, 41 Pac. 1002. In California, it is held that, even if the defendant is a non-resident, he is bound to know the day fixed for setting cases for trial, and if there is no such day fixed he must ascertain the day of trial from the proceedings of the court or otherwise; and he cannot have a judgment vacated merely on the ground that neither he nor his attorney had notice that the case was set for trial. Dusy v. Prudom, 95 Cal. 648, 30 Pac. 798. Compare Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Clark v. Ovharzabal, 129 Cal. 328, 61 Pac. 1119.

§ 325. Unauthorized Appearance by Attorney.

By the English rule, where a defendant has been served with process, and an attorney without authority appears for him, the court will not interfere to set aside the proceedings, if the attorney be solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the court will relieve the defendant on equitable terms if he has a defense on the merits. But where a plaintiff, without serving a defendant, accepts the appearance of an unauthorized attorney for the defendant, the court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and the expense to which he has been put from the delinquent attorney by summary proceedings.²¹⁸ It is the prevailing doctrine of the American cases that a judgment obtained against a party upon whom no process was served, and for whom an attorney has entered an appearance without authority, may be set aside, even at a subsequent term.²¹⁹ In

²¹⁸ *Bayley v. Buckland*, 1 Exch. 1.

²¹⁹ *American Aquol & Pyrodene Paint Co. v. Smith*, 90 Hun, 609, 35 N. Y. Supp. 723; *Post v. Charlesworth*, 66 Hun, 256, 21 N. Y. Supp. 168; *Woods v. Dickinson*, 7 Mackey, 301; *Longman v. Bradford*, 108 Ga. 572, 33 S. E. 916; *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424; *Critchfield v. Porter*, 3 Ohio, 518; *Lyon v. Boilvin*, 2 Gilman (Ill.) 629; *Russell v. Pottawattamie Co.*, 29 Iowa, 256; *Stanton-Thompson Co. v. Crane*, 24 Nev. 171, 51 Pac. 116; *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922. In Pennsylvania, where judgment is entered against a defendant in an action of which he had no notice, service of the writ having been accepted for him by an attorney who had no authority to act for him, it is proper for the court, on defendant's motion, to strike off the judgment. *Bryn Mawr Nat. Bank v. James*, 152 Pa. 304, 25 Atl. 823. But if it is not admitted that the attorney's appearance for defendant was unauthorized, then the judgment cannot be stricken off, but can only be opened, and the disputed facts sent to a jury. *Swartz v. D. S. Morgan & Co.*, 163 Pa. 195, 29 Atl. 975, 43 Am. St. Rep. 786. Defendant must act promptly; if he was aware that an attorney, though unauthorized, had appeared for him, a default judgment will not be vacated after the lapse of 10 years. *Lytile v. Forest*, 16 Pa. Co. Ct. R. 239.

In New York, it appears to be settled that relief against a judgment rendered against one not served with process, on the unauthorized appearance of an attorney in his name, may be sought and obtained by motion in the case in which such appearance was entered; that if, at the time of such motion, the attorney who entered such appearance is insolvent, it is no reason

some of the states, however, there is still a disposition to base a distinction on the question of the attorney's solvency, and to hold that the judgment should not be vacated, if he is able to respond in damages, though he was entirely without authority to appear.²²⁰ At any rate, the claim of a party for whom an appearance has been entered, to deny the authority of the attorney and ask relief, is viewed with great disfavor by the courts wherever innocent third persons have acquired rights under the judgment or decree sought to be annulled.²²¹ And relief will be denied where the fact of the attorney's authority is not fully negated, but left in doubt under the testimony, and there is no allegation of a meritorious defense to the action.²²² Applications for relief against a judgment on this ground are more commonly made by bill in equity for an injunction against the enforcement of the judgment than by motion to vacate it, and the point will receive further consideration in connection with the former species of remedies.²²³

for denying the motion that, at the time the judgment was given, the attorney was able to respond in damages; that it rests in the discretion of the court, according to the circumstances of the particular case, either to vacate the judgment entirely or to allow it to stand as security, with leave to the defendant to come in and defend; but that if the defendant was a non-resident, and was not served, he is entitled to have the judgment set aside absolutely. *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771; *City of New York v. Smith*, 61 N. Y. Super. Ct. 374, 20 N. Y. Supp. 666.

²²⁰ *University of North Carolina v. Lassiter*, 83 N. C. 38; *Chadbourn v. Johnston*, 119 N. C. 282, 25 S. E. 705. And see *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; *Seale v. McLaughlin*, 28 Cal. 668; *Schirling v. Schies*, 41 Miss. 644; *Smith v. Bowditch*, 7 Pick. (Mass.) 137; *Powers v. Trenor*, 3 Hun, 3.

²²¹ *Kenyon v. Shreck*, 52 Ill. 382.

²²² *Russell v. Pottawottamie Co.*, 29 Iowa, 256. When the record shows that a defendant appeared by his attorney, it is conclusive of the appearance, but only prima facie evidence of the authority of the attorney to act, which may be denied and rebutted by proof. *Blyth & Fargo Co. v. Swenson*, 15 Utah, 345, 49 Pac. 1027. The burden of proof is on the party denying the attorney's authority to appear. *Connell v. Galligher*, 36 Neb. 749, 55 N. W. 229. And a party to an action cannot retry the question of the authority of an attorney to represent him therein, by a petition to vacate the judgment, when such question was adjudicated in the original action on a motion to dismiss. *Roberts v. Shelton*, S. W. R. Co., 21 Wash. 427, 38 Pac. 576.

²²³ See, *infra*, § 374.

§ 326. Irregularities.

It is a general rule that the court in which a judgment was rendered may vacate it, on motion, at the same or a subsequent term, on proof that it was entered irregularly and not according to the course of the court.²²⁴ Thus a judgment entered in favor of the plaintiff, before the time for answering has expired, may properly be set aside;²²⁵ and so may a judgment entered while there was an answer or demurrer on file and not yet disposed of.²²⁶ So a judgment in a suit in equity, entered through inadvertence by the clerk on a special advisory verdict, while other issues of fact remain to be determined by the court, may be set aside, and a new judgment entered, after the adoption of the special verdict by the court and its findings on other issues.²²⁷ On similar principles a judgment will be vacated which was rendered on issue joined without

²²⁴ *O'Hara v. Baum*, 82 Pa. 416; *Murdock v. Steiner*, 45 Pa. 349; *Craig v. Wroth*, 47 Md. 281; *Keaton v. Banks*, 32 N. C. 381, 51 Am. Dec. 393; *Dick v. McLaurin*, 63 N. C. 185; *Cowles v. Hayes*, 69 N. C. 410; *Winslow v. Anderson*, 20 N. C. 9, 32 Am. Dec. 651; *Hervey v. Edmunds*, 68 N. C. 243; *Wolfe v. Davis*, 74 N. C. 597; *Foreman v. Carter*, 9 Kan. 674; *Reynolds v. Stansbury*, 20 Ohio, 344, 55 Am. Dec. 459; *Hunt v. Yeatman*, 3 Ohio, 16; *Huntington v. Finch*, 3 Ohio St. 445; *Branstetter v. Rives*, 34 Mo. 318; *Downing v. Still*, 48 Mo. 309; *Doan v. Holly*, 27 Mo. 256; *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601. But some of the cases hold that if the alleged irregularity is not apparent on the face of the record, it cannot be vacated on motion, unless during the term at which the judgment was rendered. *Phillips v. Evans*, 64 Mo. 17; *Hall v. West Chester Pub. Co.*, 180 Pa. 561, 37 Atl. 106; *Tuffree v. Stearns Ranchos Co. (Cal.)* 54 Pac. 826; *Busching v. Sunman*, 19 Ind. App. 683, 49 N. E. 1091. As to raising questions of jurisdiction in this manner, see *Parker v. Belcher*, 87 Ga. 110, 13 S. E. 314; *Richardson v. Stowe*, 102 Mo. 33, 14 S. W. 810.

²²⁵ *Remnant v. Hoffman (Cal.)* 11 Pac. 319; *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218; *Mailhouse v. Inloes*, 18 Md. 329; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123. See *supra*, § 85. But compare *Williamson v. Nicklin*, 34 Ohio St. 123. The fact that certain creditors in insolvency proceedings were adjudged in default, when they were not so in fact, and thereby denied a recovery to which they were entitled, is sufficient reason to set aside the judgment. *Cooper v. Disbrow*, 106 Iowa, 550, 76 N. W. 1013.

²²⁶ *Norman v. Hooker*, 35 Mo. 366; *Ollphant v. Whitney*, 34 Cal. 25; *Follett v. Alexander*, 58 Ohio St. 202, 50 N. E. 720.

²²⁷ *Cummings v. Ross*, 90 Cal. 68, 27 Pac. 62.

any notice of trial or appearance at the trial,²²⁸ or where a default was taken and final judgment entered on the first day of the term,²²⁹ or where an amendment was allowed which introduced an entirely new cause of action, and the defendant was defaulted without having had a proper opportunity to defend,²³⁰ or where the judgment was taken before the case regularly came up for hearing.²³¹ So also, a judgment obtained on a complaint or petition which does not contain any averments showing liability on the part of the defendant will be set aside.²³² And the same course may be taken if the verdict and judgment are for an amount in excess of the damages laid in the writ or claimed in the declaration or complaint, unless the plaintiff remits the excess, or unless the judgment can be corrected, in this particular, from matter of record.²³³ It will also be proper to set aside a judgment which was entered after the death of a party,²³⁴ or which was rendered on a joint contract against a part only of the defendants, when it should have been against all,²³⁵ or when a default was wrongly taken in consequence of a misnomer of the defendant.²³⁶ A judgment entered on a declaration reciting a

²²⁸ *People v. Bacon*, 18 Mich. 247; *Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161.

²²⁹ *Clegg v. Flithian*, 32 Ind. 90.

²³⁰ *Weatherford v. Van Alstyne*, 22 Tex. 22.

²³¹ *Beach v. McCann*, 1 Hilt. (N. Y.) 256; *Findley v. Johnson*, 1 Overt. (Tenn.) 344. A judgment for plaintiff in assumpsit, after trial, should be set aside, and a new trial granted, if there was no plea by defendant. *Johnson v. Fry*, 88 Va. 695, 14 S. E. 183.

²³² *Mason v. Kansas City C. Ry. Co.*, 58 Kan. 817, 51 Pac. 284. But where an amended complaint, on which judgment is rendered, is unobjectionable, the judgment will not be set aside because the original complaint did not state a cause of action. *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51.

²³³ *Barnes v. Branch*, 3 McCord (S. C.) 19; *Andrews v. Monilaws*, 8 Hun. 65. See *F. A. Poth Brewing Co. v. Bernd* (N. J.) 36 Atl. 664; *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725; supra, § 138. When the proper remedy is by appeal, see *Palmer v. Bank of Zumbrota*, 65 Minn. 90, 67 N. W. 893. Adjudging interest on notes from the date they were due, instead of the last day of grace, is not such error as warrants setting aside the judgment, the amount being small. *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 606.

²³⁴ *Bowen v. Troy Portable Mill Co.*, 31 Iowa, 460; *Holmes v. Honie*, 8 How. Prac. 384; supra, § 199.

²³⁵ *Mullendore v. Silvers*, 34 Ind. 98.

²³⁶ *Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830.

bond and warrant of attorney to confess judgment, but without any appearance for the defendant or formal confession of judgment, will be set aside as irregular;²³⁷ and so will a judgment taken by default when it appears that the real party in interest was not made a party to the action.²³⁸ But a defendant cannot have a judgment against him opened because the suit was brought in the name of a wrong person, if that person is authorized to receive satisfaction of the judgment and to give a valid discharge.²³⁹ It is also proper to vacate a judgment entered where no findings of fact or law were made or filed by the court, as required by law, and findings were not waived,²⁴⁰ and inconsistency between the findings of fact and conclusions of law in the judgment of a referee, confirmed by the court, is sufficient ground for setting the judgment aside.²⁴¹

But on the other hand, it is not every trivial or inconsiderable irregularity that will support an application to vacate the judgment. The principles which should govern the exercise of this remedial power of the courts have been well stated by the supreme court of North Carolina in the following language: "A motion in the action to set aside the judgment for irregularity will be entertained by the court, if it should be made within a reasonable period after it was granted [rendered]. This, however, does not imply that every judgment affected in any degree, directly or indirectly, by some or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action or the proceedings in it; there are others of more or less importance that may be waived or cured by what may take place or be done in the action after they happen; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court

²³⁷ *Lytle v. Colts*, 27 Pa. 193. See, also, *Knox Co. Bank v. Doty*, 9 Ohio St. 506, 75 Am. Dec. 479.

²³⁸ *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77. Where, in ejectment, judgment by default was rendered against a tenant without the knowledge of his landlord, a motion to vacate is proper. *Mowry v. Nunez* (Cal.) 33 Pac. 1122. Compare *Chappell v. Real-Estate Pooling Co.*, 91 Md. 754, 46 Atl. 982.

²³⁹ *Grinnell v. Schmidt*, 2 Sandf. Ch. 706.

²⁴⁰ *Prondzinski v. Garbutt*, 9 N. D. 239, 83 N. W. 23.

²⁴¹ *Moore v. Richardson*, 5 S. C. 142.

will or will not grant such a motion in any case must depend upon a variety of circumstances, and largely upon their peculiar application to the case in which the motion shall be made. Generally a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it, or when the judgment is void. The court will always, upon motion, strike from its record a judgment void for irregularity."²⁴² Although the irregularity might have defeated the proceeding, if objection had been timely and properly made, yet if it is such as must be deemed waived by the failure to object, it will not be ground for vacating the judgment.²⁴³ A failure to give security for costs, under the general rule of the court, is no cause for setting aside the judgment.²⁴⁴ It is also held that if any portion of a judgment is regular and valid, it will not be set aside as irregular and invalid upon motion.²⁴⁵ An affidavit is not required to support a rule to strike off a judgment which, on the face of the record, appears to have been unlawfully and-improvidently entered.²⁴⁶

§ 326a. Objections to Jury.

A motion to vacate or set aside a judgment will not generally be granted on the ground that one or more of the jury, upon whose verdict the judgment was rendered, was incompetent or disqualified, or on account of his alleged bias or hostility against the unsuccessful party, or by reason of any alleged misconduct on the part of the jury, the proper remedy, in such a case, being by challenge duly interposed at the trial, or by motion in arrest of judgment, or by a

²⁴² *Williamson v. Hartman*, 92 N. C. 236. And see *Alexander v. Ling*, 31 Or. 222, 50 Pac. 915; *Crook v. Hamlin*, 140 N. Y. 297, 35 N. E. 499. A judgment is not void, and subject to a motion to vacate, because the judgment roll, as made up, did not contain all the proper papers, the remedy being by motion to have such papers inserted. *Breckenridge Co. v. Perkins*, 14 App. Div. 629, 43 N. Y. Supp. 800.

²⁴³ *Cosgrove v. Butler*, 1 S. C. 241; *Crow v. American Mortgage Co.*, 92 Ga. 815, 19 S. E. 31; *Slater v. Skirving*, 45 Neb. 594, 63 N. W. 848.

²⁴⁴ *Lytte v. Fenn*, 3 McLean, 411, Fed. Cas. No. 8,651.

²⁴⁵ *Challiss v. Headley*, 9 Kan. 684.

²⁴⁶ *Allen v. Krips*, 119 Pa. 1, 12 Atl. 759.

motion for a new trial, according to the circumstances.²⁴⁷ But it has been ruled that a verdict not rendered by the persons designated and selected according to law, but participated in by others, who, by fraudulent practices, obtained seats in the jury box, heard the evidence, and returned a verdict, having no right or authority to do so, and a judgment entered in pursuance of such verdict, should be set aside upon the motion of the injured party, if he was innocent of the fraud, without inquiry as to whether or not it was just as between the parties.²⁴⁸

§ 327. Judgments against Persons under Disabilities.

We have already seen that a judgment against a married woman, rendered in an action to which her coverture, if pleaded, would have been a good defense, is certainly voidable, if not absolutely void;²⁴⁹ and that the same is true of a judgment against an infant for whom no guardian was appointed or appeared.²⁵⁰ It follows, of course, that such judgments may be set aside, upon a proper and timely application by motion, by the court which rendered them. Where a statute provides that judgments shall not be set aside on motion, for irregularities, after the lapse of a certain time, this does not apply to cases where the motion is based on errors of fact; and it is held that the entry of a judgment against an infant or a person under other disabilities, or a dead man, is not an irregularity but an error of fact; and the statute does not affect the power of the court to vacate it on motion.²⁵¹

²⁴⁷ *Bickel v. Kraus*, 100 Ky. 728, 39 S. W. 414; *Mize v. Americus Manuf'g & Imp. Co.*, 109 Ga. 359, 34 S. E. 583; *supra*, § 103.

²⁴⁸ *Illinois Steel Co. v. Szutenbach*, 67 Ill. App. 280.

²⁴⁹ *Supra*, § 190. Compare *Littster v. Littster*, 151 Pa. 474, 25 Atl. 117; *Adams v. Grey*, 154 Pa. 258, 26 Atl. 423.

²⁵⁰ *Supra*, §§ 193-196.

²⁵¹ *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Levy v. Williams*, 4 S. C. 515; *Keaton v. Banks*, 32 N. C. 381, 51 Am. Dec. 393; *Bond v. Neuschwander*, 86 Wis. 391, 57 N. W. 54; *Consolidated Coal Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600; *Rogers v. McMillen*, 6 Colo. App. 14, 39 Pac. 891; *State v. Tate*, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664. In Pennsylvania, it is said that the case of a judgment entered against a dead man is an exception to the rule that a motion to strike off a judgment must be on the ground of irregularity

§ 328. Unauthorized Entries.

A judgment which was inadvertently or irregularly entered by the judge or the clerk of the court without any authority, may be vacated at any time.²⁵² In a case in Iowa, after an appeal had been perfected and a supersedeas bond filed, it was agreed between the parties to the action, without the consent of the sureties, that a judgment should be entered in the supreme court against the appellants and sureties, and a judgment of affirmance was accordingly entered. It was held that upon a motion made at the following term, at the instance of the sureties, the court had jurisdiction to set aside the judgment.²⁵³

§ 329. Judgment not Vacated because Erroneous.

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion.²⁵⁴ Thus, the reception of secondary or illegal evi-

appearing on the face of the record, and it may be stricken off. *Stevenson v. Virtue*, 21 Pa. Co. Ct. R. 229.

²⁵² *Merrick v. City of Baltimore*, 43 Md. 219; *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727; *United States v. McKnight*, 1 Cranch, C. C. 84, Fed. Cas. No. 15,695; *Murray v. Derrick*, 101 Ga. 113, 28 S. E. 616; *Wolf v. Shenandoah Nat. Bank*, 84 Iowa, 138, 50 N. W. 561; *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75; *Vanderpool v. Vanderpool*, 162 Pa. 394, 29 Atl. 910. But in Illinois, it is said that a judgment entered for a bona fide debt, past due, will not be set aside at a subsequent term, although entered without authority. *Reynertson v. Central Lumber Co.*, 69 Ill. App. 131.

²⁵³ *Drake v. Smythe*, 44 Iowa, 410.

²⁵⁴ *State v. Horton*, 89 N. C. 581; *May v. Stimson Lumber Co.*, 119 N. C. 96, 25 S. E. 721; *Hauscheld v. Hauscheld*, 33 App. Div. 296, 53 N. Y. Supp. 831; *Tallaferro v. Steele*, 14 La. Ann. 656; *Harriman v. Swift*, 31 Vt. 387; *Peake v. Redd*, 14 Mo. 79; *Bank of United States v. Moss*, 6 How. 31, 12 L. Ed. 331; *Wiggins v. Stelner*, 103 Ala. 655, 16 South. 8; *Coffey v. Proctor Coal*

dence in proof of a fact is no ground to annul the judgment rendered in the case.²⁵⁵ The statutes enacted in many of the states, granting power to vacate judgments rendered against a party through his "mistake, inadvertence, surprise, or excusable neglect," do not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court.²⁵⁶ So the decree of a court of equity cannot be set aside, on motion, for defective allegations in the bill or for defective pleadings; the proper remedy is by bill of review.²⁵⁷

§ 330. Not for Grounds which might have been pleaded in Defense.

A motion or proceeding to vacate or set aside a judgment cannot be sustained on any grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence.²⁵⁸ So where, in an action regularly commenced and prosecuted, without any fraud or fraudulent representations, judgment is rendered by consent against the defendants, they cannot thereafter have the judgment set aside and a new trial granted, on the ground of the existence of a complete legal defense to the action, the nature and extent of which they were aware of at the time of the entry of judgment.²⁵⁹ A judgment will not be stricken off because the warrant of attorney on which it was entered appears to be dated

Co. (Ky.) 20 S. W. 288; *Sexton v. Rock Island Lumber & Manuf'g Co.*, 49 Kan. 153, 30 Pac. 164; *Pierson v. Benedict*, 5 Kan. App. 790, 48 Pac. 996; *Davis v. Fields*, 9 Wash. 78, 37 Pac. 281. But a trial court, being satisfied that its order for the distribution of a fund is not in accordance with the direction of the supreme court relative thereto, may vacate the order, to the end that the direction may be carried out. *Fifth Nat. Bank v. Clinton Circuit Judge*, 100 Mich. 67, 58 N. W. 648.

²⁵⁵ *Elder v. City of New Orleans*, 31 La. Ann. 500.

²⁵⁶ *Loomis v. Rice*, 37 Wis. 262.

²⁵⁷ *Brown v. Bennett*, 55 Ga. 189.

²⁵⁸ *Roblehaud v. Nelson*, 28 La. Ann. 578; *Barksdale v. Greene*, 29 Ga. 418; *Easley v. Camp*, 40 Ga. 698; *Field v. Sisson*, 40 Ga. 67; *Purity Ice Works v. Rountree*, 104 Ga. 676, 30 S. E. 885; *Smith v. Wachob*, 179 Pa. 260, 36 Atl. 221; *Deering Harvester Co. v. Donovan*, 82 Minn. 162, 84 N. W. 745, 83 Am. St. Rep. 417.

²⁵⁹ *Elder v. National Bank*, 12 Kan. 242; *Carlson v. Phinney*, 56 Minn. 476, 58 N. W. 38; *Gillespie v. Rogers*, 184 Pa. 488, 39 Atl. 290.

on Sunday; courts will not, on such grounds, interfere with an executed contract.²⁶⁰ Where a judgment was obtained in a court of law, and an injunction was afterwards issued to restrain the collection of it, which injunction was dissolved and judgment entered on the injunction bond, it was held that a motion to vacate the latter judgment, upon an allegation that the original judgment had been satisfied by payment to the sheriff, could not be entertained; the proper course would have been to plead such payment or have satisfaction entered on the record.²⁶¹ But in Pennsylvania, a judgment by confession on a warrant of attorney may be opened and the defendant let in to a defense, where it appears that the defendant was entitled to certain credits which should have been deducted from the amount of the judgment, or set off against it.²⁶²

§ 331. Illegality of Cause of Action.

An apparent exception to the rule stated in the preceding section is that in some jurisdictions the courts exercise the power to open or vacate judgments in cases where the consideration on which they are founded is tainted with illegality. Usury has been considered a good ground for calling this power into operation.²⁶³ But the general rule is wise and salutary, and exceptions of this kind should

²⁶⁰ *Baker v. Lukens*, 35 Pa. 146.

²⁶¹ *Council v. Willis*, 66 N. O. 359.

²⁶² *Bright v. Diamond*, 180 Pa. 476, 42 Atl. 45; *Helmgartner v. Stewart*, 180 Pa. 500, 37 Atl. 93. So, where a bond with warrant of attorney is given with a mortgage for the purchase money of land, judgment entered thereon may be opened to permit the defendant to show a contemporaneous oral agreement that the bond should be collectible only out of the property conveyed. *Schweyer v. Walbert*, 190 Pa. 334, 42 Atl. 604. A judgment entered by the assignee of a judgment note will be opened where it appears that the defendant had paid the note to the payee without notice of the assignment. *Walker v. Sallada*, 17 Pa. Co. Ct. R. 371.

²⁶³ *Anderson's Appeal* (Pa.) 1 Atl. 329; *Fleming v. Jencks*, 22 Ill. 475. But if usurious interest has been paid on a judgment note after judgment has been entered on it, that does not make it necessary to open the judgment in order to give the debtor proper relief. The payment will be considered as an equitable payment on the judgment itself to the amount of the excess of interest, and the court may stay execution, as in any other case of alleged payment, until the facts can be ascertained and the just amount applied to the judgment. *Shafer's Appeal*, 99 Pa. 246.

not be received with any degree of favor where the party objecting (as will usually happen) was not prevented from setting up the illegality as a defense to the action. In Georgia, it was held that a constitutional provision that the courts should not render or enforce any judgment for a demand founded on slave property as the consideration, did not authorize them to vacate a judgment already rendered on such a demand.²⁶⁴ And in general, in accordance with the rule that, where both parties have equally participated in an immoral or illegal transaction the courts will refuse to aid either of them, but will leave them where they stand, it is held that a judgment taken by confession or default will not be opened or vacated to allow the defendant to escape from liability on an unlawful or immoral transaction in which he knowingly participated.²⁶⁵

§ 332. Newly-discovered Evidence.

Where facts occur after judgment (or before judgment but after the time when the party can avail himself of them in the action) showing that the judgment ought not to be enforced, in whole or in part, relief may be given on account thereof, on motion to vacate the judgment, to order it satisfied, or to stay proceedings on it, according to the circumstances of the particular case.²⁶⁶ But the party must be prompt and diligent. A judgment will not be vacated on the ground of newly-discovered evidence, when it appears that the defendant, knowing that the claim sued for was paid, and that there were receipts for its payment, yet neglected to appear and make efforts to procure evidence of the same.²⁶⁷ And where a motion for a new trial has been overruled, on the ground that the

²⁶⁴ *Ransone v. Grist*, 40 Ga. 241; *Inman v. Jones*, 44 Ga. 44; *Bell v. Hanks*, 55 Ga. 274.

²⁶⁵ *Fields v. Brown*, 80 Ill. App. 287; *Shumaker v. Reed*, 13 Pa. Co. Ct. R. 547; *Woelfel v. Hammer*, 159 Pa. 446, 28 Atl. 146.

²⁶⁶ *Cooley v. Gregory*, 16 Wis. 303; *Wells, Fargo & Co. v. Wall*, 1 Or. 295; *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366; *Krall v. Campbell Printing-Press & Manuf'g Co.*, 79 Tex. 556, 15 S. W. 585. Compare *Ziegler v. Evans*, 8 Kulp (Pa.) 180.

²⁶⁷ *Heathcote v. Haskins*, 74 Iowa, 566, 38 N. W. 417. And see *Merrifield v. Bell*, 60 Hun, 576, 14 N. Y. Supp. 322; *Robinson v. Davis*, 66 Ark. 429, 51 S. W. 66.

newly-discovered evidence on which the application is based is not of sufficient importance for that purpose, the same evidence cannot be made the basis of a direct action to set aside the judgment.²⁶⁸

§ 333. Judgment on Reversed Judgment.

Where suit is brought in one state, say Colorado, on a judgment rendered by a trial court in another state, say Illinois, and judgment recovered thereon, and subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, is reversed, these facts, being properly brought before the court, constitute good ground for vacating the judgment in Colorado.²⁶⁹ Similarly, where a judgment is entered on a warrant of attorney, and a transcript of it taken to another county, and afterwards the original judgment is stricken off for cause, the judgment in the other county falls with it.²⁷⁰ On analogous principles, when the defendant in a criminal case is tried, and a fine imposed on him, and judgment entered thereon for the amount of the fine and costs, and afterwards the governor remits the fine, the court should, on motion, vacate the judgment as to the fine, leaving it subsisting as to the costs.²⁷¹

²⁶⁸ *Mayor, etc., of City of New York v. Brady*, 115 N. Y. 599, 22 N. E. 237. In England, where it is sought to rescind a valid and final judgment on the ground of the discovery of new evidence, it must be shown that such evidence is both new and material; although evidence may have been withheld from the court at the original trial by one of the parties to the suit, with an improper intention, such conduct is not sufficient to set aside the judgment unless the evidence withheld would have had a material effect upon the decision of the court. *Boswell v. Coaks*, 6 Rep. 167. A change in the interpretation of a law applicable to a cause prosecuted to judgment does not entitle the unsuccessful party in the suit to reopen the controversy. *Travis County v. King Iron Bridge & Manuf'g Co.*, 34 C. C. A. 620, 92 Fed. 690.

²⁶⁹ *Heckling v. Allen* (C. C.) 15 Fed. 196; *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107.

²⁷⁰ *Banning v. Taylor*, 24 Pa. 297.

²⁷¹ *Chisholm v. State*, 42 Ala. 527.

§ 334. Statutory Grounds for Vacating Judgments.

Hitherto we have been considering what may be called the common law grounds for vacating judgments,—those causes which, independent of statute, are recognized as sufficient to call into play the inherent power of courts of record to grant relief of this nature. In many of the states, however, the matter is regulated by statutes, which empower the courts to set aside judgments for certain enumerated causes within a limited time. Thus in several states, the laws authorize the court, in its discretion and upon such terms as may be just, to relieve a party from a judgment or order taken against him through fraud or through his “mistake, inadvertence, surprise, or excusable neglect,” provided the application be made within a certain time after the rendition or entry of judgment (or “after notice thereof”) usually six months or a year.²⁷² In several others the purport of the statute is substantially the same, though expressed in somewhat different language, the causes specified being “unavoidable casualty or misfortune preventing the party from prosecuting or defending,” “fraud practised by the successful party in obtaining the judgment,” mistake of the clerk, death of a party, etc.²⁷³ In Connecticut, the statute authorizes the vacation of a judgment for mistake, accident, or other reasonable cause.²⁷⁴ In Georgia, a judgment by default may be opened where the defendant was prevented by “providential cause” or “excusable neglect” from filing his defense at the proper time.²⁷⁵ In Vermont, similar action may be taken when the defendant was unjustly deprived of a hearing by

²⁷² Code Civ. Proc. N. Y. § 724; Code Civ. Proc. N. C. § 274; Code Proc. S. C. § 195; Rev. St. Ind. 1894, § 399 (Rev. St. 1881, § 396); Rev. St. Wis. § 2832; Code Civ. Proc. Dak. § 143; Comp. Laws N. D. § 4939; Comp. Laws S. D. § 4939; Code Civ. Proc. Cal. § 473; Code Civ. Proc. Colo. § 75; 1 Hill's Ann. Laws Or. § 102; Code Civ. Proc. Mont. § 774; 2 Ballinger's Ann. Codes & St. Wash. § 5153; 2 Hill's Code Wash. § 221; Gen. St. Nev. 1885, § 3217; Rev. St. Idaho 1887, § 4229; Comp. Laws Utah, § 3256.

²⁷³ Rev. St. Ohio, § 5354; Miller's Code Iowa, § 3154; Civ. Code Ky. § 518; Gen. St. Kan. 1889, par. 4669; Code Civ. Proc. Neb. § 602; Sand. & H. Dig. Ark. § 4197; Code Civ. Proc. Okl. § 588.

²⁷⁴ Gen. St. Conn. 1888, § 1126.

²⁷⁵ Civil Code Ga. § 5072.

fraud, accident, or mistake.²⁷⁶ In Minnesota, a judgment may be set aside which was obtained by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party.²⁷⁷ In Ohio, a judgment may be vacated for "irregularity in obtaining it."²⁷⁸ The construction of these terms will mainly occupy our attention through the succeeding sections. But before passing on, it is necessary to observe that these statutes are exclusive with respect to the causes which they enumerate but not as to other possible causes. That is, if a party seeks relief on the ground of one of the causes specified in the statute, he must bring himself well within its terms and his application must be made within the time limited. But the fact that such and such causes are provided by statute does not prevent the courts from acting on other causes, just and reasonable in themselves and good at common law, and where an application is based on such a ground, outside the statute, it is not governed by the statute, in respect to the time of moving or otherwise.²⁷⁹

§ 335. Mistake.

When statutes authorize the vacation of a judgment entered against a party through his "mistake," it is to be understood that they mean a mistake of fact. Mistake of law—that is, the party's ignorance of the law, or mistake as to his legal rights or duties in the premises—will not warrant the setting aside of the judgment.²⁸⁰ And even when the mistake is one of fact, there must be some reasonable and valid excuse for its having occurred, so that it cannot

²⁷⁶ R. L. Vt. § 1422.

²⁷⁷ Gen. St. Minn. 1878, c. 66, § 285; Gen. St. Minn. 1894, § 5434.

²⁷⁸ Rev. St. Ohio, § 5357.

²⁷⁹ *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; *Cowles v. Hayes*, 69 N. C. 406; *Bond v. Epley*, 48 Iowa, 600. See *People v. O'Connell*, 23 Cal. 281.

²⁸⁰ *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118; *Chaffin v. Fulkerson*, 95 Ky. 277, 24 S. W. 1066; *Jartman v. Pacific Fire Ins. Co.*, 69 Conn. 355, 37 Atl. 970; *Thompson v. Harlow*, 150 Ind. 450, 50 N. E. 474; *In re Carr's Will*, 64 Hun, 636, 19 N. Y. Supp. 647; *Thacker v. Thacker*, 125 Ind. 489, 25 N. E. 595. Compare *Arnold v. Norfolk & New Brunswick Hosiery Co.*, 65 Hun, 621, 19 N. Y. Supp. 957.

be said to be due merely to the party's heedlessness or indifference, and he must show a defense to the action and due diligence in seeking to vacate the judgment after discovering his mistake. These conditions being met, the judgment may be set aside on the ground of a mistake as to the identity of the suit, as where the party honestly became confused between different suits brought against him, or between a civil and a criminal action touching the same subject-matter and pending at the same time;²⁸¹ or a mistake as to the capacity in which he is sued, as, if he supposes the action to be against him in an official capacity when it was really the intention to sue him as an individual;²⁸² or a mistake as to the time when he is required to plead or answer, or as to the time of the trial.²⁸³ But on the other hand, it is said that an affidavit that the party defaulted mistook the court in which his case was pending does not show sufficient ground for setting aside the judgment.²⁸⁴ And courts are not much disposed to vacate judgments on the ground of misunderstandings between parties and their counsel. Thus, it is held that a party's mistaken belief that he had retained an attorney to take charge of the case does not entitle him to have a default judgment vacated, where the facts did not justify that belief.²⁸⁵ But

²⁸¹ *Bertline v. Bauer*, 25 Wis. 486; *Martin v. Curley*, 70 Minn. 489, 73 N. W. 405. See *Devlin v. Boyd*, 69 Hun, 328, 23 N. Y. Supp. 523. One who suffers judgment by default in a suit to foreclose a mortgage, to which his name was forged, cannot afterwards have the judgment set aside on the ground that his failure to appear and defend was due to the fact that he thought the suit was to foreclose another mortgage given by him to a third person. *Cleland v. Hamilton Loan & Trust Co.*, 55 Neb. 13, 75 N. W. 239.

²⁸² *Capital Savings Bank & Trust Co. v. Swan*, 100 Iowa, 718, 69 N. W. 1065. But one who is sued as administrator and individually, and who, when the summons is shown to him, says he knows all about it, walks away from the officer before it is read to him, and, supposing he is sued only as administrator, makes no defense, cannot have a judgment by default set aside. *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963.

²⁸³ *Johnson v. Eldred*, 13 Wis. 482; *Manwaring v. Lippincott*, 52 App. Div. 526, 65 N. Y. Supp. 428; *Hanthorn v. Oliver*, 32 Or. 57, 51 Pac. 440, 67 Am. St. Rep. 518; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Miller v. Carr*, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180; *Coos Bay, R. & E. R. & Nav. Co. v. Endicott*, 34 Or. 573, 57 Pac. 61. Compare *Grosvenor v. Doyle*, 50 Ill. App. 47.

²⁸⁴ *Robertson v. Bergen*, 10 Ind. 402.

²⁸⁵ *Ames Iron Works v. Chinn*, 20 Tex. Civ. App. 382, 49 S. W. 665; *North-*

a mistake or misunderstanding as to the terms or effect of an agreement between the two parties to the suit may justify the opening of a default, or the modification of the judgment.²⁸⁶ In an action to set aside a judgment on the ground of mistake, if the complaint fails to make explanation of the mistake or the causes which produced it, it fails to set forth facts sufficient to constitute a cause of action.²⁸⁷

The "mistake" which will justify the vacation of a judgment may also be the mistake of the court or the judge. For instance, a mistake in the transmission of a telegram by the judge of the court, for which the party is in no way responsible, whereby he is deprived of a hearing on the trial, is ground for vacating the judgment.²⁸⁸ But "wherever it may be found that inadvertence or mistake is held to be a ground for setting aside a judgment, it will be noticed that it is not a mistake of the law, or an inadvertent conclusion by the court as to what the law is, but a mistake or inadvertence in doing something not intended to be done."²⁸⁹ And where the judgment entered on the journal is different from what was intended by the court, but is shown to be such as ought to have been rendered, it will not be vacated or modified as entered by mistake.²⁹⁰

§ 336. Surprise.

Under a statute which empowers the court, within a year after notice of a judgment, to relieve a party therefrom on the ground of "surprise," the fact that the party was surprised by a ruling of the court, refusing to continue the cause on his motion, is not sufficient.²⁹¹ Nor is it enough that he was surprised by a decision hold-

ern Pac. & P. S. S. R. Co. v. Black, 3 Wash. St. 327, 28 Pac. 538. See Moore v. Kelly & Jones Co., 109 Ga. 798, 35 S. E. 168.

²⁸⁶ *Benge v. Potter* (Ky.) 55 S. W. 431.

²⁸⁷ *Douglass v. Brooks*, 38 Cal. 670.

²⁸⁸ *Thum v. Pike* (Idaho) 55 Pac. 864.

²⁸⁹ *Cooper v. Duncan*, 20 Mo. App. 355; *Sargent v. Kindred*, 5 N. D. & 63 N. W. 151.

²⁹⁰ *Murphy v. Swadner*, 34 Ohio St. 672.

²⁹¹ *Breed v. Ketchum*, 51 Wis. 164, 7 N. W. 550. See *Winter v. State*, 18 Ga. 275.

ing a complaint bad on other grounds than those urged,²⁹² nor that he was surprised by evidence produced at the trial, unless he asked for a continuance to procure testimony to meet it,²⁹³ nor because he was absent from the trial in consequence of his belief that the case could not possibly be reached for trial that day, although it was reached only through the unexpected continuance of some of the preceding cases.²⁹⁴ Nor can a party claim that he was legally "surprised" by the transfer of his case to a different court, though he was actually ignorant of it, if he might have discovered the fact by due diligence.²⁹⁵ On the other hand, in a case in West Virginia, it appeared that an action was brought in a county court, and two years later was transferred to the circuit court, no order except continuances being made in it after such transfer. The judge of the circuit court could not preside at the trial, and twelve years later the plaintiff, in the absence of the defendant and his counsel, caused a special judge to be elected, and, without the knowledge of the defendant, the case was tried, and a verdict and judgment rendered for the plaintiff. The defendant, being notified of such judgment, moved the court to set the same aside because of the facts above stated, and upon his affidavit alleging surprise and the full payment of the debt sued on the circuit court set aside the judgment and awarded the defendant a new trial. In this, it was held, there was no error.²⁹⁶ So, again, where the respondent to a petition for a writ of prohibition files a demurrer and answer, and the demurrer is overruled, and judgment absolute given against him on the insufficiency of his answer, where, in the absence of a motion for judgment on the pleadings, he expected that only the demurrer would be passed on, a motion to vacate the judgment for surprise will be granted.²⁹⁷ But it is probable that the species of "surprise" primarily contemplated by the statutes is that which results from the taking of a judgment contrary to an agreement or understand-

²⁹² *Ean v. Chicago, M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N. W. 329.

²⁹³ *Robinson v. Davis*, 66 Ark. 429, 51 S. W. 66.

²⁹⁴ *Andres v. Kridler*, 49 Neb. 535, 68 N. W. 938.

²⁹⁵ *Phillip v. Davis (Iowa)* 78 N. W. 810.

²⁹⁶ *Bennett v. Jackson*, 34 W. Va. 62, 11 S. E. 734.

²⁹⁷ *Heilbron v. Campbell (Cal.)* 23 Pac. 1032.

ing that the case should be continued or not pressed, or not brought to trial,²⁹⁸ though that is also a kind of fraud. It seems that there may also be legal "surprise" in the unexpected withdrawal from the case of a party's attorney,²⁹⁹ though not where the judgment was given by consent of the party's attorney, and the contention merely is that he exceeded his authority.³⁰⁰

§ 337. Casualty or Misfortune.

In several of the states, as we have already stated, the statutes specify "unavoidable casualty or misfortune preventing the party from defending or prosecuting" as a ground for vacating judgments. Decisions under this clause are of general importance; for it cannot be doubted that failure to appear in consequence of an unavoidable casualty or misfortune would be a case of "excusable neglect" within the statutes in other states. That the defendant was prevented from reaching the place of trial by a railroad accident, or by the impassable condition of the roads, or by storms or other insuperable obstacles, is a sufficient ground for vacating a default judgment against him, if he shows a good defense.³⁰¹ So also, the judgment should be vacated where it appears that the summons was served at his residence while he, with all the members of his family, was absent on a vacation, and that he had no knowledge of the action until he was requested to pay the judgment,³⁰² or where the civil docket was disarranged by the trial of the criminal docket, and defendant's case was disposed of while his attorney was temporarily absent from the court room,³⁰³ or where, shortly before the trial, defendant's attorney absconded, without the knowledge of his client.³⁰⁴ But the mere fact that the party wrote to an attorney to

²⁹⁸ See, *supra*, § 322. And see *Dunlop v. Schubert*, 97 Wis. 135, 72 N. W. 350.

²⁹⁹ *Ex parte Rountree*, 51 S. C. 405, 29 S. E. 66.

³⁰⁰ *Hairston v. Garwood*, 123 N. C. 345, 31 S. E. 653.

³⁰¹ *Town of Omro v. Ward*, 19 Wis. 232; *Decker v. Graves*, 10 Ind. App. 25, 37 N. E. 550. Compare *Malek v. Kodad*, 92 Iowa, 763, 60 N. W. 491.

³⁰² *Schnitzler v. Fourth Nat. Bank*, 1 Kan. App. 674, 42 Pac. 496.

³⁰³ *Cooley v. Barbourville Land & Improvement Co.'s Assignee (Ky.)* 43 S. W. 464.

³⁰⁴ *Ennis v. Fourth St. Bldg. Ass'n*, 102 Iowa, 520, 71 N. W. 423.

appear for him, though without disclosing his defense, and had no knowledge that his letter was not delivered to the attorney until after the judgment was rendered and the court had adjourned, is not a sufficient excuse.³⁰⁵ Nor is it sufficient that the party failed to appear at the time his case was called in consequence of misunderstanding his attorney's statement as to when the court met,³⁰⁶ nor that his absence from home on a business trip prevented him from receiving notices sent to him by his counsel, as to the progress of the case and the time of its trial.³⁰⁷ On the other hand, mental unsoundness is such a "misfortune," within the meaning of the statutes, as will authorize the court to vacate or modify a judgment.³⁰⁸ And if a party is deprived of the opportunity to interpose a meritorious defense by being detained as a convict in the penitentiary, the court may, on a proper application after his release, open the default and vacate the judgment.³⁰⁹ But mere ignorance of the English language is not a sufficient ground for such relief, if the defendant knew that a suit had been commenced against him.³¹⁰

§ 338. Sickness of Defendant.

In some of the states, it is held that the illness of a party, occurring on or continuing through the day of trial, and so severe as to confine him to his house and prevent him from attending the court and trying his suit, is such an "unavoidable casualty or misfortune" as entitles him to have the judgment against him set aside.³¹¹ And in other states, this is considered a case of "excusable neglect."³¹² But in some few jurisdictions there is a manifest reluctance

³⁰⁵ *School District No. 13 v. Lovejoy* (C. C.) 16 Fed. 323; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98.

³⁰⁶ *Ross v. Louisville & N. R. Co.*, 92 Ky. 583, 18 S. W. 456.

³⁰⁷ *Bates v. Bates*, 66 Minn. 131, 68 N. W. 845.

³⁰⁸ *Bean v. Haffendorfer*, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138; *Small v. Reeves*, 104 Ky. 289, 46 S. W. 726.

³⁰⁹ *Bonnell v. Rome, W. & O. R. Co.*, 12 Hun (N. Y.) 218.

³¹⁰ *Heisterhagen v. Garland*, 10 Mo. 66.

³¹¹ *Gheer v. Huber*, 32 Kan. 319, 4 Pac. 290; *Luscomb v. Maloy*, 26 Iowa, 444; *French v. Eversole* (Ky.) 32 S. W. 211.

³¹² *Sage v. Matheney*, 14 Ind. 369; *Flanagan v. Patterson*, 78 Ind. 514; *Monroe v. Paddock*, 75 Ind. 422; *Depriest v. Patterson*, 85 N. C. 376; *Good-*

to admit sickness as a sufficient excuse. In Georgia, a motion to set aside a judgment by default, on the ground that the defendant was sick when it was rendered and could not put in his plea, was overruled, no reason being shown why the plea was not filed before the trial term.³¹³ And in Indiana, the latest rulings decide that a judgment should not be vacated because the defendant was too sick to be present at the trial, as he might have appeared by attorney.³¹⁴ This seems to be the doctrine also in Illinois.³¹⁵ In one case the defendant showed that he was confined to his house, during the pendency of the action, by a wound in the foot, but the court refused to open the judgment.³¹⁶ The sickness of a member of the defendant's family may be a ground upon which the judge may grant a continuance, but it is not a reason for setting aside a default.³¹⁷

§ 339. Sickness of Counsel.

It is held by several very respectable authorities that the illness of defendant's counsel, so severe as to prevent him from appearing and trying the case, is a good ground for vacating the judgment.³¹⁸ This, however, has been fairly denied.³¹⁹ It seems reasonable to hold that such an excuse would not be sufficient if the party had any opportunity to retain other counsel, or otherwise to escape the

hue v. Meyers, 58 Tex. 405; Holliman v. Pearlstone (Tex. Civ. App.) 29 S. W. 542; Carey v. Browne, 67 Hun, 516, 22 N. Y. Supp. 521; In re Traver, 9 Misc. Rep. 621, 30 N. Y. Supp. 851; Bank of Princeton v. Johnston, 41 W. Va. 550, 23 S. E. 517.

³¹³ Cannon v. Harrold, 61 Ga. 158.

³¹⁴ Jonsson v. Lindstrom, 114 Ind. 152, 16 N. E. 400.

³¹⁵ Shaffer v. Sutton, 49 Ill. 506; Edwards v. McKay, 73 Ill. 570.

³¹⁶ Gardenhire v. Vinson, 39 Ark. 270.

³¹⁷ Skinner v. Bryce, 75 N. C. 287; Selberling v. Schuster, 83 Iowa, 747, 49 N. W. 844; Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 Pac. 125. Compare Thornall v. Turner, 23 Misc. Rep. 363, 51 N. Y. Supp. 214.

³¹⁸ Willmarth v. Gatfield, 1 How. Prac. 52; Bristol v. Galvin, 62 Ind. 352; Stout v. Lewis, 11 Mo. 438; Harralson v. McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; Callanan v. Aetna Nat. Bank, 84 Iowa, 8, 50 N. W. 69; Southwestern Telegraph & Telephone Co. v. Jennings (Tex. Civ. App.) 51 S. W. 288.

³¹⁹ Clark v. Ewing, 93 Ill. 572; McFarland v. White, 13 La. Ann. 394. See Hittle v. Zelmer, 164 Ill. 64, 45 N. E. 419; Heaton v. Peterson, 6 Ind. App. 1, 31 N. E. 1133.

default or verdict. But if the attorney's illness was so sudden that there was no time to employ other counsel, or if it was unknown to the defendant, or he was unable to act in the matter, or no one was present to ask for a continuance, it would be manifestly unjust to visit the misfortune upon the defendant who was guilty of no carelessness or lack of diligence. And indeed the cases hold that if both the attorney and the defendant were sick, whereby the former was prevented from attending to the case and the latter was prevented from retaining other counsel, the judgment should be vacated.³²⁰ Whether the illness or death of a member of the attorney's family occurring at such a juncture as to draw him away from the case, is a sufficient ground for relief, is an unsettled question.³²¹ But without doubt it should be decided on the lines above laid down with respect to the counsel himself. In a case where the defendant employed a prominent attorney, who died three weeks before the return term, and whose death was conspicuously noticed in the newspapers, and the defendant then neglected to employ other counsel, and suffered a default, it was held that he was not entitled to have the judgment vacated.³²²

§ 340. Excusable Neglect.

The "excusable neglect" of the defendant is specifically mentioned, in the statutes of several states, as one of the grounds upon which judgments may be set aside.³²³ And under this designation may be classed the unavoidable absence of the party, when he is kept away from the trial of his case by the performance of duties which he cannot legally postpone or escape.³²⁴ Thus, it is a good excuse for failure to attend if he was compelled, at that time, to appear

³²⁰ *Harvey v. Wilson*, 44 Ind. 231; *Goodhue v. Meyers*, 58 Tex. 405.

³²¹ Compare *Powell v. Washington*, 15 Ala. 803, with *Stout v. Lewis*, 11 Mo. 438.

³²² *Kivett v. Wynne*, 89 N. C. 39.

³²³ *Supra*, § 334. See *Egan v. Rooney*, 38 How. Prac. (N. Y.) 121; *Kelth v. McCaffrey*, 145 Mass. 18, 12 N. E. 419.

³²⁴ But the fact that defendant was a milkman, delivering milk every day in a city, and had no one to attend to his duties in his absence, is not sufficient excuse for his neglect to appear and defend an action against him. *Landa v. McGehee* (Tex.) 10 S. W. 516.

before a grand jury,³²⁵ or before another court,³²⁶ or if he was necessarily absent in the actual military service of the United States.³²⁷ Again, it is a case of "excusable neglect" if the party's failure to plead, or to follow up his case, or to be present at its trial, was due solely to his reliance upon assurances given him by those upon whom he had a right to depend (as, the adverse party, or counsel retained in the case, or a competent business adviser) that it would not be necessary for him to take an active part in the case, or that the suit would not be prosecuted.³²⁸ But the fact that the defendant supposed a summons which was served on him to be a paper in another cause pending between himself and the plaintiff, and for that reason took no measures to answer it, is not excusable neglect.³²⁹ But where the officer did not read or give a copy of the summons to the defendant, but told him it was a subpoena for him as a witness in a case pending in another court, and the defendant did not learn the truth until too late, this was held a sufficient excuse.³³⁰

An application to open or vacate a judgment on this ground must show the cause of the party's neglect of the case, and that it was

³²⁵ *Frazier v. Bishop*, 29 Mo. 447.

³²⁶ *Tullis v. Scott*, 38 Tex. 537. Compare *Kitson v. Blake*, 60 Hun. 579, 14 N. Y. Supp. 446.

³²⁷ *Piper v. Aldrich*, 41 Mo. 421.

³²⁸ *Wicke v. Lake*, 21 Wis. 410, 94 Am. Dec. 532; *Rowland v. Jones*, 2 Heisk. (Tenn.) 321; *Birch v. Frantz*, 77 Ind. 190; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537; *Clty Block Directory Co. v. App.*, 4 Colo. App. 350, 35 Pac. 985; *Craig v. San Bernardino Inv. Co.*, 101 Cal. 122, 35 Pac. 558; *Henderson v. Lange*, 71 Minn. 468, 74 N. W. 172. Compare *State v. Casey*, 9 S. D. 436, 69 N. W. 585; *Craig v. Major*, 139 Ind. 624, 35 N. E. 1098. The fact that defendant relied on the assurance of a constable, who had no authority to give such assurance, that the suit would be abandoned, does not excuse his neglecting the case. *Harding v. R. S. Peale Co.*, 44 Ill. App. 344.

³²⁹ *White v. Snow*, 71 N. C. 232. See *State v. O'Neill*, 4 Mo. App. 221.

³³⁰ *Hite v. Fisher*, 76 Ind. 231. See *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117. Where a summons was served on a director of a corporation, who neglected to notify the managing officers or attorneys until after the entry of a judgment by default, and they had no knowledge of the suit, and showed a defense to part of the claim, it was held that the default should be opened. *G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022.

excusable.³³¹ If the papers disclose mere carelessness, lack of attention, or indifference to his rights, on the part of the applicant or his counsel, he cannot expect an opportunity to redeem the past. The law exacts diligent attention from all suitors. If the party's negligence is without excuse or justification, he must abide the consequences.³³² And as indicating the kind and amount of diligence required of him, it may be stated, first, that unless he means to try his own case, it is his duty to retain an attorney, more especially where the party himself is a non-resident.³³³ He must see to it that the attorney understands and accepts the retainer. It will not be sufficient excuse for a default that a letter sent to an attorney, asking him to appear in the case, was not delivered until after the trial, if there was time to secure counsel by telegraphing.³³⁴ If an attorney employed to represent the defendant dies or withdraws from the case, an effort to supply his place in due season must be shown.³³⁵

³³¹ *Mitchell v. Allen*, 110 Ga. 282, 34 S. E. 851. The mere fact that defendant reached the court half an hour too late, and after the case had been disposed of, constitutes no excuse for the default. *Mullane v. Roberge*, 21 Misc. Rep. 342, 47 N. Y. Supp. 155.

³³² *Brand v. Stafford*, 28 La. Ann. 51; *Fritz v. Roney*, 9 Pa. Dist. R. 27; *Griffin v. Brewer*, 96 Ga. 758, 22 S. E. 284; *Athens Leather Manuf'g Co. v. Myers*, 98 Ga. 396, 25 S. E. 503; *Harms v. Jacobs*, 160 Ill. 589, 43 N. E. 745; *Nauer v. Benham*, 45 Minn. 252, 47 N. W. 796; *Shay v. Chicago Clock Co.*, 111 Cal. 549, 44 Pac. 237; *Myers v. Landrum*, 4 Wash. St. 762, 31 Pac. 33. It is gross negligence to pay no attention to an action for 18 months after service of process. *Grootemaat v. Tebel*, 39 Wis. 576. In a case in North Carolina, where defendant retained counsel and fully informed him of his defense, and subpoenaed witnesses, but thought his own presence at the trial would not be necessary, and therefore did not attend, but the witnesses did not appear and there was no one to ask for a continuance, and judgment was taken against him, it was held that his negligence was inexcusable, and the judgment should not be opened. *Waddell v. Wood*, 64 N. C. 624. And see *Oliver v. Gerstle*, 58 Ill. App. 615.

³³³ *Union Cent. Life Ins. Co. v. Lipscomb* (Tex. Civ. App.) 27 S. W. 307.

³³⁴ *Finlayson v. American Acc. Co.*, 109 N. C. 196, 13 S. E. 739. It is no ground for opening a judgment that the attorney did not receive the letter asking him to appear and defend the suit in time to do so, where the defendant himself, though several times in the town where the attorney lived, failed to inquire for him or seek information regarding the suit. *Post v. Carr*, 42 W. Va. 72, 24 S. E. 583.

³³⁵ *Simpson v. Brown*, 117 N. C. 482, 23 S. E. 441. Compare *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41.

Having retained counsel, it is the client's duty to inform him fully of the nature and grounds of his defense, to assist him in the preparation of the case, and to attend at the trial, unless advised by his counsel that his presence is not necessary. If he fails in these particulars, his negligence cannot be held to be excusable.³³⁶ Undoubtedly a party has a right to depend on his attorney's keeping him informed of the progress of the case; and a judgment may be vacated for excusable neglect or surprise, although the defendant was represented by counsel.³³⁷ But it is not sufficient excuse for a default that defendant's counsel did not notify him of the time of the trial, if the defendant himself had actual notice that the case would probably be tried at a given term, at which it actually was tried.³³⁸

But in all these cases, the party's failure to take the steps required of him was due to his own want of diligence or attention. The situation is entirely different where, in the exercise of all due vigilance and activity, he was prevented from filing a pleading or attending the trial by an accident or chain of accidents which he could not have controlled,³³⁹ or by a genuine and excusable mistake or miscalculation.³⁴⁰ It is not, however, a case of excusable neglect when the only reason for not filing an answer in time was that the peculiar nature of the case required more than the usual time in the preparation of an answer, and the attorney could not give it his undivided attention.³⁴¹ And a judgment will not be set aside on the ground that the defendant was prevented from being represented at the trial and making his defense, when the defense set up in the affi-

³³⁶ *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476; *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 804; *Hahn v. Gates*, 169 Ill. 299, 48 N. E. 398; *Parker v. Belcher*, 87 Ga. 110, 13 S. E. 314; *Schroer v. Wessell*, 89 Ill. 113; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269.

³³⁷ *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66.

³³⁸ *Leader v. Dunlap*, 6 Pa. Super. Ct. 243. And see *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64.

³³⁹ *Fitzpatrick v. Campbell*, 58 Minn. 20, 59 N. W. 629; *Mitchell & Lewis Co. v. Downing*, 23 Or. 448, 32 Pac. 394; *Blain v. Shaffner*, 37 Ill. App. 394; *Williams v. Richmond & D. R. Co.*, 110 N. C. 466, 15 S. E. 97.

³⁴⁰ *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 502. See, also, *In re Davis' Estate*, 15 Mont. 347, 39 Pac. 292.

³⁴¹ *Balley v. Taaffe*, 29 Cal. 422.

davit in support of his motion is entirely new and not disclosed by the original pleadings.³⁴²

§ 340a. Mistake, Ignorance, or Erroneous Advice of Counsel.

Certain of the cases lay down a broad general rule that the mistake or ignorance of a party's counsel will not relieve him from a judgment rendered against him.³⁴³ But a majority of the decisions favor the principle that a mistake of the party's attorney may warrant the vacation of the judgment, as well as a mistake made by the party himself, provided it was a mistake of fact, and not of law, and provided it was such as might reasonably and genuinely have occurred. Thus, we find authorities justifying the grant of such relief where the judgment was entered in consequence of the attorney's mistake or misapprehension as to the real facts of the case, or the circumstances of the transaction out of which the suit arose,³⁴⁴ or his mistake or miscalculation as to the time for pleading or for the trial, or as to the case being set for trial or placed on the calendar.³⁴⁵

³⁴² *Kehler v. New Orleans Ins. Co.* (C. C.) 23 Fed. 709.

³⁴³ *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1086.

³⁴⁴ *Underwood v. Underwood*, 87 Cal. 523, 25 Pac. 1065; *McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656.

³⁴⁵ *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Springer v. Gillespie* (Tex. Civ. App.) 56 S. W. 369; *Lathrop v. O'Brien*, 47 Minn. 428, 50 N. W. 530; *Hermance v. Cunningham*, 49 Neb. 897, 69 N. W. 311; *Horton v. New Pass Gold & S. Min. Co.*, 21 Nev. 184, 27 Pac. 376; *Scott v. Smith*, 133 Mo. 618, 34 S. W. 864; *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181. But no sufficient excuse is shown by an affidavit of counsel that he had forgotten on what day the term began, when he admits receiving the summons before the term, and the summons itself showed when the term began. *Baltimore & O. R. Co. v. Flinn*, 2 Ind. App. 55, 28 N. E. 201. Nor is it sufficient ground for opening a judgment that a clerk in the office of defendant's attorneys inadvertently placed the cause on the office diary for the January term instead of the December term, when the attorneys knew, when the suit was begun, that the answer would have to be filed at the December term. *Barrett v. Queen City Cycle Co.*, 179 Ill. 68, 53 N. E. 550. A custom in one section of the state for circuit courts not to try cases on the first day of the term is no excuse for the absence of an attorney whose case is set for trial on that day, where it is not shown that the custom is invariable. *Wilson v. Scott*, 50 Mo. App. 329. And see, as denying that the attorney's mistake or miscalculation of time is ground for vacating a judgment, *Smith v. Watson*, 28 Iowa, 218; *People v. Ralus*, 23 Cal. 127.

So, a showing that defendant, after receiving service, engaged an attorney to conduct his defense, and that the latter failed to find the case because it was docketed in a wrong name, and for that reason omitted to make any defense, is sufficient to warrant the setting aside of a default.³⁴⁶ And the same rule applies where the attorney mistakenly advised his client that the action had been discontinued.³⁴⁷

But if the mistake made by the attorney was a mistake of law, such relief cannot be granted. This principle is applied not only where he was in error, legally speaking, as to the rights or duties of his client, or as to the legal effect of substantive facts in the case, but also where the attorney takes a wrong course or fails to take the right course in consequence of his ignorance or misunderstanding of the rules of procedure.³⁴⁸ Where a defendant who really has a good defense to the action is dissuaded from setting it up and contesting the suit, and suffers a default, by reason of erroneous advice from his attorney, it is thought, in several of the states, that this will constitute a sufficient ground for vacating the judgment rendered against him.³⁴⁹ But elsewhere, on the ground that such a mistake is one of law, it is ruled that an application to open or vacate the judgment cannot be based on such grounds.³⁵⁰

§ 341. Negligence of Attorney.

In a majority of the states, the courts have steadily refused to set aside a judgment on the sole ground of the neglect or carelessness of the attorney for the party against whom it was rendered. The

³⁴⁶ *Clifford v. Gruelle* (Ky.) 32 S. W. 937.

³⁴⁷ *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29.

³⁴⁸ *In re Hoopes' Estate*, 185 Pa. 167, 39 Atl. 840; *Hicklin v. McClear*, 19 Or. 508, 24 Pac. 992; *Phifer v. Travellers' Ins. Co.*, 123 N. C. 405, 31 S. E. 715; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423; *Harbaugh v. Honey Lake Valley Land & Water Co.*, 109 Cal. 70, 41 Pac. 792; *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863.

³⁴⁹ *Baxter v. Chute*, 50 Minn. 164, 52 N. W. 379, 36 Am. St. Rep. 633; *Douglas v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247.

³⁵⁰ *Mouser v. Harmon*, 96 Ky. 591, 29 S. W. 448; *Cox v. Armstrong* (Ky.) 43 S. W. 189; *Milwaukee Mut. Loan & Bldg. Soc. v. Jagodzinski*, 84 Wis. 35, 54 N. W. 102.

act or omission of the attorney is the act or omission of the client, and no negligence will be excusable in the former which would not be excusable in the latter.³⁵¹ This view has recently found expression in a case in Kansas, of which the circumstances were so unusually severe as to deserve somewhat detailed mention. It appeared that the plaintiff resided in Kansas and the defendants in another state; that the defendants employed an attorney in Kansas to file an answer and attend to the case; that the attorney never filed such answer, but, before the time for filing it had expired, he left the state, and never returned, and no answer was ever filed in the case; that after more than four months had elapsed since the defendants made default by not filing an answer, a judgment was rendered against them in accordance with the prayer of the plaintiff's petition; that the defendants had no knowledge of the negligence of their attorney, or of the rendition of such judgment, until a long time after both had occurred; that the attorney was insolvent; and that the defendants had a good defense to the action. It was held that neither of these circumstances, nor all combined, could be considered such an "unavoidable casualty or misfortune preventing the party from defending" the action, that the defendants could have the judgment vacated and be let in to defend.³⁵² It is generally

³⁵¹ *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290; *Davison v. Heffron*, 31 Vt. 687; *Burke v. Stokely*, 65 N. C. 569; *Foster v. Jones*, 1 McCord (S. C.) 116; *Tarrant Co. v. Lively*, 25 Tex. Supp. 399; *Welch v. Challen*, 31 Kan. 696, 3 Pac. 314; *Kreite v. Kreite*, 93 Ind. 583; *Spaulding v. Thompson*, 12 Ind. 477, 74 Am. Dec. 221; *Jones v. Leech*, 46 Iowa, 186; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162; *Ordway v. Suchard*, 31 Iowa, 481; *State v. Elgin*, 11 Iowa, 216; *Bosbyshell v. Summers*, 40 Mo. 172; *Austin v. Nelson*, 11 Mo. 192; *Gehrke v. Jod*, 59 Mo. 522; *Kerby v. Chadwell*, 10 Mo. 392; *Matthis v. Inhabitants of Town of Cameron*, 62 Mo. 504; *Merritt v. Putnam*, 7 Minn. 493, (Gil. 399); *Smith v. Tunstead*, 56 Cal. 175; *People v. Rains*, 23 Cal. 127; *Ekel v. Swift*, 47 Cal. 620; *Harper v. Mallory*, 4 Nev. 447; *United States v. Wallace* (D. C.) 46 Fed. 569; *Phillips v. Collier*, 87 Ga. 66, 13 S. E. 260; *Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Woolley v. Sullivan* (Tex. Civ. App.) 43 S. W. 919; *Metropolitan Life Ins. Co. v. Bergen*, 64 Ill. App. 685; *Moore v. Horner*, 146 Ind. 287, 45 N. E. 341; *Parker v. Indianapolis Nat. Bank*, 1 Ind. App. 462, 27 N. E. 650; *Jackson v. Gould*, 96 Iowa, 488, 65 N. W. 406; *Church v. Lacy*, 102 Iowa, 235, 71 N. W. 338; *Anderson v. Green* (Ky.) 55 S. W. 420; *Wynn v. Frost*, 6 Okl. 89, 50 Pac. 184.

³⁵² *Welch v. Challen*, 31 Kan. 696, 3 Pac. 314.

held that the attorney's neglect to file a plea or answer in the action will not justify the setting aside of a judgment by default.³⁵³ But a case in New York holds that where the defendant's counsel omitted to enter a plea, and the neglect of the client to examine the records to see whether his plea was on file was excusable, there was good ground to open the judgment.³⁵⁴ Where a party had time to give his personal attention to the defense of the action before a default was entered, and he failed to do so, it was held that the fact that counsel, whom he supposed he had engaged to make his defense, omitted to do so, did not make it imperative on the court to set aside the default.³⁵⁵ Moreover, it is the duty of an attorney to follow up with diligence the cases in which he is retained, to watch the progress of each cause with vigilance, to note carefully the various steps taken by his adversary or by the court, and to secure due notice of every successive development in the action which requires movement on his part. His carelessness or inattention in these respects is not excusable. If the client suffers a default, or otherwise loses his case, because of the failure of his attorney to pursue and follow up the action with due care and watchfulness, it will not be ground for vacating the judgment.³⁵⁶

On the other hand, it is held in a few states (and notably in New York) that the negligence of the attorney is a sufficient ground for setting aside the judgment, provided the client himself was not di-

³⁵³ *Austin v. Nelson*, 11 Mo. 192; *Kerby v. Chadwell*, 10 Mo. 392; *Harper v. Mallory*, 4 Nev. 447; *Butler v. Morse*, 66 N. H. 429, 23 Atl. 90; *Bentley v. Finch*, 86 Ga. 800, 13 S. E. 155; *Schultz v. Meiselbar*, 144 Ill. 26, 32 N. E. 550; *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218; *Tarrant Co. v. Lively*, 25 Tex. Supp. 399; *Jones v. Leech*, 46 Iowa, 186.

³⁵⁴ *Clark v. Lyon*, 2 Hill. 91.

³⁵⁵ *Schroer v. Wessell*, 89 Ill. 113. Negligence of counsel is not excusable neglect, for which a judgment will be set aside, where the client took no interest in the case, did not attend the court, gave no instructions to his attorney, nor asked any from him. *Norton v. McLaurin*, 125 N. C. 185, 24 S. E. 269.

³⁵⁶ *Brumbaugh v. Stockman*, 83 Ind. 583; *Norton v. McLaurin*, 125 N. C. 185, 24 S. E. 269; *McDaniel v. McLendon*, 85 Ga. 614, 11 S. E. 869; *Padgett v. Evans* (Tex. Civ. App.) 51 S. W. 513; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425, 34 Pac. 76; *Haggin v. Lorentz*, 13 Mont. 406, 34 Pac. 607; *Liverpool & L. & G. Ins. Co. v. Perrin* (N. M.) 61 Pac. 124.

rectly in fault.³⁵⁷ A party may be relieved from a judgment obtained against him by reason of the negligence, ignorance, or fraud of his attorney, without compelling him to resort to an action against the attorney or show the latter to be insolvent.³⁵⁸ And even in the states which generally adhere to the stricter rule, there is a disposition to relax it somewhat under exceptional circumstances. Thus, where an attorney overlooked the case on the trial-calendar, by reason of its being placed thereon under a title calculated to mislead, and the case was called and defaulted, and there was a meritorious defense, it was held that the default and judgment rendered thereon might be set aside, application being made at the same term.³⁵⁹ So where it was made to appear by affidavit of defendant's attorneys that the reason why they did not appear and file an answer was on account of an accidental misplacement of the petition and notice handed to them by the plaintiff, whereby the case was overlooked by them in examining their papers at the commencement of the term, in order to ascertain what cases they had to attend, it was considered that setting aside the default was no abuse of discretion.³⁶⁰ So it is proper to vacate an order of dismissal, on motion of the plaintiff's attorney, supported by his statement that he had consented to the dismissal improvidently, and accompanied by his offer to refund the costs paid by the defendant

³⁵⁷ *Nash v. Whetmore*, 33 Barb. (N. Y.) 159; *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 639; *Clark v. Lyon*, 2 Hilt. (N. Y.) 91; *Phillips v. Hawley*, 6 Johns. (N. Y.) 129; *Tripp v. Vincent*, 8 Paige (N. Y.) 180; *Millsbaugh v. McBride*, 7 Paige (N. Y.) 509, 34 Am. Dec. 360; *Meacham v. Dudley*, 6 Wend. (N. Y.) 514; *Gideon v. Dwyer*, 17 Misc. Rep. 233, 40 N. Y. Supp. 1053; *De Marco v. Mass*, 31 Misc. Rep. 827, 64 N. Y. Supp. 768. And see, also, *Thompson v. Goulding*, 5 Allen (Mass.) 82; *Bradford v. Colt*, 77 N. C. 72; *Griel v. Vernon*, 65 N. C. 76; *Hanson v. Michelson*, 19 Wis. 498; *Babcock v. Perry*, 4 Wis. 31; *Ash-ton v. Dashaway Ass'n* (Cal.) 33 Pac. 446. But the mere fact that the defendant wrote to an attorney requesting him to enter an appearance for him, which the attorney failed to do, in consequence of which judgment was entered by default, does not make out such a case of "excusable neglect" as would justify the court in vacating the judgment. *Burke v. Stokely*, 65 N. C. 569.

³⁵⁸ *Sharp v. Mayor of City of New York*, 31 Barb. (N. Y.) 578.

³⁵⁹ *Allen v. Hoffman*, 12 Ill. App. 573.

³⁶⁰ *Ordway v. Suchard*, 31 Iowa, 481.

after notice of the motion.³⁶¹ The negligence of any person who is delegated or employed by the attorney to attend to the case or take his place is of course imputable to the attorney himself, and will not be excusable in the one unless it would have been in the other.³⁶² And where an attorney is engaged simply to employ counsel to appear at another place, he is a mere agent, and his negligence in failing to employ counsel is the negligence of his principal.³⁶³ The burden is on a party seeking to be excused by the neglect of counsel to show that he employed counsel practising habitually in the particular court or who specially agreed to attend to the case.³⁶⁴

§ 342. Misunderstanding of Counsel.

A misunderstanding between the defendant in an action and an attorney, as to whether the latter had been retained or not, in consequence of which the judgment goes by default, will be good ground, provided the mistake was genuine, for setting aside the judgment.³⁶⁵ So where, in consequence of a misunderstanding between a defendant and his attorney, attributable to the negligence of a third person, the real defense is not interposed, and he does not discover the fact until after judgment has been recovered against him, it is no abuse of discretion to vacate the judgment.³⁶⁶ So in a case where the defendant in a judgment by default applied to the court to open the same, and showed in his affidavit that he believed the case was being defended in his behalf by the attorneys who represented his co-defendants, and the record entries in the early stages of the cause

³⁶¹ *Benwood Iron-Works Co. v. Tappan*, 56 Miss. 659.

³⁶² *Davison v. Heffron*, 31 Vt. 637; *Webster v. McMahan*, 13 Mo. 582.

³⁶³ *Finlayson v. American Acc. Co.*, 100 N. C. 196, 13 S. E. 739.

³⁶⁴ *Manning v. Roanoke & T. R. Co.*, 122 N. C. 428, 28 S. E. 963.

³⁶⁵ *Panesi v. Boswell*, 12 Heisk. (Tenn.) 323; *McKinley v. Tuttle*, 34 Cal. 235; *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880. But see section 340, *supra*, as to the duty of the defendant to see to it that his attorney understands and accepts the retainer. It is said that the fact that defendant's counsel, through a misunderstanding, failed to appear at the trial, is no ground for setting aside a default, where defendant's only complaint is that the judgment is for more than he thinks it ought to be. *McRae v. Adams*, 85 Ill. App. 528.

³⁶⁶ *Dixon v. Lyne* (Ky.) 10 S. W. 469.

showed that those attorneys appeared for "the defendants" generally, and there was shown to be a good defense on the merits, it was held that good cause appeared for opening the judgment.³⁶⁷

§ 343. Unavoidable Absence of Counsel.

Where, in the unavoidable absence of the defendant's attorney (as, when he is engaged in trying a case in another court, which was begun before the plaintiff's case was called, and is unexpectedly protracted) a judgment is entered for the plaintiff, if all appears to have been done in good faith, and the defendant could not proceed without his counsel, and there is a meritorious defense, the cases generally hold that this will be good ground for vacating the judgment.³⁶⁸ Similar rulings have been made in cases where the attorney's absence was caused by the sudden and dangerous illness of a near relative,³⁶⁹ or by his necessary attention to the duties of a public office which he holds.³⁷⁰ On the other hand, there are decisions to the effect that it is not a sufficient excuse for the attorney's absence that he was "detained by important legal business elsewhere," or that he was in attendance upon the legislature as a member of that body.³⁷¹ But the rule which appears to rest upon the surest foundation of sound legal reason is that which requires proof that the attorney's absence was truly unavoidable, in the sense that he could not have prevented judgment going against his client, in his absence, by any vigilance, or precaution on his part. According to the decisions favoring this rule, if counsel has cases coming on in two different courts at the same time, he must obtain leave

³⁶⁷ *Kupferle v. Merchants' Nat. Bank*, 32 Ark. 717. And see *Heaps v. Hoopes*, 68 Md. 383, 12 Atl. 882.

³⁶⁸ *McArthur v. Slauson*, 60 Wis. 293, 19 N. W. 45; *Beall v. Marietta Paper Mill Co.*, 45 Ga. 28; *Stout v. Lewis*, 11 Mo. 438; *Smith v. Moreton Truck & Storage Co.*, 19 Ohio Cir. Ct. R. 628.

³⁶⁹ *Martin v. St. Charles Tobacco Co.*, 53 Mo. App. 655; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86. Compare *Cresswell v. White*, 3 Ind. App. 306, 29 N. E. 612.

³⁷⁰ *Hill v. Crump*, 24 Ind. 291.

³⁷¹ *Wilson v. Scott*, 50 Mo. App. 329; *Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029; *Carr v. Dawes*, 46 Mo. App. 351, 598; *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 306.

of absence from one or other of the courts and arrange that his case shall not be proceeded with there in his absence.³⁷² If he is likely to be detained elsewhere by business of importance, legal or otherwise, he must apply to the opposing counsel for a continuance or an extension of time.³⁷³ If, starting from a distant point, he finds that he cannot reach the place of trial in due season, he should telegraph to the judge and ask to have the case held until his arrival.³⁷⁴ And it is quite clear that a judgment should not be set aside on this ground when no explanation or excuse for the attorney's absence is offered, or when it appears that he was guilty of carelessness or lack of attention, or that he withdrew from the court room in the mistaken belief that his case would not be reached before his return.³⁷⁵

§ 344. Fraud of Attorney.

If an attorney corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So also, if a plaintiff is guilty of so influencing the attorney of the defendant by the payment of money without the knowledge or consent of his client, as to make it the interest of such attorney that the plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any opposition to the rendition of the judgment in favor of the plaintiff, a new action may be maintained by the defendant to set aside such judgment and open the case for a new and fair hearing.³⁷⁶ It has even been held that, where an attorney withdraws from the case, and judgment goes against his client, the mere fact that the latter did not consent to the withdrawal or know of it, will enable him to

³⁷² *Western & A. R. Co. v. Pitts*, 79 Ga. 532, 4 S. E. 921.

³⁷³ *Grove v. Bush*, 86 Iowa, 94, 53 N. W. 88.

³⁷⁴ *Caughy v. Northern Pac. Elevator Co.*, 51 Minn. 324, 53 N. W. 545.

³⁷⁵ *Pitzele v. Lutkins*, 85 Ill. App. 662; *Huntington v. Emery*, 74 Md. 67, 21 Atl. 495; *Gray v. Sabin*, 87 Cal. 211, 25 Pac. 422.

³⁷⁶ *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *Beck v. Bellamy*, 93 N. C. 129. But in Iowa, a judgment cannot be vacated for fraud and negligence of attorneys in not interposing a valid defense, under Code, § 4091, authorizing vacation of judgment for fraud in obtaining it. *McCormick v. McCormick*, 109 Iowa, 700, 81 N. W. 172.

have the judgment opened.³⁷⁷ A stronger case for such relief is of course made out where it is shown that the attorney's withdrawal was caused by hostility to his client for alleged nonpayment of his fees.³⁷⁸ If the client consents to the withdrawal of his attorney's appearance, he precludes himself from moving for the vacation of the judgment.³⁷⁹

§ 345. Misinformation as to Time of Trial.

Where a party who seeks the vacation of a judgment rendered against him in the absence of his counsel and himself explains their failure to attend the trial by showing that they relied on a statement made by the judge of the court that the case would not be tried at the current term, or that it could not be reached before a distant date, or that nothing further would be done without notifying counsel, notwithstanding which a default was taken, it is generally held to be a case of "excusable neglect," such as will warrant the opening of the judgment.³⁸⁰ And a similar rule is applied where counsel was misled by information or assurances given him by the clerk of the court, as to the time when the case would be reached in its order, or as to the time when the court would proceed with the business before it.³⁸¹ But some of the authorities maintain the rule

³⁷⁷ *Utah Commercial & Savings Bank v. Trumbo*, 17 Utah, 198, 53 Pac. 1063. In South Carolina, it is not necessary to show fraud and collusion between an attorney who filed a demurrer for defendant and afterwards withdrew it, and allowed judgment by default, and the plaintiff, in order to authorize the court to set such judgment aside, since there was no trial. *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66.

³⁷⁸ *Nichells v. Nichells*, 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515, 57 Am. St. Rep. 540; *Herbert v. Lawrence*, 21 Civ. Proc. R. 336, 18 N. Y. Supp. 95.

³⁷⁹ *Fincher v. Malcolmson*, 96 Cal. 38, 30 Pac. 835; *Dudley v. Broadway Ins. Co.*, 42 App. Div. 555, 59 N. Y. Supp. 668.

³⁸⁰ *Ratliff v. Baldwin*, 29 Ind. 16, 92 Am. Dec. 330; *Cruse v. Cunningham*, 79 Ind. 402; *Sanders v. Hall*, 37 Kan. 271, 15 Pac. 197; *Jean v. Hennessy*, 74 Iowa, 348, 37 N. W. 771, 7 Am. St. Rep. 486; *Buena Vista Co. v. I. F. & S. O. R. Co.*, 49 Iowa, 657; *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Fleetwood v. Equitable Mortg. Co.*, 108 Ga. 811, 33 S. E. 1014.

³⁸¹ *Hewitt v. Hazard*, 33 App. Div. 630, 53 N. Y. Supp. 340; *Nash v. Denton*, 59 Kan. 771, 51 Pac. 896; *Anaconda Min. Co. v. Salle*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472. But the fact that judgment is rendered in the absence of defendant's counsel, because he relied on the clerk of the court

that even such official assurances will not relieve litigants (or their counsel) from the duty of exercising the utmost vigilance in watching the progress of their causes.³³²

§ 345a. Estoppel to Apply for Vacation of Judgment.

A party, against whom a judgment has been taken under circumstances which would ordinarily entitle him to apply for its vacation, may be estopped by his conduct to ask for such relief. This is held to be the case where he has been guilty of fraud in attempting to elude execution on the judgment by setting up a claim under a fictitious name to the goods sought to be levied on,³³³ or where he has made a "declaration of no defense" to the note on which the judgment was entered and offered to pay it to the present holder before maturity,³³⁴ or where a judgment by default, barring redemption, has been rendered against a junior incumbrancer through his excusable neglect, and he learns of the judgment while the period of redemption is running, but fails to redeem.³³⁵ On the other hand, it is said, in New York, that a defendant is not estopped to apply to have a default opened and for leave to set up a meritorious defense, unless the plaintiff has been prejudiced by the loss of some substantial advantage which he would have had if the defense had been interposed at the proper time.³³⁶ And it seems that the fact that a default judgment has been satisfied by a sale of the defendant's property does not deprive him of relief, unless it is shown that some one was misled by his failure to prevent the sale.³³⁷

to inform him of the day of trial, which the latter failed to do, does not make a case of "excusable neglect." *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113.

³³² *National Fertilizer Co. v. Hinson*, 103 Ala. 532, 15 South. 844; *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1036; *Stewart v. Cannon*, 66 Minn. 64, 68 N. W. 604; *Elton v. Brettschneider*, 33 Ill. App. 355; *American Brewing Co. v. Jergens*, 21 Ind. App. 595, 52 N. E. 820.

³³³ *Rohrbacker v. Schultz*, 10 Pa. Co. Ct. R. 282.

³³⁴ *Humphrey v. Tozler*, 154 Pa. 410, 26 Atl. 542.

³³⁵ *Becker v. Huthsterner*, 142 Ind. 99, 41 N. E. 323.

³³⁶ *Smith v. Weston*, 81 Hun, 87, 30 N. Y. Supp. 649.

³³⁷ *Shepherd v. Marvel*, 16 Ind. App. 417, 45 N. E. 526. Compare *CoJey v. Carter*, 47 Kan. 22, 27 Pac. 128.

PART VII. PRACTICE ON VACATING JUDGMENTS.

§ 346. Notice of Application.

Where the power to vacate judgments depends upon such statutory provisions as we have been considering, it is generally requisite that notice of the application be given to the other party. But at common law this is not always necessary. It is not irregular for a court to set aside during the term a judgment rendered by it, without notice to the defendant. It cannot be assumed that the want of notice was prejudicial to him, the court having authority to set aside such judgment despite any objections he could make.³⁸⁸ And in one case this was done, without notice, although the docket had been closed, the plaintiff's counsel had left the court, and a similar motion had been previously refused.³⁸⁹ But after the term the case is different. Then the parties are no longer before the court, actually or constructively, and a judgment cannot be set aside on motion without notice to the adverse party or his representatives.³⁹⁰ The notice should in general be addressed to and served upon the party himself. But it is held that the authority of an attorney so far continues after final judgment that service on him of notice of a motion to vacate the judgment for fraud in obtaining it or for want of

³⁸⁸ *Smith v. Robinson*, 11 Ala. 270; *Rich v. Thornton*, 69 Ala. 473; *Desribes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Lake v. Jones*, 49 Ind. 297; *Burnside v. Ennis*, 43 Ind. 411; *Yancy v. Teter*, 39 Ind. 305.

³⁸⁹ *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338.

³⁹⁰ *Ingram v. Belk*, 2 Rich. Law (S. C.) 111; *Martindale v. Brown*, 18 Ind. 284; *Smith v. Chandler*, 13 Ind. 513; *Lake v. Jones*, 49 Ind. 297; *Burnside v. Ennis*, 43 Ind. 411; *Yancy v. Teter*, 39 Ind. 305; *Lane v. Wheless*, 46 Miss. 666; *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Nuckolls v. Irwin*, 2 Neb. 60; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337; *Register v. Woodward Iron Co.*, 82 Md. 645, 33 Atl. 320; *Chapdelaine v. Handy*, 18 R. I. 706, 30 Atl. 342; *Texas Land & Loan Co. v. Winter*, 93 Tex. 560, 57 S. W. 39; *Alliance Trust Co. v. Barrett*, 6 Kan. App. 689, 50 Pac. 465; *Brady v. Washington Ins. Co.*, 67 Ill. App. 159; *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498. Where a motion to vacate a judgment is filed during the trial term, but no notice thereof is given to the adverse party until after the commencement of a subsequent term, it will be considered as made during the subsequent term. *Morrell Hardware Co. v. Princess Gold Min. Co.* (Colo. App.) 63 Pac. 807.

jurisdiction will bind his client.³⁹¹ And no notice to the adverse party of such a motion is necessary when he is present by his counsel at the time the motion is made,³⁹² or when he appears by his counsel and takes part in the hearing on the motion.³⁹³ If the party is dead, his personal representative should receive the notice. The proper practice is to take an order reciting the judgment, the grounds relied on, the death of the party, and the qualification of the representative, and calling upon him to show cause why the judgment complained of should not be set aside, and this order should be served as others are.³⁹⁴ Generally speaking, all the parties to a judgment should be made parties to a proceeding, either in equity or at law, under the statute, to annul it.³⁹⁵ But a defendant mortgagor need not be served with notice of a motion by his co-defendant, a prior mortgagee, to set aside a default judgment in the foreclosure proceedings, under which the property was sold to the plaintiff.³⁹⁶ And where a judgment which had been standing for several terms, and upon which an execution had issued, resulting in the sale of defendant's land, had been set aside on motion of the defendant, it was held that no notice of a motion on the part of the plaintiff to revoke the order setting the judgment aside, and to reinstate the same and the execution on the docket, was necessary.³⁹⁷

³⁹¹ *Phelps v. Heaton*, 79 Minn. 476, 82 N. W. 990; *Jordan v. Tarver*, 92 Ga. 379, 17 S. E. 351; *Pick v. Glickman*, 54 Ill. App. 646. Where an attorney has appeared for a party in an action, and has prosecuted it to judgment, he remains attorney for the party until he has secured a judgment not liable to vacation for any cause provided by statute or established practice, and hence a motion made by a defendant to vacate a judgment, on the ground that no summons had been served on him, or on the ground of fraud, may properly be served on the attorney of record for the plaintiff. *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858; *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1005.

³⁹² *Hill v. Crump*, 24 Ind. 291; *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 102.

³⁹³ *Worth v. Wetmore*, 87 Iowa, 62, 54 N. W. 56; *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Jennings v. Pearce*, 101 Ala. 438, 14 South. 319.

³⁹⁴ *Grier v. Jones*, 54 Ga. 154.

³⁹⁵ *Day v. Goodwin*, 104 Iowa, 374, 73 N. W. 864, 65 Am. St. Rep. 465.

³⁹⁶ *Schart v. Schart*, 116 Cal. 91, 47 Pac. 927.

³⁹⁷ *Perry v. Pearce*, 68 N. C. 367.

§ 346a. Requisites of Petition or Moving Papers.

Where the statute authorizes the vacation of judgments for certain causes "on complaint or motion filed within two years," a written complaint or motion must be filed, in order to obtain the relief desired.³⁹⁸ The papers must show the existence of one of the statutory causes for setting aside the judgment, or must aver such facts as will be sufficient to warrant the court, in the exercise of its general jurisdiction, in taking such action.³⁹⁹ It is not sufficient to allege, in the words of the statute, that the applicant was prevented from defending the suit by "unavoidable casualty or misfortune," or that the judgment was taken against him through his "inadvertence" or "excusable neglect;" but the facts constituting the casualty or misfortune, or relied on as excusing the inadvertence or neglect, must be fully set forth.⁴⁰⁰ Furthermore, the applicant must show that he has a valid and meritorious defense to the action; and this must be made to appear, not by a mere averment that he has such a defense, but by setting forth fully the facts which constitute the proposed defense.⁴⁰¹ And in some of the states, it is provided by stat-

³⁹⁸ *Ohio Falls Car Co. v. Sweet & Clark Co.*, 7 Ind. App. 163, 34 N. E. 533.

³⁹⁹ *Kirkham v. Gibson*, 52 Neb. 23, 71 N. W. 960.

⁴⁰⁰ *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863; *American Brewing Co. v. Jergens*, 21 Ind. App. 595, 52 N. E. 820; *Combs v. Bentley* (Ky.) 41 S. W. 8; *Deane v. Loucks*, 58 Hun, 555, 12 N. Y. Supp. 903. A statement that the defendant had reason to believe that his counsel would attend to the case, which the latter failed to do, is fatally defective in not setting forth the facts on which such belief was founded. *Brown v. Warren*, 17 Nev. 417, 30 Pac. 1078. Statements that the court was not legally in session when the judgment was rendered, and had no authority to hold a term at that time, are of conclusions of law, merely, and unavailing. *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156.

⁴⁰¹ *Mayer v. Mayer*, 27 Or. 133, 39 Pac. 1002; *Young v. Conklin*, 3 Misc. Rep. 122, 23 N. Y. Supp. 993; *Ellis v. Bonner*, 7 Tex. Civ. App. 539, 27 S. W. 687; *Provins v. Lovi*, 6 Okl. 94, 50 Pac. 81; *State v. Lockhart*, 18 Wash. 531, 52 Pac. 315; *Sanford v. Weeks*, 50 Kan. 339, 31 Pac. 1088; *Brewster v. Boyle*, 64 Hun, 636, 19 N. Y. Supp. 146; *Hughes v. Housel*, 33 Neb. 703, 50 N. W. 1127; *Keator v. Case* (Tex. Civ. App.) 31 S. W. 1099. An affidavit which merely states that the defense "is purely one of law," without setting out the facts, is not sufficient. *Brewer & Hoffman Brewing Co. v. Lonergan*, 63 Ill. App. 28. A judgment entered on a judgment note will not be opened on a petition by defendant alleging that, if he signed the note, it was when

ute that a judgment shall not be vacated until it is adjudged that there is a valid defense to the action, or, if the plaintiff seeks its vacation, that there is a valid cause of action.⁴⁰² Where this provision is in force, it is error for the court to render a judgment of vacation before it has adjudged that there is a valid defense.⁴⁰³ Again, in some states, it is required that the applicant for the vacation of a judgment shall file with his moving papers a copy of the answer which he proposes to put in, in case the judgment is opened; and it is held that this provision is mandatory, and that such an application should by no means be granted unless the statute is complied with in this particular.⁴⁰⁴ In New York, however, it has been said that where the moving papers show the nature of the defense and the good faith of the applicant, it is not absolutely necessary to serve the proposed answer with the motion.⁴⁰⁵

In general, it may be stated that while good practice requires a strict compliance with the statutes in these applications, mere irregularities in the method of obtaining the vacation of a judgment,—as where the showing in support of the motion, and the motion itself,

he was drunk, the indebtedness not being denied. *Ford v. Tigue*, 8 Kulp (Pa.) 428.

⁴⁰² Code Neb. § 606; Miller's Code Iowa, § 3159.

⁴⁰³ *Bond v. Wycoff*, 42 Neb. 214, 60 N. W. 504; *Western Assur. Co. v. Klein*, 48 Neb. 904, 67 N. W. 873; *Follett v. Alexander*, 58 Ohio St. 202, 50 N. E. 720. Compare *State v. Duncan*, 37 Neb. 631, 56 N. W. 214.

⁴⁰⁴ *Richardson v. Sun Printing & Publishing Ass'n*, 20 App. Div. 329, 46 N. Y. Supp. 814; *Worth v. Wetmore*, 87 Iowa, 62, 54 N. W. 56; *McBrien v. Riley*, 38 Neb. 561, 57 N. W. 385; *Lawler v. Bashford-Burmister Co. (Ariz.)* 46 Pac. 72. There is no difference between legal and equitable actions in respect to this requirement of the statute. *Superior Consol. Land Co. v. Dunphy*, 93 Wis. 188, 67 N. W. 428. A demurrer does not satisfy a rule requiring the applicant to file a copy of his proposed "answer." *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117. But he is not precluded from afterwards obtaining leave of court to file an additional paragraph to his answer. *Bryant v. Richardson*, 126 Ind. 145, 25 N. E. 807. In Washington, the party need not tender his answer until after the determination of the merits of his application. *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053. And in Indiana, the rule is complied with by filing the answer at the time of entry of the order opening the judgment. *Bryant v. Richardson*, 126 Ind. 145, 25 N. E. 807.

⁴⁰⁵ *Carey v. Browne*, 67 Hun, 516, 22 N. Y. Supp. 521. And see *Worth v. Wetmore*, 87 Iowa, 62, 54 N. W. 56. But compare *Richardson v. Sun Printing & Publishing Ass'n*, 20 App. Div. 329, 46 N. Y. Supp. 814.

are not strictly in conformity with the statute,—will not defeat the order vacating the judgment.⁴⁰⁶ The motion should not be denied upon the particular grounds assigned thereby, and the mover left to make another motion for the same purpose, simply assigning in its support a ground not before specified, but which plainly appears in the record.⁴⁰⁷ If the judgment has been affirmed on appeal, it will not be vacated on the application of the losing party, based on the same grounds which he urged in a motion for a new trial in the original suit.⁴⁰⁸ If the motion is denied, the court should find the facts on which it bases its conclusion that no just and reasonable cause has been shown for the setting aside of the judgment.⁴⁰⁹

§ 347. Affidavit of Merits.

In order to justify the opening or vacation of a judgment, it is not sufficient to show that the applicant did not have an opportunity to be heard in the case; but there must also be a prima facie showing that, if he had presented his defense, it would have prevailed, so that the judgment, as it stands, works injustice. In addition, therefore, to setting forth some one of the statutory grounds for setting aside a judgment, and the nature of the cause which prevented a defense being made, or the party's excuse for not defending, as stated in the preceding section, the application must be supported by an affidavit alleging a good and meritorious defense to the action on the merits, called an "affidavit of merits." This is imperatively required under the statutes authorizing the vacation of judgments for specified causes.⁴¹⁰ And independently of statutes, it has always been the

⁴⁰⁶ *Boston Loan & Trust Co. v. Organ*, 53 Kan. 386, 36 Pac. 733; *Wilson & Toms Inv. Co. v. Hillyer*, 50 Kan. 446, 31 Pac. 1064; *Hoag v. Old People's Mut. Ben. Soc.*, 1 Ind. App. 28, 27 N. E. 438.

⁴⁰⁷ *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

⁴⁰⁸ *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490.

⁴⁰⁹ *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508.

⁴¹⁰ *Van Horne v. Montgomery*, 5 How. Prac. (N. Y.) 238; *Hunt v. Wallis*, 6 Paige (N. Y.) 371; *Gold v. Hutchinson*, 26 Misc. Rep. 1, 55 N. Y. Supp. 575; *Cross v. Birch*, 27 Misc. Rep. 205, 58 N. Y. Supp. 438; *Cahill v. Lillenthal*, 30 Misc. Rep. 429, 62 N. Y. Supp. 524; *Thornall v. Turner*, 23 Misc. Rep. 363, 51 N. Y. Supp. 214; *Draper v. Bishop*, 4 R. I. 489; *Richardson v. Finney*, 6 Dana (Ky.) 319; *Grundy v. Kelley* (Ky.) 41 S. W. 20; *Foster v. Martin*, 20 Tex. 118; *Cook v. Phillips*, 18 Tex. 31; *Watson v. Newsham*, 17 Tex. 437;

practice of our courts, from the very earliest times, on an application to open or set aside a judgment, to require some sort of showing, by affidavit or otherwise, that the judgment is unjust as it stands and prejudicial to the party complaining, and that he has a meritorious defense.⁴¹¹ It may therefore be regarded as a universal requirement. But the rule is subject to a few well-defined exceptions in peculiar cases.⁴¹² Thus a judgment by default, entered before the court has acquired jurisdiction in the case, may be set aside without an affidavit of merits.⁴¹³ So the rule does not apply where it was grossly irregular for the default to have been entered;⁴¹⁴ or where the defendant complains of irregularity amounting to denial of his substantial rights;⁴¹⁵ or where the judgment is alleged to have been procured by fraud.⁴¹⁶ But in all cases where the application is not based upon want of jurisdiction or irregularity, but upon something presented as an excuse by the defendant, he must make an affidavit of merits. And nothing else can take its place and serve its purpose. An answer to the complaint, already on file or which the defendant proposes to file, is not equivalent to an affidavit of merits, although it

Frost v. Dodge, 15 Ind. 139; *Dale v. Bugh*, 16 Ind. 233; *Lake v. Jones*, 49 Ind. 297; *Grubb v. Crane*, 5 Ill. 153; *Lamb v. Nelson*, 34 Mo. 501; *Palmer v. Russell*, 34 Mo. 476; *Adams v. Hickman*, 43 Mo. 168; *Butler v. Mitchell*, 15 Wis. 353; *People v. Rains*, 23 Cal. 127; *Bailey v. Taaffe*, 29 Cal. 422; *Reese v. Mahoney*, 21 Cal. 305; *Parrott v. Den*, 34 Cal. 79; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199.

⁴¹¹ *Miller v. Alexander*, 1 N. J. Law, 400.

⁴¹² In Washington, no affidavit of merits is required of a defendant petitioning for the vacation of a judgment by default, and for leave to answer, since the petition must state the facts and be verified. *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053. In Colorado, it is said that an affidavit of merits is not a necessity to the setting aside of a judgment by default, though good practice requires it. *State Board of Agriculture v. Meyers*, 13 Colo. App. 500, 58 Pac. 879.

⁴¹³ *Rice v. Griffith*, 9 Iowa, 539; *Branstetter v. Rives*, 34 Mo. 318; *Norton v. Atchison, T. & S. F. R. Co.*, 97 Cal. 388, 32 Pac. 452, 33 Am. St. Rep. 198. Compare *Kramer v. Gerlach*, 28 Misc. Rep. 525, 59 N. Y. Supp. 855.

⁴¹⁴ *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218.

⁴¹⁵ *Walla Walla Printing & Publishing Co. v. Budd*, 2 Wash. T. 336, 3 Pac. 602.

⁴¹⁶ *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Morris v. Kahn*, 31 Misc. Rep. 25, 62 N. Y. Supp. 1040.

discloses a defense apparently complete and meritorious, and although it is verified.⁴¹⁷ In several of the states the authorities hold that this affidavit is not sufficient if it merely states that the defendant has a meritorious defense to the action; but it must contain a full statement of the facts constituting the proposed defense, in order that the court may judge whether it is a good and meritorious defense or not.⁴¹⁸ And the facts must be stated positively and affirmatively; allegations merely on "information and belief" are not sufficient.⁴¹⁹ But in some other states, it is a rule established by statute, or by the settled practice of the courts, that the affidavit of merits is sufficient if it sets forth that the defendant has fully and fairly stated the case to his counsel and that he is advised by him, and believes, that he has a full, perfect, and meritorious defense to the action.⁴²⁰ But an affidavit framed under this rule must be very full and explicit, and must not omit any of the particulars just mentioned.⁴²¹ And it

⁴¹⁷ *Mowry v. Hill*, 11 Wis. 146; *Jones v. Russell*, 3 How. Prac. 324. Compare *Town of Omro v. Ward*, 19 Wis. 232. See *Spencer v. Thistle*, 13 Neb. 227, 13 N. W. 214. Where the court allowed a party to file an intervention, and afterwards an answer and cross-complaint, to authorize the opening of a judgment against such party an affidavit of merits is not required. *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797. An order opening a default will not be reversed solely because of the insufficiency of the affidavit of merits or of the answer, unless the answer is such that it could be stricken out on motion. *Forin v. City of Duluth*, 66 Minn. 54, 68 N. W. 515.

⁴¹⁸ *Palmer v. Rogers*, 70 Iowa, 381, 30 N. W. 645; *Lamb v. Nelson*, 34 Mo. 501; *Castillo v. Bishop*, 51 Mo. 162; *Foster v. Martin*, 20 Tex. 118; *Roberts v. Corby*, 86 Ill. 182; *Frost v. Dodge*, 15 Ind. 139; *Toledo, W. & W. R. Co. v. Gates*, 32 Ind. 238; *Goldsberry v. Carter*, 28 Ind. 59.

⁴¹⁹ *Columbus Mut. Life Ass'n v. Plummer*, 86 Ill. App. 446; *Jenkins v. Gamewell Fire Alarm Tel. Co. (Cal.)* 31 Pac. 570; *Superior Consol. Land Co. v. Dunphy*, 93 Wis. 188, 67 N. W. 428.

⁴²⁰ *Burnham v. Smith*, 11 Wis. 258; *Woodward v. Backus*, 20 Cal. 137; *Reidy v. Scott*, 53 Cal. 69; *Francis v. Cox*, 33 Cal. 323; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252.

⁴²¹ The affidavit must allege that the party has stated the "case" or "the facts of the case" to his counsel; if it merely shows that he has stated the "facts of his defense" to his counsel it is not sufficient. *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Burnham v. Smith*, 11 Wis. 258. An affidavit that deponent is advised by his counsel that he has a good and sufficient defense, but without stating that he has fully and fairly stated the case to his counsel, will not answer. *Gold v. Hutchinson*, 26 Misc. Rep. 1, 55 N. Y. Supp. 575. And see *Day v. Mertlock*, 87 Wis. 577, 58 N. W. 1037.

seems that this manner of averring merits will not answer at all in chancery. Such an affidavit is not sufficient to authorize a court of equity to set aside a regular default or decree, but the affidavit should state the substance of the defense, or it should be stated under oath in some form, so that the court may judge whether it is meritorious.⁴²² The affidavit should be made by the applicant himself, unless good reasons exist for having it made by another person.⁴²³ It may be made by an attorney if he has personal knowledge of the facts to be sworn to in it.⁴²⁴ But the affidavit of an attorney, that from his client's statement of the case to him he believes that the client has a good and substantial defense upon the merits, is not sufficient.⁴²⁵ Nor is an affidavit which states that from an examination of the defendant's case, so far as he has made such examination, he verily believes that it is better than the plaintiff's.⁴²⁶ It is also considered necessary, when the affidavit is made by the defendant's attorney, to set forth some good and sufficient reason why the party himself does not make it.⁴²⁷ An affidavit of an attorney, upon information and belief, as to a defense on the merits, but containing no statement of the facts on which the same is based, and alleging as an excuse an unsuccessful search for the papers by a third person, who makes no affidavit to that effect, is insufficient.⁴²⁸

§ 348. Meritorious Defense must be shown.

The defense, it is said, must be meritorious. By this we mean that it must be substantial and not merely technical, fair and honest and not unconscionable.⁴²⁹ It is considered in Pennsylvania that an ap-

⁴²² *Goodhue v. Churchman*, 1 Barb. Ch. 596; *Winship v. Jewett*, Id. 173; *McGaffigan v. Jenkins*, 1 Barb. 31.

⁴²³ *Bailey v. Taaffe*, 29 Cal. 422.

⁴²⁴ *Frankoviz v. Smith*, 35 Minn. 278, 28 N. W. 508; *Horton v. New Pass Gold & Silver Min. Co.*, 21 Nev. 184, 27 Pac. 376; *Pettigrew v. City of Slour Falls*, 5 S. D. 646, 60 N. W. 27; *Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830.

⁴²⁵ *Stilson v. Rankin*, 40 Wis. 527.

⁴²⁶ *Bailey v. Taaffe*, 29 Cal. 422.

⁴²⁷ *Davis v. Solomon*, 28 Civ. Proc. R. 420, 56 N. Y. Supp. 80; *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219.

⁴²⁸ *Hitchcock v. Herzer*, 90 Ill. 543.

⁴²⁹ *Welton v. Littlejohn*, 163 Pa. 205, 29 Atl. 871; *Daly v. Thompson*, 5

plication to open a judgment is in effect a demand for equitable relief, and the applicant must make out a case which would justify a chancellor in entering a decree.⁴³⁰ Where the complaint, in an action to set aside a judgment, does not attempt to show that the plaintiff had or has any valid defense to the original action, a demurrer to the answer, whether good or bad, is properly overruled. "A bad answer is sufficient for a bad complaint."⁴³¹ In another case, where it was proposed to set aside a default and reinstate the case that the defendant might plead to the merits, and it appeared that substantially the same matters proposed to be pleaded had been determined against the defendant in a former litigation, it was held that the motion was properly denied.⁴³² But where a default has been taken against a person upon whom there was no service of process, and over whom the court acquired no jurisdiction, he is entitled to have the judgment annulled without showing a meritorious defense to the action.⁴³³ A defendant who seeks to open a judgment which he has suffered voluntarily and under the advice of counsel, must show the court specifically in what his defense consists; general allegations will not suf-

Pa. Dist. R. 749; *Jospe v. Lighte*, 22 Misc. Rep. 146, 48 N. Y. Supp. 645; *Phillips v. Equitable Life Assur. Soc.*, 26 N. Y. Supp. 522; *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696; *Le Duc v. Slocomb*, 124 N. C. 347, 32 S. E. 726; *Reab v. Sherman*, 93 Ga. 792, 20 S. E. 642; *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Durham v. Moore*, 48 Kan. 135, 29 Pac. 472; *Becker v. Huthsteiner*, 142 Ind. 99, 41 N. E. 323; *West v. Miller*, 125 Ind. 70, 25 N. E. 143; *Davis v. Steuben School Tp.*, 19 Ind. App. 694, 50 N. E. 1; *Culver v. Brinkerhoff*, 76 Ill. App. 679; *Mann v. Warde*, 64 Ill. App. 108; *Kime v. Fenner*, 54 Neb. 476, 74 N. W. 869; *Gilbert v. Marrow*, 54 Neb. 77, 74 N. W. 420; *Clark v. Charles*, 55 Neb. 202, 75 N. W. 563; *Pettigrew v. City of Sioux Falls*, 5 S. D. 646, 60 N. W. 27; *Tacoma Lumber & Manuf'g Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115; *Western Security Co. v. Lafleur*, 17 Wash. 406, 49 Pac. 1061; *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. The rule is sometimes stated in this form; that a judgment will not be set aside where, on a new trial, the judgment must be the same. *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423.

⁴³⁰ *Knarr v. Elgren* (Pa.) 9 Atl. 875.

⁴³¹ *Rupert v. Martz*, 116 Ind. 72, 18 N. E. 381.

⁴³² *Storey v. Weaver*, 66 Ga. 296.

⁴³³ *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913; *Taylor v. Coughlan*, 73 Ill. App. 378.

face.⁴³⁴ But on a motion to open a default the court will not determine absolutely whether the defense interposed will be sufficient at the trial, but merely see that it is not frivolous. If set up in good faith, and with a sufficient excuse for the party's negligence in not having presented it at the proper time, he will be let in to answer as of course.⁴³⁵

§ 349. Technical or Unconscionable Defense not Sufficient.

The privilege of vacating judgments is to be used only in the furtherance of justice, and a judgment should not be set aside unless it is unjust as it stands. Hence, if it is regular on its face, it will never be opened up merely for the purpose of letting in an unconscionable, dishonest, or purely technical defense.⁴³⁶ That usury is to be regarded as a defense of this character is settled beyond question. The court will not open a judgment merely to allow the plea of usury to be set up, or, if it opens the judgment on other grounds, may forbid the defendant to interpose that defense.⁴³⁷ In regard to a plea of the statute of limitations, there is room for more doubt. Some of the cases hold that such defense is not sufficient to justify the court

⁴³⁴ *Ellis v. Jones*, 6 How. Prac. (N. Y.) 296.

⁴³⁵ *Excise Com'rs v. Hollister*, 2 Hill. (N. Y.) 588. Before the court will set aside a judgment on a money judgment, it must be shown that the petitioner was not indebted to the judgment plaintiff; the defense of nul tiel record is not sufficient. *Bank of Stratton v. Dixon*, 105 Iowa, 148, 74 N. W. 919.

⁴³⁶ *Parrott v. Den*, 34 Cal. 79; *Thatcher v. Haun*, 12 Iowa, 303; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162; *Bank of Statesville v. Foote*, 77 N. C. 131; *Mulhollan v. Scoggin*, 8 Neb. 202; *Anderson v. Beebe*, 22 Kan. 768; *Jorgensen v. Griffin*, 14 Minn. 464 (Gil. 346); *Pennington's Adm'x v. Gibson*, 6 Ark. 447; *Hazelrigg v. Wainwright*, 17 Ind. 215; *Marsh v. Lasher*, 13 N. J. Eq. 253; *Audubon v. Excelsior Ins. Co.*, 10 Abb. Prac. (N. Y.) 64; *Bard v. Fort*, 3 Barb. Ch. (N. Y.) 632; *Gay v. Gay*, 10 Paige (N. Y.) 374; *Gourlay v. Hutton*, 10 Wend. (N. Y.) 595; *St. Paul & D. R. Co. v. Blackmar*, 44 Minn. 514, 47 N. W. 172; *Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878; *Herald v. Hargis* (Ky.) 54 S. W. 958. Compare *Benedict v. Arnoux*, 85 Hun, 283, 32 N. Y. Supp. 905.

⁴³⁷ *Farish v. Corlies*, 1 Daly (N. Y.) 274; *Lovett v. Cowman*, 6 Hill (N. Y.) 226; *Candler v. Pettit*, 1 Paige (N. Y.) 427; *Marsh v. Lasher*, 13 N. J. Eq. 253; *Morris v. Slatery*, 6 Abb. Prac. (N. Y.) 74; *Grant v. McCaughin*, 4 How. Prac. (N. Y.) 216; *Quincy v. Foot*, 1 Barb. Ch. (N. Y.) 496; *Hazelrigg v. Wainwright*, 17 Ind. 215.

in opening the judgment, at least if there is nothing to show that the debt is not still morally and honestly due.⁴³⁸ Indulgence, it is said, should not be granted for the defendant's laches merely to enable him to deny the like indulgence to the laches of his adversary. In Ohio the decisions are that this plea is one not to be favored, and where an issue has been made up, or the defendant is in default, he will not be allowed to put in the plea of the statute, unless under peculiar circumstances.⁴³⁹ But on the other hand, in some states it is held that the statute of limitations is a good and meritorious plea, that it is sufficient ground for opening the judgment, and that if the trial court refuses to set aside the judgment unless the defendant will agree to waive this defense, it is a manifest abuse of discretion.⁴⁴⁰ A set-off may perhaps be considered, in some instances, as a meritorious defense within this rule, but a judgment should not be opened to the prejudice of the plaintiff merely to enable the defendant to interpose a counter-claim which he may enforce by action, where there is no doubt as to the plaintiff's responsibility.⁴⁴¹ So again, the court will not open up a default to permit a defense of the statute of frauds to be made either by demurrer or plea, unless under special and peculiar circumstances.⁴⁴² In equity, a decree fairly and regularly obtained by default, for want of an answer, will not be set aside to let in a defense founded on a fraudulent speculation undeserving of the favor of the court.⁴⁴³ A judgment should not be opened where the only defense set up is a technical objection to the plaintiff's capacity to sue, such objection not appearing on the face

⁴³⁸ *Pennington's Adm'x v. Gibson*, 6 Ark. 447; *Hawes v. Hoyt*, 11 How. Prac. (N. Y.) 454; *Haines v. Lytle*, 4 West. Law J. 1; *Douglas v. Douglas*, 3 Edw. Ch. (N. Y.) 390; *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

⁴³⁹ *Sheets v. Baldwin's Adm'rs*, 12 Ohio, 120; *Newsom's Adm'r v. Ran*, 18 Ohio, 240.

⁴⁴⁰ *Ellinger's Appeal*, 114 Pa. 505, 7 Atl. 180; *Mitchell v. Campbell*, 14 Or. 454, 13 Pac. 190; *Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847. See, also, *Gourlay v. Hutton*, 10 Wend. (N. Y.) 595.

⁴⁴¹ *Leahey v. Kingon*, 22 How. Prac. (N. Y.) 209; *Croop v. Dodson*, 7 Kulp (Pa.) 13; *Cresswell v. White*, 3 Ind. App. 306, 29 N. E. 612; *Boas v. Heffron*, 40 Ill. App. 652.

⁴⁴² *McCulloch v. Tapp*, 4 West. Law Month. 575.

⁴⁴³ *Parker v. Grant*, 1 Johns. Ch. (N. Y.) 630.

of the complaint.⁴⁴⁴ So where the judgment was entered on a mechanic's lien, and the defense offered is that the lien was defective as being for a lump sum, instead of setting out the articles furnished.⁴⁴⁵ Where municipal officers are sued on a warrant drawn by them, a judgment by confession will not be struck off at the suit of a tax payer on the mere ground that the action should have been on the original debt, instead of on the warrant, where it is not denied that the debt was just.⁴⁴⁶ Again, a judgment by default on a policy of insurance should not be set aside where the defense is a forfeiture of the policy, unless it is shown that the alleged forfeiture has not in any way been waived, and that, on a trial, the result would probably be different.⁴⁴⁷ But on the other hand, a plea of a discharge in bankruptcy or insolvency is not technical, but goes to the merits as a plea in bar.⁴⁴⁸ And the same is true of a plea of *res judicata*. To prohibit the defendant from pleading a former judgment in bar of the present action, as a condition to lifting a default against him, is error.⁴⁴⁹ And so, where the action is on a note, the defense that it was given for money lost in gaming is a defense to the merits, and should be allowed.⁴⁵⁰ In California, it is said that the statement that the defense appears on the face of the complaint shows it to be of a technical character merely and therefore insufficient.⁴⁵¹

§ 350. Opening Judgment to admit Defense.

In Pennsylvania, the usual and favorite practice, upon a proper and timely application for relief against a judgment by confession or default, is to open the judgment, but without vacating it and without impairing its lien, and let the defendant in to a defense on the mer-

⁴⁴⁴ *Abram French Co. v. Marx*, 8 Misc. Rep. 490, 28 N. Y. Supp. 749.

⁴⁴⁵ *Caldwell v. Carter*, 153 Pa. 310, 25 Atl. 831.

⁴⁴⁶ *Maneval v. Jackson Tp.*, 141 Pa. 426, 21 Atl. 672, 28 Wkly. Notes Cas. 130.

⁴⁴⁷ *Union Cent. Life Ins. Co. v. Lipscomb* (Tex. Civ. App.) 27 S. W. 307.

⁴⁴⁸ *Kahn v. Casper*, 51 App. Div. 540, 64 N. Y. Supp. 838; *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849.

⁴⁴⁹ *Audubon v. Excelsior Fire Ins. Co.*, 10 Abb. Prac. (N. Y.) 64.

⁴⁵⁰ *Ruckman v. Pitcher*, 1 N. Y. 392; *Bank of Kinderhook v. Gifford*, 40 Barb. (N. Y.) 659; *Grant v. McCaughin*, 4 How. Prac. (N. Y.) 216.

⁴⁵¹ *People v. Rains*, 23 Cal. 127.

its.⁴⁵² It is in the light of this statement that we are to understand the remark that to open a judgment is not to set it aside, and that when it is closed by the action of the court it takes its place as if it had never been disturbed.⁴⁵³ Thus, for example, a judgment entered on a warrant of attorney should be opened to let the defendant plead his discharge in bankruptcy, when he acts immediately upon notice.⁴⁵⁴ On opening a judgment, in accordance with this practice, the judgment itself may be regarded as standing in the place of a declaration, and the entry of a non pros. for want of a declaration is irregular.⁴⁵⁵ But the opening of the judgment leaves the burden and the mode of proof exactly the same as if the judgment had never been entered. Hence if the defendant pleads non est factum as to the instrument on which it was founded, the record of the judgment is not even prima facie evidence for the plaintiff.⁴⁵⁶ When a judgment is thus opened, the defenses which may be set up are limited. For instance, it does not become subject to set-off generally. If the defendant has a valid claim against the plaintiff exceeding the amount of the judgment, he cannot recover a verdict for the excess. He may be permitted to attack the validity of the claim on which the judgment is founded, or the good faith of the transaction connected with the consideration, or to show subsequent payment of the debt or equitable discharge therefrom. But in some manner, either in law or equity, the subject-matter of defense must have attached to the judgment or the consideration on which it rests.⁴⁵⁷ The defendant can urge defenses existing at the time of the rendition of the judgment, but not those accruing subsequently.⁴⁵⁸ If a judgment be opened upon an affidavit of defense, and the defendant let in to a defense upon the merits, he will not, upon the trial, be permitted to take advantage of a technical exception to the form of action.⁴⁵⁹ And, generally, the rules stated in the preceding section will apply to this

⁴⁵² Cochran v. Eldridge, 49 Pa. 365.

⁴⁵³ Gloninger v. Hazard, 4 Phila. (Pa.) 354.

⁴⁵⁴ Wise's Appeal, 90 Pa. 193; Adam's Appeal, 101 Pa. 471.

⁴⁵⁵ Bush v. Monteith, 2 Wkly. Notes Cas. (Pa.) 112.

⁴⁵⁶ West v. Irwin, 74 Pa. 258; Collins v. Ireas, 77 Pa. 493.

⁴⁵⁷ Beaty v. Bordwell, 91 Pa. 438.

⁴⁵⁸ Curtis v. Slosson, 6 Pa. 265.

⁴⁵⁹ Ekel v. Snevily, 3 Watts & S. (Pa.) 272, 38 Am. Dec. 758.

manner of practice. So where a judgment on a note is opened, with leave to the defendant to defend on matters stated in his petition, he cannot set up a breach of contract not alleged in the petition.⁴⁶⁰

§ 351. Evidence.

The party who seeks the opening or vacation of a judgment must sustain the burden of proof, and must establish his right to the relief asked by clear and satisfactory evidence.⁴⁶¹ Where the ground alleged is irregularity or want of jurisdiction, there are some authorities showing a reluctance to permit contradiction of the record.⁴⁶² But the rule obtaining in the majority of the states is that the recitals of the record (as, for instance, a recital that the defendant was duly served with process) are presumed to be correct and will prevail in the absence of sufficient countervailing evidence; but that the defendant may contradict and overthrow such recitals, the only question being upon the strength and clearness of his evidence.⁴⁶³ Of course it is equally open to the adverse party to present affidavits sustaining the record and showing jurisdiction, and the issue will then be determined upon the preponderance of the evidence.⁴⁶⁴ Where it is sought to have a judgment or decree set aside on the ground of fraud in procuring it, the evidence must be clear and cogent, so as to convince the court that the facts alleged to constitute the fraud existed, and were operative in procuring the decree.⁴⁶⁵ If the evi-

⁴⁶⁰ *Marsh v. Nordyke & Marmon Co.* (Pa.) 15 Atl. 875.

⁴⁶¹ *Smith v. Black*, 51 Md. 247.

⁴⁶² *Pulliam v. Dillard*, 71 Ga. 598; *Stony Island Hotel Co. v. Johnson*, 57 Ill. App. 606; *Arnold v. Kilchmann*, 80 Ill. App. 229.

⁴⁶³ *Shortz v. Quigley*, 1 Bin. (Pa.) 222; *Guernsey v. Froude*, 13 Pa. Super. Ct. 405; *Gay v. Grant*, 101 N. C. 206, 8 S. E. 99; *Atchison Sav. Bank v. Means*, 61 Kan. 857, 58 Pac. 989; *Kolb v. Raisor*, 17 Ind. App. 551, 47 N. E. 177; *Wolf v. Shenandoah Nat. Bank*, 84 Iowa, 138, 50 N. W. 561; *Jamison v. Weaver*, 84 Iowa, 611, 51 N. W. 65; *Farnsley v. Stillwell*, 107 Iowa, 631, 78 N. W. 678; *Whitney v. Daggett*, 108 Cal. 232, 41 Pac. 471; *McKinley v. Tuttle*, 34 Cal. 235; *Norton v. Atchison, T. & S. F. R. Co.*, 97 Cal. 388, 30 Pac. 585, 33 Am. St. Rep. 198; *Whitfield v. Howard*, 12 S. D. 355, 81 N. W. 727.

⁴⁶⁴ *Stover v. Hough*, 47 Neb. 789, 66 N. W. 825; *Provost v. Provost*, 64 Hun. 634, 18 N. Y. Supp. 896; *Bausman v. Tilley*, 46 Minn. 66, 48 N. W. 459.

⁴⁶⁵ *Smith v. Miller* (Tenn. Ch.) 42 S. W. 182; *National Mut. Bldg. Ass'n v. Kondrak*, 9 Kulp (Pa.) 14.

dence presented by the applicant is not contradicted, it will justify the court in vacating the judgment, provided it is plain, positive, and specific.⁴⁶⁶ But if his allegations are traversed by affidavits or testimony presented on behalf of the adverse party, then the applicant must establish his contention by a fair preponderance of evidence.⁴⁶⁷ So, where the ground offered for the vacation of the judgment is the disability of the defendant (as, that he was insane when the action was commenced), he must assume the burden of proving the fact, by superior weight of testimony.⁴⁶⁸

Where a party moves for the vacation of a judgment taken against him by reason of "unavoidable casualty or misfortune," or through his "mistake, surprise, or excusable neglect," as provided by the statutes, he must furnish clear and satisfactory proof of the facts constituting the cause which prevented him from defending, or excusing his default; ⁴⁶⁹ affidavits may be filed contradicting the matters which he alleges; ⁴⁷⁰ and the motion will not be granted, where the evidence is conflicting, unless the applicant makes out his case by a fair preponderance of the testimony.⁴⁷¹

An application for the vacation of a judgment, as has been already stated, must be accompanied by a showing that the defendant has a good defense on the merits. But while the court may inquire whether the proposed defense is meritorious, and whether it would be sufficient, if established, to defeat the plaintiff's claims,⁴⁷² the in-

⁴⁶⁶ *Yost v. Mensch*, 141 Pa. 73, 21 Atl. 507, 27 Wkly. Notes Cas. 562.

⁴⁶⁷ *Tidoute & Tiona Oil Co. v. Shear*, 161 Pa. 508, 29 Atl. 107; *Lomison v. Faust*, 145 Pa. 8, 23 Atl. 377; *Oberly v. Oberly*, 190 Pa. 341, 42 Atl. 1105; *Layton v. Prewitt* (Ky.) 25 S. W. 882; *Brown v. Stegemann* (Iowa) 81 N. W. 450. But in Pennsylvania, it is said that the rule that, the presumption being in favor of the validity of a judgment, the burden is on the defendant to establish invalidity by a preponderance of evidence, and when the proof is in equipoise the judgment will not be opened, does not apply where it was obtained by defendant's attorney or agent through fraud and abuse of trust relations. *Gillespie v. Weiss*, 22 Pa. Co. Ct. R. 177.

⁴⁶⁸ *Smith v. McClure*, 146 Ind. 123, 44 N. E. 1004.

⁴⁶⁹ *Spalding v. Crawford*, 3 App. D. C. 361.

⁴⁷⁰ *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303.

⁴⁷¹ *Quick v. Lawrence Nat. Bank*, 10 Ind. App. 523, 38 N. E. 73; *Mogelberg v. Clevinger*, 93 Iowa, 736, 61 N. W. 1092; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962.

⁴⁷² *Gibbons v. Campbell*, 66 Hun, 631, 21 N. Y. Supp. 233; *Randall v. Unit-*

quiry does not include the truth of the defense. If the proposed plea or answer is investigated at all, on the motion to vacate or open the judgment, it is only to the extent of ascertaining whether the facts set up, assuming their truth, constitute a good and meritorious defense. Those facts must of course be proved on the subsequent trial, but they are not in issue on the motion to open or set aside the judgment. Hence, generally speaking, counter affidavits cannot be filed, nor counter evidence heard in any form as to the matters alleged as constituting a defense to the original action.⁴⁷³ But in Pennsylvania, on a rule to open a judgment, evidence may be heard both for and against the proposed defense; and the judgment will not be disturbed if the defendant's assertion of the facts on which he relies is not corroborated and is traversed by an equally positive and comprehensive denial on the part of the plaintiff. If further testimony is introduced, the court will decide the motion according to the preponderance of evidence, or it may, in the exercise of a sound discretion, open the judgment and let the issue be decided by the verdict of a jury.⁴⁷⁴ And a similar practice is observed in Illinois.⁴⁷⁵

ed Life & Accident Ins. Ass'n, 59 N. Y. Super. Ct. 587, 14 N. Y. Supp. 631; *Pitzele v. Lutkins*, 85 Ill. App. 602.

⁴⁷³ *Benedict v. Arnoux*, 85 Hun, 283, 32 N. Y. Supp. 905; *Buck v. Havens*, 40 Ind. 221; *Hill v. Crump*, 24 Ind. 291; *Pratt v. Kells*, 28 Ala. 390; *Masten v. Indiana Car & Foundry Co.*, 25 Ind. App. 175, 57 N. E. 148; *Worth v. Wetmore*, 87 Iowa, 62, 54 N. W. 56; *Francis v. Cox*, 33 Cal. 323; *Gracler v. Weir*, 45 Cal. 53; *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; *G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

⁴⁷⁴ *Woods v. Irwin*, 141 Pa. 278, 21 Atl. 603, 23 Am. St. Rep. 282, 23 Wkly. Notes Cas. 185; *City of Philadelphia v. Weaver*, 155 Pa. 74, 25 Atl. 876; *Stockwell v. Webster*, 160 Pa. 473, 28 Atl. 837; *Steiner v. Scholl*, 163 Pa. 465, 30 Atl. 159; *Gillespie v. Webster*, 180 Pa. 405, 36 Atl. 928; *Burley v. Filby*, 193 Pa. 374, 44 Atl. 453; *Krebs v. Clark*, 9 Pa. Co. Ct. R. 420; *McNeal v. Banks*, 6 Kulp, 371; *Hildreth v. Davis*, Id. 336; *Fishblate v. McCullough*, 7

⁴⁷⁵ *Heffling v. Van Zandt*, 162 Ill. 162, 44 N. E. 424; *Matzenbaugh v. Doyle*, 156 Ill. 331, 40 N. E. 935; *Sundberg v. Temple*, 33 Ill. App. 633; *Anderson v. Studebaker*, 37 Ill. App. 532; *Truby v. Case*, 41 Ill. App. 153. Compare *Dionne v. Matzenbaugh*, 49 Ill. App. 527. In *Brown v. Huber*, 79 Ill. App. 109, it is said that, where the evidence on a motion to vacate a judgment by confession is conflicting, and the contested matter in doubt, the motion should be allowed.

§ 352. Imposition of Terms.

Since the opening or vacating of a judgment, in any case where an imputation of laches or inattention rests upon the party applying, is an act of grace and favor and is discretionary with the trial court, it has power to impose such terms as may be just and reasonable, as a condition to the granting of such relief, and its action in this respect will not be interfered with, unless for a gross and manifest abuse of discretion.⁴⁷⁶ But the converse of this rule is equally true. The imposition of terms is by no means a necessary condition to the opening of a judgment (unless made so by statute), and the judgment-creditor cannot complain that terms were not imposed, unless he can also show that the action of the court was arbitrary and unjust,⁴⁷⁷ more especially where a judgment by default is opened at the same term at which it was entered.⁴⁷⁸ The most usual application of this power of imposing terms is the requirement that the party pay all previous costs in the action as a condition precedent to the opening of the judgment. It is clearly within the power of the court to make the payment of costs a condition to granting the relief asked,⁴⁷⁹ includ-

Pa. Dist. R. 364; *Lee v. Sallada*, 7 Pa. Super. Ct. 98; *Hellner v. Falls Coal Co.*, 9 Pa. Super. Ct. 78. The rule as stated in *Klopfer v. Ekis*, 155 Pa. 41, 25 Atl. 785, is that a petition to open a judgment should not be granted unless there is more than oath against oath; but when there is more than this, and it comes to the question of weight of the evidence, it is for the court below, in the exercise of a sound discretion, to decide to which side the scales incline, and if it is in doubt on this question, or as to the credibility of the witnesses, a prudent course would be to open the judgment, and thus obtain the aid of a jury at the trial.

⁴⁷⁶ *Ensly v. Wright*, 3 Pa. 501; *McMurray's Heirs v. City of Erie*, 59 Pa. 223; *Huston Township Co-op. Mut. Fire Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926; *Hornthal v. Finelite*, 9 Misc. Rep. 724, 29 N. Y. Supp. 686; *Fowble v. Walker*, 4 Ohio, 64; *Hovey v. Middleton*, 56 Ill. 468; *Mason v. McNamara*, 57 Ill. 274; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088; *Young v. Bircher*, 31 Mo. 136, 77 Am. Dec. 638; *Magoon v. Callahan*, 39 Wis. 141; *Howe v. Coldren*, 4 Nev. 171.

⁴⁷⁷ *Kelber v. Pittsburg Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335; *Warder v. Patterson*, 6 Dak. 83, 50 N. W. 484; *Johnson v. McCurry*, 102 Ga. 471, 31 S. E. 88.

⁴⁷⁸ *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910.

⁴⁷⁹ *Goodness v. Metropolitan St. Ry. Co.*, 49 App. Div. 76, 63 N. Y. Supp. 476; *Szerlip v. Baier*, 22 Misc. Rep. 351, 49 N. Y. Supp. 300; *Schwartz v.*

ing, in a proper case and where justice appears to require it, the disbursements of the opposite party,⁴⁸⁰ a proper fee to his attorneys,⁴⁸¹ and his reasonable personal expenses incurred in connection with the suit,⁴⁸² and also the costs of the motion itself.⁴⁸³ But the imposition of costs is not a legal necessity. It is equally in the discretion of the court, if it considers such action just and proper in the particular case, to omit this requirement. Thus, an order vacating a judgment on account of surprise or excusable neglect, need not require the payment of all costs as a condition precedent.⁴⁸⁴ And indeed, where the ground of the application is a want of jurisdiction in the court, no process having been served on the defendant, it would not be at all proper to require him to pay the costs, since, in that case, he is not chargeable with any kind or degree of fault or carelessness.⁴⁸⁵ Another very common requirement, on the opening of a judgment, is

Schendel, 24 Misc. Rep. 701, 53 N. Y. Supp. 773; *Cooper v. Borough of Kingston*, 6 Kulp (Pa.) 344; *Stewart v. Scully*, 46 Kan. 491, 26 Pac. 937; *Yost v. Minneapolis Harvester Works*, 41 Ill. App. 556; *Ueland v. Lynch*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698; *Leake v. Gallogly*, 34 Neb. 837, 32 N. W. 824; *Howe v. Independence Consol. Gold & Silver Min. Co.*, 29 Cal. 72; *Leet v. Grants*, 36 Cal. 288; *Bailey v. Taaffe*, 29 Cal. 422; *People v. O'Connell*, 23 Cal. 281; *Roland v. Kreyenhagen*, 18 Cal. 455.

⁴⁸⁰ *Muller v. Post*, 58 Hun, 604, 11 N. Y. Supp. 615; *Traitteur v. Livingston*, 59 N. Y. Super. Ct. 140, 13 N. Y. Supp. 603; *Ketcham v. Elliott*, 66 Hun, 627, 20 N. Y. Supp. 745; *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

⁴⁸¹ *McCarty v. Altonwood Stock Farm*, 68 Hun, 551, 22 N. Y. Supp. 1091; *Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778; *Frelberg v. Le Clair*, 78 Wis. 164, 47 N. W. 178.

⁴⁸² *Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559; *McCarty v. Altonwood Stock Farm*, 68 Hun, 551, 22 N. Y. Supp. 1091.

⁴⁸³ *Richardson v. Sun Printing & Publishing Ass'n*, 20 App. Div. 329, 46 N. Y. Supp. 814.

⁴⁸⁴ *Ryan v. Mooney*, 49 Cal. 33; *Robinson v. Merrill*, 80 Cal. 415, 22 Pac. 260; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910. In Georgia, it is said that, while, under the rule of court, a judgment by default should never be opened without the payment of costs, yet where these terms are not insisted upon by opposite counsel, the court may, in its discretion and in conformity to local practice, for special reasons, allow pleas to be filed without the payment of costs, though such practice is unsound. *Butler v. Richmond & D. R. Co.*, 88 Ga. 594, 15 S. E. 668.

⁴⁸⁵ *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892; *Stanton-Thompson Co. v. Crane*, 24 Nev. 171, 51 Pac. 116.

that the party shall plead to the merits, or shall forbear to set up some particular defense which is considered unconscionable or purely technical. It cannot be doubted that this rests in the discretion of the court.⁴⁸⁶ But it seems that the order requiring defendant to "answer" should not be so framed as to exclude his right to demur.⁴⁸⁷ And requiring him to consent that the verdict on the trial shall be final and that no appeal shall be taken for any reason, is in excess of the court's authority.⁴⁸⁸ Other conditions may be imposed where it is necessary to save to the judgment-creditor the fruits of the judgment he has already recovered. Thus, it is not an abuse of discretion, where the circumstances of the particular case warrant it, to require the defendant to consent to the appointment of a receiver of the property in question.⁴⁸⁹ So also, the court may order that the judgment shall stand as security for the amount ultimately recovered by the plaintiff, or may require the defendant to give a bond with sureties conditioned for the payment of any judgment the plaintiff may recover,⁴⁹⁰ or order him to give an undertaking not to sell or incumber any of his property to hinder the plaintiff in the collection of his claim.⁴⁹¹ It has even been held to be a fair exercise of the court's discretion, as a condition on opening a judgment by default, to require the defendant to deposit with the clerk of the court a sum of money sufficient to secure the plaintiff's claim, together with the costs and disbursements.⁴⁹² But in regard to all such conditions as

⁴⁸⁶ *Bailey v. Clayton*, 20 Pa. 295; *Thompson v. Dickinson*, 159 Mass. 210, 34 N. E. 262; *Dennison v. Chapman*, 102 Cal. 618, 36 Pac. 943; *Ridley v. Manhattan Ry. Co.*, 72 Hun, 164, 25 N. Y. Supp. 380. See *Anaconda Min. Co. v. Salle*, 16 Mont. 8, 39 Pac. 909.

⁴⁸⁷ *Berg v. Pohl*, 24 Misc. Rep. 740, 53 N. Y. Supp. 799.

⁴⁸⁸ *Fuchs & Lang Manuf'g Co. v. Springer & Welty Co.*, 15 Misc. Rep. 443, 37 N. Y. Supp. 24.

⁴⁸⁹ *Exley v. Berryhill*, 36 Minn. 117, 30 N. W. 436.

⁴⁹⁰ *Dudley v. Brinck*, 8 Misc. Rep. 76, 28 N. Y. Supp. 527; *Hart v. Washburn*, 17 N. Y. Supp. 85, 62 Hun, 623; *Halter v. Spokane Soap-Works Co.*, 12 Wash. 662, 42 Pac. 126. Compare *Glickman v. Loew*, 29 App. Div. 479, 51 N. Y. Supp. 1078; *Brown v. Brown*, 37 Minn. 128, 33 N. W. 546; *Union Nat. Bank v. Benjamin*, 61 Wis. 512, 21 N. W. 523.

⁴⁹¹ *Schwartz v. Schendel*, 24 Misc. Rep. 701, 53 N. Y. Supp. 773.

⁴⁹² *Fuchs & Lang Manuf'g Co. v. Springer & Welty Co.*, 15 Misc. Rep. 443, 37 N. Y. Supp. 24. Compare *Stivers v. Ritt*, 29 Misc. Rep. 341, 60 N. Y. Supp. 507.

these, it must be remembered that the question is not one of the court's power in the matter, but of the exercise of a sound judicial discretion; and therefore the conditions to be imposed in each individual case must rest upon the distinctive facts of that case. Onerous terms should not be imposed upon a defendant who is not greatly in fault. On the other hand, if the judgment is now good and collectible, it should not be set aside without adequate security furnished, where there is a prospect that a subsequent recovery on the same claim could not be enforced. Justice to both parties should guide the court, and all the pertinent facts of the particular case should be considered.

It is to be noted that a judgment ordered to be set aside "on payment of all costs" remains in full force until such payment is made.⁴⁹³ And so, if an order is made setting aside a judgment on condition that the moving party pay to the other a sum of money and file an answer within a certain time, the conditions must be complied with within the time fixed, or the judgment will remain in force as if the order had never been made.⁴⁹⁴

§ 353. Partial Vacation of Judgment.

Where a judgment is rendered on a petition which contains two distinct causes of action, though not separately stated and numbered, but united in a single count, and a motion is made to vacate and set aside the judgment and grant a new trial for defects apparent in the record, and the record discloses that judgment was properly entered on one cause of action and improperly entered on the other, the court may sustain the motion in part and vacate the judgment as to the one cause of action, while at the same time it overrules the motion in part and refuses to disturb the judgment in respect to the other cause of action.⁴⁹⁵ But it is thought that a defendant cannot take advantage of so much of a decree as is favorable to him, and

⁴⁹³ Gregory v. Haynes, 21 Cal. 443; Furman v. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629.

⁴⁹⁴ Hartman v. Olvera, 49 Cal. 101.

⁴⁹⁵ Weaver v. Leach, 26 Kan. 179. See Wise v. Schloesser, 111 Iowa, 16, 82 N. W. 439.

have it set aside as to the residue.⁴⁹⁶ A judgment may also be opened as to some of the defendants, and not as to the others, where their interests are severable and the judgment is not an entirety.⁴⁹⁷ But in Texas, under a statute providing that only one final judgment shall be entered in any cause, a judgment in a suit by a seller to recover goods procured from him through fraud, entered against the vendee, his trustee in insolvency, a receiver of his property, and his sureties, is an entirety, and cannot be set aside as to a part of the judgment-debtors.⁴⁹⁸ So an order setting aside a judgment enforcing a lien for street improvements against the lots of various owners goes to the entire judgment, and not merely to the judgment as against the persons who moved to set it aside.⁴⁹⁹

§ 354. Allowance of Application discretionary.

A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, whether of allowance or refusal, will not generally be disturbed by the appellate court, unless there has been a manifest abuse of such discretion.⁵⁰⁰ The nature of this discretion has been described, in a well-considered opinion of the

⁴⁹⁶ *Ross v. Ross*, 21 Or. 9, 26 Pac. 1007.

⁴⁹⁷ *Wright v. Churchman*, 135 Ind. 683, 35 N. E. 835.

⁴⁹⁸ *Levy v. Gill* (Tex. Civ. App.) 46 S. W. 84.

⁴⁹⁹ *Bitzer v. O'Bryan* (Ky.) 54 S. W. 951.

⁵⁰⁰ *Eldred v. Hazlett's Adm'r.*, 38 Pa. 16; *Gilliland v. Bredin*, 63 Pa. 393; *Lamb's Appeal*, 89 Pa. 407; *Sweesey v. Kitchen*, 80 Pa. 160; *McClelland v. Pomeroy*, 75 Pa. 410; *Earley's Appeal*, 90 Pa. 322; *Wernet's Appeal*, 91 Pa. 319; *Leader v. Dunlap*, 6 Pa. Super. Ct. 243; *O'Brien v. Sylvester*, 12 Pa. Super. Ct. 408; *City of New York v. Smith*, 138 N. Y. 676, 34 N. E. 400; *Cunningham v. Hatch*, 18 N. Y. Supp. 458; *Seiffert v. Caverley*, 19 N. Y. Supp. 520; *St. Clair v. Conlon*, 12 App. D. C. 161; *Hudgins v. White*, 65 N. C. 393; *Herren v. Harralson*, 97 Ga. 374, 24 S. E. 457; *Bridges v. Blakeman*, 108 Ga. 801, 34 S. E. 122; *Elliston v. Bank of Commonwealth*, 3 Dana (Ky.) 99; *Hopkins v. Hopkins*, 47 Kan. 103, 27 Pac. 822; *Cavanaugh v. Toledo, W. & W. R. Co.*, 49 Ind. 149; *Hoag v. Old People's Mut. Ben. Soc.*, 1 Ind. App. 28, 27 N. E. 438; *Burke v. Ward*, 50 Ill. App. 283; *Carr v. School District of Belton*, 42 Mo. App. 154; *Hunt v. Jenney*, 2 Mo. App. Rep'r, 1249; *Merritt v. Putnam*, 7 Minn. 493 (Gil. 399); *Granse v. Frings*, 46 Minn. 352, 49 N. W. 60; *Pine Mountain Iron & Coal Co. v. Tabour*, 55 Minn. 287, 56 N. W. 895; *St. Mary's Hospital v. National Ben. Co.*, 60 Minn. 61, 61 N. W. 824; *Seymour v. Board of*

supreme court of California, in terms which would probably be accepted as accurate and reasonable in all jurisdictions. "The discretion intended," says the court, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merits in *foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."⁵⁰¹ It is also said, however, that as a general rule, in a doubtful case, the court should incline to relieve. The exercise of the court's discretion ought to tend in a reasonable degree to bring about a judgment on the merits of the case, and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a rule, that the doubt should be resolved in favor of the application, proper terms and conditions being imposed.⁵⁰² A doubt as to the propriety of allowing the motion may arise from the nature of the evidence or the

Sup'rs of Chippewa County, 40 Wis. 62; *Wheeler & Wilson Manuf'g Co. v. Monahan*, 63 Wis. 194, 23 N. W. 109; *Evans v. Fall River County*, 4 S. D. 119, 55 N. W. 862; *Dougherty v. Nevada Bank*, 68 Cal. 275, 9 Pac. 112; *Garner v. Erlanger*, 86 Cal. 60, 24 Pac. 805; *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652, 30 Pac. 762; *Clarke v. Witram*, 99 Cal. 50, 33 Pac. 798; *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *White v. Northwest Stage Co.*, 5 Or. 99; *Askren v. Squire*, 29 Or. 228, 45 Pac. 779; *Lovejoy v. Willamette Transp. & Locks Co.*, 24 Or. 569, 34 Pac. 600; *City of Spokane Falls v. Curry*, 2 Wash. St. 541, 27 Pac. 477; *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *Hagar v. Wilkoff*, 2 Okl. 580, 39 Pac. 281.

⁵⁰¹ *Bailey v. Taaffe*, 29 Cal. 422.

⁵⁰² *Watson v. San Francisco & H. B. B. Co.*, 41 Cal. 17; *Vermont Marble Co. v. Black* (Cal.) 38 Pac. 512.

fact of its being evenly balanced. Thus, where the oath of the petitioner is opposed by the oath of the plaintiff in the judgment, it is no abuse of discretion to refuse to open the judgment.⁵⁰³ But if the relief is accorded, it will be presumed, in the court above, that there was sufficient evidence to justify the order.⁵⁰⁴ Where the situation of the judgment-creditor has undergone a material change, as by the incurring of expense in issuing and levying execution, and by the fact that a material witness has, by the death of the judgment-debtor, become disqualified, there is no abuse of discretion in refusing to open the judgment.⁵⁰⁵

But it is only in cases of doubt as to the facts of the case, or as to the propriety of allowing the motion, that the discretion of the court comes into play. Where the case is plain and free from all uncertainty, it is not a question of discretion but of legal right. For instance, if absolutely no excuse is offered for the default of the moving party, an order vacating the judgment is not within the discretion of the court.⁵⁰⁶ On the other hand, if adequate cause for setting aside the judgment is shown by the uncontradicted evidence or affidavits of the petitioner, the court must grant relief; it has no discretion to refuse;⁵⁰⁷ and the petitioner may even have mandamus to compel the court to act, if the judgment or decree cannot be taken up on appeal.⁵⁰⁸ In Missouri it is said that "while this court will not interfere with the discretion of the trial court in refusing to vacate and set aside a judgment where there is a conflict of evidence, it will do so when the evidence is all on one side and it is clear that the discretion has been abused."⁵⁰⁹ In Wisconsin, the area of the court's discretion appears to be more contracted. It is said that "unless the default of the party is excused and a verified answer tendered showing a defense on the merits," the appellate

⁵⁰³ *Barton's Appeal* (Pa.) 7 Atl. 168; *Rieker v. Doerr*, 16 *Lanc. Law Rev.* 59.

⁵⁰⁴ *Willett v. Millman*, 61 *Iowa*, 123, 15 *N. W.* 866.

⁵⁰⁵ *Jefferson Co. Bank v. Robbins*, 67 *Wis.* 68, 29 *N. W.* 893.

⁵⁰⁶ *Milwaukee Mut. Loan & Bldg. Soc. v. Jagodzinski*, 84 *Wis.* 35, 54 *N. W.* 102.

⁵⁰⁷ *Hull v. Vining*, 17 *Wash.* 352, 49 *Pac.* 537.

⁵⁰⁸ *Campbell v. Donovan*, 111 *Mich.* 247, 69 *N. W.* 514; *Bridgeport Electric & Ice Co. v. Bridgeport Land & Imp. Co.*, 104 *Ala.* 276, 16 *South.* 93.

⁵⁰⁹ *Craig v. Smith*, 65 *Mo.* 536.

court will not interfere with a refusal to open the judgment.⁵¹⁰ A court having jurisdiction to set aside a judgment has the right to give any less relief by which justice may be obtained and by which the rights of a party in excusable default may be protected, and the mode of effecting this object is under the control and subject to the discretion of the court.⁵¹¹ In California the trial court has no power to review its own order setting aside a judgment for want of service of summons, where the order was regularly made after hearing and consideration.⁵¹² According to the practice in some of the states, the refusal of the court below to open a judgment is ground for an appeal, but cannot be brought up on writ of error.⁵¹³

§ 354a. Practice on Opening Default.

Where the relief sought by a judgment-debtor is not that the judgment should be stricken off or absolutely set aside as being void, but that a default should be opened, so that he may contest the case on the merits, and the application is granted, the proper practice is for the court to include in its order a direction that the party have leave to plead, or that a new trial be granted, or that the case be set down for trial or hearing, according to the situation of the particular case.⁵¹⁴ It is not proper to enjoin the enforcement of the judgment.⁵¹⁵ But where matters arise, in an application to vacate a confessed judgment, which are proper to be submitted to a jury,

⁵¹⁰ *Union Lumbering Co. v. Board of Sup'rs of Chippewa Co.*, 47 Wis. 245, 2 N. W. 281.

⁵¹¹ *McCall v. McCall*, 54 N. Y. 541.

⁵¹² *Hanson v. Hanson* (Cal.) 20 Pac. 736.

⁵¹³ *Gillespie v. Campbell* (Pa.) 1 Atl. 665.

⁵¹⁴ *Beck v. Juckett*, 111 Iowa, 339, 82 N. W. 762; *Belknap v. Groover* (Tex. Civ. App.) 56 S. W. 249; *Gormully & Jeffery Manuf'g Co. v. Catharine*, 25 Misc. Rep. 338, 55 N. Y. Supp. 475. In Pennsylvania, where a judgment is set aside after the term at which it was rendered, it is better that the formal entry should be, "Judgment vacated, verdict set aside, and new trial granted," instead of merely "Rule absolute for new trial," which does not at once show all that has been done. *Fisher v. Hestonville, M. & F. Pass. Ry. Co.*, 185 Pa. 602, 40 Atl. 97.

⁵¹⁵ *Hunton v. Euper*, 63 Ark. 323, 38 S. W. 517.

further proceedings under the judgment may be stayed, and the matters accordingly submitted.⁵¹⁶ Where, after a judgment by default, leave is granted to the defendant to plead, "the judgment to stand," and, on trial of the general issue filed accordingly, plaintiff has a verdict for less than the amount of the original judgment, it is proper to let the judgment stand as of its original date for such reduced amount, rather than to enter it as of the date of the verdict.⁵¹⁷

§ 355. Effect of Vacating Judgment.

If a judgment is absolutely void and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not. But if it is voidable only, and not void, it seems clear, as a matter of legal reason, that acts done under it by the plaintiff or others ought not to be invalidated by its subsequent vacation, provided that the reason for setting it aside be not attributable to the plaintiff, but the relief be granted as a matter of grace and favor to the defendant and on account of his mistake or excusable neglect. On the other hand, if the judgment is to be vacated by reason of the fraud or misconduct of the plaintiff, or for any irregularity for which he is actually or constructively to blame, it is equally clear that he should not be permitted to justify under it. And herein there is an important difference between the setting aside of an irregular judgment and the reversal of an erroneous judgment. "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle has never been applied to a judgment merely erroneous and reversed for error by a court of review. An irregular judgment is called voidable, and when set aside is treated as though void from the beginning; for the party himself is held chargeable with the irregularity; while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to

⁵¹⁶ *Rasmussen v. Smith*, 82 Ill. App. 334.

⁵¹⁷ *Dulle v. Lally*, 167 Ill. 485, 47 N. E. 753.

the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of distinction between the two, and it is manifestly a just and proper distinction. While it may well be held that a party is not justified by a judgment which is subsequently set aside for an irregularity in entering it up, it would seem unjust to hold that a judgment duly rendered by the court shall fail to protect a party acting under it before reversal, because reversed for error committed by the court."⁵¹⁸ Under the Pennsylvania practice, as already explained,⁵¹⁹ an order opening a judgment and letting the defendant in to a defense, does not destroy the lien from the date of its original entry.⁵²⁰ But in some other jurisdictions, the vacation of a judgment, especially at the same term at which it was rendered, leaves the case as if there had been no entry of judgment.⁵²¹ A more difficult question concerns the intervening rights of third persons. Some of the cases hold that a judgment by default may be opened on showing of an adequate cause, where the case has not been enrolled, though third parties have purchased in reliance on the judgment.⁵²² But the prevailing opinion appears to be that the setting aside of a judgment will not affect the title to property which was the subject of the judgment, or is affected by it,

⁵¹⁸ *Simpson v. Hornbeck*, 3 Lans. (N. Y.) 53.

⁵¹⁹ *Supra*, § 350.

⁵²⁰ *Steinbridge's Appeal*, 1 Pen. & W. (Pa.) 481. A judgment is a judgment to all intents and purposes, and with all its incidents and attributes, after the allowance of a rule to open it, the same as before; and hence, when it is closed again, after a trial on the merits by a verdict for a sum due, an execution issues upon it for the amount, so found as if it had not been disturbed. *McAnulty v. National Life Ass'n*, 6 Lack. Leg. N. 128.

⁵²¹ *Aetna Life Ins. Co. v. Board of Com'rs of Hamilton County*, 25 C. C. A. 94, 79 Fed. 575; *Olson v. Nunnally*, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296. In Nebraska, a court has no power, on setting aside a mere money judgment, to continue in existence the statutory judgment lien so that it may attach to such judgment as may be subsequently rendered in the same cause. *Farmers' Loan & Trust Co. v. Killinger*, 46 Neb. 677, 65 N. W. 790, 41 L. R. A. 222.

⁵²² *Benedict v. Auditor General*, 104 Mich. 269, 62 N. W. 364.

if it has passed to a purchaser in good faith, relying on the judgment.⁵²²

⁵²² Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073. In Minnesota, the matter is regulated by a statute which provides that the setting aside of a judgment shall not prevail against a bona fide purchaser, whose title was based thereon, where the judgment had been of record in the proper county for a period of not less than three years before the application to set aside the judgment was made. Gen. Laws Minn. 1887, c. 61; Drew v. City of St. Paul, 44 Minn. 501, 47 N. W. 158; Gowen v. Conlow, 51 Minn. 213, 53 N. W. 365.

CHAPTER XV.**RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW.****PART I. JURISDICTION OF EQUITY TO ENJOIN THE ENFORCEMENT OF JUDGMENTS.**

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PART I. JURISDICTION OF EQUITY TO ENJOIN THE ENFORCEMENT OF JUDGMENTS.

§ 356. Origin of the Power.

The power and jurisdiction of the courts of equity to enjoin a party from enforcing a judgment which he has obtained, when it would be against conscience to permit him to do so, is at the present day so firmly established, so salutary in its operation, and so thoroughly in accord with the promptings of justice, that it is difficult to realize the stubbornness and bitter jealousy with which the beginnings of its exercise were resisted. That such was the fact, however, is fully certified by the historians. This species of jurisdiction "was one of the first subjects that engaged the attention of the English chancellors, and though violently resisted by common-law lawyers and judges, the power was largely exercised by Cardinal Wolsey in the reign of Henry VIII, and, according to Mr. Reeves, with great ability and justice. It is related of Sir Thomas More, who succeeded Cardinal Wolsey, that having invited the judges to dine with him, he showed them the number and nature of the causes in which he had granted injunctions to judgments of the courts of common law, and the judges, upon full debate of the matter, confessed that they could have done no otherwise themselves. Still, however, clamors against the equity jurisdiction continued until they culminated in the famous controversy in the reign of James I, which was conducted principally by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction. The very point of this controversy, according to Judge Story (1 Story's Eq. § 51), was whether a court of equity could give relief from or against a judgment at common law, and it was finally decided in favor of the equity

jurisdiction.¹ From that time down to this day the jurisdiction has been exercised in England, and decrees of ecclesiastical courts have often been relieved against on the ground of fraud;² and so in like manner have awards,³ and verdicts,⁴ and judgments at law.⁵ And even decrees in chancery may be avoided for the same cause."⁶ Nor have the improvements of the law or the changes in judicial organization superseded this power of equity or obviated the necessity of its occasional exercise.⁷ A recent decision of the supreme court of the United States declares that the appropriate remedy to set aside or enjoin the execution of judgments at law wrongfully obtained is by bill in equity.⁸ But this jurisdiction, though unquestioned, is one which, from the pressure of hardship, always an element in these cases, is liable to abuse; and the abuse of it, say the courts, is extremely mischievous, tending as it does to conflict between jurisdictions and to the promotion of needless litigation.⁹ Hence "bills seeking relief from final judgments, solemnly rendered in the due and ordinary course of administration of justice by courts of competent jurisdiction, are always watched by courts of equity with extreme jealousy, and the grounds upon which interference will be allowed are, confessedly, narrow and restricted."¹⁰

¹ Spence, Chanc. Jur. p. 674.

² Van Brough v. Cock, 1 Ch. Cas. 201; Bissel v. Artell, 2 Vern. 47.

³ Lonsdale v. Littledale, 2 Ves. Jr. 451.

⁴ Williams v. Lee, 3 Atk. 223; Bateman v. Willoe, 1 Schoales & L. 201.

⁵ Barnsley v. Powell, 1 Ves. Sr. 119; Gainsborough v. Gifford, 2 P. Wms. 424; Humphreys v. Humphreys, 3 P. Wms. 394.

⁶ Cochran v. Eldridge, 49 Pa. 365, 368, citing Lloyd v. Mansell, 2 P. Wms. 73; Galley v. Baker, Cas. t. Talbot, 201; Bradish v. Gee, Amb. 229.

⁷ The statutes limiting the time within which judgments may be set aside on motion or petition, for mistake, surprise, excusable neglect, etc., have no application to a suit in equity to enjoin or annul a judgment on the ground of fraud. McNeil v. McNeil (C. C.) 78 Fed. 834; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Irvine v. Leyh, 102 Mo. 200, 16 S. W. 10.

⁸ Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013.

⁹ Kersey v. Rash, 3 Del. Ch. 321.

¹⁰ Johnson v. Templeton, 60 Tex. 233.

§ 357. Nature of Relief granted.

The action of a court of equity in giving relief against a judgment at law is almost always indirect. Courts of chancery, it must be remembered, do not claim to exercise any supervisory power over the courts of law, or their proceedings. Judgments are not reversed or vacated in equity. Adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed, and its remedial power is exercised by putting restraint upon his usual liberty of following up his judgment by the appropriate process for its collection. Equity therefore acts on the person, not the proceeding; and while it will enjoin the enforcement of a judgment, in proper cases, it will not interfere with the judgment itself.¹¹ Some of the cases hold that a court of equity cannot set aside the judgment of a law court and award a new trial. And indeed this is rarely done, if ever, in express terms; but the same end is effected by decreeing that unless the party consents to have the judgment set aside and a new trial had, he shall be perpetually enjoined from collecting his judgment.¹² But cases sometimes arise where the right to move for a new trial at law was lost, or an application was refused, in consequence of some of the circumstances which equity always regards as sufficient warrant for its interference. In such instances, the complainant being in no fault, it is generally considered to be within the power of equity to grant a new trial.¹³ Thus relief of this character may be granted where the

¹¹ *Yancey v. Downer*, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; *Richardson v. City of Baltimore*, 8 Gill (Md.) 433; *Contee v. Cooke*, 2 Har. & J. (Md.) 179; *Blight's Heirs v. Tobin*, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219; *Farmers' Bank v. Collins*, 13 Bush (Ky.) 138; *Harding v. Fiske*, 25 Abb. N. C. 348, 12 N. Y. Supp. 139; *Justice v. Scott*, 39 N. C. 108. But equity may reform a judgment at law, by the addition of something omitted through mistake, when due cause therefor is shown. *Hamburg-Bremen Fire Ins. Co. v. Pelzer Manuf'g Co.*, 22 C. C. A. 283, 76 Fed. 479. It is no objection to the maintenance of an action to enjoin the enforcement of a judgment that it is a collateral attack on the judgment. *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865.

¹² *Pelham v. Moreland*, 11 Ark. 443; *Lawless v. Reese*, 3 Bibb (Ky.) 486; *Gainty v. Russell*, 40 Conn. 450; *Yancey v. Downer*, 5 Litt. (Ky.) 8, 15 Am. Dec. 35.

¹³ *Knifong v. Hendricks*, 2 Grat. (Va.) 212, 44 Am. Dec. 385; *Carter v.*

judgment is against conscience, and the applicant had no opportunity to make defense, or was prevented from defending by accident, or the fraud or improper management of the adverse party, and without fault on his own part.¹⁴ There is much learning in the books on this point, but it is merely collateral to our present subject and belongs more properly to a treatise on equity. A few words must be added as to the measure of the relief granted. It should always be adjusted to the exigencies of the particular case. If it is claimed that the judgment at law is excessive,—either because of the fraud or unfair dealing of the other party, or in consequence of a mistake or miscalculation,—that is no ground for enjoining the whole judgment. The creditor should merely be prohibited from proceeding to collect the excess.¹⁵ So where the execution of a judgment has been enjoined, and the defendant, upon being interrogated, admits a partial payment of such judgment, the injunction should be perpetuated for the amount admitted to have been paid, and dissolved as to the remainder still due.¹⁶

§ 358. What Adjudications subject to the Power.

Generally speaking, all judgments rendered or purporting to be rendered by courts of law are subject to the equitable power here considered. As to the particular case of a judgment that is absolutely void, however, the authorities do not agree. Some of the decisions hold that the defendant in a judgment cannot have equitable relief against it because it is either erroneous or void, since, if void, it may be disregarded or may be set aside on motion, and if erro-

Bennett, 6 Fla. 214; Hoskins v. Hattenback, 14 Iowa, 314; Land v. Elliot, 1 Smedes & M. (Miss.) 608; How v. Mortell, 28 Ill. 478; Deputy v. Tobias, 1 Blackf. (Ind.) 311, 12 Am. Dec. 243. But equity will not set aside a judgment at law on grounds which were presented to the trial court in a motion for a new trial, and held insufficient. Telford v. Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Hendrickson v. Bradley, 29 C. C. A. 303, 85 Fed. 508.

¹⁴ Carrington v. Holabird, 17 Conn. 530.

¹⁵ Hale v. Bozeman, 60 Miss. 965; Booth v. Kesler, 6 Grat. (Va.) 350; Barrow v. Robichaux, 14 La. Ann. 207; Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752. Or the court may order satisfaction of the judgment on payment of the amount actually due. Lindley v. Ross, 137 Pa. 629, 20 Atl. 944.

¹⁶ Perry v. Kearney, 14 La. Ann. 400. And see Kamm v. Stark, 1 Sawy. 547, Fed. Cas. No. 7,604.

neous it may be revised on appeal.¹⁷ There is much to be said in favor of this view, especially in contemplation of the known reluctance of equity to interfere if any adequate remedy offers itself at law. If the judgment is merely void, a sale under it would be a nullity. The purchaser would take no title, and the officer would be liable as a trespasser. Still, in some of the states, a bill for an injunction is considered the appropriate method for obtaining relief even against a void judgment, and this practice has become fully established by the rulings of the courts.¹⁸ An injunction will lie to prevent the collection of a judgment which has been vacated or set aside by the court which rendered it.¹⁹ And an execution issued on a judgment the record of which has been destroyed, there being no renewal by substitution, will be enjoined.²⁰ But in the case of a judgment on a promissory note which was given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife, the chancery court refused to interfere, because the whole proceeding was "an abuse of legal process and a fraud on the law."²¹ A judgment by scire facias is of the same force as any other, and while it may be enjoined in a proper case, the defendant is not entitled to any greater indulgence, in respect to his own neglect or omission, than in any other case.²² It is also held that a court has power to enjoin the collection of a judgment which it had power to render, although, by reason of the accrued interest and costs, the amount exceeds the limit of original jurisdiction.²³ As a general rule, equity will not re-examine and re-

¹⁷ *Murphree v. Bishop*, 79 Ala. 404; *Lockridge v. Lyon*, 68 Ga. 137; *Sanchez v. Carriaga*, 31 Cal. 170; *St. Louis, I. M. & S. Ry. Co. v. Reynolds*, 89 Mo. 146, 1 S. W. 208. See *Fuller v. Townsley-Myrick Dry-Goods Co.*, 58 Ark. 314, 24 S. W. 635.

¹⁸ *Glass v. Smith*, 66 Tex. 548, 2 S. W. 195; *Smith v. Deweese*, 41 Tex. 595; *Cooke v. Burnham*, 32 Tex. 129; *Chambers v. Hodges*, 23 Tex. 110; *Hernandez v. James*, 23 La. Ann. 483; *Tomlinson v. Litze*, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458; *Heath v. Halfhill*, 106 Iowa, 131, 76 N. W. 522; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824.

¹⁹ *Rickets v. Hitchens*, 34 Ind. 348.

²⁰ *Cyrus v. Hicks*, 20 Tex. 483.

²¹ *Wells v. Smith*, 13 Gray (Mass.) 207, 74 Am. Dec. 631.

²² *Thompson v. Hammond*, 1 Edw. Ch. (N. Y.) 497.

²³ *Davis v. Davis*, 10 Bush (Ky.) 274.

adjust settlements which have been made by compromise judgments in courts of law having jurisdiction of the subject-matter. Yet a compromise judgment, if obtained by fraud, accident, or mistake, may be relieved against by injunction.²⁴ There is also undoubted jurisdiction in equity to set aside an award, if good and equitable reasons are presented for such action.²⁵ But a bill will not lie to vacate an award on the ground of mistake on the part of the arbitrators or failure to determine all the matters submitted; for these matters may be pleaded in defense to an action at law on the award.²⁶ Where, under a code practice, decrees are to be enforced by execution in the same manner as judgments at law, an injunction may be granted, if otherwise proper, to restrain the execution of a decree.²⁷ The fact that a judgment has been affirmed on appeal does not exempt it from liability to attack by an original bill in equity for fraud, perjury, or mistake.²⁸ But equity will not interfere to set aside an interlocutory decree in a cause then pending in another court.²⁹

§ 359. What Parties may Apply.

As a rule, relief in equity against a judgment at law is given only to the parties to the action,³⁰ or their privies,³¹ or those whose rights are directly affected by the judgment. Thus, one who has purchased land subject to the lien of a judgment cannot go into equity to enjoin the judgment, his grantor making no objection to it, unless he can show that it was founded in fraud and expressly designed to injure him in his rights as a purchaser.³² So an execution in

²⁴ *Hahn v. Hart*, 12 B. Mon. (Ky.) 426; *United States Electric Lighting Co. v. Leiter*, 19 D. C. 575; *Steiner v. Lenz*, 110 Iowa, 49, 81 N. W. 190; *Swanson v. Jordan* (Tenn. Ch.) 52 S. W. 1102; *City of Goliad v. Weisiger*, 4 Tex. Civ. App. 653, 23 S. W. 694.

²⁵ *Milnor v. Georgia R. & Banking Co.*, 4 Ga. 385.

²⁶ *Mickles v. Thayer*, 14 Allen (Mass.) 114.

²⁷ *Oro Fino & Morning Star Min. Co. v. Cullen*, 1 Idaho, 126.

²⁸ *Nelson v. First Nat. Bank* (C. C.) 70 Fed. 526.

²⁹ *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

³⁰ *Mayes v. Woodall*, 35 Tex. 687; *Marriner v. Smith*, 27 Cal. 649.

³¹ *Bullock v. Winter*, 10 Ga. 214.

³² *Marriner v. Smith*, 27 Cal. 649; *Shufelt v. Shufelt*, 9 Paige (N. Y.) 137, 37 Am. Dec. 381; *French v. Shotwell*, 6 Johns. Ch. (N. Y.) 235.

ejectment will not be restrained at the instance of a stranger holding a paramount title, for if his title is good the judgment does not affect him.³³ Nor will an injunction be granted to restrain execution-creditors from proceeding to sell the property of their debtor, on the ground that certain claims to the property have been interposed, casting a cloud upon the title, and rendering it probable that the property will bring less than its value, to the injury of other creditors of the same debtor, the debtor being insolvent.³⁴ A stranger to an execution, whose goods have been levied on under it, cannot have an injunction on the ground that the judgment was erroneous; for he has a good remedy at law.³⁵ But on the other hand, it has been held that where a judgment-creditor may collect from property that his debtor has not conveyed, but refuses or fails to do so, he may be enjoined from proceeding against the debtor's grantee.³⁶ It is certainly clear that a third person may maintain an action to enjoin perpetually the enforcement of a judgment which was procured through fraud and for the purpose of defrauding him.³⁷ And in some states it has been held that where a judgment is entered by confession without action, unless the statute authorizing such entry has been substantially complied with, the enforcement of the judgment may be enjoined, upon principles of equity, at the suit of a third party prejudiced thereby.³⁸ If the applicant is in privity of interest or estate with the defendant, he is of course not regarded as a stranger to the action, and his right to interfere is more easily established. Thus, where a suit was brought in Massachusetts against a corporation on a judgment rendered in New York, and no defense had been made by the company in the latter state, a temporary injunction was granted restraining the suit on a bill filed by an individual stockholder.³⁹ So the receiver of a national bank, though not a party to a suit

³³ *Harper v. Hill*, 35 Miss. 63. And see *Whitman v. Willis*, 51 Tex. 429. Compare *Alexander v. Mortgage Co. of Scotland* (C. C.) 47 Fed. 131.

³⁴ *Robinson v. Thompson*, 30 Ga. 933. See *Mentzer v. Ellison*, 7 Colo. App. 315, 43 Pac. 464.

³⁵ *Markley v. Rand*, 12 Cal. 275.

³⁶ *Hurd v. Eaton*, 28 Ill. 122.

³⁷ *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245.

³⁸ *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505.

³⁹ *Sumner v. Marcy*, 3 Woodb. & M. 105, Fed. Cas. No. 13,609.

against the bank in a state court, may appear in that court and contest the validity of the judgment.⁴⁰ The same rule applies to a holder of bonds of a corporation, the value of which is impaired by a collusive decree, to which he was not a party, establishing other claims against the corporation as liens upon its property superior to the lien of its bonds.⁴¹ So also, the beneficiaries of a trust estate may maintain a bill to enjoin a fraudulent judgment against their trustee, to which they were not parties.⁴² And the same principle applies as between a principal and guarantor, or principal and surety.⁴³ A judgment at law against two defendants may be annulled by a decree of a court of chancery as to one and remain binding as to the other.⁴⁴ But if the bill is filed by one defendant alone, the other should be made a party to the action, unless sufficient reasons for the omission be stated.⁴⁵ And where a separate judgment is rendered against each of two joint wrong-doers, neither judgment can be perpetually enjoined while both remain in force and unsatisfied, although one of such judgments has been assigned by the holder to a third person.⁴⁶ Since the sovereign is beyond the reach of any prohibitory process, it follows that an injunction cannot be issued to restrain the United States from collecting a judgment in its favor.⁴⁷

§ 360. What Courts Exercise the Power.

The enjoining of a judgment at law is a purely equitable remedy. But it is not necessary for its exercise that the tribunal should be distinctively and individually organized as a chancery court. This power is habitually brought into play in those states where, for want of separate equity courts, the law courts apply equitable remedies.

⁴⁰ *Denton v. Baker*, 35 C. C. A. 187, 93 Fed. 46.

⁴¹ *Richardson v. Loree*, 36 C. C. A. 301, 94 Fed. 375.

⁴² *Snelling v. American Freehold Land Mortg. Co.*, 107 Ga. 852, 31 L. R. A. 59, 33 S. E. 634, 73 Am. St. Rep. 160.

⁴³ *Bradshaw v. Miners' Bank*, 26 C. C. A. 673, 81 Fed. 902; *Michener v. Springfield Engine & Thrasher Co.*, 142 Ind. 130, 40 N. E. 679.

⁴⁴ *Kennedy v. Evans*, 31 Ill. 258; *Barnett v. Lynch*, 1 Marv. (Del.) 114, 40 Atl. 666. See *Fulliam v. Drake*, 105 Iowa, 615, 75 N. W. 479.

⁴⁵ *Gates v. Lane*, 44 Cal. 392.

⁴⁶ *Meixell v. Kirkpatrick*, 25 Kan. 19.

⁴⁷ *Hill v. United States*, 9 How. 386, 13 L. Ed. 185.

And even under the codes, where law and equity are fused, equitable jurisdiction, equitable proceedings, and equitable remedies are not abolished, although metamorphosed as to their external appearance. Questions as to the power to enjoin judgments most commonly arise between co-ordinate courts. In several of the states it is held that one court has no jurisdiction of an action to enjoin or annul the judgment of another court of concurrent jurisdiction, or of a court of co-ordinate rank in another district or division of the same state.⁴⁸ And in some, this rule is established by statute.⁴⁹ But in others, it is thought that any court having jurisdiction of the parties and the subject-matter may issue its injunction to restrain the enforcement of a judgment, in a proper case, as where the judgment has been paid or satisfied, or was procured by fraud and conspiracy, though it was rendered by a court of concurrent or equal jurisdiction.⁵⁰ Thus, in Tennessee, it is held that one chancery court may enjoin the execution of a judgment wrongfully taken in another chancery court.⁵¹ In the exercise of its jurisdiction over the parties, a court may enjoin the enforcement of a judgment rendered in another state,⁵² and an execution issued upon a judgment of the supreme court of a state may be enjoined by the district court of the county in which it is sought to be enforced.⁵³ Also, chancery has jurisdiction to cancel,

⁴⁸ *Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537; *Beck v. Fransham*, 21 Mont. 117, 53 Pac. 96; *Reynolds v. Dunlap*, 94 Ga. 727, 19 S. E. 906; *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 57 S. W. 984; *Corbin v. Casina Land Co.*, 26 App. Div. 408, 49 N. Y. Supp. 929; *Mosby v. Gisborn*, 17 Utah, 257, 54 Pac. 121.

⁴⁹ Civ. Code Prac. Ky. § 285, provides that "an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered." A similar rule is enacted in Iowa (Miller's Code, § 3396), and in Connecticut (Gen. St. § 775). See *Jacobson v. Wernert* (Ky.) 41 S. W. 281; *Oberholtzer v. Hazen* (Iowa) 70 N. W. 207; *Smith v. Hall*, 71 Conn. 427, 42 Atl. 86.

⁵⁰ *Sayers v. Burkhardt*, 29 C. C. A. 137, 85 Fed. 246; *Ashcraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69; *Holderman v. Tedford*, 7 Kan. App. 657, 53 Pac. 887; *Sheriff v. Judge of Twenty-First Judicial District Court*, 46 La. Ann. 29, 14 South. 427.

⁵¹ *Douglass v. Joyner*, 60 Tenn. 32.

⁵² *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449.

⁵³ *Massie v. Mann*, 17 Iowa, 131; *Brown v. Walker* (C. C.) 84 Fed. 532.

and enjoin the enforcement of, a void judgment rendered by a justice of the peace.⁵⁴

The federal courts are prohibited by statute from granting writs of injunction to stay proceedings in any of the state courts, and this prevents them from enjoining the enforcement of a judgment recovered in a state court.⁵⁵ But a federal circuit court, where the requisite diversity of citizenship exists, and the amount in controversy is sufficient, has jurisdiction to entertain a suit and enter a decree which, as between the parties, shall set aside, annul, and vacate a judgment of a state court, and the proceedings taken and rights acquired thereunder, on the ground that such judgment was procured by fraud or was void for want of jurisdiction.⁵⁶ A state court has no power or jurisdiction to restrain an action in any of the federal courts, nor to enjoin the enforcement of a judgment rendered by a court of the United States, though its injunction may be directed in personam against the parties entitled to the benefit of the decree or judgment.⁵⁷

§ 361. Concurrent Remedies.

Embarrassing questions sometimes arise as to the right and power of equity to interfere by injunction against a judgment while the party has a concurrent and equally efficacious remedy by application to the court which rendered the judgment, or by appeal to a higher court. The general rule, however, as established by the best authorities, is that the party seeking relief must have exhausted all his resources at law, for equity will not grant an injunction where there

⁵⁴ Leonard v. Capital Ins. Co., 101 Iowa, 482, 70 N. W. 629.

⁵⁵ Rev. St. U. S. § 720; Louisville Trust Co. v. City of Cincinnati (C. C.) 73 Fed. 716; Foote v. Glenn (C. C.) 52 Fed. 529. See Terre Haute & I. R. Co. v. Peoria & P. U. R. Co. (C. C.) 82 Fed. 943.

⁵⁶ Howard v. De Cordova, 177 U. S. 600, 20 Sup. Ct. 817, 44 L. Ed. 908; Davenport v. Moore (C. C.) 74 Fed. 945; McNeil v. McNeil (C. C.) 78 Fed. 834; Young v. Sigler (C. C.) 48 Fed. 182; Northern Pac. R. Co. v. Kurtzman (C. C.) 82 Fed. 241.

⁵⁷ Riggs v. Johnson Co., 6 Wall. 166, 18 L. Ed. 768; United States v. Keokuk, 6 Wall. 514, 18 L. Ed. 933; Central Nat. Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Prugh v. Portsmouth Sav. Bank, 48 Neb. 414, 67 N. W. 309; Strozler v. Howes, 30 Ga. 578; English v. Miller, 2 Rich. Eq. (S. C.) 320; Coster v. Griswold, 4 Edw. Ch. 364.

is an adequate remedy at law.⁵⁸ Nor will the court grant an injunction to stay proceedings in another court having the same power to grant relief.⁵⁹ But the remedy at law, though adequate to the case, may have been lost through circumstances not attributable to the neglect or fault of the party seeking relief. In such instances, all question as to the right of equity to lend its aid is at once removed. Thus, where there are statutes authorizing the law courts to grant relief from their judgments in certain cases, this will not preclude a party, in a proper case, from obtaining relief in equity after the time limited for applying for relief under those statutes has elapsed, provided sufficient reasons are shown for not having made such application in time.⁶⁰ If, for example, the judgment was fraudulently and secretly entered up, and the defendant had no notice or knowledge of its existence until after the expiration of the time within which he might have moved the law court to vacate it, it is a case for equitable interference, merits being shown.⁶¹

§ 362. Same; Relief on Motion.

The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments, and the enactment of statutes in many of the states authorizing the setting aside of judgments taken against a defendant "through his mistake, inadvertence, surprise, or excusable neglect," have considerably abridged the province of equity in giving relief by injunction. And the rule is generally adhered to, as the more safe and conservative principle, that equity will not grant relief against an execution if the party can equally well be relieved, on motion to open, vacate, or

⁵⁸ *Wilkinson v. Rewey*, 59 Wis. 554, 18 N. W. 513; *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451; *Bibend v. Kreutz*, 20 Cal. 109; *Hart v. Lazaron*, 46 Ga. 396; *Johnson v. Driver*, 108 Ga. 595, 34 S. E. 158; *Burch v. West*, 134 Ill. 258, 25 N. E. 658; *Missouri, K. & E. Ry. Co. v. Hoereth*, 144 Mo. 136, 45 S. W. 1085; *Bankers' Life Ins. Co. v. Robbins*, 53 Neb. 44, 73 N. W. 269; *Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496.

⁵⁹ *Grant v. Quick*, 5 Sandf. (N. Y.) 612; *Dufossat v. Berens*, 18 La. Ann. 339.

⁶⁰ *District Twp. of Newton v. White*, 42 Iowa, 608; *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232.

⁶¹ *Spooner v. Leland*, 5 R. I. 348.

modify the judgment, or to stay or quash the execution, in the court which issued the execution or has control of it.⁶² It is true that some cases maintain a different view, holding that although the judgment might be vacated or set aside on motion, and although the time for so moving has not yet expired, still equity may enjoin the enforcement of the judgment.⁶³ But in so holding they depart from the fundamental principles of equity and are not to be commended. If the time limited by law for seeking relief in the law court has already expired, without the neglect or fault of the party, that, as stated in the preceding section, is a different matter, and the right of equity to interfere is unquestioned.⁶⁴ It has been held that the summary refusal of a motion for a new trial or for the vacation of the judgment will not prevent the party from coming into equity with a bill for an injunction, based on the same grounds.⁶⁵ But the weight of author-

⁶² *Cowley v. Northern Pac. R. Co.* (C. C.) 46 Fed. 325; *Furnald v. Glenn* (C. C.) 56 Fed. 372; *Reed v. Prescott*, 70 N. H. 88, 46 Atl. 457; *Smith v. Kammerer*, 152 Pa. 98, 25 Atl. 165; *Brown v. Chapman*, 90 Va. 174, 17 S. E. 855; *Morrison v. Speer*, 10 Grat. (Va.) 228; *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. 1088; *Henderson v. Moore*, 125 N. C. 383, 34 S. E. 446; *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831; *Hart v. Lazaron*, 46 Ga. 396; *J. A. Roebling Sons Co. v. Stevens Electric Co.*, 93 Ala. 39, 9 South. 369; *Hintrager v. Sumbargo*, 54 Iowa, 604, 7 N. W. 92 (compare *Connell v. Stelson*, 33 Iowa, 147); *Hulett v. Hamilton*, 60 Minn. 21, 61 N. W. 672; *Hockaday v. Jones*, 8 Okl. 156, 56 Pac. 1054; *Imlay v. Carpentier*, 14 Cal. 173; *Bibend v. Kreutz*, 20 Cal. 109; *Logan v. Hillegass*, 16 Cal. 201.

⁶³ *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Norwich Union Fire Ins. Soc. v. Stang*, 18 Ohio Cir. Ct. R. 464; *Landrum v. Farmer*, 7 Bush (Ky.) 46; *Hernandez v. James*, 23 La. Ann. 484; *Caruthers v. Hartsfield*, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580.

⁶⁴ *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Larson v. Williams*, 100 Iowa, 110, 63 N. W. 464, 62 Am. St. Rep. 544; *Radzuweit v. Watkins*, 53 Neb. 412, 73 N. W. 679; *Spooner v. Leland*, 5 R. I. 348. But if the party knew of the judgment against him in time to have moved for its vacation, that remedy being available, he cannot have relief in equity without showing some sufficient reason why he did not proceed at law. *Woodward v. Pike*, 43 Neb. 777, 62 N. W. 230; *Rowlett v. Williamson*, 18 Tex. Civ. App. 28, 44 S. W. 624; *Long v. Eisenbels*, 18 Wash. 423, 51 Pac. 1061.

⁶⁵ *Simpson v. Hart*, 14 Johns. (N. Y.) 63; *Sherer v. Akers*, 74 Mo. App. 217. Where a justice of the peace refuses to vacate a judgment obtained in his court through fraud, and no appeal lies, the judgment debtor is entitled to relief in equity. *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50.

ity is against this proposition. The best cases hold that equity will refuse to act by injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter is *res judicata* and equity will not re-open it.⁶⁶ To show the disposition of the chancery courts in this regard, we cite the case of *Dalhoff v. Keenan*,⁶⁷ where it appeared that the party had filed his petition for a new trial in the law court within the time prescribed by the code, alleging that the judgment was fraudulent, but this petition was dismissed because a necessary witness was absent and because the other party promised that he would make "a fair offer of compromise," and afterwards the complainant brought an action in equity to set aside the judgment and for a new trial of the issues. But it was held that the action in equity was properly dismissed, because the complainant had an adequate and speedy remedy at law, which he had begun to pursue but had improvidently abandoned.

§ 363. Same; Appeal, Error, or Certiorari.

In pursuance of the same general principle, the party must have exhausted his possible remedies by appeal, writ of error, or certiorari, before equity will hear him. If, by failing to appeal, or by prosecuting an appeal in a defective or insufficient mode, he loses his remedy at law, he cannot proceed in equity by injunction, unless new and sufficient equities be alleged.⁶⁸ Nor will a judgment be enjoined

⁶⁶ *Wilson v. Buchanan*, 170 Pa. 14, 32 Atl. 620; *Matson v. Field*, 10 Mo. 100; *Davis v. Bass*, 4 Ind. 313; *Collins v. Butler*, 14 Cal. 223; *Critchfield v. Porter*, 3 Ohio, 518; *Gray v. Barton*, 62 Mich. 186, 28 N. W. 813.

⁶⁷ 66 Iowa, 679, 24 N. W. 273.

⁶⁸ *Leet v. Leet*, 12 App. Div. 11, 42 N. Y. Supp. 174; *Ludwig v. Lazarus*, 10 App. Div. 62, 41 N. Y. Supp. 773; *Rafferty v. Potter*, 21 R. I. 517, 45 Atl. 152; *Brumbaugh v. Schnebly*, 2 Md. 320; *Flanneken v. Wright*, 64 Miss. 217, 1 South. 157; *Long v. Smith*, 39 Tex. 160; *Texas-Mexican R. Co. v. Wright* (Tex. Civ. App.) 29 S. W. 1134; *McHugh v. Sparks*, 15 Tex. Civ. App. 57, 38 S. W. 537; *San Antonio & A. P. R. Co. v. Glass* (Tex. Civ. App.) 40 S. W. 330; *James' Adm'r v. Neal's Adm'r*, 3 T. B. Mon. (Ky.) 369; *Todd v. Jackson*, 22 Ky. Law Rep. 1097, 61 S. W. 1; *Evans v. International Trust Co.* (Tenn. Ch.) 59 S. W. 373; *Palmer v. Malone*, 1 Heisk. (Tenn.) 549; *Ward v. Derrick*, 57 Ark. 500, 22 S. W. 93; *Parsons v. Pierson*, 128 Ind. 479, 28 N. E. 97; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865; *Wyman v. Hardwick*, 52 Mo. App. 621; *Renfroe v. Renfroe*, 54 Mo. App. 429; *Brown*

when the complainant has neglected to except to it as he might have done.⁶⁹ So a judgment which is not appealed from, and which directs a forced sale of articles for its satisfaction which are by law exempt from forced sale, is not a nullity, however erroneous; and when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to injunction.⁷⁰ Nor is the death of a party before judgment sufficient ground for an injunction; the proper remedy is by error coram nobis.⁷¹ If the right of appeal has been lost by lapse of time, the party seeking the aid of equity must be able to show that such loss was not the result of his own negligence, default, or indifference.⁷² If he has been deprived of his opportunity to appeal by the fraud or deceit of the adverse party, or by a trick played upon him, this will furnish a stronger ground for equity to interfere, but it must also appear that the complainant has no adequate remedy at law.⁷³ Where the right of appeal has been cut off by the death or resignation of the trial judge before signing the bill of exceptions, equity

v. Campbell, 110 Cal. 644, 43 Pac. 12; *Daly v. Pennie*, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; *Mayer v. Nelson*, 54 Neb. 434, 74 N. W. 841. See per contra, *Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460; *Williams v. Pile*, 104 Tenn. 273, 56 S. W. 833.

⁶⁹ *Dibble v. Truluck*, 12 Fla. 185.

⁷⁰ *Rountree v. Walker*, 46 Tex. 200.

⁷¹ *Williamson's Adm'r v. Appleberry*, 1 Hen. & M. (Va.) 206. And see *Holman v. G. A. Stowers Furniture Co.* (Tex. Civ. App.) 30 S. W. 1120.

⁷² *Waldo v. Thweatt*, 64 Ark. 126, 40 S. W. 782; *Hollenbeak v. McCoy*, 127 Cal. 21, 59 Pac. 201. The fact that petitioner relied on a promise of the trial judge to inform him of his decision in time to enable petitioner to file a bill of exceptions for the purpose of appeal, and that the judge forgot to do so, is not sufficient ground for equity to set aside the judgment, for it shows that the petitioner was not free from default and neglect. *Donaldson v. Roberts*, 109 Ga. 832, 35 S. E. 277.

⁷³ In case of a default judgment, the mere fact that plaintiff did not notify defendant of the entry of judgment, and did not sue out execution until after the lapse of a year, in order that defendant might not petition for a writ of review, is not such fraud as will entitle defendant to restrain the enforcement of the judgment. *Trustees of Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570. So, where the successful party wrongfully obtained possession of a case made for appeal by the defeated party, and withheld it until the time for appeal had passed, it was held to be no ground to enjoin the judgment. For the remedy was by petition in error in the appellate court. *Muse v. Wafer*, 29 Kan. 279.

may enjoin the enforcement of the judgment, if it is shown to be unjust and oppressive, and if the applicant for relief has not been guilty of any want of due diligence.⁷⁴ And if a meritorious bill of exceptions is dismissed because of a mistake made by the certifying judge, without the fault of counsel, an injunction may be granted against the judgment until the matters set up in the dismissed bill of exceptions can be heard.⁷⁵ But it is held that enforcement of a judgment should not be enjoined merely because the trial judge wrongfully refused to allow an appeal, or to sign the bill of exceptions, or to approve the bond offered for appeal; for in such cases there is an adequate remedy by mandamus.⁷⁶ On the other hand, equity may relieve against a judgment from which no appeal could be taken because the amount in controversy was too small, and will do so where a meritorious case for its interference is made out.⁷⁷ And so where the attempt to appeal was frustrated by the destruction of the records by fire, provided the complainant has been in no fault.⁷⁸

In Illinois, it was at one time held that relief might be obtained against a judgment on the ground of fraud, though the party might have a remedy at law; and that, even if he had notice of the judgment in time to appeal, and made an abortive attempt to do so, this would not prevent him from applying to equity for an injunction.⁷⁹ But later decisions hold that, if a judgment is not the result of the negligence of the person against whom it is rendered, it is unjust; and if he cannot appeal from it, he may sue out a writ of certiorari,

⁷⁴ *Kansas & A. V. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; *Little Rock & F. S. Ry. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 30 L. R. A. 560, 54 Am. St. Rep. 216; *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799; *Galbraith v. Barnard*, 21 Or. 67, 28 Pac. 1110.

⁷⁵ *Kohn v. Lovett*, 43 Ga. 179.

⁷⁶ *Houston, E. & W. T. Ry. Co. v. Ellisor*, 14 Tex. Civ. App. 706, 37 S. W. 972; *Boyd v. Weaver*, 134 Ind. 266, 33 N. E. 1027. Compare *Picket v. Morris*, 2 Wash. (Va.) 255.

⁷⁷ *Gulf, C. & S. F. Ry. Co. v. King*, 80 Tex. 681, 16 S. W. 641; *Gulf, C. & S. F. Ry. Co. v. Henderson*, 83 Tex. 70, 18 S. W. 432.

⁷⁸ *Bailey v. Stevens*, 11 Utah. 175, 39 Pac. 828.

⁷⁹ *Nelson v. Rockwell*, 14 Ill. 375.

and have a new trial; and therefore he cannot sue to enjoin its collection.⁸⁰

§ 364. Same; Cross-Actions and Actions over.

In a number of instances courts of equity have refused to enjoin the collection of a judgment (unjust and inequitable though it might be), where the party had an adequate and available remedy at law by a cross-action, as for breach of warranty of the property for the price of which the suit was brought.⁸¹ So where the defendant was prevented by unavoidable accident from setting up offsets to the plaintiff's demand, which were not connected with the claim sued on and may be enforced at law, he is not entitled to enjoin the judgment and interpose his counterclaims against it, but must pursue his remedy at law.⁸² The availability of the legal remedy being the test, it would seem that the existence of a counterclaim, capable of being used as an independent cause of action, should be no bar to equitable relief, if it could not be enforced against the plaintiff in consequence of his being a non-resident and keeping beyond the jurisdiction. But the courts hold otherwise. On this state of facts an injunction has been refused.⁸³ On the same principle, equity will not interfere to give relief where the judgment debtor is in such a position that he may make himself whole, immediately upon paying the judgment, by a suit at law against a person who is responsible over to him for the loss or damage he may suffer.⁸⁴ Thus, injunction will not issue to restrain the execution of a void judgment, when replevin against the officer would furnish a full and adequate remedy.⁸⁵ But in some states it is held that a cause of action by a judgment defendant against the officer who falsely returned a service on defendant is not an adequate remedy at law, such as to prevent equity

⁸⁰ Booth v. Koehler, 51 Ill. App. 370; Reid v. Stock Yards L. Coal & F. Co., 88 Ill. App. 32.

⁸¹ Ponder v. Cox, 26 Ga. 485; Henry v. Elliott, 59 N. C. 175; Gorman v. Young (Ky.) 18 S. W. 369. See Murphy v. Cuddihy, 111 Iowa, 645, 82 N. W. 999.

⁸² Hudson v. Kline, 9 Grat. (Va.) 379.

⁸³ Beall v. Brown, 7 Md. 393.

⁸⁴ Drake v. Lyons, 9 Grat. (Va.) 54.

⁸⁵ Straub v. Simpson, 74 Mo. App. 230.

from enjoining the enforcement of the judgment as obtained by the fraud of the officer.⁸⁶

PART II. GROUNDS FOR ENJOINING JUDGMENTS.

§ 365. General Grounds for Equitable Relief.

There are two reasons why equity is slow to interfere with the operation of judgments recovered in a court of law. In the first place, it is sensitive to the imputation of seeking to usurp a species of appellate jurisdiction and so to extend its power over all other courts. And secondly, a judgment on the merits ought to be forever conclusive between the parties, no re-examination should be allowed, and it is neither the function nor the ambition of equity to overhaul judgments at law. Hence, in applying to equity for relief, it is necessary that something more than a merely erroneous or irregular judgment should be shown.⁸⁷ Some of the elements which universally afford an attaching-point for the equitable jurisdiction must be present, making it unconscientious for the successful party to enforce his judgment as it stands. Thus, if the defense was one which could not be interposed at law, equity will relieve, because the party has not had a fair trial. So if he was ignorant of his defense, and guilty of no laches in failing to discover it; or was prevented from setting it up by fraud or accident, or the act of his adversary, without any negligence or fault on his own part. The object of an injunction to stay proceedings at law is to prevent the party against whom it issues from availing himself of an unfair advantage, resulting from fraud, accident, mistake, or otherwise, and which would therefore be against conscience.⁸⁸ Hence equity cannot relieve against the oper-

⁸⁶ *Dowell v. Goodwin*, 22 R. I. 287, 47 Atl. 693, 51 L. R. A. 873, 84 Am. St. Rep. 842.

⁸⁷ Questions which have been adjudicated in a court of law having jurisdiction of the parties and the subject-matter cannot be reviewed by the defeated party in a suit in equity, since equity has no power to review or correct errors in a proceeding at law. *Fullam v. Drake*, 105 Iowa, 615, 75 N. W. 479.

⁸⁸ *Little v. Price*, 1 Md. Ch. 182; *Bachelder v. Bean*, 76 Me. 370; *Mason v. House*, 20 Tex. Civ. App. 500, 49 S. W. 911; *Handley v. Jackson*, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831; *Perry v. Johnston* (C. C.) 95 Fed. 322.

ation of a judgment at law simply on account of its hardship.⁸⁹ It must first of all appear that it would be unjust and against conscience to enforce the judgment.⁹⁰ Then it must be shown that if a new and fair examination of the merits be had, the result will be other than that already reached.⁹¹ There must be a meritorious defense. No matter what circumstances of fraud or irregularity may have attended the entry of the judgment, if it appears that no defense was made because no valid defense existed, and that the instrument in suit was given for a valid and valuable consideration, an injunction will be refused.⁹² Nor will equity interfere unless it shall also be shown that the party has used due diligence and exhausted every means of defending the case or obtaining redress at law.⁹³ But on the other hand, where a proper case for relief by injunction is made out, the fact that the judgment-creditor is of undoubted solvency and able to refund the money which may be collected on the execution, will not prevent such equitable intervention.⁹⁴

§ 366. General Rule stated.

The leading case in America upon the subject of equitable relief against judgments at law, is that of *Marine Insurance Co. v. Hodgson*.⁹⁵ In that case Chief Justice Marshall specified the grounds for the interference of equity in the following terms: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any

⁸⁹ *Hill's Ex'x v. Rogers*, Rice, Eq. 7; *Hamilton v. Adams*, 15 Ala. 596, 50 Am. Dec. 150.

⁹⁰ *Fowler v. Lee*, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

⁹¹ *Taggart v. Wood*, 20 Iowa, 236; *Sauer v. City of Kansas*, 69 Mo. 46.

⁹² *Sohler v. Merrill*, 3 Woodb. & M. 179, Fed. Cas. No. 13,158.

⁹³ *Wells, Fargo & Co. v. Wall*, 1 Or. 296; *Nevins v. McKee*, 61 Tex. 412.

⁹⁴ *Carrington v. Holabird*, 19 Conn. 84. See *Shipman v. Fletcher's Adm'r*, 95 Va. 585, 29 S. E. 325.

⁹⁵ 7 Cranch, 332, 3 L. Ed. 362.

fault or negligence in himself or his agents, will justify an application to a court of chancery." And the principles here set forth, though perhaps somewhat extended by more recent decisions, have been adopted without question, as a general statement of the rule, in all our courts.⁹⁶ "When a party goes into chancery after a trial at law," says a learned judge in New York, "he must be able to impeach the justice and equity of the verdict, and it must be upon grounds which either could not be made available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or other fault on his part."⁹⁷ "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."⁹⁸ So speak all the authorities.

⁹⁶ *Railroad Co. v. Neal*, 1 Woods, 353, Fed. Cas. No. 11,534; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; *Pettes v. Whitehall Bank*, 17 Vt. 435; *Wingate v. Haywood*, 40 N. H. 437; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Vilas v. Jones*, 1 N. Y. 274; *Briesch v. McCauley*, 7 Gill (Md.) 189; *Little v. Price*, 1 Md. Ch. 182; *Kent v. Ricards*, 3 Md. Ch. 392; *Windwart v. Allen*, 13 Md. 196; *Alford v. Moore's Adm'r*, 15 W. Va. 597; *Braden v. Reitzenberger*, 18 W. Va. 286; *Ponder v. Cox*, 26 Ga. 485; *Watts v. Gayle*, 20 Ala. 817; *Lafon's Ex'rs v. Desessart*, 1 Mart. N. S. (La.) 71; *Nevins v. McKee*, 61 Tex. 412; *Lester v. Hoskins*, 26 Ark. 63; *Miller v. Morse*, 23 Mich. 365; *Kelleher v. Boden*, 55 Mich. 295, 21 N. W. 346; *Proctor v. Pettitt*, 25 Neb. 96, 41 N. W. 131; *Wells, Fargo & Co. v. Wall*, 1 Or. 295; *Mastick v. Thorp*, 29 Cal. 444; *Boston v. Haynes*, 33 Cal. 31; *Taggart v. Wood*, 20 Iowa, 236; *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245; *West v. Magness* (Tenn. Ch.) 46 S. W. 469; *Foshee v. McCreary*, 123 Ala. 493, 26 South. 309; *Wilson S. M. Co. v. Curry*, 126 Ind. 161, 25 N. E. 896; *Kaufman v. Schneider*, 35 Ill. App. 256; *Losey v. Neldig*, 52 Neb. 167, 71 N. W. 1067; *Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559; *City of Broken Bow v. Broken Bow Waterworks Co.*, 57 Neb. 548, 77 N. W. 1078; *McBride v. Wakefield*, 58 Neb. 442, 78 N. W. 713. Equity will not enjoin the collection of a judgment against a municipal corporation, regularly obtained and supported by a moral obligation to pay, even though there may be a good technical defense. *Skirving v. National Life Ins. Co.*, 8 C. C. A. 241, 59 Fed. 742.

⁹⁷ *Vilas v. Jones*, 1 N. Y. 274.

⁹⁸ *Hendrickson v. Hinckley*, 17 How. 443, 15 L. Ed. 123.

§ 367. Errors and Irregularities.

The doctrine is fully established that a court of equity will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense over which the court pronouncing the judgment had full jurisdiction, set aside the judgment or enjoin its enforcement simply on the ground that it was unjust, irregular, or erroneous, or because the equity court would, in deciding the same case, have come to a different conclusion.⁹⁹ A

⁹⁹ 2 Story's Eq. Jur. § 1572; *Baker v. Morgan*, 2 Dow. 526; *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91; *Ludlow v. Ramsey*, 11 Wall. 581, 20 L. Ed. 216; *Pettes v. Whitehall Bank*, 17 Vt. 435; *Fletcher v. Warren*, 18 Vt. 45; *Paddock v. Palmer*, 19 Vt. 581; *Stilwell v. Carpenter*, 59 N. Y. 414; *Shottentkirk v. Wheeler*, 3 Johns. Ch. 279; *De Reimer v. Cantillon*, 4 Johns. Ch. 85; *Holmes v. Remsen*, 7 Johns. Ch. 286; *Donovan v. Finn*, 1 Hopk. Ch. 59; *Bush v. O'Brien*, 47 App. Div. 581, 62 N. Y. Supp. 685; *Vanarsdalen v. Whitaker*, 10 Phila. 153; *Holmes v. Steele*, 28 N. J. Eq. 173; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9; *Stout v. Slocum*, 52 N. J. Eq. 88, 28 Atl. 7; *Methodist Protestant Church v. Mayor of City of Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Slack v. Wood*, 9 Grat. (Va.) 40; *McDowall v. McDowall, Bailey, Eq. (S. C.)* 324; *Stockton v. Briggs*, 58 N. C. 309; *Grantham v. Kennedy*, 91 N. C. 148; *Cohen v. Dubose*, 1 Harp. Eq. (S. C.) 102, 14 Am. Dec. 709; *Hunt v. Coachman*, 6 Rich. Eq. (S. C.) 286; *Turpin v. Thomas' Representatives*, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615; *Robuck v. Harkins*, 38 Ga. 174; *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Coffin v. McCullough's Adm'r*, 30 Ala. 107; *Saunders v. Albritton*, 37 Ala. 716; *Ammons v. Whitehead*, 31 Miss. 49; *Walker v. Villavaso*, 26 La. Ann. 42; *Fitzhugh v. Orton*, 12 Tex. 4; *Pryor v. Emerson*, 22 Tex. 162; *Roller v. Wooldridge*, 46 Tex. 485; *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234; *Burke v. Wheat*, 22 Kan. 722; *Missouri Pac. R. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846; *Publishing House of Evangelical Ass'n v. Heyl*, 61 Kan. 634, 60 Pac. 317; *Ex parte Christian*, 23 Ark. 641; *Clopton v. Carlross*, 42 Ark. 560; *Dunn v. Fish*, 8 Blackf. (Ind.) 407; *Macy v. Lloyd*, 23 Ind. 60; *De Haven v. Covalt*, 83 Ind. 344; *Davis v. Clements*, 148 Ind. 606, 47 N. E. 1056, 62 Am. St. Rep. 539; *Fitch v. Byall*, 149 Ind. 554, 49 N. E. 455; *Hart v. O'Rourke*, 151 Ind. 205, 51 N. E. 330; *Chicago Waifs Mission & Training School v. Excelsior Electric Co.*, 44 Ill. App. 425; *Hendron v. Kinner*, 110 Iowa, 544, 81 N. W. 783; *Drake v. Hanshaw*, 47 Iowa, 201; *Hazeltine v. Reusch*, 51 Mo. 50; *Corley v. McKeag*, 57 Mo. App. 415; *Missouri, K. & T. Ry. Co. v. Warden*, 73 Mo. App. 117; *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; *Merritt v. Baldwin*, 6 Wis. 439; *Jilsun v. Stebbins*, 41 Wis. 235; *Ableman v. Roth*, 12 Wis. 81; *Pier v. Sunol*, 6 Cal. 294; *Logan v. Hillegass*, 16 Cal. 200; *Fox v. McClay*, 48 Neb. 820, 67 N. W. 888.

good illustration of this rule is furnished by the decision in a case where the defendant at law, after losing his case by reason of a suggestion of the court that his remedy was in chancery and not at law, applied for relief in equity. It was said: "If the party chose to believe in the opinion of the court, it must be at his own hazard, and it now seems to me to be no good ground for relief in equity that the court or his counsel gave him bad advice; he should have excepted to the opinion of the court in refusing to continue, and if on examination this should be found to be error, then he would have had relief; but having failed to do so furnishes no more ground for relief than he would have been entitled to if the court had committed any other error, and he had submitted to it till it was too late to redress it."¹⁰⁰ To take another illustration,—where a judgment was rendered according to a particular construction of a statute, and, after a writ of error thereon was barred by the statute of limitations, the supreme court gave a different construction to the statute in another case, it was held that equity would not interfere to open the judgment.¹⁰¹ Again, that a debt was divided and suits brought on each portion in a justice's court which would have no jurisdiction over one suit for the whole amount, is no reason for enjoining the judgment in one suit, unless it also appears that by means of the division the defendant was deprived of some right or remedy, and that he had not consented to the division.¹⁰² It is well settled that no injunction can be had against a judgment merely on account of a defect or insufficiency of the evidence, or because the rules of evidence were violated on the trial.¹⁰³ Nor can a court of equity set aside a judgment, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings,¹⁰⁴ nor because there was no finding of fact

¹⁰⁰ *Risher v. Roush*, 2 Mo. 95, 22 Am. Dec. 442.

¹⁰¹ *Jones v. Watkins*, 1 Stew. (Ala.) 81. And see *Cassel v. Scott*, 17 Ind. 514.

¹⁰² *Pryor v. Emerson*, 22 Tex. 162.

¹⁰³ *Pico v. Sunol*, 6 Cal. 294; *Hunt v. Coachman*, 6 Rich. Eq. (S. C.) 286; *Merritt v. Baldwin*, 6 Wis. 439; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Brigot's Heirs v. Brigot*, 49 La. Ann. 1428, 22 South. 641; *Geyer v. Douglass*, 85 Iowa, 93, 52 N. W. 111; *Nashville, C. & St. L. Ry. Co. v. Mattingly*, 101 Ky. 219, 40 S. W. 673.

¹⁰⁴ *Allen v. Allen*, 38 C. C. A. 336, 97 Fed. 525; *Hunter v. Kansas City Safe-Deposit & Savings Bank*, 158 Mo. 262, 58 S. W. 1053; *Moore v. Brit-*

to support the judgment,¹⁰⁵ nor for any irregularities as to the service of the summons, the judgment not being shown to be unjust.¹⁰⁶ So, an illegal allowance in a judgment, or an error in the calculation of interest, is no ground for an injunction.¹⁰⁷ But where, through fraud, accident, or mistake, a judgment has been entered for an amount, or in terms, not as intended, equity will give relief, on clear and satisfying proof.¹⁰⁸ Or, as differently stated, equity will relieve in cases of mistakes in judgments, decrees, or other matters of record, when the mistake is not judicial and there are no other means of obtaining redress.¹⁰⁹ Thus, where the defendant agreed that the justice before whom the case was pending should enter a conditional judgment against him, and the justice entered an absolute judgment by confession, it was considered that equity might relieve.¹¹⁰ So where a judgment was entered against a sheriff, under a mistake of the clerk in supposing a bail-piece to be insufficient, when the counsel had agreed that it might be filed, relief was granted against the judgment.¹¹¹

§ 368. Fraud.

Fraud has always been reckoned among the special abhorrences of equity, and fraud is one of the grounds upon which application is most frequently made to equity for relief or redress. It is well settled that equity will enjoin a party from enforcing a judgment which he has obtained by means of fraud.¹¹² "Fraud will vitiate a judg-

ton, 15 Tex. Civ. App. 237, 38 S. W. 528; *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; *Reast v. Hughes* (Tex. Civ. App.) 33 S. W. 1003.

¹⁰⁵ *Petalka v. Fitle*, 33 Neb. 756, 51 N. W. 131.

¹⁰⁶ *Garden City Wire & Spring Co. v. Kause*, 67 Ill. App. 106.

¹⁰⁷ *Davis v. Wade*, 58 Mo. App. 641; *Walker v. Villavaso*, 26 La. Ann. 42; *Baggett v. Watson*, 70 Miss. 64, 11 South. 679. See *Cohen v. Dubose*, 1 Harp. Ch. 102.

¹⁰⁸ *Katz v. Moore*, 13 Md. 566.

¹⁰⁹ *Smith v. Butler*, 11 Or. 46, 4 Pac. 517.

¹¹⁰ *Gwinn v. Newton*, 8 Humph. (Tenn.) 710.

¹¹¹ *Smith v. Wallace*, 1 Wash. (Va.) 254.

¹¹² *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; *Wingate v. Haywood*, 40 N. H. 437; *Pearce v. Olney*, 20 Conn. 544; *Carrington v. Holabird*, 17 Conn. 530; *Greene v. Haskell*, 5 R. I. 447; *Munn v. Worrall*, 16 Barb. (N. Y.) 221; *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9; *Whittelsey v.*

ment, and a court of equity may declare it a nullity. Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereupon."¹¹³ The rule is concisely stated by the chancery court in New Jersey in the following language: "The court will grant relief against a judgment which is against conscience, which was obtained by fraud or in any other way by which injustice has been done, and where the injured party has had no opportunity for defense, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment is obtained, and timely application for relief is made to this court."¹¹⁴ A bill will lie to vacate a judgment for fraud, even although it has already been made the foundation in another state of a suit in which the defendant's property in that state has been attached.¹¹⁵ So, the fact that one is solvent is no ground for refusing to enjoin proceedings on a judgment which he has obtained by fraud.¹¹⁶ On the other hand, a judgment cannot be impeached in equity on the ground of fraud practised by the successful party, where it appears that the fraud, if attempted, was unsuccessful.¹¹⁷ And equity will not interfere on the ground of fraud unless the fraud is clearly stated and proved.¹¹⁸ And allegations that the judgment was obtained "through fraud and other ill practices" are too vague and general.¹¹⁹

Delaney, 73 N. Y. 571; *Binsse v. Barker*, 13 N. J. Law, 263, 23 Am. Dec. 720; *Burch v. Scott*, 1 Bland (Md.) 112; *Kent v. Ricards*, 3 Md. Ch. 392; *Polndexter v. Waddy*, 6 Munf. 418, 8 Am. Dec. 749; *Smith v. Hays*, 54 N. C. 321; *Brown v. Thornton*, 47 Ga. 474; *Dugan v. McGann*, 60 Ga. 353; *Hair v. Lowe*, 19 Ala. 224; *Hahn v. Hart*, 12 B. Mon. (Ky.) 426; *Crank v. Flowers*, 4 Heisk. (Tenn.) 629; *Ogden v. Larrabee*, 57 Ill. 389; *Cowin v. Toole*, 31 Iowa, 513; *Bresnahan v. Price*, 57 Mo. 422; *Payne v. O'Shea*, 84 Mo. 129; *Burpee v. Smith*, Walk. Ch. (Mich.) 327; *Hayden v. Hayden*, 46 Cal. 332; *Smith v. Quarles* (Tenn. Ch.) 46 S. W. 1035; *Oliver v. Riley*, 92 Iowa, 23, 60 N. W. 180; *Larson v. Williams*, 100 Iowa, 110, 69 N. W. 441, 62 Am. St. Rep. 544; *Smith v. Taylor*, 78 Mo. App. 630; *Benson v. Anderson*, 10 Utah, 135, 37 Pac. 256.

¹¹³ *Wingate v. Haywood*, 40 N. H. 437.

¹¹⁴ *Moore v. Gamble*, 9 N. J. Eq. 246.

¹¹⁵ *Edson v. Cummings*, 52 Mich. 52, 17 N. W. 693.

¹¹⁶ *Sanderson v. Voelcker*, 51 Mo. App. 328.

¹¹⁷ *Allen v. Allen*, 38 C. C. A. 336, 97 Fed. 525.

¹¹⁸ *Jones v. South's Adm'rs*, 3 A. K. Marsh. (Ky.) 352.

¹¹⁹ *Rooks v. Williams*, 13 La. Ann. 374.

And further, in order to obtain equitable relief against a judgment on the ground of fraud, it is necessary to be alleged and shown that there is a good defense on the merits.¹²⁰ Or, as otherwise stated, it must be made clearly to appear that the judgment has no other foundation than the fraud charged, and that if there had been no fraud there would have been no judgment.¹²¹ Thus equity will not relieve against a judgment alleged to have been obtained by fraud, where the relief asked for is merely a reduction of the damages.¹²² It has been adjudged a good ground for the intervention of equity that the judgment, fairly and regularly rendered, has afterwards been fraudulently altered so as to increase the amount for which it stands,¹²³ or so as to include a person not originally named in it nor made a party to the action.¹²⁴ Aside from the cases just instanced, it is evident that the fraud on which the application to equity is based may be of three different characters, or arise in three several ways. First, there may have been fraud in the instrument or transaction on which the judgment at law is founded. This, since it constitutes a good defense to the suit at law, must be set up then and there. If the defendant was ignorant of it, or had no opportunity to plead it, or was prevented from setting it up by the artifice or fraud of his adversary, it may be available on a subsequent application to chancery. But otherwise it furnishes no ground for equitable interference.¹²⁵ Secondly, whatever was the character of the defense, sup-

¹²⁰ *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; *Hair v. Lowe*, 19 Ala. 224; *Pearce v. Olney*, 20 Conn. 544; *Ableman v. Roth*, 12 Wis. 81; *Way v. Lamb*, 15 Iowa, 79; *Atwater v. American Exch. Nat. Bank*, 40 Ill. App. 501; *Henkleman v. Peterson*, Id. 540.

¹²¹ *Dringer v. Receiver of Erie Ry. Co.*, 42 N. J. Eq. 573, 8 Atl. 811.

¹²² *Inhabitants of Essex County v. Berry*, 2 Vt. 161; *Murdock v. De Vries*, 37 Cal. 527.

¹²³ *Babcock v. McCamant*, 53 Ill. 214.

¹²⁴ *Chester v. Miller*, 13 Cal. 558.

¹²⁵ *Muscatine v. Mississippi & M. R. Co.*, 1 Dill. 536, Fed. Cas. No. 9,971; *Gardiner v. Van Alstyne*, 163 N. Y. 573, 57 N. E. 1110; *Taylor v. Mallory*, 76 Md. 1, 23 Atl. 1098; *Adler v. Van Kirk Land & Const. Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133; *Covington v. Chamblin*, 156 Mo. 574, 57 S. W. 728; *Hamilton v. McLean*, 139 Mo. 678, 41 S. W. 224; *Link v. Link*, 48 Mo. App. 345; *Shufeldt v. Gandy*, 34 Neb. 32, 51 N. W. 302; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747. A bill to set aside a judgment for fraud must aver that the complainant had

posing it to be good and meritorious, the successful party may have practised fraud or trickery in such wise as to prevent the other from bringing it before the court. Here equity will relieve, if the applicant himself was guilty of no negligence or fault. And thirdly, the fraud charged may have been practised in the act of procuring the judgment to be entered, or in taking judgment in violation of an agreement to the contrary. This also is sufficient ground for the interference of equity. These propositions will be elaborated in the next succeeding sections.

§ 369. Fraud in Preventing Defense.

Where a party, having a good defense to an action commenced against him at law, is prevented, by the fraud or fraudulent representations of the plaintiff or his attorney, from setting up that defense, and a judgment is obtained against him, without any negligence or fault on his part, it is a proper case in equity for relief against the judgment.¹²⁶ As remarked by a learned judge, "a decree or judgment receives its force from the fact that it is the decision of a competent tribunal, before which both the parties have had an opportunity of appearing and prosecuting their claims and having them fairly adjudicated. When this is prevented by the fraud or circumvention of one of the parties, without the fault or negligence of the other, the decree or judgment of the court ceases to have its binding effect, and it is competent for the party injured to resort to a court of chancery to obtain relief."¹²⁷ Thus, in one case, a perpetual injunction was granted, in order to stay proceedings on a judgment at law obtained in a suit instituted in the name of a person

no knowledge of the fraud before final judgment was rendered. *Noll v. Chattanooga Co.* (Tenn. Ch.) 38 S. W. 287. And see *infra*, § 378.

¹²⁶ *Huggins v. King*, 3 Barb. (N. Y.) 616; *Spencer v. Vigneaux*, 20 Cal. 442; *Cummins v. White*, 4 Blackf. (Ind.) 356; *Mack v. Doty*, Harr. (Mich.) 366; *Polindexter v. Waddy*, 6 Munf. (Va.) 418, 8 Am. Dec. 749; *De Louis v. Meek*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; *Lazarus v. McGuirk*, 42 La. Ann. 194, 8 South. 253; *Dodge v. Williams*, 107 Ga. 410, 33 S. E. 468; *Mitchell v. Kirby* (Ky.) 38 S. W. 507.

¹²⁷ *Lockwood v. Mitchell*, 19 Ohio, 448, 53 Am. Dec. 438. This was also the ground of the decision in the remarkable litigation reported as "The Wagner Cases," 59 Md. 313.

not interested, whose name was used only for the purpose of preventing a defense which the defendant had against the real plaintiff in interest.¹²⁸ So, equity will relieve where, in *ex parte* proceedings in foreign attachment, advantage, after being waited for, has been deliberately taken of a complainant's absence to obtain, without his knowledge, a judgment upon a claim to which he has a sufficient defense either at law or in equity, and to sell his land for an inadequate price to the plaintiff in the attachment suit.¹²⁹ It is to be observed that the rule that a judgment silences all defenses which might have been urged against its rendition cannot be invoked in an action to enjoin its execution for fraud, when the fraud alleged consists in acts of the party which prevented his adversary from setting up his defenses.¹³⁰ At the same time, a party to an action at law must not be too credulous, nor rely too easily upon mere suggestions or representations made to him by his adversary. Though the conduct of his opponent may have been tricky or evasive, it is his own duty to be careful and vigilant, and he cannot obtain relief in equity, on this ground, unless he shows that he is free from the charge of negligence or lack of due attention to his case.¹³¹

§ 370. Fraud in Procuring the Judgment.

While it is true that equity will not generally listen to an impeachment of a judgment on the ground of fraud, when the fraud alleged was antecedent to the judgment and was or might have been litigated in the action at law, yet fraud practised in the very matter of obtaining the judgment is regarded as perpetrated upon the court as well as upon the injured party, and a judgment so procured may be enjoined.¹³² The rule has been thus stated: "The question of fraud

¹²⁸ *Greenleaf v. Maher*, 2 Wash. C. C. 393, Fed. Cas. No. 5,780.

¹²⁹ *Herbert v. Herbert*, 47 N. J. Eq. 11, 20 Atl. 290.

¹³⁰ *Lazarus v. McGuirk*, 42 La. Ann. 194, 8 South. 253.

¹³¹ See *Hoey v. Jackson*, 31 Fla. 541, 13 South. 459; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085; *German Fire Ins. Co. v. Perry*, 45 Ill. App. 197.

¹³² *Muscattine v. Mississippi & M. R. Co.*, 1 Dill. 536, Fed. Cas. No. 9,971; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *Lee v. Harmon*, 84 Mo. App. 157; *Watts v. Frazer*, 80 Ala. 186; *Hogg v. Link*, 90 Ind. 346; *Pearce v. Olney*, 20 Conn. 544; *Asbury v. Frisz*, 148 Ind. 513, 47 N. E. 328;

which is open to examination in such case is as to something which intervened in the proceedings by which the judgment was obtained, and it must have occurred in the very concoction or procuring of the judgment, and not have been known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention. The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud."¹³³ Or, as otherwise stated, the fraud alleged must be extrinsic or collateral to the matters involved in the issues or the trial at law.¹³⁴ Where, as in some of the states, the statutes authorize the courts to vacate their own judgments for "fraud" practised by the successful party in obtaining them, it is held that the word "fraud" is used in its common and direct sense; it means fraud in fact, not fraud in law, and embraces only intentional wrong.¹³⁵ The fraud which will justify a court of equity in thus interfering may assume various shapes. It may consist in deceit and imposition practised upon the court, as a means of obtaining a judgment which

Turner v. Colson (Ky.) 55 S. W. 551; Schroer v. Pettibone, 163 Ill. 42, 45 N. E. 207.

¹³³ Stilwell v. Carpenter, 2 Abb. N. C. (N. Y.) 238; Seals v. Weldon, 121 Ala. 319, 25 South. 1021.

¹³⁴ Irvine v. Leyh, 124 Mo. 361, 27 S. W. 512; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. A default judgment recovered by means of false statements in respect to a fact essential to the right of recovery, which deceived both the defendant and the court, cannot be set aside by a suit in equity, as this is not a collateral or extrinsic fraud. Ritchie v. McMullen, 25 C. C. A. 50, 79 Fed. 522. Equity cannot set aside an adjudication at law determining and locating the quantity of lands required for a public use merely because the parties who brought about the adjudication had a fraudulent or illegal intent; but it must appear that the court itself proceeded fraudulently, or in excess of its powers, or that it committed a gross mistake, or was imposed upon by fraudulent methods. Coe v. Aiken (C. C.) 61 Fed. 24. But it has been said that the rule that fraud for which equity will vacate a judgment must be fraud in procuring the judgment, is not to be applied in all its strictness to a judgment based on service by publication against one who had no actual notice; but relief will be given in such case on proof that the judgment was entered on a cause of action known to be without foundation. Irvine v. Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10.

¹³⁵ Ohio & W. Mortgage & Trust Co. v. Carter, 9 Kan. App. 621, 58 Pac. 1040. And see Williams v. Lumpkin, 86 Tex. 641, 26 S. W. 493.

never ought to have been rendered,¹³⁶ or in the act of the successful party in illegally tampering with the jury,¹³⁷ or in his wrongful conduct in obtaining a judgment and a sale of defendant's property by a surreptitious use of legal process and proceedings,¹³⁸ or in collusion. Thus, collusion between the plaintiff and the judge or justice who rendered the judgment will be ground for enjoining its execution.¹³⁹ So a judgment against an estate may be enjoined when it is shown to have been obtained by means of collusion between the executor or administrator and the alleged creditor or claimant.¹⁴⁰ And the same is true of a judgment against a corporation recovered by collusion between its president and the plaintiff.¹⁴¹ Again, one not a party to an account, who causes an action to be begun thereon for his own benefit, but ostensibly for the plaintiff, by whom all interest in the action and in the judgment is disclaimed, should be enjoined from enforcing the judgment.¹⁴² Where a claim on which an action had been brought was settled before the term of the court began, and the plaintiff wrongfully entered the action and took judgment, the

¹³⁶ *Benson v. Anderson*, 10 Utah, 135, 37 Pac. 256; *Larson v. Williams*, 100 Iowa, 110, 69 N. W. 441, 62 Am. St. Rep. 544; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358. But a court of equity will not set aside a judgment rendered by a court of competent jurisdiction, on the ground of fraud, because of false statements made by the defendants to the court as to their financial condition, by which the court was induced to render, and the plaintiff to accept, a judgment for less than the amount actually due. *United States v. Beebe*, 34 C. C. A. 321, 92 Fed. 244. So, an independent suit cannot be maintained in equity to set aside a decree allotting a homestead to the widow of a decedent, on the ground that, in procuring such decree, she misrepresented to the court the facts as to the property. *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736. Again, proof that evidence which would go to prevent the recovery of a judgment was collusively withheld from the court is not alone sufficient to establish fraud or imposition; it must also appear that the judgment was in fact unjust. *First Baptist Church v. Syma*, 51 N. J. Eq. 363, 28 Atl. 461.

¹³⁷ *Platt v. Threadgill* (C. C.) 80 Fed. 192.

¹³⁸ *Herbert v. Herbert*, 49 N. J. Eq. 565, 25 Atl. 366.

¹³⁹ *Kimble v. Short*, 2 Kan. App. 130, 43 Pac. 317; *Mason v. Quinn*, 9 Pa. Leg. Reg. (Pa.) 543.

¹⁴⁰ *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095; *First Baptist Church v. Syms* (N. J.) 31 Atl. 717; *Ramsey v. Hicks*, 53 Mo. App. 190.

¹⁴¹ *Babcock Hardware Co. v. Farmers' & Drovers' Bank*, 54 Kan. 273, 38 Pac. 256.

¹⁴² *Marchman v. Sewell*, 93 Ga. 653, 21 S. E. 172.

court in equity granted an injunction against the execution.¹⁴³ So where a written agreement was made, on the understanding that payment might be made in money, or in property at a valuation by two honest men, and that this understanding should be indorsed upon the agreement, which the party afterwards refused to do, but took judgment on the contract, it was held that chancery would consider the indorsement as made and would enjoin the judgment.¹⁴⁴ But in order to obtain this relief it is essential that the complainant himself should be entirely free from any fraud or improper conduct. Thus a party against whom a judgment has been entered on a bond cannot obtain relief in equity, against such judgment, on the ground that he was acting as the agent of the judgment plaintiff in the sale of territory in which to sell a patented article, and that such bond was only a sham, by which to induce others to purchase patent rights, and was never to be enforced against him.¹⁴⁵

§ 371. Deceit and Concealment.

Where a judgment at law has been procured by artifice or concealment on the part of the plaintiff, and the court where the fraud has been perpetrated is not able to afford adequate relief, a court of equity will take hold of the party who has committed the fraud and will prevent his using the judgment to the injury of his adversary.¹⁴⁶

¹⁴³ *Devoll v. Scales*, 49 Me. 320; *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268.

¹⁴⁴ *Dandridge v. Harris*, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

¹⁴⁵ *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

¹⁴⁶ *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Griffith v. Reynolds*, 4 Grat. (Va.) 46; *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376; *Fish v. Lane*, 3 N. C. 342; *Spencer v. Vigneaux*, 20 Cal. 442; *Mosby v. Gisborn*, 17 Utah, 257, 54 Pac. 121. But a defendant cannot claim fraud in the rendering of a judgment against him merely because the plaintiff therein did not volunteer information immaterial to the issues, and which could have been used only to affect the credibility of witnesses. *Long v. Gilbert* (Tenn.) 59 S. W. 414. A compromise judgment will not be set aside on the ground of fraud, because of representations by the defendants that they were without property, and that nothing could be realized by execution against them, when no representations are made with respect to the merits of the cause of action, and especially where the complaint itself is based upon the fact of their insolvency. *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563.

Thus a vendee of land may come into equity to enjoin a judgment at law on the notes given for purchase-money, upon alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate.¹⁴⁷ So on account of a deficiency in the quantity of the land sold, which would entitle the vendee to a diminution of the price.¹⁴⁸ So on account of a representation that the property was free from charges, when in fact it was incumbered by liens for more than its value.¹⁴⁹ In a case where the sureties on a replevin-bond alleged that they had been induced, while in a state of intoxication, to sign a blank paper, upon which the bond was afterwards written in, it was held that equity would not relieve them unless it were shown that an unfair advantage had been taken of their condition to their detriment.¹⁵⁰ But equity will relieve against a judgment entered on an agreement to which one defendant's name was forged, although the co-defendant who forged it was the only culpable party, the judgment being entered under a mistake of fact.¹⁵¹

§ 372. Perjury.

Whether relief will be granted in equity on the ground that the judgment was procured by the perjury of the plaintiff or a witness, is disputed. There are some English and American cases holding that such action is proper, where adequate redress cannot be had at law, and where the proof to convict the perjured witness could not be obtained in time to be used on the trial.¹⁵² And in at least one state

¹⁴⁷ *Walton v. Bonham*, 24 Ala. 513; *Wray's Adm'rs v. Furniss*, 27 Ala. 471; *Cox v. Jerman*, 41 N. C. 526; *Graham v. Tankersley*, 15 Ala. 634; *Jaynes v. Brock*, 10 Grat. (Va.) 211; *Gray v. Ward* (Tenn.) 52 S. W. 1028.

¹⁴⁸ *Davis v. Millaudon*, 14 La. Ann. 868.

¹⁴⁹ *Poe v. Decker*, 5 Ind. 150. Compare *Amfck v. Bowyer*, 3 W. Va. 7.

¹⁵⁰ *Campbell v. Ketcham*, 1 Bibb (Ky.) 406.

¹⁵¹ *Lindsley v. Sparks*, 20 Tex. Civ. App. 56, 48 S. W. 204.

¹⁵² *Coddrington v. Webb*, 2 Vern. 240; *Tovey v. Young*, Finch, Prec. Ch. 193; *Pegram v. King*, 9 N. C. 605; *Burgess v. Lovengood*, 55 N. C. 457. The United States supreme court has held that a court of equity may entertain a suit to enjoin the enforcement of a judgment at law when the bill alleges that the judgment was obtained by the use of a forged letter as evidence, the complainant being ignorant of the existence of such evidence before the trial, and not discovering its falsity until too late to move for a new trial, and not being guilty of any laches in the matter. *Marshall v.*

(Minnesota) the statutes authorize a suit to be brought to set aside a judgment obtained by the fraud or perjury of the prevailing party.¹⁵³ In some other jurisdictions, it is thought that if a party to a suit intentionally procures and produces false testimony, suborning his witnesses to perjury and conspiring with them to secure a judgment, this amounts to such fraud as will enable the adverse party, if defeated in the suit, to secure an injunction against the judgment.¹⁵⁴ But this doctrine is denied in other states,¹⁵⁵ and indeed the general current of authority is now in favor of the rule that perjury committed by the successful party or his witnesses at the trial is no sufficient ground for vacating the judgment or enjoining its enforcement.¹⁵⁶

§ 373. Taking Judgment contrary to Agreement.

If the plaintiff or his attorney makes promises or representations to the defendant, to the effect that the suit will not be pressed, or brought to trial, or will be dismissed, or that credits will be allowed, or that no recovery will be sought against him, or any other similar matter, to induce him to refrain from defending the case, and if the latter, honestly relying upon the understanding thus established, omits to present his defense, notwithstanding which the plaintiff fraudulently and in violation of the agreement proceeds to take a

Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870. A final decree which plaintiff permits to go against him because of false answers under oath by defendants, plaintiff being unable to present evidence to overcome the same, is vitiated by fraud and may be annulled. *Graver v. Faurot*, 22 C. C. A. 156, 76 Fed. 257.

¹⁵³ Gen. St. Minn. 1894, § 5434. See *Watkins v. Landon*, 67 Minn. 136, 69 N. W. 711.

¹⁵⁴ *Barr v. Post*, 59 Neb. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

¹⁵⁵ *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077; *Noll v. Chattanooga Co. (Tenn.)* 38 S. W. 287; *Ross v. Wood*, 70 N. Y. 8.

¹⁵⁶ *Demerit v. Lyford*, 27 N. H. 541; *Gott v. Carr*, 6 Gill & J. (Md.) 309; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Woodruff v. Johnston*, 61 N. Y. Super. Ct. 348, 19 N. Y. Supp. 861; *Cotzhausen v. Kerting (C. C.)* 29 Fed. 821; *Latimer v. Dean*, 31 Pittsb. Leg. J. (N. S.) 192; *Smedes v. Ilsley*, 68 Miss. 590, 10 South. 75; *Guthrie v. Doud*, 33 Ill. App. 68; *Barr v. Post*, 59 Neb. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; *Friese v. Hummel*, 26 Or. 145, 37 Pac. 458, 46 Am. St. Rep. 610.

judgment, equity will grant relief by injunction.¹⁵⁷ So where a judgment is fraudulently taken by default in violation of an agreement for a compromise, the interposition of a defense being thus prevented, its enforcement will be restrained, and titles acquired under it (with notice) will be voidable in equity.¹⁵⁸ So equity will relieve against a judgment obtained by inducing the defendant to withdraw an equitable plea filed in the case, by a promise of the plaintiff that if such plea were withdrawn he would do the equity set up in the plea, which he failed to do.¹⁵⁹ In another case, where the maker of a promissory note held a receipt, acknowledging payment thereof, from the indorsee, who sued upon the note, representing to the maker that he did not intend to enforce its collection against him, but against the payee, and judgment was accordingly rendered by default, it was held that an injunction should be granted perpetually restraining the collection of the judgment from the maker.¹⁶⁰ Where a defendant suffers judgment to be taken against him in con-

¹⁵⁷ *Pearce v. Olney*, 20 Conn. 544; *Chambers v. Robbins*, 28 Conn. 552; *Delaney v. Brown*, 72 Vt. 344, 47 Atl. 1067; *Hinckley v. Miles*, 15 Hun (N. Y.) 170; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Moore v. Gamble*, 9 N. J. Eq. 246; *Miller v. Harrison*, 32 N. J. Eq. 76; *Chase v. Manhardt*, 1 Bland (Md.) 333; *Kent v. Ricards*, 3 Md. Ch. 392; *Holland v. Trotter*, 22 Grat. (Va.) 136; *Jarman v. Saunders*, 64 N. C. 367; *Markham v. Angier*, 57 Ga. 43; *Purviance v. Edwards*, 17 Fla. 140; *Brooks v. Whitson*, 7 Smedes & M. (Miss.) 513; *Newman v. Meek*, Smedes & M. Ch. (Miss.) 331; *Burnley v. Rice*, 21 Tex. 171; *Williams v. Fowler*, 2 J. J. Marsh. (Ky.) 405; *Broaddus v. Broaddus*, 3 Dana (Ky.) 536; *Edmondson v. Moseby's Heirs*, 4 J. J. Marsh. (Ky.) 497; *Newnan v. Stuart*, 5 Hayw. (Tenn.) 78; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Stone v. Lewman*, 28 Ind. 97; *Johnson's Adm'rs v. Unversaw*, 30 Ind. 435; *Wierich v. De Zoya*, 2 Gilman (Ill.) 385; *Beams v. Denham*, 2 Scam. (Ill.) 58; *How v. Mortell*, 28 Ill. 479; *Rogers v. Gwinn*, 21 Iowa, 58; *De Louis v. Meek*, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; *Baker v. Redd*, 44 Iowa, 179; *Perry v. Siter*, 37 Mo. 273; *Roberts v. Miles*, 12 Mich. 297; *Scriven v. Hursh*, 39 Mich. 98; *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891; *Sanderson v. Voelcker*, 51 Mo. App. 328; *Hamilton v. Wood*, 55 Minn. 482, 57 N. W. 208; *Heim v. Butin* (Cal.) 40 Pac. 39; *McLeran v. McNamara*, 55 Cal. 508.

¹⁵⁸ *Murphy v. Smith*, 86 Mo. 333; *Nealls v. Dicks*, 72 Ind. 374; *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688; *Rogers v. Gwinn*, 21 Iowa, 58; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Kent v. Ricards*, 3 Md. Ch. 392; *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140.

¹⁵⁹ *Markham v. Angier*, 57 Ga. 43.

¹⁶⁰ *Baker v. Redd*, 44 Iowa, 179.

sideration of an agreement on the plaintiff's part that no money need be paid on it except upon the happening of a certain event, the plaintiff will not be permitted to exact payment in violation of the agreement.¹⁶¹ So where the liability of the principal had been fixed and discharged, and the surety had been lulled into security by the delusive promises of his creditor and had been the victim of artifice and circumvention, and the judgment against him was obtained in contempt of an injunction, and the assertion of any right under it would be fraudulent, it was considered a proper case for the intervention of equity.¹⁶² In order to induce a court of equity to declare a judgment confessed for a certain amount to be merely collateral security for whatever sum might be found due from defendant to plaintiff, the court must be satisfied beyond a reasonable doubt that such was the agreement of the parties, but upon being so satisfied it will enjoin the enforcement of the judgment, on the ground that to enforce it would be a fraud on the defendant.¹⁶³ A judgment recovered before a justice for an unjust amount, after an executed agreement of settlement, relied on by the defendant, but invalid because made on Sunday, will be enjoined in equity.¹⁶⁴

§ 374. Unauthorized Appearance of Attorney.

It was the rule of the early English law that where a regular attorney of the court appeared and answered for the defendant in a suit at law, a judgment recovered by the plaintiff would not be vacated, nor execution enjoined by a court of equity, though the attorney appeared without authority from the defendant, unless it were shown that the attorney was not of sufficient ability to answer for the damages caused by his unauthorized act, or there had been collusion between him and the plaintiff. And this view was at one time generally favored by the American courts, and even now it still retains its force in some few jurisdictions.¹⁶⁵ But in the progressive de-

¹⁶¹ Moore v. Barclay, 16 Ala. 158.

¹⁶² Cage v. Cassidy, 23 How. 109, 16 L. Ed. 430. And see Cassidy v. Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116.

¹⁶³ Kelghler v. Savage Manuf'g Co., 12 Md. 383, 71 Am. Dec. 600. See Cooper v. Tyler, 46 Ill. 462, 95 Am. Dec. 442.

¹⁶⁴ Blakesley v. Johnson, 13 Wis. 530.

¹⁶⁵ Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Smyth v. Balch, 40

velopment of the law, this harsh and inequitable rule has fallen into desuetude. It has been abandoned by the English courts.¹⁶⁶ And in this country, almost universally, it is now held that equity may enjoin the collection of a judgment, unjust in itself, which was procured upon the appearance of an attorney without authority, without any regard to the question of the latter's solvency and ability to respond in damages.¹⁶⁷ But the complainant must make it appear that the judgment is inequitable in itself, by reason of some fraud or trick or collusion, or that the result would or might have been different if there had been a full and fair trial upon the merits.¹⁶⁸ If an attorney, assuming without authority to act for a plaintiff, brings a suit and loses it, the defendant recovering a judgment for costs, equity will restrain the enforcement of such judgment in the same circumstances which would induce it to relieve the defendant in the converse case.¹⁶⁹

N. H. 363; *Hoffmire v. Hoffmire*, 3 Edw. Ch. (N. Y.) 174; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561. See 1 Salk. 86.

¹⁶⁶ *Bayley v. Buckland*, L. R. 1 Exch. 1; *Robson v. Eaton*, 1 Term R. 62; *Hubbart v. Phillips*, 13 Mees. & W. 702.

¹⁶⁷ *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *De Louls v. Meek*, 2 G. Greene (Iowa) 53, 50 Am. Dec. 491; *Critchfield v. Porter*, 3 Ohio, 518; *Allen v. Stone*, 10 Barb. (N. Y.) 547; *Jones v. Williamson*, 5 Cold. (Tenn.) 371; *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Cassidy v. Automatic Time Stamp Co.*, 185 Ill. 431, 56 N. E. 1116; *Handleley v. Jackson*, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; *Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559; *Hollinger v. Reeme*, 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402; *Smith v. Johnson*, 44 W. Va. 278, 29 S. E. 509. In *United States v. Throckmorton*, supra, Mr. Justice Miller said: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, [or by] a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

¹⁶⁸ *Budd v. Gamble*, 13 Fla. 265; *Harris v. Gwin*, 18 Miss. 563. Compare *Mills v. Scott* (C. C.) 43 Fed. 452.

¹⁶⁹ *Smyth v. Balch*, 40 N. H. 363; *Robson v. Eaton*, 1 Term R. 62.

§ 375. Negligence or Mistake of Counsel.

It is well settled that equity will not relieve against a judgment at law on account of any ignorance, unskillfulness, or mistake of the party's attorney (unless caused by the opposite party), nor for counsel's negligence or inattention.¹⁷⁰ The fault is in such cases attributed to the party himself. Thus the neglect of an attorney to plead a valid and proper defense, or to attend the trial, either intentionally or through forgetfulness, and his failure for like reasons to notify his client of the time of trial, whereby a judgment is wrongfully obtained against the client, furnishes no ground for relief against the judgment.¹⁷¹ So a party cannot obtain a new trial in equity, on the ground that his counsel mistook the facts of his defense, if he was present at the trial.¹⁷² Nor is it an adequate ground for relief that the counsel neglected to assign errors on an appeal in the case.¹⁷³ In a case in California it appeared that the defendant's attorney on the trial objected to the introduction of certain testimony, and the

¹⁷⁰ *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216; *Village of Celina v. Eastport Sav. Bank*, 15 O. C. A. 495, 68 Fed. 401; *Trustees of Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570; *Scroggin v. Hammett Grocer Co.*, 66 Ark. 183, 49 S. W. 820; *Funk v. Kansas Manuf'g Co.*, 53 Neb. 450, 73 N. W. 931; *Sasser v. Olliff*, 91 Ga. 84, 16 S. E. 312; *Wynn v. Wilson*, 1 Hemp. 698, Fed. Cas. No. 18,116; *Rogers v. Parker*, 1 Hughes, 148, Fed. Cas. No. 12,018; *Warner v. Conant*, 24 Vt. 351, 58 Am. Dec. 178; *Burton v. Wiley*, 26 Vt. 430; *McBroom v. Sommerville*, 2 Stew. (Ala.) 515; *Watts v. Gayle*, 20 Ala. 817; *Broda v. Greenwald*, 66 Ala. 538; *Dibble v. Truluck*, 12 Fla. 185; *Barrow v. Jones*, 1 J. J. Marsh. (Ky.) 470; *Morton's Ex'rs v. Nunnally*, 3 Hayw. (Tenn.) 210; *Chester v. Apperson*, 4 Heisk. (Tenn.) 639; *Graham v. Roberts*, 1 Head. (Tenn.) 56; *Burton v. Hynson*, 14 Ark. 32; *White v. Bank of United States*, 6 Ohio, 529; *Winchester v. Grosvenor*, 48 Ill. 517; *Dinet v. Eigenmann*, 96 Ill. 39; *Kern v. Strausberger*, 71 Ill. 413; *Fuller v. Little*, 69 Ill. 229; *Shricker v. Field*, 9 Iowa, 366; *Jones v. Leech*, 46 Iowa, 186; *Miller v. Bernecker*, 46 Mo. 194; *Bowman v. Field*, 9 Mo. App. 576; *Huebschman v. Baker*, 7 Wis. 542; *Farmers' Loan & Trust Co. v. Walworth County Bank*, 23 Wis. 249; *Boston v. Haynes*, 33 Cal. 31; *Quinn v. Wetherbee*, 41 Cal. 247.

¹⁷¹ *Sharp v. Moffitt*, 94 Ind. 240; *Bardonski v. Bardonski*, 144 Ill. 284, 33 N. E. 39; *Payton v. McQuown*, 97 Ky. 757, 31 S. W. 874, 31 L. R. A. 33, 53 Am. St. Rep. 437; *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836.

¹⁷² *Jamison v. May*, 13 Ark. 600.

¹⁷³ *Miller v. Bernecker*, 46 Mo. 194; *Dinet v. Eigenmann*, 96 Ill. 39.

court erroneously overruled the objection. An exception was taken to the ruling, and by reason of such erroneous ruling the plaintiff recovered judgment. The testimony was taken down by the official reporter, who failed to note the objection and exception. The defendant moved for a new trial, and adopted as his statement the report of the official reporter, without observing the error in the report, and for that reason failed to obtain a new trial. It was held that the mistake had been accompanied by such negligence on the part of the attorney that a court of equity would not relieve against the judgment.¹⁷⁴ A few exceptions to this rule are to be discovered in the books. Thus, in an early case in Tennessee, where a defendant at law had instructed his counsel in his defense, but the plea was so framed that the evidence did not support it and the defense therefore failed, it was considered that equity would be justified in giving relief.¹⁷⁵ In New York—where, to be sure, the practice is excessively liberal in this respect—the courts will entertain a motion for the vacation of a judgment on the ground of the neglect or mistake of counsel. With a fine spirit of humanity, but with little regard for the settled principles of law, they declare that they will not suffer a client to be ruined because he has employed an incompetent or unworthy attorney.¹⁷⁶

§ 376. Want of Jurisdiction.

It is generally held that where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment, if it be shown that there is a meritorious defense to the action.¹⁷⁷ And

¹⁷⁴ *Quinn v. Wetherbee*, 41 Cal. 247.

¹⁷⁵ *Click v. Gillespie*, 4 Hayw. (Tenn.) 4.

¹⁷⁶ *Sharp v. Mayor, etc., of City of New York*, 31 Barb. 578.

¹⁷⁷ *Myers v. Daniels*, 59 N. C. 1; *Morgan v. Scott, Minor (Ala.)* 81. 12 Am. Dec. 35; *Brooks v. Harrison*, 2 Ala. 209; *Secor v. Woodward*, 8 Ala. 500; *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Stubbs v. Leavitt*, 30 Ala. 352; *Robinson v. Reid's Ex'r*, 50 Ala. 69; *Dunklin v. Wilson*, 64 Ala. 162; *Southern Ex. Co. v. Craft*, 43 Miss. 508; *McFaddin v. Spencer*, 18 Tex. 440; *Wofford v. Booker*, 10 Tex. Civ. App. 171, 30 S. W. 67; *Jennings v. Shiner (Tex. Civ. App.)* 43 S. W. 276; *Tucker v. Williams (Tex. Civ. App.)* 56 S. W. 585; *Walker*

the fact that the law-court, in rendering judgment, passed on the sufficiency of an alleged service of the notice is not a bar to a re-adjudication of the question in an action to restrain execution of the judgment.¹⁷⁸ It is also held that where a judgment passes against a party before actual notice to him, although a copy of the writ was left at his residence, he being then absent from the state, equity will relieve if there is a substantial defense.¹⁷⁹ But it is no ground for relief that the defendant forgot that the writ was served upon him, whereby he was prevented from appearing and defending,¹⁸⁰ or that he erroneously supposed the suit was intended to be against another person.¹⁸¹ Nor will equity relieve on account of the want of notice, where it appears that the rendition of the judgment was suspended, by consent, until the opinion of the supreme court in another case between the same parties could be had, and that the judgment was not given until after such opinion had been obtained.¹⁸² Chancery has also refused to interfere in a case where the defendant, not denying that he had been duly served, alleged that he was not a citizen or resident of the state and had been fraudulently decoyed within the jurisdiction in order to procure service on him; for, said the court, the objection should have been taken by appearing in the original suit and moving to set aside the service.¹⁸³ Applications of this character are most commonly made in cases where, out of several defend-

v. Wynne, 3 Yerg. (Tenn.) 62; *Ingle v. McCurry*, 1 Helsk. (Tenn.) 26; *Ridgeway v. Bank of Tenn.*, 11 Humph. 523; *Ryan v. Boyd*, 33 Ark. 778; *Montague v. Mitchell*, 28 Ill. 481; *Weaver v. Poyer*, 79 Ill. 417; *Wilday v. McConnel*, 63 Ill. 278; *Coon v. Jones*, 10 Iowa, 131; *Givens v. Campbell*, 20 Iowa, 79; *Jamison v. Weaver*, 84 Iowa, 611, 51 N. W. 65; *Iowa Union Tel. Co. v. Boylan*, 86 Iowa, 90, 52 N. W. 1122; *United States Mut. Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571; *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713; *White v. Espey*, 21 Or. 328, 28 Pac. 71; *Roberson v. Crow* (Ind. T.) 53 S. W. 534; *Campbell v. Edwards*, 1 Mo. 324; *San Juan & St. L. Mining & Smelting Co. v. Finch*, 6 Colo. 214; *Martin v. Parsons*, 49 Cal. 94; *Jeffery v. Fitch*, 46 Conn. 601. Per contra, *Armsworthy v. Cheshire*, 17 N. C. 234, 34 Am. Dec. 273.

¹⁷⁸ *State Ins. Co. v. Waterhouse* (Iowa), 43 N. W. 611.

¹⁷⁹ *Jones v. Commercial Bank*, 5 How. (Miss.) 43, 35 Am. Dec. 419.

¹⁸⁰ *Cullum v. Casey*, 1 Ala. 351; *Deweese v. Richardson*, 1 A. K. Marsh. (Ky.) 312.

¹⁸¹ *Higgins v. Bullock*, 73 Ill. 205.

¹⁸² *Stein v. Burden*, 30 Ala. 270.

¹⁸³ *Vastine v. Bast*, 41 Mo. 493. Compare *Grass v. Hess*, 37 Ind. 193.

ants, only a part have been notified of the suit. Thus a judgment rendered against a joint maker of a note, without service upon him of any summons or process, is void, and where it appears that the right of action on the note has expired, so that there exists a good defense, a perpetual injunction will be granted, restraining the execution of such judgment.¹⁸⁴ So a judgment confessed by one partner against the firm, without the consent of the others, will be enjoined.¹⁸⁵ But on the other hand, where a judgment has been obtained against a principal and surety, it is no ground for an injunction in favor of the surety that the principal was not served with process and had no opportunity to defend.¹⁸⁶ Equity also has jurisdiction to vacate a judgment which has been fraudulently altered so as to include a defendant who was not served and not originally included in the judgment.¹⁸⁷ So, where a suit between citizens of the same state has been brought in a federal court, by collusion or otherwise, on the ground of defendant's alienage, and a default decree entered, such proceedings are wholly without jurisdiction and void, and the execution of the decree may be enjoined.¹⁸⁸ The same remedy may also be sought where the failure of jurisdiction was in respect to the subject-matter of the controversy or the amount involved.¹⁸⁹ But in any case the complainant has the burden of proving affirmatively the facts constituting want of jurisdiction.¹⁹⁰ And he must show that he has not been negligent in failing to avail himself of such remedies as the law would afford him.¹⁹¹ Although the general consensus of judicial opinion is as stated in the beginning of this section, the decisions in some of the states hold that equity ought not to restrain a judgment on the mere ground that it was void for want of jurisdiction, since the complainant has an adequate remedy at law, by motion

¹⁸⁴ *Gerrish v. Seaton*, 73 Iowa, 15, 34 N. W. 485.

¹⁸⁵ *Christy v. Sherman*, 10 Iowa, 535.

¹⁸⁶ *Mason v. Miles*, 63 N. C. 564.

¹⁸⁷ *Chester v. Miller*, 13 Cal. 558.

¹⁸⁸ *Broadis v. Broadis* (C. C.) 86 Fed. 951.

¹⁸⁹ See *Hill v. Gordon* (C. C.) 45 Fed. 276; *Donham v. Springfield Hardware Co.*, 10 C. C. A. 294, 62 Fed. 110.

¹⁹⁰ *Elchoff v. Elchoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; *Westbrook v. Thompson*, 104 Tenn. 363, 58 S. W. 223.

¹⁹¹ *Hamblin v. Knight*, 81 Tex. 351, 16 S. W. 1082, 26 Am. St. Rep. 818.

or otherwise, in the original cause.¹⁹² Probably the true note of distinction is struck in the cases which rule that equity will not enjoin the judgment unless it is shown to be inequitable and unjust; if the party merely relies upon a defect of jurisdiction, without attempting to show that the merits are with him also, he must seek his remedy at law.¹⁹³

§ 377. Judgment founded on False Return of Service.

Equity may vacate or enjoin the judgment of a court of law, when it is shown to be unjust and that the court rendering it never had jurisdiction of the person of the defendant, although assuming it, in consequence of a false return of service by the sheriff or other officer.¹⁹⁴ In a case in California, where the action was to enforce a tax-lien on land, and there was no service of summons and no appearance by the defendants, and the court commissioner drafted the decree, and either fraudulently or by neglect inserted a clause in the decree that the summons had been served and the judge, deceived by the false recitals in the decree, signed it and ordered it to be entered as the judgment of the court, and at the sheriff's sale under the de-

¹⁹² Fullan v. Hooper, 66 How. Prac. 75; Morris v. Morris, 76 Ga. 733; Partin v. Luterloh, 59 N. C. 341.

¹⁹³ Stokes v. Knarr, 11 Wis. 389; Gerrish v. Hunt, 66 Iowa, 682, 24 N. W. 274; Off v. Title G., A. & T. Co., 87 Ill. App. 472; Newman v. Taylor, 69 Miss. 670, 13 South. 831; Fickes v. Vick, 50 Neb. 401, 69 N. W. 951; Combs v. Hamlin Wizard Oil Co., 58 Ill. App. 123.

¹⁹⁴ Miller v. Gorman, 38 Pa. 309; Brooks v. Harrison, 2 Ala. 209; Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666; Walker v. Gilbert, Freem. Ch. (Miss.) 85; Jones v. Commercial Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419; Ridgeway v. Bank of Tenn., 11 Humph. (Tenn.) 522; Ingle v. McCurry, 1 Heisk. (Tenn.) 26; Bell v. Williams, 1 Head (Tenn.) 229; Estis v. Patton, 3 Yerg. (Tenn.) 382; Ryan v. Boyd, 33 Ark. 778; Owens v. Ranstead, 22 Ill. 161; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Newcomb v. Dewey, 27 Iowa, 381; Stone v. Skerry, 31 Iowa, 582; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Dowell v. Goodwin, 22 R. I. 287, 47 Atl. 693, 51 L. R. A. 873, 84 Am. St. Rep. 842; Bramlett v. McVey, 91 Ky. 151, 15 S. W. 49; Huntington v. Crouter, 33 Or. 408, 54 Pac. 208, 72 Am. St. Rep. 726; DuBois v. Clark, 12 Colo. App. 220, 55 Pac. 750. But equity will not enjoin the enforcement of a judgment merely because the return on the summons is defective, if it appears that the summons was properly served, and defendant had ample opportunity to defend. Peoria, D. & E. Ry. Co. v. Duggan, 32 Ill. App. 351; McFaddin v. Garrett, 49 La. Ann. 1319, 22 South. 358.

cree the commissioner became the purchaser and obtained a sheriff's deed, it was held that a court of equity would grant relief to the owner, by restraining the purchaser from setting up the judgment as an estoppel or from using it to perpetuate the advantage he had gained.¹⁹⁵ It should be remarked that there is a line of decisions wherein the application of the rule above stated is materially restricted. These cases hold that equity should not grant relief unless the false return of service was procured or induced by the plaintiff, or unless the latter can be in some way connected with the deception, thus linking the case supposed with the category of those wherein the defendant was prevented from setting up his defense by the trickery or fraud of his adversary.¹⁹⁶ The analogy here presented is plausible, but deceptive. For in case the plaintiff is in no fault, and the officer is alone to blame for the false return, these decisions can suggest no remedy except that the defendant should pay the judgment and then bring his action against the officer.¹⁹⁷ Practically, however, this remedy must often be illusory. And at its best, it involves a circuitry and remoteness of obtaining redress which is foreign to the spirit of equity. But although the main rule for cases of this sort may be regarded as generally well settled, there is a material difference of opinion as to whether the relief will be granted when there still exists a complete and adequate remedy in the original suit. Numerous respectable authorities hold that it should be granted;¹⁹⁸ others that it should be refused.¹⁹⁹ But at all events, before equity

¹⁹⁵ *Martin v. Parsons*, 49 Cal. 95.

¹⁹⁶ *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552; *Johnson v. Jones*, 2 Neb. 126; *Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400, 19 Am. Dec. 135; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Gardner v. Jenkins*, 14 Md. 58; *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

¹⁹⁷ In *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552, it was said: "In cases of false returns affecting a defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal."

¹⁹⁸ *Landrum v. Farmer*, 7 Bush (Ky.) 46; *Caruthers v. Hartsfield*, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580; *McNairy v. Eastland*, 10 Yerg. (Tenn.) 309; *Connell v. Stelson*, 33 Iowa, 147; *Hernandez v. James*, 23 La. Ann. 483; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193.

¹⁹⁹ *Bibend v. Kreutz*, 20 Cal. 109; *Sanchez v. Carriaga*, 31 Cal. 170; *Comstock*

will interpose by injunction in a case of this description, it must be averred and proved that the defendant has a meritorious defense, or at least something more than the mere barren right of being permitted to defend.²⁰⁰

§ 378. **Legal Defense not Interposed.**

The rule is well settled and perfectly inflexible, that if the defendant in an action at law had a good defense, purely legal in its nature, of the existence of which he was aware, and which he had an opportunity to set up, but neglected to defend himself, he cannot come into equity seeking relief against the judgment in that action, on the same grounds which constituted that defense, unless his failure to make the defense was due to circumstances of fraud, accident, or surprise, entirely unmingled with negligence or fault on his own part.²⁰¹ In

v. Clemens, 19 Cal. 77; *Chambers v. King Wrought Iron Bridge Manufactory*, 16 Kan. 270; *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451.

²⁰⁰ *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Coon v. Jones*, 10 Iowa, 131; *Secor v. Woodward*, 8 Ala. 500; *Gardner v. Jenkins*, 14 Md. 58; *Harris v. Gwin*, 10 Smedes & M. (Miss.) 563; *Fowler v. Lee*, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

²⁰¹ *Hungerford v. Sigerson*, 20 How. 156; *Wynn v. Wilson*, 1 Hempst. 698, Fed. Cas. No. 18,116; *New Orleans v. Morris*, 3 Woods, 103, Fed. Cas. No. 10,182; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; *Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 86; *Mills v. Van Voorhis*, 10 Abb. Prac. (N. Y.) 152; *Ingalls v. Merchants' Nat. Bank*, 51 App. Div. 305, 64 N. Y. Supp. 911; *Katz v. Moore*, 13 Md. 566; *Ewing v. Nickle*, 45 Md. 413; *Lyday v. Double*, 17 Md. 188; *Huston v. Ditto*, 20 Md. 305; *Harnsbarger's Adm'r v. Kinney*, 13 Grat. (Va.) 511; *Smith v. McLain*, 11 W. Va. 654; *Jackson v. Patrick*, 10 S. C. 207; *Robbins v. Mount*, 3 Ga. 74; *Pollock v. Gilbert*, 16 Ga. 398; *Vaughn v. Fuller*, 23 Ga. 366; *Neal v. Henderson*, 72 Ga. 209; *Bailey v. State Sav. Bank*, 97 Ga. 398, 24 S. E. 40; *Starnes v. Mutual Loan & Banking Co.*, 97 Ga. 400, 24 S. E. 138; *Griffin v. Smyly*, 105 Ga. 475, 30 S. E. 416; *Foster v. State Bank*, 17 Ala. 672; *Thomas v. Phillips*, 4 Smedes & M. (Miss.) 358; *Williams v. Jones*, 10 Smedes & M. (Miss.) 108; *Semple v. McGatagan*, 10 Smedes & M. (Miss.) 98; *Scroggins v. Howorth*, 23 Miss. 514; *Shipp v. Wheelless*, 33 Miss. 646; *Jordan v. Thomas*, 34 Miss. 72, 69 Am. Dec. 387; *Gaines v. Kennedy*, 53 Miss. 103; *Minor v. Stone*, 1 La. Ann. 283; *Todd v. Fisk*, 14 La. Ann. 13; *McRae v. Purvis*, 12 La. Ann. 85; *Gibson v. Moore*, 22 Tex. 611; *Jordan v. Corley*, 42 Tex. 284; *Prewitt v. Perry*, 6 Tex. 260; *Coffee v. Ball*, 49 Tex. 16; *Smith v. Durrett, Sneed* (Ky.) 236; *Cowan v. Price*, 1 Bibb (Ky.) 173; *Paynter v. Evans*, 7 B. Mon. (Ky.) 420; *Galbraith v. Martin*, 5 Humph. (Tenn.) 50; *Brandon v. Green*, 7 Humph. (Tenn.) 130;

other words, "a court of chancery will not entertain a party seeking relief against a judgment at law in consequence of his default upon grounds which might have been successfully taken in the said [law] court, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown why the defense at law was not made."²⁰² Thus relief in equity was refused in a case where the defendant had a good defense of a discharge under the bankrupt act, but neglected to answer or plead it because the plaintiff had commenced the suit before his discharge in bankruptcy, and continued it, unknown to him, from term to term, until after his discharge, before taking judgment; for he knew of the institution of the suit and was bound to notice everything else that was done.²⁰³ Nor will equity relieve because the party did not prove on the trial payments which he alleges he had made, unless he shows some fraud or circumvention practised to prevent his making the proof.²⁰⁴ Nor because the promissory note upon which judgment was rendered was without consideration.²⁰⁵ That the legal defense was not presented or considered through the oversight of counsel or the error of the judge, or the failure on the part of the defendant to collect the evidence in due season and present it in a way to be available, is no sufficient excuse.²⁰⁶ And if the de-

Ohio & W. Mortg. & Trust Co. v. Carter, 9 Kan. App. 621, 58 Pac. 1040; *Kimball v. Hutchison*, 61 Kan. 191, 59 Pac. 275; *Andrews v. Fenter*, 1 Ark. 186; *Lester v. Hoskins*, 26 Ark. 63; *Bently v. Dillard*, 6 Ark. 79; *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Menifee's Adm'r v. Ball*, 7 Ark. 520; *Raburn v. Shortridge*, 2 Blackf. (Ind.) 480; *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *Smith v. Powell*, 50 Ill. 21; *Higgins v. Bullock*, 73 Ill. 205; *Carney v. Village of Marselles*, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; *Newman v. Schueck*, 58 Ill. App. 328; *Lewis v. Firemen's Ins. Co.*, 67 Ill. App. 195; *Spraker v. Bartlett*, 73 Ill. App. 522; *Johnson v. Lyon*, 14 Iowa, 431; *Faulkner v. Campbell, Morris (Iowa)* 148; *Collier v. Easton*, 2 Mo. 146; *Kelly v. Hurt*, 74 Mo. 561; *Kelleher v. Boden*, 55 Mich. 295, 21 N. W. 346; *Sargeant v. Bigelow*, 24 Minn. 370; *Clark v. Lee*, 58 Minn. 410, 59 N. W. 970; *Snyder v. Vannoy*, 1 Or. 344; *Marsh v. Edgerton*, 1 Chand. (Wis.) 198, 2 Pin. 230; *Phelps v. Peabody*, 7 Cal. 50; *Agard v. Valencia*, 39 Cal. 292.

²⁰² *Braden v. Reitzenberger*, 18 W. Va. 236; *Nevins v. McKee*, 61 Tex. 412.

²⁰³ *Bellamy v. Woodson*, 4 Ga. 175, 48 Am. Dec. 221.

²⁰⁴ *Deaver v. Erwin*, 42 N. C. 250; *Harnsbarger's Adm'r v. Kinney*, 13 Grat. (Va.) 511; *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

²⁰⁵ *Garrison v. Cobb*, 106 Ind. 245, 6 N. E. 332.

²⁰⁶ *Lebanon Mut. Ins. Co.'s Appeal (Pa.)* 1 Atl. 559.

defendant is precluded from setting up in equity defenses which he might have made available at law, much less can he urge, as a ground for relief in equity, any defenses which actually were tried and determined at law. Equity will invariably decline to re-examine a question which was fully and fairly examined at law. The decision, however inequitable it may appear, is final, and the matter is *res judicata*.²⁰⁷ Hence a judgment obtained without fraud or mistake, upon issue joined and after litigation, will be interfered with by a court of equity only when it appears, first, that to allow its execution would be against equity and good conscience, and second, that the facts rendering it thus inequitable were not available as a defense in the action in which the judgment was recovered.²⁰⁸

§ 379. Illegality of Consideration.

In regard to judgments rendered upon a contract which was inherently illegal or immoral, there has been some difference of opinion as to whether equity ought not to relax the strictness of the rule stated above, and enjoin such judgments, irrespective of the fact that such illegality of the consideration might and should have been set up as a defense at law. Some cases are to be found in which relief has been thus granted where the judgment was founded upon usury.²⁰⁹ But the more favored opinion is that where the defense of usury was open to the defendant at law and he had an opportunity to set it up, but neglected to do so, equity will not relieve.²¹⁰ There are also precedents for the intervention of equity to annul gaming

²⁰⁷ *Bateman v. Willoe*, 1 Schoales & L. 204; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362; *Truly v. Wanzer*, 5 How. 141, 12 L. Ed. 88; *Hendrickson v. Hincley*, 17 How. 443, 15 L. Ed. 123; *Forsythe v. McCreight*, 10 Rich. Eq. (S. C.) 308; *More v. Bagley*, Breese, 94, 12 Am. Dec. 144; *Yongue v. Billups*, 23 Miss. 407; *Briesch v. McCauley*, 7 Gill (Md.) 189; *Brown v. Wilson*, 56 Ga. 534; *White v. Cahal's Adm'r*, 2 Swan (Tenn.) 550; *Simpson v. Hart*, 1 Johns. Ch. 97; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; *Agard v. Valencia*, 39 Cal. 292; *Foster v. State Bank*, 17 Ala. 672; *Snyder v. Vannoy*, 1 Or. 344; *Sumner v. Whitley*, 1 Mo. 708; *Matson v. Field*, 10 Mo. 100.

²⁰⁸ *Clute v. Potter*, 37 Barb. (N. Y.) 199.

²⁰⁹ *Frierson v. Moody*, 3 Humph. (Tenn.) 561; *Greer v. Hale*, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814.

²¹⁰ *Lucas v. Spencer*, 27 Ill. 15; *Chinn v. Mitchell*, 2 Metc. (Ky.) 92; *Brown v. Toell's Adm'r*, 5 Rand. (Va.) 543, 16 Am. Dec. 759.

contracts, though the defense could have been interposed at law.²¹¹ In Illinois, a statute provides that all judgments, mortgages, bonds, notes, etc., given or executed for any money won by gaming, may be set aside by any court of equity upon bill filed for that purpose by the person giving, entering into, or executing the same, or by any other person interested therein. This, it is held, applies as well to judgments rendered in contested actions as to judgments on confession. And, such a suit being authorized by statute, the fact that the illegality of the contract sued on would have constituted a good defense to the action in which the judgment was recovered, does not oust the court of chancery of jurisdiction.²¹² In a recent case it was held that a bill would lie to enjoin the plaintiff from collecting a judgment confessed five years previously, under a warrant of attorney in a bond, the defendant having had no day in court, upon the ground that the consideration of the bond was an agreement to suppress a prosecution for a felony.²¹³ But the supreme federal court holds, and with undoubted justice, that equity should not relieve against a judgment at law on the ground that it was founded on a consideration illegal and expressly forbidden by the laws of the state, when the party applying for relief was in *pari delicto* with the other; "a position," says the court, "which, however it might shield him against attempts from associates in wrong, so far as these should be urged through the instrumentality of courts of justice, can invest him with no rights, either at law or in equity, as against advantages acquired by his confederates."²¹⁴

²¹¹ *Woodson v. Barrett*, 2 Hen. & M. (Va.) 86, 3 Am. Dec. 612; *Skipwith v. Strother*, 3 Rand. (Va.) 214; *Clay v. Fry*, 3 Bibb. (Ky.) 248, 6 Am. Dec. 654. Compare *Owens v. Van Winkle Gin & Machinery Co.*, 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767.

²¹² Rev. St. Ill. c. 38, § 135; *West v. Carter*, 129 Ill. 249, 21 N. E. 782; *Mallett v. Butcher*, 41 Ill. 382; *Lucas v. Nichols*, 66 Ill. 41; *Harris v. McDonald*, 79 Ill. App. 638. See also *Lucas v. Waul*, 12 Smedes & M. (Miss.) 157.

²¹³ *Given's Appeal*, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795. And see *Heath v. Cobb*, 17 N. C. 187.

²¹⁴ *Sample v. Barnes*, 14 How. 70, 14 L. Ed. 330; *Creath v. Sims*, 5 How. 192, 12 L. Ed. 110.

§ 380. Excuses for not defending at Law.

Among the excuses for not making one's defense at law which are generally considered as sufficient to justify the interference of equity are the following:—fraud, circumvention, or any other improper act of the other party whereby a defense was prevented; mistake, surprise, or accident; and justifiable ignorance of the facts constituting a defense.²¹⁵ Some of these have already been considered, and the others will be considered in their order. But first it is necessary to advert to certain kinds of excuses which have been adjudged inadequate, and to the manner of satisfying the court of the existence of a valid excuse. That the debtor had a valid defense, but was advised by his counsel that it was not necessary to bring it forward before the court, is unanimously condemned as insufficient to warrant the intervention of a court of chancery.²¹⁶ Nor can equity enjoin a judgment where the only reason alleged for the failure of the defendant to avail himself of a legal defense is an erroneous ruling of the law court excluding such defense.²¹⁷ So when the grounds relied on in equity are equally available at law, it is no ground for relief that parties, who were not at the time of the trial examinable as witnesses, have since been made so by statute.²¹⁸ If a party, having a good defense at law, by his own voluntary act deprives himself of the means of making it, a court of equity will not interpose in his behalf; as where a party, having a good defense to a note, voluntarily exe-

²¹⁵ A good statement of the rule is that, to entitle a party to relief in equity against a judgment on account of the loss of his defense, it must be shown that it was occasioned by the fraud or fault of the adverse party, or by his own mistake, unmixed with any negligence or fault of himself, his counsel, or agents. *Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156.

²¹⁶ *Duckworth v. Duckworth's Adm'r*, 35 Ala. 70; *Brown v. Wilson*, 56 Ga. 534; *Shricker v. Field*, 9 Iowa, 367.

²¹⁷ *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678; *Edmanson v. Best*, 6 C. C. A. 471, 57 Fed. 531; *Ingwersen v. Buchholz*, 88 Ill. App. 73.

²¹⁸ *Kendall v. Winsor*, 6 R. I. 453. A judgment in a suit by an administrator cannot be enjoined merely because, under the statute, the defendants were not competent to testify in the suit in which the judgment was entered, and there was no other evidence to sustain their defense. *Williams v. Carr*, 4 Colo. App. 368, 36 Pac. 646.

cutes a deed of trust to secure its payment, equity will not enjoin the execution of the trust on account of such defense to the original note.²¹⁹ In regard to the evidence to prove the state of facts alleged as an excuse for the party's failure to make his defense at law, it is said that "the same certainty of proof is not required to establish an excuse for not making the defense at law that would be demanded to establish the existence of that defense."²²⁰ Yet as it is the excuse, and not the defense, which must be established at this stage of the proceedings, it is of no avail to prove the defense if the excuse remains without evidence to support it. For example, where A. pays a debt for which he and B. are liable, and afterwards recovers a judgment at law against B. for half the amount, and on a bill by B. for relief against the judgment, on the ground that he was surety for A. in the debt, he fails to prove his alleged reason for not making the defense at law, but proves that he was surety for A., there can be no relief afforded to him in equity.²²¹

§ 381. Same; Mistake.

A mistake of fact, provided it be honest and genuine, and such as a man might reasonably make, will be a sufficient excuse for not defending an action at law, and will warrant a court of equity, if the judgment be against conscience, in interposing by injunction to restrain its enforcement.²²² For instance, where A., a creditor of B., called upon the latter to execute a bond with surety for the debt, and supposing himself authorized by the conversation, applied to C. to execute the bond as surety, who did so accordingly, and A. subsequently recovered judgment on the bond, it was held; upon a bill by C. showing that A.'s representation of his authority from B. was made under a mistake, that the judgment should be enjoined as

²¹⁹ *Fanning v. Farmers' & Merchants' Bank*, 8 Smedes & M. (Miss.) 139.

²²⁰ *Rice v. R. R. Bank*, 7 Humph. (Tenn.) 39.

²²¹ *Turner v. Davis*, 7 Leigh (Va.) 227, 30 Am. Dec. 502.

²²² *Bibend v. Kreutz*, 20 Cal. 109; *Chase v. Manhardt*, 1 Bland (Md.) 350; *Ford v. Ford*, Walk. (Miss.) 505, 12 Am. Dec. 587; *Drew v. Clarke*, *Cooke* (Tenn.) 374, 5 Am. Dec. 698; *Partridge v. Harrow*, 27 Iowa, 96, 90 Am. Dec. 643; *Wilson v. Boughton*, 50 Mo. 17; *Kohn v. Lovett*, 43 Ga. 180; *Lumpkin v. Williams*, 1 Tex. Civ. App. 214, 21 S. W. 967; *Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882.

against C.²²³ But it is no ground for relief in equity that the party was prevented from making his defense at law by a mistake of law, although it was a mutual mistake of both parties to the suit.²²⁴ Nor that the defendant mistook his rights and so failed to make a defense which it was competent for him to present at law.²²⁵ Nor will equity interfere because of his ignorance of the nature of the proceeding against him and a misapprehension of what was necessary to charge him.²²⁶ Nor because he misunderstood the nature of the action and because those interested in the matter were out of the county.²²⁷ Nor will relief be granted where the defendant, misnamed in the process, was in court when the judgment was rendered against him by default, and failed to defend by advice of his counsel.²²⁸ Where an application for relief is made upon this ground, due diligence must be shown and the facts set forth showing how the omission occurred.²²⁹

§ 382. Same; Surprise.

In the cases where surprise has been accepted as a sufficient excuse for not defending at law, it has generally transpired that the surprise was one intentionally prepared by the plaintiff and sprung upon the defendant at the trial, whereby the case is assimilated to that of a fraud or trick on the former's part. Thus, in an early case, the payee of an usurious note pretended to have sold and transferred the same to a third person, in whose name a suit at law was brought upon the note, whereby the makers of the note were induced to suppose that the payee of the note could be examined by them as a witness in that suit to prove the usury, but such payee, when called as a witness at the trial, testified that he was one of the real plaintiffs in interest in

²²³ *Bird v. Chaffin*, 21 N. C. 55.

²²⁴ *Richmond & P. R. Co. v. Shippen*, 2 Pat. & H. (Va.) 327; *Meem v. Rucker*, 10 Grat. (Va.) 506; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498; *City of Broken Bow v. Broken Bow Waterworks Co.*, 57 Neb. 548, 77 N. W. 1078.

²²⁵ *Dickerson v. Board of Com'rs of Pipeley Co.*, 6 Ind. 128, 63 Am. Dec. 373; *Snyder v. Rinehart*, 20 Colo. 448, 39 Pac. 408.

²²⁶ *Meem v. Rucker*, 10 Grat. 506; *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270.

²²⁷ *State Bank v. Stanton*, 2 Gilman (Ill.) 352.

²²⁸ *Graham v. Roberts*, 1 Head (Tenn.) 56.

²²⁹ *Simmons v. Martin*, 53 Ga. 620; *Slappey v. Hodge*, 99 Ala. 300, 13 South. 256.

the suit, and declined to testify as to the alleged usury, and from the state of the pleadings he could not be examined as a plaintiff under the statute for the prevention of usury. It was held that the defendants in that suit could maintain a bill in chancery against the real plaintiffs in the suit at law for discovery and relief, upon the ground that they had been deceived and defrauded out of their defense at law.²³⁰ But an injunction will not be allowed on the ground of surprise, where there was no surprise but such as the party might have reasonably anticipated.²³¹ And a party seeking relief in equity on this ground must show that the surprise was not in consequence of his own negligence.²³² Thus it is no excuse that the witness on whom the defendant relied, but whom he had never questioned, failed to prove the defense set up.²³³ So the fact that the party's counsel was surprised by the production of a certain piece of evidence is no ground for relief in equity, if he was previously cognizant of the evidence.²³⁴ On the same principle, surprise of a party or his counsel, at the fact that the supreme court refused to review the judgment of the circuit judge, under a stipulation of the parties which had, in effect, made the decision of such judge final, is no ground for equitable interference with the judgment.²³⁵

§ 383. Same; Accident or Misfortune.

Unavoidable accident or misfortune, preventing the party from making his defense at law, is a sufficient ground for the interference of equity in an otherwise meritorious case.²³⁶ This, it will be remembered, is one of the grounds specified in the statutes of some of the states as authorizing the vacation of a judgment on motion in the court where rendered.²³⁷ It may be stated that equity is guided by

²³⁰ *Post v. Boardman*, 10 Paige, 580.

²³¹ *Fowler v. Roe*, 11 N. J. Eq. 367; *Shannon v. Reese*, 38 Ala. 596.

²³² *Lawson v. Bettison*, 12 Ark. 401.

²³³ *Williams v. Lockwood*, 1 Clarke, Ch. (N. Y.) 172.

²³⁴ *Gibson v. Watts*, 1 McCord, Eq. (S. C.) 490; *Hall v. Griffin*, 119 Ala. 214, 24 South. 27.

²³⁵ *Farmers' Loan & Trust Co. v. Walworth Co. Bank*, 23 Wis. 249.

²³⁶ *Kersey v. Rash*, 3 Del. Ch. 321; *Radzuweit v. Watkins*, 53 Neb. 412, 73 N. W. 679; *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789.

²³⁷ *Supra*, §§ 337-340.

practically the same rules which have been applied by the courts of law in construing these statutes, except, perhaps, that the lines are rather more closely drawn in equity, and less indulgence is shown in respect to the kinds of accident which are accepted as sufficient excuses, and in respect to the possibility of the party's surmounting the obstacle and making his defense. A few illustrative cases may follow here. It has been broadly held that the sickness of a party, or of his near relative, or the pendency of another suit against him requiring his attendance, will not authorize the interference of equity.²³⁸ And this is undoubtedly true, if it would have been possible for him to be represented by counsel. Floods, which prevented him from reaching the place of trial, will furnish a sufficient excuse, but only in case the bill is very explicit as to the time of the prevalence of high water and of the meeting and adjournment of court, and as to the efforts that were made to reach it, and as to the impossibility of a successful defense in the absence of the defendant.²³⁹ In another case, equity refused to enjoin a judgment on the ground that the defendant was precluded by intense excitement prevailing in the country from attending court, that it was dangerous to travel from home, that it was generally understood there would be no court, and that the judge of the court said that he should hold no session for the trial of cases.²⁴⁰ It should be remarked, in this connection, that a good excuse for not being present at the term at which judgment was rendered, is not sufficient where no counsel was employed, nor witnesses summoned, nor any other steps taken to defend the action.²⁴¹ The inability of the party's attorney to attend the court, or his sickness, may, under some circumstances, entitle the party to relief in equity;²⁴² but it is no ground for an injunction that defendant's counsel was absent,

²³⁸ *Pharr v. Reynolds*, 3 Ala. 521. See *Hord v. Dishman*, 5 Call (Va.) 279; *Wood v. Lenox*, 5 Tex. Civ. App. 318, 23 S. W. 812, *Roller v. Ried* (Tex.) 24 S. W. 655; *Hopper v. Davies*, 70 Ill. App. 682; *Owen v. Gerson*, 119 Ala. 217, 24 South. 413.

²³⁹ *English v. Savage*, 14 Ala. 342; *Brooks v. Whitson*, 15 Miss. 513.

²⁴⁰ *George v. Tutt*, 36 Mo. 141. See *Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

²⁴¹ *McCollum v. Prewitt*, Ala. Sel. Cas. 498; *Cole v. Hundley*, 16 Miss. 473.

²⁴² *McBroom v. Sommerville*, 2 Stew. (Ala.) 515. See *Sasser v. Olliff*, 91 Ga. 84, 16 S. E. 312.

when it appears that the defendant, if present at the trial, might have employed other counsel equally competent.²⁴³ So the death of defendant's original counsel, and want of familiarity, on the part of the counsel who succeeds him, with the grounds of the defense, do not furnish a sufficient reason for equity to enjoin the enforcement of the judgment.²⁴⁴ On the other hand, equity has thought it proper to give relief on account of the loss of a written contract without which the defense at law could not be made;²⁴⁵ but has refused its aid where it was not satisfied that the loss of the particular document would endanger the complainant's defense in the court of law.²⁴⁶ In a case where parties were prevented from making their defense at law by the acts of the plaintiff, until the only witness by whom the defense could be proved was dead, and a resort to a court of chancery in consequence thereof became indispensable, it was held that they were entitled to relief in that court.²⁴⁷ But the fact that a witness omitted, in giving his testimony, to state a material fact, and that the complainant, by reason of his deafness, did not know of such omission until after the trial, is no ground for relief.²⁴⁸

§ 384. Ignorance of Legal Defense.

It may be regarded as well settled, upon the authorities, that equity will grant relief against a judgment at law where it is shown that there is a good and valid defense to the action on the merits, of which the defendant was ignorant at the time of the trial, and which he could not have discovered, by the exercise of reasonable and proper diligence, in time to set it up at law.²⁴⁹ For example, where

²⁴³ *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216; *Mock v. Oundiff*, 6 Port. (Ala.) 24.

²⁴⁴ *Powell v. Stewart*, 17 Ala. 719.

²⁴⁵ *Vathir v. Zane*, 6 Grät. (Va.) 246.

²⁴⁶ *Rogers v. Cross*, 3 Chaud. 34.

²⁴⁷ *Mack v. Doty*, Har. (Mich.) 368.

²⁴⁸ *Stone v. Moody*, 6 Yerg. (Tenn.) 31.

²⁴⁹ *Davis v. Tilleston*, 6 How. 114, 12 L. Ed. 366; *Garrett v. Lynch*, 45 Ala. 211; *Wales v. Bank of Michigan*, Har. (Mich.) 308; *Hubbard v. Hobson*, Breese (Ill.) 190; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 63; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423; *Iglehart v. Lee*, 4 Md. Ch. 514; *Baltzell v. Randolph*, 9 Fla. 366; *Meek v. Howard*, 10 Smedes & M. (Miss.) 502; *Brown v. Luehrs*, 79 Ill. 575; *Wells, Fargo & Co. v. Wall*, 1 Or. 295; *Ludington v.*

an administrator has recovered judgment for the purchase money of property of his intestate sold by him, it is a sufficient excuse to the vendee for not defending at law, that he did not know until after the judgment was rendered that the administrator had no authority to sell.²⁵⁰ So where the creditor obtains a judgment at law against the sureties before they have notice of an agreement to forbear suit, equity will enjoin its collection.²⁵¹ But it is an important corollary to the above rule—or, indeed, an integral part of the rule—that mere ignorance of his defense is not sufficient; it must be shown that the party is guilty of no negligence, and that he could not possibly have ascertained it by the exercise of careful and reasonable diligence.²⁵² It must appear that the defendant's ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party.²⁵³ "A party who seeks the aid of a court of chancery, after a judgment at law against him, on the ground that he was ignorant of the defense, must show the exercise of ordinary diligence to discover it; or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part."²⁵⁴ Thus an alteration in an instrument sued on at law may be taken advantage of there, and the failure of the defendant to discover the alteration until after judgment is no ground for relief in equity.²⁵⁵ So the allegation that there was a mistake in an account, upon which a judgment at law was recovered, which was not discovered until after the trial and verdict,

Handley, 7 W. Va. 269; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Rust v. Ware*, 6 Grat. (Va.) 50, 52 Am. Dec. 100.

²⁵⁰ *Crisman v. Beasley*, 1 Smedes & M. Ch. (Miss.) 561.

²⁵¹ *Armistead v. Ward*, 2 Pat. & H. (Va.) 504.

²⁵² *Brown v. Swann*, 10 Pet. 497, 9 L. Ed. 508; *Avery v. U. S.*, 12 Wall. 304, 20 L. Ed. 405; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333, 3 L. Ed. 362; *Metropolitan El. Ry. Co. v. Johnston*, 158 N. Y. 739, 53 N. E. 1128; *Devlin v. Boyd*, 61 Hun, 625, 16 N. Y. Supp. 37; *McCollum v. Prewitt*, 37 Ala. 573; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Leggett v. Morris*, 6 Smedes & M. (Miss.) 723; *Slack v. Wood*, 9 Grat. (Va.) 40; *Taliaferro's Adm'r v. Branch Bank*, 23 Ala. 755; *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *McCown v. Macklin's Ex'r*, 7 Bush (Ky.) 308; *Thompson v. Berry*, 3 Johns. Ch. (N. Y.) 395; *Tutt v. Ferguson*, 13 Kan. 45; *Garrett v. Lynch*, 45 Ala. 204.

²⁵³ *Carolus v. Koch*, 72 Mo. 645.

²⁵⁴ *Stinnett v. Branch Bank*, 9 Ala. 120.

²⁵⁵ *Shelmire v. Thompson*, 2 Blackf. (Ind.) 270.

is not sufficient to authorize an injunction against the judgment.²⁵⁶ Nor is it any ground for relief in equity that defendant did not know, at the time of the trial at law, what the legal criterion of damages was.²⁵⁷

§ 385. *Discovery must have been sought.*

It is no excuse for failure to set up a legal defense in the action at law that the defendant could not make it available without invoking the aid of chancery to get a discovery; he should have obtained such discovery before going to trial at law.²⁵⁸ This principle was once stated by Chancellor Walworth in the following terms: "As a general rule, if a party against whom an action is brought has a legal defense, he must avail himself of it in the suit at law. It will be too late, after he has suffered a judgment to be recovered against him there, to apply to this court for relief. And even where the facts constituting the legal defense can only be established by a discovery from the plaintiff, if they are fully known to the defendant, and he can avail himself of them upon the trial by the aid of a bill of discovery, he should resort to that mode of defense when the necessity of it is apparent, or he may be precluded by the judgment in that suit. In cases of this kind, however, this court will accept of a satisfactory excuse for not resorting to a bill in the first instance, and may grant relief after judgment has been obtained in the suit at law."²⁵⁹

²⁵⁶ Falls v. Robinson, 5 Md. 365.

²⁵⁷ McKean v. Read, 6 Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

²⁵⁸ Norton v. Woods, 5 Paige (N. Y.) 249; Bartholomew v. Yaw, 9 Paige (N. Y.) 165; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Albritton v. Bird, R. M. Charl. (Ga.) 93; Barker v. Elkins, 1 Johns. Ch. (N. Y.) 465. See also Norris v. Hume, 2 Leigh (Va.) 334, 21 Am. Dec. 631; Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508; Green v. Massie, 21 Grat. (Va.) 358.

²⁵⁹ Norton v. Woods, 5 Paige (N. Y.) 249. An exactly opposite view was taken in Deputy v. Tobias, 1 Blackf. (Ind.) 311, 12 Am. Dec. 243, where Holman, J., said: "But a bill of discovery is the dernier resort in obtaining testimony, inasmuch as when it is resorted to, it shuts the door against every other method. Therefore it is purely discretionary with every suitor whether he will file such a bill or not, and he can never be considered in laches for not seeking a discovery from the opposite party."

§ 386. Newly-discovered Evidence.

On principles analogous to those just considered, it is held that where the defendant knew of his defense at the time of the trial at law, but had no evidence to support it, was ignorant that any such evidence existed, and could not have discovered it by the exercise of due diligence, equity will grant him relief upon the ascertainment and production of such evidence.²⁶⁰ But here, it is obvious, any court would be slow to pardon any negligence or sloth on the part of the defendant in seeking for the evidence which he needs. Being aware that he has a good legal defense, it is his duty, as well as his interest, to make the most careful and exhaustive efforts to arm himself with the testimony which will support it. If he has not done this,—if he has been negligent in the search for evidence,—equity will not relieve him.²⁶¹ And the substance of the newly-discovered evidence must be set forth in the bill, in order that the chancery court may judge whether it is of the requisite character and weight.²⁶² In regard to the last point, the circumstances under which equity will grant a new trial because of newly-discovered evidence have been summed up as follows: (1) The evidence must have been discovered since the trial. (2) It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence. (3) It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. (4) It must not be merely cumulative, corroborative, or collateral.²⁶³ It remains to be stated that the statutory provisions,

²⁶⁰ *Alley v. Ledbetter*, 16 N. C. 449; *Levan v. Patton*, 2 Helsk. (Tenn.) 108; *Cox v. Mobile & G. R. Co.*, 44 Ala. 611; *McGehee v. Gold*, 68 Ill. 215; *Rust v. Ware*, 6 Grat. (Va.) 50, 52 Am. Dec. 100; *Iglehart v. Lee*, 4 Md. Ch. 514; *Footo v. Silsby*, 1 Blatchf. 545, Fed. Cas. No. 4,918; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423; *Mills v. Van Voorhis*, 10 Abb. Prac. (N. Y.) 152; *Melick v. First Nat. Bank*, 52 Iowa, 94, 2 N. W. 1021; *Wilson v. Wilson*, 113 Ala. 670, 21 South. 67. Per contra, *Gusman v. De Poret*, 33 La. Ann. 333.

²⁶¹ *Taylor v. Bradshaw*, 6 T. B. Mon. (Ky.) 145, 17 Am. Dec. 132; *Glover v. Hedges*, 1 N. J. Eq. 113; *McCaulis v. Duval*, 69 Ga. 744.

²⁶² *Miller v. McGuire*, 1 Morris (Iowa) 150.

²⁶³ *Wynne v. Newman's Adm'r*, 75 Va. 816; *Willems v. Willems*, 72 Ill. App. 200; *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273. The evidence must be

in many of the states, authorizing the law courts to grant new trials on the ground of newly-discovered evidence, do not divest the courts of equity of the power to grant a new trial in cases where the facts will justify it.²⁶⁴

§ 387. Negligence of Party precludes Relief.

A litigant is required to exercise the greatest degree of watchfulness over the progress of his case in court; and if he fails to attend the trial and assert his rights, merely in consequence of his own opinion of the state of the docket, or through forgetfulness, or negligence of any other kind, he will have no standing in equity after a judgment.²⁶⁵ That he omitted to defend the suit in consequence of being misled by the clerk of the court as to its character, is considered as inexcusable negligence.²⁶⁶ So, where a garnishment suit is pending, but is not prosecuted to judgment for two terms after that to which it was made returnable, the garnishee has no right to think that the suit is abandoned as to him and settle his debt, and if he does so, equity will not grant him relief from a judgment subsequently obtained against him in the garnishment suit.²⁶⁷ So where a defendant at law, having a good legal defense, merely writes to counsel to defend him, without instructing him in his defense, he is guilty of such neglect as to preclude relief in equity against a judg-

of such a conclusive character that if it had been offered it would have produced a different result. *Bloss v. Hull*, 27 W. Va. 503.

²⁶⁴ *Horn v. Queen*, 4 Neb. 108; *Colyer v. Langford's Adm'rs*, 1 A. K. Marsh. (Ky.) 237; *Duncan v. Lyon*, 3 Johns. Ch. 356, 8 Am. Dec. 513; *Baltzell v. Randolph*, 9 Fla. 366. See *Snider v. Rinehart*, 20 Colo. 448, 39 Pac. 408.

²⁶⁵ *Warner v. Conant*, 24 Vt. 351, 58 Am. Dec. 178; *Yancey v. Downer*, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 389; *Briggs v. Smith*, 5 R. I. 213; *McVicar v. Filler*, 31 Mich. 304; *Gardiner v. Van Alstyne*, 22 App. Div. 579, 48 N. Y. Supp. 114; *Berry v. Burghard*, 111 Ga. 117, 36 S. E. 459; *Barr v. Post*, 59 Neb. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; *Ohio & W. Mortgage & Trust Co. v. Carter*, 9 Kan. App. 621, 58 Pac. 1040; *Mason v. Jones*, 7 D. C. 247; *Ivey v. McConnell* (Tex. Civ. App.) 21 S. W. 403; *Roots v. Cohen* (Miss.) 12 South. 593; *Hollinger v. Reeme*, 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402.

²⁶⁶ *Hanna v. Morrow*, 43 Ark. 107.

²⁶⁷ *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 389.

ment.²⁶⁸ But a distinction must be taken between such neglect as is attributable solely to the party himself and such as is brought about by the improper or deceitful conduct of the other side. The former is not excusable, the latter sometimes is.²⁶⁹

It is not only in making his defense at law that a party is required to exercise diligence. Though he may have a good excuse for failing to set up such defense at the proper time, still equity will refuse to give him an injunction against the judgment if he negligently omitted, having full knowledge of the facts, to apply in due season for such remedies as were open to him by appeal, motion for a new trial, or motion to vacate the judgment.²⁷⁰ And aside from this, chancery will be slow to extend assistance to one who has been so dilatory or slothful in seeking its aid as to be chargeable with laches.²⁷¹

§ 388. Defense not available at Law.

Thus far we have been speaking only of defenses purely legal in their character and which could have been interposed in the action at law. But where the case varies from this type, entirely different rules apply. If the matter relied on by the complainant could not have been received as a defense in the trial at law, because it fell within the exclusive jurisdiction of chancery, or by reason of the forms of legal procedure, equity will relieve notwithstanding there may have been an ineffectual attempt to defend at law.²⁷² And

²⁶⁸ *Stanard v. Rogers*, 4 Hen. & M. (Va.) 438; *Hill v. Bowyer*, 18 Grat. (Va.) 384; *Sanders v. Fisher*, 11 Ala. 812.

²⁶⁹ *Rowland v. Jones*, 2 Heisk. (Tenn.) 321.

²⁷⁰ *Heller v. Dyerville Manuf'g Co.*, 116 Cal. 127, 47 Pac. 1016; *Perkins v. St. Louis, K. C. & O. R. Co.*, 143 Mo. 513, 45 S. W. 260; *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

²⁷¹ *Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103; *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49; *Cheney v. Hovey*, 56 Kan. 637, 44 Pac. 605. See *Raisin Fertilizer Co. v. McKenna*, 114 Ala. 274, 21 South. 816.

²⁷² *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216; *Hendrickson v. Hinckley*, 17 How. 443, 15 L. Ed. 123; *Ferriday v. Selcer*, Freem. Ch. (Miss.) 258; *Calloway v. McElroy*, 3 Ala. 406; *Clifton v. Livor*, 24 Ga. 91; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Vennum v. Davis*, 35 Ill. 568; *Dunham v. Downer*, 31 Vt. 249; *Kersey v. Rash*, 3 Del. Ch. 321; *Newton v. Field*, 16 Ark. 216; *Stevens v. Hertzler*, 114 Ala. 563, 22 South. 121; *Vanscoy v. Stinchcomb*, 29

where the defendant has both a legal defense and an equitable defense, the latter not cognizable at law, a failure to use diligence in making his legal defense will not, it seems, prevent a court of equity²⁷³ from granting an injunction upon proof of the equitable defense, in case a judgment is rendered against him.²⁷³ The most difficult question under this head arises in connection with the codes of practice, enacted in several of the states, which confer large equitable powers upon the courts of law. One decision holds that such a statute merely permits, but does not require, an equitable defense to be made to an action on a legal demand; and therefore, if the defendant fails to avail himself of this privilege, and permits a judgment to go against him, he may still bring an equitable action to obtain relief against the judgment.²⁷⁴ Notwithstanding the plausibility of this reasoning, it is opposed by the weight of the authorities, which rule that the fact that a defense is equitable is no excuse for not setting it up at law, if available under the code.²⁷⁵

§ 389. Defense available either at Law or Equity.

There is a third possibility in regard to the character of the defense to the action; it may be one that is equally available either at law or in equity. In this event, where the defense is a matter of which courts of law and equity have concurrent jurisdiction, it is generally held that the party may choose the forum in which to make his defense, and if he omits to do so at law, he may then have recourse to equity for relief against the judgment.²⁷⁶ Thus, in some of the states, equity will relieve against a judgment at law, by default, for

W. Va. 263, 11 S. E. 927; *Gillett v. Sullivan*, 127 Ind. 327, 26 N. E. 827; *Hawkins v. Harding*, 37 Ill. App. 564. Compare *Gentle v. Atlas Savings & Loan Ass'n*, 105 Ga. 406, 31 S. E. 544.

²⁷³ *Cornelius v. Thomas*, 1 Tenn. Ch. 283; *Winchester v. Gleaves*, 3 Hayw. (Tenn.) 213.

²⁷⁴ *Dorsey v. Reese*, 14 B. Mon. (Ky.) 157.

²⁷⁵ *Kelly v. Hurt*, 74 Mo. 561; *Winfield v. Bacon*, 24 Barb. (N. Y.) 154; *Savage v. Allen*, 54 N. Y. 458.

²⁷⁶ *Harlan v. Wingate's Adm'r*, 2 J. J. Marsh. (Ky.) 138; *Dorsey v. Reese*, 14 B. Mon. (Ky.) 157; *Morrison's Ex'r v. Hart*, 2 Bibb (Ky.) 4, 4 Am. Dec. 663; *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Bently v. Dillard*, 6 Ark. 79; *Rathbone v. Warren*, 10 Johns. 587. But compare *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Galbraith v. Martin*, 5 Humph. (Tenn.) 50.

money won at gaming, because here the jurisdiction of law and equity is concurrent, and the party may have his election where he will set up his defense; and if he so chooses he may let judgment go by default at law, and then resort to equity; although it would of course be otherwise if he had presented his defense at law and failed.²⁷⁷ For if, in any case where the jurisdiction of law and equity is concurrent, the party makes his defense in the trial at law, he will be regarded as having made his election; and if he fails he will have no ground for a bill in equity for relief against the judgment, unless his defeat occurred through fraud or accident.²⁷⁸ And this election is manifested, it is said, "by offering any defense whatever, it matters not whether by demurrer to the declaration, or by plea in abatement or in bar."²⁷⁹ But it is also held that if there is a doubt whether a defense is available at law, and there is an undoubted jurisdiction in equity, and at law the defendant omits to make his defense, or if he makes it and it is overruled on the ground that it cannot be considered at law, a court of equity may afford relief, notwithstanding a trial at law.²⁸⁰

§ 390. Satisfaction or Release of Judgment.

Payment, release, or discharge of the claim on which a suit is founded must generally be set up as a defense before judgment. It forms no exception to the rule that matters cannot be heard on a bill in equity which might have been pleaded in the action at law, unless the party was prevented from bringing them before the court by fraud or accident, without his own fault or negligence.²⁸¹ But payment made after the institution of suit, where it cannot be brought

²⁷⁷ *Clay v. Fry*, 3 Bibb (Ky.) 248, 6 Am. Dec. 654; *Lucas v. Nichols*, 66 Ill. 41; *Gough v. Pratt*, 9 Md. 526; *Collins v. Lee*, 2 Mo. 16. See supra, § 379.

²⁷⁸ *Haughey v. Strang*, 2 Port. (Ala.) 177, 27 Am. Dec. 648; *Dutil v. Pacheco*, 21 Cal. 438, 82 Am. Dec. 749; *Burton v. Hynson*, 14 Ark. 32; *Dickson v. Richardson*, 16 Ark. 114; *Morrison's Ex'r v. Hart*, 2 Bibb (Ky.) 4, 4 Am. Dec. 663; *Dunham v. Downer*, 31 Vt. 249; *Farmers' Fire Ins. Co. v. Johnston*, 113 Mich. 426, 71 N. W. 1074.

²⁷⁹ *Le Guen v. Gouverneur*, 1 Johns. Cas. 505, 1 Am. Dec. 121.

²⁸⁰ *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415.

²⁸¹ *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 90; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 356, 8 Am. Dec. 513.

to the notice of the court before judgment, under the local practice, is good ground for enjoining the judgment.²⁸² Whether a bill in equity for an injunction is the proper remedy to prevent a judgment-plaintiff from proceeding to collect anew a judgment which has been in fact satisfied, has been disputed. Some of the cases hold that such an application is meritorious and should be allowed.²⁸³ But others, and we think with better reason, consider that equity ought not to interfere in such a case, inasmuch as the party has a prompt and adequate remedy at law.²⁸⁴ But it is held that a court of equity will relieve against the suing out or levy of any process of execution upon a judgment enjoined which has been discharged by proceedings in bankruptcy.²⁸⁵

§ 391. Injunction as a Means of securing Set-Off.

As equity may order one judgment to be set off against another, so also it has power to restrain the execution of a judgment when it is made to appear that the judgment-defendant has a debt against the plaintiff exceeding the judgment in amount and that the latter is insolvent.²⁸⁶ But a bill for this purpose cannot be sustained on the mere ground that the defendant has claims against the plaintiff which might be the subject of set-off, if there is no averment to show that the former for any reason could not have availed himself of his right of set-off in the action in which the judgment against him was recov-

²⁸² *Humphreys v. Leggett*, 9 How. 297, 13 L. Ed. 145; *Florat v. Handy*, 35 La. Ann. 816.

²⁸³ *Bowen v. Clark*, 46 Ind. 405; *Shaw v. Dwight*, 16 Barb. 536; *Mallory v. Norton*, 21 Barb. 424; *Texas Land & Mortg. Co. v. Worsham*, 5 Tex. Civ. App. 245, 23 S. W. 938; *Smith v. Taylor*, 78 Mo. App. 630; *Kallander v. Neidhold*, 98 Mich. 517, 57 N. W. 571; *Johnson v. Huber*, 106 Wis. 282, 82 N. W. 137; *Phillips v. Kuhn*, 35 Neb. 187, 52 N. W. 881; *Marks v. Willis*, 36 Or. 1, 58 Pac. 526, 78 Am. St. Rep. 752; *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752.

²⁸⁴ *McRae v. Davis*, 58 N. C. 140; *Perrine v. Carlisle*, 19 Ala. 686; *Lansing v. Eddy*, 1 Johns. Ch. (N. Y.) 49; *Robinson v. McDowell*, 125 N. C. 337, 34 S. E. 550; *Rollins v. National Casket Co.*, 40 W. Va. 590, 21 S. E. 722.

²⁸⁵ *Peatross v. McLaughlin*, 6 Grat. (Va.) 64.

²⁸⁶ *McClellan v. Kinnaid*, 6 Grat. (Va.) 352. And see also *Hinrichsen v. Reinback*, 27 Ill. 295; *Sumner v. Whitley*, 1 Mo. 708; *Capehart v. Etheridge*, 63 N. C. 353; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Dunham Lumber Co. v. Holt*, 124 Ala. 181, 27 South. 556.

ered.²⁸⁷ Nor will proceedings on a judgment at law be enjoined in equity in order to give the defendant an opportunity to set off or recoup a counterclaim, where such claim is unliquidated and arose out of an entirely distinct transaction.²⁸⁸ An injunction granted to restrain the collection of a judgment on the ground that the debtor therein is entitled to a credit for a sum less than the whole amount of the judgment, should provide that the judgment-creditor may proceed by execution to collect the undisputed balance of the judgment.²⁸⁹

§ 392. Personal Disability of Parties.

Courts of equity are sometimes called upon to restrain the enforcement of a judgment on the ground that it was taken against a person who, at the time, was incapacitated for legal action by some personal disability, such as infancy, coverture, or lunacy. The degree of validity to be attributed to such judgments is chiefly disputed, as we have already seen, in cases where a judgment by default has been rendered upon a cause of action to which the infancy or coverture, if pleaded, would have been a complete defense.²⁹⁰ If, on the one hand, such disability of the defendant is not regarded as a jurisdictional defect, a judgment of this character will at most be voidable and not void. This is the position taken by many of the courts, as will appear from the sections just cited. But in such case, the remedy is obviously by motion or other appropriate proceeding in the court rendering the judgment. And any application to equity for relief would be met by the familiar rule that an injunction cannot be granted on account of matters which might and should have been pleaded in defense to the action at law.²⁹¹ But if, on the other hand, as many decisions hold, such a status as coverture amounts to a ne-

²⁸⁷ *Wolcott v. Jones*, 4 Allen (Mass.) 367; *Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224; *Twigg v. Hopkins*, 85 Md. 301, 37 Atl. 24; *Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

²⁸⁸ *Jackson v. Bell*, 31 N. J. Eq. 554.

²⁸⁹ *Levy v. Steinbach*, 43 Md. 212.

²⁹⁰ See, as to married women, §§ 188-191; as to infants, §§ 193-197; and as to lunatics, § 205.

²⁹¹ See *Wyman v. Hardwick*, 52 Mo. App. 621; *Evans v. Calman*, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; *Levystein v. O'Brien*, 106 Ala. 352, 17 South. 550, 30 L. R. A. 707, 54 Am. St. Rep. 56.

gation of that juristic personality which is essential to the formation of any and all legal relations, then it is equally evident that the courts of law can acquire no jurisdiction over a defendant so circumstanced, and that a judgment such as that supposed would be simply null. That equity would have power to restrain its collection seems clear beyond doubt. And it will become still more clear if we reflect that, since, on the premises, the defendant would have no power to employ an attorney or interpose a defense, the case is brought well within the confines of the rule which has formed the connecting thread of this whole chapter, viz.: that chancery will relieve against an inequitable judgment on grounds which could not have been pleaded at law.²⁹² The reader will be further advised of the doctrines on this topic by referring to the discussion of the general subject in a previous chapter. It is held that service of process on a privileged person (as a member of the legislative body) is not void, and his remedy is by motion or plea, and not by injunction to restrain an execution on a judgment by default against him on such service.²⁹³

PART III. PRACTICE ON APPLICATION TO ENJOIN JUDGMENT.

§ 393. Nature and Requisites of Bill.

A bill in equity for the vacation of a judgment, or to enjoin its enforcement, should always show that the merits of the controversy are with the complainant. If it fails to allege a good and meritorious defense to the claim on which the judgment was rendered, so that it would be inequitable and unjust to allow the enforcement of the judgment as it stands, the bill states no cause of action and must be dismissed.²⁹⁴ Nor is it enough to aver that complainant has stat-

²⁹² Griffith v. Clarke, 18 Md. 457; Medart v. Fasnatch, 15 La. Ann. 621

²⁹³ Peters v. League, 13 Md. 58, 71 Am. Dec. 622.

²⁹⁴ White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; Massachusetts Benefit Life Ass'n v. Lohmiller, 20 C. C. A. 274, 74 Fed. 23; Home Life Ins. Co. v. Caulk, 86 Md. 385, 38 Atl. 901; Anderson v. Oldham, 82 Tex. 228, 18 S. W. 557; Rotan's Heirs v. Springer, 52 Ark. 80, 12 S. W. 156; Buntain v. Blackburn, 27 Ill. 406; Combs v. Hamlin Wizard Oil Co., 58 Ill. App. 123; Tompkins v. Lang, 74 Ill. App. 500; Ableman v. Roth, 12 Wis. 81; Petalka v. Fitle, 33 Neb. 756, 51 N. W. 131; Janes v. Howell, 37 Neb. 320, 55 N. W.

ed the facts to his attorney and is advised by him that he has a good defense; he must allege explicitly that he has such a defense, and set out the facts constituting it.²⁹⁵ Even a void judgment will not be set aside in equity where no meritorious defense to the action is shown, if the invalidity is not apparent on its face.²⁹⁶ So, on a bill in equity to vacate a judgment and obtain a new trial, the relief will be denied where it appears that the evidence on a new trial would be in direct conflict, and might properly result in a second judgment identical with the first.²⁹⁷

Again, the bill must show, by sufficient averments, that there is some adequate ground for equity to interfere with the judgment at law, such as fraud, accident, or mistake, want of jurisdiction, excusable failure of the complainant to present his defense at law, or the like, and it must set forth the facts constituting the fraud or other ground on which he means to rely.²⁹⁸ Thus, where it is alleged that the adverse party practised fraud in obtaining the judgment, the facts showing such fraud must be stated in a plain and concise manner, as in other cases, mere knowledge of certain facts not being sufficient; the fraudulent acts and proceedings of such party, designed and practised for the purpose of securing an unfair and unjust judgment, must be clearly shown.²⁹⁹ But a petition to set aside

965, 40 Am. St. Rep. 494; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944. A joint complaint to review a judgment for newly-discovered matter must state a cause of action as to all the complainants. *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926. The rule above stated does not apply where the plaintiff himself is seeking affirmatively to enforce the judgment. *Campbell Printing Press & Manuf'g Co. v. Marder, Luse & Co.*, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573.

²⁹⁵ *Eldred v. White*, 102 Cal. 600, 36 Pac. 944.

²⁹⁶ *Pilger v. Torrence*, 42 Neb. 903, 61 N. W. 99.

²⁹⁷ *Roots v. Cohen* (Miss.) 12 South. 593.

²⁹⁸ *Willems v. Willems*, 72 Ill. App. 200; *Young v. Sigler* (C. C.) 48 Fed. 182; *Handley v. Jackson*, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; *Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929; *McDonald v. Pearson*, 114 Ala. 630, 21 South. 534. A bill to enjoin the enforcement of a judgment rendered by a court of competent jurisdiction must state facts sufficient to overcome the presumption that the judgment is valid. *Davis v. Clements*, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539.

²⁹⁹ *Ohio & W. Mortgage & Trust Co. v. Carter*, 9 Kan. App. 621, 58 Pac. 1040. A bill attacking a judgment as fraudulent by reason of the judge's having been counsel before the trial should state on whose behalf he so acted.

a judgment obtained by fraud, which sets out the facts showing the fraud, is sufficient though it lacks a specific allegation of fraud.³⁰⁰ Where the ground of attack on the judgment is want of jurisdiction, a petition alleging that there was no service of process on the judgment-defendant, that he did not employ counsel or authorize any one to retain counsel to represent him in the suit, and that he knew nothing about the suit or the judgment rendered therein, is good on demurrer.³⁰¹

In the next place, the complainant in such a suit must exonerate himself; that is, he must introduce proper averments to show that the judgment against him was not attributable to his own negligence or lack of attention to the progress of the case, and that he has been diligent in seeking to make his defense, and he must set forth the facts which he relies on as showing such diligence.³⁰² For instance, a statement that complainant used all the diligence in his power to procure the evidence necessary to defeat the suit at law is not sufficient; the facts in regard to the diligence used must be set out, so that the court can determine whether proper diligence has been exercised.³⁰³

Further, the complainant must allege that he has no adequate remedy at law against the judgment, or (if the case be so) that he has unavailingly exhausted his legal remedies; or, if he failed to seek redress at law, he must show the reason for such failure and clear himself of the charge of negligence or carelessness.³⁰⁴

Finally, a bill seeking to enjoin the collection of a judgment and

and that the complainant objected to his sitting, or failed to object by reason of ignorance of the judge's disqualification. *Griffith v. Griffith* (Tenn.) 46 S. W. 340.

³⁰⁰ *Oliver v. Riley*, 92 Iowa, 23, 60 N. W. 180.

³⁰¹ *Graham v. East Texas Land & Imp. Co.* (Tex.) 50 S. W. 579.

³⁰² *Ratliff v. Stretch*, 130 Ind. 282, 30 N. E. 30; *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123; *Gulf, C. & S. F. Ry. Co. v. Henderson*, 33 Tex. 70, 18 S. W. 432; *Griffith v. Griffith* (Tenn.) 46 S. W. 340; *East Texas Land & Improvement Co. v. Graham*, 24 Tex. Civ. App. 521, 60 S. W. 472; *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926.

³⁰³ *Brady v. Horvath*, 79 Ill. App. 17.

³⁰⁴ *Eldred v. White*, 102 Cal. 600, 36 Pac. 944; *Lininger v. Glenn*, 33 Neb. 187, 49 N. W. 1128; *National Fertilizer Co. v. Hinson*, 103 Ala. 532, 15 South. 844; *Hockaday v. Jones*, 8 Okl. 156, 56 Pac. 1054.

execution, which does not so identify them as to make it appear what judgment and execution are meant, and which does not limit the prayer to any particular judgment and execution, is demurrable.³⁰⁵ A bill to vacate a decree for fraud may be filed without leave of court first obtained, unless that is made necessary by local statute or rule of court.³⁰⁶

§ 393a. Evidence.

In a proceeding in equity to enjoin the enforcement of a judgment at law, the presumption is in favor of the regularity and the justness of the judgment attacked, and the burden is upon the complainant to show that he is equitably entitled to be relieved from the obligation of the judgment.³⁰⁷ While there is no rule as to the precise measure of proof which will justify a court of equity in opening or enjoining a judgment, it is stated that the weight of the evidence should be clearly with the party seeking relief against the judgment.³⁰⁸ Or, as stated with reference to a judgment alleged to have been procured through fraud, the evidence of the fraud must be clear and convincing.³⁰⁹ Where the answer is a general denial, evidence of matters occurring after the rendition of the judgment is not admissible.³¹⁰

§ 393b. Joinder of Parties.

In a bill in equity to enjoin or set aside a judgment or decree, it is generally necessary to join as parties defendant all persons whose rights would or might be affected by the grant of the relief asked.³¹¹ But where one of several joint judgment-debtors sues to restrain the enforcement of the judgment as against himself alone, he need not join the others as parties plaintiff.³¹² Where the action is

³⁰⁵ Adams v. White, 23 Fla. 352, 2 South. 774.

³⁰⁶ McDonald v. Pearson, 114 Ala. 630, 21 South. 534.

³⁰⁷ Tompkins v. Lang, 74 Ill. App. 500; Mutual Nat. Bank v. Moore, 104 La. 150, 29 South. 103; Adams School Tp. v. Irwin, 150 Ind. 12, 49 N. E. 806.

³⁰⁸ Fisher v. Holbrook, 7 Pa. Super. Ct. 647.

³⁰⁹ Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Evans v. International Trust Co. (Tenn.) 59 S. W. 373.

³¹⁰ Burnett v. Milnes, 148 Ind. 230, 46 N. E. 404.

³¹¹ Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830.

³¹² Merriman v. Walton, 105 Cal. 408, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50.

brought against the sheriff or other officer holding process under the judgment, to restrain him from proceeding for its collection, it is said that the person in whose favor the judgment was rendered should be made a defendant.³¹³ But on the other hand, in Texas, if the suit is against the judgment-creditor, neither the justice of the peace who rendered the judgment, nor the officer who is about to levy execution under it, is a proper party, notice to them of the injunction being sufficient.³¹⁴

§ 394. Conditions on Granting Relief.

In accordance with the general rule and policy of equity, it is held that he who seeks relief against a judgment must do equity; that is, he must restore any advantage he may have gained, and he must submit to all orders of the court necessary to adjust the rights of the litigants in entire accordance with equity.³¹⁵ Thus, if the whole amount involved is not disputed, the complainant must pay or offer to pay what he admits to be due, or show some sufficient excuse for his failure; otherwise his case cannot be sustained.³¹⁶ An order for

³¹³ *East Riverside Irr. District v. Holcomb*, 128 Cal. 315, 58 Pac. 817. Unknown heirs of a former grantee, made parties in proceedings leading to a decree affecting the title to real estate, are proper, but not necessary, parties defendant in a later action to set aside such decree on the ground of fraud, where such unknown heirs are not parties to the fraud attacked. *Kannally v. Renner*, 84 Ill. App. 51.

³¹⁴ *Gulf, C. & S. F. Ry. Co. v. Blankenbeckler*, 13 Tex. Civ. App. 249, 35 S. W. 331.

³¹⁵ *Creed v. Scruggs*, 1 Helsk. (Tenn.) 590; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Baragree v. Cronkhite*, 33 Ind. 192; *Yonge v. Shepperd*, 44 Ala. 315; *Overton v. Stevens*, 8 Mo. 622; *Flickinger v. Hull*, 5 Gill (Md.) 60; *Shelton v. Gill*, 11 Ohio, 417; *Hill v. Harris*, 42 Ga. 412.

³¹⁶ *Yonge v. Shepperd*, 44 Ala. 315; *Jordan v. Chester (Tex.)* 43 S. W. 904; *Kelfer v. Summers*, 137 Ind. 106, 35 N. E. 1103; *Tompkins v. Lang*, 74 Ill. App. 500; *Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454; *Brewer v. Mock*, 14 Colo. App. 454, 60 Pac. 578. Code N. Y. § 613, provides that an order staying proceedings on a money judgment shall not be granted unless the full amount of the judgment is paid into court, or an undertaking given in lieu thereof, as well as an undertaking to secure payment of damages; and this applies to a motion for an injunction restraining the sheriff from paying over the proceeds of a sale under a judgment. *Ingalls v. Merchants' Nat. Bank*, 51 App. Div. 305, 64 N. Y. Supp. 911. In Alabama, where a bill to restrain the enforcement of a judgment admits that a certain amount of

an injunction to a sale under execution does not become effectual until any conditions required by the order (such as the execution of a bond) have been complied with.³¹⁷ Equity will of course be guided, in the matter of imposing conditions, by the peculiar circumstances of the individual case.

§ 395. Effect of Enjoining Judgment.

An injunction to prevent a judgment-plaintiff from proceeding further with his execution does not generally operate as a release of errors.³¹⁸ And so the injunction, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction.³¹⁹ Hence, "when the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to a levy when the injunction is removed."³²⁰ But where the collection of an execution is enjoined, and the officer has other junior executions in his hands, and proceeds to sell the property levied upon, he cannot apply the proceeds to the execution enjoined, although before the return of the process the injunction, by consent, is dissolved by order of court.³²¹ A judgment suspended by injunction may be revived on the death of either party, and the injunction operates on the judgment on scire facias, prohibiting execution thereon.³²² Where the execution of a judgment is restrained by injunction until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien.³²³ Where a judgment upon a bill of exchange against an acceptor was

it is due, such amount should be paid into court. A simple offer to pay is insufficient. *J. A. Roebling Sons Co. v. Stevens Electric Light Co.*, 93 Ala. 39, 9 South. 369.

³¹⁷ *Pell v. Lander*, 8 B. Mon. (Ky.) 554.

³¹⁸ *St. Louis, A. & T. H. R. Co. v. Todd*, 40 Ill. 89.

³¹⁹ *Smith v. Everly*, 4 How. (Miss.) 178.

³²⁰ *Lynn v. Gridley, Walk.* (Miss.) 548, 12 Am. Dec. 591.

³²¹ *Newlin v. Murray*, 63 N. C. 566.

³²² *Richardson's Adm'r v. Prince George Justices*, 11 Grat. (Va.) 190.

³²³ *Work v. Harper*, 31 Miss. 107, 68 Am. Dec. 549.

enjoined, it was held not to enjoin suits against the other parties to the bill.³²⁴

§ 396. Dissolution of Injunction.

Where the injunction of an entire judgment at law has in the first instance been properly granted, and the answer shows that the complainant is entitled to some relief, though not to the extent claimed in the bill, the injunction may be dissolved in part, or continued on such terms as will insure ultimate justice between the parties; but to authorize such dissolution, or a requirement that the complainant pay a portion of the judgment into court, as a condition to the continuance, the answer should show explicitly the amount which the plaintiff at law is in equity entitled to receive. If this be not done, and there is no danger of the debt being lost by continuing the injunction, it should be retained until the final hearing.³²⁵ On dissolving an injunction shown to be groundless, damages may be given against the complainant according to the amount of the judgment enjoined.³²⁶

³²⁴ *Bohannon v. Combs*, 12 B. Mon. (Ky.) 563.

³²⁵ *Maulden v. Armistead*, 18 Ala. 500.

³²⁶ *Stewart v. Robinson*, 24 La. Ann. 182. See *Off v. Title G., A. & T. Co.*, 87 Ill. App. 472.

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PART I. ORIGIN AND NATURE OF JUDGMENT-LIENS.

§ 397. Early History of Judgment-Liens.

At common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. "This was in accordance with the policy of the feudal law, introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute of Westminster 2d, 13 Edward I, c. 18, by which, in the interest of trade and commerce, the writ of *elegit* was for the first time provided for. By that statute the judgment-creditor was given his election to sue out a writ of *feri facias* against the goods and chattels of the defendant, or else a writ

commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough) and a moiety of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an *elegit*, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by *elegit*.”¹ It will be at once apparent that the right thus conferred upon the creditor gave rise to a true judgment lien, although it differed materially, both in its extent and the manner of its enforcement, from the type with which we are now familiar.

§ 398. Judgment-Lien is Statutory.

If we inquire, therefore, in any case, for the ultimate basis of the lien of a judgment on land, it must be supported by statutory authority. In most, if not all, of the American states, the legislatures have enacted in express and positive terms that judgments shall be liens on land for a prescribed number of years. But in some, this direct creation of a most effective remedy did not come until comparatively late in their history. In the interval, it is true, real estate was considered bound by a judgment against its owner, but that was only in virtue of the early English statute above referred to, which had been adopted by the state or not repudiated. Thus the statute of Westminster 2d “was substantially adopted in Virginia at an early day, and in consequence of this right to subject a moiety of the defendant’s lands, the courts held that a lien was acquired by the judgment, which extended to all the defendant’s lands within the state, and which was superior to the claims of subsequent purchasers, though for valuable consideration and without notice. The lien thus acquired was a legal lien, and remained so long as the capacity to sue out an *elegit* continued, whether the writ was sued out or not.”²

¹ *Hutcheson v. Grubbs*, 80 Va. 254; *Jones v. Jones*, 1 Bland (Md.) 443. 18 Am. Dec. 327; 2 Co. Inst. 304; 3 Bl. Comm. 418; Bac. Abr. “Execution,” D.

² *Hutcheson v. Grubbs*, 80 Va. 254; *Borst v. Nalle*, 28 Grat. (Va.) 423; *Price v. Thrash*, 30 Grat. (Va.) 515; *Leake v. Ferguson*, 2 Grat. (Va.) 420; *Taylor’s Adm’r v. Spindle*, Id. 44. See, also, *Coombs v. Jordan*, 3 Bland (Md.) 284. 22 Am. Dec. 236.

But, compared with the species of judgment lien now commonly known, it could only be regarded as a qualified or restricted lien. For, from the nature of the writ which occasioned it and by which it was to be enforced, it could not be foreclosed by a sale of the realty, but only by taking it into possession and receiving the rents and profits. In the absence, then, of express legislative enactment, judgments do not attach as liens to real estate in the modern sense of the term.³ "Unless there is a statute in the particular state expressly making a judgment a lien on real estate, no such property will attach to it; and the only kind of lien belonging to it will be that arising in consequence of the right to take out an *elegit*."⁴ An illustration of this may be found in a decision of the supreme court of Pennsylvania that, in divorce proceedings, an order for the payment of the wife's expenses and support *pendente lite* is not a judgment such as to create a lien on the husband's lands; the ruling being based on the ground that there is no statutory authority for so regarding it.⁵

§ 399. Legislative Control of Judgment-Liens.

Since liens arising from judgments are exclusively the creatures of statute, we should naturally expect to find them largely under the control of the legislature, except in so far as the necessity of preserving vested rights and contractual obligations should forbid such interference. And so the decisions have always held. Thus a law requiring a judgment to be docketed in each county where it is sought to bind real estate of the defendant, although previously it was a lien throughout the state without this, is constitutional and valid.⁶ So a statute changing the mode of acquiring a lien under an existing judgment upon the property of the debtor (for example, by substituting the lien of a docketed judgment for that formerly created by a

³ *Walker v. Elledge*, 65 Ala. 51; *Carlisle v. Godwin*, 68 Ala. 137; *Mitchell v. Wood*, 47 Miss. 231; *Converse v. Michigan Dairy Co.* (C. C.) 45 Fed. 18; *Thompson v. Avery*, 11 Utah, 214, 30 Pac. 829.

⁴ *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804.

⁵ *Groves' Appeal*, 68 Pa. 143.

⁶ *Tarpley v. Hamer*, 9 Smedes & M. (Miss.) 310; *Spencer v. Rippe*, 7 Okl. 608, 56 Pac. 1070. Compare *Rock Island Nat. Bank v. Thompson*, 74 Ill. App. 54.

feri facias) is not objectionable on constitutional grounds.⁷ So again, it has been held that a statute which provides that "no judgment heretofore rendered or which may hereafter be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien upon the estate of any judgment-debtor to the prejudice of any bona fide judgment-creditor," affects the remedy merely, and, in its operation upon judgments rendered before its passage, it is not to be considered *ex post facto*, nor does it impair the obligation of contracts.⁸ But the latest decisions regard the statute giving the right to a judgment lien as a part of the contract on which the judgment is based; and hence it is now held that a law which absolutely destroys the lien of a judgment, or provides that it shall cease and determine at the end of a limited period after the date of the judgment, is unconstitutional and void, so far as it relates to judgments rendered prior to its passage, as impairing the obligation of contracts and invading vested rights.⁹ But however it may be in regard to judgments entered before the passage of the act, it is certain that a statute denying to final judgments thereafter rendered the incident of a lien on real property does not impair the obligation of contracts made before its enactment.¹⁰ And conversely, it is entirely competent for the legislature to invest existing judgments, as well as future judgments, with the incidents of a lien, by retrospective laws.¹¹

⁷ *Whitehead v. Latham*, 83 N. C. 232.

⁸ *McCormick v. Alexander*, 2 Ohio, 65; *Bank of United States v. Longworth*, 1 McLean, 35, Fed. Cas. No. 923; *Ray v. Thompson*, 43 Ala. 434, 94 Am. Dec. 696.

⁹ *Merchants' Bank of Danville v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104.

¹⁰ *Moore v. Holland*, 16 S. C. 15. A statute is valid which provides that a judgment recovered for money won by defendant from another at gaming shall be a lien on the property where the gambling took place, provided it was with the knowledge of the owner; for the reason of the statute has reference to the discouragement of gambling, rather than to the natural justice of the case as between parties. *Trout v. Marvin*, 62 Ohio St. 132, 56 N. E. 655.

¹¹ *Moore v. Letchford*, 35 Tex. 185, 14 Am. Rep. 303.

§ 400. Lien gives no Property in Debtor's Land.

"If anything is settled by reason and authority, it is that a judgment-creditor is not entitled to the protection of a purchaser of the legal title against an equitable owner or his creditors, or to any advantage which his debtor had not."¹² A judgment-lien, binding the present and future real property of the debtor, is a creation of statute laws and has no other existence; a general lien by judgment does not constitute per se a property in the land itself, but only gives a right to levy on the same to the exclusion of adverse interests subsequent to the judgment.¹³ Hence a judgment creditor has neither *ius in re* nor *ius ad rem* in the debtor's land, but only the right to make his lien effectual by a sale under execution.¹⁴ So if A. makes a verbal contract with B. to sell him a tract of land and puts him in possession, judgment-creditors of B. do not thereby, by virtue of the lien of their judgments or the levy of execution, acquire such an interest in the land as to entitle them to be subrogated to the rights of B., and to compel A. to make a conveyance to them upon paying him the purchase-price which B. was to pay.¹⁵ But on the other hand, a judgment-creditor has the right to proceed by ancillary proceedings, in any other court of concurrent jurisdiction with the court rendering the judgment, to remove clouds from titles to any property which he deems to be subject to the lien of his judgment.¹⁶ A judgment for a sum of money, which may be satisfied by a sale of real estate if not otherwise satisfied, is not *lis pendens* in regard to the title to the real estate of the defendant in the judgment; either

¹² Reed's Appeal, 13 Pa. 476.

¹³ Finch v. Winchelsea, 1 P. Wms. 277; Brace v. Duchess of Marlborough, 2 P. Wms. 491; Conard v. Atlantic Ins. Co., 1 Pet. 443, 7 L. Ed. 189; Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Cover v. Black, 1 Pa. 493; Reed's Appeal, 13 Pa. 476; Sill v. Swackhammer, 103 Pa. 7; Kollock v. Jackson, 5 Ga. 153; Foute v. Fairman, 48 Miss. 536; Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 563; Swarts v. Stees, 2 Kan. 236, 85 Am. Dec. 588; Ashton v. Slater, 19 Minn. 347 (Gil. 300.)

¹⁴ Dail v. Freeman, 92 N. C. 351; Bruce v. Sugg, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562.

¹⁵ Logan v. Hale, 42 Cal. 645.

¹⁶ Scottish-American Mortg. Co. v. Follansbee (C. C.) 14 Fed. 125.

it is a lien or the real estate is not affected by it.¹⁷ Since a judgment-lien constitutes no property in the land itself, the judgment-debtor has a right, previous to levy, to cut timber and firewood, which, if not removed, are his personal property and do not pass by execution-sale.¹⁸ An assignee in bankruptcy takes the property subject to all existing liens, and cannot avail himself of a claim that an execution was dormant at the time of the assignment, if the bankrupt could not.¹⁹

§ 401. Lien is General.

"A judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment-creditor as to the existence of such liens."²⁰ In the case, however, where mortgaged premises have been sold at a sheriff's sale under a judgment junior to the mortgage, and where the time for redemption has not expired, the general lien of the judgment is turned into a specific lien upon the premises, to the extent of the amount of the bid at the sheriff's sale and of the interest thereon.²¹ It should also be noted, that the lien being but an incident of the judgment, its loss does not necessarily impair the validity of the judgment as a personal security. Thus a judgment obtained against a decedent in his lifetime, the lien of which has expired by failure to revive, is sufficient evidence of a claim in the distribution of a fund which belongs to his estate.²²

§ 402. Courts cannot control the Lien.

As a general rule, and except in special and peculiar cases, it does not belong to the courts of law to prescribe the kind or extent of the lien which shall result from the judgments they pronounce, or to con-

¹⁷ *St. Joseph Manuf'g Co. v. Daggett*, 84 Ill. 556.

¹⁸ *Independent School Dist. v. Werner*, 43 Iowa, 643.

¹⁹ *Crane v. Penny* (D. C.) 2 Fed. 187.

²⁰ *Rodgers v. Bonner*, 45 N. Y. 379; *Lanning v. Carpenter*, 48 N. Y. 408; *Dozier v. Lewis*, 27 Miss. 679; *Mansfield v. Gregory*, 11 Neb. 297, 9 N. W. 87.

²¹ *Snyder v. Stafford*, 11 Palge (N. Y.) 71.

²² *Esterly's Appeal*, 109 Pa. 222.

trol it in any way, as by restricting it to certain described property.²³ The court has usually nothing to do with the manner in which its judgment shall be enforced or the fund from which it shall be satisfied; it merely pronounces the sentence of the law upon the facts before it, to which, thereupon, the incident of a lien attaches by virtue solely of positive law. It is of course to be understood that reference is here made to judgments at law, as distinguished from decrees in chancery. The powers of equity in this respect are sufficiently familiar.

§ 403. Parties cannot change Nature of Lien.

"The lien of a judgment upon the lands of the judgment-debtor is entirely the creature of the statute, and is not dependent in any manner upon the contract of the parties. It begins, continues, and terminates at the will of the legislature."²⁴ Hence parties cannot by agreement convert a judgment into a chattel mortgage or a bill of sale, or give to it any greater effect than the law gives it; and a parol agreement that a judgment shall be a lien upon all the debtor's personal property will not be enforced in equity, even as against subsequent assignees who assent to the arrangement.²⁵

§ 404. Docketing the Judgment.

It is a general statutory requisite that judgments shall be duly entered upon the docket before they can become liens upon the debtor's realty, at least as against subsequent purchasers in good faith.²⁶ Unless this requirement is complied with, the judgment will not attach as a lien upon the debtor's property.²⁷ And it is the

²³ *Castro v. Illes*, 13 Tex. 220; *Hadwin v. Fisk*, 1 La. Ann. 43. Where a judgment is a legal lien upon real estate, such lien is enforceable by sale of the property, and does not require the aid of a court of equity to enforce it. *Davis v. Harper*, 14 App. D. C. 463.

²⁴ *Houston v. Houston*, 67 Ind. 276.

²⁵ *Lanning v. Carpenter*, 48 N. Y. 408.

²⁶ But it is held that a judgment, though undocketed, is good against subsequent creditors with or without notice. *Gordon v. Rixey*, 76 Va. 694. Under the Texas statute which requires judgments to be recorded in order to create liens, an unrecorded writ of error bond, given upon an unrecorded judgment, creates no lien. *Hart v. Russell*, 32 Tex. 31.

²⁷ *Callanan v. Votruba*, 104 Iowa, 672, 74 N. W. 13, 40 L. R. A. 375, 65 Am.

duty of the judgment creditor to see to it that his judgment is rightly and properly entered; for if a mistake is made, it may prevent the judgment from binding the land in the hands of a subsequent purchaser, though it would remain binding as between the original parties.²⁸ The statutory provisions in the different states, as to the time and manner of entering judgments upon the docket, and as to the nature and contents of the docket entries, differ so widely that it would not be profitable to discuss them in this place; but the reader is referred to certain illustrative cases cited in the margin.²⁹

§ 105. Indexing the Judgment.

In many of the states there is a further statutory requirement, designed for convenience and expedition in making searches, that the judgment be duly indexed. This is usually done in a separate book or series of books kept for that purpose, and under the judgment-debtor's surname in its alphabetical order. The statute may be so framed as to make the index an essential part of the record; and when this is the case, a judgment is no lien upon the debtor's property, until correctly indexed, as against a purchaser who has searched the index with due care.³⁰ And the judgment, though duly filed and recorded, creates no lien if it is not indexed.³¹ Where the

St. Rep. 538; *Sklower v. Abbott*, 19 Mont. 228, 47 Pac. 901; Act Ga. Dec. 20, 1890 (St. 1890, No. 72, p. 17). Compare *Johnson v. Schlosser*, 146 Ind. 509, 45 N. E. 702, 36 L. R. A. 59, 58 Am. St. Rep. 367.

²⁸ *Wood v. Reynolds*, 7 Watts & S. (Pa.) 406. See *Hesse v. Mann*, 40 Wis. 500.

²⁹ *Spence v. Brown*, 86 Tex. 430, 25 S. W. 413; *Gullett Gin Co. v. Oliver*, 78 Tex. 182, 14 S. W. 451; *Gunter v. Buckler* (Tex. Civ. App.) 32 S. W. 229; *Reynolds v. Collier*, 103 Ala. 245, 15 South. 603; *Lamey v. Coffman*, 11 Wash. 301, 39 Pac. 682.

³⁰ *Metz v. State Bank*, 7 Neb. 165; *Sterling Manuf'g Co. v. Early*. 69 Iowa, 94, 28 N. W. 458. But where a subsequent mortgagee of land belonging to a judgment debtor has actual notice that a judgment against the latter is defectively indexed, the mortgage is subject to such judgment. *Butts v. Cruttenden*, 14 Pa. Super. Ct. 449. A judgment rendered and entered against two defendants jointly, but indexed as to only one of them, creates a lien on such defendant's property. *Blum v. Keyser*, 8 Tex. Civ. App. 675, 28 S. W. 561; *Whitacre v. Martin*, 51 Minn. 421, 53 N. W. 806.

³¹ *Nye v. Moody*, 70 Tex. 434, 8 S. W. 606; *Oppenheimer v. Robinson* (Tex. Civ. App.) 26 S. W. 320.

original index of a judgment is not sufficient to create a lien, a new index, made on the transfer of the record of judgments to a new book, will not, as an original index, render the judgment a lien as of the date of the transfer.³² And when two indices of abstracts of judgments are kept by the clerk of the court, it is necessary that each abstract should be entered in each index.³³ But when the index entry is properly made, the lien is not affected by the failure of the clerk to note on the face of the record that he has indexed it.³⁴ And in Virginia, it has been decided that indexing the judgment is no part of the record; and a judgment creditor who procures his judgment to be properly docketed secures a valid lien, even though it is not properly indexed, as against a purchaser who has been led to buy by the omission in the index.³⁵

§ 406. Certainty required in Docket and Index as to Names of Parties.

The common occurrence of mistakes in the docketing and indexing of judgments, such as mis-spelling of names and other irregularities, has frequently led the courts to pass upon the degree of certainty required in these entries. The purport of the decisions appears to be that the sufficient degree of accuracy is attained if an intending purchaser (for example), exercising a reasonable degree of care and a reasonable amount of intelligence in making a search, could not fail to be apprised of the existence and character of the judgment. At the same time, "a subsequent purchaser is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril."³⁶

³² *Glasscock v. Stringer* (Tex. Civ. App.) 32 S. W. 920.

³³ *Central Coal & Coke Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 334, 34 S. W. 383.

³⁴ *Gullett Gin Co. v. Oliver*, 78 Tex. 182, 14 S. W. 451.

³⁵ *Old Dominion Granite Co. v. Clarke*, 28 Grat. 617.

³⁶ *Metz v. State Bank*, 7 Neb. 165. A record of a judgment against one whose Christian name is indicated only by initial letters is effectual to put upon inquiry a subsequent purchaser of lands, the title to which appears of record in a person of the same surname as such judgment debtor, and whose Chris-

Since the principal object of such an index is to afford information concerning judgment debtors and the liens on their property, it is generally held that subsequent purchasers and incumbrancers will be charged with notice of a judgment which is correctly indexed under the name of the defendant, although the plaintiff's name may be placed under a wrong letter, or not indexed at all.³⁷ But the entry of the judgment must be placed under the letter which begins the defendant's surname, not under the initial of his first name.³⁸ It is not, however, necessary to specify the character in which the parties sued or defended; and the law is sufficiently complied with by placing the defendant's name in its proper alphabetical position, followed by the plaintiff's name, though neither party is designated as defendant or plaintiff, and though neither the word "versus" or "against," nor any abbreviation thereof, is placed after either name.³⁹

A description of a person by the name by which he is commonly known is sufficient for the purposes of a docket entry.⁴⁰ That the name is mis-spelled is not always a fatal error. If it is spelled phonetically,—that is, if the name as written on the index would be pronounced in the same manner as the person's true name is commonly and habitually pronounced,—it is sufficient to give notice, provided that the variation in spelling is not so radical that no one would be likely to think of the names as identical.⁴¹ But there must be such a degree of approximation as to be readily understood. For instance, a judgment rendered against "Bankhead," and recorded and

tion name has the same initial. *Pinney v. Russell & Co.*, 52 Minn. 443, 54 N. W. 484.

³⁷ *Franke v. Lone Star Brewing Co.*, 17 Tex. Civ. App. 9, 42 S. W. 861; *Central Coal & Coke Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 334, 34 S. W. 383. But in Alabama, under the statute, the record of a judgment creates no lien on the defendant's property unless the name of the plaintiff or the owner of the judgment is shown therein. *Duncan v. Ashcraft*, 121 Ala. 552, 25 South. 735; *Appling v. Stovall*, 123 Ala. 398, 26 South. 212; *Ivy Coal & Coke Co. v. Alabama Nat. Bank*, 123 Ala. 477, 26 South. 213.

³⁸ *Willis v. Downes* (Tex. Civ. App.) 46 S. W. 920.

³⁹ *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247; *Von Stein v. Trexler*, 5 Tex. Civ. App. 299, 23 S. W. 1047.

⁴⁰ *In re Jones' Estate*, 27 Pa. 336.

⁴¹ *Myer v. Pegaly*, 39 Pa. 429, 80 Am. Dec. 534.

indexed as against "Burkhead," confers no lien.⁴² So it has been held that "Helen" and "Ellen" cannot be regarded as the same name; and a judgment entered and indexed against "Ellen Desney" is not constructive notice that it is a lien upon lands of "Helen Desney."⁴³ Again, the statute requiring record notice of judgment-liens intends that the docket shall exhibit the names spelled in English. It is to furnish a guide to the eye, not the ear. Hence "Joest" will not serve for "Yoest."⁴⁴ Although it is true, as a general rule, that the law recognizes but one Christian name, and there are decisions to the effect that the omission of the initial letter of the defendant's middle name will not render the entry invalid or prevent the judgment from becoming a lien as against subsequent purchasers,⁴⁵ yet most of the authorities hold that the entry cannot be considered complete or sufficient unless it designates, at least by an initial, each of the names of the defendant preceding his surname, especially where the statute requires his name to be set out "at length."⁴⁶

The term "Junior" is a convenient means of distinguishing between father and son who bear the same name, but, on common law principles, it is no part of the younger man's name, and hence is not required to be included in the docket-entry of a judgment against him, although the "Senior" of the same name resides in the same county.⁴⁷ A judgment against a firm, docketed without setting out the Christian names of the individual partners, is held in Pennsylvania and Texas to be of no effect as a lien, so far as regards subsequent purchasers and incumbrancers in good faith.⁴⁸ But an opposite view

⁴² *Anthony v. Taylor*, 68 Tex. 403, 4 S. W. 531.

⁴³ *Thomas v. Desney*, 57 Iowa, 58, 10 N. W. 315. So, a judgment docketed and indexed as against "May Alley" is not notice to a purchaser from "Mary A. Allely." *Phillips v. McKaig*, 36 Neb. 853, 55 N. W. 259.

⁴⁴ *Hell's Appeal*, 40 Pa. 453, 80 Am. Dec. 590.

⁴⁵ *Clute v. Emmerich*, 26 Hun, 10.

⁴⁶ *Crouse v. Murphy*, 140 Pa. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Am. St. Rep. 232; *Johnson v. Hess*, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; *Davis v. Steeps*, 87 Wis. 472, 58 N. W. 769, 23 L. R. A. 818, 41 Am. St. Rep. 51. See *Butts v. Cruttenden*, 14 Pa. Super. Ct. 449.

⁴⁷ *Bidwell v. Coleman*, 11 Minn. 78 (Gil. 45).

⁴⁸ *York Bank's Appeal*, 36 Pa. 458; *Ridgway's Appeal*, 15 Pa. 177, 53 Am. Dec. 586; *Smith's Appeal*, 47 Pa. 128; *Hamilton's Appeal*, 103 Pa. 368; *Gullett Gin Co. v. Oliver*, 78 Tex. 182, 14 S. W. 451; *Pierce v. Wimberly*, 78 Tex.

obtains in California.⁴⁹ And it appears to be immaterial that a mistake was made in setting out the firm name of the defendants, if their individual names are correctly given in the docket and index.⁵⁰ If there are several defendants (not partners), but some of them are merely formal or nominal parties, it is sufficient if the index contains the names of those only against whom a personal judgment, or judgment for money, is rendered.⁵¹ But if all the defendants are equally affected by the judgment, as real and substantial parties, no lien will be created upon the lands of any one of them whose name is omitted from the docket and index, as against subsequent purchasers or incumbrancers, or as against creditors whose subsequent judgments are duly entered and indexed.⁵² It must finally be observed that a judgment duly rendered against one whose name is mis-spelled or otherwise incorrectly given in the proceedings, will be a lien on his real estate, when docketed, against all but those who can claim that, by reason of the error, the docket was no notice to them. A fraudulent grantee cannot object to it.⁵³

§ 406a. Same; As to Amount.

The record of a money judgment should always show the amount for which it was rendered, and the rate of interest which it bears, so as to convey definite and precise information to subsequent lienors or purchasers. In some states, this is explicitly required by statute; and a failure to comply with the law in this respect will deprive the judgment of its character as a lien. Thus, if the amount for which the judgment was rendered is incorrectly stated, or if it

187, 14 S. W. 454; *Steffens v. Cameron* (Tex.) 19 S. W. 1068; *Glasscock v. Price* (Tex. Civ. App.) 45 S. W. 415. But it seems that if the name of the defendant is correctly given, it is not a material mistake that the names of the plaintiffs (a firm) are set forth only in the style of the partnership. *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209; *Openheimer v. Robinson*, 87 Tex. 174, 27 S. W. 95.

⁴⁹ *Hibberd v. Smith*, 50 Cal. 511.

⁵⁰ *Willis v. Downes* (Tex. Civ. App.) 46 S. W. 920; *Semple v. Eubanks*, 13 Tex. Civ. App. 418, 35 S. W. 509.

⁵¹ *W. P. Fuller & Co. v. Hull*, 19 Wash. 400, 53 Pac. 606.

⁵² *Dewey v. Sugg*, 109 N. C. 328, 13 S. E. 923, 14 L. R. A. 396; *Noble v. Barner*, 22 Tex. Civ. App. 357, 55 S. W. 382.

⁵³ *Fuller v. Nelson*, 35 Minn. 213, 28 N. W. 511.

is not expressed in dollars and cents (either by words or by the appropriate marks or abbreviations), it will not create any lien on the property of the judgment debtor.⁵⁴ As to interest on the judgment, it is enough if the rate of interest which the judgment bears is correctly specified, so that the amount of interest due at any given time can be ascertained by mere calculation.⁵⁵ But an abstract which fails to show credit for an amount recovered on an execution sale does not create a lien.⁵⁶

PART II. WHAT JUDGMENTS CREATE LIENS.

§ 407. What is necessary to Judgment-Liens.

In order that a judgment should create a lien upon the real property of the debtor, it is first of all necessary that it should be capable of collection by execution against such property.⁵⁷ A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.⁵⁸ So a judgment against a municipal corporation is not a lien on its real estate, because no execution can issue against the land.⁵⁹ Next, it is essential that the judgment should have been rendered by a lawful and validly constituted court. Upon this point questions have seldom arisen, except in connection with the acts of courts created by the insurrectionary authorities in the southern states during the late civil war. Thus it was held in

⁵⁴ *Bush v. Farris*, 18 C. C. A. 315, 71 Fed. 770; *In re Boyd*, 4 Sawy. 262, Fed. Cas. No. 1,746; *Glasscock v. Stringer* (Tex. Civ. App.) 32 S. W. 920. Failure of the record of the judgment to include the amount of the costs will defeat the lien only to the extent of the costs. *Lamey v. Coffman*, 11 Wash. 301, 39 Pac. 682.

⁵⁵ *P. J. Willis & Bro. v. Sommerville*, 3 Tex. Civ. App. 509, 22 S. W. 781; *First Nat. Bank v. Cloud*, 2 Tex. Civ. App. 627, 21 S. W. 770. But where the abstract of a judgment erroneously states the date of a credit thereon, so that a proper calculation of the interest due on the judgment as recorded would not show the amount actually due, it is defective and creates no lien. *Noble v. Barner*, 22 Tex. Civ. App. 357, 55 S. W. 382.

⁵⁶ *Willis v. Sanger*, 15 Tex. Civ. App. 655, 40 S. W. 229.

⁵⁷ *Hagan v. Chapman*, 1 Pennewill (Del.) 445, 41 Atl. 974; *Heff v. Cox*, 5 Ohio N. P. 413.

⁵⁸ *In re Boyd*, 4 Sawy. 262, Fed. Cas. No. 1,746.

⁵⁹ *Schaffer v. Cadwallader*, 36 Pa. 126; *People v. Superior Court of Cook County*, 55 Ill. App. 376.

Alabama that judgments rendered by the courts of that state, during the period referred to, did not create such a lien upon the property of the judgment debtor as, in the absence of legislation, could be recognized and enforced by the courts of the now existing state government.⁶⁰ Later decisions, it is true, have recognized a higher degree of validity in such judgments;⁶¹ but it is only by acknowledging the rightful existence of those courts, so that the change of opinion does not militate against the rule here contended for.

In the next place, in order that there should be a lien, it is necessary that there be a valid and subsisting judgment. If the alleged judgment is absolutely void and a mere nullity, it can of course create no lien. Or, to speak more exactly, it creates that which may bear the semblance and color of a lien, but which is incapable of originating or transferring rights, since the judgment itself, to which the lien is only an incident, will not bear the test of judicial scrutiny. Similarly, where a verdict and judgment are set aside and a new trial granted, such judgment does not operate as a lien upon the defendant's property.⁶² And so a judgment which has been reversed upon appeal, is not a lien, pending its further appeal, upon the defendant's estate, and it will not be allowed to prejudice the title of a bona fide purchaser for value.⁶³ It was even held, in an early Massachusetts case, that a deed of land was a good and lawful conveyance, although an execution had been levied upon the land, when the judgment under which the execution issued, though not

⁶⁰ *Martin v. Hewitt*, 44 Ala. 418; *Noble v. Cullom*, 44 Ala. 554; *Barclay v. Plant*, 50 Ala. 509. The incident of lien was accorded to such judgments by Rev. Code Ala. § 2877 (Act Feb. 19, 1867).

⁶¹ *Parks v. Coffey*, 52 Ala. 42; *Hill v. Huckabee*, 52 Ala. 155; *Hill v. Armistead*, 56 Ala. 118. See *supra*, § 173.

⁶² *Paxton v. Boyce*, 1 Tex. 317.

⁶³ *Foot v. Dillaye*, 65 Barb. 521; *Meyer v. Campbell*, 12 Mo. 603; *Oliver v. Lansing*, 57 Neb. 352, 77 N. W. 802. The subsequent rendition of another judgment in the same cause will not revive the lien of a judgment reversed on appeal, so as to make it effective from the date of the original judgment. *Id.* But where an injunction against a judgment is perpetuated only as to a part of it, or a reversal is only as to part of a judgment, the lien of the part not affected continues from the date of the judgment. *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

yet reversed, was so erroneous that it was "legally certain" that it would be reversed.⁶⁴

In the next place, it is requisite that the judgment should be for a definite and certain sum of money.⁶⁵ A judgment which specifies no sum recovered, but refers to the pleadings to show what is adjudged, cannot create a lien on lands of the defendant as against a party lending on the property without other notice than that afforded by the registry of the judgment.⁶⁶ But a judgment in an action for an accounting between partners, requiring the payment of a specified sum of money by one of the parties to a receiver, may be docketed in favor of the receiver and be enforced by execution.⁶⁷ And a final judgment of a court of record is a lien, although for costs only.⁶⁸

In the next place, it is important to pay some attention to the kind or character of the judgment, with reference to its capacity for creating a lien. A judgment by confession carries with it a lien on lands,⁶⁹ and so of course does a judgment by default, if it is final and definite. In Pennsylvania, under the statutes on the subject, an award has no greater effect than the verdict of a jury until approved by the court and judgment entered on it, and consequently, until that is done, it does not constitute a lien on realty.⁷⁰ A decree for alimony has only the lien of an ordinary judgment for money, as to any property of the defendant not specifically dealt with in the decree.⁷¹ In some states, a forfeited forthcoming bond has the force of a judg-

⁶⁴ *Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32.

⁶⁵ *Hamberger v. Easter*, 57 Ga. 71; *Lurette v. Carrane*, 27 La. Ann. 298; *Eames v. Germania Turn Verein*, 74 Ill. 54; *Roane v. Hamilton*, 101 Iowa, 250, 70 N. W. 181.

⁶⁶ *Lurette v. Carrane*, 27 La. Ann. 298.

⁶⁷ *Geery v. Geery*, 63 N. Y. 252.

⁶⁸ *Bobb v. Graham*, 15 Mo. App. 289.

⁶⁹ *Gilman v. Hovey*, 26 Mo. 280.

⁷⁰ *Stephen's Ex'rs' Appeal*, 38 Pa. 9. An award of arbitrators in favor of a plaintiff, from which he appeals, is not a lien upon the defendant's real estate so long as the appeal stands. *Eaton's Appeal*, 83 Pa. 152. Under a statute in Pennsylvania, directing the amount of a verdict to be entered in the judgment docket, the lien of a verdict partakes of the nature of a judgment lien. *Fuellhart v. Blood*, 21 Pa. Co. Ct. R. 601.

⁷¹ *Coulter v. Lumpkin*, 94 Ga. 225, 21 S. E. 461; *Conrad v. Everich*, 50 Ohio St. 476, 35 N. E. 58, 40 Am. St. Rep. 679; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358.

ment, so as to create a lien upon the lands of the obligors, but only from the time the bond was returned to the clerk's office.⁷² A recognizance to the commonwealth, or a judgment thereon in favor of the commonwealth, creates no lien upon the estate of the party, unless by express statute.⁷³ So a rule absolute against a sheriff requiring him to pay over money is not such a judgment as binds his property in the same way in which judgments on verdicts bind it.⁷⁴ The mere loaning of money to a judgment debtor, to be applied by him in part satisfaction of a judgment which is a lien upon the debtor's land, does not operate to transfer such lien, in whole or in part, to the lender, even though it was understood between the parties to the transaction that it should have that effect.⁷⁵

§ 408. Interlocutory Judgments.

It is generally held that an interlocutory judgment by default, which lacks finality until the amount of the recovery is ascertained, cannot be considered as creating a lien. The incident of lien does not attach until the sum to be recovered is made definite and finally entered up, and then it does not relate back to the entry of the interlocutory judgment.⁷⁶ But the supreme court of Pennsylvania has ruled that a judgment entered by default for want of a plea is not interlocutory but final, and constitutes a lien upon the defendant's real estate from the date of entry, although the damages may not have been assessed, if the claim is for a sum certain or is ascertainable by calculation.⁷⁷ But a judgment by confession for a sum to be ascertained by the prothonotary binds the real estate of the

⁷² *Cabell v. Given*, 30 W. Va. 760, 5 S. E. 442.

⁷³ *Commonwealth v. Adkins*, 8 B. Mon. (Ky.) 380. See *Thompson v. Avery*, 11 Utah, 214, 39 Pac. 829.

⁷⁴ *Speer v. McPherson*, 24 Ga. 146.

⁷⁵ *Unger v. Leiter*, 32 Ohio St. 210.

⁷⁶ *De Saussure v. Zeigler*, 6 Rich. (S. C.) 12; *Davidson v. Myers*, 24 Md. 538; *Citizens' Loan Ass'n v. Martin*, 1 Marv. (Del.) 213, 40 Atl. 1108. But a judgment for money in an action on a note and to foreclose the mortgage securing it is final, so as to be a lien on other property of the defendant, though the judgment of foreclosure is not final. *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264.

⁷⁷ *Sellers v. Burk*, 47 Pa. 344; *Hays v. Tryon*, 2 Miles, 208; *Bryan v. Eaton*, 4 Wkly. Notes Cas. 493.

defendant only from the time of the liquidation of the sum by the prothonotary.⁷⁸

§ 409. Judgments against Personal Representatives.

Inasmuch as executors and administrators are not invested with the title to the lands of the decedent, it follows that judgments rendered against them in their representative character have no operation as liens upon realty belonging to the estate.⁷⁹ And in Connecticut, under a statute which provides that if the owner of an unsatisfied judgment shall file a certificate in the town clerk's office, it shall constitute a lien upon land belonging to the debtor, which may be foreclosed or redeemed in the same manner as a mortgage, if an execution could have been levied thereon, it is held that a judgment creditor who has obtained a judgment against the administrator of his debtor's estate cannot thus obtain a lien against the land of the estate.⁸⁰

§ 410. Nunc Pro Tunc Judgments.

A purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the land of a third person by the rendition of a nunc pro tunc judgment against his grantor.⁸¹ In a case in Indiana, two judgments having been rendered by a justice of the peace, the plaintiff took transcripts and filed them in the clerk's office of the proper county; afterwards the judgment debtor sold a tract of land situated in that county and received the purchase-money in full; a few days later the transcripts,

⁷⁸ *Philadelphia Bank v. Craft*, 16 Serg. & R. (Pa.) 347.

⁷⁹ *Laidley v. Kline*, 8 W. Va. 218; *Woodyard v. Polsley*, 14 W. Va. 211; *Di Lorenzo v. Dragone*, 25 Misc. Rep. 26, 54 N. Y. Supp. 420; *Wright v. Franklin Bank*, 59 Ohio St. 80, 51 N. E. 876; *Applegate v. Applegate*, 107 Iowa, 312, 78 N. W. 34; *Mott v. Newark German Hospital*, 55 N. J. Eq. 722, 37 Atl. 757.

⁸⁰ *Flynn v. Morgan*, 55 Conn. 130, 10 Atl. 466.

⁸¹ *Miller v. Wolf*, 63 Iowa, 233, 18 N. W. 889; *McNamara v. New York, L. E. & W. R. Co.*, 56 N. J. Law, 56, 28 Atl. 313; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821.

together with the order-book in which they were recorded, were destroyed by fire; afterwards the justice made out new transcripts, and these were duly filed. It was held that the judgments, as evidenced by the second transcripts, were not liens on the land.⁸² An amendment of a judgment which was originally incomplete cannot relate back so as to impair the title of one who purchased the judgment-debtor's land, prior to the order of amendment, in good faith and for a valuable consideration.⁸³

§ 411. Decrees in Chancery.

It is generally held, under statutes assimilating judgments and decrees in respect to their effects and means of enforcement, that a decree in chancery, if for a liquidated sum of money, creates a lien upon the debtor's land.⁸⁴ The proviso here inserted obviously restricts the class of decrees attended with this incident within narrow limits. Thus it is said: "A decree of foreclosure is not such a decree as will confer a general lien as a judgment at law. True, the statute provides that decrees of courts of chancery 'shall, from the time of their being pronounced, have the force and effect of a judgment at law.' A judgment at law gives a general lien, but it is not every decree in chancery that can give a lien similar to a judgment. There are a great variety of decrees in chancery which give no lien, such as decrees or injunctions to stay waste, to surrender and cancel securities, to set aside fraudulent conveyances, and various others; yet the language of the statute covers all decrees. Hence the language of the statute must be limited, and as a lien is only a security for a money demand, no decree in chancery can confer a lien under the statute except a decree expressly for the payment of money. At law it is only a judgment against a debtor or a judgment for the payment of money that gives a lien; a judgment in ejectment gives no lien. Hence the decrees in chancery that confer liens similar to judgments are decrees for the payment of money. A decree of fore-

⁸² *Sheldon v. Arnold*, 17 Ind. 165.

⁸³ *Lea v. Yates*, 40 Ga. 56.

⁸⁴ *Scriba v. Deane*, 1 Brock. 166, Fed. Cas. No. 12,559; *Eames v. Germania Turn Verein*, 74 Ill. 54; *Blake v. Heyward*, 1 Bailey, Eq. (S. C.) 208; *Close v. Close*, 28 N. J. Eq. 472.

closure is not a decree for the payment of money.”⁸⁵ A decree providing that if the defendant does not, in a given time, pay the plaintiff a certain sum, certain property of the defendant, real and personal, on which the plaintiff has a specific lien, shall be sold, is not a decree which creates a lien on other real estate of the defendant.⁸⁶ In an action to enforce a mortgage, if a judgment is entered directing a sale of the mortgaged property and an application of the proceeds on the amount due, and further declaring that, in case of a deficiency, the plaintiff have execution for the balance, the lien of the judgment does not attach to real estate of the defendant other than that mortgaged, until after a sale has been made and a deficiency reported, even if the judgment is docketed when first rendered.⁸⁷ “A mere contingent provision, referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment, but until the amount to be recovered is ascertained and fixed, no effect can be given to it as a lien.”⁸⁸ It is also held that a judgment recovered for a debt secured by a mortgage on lands cannot become a lien on such lands; and a sale of the equity of redemption under an execution on such judgment will not confer any title upon the purchaser; and it makes no difference that the judgment was not recovered upon the bond accompanying the mortgage, so long as it was obtained for the same indebtedness.⁸⁹ It should be added that chancery may create a lien directly by decree for that purpose.⁹⁰

⁸⁵ *Myers v. Hewitt*, 16 Ohio, 449, 454, per Read, J. And see *Hamberger v. Easter*, 57 Ga. 71; *Karnes v. Harper*, 48 Ill. 527; *Kirby v. Runals*, 140 Ill. 289, 29 N. E. 697; *Huntington v. Meyer*, 92 Wis. 557, 66 N. W. 500; *Kraner v. Chambers*, 92 Iowa, 681, 61 N. W. 373.

⁸⁶ *Linn v. Patton*, 10 W. Va. 187.

⁸⁷ *Hibberd v. Smith*, 50 Cal. 511; *Culver v. Rogers*, 28 Cal. 520; *Chapin v. Broder*, 16 Cal. 403; *Winston v. Browning*, 61 Ala. 80; *Hershey v. Dennis*, 53 Cal. 77; *Bell v. Gilmore*, 25 N. J. Eq. 104. See *Roll v. Rea*, 57 N. J. Law, 647, 32 Atl. 214. Per contra, *Fletcher v. Holmes*, 25 Ind. 458; *Blum v. Keyser*, 8 Tex. Civ. App. 675, 28 S. W. 561; *W. P. Fuller & Co. v. Hull*, 19 Wash. 400, 53 Pac. 666.

⁸⁸ *Chapin v. Broder*, 16 Cal. 403.

⁸⁹ *Greenwich Bank v. Loomis*, 2 Sandf. Ch. 70.

⁹⁰ *Carmichael v. Abrahams*, 1 Desaus. (S. C.) 114. See *Branley v. Dambly*, 60 Minn. 282, 71 N. W. 1026.

§ 412. Judgments of Inferior Courts.

Judgments rendered by justices of the peace and other inferior courts are not generally recognized by the statutes as creating a lien upon the debtor's realty. But it is commonly provided that such judgments may be transferred, by transcript, to one of the superior courts, and that, the transcripts being duly filed and entered, the judgments shall have the same effect, as liens, as if originally rendered by the court to which they are so transferred. The lien attaches from the time of filing the transcript with the clerk of the superior court, and binds the same property which would have been affected by a judgment of the latter court.⁹¹ And this is so, although the clerk may neglect to enter such judgment in the docket of the court.⁹² The transcript, to become a lien on real estate, must be filed in the proper court of the county where the judgment was recovered, and cannot in the first instance be filed in the court of another county.⁹³ The statutes generally limit the time within which

⁹¹ *Hawkins v. Wills*, 4 U. S. App. 274, 1 C. C. A. 339, 49 Fed. 506; *Brown v. Hyman*, 27 N. Y. Supp. 436; *Dysart v. Branderth*, 118 N. C. 968, 23 S. E. 966; *Bunding v. Miller*, 10 Mo. 445; *Tracy v. Whitsett*, 51 Mo. App. 149; *Work v. Brown*, 38 Neb. 498, 56 N. W. 1082. The Pennsylvania Act of June 24, 1885, which gives to judgments of justices of the peace, aldermen, etc., the same force as if originally obtained in the court of common pleas, where a transcript thereof has been filed in the office of the prothonotary, was intended to give the judgment creditor the right to levy execution on the personal estate as well as the real estate of the debtor, which right had been doubtful under the prior statutes, and was not intended to repeal Act May 5, 1854, which provides that "no execution shall be issued on a judgment rendered before a justice of the peace or alderman, after five years from the rendition of such judgment, unless the same shall have been revived by scire facias or amicable confession." *Smith v. Wehrly*, 157 Pa. 407, 27 Atl. 700; *Inquirer Printing & Publishing Co. v. Same*, 157 Pa. 415, 27 Atl. 703. In Nebraska, under Code Civ. Proc. § 561, the docketing in the district court of a judgment rendered by a county court or a justice of the peace, does not make such judgment one of the district court, so as to entitle the judgment creditor to a pro rata distribution of funds with a creditor under a contemporaneous district court judgment. *Moores v. Peycke*, 44 Neb. 405, 62 N. W. 1072.

⁹² *Petray v. Howell*, 20 Ark. 615.

⁹³ *Pemberton v. Pollard*, 18 Neb. 435, 25 N. W. 582; *Bowman v. Silvus*, 6 Kulp (Pa.) 496.

such a transcript of a justice's judgment may be filed, but unless there is an explicit restriction of the time, it may be done at any time during the life of the judgment.⁹⁴ The transcript may be filed before the time to appeal from the judgment has expired.⁹⁵ But in order to obtain the advantage of a lien by this method of proceeding, it is necessary to comply fully with the requirements of the statute. If the law contemplates the filing of a complete transcript of the justice's record, it is not satisfied by a mere abstract of the judgment.⁹⁶

While the allowance of a claim against the estate of a decedent, by a probate court, has all the force and effect of a judgment, it is not generally regarded as creating a lien on the estate.⁹⁷

§ 413. Judgments of Federal Courts.

In states where the judgments of state courts of record create a lien upon the lands of the judgment-debtor, the judgment of a United States circuit or district court, sitting within the state, has the same operation, as a lien, in the county where rendered, and, under certain restrictions to be hereafter noticed, throughout the territory of the state.⁹⁸

§ 414. Statutory Basis of such Liens.

If, as we have already seen, judgment-liens are essentially the creatures of statute law, it is pertinent to inquire how the judgments of the federal courts came to be invested with this operation. Until

⁹⁴ Rhoad v. Patrick, 37 S. C. 517, 16 S. E. 536.

⁹⁵ Dawson v. Cunning, 50 Ill. App. 286.

⁹⁶ White v. Espey, 21 Or. 328, 28 Pac. 71.

⁹⁷ Kennerly v. Shepley, 15 Mo. 648, 57 Am. Dec. 219; Stone v. Wood, 16 Ill. 177.

⁹⁸ Massingill v. Downs, 7 How. 760, 12 L. Ed. 903; Williams v. Benedict, 8 How. 107, 12 L. Ed. 1007; Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Cropsey v. Crandall, 2 Blatchf. 341, Fed. Cas. No. 3,418; Lombard v. Bayard, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; Carroll v. Watkins, 1 Abb. U. S. 474, Fed. Cas. No. 2,457; Barth v. Makeever, 4 Biss. 206, Fed. Cas. No. 1,069; Shrew v. Jones, 2 McLean, 78, Fed. Cas. No. 12,818; Sellers' Lessee v. Corwin, 5 Ohio, 398, 24 Am. Dec. 301; Lawrence v. Belger, 31 Ohio St. 175; Byers v. Fowler, 12 Ark. 218, 44 Am. Dec. 271; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Manhattan Co. v. Evertson, 6 Paige (N. Y.) 457; Andrews v. Wilkes, 6 How. (Miss.) 554, 38 Am. Dec. 450; Simpson v. Niles, Smith (Ind.) 104; Polard v. Cocke, 19 Ala. 188.

a recent date there was no legislation of congress specifically declaring that such judgments should have the incident of a lien upon land. Nor could it be within the province of a state legislature to enact that they should have that effect. The answer to the question is given in the following language: "Judgments were not liens at common law, but congress, in adopting the modes of process prevailing in the states at the time the judicial system of the United States was organized, made judgments recovered in the federal courts liens in all cases where they were so by the laws of the states, and a later act of congress has provided that judgments shall cease to have that operation in the same manner and at the same periods in the respective federal districts as like processes do when issued from the state courts."⁹⁹ It must not be supposed, however, that this indirect method of vesting such judgments with the quality of lien was in any sense a recognition of a right in the states to regulate the operation of federal judgments. Judgment-liens in the federal courts owe their existence solely to the authority of the national government. As remarked by the supreme court of Ohio: "That judgment-liens are the creations of positive law, without which they cannot exist, and that they cannot survive the law which gives them being, are principles too well settled to be drawn in question. I suppose it equally clear that they must be created by the government under whose authority the judgment is rendered. The state may determine the effect of its own judgments, but cannot affect those rendered by the courts of the United States; while the same limitation is equally true of the legislation of the general government. Each has an equal right to provide for the security and satisfaction of judgments rendered in its courts, but neither has any power whatever to limit

⁹⁹ *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262, Clifford, J. See, also, *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924. The act of congress above referred to is as follows: "Judgments or decrees, rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon." Rev. St. U. S. § 967. This was substantially a re-enactment of the act of July 4, 1840 (5 Stat. 393) c. 43, § 4. In a territory, the judgments of the federal courts are liens on the debtor's land only when judgments are liens by the laws of the territory. *Thompson v. Avery*, 11 Utah, 214, 39 Pac. 829.

this sovereign right in the other.”¹⁰⁰ But since congress originally adopted the state laws on the subject, the rules for determining the nature and character of the judgments that would give a lien, for ascertaining what species of estates were bound thereby, and similar matters, had to be sought in the laws and decisions of the particular state.¹⁰¹ Thus it is ruled that a verdict alone, without the entry of a judgment, in a federal court, gives no lien upon land in Pennsylvania.¹⁰² So if, under the state law, the lien of a judgment rendered by a court of the state attaches from the day of the final adjournment of the term, the same rule applies to federal judgments in that state.¹⁰³ So judgment-liens of the federal courts are subject to the state statute of limitations like the liens of domestic judgments.¹⁰⁴ And the lien of such a judgment may be modified or suspended, during the pendency of an appeal or writ of error, in accordance with the state practice, in the discretion of the federal court.¹⁰⁵

§ 415. Territorial Extent of such Liens.

In the absence of restrictive legislation by congress, the lien of a federal judgment was always held to be co-extensive with the jurisdiction of the court which rendered it. That is to say, if the judgment was entered by a federal district court, its lien extended to all chargeable property of the debtor throughout the district, and was not restricted to the particular county in which the court was sitting, although, by the state law, the lien of a judgment rendered by a state court in that county would not extend into another county; and similarly, if the judgment were rendered by a United States circuit court, its lien would cover all property of the debtor within the confines of the circuit.¹⁰⁶ To this effect was a decision of the chief federal

¹⁰⁰ *Corwin's Lessee v. Benham*, 2 Ohio St. 36.

¹⁰¹ *Perkins v. Brierfield Iron & Coal Co.*, 77 Ala. 403.

¹⁰² *Estate of Morris*, 6 Phila. 134.

¹⁰³ *Jones v. Guthrie*, 23 Ill. 421.

¹⁰⁴ *Abbey v. Commercial Bank*, 34 Miss. 571, 69 Am. Dec. 401.

¹⁰⁵ *United States v. Sturgis* (D. C.) 14 Fed. 810.

¹⁰⁶ *Conard v. Atlantic Ins. Co.*, 1 Pet. 453, 7 L. Ed. 189; *Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818; *Cropsey v. Crandall*, 2 Blatchf. 341, Fed. Cas. No. 3,418; *Carroll v. Watkins*, 1 Abb. U. S. 474, Fed. Cas. No. 2,457; *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; *Barth v. Makeever*,

court, where it was said: "In those states where the judgment or the execution of the state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."¹⁰⁷ As a necessary consequence of this doctrine it was held that state statutes requiring judgments to be recorded in the county in which the land lies could have no effect upon the lien of the judgment of a federal court.¹⁰⁸ But congress has recently passed an act which materially changes the law in this respect, and in effect puts the judgments of the federal courts upon the same footing with those of the state courts, in respect to the territorial extent of their lien. The wording of the act is given in a note.¹⁰⁹ The purport of this statute appears to be as follows: 1. The judgment of a

4 *Biss.* 206, *Fed. Cas. No.* 1,069; *Byers v. Fowler*, 12 *Ark.* 218, 44 *Am. Dec.* 271; *Trapnall v. Richardson*, 13 *Ark.* 543, 58 *Am. Dec.* 338; *Doyle v. Wade*, 23 *Fla.* 90, 1 *South.* 516, 11 *Am. St. Rep.* 334; *Hall v. Green*, 60 *Miss.* 47; *Branch v. Lowery*, 31 *Tex.* 96; *United States v. Duncan*, 12 *Ill.* 523, *Fed. Cas. No.* 15,003; *Sellers' Lessee v. Corwin*, 5 *Ohio*, 398, 24 *Am. Dec.* 301; *Rock Island Nat. Bank v. Thompson*, 173 *Ill.* 593, 50 *N. E.* 1089, 64 *Am. St. Rep.* 137.

¹⁰⁷ *Massingill v. Downs*, 7 *How.* 760, 12 *L. Ed.* 903.

¹⁰⁸ *Doyle v. Wade*, 23 *Fla.* 90, 1 *South.* 516, 11 *Am. St. Rep.* 334; *Carroll v. Watkins*, 1 *Abb. U. S.* 474, *Fed. Cas. No.* 2,457. Compare *Hall v. Green*, 60 *Miss.* 47.

¹⁰⁹ Act Cong. August 1, 1888 (25 *Stat.* 357), provides as follows: "That judgments or decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: Provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise con-

federal court will become a lien upon real property situated in the county where the court was sitting at the time of its rendition, at all events and without any reference to docketing, etc., under state laws. 2. If the laws of the state restrict the liens of judgments rendered by its own courts, in the first instance, to property within the county where the court has jurisdiction, but provide that a judgment lien may attach to property situate in another county in the same state, when the judgment is docketed, or a transcript of it filed, in the proper office in such other county, and if the statute authorizing such transfers of judgments, for purposes of lien, from one county to another, expressly includes judgments of the federal courts in the description of judgments which may be so transferred, or if there is a separate statute assimilating judgments of the federal courts, in this respect, to the judgments of the courts of the state, then the lien of a judgment rendered by a United States court in such state will be primarily restricted to property within the county where the court was sitting at the time the judgment was rendered, but may be ex-

formed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the state of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

In several of the states, since 1888, statutes have been enacted to meet and carry into effect the provisions of the above act of congress. They authorize judgments and decrees of the federal courts to be docketed (or transcripts to be filed) in the clerks' offices in the different counties of the state, in the same manner as judgments of the domestic courts, so as to attach as liens upon realty in the several counties where they are so recorded. See *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124, construing an act of North Carolina of 1889; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 503, 50 N. E. 1089, 64 Am. St. Rep. 137, construing Laws Ill. 1889, p. 197. See, also, Laws Or. 1891, p. 41. In Kansas, the existing statute (Gen. St. 1868, c. 80, § 419) is held to satisfy the requirements of the act of congress. *Dartmouth Sav. Bank v. Bates* (C. C.) 44 Fed. 546. On the other hand, the statute of Ohio (Rev. St. § 5056) does not apply to judgments rendered in the United States courts. *Stewart v. Wheeling & L. E. Ry. Co.*, 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

tended to other counties of the state upon compliance with the requirements of the state statute in regard to docketing or filing judgments in other counties. 3. If the laws of the state limit the lien of its own judgments to the county where rendered, and authorize the transfer of such judgments to other counties for purposes of lien, but make no provision for the transfer of judgments of the United States courts, then the act of congress of 1888 does not apply at all, and the extent of the lien of judgments of the federal courts in such state will remain precisely as before the passage of that act; that is to say, the lien of a judgment rendered by a federal court within such state will be co-extensive with the territorial jurisdiction of the court rendering it.¹¹⁰

In Kansas, where the statute in force before 1888, providing for the transfer of judgments from one county to another, for purposes of lien, was already applicable to judgments of the federal courts, it was held that a creditor who had obtained a judgment in a federal court in that state before the passage of the act of congress of 1888, would be obliged, if he wished to bind realty in other counties, to file transcripts of his judgment therein within a reasonable time after the enactment of the act of congress; and that if he neglected for more than four months after the passage of the law to take such action, he would lose his lien.¹¹¹ But elsewhere it has been held that the act of congress does not affect the lien of a judgment which had attached prior to the passage of the act.¹¹²

It has also been held that a judgment in favor of the United States, recovered in one of the federal courts outside of a given state, is not a lien upon lands within that state from the docketing of the judgment, although, by the law of the United States, an execution on such judgment may be issued against the defendant's property in any state of the Union.¹¹³

¹¹⁰ *Dartmouth Sav. Bank v. Bates* (C. C.) 44 Fed. 546.

¹¹¹ *First Nat. Bank v. Clark*, 55 Kan. 219, 40 Pac. 270.

¹¹² *Commercial Bank v. Eastern Banking Co.*, 51 Neb. 766, 71 N. W. 1024.

¹¹³ *Manhattan Co. v. Evertson*, 6 Palge (N. Y.) 457.

§ 416. Decrees in Admiralty.

A final decree in admiralty in the United States district court in a suit in personam, for the payment of money, is a lien on the lands of the defendant in the district. "Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the district courts of the United States, but the circuit courts hear such cases on appeal, and, as a matter of daily practice, render decrees therein for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provisions under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the district courts."¹¹⁴

PART III. TO WHAT PROPERTY THE LIEN ATTACHES.**§ 417. Territorial Restriction of Lien.**

Although a judgment in personam has the effect of establishing a claim against the defendant which follows his person and may be enforced against him, by some appropriate proceeding, wherever he may be found, yet it can be collected by the direct process of execution only within the territory over which the court rendering the judgment has jurisdiction and within which its process may run. Hence, as a general rule, the judgment constitutes a lien only upon the real estate of the debtor lying within such territorial limits. A judgment rendered in one state or country is not a lien upon land in another state or country.¹¹⁵ In order to have that effect, it must be made the basis of a suit and judgment in the second state or country, and then the lien will attach as an incident of the second judgment, not the first. And even within the limits of the same state, unless

¹¹⁴ *Ward v. Chamberlain*, 2 Black, 430, 17 L. Ed. 319.

¹¹⁵ *Billan v. Hercklebrath*, 23 Ind. 71; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; *Smith v. Eyre*, 149 Pa. 272, 24 Atl. 288. But where a judgment was recovered in M. county, Virginia, and became a lien on lands in B. county, its lien was neither lost nor impaired by reason of the division of the state of Virginia into two states and the falling of M. county into the state of West Virginia. *Gatewood's Adm'r v. Goode*, 23 Gratt. (Va.) 880.

it is otherwise provided by the statutes, the lien of a judgment attaches only to the real estate of the debtor which lies within the particular county where the judgment was rendered and docketed.¹¹⁶ But where a judgment-lien attaches upon lands in a certain county, and afterwards a new county is set off, within which these lands (or part of them) fall, the lien does not cease to exist by reason of such new organization, but holds during the full period allowed by statute without any further record.¹¹⁷ "It is supposed that when a new county is organized, with no saving clause in the act, and land subject to a judgment-lien in the old county falls within the new organization, the lien ceases to exist. We do not think so. The lien being given by express provision, although it is admitted, as a part of the remedy, to be within the control of the legislature, must, nevertheless, remain until lost by the act of the judgment-creditor, or taken away by subsequent legislation."¹¹⁸

§ 418. Transfer of Judgment to Another County.

In many of the states there are statutes authorizing a transcript of a judgment recovered in one county to be docketed in another, for the purpose of binding lands of the judgment-debtor situated in the latter county.¹¹⁹ Such a transfer, however, does not destroy the

¹¹⁶ *King v. Portis*, 77 N. C. 25; *Baker v. Chandler*, 51 Ind. 85; *State Bank v. Carson*, 4 Neb. 498; *Goodell v. Blumer*, 41 Wis. 436; *Farmers' Bank v. Heighe*, 3 Md. 357. See *Barnett v. East Tennessee, V. & G. R. Co. (Tenn.)* 48 S. W. 817. In Alabama it was held, in 1843, that the lien of a judgment in any court of record of the state extended to all the lands of the judgment debtor within the state. *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301. And in Pennsylvania, in 1792, a similar ruling was made in regard to the effect of a judgment in the supreme court. *Ralston v. Bell*, 2 Dall. 158, 1 L. Ed. 330.

¹¹⁷ *Davidson v. Root*, 11 Ohio, 98, 37 Am. Dec. 411; *People v. Hovious*, 17 Cal. 471; *Hays' Appeal*, 8 Pa. 182; *West's Appeal*, 5 Watts (Pa.) 87; *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625; *Dermott v. Carter*, 109 Mo. 21, 18 S. W. 1121.

¹¹⁸ *Davidson v. Root*, 11 Ohio, 98, 37 Am. Dec. 411.

¹¹⁹ *Farmers' Bank v. Heighe*, 3 Md. 357; *Goodell v. Blumer*, 41 Wis. 436; *Perry v. Morris*, 65 N. C. 221; *Neil v. Colwell*, 66 Pa. 216; *Code Civ. Proc. Cal.* § 674; *Acts Ark.* 1801, No. 56, p. 92, § 1; *Comp. Laws S. D.* § 5104; *Bostwick v. Benedict*, 4 S. D. 414, 57 N. W. 78; *Code Civ. Proc. Mont.* § 1200; *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 Mont. 184, 61 Pac. 3.

lien of the judgment on the debtor's property in the county where it was originally docketed.¹²⁰ But on the other hand, if the statute enacts that its lien shall continue in the second county for a prescribed term after the filing of the transcript there, it is held that the lien will bind the land in the second county during the whole of such term, although, in the interval, it may have expired by limitation in the first county.¹²¹ It is to be noted that a transcript thus entered in another county is not a judgment of the court to which transferred, but a quasi judgment for certain limited purposes, such as lien, execution, and revival. Hence if the original judgment is set aside for irregularity, the judgment on the transcript will fall with it.¹²² Another consequence of this principle is that no authority can be derived from the statute for a transfer of the same judgment from the second county to a third,—that would be merely an exemplification of an exemplification. If it is desired to bind lands in a third county, a transcript must be taken directly from the first.¹²³ And when a judgment is so transferred, its merits cannot be inquired into at all by the court to which it is taken; it is there only for purposes of enforcement and satisfaction.¹²⁴ In regard to the requisites of the transcript, it is necessary that it should be sufficient to give reasonably certain and definite information to subsequent purchasers or lienors. It is held to answer this requirement if it sets out the date of the rendition of the judgment, the names of the parties to the suit, the amount of the debt, and the costs of the action.¹²⁵ If the statute provides that "judgments at law" may be thus transferred from one county to another, this term will not be given an extensive signification, but will be taken in its strict meaning. Thus, a verdict, without the rendition of judgment upon it, is not capable of being taken to another county for purposes of lien.¹²⁶ And under a statute worded as above, a decree of a court of equity cannot be thus trans-

¹²⁰ *Perry v. Morris*, 65 N. C. 221.

¹²¹ *Donner v. Palmer*, 23 Cal. 40. Compare *Bradfield v. Newby*, 130 Ind. 59, 28 N. E. 619.

¹²² *Brandt's Appeal*, 16 Pa. 343.

¹²³ *Mellon v. Guthrie*, 51 Pa. 116.

¹²⁴ *King v. Nimick*, 34 Pa. 297.

¹²⁵ *Wilson v. Patton*, 87 N. C. 318.

¹²⁶ *Balley v. Eder*, 90 Pa. 448.

ferred to another county, although it be for the payment of a definite sum of money.¹²⁷ But a valid and subsisting judgment may be transferred after the death of the plaintiff, and the suggestion of death and substitution of the administrator may be made either before or after the transfer.¹²⁸

§ 419. **Lien binds Real Estate.**

The language usually employed in statutes on this subject is to the effect that judgments shall be a lien on the "real estate" or "real property" of the defendant.¹²⁹ These terms serve well enough to exempt chattels from this operation of a judgment, but leave room for a certain ambiguity as to the various species of estates and interests in land which may possibly come under the designation of realty. These questions will be examined in succeeding sections. It has been held that judgments against a turnpike company are not liens upon the turnpike road.¹³⁰ And under the laws of Texas regulating railways, a railroad is not considered real estate within the meaning of a statute which makes the judgment of a court of record a lien on the "real estate" of the debtor.¹³¹ But if the laws of the particular state

¹²⁷ *Brooke v. Phillips*, 83 Pa. 183.

¹²⁸ *Walt's Adm'rs v. Swinehart*, 8 Pa. 97.

¹²⁹ A judgment does not create a lien upon personal property belonging to the debtor. *McNamara v. New York, L. E. & W. R. Co.*, 56 N. J. Law, 56, 28 Atl. 313; *Stahlman v. Watson* (Tenn.) 39 S. W. 1055. The lien does not bind choses in action. *Fidelity & Deposit Co. v. Exchange Bank*, 100 Ga. 619, 28 S. E. 393; *Stahlman v. Watson*, supra. Nor the right of a licensee under an oil lease. *Meridian Nat. Bank v. McConica*, 8 Ohio Cir. Ct. R. 442. Nor the interest of one holding a parol license to mine, at least while the license remains revocable. *Blindert v. Kreiser*, 81 Wis. 174, 51 N. W. 324. On the other hand, machinery permanently attached to realty may become subject to the lien of a judgment against the owner of the land, although sold under an agreement that title should remain in the seller until full payment. *Raymond v. Schoonover*, 181 Pa. 352, 37 Atl. 524. See also, as to permanent improvements on the land partaking of the character of realty. *Lessert v. Sieberling*, 59 Neb. 309, 80 N. W. 900. A judgment lien existing at the time an executor sells real estate is transferred from the land to the fund arising from such sale. *Barkman v. Hain*, 5 Ohio N. P. 508. The lien of a judgment against a corporation whose assets consist partly in real estate is an incumbrance on such real estate. *Willis v. Rapid Valley Horse-Ranch Co.*, 7 S. D. 114, 63 N. W. 546.

¹³⁰ *Beam's Appeal*, 19 Pa. 453.

¹³¹ *Scogin v. Perry*, 32 Tex. 21.

are so framed as to give the character of fixtures to the rolling stock of a railroad, then such stock will be subject to the lien of a judgment.¹²²

§ 420. **Actual Interest of Debtor bound.**

The lien of a judgment attaches to the precise interest or estate which the judgment-debtor has, actually and effectively, in the land. By this is meant that, as the recovery of a judgment against him cannot of itself operate to change the quantity of his interest in the property, so its lien cannot be made effectual to bind or convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated. Hence it is of no consequence that he may have an apparent or colorable interest greater than would pass by his conveyance of the title; the lien has no effect except upon his actual estate, legal or equitable, according as the law varies in the different jurisdictions.¹²³ "The general lien of a judgment-creditor upon the lands of his debtor is subject to all equities which existed against such lands in favor of third persons at the time of the recovery of the judgment. And the court of chancery will so control the legal lien of the judgment-creditor as to restrict it to the actual interest of the judgment-debtor in the property, so as fully to protect the rights of those who have a prior equitable interest in such property or in the proceeds thereof."¹²⁴ "The moment a judgment is docketed it becomes in law a general lien on all the real estate of the debtor, not only as against himself, but also

¹²² *Milwaukee & M. R. Co. v. James*, 6 Wall. 750, 18 L. Ed. 854.

¹²³ *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; *In re Estes* (D. C.) 6 Sawy. 459, 3 Fed. 134; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Ex parte Trenholm*, 19 S. C. 126; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Holden v. Garrett*, 23 Kan. 98; *Doswell v. Adler*, 28 Ark. 82; *Unknown Heirs of Whitney v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638; *Sharpe v. Davis*, 76 Ind. 17; *Heberd v. Wines*, 105 Ind. 237, 4 N. E. 457; *Churchill v. Morse*, 23 Iowa, 229, 92 Am. Dec. 422; *Union Bank v. Manard*, 51 Mo. 548; *Uhl v. May*, 5 Neb. 157; *Galway v. Malchow*, 7 Neb. 285; *Colt v. Du Bols*, 7 Neb. 391; *Berkley v. Lamb*, 8 Neb. 302, 1 N. W. 320; *Nessler v. Neher*, 18 Neb. 649, 26 N. W. 471; *Id.*, 23 N. W. 345. And see *Robisson v. Miller*, 158 Pa. 177, 27 Atl. 887; *Cleavenger v. Felton*, 46 W. Va. 249, 33 S. E. 117; *Hawley v. Smelding*, 3 Kan. App. 159, 42 Pac. 841.

¹²⁴ *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 207, 47 Am. Dec. 305.

as against all other persons deriving title through or under him subsequent to such judgment. It affects the legal estate, and the lien of the judgment cannot at law be detached or defeated by any species of alienation whatsoever."¹³⁵ A judgment is not a lien on land unless there is a legal or equitable seisin of the judgment-debtor; but where he is the actual possessor, that is sufficient, for actual possession is prima facie evidence of title.¹³⁶ On the other hand, although the legal title to land is in one, yet if another has actual possession, a judgment against the former is a lien only upon his interest, whatever that may be, for the possession of the other is notice to all the world of his claims.¹³⁷ In Illinois it is held that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of notice from other sources.¹³⁸

§ 421. Title held in Trust.

The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person.¹³⁹ And transitory seisin of lands by the judgment-debtor, in trust for another, will not subject the lands to the judgment-lien.¹⁴⁰ To illustrate, in a recent case it appeared that A. agreed to purchase three lots from B. as agent for C., and the deed was made out to A., but he declined to receive it on the ground

¹³⁵ *Morris v. Mowatt*, 2 Paige (N. Y.) 586, 22 Am. Dec. 661.

¹³⁶ *Jackson v. Town*, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405.

¹³⁷ *Uhl v. May*, 5 Neb. 157; *Lumbard v. Abbey*, 73 Ill. 177; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740.

¹³⁸ *Massey v. Westcott*, 40 Ill. 160.

¹³⁹ *Ellis v. Tousley*, 1 Paige (N. Y.) 280; *Lounsbury v. Purdy*, 11 Barb. (N. Y.) 490; *Withnell v. Courtland Wagon Co.* (C. C.) 25 Fed. 372; *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386. See, also, *Fulton's Estate*, 51 Pa. 204; *Moore v. Thomas*, 137 Ind. 218, 36 N. E. 712; *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581. In Iowa, the doctrine is that a judgment is not a lien upon land to which the judgment debtor holds only the naked legal title, when the fact that a third person owns the equitable title is either disclosed by the record or is known to the judgment creditor (*Brebner v. Johnson*, 84 Iowa, 23, 50 N. W. 35); and that, as an express trust cannot be established by parol evidence, such evidence is not admissible to show that the title of real estate in the name of a judgment defendant is held in trust for another, and that therefore the property is not subject to the lien of the judgment. *Brown v. Barngrover*, 82 Iowa, 204, 47 N. W. 1082.

¹⁴⁰ *Alcardi v. Craig*, 42 Ala. 311.

that he could not pay for the lots and had agreed to let D. have them at the stipulated price. The agent refused to alter the deed, and D. paid the money to him, and A. conveyed the property to D. It was held that under these circumstances a judgment against A. was not a lien on the lands conveyed to D. The court observed that A. "was vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit, and held the legal title in trust for D. Under such circumstances A. had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value."¹⁴¹ So where a grantee is named in a conveyance and designated as "trustee," this is sufficient to allow him to hold the title for the unnamed beneficiary, if one actually exists, and a judgment and levy of execution against the trustee individually are a lien only on his personal interest, if any, in the property.¹⁴² So in an action against a partner, who held the legal title to a mine in trust for the benefit of the firm, to enforce a lien for labor performed thereon, where judgment is rendered against him, only his interest in the mine can be sold to satisfy such lien.¹⁴³ Another important application of this principle is in the case where one sells and conveys real estate to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, the same then enuring to the benefit of the grantee. If, between the date of the conveyance and the acquisition of the perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment.¹⁴⁴

The same rule also applies in the case where the judgment debtor, though having the legal title to lands, holds it subject to a resulting trust in favor of another. Thus, where one person pays the purchase

¹⁴¹ *Atkinson v. Hancock*, 67 Iowa, 452, 25 N. W. 701; *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100.

¹⁴² *Boardman v. Willard*, 73 Iowa, 20, 34 N. W. 487. But property conveyed to an insolvent purchaser as trustee for his wife, the consideration being paid by the husband, becomes subject to the lien of a judgment against him, which is not divested by a return and cancellation of the deed, the same not having been recorded. *Kline v. Triplett* (Va.) 25 S. E. 886.

¹⁴³ *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751.

¹⁴⁴ *Watkins v. Wassell*, 15 Ark. 73.

money for a parcel of realty, and procures the title to be placed in the name of another, if the latter has no substantial interest in the property, a judgment against him will not be a lien on the land.¹⁴⁵ So where one conveys land to another by a deed absolute in form, but intended as security for the payment of money, or subject to a parol agreement to reconvey, the grantee has no such interest in the property as will be bound by the lien of a judgment recovered against him.¹⁴⁶

§ 422. Inchoate Title.

On the general principle that a judgment-lien attaches to the precise interest which the debtor has in the land, whatever that interest may be, the authorities hold that the lien may be considered as binding several species of inchoate or inceptive titles. Thus a purchaser at a sale under order of the probate court acquires an inceptive title or interest in the property so purchased at the time it is struck down to him, and judgments entered against him subsequent to the sale, but prior to its confirmation by the court, are a lien upon such interest subject to the future confirmation of the sale.¹⁴⁷ So a purchaser at sheriff's sale, before his deed has been acknowledged, has an inceptive interest in the land by the contract, which may be bound by the lien of a judgment.¹⁴⁸ And numerous cases have decided that a judgment-lien will attach to land which has been purchased from the government, in advance of the issuance of a patent to the buyer.¹⁴⁹ But it is also held, and with much show of reason, that a judgment is not a lien upon a mere right of pre-emption.¹⁵⁰

¹⁴⁵ *Wade v. Sewell* (C. C.) 56 Fed. 129; *Carter v. Challen*, 83 Ala. 135, 3 South. 313; *Bucknell v. Deering*, 99 Iowa, 548, 68 N. W. 825; *Coldiron v. Asheville Shoe Co.*, 98 Va. 364, 25 S. E. 238; *Baird v. Williams*, 4 Okl. 173, 44 Pac. 217. See *Blackburn v. Lake Shore Traffic Co.*, 90 Wis. 362, 63 N. W. 289.

¹⁴⁶ *Main v. Bosworth*, 77 Wis. 660, 46 N. W. 1043; *Michael v. Knapp*, 4 Tex. Civ. App. 464, 23 S. W. 280.

¹⁴⁷ *Holmes' Appeal*, 108 Pa. 23. But a purchaser who has utterly failed to comply with the terms of sale, has no estate in the premises, legal or equitable, to be bound by a judgment-lien. *Jacobs' Appeal*, 23 Pa. 477.

¹⁴⁸ *Morrison v. Wurtz*, 7 Watts (Pa.) 437; *Slater's Appeal*, 28 Pa. 169.

¹⁴⁹ *Levi v. Thompson*, 4 How. 17, 11 L. Ed. 856; *Landes v. Brant*, 10 How. 348, 13 L. Ed. 449; *Huntingdon v. Grantland*, 33 Miss. 453; *Jackson's Lessee v. Williams*, 10 Ohio, 69; *Rogers v. Brent*, 5 Gilman (Ill.) 573, 50 Am. Dec. 422; *Cavender v. Smith's Heirs*, 5 Iowa, 157.

¹⁵⁰ *Harrington v. Sharp*, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365. In this

§ 423. Land Fraudulently Conveyed.

Where a person has aliened his land by a conveyance which is in fraud of his creditors, and afterwards a judgment is recovered against him, many of the authorities hold that such judgment does not attach as a lien upon the land, at least until the commencement of an action by the judgment-creditor to set aside the conveyance; on the ground that the fraudulent conveyance is not void, but voidable, and that it is valid as between the parties, and as to the plaintiff, until attacked.¹⁵¹ In one of the cases cited in the margin, Judge Deady, after an extensive review of the authorities, expressed himself as follows: "In my own opinion the lien of a judgment which is limited by law to the property of or belonging to the judgment-debtor at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the

case the court said: "Under our statute a judgment is a lien only on the 'real estate of the person' against whom it was rendered. By the language 'real estate of the person,' we understand that the fee-simple, or estate of inheritance, must be in the person, in order to have the judgment against him operate as a lien upon the land. A mere pre-emption right confers no such fee or estate upon a person. It is but a temporary and conditional interest, unknown to the common law. It only imparts to the pre-emptor a right over others to purchase the land within a limited period, at a stipulated price, and if he fails to pay the price within the time required, the right ceases. It is of a nature no greater than an estate for years—a mere equitable and contingent interest; and hence we are firmly of opinion that a judgment cannot operate as a lien upon a pre-emption right to lands." So also, a general judgment is not a lien on a locator's interest in a mining claim on public lands for which no patent has been issued. *Phoenix Min. & Mill. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777.

¹⁵¹ *Miller v. Sherry*, 2 Wall. 249, 17 L. Ed. 827; *Brooks v. Wilson*, 53 Hun, 173, 6 N. Y. Supp. 116; *Manhattan Co. v. Evertson*, 6 Paige (N. Y.) 465; *McKee v. Gilchrist*, 3 Watts (Pa.) 230; *Mulford v. Peterson*, 35 N. J. Law, 127; *Neal v. Foster* (C. C.) 36 Fed. 20; *Rapple v. International Bank*, 93 Ill. 306; *In re Estes* (D. C.) 3 Fed. 134; *United States v. Elsenbels* (D. C.) 88 Fed. 4; *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137; *Joyce v. Perry*, 111 Iowa, 567, 82 N. W. 941; *French Lumbering Co. v. Therlault*, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a bona fide purchaser. The operation of the lien of a judgment, being limited by statute to the property then belonging to the judgment-debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."¹⁵²

But, on the other hand, many well considered cases hold that a subsequent judgment is a lien on land previously conveyed in fraud of creditors, and that the judgment-creditor may treat the conveyance as simply void, and may rest exclusively upon his legal remedies, without invoking the aid of a court of equity; that is, he may proceed to sell the land upon execution, leaving it to the sheriff's vendee to impeach the fraudulent conveyance.¹⁵³ According to an-

¹⁵² In re Estes (D. C.) 3 Fed. 134, 141.

¹⁵³ Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Chautauqua Co. Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Eastman v. Schettler, 13 Wis. 324; Smith v. Morse, 2 Cal. 524; First Nat. Bank v. Maxwell, 123 Cal. 300, 55 Pac. 980, 69 Am. St. Rep. 64. In re Lowe (D. C.) 19 Fed. 589; Slattery v. Jones, 96 Mo. 216, 8 S. W. 554, 9 Am. St. Rep. 344. In Jackson v. Holbrook, *supra*, the choice of remedies open to the judgment-creditor is indicated as follows: "A judgment-creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditors' bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the lands

other view, if the debtor has fraudulently conveyed away or incumbered his real estate, so as to interpose an obstacle which embarrasses the creditor in appropriating it by legal process in satisfaction of his debt, then the latter may file his bill to remove out of the way such fraudulent conveyance or incumbrance, and it is not necessary for him to first take out execution on his judgment, for the judgment is a lien on the land.¹⁵⁴ But of course these rules only apply in cases where the conveyance was made with intent to hinder and defraud creditors. Thus a judgment is not a lien on land which the debtor has previously conveyed in good faith to his son, in trust for his wife, to pay a debt really due her.¹⁵⁵ And in any other case where the fraudulent purpose was clearly wanting, the judgment would be no lien.

sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and applied. *Erickson v. Quinn*, 15 Abb. Prac. N. S. (N. Y.) 168. In the first two classes, the creditor enforces his judgment at law, and the sale upon execution must necessarily be subject to prior statutory liens. The purchaser in such cases succeeds to such title only as the debtor had, treating the debtor's fraudulent transfer as void. *Freem. Ex'ns*, § 447. As to cases falling within the second class, the object of the equitable suit is to make the legal remedy more effective. In such case, no trust is created in respect to the property, but the creditor falls back upon his legal remedy, and, instead of bringing his equitable suit before the sale, he may, if necessary, maintain it after sale in the form of an action to remove a cloud from his title. *Erickson v. Quinn*, supra. And where assets are applied by the court in creditors' suits, as respects real estate, the rule is, as in other cases, to prefer prior liens, in the distribution. 'Where the law gives priority, equity will not destroy it; and especially where legal assets are created by statute as judgment-liens, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery.' *Kent, C. J., Codwise v. Gelston*, 10 Johns. 522; *Scouton v. Bender*, 3 How. Prac. (N. Y.) 185; *Wiswall v. Sampson*, 14 How. 67, 14 L. Ed. 322." In Pennsylvania, it is said that a judgment creditor, who advises the debtor to make a fraudulent conveyance in order to cheat another creditor, does not thereby lose the lien of his judgment. *Fidler v. John*, 178 Pa. 112, 35 Atl. 976.

¹⁵⁴ *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460.

¹⁵⁵ *Benson v. Maxwell* (Pa.) 14 Atl. 161.

§ 424. Exempt Property.

In the nature of things, a judgment cannot operate as a lien upon any property which is by law exempt from seizure and sale on execution. Under a statute providing that judgments shall be liens on real estate subject to execution, where the entire property of a resident householder at the time of the rendition of a judgment is less in value than the amount allowed by law as exempt from execution, and so continues, the judgment does not become a lien on his real estate, and his grantee takes it free from any lien of the judgment or execution issued upon it.¹⁵⁶

425. Homestead Property.

Since land held as a homestead is not liable to levy and sale on execution, it is not bound by the lien of a judgment against the owner, except as to the surplus value of the property, if any, over the amount limited as a homestead exemption. Hence, while the land retains this character, the owner will not be deterred from placing incumbrances upon it, or even alienating it, by the fact that there are judgments outstanding against him.¹⁵⁷ But a judgment-lien against property acquired before the filing of a declaration of homestead by the debtor and his wife, or before the debtor's marriage, or otherwise before the land acquires the character of a homestead, subjects such property to sale under execution; such lien cannot be divested by any subsequent act of the owners.¹⁵⁸ And if

¹⁵⁶ *Dumbould v. Rowley*, 113 Ind. 353, 15 N. E. 463; *King v. Easton*, 135 Ind. 353, 36 N. E. 181.

¹⁵⁷ *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 123; *Sullivan v. Hendrickson*, 54 Cal. 258; *Monroe v. May*, 9 Kan. 466; *Gapen v. Stephenson*, 17 Kan. 613; *Lorimer v. Marshall*, 44 Ill. App. 645; *Farmers' Loan & Trust Co. v. Schwenk*, 54 Neb. 657, 74 N. W. 1063; *Traders' Nat. Bank v. Schorr*, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; *Lamb v. Shays*, 14 Iowa, 567; *Wiggins v. Chance*, 54 Ill. 175; *Black v. Epperson*, 40 Tex. 162; *Briggs v. Briggs*, 45 Iowa, 318; *Grimes v. Portman*, 99 Mo. 229, 12 S. W. 792.

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the property loses its character as a homestead, it then becomes subject to existing and future judgments. Thus, under a law which enacts that the homestead exemption shall exist "so long as the same shall be owned and occupied by the debtor as such homestead," a judgment against the owner of land is a lien which remains dormant while the land is so occupied, but it becomes living and operative as soon as the homestead occupation is abandoned.¹⁵⁹ In that event, all existing judgments will attach together as of the date of the abandonment, but without regard to their seniority, and priority will belong to the creditor who first manifests his diligence by levying on the property.¹⁶⁰ It is evident that if an abandonment of the homestead character of the land precedes the debtor's alienation of it by such an interval of time that the two acts cannot be considered as parts of the same transaction, the liens of existing judgments will attach, and the property will go to the purchaser burdened with such liens.¹⁶¹ But a more difficult question arises in case the relinquishment of the homestead consists in the very act of selling it. According to the decisions in some of the states, if the owner of a homestead attempts to alienate the land ipso facto he abandons its character as a homestead, and at the same instant the liens of existing judgments against him attach to the property, and the purchaser must therefore take it charged with such liens.¹⁶² This view is based

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from G. and the original grantor. Upon this state of facts it was held that judgments rendered against G. prior in date to such conveyance were liens on his interest in the land, but as to those rendered subsequent to that period, H. was entitled to relief by perpetual injunction against them.¹⁸⁶

§ 431. Partnership Property.

A judgment against a partnership for a firm debt, entered by confession of all the partners, is a lien upon the partnership real estate.¹⁸⁷ And so also a judgment of a separate creditor against one of the partners will be a lien on the firm property, although subordinated to all claims against the partnership as such. Where realty is purchased with partnership funds and held and used for partnership purposes, though the legal title is in the name of individual partners, the statutory lien of a judgment of a separate creditor, on such land, must be postponed to the equity of a firm creditor whose claim accrued during the continuance of the partnership, although subsequent to the time that such statutory lien attached. Such lien is good only to the extent of the residuary interest of the partners in the land, after the satisfaction of all claims against the partnership.¹⁸⁸ Conversely, a judgment against the firm is a lien on the separate real estate of the individual partners.¹⁸⁹ But where, upon a hearing before an auditor appointed to determine the validity of certain claims against an estate, a judgment obtained against the firm of which the decedent was a member was filed, it was held that as the record did not show the names of the individual partners, the judgment could not be charged upon the individual property of the decedent.¹⁹⁰

¹⁸⁶ *Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88.

¹⁸⁷ *In re Coddling* (D. C.) 9 Fed. 849.

¹⁸⁸ *Page v. Thomas*, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788. And see, also, *Meily v. Wood*, 71 Pa. 488, 10 Am. Rep. 719; *Hoskins v. Johnson*, 24 Ga. 625.

¹⁸⁹ *Cummings' Appeal*, 25 Pa. 268, 64 Am. Dec. 695; *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501. A contrary view is maintained in *Stadler v. Allen*, 44 Iowa, 198. And see *Baldrige v. Eason*, 99 Ala. 516, 13 South. 74. Individual creditors of a partner are not entitled to priority of payment out of proceeds of his individual real estate, as against a judgment creditor of the firm, who, by docketing his judgment, has acquired a prior lien on such real estate. *MacDonald v. MacDonald*, 62 Hun, 621, 17 N. Y. Supp. 230.

¹⁹⁰ *Fox's Appeal* (Pa.) 11 Atl. 228.

§ 432. **After-Acquired Property.**

In most of the states it is held that the lien of a judgment attaches to and binds land acquired by the debtor after the rendition and docketing of the judgment; it being either so provided by statute, or by following the doctrines of the English common law.¹⁹¹ But in two states—Pennsylvania and Ohio—it has been firmly settled from a very early day that the lien will not attach to after-acquired lands unless they are levied on, and consequently the debtor can make clear title to such lands in the interval, and execution cannot be levied on lands which the defendant got by purchase after the judgment, if he aliened them in good faith before levy.¹⁹² And this doctrine has also been accepted in a few other states.¹⁹³ By the English common law the lien attached to subsequently acquired realty without a levy.¹⁹⁴ In Illinois, the rule is that where an execution is issued upon a judgment within one year from its rendition, the judgment will become a lien upon any real estate the judgment-defendant may acquire subsequent to its rendition and within seven years, but if no execution

¹⁹¹ *Ridgely v. Gartrell*, 3 H. & McH. (Md.) 449; *McClung v. Belrne*, 10 Leigh (Va.) 394, 34 Am. Dec. 739; *Handly v. Sydenstricker*, 4 W. Va. 605; *Ralston v. Field*, 32 Ga. 453; *Harrison v. Roberts*, 6 Fla. 711; *Moody v. Harper*, 25 Miss. 484; *Jenkins v. Gowen*, 37 Miss. 444; *Cayce v. Stovall*, 50 Miss. 398; *Thulemeyer v. Jones*, 37 Tex. 500; *Barron v. Thompson*, 54 Tex. 235; *Franke v. Lone Star Brewing Co.*, 17 Tex. Civ. App. 9, 42 S. W. 861; *Greenway v. Cannon*, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161; *Chapron v. Cassaday*, 3 Humph. (Tenn.) 661; *Davis v. Benton*, 2 Sneed (Tenn.) 665; *Babcock v. Jones*, 15 Kan. 296; *Bank v. Watson*, 13 Ark. 74; *Ridge v. Prather*, 1 Blackf. (Ind.) 401; *Curtis v. Root*, 28 Ill. 367; *Wales v. Bogue*, 31 Ill. 464; *Steele v. Taylor*, 1 Minn. 274 (Gil. 210); *Colt v. Du Bois*, 7 Neb. 391; *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932; *Lessert v. Sieberling*, 59 Neb. 309, 80 N. W. 900; *Leonard v. White Cloud Ferry Co.*, 11 Neb. 340, 7 N. W. 538.

¹⁹² *Colhoun v. Snider*, 6 Bin. (Pa.) 135; *Rundle v. Ettwein*, 2 Yeates (Pa.) 23; *Packer's Appeal*, 6 Pa. 277; *Lea v. Hopkins*, 7 Pa. 492; *Moorehead v. McKinney*, 9 Pa. 265; *Waters' Appeal*, 35 Pa. 523, 78 Am. Dec. 354; *Ross' Appeal*, 106 Pa. 82; *Torrence v. Torrence*, 24 Pa. Co. Ct. R. 408; *Roads v. Symmes*, 1 Ohio, 281, 13 Am. Dec. 621; *McCormick v. Alexander*, 2 Ohio, 65; *Stiles v. Murphy*, 4 Ohio, 92.

¹⁹³ *Harrington v. Sharp*, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365. See *H. Herman Sawmill Co. v. Martin*, 22 Ky. Law Rep. 651, 58 S. W. 524.

¹⁹⁴ 4 Kent, Comm. *435-6.

is issued thereon within a year, no lien will exist.¹⁹⁵ The lien of a judgment attaches to after-acquired property from the time the title vests in the debtor, but does not relate back to the date of the judgment. Hence the liens of all judgments in existence when the debtor acquires the property attach simultaneously and equally.¹⁹⁶

§ 433. Equitable Estates and Interests.

At common law, and generally in the absence of a statute expressly giving to it that effect, the lien of a judgment does not extend to an equitable interest held by the judgment-debtor in the land.¹⁹⁷ For instance, a judgment is not a lien upon a possible equitable interest of the debtor in a tract of land, which interest arises out of a mistake made by the sheriff, in selling the land on execution, as to the quantity contained in the tract.¹⁹⁸ In many of the states, statutes have been enacted changing the common law rule and assimilating legal and equitable estates for purposes of lien and execution. But in cases of ambiguity in such acts, or lack of specific reference to equitable interests, considerable doubt has been expressed as to the propriety of departing from the ancient rule. Thus in Oregon, although the statute enacts that a judgment shall be "a lien on all real property of the judgment-debtor not exempt from execution, owned by him in the county at the time of docketing," yet it is held that a judgment at law is not a lien upon an equitable title in land.¹⁹⁹ On the other hand, in Maryland, it is considered that a judgment is a

¹⁹⁵ Breed v. Gorham, 108 Ill. 81.

¹⁹⁶ Cayce v. Stovall, 50 Miss. 396. See *infra*, § 460.

¹⁹⁷ Morsell v. First Nat. Bank, 91 U. S. 357, 23 L. Ed. 436; *Brandles v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760; *Withnell v. Courtland Wagon Co.*, 25 Fed. 372; *Jackson v. Chapin*, 5 Cow. (N. Y.) 485; *Bogart v. Perry*, 1 Johns. Ch. 52; *Truesdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233; *Dixon v. Dixon*, 81 N. C. 323; *Powell v. Knox*, 16 Ala. 364; *Kirkwood v. Koester*, 11 Kan. 471; *Baird v. Kirtland*, 8 Ohio, 21; *Russell v. Houston*, 5 Ind. 180; *Jeffries v. Sherburn*, 21 Ind. 112; *Harrington v. Sharp*, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365; *Trask v. Green*, 9 Mich. 358; *Nessler v. Neher*, 18 Neb. 649, 28 N. W. 471; *Woolworth v. Parker*, 57 Neb. 417, 77 N. W. 1090; *Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229, 4 Pac. 332.

¹⁹⁸ *Russell v. Houston*, 5 Ind. 180. See, a similar case, *Terrell v. Prestell*, 18 Ind. 86.

¹⁹⁹ *Smith v. Ingles*, 2 Or. 43.

legal lien upon an equitable estate in lands, and binds them from its date, on the ground that the statute makes no distinction between the two species of interests.²⁰⁰ Under the statutes of Iowa, judgments of superior courts are liens upon all interests of the judgment-debtor in real estate, whether legal or equitable, and it is immaterial, as between the parties, whether such interest appears of record or not.²⁰¹ In Pennsylvania the same result is reached, but without the aid of a statute. The reason is thus stated by the court: "At common law an equitable estate is not bound by a judgment or subject to an execution, but the creditor may have relief in chancery. We have no court of chancery, and have therefore, from necessity, established it as a principle that both judgments and executions have an immediate operation on equitable estates."²⁰²

Although at common law, and so far as regards the competence of the law courts, without the aid of a statute, there is no method of making a judgment-lien effectual upon a purely equitable estate in the land held by the debtor, yet it has always been held by the courts of chancery that, for their purposes, such interests were just as much bound by the judgment as any legal estate, and could be subjected to its satisfaction through the processes of equity.²⁰³ "Courts of chancery, in adjusting the conflicting rights of creditors, following by analogy the principles of the common law, will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor."²⁰⁴ In Tennessee a judgment creates a lien upon equitable estates in land, to be asserted in a court of chancery, co-extensive with the lien which at law exists upon legal estates, and which will in like manner attach to after-acquired equitable realty.²⁰⁵

²⁰⁰ *McMeehan v. Marman*, 8 Gill & J. (Md.) 57.

²⁰¹ *Lathrop v. Brown*, 23 Iowa, 40; *Blain v. Stewart*, 2 Iowa, 378.

²⁰² *Auwerter v. Mathlot*, 9 Serg. & R. 402; *Carkhuff v. Anderson*, 3 Bin. 4; *Semple v. Mown*, 4 Phila. 85.

²⁰³ *Unknown Heirs v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *Haleys v. Williams*, 1 Leigh (Va.) 140, 19 Am. Dec. 743; *Michaux's Adm'r v. Brown*, 10 Grat. (Va.) 612; *Roach v. Bennett*, 24 Miss. 98.

²⁰⁴ *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589.

²⁰⁵ *Chapron v. Cassaday*, 3 Humph. 661. See *Weaver v. Smith*, 102 Tenn. 47, 50 S. W. 771.

§ 434. Equity of Redemption.

It is generally held that a judgment creates a lien upon an equity of redemption of real estate from the time it is recorded.²⁰⁶ And a judgment-debtor cannot, by conveying his equity of redemption to a prior mortgagee, cut off the lien of a judgment.²⁰⁷ So a judgment obtained against the owner of an equity of redemption in mortgaged premises, after a decree of foreclosure but before a sale of the premises by the master, has an equitable lien upon the surplus moneys produced by the sale under the decree; but it is otherwise if the judgment was docketed subsequent to the sale.²⁰⁸ Where, after making a contract for the sale of land, the vendor assigns his claim for the purchase-money and conveys the legal title to another as collateral security for a debt, such conveyance is in legal effect a mortgage, and the vendor has a right of redemption, or a resulting trust, which is bound by the lien of a judgment subsequently rendered against him.²⁰⁹ But in a case where a court of chancery, upon a creditor's bill, had ordered the debtor to convey his realty to a receiver appointed by the court, it was held that a judgment recovered against the debtor after his conveyance to the receiver did not create a lien upon the lands.²¹⁰ And in general, where a debtor has conveyed an estate to trustees upon an active trust, so that there remains in him nothing more than a reversionary equitable interest, and afterwards a judgment is recovered against him, its lien will not, at common law, attach to such remaining interest of the debtor. But in equity the judgment-creditor is not without remedy. For, by filing a bill for that purpose, he may secure a quasi lien, which will give him an interest in any surplus which may remain from the estate after dis-

²⁰⁶ *Bank v. Morsell*, 1 McArthur, 155; *Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460; *Taylor v. Cornelius*, 60 Pa. 187; *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 997. Compare *Blair v. Chamblin*, 39 Ill. 526, 89 Am. Dec. 322.

²⁰⁷ *Walters v. Defenbaugh*, 90 Ill. 241.

²⁰⁸ *Sweet v. Jacocks*, 6 Paige, 355, 31 Am. Dec. 252. See *Sullivan v. Leckie*, 60 Iowa, 326, 14 N. W. 355.

²⁰⁹ *Kinports v. Boynton*, 120 Pa. 306, 14 Atl. 135, 6 Am. St. Rep. 706.

²¹⁰ *Chautauqua Co. Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442.

charging the trusts and which would result to the grantor's benefit, paramount to that of the latter.²¹¹ Thus, at common law, a judgment is not a lien upon real estate which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of debts of the grantor described in the deed of trust.²¹² But in many of the states, under the statutes or settled precedents of the courts, before adverted to, which have changed the ancient rule in regard to legal liens upon equitable estates, it is now held that the resulting trust in favor of the grantor in such a trust deed is property which will be bound by the lien of a subsequent judgment, and that such lien may be enforced by levy and sale of the land subject to the incumbrance of the trust deed.²¹³ After a sale, however, under the deed of trust, the debtor's right to redeem is removed from the land and is represented by the surplus in the hands of the trustee, against which such judgment-lien is continued and may be enforced in equity.²¹⁴ But if the judgment-creditor suffers a sale to be made under the deed of trust, without getting out execution on his judgment or otherwise giving the trustee actual notice of his claim, and the latter pays over the surplus in his hands, after satisfying the objects of the trust, to the grantor, the judgment-creditor cannot recover in an action against the trustee, for the latter is not bound to search the records for possible liens upon the fund.²¹⁵

Where the statutes authorize the sale of land for delinquent taxes, but provide that the owner shall have a limited period within which to redeem from such sale, his interest in the property, during the

²¹¹ *Freedman's Savings Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301; *Brandies v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760; *McFerran v. Davis*, 70 Ga. 661; *Schroeder v. Gurney*, 10 Hun, 413; *Chautauqua Co. Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442.

²¹² *Morsell v. Bank*, 91 U. S. 357, 23 L. Ed. 436; *Marlow v. Johnson*, 31 Miss. 128. See *Johnston v. Lemmonds*, 109 N. C. 643, 14 S. E. 86.

²¹³ *Trimble v. Hunter*, 104 N. C. 129, 10 S. E. 291; *Hale v. Horne*, 21 Grat. (Va.) 112; *Pahlman v. Shumway*, 24 Ill. 127; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354.

²¹⁴ *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354.

²¹⁵ *Warner v. Veitch*, 2 Mo. App. 459; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354.

running of such period, is subject to the lien of judgments rendered against him.²¹⁶

§ 435. Judgment against Trustee.

A trustee cannot bind land held under the trust by a confession of judgment. The lien resulting from such judgment will attach to nothing but the personal interest, if any, which the trustee may have in the estate.²¹⁷ But a trustee who, without the knowledge of his cestui que trust, purchases real estate, takes the title in his own name, and pays part of the consideration with trust funds in his hands and gives his own note and mortgage for the remainder, has an interest in the land upon which a judgment against him will attach as a lien.²¹⁸

§ 436. Land held under a Power.

If land is held by one under a power of appointment which he might exercise for his own benefit, it is generally held that he has such an interest in the estate as will be bound by the lien of a judgment against him.²¹⁹ In a case in New York, it appeared that cer-

²¹⁶ *McNeill v. Carter*, 57 Ark. 579, 22 S. W. 94; *Appeal of Singer* (Pa.) 7 Atl. 800; *Hill v. Gordon*, 45 Fed. 276. It is otherwise where land is absolutely forfeited to the state for nonpayment of taxes. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

²¹⁷ *Huntt v. Townshend*, 31 Md. 336, 100 Am. Dec. 63.

²¹⁸ *Martin v. Baldwin*, 30 Minn. 537, 16 N. W. 449.

²¹⁹ *Brandies v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760. In this case *Matthews, J.*, said: "Prior to the enactment of 1 & 2 Vic. c. 110, it was settled in England that at law a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favor of a mortgagee. *Doe v. Jones*, 10 Barn. & C. 450; *Tunstall v. Trappes*, 3 Sim. 286, 300. And it was held to be immaterial that the purchaser had notice of the judgment; *Eaton v. Sanxter*, 6 Sim. 517; or that a portion of the purchase-money was set aside as an indemnity against it. *Skeeles v. Shearly*, 8 Sim. 153, s. c. on appeal, 3 Mylne & C. 112. In that case, *Sir John Leach*, the vice-chancellor, decided that the effect of the transmission of the estate by appointment was, that the appointee takes it in the same manner as if it had been limited to him by the deed under which the appointor takes in default of appointment, and, consequently, free and disconnected from any interest which the appointor had in the tenements in default of appointment; that, as the appointee is in no sense the assignee of the appointor,

tain lands were devised to trustees upon certain conditions, and with a further provision by which the cestui que trust, S., was empowered and authorized to convey and dispose, by his last will and testament, of all the said land, or any part thereof, and to limit and appoint the uses thereof in such manner as he might deem proper. In case S. should die without having made such will and appointment, then remainder in fee to his surviving issue. S. during his life conveyed several portions of the land to different grantees, and died without surviving issue. It was held that the power originally given to S. was a general power, of which he might have the exclusive benefit, and that, having exercised it, his interest in the property was to be deemed assets, upon which judgments recovered against him were equitable liens.²²⁰

§ 437. Judgment against Cestui Que Trust.

The equitable estate or interest of a cestui que trust in a dry or passive trust merely, is liable to execution and sale on a judgment recovered against him.²²¹ But in this country generally, in the absence of a statute changing the rule of the common law, a judgment is not a lien on the interest or estate of the beneficiary in an active trust, nor is there any remedy at law to enforce the payment of a judgment out of such interest or estate.²²² The creditor may indeed obtain relief upon a bill in equity, but the ground of the jurisdiction is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment

he cannot be affected by judgments which affect only the estate and interest of the appointor, and, that being so, the circumstance of his having notice of such judgments is immaterial. The statute of 1 & 2 Vic. c. 110, altered the law in this respect, by making judgments an actual charge on the debtor's property, where he has, at the time the judgment is entered up, or at any time afterward, any disposing power over it, which he might, without the assent of any other person, exercise for his own benefit; so that it would continue to bind the property, notwithstanding any appointment. 2 Sugd. Powers (7th Lond. Ed.) 33; Burt. Real Prop. (8th Lond. Ed.) 233; Hotham v. Somerville, 9 Beav. 63."

²²⁰ Tallmadge v. Sill, 21 Barb. 34.

²²¹ Doe dem. McMullen v. Lank, 4 Houst. (Del.) 648.

²²² Flanagan v. Daws, 2 Houst. (Del.) 476; Beckett v. Dean, 57 Miss. 232.

by means of an equitable execution.²²³ In an early Virginia case, it appeared that a deed of marriage settlement vested certain real estate in a trustee, in trust to pay the wife an annuity out of the profits,

²²³ *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301. In delivering the opinion of the court in this case, Matthews, J., observed: "At common law executions upon judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them. They could not be levied upon the estate of the trustee when the judgment was against the cestui que trust for the same reason; and when the judgment was against the trustee, if his legal estate should be levied on, the execution-creditor could acquire no beneficial interest, and if the levy tended injuriously to affect the interest of the cestui que trust, the latter would be entitled to relief, by injunction or otherwise, in equity. Lewin, *Trusts*, 181, 186; 2 Spence, *Eq. Jur.* 39. But as courts of equity regarded the cestui que trust as the true and beneficial owner of the estate, to whose uses, according to the terms of the trust, the legal title was made subservient, so in its eyes the estate of the cestui que trust came to be invested with the same incidents and qualities which in a court of law belonged to a legal estate, so far as consistent with the preservation and administration of the trust. This was by virtue of a principle of analogy, adopted because courts of equity were unwilling to interfere with the strict course of the law, except so far as was necessary to execute the just intentions of parties, and to prevent the forms of law from being made the means and instruments of wrong, injustice, and oppression. Thus equitable estates were held to be assignable and could be conveyed or devised, were subject to the rules of descent applicable to legal estates, to the tenancy by the curtesy, though not to dower, by an anomalous exception afterwards corrected by statute 3 & 4 Will. 4, c. 105; and were ordinarily governed by the rules of law which measure the duration of the enjoyment or regulate the devolution or transmission of estates; so that, in general, whatever would be the rule of law, if it were a legal estate, was applied by the court of chancery by analogy to a trust estate. 1 Spence, *Eq. Jur.* 502. When the object of the bill is to obtain satisfaction of the judgment, by a sale of the equitable estate, it must be alleged that execution has been issued. This is not supposed to be necessary wholly on the ground of showing that the judgment-creditor has exhausted his remedy at law; for, if so, it would be necessary to show a return of the execution unsatisfied, which, however, is not essential. Lewin, *Trusts*, 513. But the execution must be sued out; for if the estate sought to be subjected is a legal estate, and subject to be taken in execution, the ground of the jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law (*Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553); and if the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment-creditor is bound, nevertheless, to put himself in the same position as if the estate were legal, because the action of the court converts the estate, so as to make it subject to an execution, as if it were legal. The ground of

and, subject to the annuity, in trust for the grantor's son. The annuitant being yet alive, a creditor of the son recovered judgment against him and brought a bill in equity to subject the son's equitable interest in the estate to the debt. It was held that such equitable interest could not be taken in execution at law, but that it was bound by the judgment in equity, and would be applied to the satisfaction of the debt; but as the annuitant was yet living and could not be compelled to take a gross sum in satisfaction of the annuity, and as the trustee was to hold the subject and pay the annuity out of the profits, equity ought not to direct an out and out sale of the debtor's interest subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt.²²⁴ In Indiana, judgments are by statute liens on lands held in trust for the judgment debtor in their chronological order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where the plaintiff in the senior judgment is not a party.²²⁵

§ 438. Interest of Vendor under Executory Contract.

Where the owner of land executes an agreement for the sale and conveyance of the same, he continues to be the legal owner so long as any part of the purchase-money conditioned in the contract remains unpaid, and his interest in the estate (which is the fee, subject to the equitable right of the vendee) is bound by the lien of a judg-

the jurisdiction, therefore, is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest subject to prior incumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the incumbrancers according to the order in which they may be entitled to participate. *Sharpe v. Earl of Scarborough*, 4 Ves. 538. It is to be noted, therefore, that the proceeding is one instituted by the judgment-creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill."

²²⁴ *Coutts v. Walker*, 2 Leigh (Va.) 268.

²²⁵ *Maxwell v. Vaught*, 96 Ind. 136.

ment duly docketed against him after the execution of the agreement, but before the execution of a deed; and on a sale under such judgment, the sheriff's vendee succeeds to the precise situation of the original vendor, and becomes entitled to require and receive payment of the balance of the purchase-money.²²⁶ Since, however, the lien of a judgment attaches only to the real and effective interest of the debtor, and is subject to all prior rights and equities, it can never operate to pass any greater or more extensive estate than the debtor himself could have transferred by his voluntary alienation. Hence, in the case supposed, the equitable right of the vendee to require a conveyance upon fulfilling his part of the contract is not cut out or set aside by the attaching of the judgment-lien. No matter into whose hands the legal title may pass by sale under execution, the vendee's claim remains the same. And the execution purchaser's interest is limited to the amount of purchase-money remaining due, after payment of which he must convey the legal title.²²⁷ In this divided condition of the title, judgments against vendor and vendee

²²⁶ *Minneapolis & St. Louis R. Co. v. Wilson*, 25 Minn. 382; *Young v. Devries*, 31 Grat. (Va.) 304; *Stewart v. Coder*, 11 Pa. 90; *Ware v. Jackson*, 19 Ga. 452; *Gaar v. Lockridge*, 9 Ind. 92; *McMullen v. Wenner*, 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543; *Fasholt v. Reed*, 16 Serg. & R. (Pa.) 266; *Lefferson v. Dallas*, 20 Ohio St. 68; *Filley v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337; *Uhl v. May*, 5 Neb. 157; *Courtney v. Parker*, 16 Neb. 311, 20 N. W. 120 (s. c. 21 Neb. 582, 33 N. W. 262); *Olander v. Tighe*, 43 Neb. 344, 61 N. W. 633; *Wehn v. Fall*, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397; *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Wells v. Baldwin*, 28 Minn. 406, 10 N. W. 427. Per contra, *Woodward v. Dean*, 46 Iowa, 499; *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Georgetown v. Smith*, 4 Cranch, C. C. 93, Fed. Cas. No. 5,347; *Moore v. Byers*, 65 N. C. 240; *Money v. Dorsey*, 7 Smedes & M. 15.

²²⁷ *Filley v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337; *Moyer v. Hinman*, 17 Barb. 137. "The equitable title of the vendee in a contract for the purchase of land, made in good faith and for a full and adequate consideration, is superior to the lien of a judgment-creditor whose judgment is recovered with notice, actual or constructive, of such contract. The judgment is a technical lien upon the land, subject to the contract, because the legal title rests in the vendor, but to be enforced only against the interest of the latter to the extent of the unpaid purchase-money. Upon the fulfillment of the contract by the parties thereto such lien ceases, and is as effectually cut out as if the deed had been executed at the date of the contract. The judgment-debtor, having no lien, cannot afterwards apply to a court of equity to redeem from a prior mortgage." *Berryhill v. Potter*, 42 Minn. 279, 44 N. W. 251.

respectively, by their different creditors, bind the right of each in the land, whether legal or equitable.²²⁸ Now it is evident that three cases may arise, according to the situation of the parties in reference to the payment of purchase-money at the date of the docketing of the judgment. For either the whole of the price may have been paid at that time, or none of it, or a part only. And these three cases, though presenting somewhat different features, are all governed by the same general principle. In the first place, if the whole of the purchase-money has been paid by the vendee at the time judgment is entered against the vendor, the lien will indeed attach upon the title still remaining in the latter (until the execution of the deed), but it could pass no real or beneficial interest in the land. The purchaser at sheriff's sale under the judgment would acquire nothing but the naked legal title, which he would hold in trust for the vendee, and which he must convey upon demand or at the time stipulated in the agreement.²²⁹ Similarly, if, by the agreement, the whole purchase-money is to be applied to the discharge of judgments prior to the agreement, and is so applied, a judgment subsequent to the agreement is not binding on the land.²³⁰ In the next place, although none of the purchase-money has been paid, yet the contract of sale will give the vendee an equitable interest in the estate which is not to be displaced by a subsequent judgment-lien against the vendor.²³¹ The purchaser at an execution sale under the judgment would take the legal title, but he would take it charged with the contract of sale, and could demand from the vendee no more than the stipulated price. In the third place, if a part of the purchase-money has been paid and the purchaser's note given for the balance, the lien of a judgment will still attach to the vendor's interest.²³² Yet if the note given for such balance of price is passed away, before maturity, to a bona fide holder for value without notice, and is duly paid in his

²²⁸ *Chaboon v. Hollenback*, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587.

²²⁹ *Manley v. Hunt*, 1 Ohio, 257; *Lounsbury v. Purdy*, 11 Barb. (N. Y.) 490; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740. See *Brown v. Butler*, 87 Va. 621, 13 S. E. 71.

²³⁰ *Foster v. Foust*, 2 Serg. & R. (Pa.) 11.

²³¹ *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Lane v. Ludlow*, 2 Palne, 591, Fed. Cas. No. 8,052.

²³² *Bell v. McDuffie*, 71 Ga. 264.

hands (no injunction preventing either of these acts being done), then the vendor has no longer any interest in the property, and the lien is gone.²³³ An exception to the rule is sometimes based upon the fact of possession in the vendee. Thus it has been held that land in the possession of a vendee under a valid contract to purchase cannot be sold as the property of the vendor under judgments which did not obtain liens until after the contract was made.²³⁴ At any rate, it appears to be well settled that the docketing of the judgment is not notice of the lien to the purchaser in possession, since, after he has taken his contract for the purchase, he is not bound to keep the run of the dockets; and payments subsequently made by him to the judgment-debtor, pursuant to the contract, without actual notice of the judgment, are valid as against its lien upon the land.²³⁵ If the premises are sold at sheriff's sale, on a judgment against the vendor entered before the date of the contract for a sum exceeding the amount the vendee was to pay, the latter is entitled to the surplus, in preference to a creditor of the vendor whose judgment was obtained after the date of the articles.²³⁶

§ 439. Interest of Vendee under Executory Contract.

In regard to the interest of the vendee in an executory contract for the sale of lands, it must be remembered that his estate is equitable merely, the legal title remaining in the vendor, and consequently, at common law, it would not be subject to levy and sale on execution. But, as we have already seen,²³⁷ the common law rule

²³³ Riddle's Appeal (Pa.) 7 Atl. 232; Logan's Adm'r v. Pannill, 90 Va. 11, 17 S. E. 744. In Moore v. Byers, 65 N. C. 240, it was held that where a vendor of land receives part of the purchase-money and takes notes for the residue thereof, retaining the title until such notes shall be paid, and afterward a judgment is obtained against him, and he then dies, such judgment will not be a lien upon the land or the notes in the hands of his executors, but the notes, when collected, will be assets for the payment of debts.

²³⁴ Adickes v. Lowry, 15 S. C. 128; Elwell v. Hitchcock, 41 Kan. 130, 21 Pac. 109. And see Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591; Hecker v. Mourer, 8 Pa. Super. Ct. 43.

²³⁵ Moyer v. Hinman, 13 N. Y. 180; Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656.

²³⁶ Siter's Appeal, 26 Pa. 178; Crouse's Appeal, 28 Pa. 139.

²³⁷ Supra, § 433.

as to judgment-liens on equitable interests has been modified in many of the states by statutes. Hence it is held, in several jurisdictions, that where a vendee of land has paid part of the purchase-money and holds a bond for title, but has not yet received a conveyance, he has acquired such an interest in the land as will be bound by the lien of a judgment against him.²³⁸ Of course an execution-purchaser of such interest would succeed to the precise situation of the judgment-debtor, and would be entitled to demand a deed from the original vendor upon complying with the terms of the original contract, but would take no higher or greater interest. On the other hand, in some few of the states, either in pursuance of the common law doctrine or by express provision of the statutes, it is held that the interest of a debtor in a contract for the purchase of lands cannot be sold on an execution against him, but the remedy of the judgment-creditor is by a suit in equity, after his execution at law has been returned unsatisfied.²³⁹ It is also held that a conveyance with covenant of title made by a grantor who has a bond for a deed, and before he obtains the legal title, vests the legal title in the grantee *eo instante* when the grantor obtains it, and there is no space of time in which the lien of a judgment obtained against such grantor, after the conveyance was made, can attach against the land.²⁴⁰

²³⁸ *Adams v. Harris*, 47 Miss. 144; *Foster's Appeal*, 3 Pa. 79; *Auwerter v. Mathlot*, 9 Serg. & R. (Pa.) 402; *Oatlin v. Robinson*, 2 Watts (Pa.) 373; *Ralston v. Field*, 32 Ga. 453; *Harp v. Patapsco Guano Co.*, 99 Ga. 752, 27 S. E. 181; *McFarland v. Fish*, 34 W. Va. 548, 12 S. E. 548; *Damron v. Smith*, 37 W. Va. 580, 16 S. E. 807; *Davis v. Vass*, 47 W. Va. 811, 35 S. E. 826; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Jackson v. Parker*, 9 Cow. (N. Y.) 73; *Russell's Appeal*, 15 Pa. 319; *Pugh v. Good*, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534; *Waters' Appeal*, 35 Pa. 523, 78 Am. Dec. 354; *Rand v. Garner*, 75 Iowa, 311, 39 N. W. 515.

²³⁹ *Ellsworth v. Cuyler*, 9 Paige (N. Y.) 418; *Boughton v. Bank of Orleans*, 2 Barb. Ch. (N. Y.) 458; *Cooper v. Cutshall*, *Smith* (Ind.) 128; *Gentry v. Allison*, 20 Ind. 481; *Roddy v. Elam*, 12 Rich. Eq. (S. C.) 343. And see *Sweeney v. Pratt*, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101; *Rosenberger v. Jones*, 118 Mo. 559, 24 S. W. 203; *Nelson v. Turner*, 97 Va. 54, 33 S. E. 390; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350, 28 S. W. 227.

²⁴⁰ *Lamprey v. Pike* (C. C.) 28 Fed. 30. Compare *Van Camp v. Peerenboom*, 14 Wis. 65.

§ 439a. Sale of Land After Entry of Judgment.

When the lien of a judgment has once attached to land, it cannot be divested by any voluntary alienation of the property by the owner thereof; that is to say, any purchaser from the judgment debtor, who has actual or constructive notice of the lien of the judgment on the property, will take the estate charged with the lien.²⁴¹ And if a purchaser has knowledge that a judgment debtor is the real owner of the land, he will take it subject to the lien of the judgment, although the record title was in a trustee when the judgment was rendered, and the sale was not fraudulent as to creditors.²⁴² But he will take the property subject only to the amount called for by the judgment as recorded, and not subject to an usurious increase under a subsequent agreement between the creditor and the judgment debtor.²⁴³ Of course the land is charged only with the liens of such judgments as existed at the time of the purchase. A bona fide sale of real property for a fair price, with no fraudulent intent, leaves no rights in the vendor subject to the lien of a judgment subsequently recovered.²⁴⁴ But where the lien of an existing judgment is specifically excepted from the covenants of warranty in the deed, the purchaser cannot insist that his grantor's chattels shall be exhausted before the land is sold on execution under the judgment.²⁴⁵

Where the statutes provide that the lien of a judgment shall endure only for a limited period, or shall expire, or cease to be effective, after the lapse of a certain number of years, this limitation will enure to the benefit of a purchaser from the judgment debtor, so that, at the end of the statutory time, such purchaser's title will be freed from the lien of the judgment.²⁴⁶ Where a sale of a judgment debt-

²⁴¹ *Lessert v. Sieberling*, 59 Neb. 309, 80 N. W. 900; *First Nat. Bank v. Hays* (Idaho) 61 Pac. 287; *Minnich v. Shaffer*, 135 Ind. 634, 34 N. E. 987; *Stewart v. Perkins*, 110 Mo. 660, 19 S. W. 989.

²⁴² *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 48 S. W. 605.

²⁴³ *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

²⁴⁴ *Appeal of State Line & S. R. Co.*, 171 Pa. 12, 32 Atl. 1128.

²⁴⁵ *Wollam v. Brandt*, 56 Neb. 527, 76 N. W. 1081.

²⁴⁶ *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264. In Georgia, a statute provides that, when any person has purchased real property, in good faith and for a valuable consideration, and has been in possession of the same

or's property is effected by order of court, it is competent for the court (as to all parties within its jurisdiction and whose claims are before it) to direct that the sale shall be made free from all incumbrances, and that the existing liens shall be transferred to the fund arising from the sale.²⁴⁷

What has been said of voluntary conveyances in fee by a judgment debtor applies equally to conveyances by way of mortgage. When a judgment for money has attached as a lien upon real estate, a mortgage thereafter executed will not invest the mortgagee with a lien superior to that of the judgment.²⁴⁸

§ 440. Estates successively Conveyed.

A judgment-creditor cannot enforce his lien against the land of a subsequent purchaser so long as there are other lands of the debtor sufficient to satisfy the judgment.²⁴⁹ And where lands subject to the lien of a judgment have been sold or incumbered by the owner at different times to different purchasers, there is no contribution among the successive purchasers, but the various tracts are liable to the satisfaction of the judgment in the inverse order of their alienation or incumbrance, the land last sold being first chargeable. In such case, the equities between the several purchasers are equal, yet the first purchaser, having the prior equity, is preferred.²⁵⁰ A judg-

for four years, it shall be discharged from the lien of any judgment against his grantor. Civ. Code Ga. § 5355. See this statute construed in *Hale v. Robertson*, 100 Ga. 168, 27 S. E. 937; *Blalock v. Denham*, 85 Ga. 646, 11 S. E. 1038.

²⁴⁷ *Nelson v. Jenks*, 51 Minn. 108, 52 N. W. 1081. Judgments rendered before a void assignment for the benefit of creditors and the appointment of a receiver become liens on the lands of the assignor. *Younger v. Massey*, 41 S. C. 50, 19 S. E. 125.

²⁴⁸ *Beach v. Reed*, 55 Neb. 605, 76 N. W. 22. As to judgment liens in the case of a deed absolute in form but intended as a security, see *Omaha Coal, Coke & Lime Co. v. Sues*, 54 Neb. 379, 74 N. W. 620; *Main v. Bosworth*, 77 Wis. 660, 46 N. W. 1043; *Michael v. Knapp*, 4 Tex. Civ. App. 464, 23 S. W. 280.

²⁴⁹ *James v. Hubbard*, 1 Paige (N. Y.) 228.

²⁵⁰ *National Sav. Bank v. Creswell*, 100 U. S. 630, 25 L. Ed. 713; *Relfe v. Bibb*, 43 Ala. 519; *McClung v. Beirne*, 10 Leigh (Va.) 394, 34 Am. Dec. 739 (overruling *Beverley v. Brooke*, 2 Leigh [Va.] 425); *Nailer v. Stanley*, 10 Serg. & R. (Pa.) 450, 13 Am. Dec. 691; *Clowes v. Dickenson*, 5 Johns. Ch. (N.

ment-creditor, having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.²⁵¹

PART IV. DATE OF THE LIEN.

§ 441. Common Law Rule.

It was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term and are considered as rendered on that day; and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second or any succeeding day, although actually prior to the rendition of the judgment.²⁵² "This general principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded are, in a great degree, left to conjecture. One reason is assigned arguendo in the case of *Wynne v. Wynne* [1 Wils. 39] cited at the bar: that all the suitors whose cases are in such a situation as to entitle them to a judgment on the first day of the court ought to be in the same situation, and none to have any advantage over another, and as it is impossible for the

Y.) 235; *Rodgers v. McCluer's Adm'rs*, 4 Grat. (Va.) 81, 47 Am. Dec. 715; *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491; *Meek v. Thompson*, 99 Tenn. 732, 42 S. W. 685; *Bank of Hamburg v. Howard*, 1 Strob. Eq. (S. C.) 173; *James v. Hubbard*, 1 Paige (N. Y.) 228; *Merritt v. Richey*, 97 Ind. 236; *Day v. Patterson*, 18 Ind. 114; *Sidener v. White*, 46 Ind. 588; *Houston v. Houston*, 67 Ind. 276; *Jones v. Myrick's Ex'rs*, 8 Grat. (Va.) 179.

²⁵¹ *Jones v. Myrick's Ex'rs*, 8 Grat. (Va.) 179.

²⁵² *Johnson v. Smith*, 2 Burrows, 967; *Bragner v. Langmead*, 7 Term R. 20; *Waghorne v. Langmead*, 1 Bos. & P. 571; *Fann v. Atkinson*, Will. 427; *Odes v. Woodward*, 2 Ld. Raym. 766; *Robinson v. Tonge*, 3 P. Wms. 397; *Farley v. Lea*, 20 N. C. 307, 32 Am. Dec. 680; *Foust v. Trice*, 53 N. C. 494; *Harding v. Spivey*, 30 N. C. 63; *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642; *Colt v. Du Bois*, 7 Neb. 391; *Mutual Assurance Soc. v. Stanard*, 4 Munf. (Va.) 539; *Brockenbrough's Ex'x v. Brockenbrough's Adm'r*, 31 Grat. (Va.) 580; *Hooton v. Will*, 1 Dall. 450, 1 L. Ed. 218; *Sturges v. Bank of Cleveland*, 3 McLean, 140, Fed. Cas. No. 13,571.

court to give judgment in all such cases in one day, the only means of putting them upon a footing of equality is to refer all given in the same term to the first day, and give them the same effect as if they were really so. Another reason may have been to prevent debtors from withdrawing their property from the effect of judgments against them by alienations made after it was known that in the course of the term a judgment would pass. Whatever was the foundation of the rule, it operated uniformly as between different creditors, and the creditors of and purchasers from the debtor, without any exception, so far as I have been able to discover, until the case of purchasers was provided for by the statute 29 Car. 2, c. 3, § 14, which required that the true date of all judgments should be noted on the margin of the roll, and provided that they should bind, as to purchasers, only from such date. Before that statute, judgments confessed in vacation, under powers of attorney previously given for that purpose, related to the first day of the preceding term and overreached intermediate alienations. To remedy this mischief—of allowing judgments confessed under powers of attorney, when no previous suit was depending, to overreach intermediate alienations—was the chief object of the provision of the statute on that subject, as appears by its preamble. . . . But cases might occur in which judgments might be rendered during a term which could not by possibility relate to the first day; as where it appears that the plaintiff's case was not in a condition for a judgment on the first day, if the court had been prepared to hear it, and some further proceeding was indispensably necessary to mature his case for judgment. *Wynne v. Wynne*, 1 Wils. 42; *Swann v. Broome*, 3 Burrows, 1596. . . . These are the only adjudged cases I have met with in which exceptions have been allowed to the general rule, and they are founded upon obviously good reasons, that might very well apply to all cases in which it appeared that the plaintiff's case could not be matured for judgment on the first day of the term.”²⁵³

²⁵³ *Coutts v. Walker*, 2 Leigh (Va.) 268.
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§ 442. Exceptions to the Rule.

The principal exceptions to this rule of the common law have been already mentioned, in the decision quoted in the preceding section, and the authorities are generally in harmony with the conclusions there reached. Thus it is agreed that the rule does not apply to a judgment rendered during the term in a case which was in such a condition that the judgment could not have been given on the first day of the term.²⁵⁴ And at a very early day, it was held that, as between creditors, judgments by confession do not relate to the preceding term, but take priority according to the times of their entry.²⁵⁵ In North Carolina it has been adjudged that a rule of court, that all judgments docketed during the term "shall be deemed to be docketed on the first day of the term," makes them relate to the first day even when the judge fails to open court on that day.²⁵⁶ But on the other hand, in Virginia, it is considered that the lien dates only from the first day on which the court is actually in session.²⁵⁷ So, in Ohio, a mortgage handed in for record on the first day of the term of court, but before the court actually convened, was held to prevail against the lien of a judgment recovered at the same term. The court said: "At what time, then, does a term of court begin? It cannot be said that a term of court commences before the judges authorized to hold court have convened. There can be no term of court unless there is a court. If judgments attach only as liens from the beginning of the term of court, they attach from the time on the first day of the term at which the court was duly organized and opened."²⁵⁸ As against intervening purchasers, it may be regarded

²⁵⁴ *Swann v. Broome*, 3 Burrows, 1596; *Yates v. Robertson*, 80 Va. 475; *Withers v. Carter*, 4 Grat. (Va.) 407, 50 Am. Dec. 78.

²⁵⁵ *Welsh v. Murray*, 4 Dall. 320, 1 L. Ed. 850. And see *Hockman v. Hockman*, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 816.

²⁵⁶ *Norwood v. Thorp*, 64 N. C. 682.

²⁵⁷ *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642.

²⁵⁸ *Follett v. Hall*, 16 Ohio, 111, 47 Am. Dec. 365; *Holliday v. Franklin Bank*, 16 Ohio, 533. The lien of a judgment creditor, under a judgment rendered after the service of summons in a foreclosure suit against the debtor, instituted at the same term of court, is subject to the decree of foreclosure, though the judgment, by force of the statute, has a retroactive effect from

as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance.²⁵⁹ And in at least one state the common law rule has never been accepted at all. "The uniform, uninterrupted practice in Pennsylvania for more than a century [that is, a century prior to 1805] has been to consider the binding effect of judgments upon lands to take place only from the actual entry of the judgments. Judgments thus entered have never been supposed liable to be affected by fictions or relations. This custom has been used and approved since the first settlement of the province and conduces to safety and security. As between conflicting judgment-creditors, the well known rule applied to the truth of the fact as to the entry of the judgments, 'qui prior est tempore potior est jure,' must govern."²⁶⁰

§ 443. Present Statutory Rules.

That the rule of the common law, fixing the date of the lien of a judgment by relation to the first day of the term, has been abolished in a great majority of the states, and has been much modified in others, will appear from the following synopsis of the present statutes on the subject:

In Kansas,²⁶¹ Nebraska,²⁶² Ohio,²⁶³ and Wyoming,²⁶⁴ the lien at-

the first day of the term. *Appleby v. Mullaney*, 7 Ohio N. P. 120. Where a levy on land is made after the judgment is revived, the lien dates from the seizure on execution, and not from the time of the revivor. *Smith v. Hogg*, 52 Ohio St. 527, 40 N. E. 406.

²⁵⁹ *Morgan v. Sims*, 26 Ga. 283; *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49. And see *Emporia Mut. Loan & Sav. Ass'n v. Watson*, 45 Kan. 132, 25 Pac. 586.

²⁶⁰ *Welch v. Murray*, 4 Yeates, 197.

²⁶¹ Civil Code Kan. § 419; *Bowling v. Garrett*, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377.

²⁶² Code Civ. Proc. Neb. § 477; *Ocobock v. Baker*, 52 Neb. 447, 72 N. W. 582, 66 Am. St. Rep. 519; *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920. A judgment, not confessed, rendered at a term subsequent to that in which the action was commenced, is superior to a mortgage or conveyance of the debt-

²⁶³ Rev. St. Ohio, § 5375; *Jeffrey v. Moran*, 101 U. S. 285, 25 L. Ed. 785; *Urbana Bank v. Baldwin*, 3 Ohio, 65; *National Bank of Columbus v. Tennessee Coal, Iron & R. Co.*, 62 Ohio St. 564, 57 N. E. 450.

²⁶⁴ Rev. St. Wyo. § 3829; *Coad v. Cowhick*, 9 Wyo. 316, 63 Pac. 584.

taches "from the first day of the term at which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered."

In Virginia and West Virginia, the lien attaches "at or after the date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was so rendered."²⁰⁵

In seven states and territories (Arkansas, Indiana, Iowa, Missouri, New Mexico, North Carolina, and Wisconsin), the lien commences on the day of the "rendition" of the judgment.²⁰⁶

In nine states (Colorado, Dakota, California, Idaho, Montana, Minnesota, New York, Oregon, and Utah), the lien of a judgment commences from the date on which it is "docketed."²⁰⁷

In Alabama and Texas, it begins from the date on which the judgment is "registered."²⁰⁸

or's land, executed after the commencement of the term at which the judgment is rendered, though before the actual rendition of the judgment. *Hoagland v. Green*, 54 Neb. 164, 74 N. W. 424; *Norfolk State Bank v. Murphy*, 40 Neb. 735, 59 N. W. 706, 38 L. R. A. 243. A judgment revived is a lien from the date of the order of revivor. *Horbach v. Smiley*, 54 Neb. 217, 74 N. W. 623.

²⁰⁵ Code Va. § 3567; *New South Building & Loan Ass'n v. Reed*, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; *Yates v. Robertson*, 80 Va. 475; Code W. Va. p. 863, § 5; *Smith v. Parkersburg Co-Operative Ass'n*, 48 W. Va. 232, 37 S. E. 645.

²⁰⁶ Dig. St. Ark. 1884, p. 801, § 3918; Code Civil Proc. Ind. § 608; 2 McClain's Code Iowa 1888, p. 1177, § 4089; Rev. St. Mo. 1889, § 6012 (this statute provides that judgments shall be a lien on lands after their rendition, but if two or more judgments are rendered at the same term against the same person, their lien shall commence on the last day of the term. See *Bradley v. Heffernan*, 156 Mo. 653, 57 S. W. 763; *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565, 57 S. W. 1095); Code Civil Proc. N. M. § 2133; Code N. C. § 435; Rev. St. Wis. 1878, § 2902. See *Friar v. Ray*, 5 Mo. 511.

²⁰⁷ Civil Code Colo. § 211; Code Civil Proc. Dak. § 300; Code Civil Proc. Cal. § 671; Rev. St. Idaho 1887, § 4457; Comp. St. Mont. 1887, p. 139, § 307; Gen. St. Minn. 1878, c. 66, § 277; Code Civil Proc. N. Y. § 1250; Hill's Ann. Laws Or. p. 342; 2 Comp. Laws Utah 1888, p. 300, § 3414. See *Stannis v. Nicholson*, 2 Or. 332.

²⁰⁸ Act Ala. Feb. 28, 1887, § 1; Rev. St. Tex. art. 3159; *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247. See *Quinn v. Wiswall*, 7 Ala. 645; *Ala. C. & N. Co. v. State*, 54 Ala. 36; *Ex parte Dillard*, 68 Ala. 594; *Powe v. McLeod*, 76 Ala. 418.

In Arizona, from the day when the judgment is "recorded and indexed."²⁶⁹

In New Jersey, from the date of its "actual entry."²⁷⁰

In Florida, the lien commences when the judgment is "entered and pronounced in any court."²⁷¹

In Pennsylvania, the lien attaches from the date of entry or revival of the judgment.²⁷²

In Georgia and Illinois, judgments rendered at the same term are all of equal date.²⁷³

In Maine, New Hampshire, and Vermont a judgment is regarded as having been rendered on the last day of the term unless it appears by the record to have been rendered on a different day.²⁷⁴

In Maryland, according to the decisions, "a judgment has relation to the time when it is entered up. It will not affect any bona fide conveyance made for value before that time, for it only attaches upon that which is then or afterwards becomes the property of the debtor."²⁷⁵ And in Tennessee, also, the lien commences from the actual date of the judgment and has no relation back to the beginning of the term.²⁷⁶

§ 444. Cases in which Lien relates back.

There are certain cases in which, by an exception to the now commonly accepted rule, the lien may relate back to a time anterior to the actual date of the judgment. Thus, in a proceeding in rem by attachment on land, the lien of the judgment of condemnation is a specific lien on the property condemned, which relates back to the time when the attachment was laid, and ripens into a perfect legal

²⁶⁹ Rev. St. Ariz. § 2252.

²⁷⁰ Revision N. J. p. 520, § 2. See *Hunt v. Swayze*, 55 N. J. Law, 33 25 Atl. 850.

²⁷¹ McClel. Dig. Laws Fla. p. 618, § 1.

²⁷² 1 Brightley, Purd. Dig. Pa. p. 946, § 5.

²⁷³ Code Ga. 1882, § 3573; Rev. St. Ill. 1889, p. 840, § 1. See *Morgan v. Sims*, 26 Ga. 283; *Ryhiner v. Frank*, 105 Ill. 326.

²⁷⁴ *Chase v. Gilman*, 15 Me. 64; *Goodall v. Harris*, 20 N. H. 363; *New Hampshire Strafford Bank v. Cornell*, 2 N. H. 324; *Bradish v. State*, 35 Vt. 452; *Town of Huntington v. Town of Charlotte*, 15 Vt. 46.

²⁷⁵ *Dyson v. Simmons*, 48 Md. 207, 215; *Anderson v. Tuck*, 33 Md. 225.

²⁷⁶ *Murfrees Heirs v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 232.

title in the purchaser under the execution.²⁷⁷ So, upon the declaration of the forfeiture of a writ of error bond, by a judgment affirming the judgment below, the lien which springs out of it relates back to the time of its execution and binds the land of the surety in the county where the original judgment was rendered from that time.²⁷⁸ Again, "a judgment entered on the day on which the defendant's land is sold by the sheriff on an execution, is a lien on his land at the time of the sale, although entered at a later hour of the day than the sale, and is entitled to share in the proceeds."²⁷⁹ But on the other hand, a judgment for damages for detention of dower takes date, as a lien, from the time of its entry, and not from the time when the right to dower accrued.²⁸⁰ So the lien of a judgment on which execution is stayed dates not from the rendition of the judgment, but from the time when execution may be sued out.²⁸¹ And in general, except under the most exceptional circumstances, the lien cannot be considered as relating back to the time of the accrual of the cause of action.²⁸²

PART V. PRIORITY AND PRECEDENCE OF JUDGMENT-LIENS.

§ 445. Lien is Subject to Prior Rights and Equities.

The attaching of a judgment-lien upon land does not disturb the condition of the title with respect to existing equities, interests, or other liens. The new lien must simply take its place in the ranks. It is subordinate and inferior to conveyances, mortgages, or other judgment liens, previously made or procured without fraud,²⁸³ but

²⁷⁷ *Cockey v. Milne's Lessee*, 16 Md. 200. In West Virginia, on the rendition of a judgment on an attachment, the lien of the attachment is merged in the judgment, and the priority of the lien is referred back to the first day of the term. *Smith v. Parkersburg Co-Operative Ass'n*, 48 W. Va. 232, 37 S. E. 645.

²⁷⁸ *Berry v. Shuler*, 25 Tex. Supp. 140; *Shane v. Francis*, 30 Ind. 92.

²⁷⁹ *Small's Appeal*, 24 Pa. 398.

²⁸⁰ *Evans v. Evans*, 1 Phila. 113.

²⁸¹ *United States Bank v. Winston's Ex'r*, 2 Brock. 252, Fed. Cas. No. 944.

²⁸² *White v. K. & D. M. R. Co.*, 52 Iowa, 97, 2 N. W. 1016; *Lentz v. Lamplugh*, 12 Pa. 344.

²⁸³ *Horne v. Seisel*, 92 Ga. 683, 19 S. E. 709; *Martinez v. Lindsey*, 91 Ala. 334, 8 South. 787; *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272; *Wynne v. State Nat. Bank*, 82 Tex. 378, 17 S. W. 918; *Willis v. Heath* (Tex.) 18 S. W.

superior to a conveyance or incumbrance of real property of the debtor, to which the judgment lien had already attached before such conveyance or incumbrance was made,²⁸⁴ the last proposition being subject to the proviso that the judgment will not prevail against a subsequent sale or lien on the property unless it has been docketed, filed, registered, or otherwise made a matter of public record, as the local statute may provide.²⁸⁵

The lien of a judgment is also subject to all the equities which were held against the land in the hands of the judgment-debtor at the time the judgment was rendered. And if called upon in a proper case, the courts of chancery are always ready to protect the rights of those who hold such equities, as against the legal lien of the judgment, and to confine the efficacy of the latter to the actual interest, or residuary estate (so to speak) of the debtor, after due recognition is given to the outstanding equities in their proper order.²⁸⁶ Thus a

801; *Anglo-American Land, Mortgage & Agency Co. v. Bush*, 84 Iowa, 272, 50 N. W. 1063. As to prior fraudulent or invalid conveyances or mortgages, see *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960. A chattel mortgage filed before a judgment in a justice's court will prevail over an execution issued on such judgment. *Woolner v. Levy*, 48 Mo. App. 469. A deed made by an insane person not under guardianship is voidable only; it passes title so that a judgment thereafter rendered will not be a specific lien on the property conveyed until the conveyance is actually avoided. *French Lumbering Co. v. Theriault*, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

²⁸⁴ *Well v. Casey*, 125 N. C. 356, 34 S. E. 508, 74 Am. St. Rep. 644; *Gulley v. Thurston*, 112 N. C. 192, 17 S. E. 13. Where land is omitted from a mortgage by mistake, the lien of a judgment subsequently filed against the mortgagor is subject to the equity of the mortgagee. *Chadron Building & Loan Ass'n v. Hamilton*, 45 Neb. 369, 63 N. W. 808. That one buys land for a full price, in good faith, and without notice, is of no avail against the lien of a prior judgment. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457.

²⁸⁵ See *Sweetland v. Buell*, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676; *McKenna v. Van Blarcom*, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

²⁸⁶ *Finch v. Earl of Winchelsea*, 1 P. Wms. 277; *Pierce v. Brown*, 7 Wall. 205, 19 L. Ed. 134; *Sweet v. Jacobs*, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Ells v. Tousley*, 1 Paige (N. Y.) 280; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Floyd v. Harding*, 28 Grat. (Va.) 401; *Walke v. Moody*, 65 N. C. 599; *Coster's Ex'rs v. Bank of Georgia*, 24 Ala. 37, 64; *Larther v. Hogan*, 1 La. Ann. 330; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Frazer v. Thatcher*, 49 Tex. 26; *Wharton v. Wilson*, 60 Ind. 591; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. 950; *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444; *Goodell v. Blumer*, 41 Wis. 436.

lien by contract upon real property, prior in time to the judgment, is paramount to the judgment-lien, though the judgment-creditor has no notice or knowledge of such prior lien by contract, and a purchaser at execution-sale under the judgment, with notice, actual or constructive, acquires no greater interest than the judgment-debtor had.²⁸⁷ In a case where a person who had contracted for the purchase of land obtained a deed for the same from the vendor under an agreement that it should not be used until the balance of the purchase-money then due was paid, it was held that this was a valid delivery of the deed to pass the legal title to the land to the vendee subject to the vendor's equitable lien for the unpaid purchase-money, and that such balance of price must be paid in preference to a judgment against the vendee which was a lien upon his estate in the land.²⁸⁸ A specific equitable lien upon land is entitled to a preference over a subsequent legal lien by judgment. But an equitable lien created to secure an antecedent indebtedness (for example, an agreement by a debtor to execute a mortgage to his creditor) is not entitled to a preference over a lien by judgment where both attach upon the land at the same time.²⁸⁹ Nor are judgment-creditors protected against

²⁸⁷ *Doswell v. Adler*, 28 Ark. 83.

²⁸⁸ *Arnold v. Patrick*, 6 Paige (N. Y.) 310. In a later case in the same state it was said: "The question as to the extent to which a secret, equitable, and unrecorded lien of a vendor, for unpaid purchase-money of lands sold and conveyed by him, exists as against a judgment-creditor after the lien is recorded, or other parties than the vendee, must depend upon the facts and circumstances of the particular case. Such lien cannot exist generally against purchasers in good faith, under a conveyance of the legal estate, without notice, when the purchase-money has been paid. The general rule stated applies more particularly to cases where it is sought to enforce an equitable lien for the purchase-money, which has never been put on record as against subsequent mortgagees or purchasers in good faith and for a valuable consideration. In such a case it is too clear to admit of any question that the rights of the person claiming such equitable lien should yield, by reason of his neglect, to the claims of subsequent incumbrancers or purchasers, and it may well be asserted that a prior claimant for the purchase-money, under such circumstances, has, by his silence and neglect, yielded his right." *Spring v. Short*, 90 N. Y. 538. See *Tallman v. Farley*, 1 Barb. 280. In *Valentine v. Seiss*, 79 Md. 137, 28 Atl. 892, it is held that an unrecorded contract for the sale of land, made in good faith for a valuable consideration, takes precedence of the general lien of a subsequent judgment.

²⁸⁹ *Dwight v. Newell*, 3 N. Y. 185.

trusts of which they have no notice, or allowed in equity to hold against the cestui que trust.²⁹⁰ An opinion counter to the general rule has sometimes been expressed in Pennsylvania. In a case in that state it appeared that A. advanced money to B. and took his judgment therefor, on the faith of an entry of satisfaction of a prior judgment; but upon the application of the equitable assignee of the prior judgment, the court struck off the entry of satisfaction. In the distribution of the proceeds of a sheriff's sale of B.'s real estate, it was held that A. was entitled to be paid in full, before the prior judgment could participate in the distribution; for A. was not required to look into equities to which he was not a party and of which he had no knowledge.²⁹¹

§ 446. As against Prior Unrecorded Conveyance.

In many of the states there are statutes which make a deed or mortgage invalid, as against subsequent bona fide purchasers and creditors, unless it is duly recorded. And where the law stands thus, it is generally held that the lien of a judgment is to be preferred to a conveyance executed before the rendition of the judgment but not recorded until afterwards, provided that the judgment-creditor has no actual notice of the existence of such prior conveyance.²⁹² "As a

²⁹⁰ *Shryock v. Waggoner*, 28 Pa. 430.

²⁹¹ *Harner's Appeal*, 94 Pa. 480.

²⁹² *United States v. Devereux*, 32 C. C. A. 564, 90 Fed. 182; *Lash v. Hardick*, 5 Dill. 505, Fed. Cas. No. 8,097; *Hunt v. Swayze*, 55 N. J. Law, 33, 25 Atl. 850; *McClure v. Thistle's Ex'rs*, 2 Grat. (Va.) 182; *Young v. Devries*, 31 Grat. (Va.) 304; *Robinson v. Commercial & Farmers' Bank (Va.)* 17 S. E. 730; *Blakemore v. Wise*, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; *Price v. Wall's Ex'r*, 97 Va. 334, 33 S. E. 599, 75 Am. St. Rep. 788; *Anderson v. Nagle*, 12 W. Va. 98; *Andrews v. Mathews*, 59 Ga. 466; *Motley v. Jones*, 98 Ala. 443, 13 South. 782; *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 58 Miss. 846; *Cavanaugh v. Peterson*, 47 Tex. 198; *Firebaugh v. Ward*, 51 Tex. 409; *Russell v. Nall*, 2 Tex. Civ. App. 60, 23 S. W. 901; *Hawkins v. Files*, 51 Ark. 417, 11 S. W. 681; *Cleveland v. Shannon (Ark.)* 12 S. W. 497; *Mayham v. Coombs*, 14 Ohio, 428; *Guiteau v. Wisely*, 47 Ill. 433; *Smith v. Willard*, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; *Vause v. Templeton*, 87 Ill. App. 455; *Reed v. Austin's Heirs*, 9 Mo. 722, 45 Am. Dec. 336; *Frothingham v. Stacker*, 11 Mo. 77; *Belcher v. Curtis*, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376; *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. 468; *Hall v. Sauntry*, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497; *Lewis v. Atherton*, 5 Okl.

general proposition," says the court in Texas, "a judgment lien only attaches to the actual interest of the debtor in the land; but on account of our registration laws, ordinarily, if the judgment-lien attaches before the creditor has notice of the existence of the unrecorded deed, then such deed is subordinated to the lien, and subsequent notice of the existence of the deed would work no change in the rights of the parties."²⁹³ But this applies only to a creditor who is not informed as to the prior deed or mortgage. If, at the time of docketing the judgment, he has notice of the unrecorded conveyance, the judgment lien will take second place.²⁹⁴ And this notice may very well be constructive, or inferred from circumstances. Whatever is sufficient to charge a purchaser with notice is sufficient to charge a judgment creditor.²⁹⁵ Thus, an unrecorded deed will take precedence over a subsequent judgment against the grantor, where the grantee was in actual, open, and notorious possession under the deed, and especially where he has given a purchase-money mortgage for part of the price, and the same is duly recorded.²⁹⁶ But the mere fact that the land, being unimproved, is inclosed, and is advertised as being for sale, by signs posted on the property, is not sufficient to put the judgment creditor on inquiry.²⁹⁷ If the latter had no notice of the unrecorded deed at the time the judgment was rendered or placed on the docket, his rights are not affected by the fact that he acquires knowledge of such deed at the time he sells the

90, 47 Pac. 1070. This rule does not apply (in Illinois) to holders of judgments on claims allowed against the estate of a decedent, such judgments not being liens on lands left by the latter. *Noe v. Montray*, 170 Ill. 169, 48 N. E. 709. And a statute placing judgment creditors on the same footing with bona fide purchasers, as against unrecorded conveyances, does not give them priority over a resulting trust which cannot be made a matter of record. *School District No. 10 v. Peterson*, 74 Minn. 122, 76 N. W. 1126, 73 Am. St. Rep. 337.

²⁹³ *Calvert v. Roche*, 59 Tex. 463.

²⁹⁴ *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281; *Stovall v. Odell*, 10 Tex. Civ. App. 169, 30 S. W. 66; *Barnett v. Squyres* (Tex. Civ. App.) 52 S. W. 612. Compare *Winston v. Hodges*, 102 Ala. 304, 15 South. 528.

²⁹⁵ *H. C. Tack Co. v. Ayers*, 56 N. J. Eq. 56, 38 Atl. 194.

²⁹⁶ *Adam v. Tolman*, 180 Ill. 61, 54 N. E. 174. And see *Powell v. Allred*, 11 Ala. 318; *Northwestern Land Co. v. Dewey*, 58 Minn. 359, 59 N. W. 1065; *Gardom v. Chester*, 60 N. J. Eq. 238, 46 Atl. 602. Compare *Hill v. Gordon* (C. C.) 45 Fed. 276.

²⁹⁷ *Clark v. Butts*, 73 Minn. 467, 76 N. W. 263.

land under an execution on his judgment.²⁹⁸ And although, as stated, an unrecorded deed will take precedence as against a judgment creditor, if, before the recovery of his judgment, he has actual notice of the conveyance by the debtor, yet the assignee of such judgment, who buys without notice that his assignor had notice before the rendition of the judgment of the unrecorded conveyance, is not affected by the notice to his assignor.²⁹⁹ And so, while a mortgage imperfectly recorded is ineffectual as a lien against subsequent judgment-creditors, yet if there be a second mortgage, between the first and the judgments in point of time, to which the proceeds of the mortgaged premises when sold would be paid, and this mortgagee had actual notice of the first mortgage when he took his own, the first mortgage is good as to him, and therefore is entitled to have the money appropriated to it.³⁰⁰

But in a number of states the statutes are such that a deed or mortgage is valid without being recorded. And in these jurisdictions the courts adhere to the rule that a judgment is a lien only upon the actual interest of the debtor, and consequently that the judgment acquires no lien at all if the land has been previously conveyed away, although the deed is not recorded, or that its lien is subordinated to that of a prior unrecorded mortgage.³⁰¹ But if there be a sale made under such subsequent judgment to a third person, for value paid and without notice, the rights of such purchaser will take priority over those of the grantee in an unrecorded deed or mortgage.³⁰²

²⁹⁸ *Smith v. Willard*, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; *Russell v. Nall*, 2 Tex. Civ. App. 60, 23 S. W. 901.

²⁹⁹ *Duke v. Clark*, 58 Miss. 465.

³⁰⁰ *Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

³⁰¹ *Sparks v. State Bank*, 7 Blackf. (Ind.) 469; *Schroeder v. Gurney*, 73 N. Y. 430; *Mellon's Appeal*, 32 Pa. 121; *Larimer's Appeal*, 22 Pa. 41; *Norton v. Williams*, 9 Iowa, 528; *Bell v. Evans*, 10 Iowa, 353; *Wilcoxson v. Miller*, 49 Cal. 193; *Hampton v. Levy*, 1 McCord Eq. (S. C.) 107; *Farley v. McAlister*, 39 Tex. 602; *Smith v. Savage*, 3 Kan. App. 556, 43 Pac. 847; *Stanhillber v. Graves*, 97 Wis. 515, 73 N. W. 48; *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841. For the rule in Georgia, see *Balley v. Balley*, 93 Ga. 768, 21 S. E. 77; *Donovan v. Simmons*, 96 Ga. 340, 22 S. E. 966; *Lytle v. Black*, 107 Ga. 386, 33 S. E. 414.

³⁰² *Evans v. McGlasson*, 18 Iowa, 150; *Paine's Lessee v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585.

§ 447. Precedence of Purchase-Money Mortgage.

A mortgage or trust-deed given to secure the balance of purchase-money on a tract of land, executed simultaneously with the conveyance of the legal title and duly recorded, has priority of lien over judgments obtained against the purchaser anterior to the conveyance.³⁰³ In such case, the purchaser acquires only a temporary seisin, and not such an interest in the land as becomes subject to the lien of a judgment against him in preference to the mortgage, as the deed and the mortgage are but parts of the same transaction.³⁰⁴ And where the purchaser, at the same time he receives the conveyance, executes a mortgage to a third person, who advances the purchase-money for him, such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself.³⁰⁵ Thus if A. executes a deed of land to B., and B. mortgages it to C., and also conveys it back to A., the two deeds and mortgage being executed as parts of one transaction solely to enable B. to procure a loan from C., no lien of a judgment held by D. against B. at the time thereof can attach to B.'s interest, and no execution afterward issued can be levied thereon.³⁰⁶ But where a judgment debtor acquires title to land after the judgment has been obtained, and immediately executes a mortgage thereof to a third person to secure him against some distinct debt or liability, and not to secure the purchase-money of the land, the judgment will be the elder lien.³⁰⁷

³⁰³ *Cake's Appeal*, 23 Pa. 186, 62 Am. Dec. 328; *Parsons v. Hoyt*, 24 Iowa, 154; *Scott v. Warren*, 21 Ga. 408; *Straus v. Bodeker's Ex'x*, 86 Va. 543, 10 S. E. 570; *Cowardin v. Anderson*, 78 Va. 88; *Summers v. Darne*, 31 Grat. (Va.) 791; *Clark v. Munroe*, 14 Mass. 351; *Clark v. Butler*, 32 N. J. Eq. 664; *Curtis v. Root*, 20 Ill. 53; *Courson v. Walker*, 94 Ga. 175, 21 S. E. 287. Compare *Roane v. Baker* (Ill.) 2 N. E. 501.

³⁰⁴ *Cowardin v. Anderson*, 78 Va. 88.

³⁰⁵ *Haywood v. Nooney*, 3 Barb. (N. Y.) 643; *Cowardin v. Anderson*, 78 Va. 88; *Clark v. Munroe*, 14 Mass. 351; *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. 519.

³⁰⁶ *Ransom v. Sargent*, 22 Kan. 516.

³⁰⁷ *Root v. Curtis*, 38 Ill. 192; *Well v. Casey*, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644.

§ 448. Priority of Government Claims.

It is provided, by section 346 of the Revised Statutes of the United States, that "whenever any person indebted to the United States is insolvent . . . the debts due the United States shall be first satisfied," and this priority is declared to extend to cases in which an act of bankruptcy is committed. Section 5101 provides that in the order for a dividend in a bankruptcy proceeding, after paying certain costs and expenses, "debts due the United States shall have priority."⁸⁰⁸ It may now be regarded as settled that the priority of the United States, given by these statutes, "does not overrule any liens upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency."⁸⁰⁹

It is competent for the legislature of a state to enact that taxes assessed against real property shall constitute a paramount lien or claim upon the same, and shall take precedence of all other liens, however created, whether by mortgage, judgment, or otherwise. When such a law is in force (as is the case in several of the states), the lien of a judgment against the owner will be subordinated and postponed to the statutory lien of taxes on the property, even though the judgment was recovered before the levy or assessment of the taxes; and a valid and completed sale for the taxes will divest the lien of the judgment, leaving to the creditor only the right to come upon the surplus, if any, or to redeem from the tax sale.⁸¹⁰

In some states, it is held that a judgment obtained against one in his lifetime has the preference over a debt or specialty passed to the

⁸⁰⁸ And see Bankr. Act 1898, § 64, par. "b," cl. 5.

⁸⁰⁹ *United States v. Lewis*, 13 N. B. R. 38, Fed. Cas. No. 15,595; *Cottrell v. Pierson* (C. C.) 12 Fed. 805; *Hoppock v. Shoher*, 69 N. C. 153; *Conard v. Atlantic Ins. Co.*, 1 Pet. 438, 7 L. Ed. 189; *Brent v. Bank of Washington*, 10 Pet. 506, 9 L. Ed. 517. In so far as the early case of *Thelusson v. Smith*, 2 Wheat. 396, 4 L. Ed. 271, may have asserted a different doctrine, it must be regarded as overruled by the later decisions above cited.

⁸¹⁰ See Black, *Tax Titles*, §§ 185, 186, 426; *First Nat. Bank v. Hendricks*, 134 Ind. 361, 33 N. E. 110; *Eaton's Appeal*, 83 Pa. 152; *Jenkins v. Newman*, 122 Ind. 99, 23 N. E. 683; *Dunlap v. Gallatin Co.*, 15 Ill. 7; *Keating v. Craig*, 73 Mo. 507; *Hardenbergh v. Converse*, 31 N. J. Eq. 500; *Staunton v. Harris*, 9 Heisk. (Tenn.) 579.

state after such judgment, in the settlement of the estate of the decedent.⁸¹¹

§ 449. **Priority by Date of Entry.**

By reference to a preceding section it will be seen that in at least seventeen states and territories, by the statutes, the lien of a judgment commences from the day when it is docketed or registered or the date of its actual entry. And it is a general rule that, as between all judgment liens entered at different times, that which was first docketed has the preference.⁸¹² And on similar principles, where several judgment creditors resort to equity to subject an equitable interest of their debtor in land to the satisfaction of their judgments, they will be entitled to satisfaction according to the priority of their judgments in point of time.⁸¹³ As between a judgment at law and a decree in equity, where the law requires both to be enrolled; the same rule obtains; and where a decree is obtained prior to a judgment against the same defendant, but the judgment is enrolled before the decree, the judgment takes the precedence.⁸¹⁴ As between a judgment in another county and a mortgage, priority of lien is deter-

⁸¹¹ Hollingsworth v. Patten's Adm'x, 3 Har. & McH. (Md.) 125.

⁸¹² Johnson v. Mitchell, 17 Ga. 593; Puryear v. Taylor, 12 Grat. (Va.) 401; Stewart v. Wheeling & L. E. Ry. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Hagadorn v. Hart, 62 Hun, 94, 16 N. Y. Supp. 625; Max Meadows Land & Imp. Co. v. McGavock, 98 Va. 411, 36 S. E. 490; Osborne v. Hill, 91 Ga. 137, 16 S. E. 965. Under a statute providing that entries on the judgment docket "shall be so made that one shall follow the other in the order of time in which the said judgments shall have been rendered," priority of position on the page of the docket prima facie implies priority of date. In re Kann's Estate, 171 Pa. 262, 32 Atl. 1095. But a judgment which, on its face, is prior in date to another judgment, anterior in position on the judgment docket, will have priority over such judgment in distribution. Buhl v. Wagner, 22 Pa. Co. Ct. R. 608; In re Kaun's Estate, supra. Where two judgments are erroneously docketed and indexed, the one first entered has priority. In re Shaver, 18 Pa. Co. Ct. R. 202.

In Illinois, where the statute provides that "there shall be no priority of the lien of one judgment over that of another rendered at the same term of court or on the same day in vacation," it is held that executions on judgments confessed on different days in vacation are entitled to priorities. Coe v. Hallam, 173 Ill. 461, 50 N. E. 1072.

⁸¹³ Haleys v. Williams, 1 Leigh (Va.) 140, 19 Am. Dec. 743.

⁸¹⁴ McKee v. Gayle, 46 Miss. 676.

mined by priority of registration in the county where the land is situated.³¹⁵ A judgment for a firm debt has no priority over a judgment previously obtained against the several members of the firm on their individual liabilities, and the purchaser at a sale under execution to enforce the latter judgment takes a good title as against the purchaser at a sale under the former.³¹⁶ So the lien of a judgment rendered pending a petition for divorce, and before the rendition of a decree for alimony, is superior to that of the decree, where the petition does not allege a claim to any specific tract of land, or pray for alimony by way of annuity upon the husband's real estate generally.³¹⁷ It should also be remarked that the lien of a judgment depends upon the condition of the record at the time of its entry, and cannot be affected by a subsequent revival of an earlier judgment giving such senior judgment creditor rights which did not exist at the time of the entry of the junior judgment.³¹⁸

The same rule which applies as between two judgments also governs the case of a conflict between a judgment and a conveyance, where the laws require the latter to be registered.³¹⁹ Thus, according to a late case, under a statute providing that judgments shall be entered by the clerk on the judgment docket of the court, and, if docketed within ten days from the end of the term, shall be a lien on the debtor's real estate from the beginning of the term, a deed exe-

³¹⁵ *Firebaugh v. Ward*, 51 Tex. 409.

³¹⁶ *Davis v. Delaware & H. Canal Co.*, 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418. The law is the same also in the converse case; subsequent judgments against the individual members of the firm are postponed to a prior judgment against the firm. *Stevens v. Bank of Central New York*, 31 Barb. (N. Y.) 290.

³¹⁷ *Hamlin's Lessee v. Bevans*, 7 Ohio, 161, pt. 1, 28 Am. Dec. 625.

³¹⁸ *Young v. Young*, 20 Pa. Co. Ct. R. 45. But the equitable right of a judgment creditor, whose judgment is recovered after an entry of satisfaction entitling him to priority over a senior judgment creditor, which satisfaction is set aside, can be enforced only where the property of the debtor is more than sufficient to pay intermediate judgments between his and that of the senior judgment creditor. *McCune v. McCune*, 164 Pa. 611, 30 Atl. 577.

³¹⁹ Under Code N. C. § 435, which makes a docketed judgment a lien on "all the land" of the debtor in the county where it is docketed, from the date of the docketing, the lien of a judgment has priority over the liens of mortgages on the homestead executed subsequently to the docketing of such judgment. *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483.

cuted in November is superior to a judgment rendered in the preceding August and docketed in the following July.³²⁰ And where a judgment is a prior lien to a mortgage, a purchaser under the judgment will stand in the place of the judgment-creditor and take precedence of the mortgage, although his title under the sheriff's sale be defective.³²¹ It remains to notice certain exceptional cases wherein a departure from the foregoing rule has been sanctioned. These are mostly governed by considerations of justice and equity. Thus, where money is made under several executions issued on different judgments, that issuing upon the elder judgment is not entitled to priority of satisfaction if it has been delayed or suspended in fraud of the rights of other creditors.³²² So where, upon promissory notes given for the purchase-money of land and secured by an express lien or equitable mortgage in the deed of conveyance, several judgments are rendered, in favor of two different holders of such notes, against the maker, each of the judgments is entitled to share in the proceeds of the land, even though one may have been recovered and enrolled before the other.³²³ In a case in West Virginia, where two judgments had been recovered, one in 1868 and the other in 1869, and the one last recovered was docketed in 1870, while the one first obtained was docketed in 1871, but both were docketed before a contract in writing or deed to a purchaser for valuable consideration without notice was recorded, it was held that the judgment first recovered, though last docketed, had priority.³²⁴

§ 450. Two Judgments entered the Same Day.

The rule obtaining in a majority of the states is that, as between judgments entered of record on the same day, there is no priority, for the law cannot in this case regard fractional parts of a day; hence all such judgments create equal liens, and the issuing of an execution on any one of them does not affect the others, but, the land of the defendant being sold, a pro rata distribution of the proceeds must

³²⁰ *Holman v. Miller*, 103 N. C. 118, 9 S. E. 429.

³²¹ *Walt's Ex'r v. Savage* (N. J.) 15 Atl. 225.

³²² *Grand Gulf Bank v. Henderson*, 5 How. (Miss.) 292.

³²³ *Aaron v. Warner*, 62 Miss. 370.

³²⁴ *Anderson v. Nagle*, 12 W. Va. 98.

be made in satisfaction of the judgments.³²⁵ In North Carolina, however (and in a few sporadic cases elsewhere), it is held that where several judgments are docketed on the same day, the court will inquire into the fractional part of a day, in order to ascertain which was the first entered and give it the preference.³²⁶ In New York, the statute requires the clerk of the court to docket a judgment by entering upon the docket book certain particulars, including "the day, hour, and minute when the judgment roll was filed, and the day, hour, and minute when the judgment was docketed in his office."³²⁷ And judgments entered the same day will take rank according to the exact time when they were placed upon the docket. In some other states, the doctrine is that where two judgments in favor of different plaintiffs against the same defendant are filed and docketed on the same day, neither has the preference as a lien; but if one of the creditors first takes out an execution and delivers it to the sheriff before the other creditor takes out his execution, and the lands of the debtor are taken and sold, a priority will be gained by the vigilant creditor, and his execution must be first satisfied.³²⁸ In Mississippi, the question of the priority of the rendition of two judgments in the same court is to be determined by the minutes of the court, and it is not admissible to show by evidence aliunde that the one last entered was in fact first rendered.³²⁹

³²⁵ Claason's Appeal, 22 Pa. 359; Metzler v. Kilgore, 3 Pen. & W. (Pa.) 245, 23 Am. Dec. 76; Ladley v. Creighton, 70 Pa. 490; Mechanics' Bank v. Gorman, 8 Watts & S. (Pa.) 304; Clawson v. Eichbaum, 2 Grant, Cas. (Pa.) 130; Emerick v. Garwood, 1 Browne (Pa.) 20; Rockhill v. Hanna, 4 McLean, 554, Fed. Cas. No. 11,080; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891; Bruce v. Vogel, 38 Mo. 100; Janney's Ex'r v. Stephen's Adm'r, 2 Pat. & H. 11; Burney v. Boyett, 1 How. (Miss.) 39.

³²⁶ Bates v. Hinsdale, 65 N. C. 423; Lemon v. Staats' Heirs, 1 Cow. (N. Y.) 502; Biggam v. Merritt, Walk. (Miss.) 430, 12 Am. Dec. 576.

³²⁷ Code Civ. Proc. § 1246. A similar rule prevails in Alabama. See German Security Bank v. Campbell, 99 Ala. 249, 12 South. 436, 42 Am. St. Rep. 55.

³²⁸ Lippencott v. Willson, 40 Iowa, 425; Tilford v. Burnham, 7 Dana, 109; Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76; Kesterson v. Tate, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419.

³²⁹ Johnson v. Edde, 58 Miss. 664; Herron v. Walker, 69 Miss. 707, 12 South. 259.

§ 451. Judgment and Conveyance entered the Same Day.

The doctrine has sometimes been expressed that a judgment entered on a given day, no matter at what hour, is a lien during the whole of that day, and therefore has preference over a mortgage or other conveyance recorded at any hour of the same day.³³⁰ But this view is generally rejected, as too refined and artificial, although, in some states, a distinction is still made between a deed and a mortgage, as to their respective rank as against a judgment docketed on the same day. It may now be regarded as well settled that, in a contest between a vendee of the land and a judgment-creditor whose judgment was docketed on the same day with the conveyance, the fractions of the day must be taken into consideration, the precise time of each ascertained, and the rule applied "first in order first in right."³³¹ In the language of Chief Justice Gibson of Pennsylvania, "the argument that a judgment, whose date in contemplation of law covers the whole day, is necessarily anterior to a conveyance at an intermediate point of the same day, is too subtle to be solid. The conclusion attempted would not be borne out by the most fanciful effect of the legal fiction; for it might be possible to deliver a conveyance so exactly at the stroke of twelve as to leave no room for an intervening lapse of any appreciable portion of time. But justice is not to be dispensed on principles so artificial where it can be avoided. When judgments bear the same date, they must necessarily come in together; but between a judgment and a conveyance, actual priority must be shown like any other fact."³³² The last statement in the foregoing quotation,—that the precise time of entry of the judgment may be shown by less than record proof,—though reasonable and well calculated to promote justice, is not everywhere accepted. In at least one state, the courts refuse to hear evidence outside the rec-

³³⁰ *Hollingsworth v. Thompson*, 5 Har. (Del.) 432. See *Boyer's Estate*, 51 Pa. 432, 91 Am. Dec. 129.

³³¹ *Clawson v. Elchbaum*, 2 Grant, Cas. (Pa.) 130; *Mechanics' Bank v. Gorman*, 8 Watts & S. (Pa.) 304; *Small's Appeal*, 24 Pa. 398; *Ladley v. Creighton*, 70 Pa. 490; *Murfree's Heirs v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

³³² *Mechanics' Bank v. Gorman*, 8 Watts & S. 304; *Hoppock's Ex'rs v. Ramsey*, 28 N. J. Eq. 413.

ord, on the question of the actual priority of the judgment and the deed, and award the precedence to the lien of the former unless it actually appears of record to have been subsequent to the conveyance.³³³ In a contest of this sort, it is held, the lien of the judgment takes effect from its rendition by the judge, and not from the time of signing the minutes of the court.³³⁴

In a contest for priority between a mortgagee of the land and a judgment-creditor whose judgment was docketed on the same day with the mortgage, it seems reasonable to accord to the former the same rights and privileges that are granted to a purchaser. And in Tennessee this is the accepted doctrine. The hour of entry may be inquired into, and actual priority will give legal precedence.³³⁵ But in Pennsylvania the rule is otherwise. Evidence is not admissible of the hour at which the judgment was rendered; if the judgment-lien and the mortgage-lien are created on the same day, they are entitled to equality of distribution.³³⁶ "The fractional division of a day cannot be noticed in determining the time when the lien of a judgment attached. If it could be, there is nothing on the record of this judgment to show whether it was entered at an earlier or a later moment than the mortgage. The rule in such cases is to treat the two liens as commencing simultaneously, and if the land of the debtor is not sufficient to pay both, the loss must be divided in equal proportions."³³⁷

§ 452. Judgment given to secure Future Advances.

Though a judgment confessed to secure future advances to be made to the borrower himself will, in equity, be postponed to a subsequent bona fide judgment for a subsisting debt, except for such advances as had been made before the second judgment was obtain-

³³³ *Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. (Tenn.) 312.

³³⁴ *Clark v. Duke*, 59 Miss. 575.

³³⁵ *Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. (Tenn.) 312.

³³⁶ *Clawson v. Elchbaum*, 2 Grant, Cas. (Pa.) 130; *Claason's Appeal*, 22 Pa. 350; *Hendrickson's Appeal*, 24 Pa. 363. And see *Goetzinger v. Rosenfeld*, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257.

³³⁷ *Hendrickson's Appeal*, 24 Pa. 363.

ed, yet a judgment confessed to secure existing debts which the plaintiff agrees to pay or assume, to the amount of the judgment, does not come within that category, and is valid from the date, against subsequent liens, although at the date of the confession no debt is specified except one due to the plaintiff himself.³³⁸ A judgment entered on a bond conditioned that the obligor will pay to the obligee the sum of all notes, checks, drafts, and obligations which B. has incurred or may hereafter incur to a certain bank, is a lien for future advances as against intervening incumbrances only from the date of such future advances.³³⁹

§ 453. Prior Undocketed Judgment.

As we have already shown, a judgment does not attach as a lien upon real estate until it is duly entered of record. Hence a prior undocketed judgment will be postponed to a subsequent conveyance or incumbrance effected in good faith and put on record.³⁴⁰ And if, before the purchase of real estate, the purchaser, having received information that a transcript of a judgment against the owner has been filed, goes to the proper officers, and in good faith causes an examination of the records to be made, and they disclose the fact that there is no judgment-lien, he is justified in acting upon the belief that there is none.³⁴¹ But if a judgment is actually recorded, the fact that a party is ignorant of it is due to his own negligence, against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault.³⁴²

³³⁸ Walker v. Arthur, 9 Rich. Eq. (S. C.) 397.

³³⁹ Kerr's Appeal, 92 Pa. 236.

³⁴⁰ Corley v. Renz (Tex. Civ. App.) 24 S. W. 935; Dotterer v. Harden, 88 Ga. 145, 13 S. E. 971.

³⁴¹ Bell v. Davis, 75 Ind. 314. It has even been held that actual notice by a purchaser of land of an undocketed judgment does not render the judgment a lien on the land, as against him. Glasscock v. Stringer (Tex. Civ. App.) 32 S. W. 920; Sklower v. Abbott, 19 Mont. 228, 47 Pac. 901.

³⁴² Bunn v. Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48.

§ 454. As against Subsequent Dower Right.

Where the lien of a judgment has attached to land, and the owner afterward marries, the lien is not thereby divested or postponed to the wife's inchoate right of dower created by the marriage.³⁴³ But if the lien attaches subsequent to the marriage, it will be subordinate to the wife's right of dower.³⁴⁴

§ 455. Priority by Superior Diligence.

In cases where several judgments have an exact equality of lien, it will sometimes happen that one of the creditors, by his superior activity and diligence, will put himself in a position to claim a preference over the other, and such claim is always recognized and enforced. This is the case, in some states, where two judgments are entered on the same day, but one creditor sues out execution while the other remains inactive.³⁴⁵ And this claim, founded on superior vigilance, will sometimes even result in elevating a junior judgment above the rights of the elder lien. Thus, where plaintiff and defendant were judgment-creditors of the same party, and sought to enforce their judgments against a piece of land which had been fraudulently conveyed away by the judgment-debtor, it was held that, the plaintiff having taken the first steps to uncover the property fraudulently conveyed, his rights were superior to those of the defendant, although the latter held the senior judgment.³⁴⁶ On similar principles, an

³⁴³ *Brown v. Williams*, 31 Me. 403; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Lane v. Gover*, 3 Har. & McH. (Md.) 394; *Queen Anne's Co. v. Pratt*, 10 Md. 5; *Davidson v. Frew*, 14 N. C. 3, 22 Am. Dec. 708; *Hodges v. McCabe*, 10 N. C. 78; *Bisland v. Hewett*, 11 Smedes & M. (Miss.) 164; *Robbins v. Robbins*, 8 Blackf. (Ind.) 174; *Elceman v. Finch*, 79 Ind. 511.

³⁴⁴ *Gould v. Luckett*, 47 Miss. 96, 116.

³⁴⁵ *Supra*, § 450.

³⁴⁶ *Boyle v. Maroney*, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657; *Bridgman v. McKissick*, 15 Iowa, 260; *Howland v. Knox*, 59 Iowa, 46, 12 N. W. 777; *Lyon v. Robbins*, 46 Ill. 276; *Armington v. Rau*, 100 Pa. 165; *Haak's Appeal*, 100 Pa. 59. But a very vigorous dissent from this opinion has been expressed in a recent case in Minnesota. *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683. And see *Wilkinson v. Paddock*, 125 N. Y. 748, 27 N. E. 407; *Matula v. Lane*, 22 Tex. Civ. App. 391, 55 S. W. 504.

attachment is a valid charge upon land from the moment it is levied, so that a sale on execution relates back to that event for the purpose of defeating all intervening incumbrances, as a judgment recovered between the levy of the attachment and the judgment in the attachment suit.³⁴⁷ So again, if a judgment-creditor delivers his execution to the sheriff merely for the purpose of protection against other creditors and with no bona fide intention of making the money, and directs the sheriff not to levy, or not to sell, until he receives further orders, such acts will postpone the lien of his judgment to that of junior creditors who proceed in good faith to a levy and sale.³⁴⁸

§ 456. Priority by Prior Levy.

There are some cases in which a junior judgment may acquire the precedence by virtue of superior diligence in making a levy. Thus, under the laws of some of the states, where a judgment-creditor allows more than one year to elapse after his judgment has become a lien on real estate, before he takes out and levies an execution, his lien becomes subsequent and inferior to the liens of other judgment-creditors.³⁴⁹ In this connection we must call attention to an extremely interesting and peculiar question—called the “triangular question”—which arises where there is a judgment not levied within a year, a junior judgment levied within the year, and thus acquiring a preference as against the senior judgment, and an intervening mortgage executed and recorded prior to the rendition of the second judgment. Under these circumstances it is held that the senior judgment must be first paid, and then the mortgage, and the junior

³⁴⁷ *Lackey v. Selbert*, 23 Mo. 85; *Langdon v. Raiford*, 20 Ala. 532. Compare *Lichton v. McDougald*, 5 Ga. 176.

³⁴⁸ *Field v. Liverman*, 17 Mo. 218; *Patton v. Hayter*, 15 Ala. 18; *Andrus v. Burke* (N. J. Ch.) 48 Atl. 228.

³⁴⁹ *Lamme v. Schilling*, 25 Kan. 92. And see *Excelsior Manuf'g Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408; *Klsteron v. Tate*, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419. Under the laws of Ohio regulating the lien of judgments, a judgment levied within a year from its rendition, upon a part of the lands of the judgment debtor, is not a lien upon the lands not levied upon, as against a subsequent judgment rendered more than a year after the first and levied upon such lands within a year from its rendition. *Pence v. Cochran* (D. C.) 6 Fed. 269; *Bish v. Burns*, 7 Ohio Cir. Ct. R. 283.

judgment must be postponed to both. The difficulties of the question, and its solution, are thus presented by the supreme court of Ohio: "If it be attempted to settle the question on the principle of superiority, it runs in a circle and produces no result. If the junior judgment takes it from the senior judgment, then the mortgage would take it from the junior judgment, and the senior judgment from the mortgage, and thus perpetually without a conclusion. If it be attempted to reason it out by interposing intervening liens, it results in a triangle of equal equities, without any circumstance to determine in favor of either. If it be said that the intervening mortgage should protect the senior judgment, because it was superior to the junior judgment and inferior to the senior, so it might, with equal reason, be said that the senior judgment should check the mortgage in favor of the junior judgment, or that the junior judgment should protect the mortgage from the senior judgment. The court therefore felt the necessity of establishing a rule, and that which was considered least objectionable was adopted, to wit, that each should have precedence according to age. This, too, has some show of reason in the fact that the lien of the senior judgment extended to the whole estate mortgaged, and the mortgagee took subject to such lien, and would hold only as to the balance of the estate after satisfying the senior judgment, and the lien of the junior judgment attached only to the balance left, if any, after satisfying the mortgage out of the balance left by the senior judgment. Or, in other words, the junior judgment attached only to the equity of redemption in that portion of the interest covered by the mortgage, after satisfying the lien of the senior judgment."³⁵⁰ Where there are two executions against the same defendant, the lien of the executions, as between the execution-creditors, attaches from the levy, and not from the time at which they went into the hands of the officer.³⁵¹

³⁵⁰ *Holliday v. Franklin Bank*, 16 Ohio, 535; *Braze v. Lancaster Bank*, 14 Ohio, 318; *Fitch v. Mendenhall*, 17 Ohio, 578.

³⁵¹ *Field v. Milburn*, 9 Mo. 492.

§ 457. Postponement by Stay of Execution.

It is held that an extension of time for payment or stay of execution on real estate to a time short of the statutory period of limitation of a judgment-lien may be made without prejudice to the creditor, and does not postpone the judgment to other and junior judgments.³⁵² But on the other hand, a mortgage for a valuable consideration made pending a stay of execution by order of the plaintiff, will take precedence of the judgment.³⁵³

§ 458. Postponement by Failure to Revive.

In those jurisdictions where a judgment, in order that its lien may continue, must be periodically revived, the lien of a judgment not revived within the statutory time will be superseded by the lien of younger judgments in full original life or which have been duly revived.³⁵⁴ And the same consequence will result although the record shows that the elder judgment was for purchase-money.³⁵⁵

§ 459. Sale under Junior Judgment.

It is the settled rule in at least two states, that the lien of the senior judgment is divested by a sale under the junior judgment and execution, and the remedy of the senior creditor is to claim enough of the fund to satisfy his judgment.³⁵⁶ And so, under a statute which provides that judgments shall take precedence in the order in which executions shall be taken out and levied, in a case

³⁵² *Marshall v. Moore*, 36 Ill. 321.

³⁵³ *Sanford v. Ogden*, 34 Ala. 118.

³⁵⁴ *Pennsylvania Agricultural & Manuf'g Bank v. Crevor*, 2 Rawle (Pa.) 224; *Miller v. Miller*, 147 Pa. 545, 548, 23 Atl. 841; *Kaminsky v. Trantham*, 45 S. C. 393, 23 S. E. 132; *Colson v. Kennedy*, 88 Ga. 174, 14 S. E. 119; *Brady v. Creditors*, 43 La. Ann. 165, 9 South. 59; *Davisson v. Mackay*, 22 Or. 247, 29 Pac. 791; *Smith v. Schwartz*, 21 Utah, 126, 60 Pac. 305.

³⁵⁵ *Ruth's Appeal*, 54 Pa. 173.

³⁵⁶ *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Dowdell v. Neal*, 10 Ga. 148; *Sanders v. McAfee*, 42 Ga. 255; *Tarver v. Ellison*, 57 Ga. 54; *Jones v. Wright*, 60 Ga. 364; *Blohme v. Lynch*, 26 S. C. 300, 2 S. E. 136; *Matthews v. Nance*, 49 S. C. 389, 27 S. E. 408.

where the first lien was a judgment on which no levy had been made, and the second lien was a mortgage, and the third a judgment under which a levy and sale took place, it was held that the lien of the elder judgment was destroyed, and in an action to foreclose the mortgage, it was considered to be free from the lien of the first judgment, and, being prior to the second judgment, it was free from that lien also.³⁵⁷ But the general rule undoubtedly is, that a sale under the junior judgment does not divest the lien of the elder judgment; the property passes subject to such elder lien; the junior creditor is entitled to all the money made at his sale, but afterwards, at any time within the statutory period, the senior creditor may take the appropriate steps to enforce his lien.³⁵⁸ And it is even held that where both judgments, the elder and the junior, are the property of the same person, he may proceed to levy and sell under the younger lien without any prejudice to his right afterwards to enforce the other, or without disturbing or destroying its lien, provided his conduct is free from any imputation of deceit or unfairness towards the purchaser.³⁵⁹

§ 460. Order of Priority on After-Acquired Lands.

If several judgments are rendered and entered against the same defendant at different times, and he afterwards acquires the legal title to real estate, the liens of the several judgments attach together upon the property at the same instant; all stand upon the same footing, and the oldest judgment has no priority.³⁶⁰ This general rule

³⁵⁷ *Lambertville Nat. Bank v. Boss* (N. J.) 13 Atl. 18. Compare *Holliday v. Franklin Bank*, 16 Ohio, 535; *supra*, § 456.

³⁵⁸ *Commercial Bank v. Yazoo Co.*, 6 How. (Miss.) 530, 38 Am. Dec. 447; *Rankin v. Scott*, 12 Wheat. 177, 6 L. Ed. 592; *Littlefield v. Nichols*, 42 Cal. 372; *Shotwell v. Murray*, 1 Johns. Ch. (N. Y.) 512; *Bruce v. Vogel*, 38 Mo. 100; *Lathrop v. Brown*, 23 Iowa, 40; *Hiestand v. Williamson*, 128 Pa. 122, 18 Atl. 427; *Paddack v. Staley*, 13 Colo. App. 363, 58 Pac. 363.

³⁵⁹ *Shotwell v. Murray*, 1 Johns. Ch. (N. Y.) 512.

³⁶⁰ *In re Hazard's Estate*, 141 N. Y. 586, 36 N. E. 739; *Moore v. Jordan*, 117 N. O. 86, 23 S. E. 259, 42 L. R. A. 209, 53 Am. St. Rep. 576; *Belknap v. Greene*, 56 S. C. 119, 34 S. E. 26; *Moody v. Harper*, 25 Miss. 484; *Cayce v. Stovall*, 50 Miss. 396; *Willis v. Downes* (Tex. Civ. App.) 46 S. W. 920; *Matula v. Lane*, 22 Tex. Civ. App. 391, 55 S. W. 504; *Relfe v. McComb*, 2 Head (Tenn.) 558, 75 Am. Dec. 748; *Davis v. Benton*, 2 Sneed (Tenn.) 665; *Michaels v. Boyd*, Smith

is accepted in all the states, so far as we have been able to discover, except Oregon. In that state, judgment-liens attach to after-acquired property in the order of the dates of the docketing of the judgments.³⁰¹ In another state, where personal property of the defendant in execution is brought into the county after executions of different judgment-creditors have come to the sheriff's hands against such defendant, the eldest judgment creditor who has preserved his lien will have the prior right.³⁰² It has also been thought that, where a statute requires an executor to pay judgments docketed against the deceased, according to their priority, a creditor whose judgment was first docketed will be entitled to priority of payment, though the property sought to be applied was acquired by the judgment debtor after all the judgments had been docketed.³⁰³ Again, where a debtor has made a fraudulent and simulated sale of property, and afterwards several judgments are recovered against him, and the property is then returned to him, the liens of the judgments will rank according to their several dates of recordation.³⁰⁴ So also, where land has been appropriated for a right of way, a prior judgment creditor of the owner of the land has a lien on the money awarded superior to that of an assignee of the judgment of award.³⁰⁵

PART VI. DURATION OF THE LIEN.

§ 461. General Rules.

In the statutes of every state there is fixed a limitation of the period during which a judgment shall continue to be a lien upon real estate. Sometimes this period is set absolutely at ten years;³⁰⁶

(Ind.) 100; *Ware v. Purdy* (Iowa) 60 N. W. 526; *Klisteron v. Tate*, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419; *Ware v. Delahaye*, 95 Iowa, 667, 64 N. W. 640.

³⁰¹ *Creighton v. Leeds*, 9 Or. 215.

³⁰² *Wood v. Gary*, 5 Ala. 43.

³⁰³ *In re Foster's Estate*, 8 Misc. Rep. 344, 29 N. Y. Supp. 316.

³⁰⁴ *Schwabacher v. Lebrook*, 48 La. Ann. 821, 19 South. 758.

³⁰⁵ *Yakima Water, Light & Power Co. v. Hathaway*, 18 Wash. 377, 51 Pac. 471.

³⁰⁶ A sale may be made under the judgment on the tenth anniversary of the day on which it was rendered, or, if the ten years expire on a Sunday,

sometimes the lien runs for five years, with the privilege of renewal for an equal period, and successive revivals after that;³⁶⁷ and in some jurisdictions the statutory time may vary from the types here cited. Occasionally we meet with a statute which makes the life of the lien depend upon the issuing of execution, or which makes a distinction, as to its continuance, founded on the character of the person against whom it is set up, whether he be the debtor, a purchaser, or a subsequent incumbrancer. Thus, in Nebraska, the lien of a judgment continues for five years after the rendition of the judgment, and as against all persons except bona fide judgment-creditors, for five years after the issuance of execution.³⁶⁸ A judg-

then on the following day. *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794. But the issuance of an execution and the making of a levy within the 10 years will not be effectual to continue the lien of the judgment to the time of sale, where the sale does not take place until after the expiration of the 10 years; and the purchaser at such sale will take subject to liens placed on the land since the rendition of the judgment. *Wells v. Bower*, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570; *Albee v. Curtis*, 77 Iowa, 644, 42 N. W. 508; *Lakin v. C. H. McCormick & Bro.*, 81 Iowa, 545, 46 N. W. 1061. So in South Dakota, where the statute makes a judgment lien continue for ten years from the time of its docketing, and provides for an action to enforce the lien on real estate, if such an action is commenced and brought to issue within the ten years, but not reached for trial until after the expiration thereof, the lien is lost. *Ruth v. Wells*, 13 S. D. 482, 83 N. W. 568.

³⁶⁷ See *Wetmore v. Wetmore*, 155 Pa. 507, 28 Atl. 694. The statute in South Carolina provides that a judgment shall be a lien on real estate for 10 years from the date of its entry, but the plaintiff may, within three years "after its active energy has expired, revive the judgment, with like liens as in the original for a like period." It is held that a judgment revived within the three years has a continuous lien from the date of its entry, and its priority is preserved as against all liens which existed against the judgment debtor during the period of its original active energy. *Verner v. Bookman*, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870; *Woodward v. Woodward*, 39 S. C. 259, 17 S. E. 638, 39 Am. St. Rep. 716. Under the present statute in Arkansas, judgment liens continue in force only for three years unless renewed. Acts Ark. 1891, No. 56, § 2, p. 92.

³⁶⁸ *Reynolds v. Cobb*, 15 Neb. 378, 19 N. W. 502; *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109; *Cotton v. First Nat. Bank*, 51 Neb. 751, 71 N. W. 711; *Dillon v. Chicago, K. & N. R. Co.*, 58 Neb. 472, 78 N. W. 927. See *Pasour v. Rhyne*, 82 N. C. 149; *Pipkin v. Adams*, 114 N. C. 201, 19 S. E. 105; *McCarty v. Ball*, 82 Va. 872, 1 S. E. 189; *Benbow v. Boyer*, 89 Iowa, 404, 56 N. W. 544. The statute in New York, which provides that execution may be had upon real estate after the 10 years by filing a notice, subscribed

ment, however, does not lose its lien upon real estate by the suffering of an execution, issued thereon, to lie dormant in the sheriff's hands. The doctrine on the subject of dormant executions does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy. And such lien does not become dormant until the expiration of the full statutory limitation.³⁶⁹ In cases where the judgment must be periodically revived, it is held that the question, whether the lien has been kept alive and remains in force, must be determined by an inspection of the record; if the record does not show its existence, the lien is lost.³⁷⁰ The lien of a judgment in favor of the state is never lost by lapse of time.³⁷¹

§ 462. Dormant Judgment Acts.

In several of the states there are statutes which prescribe that, after the lapse of a certain time, the lien of a judgment shall be lost, unless, within that time, steps have been taken to enforce it, such as the levy of an execution on property of the defendant.³⁷² These statutes are

by the sheriff, describing the judgment, the execution, and the property levied upon, does not extend the original lien of the judgment. *Floyd v. Clark*, 16 Daly, 528, 17 N. Y. Supp. 848. But a judgment for foreclosure and sale of mortgaged premises may be enforced even after 20 years or more from its entry. *Wing v. De La Rionda*, 125 N. Y. 678, 25 N. E. 1064.

³⁶⁹ *Muir v. Leitch*, 7 Barb. 341. The statute of limitations begins to run on a judgment by default from the entry of the judgment, and not from the entry of the default. *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218.

³⁷⁰ *Duffey v. Houtz*, 105 Pa. 96.

³⁷¹ *Comm. v. Baldwin*, 1 Watts (Pa.) 54, 26 Am. Dec. 33.

³⁷² In Georgia, the Code, § 2914, provides that no domestic judgment shall be enforced after the expiration of seven years from the time of its rendition, where no execution has been issued on it, or where execution has been issued and seven years have expired from the time of the last entry on the execution made by an officer authorized to execute and return the same. See *Smith v. Williams*, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; *Formby v. Shackelford*, 94 Ga. 670, 21 S. E. 711. An entry on an execution signed by a person as "Former Sheriff" does not satisfy the statute, as an ex-sheriff is not authorized to execute and return executions. *Orr v. Morrow*, 91 Ga. 143, 17 S. E. 287. Nor will the judgment be saved by an entry on the execution docket, made by the clerk without being thereto requested by the judgment creditor, that on a certain day the execution was handed by him to the sheriff. *Daniel v. Haynes*, 91 Ga. 123, 16 S. E. 649. In Texas, the law provides that a judgment whereon execution has not issued within

called "dormant judgment acts," and unless their terms are complied with, the lien of a judgment will expire and give place to junior liens.³⁷³ They are not merely statutes of limitations, and a judgment will not be saved from dormancy by the mere fact that partial payments are made and receipted for within the limited time,³⁷⁴ nor by the payment of the costs of the action to the clerk and his entry of the fact upon the execution.³⁷⁵ An officer's indorsement on the writ that he had received directions from the plaintiff's attorney to collect it is not sufficient to keep the judgment alive,³⁷⁶ nor can that object be accomplished by making upon the execution a nunc pro tunc entry of a levy alleged to have been made before the judgment became dormant.³⁷⁷ In Tennessee, where the statute requires an execution to be taken out and the land sold within twelve months, the lien is not saved by the levy of an execution and the filing of a creditor's bill, nor by a stipulation contained in the judgment that execution shall not issue for a certain time after its rendition.³⁷⁸ On the other hand, an execution regularly issued within the limited time will stop the running of the statute against the judgment, though it was issued for that sole purpose and without any expectation of collecting the money,³⁷⁹ as, where the execution is levied on defendant's homestead, and a claim of exemption is successfully inter-

12 months after its rendition may be revived within 10 years after its date, and not thereafter. It is not necessary that an execution should issue every 12 months, in order to keep alive a judgment on which an execution had been taken out within the first year after its rendition. *Central Coal Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 334, 34 S. W. 383; *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086. See *Mundine v. Brown* (Tex. Civ. App.) 23 S. W. 90; *Adams v. Crosby*, 84 Tex. 99, 19 S. W. 355.

³⁷³ *Thomas v. Van Meter*, 164 Ill. 304, 45 N. E. 405; *Horbach v. Smiley*, 54 Neb. 217, 74 N. W. 623; *Smith v. Hogg*, 52 Ohio St. 527, 40 N. E. 406; *Thompson v. Hubbard*, 3 Kan. App. 714, 44 Pac. 1095.

³⁷⁴ *Stanley v. McWhorter*, 78 Ga. 37, 1 S. E. 260; *Lewis v. Smith*, 99 Ga. 603, 27 S. E. 162; *Blue v. Collins*, 109 Ga. 341, 34 S. E. 598; *Nelson v. Gill*, 56 Ga. 536.

³⁷⁵ *Lewis v. Smith*, 99 Ga. 603, 27 S. E. 162.

³⁷⁶ *Hanks v. Pearce*, 96 Ga. 159, 22 S. E. 676.

³⁷⁷ *Lewis v. Smith*, 99 Ga. 603, 27 S. E. 162.

³⁷⁸ *Gardenhire v. King*, 97 Tenn. 585, 37 S. W. 548.

³⁷⁹ *Murphy v. Klein*, 71 Miss. 908, 15 South. 658.

posed.³⁸⁰ A decree in equity which merely prescribes the performance of a duty is not within either the letter or the spirit of these acts,³⁸¹ but the filing of an equitable petition, for the purpose of enforcing the collection of a judgment, is sufficient to prevent the running of the dormancy statute, as against such judgment, so long as the equitable action is pending.³⁸² An order by a justice of the peace for the sale of property attached in a suit before him is an "execution," within the meaning of these statutes.³⁸³ And since the usual method of enforcing the payment of a judgment against a municipal corporation is by the writ of mandamus, issued to enforce the levy and collection of taxes for that purpose, this writ is to be considered the equivalent of a writ of execution, within the meaning and purpose of the statutes relating to the dormancy of judgments, when the question concerns a judgment against a municipality.³⁸⁴ When a judgment has become dormant by the laws of the state where it was rendered, and has not been revived or renewed, it cannot be fastened as a lien upon lands of the judgment debtor in another state.³⁸⁵

§ 463. Legislative Abridgment of the Time.

It is a familiar principle of constitutional law that a statute, retroactive in its operation, which merely changes the remedy provided for the enforcement of an existing right, cannot be said to impair the obligation of contracts, if a substantive and effective remedy is still left to the creditor. And it is an equally well known rule that a statute of limitations, applying retroactively to existing rights or remedies and abridging the period of time allowed for their enforcement, is not invalid in such application, if a reasonable length of time is left for the assertion of such rights, or the prosecution of such remedies, before the bar of the statute cuts them off. Now, using these two admitted rules as premises, it is easy to deduce the conclusion

³⁸⁰ *McClarín v. Anderson*, 104 Ala. 201, 16 South. 639. Compare *Wuest v. James*, 51 Ohio St. 230, 36 N. E. 832.

³⁸¹ *Butler v. James*, 33 Ga. 148.

³⁸² *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97.

³⁸³ *Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166.

³⁸⁴ *Dempsey v. Township of Oswego*, 2 C. C. A. 110, 51 Fed. 97.

³⁸⁵ *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071.

that a statute shortening the time during which, by earlier laws, the lien of a judgment was to continue, is not open to any constitutional objection, in its application to judgments whose lien had attached before the act was passed, if a reasonable time (though less than the original period) is still allowed to the judgment-creditor in which to enforce his lien. And so the authorities hold.³⁸⁶ But the case is different if the statute is made to apply to a case in which the whole of the new period of limitation had run before the passage of the act, so that the lien would be instantly cut off. Thus, where a statute had provided that a final judgment should be a lien for ten years, and that the creditor might have an additional three years within which to revive it, and a later act repealed the proviso allowing the additional three years, it was held that the latter act was unconstitutional, as interfering with vested rights, when applied to a judgment the lien of which had expired before its passage, but the additional three years for reviving which had not then expired.³⁸⁷

§ 464. Lien of Transferred Judgment.

The length of time during which the lien of a judgment transferred from one county to another shall continue depends entirely upon the construction of the local statute. In Pennsylvania such lien continues for five years from the entry of the judgment in the county to which it is transferred.³⁸⁸ But on the other hand, in Indiana, under a statute declaring that the lien of a judgment shall continue for ten years after the rendition thereof, and another statute, providing that when a transcript of a judgment from another county is filed, the judgment set forth in the transcript shall be a lien on property within the county to the same extent as judgments of the local court, from the time of filing the transcript, it is held that the lien of a judgment, a transcript of which is filed in another county, is in force for ten

³⁸⁶ *Henry v. Henry*, 31 S. C. 1, 9 S. E. 726; *McCormick v. Alexander*, 2 Ohio, 65; *supra*, § 399.

³⁸⁷ *King v. Belcher*, 30 S. C. 381, 9 S. E. 359; *Merchants' Bank of Danville v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216.

³⁸⁸ *Knauss' Appeal*, 49 Pa. 419.

years after its rendition, and not ten years from the time of filing the transcript.³⁸⁹

· § 465. **Extension of Lien by Agreement of Parties.**

It has been held that where a judgment is rendered in pursuance of a written agreement of the parties, entered of record, that the judgment shall be rendered collectible and payable nine years from its date, the ten years during which such judgment will remain a lien on the real estate of the defendant will not commence to run until the expiration of the nine years.³⁹⁰ In the case cited the law of Indiana is thus stated: The lien of judgments upon real estate is regulated by statute, and the general rule is that the lien continues for ten years from the rendition of the judgment and no longer; but there are four exceptions, the statute excluding from the computation of time (1) the time during which the party is restrained by an appeal from proceeding, (2) the time during which the plaintiff is restrained by an injunction, (3) the time the plaintiff may be prevented from proceeding by the death of the defendant, and (4) the time the plaintiff may be prevented from enforcing the judgment by an agreement of the parties entered of record. But it must be considered very doubtful whether any such exception as that last mentioned would be admitted in other states, unless specifically provided for by the statute.³⁹¹ As between the parties a judgment may be kept alive, although once paid, for the purpose of securing another loan; but as against subsequent lien-creditors, a mortgage or judgment once paid cannot be kept alive.³⁹²

§ 466. **Survival against Judgment-Debtor.**

The lien of a judgment expires, at the end of the statutory period, only as against subsequent purchasers or incumbrancers, but it still continues, the judgment being unsatisfied, against the judgment-

³⁸⁹ *Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. 463. See a later decision in the same case in 21 N. E. 243.

³⁹⁰ *Applegate v. Edwards*, 45 Ind. 329. And see *Patterson v. Baxley*, 33 S. C. 354, 11 S. E. 1065.

³⁹¹ *Savings & Trust Co. v. Bear Valley Irr. Co.*, 89 Fed. 82.

³⁹² *Pelrce v. Black*, 105 Pa. 342.

debtor himself.³⁹³ Hence if one suffers his property to be sold on execution issued on a judgment after its lien has expired by limitation, he cannot afterwards, in a collateral proceeding, call in question the validity of the sale.³⁹⁴ So in a case where the real estate of a debtor was sold by the sheriff, and the proceeds applied to the payment of all judgments which had been either entered or revived within five years, and they were all thereby discharged, and there was a surplus, and there were two judgments the liens of which had expired, in consequence of their not being revived, it was held that the surplus belonged to the holders of those two judgments. For although, as to creditors whose judgment-liens were in force, these unrevived judgments had undoubtedly ceased to be liens, yet, as between them and the judgment-debtor, the liens continued notwithstanding their non-revival within the statutory time.³⁹⁵ Inasmuch as the statutes ordinarily provide that the lien shall expire, after a certain time, as against "bona fide purchasers and subsequent incumbrancers," some attention to these terms becomes necessary. As to the former, it is held that if a purchaser collusively contrives with the judgment-debtor to deprive the creditor of his lien upon the lands purchased, knowing that the judgment is unpaid, or if he purchases under circumstances indicating an intention to deprive the creditor of the means of collecting his judgment, such purchaser will not be protected as a bona fide purchaser of the land, discharged of the lien of such judgment, although he pays the full value of the estate.³⁹⁶ As to the term "subsequent incumbrancers" in these statutes, it is held to apply to creditors of a grantee of the judgment-debtor, where the conveyance was made within the statutory period, and the debts were contracted after the grantee's investiture with the legal title.³⁹⁷

³⁹³ *McCahan v. Elliott*, 103 Pa. 634; *Fetterman v. Murphy*, 4 Watts (Pa.) 424, 28 Am. Dec. 729; *Aurand's Appeal*, 34 Pa. 151; *Bank of North America v. Fitzsimons*, 3 Bin. (Pa.) 342; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

³⁹⁴ *Hinds v. Scott*, 11 Pa. 19, 51 Am. Dec. 506; *Tufts v. Tufts*, 18 Wend. (N. Y.) 621; *Yeager v. Davis*, 112 Ind. 230, 13 N. E. 707.

³⁹⁵ *Brown's Appeal*, 91 Pa. 435. Compare *Nutt v. Cuming*, 22 App. Div. 92, 47 N. Y. Supp. 800; *Floyd v. Clark*, 16 Daly, 528, 17 N. Y. Supp. 848.

³⁹⁶ *Pettit v. Shepherd*, 5 Paige (N. Y.) 493, 28 Am. Dec. 437.

³⁹⁷ *Gridley v. Watson*, 53 Ill. 186.

§ 467. Death of Judgment-Debtor.

In most of the states, the lien of a judgment on real estate is not destroyed by the death of the judgment debtor, but continues in force for the same length of time as if he had remained in life.³⁹⁸ But in Pennsylvania, a statute provides that a judgment against a decedent at the time of his death "shall not continue a lien on the real estate of such decedent as against a bona fide purchaser, mortgagee, or other judgment creditor of such decedent, or of his heirs or devisees." This, however, does not limit the lien as against the heirs and devisees of the judgment debtor; as to such persons, the land will continue to be bound by the lien of the judgment for five years after the death of the decedent.³⁹⁹ In New York, the statutes give to docketed judgments a lien on land for ten years, and provide that a judgment lien, if existing at the death of the judgment debtor, shall "continue for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll." This is not an abridgment of the life of the lien, and it will not be limited to three years and a half from the debtor's death, if the original ten years would not expire within that time.⁴⁰⁰

§ 468. Remedies of Creditor after Expiration of Lien.

It is well settled that the lien of a judgment cannot be enforced in equity after the right to enforce the judgment at law has ceased to exist.⁴⁰¹ But if the judgment creditor, during the life of the judgment, files his bill in equity against the judgment debtor and an-

³⁹⁸ *Morton v. Adams*, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53; *Barrett v. Furnish*, 21 Or. 17, 26 Pac. 861; *Ensley v. Wheeler*, 98 Ala. 200, 13 South. 473; *Lewis v. Smith*, 99 Ga. 603, 27 S. E. 162; *Ritchey v. Buricke's Adm'rs.* 21 Ky. Law Rep. 1120, 54 S. W. 173; *McAfee v. Reynolds (Ind.)* 28 N. E. 423, 18 L. R. A. 211, 30 Am. St. Rep. 194.

³⁹⁹ See *Fuellhart v. Blood*, 7 Pa. Dist. R. 575; *Biesecker v. Cobb*, 13 Pa. Super. Ct. 56; *Konigsmaker v. Brown*, 14 Pa. 269; *Nicholas v. Phelps*, 15 Pa. 36; *Shearer v. Brinley*, 76 Pa. 300; *Baxter v. Allen*, 77 Pa. 468; *Stevenson v. Black (Pa.)* 1 Atl. 312.

⁴⁰⁰ *In re Holmes*, 59 Hun, 369, 13 N. Y. Supp. 100, affirmed 131 N. Y. 80, 29 N. E. 1003.

⁴⁰¹ *Smith v. Meredith*, 30 Md. 429; *Hutcheson v. Grubbs*, 80 Va. 251.

other, to subject property to the payment of his judgment, he does not lose his lien on such property if he allows his judgment to become **dormant** (or if the general lien of the judgment expires by statutory limitation) **before** the entry of a final decree in the equity suit.⁴⁰² But if the creditor **has lost his lien** by his failure to take the proper steps to enforce it in due season, **he cannot** change the result by the mere act of issuing an execution.⁴⁰³ But it is not necessary that a judgment should be revived in order to maintain its lien on money in the sheriff's hands.⁴⁰⁴

PART VII. SUSPENSION AND DISCHARGE OF JUDGMENT LIENS.

§ 469. General Principles.

Inasmuch as the lien of a judgment does not merely bind the debtor's estate by his own consent or sufferance, but attaches by force of law in consequence of the rendition of the judgment against him, it follows that he cannot relieve his land from its burden by any act short of satisfying the judgment, nor can he, without a release from the judgment-creditor, change, limit, or impair the lien or prejudice the rights of its holder. The act of the debtor, therefore, in selling, conveying, mortgaging, or leasing the land, or his abandonment or repudiation of the title, or attornment to a third person (if he really had an interest subject to the judgment), cannot affect or destroy the lien of the judgment when once it has attached.⁴⁰⁵ Thus a voluntary assignment for the benefit of creditors does not affect liens on the land assigned created by existing judgments against the assignor.⁴⁰⁶ Nor, after such an assignment, does the failure of a creditor to sue

⁴⁰² *City of Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367.

⁴⁰³ *Roe v. Swart*, 5 Cow. (N. Y.) 294.

⁴⁰⁴ *Commonwealth v. Gleim*, 3 Pen. & W. (Pa.) 417.

⁴⁰⁵ *Morris v. Mowatt*, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; *Decker v. Gilbert*, 90 Ind. 107; *Brooker v. Sprague*, 99 Ind. 169; *Rodgers v. McCluer*, 4 Grat. (Va.) 81, 47 Am. Dec. 715; *Agricultural Bank v. Pallen*, 8 Smedes & M. (Miss.) 357, 47 Am. Dec. 92; *Tinney v. Wolston*, 41 Ill. 215; *Edmunds v. Smith*, 52 N. J. Eq. 212, 27 Atl. 827.

⁴⁰⁶ *Shaeffer's Appeal*, 101 Pa. 45.

out and levy execution impair the lien of his judgment.⁴⁰⁷ But in one state it has been held that although a judgment is by law a lien upon the land of the defendant, yet he may after the judgment convey good title, if he has at all times afterwards a sufficient amount of property, subject to and within reach of an execution, to satisfy the judgment.⁴⁰⁸

§ 470. *Suspension of Lien by Injunction.*

An injunction against the enforcement of a judgment at law, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction, after which the lien will revive and continue for the full statutory period.⁴⁰⁹ Whether this statutory period is to be computed exclusive of the time during which the lien was so suspended, is not clear upon the authorities, and must be determined by the language of the local statute. In one state the law expressly excepts from the computation of the period for which the lien continues in life "the time during which the plaintiff is restrained by an injunction."⁴¹⁰ But in another state, for want of a similar saving clause in the statute, the courts have been forced to conclude that if the lien ran out during the pendency of such an injunction, it was finally lost, and could not be revived, upon the dissolution of the injunction, at least as against a bona fide purchaser from the judgment-debtor.⁴¹¹ But here considerations of equity must intervene, and it becomes important to inquire at whose instance the injunction was issued. For instance, in a case where the creditor was prevented from enforcing his execution until after the time prescribed by the statute, in consequence of an injunction granted on the application of a mortgagee of the property, the lien of whose mortgage was, at the issuance of the injunction, secondary to that of the judgment, and the injunction was subsequently dissolved, upon the failure of the mortgagee to establish

⁴⁰⁷ *Scott v. Dunn*, 26 Ohio St. 63.

⁴⁰⁸ *Howse v. Judson*, 1 Fla. 133.

⁴⁰⁹ *Smith v. Everly*, 4 How. (Miss.) 178; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591; *supra*, § 395.

⁴¹⁰ *Applegate v. Edwards*, 45 Ind. 329.

⁴¹¹ *Tucker v. Shade*, 25 Ohio St. 355.

his claim to protection; it was held that he could not take advantage of the fact that the lien of the judgment was lost, and that he was not entitled to hold the property discharged of the lien of the judgment.⁴¹² In Alabama a judgment-lien is discharged by an injunction issued upon the execution of a bond with sureties by the judgment-debtor, if the bond provides the plaintiff with another security for the payment of his judgment.⁴¹³

§ 471. Stay of Proceedings.

In general, the lien of a judgment is not destroyed by an agreement of the parties to stay execution for a specified period.⁴¹⁴ And a stay of proceedings by order of court, pending a motion for a new trial, or by appeal with stay-bond, merely suspends the running of the statutory time during which a judgment is a lien on real estate, but it does not postpone its beginning until after the stay has ceased.⁴¹⁵

§ 472. Opening or Vacating Judgment.

Opening a default judgment merely to let the defendant in to a defense does not destroy its lien; the lien continues for the statutory period.⁴¹⁶ But vacating a judgment effectually obliterates it for all purposes; and of course the lien is thereby cancelled, leaving the judgment-debtor free to sell or encumber the property anew. But judgments which have been vacated are sometimes restored, and thereby the lien of the judgment re-attaches. A party whose judgment has been illegally vacated will not be deprived of his lien if he ultimately procures the reversal of the order which set it aside, unless the equities of bona fide purchasers or incumbrancers have intervened. And further, the lien is restored to the exact position it occupied at

⁴¹² *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549.

⁴¹³ *Bartlett v. Gayle*, 6 Ala. 305, 41 Am. Dec. 52.

⁴¹⁴ *Brewster v. Clamfit*, 33 Ark. 72; *Love v. Harper*, 4 Humph. (Tenn.) 113; *Ayers v. Waul*, 44 Tex. 549.

⁴¹⁵ *Barrollhet v. Hathaway*, 31 Cal. 395, 89 Am. Dec. 193; *Isler v. Brown*, 66 N. C. 556; *Mercantile Trust Co. v. St. Louis & S. F. Ry. Co.*, 69 Fed. 193; *Hobbs v. Simmonds*, 61 Conn. 235, 23 Atl. 962.

⁴¹⁶ *Cope's Appeal*, 96 Pa. 294. See *Smith v. De Lanty*, 11 Wash. 386, 39 Pac. 638. Compare *Crane v. Richardson*, 73 Miss. 254, 18 South. 542.

the time the judgment was vacated. That is, it continues to take precedence of any liens which were junior to it at that date, unless the holders of such junior liens have acquired new rights, by proceedings under their several judgments, of which they cannot justly be deprived.⁴¹⁷

§ 473. Appeal or Error.

It is generally held that the lien of a judgment is not discharged by an appeal being taken, but merely suspended; nor is the judgment on appeal a discharge of the lien of the judgment below.⁴¹⁸ "Even if there be a new judgment [e. g., of affirmance on appeal], this does not necessarily destroy the lien which the law has given, for it is competent for the law to keep the lien in existence, although a new judgment be predicated on the first."⁴¹⁹ And where a decree is reversed in part and affirmed as to the residue, the reversal in part does not destroy the lien of so much of the decree as is unreversed.⁴²⁰

§ 474. Bankruptcy.

The lien of a judgment-creditor who fails to prove his debt is not displaced by the subsequent bankruptcy of the debtor. And where a judgment-debtor is declared a bankrupt, has his homestead set apart, procures his discharge, and afterwards disposes of the property set apart as a homestead, it at once becomes subject to execution under the prior judgment. "Liens are not destroyed but preserved by the bankrupt act."⁴²¹

⁴¹⁷ *King v. Harris*, 34 N. Y. 330; *Id.*, 30 Barb. 471; *Smith v. De Lanty*, 11 Wash. 386, 39 Pac. 638.

⁴¹⁸ *Hardee v. Stovall*, 1 Ga. 92; *Montgomery v. McGimpsey*, 7 Smedes & M. (Miss.) 557; *Curtis v. Root*, 28 Ill. 367; *Moore v. Rittenhouse*, 15 Ohio St. 310; *Dewey v. Latson*, 6 Cal. 130; *Leonard's Appeal*, 94 Pa. 180; *Gottlieb v. Thatcher*, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; *Schafer v. Buck*, 76 Ill. App. 464. Compare *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Wronkow v. Oakley*, 133 N. Y. 505, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661; *Gruner v. Westin*, 66 Tex. 200, 18 S. W. 512; *Rubinsky v. Patrick*, 2 Pa. Dist. R. 695.

⁴¹⁹ *Planters' Bank v. Calvit*, 3 Smedes & M. (Miss.) 143, 41 Am. Dec. 616.

⁴²⁰ *Thomson's Adm'r v. Chapman's Adm'r*, 83 Va. 215, 2 S. E. 273.

⁴²¹ *Jackson v. Allen*, 30 Ark. 110; *McCance v. Taylor*, 10 Grat. (Va.) 580. But see *Bankr. Act 1898*, § 67.

§ 475. Appointment of Receiver.

It is held that the lien of a judgment on the real estate of a corporation is not lost or affected by the subsequent appointment of a receiver to settle the business of such corporation; nor is the judgment-plaintiff thereby prevented from proceeding by execution, levy, and sale of such property to make his debt;⁴²² though of course he must apply to the court appointing the receiver for leave to levy on the property in the latter's hands. And the lien of a judgment will not be continued beyond the statutory period by the mere fact that, during such period, all the judgment debtor's property is in the hands of a receiver, under the control of a court having jurisdiction; and if, during this period, the judgment creditor does not ask permission of the court appointing the receiver to levy his execution, he loses his lien by his own neglect.⁴²³

§ 476. Taking Defendant on Capias.

At common law, "the writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods."⁴²⁴ Hence the lien of the judgment is destroyed by an execution against the debtor's person. It may, however, revive, in the few cases in which the creditor, failing to obtain satisfaction by this means, is permitted to resort to other remedies; but not as against intervening rights. "If the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon, as against creditors who have obtained a precedence during such suspension."⁴²⁵ Where a judgment is recovered against several, and a

⁴²² *Southern Bank v. Ohio Ins. Co.*, 22 Ind. 181; *Central Coal & Coke Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 334, 34 S. W. 383.

⁴²³ *Savings & Trust Co. v. Bear Valley Irr. Co. (C. O.)* 89 Fed. 32. Compare *Sample v. Eubanks*, 13 Tex. Civ. App. 418, 35 S. W. 509.

⁴²⁴ 3 Bl. Comm. 414.

⁴²⁵ *Rockhill v. Hanna*, 15 How. 189, 14 L. Ed. 656.

capias served on one of them, who executes a forthcoming bond, which is forfeited, this does not extinguish the lien of the judgment upon the land of the others.⁴²⁶

§ 477. Payment.

The lien of a judgment is discharged by payment of the judgment.⁴²⁷ But a tender of the amount of the judgment, if not accepted, does not extinguish its lien.⁴²⁸ An attorney's lien upon a judgment affects only his client's interests, and not the right of the opposite party to discharge the judgment with depreciated funds.⁴²⁹ But although a judgment lien or obligation may be extinguished at law by the payment of the debt, yet, for the benefit of a surety who has paid it, the lien in equity continues in full force.⁴³⁰ But after it is thus discharged, it is said that the lien cannot be restored by any subsequent agreement between the parties;⁴³¹ although, in some jurisdictions, it appears that it may be kept alive for the purpose of securing further advances.⁴³²

§ 478. Cancellation or Entry of Satisfaction.

A judgment creditor who enters satisfaction of his judgment, or causes an execution to be returned satisfied, authorizes others to treat the property of the debtor as released from the lien incident to the judgment.⁴³³ And so a judgment, when cancelled by order of

⁴²⁶ *Leake v. Ferguson*, 2 Grat. (Va.) 419.

⁴²⁷ *Banks v. Evans*, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734. But where a judgment is given to secure the payment of an accommodation note, the renewal of the note at maturity does not constitute payment, so as to discharge the lien of the judgment. *Laucks v. Michael*, 154 Pa. 355, 26 Atl. 314. A judgment plaintiff in lawful possession of lands on which his judgment is a lien has not the right to apply the rents and profits therefrom to the satisfaction of his judgment as against the owner, who is not a judgment defendant. *Boggs v. Douglass*, 105 Iowa, 344, 75 N. W. 185.

⁴²⁸ *People v. Beebe*, 1 Barb. (N. Y.) 379; *Law v. Jackson*, 9 Cow. (N. Y.) 641.

⁴²⁹ *Nell v. Staten*, 7 Heisk. (Tenn.) 290.

⁴³⁰ *German-American Sav. Bank v. Fritz*, 68 Wis. 390, 32 N. W. 123.

⁴³¹ *De La Vergne v. Evertson*, 1 Paige (N. Y.) 181, 19 Am. Dec. 411.

⁴³² *Peirce v. Black*, 105 Pa. 342.

⁴³³ *Page v. Benson*, 22 Ill. 484; *Branch Bank v. Ford*, 13 Ala. 431. But a senior judgment creditor, who erroneously enters satisfaction of his judgment

the court, ceases to be a lien on real estate owned by the debtor during the life of the judgment.⁴³⁴ On the same principle, where the defendant executed his notes for the amount of the judgment rendered against him, which was subsequently cancelled, it was held that the judgment ceased to exist, and there was no longer a lien upon the defendant's real estate, when no fraud was imputable in obtaining the cancellation.⁴³⁵

§ 479. Sale of the Land.

A sale of land under an execution extinguishes the lien of the judgment on the land sold.⁴³⁶

§ 480. Acquisition of Title by Judgment-Creditor.

Since a judgment is a general lien upon all the debtor's real estate, it does not merge when the judgment-creditor acquires title to a particular portion of such lands, but may, in ordinary cases, be enforced against the remaining lands.⁴³⁷ In case the creditor should become the owner of the only piece of land belonging to the debtor, there would probably be a merger of the lien, but no loss of the right to satisfy the judgment by levy upon personalty. But the precise question does not appear to have come before the courts.

§ 481. Release of Lien.

A release by a judgment creditor, at the instance of the debtor, of one of several tracts of land bound by a judgment, will not operate as a release of the others.⁴³⁸ It is said that a release of a judgment-lien may be by parol, but the proof thereof must be clear, satisfactory,

ment, is still entitled to priority, on such satisfaction being set aside, as against subsequent judgment creditors, whose judgments were recovered prior to the entry of satisfaction, and who have in no way been misled by such entry. *McCune v. McCune*, 164 Pa. 611, 30 Atl. 577.

⁴³⁴ *Worthington v. Nelson*, 75 Iowa, 648, 36 N. W. 911.

⁴³⁵ *Polk Co. v. Nelson* (Iowa) 43 N. W. 80.

⁴³⁶ *People v. Easton*, 2 Wend. 297.

⁴³⁷ *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790. And see *Sellers v. Floyd*, 24 Colo. 484, 52 Pac. 674; *In re Voorhies*, 46 S. C. 114, 24 S. E. 170.

⁴³⁸ *Wolfe v. Gardner*, 4 Har. (Del.) 338.

and conclusive.⁴³⁹ There may also be a species of release in equity or by estoppel. Thus, where lands subject to the incumbrance of a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment-debtor and are entitled to the same equities; and a release by the judgment-creditor, without their consent and with knowledge of their rights, of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment.⁴⁴⁰ In a case in New York, it appeared that the agent of the judgment-creditor was present at a sale, by the debtor to a third person, of certain lands on which the judgment was a lien, drew the conveyance, and was informed of the sale, and the debtor soon afterward delivered to such agent, as security for the judgment-debt, the notes given in payment for the land conveyed. It was held that the receipt of these notes by the agent of the creditor, with knowledge of their consideration, although it did not affect the creditor's lien upon the lot as security for the judgment in case it should not be otherwise satisfied, imposed on him, in equity, a duty to apply the proceeds of the notes in reduction of the judgment.⁴⁴¹

⁴³⁹ Dalby v. Cronkhite, 22 Iowa, 222.

⁴⁴⁰ Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625.

⁴⁴¹ Ingalls v. Morgan, 10 N. Y. 178. So, where the owner of a judgment which was a lien on personal property, and on real property subject to an attachment, sold the personal property, but made no attempt to enforce his claim against the realty, and two years thereafter the debtor conveyed it to the attaching creditor in payment of his claim, which was more than the value of the land; and the grantee thereafter, with the judgment creditor's knowledge, paid the taxes thereon, claiming to own it, for a period of eight years, it was held that the judgment creditor had abandoned his lien. Call v. Cozart (Tenn.) 48 S. W. 312. But judgment creditors, by bringing suits in equity to have fraudulent transfers of land set aside, and by having receivers appointed therein, not of the real estate of the judgment debtors, but of the personal property and the rents and profits of the real estate only, do not thereby waive their legal liens on the lands, or on the surplus fund arising from the sale of the land under a mortgage thereon. Wilkinson v. Paddock, 125 N. Y. 748, 27 N. E. 407.

CHAPTER XVII.**REVIVAL OF JUDGMENTS.**

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§ 482. Revival by Motion or Suit.

In several of the states, when a judgment has become dormant, or has lost its lien by the expiration of the statutory period of limitation, it may be revived, for purposes of lien and execution, by a formal suit or action brought for that purpose, having all the characteristics of a plenary proceeding.¹ In South Carolina, the proper proceeding to revive a judgment is to issue a summons to renew execution, although an order giving permission to issue execution on a judgment will revive it.² In California, the statute provides that "in all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion

¹ *Ingraham v. Champion*, 84 Wis. 235, 54 N. W. 398; *Haupt v. Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

² *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861; *Ex parte Graham*, 54 S. C. 163, 22 S. E. 67.

or by judgment for that purpose.”³ But a judgment which has become barred by statute cannot be revived by a parol promise to pay it.⁴ Nor will supplementary proceedings on a judgment be effectual to keep it alive or take the place of an action to revive it.⁵ In some jurisdictions, it is necessary for the personal representatives of a deceased judgment creditor to revive it, in order to be able to enforce it as against the judgment debtor; and whether this should be done by a formal action, or may be effected merely on motion, will depend upon the local statute.⁶

§ 482a. Revival by Scire Facias.

The statutes of several of the states provide that a judgment shall cease to be a lien on real estate at the expiration of a certain period of time (usually five or ten years), but also provide that, within that period, the judgment may be revived by a proceeding by scire facias, with the effect of continuing its lien for another like period. When used for this purpose, the writ requires the defendant to show cause why the judgment should not be revived and its lien continued.⁷ The purpose of a proceeding by scire facias to revive a personal judgment is not to raise the issue of the validity of the original judgment, but to give the debtor an opportunity to show, if he can, that it has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against it, and to give the creditor a new right of enforcement from the date of the judgment of revival. Such a proceeding is not a substitute for an action of debt on the judgment, but one which may be maintained concurrently with such action, and without regard to its pendency.⁸

³ Code Civ. Proc. Cal. § 685. See *Cortez v. Superior Court*, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37.

⁴ *Ludwig v. Huck*, 45 Ill. App. 651.

⁵ *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 68 Am. St. Rep. 653.

⁶ See *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271; *Reynolds v. Crook*, 95 Ala. 570, 11 South. 412; *Alford v. Hoag*, 8 Kan. App. 141, 54 Pac. 1105; *Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320.

⁷ *Wonderly v. Lafayette County (C. C.)* 74 Fed. 702; *City Building & Loan Ass'n v. Niskey*, 21 Pa. Co. Ct. R. 226.

⁸ *Lafayette County v. Wonderly*, 34 C. C. A. 360, 92 Fed. 313. An action
(732)

In this sense, the proceeding by scire facias, while it partakes in some measure of the characteristics of an independent action at law (as, in requiring service of a writ and a plea by the defendant), yet is not regarded as a new suit. In contemplation of law it is merely a continuation of the action which resulted in the judgment now sought to be revived, and as dependent upon the liability already created by that judgment.⁹ Each successive writ of scire facias to revive a judgment, or to recover damages for the breach of the condition of a bond on which the judgment has been rendered, must be founded upon the judgment which immediately preceded it; for a recovery upon a writ of scire facias is a bar to any subsequent recovery upon the original judgment.¹⁰ It must be observed that this writ, as a remedy for the revival or enforcement of a judgment, is not universally applicable in the United States. In some jurisdictions, where the only form of action authorized by law is the "civil action," the writ of scire facias is unknown in practice.¹¹

brought on a judgment by regular summons and complaint, wherein a money judgment alone is prayed for, is not in the nature of a scire facias. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861.

⁹ *Hatch v. Eustis*, 1 Gall. 160, Fed. Cas. No. 6,207; *Fitzhugh v. Blake*, 2 Cranch, C. C. 37, Fed. Cas. No. 4,840; *Adams v. Rowe*, 11 Me. 89, 25 Am. Dec. 266; *State Treasurer v. Foster*, 7 Vt. 52; *Comstock v. Holbrook*, 16 Gray (Mass.) 111; *Gray v. Thrasher*, 104 Mass. 373; *Eldred v. Hazlett's Adm'r*, 38 Pa. 16; *Irwin v. Nixon's Heirs*, 11 Pa. 419, 51 Am. Dec. 559; *Kirkland v. Krebs*, 34 Md. 93; *Ingram v. Belk*, 2 Strob. (S. C.) 207, 47 Am. Dec. 591; *Funderburk v. Smith*, 74 Ga. 515; *Brown v. Harley*, 2 Fla. 159; *Perkins v. Hume*, 10 Tex. 50; *Masterson v. Cundiff*, 58 Tex. 472; *Carter v. Carriger's Adm'r's*, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; *Blackwell v. State*, 3 Ark. 320; *Wolf v. Pounsford*, 4 Ohio, 397; *Challenor v. Niles*, 78 Ill. 78; *Denegre v. Haun*, 13 Iowa, 240; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484; *Long v. Thormond*, 83 Mo. App. 227. But a scire facias to revive a judgment on which no execution issued in a year and a day may be regarded as a suit on the judgment, so far as concerns the plaintiff's right to discontinue as to parties not served. *Hanson v. Jacks*, 22 Ala. 549.

¹⁰ *Collingwood v. Carson*, 2 Watts & S. (Pa.) 220; *Custer v. Detterer*, 3 Watts & S. (Pa.) 28.

¹¹ *Humiston v. Smith*, 21 Cal. 129.

§ 483. Venue of the Action.

It is a settled rule that a scire facias to revive a judgment can issue only from the court in which the record remains of the judgment to be revived.¹² Thus, proceedings to revive a judgment against the heirs of the defendant, so as to have execution against lands inherited by them, must be brought in the court where the judgment was rendered, and an independent suit therefor in another county, where a transcript had been filed to obtain a lien, cannot be maintained where the lands have been sold without fraud.¹³ Where the defendant resides out of the county, service must be perfected by sending out process to the county where he is to be found, directed to the sheriff of that county, whose duty it then becomes to serve and return the process.¹⁴ Where a judgment has been obtained before a justice of the peace, and a transcript taken and filed in the court of common pleas, a scire facias to revive the judgment must be issued by the common pleas and not by the justice.¹⁵ This writ cannot be brought in a court of chancery to enforce or revive a

¹² Vallance v. Sawyer, 4 Me. 62; State v. Brown, 41 Me. 535; State v. Kinne, 39 N. H. 129; Carlton v. Young, 1 Aikens (Vt.) 332; Gibson v. Davis, 22 Vt. 374; Osgood v. Thurston, 23 Pick. (Mass.) 110; In re Dougherty's Estate, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Boylan v. Anderson, 3 N. J. Law, 529; Tindall v. Carson, 16 N. J. Law, 94; Conner v. Neff, 2 Ind. App. 364, 27 N. E. 645; City Nat. Bank v. Swink (Tex. Civ. App.) 49 S. W. 130; Grimke's Ex'rs v. Mayrant, 2 Brevard (S. C.) 202; Dickinson v. Allison, 10 Ga. 557; Funderburk v. Smith, 74 Ga. 515; Chapman v. Nelson, 31 La. Ann. 341; Masterson v. Cundiff, 58 Tex. 472; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638; Challenor v. Niles, 78 Ill. 78; Carnes v. Crandall, 4 Iowa, 151; Wilson v. Tiernan, 3 Mo. 577.

¹³ Thompson v. Parker, 83 Ind. 96. Compare Kendig v. North, 7 Del. Co. R. (Pa.) 574.

¹⁴ Dickinson v. Allison, 10 Ga. 557.

¹⁵ Brannan v. Kelley, 8 Serg. & R. (Pa.) 479; Smith v. Wehrly, 157 Pa. 407, 27 Atl. 700. An action to revive a judgment may be brought in the trial court on a judgment of the supreme court rendered in favor of plaintiff on reversal of a judgment in favor of defendant in an action on a money demand, though the judgment of the supreme court was never certified to the trial court, nor entered in its minutes, as, in such case, the judgment of the supreme court will be considered as the judgment of the trial court. Carothers v. Lange (Tex. Civ. App.) 55 S. W. 580.

decree, unless there be a statute authorizing executions to issue upon decrees in equity.¹⁶

§ 484. Right to Sue out Scire Facias.

At common law, a party was not entitled to maintain a scire facias to have execution of a judgment where there was no change of parties, and the writ was available only in cases where the time for issuing execution was past.¹⁷ But according to the modern decisions, an action of debt, or a scire facias, may be brought on a judgment after an execution has issued, and it is not a valid objection to such a proceeding that, at the time of its commencement, the plaintiff could have proceeded by execution.¹⁸ And where a party unnecessarily sues out a scire facias, when he might have an immediate execution, the writ should not be quashed for that reason, but execution should not issue until he obtains judgment under the writ.¹⁹ Complete satisfaction of the judgment will alone suffice to prevent its revival in this manner.²⁰ Thus a subsisting levy on land is no bar to a scire facias on the judgment to continue its lien or to substitute a representative of either party.²¹ So a conditional appropriation by an auditor to a judgment-creditor in the distribution of proceeds of the debtor's real estate, will not prevent the reviving of the judgment for the whole amount, where no money has been actually received upon it, and the conditions attached to the appropriation have

¹⁶ *Jeffreys v. Yarborough*, 16 N. C. 510; *Curtis v. Hawn*, 14 Ohio, 185; *Logan v. Cloyd*, 1 A. K. Marsh. (Ky.) 201.

¹⁷ *Harmon v. Dedrick*, 3 Barb. (N. Y.) 192.

¹⁸ *Stewart v. Peterson's Ex'rs*, 63 Pa. 230; *Stille v. Wood*, 1 N. J. Law, 118; *Rogers v. Hollingsworth*, 95 Tenn. 357, 32 S. W. 197. The right to a mandamus for the enforcement of a judgment is equivalent to the right to issue an execution thereon for the purposes of an application to revive the judgment on scire facias. *Wonderly v. Lafayette County* (C. C.) 74 Fed. 702.

¹⁹ *Lambson v. Moffett*, 61 Md. 426.

²⁰ A judgment which has been paid and extinguished by the owner of land on which it was a lien cannot be afterwards revived to cut out other liens. *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616. A judgment which has become barred by the statute of limitations cannot be revived by scire facias. *Browne & Manzanares Co. v. Chavez*, 9 N. M. 316, 54 Pac. 234.

²¹ *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

not been fulfilled.²² So a scire facias may be issued to revive a judgment which has been removed by a writ of error sued out without bail and still pending; for a writ of error without bail is not a supersedeas.²³ But the writ cannot be used to revive a judgment on which no execution could ever have issued.²⁴

§ 485. Time of Issuing the Writ.

Where the statute provides that no judgment shall continue a lien on realty for a longer period than five years (or ten years) from the day of entry or revivor, unless a writ of scire facias to revive it be sued out within that period, the limitation of the time of bringing the writ begins to run from the rendition of the judgment.²⁵ But in such case the day of entry of the judgment is to be excluded in the computation of the period within which it must be revived.²⁶ And where the last day of the period thus computed falls on Sunday, a writ of scire facias issued on the Monday following is in time to preserve the lien.²⁷ And if the process of scire facias to revive issues a

²² *Masser v. Dewart*, 46 Pa. 534.

²³ *Boyer v. Rees*, 4 Watts (Pa.) 201.

²⁴ *Turner v. Dupree's Adm'r*, 19 Ala. 198; *Horton v. Clark*, 40 Ga. 412. But in Missouri, the statutes having provided for the revival of judgments by scire facias, without making any exceptions, the courts cannot except a judgment from their operation on the ground that it is not a lien on property, or because no execution could issue thereon. *Lafayette County v. Wonderly*, 34 C. C. A. 360, 92 Fed. 313.

²⁵ *Scott v. Seelye*, 39 La. Ann. 749, 2 South. 300; *Ayre v. Burke*, 82 Va. 338, 4 S. E. 618; *Browne & Manzanares Co. v. Chavez*, 9 N. M. 316, 54 Pac. 234. The general law as to the limitation of actions does not apply to the proceeding to revive dormant judgments. *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484. As to retrospective operation of statutes limiting the time within which scire facias may be brought to revive judgments, see *Wrightman v. Boone County*, 31 C. C. A. 570, 88 Fed. 435. As to the effect of nonresidence or personal disabilities of the parties in suspending the running of the statute of limitations, see *Bartol v. Eckert*, 50 Ohio St. 31, 33 N. E. 294. Where a judgment has been already revived on scire facias, the period of limitation begins to run from the date of the revival instead of the date of the original judgment. *Kratz v. Preston*, 52 Mo. App. 251.

²⁶ *Green's Appeal*, 6 Watts & S. (Pa.) 327; *Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858.

²⁷ *Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858.

single day within the time, it saves the bar;²⁸ and the terre-tenant may be connected with this process, though not named in it, by an alias, which latter may issue any time within five years.²⁹ In some states, the life of a judgment-lien is continued for a certain period after the death of the debtor, without reference to the time that may have elapsed since its entry or last revival, provided it had not then become dormant. But elsewhere it is held that if more than five years of the whole period (ten years) have elapsed during the life of the debtor, then the creditor has only the remainder of the ten years in which to revive the judgment against the personal representatives.³⁰ In Pennsylvania a judgment may be revived against terre-tenants at any time within the period of five years, notwithstanding there may have been an intermediate revival by scire facias without notice to them.³¹ But an alias scire facias, issued after five terms from the former, is not sufficient to preserve the lien of a judgment which had expired in the interval.³² In the same state it was formerly held that where there was a stay of execution, the five years within which the judgment must be revived, did not begin to run until the expiration of the stay.³³ But this was afterwards changed by a statute.³⁴

§ 486. Pleadings.

The writ of scire facias to revive a judgment is not merely a form of summons or citation to the defendant; it also serves the purpose of a declaration, to which the defendant may plead or demur, as to any other declaration. And as the proceeding is not original, but a

²⁸ The issuance of a writ of scire facias to revive a judgment suspends the running of the statute of limitations against it for the purposes of the proceeding, and the fact that the judgment would have become ineffective for any purpose, by limitation, before the hearing, had the proceeding not been commenced, is no defense to a revival. *Lafayette County v. Wonderly*, 34 C. C. A. 360, 92 Fed. 313; *Fitzpatrick v. Leake*, 47 La. Ann. 1643, 18 South. 649.

²⁹ *Lichty v. Hochstetler*, 91 Pa. 444; *Porter v. Hitchcock*, 98 Pa. 625; *Silverthorn v. Townsend*, 37 Pa. 263.

³⁰ *Handy v. Smith's Adm'r*, 30 W. Va. 195, 3 S. E. 604.

³¹ *Fursht v. Overdeer*, 3 Watts & S. 470.

³² *Allen v. Liggett*, 81 Pa. 486. See *Stewart v. Justices of St. Clair County Court (C. C.)* 47 Fed. 482.

³³ *Pennock v. Hart*, 8 Serg. & R. 369.

³⁴ Act Pa. March 26, 1827.

continuation of the former action, the plaintiff is not required to file a new declaration or rule the defendant to plead.³⁵ Where a legal title to have execution of the original judgment is not set out in the writ, judgment may be arrested as for want of a cause of action.³⁶ A scire facias to revive a judgment must therefore follow the original judgment in amount, date, and parties; otherwise it is defective under a plea of nul tiel record.³⁷ But it is sufficient if the writ contains such recitals as will point to the judgment intended to be revived with such certainty that the defendant must know what judgment is meant.³⁸ It is not necessary to aver that execution was not issued within a year and a day; that the judgment remains unpaid and unsatisfied is a sufficient allegation.³⁹ So a writ of scire facias, in reciting a judgment on a prior scire facias, need not recite the amount for which such judgment was obtained; such a recital is in no respect uncertain, informal, or insufficient, when the writ recites the judgment on the prior scire facias as it would be set out in the full and formal record of that judgment.⁴⁰ So a scire facias against the heir, on a judgment recovered against the ancestor, need not aver ineffectual proceedings against the personal representatives;

³⁵ *Blake v. Dodemead*, 2 Strange, 775; *Governor and Company of Bank of Scotland v. Fenwick*, 1 Exch. 792; *Nunn v. Claxton*, 3 Exch. 712; *Nesbit v. Manro*, 11 Gill & J. (Md.) 281; *Bowle v. Neale*, 41 Md. 124; *Bish v. Williar*, 59 Md. 382; *McVeigh v. Bank of Old Dominion*, 76 Va. 267; *Brown v. Harley*, 2 Fla. 159; *Hopkins v. Howard*, 12 Tex. 7; *State v. Robinson*, 8 Yerg. (Tenn.) 370; *Oalhoun v. Adams*, 43 Ark. 238; *Farris v. People*, 58 Ill. 28; *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590.

³⁶ *McKinney v. Mehaffey*, 7 Watts & S. (Pa.) 276.

³⁷ *Richter v. Cummings*, 60 Pa. 441; *Wolf v. Pounsford*, 4 Ohio, 397; *Warfield v. Brewer*, 4 Gill (Md.) 265.

³⁸ *Ward v. Prather's Adm'r*, 1 J. J. Marsh. (Ky.) 4; *Davidson v. Hunter*, 22 Utah, 117, 61 Pac. 556. Though the scire facias must correctly recite the original judgment, irregularities not misleading will not avoid it; and where defendant has suffered a default thereon, and execution has issued, no mere junior creditor can object. *Landon v. Brown*, 160 Pa. 538, 28 Atl. 921.

³⁹ *Albin v. People*, 46 Ill. 372. But if the statement accompanying the scire facias shows on its face that the judgment is more than 20 years old, and avers merely that no part of the debt has been paid, it does not rebut the presumption of payment of the judgment. *Hummel v. Lilly*, 188 Pa. 463, 41 Atl. 613, 68 Am. St. Rep. 879. Compare *National Sav. Bank v. Welcker*, 21 D. C. 324.

⁴⁰ *Brown v. Chesapeake & O. Canal Co. (C. C.)* 4 Fed. 770.

but if no such proceedings have been had, such defense must be set up by plea.⁴¹ But on the other hand, a writ of scire facias to enforce a judgment rendered against a trustee is insufficient if it be only alleged therein that the plaintiff recovered a judgment against the defendant as trustee. It should appear for what the trustee was made chargeable.⁴² A substantial variance between the recitals in the writ of scire facias and the judgment to be revived would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original.⁴³

§ 487. Service of Writ.

At common law, the rule is that two returns of nihil to a writ of scire facias are equivalent to a return of scire feci; that is, the court thereupon acquires jurisdiction of the defendant and may proceed to award execution on the original judgment.⁴⁴ But here an important distinction is recognized, viz., that if execution is awarded upon a return of scire feci, the defendant is concluded by the judgment; but when it is awarded upon two returns of nihil, the defendant may afterwards present his defense by audita querela, or upon motion to the court, and may have the full benefit thereof.⁴⁵ And the revival of a judgment by scire facias for purposes of execution, on two returns of nihil, operates merely to keep in force the local lien, and does not stop the running of the statute of limitation in another state, where the defendant resides, nor support a new action against the defendant in another state.⁴⁶ The common-law rule is

⁴¹ *Rogers v. Denham's Heirs*, 2 Grat. (Va.) 200.

⁴² *Gibson v. Davis*, 22 Vt. 374.

⁴³ *In re Dougherty's Estate*, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326.

⁴⁴ *Randal v. Wale*, Cro. Jac. 59; *Barret v. Cleydon*, 2 Dyer, 168; *Bromley v. Littleton*, Yel. 112; *Andrews v. Harper*, 8 Mod. 227; *Warder v. Tainter*, 4 Watts (Pa.) 270; *Chambers v. Carson*, 2 Whart. (Pa.) 9; *Oumming v. Eden's Devisees & Terre-Tenants*, 1 Cow. (N. Y.) 70; *Woodfork v. Bromfield*, 5 N. C. 187; *Ingram v. Belk*, 2 Strob. (S. C.) 207, 47 Am. Dec. 591; *Barrow v. Bailey*, 5 Fla. 9; *Dunlevy v. Ross*, Wright (Ohio) 287; *Sans v. People*, 3 Gilman (Ill.) 327; *Choate v. People*, 19 Ill. 63; *Brown v. Wygant*, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284; *Kratz v. Preston*, 52 Mo. App. 251.

⁴⁵ *Barrow v. Bailey*, 5 Fla. 9; *Kratz v. Preston*, 52 Mo. App. 251; *Jones v. George*, 80 Md. 294, 30 Atl. 635.

⁴⁶ *Owens v. McCloskey*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; *Betts*

still adhered to in some of the states. Thus, in Massachusetts, if the law prescribes no particular form of notice to be given to a defendant beyond the jurisdiction of the court, it is for the court to cause such notice to be given to him as shall be reasonable and enable him to appear and defend his rights.⁴⁷ But in some other states it is held that the writ of scire facias must be served personally.⁴⁸ And where there is a terre-tenant of the land, he must also be served with process; although, if he appears and confesses judgment on the scire facias, he thereby waives the objection that he was not served.⁴⁹ In Pennsylvania, it is held that service is good when made on the defendant, who remains in the possession of his real estate, although he has made an assignment for the benefit of his creditors.⁵⁰ But where the judgment to be revived is against two defendants jointly, the scire facias must be served on both; if served on only one of the joint debtors, it cannot afterwards be amended so as to include both, so as to save the bar of the statute.⁵¹

§ 488. Parties Plaintiff.

The plaintiff in a scire facias will ordinarily be the same person who was plaintiff in the original judgment, and in such case his capacity to sue out the writ will be governed by the same rules which determine the capacity of persons to maintain other species of actions. Thus, a married woman may bring a scire facias to continue

v. Johnson, 68 Vt. 549, 35 Atl. 489; *Robb v. Anderson*, 43 Ill. App. 575; *Rice v. Moore*, 48 Kan. 590, 30 Pac. 10, 16 L. R. A. 198, 30 Am. St. Rep. 318; *Heppler v. Davis*, 32 Neb. 556, 49 N. W. 458, 13 L. R. A. 565, 29 Am. St. Rep. 457. But in Louisiana, when the defendant resides in another state, the court may appoint a curator ad hoc, upon whom service can be made, and thereupon a judgment may be rendered binding on the defendant; a suit to revive a judgment being considered one quasi in rem. *Bertron v. Stewart*, 43 La. Ann. 1171, 10 South. 295.

⁴⁷ *Comstock v. Holbrook*, 16 Gray, 111.

⁴⁸ *Feeter v. McCombs*, 1 Wend. (N. Y.) 19; *Rice v. Talmadge*, 20 Vt. 378; *Betts v. Johnson*, 68 Vt. 549, 35 Atl. 489; *Mendenhall v. Robinson*, 56 Kan. 633, 44 Pac. 610. See *Phillips v. Walt*, 106 Ga. 580, 32 S. E. 842.

⁴⁹ *Dickerson's Appeal*, 7 Pa. 255; *White v. Harden*, 154 Pa. 387, 23 Atl. 312.

⁵⁰ *In re Dohner's Assignees*, 1 Pa. 101.

⁵¹ *Lyon v. Ford*, 20 D. C. 580.

the lien of a judgment against her husband, the judgment having been entered in her favor before they were married.⁵² When the writ is used to revive a judgment in favor of an intestate, it should be issued in the name of his administrator; but if issued in the name of the intestate, it may be amended by substituting that of the administrator.⁵³ Where the judgment creditor has become a bankrupt, the right to procure a revival of the judgment devolves upon his trustee in bankruptcy.⁵⁴ Where the judgment has passed by assignment to a third person, the determination of the proper plaintiff in an action to revive it will depend upon the statutory rules in the particular jurisdiction. If the law requires all suits to be brought in the name of "the real party in interest," the scire facias should be sued out in the name of the assignee. If, however, such a provision does not exist, a suit to revive a judgment is properly brought in the name of the original plaintiff, even though the judgment may have become the property of a third person.⁵⁵

§ 489. Parties Defendant.

The general rule is that "all the parties to the original judgment must be parties to the proceedings to renew or revive that judgment."⁵⁶ It is also a rule that all persons must be joined who have

⁵² *Kinkade v. Cunningham*, 118 Pa. 501, 12 Atl. 410.

⁵³ *Challenor v. Niles*, 78 Ill. 78.

⁵⁴ See *Brown v. Wygant*, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 234.

⁵⁵ See *Marbury v. Pace*, 30 La. Ann. 1330; *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160; *Wells v. Graham*, 39 W. Va. 605, 20 S. E. 576; *Haupt v. Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698; *Bludworth v. Poole*, 21 Tex. Civ. App. 531, 53 S. W. 717. Where scire facias is brought upon a judgment which has been assigned to third persons in unequal portions, separate judgments of revival may be entered thereon in favor of the several assignees for the amounts respectively due to them. In *re Ernst's Estate*, 164 Pa. 87, 30 Atl. 371. But one who obtains a judgment against a garnishee, based on the latter's indebtedness to the principal debtor on another judgment, cannot of his own volition, and without attempting to levy execution on the judgment recovered in the garnishment proceedings, substitute himself as use plaintiff in the judgment which his debtor holds against the garnishee, and issue process for its revival and collection. *Wherry v. Wherry*, 179 Pa. 84, 36 Atl. 165.

⁵⁶ *Funderburk v. Smith*, 74 Ga. 515. See *Messmore v. Williamson*, 189 Pa. 73, 41 Atl. 1110.

a substantial interest in the land to be bound by the lien. But the failure to make a naked trustee, who has no beneficial interest in the land, a party to a writ issued for the revival of the judgment, will not destroy the hold of the judgment on a cestui que trust who is duly joined.⁵⁷ In a recent case in the United States circuit court for the western district of Tennessee, the question was on a scire facias to revive a judgment against the old corporation of the city of Memphis. It appeared that the legislature had abolished the charter of that city and organized the same inhabitants and territory into a municipal corporation by another name, and the supreme court of the state had construed the legislation as creating a successor to the old corporation liable for its debts. It was therefore adjudged that scire facias was the proper remedy to revive a judgment existing against the old corporation at the time of the repeal of the charter, against the new corporation; and the fact that the assets of the extinct municipality were undergoing administration in a court of equity under regulations prescribed by the legislature did not defeat the plaintiff's right to a revivor, nor the fact that there was no property liable to execution in the hands of the new corporation.⁵⁸ A number of judgments against the same person may be consolidated and revived in one amicable action of scire facias, although one of them is also against another defendant, and, when so revived, the continuity of the liens is preserved.⁵⁹

§ 490. Same; Judgment against Decedent.

Scire facias is the proper remedy to revive a judgment against an ancestor so as to compel the heirs at law to satisfy it out of lands inherited by them.⁶⁰ But as to the proper persons to be made defendants to a revival of this sort, there is the greatest diversity of practice in the different states. In some jurisdictions the rule obtains

⁵⁷ *Bowers v. Harner*, 3 Phila. (Pa.) 146. A judgment against a former husband cannot be revived, after his death, against his wife and her second husband, over the latter's objection, merely because he is the husband of decedent's wife. *Wessell v. Gross* (Tenn. Ch. App.) 57 S. W. 372.

⁵⁸ *Grantland v. City of Memphis*, 12 Fed. 287.

⁵⁹ *Yeager's Appeal*, 129 Pa. 268, 18 Atl. 137.

⁶⁰ *Commercial Bank v. Kendall*, 21 Miss. 278.

that it is not necessary to make the executors or administrators of a deceased defendant parties to the writ, the subject-matter in dispute being beyond their province, but that the heirs and terre-tenants must be joined.⁶¹ In Pennsylvania, and some other states, on the other hand, it is established law that where a judgment has been obtained against a man in his lifetime, it may be revived after his death, for the purpose of lien and execution, by a scire facias issued against his personal representatives alone, and in such case it is unnecessary to bring in the widow and heirs by a writ against them.⁶² And conversely it is held, in the same state, that under these circumstances, if the writ be sued only against the heirs in possession of the inheritance, it is erroneous; the executor or administrator must be made a party to it.⁶³ In Indiana, it is said that the administrator and heirs of a decedent are properly joined as defendants in a proceeding to revive a judgment against him.⁶⁴ In Maryland, where the original defendant in a judgment is dead, and scire facias is issued to revive the judgment as against his land, it must be issued against the terre-tenant and also the personal representatives.⁶⁵ It is to be remarked that a scire facias against the heirs and terre-tenants of the judgment debtor will not reach property never owned by such debtor, but inherited by his children after his death from a third person.⁶⁶

⁶¹ *Tessier v. Wyse*, 3 Bland (Md.) 40; *Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 398; *Stewart v. Gibson*, 71 Mo. App. 232. A judgment of revivor of a judgment against an intestate imposes no personal liability on the heirs, though they are necessary parties defendant to the action. *Stewart v. Gibson*, *supra*.

⁶² *Middleton's Ex'rs v. Middleton*, 106 Pa. 252; *Grover v. Boon*, 124 Pa. 399, 16 Atl. 885; *McMillan v. Red*, 4 Watts & S. 237; *United States v. Houston* (D. C.) 48 Fed. 207; *Hauck v. Gundaker*, 21 Pa. Co. Ct. R. 12; *Cheraw & C. R. Co. v. Marshall*, 40 S. C. 59, 18 S. E. 247. See *Colenburg v. Venter*, 173 Pa. 113, 33 Atl. 1046; *Callahan v. Fahey*, 10 Pa. Co. Ct. R. 488; *In re Davey's Estate*, 9 Pa. Co. Ct. R. 125.

⁶³ *Brown v. Webb*, 1 Watts, 411.

⁶⁴ *Graves v. Skeels*, 6 Ind. 107.

⁶⁵ *Tiers v. Codd*, 87 Md. 447, 39 Atl. 1044.

⁶⁶ *Adams v. Stake*, 67 Md. 447, 10 Atl. 444.

§ 491. Same; Joint Defendants.

In case the judgment sought to be revived was rendered against two or more joint defendants, it is a practically universal rule that the scire facias must follow the judgment, and all the original defendants must be made defendants to the writ, if living; if one has died, the writ must be against the survivors jointly with the heirs and terre-tenants of the decedent (or his personal representative in proper cases); and it is irregular to take proceedings against the surviving defendants alone, or against the representatives of the decedent without joining the survivors.⁶⁷ Hence, where a plaintiff for any sufficient cause desires to revive a judgment against one or more of several defendants without joining all, his remedy is by an action of debt on the judgment; it cannot be done by scire facias.⁶⁸ So where a writ to revive a judgment against several is not served on one of them, the plaintiff cannot discontinue the proceeding as to him and revive the judgment against the others.⁶⁹

§ 492. Terre-Tenants.

A terre-tenant, in the sense in which the term is used in connection with the subject-matter now under consideration, is one who has an estate in the land, coupled with the actual possession, which he derived mediately or immediately from the judgment-debtor while the land was bound by the lien. And the rule is, that on a scire facias

⁶⁷ *Sainsbury v. Pringle*, 10 Barn. & C. 751; *Fowler v. Rickerby*, 9 Dowl. 682; *Panton v. Hall*, 2 Salk. 508; *Rex v. Chapman*, 3 Anst. 811; *Grenell v. Sharp*, 4 Whart. (Pa.) 344; *Commonwealth v. Mateer*, 16 Serg. & R. (Pa.) 416; *Dowling v. McGregor*, 91 Pa. 410; *McAfee v. Patterson*, 2 Smedes & M. (Miss.) 593; *Henderson v. Vanhook*, 24 Tex. 358; *Bolinger v. Fowler*, 14 Ark. 27; *Calloway's Heirs v. Eubank*, 4 J. J. Marsh. (Ky.) 280; *Gray's Adm'r v. McDowell*, 5 T. B. Mon. (Ky.) 501; *Murray's Adm'r v. Baker*, 5 B. Mon. (Ky.) 172; *Huey's Adm'r v. Redden's Heirs*, 3 Dana (Ky.) 488; *Mitchell's Heirs v. Smith's Heirs*, 1 Litt. (Ky.) 243; *Hallowell v. Brown*, 8 Houst. (Del.) 500, 32 Atl. 392; *Rowland v. Harris* (Tex. Civ. App.) 34 S. W. 295.

⁶⁸ *Carson v. Moore*, 23 Tex. 450. But compare *Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43; *National Exchange Bank v. Preston*, 97 Va. 222, 33 S. E. 546.

⁶⁹ *Greer v. State Bank*, 10 Ark. 455; *Coleman v. Edwards*, 2 Bibb (Ky.) 395. Compare *Hanson v. Jacks*, 22 Ala. 549.

to revive the lien of a judgment on land which is in the possession of a terre-tenant, it is essential that the terre-tenant be made a party to the proceeding.⁷⁰ In Pennsylvania, however, under the wording of the statute, it has been decided that the issuing of a scire facias within five years after the judgment was rendered continues the lien on lands that had been conveyed by the defendant, although no service of the writ is actually made on the terre-tenant.⁷¹ In the same state the statutes provide two modes of reviving a judgment, (1) by agreement between the parties and terre-tenants, (2) by a writ of scire facias. And it is held that a revival by agreement with the judgment-debtor alone does not continue the lien, as against the terre-tenants, after the expiration of the statutory period.⁷² But, on the other hand, an amicable revival of the judgment by the terre-tenant, by an agreement to which the defendant is not a party, will continue the lien of the judgment on the land.⁷³ And if the writ is served upon the terre-tenant, it matters not that judgment is not formally entered against him on the scire facias.⁷⁴

As to who are to be considered terre-tenants, the authorities are in the main harmonious, the definition given at the beginning of this section exhibiting the substantial result of the various rulings. And first, the party must have a substantial interest or estate in the land. Thus, a mere occupant, holding in the character of a yearly lessee of

⁷⁰ *Lusk v. Davidson*, 3 Pen. & W. (Pa.) 229; *McCray v. Clark*, 82 Pa. 457; *Long v. Miller*, 158 Pa. 573, 28 Atl. 233; *Suter v. Findley*, 5 Pa. Super. Ct. 163; *Morton's Ex'rs v. Croghan's Terre-Tenants*, 20 Johns. (N. Y.) 106; *Von Puhl v. Rucker*, 6 Iowa, 187. In Pennsylvania, under the act of April 16, 1840, the terre-tenant is not entitled to notice of the revival of a judgment as between the original parties, unless he has, at the time of such revival, recorded his deed or taken such possession of the land as amounts to constructive notice to the judgment creditor. *Buck's Appeal*, 100 Pa. 109.

⁷¹ *Meinwelsner v. Hains*, 110 Pa. 468, 2 Atl. 431.

⁷² *Baum v. Custer* (Pa.) 13 Atl. 771; *Armstrong's Appeal*, 5 Watts & S. (Pa.) 352. But the lien of a judgment on a farm which defendant owned and lived on when judgment was entered is continued by a revival of the judgment by an amicable scire facias, signed by defendant alone, the record title and the possession remaining the same, notwithstanding a secret conveyance by defendant to his wife. *Lyon v. Cleveland*, 170 Pa. 611, 33 Atl. 143, 30 L. R. A. 400, 50 Am. St. Rep. 782.

⁷³ *Sames's Appeal*, 26 Pa. 184; *Landon v. Brown*, 160 Pa. 538, 28 Atl. 921.

⁷⁴ *Day v. Willy*, 3 Brewst. 43; *Duncan v. Flynn*, 9 Pa. Co. Ct. R. 321.

the defendant, need not be made a party to the writ.⁷⁵ So an assignee for the benefit of creditors is not a purchaser; he is a mere volunteer standing in the place of the assignor, and, as a general rule, has no rights against the lien-creditors of the assignor which the latter did not himself have.⁷⁶ Secondly, the person to be bound as terre-tenant must derive his title from the judgment debtor. "Where a party is in possession holding title adverse to that of the defendant, or paramount to his, such party is not a terre-tenant within the meaning of the law, because his rights are in no manner affected by the judgment. If he has a good title, the judgment does not bind his land, nor can a sale under the execution affect his interest. One who purchased the lands at a tax sale, and went into possession, is not a terre-tenant. If the sale was valid, the purchaser held a title paramount to the judgment, and not to be affected by the proceedings under the execution. If the sale was invalid, then the purchaser was in possession without title under the judgment-debtor, and not as his terre-tenant."⁷⁷ In the third place, the person designated as terre-tenant must have obtained his title from the judgment-debtor during the time when the land was bound by the lien of the judgment. A purchaser after the lien has expired is not a terre-tenant and is not bound by the judgment on the scire facias.⁷⁸ The

⁷⁵ *Clippinger v. Miller*, 1 Pen. & W. 64.

⁷⁶ *Kepler v. Erie Dime Savings & Loan Co.*, 101 Pa. 602. Similarly, assignees in bankruptcy are not terre-tenants who must have notice of the revival of a judgment. *In re Huddell* (C. C.) 47 Fed. 207.

⁷⁷ *Polk v. Pendleton*, 31 Md. 118.

⁷⁸ *Dengler v. Kiehner*, 13 Pa. 38, 53 Am. Dec. 441. In this case Gibson, C. J., said: "A judgment-creditor has a right to call on a terre-tenant of land, purchased by him from the debtor while it was bound by the judgment, to show why the debt ought not to be levied on it; and the terre-tenant having slept his time, being warned, is concluded as to everything he might have made matter of defense to the scire facias. But the creditor must at least have laid a prima facie case; he must show that he whom he calls a terre-tenant actually stood in the relation of one, else there will not have been such privity between them as would estop the latter by the judgment. But who is a terre-tenant? Not every one who happens to be in possession of the land. There can be no terre-tenant who is not a purchaser of the estate, mediately or immediately, from the debtor, while it was bound by the judgment; and when he has taken a title thus bound, he must show how the lien of it has been discharged, whether by payment, release, or efflux of time. These are matters of defense which may be precluded. True, we have a

failure of a judgment-creditor to preserve his lien, by neglecting to give the terre-tenant notice of a scire facias to revive, will not discharge the liability of a surety on the bond upon which the judgment was entered.⁷⁹

§ 493. Defense.

On the general principle of *res judicata* (which applies equally to proceedings by *scire facias* as to any other action or suit), and on the further ground that this method of reviving a judgment is merely a supplementary step in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defense to the *scire facias* any matter which existed before the rendition of the original judgment and might have been presented in the former proceeding.⁸⁰ In no case and under no circumstances can the merits of

statute which directs notice to be given to occupants, but only to let the lessee of a terre-tenant in to a defense, which his landlord may have neglected to make, for his protection. The facts of this case are, that the estate had been bound by the judgment, but that the lien of it had expired when the ancestor of the plaintiffs purchased it. It had ceased to be a judgment of greater effect against the land than it was against the debtor's chattels, and the purchaser's title was paramount to it. He was not a terre-tenant or the lessee of a terre-tenant, and as he had not a day in court, the judgment, being *inter alios*, was not an estoppel. The case is clearly within the principle of *Mitchell v. Hamilton* [8 Pa. 496], and is ruled by it."

⁷⁹ *Kindt's Appeal*, 102 Pa. 441.

⁸⁰ *Allens v. Andrews*, Cro. Eliz. 283; *Cook v. Jones*, Cowp. 727; *Thomas v. Williams*, 3 Dowl. P. C. 655; *Baylis v. Hayward*, 4 Adol. & E. 256; *Dickson v. Wilkinson*, 3 How. 57, 11 L. Ed. 491; *United States v. Thompson*, Gilp. 614, Fed. Cas. No. 16,487; *Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746; *Springfield Card Manuf'g Co. v. West*, 1 Cush. (Mass.) 388; *Thayer v. Tyler*, 10 Gray (Mass.) 164; *Sigourney v. Stockwell*, 4 Metc. (Mass.) 518; *Stephens v. Howe*, 127 Mass. 164; *Robbins v. Bacon*, 1 Root (Conn.) 548; *Bradford v. Bradford*, 5 Conn. 127; *McFarland v. Irwin*, 8 Johns. (N. Y.) 77; *Cardesa v. Humes*, 5 Serg. & R. (Pa.) 65; *Davidson v. Thornton*, 7 Pa. 128; *Carr v. Townsend's Ex'rs*, 63 Pa. 202; *Weaver v. Wible*, 72 Pa. 469; *Pittsburgh, C. & St. L. Ry. Co. v. Marshall*, 85 Pa. 187; *Wurzberger v. Carroll*, 8 Kulp (Pa.) 266; *Mulligan v. Devlin*, 12 Pa. Co. Ct. R. 465; *Loeber v. Moore*, 20 D. C. 1; *Willett v. Otterback*, Id. 324; *Kemp v. Cook*, 6 Md. 305; *May v. State Bank*, 2 Rob. (Va.) 56, 40 Am. Dec. 726; *Ferebee v. Doxey*, 28 N. C. 448; *Koon v. Ivey*, 8 Rich. 37; *Camp v. Baker*, 40 Ga. 148; *Miller v. Shackelford*, 16 Ala. 95; *Betancourt v. Eberlin*, 71 Ala. 461; *Mathews v. Mosby*, 13 Smedes & M. (Miss.) 422; *Anderson v. Williams*, 2 Cushm. (Miss.) 684; *Pollard v. Eckford*,

the original judgment be inquired into by the defendant on a writ to revive it. As a rule, therefore, the only allowable pleas to a scire facias upon a judgment are (1) nul tiel record (under which the defendant may deny the existence of the original judgment or allege that it is entirely void), and (2) payment, including release, satisfaction, or discharge of the original judgment.⁸¹ Thus the objection that a bond and warrant were usurious cannot be taken to a scire facias on the judgment confessed on the warrant.⁸² Nor can the invalidity of the consideration for the contract on which the judgment was rendered be shown in defense,⁸³ nor the coverture or other disability of one of the parties,⁸⁴ nor is it permissible to set up in defense that the judgment sought to be revived was obtained by fraud,⁸⁵ or that there was fraud in the negotiation of the note on which the judgment was given, before suit was begun on it.⁸⁶ Again, the pendency of an action of debt on a judgment concurrently with a proceeding by scire facias for its revival is not a defense to the latter proceeding, nor is a judgment for the plaintiff in the former action before the hearing on the writ.⁸⁷ A general denial of each and every allegation of the writ not admitted in the answer is not a form of defense permitted in scire facias to revive a judgment.⁸⁸ But of course the statute of limitations is a good defense to the scire facias, though it must be specially pleaded,⁸⁹ and also the defendant may show that his position with reference to the judgment is that

50 Miss. 631; *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *City Nat. Bank v. Swink* (Tex. Civ. App.) 49 S. W. 130; *Nestierode v. Foster*, 8 Ohio Cir. Ct. R. 70; *Bell v. Williams*, 4 Sneed (Tenn.) 196; *Love v. Allison*, 2 Tenn. Ch. 111; *Vredenburg v. Snyder*, 6 Iowa, 39; *Watkins v. State*, 7 Mo. 334; *Riley's Adm'r v. McCord's Adm'r*, 24 Mo. 265.

⁸¹ *Blackburn v. Beall*, 21 Md. 208; *Dowling v. McGregor*, 91 Pa. 410; *McCracken v. Swartz*, 5 Or. 62.

⁸² *Lysle v. Williams*, 15 Serg. & R. 135; *Bickel v. Cleaver*, 13 Pa. Co. Ct. R. 314.

⁸³ *Mulligan v. Devlin*, 2 Pa. Dist. R. 685.

⁸⁴ *Lauer v. Ketner*, 162 Pa. 265, 29 Atl. 908, 42 Am. St. Rep. 833.

⁸⁵ *Bruno v. Oviatt*, 48 La. Ann. 471, 19 South. 464.

⁸⁶ *Supplee v. Halfmann*, 161 Pa. 33, 28 Atl. 941.

⁸⁷ *Lafayette County v. Wonderly*, 34 C. C. A. 360, 92 Fed. 313.

⁸⁸ *Wonderly v. Lafayette County* (C. C.) 77 Fed. 665.

⁸⁹ *Jones v. George*, 80 Md. 294, 30 Atl. 635.

of a surety only.⁹⁰ Where the charter of a corporation makes the stockholders personally liable for all debts except loans, and a judgment is obtained against the corporation and a scire facias sued out against the stockholders to charge them personally, there are no defenses open to them except, first, that they are not stockholders, or, second, that the debt on which the judgment was founded was for a loan.⁹¹

But there may be exceptional cases in which the general rule would not be strictly enforced. Thus, if the defendant dies after verdict and before judgment, and his administrator becomes a party to the suit and judgment passes against him, and execution is issued and returned unsatisfied, then, on scire facias against the administrator, he may well plead no assets or insolvency, for he had no time to make such plea in the original suit.⁹² And indeed, in one state, it is held that a defendant may set up any grounds he has in opposition to a motion to revive a judgment and to have execution.⁹³

§ 494. Same; Payment, Release, Set-Off.

As we have already stated, payment, satisfaction, or release of the original judgment is one of the defenses available in an action by scire facias to revive it.⁹⁴ It is also permissible for the defendant to avail himself, in such a proceeding, by proper allegations, of the presumption of payment which arises from the lapse of a great period of time since the rendition of the judgment without payments on it or steps taken to enforce it.⁹⁵ And it is said that he may plead both payment

⁹⁰ Nestlerode v. Foster, 8 Ohio Cir. Ct. R. 70.

⁹¹ Wilson v. Stockholders of Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424.

⁹² Hatch v. Eustis, 1 Gall. 160, Fed. Cas. No. 6,207. And see Colwell v. Rockwell, 100 Pa. 133.

⁹³ McLeod v. Williams, 122 N. C. 451, 30 S. E. 129.

⁹⁴ Hayden v. Slaughter, 43 La. Ann. 385, 8 South. 919; Smith v. Coray, 196 Pa. 602, 46 Atl. 855. If the defendant fails to appear and set up a defense of part payment, the question of payment is res judicata. Babb v. Sullivan, 43 S. C. 436, 21 S. E. 277. The plea (or affidavit of defense) must allege payment of the judgment sought to be revived; if it alleges payment of the original debt, it is not sufficient. Nealon v. McNeal, 3 Lack. Jur. (Pa.) 117.

⁹⁵ Steltzer v. Steltzer, 10 Pa. Super. Ct. 310; Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456. Where the judgment is more than 20 years old, it will not be revived, the presumption being that it has been paid. Green v.

and presumption of payment.⁹⁶ Accord and satisfaction is also a proper plea to a scire facias to revive a judgment.⁹⁷ But evidence is not admissible of payment anterior to the rendition of the original judgment.⁹⁸ And so, where a separate judgment has been rendered against one obligor on a joint and several obligation, and scire facias is issued to revive the judgment, the defendant cannot avail himself of a release given to his co-obligor subsequent to the original judgment.⁹⁹ Set-off or counterclaim is in no case available as a defense.¹⁰⁰ A terre-tenant, but no one else, may plead that the land is discharged from the lien of the original judgment.¹⁰¹

§ 495. Same; Discharge in Bankruptcy.

A discharge in bankruptcy is also a good defense to a scire facias to revive a judgment, provided the defendant was so discharged after the rendition of the original judgment; if before, he ought to have pleaded it in the principal suit.¹⁰² But where a judgment entered before the institution of bankruptcy proceedings is revived by scire facias, after the discharge of the bankrupt, upon the land subject to its lien when entered, and so restricted that it can only be enforced on such real estate (and against the proceeds thereof in the hands of a trustee for sale), the defendant is fully protected, and any execution issued on the judgment would be restrained accordingly.¹⁰³ In the case of a scire facias to revive a judgment of revival, a plea that

Plattsburg, 13 Pa. Co. Ct. R. 335. In Nebraska, the lapse of 14 years after the entry of a judgment and before a proceeding to revive is instituted, without the issuance of an execution, raises the presumption of payment, which, however, is not conclusive. *Wittstruck v. Temple*, supra.

⁹⁶ *De Ford v. Green*, 1 Marv. (Del.) 316, 40 Atl. 1120.

⁹⁷ *McCullough v. Franklin Coal Co.*, 21 Md. 256.

⁹⁸ *McVeagh v. Little*, 7 Pa. 279; *Trader v. Lawrence*, 182 Pa. 233, 37 Atl. 812.

⁹⁹ *United States v. Thompson*, Gilp. 614. Fed. Cas. No. 16,487.

¹⁰⁰ *Jenkins v. Anderson* (Pa.) 11 Atl. 558; *Anderson v. Gage*, Dud. (S. C.) 319.

¹⁰¹ *Silverthorn v. Townsend*, 37 Pa. 263.

¹⁰² *Spring Run Coal Co. v. Tosler*, 102 Pa. 342; *Stewart v. Colwell*, 24 Pa. 67; *Duncan v. Hargrove*, 22 Ala. 150; *In re Wesson* (D. C.) 4 Hughes, 522, 88 Fed. 855.

¹⁰³ *Walters v. Oyster* (Pa.) 1 Atl. 430.

the defendant was discharged as a bankrupt at a time which was later than the original judgment but before the judgment of revival, comes too late and is inadmissible.¹⁰⁴

§ 496. Same; Invalidity of Original Judgment.

Under a plea of nullity of record to a scire facias to revive a judgment, the defendant may take advantage of any facts (as total want of jurisdiction) which make the original judgment absolutely void; but if the judgment be not absolutely void, the defendant cannot, under this plea, object to mere errors or irregularities.¹⁰⁵ Thus, the failure to file a complaint in a suit commenced by attachment, although an irregularity for which, on appeal, a judgment by default could be reversed, is no defense to a scire facias to revive the judgment recovered in that suit.¹⁰⁶ So the defendant is estopped to make the defense that the judgment was rendered against him by default on insufficient service, where he has pleaded the same judgment in answer, on a plea of former recovery, in a subsequent action on the same demand.¹⁰⁷ The defendant can indeed move to set aside the original judgment because surreptitiously obtained, or the judgment will be set aside if given on default in ignorance of the party's rights, or upon the showing of a defense which arose afterwards; but otherwise he can only object by showing that the judgment has been paid or never existed.¹⁰⁸ But judgments which are absolute nullities cannot be revived. They cannot be continued in existence when they never had any life.¹⁰⁹

¹⁰⁴ *Stewart v. Colwell*, 24 Pa. 67.

¹⁰⁵ *Campbell's Appeal*, 118 Pa. 128, 12 Atl. 299; *Hauer's Appeal*, 5 Watts & (Pa.) 473; *Davidson v. Thornton*, 7 Pa. 128; *Tripp v. Potter*, 33 N. C. 121; *Fadden v. Lockhart*, 7 Tex. 573; *Anthony v. Humphries*, 9 Ark. 178; *Bell v. Williams*, 4 Sneed (Tenn.) 196; *Haynes v. Aultman, Miller & Co.*, 36 Neb. 7, 54 N. W. 511; *Loeber v. Moore*, 20 D. C. 1; *Harper v. Cunningham*, 8 D. C. 430; *Ulmer v. Frankland* (Tex. Civ. App.) 27 S. W. 766.

¹⁰⁶ *Betancourt v. Eberlin*, 71 Ala. 461.

¹⁰⁷ *Kennedy v. Bambrick*, 20 Mo. App. 630.

¹⁰⁸ *Weber v. Detwiller* (Pa.) 8 Atl. 910.

¹⁰⁹ *In re Board of Administrators*, 37 La. Ann. 916; *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 22 L. R. A. 573, 42 Am. St. Rep. 557; *Wittstruck v. Sample*, 58 Neb. 16, 78 N. W. 456.

§ 497. Same; Collateral Agreements.

It is no defense to the revival of a judgment that the plaintiff had agreed not to issue execution.¹¹⁰ And so a verbal assurance by a grantor that a clause in the deed, reserving the lien of a judgment owned by him, should never be enforced, in whole or in part, against the grantee, one of the heirs of the defendant in the judgment, on the ground of which the deed was accepted, is a purely voluntary contract, and void in a scire facias for revival against the grantee as an heir.¹¹¹ But on the other hand, under the plea of payment, the defendant may give in evidence that when he executed the bond and warrant upon which the judgment was confessed, the plaintiff promised to cancel it upon an event which has occurred since the judgment.¹¹² So an agreement entered into prior to the date of a judgment, as to the mode of its discharge, but which was not to be executed until afterwards, and all payments made in pursuance of such agreement, are admissible in evidence in support of the plea of payment and satisfaction.¹¹³ Also, the terre-tenant may offer evidence of a collateral agreement between the original parties, the effect of which is not to impair the judgment but to restrict its lien.¹¹⁴

§ 498. Judgment on Scire Facias.

According to the practice obtaining in a majority of the states, and founded on the view that this species of proceeding is not a new suit but a continuation of the original action, it is error for the court to proceed to render a new judgment, on a scire facias to revive; the proper entry is that the plaintiff have execution of the judgment mentioned in the writ and his costs.¹¹⁵ It is, however, held

¹¹⁰ Ladd v. The Church, 6 Phila. (Pa.) 591.

¹¹¹ Coddling v. Wood, 112 Pa. 371, 3 Atl. 455.

¹¹² Hartzell v. Reiss, 1 Bln. (Pa.) 289. See Smith v. Smith, 135 Pa. 48, 21 Atl. 168.

¹¹³ Downey v. Forrester, 35 Md. 117.

¹¹⁴ Sankey v. Reed, 12 Pa. 95.

¹¹⁵ Denegre v. Haun, 13 Iowa, 240; Humphreys v. Lundy, 37 Mo. 320; Hanly v. Adams, 15 Ark. 232; Camp v. Gainer, 8 Tex. 372; Murray's Adm'r v. Baker, 5 B. Mon. (Ky.) 172; Rogers v. Hollingsworth, 95 Tenn. 357, 32

some jurisdictions that the judgment on scire facias must recite the original judgment with such particularity as to identify it, and that any substantial variance will break the continuity of the lien.¹¹⁶ And in some states, the judgment on this writ should declare the amount presently due, by liquidating the amount of principal and accrued interest on the original judgment, and, if the new judgment is to bear interest, it should specify the date from which such interest is to begin.¹¹⁷

In Vermont, the law requires that the court shall give judgment for the plaintiff for the amount of the original judgment with interest, and costs on the scire facias; and this requires a new judgment which merges the original judgment, and is the judgment to be described in the execution.¹¹⁸ But in those states where the execution on a scire facias is but a reiteration of the former judgment, and is an independent sentence, it follows that if the original judgment is reversed, a judgment on a scire facias to revive it will likewise

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An order that a judgment be revived, made in a proceeding therefor, in which all proper parties are before the court, is conclusive on the question of the right to revive, as against any objection based

W. 197. See *Marx v. Sanders*, 98 Ala. 500, 11 South. 764. A judgment for possession of land may be revived the same as a judgment in a personal action, and the judgment as revived should be that plaintiff have execution, and be given the possession as against defendants and their successors. *Upt v. Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. A judgment purporting to revive the execution issued on a judgment sought to be revived is amendable so as to make it recite that the judgment itself is revived. *Phillips v. Walt*, 105 Ga. 848, 32 S. E. 647.

¹¹⁶ See *Worman's Appeal*, 110 Pa. 25, 20 Atl. 415; *Zelders' Appeal*, 137 Pa. 20 Atl. 805. In a proceeding to revive a judgment by scire facias, a judgment awarding an execution in favor of different parties, for a different amount than that recited in the writ, will be set aside. *Zumbro v. Stump*, 38 Va. 325, 18 S. E. 443.

¹¹⁷ *Kistler v. Mosser*, 140 Pa. 367, 21 Atl. 357. See *Bludworth v. Poole*, Tex. Civ. App. 551, 53 S. W. 717. In Missouri, the judgment in proceedings by scire facias to revive should simply declare that the judgment revived is still in force for the amount remaining unpaid thereon; and a finding of the aggregate amount of principal and interest due at the date of revival will be treated as surplusage. *Sappington v. Lenz*, 53 Mo. App. 44.

¹¹⁸ *Slayton v. Smille*, 66 Vt. 197, 28 Atl. 871.

¹¹⁹ *Mills v. Conner*, 1 Blackf. (Ind.) 7; *Eldred v. Hazlett*, 38 Pa. 16.

on a condition of facts existing prior to that time which could then have been made; and such matters are *res judicata* on application for a subsequent revival.¹²⁰

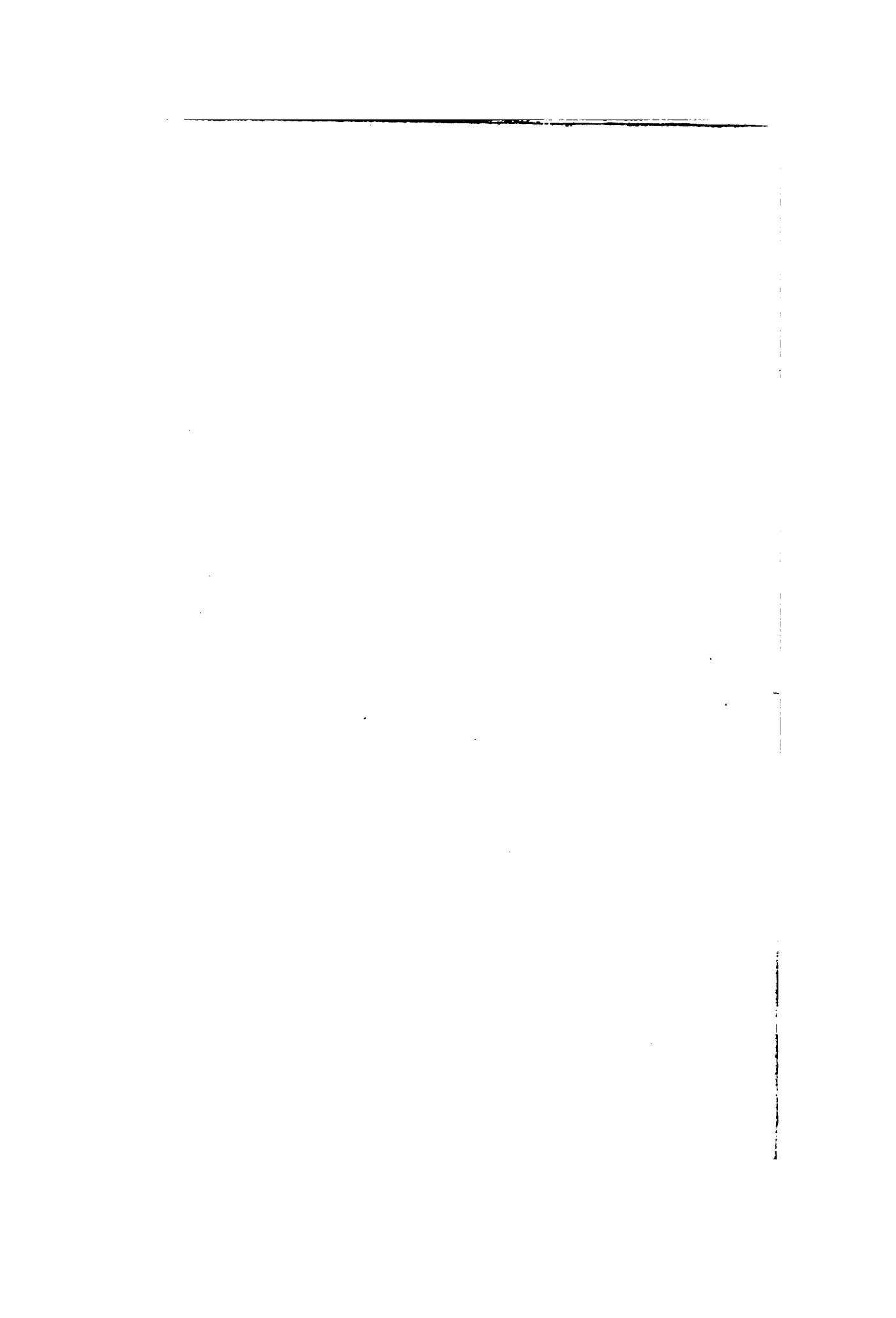
§ 499. *Practice in Pennsylvania.*

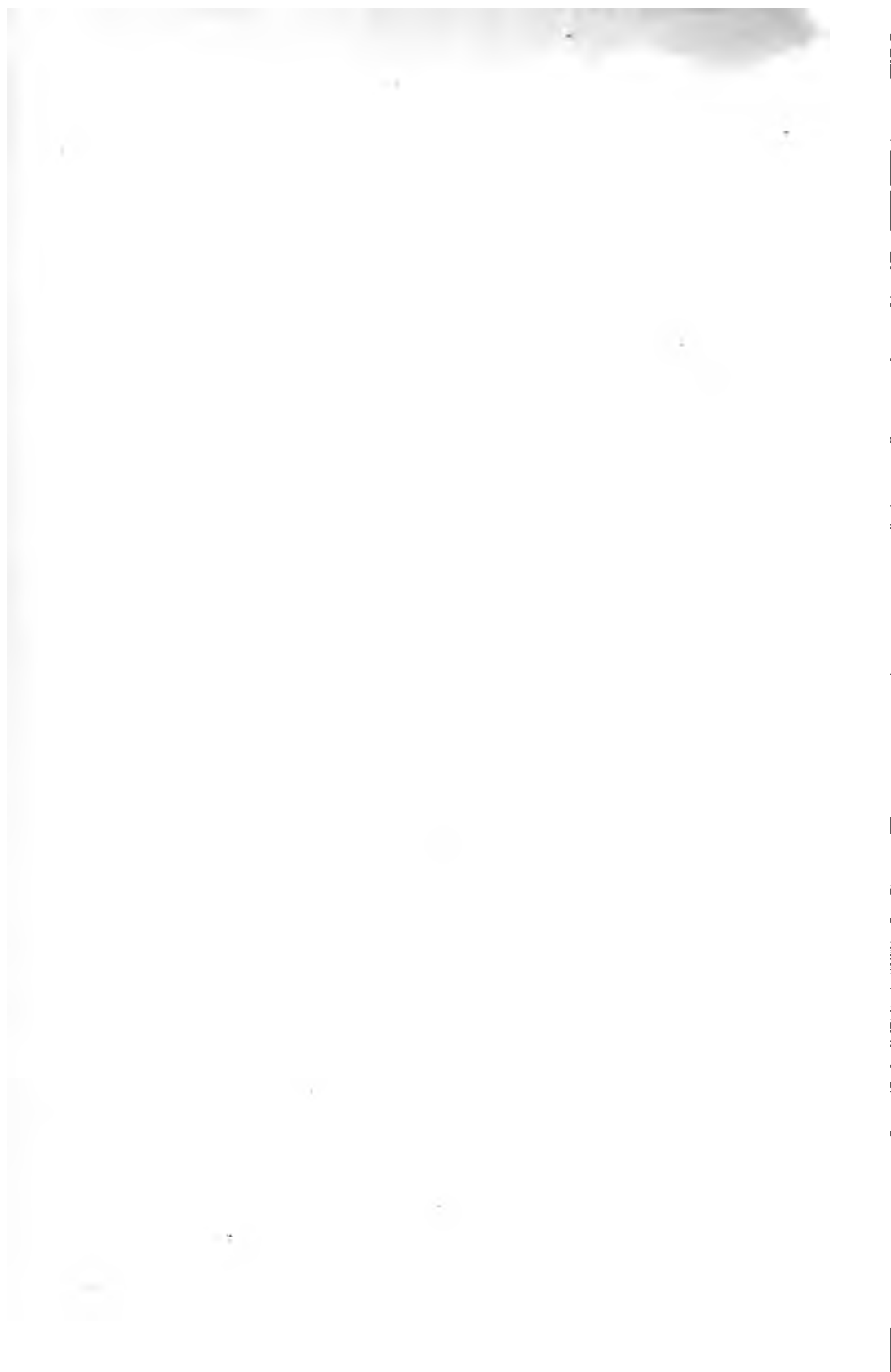
In the state of Pennsylvania the practice is different from that described in the preceding section: "A judgment regularly revived by *scire facias*," says the supreme court of that state, "is not void even if the original judgment was void. A *scire facias* here is a substitute for an action of debt elsewhere; the judgment on it is *quod recuperet*, instead of a bare award of execution; it therefore warrants the awarding of the execution. The last judgment cannot be considered invalid, although it was entered on a *scire facias* issued on a previous judgment that was void. The new judgment, being regular on its face and voidable only, has a sufficient vitality to support the sale."¹²¹ A revival of judgment by *amicable scire facias*, to be valid, and to be notice to subsequent purchasers or subsequent judgment-creditors, must be docketed; it is not sufficient that it be filed among the papers of the original judgment and noted upon the docket entry of such judgment.¹²²

¹²⁰ *Witherspoon v. Twitty*, 43 S. C. 348, 21 S. E. 256.

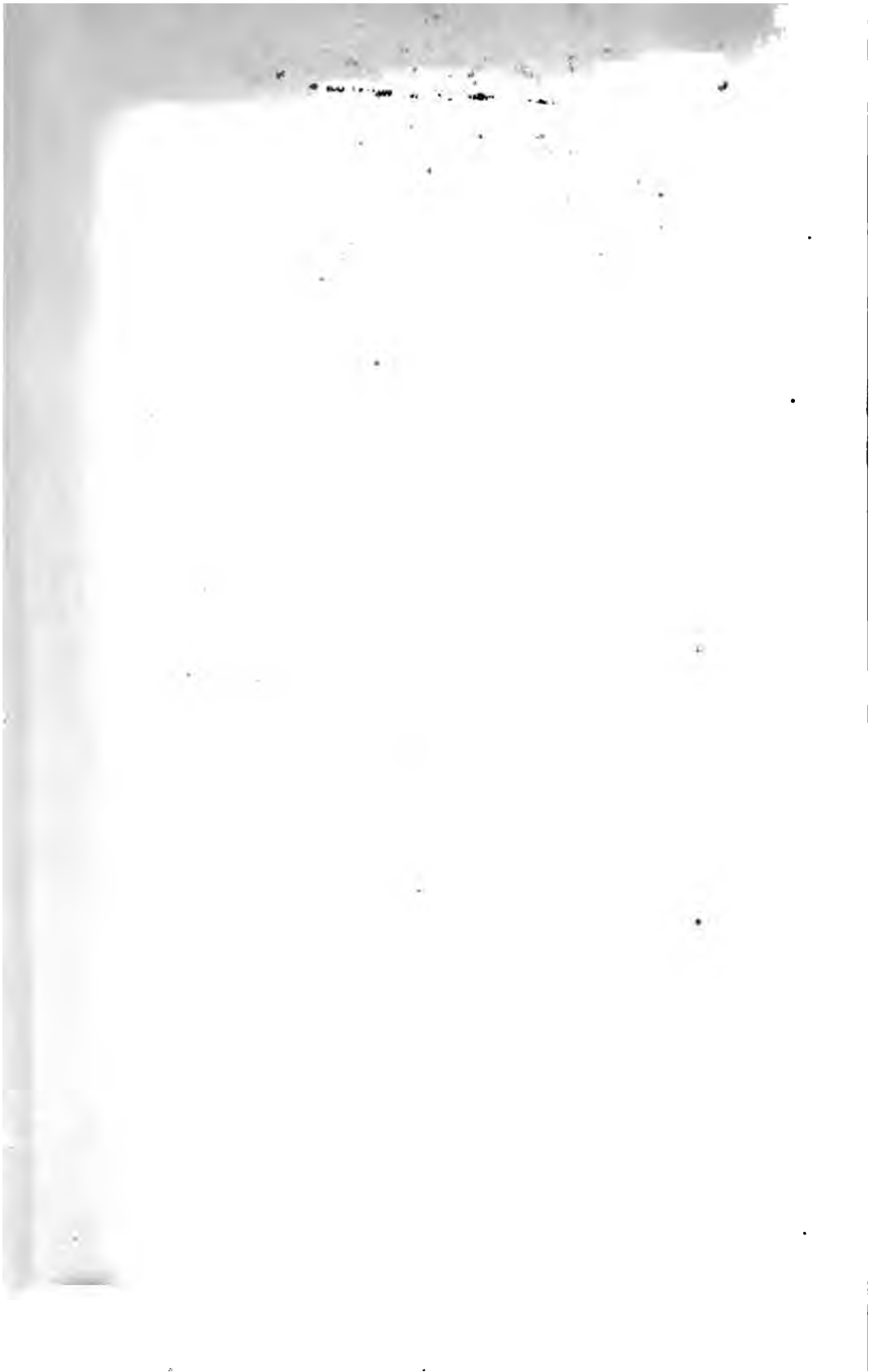
¹²¹ *Duff v. Wyncoop*, 74 Pa. 300; *Buehler's Heirs v. Buffington*, 43 Pa. 278; *Custer v. Detterer*, 3 Watts & S. 28. But a judgment so revived in Pennsylvania, without service or appearance, has no binding force as against a defendant who resides in another state. *Owens v. McCloskey*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837.

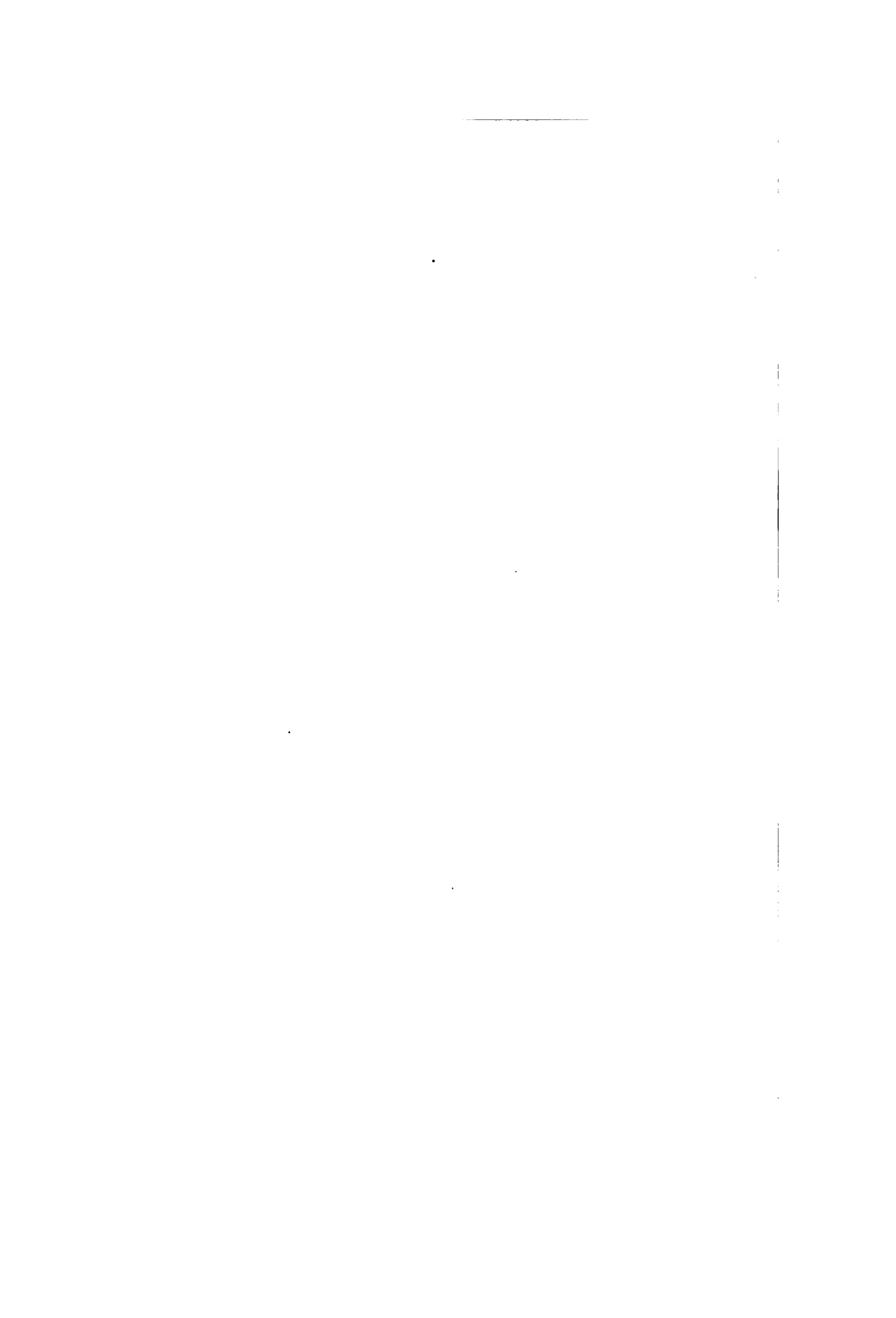
¹²² *McCleary's Appeal*, 1 Watts & S. (Pa.) 299.













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